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Trafficking in Human Organs

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Questionnaire on the general existing situation concerning human organs donation and/or selling – Portuguese Report¹

Legislation

General remarks

Portugal has ratified the *European Convention on Human Rights and Biomedicine*, which came into force on the 1st of December 2001.² Thus, chapter VI concerning “organs and tissue removal from living donors for transplantation purposes” and chapter VII containing the “prohibition of financial gain and disposal of a part of the human body” are paramount provisions in the Portuguese legal order. Article 8, 2 of the Portuguese Constitution is read by the most graduate doctrine as to entail the primacy of treaty law over national statutes.

Article 27 of the Biomedicine Convention allows for a wider protection by the State Party. However, in this particular area, such a clause is not, in general, relevant since the convention is more protective than the current statutory regulation in the field.

At the national level, Law 12/93, 22nd April, regulates the collection and transplant of human organs and tissues and the Doctor’s Deontological Code has two general provisions about transplantation.³

Article 19 of the Oviedo Convention poses three principles: 1) The principle of *ultima ratio* of transplantation medicine; 2) The principle of therapeutic benefit of the recipient; 3) The principle of subsidiary in the collection in living donors, that is, primacy should be given to collection in deceased persons.

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² DR, 3-1-2001.

³ The legal value of the Doctors’ Deontological Code is uncertain. The main doctrine accepts its legal relevance at least in relation to disciplinary sanctions and in the establishment of civil liability: *See*. F. DIAS/ S. MONTEIRO, “Portugal”, in E. DEUTSCH/ H.L. SCHREIBER (Ed.) *Medical Responsibility in Western Europe*, Springer-Verlag, 1985, p. 522.

Article 21 proscribes financial gain and article 5 of Law 12/93 forbids payment and trading of organs and tissues. Thus, in a word, trade of human organs is prohibited in our legal order.

Expenses or damages resulting from the donation or collection of organs may not be reimbursed. However, *institutions* and *agents* authorised to make the removal of the organ or tissue may be paid for that service, although it is strictly forbidden to attribute a value to the tissues and organs, which are the object of transplantation (Art. 5, n.3).

Consent for donation among living persons

In spite of the fact that *Recommendation (78) 29 of the Council of Europe*, called out for a written expression of consent, the Portuguese law, in article 8, considers it enough to obtain it “free, informed and unequivocal”.⁴ Number two of the same provision clarified that the consent should be given before a doctor other than those of the transplantation team.

Presently, according to article 19 of the CV, “consent must have been given expressly, specifically, either in written form or before an official body”. It is arguable whether the doctor named by the clinical director can be envisaged as the “official body” required by the Convention Therefore, I believe that *a written document* should be demanded.

As to the capacity:

In relation to *adults*, regenerative and non-regenerative organs and substances can be donated, when there is a family relationship up to the third grade (parents/children; brothers; grandparents/grandchildren; uncle/aunt – nephews/nieces) between the donor and the receiver.

From children or incapable adults, donation of *non-renewable substances* is never allowed, according to article 6, 3, which is in accordance with article 20, 1 of the CV.

In case of *regenerative tissue*, Art. 20 CV. and Art. 8 L 12/93 prescribe the following criteria:

⁴ The Doctrine criticizes this situation. See FARIA COSTA, “O Valor do Silêncio do Legislador Penal”, 1993, p. 117. Cfr. Paula FARIA, *Aspectos Jurídico-Penais dos Transplantes*, 1995, pp. 254 e ss.

