

Alignment of Brazil to convention 216: trafficking in human organs, under a comparative public law perspective between european union and Brazil¹

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Resumo

A questão da “mercantilização do corpo humano” e seu subsequente tratamento como mercadoria comercializável, atraiu cada vez mais a atenção dos pesquisadores de diferentes campos (Sociologia, Ética, Medicina e Direito) nos últimos anos. Neste artigo, os autores apresentam uma visão geral sobre esses desafios na perspectiva da União Europeia e do Brasil. Independentemente da proibição de tornar o corpo humano ou suas partes “uma fonte de ganho financeiro” ser incorporado nos principais sistemas jurídicos constitucionais, questões relativas ao tema são recorrentes. A pesquisa também analisa algumas questões limitadas em que as políticas de amalgamação e a moral pública são fundamentais, estão longe de ser resolvidas para outros aspectos como o “transplante de turismo” e a obstinação terapêutica e a maternidade substituta envolvendo terapias experimentais, nas perspectivas EU/Brasil.

Palavras-chave: Mercantilização do corpo humano; metodologia comparada; CoE.

Abstract

The question of “the commodification of the humanbody”, and its subsequente treatment as asaleable commodity, has increasing lybrought the attention of there searchers from diferente fields (Sociology, Ethics, Nursey, Medical and Law) during last years. Onthispaper, the authors presentan overview about these challenges on the European Community (EU) - Brazil Law perspective. Irrespective of the ban on making the human body or its parts “a source of financial gain” is embodied in the main Constitutional

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legal systems. For instance: The Brazilian and the European aims of analysis. The research analyses some borderline questions where amalgamated policy options and public morals on ethical grounds, are far from being resolved to other aspects such as the “transplant tourism” and therapeutic obstinacy and surrogate motherhood involving experimental therapies, on Brazil-EU perspectives.

Keywords: Commodification of the human body; comparative methodology; CoE.

Introduction

Bioethics guides the investigation and moral responsibility of health professionals in relation to the life and dignity of the people, offering security to the population and guaranteeing the protection of fundamental rights. Among them, the right to free initiative, the right to health and a healthy life, right to the human integrity and the, right to the autonomy and the freedom. Both the human person and the community in which he lives transforming himself over time, adding new ethical values and transforming his own history. Aristotle early recognized that “man is a political animal”⁴, and therefore, is a dependent being of the political city, polis. Consequently, the human person lives in a social environment developing relationships with one another in search of a peaceful and happy life. As such it is a being who needs the language to communicate and to unite with other people in the construction of a community, that is, “the political community would be requisite for happiness and the politics unfolding of the own Ethics”⁵. The word bioethics comes from the Greeks who “had two words to designate life: *zoé*, which refers to the common biological life, and *bios* which expresses specifically human life in its dimension Moral and political”⁶. Bioethics is also “the bridge of the future”⁷. Postmodern societies have become highly complex⁸ in its social, economic, and political relations. And in the face

⁴ ARISTÓTELES. *Política*. Translation on Portuguese by Mario da Gama Kury. Brasília: UNB, 1997. 3ª ed. [Título I, Cap. 2], p. 125.

⁵ N. SÁ et al. *Manual de Biodireito*. 2ª ed. updated and expanded. Belo Horizonte: Del Rey, 2011, p. 1.

⁶ Thus, moral bios and political bios, which for the Greeks were a public reality, underwent a process of privatization, because they became contents of subjective consciousness. Physical life and biological life, on the contrary, before private concerns of the family, became part of the public interest of the State. This phenomenon was called by Michel Foucault of bio power/biopolitics. V.P. BARRETO. *Dictionary of Political Philosophy*. São Leopoldo: Unisinos, 2010, p. 63.

⁷ V. R. POTTER. *Bioética: Ponte para o futuro*. Prefácio de Leo Pessini. São Paulo: Edições Loyola. Available at: <<http://www.pucpr.br/arquivosUpload/1237335091471892398.pdf>>. Last access on November, 30th, 2017. Bioethics is a link between science and the humanities, allowing a passage to a better quality of life.

