THE ORGANISED CRIME OF ORGAN TRAFFICKING

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Declaration

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Preface

A hundred years ago health care practitioners would have laughed at the notion that you could remove an organ from one person and transplant that organ into another person's body and at the end of this process still have both people alive and healthy. Not only has such organ transplantation now become a reality in society but advanced medical technology today even allows for the transplantation of numerous bodily organs and other tissue and materials from living or cadaveric human and animal donors to needy organ recipients.[1]

Even though medical science and technology has become advanced enough to carry out organ transplants in today's modern society it should still be regarded as somewhat of a miracle. The very first kidney transplant only took place in 1954 when Doctor Joseph Murray and his medical staff transplanted a kidney in the United States of America at the Massachusetts General Hospital where the organ donor and recipient were identical twins.[2] In 1967 the first heart transplantation ever in the world was performed by Doctor Christiaan Barnard in the Republic of South Africa. The recipient of this organ managed to live a further 18 days before dying. Doctor Barnard then performed another heart transplant in 1968 where the organ recipient

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1 http://www.who.int/transplantation/xeno/en/: 26/09/2006.

2 Prottas 1994: 2; Machado 1998: 1.

lived for a full 563 days.[3] As medical technology and immunosuppressive drugs improved over the years this survival rate increased dramatically. Today organ transplants are performed as if the procedure is more a routine than a miraculous event.

This routine procedure of the medical transplantation of organs from one living or dead body to another living body has caused major shortages in organs available for these transplantations and this has in turn lead to a thriving black market in human organ sales and illegal organ procurement activities and organ transplantations. **The question is whether or not such a market in human organs can be turned from an illegal market to a fully regulated legal market in such organs for the purpose of increasing organ supplies for transplantation and thereby decreasing illegal sales.**

In his book, *The Gift Relationship*, Titmuss[4] wholeheartedly disagrees with the selling of blood and blood products and has this to say:

> "The commercialisation of blood and donor relationships represses the expression of altruism, erodes the sense of community, lowers scientific standards, limits both personal and professional freedoms, sanctions the making of profits in hospitals and clinical laboratories, legalises hostility between doctor and patient, subjects critical areas of medicine to the laws of the marketplace, places immense social costs

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[3] http://www.odf.org.za/pages/facts.htm?sm=f_c: 29/05/2006.

[4] 1970: 246. Titmuss worked as Social Economist and Deputy Director of the Social Medicine Research Unit in London.

> on those least able to bear them – the poor, the sick and the inept – increases the dangers of unethical behaviour in various sectors of medical science and practice, and results in situations in which proportionately more and more blood is supplied by the poor, the unskilled, the unemployed, … and other low income groups and categories of exploited human populations of high blood yielders. Redistribution in terms of blood and blood products from the poor to the rich appears to be one of the dominant effects of the American blood banking system."

In this paragraph Titmuss is outlining everyone's fears concerning the legalising of a market in human organs even if he is not directly addressing the organ trade but rather the trading in blood. However, it is possible to conclude that Titmuss would disagree just as wholeheartedly with the idea of a market in bodily organs as he disagrees with the selling of blood. Although Titmuss has disagreed with this trade in blood it has not been proved that such a market would be completely destructive. It is therefore possible to debate all negative aspects of Titmuss's theory.

Legislation in South Africa, for purposes of clarifying the matter of illegal organ sales and the reason for the organ shortage, is dealt with in depth later in this dissertation. In addition legislation in countries such as the United States of America, the United Kingdom and various other countries such as Australia and Brazil is dealt with because of the fact that all these countries

have the same problems regarding organ shortage and legislation classifying the selling of bodily organs as illegal.

What is also looked at is how organ trafficking in these various countries is related to organised crime. Throughout history the body has been exploited through payment via using the human body for labour, then exploiting the body through sex and now exploiting the body through the sale and use of bodily organs.[5] Trafficking in people, which includes organ trafficking, is the third largest source of profit to organised crime groups reaching totals of over 12 billion US dollars per year and solutions to the problem of organ trafficking as an organised crime will therefore have to be dealt with.[6] Human trafficking is a huge problem worldwide because of the lack of implementation of legislation criminalising such an activity and because it is an almost risk free activity regarding the detection and prosecution of the organised crime groups in charge of human trafficking.[7] The Republic of South Africa, alongside various other countries, ratified the United Nations "Palermo Protocol" regarding trafficking in humans.[8] The protocol will be discussed in a later chapter in this dissertation.

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5 Truong 2001: 8.

6 http://lsa.unisa.ac.za/news/archive/august/vol4/human.html: 21/02/2006.

7 http://lsa.unisa.ac.za/news/archive/august/vol4/human.html: 21/02/2006.

8 http://lsa.unisa.ac.za/news/archive/august/vol4/human.html: 21/02/2006.

Leong[9] believes organ trafficking and other organised crimes exist because of the specific demand for organs and other goods and says: "If the goods or services happen to be outlawed, then illegal enterprises will emerge to meet the demand."[10]

The European Union[11] is of the opinion that organ trafficking will become unprofitable as soon as sufficient organs and tissues are made available for transplantation. This dissertation will therefore show that there is an effective solution to end illegal organ trafficking and that legalising such an organ trade could in fact be one of numerous effective solutions not only in many countries around the world but particularly in the Republic of South Africa.

This dissertation handles issues regarding the effect that the selling of bodily organs on the black market has on the growth of organised crime groups both in South Africa and around the world. Is the fact that there is legislation prohibiting organ selling the reason for the increase in organised crime related to the organ trade? Would the legalising of organ trade decrease organised crime related to organ trafficking? Who should be held

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9 2004: 23. Leong is a Research Associate Fellow at the Centre for Criminology, the University of Hong Kong. She is also a member of the Institute of Advanced Legal Studies at the University of London.

10 The Council of Europe Convention on Action against Trafficking in Human Beings No. 197 of 2005, as will be discussed in a later chapter, also places emphasis in article 6 on the fact that communities should be made aware of the fact that demand is one of the root causes of trafficking in human beings.

11 http://www.elections2004.eu.int/highlights/en/503.html: 30/06/2006.

responsible when the issue of organ trafficking arises? What are the various health issues and constitutional implications relevant to the organ trade? These questions are answered and discussed while referring to all the relevant statutes surrounding such questions.

The dissertation also briefly discusses criminal liability of the organised crime groups or persons or the operation of such an organised crime group. The medical process of transplantation and the transplantation of other bodily tissue or fluids will not be dealt with at such lengths as will be the case with organ transplantation.[12]

[12] For the purposes of this dissertation the word "organ" will be said to mean, according to section 1 of the National Health Act 61 of 2003 of South Africa, any part of the human body which performs any particular vital function, including the eye but does not include skin and appendages, flesh, bone, bone marrow, body fluid, blood or a gamete. Therefore the following organs will be included in the term "organ" for transplantation purposes: kidney, heart, lung, liver, pancreas and corneas.

Chapter 1

Introduction

1.1 Ownership over the human body and the right to self determination

For many years people have discussed the human body and its effect on human rights laws, property laws and commercialisation. There has for as many years been a great deal of debate surrounding legislation and the lack thereof dealing with the selling of bodily organs and tissue as opposed to the donation of such organs and tissue while a human being is still alive as well as once that person has died.[13]

With so many people in society all having their own ideas regarding the ethics and morals behind organ procurement and transplantation it is truly difficult, if not impossible, to formulate one precise solution to the numerous ethical, moral, legal and medical issues surrounding such organ procurement and transplantation.[14] Traditional medical policies and procurement

[13] http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004.

[14] Forsythe 2001: 2.

procedures, due to improvements of medical technology and the increased number of potential organ recipients, no longer effectively regulate organ transplantations and the donation of human organs and tissue.

The rising importance of the individual's human rights around the world furthermore makes the process of maintaining traditional policies that much more difficult. According to the Constitution[15] of the Republic of South Africa in terms of section 11 every person has the right to life, in terms of section 12(2) every person has the right to bodily and psychological integrity and in terms of section 27 everyone has the right to emergency medical treatment.[16]

The emphasis on these individual rights causes each individual person to define them differently. Naturally everyone will have alternative thoughts when it comes to deciding whether or not the organ trade should be legalised in South Africa and other countries worldwide. And of course when deciding whether to legalise organ selling one has to take into account that not all people have the same level of education and expertise as others in as far as such education and expertise is required to make important decisions regarding the aspect of selling bodily organs. There exists a huge gap in society when it comes to knowledge about organ donation and

15 Constitution of the Republic of South Africa, 1996.

16 These particular sections of the Constitution will be discussed in greater detail in a later chapter.

transplantation and this leads to uninformed ideas and beliefs within such societies as well as ill-informed decisions to sell one's body parts.[17]

Currently in the Republic of South Africa and many other countries in the world, for example the United States of America and the European Union[18] it is considered illegal (both by way of common law and various other statutory laws) to sell one's own body parts or to buy and sell the body parts of any other person.[19] The National Health Act[20] of South Africa states that it is an offence for any person who has donated tissue, gametes and other blood products to receive any form of compensation for such a donation and it is furthermore an offence to sell or trade in such tissue, gametes and other blood products.[21]

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17 Jakubowska-Winecka *et al* 2006: 12.

18 Member states to the European Union include Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom of Great Britain and Northern Ireland.

19 http://organtx.org/ethics/sales/sales.htm (Yahoo): 20/09/2004. These various pieces of legislation criminalising the selling of organs will be discussed in greater detail in following chapters. No single country actually has any legislation legalising the selling of human organs for transplantation purposes but, according to the Council of Europe's report on a questionnaire answered by member states on organ trafficking, the issue is not whether or not organ sales are legalized but whether or not any legislation exists at all to either legalise or criminalise such an organ trade. http://www.coe.int/t/e/legal_affairs/legal_co-operation/bioethics/texts_and_documents/6Reports.asp: 13/12/2006.

20 Act 61 of 2003. This Act came into effect on 2 May 2005.

21 Act 61 of 2003: Section 60(4). However, Chapter 8 of this Act regulating the control of use of blood, blood products, tissue and gametes in humans is not yet effective and for the interim period the Human Tissue Act 65 of 1983 is still in force. Section 28 of the Human Tissue Act reads as follows:

> No person except-
>
> (a) an authorised institution or the importer concerned, may receive any payment in respect of the import, acquisition or supply of any tissue for any purposes;

Many people in society, particularly those on organ transplant waiting lists and people familiar with the problem of organ shortages for transplantation purposes, are protesting against the lack of legislation dealing with the proper procurement and distribution of bodily organs and the general methods of organ donation and transplantation.[22] These people are requesting the introduction of new legislation that formulates a policy in favour of the regulated selling of bodily organs and thereby the compensating of the donor by the organ recipient or governmental and non-governmental organisations for such organ donations.[23]

The outcry from patients due to the vast shortage in organs available for life-saving transplantations emphasises the extent of this lack of legislation regulating organ donation.[24] The international community has been trying to introduce effective ways and means to cope with this organ shortage and hence the suggestion that the organ trade should be legalised.

Organ selling, however, creates the perception of human organs being commodities where in fact it can be argued by law and by public policy that

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(b) a prescribed institution or person may receive any payment in respect of the import or acquisition for or the supply to another person of blood or a blood product;

and any such payment which has been received, shall be refundable to the person who made it.

22 http://organtx.org/ethics/sales/sales.htm (Yahoo): 20/09/2004.

23 http://organtx.org/ethics/sales/sales.htm (Yahoo): 20/09/2004.

24 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004.

people do not have the right to do with their bodies and body parts simply as they please.[25]

Some believe that the selling of one's bodily organs should in fact be a matter regarding the rights of parties wanting to sell their organs and in turn the rights of parties wanting to accept such sold organs.[26] Kishore,[27] the President of the Indian Society for Health Laws and Ethics believes that the donation, sale or purchase of any organ is the choice of the individual who is donating, selling or purchasing such an organ. Would it be fair to say that we limit individual's rights in this respect for the purposes of promoting the greater good of the community or should these individuals have a choice to decide what to do when it comes to trading in their own bodily organs and tissue?[28]

The right to ownership over the human body

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25 http://organtx.org/ethics/sales/sales.htm (Yahoo): 20/09/2004.

26 Thukral and Cummins 1990:190.

27 2005: 364.

28 Forsythe 2001: 3. At present there are no known laws, either in South Africa or abroad, regulating property rights in, and ownership of, human organs to any particular person or governmental or non-governmental organisations except section 36 of the Human Tissue Act 65 of 1983. Strauss comments on this particular section as meaning the following:

> "The person who acquires tissue (including blood or a gamete) in terms of the Act, upon delivery of the body or tissue to him by means of use or otherwise, is vested with exclusive rights over it, subject to the prohibition of the sale of tissue."

Strauss 1984: 157-158. It is not the aim of this dissertation to debate this topic in too much detail. However, a passage regarding such rights of ownership has, for introductory purposes, been compiled.

The principle of personal autonomy sets forth a presumption that individual personal health choices should be left up to the individual to make. In a very real sense this asserts that patients have the ultimate right to determine their own level of acceptable medical care. Cherry,[29] an associate professor in the Department of Philosophy at Saint Edward's University in Texas, says that prohibiting individuals from selling their own body parts constricts the individual's right to freedom and personal privacy regarding lifestyle and that furthermore these individual's are prohibited from entering into contracts with potential recipients which would be mutually beneficial to both parties. But it is patently clear that society does not permit individuals to do just anything they please with their bodies.[30]

Jacqueline Laing,[31] a British journalist, does not follow Cherry's opinion about the right to bodily freedom and had this to say when in December 2003 the British Medical Association debated the possibility of creating a legal market for the selling of bodily organs:

> "The law has never recognized any unfettered rights of individuals to do what they want with their own bodies. The law places great restrictions on the use of controlled drugs such as heroin and cocaine and on practices such as bigamy and incest – even between consenting adults."

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29 2005: 85.

30 http://members.aol.com/richrwg/organs.htm: 20/09/2004.

31 Daily News: 2003.

However, what Laing is forgetting is that restrictions on the use of such drugs and on the carrying out of such activities are put in place because these drugs and activities have most definitely got a very negative effect on the human body and mind and cannot be of any benefit to any person's health whatsoever. For the greater good of humanity drugs, bigamy and incest type activities should be restricted as nothing positive can come from using drugs or participating in bigamy and incest related activities. It can however be argued that far greater good can be done for humanity by legalising the organ trade and thereby eliminating the organ shortage and saving thousands of human lives each year.

There exists therefore the possibility and perhaps necessity of defining organs as private property and thereby endowing people with an exclusive right over their bodies and bodily organs which includes an unrestricted right to exclude others from interfering with a person's property right.[32]

This whole question of property being inclusive of one's organs was questioned in the United States of America in the case of *Moore v Regents of the University of California*[33] where the Supreme Court of California rejected a tissue donor's claim that his property right had been violated when the two specialist doctor's and numerous other persons associated with the

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[32] Hartman 2005: 32. This alternative definition of organs as private property of the donor was also accepted by Charlotte Harrison, Fellow in Medical Ethics at Harvard Medical School in her article "Neither Moore nor the Market: Alternative Models for Compensating Contributors of Human Tissue 2002: 78.

[33] 793 P. 2d 479 (Cal. 1990) as discussed by Harrison in her article "Neither Moore nor the Market: Alternative Models for Compensating Contributors of Human Tissue 2002: 78.

medical treatment of the patient made profitable use of removed spleen cells from his body without his permission or awareness of the use of the cells and further without sharing any of the commercial profits with him. The court held that in this particular case a claim does not exist for the unlawful taking or use of a patient's property because of the fact that Moore both consented to the removal of such tissue and was informed of the use of such tissue by the doctors. The removal of tissue without the patient's consent will, however, constitute illegal removal. It therefore seems that the inference can be drawn that the court did admit, even if not explicitly, that the bodily tissue was the actual property of Moore. Whether such an inference was intended to be drawn or not is another question.

In a case *McFall v Shrimp*[34] heard in Pennsylvania in the United States of America in 1978 a man had asked his cousin to donate to him one of his kidneys in order for him to survive. The man claimed that he had a right to demand such an organ from his cousin and that he was willing to buy the kidney as one would buy other property or material goods. The court denied that he had such a right to another person's bodily organs, as a form of property, and said that there was never any other precedent making equitable such ownership of another's organs. On this subject Murray[35] further says that no one has any legal obligation to donate his or her body parts to

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34 *McFall v Shrimp* 10 Pa. D. & C. 3d 90 (1978).

35 1991: 19. Thomas Murray is a Professor of Biomedical Ethics and the Director of the Center for Biomedical Ethics at the Case Western Reserve University School of Medicine.

another person but that other people may expect the existence of a moral obligation to do so.

Calabresi[36] comments on this case and says that if there was such a right to another's organs then everyone with healthy organs would be giving them to people in need of such organs and that eventually the people who had healthy organs would be the ones in need of organs while the one's who were previously in need of organs would be the people in the advantaged seat. He says that such a policy would not only lead to ridiculous patterns of distribution but would also be infringing wholeheartedly on the individual's constitutional rights to privacy and personal autonomy.

When commenting further on the general idea of organs being classified as property, Calabresi is of the opinion that if people truly owned their bodies in the same manner in which they own property that they would be allowed not only to sell blood and hair, which is currently the case, but also their bodily organs.[37] Doesn't the fact that people are entitled to sell their blood and hair as property in some countries across the world in some way make it acceptable to think of other bodily organs as property and allow the sale of such body part too? Murray[38] answers this question by stating the following: "By allowing blood and hair sales shows our view that the sale of

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[36] 1991: 10. Guido Calabresi is a Sterling Professor in Law and Dean of the School of Law at the Yale University.

[37] Calabresi 1991: 10.

[38] 1991: 24.

such replenishable substances that can be obtained with minimal risk and inconvenience does not threaten the dignity of the body."

Before the enactment of the Uniform Anatomical Gift Act of 1986 in the United States of America no person had the right to dispose upon death of his or her own body or the body of any other person. This is because American courts did not consider the body to be the property of the deceased but rather state property.[39] Fortunately the Uniform Anatomical Gift Act of 1986 now allows a person to donate his or her organs after death which could, according to Thukral and Cummins,[40] lead government to assume that this will ensure an adequate supply of organ donations.

1.2 Conclusion

Present legislation criminalising the selling of bodily organs is clearly not the solution to overcoming organ demands and today there is a global fight for the right to organs of deceased patients as illustrated above. Attention must widely be given to methods in which the supply of organs can be increased throughout the world in the field of organ transplantation purposes in today's modern society.

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39 Thukral and Cummins 1990:192.

40 1990:192.

One would further assume that when looking into the issue of organ donation and the possibility of legalising organ sales for the purpose of increasing the organ supply, that one would have to understand important terminology regarding such organ donation and sale and also terminology surrounding the areas of organ trafficking on the black market today. In the chapter to follow, some of these critical definitions are dealt with to ensure that the following chapters in this dissertation are properly understood.

Chapter 2

Defining important concepts

2.1 Introduction

No one will be able to comprehend the very difficult and technical legal and medical language surrounding organ donation and transplantation as well as the organised crime of organ trafficking if it was not for helpful definitions placed in legislative pieces and case law and various reports and articles written by renowned academics. In this chapter terms such as “brain death”, “organ transplantation”, “organised crime groups” and “organ trafficking” will be defined and explained in as much detail as possible to facilitate a better understanding of the subject material. All the defined terminology is of great importance in understanding the argument against organ trafficking on the black market and in favour of adopting a legalised organ trade.

2.2 Defining medical terminology

2.2.1 Defining brain death

Brain death can be defined as that point in the human life when functioning of the brain, in other words in the cerebrum, cerebellum and brainstem, irreversibly fails and normal brain functioning can no longer continue. [41] The medical criteria used to measure brain death is non-spontaneous breathing, the absence of reflexes and other spontaneous movements as well as the absence of responses to external stimuli for approximately 24 hours.[42]

2.2.1.1 Australia

The Human Tissue Act 9860 of 1982 of the state of Victoria defines death itself as the irreversible termination of blood circulation or of all functions of the brain.

The Transplantation and Anatomy Act[43] of South Australia states under section 24(2) as follows regarding the determination of death of potential donors:

> "(2) Where the respiration and the circulation of the blood of a person are being maintained by artificial means, tissue shall not be removed from the body of the person for the purpose or a

41 Machado 1998: 208.

42 Forsythe 2001: 30.

43 Act 11 of 1983.

use specified in subsection (1) unless two medical practitioners (each of whom has carried out a clinical examination of the person, and each of whom has been for a period of not less than five years a medical practitioner) have declared that irreversible cessation of all function of the brain of the person has occurred."[44]

Both of the above Acts therefore require cession of all brain functions and termination of blood circulation when determining the moment of death of a potential donor.

2.2.1.2 Canada

The Human Tissue Gift Act[45] of British Columbia and the Human Tissue Gift Act[46] of Nova Scotia both state that the fact of death must be determined by at least two medical practitioners in accordance with accepted medical practice. It appears that other regions in Canada such as Manitoba and the Yukon do not at present have legislation governing organ donation and transplantation and the Human Tissue and Organ Donation Act[47] of Alberta is silent on the issue of determining the moment of death.

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44 The Human Tissue Act 9860 of 1982 of Victoria, the Transplantation and Anatomy Act 11 of 1983 of South Australia, the Human Tissue Act 164 of 1983 of New South Wales, the Human Tissue Transplant Act of 2005 of the Northern Territory, the Human Tissue Act 118 of 1985 of Tasmania, the Human Tissue and Transplant Act of 1982 of Western Australia and the Transplantation and Anatomy Act of 1979 of Queensland all have much the same definition of when death occurs as is presented in the above definition.

45 R.S.B.C. 1996, c. 211. s 7(1).

46 R.S.N.S. 1989, c. 215. s 8(1).

47 S.A. 2006, c. H-14.5.

2.2.1.3 South Africa

The National Health Act[48] of South Africa, which came into operation on 2 May 2005, merely defines death as meaning brain death. Brain death is not further defined within this Act itself and this regulation could potentially create future problems with regard to the legality of organ harvesting and transplantation into organ recipients when one regards the National Health Act[49] specifically.[50]

In the case of *S v Williams*[51] the court never decided on the issue of whether or not the medical view of when death occurs, being when there is brainstem death, should be accepted in law as well. In this case the court simply decided that the traditional view of when death occurs should be used; that is when respiration and blood circulation are no longer present.

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48 Section 1 of Act 61 of 2003. Chapter 8 of the National Health Act 61 of 2003, as mentioned Earlier in footnote 21, is not in force yet.

49 Act 61 of 2003.

50 The Human Tissue Act 65 of 1983 did not clearly define the term brain death either and only stated the following in section 7(2) concerning the death of the donor:

> "For the purpose of this section, the death of the person concerned shall be established by at least two medical practitioners one of whom shall have been practising as a medical practitioner for at least five years after the date on which he has registered as a medical practitioner, and none of those medical practitioners shall transplant tissue removed from the body of that person into the body of a living persons or take part in such a transplantation."

51 1986 (4) SA 1188 (A).

In *Clarke v Hurst NO and Others*[52] Judge Thirion said:

> "In *S v Williams*[53] the life-sustaining procedures were held to have been unsuccessful even though they achieved the maintenance of the patient's heartbeat, blood circulation and respiration. The decision must therefore be seen as authority for the view that the mere restoration of certain biological functions cannot be regarded as the saving of the patient's life. The maintenance of life in the form of certain biological functions such as the heartbeat, respiration, digestion and blood circulation but unaccompanied by any cortical and cerebral functioning of the brain, cannot be equated with living in the human or animal context."

From the above two cases it is easy to conclude that defining the precise moment of death can, even with a definition, be problematic. The euthanasia bill: The End of Life Decisions Act of 1999 does, however, give a definition of death which for the purposes of this dissertation is known as brain death and makes the issue of determining death easier. The Act states as follows:

> 2.(1) For the purpose of this Act, a person is considered to be dead when two medical practitioners agree and confirm in writing that a person is clinically dead according to the following criteria for determining death, namely-

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52 1992 (4) SA 630 (D): 659.

53 1986 (4) SA 1188 (A).

(a) the irreversible absence of spontaneous respiratory and circulatory functions; or

(b) the persistent clinical absence of brain-stem function.

(2) Should a person be considered to be dead according to the provisions of sub-section (1), the medical practitioner responsible for the treatment of such person may withdraw or order the withdrawal of all forms of treatment.[54]

If one uses the definition of death as stipulated in the End of Life Decisions Act of 1999 it becomes clearer what the specific requirements for measuring death are. This in turn makes it easier for health care practitioners to determine the moment of death of potential organ donors so that the consent of the donors family may be requested as soon as possible and the donated organs can be removed and transplanted so as to ensure the best results in any organ transplantation.

2.2.2 Definition of organ transplantation

Transplantation can be defined as the therapeutic replacement of an organ or other bodily tissue which have irreversibly failed to function properly with that of a healthy organ or body tissue which is functioning in a proper manner. Such transplantation can occur where an organ is removed from a

[54] In their Report on Euthanasia and the Artificial Preservation of Life in November 1998, the South African Law Commission defined the above definition of clinical death as used in the End of Life Decisions Act of 1999.

cadaveric human or animal donor to the organ recipient or from a living human or animal donor to the organ recipient.[55]

For purposes of this definition it is further necessary to define a bodily organ and what encompasses bodily tissue. According to section 1 of the National Health Act[56] of South Africa an organ can be defined as follows:

> "Organ means any part of the human body adapted by its structure to perform any particular vital function, including the eye and its accessories, but does not include skin and appendages, flesh, bone, bone marrow, body fluid, blood or a gamete."[57]

From this definition it is clear, for purposes of later discussion, that hair, nails, sperm, eggs and other replenishable body parts do not form part of the definition of an organ that can be used in the process of an organ transplant.

The Act[58] defines "tissue" as human tissue which includes flesh, bone and bone marrow, a gland, an organ, skin, body fluid, but does not include blood

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55 Machado 1998: 15.

56 Act 61 of 2003.

57 A list of vital human organs needed to survive include the following: brain, liver, heart, small intestine, pancreas, stomach, lungs, large intestine and kidney. http://www.everythinh2.com/index.pl?node=vital%20organs: 13/12/2006. However, only the following vital organs are used in organ transplantations in South Africa: kidney, heart, lung, liver and pancreas. http://www.odf.org.za: 13/12/2006. A single kidney donation can also be made while the donor is living as well as cornea donations if a donor so wishes. It is unclear whether or not a donor can donate a part of his lung or liver while living. The transplant statistics from 2000 to 2005 available on the Organ Donor Foundation website indicate that, so far, only kidneys have been donated by living donors. http://www.odf.org.za: 13/12/2006.

58 National Health Act 61 of 2003.

and gametes as tissue. The term 'tissue' is therefore much wider that the term organ and includes skin, bone and bone marrow and other body fluids that can be used to be transplanted. Once again blood is not included in the definition of human body tissue.[59]

The European Union[60] defines the term "organ" as follows:

> "organ" means a differentiated and vital part of the human body, formed by different tissues, that maintains its structure, vascularisation and capacity to develop physiological functions with an important level of autonomy."

It can be concluded from this definition that, as with the definition of "organ" within the South African legislative context, the European Union does not mean to include in their definition of "organ" non-vital body parts such as hair, nails, sperm, eggs and other replenishable tissues.[61]

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59 The repealed Human Tissue Act 65 of 1983 defined tissue to mean-
(a) any human tissue, including any flesh, bone, organ, gland or body fluid, but excluding any blood or gamete; and
(b) any device or object implanted before the death of any person by a medical practitioner or dentist into the body of such persons.
Therefore, with the exception of including bone marrow in the definition of tissue, the definition given by the National Health Act 61 of 2003 remains the same as the definition presented in the repealed Human Tissue Act.

60 Article 3(e) of Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004.

61 The South Australian Transplantation and Anatomy Act 11 of 1983 on the other hand includes in its definition of "tissue" under section 5 any organ or part of the human body including any substance extracted from the human body or any part thereof. This definition is rather wide and one can deduce that it might include sperm, eggs and other replenishable tissue.

2.3 Defining organised crime, an organised crime group and organ trafficking

Before we can assess the effects of organ trafficking on organised crime institutions we need to understand what type of criminal activity and offender we are dealing with. These concepts of organised crime and organ trafficking have no universal definition and law enforcement officials, governments, criminologists and academics define the concepts differently. Likewise, all countries will have different definitions for these crimes according to the values and customs emanating from that society.

2.3.1 Definition of organised crime

Leong[62] says that on the one hand 'organised crime' refers to a specific set of crimes such as gambling, prostitution and drug trafficking as well as other related crimes. On the other hand she defines it as an infiltration of legitimate business by organised crime. She also states that the term 'organised crime' encompasses groups such as the Mafia, Triads and other covert societies and that the reason for not being able to define organised crime universally is because organised crime means different activities to different people in different societies.

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62 2004: 19.

Goredema[63] defines organised crime in the South African context as systematic criminal activity of a serious nature committed by a structured group of individuals or a corporate body in order to obtain, secure or retain, directly or indirectly, a financial or other material benefit. This definition is broad enough to embrace participation in organised crime groups, serious economic crimes, violent crimes, corruption, money-laundering, the possession of and trafficking in narcotics, trafficking in humans, poaching, smuggling and obstructing the course of justice. At the core of organised crime, there is usually an economic imperative.

In 1967 the United States of America President's Commission on Law Enforcement and Administration of Justice defined 'organised crime' as follows:

> "A society that seeks to operate outside the control of the American people and their government. It involves thousands of criminals, working within structures as complex as those of any large corporation, subject to laws more rigidly enforced than those of legitimate governments. Its actions are not impulsive but rather the result of intricate conspiracies, carried over many years and aimed at gaining control over whole fields of activity in order to amass huge profits. The core of organised crime activity is the supplying of

[63] http://www.iss.co.za/Pubs/Monographs/No56/chap3.html: 5/12/2005. Goredema is a Senior Research Fellow for the Organised Crime and Corruption Programme for the Institute for Security Studies in Cape Town.

illegal goods and services – gambling, loan-sharking, narcotics, and other forms of vice – to countless numbers of citizen customers."[64]

From the above definitions it is once again clear that organised crime seeks to provide illegally to needy society all material goods and services that such a society cannot get hold of in any legal manner.[65] One would then imagine that the most obvious method of eliminating organised crime would be to eliminate the demand for certain services or materials. The most relevant example here would be to remove the demand for human organs by creating a method in which such organ supplies can be increased legally for all patients.

2.3.2 Definition of organised crime group

The *United Nations Convention Against Transnational Organized Crime* defines organised criminal groups as follows:

> "'Organised criminal group' shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit (Article 2 of

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64 President's Commission on Law Enforcement and Administration of Justice Task Force Report 1967.

65 For example such organised crime groups will be willing to provide bodily organs to people in need of transplantations simply because such organs are not available to them through the workings of medical policy and legislation.

the United Nations Convention against Transnational Organised Crime)."[66]

Truong[67] defines an organised crime group as any group that has a corporate structure and whose main aim is to make profit through illegal activities that survive on fear of victims and corruption of business activities.

Leong[68] goes further into Truong's definition and says that within that definition organised crime groups are often interpreted as forming part of a lasting hierarchical organisation but can also refer to smaller or loose enterprises trading in small scale illegal goods and services.

Section 11 of the Prevention of Organised Crime Act of 1998[69] of South Africa defines an organised crime group member as any person who,

(a) admits to being a member of such an organised crime group

(b) is identified as a member of such an organised crime group through a parent or guardian

(c) resides in or frequents a particular organised crime groups area and adopts their style of dress, their use of hand signs, language

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66 http://www.rcmp.ca/ccaps/traffick_e.htm: 13/12/2006; http://www.unodc.org/unodc/en/trafficking_persons_report_2006-04.html: 19/09/2006.

67 2001: 3.

68 2004: 24.

69 Act 121 of 1998.

or their tattoos, and associates with known members of an organised crime group;

(d) has been arrested more than once in the company of identified members of an organised crime group for offences which are consistent with usual organised criminal activities;

(e) is identified as a member of an organised crime group by physical evidence such as photographs or other documentation.[70]

2.3.3 Definition of organ trafficking

Trafficking was first defined in international law through the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons.[71] This definition supplements the United Nations Convention of 2000 Against Transnational Organised Crime.[72]

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[70] It is further worthwhile mentioning that the Act also defines in section 1 the term "criminal gang" as including any formal or informal ongoing organisation, association, or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity. The pattern of racketeering activity is also defined in section 1 of the Act to mean any planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 of the Act and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of the Act and the last offence occurred within 10 years after the commission of such prior offence referred to in the Schedule. Act 121 of 1998.

[71] http://www.unodc.org/unodc/en/trafficking_protocol.html: 5/10/2006. Article 3 defines trafficking as follows:
"The recruitment, transportation, transfer, harbouring or receipt of persons by improper means, such as force, abduction, fraud or coercion, for an improper purpose, like forced or coerced labour, servitude, slavery or sexual exploitation."
The definition then is intended to include a wide range of activities where human exploitation takes place under duress and involving some kind of transnational aspect.

[72] http://www.rcmp.ca/ccaps/traffick_e.htm: 13/12/2006.

Known as the 'Palermo Protocol' or the 'Trafficking Protocol', this is the most widely recognised definition of trafficking and provides an essential basis for international law reform. The definition reads as follows:[73]

a) Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

b) The consent of a victim of trafficking in persons to the intended exploitation by such means as sexual exploitation, forced labour or services and other illegal methods of trafficking[74] will be irrelevant where any of these illegal methods have been used.

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[73] http://lsa.unisa.ac.za/news/archive/august/vol4/human.html: 21/02/2006. This protocol has been ratified by countries such as Argentina, Brazil, Moldova, Philippines, Russia, Romania, Turkey, United States of America and the Republic of South Africa but not by Iran. India and Israel have gone as far as to sign the protocol but have not as yet ratified it. The effect of the ratification of the protocol by South Africa and other countries means that they have adopted the regulations within the protocol and that such regulations are now to be implemented within South Africa and the other countries who have ratified the protocol.
http://www.unodc.org/unodc/en/trafficking_persons_report_2006-04.html: 19/09/2006. This definition is also the definition provided in Article 3(a) of Directive 2006/618/EC of the European Parliament and of the Council of 24 July 2006.

[74] Here the words 'illegal methods of trafficking' can be interpreted to include organ trafficking as a

c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the illegal methods mentioned above.

The definition is clear about the fact that threat or use of force, coercion, abuse of position of vulnerability or the receiving of payments or benefits in order to gain consent from a person, even if such consent is not regarded as a relevant factor is such trafficking, will be considered as the gaining of consent for the purpose of trafficking.[75]

In the Trafficking Victims Protection Act[76] of the United States of America trafficking is similarly defined in subsection (b) as 'the recruitment, harbouring, transportation, provision, or obtaining of a person for labour or services through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery.'

The immediate definition above once again uses the words by force, fraud or coercion to indicate the involuntariness of human trafficking through organised crime groups. These crime groups take advantage of those unemployed persons who are without social structures to support them and

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means of trafficking whereby people who sell or buy their bodily organs cannot be seen as having consented to such selling or buying.

75 www.unicef.org/protection/files/child_trafficking_handbook.pdf: 7/03/2006; www.rcmp.ca/ccaps/traffick_e.htm: 13/12/2006.

76 c. 78 of 2000.

promises them a better life once the relevant transaction has taken place.[77] The supposed 'voluntary consent' which cannot be described as truly informed consent makes such poor social groups even more vulnerable to organ traffickers and human traffickers as a whole. A further reason for such exploitation of poor persons by such organised crime groups is a lack of governmental stability and the presence of political and governmental corruption.[78]

From all of the above definitions of organ trafficking it is further worth defining the words 'selling' and 'payment' as far as they are related to the organ trade. In the Oxford Advanced Learner's Dictionary the word 'sell' is related to terms such as 'exchange for money', 'offer for sale', 'to be bought by people', 'to persuade people to buy something' and to 'accept money or reward for something'.[79] In the same dictionary the word 'payment' is explained either as a sum of money paid or expected to be paid: a cash payment.[80]

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77 http://lsa.unisa.ac.za/news/archive/august/vol4/human.html: 21/02/2006.

78 http://www.ncjrs.gov/spotlight/trafficking/Summary.html: 28/06/06. Harrington, in her unpublished thesis "Organ Trade – The Price of Life", further defines organ trafficking in broader terms as: "situations where there is any degree of deception or any sum of money involved to facilitate the transfer of organs from donor to recipient." Harrington 2006: 3.

79 Hornby 2000: 1069.

80 Hornby 2000: 857. For purposes of making the trade in human organs seem more morally acceptable the word "payment' can further be defined as a reward or an *act of thanks* for something you have done.

2.4 Conclusion

All of the definitions discussed make it acceptable to conclude that organised crime and organ trafficking affects more than a small minority of people within a country and can have the effect of prejudicing hundreds of innocent victims. Organised crime, although *prima facie* seeming to work through legal businesses, has an emotional destabilising affect on society because the plan is to cause harm and destruction through actual illegal activity.[81]

The effect of such human trafficking is commented on by the Unites States of America's Department of Justice in their National Criminal Justice Reference Service[82] as, "not only a human rights abuse, but it promotes the breakdown of family and community support, fuels organised crime, deprives countries of human capital, undermines public health, creates opportunities for extortion and subversion among government officials and imposes large economic costs."