The removal of *regenerative tissue* from children and incompetent adults is exceptional;⁵ nevertheless it may be authorised, provided the conventional conditions are met:

1. Absence of available donor, capable of consent;
2. The recipient is a brother or sister of the donor;
3. The donation must have the potential to be life - saving for the recipient.
4. In case of children, *parental consent* is required (Art. 20, 2, iv; Art. 6, 2 and 3 Convention and Art. 8, 3 L 12/93)
5. Some Authors already advocated the need to control the parent's authorisation. Be it an independent entity⁶ or a judicial confirmation of the parent's consent.⁷ Nowadays the European Convention on Human Rights and Biomedicine demands the *intervention of a body* (art. 20, iv). This might be, according to the Explanatory Report, a court, a professionally qualified body, an ethics committee, etc. It "aims to guarantee that the decision to be taken is impartial."⁸ Here the Cv. has gone further than the Portuguese legislator.⁹
6. *Court authorisation* in case of incompetent adults (Art. 8, 5 L 12/93)
7. The potential donor concerned does not *object*, the law establishes a right of veto (*Vetorecht*). The Portuguese Law further prescribes that, in case the child has the ability to understand and to manifest his/her will, he must also *consent*.

⁵ Art. 52 Deontological Code states, it is an extreme procedure, that demands informed consent of the donor, and this excludes incompetent persons and, in principle, minors. As said before, though, this is not legally binding.

⁶ Paula SILVA, "Em torno da discussão sobre transplantes de órgãos e tecidos – o caso particular de Portugal e Espanha", in Brotéria, 137, n.º 6 Dezembro de 1993, p. 523 a 532. The Author suggests the creation of an independent and plural committee to approve (or disapprove) the parental consent.

⁷ VAZ RODRIGUES, *O Consentimento Informado para o Acto Médico no Ordenamento Jurídico Português*, Coimbra Editora, 2001, p. 155, defends a judicial authorization of the parental consent.

⁸ Explanatory Report, no. 129.

⁹ In cases of refusal of treatment that lead to death or severe injury of the child the doctors – that was already the understanding of the Portuguese Jurisprudence and literature - are allowed to treat the child in cases of emergency or the court can sustain the parental power. See *Conselho Consultivo da Procuradoria Geral da República* (Parecer 8/91) and Sinde MONTEIRO/ André PEREIRA, *Regulations of Civil Law to Safeguard the Autonomy of Patients at the End of Their Life*, (Jochen TAUPITZ (Ed.), Springer, 2000, p. 859.

However, one shall respect as far as reasonable the constitutional principle, which recognizes that "Parents have the right and the duty to educate and maintain their children" (Art. 36, 5 Portuguese Constitution; see also Art. 16, 26, 3 Universal Declaration of Human Rights), since it does not offend the 'Child's best interests' (See Art. 69 Portuguese Constitution and *United Nations Convention on the Rights of the Child*), PEREIRA COELHO/ GUILHERME DE OLIVEIRA, *Curso de Direito da Família*, Coimbra Editora, p. 148.

Compensation for damages

The Portuguese law adopted a *no-fault* system concerning compensation for injury done to the subjects of clinical trials. Article 9 of Law 12/93 of 22 April establishes a hypothesis of objective civil liability (no 1): “The donor has the right to medical assistance until completely recovered and to compensation for damage suffered, *independently of fault*, and this is complemented by a *compulsory liability insurance* supported by the health establishments that provide organ transplantation (no. 2).¹⁰

The classical theories of objective liability do not permit understanding of this situation, since the theory of risk and the theory of guarantee do not explain anything here. The basis for such norms, whose content is, broadly speaking, to reward people who agree to put themselves at risk in the name of the community, should rather be found – according to SINDE MONTEIRO¹¹ - in the *theory of the voluntary assumption of risk*. Someone who voluntarily accepts a risk for his health on behalf of a third party (organ donation) or the community as a whole (clinical trials) has the right to compensation independently of fault.

This system seems to be fair and adequate in order to improve organ donation and to compensate those who, in an act of love and giving may suffer serious harm, and would well be recommended at a European level.

