

CHALLENGES OF CONVENTION ON TRAFFICKING IN HUMAN ORGANS UNDER A COMPARATIVE BRAZIL-EU PUBLIC LAW PERSPECTIVE

DESAFIOS DA CONVENÇÃO SOBRE O TRÁFICO DE ÓRGÃOS HUMANOS SOB UMA PERSPECTIVA COMPARADA DO DIREITO PÚBLICO BRASIL-UE

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ABSTRACT: The aim of this article is the analysis on the alignment of current Brazil legal framework with the Convention on Trafficking in Human Organs under a comparative Public Law perspective, as regards European Union (EU) initiatives. It also reviews the eventual incorporation into the Brazilian internal law 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, informed consent, altruist, non-onerous, anonymous donations and general preference for organs of dead donors.

KEYWORDS: Fundamental Rights; Freedom of Choice; Governance.

RESUMO: O objetivo deste artigo é a análise do alinhamento do atual quadro jurídico brasi-

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leiro com a Convenção do CdE sobre Tráfico de Órgãos Humanos sob uma perspectiva comparativa de direito público, no que se refere às iniciativas da União Europeia (UE). Também analisa a eventual incorporação no direito interno brasileiro com o objetivo de enfrentar os desafios decorrentes da implementação dos Direitos Fundamentais que regem o tema e, em particular, os subprincípios da Autonomia de Vontade, consentimento informado, altruísta, não - Doações desonestas, anônimas e preferências gerais para órgãos de doadores mortos.

PALAVRAS-CHAVE: Princípios fundamentais; Autonomia da Vontade; Governança.

INTRODUCTION

The aim of this article is the analysis on the alignment of current Brazil legal framework with the Convention on Trafficking in Human Organs³. Those principles rules the existing general donation regimen in the Europe countries after entry in force of Directive 2010/45/EU on human organs intended for transplantation⁴.

The Directive has largely contributed to combating organ trafficking through the establishment of competent authorities, the authorization of transplantation centers and the basis for traceability and procurement. Aspects such as the risk-benefit ratio, pre-transplant evaluation of potential donors, altruism as an essential principle or consent to donation are analyzed on the ground of need of common standards at Union level.

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 (Santiago de Compostela 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.

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

³Council of Europe Convention against Trafficking in Human Organ. CETS No.216: <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/216>> Last access on January 24th, 2017

⁴Directive 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.

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.

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*⁵ as well as the “European Code of Conduct for Research Integrity” developed by the European Science Foundation (ESF)⁶. 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

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.

This study is a work from Research Project: Global Comparative Law: Governance, Innovation and Sustainability⁷.

⁵World 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 <[http://www.who.int/bulletin/archives/79\(4\)373.pdf](http://www.who.int/bulletin/archives/79(4)373.pdf)>. Last access on January 24th, 2017.

⁶The 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 January 24th, 2017.

⁷Offers to the society the opportunity to critically engage with and consider a range of contemporary real-world issues: Globalized Challenges in Law Regulated Sectors from BR/EU/USA, on the comparative perspective, it enables all the researchers to encounter a variety of concepts, approaches and methods from the Social Science, Innovation and Ecology. This offers for all, the opportunity to build bespoke arguments, drawing on the inter, multi and transdisciplinary group researches and this research seeks to develop cross-disciplinary and cross-national research projects which intend to overcome the disciplinary barriers enabling the growth and integration of the social study of law. On other hand, the researchers can build a forum in which scholars, professors, students, as well as practitioners who are interested in interdisciplinary studies, can organize discussions, share work, exchange ideas and build networks. Available on < <http://dgp.cnpq.br/dgp/espelhogrupo/5771319084225732>> Last access on March, 4th 2016.

1. Trafficking in Human Organs and other part of their body

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 significance⁸. 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 life⁹. Trafficking of persons for the purpose of organ removal has long remained a subject of rumor and urban myth in Brazil. For the broader social context in which these rumors may arise in Brazil¹⁰.

2. Rules of Brazil and European Community (EU) and their Challenges

In legal terms, firstly we can separate the idea of trafficking in organs, tissues and cells from trafficking in human beings itself for organ removal in one of the constituent elements of the crime - the object of the criminal offence. In the former case, the object of the crime is the organs, tissues and cells, and the deceptive practices thereof while in the latter case it is the trafficked person. Brazil and UE have approach the issue under different ways:

⁸Bittencourt, Cezar Roberto. Tratado de direito penal, São Paulo: Imprensa, Saraiva, 2016, p.35.

⁹Toledo, Francisco de Assis. Princípios Básicos de Direito Penal. São Paulo: Imprensa, Saraiva, 1994 p.15.

