Buying and Selling Organs: Issues of Commodification, Exploitation and Human Dignity

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Buying and Selling Organs: Issues of Commodification, Exploitation and Human Dignity

Roberto Andorno(*)

"Liberty is at an end whenever the laws permit that, in certain cases,
a man may cease to be a person, and become a thing"

Cesare Beccaria, *On crimes and punishments,* ch. 20

I. Introduction

The commercial trade in human organs and the trafficking of persons for the purpose of organ removal have become a serious human rights problem worldwide. In 2007, it was estimated that organ trafficking accounted for 5-10% of the kidney transplants performed annually throughout the world.[1] There are reasons to believe that these numbers have increased since then.[2]

In view of the magnitude and complexity of this problem, some intergovernmental organizations have developed over the past two decades specific legal frameworks aiming to prevent and fight organ trafficking, the most recent one being the Council of Europe's Convention against Trafficking in Human Organs (2015).[3]

Today, the ban on organ sale, no matter how supposedly 'voluntary' or 'well informed' could be the seller, can be counted amongst the principles of international biolaw.[4] This principle can be found in major intergovernmental and non-governmental instruments relating to biomedicine such as the UNESCO Universal Declaration on Bioethics and Human Rights (2005) (Art.

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[1] Debra A. Budiani-Saberi & Francis L. Delmonico, 'Organ trafficking and transplant tourism: a commentary on the global realities', *American Journal of Transplantation* 8 (2008): 925-929.

[2] European Parliament. Policy Department. Directorate-General for External Policies, *Trafficking in Human Organs. Study* (Brussels: European Union, 2015), 8.

[3] See Stefania Negri, 'Transplantation Ethics and the International Crime of Organ Trafficking', *International Criminal Law Review* 16 (2016): 287-303.

[4] Roberto Andorno, *Principles of international biolaw* (Brussels: Bruylant, 2013), 30.

21, para 5)[5], the WHO Guiding principles on human cell, tissue and organ transplantation (2010) (Principle 5)[6], the Council of Europe's Convention on Biomedicine and Human Rights, also known as the 'Oviedo Convention' (1997) (Art. 21)[7], and the World Medical Association's Statement on Human Organ and Tissue Donation and Transplantation (2000) (Para. 26).[8] At domestic level, at least 55 countries have specific legislation prohibiting the payment for organs.[9]

This paper briefly presents the two major reasons justifying the ban on the commercial trade on human organs: the commodification of the human body and the exploitation of vulnerable people. At the same time, it aims to argue that what is ultimately at stake in the practice of buying and selling human organs is the need to ensure respect for human dignity.

2. Commodification of the Human Body

Today it is widely accepted that it is morally –and legally– unacceptable to treat people as if they were mere objects. Every human being is regarded by law as deserving to be treated as 'someone' and not merely as 'something'. For this reason, contemporary legal systems tend to systematically reject any practice that implies blurring the lines between 'persons' and 'things'.[10] The sharp distinction between these two basic legal concepts has been labelled as 'the primary truth of law'.[11] This dialectic persons-things is indeed the most fundamental structuring principle of modern legal systems.

One particular application of the *summa divisio* between 'persons' and 'things' is the principle of non-commercialization of human body parts. This principle, which is included in several international and national norms

[5] 'States should take appropriate measures, both at the national and international levels, to combat (…) illicit traffic in organs'.

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

[7] 'The human body and its parts shall not, as such, give rise to financial gain'. See also the EU Charter of Fundamental Rights (2000) (Art. 3.2): 'In the fields of medicine and biology, the following must be respected in particular: (…) the prohibition on making the human body and its parts as such a source of financial gain'.

[8] 'In the case of living donors, special efforts should be made to ensure that the choice about donation is free of coercion. Financial incentives for providing or obtaining organs and tissues for transplantation can be coercive and should be prohibited'.

[9] Council of Europe / United Nations, *Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs. Joint Council of Europe and United Nations Study* (Strasbourg: Council of Europe Press, 2009), 47.

