

ESTABLISHING A MARKET FOR HUMAN ORGANS* IN SOUTH AFRICA PART 1: A PROPOSAL**

Magda Slabbert
BA(Hons) HED BProc LLB LLD
Senior lecturer, Department of Jurisprudence
University of South Africa

Hennie Oosthuizen
Bluris LLB LLD LLD
Professor and Head of Department
Criminal and Medical Law
University of the Free State

SUMMARY

In the current system of organ procurement in South Africa, demand for transplantable organs outstrips supply by far. A change in legislation governing donation of organs is desperately needed as too many patients die unnecessarily waiting for an organ. A possible solution is to reward the donor financially. Authors in other countries have also expressed the need for changes in their countries' legislation in order to legalise the sale of human organs for transplant in an effort to save more lives. The proposed way of regulating the trade in organs is through "futures contracts". In order to propose a market for human organs in South Africa, it is necessary to take note of these proposals. A problem highlighted is the question whether property rights in human organs exist. Although not legislated in South Africa, it will be shown that there are property rights in human body parts. Finally, a contract of sale for selling kidneys from living donors and a futures contract for the sale of transplantable organs from a deceased donor will be proposed after analysing arguments against the commercialisation of human organs. In Part 2 the shortcomings in South African legislation, specifically regarding organ transplants will be discussed. Solutions will be suggested in accordance with the four pillars of bioethics.

1 INTRODUCTION

Transplanting organs is a well-established and growing life-saving practice. Developments in immunology have made it possible for organ transplants to

* "Organs" in this article means vital solid organs: Kidney, heart, liver, lungs and pancreas.

** This article is based on Slabbert's LLD dissertation *Handeldryf met Menslike Organe vir Oorplantingsdoeleindes* (2003) University of the Free State, Bloemfontein.

become almost routine operations in many hospitals. The major obstacle in this field is the lack of donor organs. For almost all human organs needed for transplantation, the supply cannot nearly keep up with the demand and the demand increases daily.

The “opting-in” system of organ procurement in South Africa, by which people indicate they want to donate organs for transplantation on a voluntary basis,¹ is not meeting the demand.² Advertisements and information drives to make people aware of the need and to solicit more donors seem to meet with little, if any success. To change to any other recognised system of organ procurement such as “opting-out” or “required request” in order to acquire greater numbers of transplantable organs, seems futile considering that almost none of the other countries using those systems have sufficient organs for transplantations either.³ In the following discussion (Part 1) different systems of organ procurement will be discussed briefly by way of introduction, in order to determine their suitability for addressing the organ shortage in South Africa.

An alternative should be sought that will both attract potential living donors and motivate people to take decisions about making their organs available for transplant after their death. Such an alternative should not only substantially add to the current pool of organs but should also be legitimate and allow a person to decide according to his or her own beliefs and morals whether or not to contribute an organ in some or other way. A solution that seems to meet these requirements is a regulated market in organs. Proposals by four scholars on how markets in human organs might be operated and regulated will be discussed and analysed to see whether these may be applicable in a South African context.

To propose a market presupposes ownership, which is not a straightforward given when one talks about organs. The issue of property rights in human organs will therefore also be briefly examined and, finally, after evaluating arguments against commercialisation of body parts, two contract forms are included as a proposal to regulate the selling of human organs in South Africa.

In Part 2 attention will be given to shortcomings in South African legislation specifically regarding organ transplants. By looking at the failure of the “opting-in” system as a way of procuring organs, an argument will be

¹ S 2 of the Human Tissue Act 65 of 1983. See also Blackbeard “Consent to Organ Transplantation” 2003 *THRHR* 47-48. The UK and the USA have the same system of organ procurement as South Africa. See criticism on voluntary donation in Cohen “Increasing the Supply of Transplant Organs: The Virtues of a Futures Market” 1989 (58) *The George Washington LR* 2.

² Slabbert and Oosthuizen “Commercialisation of Human Organs for Transplantation: A View from South Africa” 2005 (24) *Med Law* 193. There is no official waiting list for patients waiting for an organ in South Africa but it is estimated that about 5 000 patients are waiting, <http://www.odf.org.za>. For statistics in the USA see Cherry *Kidney for Sale by Owner: Human Organs, Transplantation and the Market* (2005) 1-4.

³ Erin and Harris “An Ethical Market in Human Organs” 2003 (29) *J Med Ethics* 137-139; Taylor *Stakes and Kidneys: Why Markets in Human Body Parts are Morally Imperative* (2005) 23; and Cohen 1989 (58) *The George Washington LR* 4.

made out that rewarding a donor is a possible solution. Such a proposal is then linked to the four pillars of bio-ethics beneficence, non-maleficence, autonomy and justice.

2 OTHER EXISTING SYSTEMS OF ORGAN PROCUREMENT

2.1 “Opting-out”

“Opting-out”, or presumed consent, is the opposite of “opting-in”. According to this system of organ procurement, every citizen is considered an organ donor on death unless the contrary is proved.⁴ A national register of the names of people not willing to donate, or not consenting to donation is centrally kept and is available to all hospital staff in the country should a person be declared brain dead⁵ and thus be a candidate for an organ donation. This system of procuring organs seems to operate fairly successfully in Belgium.⁶ In France, however, the system of “opting-out” is less successful because, despite the fact that every person is considered a donor unless the contrary is indicated, hospital staff still ask the relatives of a deceased for a donation.⁷

“Opting-out” may not be an acceptable system of organ procurement in South Africa as the diversity of the South African population renders such a system educationally, communicatively and culturally virtually impossible. The poor and the uneducated may be disadvantaged because only the more informed groups would exercise autonomy, since only they would be aware of their right to “opt-out”.⁸

The ethical objection to procuring organs in this manner echoes the legal argument against it, as it will enable the state to take a person’s property without his or her consent.⁹ Presumed consent, or “opting-out”, presumes too much by making an empirical claim – that the person would have consented to having his or her organs removed for transplantation had he or she been asked at a time when competent to respond.¹⁰ The question of

⁴ Taylor 7.

⁵ “Brain death” is used to describe the death of the brain stem. Organs can only be used from people whose brain stem is dead and who are on life support. Non-heart-beating donors can donate tissue. “Brain death” is not accepted as “death” in the Human Tissue Act 65 of 1983. The National Health Act 61 of 2003 became effective on 2 May 2005. S 93(1) of this Act repeals the Human Tissue Act in total, but this will only happen once the regulations concerning Chapter 8 of the Act are promulgated. In the interim the Human Tissue Act and the regulations in terms thereof remain in force. The expected date for Chapter 8 of the new Act to come into full effect is unknown. The National Health Act recognizes “death” as “brain death” in s 1 of the Act. See also Mcquoid-Mason and Dada “Tissue Transplantation and the National Health Act” 2006 24(3) *CME* 129.

⁶ Jefferies “The Body as Commodity: The Use of Markets to Cure the Organ Deficit” <http://www.law.indiana.edu/glsj/vol5/no2/13jeffer.html> (accessed 2001-06-08).

⁷ *Ibid.*

⁸ Taylor 8.

⁹ *Ibid.*

¹⁰ Taylor 9.

how many people would consent to an organ donation if asked has never been probed in South Africa, but the low participation¹¹ in the current system suggests that it is unlikely that many South Africans will be comfortable with an “opting-out” system. As the system infringes on the right to autonomy, the court may also have doubts about it.

2 2 “Required request”

The system of organ procurement known as “required request”, where a person is asked to become an organ donor when admitted to a hospital,¹² seems theoretically acceptable and may prove to work effectively in the United States of America (although even there it comes under severe criticism). However, the current state of health care services in South Africa, such as staff shortages and overworked staff, and the burden placed on the health system by the incidence of HIV/Aids in the public sector, would not make this a viable option.