⁸ E. MORIN et al. *The Intelligence of Complexity*. São Paulo: Petrópolis, 2000, p. 206. In contemporary times, complex thinking begins its development at the confluence of two scientific revolutions. The first revolution introduced uncertainty with thermodynamics, quantum physics, and Cosmo physics. This scientific revolution unleashed the epistemological reflections of Popper, Kuhn, Holton, Lakatos, Feyerabendian, who showed that science was

of the history of the Western world, especially in the face of the first and second World Wars, there is a central concern in humanity – the dignity of the human person⁹.

It is necessary to strengthen the EU capacity to foster and promote the highest ethical standards at both, the donation regime and the research integrity. In particular, promote the consistent application of the principles listed the *Helsinki Declaration*¹⁰ as well as the “*European Code of Conduct for Research Integrity*” developed by the European Science Foundation (ESF)¹¹. This includes their practical application at two levels: i) embed ethics and Bioethics within the research design; and ii) to update the information of trafficking in organs, tissues and cells on Comparative Law, by focusing on the study of the relevant aspects related to the protection of the fundamental rights in the European Union (EU). Four relevant fields of study have identified covering the main legal and bioethical issues related:

- human tissues and human embryonic stem cells,
- organ transplantation and donation and human trafficking
- surrogate motherhood,
- clinical practices which involves the economic gain with humans.

In 2004, the WHO’ Resolution WHAS 7.18 urged States “*to protect the poorest and vulnerable groups from the “transplant tourism” and the sale of tissue and organs*”, without ignoring other aspects of commodification, “*especially in countries where the regulatory framework to protect live organs donors from coercion, exploration and physical harm ate not well developed and implemented*”.¹²

As regard the “commodification” itself has been subject of wider interest of researchers worldwide, including from Brazil¹³, little attention has been paid to

not the certainty but the hypothesis, that a proved theory was not definitive and remained “falsifiable”, “(p. 206)” The second most recent scientific revolution, still undetected, is the systemic revolution in the earth sciences and ecological science. (p. 205).

⁹ The democratic State of Law is based on a policy of protection of the human person dignity.

¹⁰ World Medical Association. Declaration of Helsinki *The World Medical Association has developed the Declaration of Helsinki as a statement of ethical principles to provide guidance to physicians and other participants in medical research involving human subjects. The main duty in medical research to protect the life, health, privacy, and dignity of the human subject*, available at: <[http://www.who.int/bulletin/archives/79\(4\)373.pdf](http://www.who.int/bulletin/archives/79(4)373.pdf)>. Last access on October 24th, 2017.

¹¹ The European Code of Conduct for Research Integrity (ESF and ALLEA, 2011), available at <http://www.esf.org/fileadmin/Public_documents/Publications/Code_Conduct_ResearchIntegrity.pdf>. Last access on November 24th, 2017.

¹² World Health Organization. Resolution WHA57.18 on Human Organ and Tissue Transplantation, May 2004 57th World Health Assembly was followed by a number of activities and discussions, including the Second Global Consultation on Human Transplantation: Towards a Common Global Attitude to Transplantation, held in Geneva on March from 28th to 30th, 2007.

¹³ M. SANTANA FERNANDES, et al. “Brazilian Legal and bioethical approach about donation of research and patents of human body parts.” *Journal Community Genetics*. 2017 (8); p. 199-08.

other aspects of the commodification that can be reached by other means such as the so-called transplant tourism, the surrogate motherhood or therapeutic obstinacy involving experimental therapies.

Solving the organ and tissue shortage has been pointed out as the main challenge that has to face policy-makers¹⁴. Some authors have also underlined that under legislation in Brazil, Italy, Poland, Switzerland, Spain and Singapore, organs can be removed without explicit permission in deceased patients. Although it is highly questionable that rights *ad persona* continues after death, when these practices are opposed with living donor participation, the further objectionable question is whether those “presumed consent practices may also colour the rights of the living poor”¹⁵

The organ importing and exporting countries is another issue that has attracted the attention in connexion with the transplant tourism facts.¹⁶

It is not a chance that both concepts morality and public order are also the common grounds to impose limits to the commodification in the systems of protecting under intellectual property rights¹⁷ in the framework of the patenting life in general and the human body in particular. After the *Oliver Brüstle v Greenpeace e. V.* ruling, the exclusions of patentability of human body, parts, cells or genes also covers the human beings cloning and the essential organic processes. Noted the position on this line of case-law established *inter alia* by the judgment