[10] Roberto Andorno, *La distinction juridique entre les personnes et les choses à l'épreuve des procréations artificielles* (Paris: L.G.D.J., 1996), 5.

[11] Louis Josserand, 'La personne humaine dans le commerce juridique', *Dalloz* (1932) : 1.

relating to organ transplantation, reflects an ethical and legal axiom according to which human organs should not be treated as *commodities* that can be bought and sold. Consistently with this imperative, the trade in human organs is condemned on the grounds that it entails a *commodification* of the human body.

In ethical and legal discourse, the term 'commodification' is used to refer to the turning of people into commodities or objects of trade. Slavery is the most obvious and extreme form of commodification. Slaves are reduced to mere property and thus stripped of all or most of their basic rights; slaves can be bought and sold as if they were mere merchandises; they do not belong to themselves but to their masters. Although slavery and slave trade have been formally abolished throughout the world, it is estimated that about 45.8 million people around the world are trapped in modern versions of enslavement (human trafficking for various exploitative purposes, forced labor, forced prostitution, debt bondage, etc.).[12] These new slavery-like practices constitute a highly complex phenomenon which flourishes all over the world, requiring enhanced global action to prevent it and to protect the rights of its victims.[13]

In bioethics, the concept of commodification is prominent in the discourse on two practices: the sale of body parts and surrogate motherhood. Let us focus on the former one and try to portray the concept of commodification in more precise terms.

It can be said that any form of commodification has two essential features: First, that 'persons' are turned into 'things'; and second, that gift-giving relationships are changed into commercial contracts.[14] The first feature can be called 'objectification' because parts of the body are treated as if they were *objects*, while in fact they are *constitutive elements of the person*. The body parts are regarded as 'detached' from the body, and thought of as distinct from the person whom they come from. Simultaneously, the body parts are integrated into a market logic, and seen as if they could be *sold.*[15]

It is true that an objectification of a body part may also take place in organ donation. By making abstraction of the donor's person, the potential organ receiver can actually regard the donor's organ as an 'object' that will save his or her life. All of the receiver's hopes and expectations are understandably placed on that life-saving 'thing'. Thus, the organ donor could be seen as 'commodifying' him or herself for the benefit of the receiver. Some authors have concluded from this that organ selling and organ donation are morally equivalent practices in terms of commodification, and that all that is ethically

[12] Walk Free Foundation, *Global Slavery Index*, 2016, p. 4. Available at: http://www.globalslaveryindex.org/

[13] Silvia Scarpa, *Trafficking in human beings: Modern slavery* (Oxford: Oxford University Press, 2008), 4.

[14] Herjeet Marway, Sarah-Louise Johnson, and Heather Widdows, 'Commodification of Human Tissue', in *Handbook of Global Bioethics*, ed. H. ten Have and B. Gordijn (Dordrecht: Springer, 2014), 581-598.

[15] Ibid, 585.

at stake in this domain is the need to ensure that the individual wanting to sell an organ gives a free informed consent and that the price paid for the organ is 'fair'.[16]

However, this merely utilitarian argument is too narrow and fails to capture the deep meaning and implications of the trade in human organs. Far beyond the issue of the consent and the amount of the compensation to the donor, *the crucial question is whether the human body can be treated as 'thing-like' or property.* Merely focusing on consent and compensation begs the fundamental question because it assumes that people have property rights over their bodies. Moreover, this argument fails to take into account the wider background of the increasing marketization of human interrelations as well as its impact on the life conditions of millions of people in our globalized world. Neither the 'consent' nor the 'fair' price approach is able to counteract the exploitation and commodification of impoverished sellers. Rather, the market model is likely to encourage such exploitation and commodification because any organs market is inherently based on asymmetrical power relations, and for the purpose of generating trade, the more asymmetrical the better.