There is no specific ethical barrier against this way of organ procurement but it may lead to a clinical conflict of interest for health care workers, as they have to switch their primary focus from the care of patients to asking them for organs for another person.¹³ In the United States, for example, health care workers have indicated that they do not know their legal responsibilities under the law concerning this method of organ procurement.¹⁴ Moreover, there is no positive or negative incentive for complying with the request and for some workers it is psychologically burdensome – thus a disincentive to make these requests.¹⁵

2 3 Xenotransplants and cloning

The transplantation of animal organs (xenotransplants) as an alternative to human organs is still in an experimental phase and to date has not delivered the required results.¹⁶ Cultivation of human “spare” parts through cloning or

¹¹ The Organ Donor Foundation is a non-governmental organisation in South Africa. The main aim of the organisation is to educate the public about organ donations and to improve donor identification and organ procurement programmes. The Foundation estimates that only 35 000 people carry a donor card in SA. It is difficult even to speculate on the estimated number of card carriers, as donor cards are sent out on request but the Foundation has no control over whether or not a person fills out and carries the card. SA does not have a national register where persons are officially noted as organ donors “40 000 Wag op Oorplanting in SA, Net 500 Skenk Organe” 2003-12-06 *Beeld*. For the position on donor cards in the USA see Schwindt and Vining “Proposal for a Future Delivery Market for Transplant Organs” 1986 (11) *Journal of Health Politics, Policy and Law* 486.

¹² S 5 of the 1987 Uniform Anatomical Gift Act (USA).

¹³ Taylor 7.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Daar “Paid Organ Donation – The Grey Basket Concept” 1998 (24) *J Med Ethics* 365; and Flynn *Issues in Medical Ethics* (1997) 215-216: “Ethical concerns about xenografts” were crystallized in the famous case of baby Fae. Baby Fae suffered from a heart disease. In October 1984 a baboon heart was transplanted into the baby. She died in November of the same year. There was an enormous amount of media coverage of this case and many

stem cells is also still in a developmental stage¹⁷ and as yet is not the answer to the acute organ shortage.

2 4 Illegal procurement of human organs

The buying and selling of human organs as a method of procuring organs for transplantation, is a flourishing practice in many countries.¹⁸ Because it is illegal nearly worldwide,¹⁹ no reliable statistics are available but reported cases from all over the world point at a well-established practice. Recent reports of a possibility that financial rewards may be involved in organ donations in the Cape²⁰ indicate that South Africa is no exception concerning illegal activities. It is illegal to pay donors or family members for donated organs,²¹ yet it is virtually impossible for a transplant co-ordinator to control the “exchange of gifts” between donor and recipient after the operation for the donation is performed. Foreigners seeking a kidney transplant to be performed in South Africa need to bring their own donor to the country. In cases where the donor is not related to the patient, permission is needed from the Department of Health. The Department will only give permission once it has been established that no reward is involved.²² Permission given by the Department of Health is open to controversy because although they investigate for signs of commercialisation, no one has any guarantee that

ethical questions surfaced in connection with it. For example, people asked whether the transplant surgeon had been motivated to act in his patient’s best interest or was seeking to advance his own reputation. These kinds of questions suggest the extent of the ethical unease surrounding animal-to-human transplants. When the story of Baby Fae’s transplant first broke, the American public thought it was about to witness a medical miracle. With Baby Fae’s death, however, it became apparent that there were good reasons to argue that what had transpired “should never have been allowed to happen”.

- ¹⁷ Daar 1998 (24) *J Med Ethics* 365; and “Woede oor Eerste Menskloning” 2001-11-27 *Beeld*.
- ¹⁸ Rothman “The International Organ Traffic” 1998 *New York Review of Books* 14-16 reports that: The existing routes for organ buyers are well known to desperate patients. Buyers coming from Egypt, Kuwait, Oman and the Gulf States seek organs in India. Buyers from Japan, Singapore and Hong Kong go to China. According to Friedlaender “The Right to Sell or Buy a Kidney: Are We Failing Our Patients?” 2002-03-16 (359) *Lancet* 971: A patient in the USA who waited 18 months for a kidney from a cadaver became so desperate that he travelled to Iraq where he received a transplantation from an unrelated kidney donor (seller). Four Jewish patients, also in the USA, paid more than \$200 000 (US) for kidneys from living unrelated donors.
- ¹⁹ For a list of countries prohibiting payment for human organs, see Cherry 163-168. See also Garwood-Gowers *Living Donor Organ Transplantation: Key Legal and Ethical Issues* (1999) 167-194. “Unlike much of the world there are no laws restricting the sale of organs in Pakistan and no regulation requiring informed consent of potential donors” <http://www.edition.cnn.com> “Pakistan’s lucrative kidney trade” (accessed 2007-02-26). In the Philippines, according to The Organ Donation Act of 1991 the sale of an organ does not violate the law, see a Press Release / 03 September 1999 <http://www.doh.gov.ph> (accessed 2007-02-26). See also Avancena “Need a Kidney? Visit Manila” 2007-02-09 *The Saudi Gazette* (internet edition) <http://www.saudigazette.com.sa> (accessed 2007-02-22). Iran is the only country where it is legal to buy and sell organs and it is under state control – Ram “International Traffic in Human Organs” <http://www.hinduonnet.com> (accessed 26-02-2007).
- ²⁰ “Geld Dalk Betrokke by Orgaanskenkings in die Kaap” 2001-12-06 *Beeld*.
- ²¹ S 28 of the Human Tissue Act 65 of 1983; and s 60 of the National Health Act 61 of 2003. See also Blackbeard “Organ Donation for Profit?” 2002 *Obiter* 66-72.
- ²² <http://www.netcare.co.za> (accessed 2006-09-30).

the donor will not be rewarded as soon as the donor and the recipient leave the country after the operation has been performed.²³

Illegal transactions between desperate patients and willing donors (sellers) will continue as long as the demand for human transplantable organs remains greater than the supply. As this is part of the economic system in the world and part of the way in which westerners, in particular, think about the world, we have to accept that this practice will continue. There are different kinds of proposals to combat this practice and the unacceptable results that follow in its wake, for example the moral stand approach or the economic reform approach. Both present strong arguments that cannot be ignored in the debate. Not to be sidetracked, however, this article will follow a more practical line and ask only: Should an organ market become a possibility, what should it look like and how should it be regulated legally? It might seem necessary to protect patients and sellers or donors, but how? Many researchers have suggested regulated markets in human body parts.²⁴ Only four of these proposals will be discussed, namely those of Schwindt and Vining,²⁵ Hansmann²⁶ and Crespi.²⁷ These proposals will also be evaluated to see whether they are suitable for application in a South African context.

3 PROPOSED MARKETS FOR SELLING HUMAN ORGANS

Schwindt and Vining, Hansmann and Crespi propose a futures contract for the sale of human organs from cadavers as a possible solution to the acute demand for transplantable organs. A futures market will take the form of a contractual commitment entered into by the person in whose body the organs are (the seller) to make those organs available to the other contracting party (the buyer) for transplantation upon the death of the organ seller.²⁸ Therefore the right to harvest a person's organs upon death must be purchased from him or her while he or she is alive and well.²⁹ The advantage of a futures contract is that it will encourage decisions to sell organs when

²³ A case of presumed payment for organs was discovered recently in KwaZulu-Natal. "Israeli's Financier Glo Orgaan-knoeiery in SA" 2004-01-17 *Beeld*; "Israeli's Kry Onwettig Niere" 2005-09-17 *Beeld*; Broughton "Top Doctors in Court for Kidney Scam: Suspected of Links to Syndicate Trading in Organs" 2005-08-01 *Pretoria News* reports that: Five SA surgeons were charged in the Durban magistrate's court with performing illegal kidney transplants. The charge arose from investigations which revealed that a syndicate was recruiting kidney donors from Brazil and paying them for their organs. These kidneys were then transplanted into Israelis who paid \$100 000 (US) to fly to SA for the operations. The court case has been postponed until a later date in 2007.