Deceased Persons:

The Portuguese law has adopted the so-called (*opting-out system*) - “*enge Widersprachslösung*”, that is, all citizens, stateless persons and aliens legally residing in the territory, are considered to be, *post mortem*, potential donors, in case they have not expressed the opposite will before the Ministry of Health (Art. 10 L 12/93). DL 244/94, of 26th September, regulates the National Registry of Non-Donors. In Portugal, death is defined as the *irreversible cessation of the brain functions* (L 141/99, 28th of August).

¹⁰ A similar system exists on the regime of clinical trials. Article 14 of DL 97/94 of 9 April (Clinical Trials Act) establishes that: “The subject of clinical trial has the right to be compensated for damage suffered, independently of fault”, and this is complemented by compulsory liability insurance. See SINDE MONTEIRO/ COSTA ANDRADE/ FARIA COSTA, with the collaboration of ANDRÉ PEREIRA, “Portuguese Report”, DEUTSCH/ TAUPITZ, (Eds.), *Freedom and Control of Biomedical Research, The planned revision of the Declaration of Helsinki*, Springer, 1999.

¹¹ SINDE MONTEIRO/ ANDRÉ PEREIRA, “Landesbericht Portugal”, in TAUPITZ (Hrgs.) *Zivilrechtliche Regelungen zur Absicherung der Patientenautonomie am Ende des Lebens*, Springer, 2000, p. 837.

The solution is not only in agreement with the spirit of article 10 of the CoE Resolution (78) 29, but it also represents its most radical version, since the only possible objection has to be made and recorded in the National Registry, while the family itself cannot oppose the collection of the organ. The European Parliament also recommended the ‘no-objection’ model.¹²

To go abroad to receive a donation

The Statute 12/93 has no specific provisions in this respect. Anyway, the Ministry of Health made important efforts in order to create effective transplantation centres in the National Health Service to prevent the burdens and the (social) unfairness of going abroad to receive medical treatment.¹³ Moreover, Portugal is part of the European network of organ transplantation.

Criminal Law

In case of illegal donation, there is a *serious offence of physical integrity (battery)* (Article 144 of the Penal Code), since the consent is void because it violates the *boni mores* (Art. 149º Penal Code). The doctor who performs the illegal collection of organs is to be accused of that crime punishable with 2 to 10 years in prison.

The doctor may also be prosecuted by the crime of “Criminal Association” (Art. 299º - punishment: 1 to 5 years), if he is a member of an organisation or association the scope of which is to commit crimes.¹⁴

Our Law has no specific criminal provision on trade of organs. It has neither any sanction for the remuneration of the removal.¹⁵ Art. 16 of the Transplantation Law provide a general remark saying that those who infringe it are civilly, disciplinary and criminally liable. Nevertheless, according to the legality principle (Art. 29, 1

¹² Resolution n. C 127/71 (Official Journal of the European Communities, 21 May 1979): “*The European Parliament (...) points out that only the ‘no objection’ formula can best meet the needs of recipients; advocates strongly the adoption of the ‘no objection’ formula, on condition that where such a system is introduced in a Member State, the best possible guarantee is provided that individual’s wishes will be respected...*”

¹³ This can be read in the preambles of the first Ordinances of the Ministry of Health on Transplantation centers: Minister’s Decree 130/92 of 29 February and Minister’s Decree 1245/93 of 6 December.

¹⁴ See FIGUEIREDO DIAS, *Comentário Conimbricense ao Código Penal*, II, Coimbra Editora, Coimbra, 1999, 1155 ss.

¹⁵ See Paula FARIA, *ob. cit.*, 1995, p. 271-272.

Portuguese Constitution and Art. 7 European Convention on Human Rights), no crime exists before a statute creates it.

The former Statute provided a crime regulating the collecting of organs against the will of the deceased person. The draft-law also provided some crimes on trade of organs, but they were not approved.¹⁶

With the revocation of the former Statute, doctrine discusses whether the “*crime of loss*” or “*profanation of corpse*” applies. The human body is *res extra commercium*, that means, one has no pecuniary right over it; and the same applies to the cadaver. It would be against human dignity to apply the crimes of loss or robbery, since they presuppose the existence of a property right over the corps.¹⁷

Literature¹⁸ sustains that article 226° of the Portuguese Penal Code (‘Profanation of corpse’) only aims at protecting the feeling of piety (*pietas*). Thus the removal of organs with a medical objective is outside its scope of protection.