The more the status of poverty increases in a country, the more irresistible organ trade becomes.[83] Appropriate definitions of a universal nature are therefore imperative when attempting to combat organised crime and organ trafficking. These definitions of organised crime, organised crime groups

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81 Mills and Ware 2004: 394.

82 http://www.ncjrs.gov/spotlight/trafficking/Summary.html: 28/06/06.

83 http://samvak.tripod.com/brief-organ01.html: 21/02/2006.

and human trafficking, including organ trafficking, have to adapt to the changes in society and the developing crime itself and must be reviewed and refined as time goes by. This is a massive task on its own but could, although it has not been proved in practice yet, contribute vastly to the deterrence of this large scale organised crime and organ trafficking if adapted efficiently.[84]

Further, if such definitions are adapted efficiently to deal with the organised crime of organ trafficking they would have a changing effect on organ demand and shortage. If organ trade can then be legally regulated the problem of organ shortage, as discussed in the next chapter, could be decreased.

Chapter 3

Demand for change

3.1 Introduction

This chapter will deal in depth with why there is a demand for change in legislation regarding organ donation and transplantation, statistics regarding organ shortages for transplantation in the Republic of South Africa, United States of America, United Kingdom and other countries in Europe as well as

[84] Leong 2004: 34.

providing an indication of what human organs are monetarily worth in some countries in the world, including in the Republic of South Africa.

3.2 Why this sudden demand for change in legislation?

Many people are questioning the effectiveness of legislation prohibiting the selling of bodily organs and are requesting for the introduction of new legislation that formulates a policy in favour of the selling of bodily organs, in other words the compensating of the donor for all losses and expenses in donating an organ.[85] The reason for these protests is the shortage of donated bodily organs available for transplantation worldwide.[86]

One of the reasons responsible for such a shortage in organs is the scientific advances in medical possibilities related to organ transplantations. As has already been mentioned medical science has made it possible for surgeons to become better and better at performing transplantations and increasing the survival rate of patients who have received organ transplants.[87] Therefore it can be deduced that the more people begin to realise that organ transplantation is an available option when fighting for survival the scarcer human organs for donation become. There is more frequent opportunity for patients to undergo an organ transplant but there are currently no adequate

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85 http://organtx.org/ethics/sales/sales.htm (Yahoo): 20/09/2004.

86 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004.

87 http://lsa.unisa.ac.za/news/archive/august/vol4/human.html: 22/02/2006.

reasons for health care practitioners to procure organs or for people in society to donate organs.

It is for the reason of this very technology allowing transplantations to occur that we are in a situation today where demand for human organs far overrides the supply of such organs. This is further hampered by the fact that medical technology and science is so advanced in our present society that fewer deaths occur today than 50 years ago. One's chance of surviving a vehicle accident today is far greater than it was a few years ago. This results in fewer deaths in emergency situations and inevitably leads to fewer donations of organs and even less transplantations resulting from such deaths. Poor legislation and public knowledge regarding organ donations and transplantation are other, although not the only, reasons for such organ shortages across the world.[88]

Another reason behind the organ shortage is the myths related to organ donation.[89] Families of patients for some reason believe that when a deceased family member donates his or her organs that some sort of physical harm is being caused to that deceased family member.[90] Of course this can be attributed to psychological factors surrounding the death of a loved one such as dismay and disbelief that the person is actually deceased as well as

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88 Prottas 1994: 75; Cherry 2005: 76.

89 Sque *et* al 2005: 544; Jakubowska-Winecka *et al* 2006: 12.

90 Jakubowska-Winecka *et al* 2006: 12.

issues arising from a lack of knowledge about the organ donation and transplantation process.[91]

Families also have the misguided notion that once they have agreed to donate the potential donor's organs that doctors, where it is still possible to save the donor's life, would withhold the treatment needed to save his or her life in order to procure the organs needed for transplantation into someone else's body.[92] When asked if they will donate their organs most people without hesitation say they will have no problem in donating their organs. However, when it actually comes to donating those organs for the purpose of saving someone else's life it is suddenly one's own life which seems, rightly so, more important and a person's verbal willingness to donate inevitably means nothing.[93]

Because of this worldwide shortage of organs to transplant, it has been suggested that a person should have the right to sell his or her organs. [94] Where there is a shortage of organs there will always be people prepared to ask for compensation and people willing to pay such compensation even though it is illegal. Is it any wonder people in need (of both organs and

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91 Jakubowska-Winecka *et al* 2006: 12.

92 Sque *et* al 2005: 544; Prottas 1994: 64-65. For this reason it is necessary to note that one of the fundamental policies in medical practice prohibits the doctors involved in caring for the potential donor, and finally declaring such a patient brain dead, from being the same doctors involved in procuring the organs needed for a new transplant procedure. Prottas 1994: 13. This withholding of medical treatment will be discussed in greater detail later on.

93 Breyer 2003: 1.

94 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004.

money) have turned to the black market in bodily organs to meet such needs? There is even the possibility that a profit can be attained by the donor where the patient pays an amount over and above the fair value of the organ donated.[95]

John Harris, Professor of Bioethics at Manchester University, and his colleague, Charles Erin,[96] are campaigning for an ethical market in human organs and say living donors running the risk of surgery to provide organs or tissue for transplantation should receive tax free payments and live healthy and happy lives without consequent loss of state benefits and social acceptance. They and their families should also have high priority for subsequent transplants, should the need arise.[97]

3.3 Shortage reflected in numbers

United States of America

A look at organ donor statistics in the United States of America reveals the appalling state organ donation is in and demonstrates an overwhelming demand.[98] In 1987 there were nearly 13 000 patients with renal diseases needing kidney transplants and this total was predicted to increase to an

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95 Garwood-Gowers 1999: 167.

96 2003: 138.

97 www.guardian.co.uk/uk_news/story/0,3604,1098522,00.html: 21/03/2004.

98 Reed 1994: 39 – 45; http://organtx.org/ethics/sales/sales-safrica.htm (Yahoo): 20/09/2004.

astronomical 32 500 patients needing kidney transplants by the year 2000.[99] In 1987 already more than 1 500 hearts and 1 200 livers were transplanted which proves that organ transplantations will increase just as quickly as the supply of donated organs will allow.[100]

In 1988 there were 16 034 people needing organ transplantations. In that same year only 4 085 organs were donated.[101] A total number of kidney transplants increased per year by 6,7% between 1974 and 1980 and increased again by 10,4% between 1980 and 1984 increasing the number of patients needing kidney transplants at a rate of between 8% and 10% per year.[102]

One survey found that in 1990 alone 83 028 people either died or had less-than-optimal care because of the shortage of organs.[103] Two years later, in 1992, the number of people on donor lists was up to 29 519 while the number of donated organs had barely increased to 4 521.[104] According to the Partnership for Organ Donation, less than one-third of potential donors became donors.[105] Some 79 000 patients from around the United States of

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99 Thukral and Cummins 1990: 190.

100 Thukral and Cummins 1990: 191.

101 Reed 1994: 39 – 45.

102 Thukral and Cummins 1990: 190.

103 Reed 1994: 39 – 45.

104 Reed 1994: 39 – 45.

105 Reed 1994: 39 – 45.

America are on waiting lists to receive a heart, kidney, liver and other transplants, and each year several thousand of them die waiting.[106]

The waiting list for an organ transplantation in the United States of America has more than tripled between 1990 and 1999 with numbers increasing from approximately 22 000 in 1990 to over 72 000 in 1999. The number of donors within this period has only increased slightly from 15 000 in 1990 to over 21 000 in 1999.[107]

In 1994 the United Network for Organs Sharing in the United States of America dictated the following numbers of patient's on the waiting list for transplantation as well as the number of transplantations that actually took place that year:[108]

Table 1:

Type of Organ	Number of patients on waiting list for specific organ	Number of transplantations performed in 1994 for specific organ
Kidney	27 897	9 539
Liver	4 281	3 327

106 http://organtx.org/ethics/sales/sales.htm (Yahoo): 20/09/2004.

107 http://www.centerspan.org/tnn/0103013.htm: 26/05/2006. It is simple to see that the total number of organs donated in 1999, namely 21 000, would not even have been enough for the then small demand in 1990 of 22 000 patients.

108 These statistics were taken from an article written by Ingrid Kinkopf-Zajac in 1996 published in Health Matrix Vol 6: 504.

Pancreas	238	93
Heart	3 044	2 151
Lung	1 678	657

Table 1 above indicates that for livers and hearts one quarter of the patients on the waiting list did not receive the needed organs. So far the statistics do not seem to alarming although 954 patients still did not receive a liver and 893 patients did not receive a heart. As for pancreas and lungs less than half of the patients on the waiting list received the needed organs within that year. For kidneys only one third of the patients on the waiting list received a transplant. A staggering 18 358 patients on the waiting list did not receive the needed kidney transplant.

In the United States of America 6 251 patients died from serious organ failure in 2001 before being able to receive an organ transplant because there simply were not enough organs to go around.[109]

In 2002 there were over 12 600 patients on the waiting list for kidney transplants alone in the United States of America but eventually only 3 043 of those patients actually received a kidney transplant.[110] As far as all organs are concerned only over 24 000 transplantations in total took place in

[109] Kishore 2005: 363.

[110] Kishore 2005: 363.

2002 while there was a waiting list of over 60 000 patients while in 2003 over 80 000 patients were on the waiting list for organ transplantations.[111]

In 2004 in the United States of America over 85 000 people were on the national waiting list for organ transplantations while on average 100 people were added to this waiting list every day.[112] More or less 60 000 were waiting for kidneys and the rest were on the waiting list for liver, lung and heart transplants. However, in 2004 only 25 468 transplants were performed in the United States of America.[113]

Republic of South Africa

Currently in South Africa approximately only 1000 transplants are performed annually.[114] The waiting list for organ transplantations in South Africa currently stands at 3 500.[115] This waiting list includes only patients

111 Sirico 2002-2003: 1.

112 Calandrillo 2004: 72; Kishore 2005: 363.

113 Calandrillo 2004: 84.

114 Slabbert and Oosthuizen 2005: 192. It must be noted that cornea transplants are also included in this total number of organs transplanted per year and that cornea transplants form over 75 % of the total number of organs transplanted. Volschenk 2006 – Marketing Coordinator of the Organ Donor Foundation.

115 This figure was obtained from the Marketing Coordinator of the Organ Donor Foundation of South Africa in 2006 and is not an official statistic.

who qualify financially for a transplant and who meet the medical criteria for transplantation.[116]

Approximately 10 patients per week are refused renal dialysis treatment for kidney failure not only because the treatment is too expensive but also because it is not worthwhile giving these patients the treatment when there is such a shortage of kidneys available for transplantation and no telling when even one of these patients may be able to receive a kidney.[117] According to the World Health Organisation over 70 000 transplants take place each year – 50 000 of these transplants are kidney transplants.[118] This certainly makes the demand for kidneys enormous and explains why the black market for kidney sales is so successful.[119]

Below is a table formulated from information gathered from the Organ Donor Foundation of South Africa regarding the number of transplants performed between 2000 and 2005.[120]

Table 2:

116 Thukral and Cummins 1990: 190.

117 Burger: 2003.

118 Pretoria News: 2003.

119 http://www.who.int/transplantation/organ/en/: 26/09/2006. The World Health Organisation admits that kidney transplants are by far the most frequently carried out transplantation globally.

120 http://www.odf.org.za/pages/stats2.htm?sm=f_a: 29/05/2006. This table was formulated by the Organ Donor Foundation and placed in their yearly report of 2005.

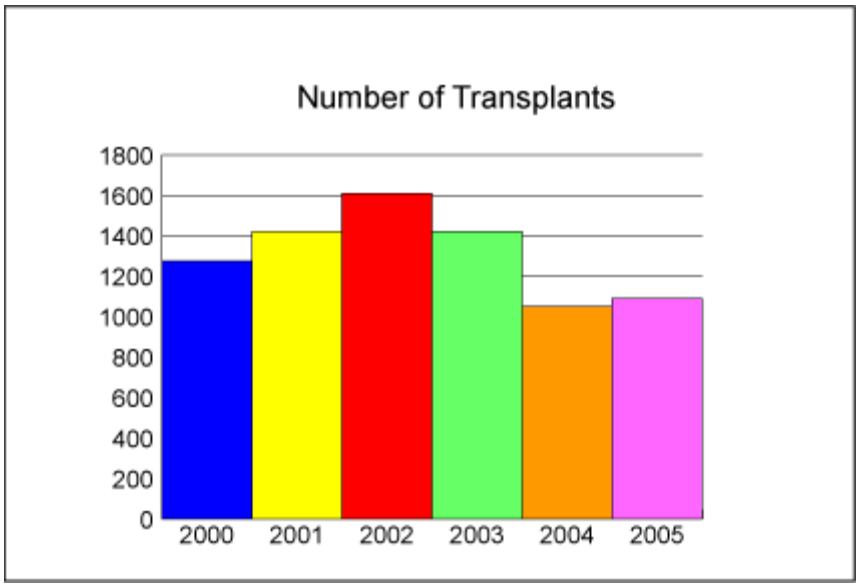

Table 2 above shows a clear decrease in the number of organ transplants occurring after 2002. Even though there is a slight increase from 2004 to 2005 these statistics are still lower than the number of organ transplantations that occurred in 2000. This means that organ transplants are not increasing at all but are in actual fact decreasing. The only explanation for such a decrease is the fact that there is a shortage in the number of transplantable organs.

Table 3:

	2000	2001	2002	2003	2004	2005
Kidney	359	374	415	359	252	232
Heart	41	29	41	30	28	27
Lung	2	None	6	8	5	4
Liver	12	8	12	9	8	14

Pancreas	None	None	4	3	8	7
Corneas	858	1024	1150	1019	744	799
Total number of transplanted organs	1272	1435	1628	1428	1047	1084
Total number of transplants excluding cornea transplants	414	411	478	409	303	285

The above Table 3 once again indicates that the highest total for organ transplantations was in 2002 with the total number of organ transplantations decreasing steadily since that year.[121] All the transplantations that occurred were necessary for the survival of the organ recipient except cornea transplants.

However, when looking at the total number of organ transplants in a given year cornea transplant almost always outnumber all other organ transplants in a 3:1 ratio. Therefore, although cornea transplants are considered in the total number of transplant performed in a given year and can be viewed as a necessary transplant for many patients, cornea transplants are not life saving transplants. For this reason such transplants can not be included in the statistics for purposes of calculating actual life saving organ transplantations.

[121] This table was once again formulated using statistics received in 2006 from the Marketing Coordinator of the Organ Donor Foundation of South Africa, Samantha Volschenk and does not form part of official information.

So when looking at the total number of life saving transplantations the outlook is very bleak. Of the 3 500 adults and children on the waiting list for organs presently in South Africa it can be calculated using the figures above that only approximately 400 will receive organs per year. And the waiting list does not decrease by an amount of 400 every year because new patients with new medical needs are placed on the list daily.

United Kingdom and Europe

In 1995 there was a waiting list for organs in the Netherlands consisting of 8 000 which equals, in the end, a waiting period of up to four years.[122] In 2003 there was a waiting list in Britain of 6 000 patients. Of those 6 000 waiting for organs 600 have already died.[123] People die daily because no organs for transplantation are available and only a third to a half of the world's people who are healthy and able to donate organs actually do so.[124] Between 15 and 30% of Europe's patients die waiting for organs each year.[125] To make this worse approximately only 28% of potential organ donors actually donate organs.[126] This demand for organs is a vital concern

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122 Sowetan: 1995.

123 Daily News: 2003.

124 http://organtx.org/ethics/sales/sales-safrica.htm (Yahoo): 20/09/2004; http://www.organselling.com/index.htm: 13/12/2006.

125 http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9822.htm: 21/02/2006.

126 Prottas 1994: 76.

in the medical, bioethical and public policy communities because of the fact that organised crime groups have recognised an economic market for organs around the world.[127]

In Western Europe there are presently 40 000 people waiting for the popularly performed kidney transplant.[128] The waiting period for such a kidney in Europe is nearly 3 years. This waiting period is set to rise by approximately 10 years by 2010 with currently 120 000 patients on dialysis treatment.[129] The most recent statistics for Britain are that more than 8 000 people in the United Kingdom need organ transplants while at present fewer than 3 000 organ transplants are performed each year.[130]

The above figures for the United States of America, the Republic of South Africa and the United Kingdom and Europe do not even include the thousands of people who are in need of transplantation but who do not have the finances and who do not meet the medical criteria necessary for such transplantations.[131] These figures, however, make it quite obvious to any person that something universal needs to be done to increase the supply of organs around the world.

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127 Thukral and Cummins 1990: 190; http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9822.htm: 21/02/2006.

128 http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9822.htm: 21/02/2006.

129 http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9822.htm: 21/02/2006.

130 Daily Mail (United Kingdom): 2006.

131 http://organtx.org/ethics/sales/sales.htm (Yahoo): 20/09/2004.

3.4 Organ shortage – myth or reality?

Scheper-Hughes, working with the Bellagio Task Force,[132] however, says that after interviewing numerous medical practitioners in South Africa and Brazil during 1997 and 1998 that the idea of 'organ scarcity' is but a myth created intentionally because of competition between public and private hospitals not to assist the competitor hospital by sending them organs they might have in their possession.[133]

She says that organs are lost every day because of this kind of unnecessary competition and also because of a lack of basic infrastructure in many of these hospitals as far as trained transplant surgeons are concerned as well as available facilities to store and transplant these organs.[134] Scheper-Hughes also mentions the issue of loyalty to one's country as a factor creating a problem of organ shortages in other countries. After interviewing a nurse in South Africa she concludes that medical practitioners would rather throw

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132 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004. Nancy Scheper-Hughes is a medical anthropologist and Director of the United States of America's Organs Watch Program. The Bellagio Task Force is an international group of people, arising out of the Organs Watch Program, consisting of medical surgeons, human rights activists and social scientists, dealt in their report on issues such as transplantation, bodily integrity and international organ trafficking. Rothman *et al*. 1997: 2741. The Bellagio Task Force is responsible for examining the ethical, medical and social effects of the trade in human organs as well as researching human rights abuses arising out of the procurement and distribution of bodily organs. http://www.journals.uchicago.edu/CA/journal/issues/v41n2/002001/002001.text.html: 27/09/2006.

133 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004; http://www.journals.uchicago.edu/CA/journal/issues/v41n2/002001/002001.text.html: 27/09/2006.

134 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004.

away organs in their possession if it could not be utilised by a South African citizen than to transport that organ to a person overseas for a transplant.[135] This is simply because the patient overseas is not a South African citizen – not because the organ cannot be transported and transplanted.[136]

Such myths surrounding organ shortages, if they are really and truly myths, should be investigated. However, with regard to the statistics as presently depicted above reporting of minimal organ transplantations throughout one year, particularly in South Africa, the conclusion must be drawn that organ shortages are more a reality than any possible myth.

3.5 Altruism versus commercialisation

One could say that we could follow a procedure of rationing organs by establishing a strict recipient patient selection process.[137] This procedure would however not be very effective as it would only lead to short term decreases in the organ shortage and will not help the procuring of reasonable amounts of organs in the long run. This is because of the fact that the

135 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004.

136 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004.

137 Thukral and Cummins 1990: 192.

procedure will result in the strict selection process becoming inequitable and arbitrary as technology and science improve.[138] However, for reasons of procuring organs for transplantation in the immediate future, this procedure might prove to be effective.

Therefore if a strict patient recipient selection process does not work then what about altruism? Cohen[139] says that altruism is expected among family members whereas financial incentive will be necessary sometimes when procuring an organ from a stranger. Prottas[140] similarly says "We expect people to act according to different values in different spheres of their lives. Within families and among friends, we expect generosity and kindness. In interactions with the world at large, market exchange relationships prevail." This then ultimately means that altruism only works when one is donating to family and friends but that it does not seem to work when donation is expected for the help of a total stranger.

Strictly speaking, having regard to the above mentioned comments, altruism cannot be said to be an effective way of increasing available organs for donation because the problem with the shortage in organs is not getting a family member or a friend to donate an organ but requiring a total stranger to do so. In addition there is the fact that if we were only trying to procure organs for donation from family members and friends then there would be

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138 Thukral and Cummins 1990: 192.

139 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004.

140 1994: 170-171.

no problem. However, the problem lies in the fact that most of the time a family member or friend's organs simply are not compatible with the potential recipient and the organ of a stranger is needed.

Slabbert[141] says organ donations and transplants are controversial subjects and many people are ill-informed about procedures such as organs donation and transplantation. Harris and Erin[142] state that the focus is always on the donor and never on the receiver, whose life depends on an organ transplant and Slabbert[143] is of the opinion that there is room for trading in organs for transplant purposes, if regulated properly. She says the law gives relatives the right to decide on organ donors, while the donor's right to self-determination is not acknowledged.[144]

The movement towards commercialisation is gaining momentum in the United States as well. Dr. Charles Plows, Chair of the American Medical Association Committee on Ethical and Judicial Affairs agrees with Slabbert's suggestion that the donor be compensated and states that, "The only one who doesn't get anything out of this whole transplant transaction is the person who's deceased. The hospital makes money out of furnishing the areas where this work is done. Certainly, transplant surgeons do well for

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141 http://www.guardian.co.uk/uk_news/story/0,3604,1098522,00.html: 21/03/2004; Slabbert's unpublished LLD thesis *Handeldryf met menslike organe vir oorplantingsdoeleindes* University of the Free State (2003).

142 2003: 138.

143 http://www.guardian.co.uk/uk_news/story/0,3604,1098522,00.html: 21/03/2004.

144 http://www.guardian.co.uk/uk_news/story/0,3604,1098522,00.html: 21/03/2004.

themselves. The patient gets a life-saving organ. But the man or woman who's donating the organ receives nothing".[145]

Harris and Erin[146] further make the statement that just because medical practitioners are paid for their services doesn't necessarily mean they are exploiting the poor or that they are no longer acting altruistically. After all the health profession was originally designed to be a caring and giving profession. Are we now suggesting that because the purpose of this profession is to care and give to society that doctors should no longer be paid for their services to the community?

Brian Carnell is also of the opinion that such organ sales should be allowed and says that the ban on such sales in the interests of morality and public policy is inconsistent with other well-established, widely accepted principles of medical ethics.[147]

Clearly the present system of voluntary consensus of an individual to donate organs, in South Africa particularly, is not working.[148] There is no doubt that a market in human organs would balance supply and demand and that

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145 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004.

146 2003: 138.

147 http://members.aol.com/richrwg/organs.htm: 20/09/2004.

148 http://organtx.org/ethics/sales/sales.htm (Yahoo): 20/09/2004.

this presently illegal form of procuring organs for transplantations seems to have the most prospects for increasing organ supplies.[149]

3.6 But what are organs and other human tissue really worth?

The illegal commerce in human organs in India is beginning to attract international attention. Approximately 5 500 kidneys are sold in India every year with an annual turnover of Rs90 crore (the currency of India).[150]

The question can be asked if selling organs is still a good idea when disadvantaged people can already not even afford to pay for a transplant let alone for the organ itself.

In the United States of America a kidney transplant costs $100 000.[151] Is it ethical to say that this price is an acceptable price to pay for any human being from any financial and social background? There is evidence that the distribution of organs is largely biased toward the wealthy and other groups of people, and that in some measure this is unavoidable.[152]

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149 http://organtx.org/ethics/sales/sales.htm (Yahoo): 20/09/2004.

150 The Statesman (India): 2004.

151 http://www.guardian.co.uk/gs/story/0,3604,1099282,00.html: 21/03/2004.

152 http://www.guardian.co.uk/gs/story/0,3604,1099282,00.html: 21/03/2004.

There are many factors which determine whether or not an individual receives a transplant.[153] At the most fundamental level, the biggest determinant is what sort of access the individual seeking treatment has to health care facilities. Poor people in general have less access to medical care than wealthy people and this leads to two results:[154]

1. They are less likely to be referred to a transplant centre.
2. If they are referred to transplant centres it is much more likely that they will be referred at a later stage in their disease than a wealthy person.[155]

Therefore is it fair to conclude that the selling of organs would not be inconsistent with current medical practices that already favour the wealthy?[156] The fact is that organ transplantation already benefits the wealthy almost exclusively if the global cost of an organ transplantation is taken into account.[157] A good example of this is that an organ will most likely rather be provided to an American who can afford the transplant than to a person in Bangladesh who cannot afford a transplant. However, even for those for whom it is highly important to undergo an organ transplant, their fear of the excessive price of the organ indicates that they fail to take

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153 http://members.aol.com/richrwg/organs.htm: 20/09/2004.

154 http://members.aol.com/richrwg/organs.htm: 20/09/2004.

155 http://members.aol.com/richrwg/organs.htm: 20/09/2004.

156 http://members.aol.com/richrwg/organs.htm: 20/09/2004.

157 http://members.aol.com/richrwg/organs.htm: 20/09/2004.

into account that an organ transplant is often cheaper than long-term treatment alternatives for prolonged kidney, heart or liver failure.[158]

Federal laws in the United States of America do not readily forbid the payment or compensation for organs and tissue used for research purposes.[159]

These are the current prices of organs and tissue or bodily liquids that may be sold[160]:

- Blood may be sold to Blood Banks for $20 for each plasma donation. A 90-minute procedure may be done two to three times per week, meaning about up to $3,000 per year.[161]
- Infertility clinics pay approximately $5,000 to $8,000 for egg donations. In the United States of America women who donate their eggs for *in vitro* fertilisation are paid as much as $75 000 in some areas of the country.[162]
- Sperm donors can be paid as much as $75 per visit.

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158 http://webjcli.ncl.ac.uk/2003/issue3/pattinson3.html: 20/09/2004.

159 Harrison 2002: 80.

160 http://www.parentsguidecordblood.com/bodyworth.html: 14/07/2005.

161 http://www.parentsguidecordblood.com/bodyworth.html: 14/07/2005. This information is the correct information as supplied by the website but would seem incorrect when compared to regulations stipulated in South Africa where a unit of blood can only be donated every 56 days. http://www.sanbs.org.za/donors/faq.htm#Q16: 27/09/2006.

162 http://organtx.org/ethics/sales/sales.htm (Yahoo): 20/09/2004.

- Good quality hair that is more than 16 inches long can be sold to wig shops for approximately $30 an ounce.
- Breast milk can be sold for between 25 cents an ounce to $6 an ounce to online auction sites and classified listings.

In Kenya a person can illegally purchase skin and other organs for over $ 1 800 in certain areas in Kenya where the organ trade is well developed.[163] In Turkey a kidney can be sold illegally for $ 2 700 and rare organs can be bought for up to $150 000 while in Bosnia organs are sold for up to $68 000.[164] In Europe kidneys are advertised for between $ 2 000 and $ 3 000. The recipients have been said to pay up to an extra $ 200 000 for the actual transplant while the middleman who arranged the sale of the organ will receive an amount estimated at $ 55 000.[165]

In South Africa kidneys are sold illegally for anything between $ 5 000 and $ 20 000.[166] In 1999 a South African doctor bought himself a kidney from India for approximately $ 2 800.[167]

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163 http://www.eastandard.net/archives/cl/hm_news/news.php?articleid=24317: 21/02/2006.

164 http://samvak.tripod.com/brief-organ01.html: 21/02/2006.

165 http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9822.htm: 21/02/2006; Sowetan: 1995.

166 The Mercury: 2005.

167 Sunday Tribune: 1999.

Therefore it is clear that there exists a thriving market for regenerative body parts and body tissue for transplantation purposes. However, the idea of selling eggs and sperm for the creation of a human being brings up other moral issues of people playing God and creating markets in human beings that are in a sense manufactured as opposed to being created naturally.[168] This is however, a totally different issue to the one we are dealing with presently and should not be included in the negative aspects associated with the organ trade.

3.7 Conclusion

What can be concluded from the above statistics on organ donations as reflected by statistics and the number of transplantations that occur each year as well as the numerous potential recipients on transplant waiting lists around the world is that, contrary to Scheper-Hughes's[169] opinion that organ shortages are myths, organ shortages are a serious problem that need to be rectified by all organ procurement and transplant agencies and networks across the globe.

After assessing why there is such a demand for organs and why people are willing to sell their organs to organ recipients and other middlemen or organ brokers, it is now also necessary to have a look at legislation which is

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168 Hartman 2005: 25. Such ethical issues as cloning of human beings, stem cell research and xenotransplantation will be dealt with in a later chapter.

169 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004.

placing a ban on such an organ trade and indirectly, it is assumed, creating a demand for organs.

Chapter 4

Some countries where human organs cannot be bought or sold

4.1 Introduction

The previous chapter sets out facts and figures surrounding the organ shortage and organs donated and transplanted over a certain number of years. After concluding that there is in fact a vast shortage of human organs available for transplantation, it is necessary to study various legislative provisions in a number of countries in order to ascertain why there is a ban on organ sales and whether or not legislation is one of the reasons there is a shortage in organs for transplantation purposes.[170] Actual case studies and practical examples related to such organ trafficking crime groups and black markets in human organs are also noted.

4.2 Republic of South Africa

4.2.1 Legislation in South Africa criminalising the selling of bodily organs

It was reported in Johannesburg's leading newspaper, *The Star*, in 2004 that in South Africa it is against the law to donate an organ to any person other than a blood relative. Spouses may not even donate organs to one another

[170] Garwood-Gower mentions a list of countries where human organs cannot be bought. This list includes, but is not limited to, Algeria, Asia, Australia, Belgium, Brazil, Chile, Columbia, Costa Rica, Cuba, Cyprus, Denmark, Finland, France, Germany, Greece, Honduras, Hong Kong, Hungary, India, Iraq, Italy, Kuwait, Lebanon, Malawi, Panama, Poland, Portugal, Romania, Russian Federation, South Africa, Spain, Sri Lanka, Turkey, United Kingdom and United States of America. Garwood-Gower 1999: 167-171, 176, 181. However, for the purposes of this dissertation, the only countries which are discussed are Australia, Brazil, Egypt, India, Iran, South Africa, Sri Lanka, United Kingdom and United States of America.

and no monetary compensation may be paid.[171] If the donee is not a relative of the organ donor then a government appointed body must investigate the situation to ensure that the donor has no ulterior motive for donating the organ in question.

Such organ transplantation may also only be performed on South African citizens unless permission is otherwise granted by the Minister of Health.[172] It will become clear after referring to the relevant legislation below that this issue surrounding non-related donations may not be the present case in South Africa any longer. Monetary compensation for donation is, however, still illegal.

The National Health Act[173] of South Africa which came into effect on 2 May 2005 states in sections 55, 56, 58, 60, 61, 62 and 65 as follows regarding the donation of tissue and organs and the use of such tissues and organs in transplantation:[174]

55 Removal of tissue, blood, blood products or gametes from living Persons

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171 The Star: 2004.

172 Eastern Province Herald: 1996.

173 Act 61 of 2003.

174 It must be noted once again that the sections mentioned above fall under Chapter 8 of the National Health Act 61 of 2003 regarding control of use of blood products, tissue and gametes in humans and that this chapter has not yet come into effect. See Fn. 21.

A person may not remove tissue, blood, a blood product or gametes from the body of another living person for any medical or dental purposes prescribed in section 56 unless it is done –

(a) with the written consent of the person from whom the tissue, blood, blood product or gametes are removed granted in the prescribed manner; and

(b) in accordance with the prescribed conditions.

56 Use of tissue, blood, blood products or gametes removed or withdrawn from living persons

(1) A person may use tissue or gametes removed or blood or blood product withdrawn from a living person only for such medical or dental purposes as may be prescribed.

(2)(a) The following tissue, blood, blood products or gametes may not be removed or withdrawn from a living person for any purpose:

(i) tissue, blood, a blood product or a gamete from a person who is mentally ill within the meaning of the Mental Health Care Act;[175]

(ii) tissue which is not replaceable by natural processes from a person younger than 18 years;[176]

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175 Act 17 of 2002.

176 This would then of course mean that no person under the age of 18 may donate organs such as kidneys, liver, heart and other main functioning organs without which a person cannot survive. The age at which persons may donate these non-replenishable organs differs in many countries. In Japan under the Law Concerning Human Organ Transplants No 104 of 1997, no person under 15 years of age may donate bodily organs and tissue. The Korean Organ Transplantation Law No. 5858 of 1999 stipulates that no person under 16 may donate human organs and the Human Organ Transplant Act of Singapore, Act 15 of 1987 dictates that no person under 21 years of age may donate human organs. The Indian Transplantation of Human Organs Act 42 of 1994 passes the

(iii) a gamete from a person younger than 18 years; or

(iv) placenta, embryonic or foetal tissue, stem cells and umbilical cord, excluding umbilical cord progenitor cells.

(b) The Minister may authorize the removal or withdrawal of tissue, blood, a blood product or gametes contemplated in paragraph (a) and may impose any condition which may be necessary in respect of such removal or withdrawal.

58 Removal and transplantation of human tissue in hospital or authorised institution

(1) A person may not remove tissue from a living person for transplantation in another living person or carry out the transplantation of such tissue except-

(a) in a hospital or an authorised institution; and

(b) on the written authority of-

(i) the medical practitioner in charge of clinical services in that hospital or authorised institution, or any other medical practitioner authorised by him or her; or

(ii) in the case where there is no medical practitioner in charge of the clinical services at that hospital or authorised institution, a medical practitioner authorised thereto by the person in charge of the hospital or authorised institution.

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decision of donating a child's organs onto the parent of the child. Bagheri 2005: 4159-4161.

(2) The medical practitioner contemplated in subsection (1) (b) may not participate in a transplant for which he or she has granted authorisation in terms of that subsection.

60 Payment in connection with the importation, acquisition or supply of tissue, blood, blood products or gametes

(1) No person, except-

(a) a hospital or an authorised institution or in the case of tissue or gametes imported or exported in the manner provided for in the regulations, the importer or exporter concerned, may receive payment in respect of the acquisition, supply, importation or export of any tissue or gamete for or to another person for any purposes of use of tissue, blood, blood products or gametes removed from a living person or for purposes of donation of body tissue, blood or blood products of deceased persons.

(b) a person or institution or an authorised institution, may receive any payment in respect of the importation, exportation or acquisition for the supply to another person of blood or a blood product.

(2) The amount of payment contemplated in subsection (1) may not exceed an amount which is reasonably required to cover the costs involved in the importation, export, acquisition or supply of the tissue, gamete, blood or blood product in question.

(With regard to this particular section it can be argued that by compensating the donor of organs or human tissue the only compensation that is being asked for would also only be reasonable compensation for actual medical costs or injuries suffered as a result of the donation of such organs or tissue).

(3) This section does not prevent a health care provider registered with a statutory health professional council from receiving remuneration for any professional service rendered by him or her.

(4) It is an offence for a person-

(a) who has donated tissue, a gamete, blood or a blood product to receive any form of financial or other reward for such donation, except for the reimbursement of reasonable costs incurred by him or her to provide such donation (own emphasis); and

(b) to sell or trade in tissue, gametes, blood or blood products, except as provided for in this Chapter.

(Subsection (4)(a) of section 60 makes it acceptable for donors to be reasonably compensated for financial losses and medical injuries regarding the donation of organs and tissue, however, it would seem that such compensation is not to the true benefit of donors because of the fact that the section states that financial reward, or compensation as it is also known, to donors is illegal. What is also not mentioned is what the term "reasonable costs" includes. Does it include all travel expenses and remuneration lost for

time spent away from work or does it simply entail the donor's medical expenses suffered by the organ donation? Clarity on this particular subsection of section 60 would be a future necessity if increasing the donor population is to be successful and further if compensating the donor is to become a procedure as routine as organ transplantation itself).

> (5) Any person convicted of an offence in terms of subsection (4) is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

Section 60 1(a) and 1(b), (2) and (3) of the National Health Act were similarly dictated in section 28 of the Human Tissue Act 65 of 1983 which amongst other things prohibited the importation of human organs into South Africa.[177] The prohibition against this payment for organs in South Africa stems from the fundamental values underlying the Constitutional right to life,[178] the right to bodily integrity[179] and right to self-determination.[180]

61 Allocation and use of human organs

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177 The Human Tissue Act 65 of 1983 has since been repealed by section 93(1) of the National Health Act 61 of 2003. However, Chapter 8 of the latter Act is not yet in force. See Fn. 21.

178 Constitution of the Republic of South Africa, 1996: Sec 11.

179 Constitution of the Republic of South Africa, 1996: Sec 12 (2).

180 Constitution of the Republic of South Africa, 1996: Sec 22.

(1) Human organs obtained from deceased persons for purposes of transplantation or treatment, or medical or dental training or research, may only be used in the prescribed manner.

(2) Human organs obtained for the purposes of transplantation or treatment as well as medical or dental training must be allocated in accordance with the prescribed procedures.

(3) An organ may not be transplanted into a person who is not a South African citizen or a permanent resident of the Republic without the Minister's authorisation in writing.

(In other words, what is often witnessed in South Africa, all transplantations occurring between a donor outside South Africa and an organ recipient also outside South Africa would be considered illegal transplantations without even mentioning that such transplantations occurred at a price to the organ recipient).[181]

(4) The Minister must prescribe –

(a) criteria for the approval of organ transplant facilities; and

(b) procedural measures to be applied for such approval.