²⁴ See also Taylor fn 41.

²⁵ 1986 (11) *Journal of Health Politics, Policy and Law* 483-500.

²⁶ "The Economics and Ethics of Markets for Human Organs" 1989 (14) *Journal of Health Politics, Policy and Law* 57-85.

²⁷ "Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs" 1994 (55) *Ohio State LJ* 1-77.

²⁸ Crespi 1994 (55) *Ohio State LJ* 28.

²⁹ Hansmann 1989 (14) *Journal of Health Politics, Policy and Law* 62.

they are least problematic, the person whose organs are involved is healthy, and he or she has the opportunity to reflect at leisure on the matter.³⁰

The authors have different views regarding the implementation and regulation of a futures contract. Shwindt and Vining are in favour of state control of the futures contracts.³¹ They argue that state control is justified by virtue of the fact that hospital staff, health care workers and the police are all state employees. They are also the role-players during a possible organ donation.³² They further propose that the organ seller should be paid on conclusion of the futures contract.

Hansmann suggests that medical insurance agencies should act as organ buyers. These companies already make actuarial calculations in respect of their members and it should therefore not be a problem to include an additional set of numbers.³³ These companies also revise their calculations and premiums annually. A special reduction in premiums for a year will ensure that the insured (organ seller) is rewarded for choosing the sell option.³⁴ This gives the seller freedom to choose annually whether or not he or she still wants to sell his or her organs. The insurance companies should register the information of their selling clients on a national database. Should a person then die in such a way that his or her organs can be transplanted, the hospital staff should consult the database.³⁵

Crespi, on the other hand, suggests that either the state or a private institution may be the buyer of organs sold through a futures contract,³⁶ but he is adamant that money received for the organ(s) used should become part of the deceased estate; the relatives should not benefit directly as this may lead to conflict and even abuse.³⁷

Crespi's proposal that the payment should form part of the deceased estate is more acceptable in a South African context than that of Hansmann concerning the reduction in medical insurance premiums, or the proposal of Schwindt and Vining that the donor (seller) should receive a reward on conclusion of the contract. To reward the donor (seller) at the conclusion of the contract, or to allow a seller a reduction in his or her medical premiums, may be problematic should the seller's organs never become available for transplantation.³⁸

³⁰ Hansmann 1989 (14) *Journal of Health Politics, Policy and Law* 70.

³¹ Schwindt and Vining 1986 (11) *Journal of Health Politics, Policy and Law* 489; Hansmann 1989 (14) *Journal for Health Politics, Policy and Law* 62 criticises the two authors for suggesting the state should be the only buyer of human organs. Crespi 1994 (55) *Ohio State LJ* 32 also criticises them.

³² Schwindt and Vining 1986 (11) *Journal of Health Politics, Policy and Law* 489.

³³ Hansmann 1989 (14) *Journal of Health Politics, Policy and Law* 63.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Crespi 1994 (55) *Ohio State LJ* 30. For a detailed discussion of his proposal, see 35-37.

³⁷ Crespi 1994 (55) *Ohio State LJ* 29.

³⁸ For criticism on the proposal of Schwindt and Vining, see Crespi 1994 (55) *Ohio State LJ* 32-33.

Crespi also underlines the importance of a national register of futures contracts so that it can easily be determined whether a person who is cerebrally dead³⁹ has in fact been a party to such an organ-selling contract.⁴⁰ If so, the hospital staff should take all reasonable steps to contact the buyer of the organ. The buyer should be responsible for the harvesting process and storage costs concerning the donation.⁴¹

In South Africa, with a public and a private health care system, it would be ideal if the buying and selling of human organs for transplantation purposes could be done through an institution such as the blood transfusion service envisaged by the National Health Act.⁴² Such a service is neither state controlled nor part of private enterprise where brokers may influence the price per organ. A national database as proposed by Crespi would also be essential in South Africa in order to administer futures contracts.

Of the three proposals discussed above, only Hansmann's is in favour of living donors (sellers).⁴³ It is submitted that this may be the solution for the acute kidney shortage in South Africa. As Hansmann also points out, living donors have the potential to meet the demand in full.⁴⁴ Moreover, a kidney from a living donor is often of a better quality than a kidney procured from a cadaver. It will also facilitate better planning for the transplant operation to take place and there is a better chance that the donated kidney will not be rejected.⁴⁵

The above proposals are undoubtedly valuable contributions to the debate surrounding organ shortages and how the problem could be solved. A futures contract may also provide the solution for the organ shortage in South Africa but it is submitted that living donors should also be allowed to sell a kidney through a contract of sale.⁴⁶ However, before a futures market in human organs may be established or before a kidney from a living person may be sold, the issue of ownership of human organs must be addressed.

Schwindt and Vining maintain that human organs are not the property of anyone in particular and should therefore not be sold unless definite property rights in human body parts are legally recognised.⁴⁷ In the following section

³⁹ When the brain stem is dead.

⁴⁰ Crespi 1994 (55) *Ohio State LJ* 30 and 36.

⁴¹ Crespi 1994 (55) *Ohio State LJ* 37.

⁴² According to s 53(1) of the National Health Act: "The Minister must establish a blood transfusion service for the Republic by granting a license to a non-profit organization, which is able to provide a blood transfusion service throughout the territory of the Republic."

⁴³ Hansmann 1989 (14) *Journal of Health Politics, Policy and Law* 71; Cohen 1989 (58) *The George Washington Law Review* 2, feels living sellers should be excluded because: "[I]t will make futures contracts more ethically acceptable as it will not raise the spectre of exploiting the poor." Crespi 1994 (55) *Ohio State Law Journal* is also against living sellers and he believes that a consensual and contractual market in human organs would satisfy all transplant needs from cadavers so that the removal of paired organs, like kidneys, from a living donor would not be necessary.

⁴⁴ Hansmann 1989 (14) *Journal of Health Politics, Policy and Law* 71.

⁴⁵ Hansmann 1989 (14) *Journal of Health Politics, Policy and Law* 71-72.

⁴⁶ See the proposed contract forms 6.1.2 and 6.2.2 below.

⁴⁷ Schwindt and Vining 1986 (11) *Journal of Health Politics, Policy and Law* 496; and Hansmann 1989 (14) *Journal of Health Politics, Policy and Law* 63.

the problem of property rights in human organs in a South African context will be addressed.

4 PROPERTY RIGHTS IN HUMAN ORGANS⁴⁸

It is not uncommon to think of one's body as one's own, as evidenced by the use of possessive pronouns like "my" hand or "your" arm. Does the possessive language entail legal rights as well?⁴⁹ The question of property rights in one's body has become more acute as a result of advances in medical technology and it will increasingly require a response from courts and legislatures.

In analysing whether there are in fact property rights in body parts in South Africa, a distinction should be made between property rights in a corpse and property rights in a kidney removed from a living person.