¹⁴ Directorate General of Human Rights and Legal Affairs. Council of Europe. Joint Council of Europe/United Nations Study Trafficking in Organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs. 2009: “*Dealing effectively with organ shortage requires the development of a deceased donation programme to enable each country to reach its maximum therapeutic potential from deceased donors. Live donation should therefore be generally regarded as a complement to deceased donation activity (...). Over the years, various conventional approaches for tackling the scarcity of organs and donors for transplantation have proven to be of limited usefulness. One approach involves changing the legal framework regarding the type of consent required to proceed with organ donation, moving from an expressed (opt-in) to a presumed (optout) system. The idea behind the model of expressed consent is that the person has to express his/her will to donate explicitly during his/her lifetime. This approach may be modified in such a way that if the donor did not communicate his/her will during his/her lifetime, consent may be obtained from relatives or other persons who had a close relationship.*”

¹⁵ A. BRYSK, “Human Rights and Private Wrongs: Constructing Global Civil Society”, *Psychology Press*, 2005, pages 105 and 106: Furthermore, the author indicates that “many Brazilian doctors object to presumed consent because of the lack of safeguards”.

¹⁶ Y. SHIMAZONO. “The State of the international organ trade: a provisional picture based on integration of available information.” *Bulletin of the World Health Organization*. Volume 85, number 12, December 2007, p. 901-980. The most relevant organ-importing countries are [Organ Watch]: Canada, Australia, Israel, Japan, Oman, Saudi Arabia and the USA. Problems of shortage of organs are behind of those practices, where the patients travel abroad looking for remedies at whatever cost, even in terms of human dignity. Pakistan, Philippines, Egypt and India have been reported as some of the main organ-exporting countries.

¹⁷ A. FONTES. “As relações da Biologia com o Direito e seus dois maiores desdobramentos: o Biodireito e a Biopirataria”, *In: Mello, Cleyson de Moraes; Martins Vanderlei. Estudos em Homenagem a Heloisa Helena Gomes Barboza: Direitos Humanos, Bioética e Sociedade*. Editar, 2017. p. 43-55.

of the Court of Justice in case, on the patentability of human embryonic stem cells are built around the principle that the use of human embryos for therapeutic or diagnostic purposes applicable in the is patentable, but not their use in scientific research.

Where as the Directive 98/44/EC states that there is a consensus within the Community that interventions in the human germ line and the cloning of human beings is against order public and morality, this position shall be confronted again those of the United States Patent and Trademark Office (USPTO), the US Federal Legislation and the strong IP protections policy by the USTR, the TRIPS enforcement, etc, through the review of relevant cases and public policy doctrines: Parke- Davis & Co. v. H.K. Mulford & Co (1912), Diamond v. Chakrabarty (1980), Plant Genetic Systems,N.V. & Biogen, Inc v. Dekalb Genetics Corp (2001) and others.

Trafficking in organs, tissues and cells - Brazil and European Community (EU): main challenges

When analysing the alignment of current Brazil legal framework with the Santiago de Compostela Convention - CoE Convention - on *Trafficking in Human Organs*¹⁸ under a comparative Public Law perspective, we have to analyse the eventual incorporation into the Brazilian internal law of the commonly accepted principles, with the purposes of addressing the challenges arising of the implementation of Fundamental rights governing the topic and in particular the principles of Freedom of choice (*autonomia de la voluntad*), Informed consent, altruist, non-onerous, anonymous donations and general preference for organs of dead donors. Those principles rule the existing general donation regimen in most of the European countries, including all the Member states of the EU after entry in force of Directive 2010/45/EU on human organs intended for transplantation¹⁹.

The ethical and legal dimensions of these issues are included in the framework of the Council of Europe (which brings together states of the European continent, including Eastern Europe countries, such as the Russian Federation) through two specific legal instruments. The first of them is the *European Convention on Human Rights and Biomedicine* (Oviedo Convention of 1997) and its four Additional Protocols; the latest instrument is the *Convention on Prevention of Illicit Trafficking of Human Organs* (CoE Convention of 2015, not yet into force). All those treaties are open to the accession of Non-Member States, such as Australia, Canada, Holy See, Japan, Mexico, United States of America and international organizations such as the EU.