(5) (a) A person who contravenes a provision of this section or

[181] In this regard the case involving Mr. Da Silva can be referred to. He was the organ donor from Brazil being paid R39 000 for his kidney which was then transplanted into an American organ recipient while the organ removal and transplantation procedure was performed in South Africa. The Sunday Times: 2005; The Mercury: 2005. This very section disallowing the transplantation of an organ without the correct authorization to someone who is not a South African citizen could be used in prosecuting medical practitioners allowing or performing such transplantation. This would diminish illegal organ sales by placing additional charges on medical practitioners allowing the selling of organs.

fails to comply therewith or who charges a fee for the human organ is guilty of an offence.

(b) Any person convicted of an offence in terms of paragraph (a) is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

62 Donation of human bodies and tissue of deceased persons

(1)(a) A person who is competent to make a will may –

(i) in the will;

(ii) in a document signed by him or her and at least two competent witnesses; or

(iii) in an oral statement made in the presence of at least two competent witnesses,

donate his or her body or any specified tissue thereof to be used after his or her death for any purpose provided for in this Act.

(2) In the absence of a donation under subsection (1) (a) or of a contrary direction given by a person whilst alive, the spouse, partner, major child, parent, guardian, major brother or major sister of that person, in the specific order mentioned, may, after that person's death, donate the body or any specific tissue of that person to an authorised institution or person.

(3)(a) The Director-General may, after death of a person and if the spouse, partner, major child, parent, guardian, major brother or major sister of that person cannot be located, donate any

specific tissue of that person to an authorised institution or a person.

(b) The Director-General may only donate the specific tissue if all the prescribed steps have been taken to locate the spouse, partner, major child, parent, guardian, major brother or major sister.

65 Revocation of donation

A donor may, prior to transplantation of the relevant organ to the organ recipient, revoke a donation in the same way in which it was made or, in the case of a donation by way of a will or other document, also by the intentional destruction of that will or document.

4.2.2 Why South Africa is a targeted country for organ sales

In 1996 the Minister of Health said that any financial payment for organs is banned and that unless such an organ is donated to a relative it forms part of government property for purposes of distributing the organs fairly and equitably.[182]

[182] Eastern Province Herald: 1996.

Cull[183] reports that in an effort to eliminate a black market in organs, transplant units had to subject themselves to regular evaluation to ensure that no financial gain was given to organ donors and that persons receiving organs had access to lifelong medical care after the transplantation. These strict measures stopped the establishment of new much needed transplantation units and inevitably led to an even larger black market in organs in South Africa. This black market is also due to the fact that in 1999 there was already a waiting list in South Africa for transplantable organs of over 1 000 patients.[184]

It is estimated that nearly 900 000 people are smuggled across South African borders each year for purposes of organ donation or organ trade, amongst other illegal activities.[185] It should be noted that while this astonishing number of donors cross South African borders, the same astonishing amount of organ recipients cross its borders as well. Most transplants that take place in South Africa frequently involve not only foreign organ donors but foreign organ recipients as well.[186] This then forms part of not only illegal organ sales but further illegal organ transplantation because of the fact that the organ donor and organ recipient are not South African citizens.[187]

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183 Eastern Province Herald: 1996.

184 Sunday Tribune: 1999.

185 Weekend Sunday Argus: 2004.

186 In other words the fact that such a large number of donors donate organs in South Africa each year does not change our statistics regarding legal donation and neither does it decrease the number of patients waiting for organs because the organs being donated do not go to South African citizens.

187 It has already been discussed that section 61(3) of the National Health Act, Act 61 of 2003, prohibits the transplantation of bodily organs to an organ recipient who is not a South African

Unfortunately because of inappropriate legislation or the application thereof in South Africa, both in regard to the National Health Act[188] and other legislation such as the Prevention of Organised Crime Act[189] and the Prevention and Combating of Corrupt Activities Act,[190] hardly anyone is ever arrested for such criminal activities.[191] This is why so many people believe that South Africa is a corrupt country and that illegal activities are ignored and nothing is thought of selling a spare organ here and there.[192]

The exchange rate between the South African rand and the United States of America's dollar provides recipients with true value for their money when it comes to selling and buying bodily organs for transplantation.[193] South Africa also has no shortage in well qualified doctors and surgeons willing to perform transplants at a price which makes South Africa a common transit destination.[194]

Citizen. The repealed Human Tissue Act 65 of 1983 did not specifically prohibit organ transplants between non-related organ donors and recipients.

188 Act 61 of 2003.

189 Act 121 of 1998

190 Act 12 of 2004.

191 Weekend Sunday Argus: 2004.

192 The Sunday Times: 2005.

193 The Sunday Times: 2005.

194 The Sunday Times: 2005; http://lsa.unisa.ac.za/news/archive/august/vol4/human.html: 21/02/2006.

However, probably the biggest problem surrounding organ trade in South Africa is the lack of legislation governing illegal trafficking in human organs in and around South Africa as well as abroad.[195] It is therefore not surprising that South Africa is one of the widest targeted countries in the world for organised crime syndicates involved in numerous illegal organ sales and purchases every year.[196] Nancy Scheper-Hughes says South Africa is an ideal place for organ traffickers to come and perform their illegal activities because South Africa has "First world medicine at Third world prices".[197]

This situation makes it obvious that legislation prohibiting human trafficking and providing enough deterrence to participate in human trafficking through stricter criminal sanctions could curb such organised criminal activity. However, the question is not only how to curb this activity but rather why this activity is taking place. It has been mentioned that trafficking is occurring because of a lack of comprehensible legislation prohibiting it. Unfortunately such organ trafficking is also occurring because of a lack of transplantable organs available to patients in need of such organs to survive in South Africa as well as in other countries around the world. This then leads to patients buying organs from organised crime groups who in turn

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195 Weekend Sunday Argus: 2004; http://lsa.unisa.ac.za/news/archive/august/vol4/human.html: 21/02/2006.

196 http://www.flonnet.com/fl1907/19070730.htm: 30/06/2005.

197 The Sunday Times: 2005.

arrange for human trafficking into South Africa for the purpose of organ trading.

The European Union[198] is looking to combat organ trafficking by requiring from member states to implement legislation that makes organ trafficking (and other forms of trafficking) an offence which is punishable not only to those physically removing the organs and performing the transplantations but also to those persons involved in the transportation, importation, exportation and storage of such organs. Perhaps this will assist various international countries, including South Africa, in combating organ trafficking and implementing relevant and effective legislation against this organised crime.

4.2.3 Cases involving the selling of bodily organs in South Africa

The fact that South Africa is one of the world's most targeted countries for organised crime syndicates has resulted in a number of cases in and around South Africa concerning organised crime in the form of organ trafficking.[199]

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198 http://www.elections2004.eu.int/highlights/en/503.html: 30/06/2006.

199 These cases specifically relate to situations involving the St. Augustine's Hospital in Durban and are discussed in this chapter in greater detail.

In June 1995 in South Africa Moses Mokgethi was found guilty in the Rand Supreme Court of murdering 6 young children for their organs. Mokgethi claims to have sold these organs for muti purposes to a local township businessman for approximately R2 500 to strengthen his business.[200]

In August 2003 Mr. Alberty da Silva from Brazil sold his kidney to an American woman who was suffering from chronic renal failure for a mere R39 000. The transplant took place in the private St. Augustine's Hospital in Durban, South Africa, where the American woman was told to tell anyone who asked that she had received the kidney from a cousin of hers who has donated the kidney altruistically. In 2005 it was reported that after two years the American woman's body was still rejecting the kidney that she had bought from Mr. Da Silva. His health condition, however, today is satisfactory.[201] In the mean time Mr. Da Silva has paid off his debts and has passed some of this money for the kidney sale on to his family. He is currently serving a sentence in a Brazilian jail for the illegal selling of his kidney.[202]

In these cases related to St. Augustine's hospital in Durban it is well worth mentioning that on 3 December 2003 Adania Robel, an Israeli citizen, was

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200 http://www.flonnet.com/fl1907/19070730.htm: 30/06/2005. This case study falls outside of the realm of organ trafficking for transplantation purposes but still falls within the realm of organ trafficking was defined in this dissertation.

201 The Sunday Times: 2005.

202 The Mercury: 2005.

arrested at the hospital, shortly after receiving a kidney transplant, for purchasing the kidney and being involved in an organised crime operation involving organ trafficking.[203] After his arrest the middleman in the organ trade transaction, Meir Shusan handed himself over to the police. On 4 December 2003 Rodrick Frank Kimberley, a South African citizen who is said to have been one of the ring-leaders in the organ trafficking syndicate, was also arrested.[204] On appearing in the Durban Magistrate's Court on a charge of contravening the now repealed Human Tissue Act,[205] Robel and Shusan were released on bail at R5 000 and R15 000 respectively.[206] Roderick Frank Kimberley was released on bail amounting to R60 000.

In June 2004 R1,5 million in assets was seized at the home of Meir Shusan, the middleman in the organ trade syndicate, after he was charged with 24 counts of contravening the Human Tissue Act.[207] St. Augustine's Hospital banked an estimated R1,3 millions rand during these illegal organ trade transactions.[208] Other related charges against the accused persons include fraud charges and charges in terms of the Prevention of Organised Crime Act.[209]

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203 Natal Witness: 2003.

204 Burger: 2003.

205 Act 65 of 1983.

206 Natal Witness: 2003.

207 Act 65 of 1983 which has been repealed by the National Health Act 61 of 2003.

208 The Star: 2004.

209 Act 121 of 1998. In terms of the charges that can be brought against the accused, chapter 2 and chapter 3 of the abovementioned Act are applicable. Chapter 2 relates to racketeering offences, as

These arrests were the result of 11 other people being arrested in Brazil for being involved in the same organised crime syndicate which performed medical tests on at least 30 people from Brazil to determine their health status before sending them to Durban where their kidneys were bought and transplanted into other wealthy foreign patients who paid up to $120 000 for a kidney.[210] Numerous Brazilians and Israelis were questioned about the organ sales and upon investigation $22 500 was seized by the police.[211] A doctor and regional transplant coordinator from the hospital were also arrested in January 2004.[212] They were part of an international syndicate smuggling illegal immigrants from Israel, Brazil and Romania to South Africa for purposes of organ donations. To ensure that the transplants appeared legal, official medical documentation was amended to reflect that both the organ donor and organ recipient were relatives.[213]

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has been defined earlier, and section 2(1) states that any person who receives, retains, uses or invests property derived directly or indirectly, while knowing or ought reasonably to have known that such property was derived through a pattern of racketeering activity will be guilty of an offence. This will be applicable to persons who have received, retained, used or invested such proceeds for themselves or on behalf of someone else. Chapter 3 of the Act relates to offences in regard to the proceeds of unlawful activities and states in section 4, 5 and 6 respectively that any person laundering money derived from unlawful activities, assisting another to benefit from the proceeds of unlawful activities or who remains in possession of, uses or acquires proceeds of unlawful activities shall be guilty of an offence.

210 Natal Witness: 2003; Cape Times: 2003.

211 Cape Times: 2003.

212 Weekend Sunday Argus: 2004.

213 The Sunday Times: 2006.

The alleged organised crime syndicate leader, Ilan Peri was convicted earlier in 2005 for tax evasion involving an amount of approximately R25 million which is only but a minor portion of the amount which he had received after arranging nearly 107 illegal transplantations occurring at the St. Augustine's Hospital.[214] Ilan Peri was arrested in Germany in August 2006 for his involvement in the organ trafficking syndicate after an international warrant for his arrest was requested by the South African Police Service.[215] Prof. John Robbs, Ahmed Haffejee, Niel Christopher, Logaindra Naidoo and Kapil Satyapaul were also arrested for their involvement in the organ trafficking syndicate and appeared in court on 16 August 2005. Kimberley, one of the ring leaders of the organ trafficking syndicate was sentenced to 6 years imprisonment, suspended for 5 years with a fine of R250 000 for contravention of the Human Tissue Act.[216]

The majority of these transplantations took place at the St. Augustine's Hospital, which specifically transplant kidneys.[217] St. Augustine's Hospital falls under the Netcare Group of hospitals in South Africa.[218] The St.

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214 Sunday Tribune: 2005.

215 The Sunday Times: 2006.

216 Natal Witness: 2005. The prosecuting of foreign nationals in South African courts has been made possible by the enactment of the International Co-operation in Criminal Matters Act 75 of 1996. The relevant sections to this Act will be noted in a later chapter regarding inter-agency co-operation.

217 http://www.netcare.co.za/live/content.php?Item_ID=144: 13/12/2006.

218 The Mercury: 2005; http://www.transplant.netcare.co.za/index.asp?LinkID=29&ContentID=39: 13/12/2006; http://www.netcare.co.za/live/content.php?Item_ID=139: 13/12/2006. The Netcare Group consists of the various Netcare hospitals and specialist medical units in South Africa. These hospitals and units supply the community with the most modern and advanced medical facilities in the country. http://www.netcare.co.za/live/content.php?Category_ID=12: 13/12/2006. The Netcare Group also actively participates in the organ donor awareness campaigns run by

Augustine's Hospital was chosen as the place for such illegal organ transplantations because of its supposed proficiency and standard of health care.[219] Both St. Augustine's Hospital and the Netcare Group were charged with conspiracy to commit fraud as well as contravening section 28 of the repealed Human Tissue Act[220] which stated that no person shall be given payment for the importation, acquisition or supply of tissue, blood products or gametes except an authorised institution or a prescribed institution or person.[221]

From the beginning the Hospital consistently denied and is still denying having anything to do with approximately 109 kidney transplantations for which various medical practitioners will stand trial. The general manager of the hospital, Rory Passmore, stated that the hospital has numerous policies and procedures in place to ensure that there is no non-compliance on any medical or legal grounds when performing organ transplantations. It has been revealed that no donors were blood relatives of the organ recipients and

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South Africa's Organ Donor Foundation. http://www.transplant.netcare.co.za/index.asp?LinkID=25&ContentID=32: 13/12/2006.

219 Cape Times: 2003.

220 Act 65 of 1983.

221 Section 28 of the Human Tissue Act 65 of 1983 reads as follows:
28 Payment in connection with import, acquisition or supply of tissue, blood, blood products or gametes
(1) No person except-
(a) an authorised institution or, in the case of tissue or gametes imported in terms of this Act, the importer concerned, may receive any payment in respect of the import, acquisition or supply of any tissue or gamete for or to another person for any of the purposes referred to in section 4(1) or 19;
(b) a prescribed institution or person may receive any payment in respect of the import or acquisition for or the supply to another person of blood or a blood product,
and any such payment which has been received, shall be refundable to the person who made it.
(2) The provisions of subsection (1) shall not prevent a medical practitioner or dentist from receiving remuneration for professional services rendered by him to any person.

that donors were compensated between 5 000 and 20 000 US dollars for their kidneys.[222]

However, as early as 1999 questions arose as to whether or not there were organs being sold in Durban through the Netcare Group. [223] Nickie Crookes, the coordinator of the Netcare Group at that time ensured the public that the strict measures taken by the Health Department, including various updates by the hospital to verify all transplantations that have been performed, guarantees that a trade in organs cannot take place in these hospitals. Crookes then further states that if parties to transplantation procedures make arrangements after the transplantation, the hospital has no method in place to investigate such arrangements.[224]

On 23 January 2004 the coordinator of organ transplants for Netcare, Lindy Dickson, after being arrested with one of the nephrologists[225] from the St. Augustine's Transplant Unit, Dr. Jeff Kallmeyer, for their involvement in the apparent international organ trafficking syndicate appeared in the Durban Regional Magistrate Court alongside Samuel Ziegler who was the Hebrew interpreter during the organ sale transactions.[226] Boxes of documentation

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222 The Mercury: 2005.

223 Sunday Tribune: 1999.

224 Sunday Tribune: 1999.

225 A nephrologist is usually part of the team of doctors required to determine if brain death has occurred or not. Prottas 1994: 87.

226 Natal Witness: 2004.

were also confiscated from the residences of Dickson and Kallmeyer. Kallmeyer was released on bail of R150 000 while Dickson and Ziegler received bail of R50 000 each.[227]

The date for the trial against these medical practitioners was set for September 2006 while similar activities were being investigated in other hospitals in Durban as well as at Netcare hospitals in Johannesburg and Cape Town.[228] The investigating official also stated that the investigation of the organised crime syndicate does not include an investigation of the hospital itself but rather the individuals who were parties to the actual crime.[229]

Unfortunately on 1 August 2006 the charges against the medical practitioners[230] were withdrawn in order for the National Prosecuting Authority to investigate the matter further. The reasons given by the National Prosecuting Authority for withdrawing the charges against these medical practitioners was that they are considering the possibility of extraditing two further suspects in the organ trade syndicate from Russia as well as arresting other suspects in South Africa.[231] Further reasons are that

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227 Natal Witness: 2004.

228 The Mercury: 2005.

229 Citizen: 2003.

230 Prof. John Robbs, Lindy Dickson and Jeff Kallmeyer were three of the nine accused who had charges against them dropped.

231 One of these suspects, Ilan Peri, has, however, since this report been arrested for his participation in organ trafficking syndicate as discussed above in previous paragraphs. The Sunday Times: 2006.

numerous witness statements have been obtained from Israeli nationals which need to be translated before being presented as evidence in the Durban Magistrate's Court. Once the investigation is complete the National Prosecuting Authority intends on reinstating the charges against the accused persons.[232]

After news of this organ trafficking syndicate the Health Minister, Manto Tshabalala-Msimang hinted to reporters that the implementation of new legislation will be discussed in parliament to close up any loopholes existing in the present National Health Act[233] regarding organ donation and transplantation.[234] She stated that in order to eliminate illegal trafficking the new health legislation, namely Chapter 8 of the National Health Act 61 of 2003 regarding control of use of blood products, tissue and gametes in humans, will provide a framework of very strict legal consequences for anyone participating in the trading of human organs.[235] The Health Department is also in the process of finalising regulation concerning organ

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232 The Sunday Times: 2006.

233 Act 61 of 2003.

234 Citizen: 2003.

235 This chapter of the National Health Act 61 of 2003 has not come into effect yet and is still awaiting a commencement date.

transplant policy[236] to eliminate organ trafficking and other related activities.[237]

In Mozambique there are numerous unstructured organised crime[238] groups murdering human beings or arranging for them to be murdered and trading in their organs to South Africa and other neighbouring countries around South Africa.[239] The aim of these crime groups is to supply bodily tissue to especially traditional healers to be used as muti in and around South Africa.[240]

One of the groups was arrested recently in Nampula Province.[241] Corruption and bribery of customs officers and police officials is often relied upon when borders have to be crossed to supply tissue in neighbouring countries.[242] Often these customs officials and police officials then also fail to investigate

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236 It is unclear whether this policy refers to the provisions mentioned in Chapter 8 of the National Health Act 61 of 2003 which are not yet in effect or whether it refers to a different organ policy that will be implemented alongside Chapter 8.

237 Citizen: 2003.

238 According to the information provided at the seminar, unstructured crime groups means organised crime groups which are mostly unsophisticated family based crime groups. ISS Regional Seminar – Organised crime, corruption and governance in the SADC Region: Pretoria – 18 and 19 April 2002.

239 http://www.ipocafrica.org/cases/cardoso/mozcorr/index.htm: 13/12/2006.

240 http://www.ipocafrica.org/cases/cardoso/mozcorr/index.htm: 13/12/2006.

241 http://www.afrol.com/articles/10739: 21/02/2006.

242 http://www.ipocafrica.org/cases/cardoso/mozcorr/index.htm: 13/12/2006.

suspicious deaths involving local children by omitting to order that autopsies and further inquiries into the matter be done.[243]

Mozambique's Attorney General, Joaquim Madeira, is under the impression that local police officers in Mozambique are directly responsible for organising illegal tissue trades in Mozambique.[244] An investigation into this matter by Madeira was prompted by reports from the Brazilian Mission in Nampula that children in Mozambique were being found without vital organs. As a result of these reports Madeira has further ordered the exhumation of numerous bodies in order to investigate the truth in these reports.[245]

Previous investigation surrounding the organ trade in Mozambique has come to indicate, according to the Mozambique government, that organ trafficking in Mozambique is largely organised by Southern African crime rings.[246] Unfortunately no fixed statistics are available to indicate whether or not there is an increase in these criminal activities but this is more likely than not the case.[247]

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243 http://www.afrol.com/articles/10739: 21/02/2006.

244 http://www.afrol.com/articles/10739: 21/02/2006.

245 http://www.afrol.com/articles/10739: 21/02/2006.

246 http://www.afrol.com/articles/10739: 21/02/2006.

247 http://www.ipocafrica.org/cases/cardoso/mozcorr/index.htm: 13/12/2006.

Ram[248] is of the opinion that numerous other organs are continually being stolen from cadavers without the consent or knowledge of the families of such deceased persons. The main reason for such thefts and murders is because dialysis treatment and transplantation of organs in South Africa is regarded only as tertiary health care which is not provided by the state. Only the very rich can afford such expensive treatment mainly provided in private hospitals.[249]

In the case of *Soobramoney v Minister of Health, KwaZulu-Natal*[250] the court had to decide the extent of section 27(3) of the Constitution of the Republic of South Africa stating that no one may be refused emergency medical treatment. The court interpreted the purpose of section 27(3) as being to ensure that treatment is given in emergency situations.

The court therefore held that the condition of a patient with irreversible chronic renal failure who required dialysis treatment two to three times a week to remain alive did not constitute an emergency for purposes of immediate remedial treatment but rather constituted an ongoing situation that was the result of deteriorating renal function.[251]

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248 http://www.flonnet.com/fl1907/19070730.htm: 30/06/2005.

249 http://www.flonnet.com/fl1907/19070730.htm: 30/06/2005.

250 1998 (1) SA 765 (CC).

251 This case will be discussed in greater detail in following Chapters of this dissertation.

For many older people of rural farms and squatter regions this harvesting and selling of bodily organs has an undeniable resemblance to traditional forms of witchcraft and "muti-killings" where body parts were sold by traditional practitioners to magically increase the wealth, health or fertility of the paying customer.[252] These traditional forms of witchcraft are, however, not only a myth but a very real reality as reports increase yearly of children being kidnapped for their organs in order that the tissue be used for muti and other traditional ceremonies.[253]

4.3 United Kingdom

There is also legislation in the United Kingdom pertaining to organ donation and transplantation and which regulates the payment of an organ donor for the donation of his or her organs.

Section 1 of Great Britain's Health Organisation Transplantation Act[254] reads as follows in regard to payment for human organs:

> "A person is guilty of an offence if in Great Britain he-
>
> (a) makes or receives any payment for the supply of, or for the offer to supply, an organ which has been or is intended to be

252 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004.

253 http://lsa.unisa.ac.za/news/archive/august/vol4/human.html: 21/02/2006.

254 Act of 1989.

removed from a dead or living person and is intended to be transplanted into another person whether in Great Britain or elsewhere;

(b) seeks to find a person willing to supply for payment such an organ to be used for transplantation purposes or offers to supply such an organ for payment;

(c) initiates or negotiates any arrangement involving the making of any payment for the supply of, or for an offer to supply, such an organ; or

(d) takes part in the management or control of a body of persons corporate or unincorporate whose activities consist of or include the initiation or negotiation of such arrangements.

(2) causes to be published or distributed, or knowingly publishes or distributes an advertisement-

(a) inviting persons to supply for payment any such organs that are to be used for transplantation or offering to supply any such organs for payments; or

(b) indicating that the advertiser is willing to initiate or negotiate any such arrangement for the sale of purchase of an organ to be used for transplantation..

The Human Organ Transplant Act of 1984 also stated that offering financial compensation for the supplying of any human organ was against the law. This Act has since been repealed by the Human Tissue Act, Ch. 30 of

2004[255] in which section 32 prohibits commercial dealings in human material for transplantation purposes. The section states the following:

"A person commits an offence if he –

a) gives or receives a reward (either financial or material advantageous) for the supply of, or for an offer to supply, any controlled material;

b) seeks to find a person willing to supply any controlled material for reward;

c) offers to supply any controlled material for reward;

d) initiates or negotiates any arrangement involving the giving of a reward for the supply of, or for an offer to supply, any controlled material;

e) takes part in the management or control of a body of persons corporate or unincorporated whose activities consist of or include the initiation or negotiation of such arrangements."

For purposes of the above section "controlled material" is defined by section 32(8) and 32(9) as material which includes human cells removed from the human body for purposes of transplantation excluding gametes, embryos and interestingly material which is subject to property because of an application of human skill.

[255] Section 69 of this Act states that the substantive provisions of the Act will only come into force on days appointed by the Secretary of State by order and that the full implementation of the Act is not expected to be before the end of 2006.

Section 32(2) of the Act[256] further makes it an offence if one publishes or advertises (whether to the general public or to one individual) that you are willing to sell or buy any human material for purposes of transplantation.
Section 32(6)(a) and 32(7) however respectively makes payment for transport, removal, preparation, preservation and storage of bodily material for transplantation purposes as well as the reasonable compensation for loss of earnings and expenses incurred by the donor acceptable.

In the United Kingdom the punishment for contravention of the above legislations and the illegal act of organ trafficking and black markets in human organs is normally 3 months imprisonment and or a fine.[257] However well meant this legislation is it does not help the 600 patients who have already died resulting from a British waiting list for organs that in 2003 was already standing at a staggering amount of 6 000 patients.[258]

In 1990 a British doctor, Raymond Crockett was disallowed from practicing medicine in Britain for his medical misconduct for arranging the sale of kidneys from two Turkish citizens for between 2 000 and 3 000 pounds sterling and later transplanting these kidneys into British citizens at a cost of 66 000 pounds sterling for each organ recipient.[259]

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256 Human Tissue Act of 2004.

257 Kishore 2005: 364.

258 Daily News: 2003.

259 Kishore 2005: 365.

Johnson[260] suggests that part of the problem facing Britain and their organ shortage, and this can similarly be noted in other parts of the world as well, is that too much attention is placed on cadaveric donation instead of educating British society about donating organs while they are still alive. He relates this back to legislation and blames the law for not making it possible to donate organs, for example a kidney, while one is alive to an unrelated donor without special permission from the Minister. This legislation is similar to legislation in many of the world's leading transplant countries including South Africa. Johnson comments further on this situation by saying that the largest organ transplant centres in Britain have the lowest rates for donations by living organ donors.

Therefore major expansion of the transplant units and transplant coordination networks is required in Britain if the problems they are experiencing in the organ supply are to be rectified. Funding of larger and more dispersed organ transplant units is one method in which the organ supply can be increased in Britain in particular.[261]

The Human Tissue Act, Ch. 30 of 2004 was set for amendment in August 2006.[262] This amendment will presumably assist the British Medical

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260 1996: 1357.

261 Wight and Cohen 1996: 989-990.

262 Daily Mail (United Kingdom): 2006. These amended provisions of the Human Tissue Act Ch. 30 of 2004 are not yet available.

Association with their problems regarding organ shortages.[263] The provisions of the old sections of the Act stated that even where a person explicitly stated that he or she wishes to donate their organs after death, that the family of such person must still give their consent before the organs of the organ donor may be harvested.[264] The amended provisions will make the wishes of the organ donor final and the family will no longer have the right to further consent to or refuse such organ donation.[265]

A spokesperson for the British Medical Association commented on this newly amended legislation stating the following:

> "The BMA is deeply worried about the shortage of organs for transplantation and the loss of life as a result. People should be able to decide what happens to their tissue or body after death and the BMA would encourage individuals to make that decision and talk to their relatives about their wishes. If people have indicated their preferences their wishes should be respected. It would also help relatives at a very difficult time of bereavement."[266]

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263 Daily Mail (United Kingdom): 2006.

264 Section 27 of the Human Tissue Act, Ch. 30 of 2004 stated in subsection (1) that in a code of practice dealing with consent the Human Tissue Act must lay down standards relating to obtaining consent from a person in a qualifying relationship to the organ donor. Subsection (4) sets out the hierarchy of people close to a deceased person who are eligible to give appropriate consent to organ donation of the deceased person.

265 Daily Mail (United Kingdom): 2006.

266 Daily Mail (United Kingdom): 2006.

4.4 United States of America

The United States of America has also found a need to regulate organ donation and transplantation but has adopted a less than strict approach to the payment for organs used for transplantation purposes. However, payment for organs is still regarded as illegal. The National Organ Transplant Act[267] states as follows regarding the sale of human body parts:

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

The word "knowingly" in the above mentioned piece of legislation suggests that if one sells or purchases a human organ for transplantation while actually believing that such sale or purchase is legal that one would in this event not be found guilty of contravening this Act.[268] This word further implies that if one is not aware of the fact that the organ is being sold or purchased that one is also free from any criminal accountability as far as any criminal or civil sanction would be concerned. This piece of legislation is the only piece of legislation that explicitly implies that knowledge of the fact that the activity is illegal is a necessity for contravening this particular Act.[269]

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267 Act 42 U.S.C. of 1984: section 274(e).

268 National Organ Transplant Act of 1984.

269 National Organ Transplant Act 42 U.S.C. of 1984.

In this particular regard South African case law and legislation regarding awareness of whether particular conduct is illegal or not may differ slightly to the National Organ Transplant Act of 1984. In South African case law ignorance of the law is no defence against prosecution for criminal activities carried out without the accused knowing that such activities were actually illegal.[270]

A non-governmental organisation, known as Organ Watch, is based at the University of California, Berkeley and they investigate and monitor reports of violations regarding the procurement and distribution of bodily organs for transplantation purposes.[271] The Bellagio Task Force,[272] arising out of the Organ Watch Organisation, situated and established in the United States of America concluded their argument against commercialisation of human organs by stating:

> "That existing social and political inequities are such that commercialization would put powerless and deprived people at still graver risk. The physical well-being of disadvantaged populations, especially in developing countries, is already placed in jeopardy by a variety of causes, including the hazards of inadequate nutrition, substandard housing, unclean water and parasitic infection. In these circumstances, adding organ sales to this roster would be to subject an

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270 *Clark v Welsh* 1975 (4) SA 469 (W).

271 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004.

272 Rothman *et al*. 1997: 2741. The Bellagio Task Force, as explained earlier, is an international group of people consisting of medical surgeons, human rights activists and social scientists, dealt in their report on issues such as transplantation, bodily integrity and international organ trafficking.

already vulnerable group to yet another threat to its physical health and bodily integrity. Because persons selling their organs would be drawn exclusively from the economically deprived, regulation cannot prevent fundamental abuses. Transparency and fairness cannot be assured."

In the case of *U.S. v Wang*[273] the accused was charged with the contravention of section 274(e) of the National Organ Transplant Act[274] which prohibits the selling of human body parts which affects interstate commerce. Wang conspired to sell the organs, specifically corneas, of executed Chinese prisoners to United States citizens for use in organ transplantations. Due to the failure of government to collect real evidence against Wang or to properly record telephonic conversations between Wang and other accused the court dismissed the charges against Wang and other accused persons.

4.5 Iran

In 2002 it was reported that Iran is one of the few countries in the world where commercial dealing in kidneys is regulated via a legal process.[275] The trade is organised and controlled by two government-endorsed NGOs - the

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273 Not reported F. Supp. 2d 1999 WL 138930 (S.D.N.Y.).

274 Act 42 U.S.C. of 1984.

275 http://www.flonnet.com/fl1907/19070730.htm: 30/06/2005; Larijani, Zahedi and Ghafouri-Fard 2004:2540.

Charity Association for the Support of Kidney Patients (CASKP) and the Charity Foundation for Special Diseases (CFSD). The role of CASKP is to put potential recipients and donors in touch with each other, and organised medical and physical tests to ensure the compatibility of donors and recipients and the mental stability of donors. After the transplant the CFSD is required by law to pay the donor a sum of $1 219, which is provided through governmental funds. Recipients often promise donors secure forms of employment or extra money after the transplant.[276]

Studies done by Javaad Zargooshi from the Department of Urology at Kermanshah University of Medical Sciences, Iran, shows that after interviewing 300 kidney vendors 6 to 12 months after the organ transplant operation that 65% of interviewed donors reported that the kidney sale had led to adverse effects on employment. Another 38%, representing largely uninsured manual labourers, had lost their jobs because they were unable to continue working at the same job after the organ transplant. Many donors were also frightened to go back to work for fear of injuring their remaining kidney. A further 90% of the vendors complained of impaired physical ability and ill health. Complaints included palpitation, tremors, chest-pain, backache, nervousness and fatigue.[277]

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276 http://www.flonnet.com/fl1907/19070730.htm: 30/06/2005; Larijani, Zahedi and Ghafouri-Fard 2004:2540.

277 http://www.flonnet.com/fl1907/19070730.htm: 30/06/2005.

There are reports that 70% of the donors suffered from post-operative depression and 60% from anxiety. Several donors said they had attempted suicide and spoke of donors who had killed themselves.[278] 70% of donors said that they felt worthless after the operation and 85% stated that if given the chance to go back in time, they would not donate their kidney and would also advise others against donating or selling their kidneys or any other organs whilst still alive. A large number of sellers spoke of not being socially accepted and demonstrated increased marital conflict following the kidney sale.[279]

Zargooshi[280] concludes that "considering the fact that the main or sole reason for donation was financial, it became clear that in the absence of altruistic motivations on which the donors could depend, financial loss became intolerable and depressing."

The organ transplantation laws and regulations have recently been amended in Iran to prohibit such organ purchases and sales. The law is however flexible regarding living donation among relatives as well as non-relatives in order to decrease waiting list fatalities. [281] An adoption of such flexibility in the South African National Health Act[282] would most certainly decrease the

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278 http://www.flonnet.com/fl1907/19070730.htm: 30/06/2005.

279 http://www.flonnet.com/fl1907/19070730.htm: 30/06/2005.

280 http://www.flonnet.com/fl1907/19070730.htm: 30/06/2005.

281 Bagheri 2005: 4160; Larijani, Zahedi and Ghafouri-Fard 2004:2540.

282 Act 61 of 2003.

present waiting list and would without a doubt lead to other amendments of this Act that would lead to tremendous increase in the organ supply available for transplantation purposes.

4.6 India

India is still relatively underdeveloped as far as legislation regarding the trading in human organs is concerned and they are also no nearer to development when it comes to the field of organ transplantations and no reliable statistics are available concerning organ donations and transplantations in India.[283] It is however estimated that over 80 000 kidney patients are in need of organ transplantations per year but that fewer than five thousand kidney transplants are actually conducted annually.[284]
The fact that transplant technology in India is not well advanced and that organ donations do not occur at a very speedy rate inevitably leads to illegal trafficking and illegal organ transplantation occurring in India. Such illegal organ transplantations just happen to be one of the most common illegal activities in this country.[285]

Until 1994 India was for 20 years a popular destination for over 600 000 illegal organ sales and transplantations which involved more than 350

283 The Statesman (India): 2004.

284 Kishore 2005: 363.

285 Truong 2001: 10.

medical doctors and hospital staff.[286] Work was advertised by agents in Dubai where innocent people would then be recruited to Bangalore in India and asked for a blood test as part of the process in receiving a visa. Upon receiving the blood tests the doctors would tell these workless people that they needed to have a major operation performed on them. Once the operation was complete the recruits would later find out that they were missing one of their kidneys. This happened to over 10 000 people in and around Bangalore not only as a result of poverty in the area and donors needing money but also the availability of necessary medical facilities and equipment needed for such organ transplants.[287]

The Voluntary Health Association of India estimated in 1995 that over 2 000 people participate in illegal organ sales every year. Recipients of these sold organs come from Europe and other wealthier areas around India who are flown into the country because of the willingness of doctors in India to perform these illegal transplantations.[288] While the recipients may come from such wealthy countries, all organ donors themselves come from poverty stricken areas in and around India. Furthermore, the poorer members of Indian society are not the lucky recipients of any donated organs for transplant purposes.[289]

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[286] Sowetan: 1995.

[287] Sowetan: 1995.

[288] Sowetan: 1995.

[289] Sowetan: 1995.

After being tipped off by one of the recruits the police raided several hospitals in Bangalore and found that kidneys were being removed from these recruits without their knowledge. This means that not only were these hospitals participating in illegal trafficking activities but that they were also taking people's organs without their consent. After this incident the government of India implemented legislation in 1994[290] that allowed only near relatives of a patient to donate a kidney to such a patient.[291] Further no payment or advertising for payment of organs was allowed and punishment for the sale of such organs through illegal organised crime groups could be up to 7 years imprisonment or a fine of up to Rs 20 000.[292] Unfortunately not all Indian states adopted this legislation.[293]

Because the law in India now requires that people be relatives before organ donation and transplantation can take place between such relatives, there is an increase in what is known as "kidney marriages". The common example used to describe this practice is where parents trade their daughter's kidney as part of the wedding dowry where the daughter's family is not a wealthy one.[294] Once the transplant has taken place the wealthy husband divorces his poor wife while she is left minus a kidney and just as poor as she was before the marriage.[295]

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290 The Transplantation of Human Organs Act 42 of 1994.

291 Kishore 2005: 364.

292 Kishore 2005: 364.

293 Larijani, Zahedi and Ghafouri-Fard 2004:2540.

294 http://lsa.unisa.ac.za/news/archive/august/vol4/human.html: 21/02/2006.