Statute no. 274/99, of 22nd July, on the dissection of cadavers for research and learning purposes, created some crimes.¹⁹ It punishes those who trade the cadaver, parts of it, organs, tissues, etc. But only if that trade is done in order to research or teaching purposes. It does not apply for the purpose of transplantation.

In conclusion, there is no criminal offence in case the doctor collects organs from a deceased person, who, while living, demanded not to be a donor.²⁰

The 5th June 2002, the Socialist Party presented a Proposal of Law in the Parliament (Draft-Law no. 49/IX) that pretends to criminalize traffic of organs and tissues, as well as the publicity or recruitment of donors.

¹⁶ Art. 25° of the Draft Law would provide: Every one, who, by any way, incentive or intervene in trade of human organs and tissues, independently of its purposes, will be punished with 1 to 5 years in prison. Art. 27 would prescribe some additional penalties: suspension or dismissing, when the agent is a civil servant; temporary or definitive prohibition of working in the transplantation service; temporary or definitive closing of the establishment where the illegal actions were performed; publicity of the condemning sentence in a newspaper.

¹⁷ Paula FARIA, *ob. cit.*, p. 127, Madalena LIMA, *Transplantes*, p. 162 and COSTA ANDRADE, *Comentário Conimbricense...*, II, p. 214.

¹⁸ Paula FARIA, *ob. cit.*, p. 136, Madalena LIMA, *ob. cit.*, p. 164 e Damião da CUNHA, *Comentário Conimbricense...*, II, p. 656.

¹⁹ Art. 20: Who, for the purposes of learning and scientific research, trades cadaver or parts of it, pieces, tissues or organs, is punished with 2 to 10 years in prison. And the penalty is aggravated (1/3 in the minimum and maximum) if the person, during his lifetime, objected to be a donor.

²⁰ This is indeed a strange ‘silence’ since the former Statute and the Draft-Law provided for some criminal offenses. See FARIA COSTA, *ob. cit.*, p. 132-134.

The Draft-Law provides a broad definition of Traffic of Organs: who with intention of commercialisation, uses or collects organs or tissues of human origin shall be punished with 2 to 10 years in prison; and if this is done without the consent of the donor, there is an aggravation of the penalty in 1/3 in the minimum and the maximum. It also creates a crime for propaganda, publicity or recruitment of 'donors'. Advertising trade of human organs or recruitment of 'donors' in order to commercialise organs or tissues shall be punished with up to 2 years in prison.

Conditions and procedures for a transplantation; Supervision and procedures

Article 3 of the Transplantation Act allows for the acts of transplantation to be effected under the responsibility and direct medical surveillance, in accordance with the *leges artis*, in public or private hospitals.

The Forensic Medicine Institute may also collect tissues for therapeutic purposes, during autopsies. Transplantation centres are authorised and monitored by the National Ministry of Health.

Ordinance 130/92, 29th February, and Ordinance 1245/93, 6th December, regulated this activity. In broad terms, the Minister only allowed the centres with technical and human conditions necessary, according to the *leges artis*, to perform these procedures. The activity was thus dependent on the Minister's authorisation.

Since 8 January 2002, Ordinance 31/2002²¹ regulates this field. Article 1 prescribes that the collection of tissues and organs of human origin for the purposes of transplantation and the activity of transplantation are dependent upon previous authorisation of the Minister of Health, after hearing the Portuguese Association of Transplantation. It further regulates the conditions and the performances of those centres.

Structures

There is a national structure with hierarchy and decentralisation. The Portuguese Organisation of Transplantation has the general co-ordination; the Transplantation

²¹ In DR, Serie I-B, 8th January 2002.