¹⁸ Council of Europe Convention against Trafficking in Human Organ. CETS No.216, available at: <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/216>>. Last access on October, 24th, 2017.

¹⁹ Directive 2010/45/EU of the European Parliament and of the Council of 7 July 2010, on standards of quality and safety of human organs intended for transplantation.

The illicit trafficking of persons for the purposes of organ donation has been specifically developed within the United Nations (*Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational organized crime*) and the Council of Europe Convention on *Action against Trafficking in Human Beings* (Convention of Warsaw, 2005). These Conventions are open to signature by any State irrespective whether it belongs or not to the European regional area.

Preventing the illegal trafficking in human organs, tissues and cells is a problem of global proportions against human rights which constitutes also a direct threat to individual and public health.

In any case, internal priorities can modify the priority and legislative goals. This is the case of *de facto* opposition of Brazil to adhere to the CoE Conventions. The facts that marginal populations could be subject to illegal marketing of organs with the purposes to economic gain cannot ignore the adverse consequences arising from in living donors

On the other hands, several questions are on the field. For instance, the gender equality protection through the use of public funded assistance in Brazil to promote transgender equity or the question of the surrogate motherhood.

Relevants aspects of CoE instruments

Recent advances in biomedicine and biotechnology have brought into existence a variety of new modalities in which human bodies, human tissues and human bodily parts may be used, modified, donated or sold, thus igniting a public debate on crucial issues laying at the interplay of bioethics.

In 2002 The Council of Europe adopted an Additional Protocol to the *Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin* (CETS n°. 186,) that provides strong prevention and repression of internal and international trafficking in persons and measures for the care of victims²⁰.

On the Chapter I – Purposes, scope and use of terms²¹, includes the following definitions: scope: The Convention applies to the trafficking in human organs for purposes of transplantation and to other forms of illicit removal and of illicit implantation²². And the Article 4, Substantive Criminal Law, regulates

²⁰ A. CAPLAN et al. “Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs”. *Joint Council of Europe/United Nations Study*, 2009, w/p.

²¹ Text from Convention - Appendix 10 (Item 10.3) Council of Europe Convention against Trafficking in Human Organs (*Adopted by the Committee of Ministers on 9 July 2014 at the 1205th meeting of the Ministers’ Deputies*).

²² -“Trafficking in human organs” mean any illicit activity in respect of human organs - “human organ” shall mean a differentiated part of the human body, formed by different tissues, that maintains its structure, vascularisation and capacity to develop physiological functions with a significant level of autonomy. A part of an organ is also considered to be an organ if its function is to be used for the same purpose as the entire organ in the human body, maintaining the requirements of structure and vascularisation.

illicit removal of human organs: Each Party of the convention are entitled to take legislative and other measures to establish as a criminal offence under its domestic law, when committed intentionally, the removal of human organs from living or deceased donors is performed without the free, informed and specific consent of the living or deceased donor, or, in the case of the deceased donor, without the removal being authorized under its domestic law; or where the living donor, or a third party, has been offered or has received a financial gain or comparable advantage or the removal of organs from a deceased donor supposes a financial gain or comparable advantage. a third party.

As there is a worldwide shortage of organs available for transplantation, there is a new and major problem, which is illegal trafficking in organs, which is now banned practically all over the world. Some victims are forced to donate an organ, others end up selling part of their body for financial gain and there are cases of people being deceived and/or others murdered for the removal and subsequent trade of human organs. The right aims to protect the society is marked by the dignity; the right condemns all action that can cause corporal or psychic injury to another or expose danger of life.

For Bittencourt, legal goods are the life of society and people, where everyone deserves constitutional protection precisely because of their social significance²³. Legal good in the broadest sense, is all that presents us as worthy, useful, necessary valuable. Goods are real things, or ideal objects endowed with immeasurable value, they are material or immaterial things, objects that besides being what they are, is something very valuable. Historically criminal law has the claim to protect life, as it is the most valuable legal asset and this needs greater protection, this subject has led to major debates on the true essence of a democratic state of law that is the inviolability of life²⁴.