295 Truong 2001: 10-11.

A 2004 case regarding organ transplantation was noted where a young man was dying and wished to be removed from life support in an effort to die peacefully and donate all his organs.[296] Before any legal implications could be given to this case the young man died. Even after his death none of his organs could be transplanted to another person because of the lack of legislation in India allowing the legal transplantation of organs from a cadaveric donor to a living person.[297] Therefore, comprehensive legislation was long overdue in India for purposes of providing organs for people in need of them and thereby curbing illegal organ trafficking because of a lack of organs available for organ transplantation.

The incorporation of the Transplantation of Human Organs Act in India in 1986 finally gave recognition to the term "brain death" and thereby enabled the quick recovery and availability of organs for transplantation.[298] However, the Act today is still very restrictive in requiring that no organ will be transplanted from a living donor to another organ recipient unless such an organ recipient is a relative of the donor. If such an organ recipient is not a relative then special permission must be granted for such an organ transplant by the authorisation committee.[299]

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296 The Statesman (India): 2004.

297 The Statesman (India): 2004.

298 The Statesman (India): 2004.

299 The Statesman (India): 2004.

Another major problem with the present Transplantation of Human Organs Act is that it only extends to three states within India, namely Goa, Himachal Pradesh and Maharashtra, as well as the other Union territories.[300] This means that the majority of Indian states still remain without legislation governing the transplantation of organs and the procedure necessary for such transplantations. For this reason there still remains a growing black market in human organs sold and purchased for the purpose of organ transplantation in India.[301]

4.7 Sri Lanka

The Sri Lankan Legal Division was established in 1967 and continues to furnish advice on matters of international law to all branches of the Ministry, Sri Lanka Diplomatic Missions abroad as well as to other Ministries and Government Departments involved in foreign transactions, covering a wide range of issues including foreign development assistance, international trade, shipping and civil aviation and security related matters.[302] Since 1967 Sri Lanka has also implemented legislation to deal with the organ trade and other matters of donation for transplantation in Sri Lanka. Act 48 of 1987 states in section 17 that no person can buy, sell or dispose of any bodily

300 The Statesman (India): 2004.

301 The Statesman (India): 2004.

302 http://www.slmfa.gov.lk/division.asp?mode=viewdivisiondetails&ID=DV06: 19/10/2006.

tissue or bodily organs for the purposes of organ transplantation for valuable consideration.[303]

4.8 Australia

Australia has relatively few incidents of illegal organ trade compared with other countries around the world. This may be attributed to Australia's isolation in comparison to other countries globally as well as their specific health care system and strict legislative and administrative criminal and medical sanctions and accountability for such illegal activities.[304]

Section 38 to section 40 of the Human Tissue Act of 1982 in Victoria makes the selling or purchasing of any human tissue or organs and the advertising to sell or purchase human tissue or organs, for the purpose of transplanting such organs into an organ recipient, an offence unless permission has been obtain from the Minister. A fine of 5 000 Australian dollars will be placed on any person selling any human tissue or organ while a fine of 10 000 Australian dollars or six months imprisonment will be given to any person purchasing such human tissue or organs. For advertising one's willingness to purchase or sell human tissue or organs for the purpose of organ transplantation one can be fined 5 000 Australian dollars.[305] The

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303 Act No. 48 of 11 Dec 1987. Currently no other information is available regarding this Act and its proper citation.

304 King and Smith 1998: 5.

305 Human Tissue Act 9860 of 1982.

Transplantation and Anatomy Act[306] of South Australia also prohibits the selling of bodily tissue.[307]

Related to the phrase 'selling of bodily tissue' it is of relevance to mention that in most statutes in Australia[308] "tissue" includes an organ or part of a human body or a substance taken from the human body or any part thereof.

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306 Act 11 of 1983.

307 Section 35(1) and 35(2) of the Transplantation and Anatomy Act 11 of 1983 states the following contracts will be void:

"(1) Subject to this section, a contract or arrangement under which a person agrees, for valuable consideration, whether given or to be given to himself or to another person –

(a) to the sale or supply of tissue from his body or from the body of another person, whether before or after his death or the death of the other persons, as the case may be;

(b) to the post-mortem examination or anatomical examination of his body after his death or of the body of another persons after the death of the other person,

is void.

(3) A person who enters into a contract or arrangement referred to in subsection (1) is guilty of an offence and liable to a penalty not exceeding five thousand dollars."

Section 35(7) of the Act above then specifies that:

"A person shall not knowingly –

(a) publish or disseminate by newspaper, book, broadcasting, television, cinematograph or other means; or

(b) exhibit to the public view in any place,

an advertisement relating to the selling or buying in Australia of tissue or of the right to remove tissue from the bodies of persons unless the advertisement and the form and wording thereof have been approved in writing by the Minister and the advertisement contains a statement to that effect."

The Human Tissue Act 164 of 1983 of New South Wales in section 32 also prohibits the trading in tissue. Under section 24 of the Human Tissue Transplant Act of 2005 of the Northern Territory and section 27 of the Human Tissue Act 118 of 1985 of Tasmania certain contracts and arrangements are prohibited from being entered into. These include contracts and arrangements for the sale or supply of tissue from the body of another human person. The Transplantation and Anatomy Act of 1979 of Queensland also under section 40 to section 42 prohibits the unauthorised buying or selling or advertising to buy tissue. Under section 29 of the Human Tissue and Transplant Act of 1982 of Western Australia one is also prohibited from trading in tissue and under section 30 one is prohibited from placing advertisements relating to the buying of such tissue.

308 These statutes include section 3 of the Human Tissue Act 9860 of 1982 of Victoria, section 3 of the Transplantation and Anatomy Act 11 of 1983 of South Australia, section 4 of the Human Tissue Act 164 of 1983 of New South Wales, section 4 of the Human Tissue Transplant Act of 2005 of the Northern Territory, section 3 of the Human Tissue Act 118 of 1985 of Tasmania and section 3 of the Human Tissue and Transplant Act of 1982 of Western Australia. Section 4 (1) of the Transplantation and Anatomy Act of 1979 of Queensland, however, defines "tissue" as follows:

Before 1998 there has not been any reported case in Australia regarding the selling or purchasing of human organs for the purpose of organ transplantation except for one case in 1990 where a Bangladeshi student wanted to sell his kidney to the Royal Melbourne Hospital. The hospital immediately declined the offer on the basis that such sale would be illegal and unethical.[309]

4.9 Brazil

The "compensated gifting" approach is very popular in Brazil. Often the donors of organs will be employees of the recipient and will be told that in return for their organ donation they will receive permanent employment, secure housing and other material benefits.[310]

When referring to organ donation and trafficking in Brazil it is relevant to once again refer to the case involving Mr. Da Silva who was the organ donor from Brazil being paid R39 000 for his kidney which was then transplanted

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"Tissue means --

(a) an organ, blood or part of—
  (i) a human body; or
  (ii) a human foetus; or
(b) a substance extracted from an organ, blood or part of—
  (i) a human body; or
  (ii) a human foetus;

but does not include—

(c) immunoglobulins; or
(d) laboratory reagents, or reference and control materials, derived wholly or in part from pooled human plasma.

309 King and Smith 1998: 3.

310 http://www.flonnet.com/fl1907/19070730.htm: 27/06/2005.

into an American organ recipient while the organ removal and transplantation procedure was performed in South Africa.[311] Other cases associating Brazil with illegal organ sales would be the international syndicate initiated by medical practitioners from South Africa and Brazil who smuggled illegal immigrants from Brazil and other countries to South Africa for purposes of organ donations.[312]

One would assume that with these organ sales occurring in Brazil some serious legislation should be implemented to curb such sales and illegal smuggling of donors. At present in Brazil the Constitution of the Federative Republic of 1988 states in section 199 that organs and other tissue removed for purposes of organ transplantation, therapy or research are prohibited from being the subject of commercialisation.[313] It has been suggested therefore that compensation for the reasonable value of the organ and compensation for medical expenses and other losses of the donor does not fall under the prohibitory sections of numerous Acts in various countries and that this is not the intention of the legislator in these countries.

4.10 Egypt

311 The Sunday Times: 2005; The Mercury 2005.

312 The Natal Witness: 2003; The Sunday Times: 2005; The Mercury: 2005; The Sunday Times: 2006.

313 Constitution of Federative Republic 5 Oct 1988.

An Egyptian charity with the responsibility of looking after and maintaining the welfare of homeless children in Egypt has been associated with the trading of these children's body parts.[314] A total of approximately 32 children under the age of 13, were taken to privately run hospitals in the area which would pay the charity up to 20 000 Egyptian pounds for each organ.[315] The sudden disappearance of these children and the increase of death rates in these homes led the Egyptian parliament to the conclusion that a criminal organisation was illegally murdering these children and selling their organs.[316] It is this kind of criminal activity that gives the organ market a bad name. The mere thought of even legalising a market in organs after hearing about these organised crime groups murdering these children is nearly unthinkable and for this reason one wouldn't even think of giving such a market a first chance.

4.11 Conclusion

When compiling a summary of the different countries discussed it can be concluded that although all the medical legislation in each discussed country criminalises the act of organ selling that such organ sales and black market transactions still continue.

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314 Truong 2001: 11.

315 Truong 2001: 11.

316 Truong 2001: 11.

The problem then is that not only is the medical legislation dealing with donation, allocation and organ transplantation not solely effective enough to deal with such illegal activities but that legislation dealing with organised crime, corruption and the proceeds of organ trafficking needs to be brought into effect together with these medical provisions to ensure that the serious economic crime of organ trafficking is dealt with effectively. For this reason the next chapter will discuss these economic crime provisions and their relevance and implementation in effectively reducing organ trafficking and other organised crime while working together with the health law provisions discussed above.

Chapter 5

Combating organised crime and organ trafficking

5.1. Introduction

In this chapter attention will be given to the following aspects, namely legislation in South Africa, the United Kingdom and other international laws regarding the combating of organised crime and organ trafficking and the forfeiture of the proceeds of organised crime. Present as well as future guidelines in the combating of organised crime and organ trafficking as well as the criminal responsibility of persons involved in organ trafficking syndicates will also be discussed.

5.2 The problem of trafficking

The two most harmful and profitable organised crime activities in the world are drug trafficking and people trafficking.[317] The Home Secretary of Britain, David Blunkett, said the following earlier this year after announcing Britain's new approach to organised crime and the establishment of its Serious Organised Crime Agency:

> "Organised criminals make their millions from human misery – trafficking in drugs and people, engaging in fraud and extortion. They control criminal empires that reach from the other side of the world to the dealer on the street corner. They believe they are beyond the reach of justice and out of our sights. This is not the case – no one should be untraceable and no one should be untouchable. This new agency will focus on tracking them down."[318]

Kishore[319] is of the opinion that to eliminate the commercialisation aspect of the organ trade through organ trafficking would be to deprive persons of needy organs necessary for their survival. He instead suggests that the commercialisation of such a trade in human organs should be better

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317 http://press.homeoffice.gov.uk/press-releases/New_Uk-Wide_Organised_Crime_Agen: 15/06/2006.

318 http://press.homeoffice.gov.uk/press-releases/New_Uk-Wide_Organised_Crime_Agen: 15/06/2006.

319 2005: 362.

maintained by the effective enforcement of proper regulatory laws governing such commercialisation.[320]

The point Kishore is therefore making with this comment is that commercialisation of organs for purposes of organ transplantation is a very good method of increasing needed organ supplies. What he is further suggesting is that such commercialisation should not be the kind of commercialisation you find on the black market in organs or the kind made use of by organised crime syndicates to procure organs for transplantation. What he is rather suggesting is that such commercialisation should be the kind of commercialisation regulated by proper constitutional laws and governed and made use of exclusively by authorised medical institutions or non-governmental organisations.

5.3 South African legislation combating organised crime and organ trafficking

One of the very important regulatory statutes in South Africa governing illegal organ trafficking and working to eliminate such trafficking would be the Prevention of Organised Crime Act 121 of 1998 which came into effect on 21 January 1999. With the enactment of the Prevention of Organised Crime Act in 1998, South Africa took a major step forward in combating crimes involving trafficking, corruption, money laundering and other related

[320] Kishore 2005: 362.

economic crimes. Although the Act was not the first attempt at criminalising these activities as such, it has been credited with having created a comprehensive set of regulatory measures and mechanisms by which to confront the organised crime problem. The following sections of the Act are relevant when seeking measures to combat organised crime and organ trafficking for purposes of this dissertation:

Section 4 of the Act codifies the offence of organised crime as follows:

> "Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and-
>
> (a) enters into any agreements or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or
>
> (b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person, which has or is likely to have the effect –
>
> (i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof;
>
> (ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere-
>
> (aa) to avoid prosecution; or

(bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, shall be guilty of an offence."

Section 5 of the Act then follows similar lines as section 4 above and provides that:

"Any person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into any agreement with anyone or engages in any arrangement or transaction whereby-

(a) the retention or the control by or on behalf of the said other person of the proceeds of unlawful activities is facilitated; or

(b) the said proceeds of unlawful activities are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way, shall be guilty of an offence."

The Prevention and Combating of Corrupt Activities Act 12 of 2004 which came into effect on 27 April 2004 then further sets out obligations and requirements to report corrupt transactions for those who might come into contact with the proceeds of organised crime.[321] The Prevention of

[321] Section 34 reads as follows:
(1) Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed-

Organised Crime Act[322] also sets out obligations and requirements to report suspicious transactions for those who might come into contact with the proceeds of organised crime.[323]

(a) an offence under Part 1, 2, 3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2; or

(b) the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official.

(2) Subject to the provisions of section 37 (2), any person who fails to comply with subsection (1), is guilty of an offence.

(3) (a) Upon receipt of a report referred to in subsection (1), the police official concerned must take down the report in the manner directed by the National Commissioner, and forthwith provide the person who made the report with an acknowledgment of receipt of such report.

(b) The National Commissioner must within three months of the commencement of this Act publish the directions contemplated in paragraph (a) in the Gazette.

(c) Any direction issued under paragraph (b), must be tabled in Parliament before publication thereof in the Gazette.

(4) For purposes of subsection (1) the following persons hold a position of authority, namely-

(a) the Director-General or head, or equivalent officer, of a national or provincial department;

(b) in the case of a municipality, the municipal manager appointed in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act 117 of 1998);

(c) any public officer in the Senior Management Service of a public body;

(d) any head, rector or principal of a tertiary institution;

(e) the manager, secretary or a director of a company as defined in the Companies Act, 1973 (Act 61 of 1973), and includes a member of a close corporation as defined in the Close Corporations Act, 1984 (Act 69 of 1984);

(f) the executive manager of any bank or other financial institution;

(g) any partner in a partnership;

(h) any person who has been appointed as chief executive officer or an equivalent officer of any agency, authority, board, commission, committee, corporation, council, department, entity, financial institution, foundation, fund, institute, service, or any other institution or organisation, whether established by legislation, contract or any other legal means;

(i) any other person who is responsible for the overall management and control of the business of an employer; or

(j) any person contemplated in paragraphs (a) to (i), who has been appointed in an acting or temporary capacity.

322 Act 121 of 1998.

323 http://www.iss.co.za/Pubs/Monographs/No56/chap3.html: 5/12/2005.

In the case of *Director of Public Prosecutions v R O Cook Properties (PTY) LTD*[324] the court dealt with the civil recovery of assets in terms of Chapter 6 of the Prevention of Organised Crime Act.[325] However, the biggest problem involved in the forfeiture of such property is determining who the true owner of such property is and which property actually forms part of the property to be confiscated and which property is not the proceeds of criminal activity or property used in the commission of a crime.

Chapter 6 of the Act concentrates primarily on property used to commit offences or which form part of the proceeds of illegal activity.[326] In other words: Was the property owned by these criminals instrumental in the committing of the offence or was such property the proceeds of organised crime? The purpose of Chapter 6 of the Act is to remove incentives for crime, to deter persons from using their property to commit crime, eliminating thereby the means by which crime is committed and advancing the ends of justice by depriving criminals of their property used in committing crime. Therefore the issue in this case was whether there was a functional relationship between property and the crime committed. Did the property play a reasonably direct role in the commission of the offence?

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[324] Director of Public Prosecutions v R O Cook Properties (PTY) LTD; National Director of Public Prosecutions v 37 Gillespie Street Durban (PTY) LTD and Another; National Director of Public Prosecutions v Seevnarayan 2004 (2) SACR 208 (SCA).

[325] Act 121 of 1998.

[326] Section 38(2) of Act 121 of 1998.

From these objectives it is clear that organ trafficking can and must be linked to the objectives in Chapter 6 in order to succeed in eliminating organ trafficking and organised crime group activities. The civil forfeiture of these criminal's property used in order to finance organ trafficking or incurred as profit through running organ trafficking groups is viewed as being the most effective manner in which organ trafficking can be eliminated and all the incentives to commit such crime can be removed.

Chapter 7 of the Act[327] also refers to a method of criminal recovery of assets that are believed to be the proceeds of organised crime and establishes a National Revenue Fund called the Criminal Assets Recovery Account.[328] Sec 64 of the Act stipulates as follows with regard to the contents of the Recovery Account:

> "The account shall consist of –
>
> (a) all moneys derived from the fulfillment of confiscation and forfeiture orders contemplated in Chapter 5 and 6;[329]
>
> (aA)all property derived from the fulfillment of forfeiture orders as contemplated in section 57;
>
> (b) the balance of all moneys derived from the execution of foreign confiscation orders as defined in the International Co-operation in

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327 Act 121 of 1998.

328 Sec 63 of Act 121 of 1998.

329 Chapter 5 of the Act referring to proceeds of unlawful activities and Chapter 6 of the Act dealing with the civil recovery of property.

Criminal Matters Act, 1996 (Act 75 of 1996), after payments have been made to requesting States in terms of that Act;

(c) Any property of moneys appropriated by Parliament, or paid into, or allocated to, the Account in terms of any other Act;

(d) Domestic or foreign grants;

(e) Any property or amount of money received or acquired from any source; and

(f) All property or moneys transferred to the Account in terms of this Act.

The Act[330] defines 'proceeds of unlawful activities' as:

> "Any property or any service, advantage, benefit or reward which is derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived."

In *Director of Public Prosecutions v R O Cook Properties (PTY) LTD*[331] the court held that such a definition must be interpreted widely to include all

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330 Section 1 of the Prevention of Organised Crime Act 121 of 1998.

331 Director of Public Prosecutions v R O Cook Properties (PTY) LTD; National Director of Public Prosecutions v 37 Gillespie Street Durban (PTY) LTD and Another; National Director of Public Prosecutions v Seevnarayan 2004 (2) SACR 208 (SCA).

forms of criminal activity and that such wide interpretation will not necessarily be unconstitutional if one considers that the property to be forfeited must have been instrumental in the committing of a crime or reaping the proceeds to crime.

Realisable property is defined in section 14 of the Prevention of Organised Crime Act[332] as:

> (1)(a) any property held by the defendant concerned; and
>
> (b) any property held by a person to whom that defendant has directly or indirectly made any affected gift.
>
> (2) Property shall not be realisable property if a declaration of forfeiture is in force in respect thereof.

In the case of *Phillips and Others v Van Den Heever NO and Others*[333] Judge Grobler states that section 26 of the Prevention of Organised Crime Act[334] prohibits the defendant from dealing with any of his or her property that could be related to any organised crime and that the concept of 'holding' of property used in section 26 should be given a wide meaning, for example the giving of the name realisable property to such 'holding' of property as described above.

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[332] Act 121 of 1998.

[333] 2004 (2) SACR 283 (W).

[334] Act 121 of 1998.

Judge Grobler says further that the powers granted to the *curator bonis* in terms of the Act[335] must be exercised with the view of making available the current value of any realisable property for satisfying any confiscation order made or possibly being made against a defendant. Therefore in order to preserve this property so that the current value remains intact until confiscation a *curator bonis* must be appointed to incur all expenses arising before confiscation. A confiscation order will only be made in terms of section 18(1) of the Act when the defendant has been found guilty of the organised crime with which he has been charged.

The Prevention and Combating of Corrupt Activities Act 12 of 2004 sets out under section 22 regulations regarding the property relating to corrupt activities, which includes organised crime as a corrupt activity, and states in subsection 1 that if the National Director of Public Prosecutions has reason to believe that a person might have in his possession or control any property that may have been used for the commission of an offence,[336] that may have

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335 Section 33(1)(a) of Act 121 of 1998.

336 Section 22 (1)(a) of Act 12 of 2004. Section 22 (1) reads as follows:
" (1) Whenever the National Director has reason to suspect that there may be in any building, receptacle or place, or in the possession, custody or control of any person any property which –
(a) may have been used in the commission, or for the purpose of or in connection with the commission, of an offence under Chapter 2;
(b) may have facilitated the commission of such an offence, or enabled any person or entity to commit such an offence, or provided financial or economic support to a person or entity in the commission of such an offence; or
(c) may be the proceeds of such an offence,
he or she may, prior to the institution of any asset forfeiture or criminal proceedings, under written authority direct that a particulate Director of Public Prosecutions or a Special Director of Public Prosecutions, shall have the power to institute an investigation in terms of the provisions of Chapter 5 of the National Prosecuting Authority Act, 1998 (Act 32 of 1998), relating to such property.

facilitated the commissioning of such an offence[337] or which may be the proceeds of such an offence[338] may institute an investigation, in terms of the regulations in section 23, relating to such property to determine whether such property was in fact used in the commissioning of an offence or if the property forms part of the proceeds of such an offence.

Section 22(3)[339] makes it clear that any property seized for investigation under section 22(1) which consists of hard cash or funds designated to a banking account that such cash or funds under investigation must be placed into a banking account opened for the purposes of the investigation from which time the Financial Intelligence Centre must be informed of the seizure of the cash or funds and the opening of the banking account.

The Financial Intelligence Centre Act 38 of 2001 then has further stipulations in section 70 which dictates matter regarding search, seizure and forfeiture of specifically cash that may have been acquired by offences.[340]

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337 Section 22 (1)(b) of Act 12 of 2004.

338 Section 22 (1)(c) of Act 12 of 2004.

339 The Prevention and Combating of Corrupt Activities Act 12 of 2004. Section 22(3) of the Act reads as follows:
"(3) If property seized under any power exercised under subsection (1) consists of cash or funds standing to the credit of a bank account, the Director of Public Prosecutions or A Special Director of Public Prosecutions who has instituted the investigation under that subsection shall cause the cash or funds to be paid into a banking account which shall be opened with any bank as defined in section 1 of the Banks Act, 1990 (Act 94 of 1990), and the Director of Public Prosecutions or a Special Director of Public Prosecutions shall forthwith report to the Financial Intelligence Centre the fact of the seizure of the cash or funds and the opening of the account.

340 Section 70(1) and 70(2) of the Financial Intelligence Centre Act 38 of 2001 regarding searching of property and seizure of property, respectively, relating to illegal financial transactions reads as follows:
"(1) A police official or person authorized by the Minister to receive a report under section 30(1), who has reasonable grounds to suspect that an offence under section 54 has been or is about to be

5.3.1 The Asset Forfeiture Unit

The National Director of Public Prosecutions established the Asset Forfeiture Unit in South Africa in 1999.[341] The Asset Forfeiture Unit has two main objectives in recovering assets from organised crime group members. These are as follows:

- To develop the law by taking test cases to court and creating the legal precedents necessary to allow for the effective use of the law.
- To build capacity to ensure that asset forfeiture is used as widely as possible to make a real impact in the fight against crime.[342]

In terms of Chapter 5 and 6 of the Prevention of Organised Crime Act,[343] as discussed above, the Asset Forfeiture Unit may seize and forfeit property that was bought from the proceeds of crime or property that may have been used in the committing of a crime.[344] In the last year the Asset Forfeiture

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committed, may at any time search any person, container or other thing in which any cash is suspected to be found.
(2) A police official or person authorized by the Minister referred to in subsection (1) may seize any cash contemplated in section 30(1)."

341 http://www.iss.co.za/Pubs/CRIMEINDEX/00VOL4NO3/Assetforfeiture.html: 8/22/2006.

342 http://www.info.gov.za/aboutgovt/justice/npa.htm: 8/22/2006.

343 Act 121 of 1998.

344 http://www.info.gov.za/aboutgovt/justice/npa.htm: 8/22/2006.

Unit has returned to victims of organised crime over R100 million and has frozen the assets of criminals amounting to R78 million.[345]

5.4 United Kingdom legislation combating organised crime and organ trafficking

The British Proceeds of Crime Act, c 29 of 2002 which came into effect on 24 July 2002 also makes it possible to more effectively prosecute organised crime offenders by enabling enforcement agencies, similarly to South African legislation, to seize the proceeds of criminal activities via civil court procedures.[346] The Act uses new methods of reducing monetary funds available to suspected crime offenders who need such funds to operate organised crime groups and syndicates.[347] The Act also prescribes ways in which proceeds of criminal activities can be ploughed back into projects and initiatives to combat organised crime and eliminate criminal activity.[348]

The first successful civil recovery of proceeds of criminal activity in Britain was undertaken through the Assets Recovery Agency in terms of the new

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345 http://www.info.gov.za/aboutgovt/justice/npa.htm: 8/22/2006.

346 Chapter 2 of the Proceeds of Crime Act, Ch. 29 of 2002. Section 243 describes the proceedings for recovery orders in England, Wales and Northern Ireland collectively and section 244 describes the proceedings for recovery orders in Scotland. Both sections state that the proceedings for the recovery order may be taken by the enforcement authority against any person whom they believe is in possession of recoverable property. A claim form or application must then be served on that person or any person believed to possess associated property which is to be the subject of the recovery order.

347 Proceeds of Crime Act, Ch. 29 of 2002.

348 Proceeds of Crime Act, Ch. 29 of 2002.

legislation provided in the Proceeds of Crime Act, c29 of 2004.[349] The offender, who was recently acquitted of drug charges, continuously deposited monetary amounts of money, equaling close to 46 000 pounds sterling at a time, into a bank account while law enforcement agencies were not aware of the offender having any known legitimate income elsewhere.[350] The Assets Recovery Agency proved on a balance of probabilities that these monetary amounts being deposited regularly was actually the proceeds of drug trafficking activity and the court ordered that these proceeds could be recovered by Britain's Assets Recovery Agency.[351]

5.5 Other international legislation combating organised crime and corruption involving organ trafficking

International legislation concerning the illegality of organ trafficking that can be additionally considered from the Council of Europe Treaty Series[352] are the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 2005,[353] the Civil

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349 Blunkett 2004: 36.

350 Blunkett 2004: 36.

351 Blunkett 2004: 36.

352 http://conventions.coe.int: 5/10/2006.

353 Council of Europe Treaty Series No. 198. http://conventions.coe.int: 5/10/2006.

Law Convention on Corruption of 1999[354] and the Criminal Law Convention on Corruption of 1999.[355]

Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime and on Financing of Terrorism (2005)

Article 3 of the Convention makes provision for confiscation measures for numerous offences including illicit trafficking in human beings and states that each party to the convention must implement legislative measures necessary to deal with the forfeiture of instrumentalities, property or proceeds of laundered finances. Article 5 determines that legislative measures must also be adopted to ensure that seizing and confiscation orders will include all property acquired with the proceeds of crime, property acquired legitimately if the proceeds of crime have been intermingled with such acquisition and all income or other benefits derived from such proceeds.

The countries who are part of this Convention can use the provisions of the Convention in combating illegal organ trafficking.

Civil Law Convention on Corruption (1999)

354 Council of Europe Treaty Series No. 174. http://conventions.coe.int: 5/10/2006.

355 Council of Europe Treaty Series No. 173. http://conventions.coe.int: 5/10/2006.

In the Preamble of the Convention it is stated that all parties are convinced of the importance for civil law to contribute to the fight against corruption by enabling persons who have suffered damage to receive fair compensation. The aim of the Convention is then stated in article 1 and reads as follows:

> "Each Party shall provide in its internal law for effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage."

Criminal Law Convention (1999)

The parties have agreed in the preamble to this Convention that they are convinced of the need to pursue, as a matter of priority, a common criminal policy and procedure aimed at the protection of society against corruption, including the adoption of appropriate legislation and preventative measures.

5.6 Innovative and effective guidelines for combating organised crime

Once again David Blunkett comments on combating organised crime by saying:

> "Modern organised criminals are sophisticated, organised and well-resourced entrepreneurs. We need to respond to this changing criminal treat, harness the skills of non-traditional investigators like accountants and legal experts and combine these with our world-class

> detectives and intelligence officers. We must become better organised, more sophisticated and more technologically capable than criminals. We must not just keep pace but have to get ahead of them."[356]

In his address to Parliament in 2004 David Blunkett[357] mentions three factors that would decrease organised criminal activity:

Firstly, he mentions that in order to eliminate organised crime one has to eliminate the profit making incentive attached to participating in such a crime. In order to do this, demand for certain services and goods must be decreased so as not to make society susceptible to participating in illegal activities voluntarily or otherwise. In the case of organ trafficking, therefore, the primary factor which would eliminate such organ trafficking would be to decease the demand for organs so that organ trafficking is no longer profitable for organised crime groups.[358]

Secondly, and probably the most effective manner to eliminate organised crime is to disrupt criminal activity and make it difficult, if not impossible, for organised crime groups to operate.[359]

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356 http://press.homeoffice.gov.uk/press-releases/New_Uk-Wide_Organised_Crime_Agen: 15/06/2006.

357 Blunkett 2004: 3.

358 Blunkett 2004: 3.

359 Blunkett 2004: 3.

Thirdly, one needs to increase the risk involved in participating in organised criminal activity both for member's of organised crime groups as well as non members who participate in once-off transactions with such criminal groups.

The most important aspect required for preventing trafficking is the identification of individuals and groups who are involved in such trafficking and recognising such incidents of governmental corruption and engagement in organised crime that leads to human trafficking and through such identification to prosecute and penalise corrupt individuals and organised crime groups.[360] Therefore one method of succeeding with the third facet that Blunkett mentions is to more thoroughly and effectively prosecuting already identified members or participants to organised crime and criminal activity.[361]

The following are high-quality examples of ideas and methods that can be implemented to disrupt organised criminal activities and combat organised crime and human trafficking not only in Britain but also in South Africa and other parts of the world:[362]

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360 http://www.ncjrs.gov/spotlight/trafficking/Summary.html: 28/06/2006. This for example is the new approach followed un the United States of America under the Victims of Trafficking and Violence Protection Act of 2000.

361 Blunkett 2004: 12-16.

362 http://www.ncjrs.gov/nathanson/etranscrime.html: 14/12/2005; Blunkett 2004: 12-16.

i) Enhancing law enforcement approaches through multi-jurisdictional cooperation and a possible international criminal justice order

This would mean that in the case of organ trafficking people who are members of such organised trafficking syndicates from South Africa can, if they are found dealing in organs on the black market in Brazil, be prosecuted for such a crime in the relevant country. Often organised crime offenders use the fact that there is no international cooperation between various countries as a means of committing organised crime such as organ trafficking.

For example organised crime groups work through third world countries who have little or no governmental or legislative regulations regarding organised crime and who do not possess structures to fight such crime and for this reason these crime groups are well aware of the fact that no prosecution procedures will be taken against them.[363]

Even if a first world country is aware of such criminal activity in a third world country and it is capable, because of it's modern law enforcement structures to combat this criminal activity, it is never too worried about this fact because the criminal activity is not directly

[363] http://www.journals.uchicago.edu?CA/journal/issues/v41n2/002001/002001.text.html: 27/09/2006.

influencing its own economy.[364] It can therefore be deduced that both first world and third world countries need to work together to eliminate organised crime as third world countries do not have the resources and skills necessary to fight organised crime as most first world countries have.

ii) Inter-agency cooperation and coordination

This would entail, amongst other things, the passing of important and relevant information, including documents and other evidence of crime syndicates, from one law enforcement agency to the next in order for prosecution of organised crime group members and other criminals participating in organised crime to occur so much faster.[365] For example the International Co-operation in Criminal Matters Act 75 of 1996 in South Africa was enacted to facilitate and regulate the providing of evidence and the execution of sentences in criminal cases and the confiscation and transfer of the proceeds of crime between the Republic of South Africa and other foreign states. The Act[366] specifically regulates the issuing of requests to foreign states for the

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364 http://www.journals.uchicago.edu?CA/journal/issues/v41n2/002001/002001.text.html: 27/09/2006.

365 Provision is made for such sharing of information in, for example the International Co-operation in Criminal Matters Act 75 of 1996 in South Africa and other provisions such as the Council of Europe's Criminal Law Convention on Corruption No. 173 of 1999, Council of Europe's Civil Law Convention on Corruption No 174 of 1999 and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism No 198 of 2005.

366 Act 75 of 1996.

obtaining of material evidence and the evidence provided by witnesses to be used in criminal proceedings.[367] The Act[368] also makes provision for foreign states to request information from South Africa for use in proceedings abroad.[369]

The European Union[370] has also established a directive which reads as

follows regarding information exchange in cases of human trafficking:

> "(1) Law enforcement, immigration or other relevant authorities of States Parties, shall, as appropriate, cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine:
>
> (a) whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel

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367 Section 2(1) of the Act reads as follows:
"(1) If it appears to a court or to the officer presiding at proceedings that the examination at such proceedings of a person who is in a foreign States, is necessary in the interest of justice and that the attendance of such person cannot be obtained without undue delay, expense or inconvenience, the court or such presiding officer may issue a letter of request in which assistance from the foreign States is sought to obtain such evidence as is stated in the letter of request for use at such proceedings."

368 Act 75 of 1996.

369 Section 7(1) of the Act reads as follows:
"(1) A request by a court or tribunal exercising jurisdiction in a foreign State or by an appropriate government body in a foreign State, for assistance in obtaining evidence in the Republic for use in such foreign State shall be submitted to the Director-General."

370 Article 10(1) of Directive 2006/618/EC of the European Parliament and of the Council of 24 July 2006.

documents are perpetrators or victims of trafficking in persons;

(b) the types of travel documents that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and

(c) the means and methods used by organised criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.

Also in the Council of Europe's Criminal Law Convention on Corruption No. 173 of 1999 provision is made for the providing of information and documentation. Article 26 deals with mutual assistance and article 28 requires that information may be spontaneously disclosed to another party if one of the members to the Convention is of the opinion that such information would assist the party in initiating or continuing investigations or proceedings concerning offences governed by the Convention.

Similar provisions are also made in the Council of Europe's Civil Law Convention on Corruption No 174 of 1999 in terms of article 11 and the acquiring of evidence and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from

Crime and on the Financing of Terrorism No 198 of 2005 where article 16 obliges all parties to the Convention to assist other parties in the identification and tracing of instrumentalities, proceeds and other property liable to confiscation as well as providing and securing evidence to prove such instrumentalities, proceeds and property are in fact instrumentalities to and proceeds of crime.

Article 5 of the Council of Europe Convention on Action Against Trafficking in Human Beings[371] makes further provisions for nations co-ordination between bodies responsible for preventing and combating trafficking in human beings.

The Trafficking Victims Protection Act[372] of the United States of America provides in section 7103 for and interagency task force to monitor and combat trafficking. Amongst some of the duties of the task force are the following:

- Engage in efforts to facilitate cooperation among countries of origin, transit and destination.
- Expand interagency procedures to collect and organise data, including significant research and resource information on domestic and international trafficking.
- Measure and evaluate progress of the United States and other countries in the areas of trafficking prevention, protection and

371 No. 197 of 2005.

372 c. 78 of 2000.

assistance to victims of trafficking as well as to measure the progress of prosecution of traffickers.

iii) Seizing organised crime leader's and member's assets

This procedure had already been discussed above and relates to section 22 of the Prevention and Combating of Corrupt Activities Act[373] and Chapter 6 of the Prevention of Organised Crime Act[374] of South Africa. For example section 26 of the Prevention of Organised Crime Act prohibits a defendant from dealing with any of his or her property that could be related to any organised crime.[375] Chapter 6 of the Prevention of Organised Crime Act primarily then assists enforcement agencies in finding and processing property used to commit offences or which form part of the proceeds of illegal activity through civil recovery measures.[376] Chapter 7 of the Act[377] also makes provision for criminal asset recovery as discussed above.

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373 Act 12 of 2004.

374 Act 121 of 1998.

375 Section 26 reads as follows:
"(1) The National Director may by way of an ex parte application apply to a competent High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates.

376 Act 121 of 1998.

377 Act 121 of 1998.

iv) Regulatory, civil and administrative sanctions providing for the civil forfeiture of criminal proceeds

As mentioned above Chapter 6 of the Prevention of Organised Crime Act[378] deals specifically with the civil recovery of the proceeds of criminal activity. Section 50 of the Act[379] states the following in regard to the making of a forfeiture order:

> "(1) The High Court shall, subject to section 52, make an order applied for under section 48(1) if the Court finds on a balance of probabilities that the property concerned –
>
> (a) is an instrumentality of an offence referred to in Schedule 1;
>
> (b) is the proceeds of unlawful activities; or
>
> (c) is property associated with terrorist and related activities.

v) Strong strategic, comprehensive and national intelligence approach

This is especially relevant in the South African context where such a comprehensive system of intelligence agencies are of no existence. South Africa has only recently established the Scorpion's Investigations Unit[380] and has no long standing Federal Bureau of

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378 Act 121 of 1998.

379 Act 121 of 1998.

380 http://www.info.gov.za/aboutgovt/justice/npa.htm: 8/22/2006.