4.1 Property rights in a corpse⁵⁰

A corpse has traditionally been viewed as an object incapable of being owned. The lawful ownership of anatomical specimens for scientific purposes by an authorised institution is an exception.⁵¹ Corpses or parts thereof may be used for training and research.⁵² Strauss points out that anatomical body parts in the possession of a medical school are *res commercio* and therefore capable of being owned and stolen.⁵³

The Human Tissue Act (for the interim period) regulates the removal and transplantation of human organs. This Act was last amended in 1989, when organ transplants were not yet routinely performed and the shortage of transplantable organs was not so acute. Section 36 of the Human Tissue Act stipulates that any person who acquires the body of a deceased by virtue of any provision in the Act acquires "exclusive rights" in respect thereof. Labuschagne interprets these "exclusive rights" as being none other than property rights.⁵⁴

⁴⁸ Also see Kennedy and Grubb *Medical Law* (2000) Chapter 15; and Charo "Body of Research Ownership and the Use of Human Tissue" 2006 (355) *The New England Journal of Medicine* 1517-1519.

⁴⁹ Gilmour "'Our' bodies: property rights in human tissue" 1993 (8) *Canadian Journal of Law and Society* 114.

⁵⁰ The discussion will focus only on the position in SA. For a discussion of cadaveric property rights in the USA and the UK see Blackbeard 2002 *Obiter* 54-59; for the position in Australia, see Griggs "The Ownership of Excised Body Parts: Does an Individual have the Right to Sell?" 1994 (1) *Journal of Law and Medicine* 223-229.

⁵¹ S 3 of the Human Tissue Act 65 of 1983.

⁵² S 4(1) of the Human Tissue Act (in the interim); and s 56 and 61 of the National Health Act.

⁵³ Strauss *Doctor, Patient and the Law* (1991) 160 fn 1. See also Blackbeard 2002 *Obiter* 59.

⁵⁴ Labuschagne "Menseregte na die Dood? Opmerkinge oor Lyk- en Grafskending" 1991 *De Jure* 145.

4 2 Property rights in organs (living persons)⁵⁵

4 2 1 Common law

A thing (*res*) may be defined in terms of its characteristics. It is a corporeal or tangible object external to persons and which is, as an independent entity, subject to juridical control by a legal subject for whom it is useful and of value.⁵⁶ From the definition it is clear that the body of a human being (or a body part) does not constitute a thing in the legal sense. Things were deemed to be external to man and therefore of an impersonal nature.⁵⁷ Roman-Dutch jurists were of the opinion that as no one is master over his own body (*dominus membrorum suorum*), by implication a person cannot consent to the removal of parts of his or her body.⁵⁸ The body and body parts were classified as *res extra commercium*.⁵⁹

It is accepted in the South African legal system that a human being is classified as a legal subject who can be the holder of rights in relation to an object, yet a human cannot be the object of a right.⁶⁰ When dealing with a real right, the object thereof is a thing (*res*) that can be either corporeal or incorporeal, and its existence is external to the human who is the holder of the right. The reason is that the object does not form part of the person's body.⁶¹

Human body parts have traditionally been regarded as *res extra commercium* and commerce in body parts has been viewed as *contra bonos mores*. Progress in medical technology has made legislation concerning restricted transactions in human body parts necessary. The Post Mortem Examinations and Removal of Human Tissue Act⁶² and later the Anatomy Act⁶³ and the Anatomical Donations and Post Mortem Examinations Act⁶⁴ were the legislature's first response to the legal problems existing as a result of organ transplantations of which the old authorities had no knowledge.⁶⁵ All legislation dealing with the donation of human tissue and blood was finally consolidated in the Human Tissue Act of 1983.⁶⁶

⁵⁵ For a discussion of the position in the USA and the UK see Blackbeard 2002 *Obiter* 60-62.

⁵⁶ Van der Walt and Pienaar *Introduction to the Law of Property* (2000) 14.

⁵⁷ D 9 2 13; De Groot *Inleiding tot de Hollandsche Rechtgeleerheid* 2 1 3.

⁵⁸ Strauss "Toestemming tot Benadeling as Verweer in die Strafreë en Deliktereg" 1961 LLD thesis Unisa 369 *et seq.*

⁵⁹ See Van der Merwe *Sakereg* (1989) 12-15.

⁶⁰ Lupton "Advances in Medical Technology and the Ownership of Human Tissue" 2001 *TSAR* 569-570.

⁶¹ See Neethling *Persoonlikheidsreg* (1998) 12-15.

⁶² 30 of 1952.

⁶³ 20 of 1959.

⁶⁴ 24 of 1970.

⁶⁵ See Blackbeard 2002 *Obiter* 64.

⁶⁶ *Ibid.* See also fn 5.

4 2 2 Statutory law

Commerce in human bodies or parts thereof is prohibited by section 28(1)(a) of the Human Tissue Act. Section 18 of the Act deals with the removal of tissue from living persons and section 19 prescribes for what purposes the tissue may be removed.

If the above is read in conjunction with section 36, it appears that any person who has acquired an organ by virtue of any of the provisions of the Act (including s 18) will acquire the “exclusive rights” in respect thereof. The consequence may be that if a person has an organ removed during an operation in a hospital the doctor in charge of the procedure acquires exclusive rights in the organs. Strauss states that a portion removed from a patient’s anatomy in the course of an operation is the property of the patient. If the patient does not claim the part so removed from his or her body it becomes *res nullius*.⁶⁷ Should the patient claim the body part, such as a gallstone or an appendix to keep in a bottle, there seems to be nothing in our law against possession by a person of parts severed from his own body.⁶⁸ Strauss further argues that if a person can decide to donate his body parts, this must translate into a right to keep them as well. Blackbeard also questions the anomaly that a person may donate organs, yet does not have ownership over them.⁶⁹ It is submitted that this is an example of property rights, because one can only consent to donate something if one is the lawful owner thereof. If a person is the lawful owner of a thing, he or she will consequently have property rights over it and will be able to sell the thing.⁷⁰

It is common practice for patients to waive their rights in body parts removed during an operation by signing to this effect on an admission form when admitted to a hospital. A clause on the admission form gives the hospital the right to dispose of any tissue removed during a medical procedure. Should a patient refuse to sign such a form it is up to the person in charge of the hospital to decide whether or not to admit the person to the hospital.⁷¹

The lack of recognition of property rights in body parts in legislation is a weakness in the transplantation process in South Africa as well as in other countries. The United States case of *Moore v Regents of the University of California*⁷² centred on the issue of who owned the tissue (spleen) once it was surgically removed.⁷³ Moore argued that he continued to own the tissue after removal thereof and that he was entitled to the profits generated by its commercial exploitation. The court did not view Moore’s cells as property at

⁶⁷ Strauss 161.

⁶⁸ *Ibid.* To take a foetus home in a bottle, however, may be seen as *contra bonos mores*.

⁶⁹ See Blackbeard 2002 *Obiter* 75.

⁷⁰ *Ibid.*

⁷¹ See, eg, the admission document, Wilgers Hospital, Pretoria East 2006.

⁷² 793 P 2d 479 (Cal 1990). Also see Griggs 1994 (1) *Journal of Law and Medicine* 224; and Kennedy and Grubb 1790-1801.

⁷³ Lupton 2001 *TSAR* 573.

common law.⁷⁴ Lupton rightly remarks that neither the common law nor any statutory provision in South Africa would have protected a plaintiff who found himself in a similar position to the one in which Moore found himself. This is clearly not a desired result in an era of modern medical technology.⁷⁵

The “no property” rule was adopted in an era that could not foresee the possibilities brought to us by medical science. It is time that the right of an individual to claim and retain ownership (and thus property) in their own body is recognised. If a flourishing “spare-part” market should arise, then it is up to Parliament to regulate it.⁷⁶

In conclusion, it is clear that in South Africa there is no clearly defined ownership in body parts at the moment. For a regulated futures market to be implemented or for a living person to be able to sell a kidney, it is essential that the current legal regime be modified to allow effective control of human organs as economic goods.