Actually, organ donation and organ selling are not morally equivalent practices. Organ donation does not really involve commodification because the donor's organ is not thought of as being *saleable.* As afore mentioned, one of the features of commodification is that the body parts are integrated into a market logic, and seen as if they could be *sold.* It is precisely when a person's organ is 'tagged' with a price and placed on the market for sale that commodification emerges. The offer of an amount of money in exchange for an organ is in no way not trivial because the presence of money radically transforms a gift-giving relationship into a commercial transaction. More than giving a gift of life, organ donors become the *sellers of an object*, which is nothing less than a part of their own body.

By putting a price to one of their organs (e.g., a kidney), which is a constitutive part of their selfhood, organ sellers are in some way 'selling' their own persons, and are therefore degrading themselves to the level of an 'object'. This is not the case in organ donation, where donors, far from commodifying themselves, perform a laudable and even heroic act of altruism. It is interesting to note that the market logic that surrounds the practice of organ selling is totally absent from organ donation, since this latter is motivated by solidarity towards a sick person, and not by the promise of a financial reward.

[16] Stephen Wilkinson, *Bodies for Sale. Ethics and Exploitation in the Human Body* (London: Routledge, 2003).

3. Exploitation of the Poor

Besides the concern about the need to prevent the commodification of the human body, the prohibition of organ trade points towards a more concrete goal: preventing the exploitation of potential donors, and especially, poor people from developing countries. When money is offered, it is obvious that the most desperate –the extreme poor, not the rich– is the most easily attracted to performing a seriously degrading act –the selling of a body part– that he or she would never do in normal circumstances. Even authors supporting the legalization of organ selling acknowledge that 'those who want to sell an organ would not do so if they could raise money for other means'.[17]

Although it is tricky to make a precise definition of 'exploitation', it seems clear that exploitation cannot be simply explained or defined in terms of a *defective informed consent.* Slavery is not less exploitative because its victims have 'consented' to it in order to survive and alleviate to some extent their miserable condition. In other words, a transaction is not exploitative *for the sole reason* that the putative victim of exploitation is coerced, lacking capacity, ill-informed or manipulated. Although these different factors invalidating the consent are in fact present in many or most cases of organ selling, exploitation may also occur when victims are legally competent, have been clearly informed of the nature of the transaction, and their consent is valid and free in purely formal legal terms.

Thus, exploitation cannot be overcome by simply establishing a system guaranteeing that potential organ sellers are fully informed about the procedure and freely consent to it, or that the price offered to them is 'fair'. This is to say that organ selling is not immoral due to merely *contingent* factors, which could be corrected in the context of a regulated market. Offering money to poor people to get their organs is an *intrinsically exploitative* practice because it cruelly takes advantage of the desperate situation of the potential victims in order to take their body parts as if they were sealable objects.

It is true that exploitation always involves the idea of some *disparity* in the value of an exchange of goods and services. For instance, it can be said that a full-time worker is exploited if the wage he or she receives is too low to actually live on. If the wages are increased to a fair level, there is no more disparity between the work done and the salary received, and consequently, there is no more exploitation. However, in the case of organ selling, this disparity cannot be prevented by simply increasing the price. As a matter of fact, organs do not have a 'fair price' and the disparity is therefore inescapable. Body parts do not have a price for the simple reason that they are not 'things'; *they are constitutive elements of our personhood.* Thus, we do not own them, and cannot sell them as if they were 'objects'. As Kant famously put it, persons do not have a 'price' but a 'dignity': while 'price' is the kind of value for which

[17] Cécile Fabre, *Whose Body is it Anyway? Justice and the Integrity of the Person* (Oxford: Clarendon Press, 2006), 144.

there can be an equivalent, 'dignity' is elevated above all price, and admits no equivalent.[18]

Some commentators who are in favor of a market for human organs make a distinction between selling a whole person, which they consider as self-enslavement, and selling an element of this person's body, which would be ethically acceptable. For example, Michael Gill and Robert Sade claim that 'a person who sells a kidney still has the rest of her body left. And she can continue to control her own destiny after that. Indeed, the money from the sale of a kidney may enhance the range the range of choices for the seller, increasing rather than decreasing her capacity to control her own destiny'.[19]