Investigations as in the United States of America.[381] On 31 August 2006 the FBI had a total of 30 626 employees. This includes 12 617 special agents and 18 009 support staff, such as intelligence analysts, language specialists, scientists, information technology specialists, and other professionals.[382]

vi) Prevention, deterrence and enforcement policies

Once again the aims of Chapter 6 of the Prevention of Organised Crime Act 121 of 1998, can be mentioned here. The objectives of this Chapter are to use civil recovery procedures to remove incentives for crime, to deter persons from using their property to commit crime, eliminating thereby the means by which crime is committed and advancing the ends of justice by depriving criminals of their property used in committing crime.[383]

The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons exists to prevent and combat trafficking in persons and to facilitate international cooperation against such trafficking.[384] Article 10 of the protocol also suggests social methods

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381 http://www.fbi.gov/quickfacts.htm: 19/10/2006. The Federal Bureau of Investigations was established in 1908 and has therefore existed for nearly 100 years.

382 http://www.fbi.gov/quickfacts.htm: 19/10/2006.

383 Preamble of Act 121 of 1998.

384 http://www.unodc.org/unodc/en/trafficking_protocol.html: 5/10/2006. Article 1 of the Protocol.

of preventing human trafficking such as research, advertising and social and economic support provided by governments and non-governmental organisations.

The Trafficking Victims Protection Act, c. 78 of 2000 of the United States of America lists several methods used to prevent trafficking and these include economic alternatives such as microcredit lending programs and job counselling to prevent and deter trafficking,[385] public awareness and information about the dangers of trafficking,[386] border interdictions to identify traffickers and trafficking victims[387] and international media programs to inform vulnerable populations in overseas regions of the dangers of trafficking and to increase further public awareness of this human rights abuse.[388]

In Canada the Criminal Code has been amended to create an offence of trafficking in persons[389] that prohibits a person from engaging in specified acts for the purpose of exploiting or facilitating the exploitation of another person[390] and the receiving of financial or

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385 Section 7104(a).

386 Section 7104(b).

387 Section 7104(c).

388 Section 7104(d).

389 Criminal Code (trafficking in persons), c. 43 of 2005.

390 Section 279(1).

other material benefit that they know results from such exploitation.[391] This Criminal Code has also specifically created an offence for organ and tissue trafficking in terms of section 279(4)(b) which reads as follows:

> "For the purposes of section 279(1) to 279(3), a person exploits another person if they
>
> (279)(4)(b) cause them, by means of deception or the use or threat of force or of any other form of coercion, to have an organ or tissue removed."

The Council of Europe Convention on Action against Trafficking in Human Beings No. 197 of 2005 states in its preamble that is considers that trafficking in human beings constitutes a violation of human rights and is an offence to the dignity and integrity of the human being. Article 6 of the Convention lists measures to discourage the demand for trafficking. These measures include research on best practices, methods and strategies, raising awareness of the responsibility and importance of the media and civil society in identifying the demand as one of the root causes of trafficking in human beings and educational programmes surrounding the aspect of human trafficking and teaching society about the importance of gender equality, dignity and integrity of human beings.

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391 Section 279(2).

5.7 Assisting law enforcement through modern approaches

One of the most successful methods of combating organised criminal activity is to stay ahead of new methods of creating and following through of such criminal activity and making society aware of organised crime groups and their methods.[392] Below are numerous approaches in which modern law enforcement can effectively combat modern organised crime tactics:

a) Regulatory policies and programs such as the Federal Office of the Superintendent of Financial Institutions in Canada which regulates sectors of the economy vulnerable to organised crime.[393] It would be useful to have such an institution in South Africa to monitor all organ and tissue donations and to ensure that the National Tissue Bank, the Organ Donor Foundation and the Centre for Tissue Engineering sticks to strict professional regulations regarding the buying, selling, transplantation and using of any human organs or tissue.

b) Systems of financial transaction monitoring and reporting of suspicious transactions as well as the protecting of persons monitoring and reporting these transactions.[394] The Prevention and Combating of

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392 http://www.ncjrs.gov/spotlight/trafficking/Summary.html: 28/06/2006; Blunkett 2004: 12-16.

393 http://www.ncjrs.gov/spotlight/trafficking/Summary.html: 28/06/2006.

394 http://www.ncjrs.gov/spotlight/trafficking/Summary.html: 28/06/2006. For example the Financial Intelligence Centre Act of 2001 in South Africa regulates such financial transactions and the monitoring and reporting thereof.

Corrupt Activities Act[395] provides, for example, in section 34 a duty to report corrupt transactions.[396] The Financial Intelligence Centre Act 38 of 2001 further provides in section 29 a duty on a person who carries on business, is in charge of or manages a business or is employed by a business and who knows or reasonably ought to know of suspicious or unusual transactions to report such suspicious and unusual transactions to the Financial Intelligence Centre within a prescribed period after knowledge of such transactions arose.

Section 52 of the Financial Intelligence Centre Act then prescribes measures that will be taken against persons who do not report such suspicious or unusual transactions.[397] Under the Ethical Rules of Conduct for practitioners registered under the Health Professions Act 56 of 1974 as provided in Government Gazette No. 29079 medical and health professionals are in terms of section 25 also required to

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395 Act 12 of 2004.

396 Section 34 of the Prevention and Combating of Corrupt Activities Act reads as follows:

(1) Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed-

(a) an offence under Part 1, 2, 3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2; or

(b) the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official.

(2) Subject to the provisions of section 37 (2), any person who fails to comply with subsection (1), is guilty of an offence.

397 Section 52 reads as follows:

"(1) Any person who fails, within the prescribed period, to report to the Centre the prescribed information in respect of a suspicious or unusual transaction or series of transactions or enquiry in accordance with section 29(1) or (2), is guilty of an offence.

(2) Any person referred to in section 29 (1) or (2) who reasonably ought to have known or suspected that any of the facts referred to in section 29(1)(a), (b) or (c) or section 29(2) exists, and who negligently fails to report the prescribed information in respect of a suspicious or unusual transaction or series of transactions or enquiry, is guilty of an offence."

report any impairments as well as unprofessional, illegal or unethical conduct.[398] This could then be directly linked to unethical or unprofessional conduct related to organ donation and transplantation.

c) Foreign policy approaches for example trade, military support and law enforcement support.[399]

d) Educating the public and implementing educational programmes in community schools to enable average citizens and children to recognise exploitive actions and corrupt activities so as to decrease the number of victims being exploited by crime groups and trafficking as well as educating children so they follow successful and lawful lives devoid of criminal activity and the joining of organised crime groups. Citizens should also be educated about their rights as victims of organised crime and the role that they can play in the criminal justice system to prevent organised crime and human trafficking.[400]

5.8 Criminal responsibility of persons involved in organ trafficking

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398 Section 25(c) of Government Gazette No. 29079 of August 2006 states the following with regard to reporting unprofessional, illegal and unethical conduct:
"(1) A student, intern or practitioner shall –
(c) report any unprofessional, illegal or unethical conduct on the part of another student, intern or practitioner."

399 http://www.ncjrs.gov/spotlight/trafficking/Summary.html: 28/06/2006.

400 http://www.ncjrs.gov/spotlight/trafficking/Summary.html: 28/06/2006.

When determining who is to be held responsible for actions arising from the illegal organ trade it is considered that all brokers, intermediaries, medical staff, including doctors, technicians and nursing staff, involved in the transplantation procedure or who promote the organ trade should be held criminally liable.[401] There should be a clear establishment of what constitutes liability and involvement in such an illegal activity and punishment should be well defined.

5.8.1 European Union

The Social, Health and Family Affairs Committee of the Parliamentary Assembly of the Council of Europe does not believe that the donor who has received financial compensation should be held criminally liable because of the fact that such a person is often misled into donating such an organ and may be pressurised because of financial needs to sell his or her organ.[402] This clearly does not seem like a rational exemption from criminal liability for all organ donors who receive monetary compensation for such donations. It seems difficult to believe that such a donor is ignorant of the extent of such an illegal activity otherwise he or she would surely donate such an organ freely at any medical institution in his or her country. Ignorance should not in this type of situation be viewed as an excuse for illegal organ selling.

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401 http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9822.htm: 21/02/2006.

402 http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9822.htm: 21/02/2006.

The United Kingdom's General Medical Council's[403] Guidance for Doctors on Transplantation of Organs from Live Donor's[404] in the European Union lays out a doctor's duties regarding organ transplantations as the following:[405]

a) The doctor must ensure that the transplantation has occurred without financial gain and without undue influence.
b) The doctor may not participate in or encourage the selling of bodily organs by advertising for donors or arranging facilities for people wishing to buy or sell organs.
c) An independent doctor must access the genuine need for transplantation and must ensure that such an organ is donated without financial incentive.
d) All medical staff and practitioners involved in the organ transplantation must exercise ethical responsibility towards each individual patient whether such patient is an organ donor or recipient.

Another duty that can very well be added to the above four duties of the medical practitioner procuring and transplanting organs is that the medical practitioner must ensure that informed consent, either by the organ donor or by the donor's family, has been given for the removal and transplantation of

403 http://www.gmc-uk.org/: 26/10/2006.

404 http://www.gmc-uk.org/guidance/current/library/transplantation_live_donors.asp#1: 26/10/2006.

405 http://www.gmc-uk.org/guidance/current/library/transplantation_live_donors.asp#1: 26/10/2006.

any bodily organs or tissues.[406] This point has been discussed in previous chapters yet remains a vital part of the organ donation and transplantation system.

5.8.2 Republic of South Africa

In South Africa the Health Professions Act[407] states in section 14 that a medical practitioner may only retain human organs of deceased persons for research, educational, training or prescribed purposes provided that such a deceased person during his or her lifetime consented to such retention. Section 23 of the Act further provides that no medical practitioner may participate in the manufacturing, sale, advertising or promotion of any medicine for trading or commercial purposes. These two sections will be interpreted to mean that medical practitioners may not be in possession of human organs other than for the purposes mentioned above and therefore also may not trade in human material or organs. "Medicine" in section 23 will be interpreted to include any medical procedure such as organ transplantation.

The Health Professions Council of South Africa[408] also has a policy statement pertaining to Perverse Incentives and Related Matters for Health Care Professionals. Paragraph 1.1 of this policy reads as follows:

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406 http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9822.htm: 21/02/2006.

407 Act 56 of 1974.

408 http://www.hpcsa.co.za: 5/10/2006.

"The HPCSA holds the view that a health care professional such as a medical practitioner, dentist and medical scientist, should at all times act in the best interests of the patient and place the clinical need of the patient paramount. To this end, a health care professional should always try to avoid potential conflicts of interest and maintain professional autonomy, independence and commitment to the appropriate professional and ethical norms. Any conflicts of interest or incentive or form of inducement which threatens such autonomy, independence or commitment to the appropriate professional and ethical norms or which does not accord first priority to the clinical need of a patient, is unacceptable."

5.8.3 United States of America

There are four basic medical principles at work in the United States of America which all practitioners of medicine must adhere to at all times, especially where organ transplantations are concerned.[409]

These are that:[410]

a) any medical treatment given to any patient must at all times be in the best interest of that patient,

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409 Forsythe 2001: 6.

410 Forsythe 2001: 6.

b) all medical practitioners maintain the balance between benefiting the patient and avoiding harm to such patient,

c) all medical practitioners must respect the dignity and integrity of a patients' body as a basic human right of such patient, and

d) all medical practitioners must promote justice and fairness in the application of medical treatment to patients.

In the case of *Moore v Regents of the University of California*[411] the Supreme Court of California held that there also exists a duty on medical practitioners to fully disclose to patients any medical procedures or treatment that such patients must undergo as well as, where bodily organs and tissue are concerned, informing donors (after consent has been obtained from such donors) about the procedures for the removal of such organs or tissue and informing them about the future use of such organs or tissue.

5.9 Conclusion

After assessing some national and international laws regarding organ trafficking and organised crime as well as assessing some of the modern methods in combating the organised crime of organ trafficking as well as other economic crimes it can be concluded that South Africa definitely needs legislation, above and beyond the present legislation dealing with organised crime, to deal specifically with human trafficking matters such as the black market in organs. The problem of organ trafficking needs to be taken into

411 793 P. 2d 479 (Cal. 1990).

account as a separate organised crime and issues of supply and demand regarding available organs for organ transplantation needs to be rectified. Besides medical or health law legislation governing this issue, as was discussed in the previous chapter, the issue needs to be regulated by legislation not only criminalising organ trafficking but also providing effective penalties to persons participating in such activities.

Chapter 6

The negative response and adverse effects of payment for organs

6.1 Introduction

As discussed in the two preceding chapters numerous pieces of legislation worldwide have criminalised the act of organ selling. These prohibitory pieces of legislation often use vague words such as ‘trade’, ‘commerce’ or ‘payment’ in dictating prohibitions to the selling of human organs.[412] Is this legislation therefore prohibiting the payment of any compensation to the

[412] Garwood-Gowers 1999: 168.

donor even if it means that that donor suffers loss of income and medical expenses? Or are these various pieces of legislation prohibiting the profit making element of a possible sale of organs but intending that the donor be compensated for pain and suffering and loss of income as well as medical expenses? These are obviously very relevant questions when determining the purpose of such prohibitory legislative laws and in deciding whether or not such prohibitions are more to the benefit of society than not.

Such legislative prohibitions against legal commerce in human organs is viewed as being more disadvantageous to society and organ recipients and donors than it is possibly advantageous. This chapter will explore all the negative responses to a possible legalisation of the trade in human organs and will show that all these negative responses are far outweighed by positive responses to such an organ trade.

There are a number of reasons why governments around the world are not enthusiastic about implementing legislation for the payment of organs. One of the reasons is that it is against the *boni mores* of society and other policy considerations.[413] However, when deciding to create a public policy that legalises organ selling but also emphasises the values and morals of society, there exists a moral burden of proof that must be met in order to make such public policy permissible and acceptable.[414]

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413 Cherry 2005: 40, 72.

414 Cherry 2005: 72-73.

Cherry[415] argues that commercialising organ supplies would provide better equality and liberty for donors to a greater extent than traditional procurement policies do at present and that this in turn would place a burden of proof on persons not agreeing with the organ trade to prove that such organ trade restrains donors freedoms and encourages irresponsible behaviour from them to the extent that such a market would cause more harm than benefit to anyone.[416]

Prof. Anton van Niekerk, Director of the Centre for Applied Ethics at the University of Stellenbosch, says that the main reason for the ban on organ sales is that the body is so uniquely respected that no person should put a commercial price on it.[417] He believes some things are so precious that not even money can buy them and that by not placing a price on human organs we are showing our respect to the human body.[418] However, the truth of the matter is that a very real price is being placed on organs not because people are disrespectful of the human body but rather out of a greater need to respect human life by performing otherwise impossible life saving organ transplants.

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415 2005: 83.

416 The Director of Public Health in the United States of America, Jeremy Wight, agrees with Cherry on this issue and adds that anyone who argues that poor people should not be allowed to sell their organs is most probably not poor himself. He further poses a similar question as Cherry by asking how it would be to the benefit of poor people to reduce their options of increasing their financial status. Marino et al 2002: 835.

417 Burger: 2003.

418 Burger: 2003.

In South Africa, contrary to the respect that should be shown to the human body by not commercialising human tissue and organs as stated by Prof. van Niekerk, a staggering monetary value is placed on blood when it is needed by a patient but when one donates blood the reward is everything but monetary.[419] Are we then disrespecting the body by selling blood to needy patients or are we just respecting human life a little more?

In other words by not commercialising human organs are we actually suggesting that we respect the body more than we respect human life and that the body is more precious than life itself? It is the purpose of this dissertation to ensure that it is always remembered that when a patient is buying an organ it is not the monetary value of that organ that is saving his or her life but the organ itself. The only reason why a monetary value is even attached to the organ is presumably because this is the only way in which such an organ can be obtained.

The federal prohibition in the United States of America against organ selling does not apply to sperm, eggs or blood, Kahn[420] noted. The law further makes it legal and acceptable in the United States of America to sell blood for profit to increase the available supply of blood for medical purposes. One of the reasons commonly cited for permitting the sale of blood is that the risk involved is insignificant if not non-existent.[421] But the relatively

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419 Burger: 2003.

420 Garwood-Gowers 1999: 194.

421 Garwood-Gowers 1999: 194.

risk-free nature of the activity does not address the problem of human rights and whether or not the selling of bodily fluids is consistent with the inalienable rights theory.[422]

The ultimate question hinted at by the selling of blood, sperm, eggs and other similar body parts is whether or not it is consistent to allow individuals to decide to sell one section of their body but not to allow them to sell other parts such as kidneys, parts of their liver and lung as well as various other sections of bodily organs.[423] In other words while there is no properly enforced system of regulation which has allowed an organ trade, these systems of selling blood and other human tissue have been allowed and have been successful within a properly regulated system.[424] Fagot-Largeault's[425] findings about the selling of blood also indicate that there are higher and

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422 http://members.aol.com/richrwg/organs.htm: 20/09/2004. To explain this concept of inalienable rights David Andolfatto can be quoted from his public paper '*A Theory of Inalienable Property Rights*' as stating the following regarding this theory: "Why do democratic societies often impose legal restrictions that render various assets or entitlements inalienable to the individual? The explanation proposed here is that these constraints arise as an institutional response against financial markets that, in a sense, work "too well." That is, I demonstrate how a well-functioning financial market can potentially work against a social policy designed to ensure a basic minimum standard of living for all types of individuals. Inalienable property rights and debt constraints emerge as a natural institutional response to the improvident tendencies of some members of society when a majority of individuals share a common distaste for neighborhood squalor." Andolfatto 2002: 382.

423 Garwood-Gowers 1999: 184.

424 Garwood-Gowers 1999: 184. It must however be kept in mind that although these methods of selling blood, hair, sperm and eggs has been successful these bodily tissues are all renewable and the loss of these bodily tissues poses not direct harm to the donor. The situation is very different for living donors who are donating nonrenewable organs such as kidneys, even if a person can survive with only one kidney.

425 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004; Fagot-Largeault 1995: 13.

safer health standards resulting from the selling of blood in France as opposed to the mere donation thereof.

6.2 Adverse effects of the present organ trade to living and cadaveric donors

6.2.1 Exploiting the poor

Critics feel that the selling of human organs to possible organ recipients and organ procurement agencies has the potential to exploit the poor and disadvantaged in a community.[426] Nancy Scheper-Hughes states in her report on Global Trafficking in Organs that: "A market price – even a fair one – on body parts exploits the desperation of the poor".[427] Cherry[428] disagrees with this statement and is of the opinion that human dignity can be better protected by creating a market in human organs than by not legalising such a market and using traditional procurement and allocation strategies.

Price[429] says that it is not the fact of payment that exploits a poor individual but the size of such a payment. He says therefore that: "…it is not 'wrongful use' but 'unfair exchange'". Price[430] further concludes that perhaps it is

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426 Slabbert and Oosthuizen 2005: 197; http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004.

427 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004.

428 2005: 73.

429 2000: 393.

430 2000: 393.

profit making by the middle-class man through the selling of an organ that can be considered unethical and not the sale of the organ itself.

As it has already been argued, organ transplantations of any kind disadvantage the poor in society as they will never be able to afford for themselves any future needed organ transplant as well as other transplantation costs.[431] There is also the fact that the modern equipment necessary for such transplantation does not exist in poorer communities. The present situation is already disadvantaging the poor in society without even having mentioned the buying and selling of human organs. And of course it can be concluded that it is the poor in society who would be willing to sell their organs because the rich in society are already wealthy and have no desire to acquire such wealth through the selling of one of their organs for what would be to them minor financial gain.

The proposed selling of bodily organs does, however, not completely exploit the poor in society to the extent that Scheper-Hughes[432] believes if does. The very act of donating an organ, whether you receive monetary compensation for that act of donation or not, would ensure in a regulated organ trade system that when an organ is needed by that particular donor or his or her family that he or she could be placed higher up on the waiting list

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431 Slabbert and Oosthuizen 2005: 197; Cherry 2005: 80-81; Kishore 2005: 365.

432 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004.

for an organ transplantation than they would have been had they not donated an organ themselves.[433]

Cherry[434] and Kishore[435] believe that by creating a market in human body parts one is actually empowering the poor in society by giving them the opportunity to develop their financial status and increase their social prospects while encouraging individual responsibility. It further affords them with the chance to increase their life expectancy by being able to look after themselves and their families better because of an increase in economic prospects. It can then surely be assumed that this will only be to the benefit of a poorer community by allowing them to control their future economic, social and health statuses and thereby eliminate inequalities.

Another point to mention is that by not wanting to exploit the poor in society through placing a price on human organs one is inadvertently disadvantaging potential organ recipients.[436] By marketing organs in a controlled

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433 For example in Singapore the Human Organ Transplant Act 15 of 1987 makes it possible for people who have registered to be organ donors to receive preference for possible organ transplants for themselves above people who have not registered to become organ donors. Section 12(a) of this Act reads as follows:
(1) Subject to subsection (2), in the selection of a proposed recipient of any organ removed pursuant to section 5-
(a) a person who has not registered any objection with the Director under section 9(1) in respect of that organ shall have priority over a person who has registered such objection.

434 2005: 83.

435 2005: 362; 364.

436 Cherry 2005: 91.

environment within certain rules and regulations one can benefit both organ donor and recipient without exploiting either one.[437]

Walzer[438] is also of the opinion that a market in organs should not exploit the poorer members of society and that organs should be sold at the same price for everyone and if that price is not low enough for poorer individuals to participate in that market then such individuals should be excluded from participating in the market for human organs. Cherry[439] criticizes Walzer's opinion by stating that such an exchange between individuals on equal footing only exploits the poor in society even more and lessens their chances of benefiting from the market by making the market unavailable to them as an option to develop their financial status and hereby further diminishing potential recipient's options in finding a suitable organ.

It has also been suggested right here in South Africa that one of the reasons why the organ trade should not be legalised is that rich people should not be unfairly privileged by being able to afford organs that poor people cannot.[440] This argument can yet again be dismissed as an argument against legalising the organ trade because of the fact that in many poor countries citizens cannot afford to undergo an organ transplantation because the medical costs even at that level are too high for them to be able to afford it and for this

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437 Cherry 2005: 90.

438 1983: 120.

439 2005: 90.

440 The Cape Times: 1998.

reason organs are still being provided to recipients on the basis of them being able to pay for the transplant.[441] Therefore even without there being a legalised organ trade, poor people will suffer in that generally organ transplantations are not an option for survival in poorer societies.[442]

However, if a poor donor were to sell an organ he did not need he might well be able to even afford to buy an organ he does need to survive. Cherry[443] further states that a commercial market in general will lead to more organs being donated and that all potential recipients, rich or poor, stand a better chance of receiving such an organ which inevitably leads to more lives being saved overall. The selling of one's organs enables individuals to then participate with others in society to not only provide for their own needs but for the needs of other helpless individuals as well. [444]

Harris and Erin[445] suggest the following for such a system of trade in human organs to be successful: "To meet legitimate ethical and regulatory concerns any such scheme must have built into it safeguards against wrongful exploitation and show concern for vulnerable people, as well as taking into

441 Calandrillo 2004: 105.

442 Calandrillo therefore suggests that where selling of organs is made legal there should exist governmental structures to ensure that organs are made equally available to both rich and poor people and that poorer patients are not disadvantaged because of inability to pay for the actual transplant. Calandrillo 2004: 105. Government grants can for example be set aside to assist poorer patients in receiving organs for transplantation purposes.

443 2005: 152.

444 2005: 152.

445 2002: 114.

account considerations of justice and equity. If all this can be done then a market in human body products will be shown to be, at the very least, not *prima facie* unethical."

6.2.2 The withholding of medical information

Where organ trade occurs there is an increasing risk of donors withholding information that could lead to the transmission of disease.[446] The European Union[447] agrees that once the idea of any incentive is placed in the mind of the donor in order for him or her to provide an organ, that such a donor will no longer be in the right mind set to provide medical practitioners or the donee with the correct information regarding any health related issues which could be potentially dangerous to the donee. This will be a permanent threat whether donors are under financial pressure or not.

Even where no financial incentive is provided and an organ is taken from someone by force, especially through organised crime groups stealing

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http://organtx.org/ethics/sales/sales.htm (Yahoo): 20/09/2004. According to Forsythe Human Immuno Virus (HIV) and Hepatitis B are two of the diseases that can be transmitted if medical information is withheld by a potential donor. Forsythe 2001: 28-29.

447 http://www.elections2004.eu.int/highlights/en/503.html: 30/06/2006. Decision 2000/96/EC of the European Commission of the European Union lists a number of communicable diseases that can be transmitted from one person to another and that are relevant when one talks of transplantations and the withholding of medical information in the donation process. These communicable diseases include, for example, Human Immuno Virus (HIV)-infection, Tuberculosis, Hepatitis A, Hepatitis B, Hepatitis C and other imported diseases such as cholera, malaria, viral haemorrhagic fevers and plague. Section 1 of the National Health Act 61 of 2003 of South Africa defines such communicable diseases to mean a disease resulting from an infection due to pathogenic agents or toxins generated by the infection due to direct or indirect transmission of the agents from the source of such infection to the host. It is deduced then that when one talks of any surgical intervention one has to take into account these communicable diseases.

organs, the chances are slim to none that any relevant medical information about the donors health will be supplied to the donee or other medical staff if any health information is even available at all at that time. To conclude, it seems quite obvious that the objectives of organised crime groups is not to provide a recipient with a healthy organ but just simply to provide them with any organ.

Numerous risks beyond the standard risk of graft rejection will exist here for potential recipients.[448] As discussed above these include possible Human Immuno Virus (HIV) infection as well as being infected with Hepatitis B. In the earlier 1990's scientific articles appeared in journals such as *The Lancet* and *Transplantation Proceedings* reporting of poor medical outcomes where kidneys have been bought from donors infected with HIV and Hepatitis B.[449] One of the risks inherent to the donor in the withholding of medical information in underground organ sales is the fact that the donor will sometimes not be medically fit to donate an organ for transplantation but that such information is not known or is not given to the person or people removing the organ.[450] This brings us then to issues relating to the health of both the organ donor and the potential recipient.

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448 Forsythe 2001: 18.

449 http://www.journals.uchicago.edu/CA/journal/issues/v41n2/002001/002001.text.htm: 27/09/2006. Other related diseases that can be passed on from the organ donor to the recipient if medical information is withheld include Cytomegalovirus which is a part of the herpes group of viruses and the Epstein-Barr virus which can result in fever, anorexia, headaches and fatigue. Forsythe 2001: 219, 222, 232.

450 Forsythe 2001: 15; The Cape Times: 1998.

6.2.3 The compromising of the donor and the recipient's health

The compromising of the donor's health and life by such selling of bodily organs is a major problem.[451] Most of the time when organs are removed from a donor and placed on the black market for trade, such removal of the organ is almost never done under correct medical supervision and instruction. Along with this problem is the problem that the donor does not receive the special medical attention after the removal of such an organ that would most certainly be the case if the organ was removed legally in a proper medical institution.[452]

This argument is viewed as boding equally well for the organ recipient because that recipient is most times no where near receiving the medical attention and immunosuppressive drugs[453] that he or she should be. Because the transplantation has not been recorded due to the fact that it was illegal it is almost impossible for such an organ recipient to receive treatment because no legal medical institution is aware of the transplantation. This very fact should be enough to persuade any organ recipient to rather purchase an organ via legal means than to use illegal methods of organ procurement. In this way we would be able to diminish the black market in organs by making

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451 Price 2000: 389.

452 http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9822.htm: 21/02/2006.

453 Forsythe discusses the most commonly used immunosuppressive drugs. Cyclosporine was the traditionally used immunosuppressive drug of transplant surgery and is now being supersede by a micro-emulsion form of cyclosporine-neoral which provides more consistent immunosuppression than other oil-based Sandimmun. Tacrolimus is another recently developed immunosuppressive drug. Some of the symptoms related to the use of Tacrolimus and other immunosuppressive drugs include tremors, paraethesia, diabetes and hypercholesterolaemia. Forsythe 2001: 102-103, 105.

such a market unsuccessful and non-profitable for all organ donors, recipients, procurement agencies and people running organised crime syndicates to acquire human organs.

Also many times a donor is so desperate for the money that a possible organ trade can endower him with and the organ recipient in turn is so desperate for an organ for transplantation that they both neglect to take into consideration whether or not they are medically fit to undergo an operation for the removal of any organ or to receive an organ transplantation.[454] A member of the International Forum for Transplant Ethics stated: "The poorer a potential vendor, the more likely it is that the sale of a kidney will be worth any risk there is."[455]

The donor's poor living conditions and bad lifestyle, whether before or after donation, might often lead to the donor later in life being forced into a situation where he or she too will need an organ transplant.[456]

A study done in a town in India showed that of a total of 350 people who sold their kidneys 80% said that they would not recommend the selling of one's organs while 85% of them stated that their general health after the removal of a kidney had deteriorated.[457] Now it can be argued that 80% of

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454 The Cape Times: 1998.

455 The Cape Times: 1998.

456 http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9822.htm: 21/02/2006.

457 Daily News: 2003.

them would not recommend selling their organs because they have already done so and it is of no further consequence to them to sell anymore organs. It is also not further stated what their reasons are for not wanting to recommend such organ sales. [458]

What can be additionally concluded about the 85% whose general health has deteriorated is the fact that such deterioration can happen to any person donating an organ, whether such donor is wealthy or not. To say that one's health has deteriorated simply due to you accepting a financial offer to sell an organ and undergo a medical operation is madness. There is no point in blaming bad health on the person's financial gain after the removal and sale of an organ. On the contrary, it is presumed that it is not because of the financial gain that one's health has been affected but because of a lack of medical assistance and bad lifestyle choices after the removal of the organ.

For this reason it can only be expected that if a financial market in organs is to succeed we must ensure that living donors receive the correct medical treatment after the removal of their organs for as long as such medical treatment is reasonably necessary. The donor must also be well educated as to what he or she can do to improve his or her lifestyle by promoting healthy living.[459] These donors can also be provided with a certain degree of life or

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458 Daily News: 2003.

459 Sirico 2002-2003: 7.

disability insurance in the future event of the donor suffering physically after the donation of an organ.[460]

Regarding the health of a donor post-donation, Kishore[461] says the following, "Even if a person gives his organ willingly and without any thought as to recompense he suffers harm to his body." This again leads us to a positive argument against the argument suggesting that organ sales lead to the bad health of the donor. Kishore[462] specifically makes a point of mentioning that the donation (whether altruistically or through financial transaction) of any organ causes harm to the donor. Are these activists against the legalising of organ sales then actually saying that no organs should be donated altruistically either for the sake of the health of the donor? Surely this would not be their argument as this would mean they were in favour of a concept that would decrease the already reduced available supply of organs to a nil percentage.

Further more Cameron and Hoffenberg[463] say:

> "The fact that paid organ donation usually takes place under unsatisfactory medical circumstances has no bearing on the argument. If one accepts the practice, then well-organised programs in which the donor is properly apprised of risk, fully assessed and followed up,

460 Sirico 2002-2003: 7.

461 2005: 364.

462 2005: 364.

463 1999: 727.

with results available for public audit, can and have been organised, for example, in India. It is the marginalisation of paid organ donation that leads to its performance in less than ideal circumstances."

6.2.4 Premature withdrawal of life support

There are possible cases where families are influenced to prematurely withdraw medical care in order to donate organs to other needy patients.[464] Often there is such a need for organs because of the vast shortage that medical practitioners and other nursing staff intentionally negotiate with families to 'let their loved ones die' in order for a donation to take place.[465] This is often not to the benefit of the donor as such donor is quite possibly still able to survive for months before eventually having medical treatment withdrawn.[466]

The possibility of this leading to diminished statistics as far as organ donation is concerned is great because people fear that once they consent to organ donation that their health and medical needs will be neglected in order to save someone else's life at obvious cost to their own life. However, donors of organs should be well informed that such medical practices are not at all ethical not to mention illegal and that whether they are donating organs

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464 Breyer 2003: 2; http://organtx.org/ethics/sales/sales.htm (Yahoo): 20/09/2004.

465 Prottas 1994: 64-65.

466 Prottas 1994: 64-65.

free of charge or at a price their own health status will always be more important than that of any possible organ recipient.

Such ethical and medical issues determining the moment of death, as has been discussed in previous chapters, will be governed by legislation such as the National Health Act 61 of 2003 and The End of Life Decisions Act of 1999 in South Africa. Forsythe[467] also gives an explanation of the clinical signs of brain death. These include the absence of the corneal reflexes and papillary light response. There should also be no motor responses to stimulation and the respiratory system should not respond to raised arterial pressure of carbon dioxide.[468]

The Hippocratic Oath[469] as stated by the Health Professions Council of South Africa has as one of its core values the following oath:

> "That I will exercise the art of medicine solely for the cure of my patients, and I will give no drug, perform no operation for a criminal purpose, even if solicited, far less suggest it; in like manner I will not give to a woman any kind of strange material to produce abortion, and I will maintain respect for human life from the moment of its conception."

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467 2001: 31.

468 Forsythe 2001: 31.

469 http://www.hpcsa.co.za/hpcsa/default.aspx?id=275: 5/10/2006.

This declaration therefore tends to confirm the above view that the donors own health status will always be more important than that of any possible organ recipient.

Part of the Physician's Oath of The World Medical Association Declaration of Geneva of 1948,[470] to which all South African medical practitioners may become members, is that at all times the health of one's patient will be one's first consideration. Even under threat one will not use one's medical knowledge contrary to the laws of humanity. This is yet another oath which states that the patient's life and best interests should be the most important concern to any medical or health care practitioner.

The International Code of Medical Ethics of 1949[471] of the World Medical Association additionally states as one of the key duties of a physician that such physician will not allow financial motives to influence his or her free and independent exercise of professional judgement on behalf of his or her patients. Another important duty that can directly be linked to the issue of premature withdrawal of life support or treatment is the duty of a physician to act only in the patient's interests when providing medical care which might, in order to prevent the physical and mental suffering of the patient, have the effect of weakening the physical and mental condition of the patient.

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470 http://www.consciencelaws.org/Conscience-Policies-Papers/pppinternational01.html: 24/10/2006.

471 http://www.wma.net/e/policy/c8.htm: 24/10/2006.

6.2.5 Pressurised or coerced donations

The organ trade could very well produce a system of economically pressurised donations whereby a donor will sell an organ out of a desperate need for money.[472] The donor will then be forced into selling his organs involuntarily. This in turn leads to questions of legality and whether the donor actually consented to selling his organs.[473] The argument, however, does not stand much ground because the offering of money to someone to buy organs does not necessarily pressurise them to sell the organ. Garwood-Gowers[474] states: "If they feel pressure by being offered money it is their own desire for money that is pressuring them, not the money itself or the person offering it."[475]

Another reason why the sale of bodily organs cannot be said to be a compromising factor in the donation process is because most people who will be selling their organs will be doing so to unrelated persons which means the choice to donate is even less coerced than it would be if that

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472 http://www.flonnet.com/fl1907/19070730.htm: 27/06/2005.

473 http://www.flonnet.com/fl1907/19070730.htm: 27/06/2005. The ethical issue of giving consent for organ donations and legislation dealing with such consent will be discussed in a later chapter.

474 1999: 178.

475 As will be discussed in further detail in a later chapter, one must also consider the issue of informed consent when discussing consent as given by organ donors for the removal of their organs. Section 7(3) of the National Health Act 61 of 2003 of South Africa defines such informed consent to mean consent for the provision of a specified health service, such as organ removal and transplantation, given by a person with the legal and necessary capacity to do so.

person was a relative to the donor. This is because many times when a family member is in need of an organ for survival the internal pressure on the possible donor and pressure from family members to donate is often even greater than any possible coercion through the sale of such an organ.[476]

6.2.6 Reduction in voluntary donations

Commerce in human organs may very well lead to a reduction in voluntary donations and ultimately a decline in altruistic donations because of the fact that a financial incentive to donate compromises the voluntariness of the choice to donate an organ and the altruistic basis for organ and tissue donation.[477]

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476 Larijani, Zahedi and Ghafouri-Fard 2004: 2540; Forsythe 2001: 16. Once again we can use the example in the case of *McFall v Shrimp* where a man had asked his cousin to donate to him one of his kidneys in order for him to survive. The man claimed that he had a right to demand such an organ from his cousin and that he was willing to buy the kidney as one would buy other property or material goods. The court then denied that he had such a right to another person's bodily organs, as a form of property, and said that there was never any other precedent making equitable such ownership of another's organs. *McFall v Shrimp* 10 Pa. D. & C. 3d 90 (1978).

477 Kishore 2005: 364.

Cherry[478] disagrees with this criticism of the body parts market and states that a donor who is willing to donate while no financial reward is being offered for such donation ought still be willing to donate even when such financial compensation is offered. He further says that where financial incentives are presented to persons when donating an organ that this does not simply mean that people may not donate organs any longer or that patient's families should not be asked to consider donating organs freely anymore. The option to donate organs altruistically and the need for medical practitioners and staff to ask patient's families to consider donation still exists.[479]

Cohen[480] likewise suggests that a commercial market in human organs can exist side by side with altruism. Providing a market for organs is merely an additional method of procuring more organs in order to decrease the organ shortage and should not be seen as the ultimate procurement strategy.

6.2.7 The increase in illegal activities to gain people's organs

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478 2005: 76. In her article 'Neither Moore nor the Market: Alternative Models for Compensating contributors of Human Tissue', Charlotte Harrison quotes Pope Pius XII as saying the following: "It is commendable for the donor to refuse recompense: it is not necessarily a fault to accept it." Harrison herself states that in any circumstances is an altruistic individual truly wishes to donate an organ there is no need for such an individual to accept payment for is. 2002: 93.