5 ARGUMENTS AGAINST THE COMMERCIALISATION OF HUMAN ORGANS⁷⁷

5.1 To sell or not to sell

Non-commercial solid-organ donations are currently acceptable worldwide. The idea that individuals have the right to dispose of their organs and other bodily parts if they so choose is also accepted.⁷⁸ Recognition of such a right respects the bodily autonomy of individuals to make choices about their own bodies and acknowledges the individual’s right of sovereignty over his or her own body. Allowing organ sales would be just another way of recognising an individual’s right to do with his or her body as he or she pleases, thus recognising the individual’s sphere of control.⁷⁹

By allowing individuals to either barter or sell something, their level of well-being might be increased. Since the selling of organs will be voluntary, it will presumably only be done when the individual believes he or she will be better off without a kidney and with the cash, than without the cash and with the kidney.⁸⁰ Markets can thus increase both autonomy and well-being.⁸¹

⁷⁴ *Ibid.* For another discussion of the case, see Gilmour 1993 (8) *Canadian Journal of Law and Society* 113-138.

⁷⁵ Lupton 2001 *TSAR* 573.

⁷⁶ Griggs 1994 (1) *Journal of Law and Medicine* 228.

⁷⁷ Also see Beauchamp “Methods and Principles in Biomedical Ethics” 2003 (29) *J Med Ethics* 272-273; De Castro “Commodification and Exploitation: Arguments in Favour of Compensated Organ Donation” 2003 (29) *J Med Ethics* 142-146; De Klerk “Die Handeldryf in of ‘Met’ Menslike Weefsel” 1991 *THRHR* 608-615; Wilkinson and Garrard “Bodily Integrity and the Sale of Human Organs” 1996 (22) *J Med Ethics* 334-339; and Hoffenberg “Acquisition of kidneys for transplantation” in Levinsky *Ethics and the Kidney* (2001) 131-133.

⁷⁸ Dworkin “Markets and Morals: The Case for Organ Sales” 1993 (66) *The Mount Sinai Journal of Medicine* 66.

⁷⁹ *Ibid.*

⁸⁰ Dworkin 1993 (66) *The Mount Sinai Journal of Medicine* 67.

Markets in votes or babies are not allowed because there are compelling reasons for not allowing trade in these things; the question therefore is whether there are such compelling arguments for the prohibition of organ sales.⁸² One should also distinguish between justified and unjustified moral repugnance as many people have deep feelings regarding the moral repugnance of abortion, contraception and homosexuality, for example, yet these are practices that society permits.⁸³ One can rightly ask whether such repugnance is justified. If so, should such practices be prohibited? The answer is clear – they should not be prohibited – but should the sale of organs then not be treated the same?⁸⁴ By analysing the main objections against the sale of human organs one may attempt to answer the question. In the final instance, forms of contracts are proposed to address these objections.

5.2 Exploitation of the poor⁸⁵

This is one of the most general arguments against the commercialisation of human organs. Those against the selling of organs believe that the poor will consent to surgery to have a kidney removed only because they are financially desperate. Prohibiting payment on ethical grounds to prevent such scenarios overlooks one important fact: to the person who needs money to feed his children or to buy expensive medicine needed by his child, the option of not selling a body part is worse than the option of selling it.⁸⁶

Others objecting to the sale of human organs feel that markets in human organs would compromise the autonomy of economically impoverished persons who would participate as vendors, since they would be coerced into selling by their poverty.⁸⁷ The concern is that the poor will be unable to fully comprehend the drastic procedure of removing a kidney, as their main focus will be the money. But, whatever the individual's economic status or level of comprehension, good medical practice demands proper counselling and explanation in order for a person to give informed consent.⁸⁸ A drastic measure open for criticism may be to prohibit individuals from selling a kidney if their average income is less than 80% of the median family income. This may eliminate the argument that the autonomy of the poor would be compromised.⁸⁹

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Cherry 39-40.

⁸⁴ *Ibid.*

⁸⁵ See also Blackbeard 2002 *Obiter* 76; Andrews "My Body my Property" 1986 *Hastings Center Report* 32; Taylor 14-17; Dworkin 1993 (66) *The Mount Sinai Journal of Medicine* 67; Hansmann 1989 (14) *Journal of Health Politics, Policy and Law* 72-73; and Cherry 6.

⁸⁶ See Andrews 1986 *Hastings Center Report* 32.

⁸⁷ See Taylor 14.

⁸⁸ See Hoffenberg 132.

⁸⁹ See Dworkin 1993 (66) *The Mount Sinai Journal of Medicine* 67; and Taylor 15.

Another objection based on income inequality is that because of unequal bargaining power, the price paid to the poor may not always be a fair one. They may not get the full market value of their organs.⁹⁰ The solution would be to regulate the market, not prohibit the sale. Minimum prices per organ could be established.⁹¹ There could also be one organisation acting as buyer and seller, a system of “monopsomy” where every buyer will have an equal chance of getting an organ.⁹²

A last argument concerning the poor is that the financially privileged may also be in a stronger position than the poor in bargaining and paying for an organ. Few patients in South Africa pay for transplants themselves. Most transplants are paid for by the state or by the patient’s medical aid fund. The issue appears to be more one of access to medical aid benefits, than access to organs. The main costs associated with transplants remain doctor’s fees, hospital costs and the costs of drugs. All these costs are determined by market trends. Dworkin therefore asks why it is legitimate for these to be market-related and not the organs?⁹³ Beauchamp concludes by saying: “Even if those who sell their kidneys are at risk of exploitation, it does not follow that a ban on the sale of kidneys is the best way to address these problems.”⁹⁴ A ban on sales could actually work as an excuse for real injustices in the system, namely that of procurement and distribution.⁹⁵

5.3 Removing an organ is harmful⁹⁶

It is not the payment that harms the body, but the physical risk to the person selling the body part or the subsequent risk of living without it. The risk for a healthy 35-year-old man or woman donating a kidney is described as being similar to the risk of driving a car sixteen miles every working day.⁹⁷ If people are allowed to donate and doctors feel comfortable about the procedure why should the fact that money is involved exaggerate the risks?

It is submitted that the argument that the organ seller is subjected to a high level of pain and risk is not sufficient to justify a ban on organ sales, since society does not condemn payment to persons involved in dangerous activities such as fire-fighting, diving or working in mines.⁹⁸ These forms of “risky labour” are often more dangerous than the sale of an organ, but persons performing these activities are sometimes regarded as heroes or being brave rather than being condemned. It also seems quite proper to

⁹⁰ *Ibid.*

⁹¹ Dworkin 1993 (66) *The Mount Sinai Journal of Medicine* 67.

⁹² See the proposal of Harris “Clones, Genes and Immortality: Ethics and the Genetic Revolution” in Kennedy and Grubb *Medical Law* (2000) 1774.

⁹³ Dworkin 1993 (66) *The Mount Sinai Journal of Medicine* 67.

⁹⁴ Beauchamp 2003 (29) *J Med Ethics* 273.

⁹⁵ *Ibid.* Injustices concerning procurement and distribution of human organs will not be discussed in this article.

⁹⁶ See also Hoffenberg 132.

⁹⁷ Andrews 1986 *Hastings Center Report* 32; and Hansmann 1989 (14) *Journal of Health Politics, Policy and Law* 73.

⁹⁸ Wilkinson and Garrard 1996 (22) *J Med Ethics* 334.

reward these people for what they do.⁹⁹ Is this anomaly not an indication of double standards?