This kind of arguments appears to ignore that every element of the human body is an interdependent and functional component of an integrated unity which forms the whole body of the person with inherent dignity. As the bioethicist Calum MacKellar points out, 'the moral value of the body's elements is similar to that of the whole body and cannot be measured financially. This means that if a whole body cannot have a price, then any of its integrated elements cannot have a price either'.[20]

4. Respect for Human Dignity

As mentioned in the previous sections, commodification of the human body and exploitation of the poor are the most common objections to the commercial trade in human organs. However, the ultimate reason for the ban on this practice is that it seriously violates *human dignity.* By reducing a person's body to the rank of a 'thing' that can be bought and sold, and exacerbating the conditions for the exploitation of the poor in the global market, the selling of human organs seriously diminishes human dignity. From this perspective, organ selling resembles self-enslavement, although in the former it is not the whole body which is sold, but only a part of it.

Human dignity is directly at stake in organ trade because the principle of respect for human dignity prevents the instrumentalization of human beings. As afore mentioned, both commodification and exploitation instrumentalize people by reducing them –their body parts– to mere 'objects' of trade. In this regard, it is worth remembering the famous Kant's second formulation of his categorical imperative, which emphasizes that we should always treat people as an *end in themselves* and never merely as a *means* to our ends. The reason

[18] See Immanuel Kant, *Groundwork for the Metaphysics of Morals* (New Haven: Yale University Press, 2002) 52 [Akademie-Ausgabe 4:431].

[19] Michael Gill and Robert Sade, 'Payment for Kidneys: The Case for Repealing Prohibition', *Kennedy Institute of Ethics Journal* 12(1) (2002) : 30.

[20] Calum MacKellar, 'Human Organ Markets and Inherent Human Dignity', *The New Bioethics. A Multidisciplinary Journal of Biotechnology and Genetic Ethics* 20(1) (2014):59.

is that human beings are not 'things' but 'persons' and hence not something that can be used merely as a means.[21]

As Cynthia Cohen notes, 'human beings and their body parts have a value that is beyond the contingencies of supply and demand or any other relative estimation. To sell an integral human body part is to corrupt the very meaning of human dignity'.[22] The parallel with self-enslavement is indeed useful to this purpose: if selling whole persons violates their dignity, selling body parts, which are an integral component of persons, also violates their dignity.

The notion of human dignity has been sometimes criticized in bioethical circles as 'hopelessly vague', as a 'mere slogan' or even as a 'useless concept'.[23] The truth is that this notion, far from being a purely philosophical or rhetorical statement, has a very powerful, revolutionary meaning which relates to the *equal worth* of all human beings.[24] It is not by chance that this notion is the bedrock of the entire international human rights system that emerged in the aftermath of the Second World War. The Universal Declaration of Human Rights (henceforth UDHR) is explicitly grounded on the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family' (Preamble). From the very beginning, the Declaration puts forward that 'all human beings are born free and equal in dignity and rights' (Article 1). All human rights are regarded by international law as 'deriving' from human dignity.[25]

Although international law does not provide a definition of human dignity, it offers helpful guidance for the understanding of this notion when it states that dignity is 'inherent' to all human beings. The term 'inherent' means 'existing in something as a permanent, essential, or characteristic attribute'.[26] The idea contained in this word, when it is accompanied by the adjective 'human', is that dignity is *inseparable from the human condition.* Thus, dignity is not an accidental quality of some human beings, or a value derived from some particular personal circumstances such as the fact of being young or old, rich or poor, man or woman, healthy or sick, but rather something that all human beings possess *by the mere fact of being human.*

The principle of respect for human dignity is not only the bedrock of international human rights law, but also plays a very central role in the international instruments relating to bioethics that have been adopted since the end of the 1990s by intergovernmental organizations such as UNESCO and the Council of Europe. Thus, it is surprising that respect for human dignity has

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[21] Immanuel Kant, op. cit., 45 (Akademie-Ausgabe 4:428).