479 Slabbert and Oosthuizen also agree that people do not necessarily have to sell their organs if the organ trade is legalised but that they can still donate their organs freely. Slabbert and Oosthuizen 2005: 198.

480 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004.

It has been suggested that there might be an increase in activities such as organ stealing and murdering of people for the purposes of procuring their organs which will result because of the sudden increase in the value of such organs.[481] The fact that there is an organ shortage already leads to underground markets and organised crime groups selling organs and body parts obtained from murdered organ donors, coerced organ donors and other donors who do not wish to voluntarily sell or even donate their organs and tissue.[482] For this reason a properly regulated organ trade system should ensure that organ stealing, kidnapping and murdering for the obtaining of human organs will not happen.

If proper legislative procedures and policies are put into place and the organ availability increases there will not be any criminal or social need to obtain organs illegally or to kidnap and murder people for their organs because the reason for such criminal activity will no longer exist and the procuring of organs by illegal means will no longer be a profitable activity.

6.3 Conclusion

All these arguments against the legalisation of commerce in human organs are useless myths, as today even without legalising such a market in human

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481 Price 2000: 389; Slabbert and Oosthuizen 2005: 196.

482 There are also alleged cases where human organs have been stolen and sold in South Africa for witchcraft purposes. Labuschagne 2001: 354.

organs, poor people are exploited on black markets,[483] people are killed for their organs[484] and even a voluntary donor's life is compromised when donating any organ.[485]

From all the above arguments that have been counter-argued the question is then not whether a trade in human organs is harmful to any one person but whether in the end such a practice and method of procuring organs will be harmful to society as a whole.[486]

Society argues that access to needed medical treatment based on the ability of a patient to pay is inconsistent with the principles of justice.[487] It is argued, however, that because of the demand for such organs society has a collective responsibility to save lives and therefore must set aside ethical notions such as altruism and the sacredness of the human body. This line of reasoning has extremely serious ethical and moral implications. Can we put aside fundamental and absolute moral principles so that a small percentage of the population can extend their lives by a few years? And more importantly, can we justify setting aside morality for non-moral purposes?[488]

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483 Slabbert and Oosthuizen 2005: 196-197.

484 Labuschagne 2001: 354.

485 Slabbert and Oosthuizen 2005: 198.

486 Cherry 2005: 89.

487 http://www.flonnet.com/fl1907/19070740.htm: 14/07/2005.

488 http://www.flonnet.com/fl1907/19070740.htm: 14/07/2005.

Chapter 7

Medical considerations and moral and ethical values related to organ transplantations

7.1 Introduction

There exists a fine line in society regarding what behaviour constitutes ethical and moral behaviour and what medical standards are to be observed

by health practitioners. Every person's idea of what is moral and ethical differs from another person's idea of moral and ethical values and the fear is that not even the majority of citizens in a country will agree on such standards of living, for example the selling of human organs and non-related organ transplants, as seems to be required to increase organ donation and organ supplies. This chapter will highlight some of the difficult medical considerations that need to be taken into account in determining who receives the short supply of organs available for transplantation as well as researching the moral and ethical dilemma in suggesting a legally regulated human organ market.

7.2 Medical considerations

One of the biggest problems regarding organ transplantation is how medical practitioners making use of hospital policy decide who gets allocated an organ and who eventually will not be an organ recipient.[489] Do you allocate an organ to the patient who needs it the most or do you give it to the person who has the optimal chance of long-term survival after the organ transplant? In general only patients with total organ system failure are eligible to be potential organ recipients.[490] It is also not uncommon for hospitals to choose younger organ recipients whose general health status tends to make

[489] Forsythe 2001: 1-2.

[490] Prottas 1994: 3.

their bodies less susceptible to non-fatal rejection of the transplanted organ than older recipients.[491]

Forsythe[492] is of the opinion that distributive justice should apply when allocating organs to patients for transplantation. What exactly he means by this is not clearly stated as distributive justice can mean nothing when there are no organs to distribute equally. However, if there were enough organs to be distributed fairly such distribution could mean that the person who has been on the waiting list for the longest period of time will be chosen as an organ recipient. Another method of fair distribution would be to choose the potential recipient who is most in need of an organ transplant to survive.[493] Both of these methods in allocating organs for transplantation will be viewed as methods ensuring distributive justice.

The traditional organ procurement process for the procurement of organs from potential donors consists of five steps:[494]

> Step 1: This process is known as referral. Potential recipients are placed on a waiting list in this stage as a result of public opinion as well as individual and medical perceptions of health which regard a patient as either being in end-stage organ failure and needing a

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491 Prottas 1994: 3.

492 2001: 11.

493 Marino *et al* 2002: 835.

494 Prottas 1994: 25-29.

transplant or regarding such a patient as someone who is not yet in direct need of a transplant.[495]

Criteria used in placing patients on a waiting list also differ from transplant centre to transplant centre and for this reason patients are not always placed on the waiting list according to whether they are really in need of an organ transplant or not.[496] These differences occur because of the different members on each evaluation committee at a transplant centre. Criteria used in evaluating potential waiting list patients also include various tests performed on patients to determine suitability for organ transplantation, a patient's age and gender as well as other medical limits or constraints that would not be present to continue an organ transplantation.[497]

The problem is not with the criteria used in each centre but with the consistency with which such criteria is applied throughout all transplant centres.[498] Some transplant centres require a full history of the patient's use of drugs and other substances such as alcohol to determine that no drugs or other substances have been used for a specific period of time before placement on a waiting list. Other

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495 Kinkopf-Zajac 1996: 511.

496 Kinkopf-Zajac 1996: 513.

497 Kinkopf-Zajac 1996: 511-513.

498 Kinkopf-Zajac 1996: 517. Some transplantation centers have no policies at all and for this reason any patient who has the need for an organ transplantation, drastic or otherwise, will be placed on a waiting list without perhaps any medical testing or consideration of any factors.

centres will exclude patients from being placed on the list for any past or present use of drugs or alcohol or other illegal substances.[499]

Step 2: This is the moment when the doctor caring for the potential donor declares the donor brain dead and ready for organ donation.[500] Many countries today will still differ in their definition of brain death and this will inevitably cause problems if and when inter-country donations and organ transplants are to occur.[501] As discussed in an earlier chapter, The End of Life Decisions Act of 1999 of the Republic of South Africa defines brain death as follows:

> "2.(1) For the purpose of this Act, a person is considered to be dead when two medical practitioners agree and confirm in writing that a person is clinically dead according to the following criteria for determining death, namely-
>
> (a) the irreversible absence of spontaneous respiratory and circulatory functions; or
>
> (b) the persistent clinical absence of brain-stem function."

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499 Kinkopf-Zajac 1996: 514. Kinkopf-Zajac believes that this is one of the ways to maintain steady organ allocation to reliable recipients. She does not believe that if a patient has for example lost his liver due to alcoholic behaviour that he should be allowed to receive another liver to destroy again just like the original one.
The referral stage is also the stage in the organ procurement process where tragedy strikes and a potential donor is referred to an organ procurement organisation whose responsibility it is to find donors suitable for organ recipients. Prottas 1994: 25.

500 Prottas 1994: 25-29.

501 Prottas 1994: 25-29.

Step 3: This stage requires that family consent must be asked from the donor's family before any organs may be removed from such a donor.[502] In some countries the medical and hospital staff will still require the family of a deceased patient to consent to organ donation even when such a donor has stated his or her consent to donation before death. This is often done so that families can keep their faith in the system of organ donation and so that they can feel involved with the entire donation process.[503]

Step 4: This step involves various logistical tests to ensure that the organ to be transplanted is kept at the right temperature constantly and that the organ remains safe for transplantation and safe to be transplanted into the organ recipient.[504]

Step 5: This is the process whereby the organ is allocated to a specific organ recipient from the waiting list for transplantation via a point system where medical as well as social and economic criteria are taken into account in assessing the potential recipient's compliance with a transplant.[505]

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502 Prottas 1994: 25-29.

503 Prottas 1994: 25-29.

504 Kinkopf-Zajaz 1996: 517-518. Current limitations on the storage of human organs are such that an average adult kidney can be effectively stored for approximately 24 hours, a liver can be stored for approximately 16 hours and a heart can be stored for about 4 to 6 hours. Forsythe 2001: 48.

505 Kinkopf-Zajac 1996: 518.

Kinkopf-Zajac[506] from the Case Western Reserve University School of Law is of the opinion that in deciding who receives an organ for organ transplantation in step 5 of the organ procurement and allocation process, the potential recipient must be assessed to determine his or her ability to comply with post transplant treatment and to determine other factors such as whether or not such a potential recipient can afford to maintain such post transplant treatment or not.

Many times the side effects of immunosuppressive drugs, the expense of such drugs and sometimes the distance that has to be travelled to receive medical treatment and obtain the drugs at a transplant centre are cited by patients as reasons for not maintaining regular treatment routines.[507] For this reason it is essential to evaluate a patient's potential suitability to undergo an organ transplant as well as undergoing future medical treatment post transplantation. This method of determining who becomes an eventual organ recipient remains an option in decreasing organ demand but the problem is that identifying patients at risk of non-compliance with treatment procedures and routines is not easy.[508]

Evaluation criteria used by transplant centres and organisations must include an evaluation of the potential recipient's social support system and the role

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506 1996: 505-507.

507 Kinkopf-Zajac 1996: 508-517.

508 Kinkopf-Zajac 1996: 508-517.

of this support system after the transplant has occurred.[509] For example, will the patient, after transplantation, have the necessary support from medical staff, family and friends to help him or her through post transplant trauma such as infection from immunosuppressive drugs,[510] depression or other emotional feelings and further to be a constant presence in the life of such an organ recipient?[511] Is there a stable psychological and familial background for the patient in other words?[512]

Evaluation criteria should also include in depth research regarding the patient's financial status and medical history.[513] For example, will the organ recipient be able to afford the long-term medication needed after organ transplantation? Does the patient live close enough to the necessary medical facilities where such drugs can be provided and where necessary medical examination can take place on a regular basis? Does the patient have a history of drug or alcohol abuse or a history of sluggish compliance with medical treatments in the past or resistance to the taking of certain necessary medication? All these factors are essential in determining who receives an

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509 Kinkopf-Zajac 1996: 522-523.

510 One of the most common infections is post-transplant lymphoproliferative disorder which results in rapid enlargement of the recipients tonsils and cervical nodes and sometimes results in isolated or multiple tumors. Forsythe 2001: 233, 235. These infections can furthermore include viral infection due to new tissue in the body as well as severe systemic toxicity and as mentioned previously tremors, diabetes, hypercholesterolaemia and paraesthesia and neoplasia. Forsythe 2001: 67, 105.

511 Kinkopf-Zajac 1996: 514.

512 Kinkopf-Zajac 1996: 514.

513 Kinkopf-Zajac 1996: 522-523.

organ for transplantation and who does not. The allocation of organs to potential recipients is not simply a process of choosing the next patient who is first in line on the waiting list.[514]

Organ procurement organisations therefore play an extremely important role in the process of procuring organs from organ donors who would not, without being asked by such organisations, donate organs. It was determined that approximately 70% of all families who have lost a loved one would, if simply asked, give their consent to have their loved one's organs donated.[515]

Cherry[516] is of the opinion that legalising the selling of bodily organs will improve the status of health care by bettering the quality and life expectancy of patient's lives, shortening the time that a patient would normally wait on a transplant waiting list and saving hundreds of lives thereby. He also believes that legalising a market in human body parts will eventually decrease the high costs involved in organ transplantations from a medical point of view taking into account the actual costs of the transplantation,

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514 The Health Professions Council of South Africa has gone as far as placing certain responsibilities on patients regarding their own health in their National Patient's Rights Charter. Some of these responsibilities include taking care of ones own health, to use the health care system properly and not to abuse it, to provide health care providers with relevant and accurate information for diagnostic, treatment, rehabilitation or counseling purposes, to comply with the prescribed treatment or rehabilitation procedures, to enquire about related costs of treatment in order to arrange payment therefore and to inform health care providers regarding a person's wishes after death.
http://www.hpcsa.co.za: 5/10/2006. These responsibilities placed on the patient him or herself will go a long way, if adhered to by the patient, in ensuring that organ transplantations and treatment after such transplantations is truly as successful as possible.

515 Prottas 1994: 10.

516 2005: 74-75.

hospital costs and the costs involved in continually taking immunosuppressive drugs and will make organ transplantations more affordable for any class of citizen.[517]

Cherry[518] further mentions five positive aspects related to a potential trade in bodily organs. These can be summarised as follows:

a) Health costs can be considerably reduced the sooner a patient can receive the necessary organ as other medical treatment, for example dialysis treatment for patients with kidney problems, will then no longer need to be supplied to such a patient.[519]

b) The running of organ procurement organisations is also not fully supported through charitable donations and therefore if such organisations are not needed because of an increase in organ donations then those funds usually made available for such organisations can now rather be spent on purchasing organs for needy patients.[520]

c) Such a market would decrease costs arising from traditional altruistic donations because it is presumed that more and more healthy

[517] Cherry 2005: 80.

[518] 2005: 81.

[519] Cherry 2005: 81.

[520] Cherry 2005: 81.

potential donors will exist and such an increase will minimalise medical complications in potential donors which will in turn decrease financial costs involved while testing such donors to check their health status and compatibility with the potential recipient.

Usually after tests have been carried out on potential donors, if such donors can then not donate organs because of medical issues or non-compatibility of organs with the potential recipient, there lies an increase in financial costs due to the fact that such tests are run at a loss to the organ transplantation process because the organs can then not be used.[521]

d) Private people selling their organs provide for more available funds to supply better health care in general.[522]

e) An organ market allows recipients to seek better tissue matches with potential donors which lowers future long-term financial transplantation costs. This is because long-term treatment following organ transplantation is less financially demanding for patients with better matched organ donors by a total of 34%.[523] Better matches in tissue between organ donor and organ recipient occur because living donors can be tested properly before the donation whereas cadaveric

[521] Cherry 2005: 81.

[522] Cherry 2005: 81.

[523] Schnitzler *et al* 1999: 1440-1446.

organs must be transplanted immediately while the organs are still functioning correctly.[524]

Because the transplanted organ is foreign tissue the immune system of the body has the natural reaction of attacking the transplanted organ to destroy this foreign tissue.[525] It is for this reason that immunosuppressive drugs need to be taken by all organ recipients for the rest of their lives, or for however long the organ stays fit within the body, to attempt to stop the body's process of natural rejection of the organ.[526]

These drugs do not have the effect, as general antibiotics do, of weakening the entire immune system of the organ recipient but they do have the effect of still making the body weak against serious infectious diseases.[527] These immunosuppressive drugs do, however, also cause many unwanted side effects such as change in physical appearance, large amounts of fat deposits and increased growth of facial and bodily hair.[528] Patients who have received organs are therefore required to continuously take care to avoid infection and communication to doctors and family members about the

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524 Cherry 2005: 81.

525 Prottas 1994: 6.

526 Prottas 1994: 6; Kinkopf-Zajac 1996: 508-517.

527 Prottas 1994: 6.

528 http://www.odf.org.za/pages/facts.htm?sm=f_c: 29/05/2006. The first drugs ever used as immunosuppressive drugs were azathioprine and prednisone. These drugs had the effect of weakening the organ recipient's entire immune system as well as having terrible toxic side effects. Today the natural product cyclosporine is used as the immunosuppressive drug of choice. This drug has a less drastic effect on the immune system and other parts of the body.

slightest infection are crucial in preventing deadly harm to the organ from rejection within the body.[529]

The survival rate of the recipient of a heart transplant, similarly to kidney and liver transplants, after 1 year is over 80%.[530] In Europe there is a 70% five-year survival rate for people undergoing organ transplantations of any kind.[531] After a period of 5 years the survival rate usually decreases to 60% although the survival rate is different for different patients taking into consideration the age of such patients, the general health before the transplant and the effect that immunosuppressive medicines have on the patient.[532]

In South Africa statistics gathered by the Organ Donor Foundation show that after 1 year all patients who have undergone a kidney transplant are physically doing very well.[533] After 5 years this percentage drops to approximately 60% of these patients still doing well physically. It has been stated further that some kidney patients even survive for more than 25 years with the same kidney after a kidney transplant.[534] For livers the survival rate

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529 Kinkopf-Zajac 1996: 506.

530 Prottas 1994: 2. In South Africa the survival rate for a heart transplant is 85 % 1 year after transplantation which then decreases to 70 % after 5 years.

531 http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9822.htm: 21/02/2006.

532 Prottas 1994: 3.

533 http://www.odf.org.za/pages/stats2.htm?sm=f_a: 29/05/2006.

534 http://www.odf.org.za/pages/stats2.htm?sm=f_a: 29/05/2006.

is 80% after one year and decreases, similar to kidneys, to 60% after 5 years.[535]

High costs of organ transplantation

Another major problem with organ transplantation is the huge medical costs involved in the actual transplantation itself. This is mainly because of the extreme costs of surgeons and other medical staff performing transplantations and the cost of post-transplantation immunosuppressive medicines.[536] Compared to these costs the price of buying an organ would be but a fraction of the actual costs of the organ transplantation.[537]

Organ transplants from animals to humans

The organ shortage has led to medical practitioners considering the transplantation of organs from animals to humans. This process is commonly known as xenotransplantation.[538]

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535 http://www.odf.org.za/pages/facts.htm?sm=f_c: 29/05/2006.

536 Kishore 2005: 365.

537 Kishore 2005: 365. Kishore believes that one of the ways to reduce the high costs of organ transplantation would be government regulation of the fees paid to surgeons and medical staff involved in the transplantation as well as reducing the costs of medical care and treatment post-transplantation.

538 http://www.centerspan.org/tnn/0006151.htm: 26/05/2006.

The Department of Health and Human Services in the United States of America has defined xenotransplantation as follows: "The implantation or infusion into a human recipient of either (a) live cells, tissues or organs from a nonhuman animal source or (b) human body fluids, cells, tissues or organs that have had external contact with live nonhuman animal cells, tissues or organs."[539]

The second explanation of what xenotransplantation is cannot truly be recognised as transplantation as defined by Machado[540] and therefore for purposes of true transplantation the first explanation of xenotransplantation is preferred.[541] King and Smith[542] define xenotransplantation as the transplantation of human tissue or organs from one species to another. This definition given by King and Smith is also an acceptable definition of xenotransplantation for purposes of this dissertation.

One would presume this is a rather controversial issue regarding the rights of animals and human dignity itself not to mention the serious concern of infectious disease from the animal donor to organ recipient with an already weakened immune system.[543] If these weaknesses in the human immune

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539 http://www.centerspan.org/tnn/0006151.htm: 26/05/2006.

540 1998: 15.

541 Machado defined transplantation to be the therapeutic replacement of an organ or other bodily tissue which has irreversibly failed to function property with that of a healthy organ or body tissue which is functioning in the proper manner. Machado 1998: 15.

542 1998: 6.

543 http://www.centerspan.org/tnn/0006151.htm: 26/05/2006. It is thought by some, however, that this process will be less controversial where these animals are already slaughtered to be used for

system could be overcome then one would have to find a suitable donor for the human body. Such a donor would need to produce rather rapidly and easily to keep up with the demand for organs while at the same time being relatively low maintenance and low budget to keep alive and well. Such a donor will also have to be of adequate size in relation to the human body.[544]

For this reason the pig is receiving a lot of media attention regarding xenotransplantation because a pig's organs fit human organs in size and functioning the best when compared to other animals. Pigs also produce large litters of young piglets which mature at a rate fast enough to maintain the organ supply.[545]

However, this procedure has been performed in recent years and medical science is advancing everyday to better xenotransplantation immunosuppressive reactions in humans.[546] Scientists have developed a way in which they can manipulate the human body into not recognising the foreign pig tissue and withstanding it better. This is done by cloning pigs so they lack a substance known as 'gal epitone'[547] which is the major target of

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daily human consumption. Ye *et al* 1994: 695.

544 Ye *et al* 1994: 695.

545 http://www.odf.org.za/pages/facts.htm?sm=f_c: 29/05/2006. Brain cells from fetal pigs have already been used successfully in the treatment of Parkinson's disease and semi permanent liver transplants for the removal of waste material from a patient whose own liver is still in the recovery process.

546 Forsythe 2001: 92; http://www.who.int/transplantation/issues_of_concern/en/index.html: 26/09/2006.

547 Gal epitone is a specific galactose antigen that is present on pig and most mammalian cells but not on the cells of human beings. Forsythe 2001: 92.

antibodies in the human body post xenotransplantation.[548] Although this technology is still not advanced enough to offer what normal organ transplantations offer, the possibilities of one day using animal organs to sustain the organ supply is being realised fast.[549]

Organ transplants using embryonic stem cells, processes of human cloning and mechanical organs

Stem cell research[550] and other medical research such as cloning human beings to produce and increase the supply of organs for transplantation as well as creating artificial tissue and organs generate further ethical controversies.[551]

There is also the possibility of producing and creating human organs and tissues from embryonic cells and umbilical cord tissue.[552] In Connecticut, United States of America, a patient's bladder was replaced with her own tissue cells that had been grown in a medical laboratory by placing the cells

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548 http://www.sky.com/skynews/article/0,,15410-13433619,00.html: 25/04/2006.

549 Forsythe 2001: 92; http://www.who.int/transplantation/issues_of_concern/en/index.html: 26/09/2006.

550 Stem cell research is conducted on tissue and cells removed from the umbilical cord of newborn babies to produce possible treatments for diseases. Tissue is also currently used from aborted fetuses in the treatment of Parkinson's and Alzheimer's disease. Halstead and Wilson 1991: 2.

551 King and Smith 1998: 6.

552 Romeo-Casabona 1999: 205-207.

over a man-made bladder mould and allowing the cells to grow gradually.[553] This method of growing tissue for transplantation has previously been successful in organs like skin, bone and cartilage. It is however still unclear whether such medical technology could be used in the growing of bigger organs such as kidneys and livers.[554]

Further possibilities include the manufacturing of mechanical organs to take over functions of human organs that have ceased to operate effectively. For example an 18 month old baby was only the second child to ever be given a mechanical heart, often called a Berlin heart, to survive until doctors could find her a real heart donor. The heart took over all the normal functions of a real heart and the girl survived for a month on this mechanical heart until she received a real heart transplant.[555]

Regarding the ethical aspects of such experiments to increase the amount of available organs for transplantation, the Nuremberg Code[556] states under the paragraph relating to permissible medical experiments that voluntary

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553 http://www.sky.com/skynews/article/0,,30200-1217604,00.html: 25/04/2006. With regard to using embryonic cells and umbilical cord tissue to create or grow organs for transplantation, section 57(2) of the National Health Act 61 of 2003 of South Africa mentions that the Minister of Health may permit therapeutic cloning utilising adult or umbilical cord stem cells. Therapeutic cloning is then defined in section 57(6)(b) as the manipulation of genetic material from either adult, zygotic or embryonic cells in order to alter the function of cells or tissues. When this section finally comes into effect it could be an enormous boost for transplant divisions and networks wishing to increase the organ supply.

554 http://www.sky.com/skynews/article/0,,30200-1217604,00.html: 25/04/2006.

555 http://www.sky.com/skynews/article/0,,30000-13510850,00.html: 25/04/2006.

556 http://www.hhs.gov/ohrp/references/nurcode.htm: 23/10/2006.

consent of the human subject is absolutely essential when undertaking such experiments.[557]

The International Ethical Guidelines for Biomedical Research Involving Human Subjects[558] also requires in guideline 1 that the individual being the subject of biomedical research must give informed consent, obtained from the investigator. Guideline 3 then goes further into the issue of informed consent of the subject of biomedical research listing the duties of the investigator in obtaining informed consent.[559]

7.3 A moral and ethical "slide" in values?

Traditionally, as can be deduced from the quotes to follow, medical associations and human rights groups around the world have condemned the

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557 It is mentioned under this code that such voluntary consent means that persons involved with such medical experiments must have the legal capacity to consent to such experiments, must be able to exercise free power of choice without force, fraud or being placed under duress and such persons must have sufficient knowledge and comprehension of such experiments to enable him or her to make an enlightened decision. Such consent to medical experiments can also be said to be governed in South Africa by numerous pieces of legislation, such as, for example, section 7(3) of the National Health Act 61 of 2003. These relevant sections regarding consent will be discussed further in a later chapter.

558 http://www.fhi.org/training/fr/Retc/pdf_files/cioms.pdf: 24/10/2006.

559 Guideline 3 lists the six duties of the investigator as follows:
- communicate to the prospective subject all the information necessary for adequately informed consent;
- give the prospective subject full opportunity and encouragement to ask questions;
- exclude the possibility of unjustified deception, undue influence and intimidation;
- seek consent only after the prospective subject has adequate knowledge of the relevant facts and of the consequences of participation, and has had sufficient opportunity to consider whether to participate;
- as a general rule, obtain from each prospective subject a signed form as evidence of informed consent; and
- renew the informed consent of each subject if there are material changes in the conditions or procedures of the research.

buying and selling of human organs. The World Health Organisation declares the commercialisation of human organs to be "a violation of human rights" and "human dignity".[560]

Kishore[561] is of the opinion that the act of providing an organ, through altruistic donation or sale, and thereby saving the life of a person who would otherwise have suffered endlessly or even died cannot be said to violate human dignity. She further states that the organ donor who sells his organs, though acting selfishly for his own benefit, knows he is saving a life and is therefore benefiting his community and the specific life of the person he is saving. This donor is therefore not acting maliciously and is not of the opinion that he is harming any human life or any constitutional right to dignity or healthcare.[562]

Some people in the medical profession have named this still unethical practice "human spare part trade".[563] The International Commission of Health Professionals for Health and Human Rights,[564] based in Geneva, described it as a "vile, deplorable and morally reprehensible

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560 http://www.flonnet.com/fl1907/19070740.htm: 14/07/2005.

561 2005: 363-365.

562 Kishore 2005: 363-365.

563 The Statesman (India): 2004.

564 Since its establishment in 1987 the objective of this non-governmental organisation has been to promote human rights in the health care system and to ensure patient integrity. The organisation consists of health and health-related professional worldwide that provide and endeavour to maintain high moral standards related to health care. http://www.un.org/esa/documents/ecosoc/c2/1995/ec21995-3.htm: 27/09/2006.

development".[565] Some people even use the terms "prostitution of the human body".[566]

7.4 Conclusion

After assessing various medical possibilities such as cloning, the use of stem cells and xenotransplantation as methods to increase organ supplies for future organ transplants it is necessary to move on to explore methods of increasing the number of organs available for transplantation in society today. The above medical procedures are still today deemed to be very unethical methods to increase the organ supply.[567] With this said the following chapter will depict further methods some of which today are not either fully recognised as ethical methods in procuring organs even though not all of these methods are illegal.

Chapter 8

Innovative ideas and opinions in increasing organ donor figures

8.1 Introduction

[565] The Statesman (India): 2004.

[566] The Statesman (India): 2004.

[567] http://www.centerspan.org/tnn/0006151.htm: 26/05/2006.

Keeping in mind the ethical and moral issues mentioned throughout this dissertation, this chapter highlights specific ways in which the organ supply can be increased to a level acceptable to meet present demands for such organs. Methods are also indicated on how proper distribution of bodily organs can be maintained without diminishing basic human rights and without exploiting the poorer members of society. It is worthwhile mentioning that all of the methods discussed in this chapter should not be sought individually but that these methods should be used collectively as a way in which to increase organ supplies.

8.2 Rewarded gifting

8.2.1 India

People in India are challenging the government to revise the Transplantation of Human Organs Act of 1986.[568] The Indian Society for Organ Transplantation has gone as far as to suggest monetary compensation to donors of organs. Dr. K.K. Malhotra, president of the society and senior consultant, said: "Several countries in the West have adopted the practice of giving some kind of incentive to donors, be it in the form of wages for the number of work days lost in the course of the operation or health insurance for the donor or a family member in case of cadaver transplants."[569]

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568 The Times of India: 2004.

569 The Times of India: 2004.

Dr. R.V.S. Yadav, former president of Indian Society for Organ Transplantation, stressed that it was not right to expect a donor to give a part of his body without any incentive. "The Organ Transplant Act[570] is a verbatim copy of the British Act,[571] which does not take into account the fibre of the Indian society or the economic differences between the two countries," he pointed out.[572] According to Yadav, once the law "recognises such compensations, the availability of organs would increase and the concept of organ trade will no -longer exist."[573] He added: "There is also the need to promote cadaver donations."[574] Payment made to such cadaveric donors can then be paid, after subtracting funeral expenses and other medical expenses, into their estates for use by the surviving spouse and his children or used to contribute to charity organisations.[575]

8.2.2 Canada

The Quebec Government is exploring the idea of compensating organ donors financially for living organ donation as well.[576] Such ideas create a fine line between organ donation and organ trade. However, officials from

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570 Referring to the repealed Transplantation of Human Organs Act of 1986. This Act was replaced by the Transplantation of Human Organs Act 42 of 1994 of India.

571 Referring to the repealed Human Organ Transplant Act of 1984 of Britain. This Act was replaced by the Human Tissue Act of 2004 of Britain.

572 The Times of India: 2004.

573 The Times of India: 2004.

574 The Times of India: 2004.

575 http://www.organselling.com/index.htm: 13/12/2006.

576 The Toronto Star: 2003.

the Quebec Health Department mentioned that such compensation will not be for the payment of organs but for the payment of losses suffered by the organ donor by way of, for example, loss of income for the number of days needed for recovery after donating an organ and any other expenses that might arise as a result of the organ donation. They are adamant that the idea behind such compensation is not to create a market in organ trading. These ideas and opinions arise from shocking statistics that only approximately 15% of kidney transplants in Quebec for 2004 came from living organ donors.[577]

8.2.3 United States of America

A survey conducted by the National Kidney Foundation in America indicated that support for financial compensation to donors has increased amongst American citizens. The survey conducted in 1992 indicates that there has been an increase in citizens willing to donate organs for compensation even though the increase, when compared to the actual percentages, does not truly reflect this.
The results of this survey are indicated in table 4 below:[578]

Table 4:

[577] The Toronto Star: 2003.

[578] Prottas 1994: 73. This table is presented as it appears in Prottas' book "The most useful gift".

POLICY	Percentage of respondents expressing strong support		
	Willing donors	Persuadable donors	Unwilling donors
There should be national support for intensive public education.	44	31	14
Donor families should get priority for transplantation.	27	18	17
Donor families should get tax credits.	14	7	8
Donor families should get cash payments.	9	8	5
Required request laws should be implemented.	25	17	7
Presumed consent laws should be implemented.	7	2	3

The only fact these statistics do clearly show is that there is a lack of public knowledge regarding the availability of organs, the organ transplantation process and the organ procurement process. Also what is obvious is that certain types of payments are viewed more acceptable than others. For example tax credits and charitable contributions, though still indirectly a cash payment, are viewed more favourably than an actual cash payment.[579]

[579] Prottas 1994: 74.

Listed below are numerous methods that can be used in attempting to increase the supply of organs nationally as well as globally. These ideas are divided into methods to increase living organ donations and methods to increase cadaveric organ donations.

8.3 Other methods to increase living organ donations

The use of living unrelated donors is likely to be the most effective way of reducing the demand for organs and shortening organ transplantation waiting lists.[580] For this reason it is most important that we endeavour to increase living organ donors now more than ever. It is further important to remember that living donors donate 'fresh' organs which are more likely easier to transplant and makes survival rates for such transplantations much higher than cadaveric organ transplants.[581] Cherry[582] adds to this fact by reminding us that by procuring organs only from deceased donors means that not only is the vitality of the organ decreased but one looses valuable screening opportunities which could assist medical practitioners in of course making better tissue matches between organ donors and recipients.

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580 Larijani, Zahedi and Ghafouri-Fard 2004: 2539.

581 Cherry 2005: 81.

582 2005: 153.

8.3.1 National organ donor registry

The first solution in combating organ trafficking and increasing the organ supply, especially in South Africa, is to create an effective national organ donor registry.[583] People willing to donate their organs can even be paid a certain fixed monetary amount to register with an organ donor foundation for purposes of future organ donation.[584]

A further possibility is that living donors, after donation, or people signing the registry, who will be donating after death, can be immediately placed at the bottom of the waiting list as potential organ recipients. As they near the front of the list they can be bypassed until such a future time when they will also possibly be in need of an organ transplant. This will ensure that unfair distribution is not a factor in affording an organ donor the opportunity of receiving an organ on the basis of him or her previously having donated an organ or expressing the willingness to donate an organ.[585] If, however, a

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583 According to information provided in 2006 by the Marketing Coordinator of the Organ Donor Foundation of South Africa, Samantha Volschenk, there currently does not exist a National Donor Registry and people wishing to donate organs must discuss such donation with a family member or contact the Foundation to be issued a donor card which must be completed by the donor and placed in an area which is easily accessible if he or she is in a situation where donation is possible, for example a motor vehicle accident.

584 Haddow 2006: 325. A study done by Haddow including interviews with nineteen Scottish families who's deceased family members had all donated organs generally preferred the system of presumed consent to organ donations above financial incentives. This system of presumed consent in a particular country assumes that all citizens in that country will be organ donors. If the citizens do not wish to donate their organs, either will living or after death, they specifically need to opt-out of the donation process.

585 In Singapore, which has currently adopted a presumed consent law, an organ donor is given priority when it comes to receiving an organ if he or she is in need based on the fact that he or she has previously donated an organ themselves. Bagheri 2005: 4161.

potential donor decides to remove him or herself from the donor registry, they will also be immediately removed from the waiting list for potential organ transplants.

Such a national organ donor registry will additionally increase the chances of organ procurement organisations in finding suitable organ donors to match potential recipients because of the fact that all the medical information needed to match donor with recipient will be in a fixed database.[586]

8.3.2 Education regarding organ donation

One way to improve communication and knowledge in the issue of procuring more human organs for transplantation is via public educational programmes where organ donation and its positive effects on society must be emphasised.[587] Educational programmes can also be used to decrease organ demand by teaching people to live healthier lives and take responsibility for their own bodies and the effect that their lifestyles and activities have on their bodies and bodily organs.[588]

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586 Calandrillo 2004: 128 and Machado 1998: 47. The idea of creating a national organ donor registry can work equally well when procuring cadaveric organs for donation.

587 Prottas 1994: 75.

588 Cherry 2005: 76.

Calandrillo[589] is further of the opinion that if hospital staff and health care workers were better trained to request donations from the deceased's family members while such families are in the grieving process that this would stimulate an increase in organ donations and better develop donor management processes. Often this problem causes potential donors to go unnoticed and potential organ transplantations are then never realised. He believes that society needs to be educated about the shortage in organs available for transplantation and that people need to realise that the many myths surrounding organ donation are just that – myths.[590]

People need to be given guidelines as to who may donate organs, which organs can be donated, which organs can be donated while one is alive and which can be donated only after death and in general simply educated about the specific medical procedures and processes of organ donation and transplantation. Further if people would like to donate their organs while they are alive, they should be specifically told about all the potential risks of donating or selling their organs so that donors can make a truly informed choice about organ donation so as not to regret it in the future.[591]

8.3.3 Compensating a donor for actual expenses and pain and suffering

589 2004: 70.

590 Calandrillo 2004: 129.

591 Calandrillo 2004: 102. This idea of educating the public about organ donation and transplantation can also work equally well when procuring cadaveric organs for donation.

In contrast to the restrictive approach to costs and expenses, a small number of countries actually require donors to be compensated for their out of pocket expenses. Section 4(2) of the Belgian legislation, for example, requires the state to provide for the compensation of living donors at public expense to cover the costs and loss of income directly resulting from the provision of an organ. [592]

In France article 665-13 of the decree[593] on the reimbursement of expenses incurred during the removal of elements or the collection of products of the human body for therapeutic purposes, requires the health care establishment carrying out the removal to reimburse the donor for the costs of transportation and accommodation and, where appropriate, lost remuneration.

Similarly, the Spanish legislation states that resources shall be made available to ensure no hardship is caused to the living donor or the family of a deceased person.[594] Section 18 of the Sickness Insurance Act[595] of Finland

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592 Decree No. 2000 – 409 of 11 May 2000 (see IDHL 2000) and Article 665 – 13. This legislation cannot be found in the translated English language and is only accessible in French.

593 Decree No. 2000 – 409 of 11 May 2000.

594 S. 2 and Crown Decree No. 426 of 22 February 1980, S. 5. This decree is only available in Spanish and French and no English translation is available to refer to.

595 Act 364 of 1963. Section 18 of the Act on the Medical Use of Human Organs and Tissues, Act 101 of 2001 also refers to section 18 of the Sickness Insurance Act 364 of 1963 and states: "The donor of an organ of tissue who suffers lack of incoem for a whole day because of removal of an organ or tissue as referred to in this Act to meet a vital transplantation need or for essential related tests and examinations, and does not get paid or receive corresponding compensation for this period, is entitled to a daily allowance as provided concerning daily allowance in the Sickness Insurance Act (364/1963)."

is slightly less generous but nonetheless provides that an organ donor who loses income for a whole day and does not receive compensation is entitled to a daily allowance.