Offices are on the field, co-coordinating the work of collection and transplantation of organs done by the Transplantation Units and the Histocompatibility Centres.

1. *POT - Portuguese Organisation of Transplantation*

The Minister of Health created the *Portuguese Organisation of Transplantation*.²² It is composed by: (1) The National Co-ordinator of Transplantation, (2) The Transplantation Board²³ and (3) The Transplantation Offices.

Its competences are:

- To establish the norms of procedure and articulation between the Transplantation Offices, the Histocompatibility Centres and the Transplantation Units;
- To improve the collection and transplantation of organs and tissues
- To define the procedures of this activity.

Transplantation is thus regulated by these technical and ethical entities that advise the Minister of Health in the enacting of ordinances on this subject.²⁴

2. *The Transplantation Offices*

There are 5 (2 in Porto, 1 in Coimbra and 2 in Lisbon); all of them working in public, central Hospitals. Their functions are:

- To work together with the Transplantation Units and the Histocompatibility Centres (there are 3) in order to achieve an adequate and in time collection and transplantation of organs and tissues;
- To consult the RENNDA (National Registry of Non-donors)
- To identify potential donors and communicate it to the transplantation teams;
- Co-ordinate transplantation at a national and international level.

3. *Transplantation Units and Histocompatibility Centres.*

Portugal has a population of around 10 Million inhabitants. It has nowadays 3 Centres for Cardiac and thoracic transplantation, 5 for liver transplants, 7 for kidney transplants, 4 for medulla and 11 for the cornea.

²² Ordinance of 9/8/96, in DR 204 II, 3/9/96

²³ Ordinance 89/97, 11/3/97. Includes the National Co-ordinator of Transplantation, the directors of the Transplantation Offices, the Histocompatibility Centres, experts nominated by the Minister of Health, a representative of the Medical Council, the President of the Portuguese Society for Transplantation and others.

Public opinion

a) Criticism about the opting-out system

Nuno OLIVEIRA defends that the norm establishing the opting-out system (Art. 10° of Law 12/93) is unconstitutional. This norm establishes that every Portuguese, stateless and foreign citizen legally residing in Portugal is a potential *post-mortem* donor, since he/she did not declare near the Minister of Health (at the National registry of non-donors) their will not to be donors. The Author says this norm does not ensure that the donor had a specific and individualised information about the legal regime.²⁵

The main doctrine, however, writes that the opting-out system is constitutionally acceptable²⁶. On the other hand, the Portuguese Constitutional Court considered that there is no fundamental right to disposal of the body, nor do relatives have the right to oppose the expressed or merely presumed will of the dead.²⁷

I do agree, though, that there are unconstitutional norms in our statutory law.

(1) Article 13, 6 L 12/93 is unconstitutional. This norm provides that when the corps is unidentifiable one presumes it is a donor, even though the person might have registered as ‘non-donors’.²⁸

(2) Article 3, 4 of DL 244/94, 26th September, establishes that the declaration of non-donor only comes into effect four days after being received.²⁹

These norms may disrespect, in practice, the will of the persons who objected to be *post-mortem* donors, thus they violate the principles of equality and proportionality.

²⁴ V.g., Ordinance n. 10507/2000 of The Minister of Health – “Revision of the rules for the Selection of the donor and receiver in cases of Homotransplantation with a cadaver kidney”.

²⁵ Nuno OLIVEIRA, *O Direito Geral de Personalidade...*, 2002, pp. 233. FARIA COSTA, “O Valor do Silêncio...”, 1993, p. 129, criticised this model also.

²⁶ João LOUREIRO, *Transplantações: um olhar Constitucional*, 1995, p. 26; Paula FARIA, *Aspectos Jurídico-Penais dos Transplantes*, 1995, p. 234.

²⁷ Ac. TC 130/88, 8 June, *BMJ*, n. 378 (Jul 1988), p. 158.