Brazil formal opposition to Declaration of Helsinki

At the time being, Brazil has not been adhered to Santiago de Compostela Convention. Nevertheless, Brazil has developed a legal framework in line with Council of Europe Convention and with Declaration of Helsinki ethical recommendations. See: Law no. 13344, of October 6, 2016²⁵. All the subjects (freedom of choice, informed consent, altruist, non-onerous, anonymous donations, general preference for organs of dead donors) are now regulated by the Brazil Association for Transplants²⁶.

Despite this, Brazil do not intend to make proposal *Legeferenda*, due to the fact that Brazil has considered Declaration of Helsinki ethical recommendations as particularly dangerous for poor people and for populations with serious health public problems, which leads to considering the text an ethical regression.

²³ C. R. BITENCOURT. *Tratado de direito penal*, São Paulo: Imprensa, Saraiva, 2016, p.35.

²⁴ F. A. TOLEDO. *Princípios Básicos de Direito Penal*. São Paulo: Imprensa, Saraiva, 1994, p.15.

²⁵ Available at: <http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2016/Lei/L13344.htm>. Last access on November, 25th, 2017.

²⁶ Available at: <http://www.abto.org.br/abtov03_ingles/>. Last access on October, 26th, 2017.

Definitive re-formulations have been proposed within this additional reflection.

Relevant aspects of Brazilian Legislation

On October 6th, 2016, the Law n^o. 13.344²⁷ was enacted in Brazil. This Act provides for prevention and repression of internal and international trafficking in persons and measures for the care of victims. In Chapter I - *Principles and guidelines*, artArt. 2 establishes the principles of respect for the dignity of the human person and the guarantee of citizenship and human right²⁸. Art. 3 set up the strengthening of federative actions and the coordination between institutional organizations and society²⁹, by means of policy coordination and the national plans to combat trafficking in persons. Articles 4 and 5 provides for specific prevention measures against trafficking in person, reinforcing the cooperation between the Justice and the Public security systems, national and foreign. The chapter IV - Protection and assistance to victims³⁰ articulates specific measures for

²⁷ This Law provides for trafficking in persons committed in Brazil against a Brazilian or foreign victim and abroad against a Brazilian victim and confronting trafficking in persons includes the prevention and repression of such a crime, as well as attention to its victims, available at <http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2016/Lei/L13344.htm>. Last access on October, 25th, 2017.

²⁸ Art. 2. The confrontation with trafficking in persons shall comply with the following principles: I - respect for the dignity of the human person; II - promotion and guarantee of citizenship and human rights; III - universality, indivisibility and interdependence; IV - non-discrimination on grounds of gender, sexual orientation, ethnic or social origin, origin, nationality, professional activity, race, religion, age group, migratory status or other status; V - transversally of the dimensions of gender, sexual orientation, ethnic or social origin, origin, race and age in public policies; VI - full attention to direct and indirect victims, regardless of nationality and collaboration in investigations or legal proceedings; VII - full protection of children and adolescents.

²⁹ Art. 3. The confrontation with trafficking in persons shall comply with the following guidelines: I - strengthening of the federative pact, by means of the joint and articulated action of the spheres of government within their respective competences; II - articulation with national and foreign governmental and non-governmental organizations; III - encouraging the participation of society in instances of social control and of class or professional entities in the discussion of policies on trafficking in persons; IV - structuring the network to deal with trafficking in persons, involving all levels of government and civil society organizations; V - strengthening of activities in areas or regions with a higher incidence of crime, such as border, ports, airports, highways and road and rail stations; VI - stimulating international cooperation; VII - incentive to carry out studies and research and their sharing; VIII - preservation of the secrecy of administrative and judicial proceedings, in accordance with the law; IX - integrated management for policy coordination and national plans to combat trafficking in persons.