5 4 Irreversibility¹⁰⁰

An objection to the sale of organs as opposed to the sale of renewable tissue such as blood and semen is that the decision is irreversible. Kidney sellers may regret their actions at a later stage, especially if they subsequently develop kidney problems. It is accepted that individuals may make decisions concerning sterilization or breast reductions that can have an effect on that person for the rest of his or her life. Why then should the removal of a kidney be treated differently? Only allowing competent adults to decide to sell an organ after giving informed consent may avoid regret. Another alternative is to provide for a short waiting period such as a "cooling-off period" between the agreement to sell an organ and its removal, and to require the donor to sign a witnessed consent form.¹⁰¹

5 5 Commodification of the human body¹⁰²

The most noteworthy argument against the commercialisation of human organs revolves around the notion of the commodification of a human being. The general feeling amongst people is that there should be limits to what can be bought and sold as commodities. The selling of human organs offends many people's notion of decency.

According to the philosopher Kant, if one buys and sells body parts, human beings have a market value and can then be treated as objects.¹⁰³ To treat people as objects is wrong because, according to him, human beings have inherent moral worth and dignity.¹⁰⁴ Resnik argues that it is possible to treat human bodies as commodities without violating human dignity and worth.¹⁰⁵ He explains that Kant uses the term "humanity" in describing our moral obligations this term refers to the rational nature in human beings, that is, "person" or "rational agents". Kant, according to Resnik, recognised the body as housing many elements, such as emotions and desires, that are distinct from the body's rational nature. If this is accepted, he argues, a body can be commodified without treating a person as a commodity.¹⁰⁶ Thus cadavers or brain dead patients that do not contain "persons" any more could be commodified without violating the dignity or worth of that person.¹⁰⁷

⁹⁹ *Ibid.*

¹⁰⁰ Also see Hansmann 1989 (14) *Journal of Health Politics, Policy and Law* 74.

¹⁰¹ Andrews 1986 *Hastings Center Report* 35.

¹⁰² See Blackbeard 2002 *Obiter* 77; Dworkin 1993 (66) *The Mount Sinai Journal of Medicine* 68; and Andrews 1986 *Hastings Center Report* 35.

¹⁰³ Kant *Groundwork of the Metaphysics of Morals* (Translated by Paton) (1948).

¹⁰⁴ *Ibid.*

¹⁰⁵ Resnik "The Commodification of Human Reproductive Materials" 1998 (24) *J Med Ethics* 389.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

Concerning living people, Resnik indicates that one has to distinguish between essential organs and extra organs. In other words a person can live with only one kidney, but a person cannot live without a heart or lungs. Doing something to a part of a living person's body does not imply something is done to the whole body. Therefore, selling a part (a kidney) need not imply selling the whole body. Hence one may commodify a part without commodifying the whole body as long as the part being sold is not an essential organ.¹⁰⁸

Commodification of body parts also raises slippery slope concerns. There may be arguments that allowing the sale of a kidney from a living person, it may lead to the selling of children or people in slavery.¹⁰⁹ These illegal actions may be avoided by strict regulations concerning the sale of a kidney and by making sure the person selling his or her kidney has given informed consent. Only a person him or herself may treat his or her kidney as a commodity; no person may treat another person's body as an object.

To conclude, the commodification of human organs is already happening, as a black market in human organs exists.¹¹⁰ Compensated organ transfers regularly take place in many countries beyond the reach of the law. Donors and recipients have been negotiating terms of organ transfers with or without the sanction of legal authorities.¹¹¹ It may be argued that the undeniable existence of the demand and the corresponding supply commodifies human organs even before anybody has tried to put a price tag on them.¹¹²

5 6 Criminal activity

It is often rumoured that adults and children are being abducted as a source of body parts. Despite extensive investigations internationally there is no evidence that such abuse has actually taken place. On medical grounds the practice would almost be inconceivable; the whole process of removing organs, matching them, keeping them in a viable and sterile condition and then transplanting them would involve teams of doctors, nurses, anaesthetists and technicians, as well as operating theatres and other facilities.¹¹³ The idea that this could be done without question or opposition is excessively farfetched.¹¹⁴

¹⁰⁸ Resnik 1998 (24) *J Med Ethics* 389-390; and Cherry 28: "A necessary condition for the legitimacy of a market in organs will be that the organs bought or sold are not integral to persons but can be conceived of as outside of the essential core of personal embodiment."

¹⁰⁹ *Ibid.*

¹¹⁰ De Castro 2003 (29) *J Med Ethics* 145.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Hoffenberg 133.

¹¹⁴ *Ibid.*

5 7 Conclusion

Many writers have indicated that arguments against selling human organs cannot stand up to robust scrutiny.¹¹⁵ Recognising the need to define ethical standards for organ donations, a task force composed of transplant surgeons, organ procurement specialists, human rights activists and social scientists met at the Rockefeller Conference Centre at Bellagio, Italy, in 1997. They reiterated that organ transplants have changed from an experimental procedure to a therapeutic intervention carried out in hospitals worldwide.¹¹⁶ This task force weighed all considerations and found no arguable ethical principle that would justify a ban on the sale of organs under all circumstances.¹¹⁷ Taking their report into consideration, it seems there is reason to believe the sale of organs may be a future consideration in South Africa and it is therefore necessary to explore the way in which such a process may take place.

6 PROPOSED WAY OF SELLING ORGANS IN SOUTH AFRICA

6 1 A contract of sale – living kidney donors (sellers)

6 1 1 Contractual requirements

If one wants to propose a contract for the selling and buying of a kidney from a living person for transplantation into the body of a patient it is necessary to look at the contractual requirements that would be necessary for such an agreement to be valid. An agreement will only be a contract if the parties intend to create an obligation or obligations, and if, in addition, the agreement complies with all other requirements which the law sets for the creation of obligations by agreement (such as the contractual capacity of the parties, possibility of performance, legality of the agreement and prescribed formalities).¹¹⁸

6 1 1 1 Agreement of will¹¹⁹

In general, consensus consists of the agreement between two or more persons about the consequences or results they wish to create.¹²⁰ The consequences of a contract are obligations. Consensus can therefore only be present if the contractants are *ad idem* about the obligations they wish to

¹¹⁵ Daar 1998 (24) *J Med Ethics* 365.

¹¹⁶ Rothman *et al* "The Bellagio Task Force Report on Transplantation Bodily Integrity and the International Traffic in Organs" 1997 (29) *Transplantation Proceedings* 2739.

¹¹⁷ Rothman *et al* 1997 (29) *Transplantation Proceedings* 2741.

¹¹⁸ Van der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract General Principles* (2003) 8.

¹¹⁹ Van der Merwe *et al* 19-28.

¹²⁰ Van der Merwe *et al* 19.

create, that is about the persons between whom they wish to create the obligation as a legal bond as well as the performances to be rendered.¹²¹

The contracting parties should therefore have the same intention concerning the contract. In the case of selling organs they should agree that the contract concerns the transplantation of the organ(s). Concerning living sellers it should be clear that the kidney (left or right) must be removed from the body of the organ seller and transplanted into the body of the patient. Medical reports concerning the health of the seller's kidneys should be added to support the offer – only a healthy kidney that can adapt to the recipient's body can be accepted.

6 1 1 2 Contractual capacity¹²²

Every party involved in the contract should have the capacity to act, which means he or she should be legally able to be an independent party to the contract. To have contractual capacity to enter into a contract of sale regarding a human organ, the seller should be 21 years or older. Section 39(4) of the Child Care Act 74 of 1983 states that a child above the age of 18 can agree to have a medical operation but it is proposed that this section should not apply to the removal or sale of a kidney for transplantation.