²⁸ Nuno OLIVEIRA, *O Direito Geral de Personalidade...*, 2002, pp. 234. Already with doubts about this regime, see FARIA COSTA, “O Valor do Silêncio...”, 1993, p. 131, CAPELO DE SOUSA, *O Direito Geral de Personalidade*, 1995, p. 191 and SINDE MONTEIRO/ ANDRÉ PEREIRA, “Landesbericht Portugal”, 2000, p. 839, note 91.

It is indeed regrettable that the Portuguese State only in 1994 has accomplished its duty to make an information campaign. Since then the number of persons opposing to be a donor is reducing every year.

In 1994, 23 778 persons declared they did not want to be post-mortem donators. In 1995 the number decreased to 10 870. In 1996, there were only 947 declarations; in 1998, 490 and in 1999 only 185...

This may mean two things: 1) Portuguese people are very much willing to be post-mortem donators or 2) the population is not aware of its rights and the State is not informing the public about the legal situation. Most likely, the second is to be taken as decisive.

b) Criticism about the “inter vivos” transplantation regime

There is one particular question, which has consistently arisen criticism, both from the part of the doctrine and from public opinion. The *numerus clausus* of donors established by Statute is limited to a very restricted number of members of the family³⁰, whilst the Convention on Human Rights and Biomedicine has no requirement and the Draft Protocol on Transplantation requires merely either a relationship of “*existential proximity*” between the donor and the recipient or even, in the absence of that relationship, the authorisation of an independent entity (Art. 9 Draft Protocol).

Arguing against this regime, NUNO OLIVEIRA defends that it violates the principle of *proportionality*, the *general personality right* and the *right to bioethical self-determination*.³¹

On the other hand, the German Constitutional Court does not sustain the unconstitutionality of provisions, which are not very different from the Portuguese ones³². The Court pointed out the importance of the free consent and the gratuity of the donation that would be endangered in case the donation among non-relatives were allowed.

²⁹ The National Ethics Committee for Life Sciences recommended (5/CNE/93), on the contrary, that the inscription be effective only after receiving the non-donor card.

³⁰ Art. 6, 3: only when there is a family relationship up to the third grade (parents/children; brothers; grandparents/grandchildren; uncle/aunt – nephews/nieces) between the donor and the receiver.

³¹ Nuno OLIVEIRA, “Inconstitucionalidade do Artigo 6.º da lei sobre a Colheita e Transplante de Órgãos de Origem Humana, *Scientia Iuridica* – Tomo XLIX, 2000, n.ºs 286/288, p. 262.

³² See German Constitutional Court, 18 August 1999, apud Nuno OLIVEIRA, “Inconstitucionalidade do Artigo 6.º...”, *Scientia Iuridica*, 2000, p. 249 ss., p. 253.

Associations and representatives of patients suffering from kidneys insufficiency have very vividly opposed this limitation of Portuguese Statute. Especially because spouses and close friends are eliminated, not for medical reasons, but only on legal grounds.

I think the legislator could well take into consideration those claims from the society and eventually change the law.³³

However, in general, transplantation surgery enjoys a very great reputation and is mentioned as very delicate and requiring a high degree of knowledge, expertise and responsibility, being therefore greatly considered by the public in general.

CONTROLLED TRADE

It is well known that the mainstream doctrine on this issue denies any possibility of trade of human organs.³⁴

First, there are the *World Health Organization principles*.³⁵ In particular, Principle 5 lauds:

The human body and its parts cannot be the subject of commercial transactions. Accordingly, giving or receiving payment (including any other compensation or reward) for organs should be prohibited.

Principles 6, 7 and 8 are a development of the same doctrine:

6 – Advertising the need for or availability of organs, with a view to offering or seeking payment, should be prohibited.

7 – It should be prohibited for physicians and other health professionals to engage in organ transplantation procedures if they have reason to believe that the organs concerned have been the subjects of commercial transactions.