Section 60(4)(a) of the National Health Act[596] of South Africa will, once it comes into effect, also allow for the reimbursement of reasonable costs incurred by the donor to provide such donation. However, this section is not clear on what the term 'reasonable costs' will include or exclude and future clarity on subsection (4)(a) will be needed.

Surgeons and ethicists at the Meeting of the American Organ Transplantation Association said the goal of offering some compensation to families of deceased donors would be to increase the supply of organs without driving away people who are willing to give organs for free.[597] This once again emphasises the fact that a system of compensating organ donors for donated organs can and should exist side by side with a system of altruistic organ donation.

Jeffrey Kahn,[598] director of the Center for Bioethics at the University of Minnesota in Minneapolis, brings up the question of whether financial incentives to donors will inevitably lead to more donations of organs. A survey questioning the possibility of incentives leading to increased organ

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596 Act 61 of 2003.

597 http://organtx.org/ethics/sales/sales.htm (Yahoo): 20/09/2004.

598 Garwood-Gowers 1999: 194.

donations was conducted and it indicated a 12% to 52% support for these incentives.[599] However, this survey is not conclusive and it is clear from the above survey that the disparity in the percentages listed is considerable.

Another survey was conducted by Reed[600] and it was found here that only 17% of respondents would change their minds about organ donation and reconsider such donation if financial incentives were attached to the donation process. Of this 17%, 12% said they would be more likely to donate if there were financial incentives involved, while only 5% said they would be less likely to donate organs.[601]

In comparison to Kahn's and Reed's statistics are the statistics presented in an article written by Barnett and Kaserman.[602] These statistics showed that people who originally would not have donated any organs or tissue were more likely to donate such organs or tissue if they were given financial incentives for it. As opposed to incentives to donors, Barnett and Kaserman[603] focus more on the lack of incentives for physicians and other medical practitioners in an effort to request organs from cadavers on permission from relatives. In their article, "Improving Organ Donation:

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599 http://organtx.org/ethics/sales/sales.htm (Yahoo): 20/09/2004.

600 1994: 39-45.

601 Reed 1994: 39 – 45.

602 1992 : 372.

603 1993: 117.

Compensation Versus Markets", Barnett and Kaserman[604] suggest a 'free functioning' market system with procurement companies receiving incentives to collect as many organs as profitable and donors in turn will then profit from donating.

Kahn[605] believes that funeral reimbursements to the organ donor or payment for loss of earnings and travel expenses will keep the altruism aspect of organ donation alive and will not have the effect of commercialising organ donating. Such kindnesses to the donor could also curb the supposed "slide in values" that could occur in the trade market for human organs.[606] Kahn further says the following about the present system of free voluntary organ donation: "The system is built on a fragile trust that cannot withstand the prospect of classified ads and online auction sites for human organs alongside antiques, art and sporting goods."[607]

This concept of compensating persons for organ donation or involvement in the organ donation process could also work in national hospitals by giving incentives to nurses and medical practitioners who are capable of and actually do eventually procure the largest number of organ donors in for example one month. This could lead to nurses and medical practitioners being willing to more often inquire from the deceased family whether or not

604 1992: 372.

605 Garwood-Gowers 1999: 194.

606 Garwood-Gowers 1999: 194.

607 Pretoria News: 2003.

they have considered organ donation of the deceased family member's bodily organs. By giving incentives to nurses and medical practitioners they will be prompted to encourage family members about the benefits of donating the deceased family member's organs and future benefits of themselves becoming organ donors. [608]

It must, however, be kept in mind that once such incentives are offered to nursing and medical staff they will possibly make greater attempts, not always in the best interests of the deceased or his or her family, to prompt families of deceased persons to have such person declared legally and medically dead. Therefore in implementing such provisions it must be ensured that the deceased person and their families' best interests are maintained at all times.

8.4 Methods to increase cadaveric organ donations

8.4.1 Transplant or donor cards

Another idea for the increase in organ donation brought by Thukral and Cummins[609] is that of a "transplant card". The card holder would therefore

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608 Numerous other ideas exist for the compensation of donors as to not exploit only the poor in society. For example donors could be given tuition subsidies for their children, reduced medical aid prices and their payment can even be placed in the donors favourite charity if they so wishes. Prisoners in the Philippines, where the commerce in human organs and tissues is legal, receive a reduced sentence upon donating a kidney for example. Halstead and Wilson 1991: 4, 6.

609 1990: 194.

be an organ donor as well as being eligible for receiving organs in the order in which he signed up for the "transplant card". The primary aim of this card is to not only to increase organ supplies for transplantation but to provide organs to needy patients via equitable allocation of organs to those patients already owning the "transplant cards".

This method can then be used to provide organ donors with the certainty of future organs being given to them when they need it as opposed to giving such an organ donor financial compensation for his donation. Similarly all drivers should have their organ donor status printed on their driver's license and if they refuse they may not receive an organ donation themselves.[610] This might seem like a harsh penalty for not becoming an organ donor but the reality is that if no one donates organs there will be no organs available to organ recipients for transplantation, regardless of whether such recipients are organ donors or not.

A cash discount on the state driver's license can also be offered to everyone who agrees to become an organ donor.[611] Another idea to increase the organ supply is by providing organ donors tax benefits or tax breaks if they donate their organs or sign donor cards to be organ donors after death.[612]

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610 Garwood-Gowers 1999: 184.

611 Garwood-Gowers 1999: 184.

612 Prottas 1994: 75.

This process of compensation uses monetary incentives without putting a price on life or the human body. However, this proposed method to increase organ donation is not without flaws. The financial and administrative infrastructure needed to maintain this method of procuring organs would be astronomical. Another problem would be the unequal and unconstitutional denial of organs to patients who have, not due to reasons on their part, not signed up for the "transplant card". It is also believed that 5 years ago 20% of the American population already own normal donor cards but only 10% of these potential donors actually have this card in their possession when an emergency occurs and the need for the use of their organs for transplantation arises.[613]

Therefore Thukral and Cummins's idea concerning a "transplant card" can only work if card holders are in actual possession of the card when an emergency occurs. Another difficulty with the "transplant card" is that families of deceased members often object to the removal and use of organs and tissue from their loved one's body. Although their consent is no longer necessary for legal removal of the organ because the donor had already consented, such removal without the consent of the family involved gives the donation process a bad reputation for future donors.[614]

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613 Forsythe 2001: 7.

614 Halstead and Wilson 1991: 3.

Further O'Niell[615] comments on the donor card system by saying the following:

> "There is no legal contract established and, in the language of the law of contract, making such an indication only represents an invitation to treat. It is extremely unlikely under a system of voluntary consent that any transplant surgeon would remove a deceased individual's organs solely on the basis of a signed donor card or licence. The accepted practice is to seek permission for the donation of organs from next-of-kin."

In South Africa there exists a similar problem regarding the donor card that is signed by South African citizens. As was pointed out in the discussion regarding a national organ donor registry and by O'Niell above, South African citizens are not legally bound to future organ donation by filling in an organ donor card. They cannot be traced through any organ donor registry and the donor card can be discarded at any time. Adding to this problem is the fact that even if the donor card is kept in tact and found by medical practitioners at the scene of an accident, the donor's family still have the final say in whether they consent to that donor donating organs or not.

From the above it is concluded that some permanent form of donor registration and tracking needs to be implemented to ensure that donors who

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615 Discussed by Machado is the article 'Organ Donation and Transplantation: An overview of current ideas and emergent practices.' written by R. O' Neill from the University of Western Sydney, Australia. Machado 1998: 45.

sign donor cards and enter onto donor registries are more effectively bound to organ donation and that families of donors are explicitly made aware of the fact that the organ donor wishes to donate his or her bodily organs.

8.4.2 Future's market or donation contracts

What is called a 'future's market' in human organs is yet another example of how the regulated organs trade can be successful.[616] This market works by allowing people interested in donating organs to sign a contract authorising the removal and transplantation of their organs once such a person is deceased. The contract, however, consists of the selling of these organs while the person is still alive and once the contract is signed such a person will receive money, either on a monthly basis or in a once off payment, for the future sale of his or her organs.[617]

The amount for which the organ is sold could, as suggested above, be divided up into monthly payments made to the donor which can be used while the person is still alive. This ensures regular contact with the transplant organisation which will guarantee the future donation of the organs. If the contract is breached or the donor no longer wants to donate his organs after death a repayment for the value that has been paid to date, at interest, can be made to the transplant organisation.[618]

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616 Calandrillo 2004: 108; http://www.organselling.com/index.htm: 13/12/2006.

617 http://www.organselling.com/index.htm: 13/12/2006.

618 http://www.organselling.com/index.htm: 13/12/2006.

This system has the following advantages: [619]

- It ensures that people do not sell their organs simply because of a need for monetary compensation.
- This proposed system, if regulated properly, should eliminate the possibility that people will be murdered for their organs to be sold on the black market.
- The decision to donate is made well ahead of the time of death which removes the unpleasant process of gaining consent from family members at the time of death before being able to harvest and transplant the organs.
- Because the decision is made years before the actual donation takes place it ensures that donors make a rational choice at a non-stressful time in their lives about donating organs.[620]

Cohen[621] has also discussed the possibility of a future's market in cadaveric donation where donors during their life-time determine what they will do with a sum of money, resulting from donation, placed in their estate upon their death. He says: "I can think of no reason why anyone who now signs

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619 http://www.organselling.com/index.htm: 13/12/2006.

620 Halstead and Wilson 1991: 6. Blumstein agrees with such future's markets or donation contracts and says that by compensating the donor of an organ or organs one is respecting and validating the right of the seller to sell and the buyer to buy and enter into a contract with one another while saving the recipients life. He states further that the seller of an organ is in no way being benefited by making such sales illegal. Blumstein 1993: 18, 23.

621 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004; 1993: 60-61.

an organ donor card would decline to do so if informed that in the process they could also specify their designee, which could be a charity, who would receive a sum of money as a result."[622]

Slabbert[623] suggests that while alive, a person draw up a legally binding contract that one's organs may be used after death and that proceeds of selling organs should go into one's estate to be administered by the deceased executor as assets of the deceased. This can be linked to the idea of a future's market as well.

Blumstein[624] similarly agrees with this idea of contractualising the selling of bodily organs and is of the opinion that this process will ensure that everyone's interests are taken into account by creating contractual rights for the donor, the organ broker and the organ recipient. He says the following about legalising the organ trade through the use of the law of contract: "The existence of a legally enforceable contract and the existence of enormous lifesaving stakes once there is an identified beneficiary creates tremendous counterforce to the current system."[625] By "current system" Blumstein[626] is embracing all forms of organ procurement policies and organ transplant

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622 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004; Cohen 1993: 60-61.

623 http://www.guardian.co.uk/uk_news/story/0,3604,1098522,00.html: 21/03/2004.

624 1993: 12. James Blumstein is a Professor of Law at the Vanderbilt University School of Law.

625 Blumstein 1993: 13.

626 1993: 13.

organisations as well as organ allocation policies and any legislation dealing with organ transplantation issues.

However, when looking at such future markets or donation contracts one has to also consider the *boni mores* and public policy regarding such markets and contracts. Traditionally society's feelings regarding such markets and contracts are feeling of revulsion at the thought of violating people's human rights by selling bodily organs or having people enter into donation contracts.[627] Cherry[628] is however of the view that one must determine whether such generalised feelings of repugnance are justified. He says that more often than not such *boni mores* and public policy are merely subjective and he concludes further that feelings depicting or motioning towards the inappropriate nature of organ sales and markets can be equally countered by feelings showing strong regard to such donation contracts and future markets.[629]

8.4.3 Presumed consent

A method of presumed consent to organ donation can be established when the donor is unable to consent and his or her prospect of survival is slim to none.[630] This presumed consent will only apply where the potential donor

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627 Cherry 2005: 40.

628 2005: 41.

629 Cherry 2005: 41.

630 Prottas 1994: 14. According to Prottas "presumed consent" means that the law presumes that

concerned has not previously stated his or her non-consent to organ donation.[631]

Belgium was the first country in the world to adopt presumed consent laws and to establish a fully functional computerised network in 1987 in which citizens could specifically object to organ donation or specifically consent to such organ donation.[632] In other words, the idea of presumed consent is that all citizens in a given country will be placed on an organ donor registry to become organ donors unless they specifically opt-out of the organ donation process. This system created a feeling of trust between society and medical practitioners and society grew to accept this form of consent without complaint.[633]

Rhonda Hartman[634] from the Center for Bioethics and Health Law at Pittsburg University believes that presumed consent would most likely lead to an increase in organ supplies because of the fact that people would lack sufficient knowledge to make an informed decision about organ donation. She further states that such presumed consent would relieve the burden of deciding to donate or not to donate that is placed on families who have just

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consent would be given if asked for and so allows the procurement to go forth unless the family spontaneously expresses disapproval.

631 Forsythe 2001: 8.

632 Roels 1999: 399. These presumed consent laws are only available as discussed by Roels and no other English translation of the Belgium laws are available to comment on.

633 Roels 1999: 399.

634 2005: 26.

lost a loved one and who are facing a period of personal loss and grief. Such presumed consent would further burden members in society to specifically opt out of organ donation during their life time.[635]

For presumed consent to be effective such consent would have to be informed consent.[636] By informed consent we mean that medical practitioners involved in the procurement process must explain in detail to the donor the nature and purpose of the organ removal process as well as the risks of such removal to the organ donor. When this is done the donor can make a truly informed consent very well knowing what his or her organs will be used for and the risk involved in donating his or her organs.[637]

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635 Cherry agrees with Hartman and further states that for presumed consent to work as a form of organ procurement that such consent must be informed and free of coercion. Cherry does however make it clear that offering to buy a poor person's organs does not necessarily coerce such a person into selling their organs. He says, "Such offers do not situate potential vendors in unjustified disadvantaged circumstances, nor do they deprive vendors of any preexisting options." Cherry 2005: 150. King and Smith also agree with Cherry and Hartman and further state that where consent is not sought before the removal of organs or tissues from a donor that such removal would constitute assault. King and Smith 1998: 2.

636 King and Smith 1998: 2.

637 This requirement of medical practitioners to inform donors properly was discussed in the United States of America case of *Rogers v Whitaker* (1992) 175 CLR 479 where the court held that informed consent of the donor is determined by that donor considering risks which both a reasonable person in the donors position and him or herself in particular as donor would attach significance to. The South African case of *Castell v De Greef* 1994 (4) SA 408 (C) also discusses the duty of a medical practitioner to inform his patient regarding the material risks and complications that might follow from a surgical operation or other medical treatment so that the patient can then exercise his or her fundamental right to self-determination in consenting to such surgical operation or medical treatment. According to the Health Professions Council of South Africa in their professional guidelines for medical practitioners, informed consent in paragraph 2.3 is stated to include the following:

1. Give your patients the information they ask for or need about their condition, its treatment and prognosis.
2. Give information to your patient in the way they can best understand it.
3. Refrain from withholding from your patients any information, investigation, treatment or procedure you know would be in their best interest.
4. Apply the principle of informed consent as an on-going process.

The National Health Act 61 of 2003 of South Africa provides a statutory definition of the term 'informed consent' in section 7(3). This section reads as follows:

> "For the purposes of this section 'informed consent' means consent for the provision of a specified health service given by a person with legal capacity to do so and who has been informed as contemplated in section 6."[638]

Section 7(3) in particular providing for a definition of informed consent will be applicable when Chapter 8 of the National Health Act 61 of 2003 finally comes into effect.

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5. Allow patients access to their medical records.

638 Section 6 of the National Health Act 61 of 2003, read along with section 7(3) regarding 'informed consent', reads as follows regarding full knowledge of medical procedures to patients:

"(1) Every health care provider must inform a user of-

(b) the user's health status except in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to the best interests of the user;

(c) the range of diagnostic procedures and treatment options generally available to the user;

(d) the benefits, risks, costs and consequences generally associated with each option; and

(e) the user's right to refuse health services and explain the implications, risks, obligations of such refusal.

(2) The health care provider concerned must, where possible, inform the user as contemplated in subsection (1) in a language that the user understands and in a manner which takes into account the user's level of literacy."

Having regard to section 6(2) above it must be mentioned that Harrington describes the manner in which donation procedures under the Transplantation of Human Organs Act 42 of 1994 of India disadvantages Indian donors. She says that when donors have to sign an affidavit to consent to donation due to affection or attachment that they feel for the recipient that the affidavit if often in English which they do not fully understand and the information provided in the affidavit is many times not explained sufficiently to donors. Harrington 2006: 11.

The National Patient's Rights Charter[639] in paragraph 2.3 discusses informed consent as one of the core rights of all patients. Under this paragraph five points relating to informed consent are mentioned. Firstly, patients must be given the information they ask for or need about their condition, its treatment and prognosis. Secondly, patients must be given this information in the best way they understand such information. Thirdly, health care practitioners may not withhold any information, investigation, treatment or procedure you know would be in their best interest. Fourthly, the principle of informed-consent must be continually applied and lastly, all patients have the right to access of their medical records.[640]

Even though it was mentioned above that presumed consent must be informed consent[641] Prottas[642] has reported that this presumed consent has been universally rejected in principle because a person's absence of intention to donate is not necessarily an indication of a person's true wishes regarding organ donation and further deprives a person from donating organs through personal autonomous choice and feelings of generosity. Even though presumed consent is not accepted freely in many societies it

639 http://www.hpcsa.co.za/hpcsa/default.aspx?id=152: 5/10/2006.

640 http://www.hpcsa.co.za/hpcsa/default.aspx?id=152: 5/10/2006. Paragraph 2.8 of the National Patient's Rights Charter further discusses informed consent by stating the following:
"Everyone has the right to be given full and accurate information about the nature of one's illnesses, diagnostic procedures, the proposed treatment and the costs involved."

641 King and Smith 1998: 2.

642 1994: 14.

has been applied to the procurement of corneas and sometimes other human tissue such as pituitary glands.[643]

8.4.4 Conscription (National or state organ bank)

One method of organ procurement suggested by Barnett and Kaserman[644] is conscription. This is where the property rights to organs of deceased persons are transferred to the available pool of organs and thereby in effect to potential organ recipients. There are however doubts as to the viability of such a policy adopted by any government institution. As discussed in the introduction to this dissertation there are obvious moral and ethical issues related to the idea that governmental organisations could have possible property rights in the bodies of deceased persons. For example section 12(2)(b) of the Constitution[645] states that everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body. Some might argue that this right to control over one's body would extend into "after death" control which at present manifests itself in the duty of medical practitioners to gain consent from the organ donor or their family before removing bodily organs for donation.

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643 Prottas 1994: 14.

644 1993: 121.

645 Constitution of the Republic of South Africa, 1996.

Therefore if such a process of conscription is to be effective it must be controlled by non-governmental organisations and institutions in order to eliminate the possibility of further corrupt or illegal activities between various governmental institutions and to keep the constitutional rights of bodily and psychological integrity of donors intact.

8.4.5 Routine request

Routine request is another method of organ procurement whereby during a person's lifetime he or she will make his or her express choice known regarding the option of organ donation.[646] This expressed choice will then be recorded on an organ registry for future reference and such a person can then be issued a donor card so as to be identified for possible future organ donation. The advantages of such a system include the convenience it brings to both donors, donor families and medical staff in that prior permission is no longer needed before medical staff can extract an organ from a donor for transplantation purposes. The family of the deceased person also need not make such an important decision about organ donation at such a grave and unpleasant time in their lives.

This method further makes society more aware of organ donation and would hopefully make it a more widely accepted deed in society.[647] One major

646 Barnett and Kaserman 1993: 121-125.

647 Barnett and Kaserman 1993: 121-125.

disadvantage of such a method of organ procurement would be the fact that without proper communication and knowledge, families of such donors are very likely to object to such extraction without further providing their own consent to medical practitioners to do so.

8.5 If a regulated system of organ dealings is to be allowed, what type of system should that be?

Dr. Nora Machado[648] from the University of Uppsala, Sweden, recommends the basic requirements needed for the efficient and effective functioning of an organ transplantation system. Her requirements include proper access being made possible for potential organs to the available organ pool, properly trained and skilled medical doctors and staff, ensuring the availability of medical technology to supply immunosuppressive drugs, the most accurate organ matches between donors and recipients and the much needed preservation of donated organs to be transplanted.[649] She further recommends well interlinked communication, support and transportation networks.

Garwood-Gower[650] says:

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[648] 1998: 17.

[649] Machado 1998: 8-19. Machado explains that the proper preservation of an organ before transplantation can take place includes an environment where the correct temperatures can be maintained during transportation and storage of the organ. In her opinion a heart cannot be stored for more than 4 hours before it is still safe to be transplanted because of the fact that the potential recipient's survival rate decreases by 6 % every hour the heart is left outside a living body.

[650] 1999: 186.

> "Whether it would be possible to have a properly regulated system of legal trade in organs without adverse health and safety consequences is difficult to say. On the one hand within a regulatorily controlled commercial system of donation organ donation would be different to the position for blood donation in as much as it is routine for organ donors to undergo detailed health and safety checks. One concern is that standards of checks might naturally slide in a system of regulated commercial donation."

Garwood-Gower[651] also states that this argument can however be dissolved by the fact that medical practitioners will still have all the financial incentives to uphold the standard of these checks and no reason whatsoever not to uphold such a health check system. He says that the obvious problem comes in where people other than medical practitioners are allowed incentives or are placed in profit making positions that could easily make them "cut corners" in the removal and transplantation process of organ transplantations.

The above problem highlighted by Garwood-Gower would clearly be the position in the case of private organ sales where the organ recipient is for example willing to pay doctors or other middleman obviously increased financial rates in order to obtain an organ for transplantation quicker than would have been the case if a certain "normal" financial rate was paid. For this reason it must be stated that for a regulated organ trade system to work

651 1999: 186.

effectively a fixed financial rate will need to be designated for all human organs to ensure that the above scenario is not realised. With this fixed rate comes, however, another problem. When one is dealing with interstate organ donation or trade one is most likely dealing with various currencies from different countries and not all currencies are of course of the same value. So in order for the fixed financial rate to then apply without creating other problems one would need to apply such a fixed rate only with regard to national or in-country organ donations and trade.

An appropriate form of relief would be to remove the cause of illegal organ trafficking by finding acceptable methods of procuring organs, for example using living organ donors. The question however is exactly what types of payment it is that legislation is prohibiting? Legislators therefore need to determine clearly which forms of payment for organs is acceptable and ethical and which are not.[652]

Article 14 of the Council of Europe's Resolution,[653] for example, prohibits parties involved in organ transplantations from making any form of profit on the grounds of public policy.[654] In most other countries around the world legislative provisions are quite similar to the Council's resolution. It does appear that compensation for time, legitimate expenses (such as payment of

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652 Garwood-Gowers 1999: 191.

653 Resolution (78) 29 on harmonisation of legislations of member states relating to removal, grafting and transplantation of human substances. Article 14 simple reads as follows:
"Substances must not be offered for any profit."

654 Garwood-Gowers 1999: 169.

medical staff and medical practitioners for the removal and transplantation of the organ) and other financial losses will not be considered profit for the purposes of prohibitions against organ selling.[655]

In 1991 the World Health Assembly approved a set of guiding principles which emphasis voluntary donation, not commercialisation and preference for cadaveric donation over living donations.[656] Guiding Principle 8 states that in regard to medical practitioners and other medical staff involved in the removal and transplantation of human organs should not receive payment in excess of the reasonable amount that should be paid for such rendered services.[657] Guiding Principle 9 of the World Health Organisation further states that organs should be provided to patients on the basis of their medical need for a transplantation and not on their ability to pay for such organs or transplantation, for example paying medical practitioners more money to gain a higher position on the organ distribution list.[658] This then makes organs accessible on delivery to any person needing a transplant and not only to persons able to pay high prices for organs.

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655 Garwood-Gowers 1999: 170.

656 http://www.who.int/ethics/topics/human_transplant/en/: 17/10/2006.

657 Guiding Principle 8 reads as follows:
"It should be prohibited for any person or facility involved in organ transplantation procedures to receive any payment that exceeds a justifiable fee for the services rendered."
http://www.who.int/ethics/topics/transplantation_guiding_principles/en/index1.html: 6/10/2006.

658 Guiding Principle 9 states the following:
"In the light of the principles of distributive justice and equity, donated organs should be made available to patients on the basis of medical need and not on the basis of financial or other consideration."
http://www.who.int/ethics/topics/transplantation_guiding_principles/en/index1.html: 6/10/2006.

Garwood-Gowers[659] says that the donor should have the following rights to payment in regard to the donation of organs:

- The right to reasonable compensation for the value of the organ donated.
- The right to compensation for pain and physical detriment suffered and in future arising from the donation of the organ.
- The right to free medical care resulting from reasonable check-ups in relation to future consequences of donating.
- The right to reasonable compensation arising from the time and effort spent in donating the organ for example compatibility tests run to determine matches.
- The right to reimbursement of expenses arising from the donation for example travel and accommodation expenses if the transplant was carried out outside the donors hometown.
- The right to compensation for loss of income arising from days and even weeks taken off from work for the purpose of donating.

Therefore not paying the donor these minimum payments for compensation would result in a serious breach of that donor's fundamental right to obtain payment for his or her labour.[660] It is proposed that the legislator should produce a policy whereby organs will be sold by "donors" as opposed to

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659 1999: 192-193.

660 Garwood-Gowers 1999: 192-193.

being donated by them. It is not proposed that such an organ sale be done any place, anytime or anywhere but that particular regulations are placed on such organ and tissue sales.

Barnett and Kaserman[661] comment on such a market in human organs by mentioning a few important aspects regarding such an organ market. The first is that a market in human organs must be restricted to cadaveric organ donors only. This will eliminate possible exploitation of living organ donors but at the same time eliminate the possibility, as Cherry[662] says, of allowing living donors the opportunity of determining their own fate and empowering them to strive for better living conditions. The second aspect of a market in human organs is that, like stated by Cherry,[663] such a market will decrease the medical costs involved in the treatment of patients suffering from organ failure.

Tribunals should be established and implemented statutorily to apply and interpret the relevant criteria involved in a legal market for human organs and to handle all matters of compensation to organ donors or their families.[664] Criteria such as adequate price scales for selling organs so as to eliminate exploitation of poor donors and proper medical facilities to

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661 1993: 125.

662 2005: 83.

663 2005: 74 -75.

664 Cherry refers to these tribunals as “compensation tribunals”. 2005: 74-75.

accommodate healthy and safe organ transplantations which keep the human dignity of the donor and recipient intact must be considered [665]

These tribunals run by government organisations could then use specific legislative standards to calculate or measure the amount of financial compensation that should be paid to an organ donor.[666] This will eliminate the possibility that organs are sold at unreasonable amounts. Specific organs can then be allocated a reasonable monetary value and all organs can then be sold at a fixed rate.

The standards taken into account by the tribunals must therefore be clear and flexible enough to adapt to changing circumstances in medical technology and research and are crucial to the successful application of legislation governing an organ trade.[667] As discussed earlier, the problem of varying currencies must also be kept in mind when designating specific prices to bodily organs so as to eliminate first world countries once again purchasing organs for transplantation at third world prices.

Harris and Erin[668] suggest that there be only one legitimate buyer, for example the National Health Society of the United States of America, who takes on the responsibility of purchasing organs and tissue products, similar

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665 Larijani, Zahedi and Ghafouri-Fard 2004: 2540.

666 Harrison 2002: 97.

667 Harrison 2002: 99.

668 2002: 114.

to the manner in which they purchase other medical equipment and drugs, for several institutions and who will ensure the equitable distribution of these human organs and tissue products. They feel that this would prevent the wealthy members of society from taking over the organ market at the expense of poorer citizens.

8.6 Conclusion

After evaluating various methods in which to increase both living and cadaveric organ donations while having a look at various surveys which were conducted to gather evidence of people's opinions regarding these methods it can be concluded that although methods of payment or compensation for donations are not always fully accepted by all members of society that there are persons who feel that such payment or compensation schemes may work.

Additionally it can also be mentioned that such payment and compensation schemes will be deemed to work well along side other methods of increasing organ donation such as national organ donor registries, educational programmes increasing the awareness of citizens regarding transplant issues, donor cards, donation contracts or future's markets, presumed consent laws, routine request laws and non-governmental organisations utilising conscription laws.

What is most important to remember is that all of the above methods must be implemented while having regard to the traditional method of voluntary donation. The idea is not to increase organ donations using one method or numerous “offensive” methods and thereby unintentionally decreasing other methods of organ donation.

Chapter 9

Constitutional considerations

9.1 Introduction

Section 2 of the Constitution of the Republic of South Africa, 1996 states that the Constitution is to be regarded as the supreme law of the Republic of South Africa. Further it states that when interpreting other laws or legislation in South Africa, regard should be given to the Constitution and that all other legislation should be interpreted in light of the Constitution and Constitutional principles of human dignity, equality and freedom.[669]

Various constitutional rights and other medical rights exist for patients in South Africa today. The Constitution of the Republic of South Africa, 1996 deems in its Bill of Rights that patient's have the right to be treated equally and without discrimination.[670] This is of course very relevant in the light of discussions regarding which patients should receive organ transplants and which patients should not. Medical practitioners may very well establish fixed principles and procedures in sorting patients for organ transplants but such practices will always have to be tested against this section on equality in order to be deemed fair and just and further more in terms of section 2 of the Constitution which, as stated above, deems that all constitutional rights

669 Section 39 of the Constitution of the Republic of South Africa, 1996.

670 Section 9 of the Constitution of the Republic of South Africa, 1996.

should be interpreted in the light of a person's human dignity, freedom and equality.

9.2 Right to life

One of the most essential rights contained in the Bill of Rights in section 11 of the Constitution would be the right to life. Does this right to life, which vests in every person regardless of their actions,[671] then also include the right to bodily organs to stay alive? The right to life surely includes all possible efforts available on the part of government and legislation to enable a patient to stay alive.[672] Is the legislation regarding the illegality of selling of human organs not minimising this right to life? Shouldn't a patient needing an organ transplant to stay alive be able to benefit from this basic human right to life and be able to apply it above and beyond other legislation and rights in South African law?

Can this right to life then not be regarded, along with the right to dignity, as a right above all other forms of legislation and common law principles, as stated in section 2 of the Constitution regarding how the Constitution itself should be interpreted, to form a principle beyond the illegality of the selling

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671 Currie and de Waal 2005: 282.

672 The aim of government by entrenching the right to life in the Bill of Rights is then to protect life. Currie and de Waal 2005: 285.

of human organs?[673] What is the purpose of this right to life if patients must die because of legislation that is not formulated to their benefit?

This right to life of the patient can then again be critisised by asking what becomes of the right to life of the donor? However, the argument here could be that in most cases the donor will be a cadaveric donor and therefore have no rights within the Constitution other than the common law and statutory law right of treating a corpse with respect.[674] And further of course when one is dealing with a donor who is not a cadaveric donor, the fact remains that such a donor will not die as a result of his or her organ donation but will merely benefit financially. His or her actual right to life is then not threatened by the selling of his/her organs.

9.3 Freedom and security of person

Section 12(2)(b)[675] also states that everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body. Would this not mean that a person is entitled to do with

673 In the case of *S v Makwanyane* 1995 (3) SA 391 (CC) the Constitutional Court held that the right to life and the right to dignity were the two most important rights entrenched in the Bill of Rights and that these two human rights are the source of all other personal rights.

674 The Human Tissue Act 65 of 1983, repealed by the National Health Act 61 of 2003, made provision in section 7 for the removal of donated tissue by a deceased person. Section 7(1) provides that any tissue removed for the deceased person for purposes of donation may only be removed within 24 hours of his or her death and upon expiry of the 24 hours the body is then claimed for burial by the deceased spouse or any other relative or any authorised person as mentioned in section 4, namely a hospital, university or technikon or any medical or dental practitioner, who is entitled thereto. Section 4(2) further states that no donation of tissue will be of force and effect if no recipient is nominated to receive such tissue.

675 Constitution of the Republic of South Africa, 1996.

his/her body, which naturally includes all bodily organs, what he/she wants to do? Would this right not include the right to sell one's bodily organs if one wanted too? Does this right to control over ones body not fall above legislation regarding the selling of one's human organs illegal? In this regard, section 22 of the Constitution states that within regulations by law,[676] everyone has the right to choose his/her trade freely. Should these regulations, however, not be weighed against the interest of the individual concerned as opposed to so called community interests?

One strategy used in several countries to try to boost organ donation rates is a "presumed consent" law, meaning that people are presumed to be willing to donate their organs after death unless they have signed a document indicating the contrary.[677] This has already been discussed above but the question remains as to whether this strategy is constitutional or not.

Section 12(2)(c)[678] of the South African Constitution states that everyone has the right not to be subjected to medical or scientific experiments without their informed consent.[679] What therefore is defined as a medical or scientific experiment? Is the medical procedure of transplantation for purposes of this section then also an experiment?

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676 In this case regulations by law would include legislation prohibiting the selling of bodily organs or compensation for donation of such organs.

677 Garwood-Gowers 1999: 184.

678 Constitution of the Republic of South Africa, 1996.

679 Constitution of the Republic of South Africa, 1996.

Currie and de Waal[680] indicate that the above questions are not easy questions to answer and that one needs to first determine what a medical or scientific experiment is and secondly what constitutes informed consent. Regarding the first enquiry they are, however, of the opinion that the day-to-day treatment of patients, such as possible organ transplants, can amount to an experiment because of the fact that medical knowledge is partial and years can pass without medical practitioners knowing the full extent and effects of the medical treatment they prescribe to their patients.[681]

Regarding the second enquiry of what constitutes informed consent, much has already been discussed in this dissertation on the topic. There remains to be noted that extreme problems with the selling of organs of prisoners on death row has arisen due to the state controlling their executed bodies and deciding to sell their organs and other bodily tissue, without their informed consent, to wealthy recipients in need of whatever organs.[682]

European military intelligence sources[683] have told of American medical practitioners removing human organs from Iraqis after finding them dead, and if not finding them dead after killing them, and then have gone on to sell these human organs to medical centers in America and various patients around the United States of America for purposes of organ

680 2005: 310.

681 Currie and de Waal 2005: 310.

682 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004.

683 It is as yet unclear exactly which military sources provided this information and the media report does not state this information.

transplantation.[684] In spite of these crimes, the United States of America's administration congratulates the Defence Secretary, Donald Rumsfeld on the "excellent job" he is doing and he continues to stay in office during the present war.[685]

Scheper-Hughes[686] reports that kidney patients from Japan would travel to Taiwan and Singapore to remove kidneys for themselves from recently executed prisoners. This practice was however stopped by laws and regulations[687] implemented by the World Medical Association in 1994.[688]

China stands alone as being accused of harvesting organs from executed prisoners for transplantation without their consent.[689] In 1996 approximately 4 300 prisoners were executed in China.[690] At the same time it was estimated that 90% of all organs transplanted in China were removed from executed prisoners.[691] Furthermore it was said that China executes three times the amount of prisoners than anywhere else in the world which leads

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684 BBC Monitoring/BBC: 2004.

685 BBC Monitoring/BBC: 2004.

686 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004.

687 These laws and regulations are not further described and it is unclear which laws and regulations are actually applicable here.

688 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004.

689 http://www.sky.com/skynews/article/0,,30000-13519519,00.html: 25/04/2006; http://observer.guardian.co.uk/international/story/0,,409218,00.html: 26/05/2006.

690 Rapport: 1996.

691 Rapport: 1996.

to the conclusion that prisoners are not being executed according to proper procedure and that many executions occur for reasons of providing organs to recipients as a way for prisoners to contribute to society for the wrongs they have done.[692] These executions now take place via lethal injection in the Chongqing Hospital so that the organs needed for transplantation do not get damaged as would many times be the case if the prisoner was shot.[693]

The British Transplantation Society has declared this act as a breach of human rights and have implied that the only way China has been able to match supply and demand is by way of selecting prisoners for organ removal before their actual execution dates.[694] Even though the FBI has investigated China and the surrounding circumstances of these executed prisoners, Chinese public officials have succeeded in obstructing any form of inspection or confirmation regarding executed prisoners.[695]

The Chinese Embassy further denies allegations of the use of organs without consent and says these allegations are not substantially supported by evidence and are groundless.[696] The Ministry of Health in China issued

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692 Parry 2006: 810.

693 Rapport: 1996.

694 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004.

695 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004.

696 http://www.sky.com/skynews/article/0,,15410-1219232,00.html: 25/04/2006.

temporary regulations on 27 March 2006 banning the selling of organs and this regulation will take effect from 1 July 2006.[697]

Similarly, regarding consent to remove bodily organs, is the case of the removal and storage of dead children's body parts without their parent's consent.[698] A pathologist, Professor Dick van Velzen, removed and stored dead foetal and infant body parts in a filthy cellar in the Alder Hey Children's Hospital in Liverpool.[699] This practice occurred while he was working at the hospital as the Chair of Foetal and Infant Pathology at the University of Liverpool between the year 1988 and 1994.[700] The parents of the children had to in many cases arrange second funerals for their children once the organs were returned.

Professor van Velzen faces a charge of serious professional misconduct and has now been struck off the United Kingdom medical registry.[701]
Organs of infants were also removed and kept at the Adelaide's Women's and Children's Hospital in Australia without the parent's consent.[702] These

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697 http://www.sky.com/skynews/article/0,,15410-1219232,00.html: 25/04/2006. The Chinese Government has now structured new guidelines regarding the removal and transplantation of organs which will come into effect in July 2006. However, these guidelines fail to define brain death and further from where organs for transplantation may be taken. Parry 2006: 810.