³⁰ Article 6 Protection and care for the direct or indirect victim of trafficking in persons includes: I - legal, social, work and employment and health care; II - reception and temporary shelter; III - attention to their specific needs, especially in relation to gender, sexual orientation, ethnic or social origin, origin, nationality, race, religion, age group, migratory situation, professional activity, cultural diversity, language, social and family ties Or other status; IV - preservation of intimacy and identity; V - prevention of revictimization in care and investigative and judicial procedures; VI - humanized care; VII - information on administrative and judicial

the protection and care for the direct or indirect victim of trafficking in persons including preservation of intimacy and identity; their social reintegration, the guarantee of access to education, culture, vocational training and work and, in the case of children and adolescents, their reintegration into the family and community.

Previously, Law no. 9,434, of February 4, 1997 - Provides for the removal of organs, tissues and parts of the human body for the purpose of transplantation and treatment and other measures³¹.

The transplant tourism in Brazil: Beyond the myth

Trafficking of persons for the purpose of organ removal has long remained a subject of rumor and urban myth in Latin America. For the broader social context in which these rumors may arise, see for example, the Scheper-Hughes analysis on the issue (1992)³². Latin-American countries have been frequently identified as locations of particularly active organ trafficking activity, whether as a locus of donors, recipients or brokers³³. The kidney transplantation occupies the first position in this trade, affecting³⁴ different countries, among them Bolivia, Peru or Brazil³⁵. Some estimates point out that almost 10 % of organs from deceased donors are intended to non-national patients. Comparable figures are indicated in the literature for Colombia³⁶.

procedures. §1º. The attention to the victims will be with the interruption of the situation of exploitation or violence, their social reintegration, the guarantee of access to education, culture, vocational training and work and, in the case of children and adolescents, the search for their reintegration into the family and community. §2º. Outside, immediate assistance to Brazilian victims will be in charge of the Brazilian consular network and will be provided regardless of their immigration status, occupation or other status. §3º. The health care provided in item I of this article must understand the aspects of physical and psychological recovery of the victim.

³¹ Available at: <http://www.planalto.gov.br/ccivil_03/leis/L9434compilado.htm> and Decree no. 2.268, of June 30, 1997 - Regulates Law No. 9.434, of February 4, 1997, which provides for the removal of organs, tissues and parts of the human body for transplantation and treatment, and other measures. Available at: <http://www.planalto.gov.br/ccivil_03/decreto/1997/D2268.htm>. All the accesses are on November, 26th, 2017.

³² N.SCHEPER-HUGHES, "Death Without Weeping: The Violence of Everyday Life in Brazil" *University of California Press*: Berkeley, 1992, p. 233-239.

³³ See: International Committee of the Red Cross. "Bellagio Task Force Report on Transplantation, Bodily Integrity, and the International Traffic in Organs", Transplantation Proceedings, 1997; 29:2739-45.; BUDIANI-SABERI et al, "Organ trafficking and transplant tourism: a commentary on the global realities", In: *American Journal of Transplantation*, Volume 8(5) (2008), pp. 926-927; Michael Bos, "An update on global organ trafficking", Presentation at the ELPAT Session of the 22nd Congress of TTS, Sydney August, 2008.

³⁴ N. SCHEPER HUGHES. "Prime numbers: organs without borders". In: *ForeignPolicy* 2005, p. 29.

³⁵ N. SCHEPER HUGHES, Op. cit. 2005, p. 31.

³⁶ L. FABREGAS. "Transplant tourism questioned at medical centres in Colombia". *Pittsburg Tribune Review*. 2007, p. 18.

Nonetheless, the efforts to regulate the organs demand related to kidney transplantation shall be also highlighted. The better knowledge of the transplantation needs can improve the efficiency of the systems. In Brazil, which ranks “second in absolute numbers of kidney and liver transplants in the world”, falls remarkably to the 28th position when the statistical take into account the effective percentage of transplanted kidneys from deceased donor according with the same relevant sources³⁷, Regrettably, those differences has not a neutral effect. According to Shimazono (2007) the motivation of most paid kidney donors is poverty, but the economic effect of the extra income received become even negative to medium, long term because of adverse effects and, eventually, by the limited employability of such patients³⁸, which in turn foster the search of better policy-oriented tools³⁹.

Although in legal terms we can separate the idea of trafficking in organs, tissues and cells from trafficking in human beings itself for the purposes of organ removal, in the latter case, the constituent elements of the crime is the attack to human dignity of the trafficked person. In the former case, the object of the crime is the organs, tissues and cells, and the deceptive practices thereof, linked to the fact “commodification” of human parts.