8 – 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.

³³ Madalena LIMA, *op. Cit.*, p. 9 f. 165 f., defends a broad interpretation of the law, accepting spouses as donors. But this interpretation is *praeter legem*. VAZ RODRIGUES, *ob. cit.*, 2001, p. 154, says that only after the legislator intervenes such a solution is possible.

³⁴ Already ULPIANUS (D., 9, 2, 3) wrote: *dominus membrorum suorum nemop videtur*, from which came the adage *Liber homo non recipit aestimationem*.

³⁵ World Health Organisation Resolution WHA 40.13, May 1987, and WHA 44.25, 13 May 1991. See also World Health Organisation Resolution WHA 42.5, May 1989, condemning the purchase and sale of organs of human origin.

Finally, Principle 9 makes an appeal to the supreme principles of equality, distributive justice and equity:

9 – In the light of the principle 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.

Some Authors discuss the arguments for and against permitting a market in organs.³⁶ The *Portuguese National Ethics Committee for Life Sciences (2/CNE/92)* defends the prohibition of (direct or indirect) trade of human organs and tissues. It admits, however, a compensation for damages (losses, pain and suffering) connected with the donation.³⁷

Also Resolution (78) 29 and the Biomedicine Convention (Art. 20) prohibit financial gain. The Resolution A3-0074/93, 14 September 1993, of the European Parliament also prohibits the trade of organs. The Draft Protocol on transplantation of organ expressly prohibits the trade of organs and tissues (Art. 21).

The libertarian thesis says that selling an organ is a universally free choice. Otherwise, it would constitute a form of paternalism, deciding what other people should do with their bodies. This definition of autonomy stems from a particularly western liberal tradition of ethics and politics, in which respect for the voluntary choice remains the sole and ultimate determinant of individual actions. The free choice argument is for example found in Englehardt's conception of autonomy, in which he sees autonomy purely in the sense of permission. The principle of permission allows people to treat themselves as they like (ENGLEHARDT 1996).³⁸

However, I would conclude that, in order to follow the idea of individual autonomy organ sales must be forbidden.³⁹ "The Belmont report from the 1970s provides for a definition of autonomy that includes respect for persons, recognising that persons with

³⁶ See, v.g., Peter de Cruz, *Comparative Healthcare Law*, 2001, p. 273.

³⁷ The Swedish Committee on Transplantation (Stockholm, 1989) recommended that the Transplants Act be made to include an express prohibition of the purchase and sale, directly or through an agent, of human biological material to be used in transplant surgery. It further proposed that actions contrary to the prohibition be punishable by imprisonment or fines.

³⁸ Erling HOG, *Living Organ Vendors in Brazil: Autonomy, Exploitation, and Human Rights*, Faculty of Law Centre for Human Rights University of Coimbra Portugal, 2001, unpublished, p. 24.

³⁹ See also Comité Consultatif de Bioéthique de Belgique, *Avis n.º 11 du 20 décembre 1999 relatif au prélèvement d'organes et de tissus chez des sujets sains vivants en vue de transplantation*, "Autoriser

diminished autonomy are entitled to protection. Secondly, the Georgetown principles, including the original ideas from the 1970s and their later revisions, also recognise the failure of autonomous persons to govern themselves under temporary constraints, including conditions that restrict options. Thirdly, the Kemp principles, created in European context in the 1990s, point to the lack of *moral* autonomy, when speaking of persons exempt of the free choice principle, supporting the idea that autonomy must be linked to principles of dignity, integrity, and vulnerability, and also to solidarity, responsibility and justice.