698 http://www.sky.com/skynews/article/0,,15410-13365756,00.html: 25/04/2006.

699 http://www.sky.com/skynews/article/0,,15410-1186190,00.html: 25/04/2006.

700 http://www.sky.com/skynews/article/0,,15410-1186190,00.html: 25/04/2006.

701 http://www.sky.com/skynews/article/0,,15410-1186190,00.html: 25/04/2006.

702 http://www.sky.com/skynews/article/0,,15410-13406579,00.html: 25/04/2006.

organs were stored at the hospital for close to 30 years before parents gained knowledge of the occurrence.[703] Thereafter approximately 100 families sued the South Australian State Government for organs removed from their babies without their consent. The majority of the families have settled claims believed to amount to millions of American dollars.[704]

A similar case involving the removal of organs without consulting the deceased family would be the case of *Brotherton v Cleveland*[705] where a man was found dead in his motor vehicle and upon declaration of death at a local hospital he was taken to a morgue for autopsy. After the autopsy the deceased's corneas were removed without the consent of the deceased's family and were thereafter used for transplantation. The deceased's wife sued the doctor for removing her husband's corneas on the ground that her dead husband was her property. The court held that the wife's claim depended on her having a constitutionally recognised property interest in her husband's corneas and upon closer reflection of the law the court determined that the wife did indeed have such a constitutionally protected interest.[706]

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703 http://www.sky.com/skynews/article/0,,15410-13406579,00.html: 25/04/2006.

704 http://www.sky.com/skynews/article/0,,15410-13406579,00.html: 25/04/2006.

705 923 F.2d 477 C.A. 6 (Ohio) 1991.

706 923 F.2d 477 C.A. 6 (Ohio) 1991. Numerous other cases have been heard in the United States of America where organs have been harvested or removed from cadavers without the consent of family members or next of kin. In *Perry v Saint Francis Hospital and Medical Center, Inc* 865 F. Supp. 724 D.Kan.1994 medical practitioners, similar to the case in *Brotherton v* Cleveland, removed long bones and eyes from a deceased man without his wife or child's consent. In *Jacobsen v Marin General Hospital* 192 F. 3d 881 C.A. 9 (Cal.) 1999 organs were harvested from the body of a boy of a Danish couple without their consent. In the case of *Newman v Sathyavaglswaran* 287 F. 3d 786 C.A. 9 (Cal.) 2002 a child's corneas were removed after death without the consent of the parents. Another case, *In Re: Organ Retention Group Litigation* [2005] Q.B. 506, was reported in the United Kingdom also relating to the removal of organs from a

Section 27 of the Bill of Rights[707] deals with health care, food, water and social security. As a 'group' right the right to health does not pertain to one specific individual but to a group of persons to whom this right will be applicable.[708] Section 27(3) states that no one may be refused emergency medical treatment. Section 5 of the National Health Act[709] also states that no health care provider, health worker or health establishment may refuse a person emergency medical treatment. This right would then be assumed to mean that when one needs an organ transplantation to survive that such organ transplantation constitutes emergency medical treatment. In *Soobramoney v Minister of Health*[710] the court provided that emergency medical treatment is considered only in the following cases:

- There must be a sudden or unexpected event or catastrophe.
- This event must be of a passing nature and not be continuous.
- The event must lead to a person requiring medical attention or treatment.
- To the extent that such treatment is necessary and available, it must be provided.[711]

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deceased child without the knowledge of consent of the child's parents.

707 Constitution of the Republic of South Africa, 1996.

708 Bilchitz 2005: 56A-2.

709 Act 61 of 2003.

710 1998 (1) SA 765 (CC).

711 *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC).

From the above cases it can be assumed that emergency medical treatment is not to be provided over any long term period but that this treatment is only available on a short term basis. This leads to the assumption that more than half of all medical cases, especially regarding terminal illness which is most definitely long term, will not be considered as cases needing emergency medical treatment. Will cases involving patients needing organ donation to survive then be considered as cases calling for emergency medical treatment? In most cases the answer can most assuredly be a positive one providing that the necessary resources are available, regardless of whether future long term medication is necessary after such transplantation.

However, section 27(2) states that the state must take reasonable legislative and other measures, within its available resources**,** to achieve progressive realisation of each of the rights under section 27. This reasonable concept requires that the following criteria be considered by the state in progressively realising, for example, the right to health:[712]

- it must ensure that adequate resources, both financial and human resources, for example medical practitioners and support groups, are available
- it must be capable of facilitating the realisation of the right
- the realising of the right must be reasonable and accessible in its construction and implementation
- it must be adaptable and focus on the problem in question
- it must include the majority of the affected population

[712] Bilchitz 2005: 56A-2.

- it must reach a balance between short, medium and long term needs, for example organ transplantation as an immediate short term need and post transplantation medication as a long term need.

As far as the term 'progressive realisation' is concerned, the courts have not truly defined this term to any great degree.[713] All that is said about the interpretation of this term is that it simply means that the right to health, and other basic socio-economic rights, cannot be realised immediately. The court does not however discuss or give steps as to how these rights should be realised and within what time frame they should be achieved. Can it then be said that the state is realising the right to health and health care when there is in fact no framework for them in which to do so? What are the future plans then in progressively realising this right to health?

In assessing the application of the progressive realisation of the right to health it is necessary to once again refer to the case of *Soobramoney v Minister of Health*[714] where a middle-aged unemployed individual was denied access to regular dialysis treatment needed to extend his life due to the fact that he was in the terminal stage of chronic renal failure. He approached the Constitutional Court with the argument that it was his constitutional right to be entitled to this kind of health care as one of the basic human right in the Bill of Rights. The court rejected his argument and held that the right to such health care depended on the resources available to

[713] Bilchitz 2005: 56A-7.

[714] 1998 (1) SA 765 (CC).

the state in order to implement such health care and that the right could therefore be justifiably limited due to a lack of available resources. It can then also be deduced from the above judgment that where there is a lack of organs available for the purposes of transplantation that there is also then a justifiable reason for not providing organs to sick patients because of a lack of resources (shortage in organs) available for such transplantations.

The court in *Soobramoney v Minister of Health*[715] additionally refused to regard the right to health care as an individual's right to such health care but rather to define the right within the broader needs of the population. With regards to this right to health care one should also note that a large portion of the South African population is suffering because of a shortage in organs and that this situation does therefore not simply involve a small number of persons within the South African population.[716] Is the state then truly realising this right to health care and treatment and do they have the infrastructure to perhaps realise this right in future upon reflection of the affect that the shortage in organs has on a large group of South Africa's population?

In *R v Cambridge Health Authority, Ex Parte B*[717] the judge stated:

> "I have no doubt that in a perfect world any treatment which a patient or a patient's family sought would be provided if doctors were willing

[715] 1998 (1) SA 765 (CC).

[716] Thukral and Cummins 1990: 190.

[717] 1995 (2) All ER 129 (CA): 137.

> to give it, no matter how much it cost, particularly when a life was potentially at stake. It would however, in my view, be shutting one's eyes to the real world if the Court were to proceed on the basis that we do live in such a world. It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. They cannot pay their nurses as much as they would like, they cannot provide the treatments they would like, they cannot purchase all the extremely expensive medical equipment they would like, they cannot carry out all the research they would like, they cannot build all the hospitals and specialist units they would like. Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients."

What must always be remembered when dealing with the rights entrenched in the Bill of Rights is that Constitutional rights and freedoms are not absolute.[718] This brings us to section 36(1) of the Constitution[719] allowing the limitation of these rights in the Bill of Rights to the extent that such limitation is reasonable and justifiable in an open and democratic society. When assessing the limitation of such fundamental rights a number of factors must be taken into account. These are as follows:

a) the nature of the right
b) the importance of the purpose of the limitation

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718 Currie and de Waal 2005: 163.
719 Constitution of the Republic of South Africa, 1996.

c) the nature and extent of the limitation
d) the relation between the limitation and its purpose
e) any less restrictive means to achieve the purpose.

Section 36(2) states that unless a right is limited constitutionally in terms of the five factors mentioned above, that no other law may limit any of the fundamental rights entrenched in the Bill of Rights. In other words if the need for bodily organs for transplant purposes cannot be progressively realised by the South African government, or any other government in the world, because of a lack of resources, is this sufficient to meet the five requirements mentioned above and thereby place a limitation on patient's access to organs for needed organ transplantations?

It is however argued with regard to the court's interpretation of the above section of the Bill of Rights that the term 'available resources' is interpreted too narrowly ignoring completely the special weight that must be attached to human rights.[720] Moellendorf[721] argues that to say there are not adequate resources to make certain health care available to patients is similar to saying that the right to a fair trial need not be protected if there are no resources available for such a fair trial. Therefore it is deduced that sufficient underlying reasons for limiting human rights should be given other than simply using lack of resources as an excuse for not fulfilling the right to health and health care for example.

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720 Moellendorf 1998: 327-330.

721 1998: 331.

Cherry[722] comments on this right to provide society with health care by saying the following: “Insofar as there exists a social commitment to provide all with access to adequate health care, including organ transplantation, this will be more effectively achieved with a market rather than through prohibition.” In other words Cherry is implying that if organs are eventually sold to organ recipients as opposed to merely being donated and this increases available organs, that government will then be in possession of the necessary resources to provide patient’s with access to organ transplants.

9.4 Conclusion

Other constitutional rights listed in the Bill of Rights that can also be applied to potential organ recipients and donors alike but that will not be discussed in further detail in this dissertation are the right to freedom of conscience, religion, thought, belief and opinion as expressed in section 15 of the Constitution as well as the right to a healthy environment and the right of access to information as listed in section 24 and section 32 of the Constitution respectively.

The relevant sections of the Constitution that have been discussed so far in this chapter must be considered and applied to all organ donors and potential recipients when drafting and implementing legislation to deal with organ donations, procurement and allocation procedures of organs for

[722] 2005: 153

transplantation as well as other legislation combating organ trafficking. The methods described in this dissertation to increase organ donation, for example donation contracts and presumed consent laws, are not mentioned with the idea in mind of infringing any constitutional rights of donors or recipients but rather with the desire of increasing available organs for transplantation as best as possible while not infringing bodily rights and rights to privacy and dignity as provided in the Constitution.[723]

[723] Constitution of the Republic of South Africa, 1996.

Chapter 10

Survey on organised crime and organ trafficking

10.1 Introduction

It has been concluded by the author that one of the biggest problems surrounding the organ trafficking industry and organ donations is the fact that people do not know enough about these issues to make a contribution to the growing problem of organ sales arising from a lack of donated organs. A survey was therefore conducted by the author to gather information on people's views regarding organ donation and the legalising of organ markets and further to access people's general knowledge on the issue of organ donation, transplantation and organ trafficking.

10.2 Contents of survey and survey results

The survey was undertaken at the 24th International Symposium on Economic Crime at Jesus College, Cambridge, England involving 62 people from 24 different countries around the world including the United States of America, United Kingdom, Australia, South Africa, Brazil, China, Japan, Namibia and various other European countries.[724] A further 8 questionnaires were answered in South Africa to produce a round figure of 70 answered

[724] A full list of the countries represented by persons who participated in the survey is given under Annexure B below.

questionnaires. The survey consisted of twenty-one questions including core questions regarding the race, gender and age group of the person answering in order to assess the various responses that different race, gender and age groups would provide.[725] The survey was representative of a very democratic group consisting of 35 males[726] and 35 females.[727]

When the participants were asked if they were aware of the organ shortage in their country 80% of them said that they were well aware of such an organ shortage.[728] However, when asked whether or not they were registered organ donors only 36% of them answered that they were actually registered as organ donors. Similarly when asked if any family members were organ donors only 39% answered positively.

Among the reasons that were given for not donating organs by those who gave a negative response was that they had not yet decided whether or not to donate, that they could not donate for religious reasons, that they had not signed up to donate because the procedures were too difficult, they are unsure where to go to register or that no one has yet approached them on the issue of organ donation. Other psychological reasons for not donating were

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725 The questionnaire for the survey is given in Annexure A below.

726 23 being white, 7 being black and 5 being either coloured, Chinese or Indian.

727 23 being white, 5 being black and 7 being either coloured, Chinese or Indian.

728 This is then a clear sign, as Calandrillo indicated, that once again public education regarding the field of organ donation and transplantations as well as organ shortages is missing. Calandrillo 2004: 129.

fear of the donation process and being unsure about how safe organ donation really is for the donor's health.

When the participants were asked if they nonetheless believe in organ donation 89% of them said they do support the process of organ donation and transplantation. The 11% who replied that they do not support organ donation or are unsure whether they support it or not gave the following reasons for such non-support:

- That they would only donate to family members in need of organs.
- That they are not sure if organ donation and transplantation is effective in saving lives.
- That they do not believe in prolonging life by transplanting organs.
- That they do not, because of religious beliefs, believe in the dissemination of person's body parts.

A mere 4% of the participants stated that they would not even donate organs to save a family members life. One of the reasons given for this response was that persons are not willing to donate organs during their lifetime. Of the 94% that said they would donate to save a family members life one person in particular mentioned that circumstances would probably compel him/her to donate to a family member to save that family members life. This is obviously an example of how organ donations can be coerced even from family members who feel obliged to donate an organ to another family member.

When asked if they would register to have their organs donated after death 89% of the participants once again indicated that they would be willing to register to have such organs donated after death. Although, as already mentioned above, only 36% of participants are actual organ donors. The remainder of the 89% of participants willing to donate therefore still need to take active steps to become organ donors before their willingness to donate can be of any effect.

When the participants were asked if they thought donors should be monetarily paid for their donation 19% gave a positive answer, 74% responded negatively and 7% were unsure if this should be done. When they were then asked if organ donors should rather be non-monetarily compensated for their organs 30% indicated a positive response, 57% indicated a negative response and 13% indicated that they were unsure about the issue. Of the 74% who said no to monetary payment for organ donation 27% of them responded positively to suggestions of non-monetary compensation.

When asked if the participants thought compensation was more acceptable than payment 29% indicated a positive response. Some of the reasons given for this choice was that if organs were only donated for payment then people would start donating organs as a means to receive income – much as what is presumably happening on the black market in bodily organs today.

Other participants indicated that non-monetary compensation preserves the altruistic factor of the donation process and will not encourage donors to specifically sell their organs while others indicated that there should be a legal obligation to assist donors when they are in future need of medical treatment as a result of their organ donation.

Only 9% of the 19% who said yes to monetary payment said no to non-monetary compensation and indicated that more donation of replenisable organs will result from monetary payment for such organs and that eventually, as has been the key point of reasoning behind this dissertation, the black market trade in organs will be eradicated.

People were further asked about their views on buying organs if a family member or themselves needed such an organ to survive and buying was their only option. 53% of the candidates admitted that they would buy organs if that was their only option for survival. 23% said that they would not buy an organ no matter what the situation was and 24% found this question particularly difficult to answer and indicated that in such a situation they were unsure of what they would do. Some of the responses given by the candidates included the following:

- The recipient should investigate whether the donor was coerced or trafficked for the purpose of procuring his or her organs and if the investigation deems that the donor was not coerced or trafficked that the recipient should offer to pay at least the medical costs, transportation and necessities of the donor.

- The candidate would buy one if it was legal and it was the only option.
- Some candidates view organ markets as only being accessible to high income groups and not being accessible to average citizens.
- Other candidates again indicated that they would buy an organ because no amount of money could ever replace a loved one and that they would do anything to help their children, no matter what the cost.

Two core questions regarding organ donation and the organ trade were then asked:

Firstly, whether legalising the market in organs could increase the amount of organs donated. 60% of the candidates said yes to this question while 31% indicated that organ donations would not increase and 9% were unsure of whether legalising the market in organs would actually increase organ donations. Some commented that although they thought the number of donated organs would increase, they also thought that the only people who would then donate their organs would be poor or underprivileged people needing money. One candidate specifically mentioned that the reason there are so few donations is because of misinformation about the donation process as well as for cultural or religious reasons.

Secondly, the candidates were asked whether they agreed that if organ shortages were diminished by legalising organ markets that the need for illegal black markets would thereby be eliminated. 46% of the candidates

answered this question positively and do feel that legalising the market in organ sales is a good way in which to regulate the organ trade and reduce black market organ sales. 26% answered that they were unsure of whether this would be the case. 30% answered that they did not agree that black markets would be eliminated by legalising the organ trade. Most of the candidates who gave negative responses to the above question indicated that they thought there would always be a black market in human organs and that if better prices for organs were available on the black market that this would still encourage illegal activity.

Further questions on state organ banks, legislation and illegal dealings in bodily organs lead to more interesting findings:

Firstly, 83% of candidates indicated a positive response to national or state owned organ banks indicating people's willingness to sacrifice rights of property of their bodies.

Secondly, only 21% of candidates stated that they were aware of illegal organ dealings or sales in their country. This once again indicated that people are unaware of the issue of organ trafficking and the shortage in available organs for transplantation.

Thirdly, surprisingly, 57% of candidates were aware of legislation governing organ donation and the organ trade in their country.

Lastly, 74% of candidates indicated that their country does not allow organ sales, 7% stated that they were unsure as to whether their country allowed organs to be bought and sold while 19% of candidates indicated that their country does allow organs to be bought and sold.[729]

10.3 Conclusion

A most important comment that was made by the candidates is that there will always be organ shortages and black markets in human organs until people are better educated about the entire concept of organ donation and can fully understand issues such as organ trafficking. What is therefore recommended as one of the basic concepts in increasing organ donation and eliminating organ trafficking, as mentioned in a previous chapter above, is educational programmes for average members of society to teach them about organ donation and transplantation and to get the message across to poorer members of society not to become victims of organ trafficking.

[729] Due to the survey being anonymous and due to all the countries legislation not being freely available it cannot be stated which of the countries presented in the survey allow such organs sales.

Chapter 11

Conclusion

Keeping in mind modern medical technology and increased knowledge on organ transplants and the organ shortage that is caused thereby today, as established by statistics provided in Chapter 3 above, it is clear that medical and ethical policy needs to be shifted to embrace procedures and regulations that increase organ supply for transplantation purposes.

The organ shortage that prevails in South Africa, and in most other countries worldwide, creates endless problems with economic markets and trade, the costs of transplants as well as medication and treatment for patients who cannot afford transplants.[730] These shortages also lead to serious crimes such as kidnapping and murder for human organs and tissue, illegal organ trafficking and organised crime through organs and tissue being sold on the black market.[731]

It is proved that there is a black market for human organs internationally and nationally and that organ sales happen whether such an activity is legal or illegal. Regardless of whether human organs are sold or donated in any country in the world, legally or illegally, social pressure to donate organs is

730 Kishore 2005: 364.

731 Kishore 2005: 364.

still placed on patients and families. These external pressures, even appealing offers to purchase organs, are not necessarily coersive.[732]

Cherry[733] says all transplantation associations responsible for organ procurement and the allocation of such organs to recipients use commodification as leverage in such procurement and allocation processes – even donation. For this reason governments need to rethink legislative policies and implement effective policies, medical procedures and regulations that will ensure that both organ donor and organ recipient benefit equally from the organ market and that the system of organ donation, transplantation and organ procurement works properly.[734]

Dr. Sundar[735] from Bangalore's Lakeside Medical Centre and Hospital believes that exploitation to organ donors exists because the organ trade is illegal and is forced underground and onto black markets. He uses an example of Holland, where prostitution is legal and regulated, and argues that the kidney trade will continue whether it is legal or illegal, and the best way to ensure that the vulnerable in society are not abused is to regulate the trade and introduce standards and not merely expel the idea of such a

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732 Cherry 2005: 151.

733 Kinkopf-Zajac 1996: 505.

734 Once Chapter 8 of the National Health Act 61 of 2003 of South Africa regarding the control of use of blood, blood products, tissue and gametes in humans does come into effect it will assist medical and legal practitioners in difficult issues as has been discussed and dealt with throughout this dissertation but will presumably not be the ultimate solutions to increasing organ supplies and eliminating organ trafficking. Further methods will need to be established by the South African government to combat organ trafficking and increase organ supplies as well as implementing organ allocation policies.

735 http://www.flonnet.com/fl1907/19070740.htm: 14/07/2005.

trade.[736] Therefore a centralised and controlled purchasing system should be implemented to sell and purchase better matched organs from a national registry of donors and recipients while providing the correct medical and psychological support needed by donors, donor families and organ recipients themselves.

Carnell[737] reports that prior to 1996 it was always illegal to sell blood in the United Kingdom even though there was a shortage of blood and not enough donors. Now in the United States and America and the United Kingdom many organisations are allowing you to sell your blood.[738] Legislation will eventually change regarding the position of trading in human organs and it will be a regulated process around the world and also here in South Africa. The question simply is "Just when will this happen?"

Regardless of all morals and ethics concerning the human body, organ donation and allocation procedures as discussed in Chapter 6 and 7 above, bodily organs are in serious demand which in turn demands a new policy from the legislators to restore the balance between available organs and available donors. Slabbert and Oosthuizen[739] say the following about legalising the market in human organs:

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736 http://www.flonnet.com/fl1907/19070740.htm: 14/07/2005.

737 http://members.aol.com/richrwg/organs.htm: 20/09/2004.

738 http://members.aol.com/richrwg/organs.htm: 20/09/2004.

739 2005: 200.

> "Commercialisation should be looked at, but not in an emotional fashion. The main aim of the commercialisation of human organs should never be forgotten; to make a valuable contribution towards reducing the gap between supply and demand."

Cohen[740] has been conducting research in India for a number of years regarding the emerging 'black market' in human organs. This research has shown that many people worldwide, wealthy or poor, are willing to travel as far as necessary to retrieve usable human organs whether legally or illegally.

It must therefore be stressed that in order to curb black markets and underground trade in human organs one must eliminate the need for people to enter into such markets by increasing available organs for transplantation. As has been shown in the above discussions on legalising such a trade in organs and eliminating organised crime groups participating in organ trafficking one can establish legislation that will legalise organ selling in a regulated way.

Harrington[741] states: "It is ironic to note that both advocates and opponents of a legalised and regulated organ trade suggest that neither route leads the poor out of poverty. Advocates of the complete sovereignty over one's body claim the removal of the right to sell an organ is causing financial hardship

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740 http://sunsite.berkeley.edu/biotech/organswatch/pages/cadraft.html: 20/09/2004.

741 2006: 10.

for the potential donor. On the other hand, research illustrates that poverty reduction is rarely achieved in the long run as a result of kidney sales."

If such a system of human organ trade was to work effectively in South Africa, government will need to take a serious look at altering existing legislation, which already appears to be ambiguous and difficult to understand, to adapt to new medical and legal requirements for a modern society. For example, as stated earlier in Chapter 4 above, subsection 4 of section 60 of the National Health Act[742] already makes it acceptable for donors to be reasonably compensated for financial losses and medical injuries regarding the donation of human organs and tissue.[743] However, this subsection can be easily misunderstood because of the fact that the subsection also states that financial reward to donors is illegal. Clarity on this particular subsection of section 60 is therefore necessary if increasing the donor population is to be successful and further if compensating the donor is to become a medical practice as routine as organ transplantation.

What must further be highlighted when discussing the development of amended regulations pertaining to the organ trade and methods to increase

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742 Act 61 of 2003.

743 Section 60(4) of the National Health Act 61 of 2003 reads as follows:
"It is an offence for a person-
(a) who has donated tissue, a gamete, blood or a blood product to receive any form of financial or other reward for such donation, except for the reimbursement of reasonable costs incurred by him or her to provide such donation; and
(b) to sell or trade in tissue, gametes, blood or blood products, except as provided for in this Chapter."

organ donation is the fact that legalising the organ trade is not deemed to be the only method available to governments when wishing to increase numbers of available organs for transplantations. Legalising the market in organs is merely viewed as one of many possibilities in order to eliminate black markets in organs and increase available organs for transplantation purposes. Various other methods have been mentioned in Chapter 8 above that are viable options when trying to increase organ donations and increase organ numbers for transplantation. These include presumed consent laws, conscription or state owned organs as well as future's markets or donation contracts.

Educational programmes and media coverage will also go a long way in assisting national hospitals in increasing their donated organ supplies. All members of society need to be properly educated and informed regarding the option of organ donation and possible future's markets or organ donation contracts.

The following is therefore recommended as a final opinion in changing legislation governing the organ trade and organ donations and thereby increasing the available pool of donated organs:

> **Firstly, the selling of organs should be arranged using a future's market contract or legal donation contract between the organ seller and the potential organ recipient or non-governmental organisation. These contracts should not be created between**

doctors and organ sellers or the state and organ sellers. This will eliminate the occurrence of so-called theft of organs and to a certain degree eliminate the problem of consent to organ donation. As stated before other methods of increasing organ donations, for example the traditional altruistic method of organ donation, should be used alongside a legalised market of bodily organs to ensure that maximum beneficial results are produced.

Secondly, the transplanting of these organs should take place only at a facility designated as a registered medical facility by the Minister of Health by notice in the Government Gazette. This will facilitate hospitals and medical staff in ensuring the medical risks to donors and recipients are minimal as well as help with eliminating the occurrence of "back alley transplants". Preoperative assessment panels should be implemented to assess the donor's health status and viability to donate as well as ensuring near perfect matches between organ donor and recipient. A Donor's Bill of Rights should be implemented which will further inform and protect sellers and buyers to ensure that they receive adequate postoperative medical attention and monitoring.[744]

Thirdly, restrictions must be placed on those able to buy organs so that the wealthy are not the only one's receiving organs. In other words organs should be given a fixed market value that is reasonable

[744] http://www.flonnet.com/fl1907/19070740.htm: 14/07/2005.

and accessible to all regardless of their financial income status. A maximum price mechanism should therefore be established so that disadvantaged people will also have an opportunity to buy organs. What must however be remembered is that a fair market price in the United States of America will not be considered a fair market price in some poorer parts of India or Africa, for example.

Fourthly, there should be international sharing of human organs and tissue through proper exchange mechanisms that would lead to less organ wastage and probably higher and better levels of organ matching between donors and recipients.[745]

Fifthly, the suggestion of imposition of mandatory financial disclosure and counselling requirements to ensure that further corruption and other organised crime activity is not evident from legalised organ trade markets.[746] For example, as has been mentioned previously, the Financial Intelligence Centre Act 38 of 2001 provides in section 29 a duty on persons who carries on business, a person who is in charge of or manages a business or is employed by a business and who knows or reasonably ought to know of suspicious or unusual transactions to report such suspicious and unusual transactions to the Financial Intelligence Centre within a

745 In the Philippines such a system of international organs sharing is used and works effectively provided that organ sharing creates reciprocal rights and duties between the different organ transplantation units. Bagheri 2005: 4160.

746 http://webjcli.ncl.ac.uk/2003/issue3/pattinson3.html: 20/09/2004.

prescribed period after knowledge of such transactions arose. Section 52 of the Financial Intelligence Centre Act then prescribes measures taken against persons who do not report such suspicious or unusual transactions.

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Key Words and Phrases

Brain death

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Constitutionality

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Organ trafficking

Organised crime

Presumed consent

Routine request

Transplantation

SUMMARY

Across the world today people are selling their bodily organs to organ trafficking syndicates in order to make money for necessities and to pay off loans used in order to survive. Modern medical technology has vastly improved the outcome of organ transplants and survival rates of human organ recipients. This in turn means that as a survival option many more potential recipients are being placed on waiting lists in order to receive organ transplants.

What therefore contributes to the organised crime of black markets in human organs is the great shortages in the numbers of donated organ necessary for organ transplantations. This is due to increased numbers of patients on transplant waiting lists. Poor donors are therefore willing, in the non-regulated system of organ trade, to sell their organs to increase their fortunes and rich ill recipients are willing to pay any price for any organ. Organised crime legislation and medical policies today make this activity illegal and this can be said to be half the problem in increased organ markets and organ trafficking syndicates.

The traditional system of organ donation, namely altruistic organ donation without compensation, is no longer effective enough in ensuring that sufficient numbers of human organs are donated yearly to meet the demand. Hospitals and other non-governmental organisations or institutions dealing

with organ donation, procurement and human organ transplantation are in desperate need of such organs for organ transplants.

For this reason various solutions have been illustrated as methods in eliminating the organised crime of organ trafficking and increasing available organs needed for transplantation. Some of these options include national organ donor registries to track current organ donors, presumed consent laws which require donors to specifically opt out of an organ donor registry, conscription or state owned organs as well as future's markets or donation contracts and other forms of compensation to donors such as tax deductions, preference for future organ transplants above other recipients and remuneration for all expenses incurred and lost during the organ donation period.

Educational and public media programmes have also been suggested to educate average citizens on the issue of organ transplantation and to make them aware of organ trafficking and the need for donated organs, whether such human organs are donated while the donor is alive or if the donor only consent to such removal of organs once deceased.

Many ethical dilemmas exist regarding these various ideas to increase donated organs. People feel that by selling human organs for example, poor donors will be exploited and altruistic donations will no longer be willing to donate their organs because of feelings of disgust for newly designed organ donation legislation.

Beyond this fear lies the fear that if organ markets were legalised only richer members of society would be able to afford organ transplantations and that thereby poorer people would not have access to organ transplants. The situation without such a legalised market in place, however, already exploits the poor members of society and bad health risks for both the organ donor and organ recipient ensue due to shocking medical surroundings and incorrect procedures used in illegal organ transplantations.

What is recommended therefore is that such legalised systems of compensated organ donation are to work in conjunction with the traditional altruistic system of organ donation and other methods used to increase organ donation and that legislation be correctly drafted and implemented to benefit both organ donor and organ recipient.

It is deemed that such a legalised system of organ sales will eventually eliminate the organised crime of organ trafficking as the illegal demand for such organs will no longer exist. This will occur because of increased organ donations due to, amongst other methods of organ procurement, educational programmes and organ donors receiving some form of compensation for their donation.

OPSOMMING

Wêreldwyd verkoop mense huidiglik hul liggaamsorgane aan sindikate wat in organe handel ten einde geld te bekom vir noodsaaklike items en lenings af te betaal om aan die lewe te bly. Die moderne mediese tegnologie het daartoe bygedra dat die oorplanting van organe geweldig verbeter het, en so ook die kans op oorlewing van die ontvangers van menslike organe. Dit beteken dus dat as ’n oorlewings opsie, word meer potensiale ontvangers op waglyste geplaas om orgaanoorplantings te ontvang.

Die groot tekort aan die beskikbaarheid van geskenkte organe dra by tot die georganiseerde misdaad van menslike organe op die swart mark. Dit is te wyte aan die toenemende hoeveelheid pasiënte op waglyste vir oorplantings. Arm skenkers is dus gewillig om in hierdie ongereguleerde sisteem van orgaanhandel hul organe te verkoop om hul armoede te verlig en ryk ontvangers is gewillig om enige prys vir organe te betaal. Wetgewing aangaande georganiseerde misdaad en beleid rondom geneeskundige aspekte maak hierdie aktiwiteite onwettig en daar is aanduidings dat dit tot die helfte van die probleem bydra in die verhoging van markte in orgaanhandel en sindikate wat in organe handeldryf.

Die tradisionele wyse van orgaanskenking, naamlik altruïstiese skenking van organe sonder vergoeding, is egter nie meer effektief genoeg om te verseker dat voldoende hoeveelhede menslike organe jaarliks geskenk word om in die aanvraag te voldoen nie. Hospitale en ander nie-staatsorganisasies of

instellings wat met orgaan skenking, die verkryging daarvan en menslike orgaanoorplantings hanteer, is in uiterste nood ten einde organe vir orgaanoorplantings te bekom.

Om hierdie rede word verskeie oplossings voorgehou as metodes om van die georganiseerde misdrywe in orgaanhandel uit te skakel en om die beskikbare organe wat vir oorplantings benodig word, te vermeerder. Van hierdie opsies sluit in die daarstelling van orgaanskenkingregisters ten einde bruikbare orgaanskenkers op te spoor, wetgewing aangaande vermoedelike toestemming wat spesifiek vereis dat skenkers kan kies om van die orgaanskenkingregisters afgehaal te word, verpligte skenking van organe wat deur die staat besit word, asook die sogenaamde toekoms-marke of skenkingskontrakte en ander vorme van vergoeding aan skenkers; byvoorbeeld belastingaftrekkings, voorkeur by toekomstige orgaanoorplantings bo ander ontvangers en kompensering vir alle uitgawes aangegaan en verlies aan inkomste tydens die orgaanskenkingsperiode.

Opvoedkundige en openbare mediaprogramme om die gemiddelde landsburgers oor die brandpunt rondom orgaanoorplanting in te lig is ook voorgestel. Hulle moet bewus gemaak word van orgaanskenking en die behoefte vir geskenkte organe, hetsy sulke organe geskenk is terwyl die skenker nog lewe of vir die verwydering van sy organe wanneer die skenker reeds te sterwe gekom het.

’n Groot aantal etiese dilemmas bestaan aangaande die onderskeie idees om geskenkte organe te vermeerder. Daar bestaan ’n vrees dat deur die verkoop van organe te wettig, arm skenkers ge-eksploiteer sal word en altruïstiese skenkers nie meer gewillig sal wees om hulle organe te skenk nie omrede hulle gebelg voel oor die nuutste geïmplimenteerde wetgewing aangaande orgaanskenking.

Onderliggend hieraan is die verdere kommer dat as orgaanmarkte gewettig word, net ryk lede van die gemeenskap orgaanoorplantings sal kan bekostig en dat arm mense dus nie toegang tot orgaanoorplantings sal hê nie. Die huidige situasie, sonder sodanige gewettigde markte in plek, eksploiteer alreeds die arm lede van die gemeenskap en die swak gesondheidsrisiko’s, vir al by die orgaanskenker en die orgaanontvanger, is te wyte aan die skokkende mediese milieu en verkeerde prosedures wat gebruik word in onwettige orgaanoorplantings.

Daar word om hierdie redes aanbeveel dat ’n gereguleerde stelsel van die vergoeding vir orgaanskenking, samelopend met die tradisionele altruïstiese gebruik van orgaanskenking moet funksioneer asook dat ander wyses gebruik moet word om orgaanskenking te vermeerder en dat wetgewing korrek opgestel en toegepas moet word om beide die orgaanskenker en orgaanontvanger te bevoordeel.

Daar word voorgehou dat so ’n wettige stelsel van orgaanverkope eventueel die georganiseerde misdrywe aangaande die handel in organe sal hokslaan

en dat die onwettige aanvraag vir sulke organe nie verder sal voortduur nie. Dit sal tot gevolg hê dat daar meerdere orgaanskenkings te wyte aan onder meer ander metodes van orgaanverkryging sal wees, asook opvoedkundige programme aangebied sal word en dat daar aan orgaanskenkers een of ander vorm van kompensasie vir hul skenking gegee sal word.

ANNEXURE A

RESEARCH REGARDING ORGANISED CRIME AND ORGAN TRAFFICKING

I am an LL.M student researching the effect of organ shortages on organ trafficking in an LL.M dissertation in the Department of Criminal and Medical Law at the University of the Free State. The dissertation compares legislation in numerous countries and people's views in those countries on organ donation and organ trafficking. Please answer the following questionnaire regardless of current legislation in your country and with regard to your personal views. The purpose of the following questions is not to discriminate against any person but to compare different viewpoints among various race, gender and age groups.

a) Race/Ethnicity: …….
b) Gender: …….
c) Age: …….
d) Country: …….

e) Are you aware of the shortage of organs in your country? Y / N

f) Do you believe in organ donation? Y / N
If not, why not?
……..……...…

g) Are you an organ donor? Y / N
If not, why not?
……

h) Is any member of your family an organ donor? Y / N

i) If a family member is in need of an organ would you donate one of your "replenishable" organs (for example a kidney) to such a family member? Y / N
If not, why not?
……

j) Would you consider donating any of your organs after death? Y / N

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k) Do you think organ donors should be paid (monetarily) for their organs? Y / N

l) Do you think organ donors should rather be compensated (non-monetarily) for their organs? Y / N

m) Do you think compensation is better than payment? Explain.
……
……

n) What are your thoughts on selling one's own organs?
……
……

If positive, should there be a fixed price/rate attached to such organ sales? Y / N

o) What are your thoughts on buying organs if a family member or yourself needed such an organ and buying was the only way in which to obtain an organ for transplantation purposes?
……
……

p) Do you think that by legalising the market in organs one can increase the number of organs donated? Y / N
If not, why not?
……
……

q) Do you agree that if the shortage in organs was decreased by legalising the organ trade that there would be a decrease in organ trafficking as there will no longer be a need for a black market in organs?
……
……

r) Are you in favour of a national/state organ bank? Y / N

s) Do you know of any dealing/trade in organs in your country? Y / N

t) Is there legislation in your country governing organ donation and organ trade? Y / N

u) Does your country allow organs to be bought or sold for transplantation purposes? Y / N

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ANNEXURE B

People from the following countries participated in the survey regarding the organised crime of organ trafficking:

Australia, Barbados, Bermuda, Brazil, British Virgin Islands, Caymen Islands, China, Denmark, Egypt, Ethiopia, Germany, Ghana, India, Japan, Namibia, Nigeria, Saudi Arabia, Singapore, South Africa, Switzerland, Ukraine, United Kingdom, United States of America, Venezuela.