Other borderline questions; surrogate motherhood and therapeutic obstinacy

Surrogate Motherhood

An example of the current controversies on the diverging theoretical and normative views is represented by the ongoing discussion on the ethical and

³⁷ See Brazilian Association of Organ Transplantation. Organ transplantation in Brazil, 2006-2013: *The total number of renal transplants (n=5.433) increased only 0.4% and failed to reach the proposed goal of 5.700 transplants. There was a 3.8% increase in the number of transplants with deceased donors but an 8.4% reduction in transplants with living donors. Some states performed more than 45 kidney transplants pmp (RS: 50.9 pmp; DF: 49.8 pmp; SP: 46.4 pmp). The rate of 7.2 living donor kidney transplants pmp is the lowest registered during the last 15 years. Only PR (16.6) and SP (12.6) performed more than 10 transplants pmp with living donors. This tendency will affect our proposal of reaching 15 living donor kidney transplants pmp by 2017. Four years patient and graft survival rates for living (95% and 88%) and deceased (90% and 78%) donor kidney transplants have been maintained stable.*

³⁸ Partial survival rates of patient and donors “are considerable lower than the internationally accepted standards. (...)” In addition, several social scientific studies describe the perceived health and economic status effect and the perceived deterioration of the donors’ health in percentages ranging from 58% to 86% of reported cases. Y. SHIMAZONO, The State of the international organ trade: a provisional picture based on integration of available information. Bulletin of the World Health Organization. Volume 85, number 12, December 2007, p. 901-980.

³⁹ A. PERES PENTEADO et al. “Kidney transplantation Process in Brazil represented in Business Process Modelling Notation.” *Transplantation Proceedings*, 2015 (47), p. 963-966.

legislative status of surrogate motherhood. In this respect, the uncovering the key theoretical and normative foundations beneath the favorable and contrary positions structuring the current debate across EU member states, charting the various positions on:

- (i) the principle of ownership over one's body;
- (ii) the likely impact on the family relationship in relation to the child future wellbeing
- (iii) the status of reproductive rights in different countries and cultural contexts;
- (iv) the rights and the protection of the interests of the newborn.

Recently the Spanish Association of Bioethics and Medical Ethics (AEBI) in its last Annual Conference (2017), under the title Surrogate Maternity: ethical-legal concerns, condemns surrogate motherhood as contrary to the dignity of women.

In addition to the issue of surrogate motherhood, the same approach is based on systematic charting and assessment of the various normative arguments and argumentative strategies used to justify particular laws, policies, and regulations

“Encarnizamiento terapeutico”: The Santiago de Compostela Case-Study

In 2015, the parents of a kid with neurophysiological problems incompatible with life, had asked to cease all intervention by the Hospital of Santiago de Compostela to artificially prolong their life of the therapeutic support that kept it against nature, in what they understood a case of therapeutic obstinacy.

The parents, requested judicial intervention against the criteria of the Hospital. The novelty of the case is the *bona fide* mediation of the judge instead of a judicial intervention. The therapeutic obstinacy is forbidden in our legal order.

“Encarnizamiento terapeutico” happens all the time on Brazil by the fact that in Brazilian law, euthanasia is considered criminal although there is no explicit provision in this regard. However, the typification provided in art. 121 of the Penal Code, that is, simple or qualified murder. It is immaterial for the legal qualification of this conduct and for the corresponding civil and criminal liability, that the patient has given his consent. Even in this hypothesis, such consent is considered, legally, irrelevant, to de-characterize such conduct as a crime.

Conclusion

Although the Brazil legislation is largely in line with the CoE Conventions covering the issues, a further alignment to these specific legal instruments is advisable in those specific areas:

(1) proposing a set of scalable actions to identify, assess and resolve critical gaps in existing Brazilian regulations and policies concerning bodily rights and the donation/ownership of human tissues and other biological materials from living donors, and

(2) addressing specific actions to improve the awareness of relevant stakeholders on bodily rights and the ethics of ownership and donation in biomedicine in line with of CoE principles

Anyway, this topic has received the interests of scholars and researchers both, from Brazilian and abroad.

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