Concerning contractual capacity and marital status, it is proposed that every spouse should be allowed to act independently from the other. According to section 2 of the Sterilization Act¹²³ a spouse can decide on sterilization without the permission of the other spouse. The Choice on Termination of Pregnancy Act 92 of 1996 also allows a woman to decide to have an abortion on her own without consulting the father of the child.¹²⁴ It is therefore submitted, taking the above into consideration, that a person should be allowed to decide for him or herself whether or not to sell a kidney.

6 1 1 3 Possibility of performance¹²⁵

One of the requirements for the creation of a contract is that the performance agreed upon must be objectively possible when the agreement is concluded. The rights and responsibilities of the contract of sale should therefore be physically and legally possible. For the sale of organs to constitute a contract, the National Health Act, when Chapter 8 becomes effective and the Human Tissue Act is repealed,¹²⁶ will have to be amended to allow a person to sell his or her kidney. The removal of an organ (a kidney) will be physically possible as long as there is medical evidence that such a kidney removal is approved by a medical doctor and that the seller

¹²¹ Van der Merwe *et al* 20.

¹²² Havenga *et al* *General Principles of Commercial Law* (2000) Chapter 5.

¹²³ 44 of 1998.

¹²⁴ S 5.

¹²⁵ See Van der Merwe *et al* 170-174.

¹²⁶ See fn 5.

has given informed consent after all material risks concerning the removal have been explained to the seller.¹²⁷

6 1 1 4 Formalities¹²⁸

A requirement for a contract of sale for human organs should be that it must be in writing. The contract must be signed by the buyer and the seller and witnessed by two competent witnesses¹²⁹ who are in each other's presence when signing the contract of sale.

When all the above requirements are met, one should be able to propose a valid contract. To meet the specific requirements for a contract of sale, the price and the object should be specified, for example: One left kidney offered for R150 000.¹³⁰

The seller of the kidney must be the person him or herself, the buyer should preferably be an institution such as the current blood bank in South Africa.¹³¹

6 1 2 *An example of a contract of sale for a kidney*

<p>CONTRACT OF SALE</p> <p>MEMORANDUM OF AGREEMENT MADE AND ENTERED INTO BY</p> <p><u>1. THE PARTIES</u></p> <p>1.1 XXXXXXXXXX</p> <p style="padding-left: 40px;">Identity number:.....</p> <p style="padding-left: 40px;">(Named the "SELLER" hereafter)</p> <p style="padding-left: 40px;">AND</p> <p>1.2 THE ORGAN BANK</p> <p style="padding-left: 40px;">(Named the "BUYER" hereafter)</p>

¹²⁷ *Castell v De Greef* 1994 4 SA 408 (C) 426F-H: "[a] risk being material if, in the circumstances of the particular case; (a) a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it; or (b) the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it."

¹²⁸ See Van der Merwe *et al* 138-146.

¹²⁹ 14 years or older

¹³⁰ Nobel Laureate (Economics) Gary S Becker and his co-worker Julio J Elias established a "market price" for a live donor kidney as a commodity. See Friedman and Friedman "Payment for Donor Kidneys: Pros and Cons" 2006 (69) *Kidney International* 961 as published online 2006-02-15.

¹³¹ See the explanation under par 3 above.

2. THE SUBJECT OF THE SALE

2.1 The SELLER hereby sells his or her

.....

To the BUYER subject to further terms and conditions determined by this purchase agreement.

(Hereafter named the "ORGAN")

2.1 The purchase price for the abovementioned ORGAN is the amount of:

R..... (.....rand)

3. PERSONAL FACTS AND/OR INFORMATION ABOUT THE SELLER

3.1 The SELLER declares hereby that he or she is capable of entering into this contract, he or she is doing so voluntary and that at the time of signing this document he or she is in full control of his or her faculties and aware of the commitment.

3.2 Without any guarantee for the correctness of the information supplied hereafter, the information supplied by the SELLER is true and correct according to the best of his or her knowledge.

3.2.1 Blood type:

3.2.2 Tissue type: (see attached medical report)

3.3 The SELLER declares hereby that he or she is:

3.3.1 unmarried.....,

3.3.2 married in community of property.....

3.3.3 married out of community of property and excluding accrual.....

3.3.4 married out of community of property with the inclusion of the accrual system.....

3.4 The SELLER declares hereby that he or she is HIV-negative, that he or she does not suffer from Aids, that he or she is free of Hepatitis A and B and that he or she is not a diabetic. Furthermore he or she declares that he or she has been tested three months prior to this agreement for all the abovementioned illnesses and that all test results were and still are negative. To prove this the SELLER hereby attaches copies of medical reports to confirm the mentioned facts.

3.5 The SELLER declares hereby that he or she has undergone the mentioned HIV tests, he or she has not received any blood transfusions and has not had sexual intercourse with any person other than his or her regular partner. As for the already mentioned illnesses, the SELLER is convinced that the situation has not changed since then.

4. CONDITIONS OF THIS SALE

This sale is concluded subject to the following conditions or requirements:

- 4.1 Any person involved with the sale and/or transplant of the ORGAN should strictly adhere to all the regulations of the relevant legislation involved with the sale of organs.
- 4.2 The SELLER should be properly informed of all advantages and disadvantages possible when such a transplant is performed. The SELLER should produce a written certificate and or report prior to the transplant or removal of the ORGAN, to confirm that he or she has been properly informed by a medical doctor and psychologists about all the advantages and disadvantages linked to such a removal or transplant. (Annexure A – Informed Consent Form)
- 4.3 The transplant of the organ will only be performed in an approved hospital or institution under the supervision of properly qualified persons as determined by legislation.
- 4.4 The BUYER or SELLER retains the right to cancel this agreement unilaterally before or within 48 hours before the ORGAN would be physically removed from the SELLER'S body without any liability and need not give any reason for his or her decision to cancel.
- 4.5 The ORGAN may only be transplanted into the body of a patient. It may not be used for any other purpose. The BUYER and SELLER agree herewith that any medical tests necessary for purposes of the transplant may be performed.
- 4.6 The BUYER is bound herewith to pay the costs and moneys related to the execution of this agreement in advance, alternatively acceptable arrangements for the payment thereof should be made. The mentioned money and expenses include cost of the SELLER'S doctors, hospital and other related necessary expenses.
- 4.7 By signing this agreement the representative of the BUYER indemnifies the SELLER of any moneys or costs due to the transplant of the ORGAN. The BUYER undertakes to give the SELLER a written indemnity form from any person, hospital or other institution for any money or expenses involved with the transplant of the ORGAN.
- 4.8 The BUYER indemnifies the SELLER from any consequence as a result of the transplant. This indemnity is also valid in the case of the patient's body rejecting the transplanted ORGAN sold to him or her.

SIGNED at..... On this day
of.....200... in the presence of the undersigned
witnesses

WITNESS 1.....

WITNESS 2.....

BUYER:..... SELLER:.....

ANNEXURE A	
INFORMED CONSENT	
I..... the undersigned, hereby give my permission that my left/right kidney may be removed for transplantation into a patient according to the regulations applicable in the legislation for such an operation.	
I further confirm that Dr..... has explained all possible medical complications to me, that I understand them and accept them.	
I confirm that I agreed voluntarily to a medical examination.	
SIGNED at On thisday of..... 200.....	
.....	
SELLER	
Witness:.....	Witness:.....

6 2 Deceased donors (sellers) – a “futures contract”

6 2 1 Background

A kidney is the only organ that a living person would be able to sell in South Africa.¹³² All other organs can only be removed from a person’s body after death.