¹⁰N. Scheper-Hughes, Death Without Weeping: The Violence of Everyday Life in Brazil (University of California Press: Berkeley, 1992), pp. 233-239. Brazil is frequently identified as locations of greater organ trafficking activity, whether as a locus of donors, recipients or brokers For the broader social context in which these rumours may arise in Brazil, for example, see: Bellagio Task Force, Op. Cit.; D. A. Budiani-Saberi, F. L. Delmonico, "Organ trafficking and transplant tourism: a commentary on the global realities", American Journal of Transplantation, Volume 8(5) (2008), pp. 926-927; Presentation by Michael Bos at the ELPAT Session of the 22nd Congress of TTS, "An update on global organ trafficking", Sydney (10-14 August, 2008).

2.1 Relevant aspects of Brazilian legislation: relevant aspects

On October 6th, 2016, the Law n°. 13.344¹¹ 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:

Chapter I - Principles and guidelines

Art. 2 establishes the principles of respect for the dignity of the human person and the guarantee of citizenship and human right¹².

Art. 3 set up the strengthening of federative actions and the coordination between institutional organizations and society¹³, 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 person¹⁴, reinforcing the cooperation between the Justice and the Public security systems, national and foreign.

¹¹This 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>, access on May, 25th, 2017.

¹²Art. 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.

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.

Article 4. Prevention of trafficking in persons shall be by means of:

- I - implementation of intersectoral and integrated measures in the areas of health, education, labor, public safety, justice, tourism, social assistance, rural development, sports, communication, culture and human rights;
- II - socio-educational campaigns and awareness raising, considering the different realities and languages;
- III - to encourage the mobilization and participation of civil society; and
- IV - to encourage projects to prevent trafficking in persons.

Chapter III - From repression to trafficking in persons

Article 5. The repression of trafficking in persons shall be by means of:

On Chapter IV - Protection and assistance to victims¹⁵ articulates specific measures for 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 measures¹⁶.

2.2 Brazil formal opposition to Declaration of Helsinki

Brasil will not adhere to Santiago de Compostela convention. In addition Brasil have developped a legal framework in line with Council of Europe covenants and Declaration of Helsinki ethical recommendations. See: Law no. 13344, of October 6, 2016¹⁷. All the subjects (Freedom of choice (autonomia de la voluntad), Informed consent, altruist, non-onerous, anonymous donations, general preference for organs of dead donors) are regulation by Brazil Asociacion for transplant¹⁸s.

Althought Brasil developped a legal framework in line with Council of Europe Covenants and Declaration of Helsinki ethical recommendations, Brasil do not

I - cooperation between organs of the justice and security system, national and foreign;

II - the integration of policies and actions of repression to related crimes and the accountability of their authors;

III - the formation of joint research teams.

Chapter IV - Protection and assistance to victims

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 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.

¹⁷Available at: < http://www.planalto.gov.br/ccivil_03/leis/L9434compilado.htm> Last access on January, 23th, 2017.

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> Last access on January, 23th, 2017.

¹⁸Available at <http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2016/Lei/L13344.htm.> Last access on April 2th,2017

¹⁸Available at <http://www.abto.org.br/abtov03_ingles/> Last access on January 2th, 2017.

intended to make proposal *Lege ferenda*, due to the fact that Brasil has considered Declaration of Helsinki ethical recommendations are particularly dangerous for poor people and population with serious health public problems, as is the case of Brazil which considered the text an ethical regression. Definitive re-formulations would be decided at the WMA meeting in October 2000. At the WMA meeting in Tel Aviv in 1999, it was decided that within this additional reflection on the proposed amendment to the Helsinki Declaration, some issues should be considered as priorities in the discussions.

2.3 Relevant aspects of convention on trafficking in human organs and their 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 and biolaw.

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 victims¹⁹:

Chapter I - Purposes, scope and use of terms²⁰, 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 implantation.

(...)

- "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

¹⁹Caplan, Arthur; Domínguez-Gil, Beatriz; Matesanz, Rafael; Prior, Carmen. 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.

²⁰Text 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).

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.

(...)

Article 4, Substantive Criminal Law, regulates 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

3. Other important issues covered by these Conventions: Subrogate motherhood and therapeutic obstinacy

3.1 Subrogate Motherhood

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

cerns, condemns surrogate motherhood as contrary to the dignity of women.

5.2 “Encarnizamiento Terapeutico”

Encarnizamiento terapeutico happens all the time on Brazil due in Brazilian law, euthanasia is considered criminal, but 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.

On Spain, 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 the judicial intervention. The therapeutic obstinacy is forbidden in our legal order.

Final Considerations

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 European Convention on Human Rights and Biomedicine (Oviedo Convention of 1997): and the Convention on Prevention of Illicit Trafficking of Human Organs.

Therefore, although the Brazil legislation is largely in line with the Convention on Prevention of Illicit Trafficking of Human Organs covering the issues, a further alignment to these specific legal instruments is advisable as a positive input 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, and
- (2) address specific actions to improve the awareness of relevant stakeholders on bodily rights and the ethics of ownership and donation in biomedicine.

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