The elaboration of autonomy related to justice is the way forward in bioethics. There is an inherent relationship between autonomy and justice, revealed in the Belmont report, the Georgetown principles and the Kemp principles.”⁴⁰

The international human rights regime is committed to social justice, underlined by the consistent appeal to dignity, integrity, social security, vulnerability, health needs, and poverty. Additionally, international policy statements (World Health Organisation, World Medical Association⁴¹) and human rights documents (Council of Europe, United Nations), commit themselves to prohibition of organ commerce while allowing for compensation.⁴²

Indirect Consent

Our Constitution allows both models (opting-in and opting-out). The most important is that, once we adopted the opting-out system, it is essential to have a procedure that guarantees the non-donor’s will. The Council of Europe also accepts this system. As we saw, some Authors agree⁴³ with this system, others oppose⁴⁴, but the Constitutional Court accepts it.

Personally, I agree with this system, since, on the one hand it provides the Doctors with more organs and tissues to save lives and we benefit from it, and – supposing

un marché des organes et tissus ramène le droit d’exister à une évaluation vénale de la valeur des personnes, contre l’affirmation de leur *autonomie* et de leur *dignité* intrinsèques.”

⁴⁰ Erling HOG, *Living Organ Vendors in Brazil: Autonomy, Exploitation, and Human Rights*, Coimbra, 2001, unpublished. Also the Additional Protocol to the American Convention on Human Rights combine autonomy and justice.

⁴¹ World Medical Association *Statement on Human Organ & Tissue Donation and Transplantation*, Adopted by the 52nd WMA General assembly in Edimburgh, Scotland during October 2000.

⁴² HOG, *Living Organ Vendors in Brazil...*, p. 66.

⁴³ Paula FARIA, *ob. cit.*, 1995, pp. 192 ss.

⁴⁴ FARIA COSTA, *ob. cit.*, 1993, p. 131 and Nuno OLIVEIRA, *ob. cit.*, 2002, p. 233.

there are information campaigns - it respects the religious and philosophical convictions of every citizen.

Organised Crime and trade of human organs

The crime 'Organised Crime is foreseen in article 299 of the Penal Code. It intends to protect public peace. The sole existence of criminal organisations and their activity denies the feeling of peace that the legal order aims at establishing and to which the citizens have right. On the contrary, it creates a sensation of general danger and fear of crime. This is, thus, an *abstract danger crime*.⁴⁵

The elements of this crime are: a) the existence of an *organisation*, a group, this means, a plurality of persons, with some stability and duration, some hierarchy, and a common feeling of decision; b) the *criminal scope*. It is not necessary that members of the organisation perpetuate the crimes; it is enough that the group supports its performance.

According to this general definition, trade of human organs can be considered as organised trade.

There is no specific legislation on trade of human organs. But legislation concerning *international criminality*⁴⁶ and *money laundering*⁴⁷ includes trade of human organs and tissues as one of the criminal activities that should be prosecuted. The United Nations approved, in 2000, the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Conventions Against Transnational Organised Crime*.⁴⁸ And for the first time in a United Nations legally binding document 'Trafficking in Persons' is defined and it includes "the removal of organs".⁴⁹

⁴⁵ FIGUEIREDO DIAS, *Comentário Conimbricense...*, II, p. 1157.

⁴⁶ The EUROPOL Convention, annex 2, enunciates traffic of human organs and tissues as one of the fields of action for the EUROPOL. See DR, I-A, 19/9/97.

⁴⁷ See Law 10/2002, 11 February (prevention and punishment of money laundering).

⁴⁸ The UN Crime Commission launched the Trafficking Protocol together with a Convention Against Transnational Organised Crime and a Smuggling Protocol in December 2000.

⁴⁹ '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

Statistics of Transplantation in Portugal

Evolution from 1994-2002⁵⁰

	1994	1995	1996	1997	1998	1999	2000	2001
Kidney	341	361	402	385	309	367	359	359
Liver	34	67	127	143	133	159	162	184
Hearth\	8	8	9	6	8	12	15	17
Medulla	82	135	180	216	243	230	236	257
Cornea	286	300	375	397	373	369	413	501
Other organs				2	1		3	5

others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude *or the removal of organs*.

⁵⁰ More information in www.opt.min-saude.pt

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