[22] Cynthia Cohen, 'Public Policy and the Sale of Human Organs', *Kennedy Institute of Ethics Journal* 12 (2002): 57.

[23] Ruth Macklin, 'Dignity is a useless concept', *British Medical Journal* 327 (2003) : 1419-1420.

[24] Jonathan Mann, 'Dignity and Health: The UDHR's Revolutionary First Article', *Health and Human Rights* 3(2) (1998):30-38.

[25] International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights (1966), Preambles.

[26] Oxford English Dictionary, See : https://en.oxforddictionaries.com/definition/inherent

been labeled as 'the shaping principle' [27] or even as the 'overarching principle'[28] of international biolaw.

Interestingly, the emphasis on human dignity and rights in modern biolaw is closely related to the same dramatic events that led to the development of international human rights law. The drafting work of the Universal Declaration of Human Rights was largely inspired by the discovery of the horror of concentration camps, including the revelation that prisoners were used for brutal medical experiments.[29] In this regard, it has been said that the Second World War was 'the crucible in which both human rights and bioethics were forged, and they have been related by blood ever since'.[30]

The international documents dealing with organ transplantation and organ trafficking also put special emphasis on human dignity. The Council of Europe's Convention against Trafficking in Human Organs (2015) condemns this practice on the grounds that it 'violates human dignity and the right to life' (Preamble). The Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin (2002) recognizes that 'the misuse of organ and tissue transplantation may lead to acts endangering human life, well-being or dignity' (Preamble). The Istanbul Declaration on Organ Trafficking and Transplant Tourism (2008) mentions 'respect for human dignity' as one of the fundamental principles, along with equity and justice, that are violated by organ trafficking and transplant tourism (Article 6).

5. Conclusion

International human rights instruments relating to biomedicine, and more specifically those dealing with organ transplantation strictly forbid buying and selling human organs. They also condemn, even more severely, human trafficking for organ removal, which can be labeled as "the new slavery-like practice of our time".[31] In doing this, they require that 'the human body and its parts be treated, not as tradable assets, but as essential aspects of our shared, embodied humanity'.[32]

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[27] Noëlle Lenoir & Bertrand Mathieu, *Les normes internationales de la bioéthique* (Paris: Presses Universitaires de France, 2004), 16.

[28] Roberto Andorno, 'Human Dignity and Human Rights as a Common Ground for a Global Bioethics', *Journal of Medicine and Philosophy* 34 (2009): 223-240.

[29] Robert Baker, 'Bioethics and human rights: A historical perspective', *Cambridge Quarterly of Healthcare Ethics* 10 (2001): 241-252.

[30] George J. Annas, *American Bioethics. Crossing Human Rights and Health Law Boundaries* (New York: Oxford University Press, 2005), 160.

[31] Silvia Scarpa, op. cit, 4.

[32] Alaistar V. Campbell, 'Human Dignity and Commodification in Bioethics', in *The Cambridge Handbook of Human Dignity. Interdisciplinary Perspectives*, ed. M. Düwell, J. Braarvig, R. Brownsword and D. Mieth, (Cambridge: Cambridge University Press, 2014), 540.

The trade in human organs does not only entail a dramatic commodification of the human body. It also encourages the exploitation of the most vulnerable people in our globalized world. Ultimately, these practices undercut the value of human dignity by allowing the instrumentalization of some human beings for the benefit of others. In summary, as Anne Phillips brilliantly points out, 'it is hard to sustain notions of ourselves as *equals* [emphasis mine] when the bodies of some are being employed to solve problems in the bodies of others'.[33]

[33] Anne Phillips, *Our Bodies. Whose Property?* (Princeton, NJ: Princeton University Press, 2013), 154.