According to the “futures contracts” mentioned earlier¹³³ the organ seller makes his or her organs available in terms of a contract that will only be enforceable once the seller dies in such a way that his or her organs are transplantable. Because it is a contract all the above requirements as applicable to the sale of organs by a living person are also applicable concerning the sale of organs from a deceased donor but there are certain terms which should be added.

6 2 1 1 Terms in the contract

A suspensive condition should state that the contract may only be executed after the death of the seller if he or she dies in such a way that his or her organs are transplantable. The specific organs to be sold after death of the seller should be described, for example: one liver, two kidneys, one heart, or the whole body, as the case may be. The amount per organ may be

¹³² A kidney is the only solid organ a person can live without. Although parts of a liver can also be used it is not common practice to donate a part of your liver in South Africa. Hair, semen, skin and blood are renewable by natural processes.

¹³³ See the proposals by other scholars in par 3 above.

indicated as being subject to inflation but it should be determined at the conclusion of the contract. The contract should furthermore stipulate that the amount to be paid per organ should be paid to the executor of the estate of the seller.

The contract should also clearly state that the agreement is subject to the HIV status of the organ seller. The seller of the organ should provide proof of his or her HIV-negative status at the conclusion of the contract. A medical report confirming this should be submitted annually until death. If the seller should die and it is determined that he or she was HIV-positive, the deceased will forfeit any advantage from the contract and the contract should be regarded as null and void.

Finally the contract should clearly state that the organ buyer will be responsible for all costs incurred by the hospital or medical staff in the process of removing and storing the available human organs.

6.2.2 An example of a "futures contract"

<p>FUTURES CONTRACT</p> <p>MEMORANDUM OF AGREEMENT MADE BY AND BETWEEN:</p> <p><u>1. THE PARTIES</u></p> <p>1.1 Name:</p> <p>Identity number:.....</p> <p>(Hereafter called the "SELLER")</p> <p>AND</p> <p>1.2 THE ORGAN BANK</p> <p>(Hereafter called the "BUYER")</p> <p><u>2. THE SUBJECT OF THIS AGREEMENT</u></p> <p>2.1 The SELLER herewith sells to the BUYER his or her subject to the terms and conditions on this contract. (Hereafter called the "ORGAN(S)")</p> <p>2.2 The amounts to be paid for the abovementioned ORGAN(S) are R(.....rand)</p> <p>2.3 The abovementioned price must be revised yearly in line with the CPX (Consumer Price index).</p> <p>2.4 The amounts mentioned above per ORGAN must be paid to the executor of the SELLER'S estate.</p>
--

3. PERSONAL FACTS AND OR INFORMATION CONCERNING THE SELLER

- 3.1 The SELLER declares hereby that he or she is capable of entering into this contract, he or she is doing it freely and voluntarily and at the time of signing this document he or she is in full control of his or her faculties and aware of the commitment.
- 3.2 Without any guarantee for the correctness of the information supplied hereafter, the information supplied by the SELLER is true and correct according to the best of his or her knowledge.
 - 3.2.1 Blood type:.....
 - 3.2.2 Tissue type:.....(see attached medical report)
- 3.3 The SELLER declares hereby that he or she is:
 - 3.3.1 Unmarried.....
 - 3.3.2 Married in community of property.....
 - 3.3.3 Married out of community of property with the exclusion of the accrual system.....
 - 3.3.4 Married out of community of property with the inclusion of the accrual system.....
- 3.4 The SELLER declares hereby that he or she is HIV-negative, that he or she does not suffer from Aids, that he or she is free of Hepatitis A and B and that he or she is not a diabetic. Furthermore he or she declares that he or she has been tested three months prior to this agreement for all the abovementioned illnesses and that all test results were and still are negative. To prove this the SELLER hereby attaches copies of medical reports to confirm the mentioned facts.
 - 3.4.1 The SELLER further undertakes to be tested for HIV annually. Thirty days after every test a copy of the test results will be supplied to the BUYER.

4. CONDITIONS OF THIS SALE

- This sale is concluded subject to the following conditions or requirements:
- 4.1 This contract will only come into effect if the SELLER dies in such a way that his or her organs are transplantable.
 - 4.2 All the regulations and the relevant Act concerning organ transplants should be strictly adhered to by any person involved with the sale and/or transplant of the ORGAN(S).
 - 4.3 The transplantation will only be performed in an approved hospital or institution under the supervision of qualified persons as determined by legislation.
 - 4.4 The BUYER is under no obligation to buy the ORGAN(S).

<p>4.5 The BUYER is bound herewith to pay all costs and moneys related to the execution of this agreement.</p> <p>4.6 By signing this agreement the BUYER, alternatively the receiver of the ORGAN(S), indemnifies the SELLER'S estate of any moneys or claims which are a necessary result of the execution of this contract. The BUYER, alternatively the receiver of the organ also undertakes to indemnify in writing the executor, alternatively the SELLER 'S relatives against claims by the hospital and/or other institutions for any money or expenses in connection with the transplantation of the ORGAN(S).</p> <p>4.7 The BUYER, alternatively the receiver of the ORGAN(S), indemnifies the SELLER'S estate against any negative results because of the transplantation. This indemnity also includes the instance of the BUYER'S body rejecting the ORGAN(S).</p> <p>SIGNED at On thisday of..... 20...</p> <p>Witnesses:</p> <p>1..... 2.....</p> <p>SELLER:..... BUYER.....</p>

7 CONCLUSION

The shortage of transplantable organs is a worldwide problem. Donor remuneration may be justifiable because of the lives that might be saved. If the commercialisation of human organs were to be allowed it should be seen as an additional method to obtain greater numbers of transplantable organs. It need not replace the system of voluntary donations.

Organ transplantations have created a new dimension of hope for patients desperately in need of an organ. Unfortunately this is a topic that does not concern ordinary people in the street as they have never been told that they will die if a transplantable organ to replace their own defective organ is not found. Those who are living happy lives do not know how it feels to be one of those dying. It is human nature to understand only that which happens to your own body or that of a family member.

In an attempt to control the ever-increasing demand for human organs to be transplanted the supply has to be dramatically increased. Current methods of organ procurement worldwide are not succeeding. The only solution seems to be legalising the sale of human organs in order to motivate more people to donate (sell) a kidney while living or to encourage people to think about what will happen with their organs after death. The possibility that a system may be misused does not make it wrong. It only requires strict regulation.¹³⁴ There are numerous arguments against the sale

¹³⁴ Van Niekerk *Geloof Sonder Sekerhede* (2005) 206. "Since 1988, Iran has adopted a compensated and regulated living-unrelated donor renal transplant program, and by providing financial incentives to volunteer living donors, has eliminated the renal transplant

of human organs, as indicated, but it is our contention that arguments against commercialisation have often been emotional rather than based on rational thinking.

It is necessary to face the reality and facts as they stand; people are dying while medical technology could save them. Money is already part of the medical game, why should payment for an organ be so unacceptable?

Hoffenberg summarises the issue:

“Most objections to organ sales can be rebutted on logical grounds. One is left with the feeling that they mostly reflect intuitive responses that do not seriously address a potentially valuable contribution towards reducing the gap between supply and demand. To be fair, this potential itself has not been tested; as yet no one knows whether or to what extent payment will increase the supply of organs. To borrow an intuitive response, I believe it would.”¹³⁵

The above are arguments concerning a proposal for the establishing of a market for human organs. Shortcomings in legislation, specifically in South Africa, and the current system of organ procurement in South Africa will be discussed in Part 2.

waiting list.” Ghods and Nasrollahzadeh “Transplantation Tourism and the Iranian Model of Renal Transplantation Program: Ethical Considerations” <http://www.ncbi.nlm.nih.gov> (accessed 2007-02-22).

¹³⁵ Hoffenberg 134.