

Editorial Comment

Is altruistic-directed living unrelated organ donation a legal fiction?

Miran Epstein¹ and Gabriel Danovitch²

¹Academic Unit for Human Science and Medical Ethics, Barts and The London School of Medicine and Dentistry, Queen Mary, University of London, London and ²Department of Medicine, David Geffen School of Medicine at UCLA, Los Angeles, CA, USA

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Introduction

The majority of pertinent political and professional bodies now regard ‘altruism’ and ‘solidarity’ as the sole foundations of any acceptable donor–recipient interaction. The European Directive, for example, makes an unequivocal statement in this respect.

As a matter of principle, tissue and cell application programmes should be founded on the philosophy of voluntary and unpaid donation, anonymity of both donor and recipient, altruism of the donor and solidarity between donor and recipient. [1]

Similar views have equally been endorsed *inter alia* by American law, the World Health Organization (WHO), and, most recently, The Transplantation Society (TTS) [2–4]. Whatever the dictionary definition of ‘altruism’ and ‘solidarity’, in the legal transplant jargon they have come to be understood as *any motivation for organ donation other than such that are formed under consent-invalidating coercion*. In fact, unless otherwise specified, the term ‘altruistic donation’ has come to mean ‘non-commercial donation’.

The market, however, constantly challenges these conceptions. By offering an apparently unlimited supply of organs, it gives patients who are facing a long wait for an organ, primarily a kidney, from a deceased donor the option of buying one from a living donor, instead of putting their relatives and loved ones to the test. By putting a price tag on body parts, it lures strangers, who would not give their organs for free anyway, into considering selling them. Finally, it promises parsimonious payers of health care a quick and cheap relief—one that does not need to rely on social solidarity or the good will of individuals. Success of the market

comes at the expense of the altruistic sphere, and a bigger market is likely to intensify the pressure on the latter even further [5,6]. Ironically, claims suggesting that altruism and solidarity are unable to meet the demand for organs, which are often invoked by proponents of the market in their attempts to promote their own solution to the global shortage of organs, ignore the fact that the problem has been caused, at least on part, by pervasive commercialization.

At any rate, within the altruistic sphere, different categories of living donation are more or less resistant to market pressures. For example, *non-directed anonymous living donation* may seem uncommercializable, but it is not. There is always some contact, whether direct or via intermediaries, between donor and recipient, which makes this category susceptible to commercialism. The same goes for *living related donation*. Indeed, it has been shown that even close family ties do not necessarily rule out commercialism or any other expressions of coercion [7]. That said, there is little doubt that the category of *directed* (designated by the donor to a specific recipient) *living unrelated donation* (directed LURD) is susceptible to commercialism even more. (Unless stated otherwise, related and unrelated donors shall be referred to as those who have and do not have legally sanctioned ties with the recipient, respectively.) Actually, under market pressures, one would expect altruistic-directed LURD to decline. This has not been the case, however.

As a matter of fact, LURD is the only category of lawful living donation to have shown a steady increase both in absolute numbers and relatively over the past 10 years. US data, for example, demonstrate an impressive surge in LURD from 287 cases out of 4059 lawful living donations in total in 1997 (7.1%) to 1589 out of 6732 in 2006 (23.6%), the vast majority of which being directed [8]. Similar trends exist in Europe as well. For all those who, perhaps prematurely, lamented the damage caused to altruism and solidarity by the pervasive commercialization of life, this trend may seem encouraging. The same goes for those who are specifically concerned with increasing the supply of organs, but refuse to seek deliverance in commercial mechanisms.

That having been said, the global surge in altruistic-directed LURD has caused some unease precisely in this respect. Concerns have been raised that, at least in some countries, it has become a Trojan horse of the market—a

Correspondence and offprint requests to: Miran Epstein, Senior Lecturer in Medical Ethics and Law, Academic Unit for Human Science and Medical Ethics, Barts and The London School of Medicine and Dentistry, Queen Mary, University of London, 2 Newark Street, London E1 2AT, UK. Tel: +020-7882-7086; Fax: +020-7882-2552; E-mail: m.epstein@qmul.ac.uk

legal fiction capable of passing commercial transactions for altruistic donations, contrary to its implicit non-commercial pretension.

Of course, this real possibility does not entail that altruistic-directed LURD must be a fiction always and everywhere. Its transformation into a fiction depends on conditions that may or may not exist. There are no logical necessities in this matter. Indeed, there may well be particular countries or transplant centres that have been spared, or circumstances where the necessary and sufficient conditions for such transformation to take place simply have not been met. The real controversy, if there should be any, is about the nature of these conditions and, even more so, the criteria for establishing whether they have been met or not.

This study attempts to explore these conditions and criteria. It then examines the implications of the fictitious practice for the global struggle against transplant commercialism. Finally, it suggests some remedies against that practice, but also scrutinizes our willingness to sustain their adverse effects.

Rumour, impression and empirical evidence

Regardless of country or centre, few would deny the possibility, however remote, of passing commercial transactions for altruistic donations. As Stephan *et al.* acknowledge, ‘We insist that there be no financial remuneration for unrelated donors; however, we have never been able to ascertain fully the complete absence of financial compensation’ [9]. In some countries there have been reports about ‘fairytale’ of potential donors recounting their ‘special’ emotional bonds with the potential recipients to oversight committees. Rumours about brokers who solicit potential vendors and instruct them how to fool the committee have equally been reported. For example, a senior medical correspondent in Israel had described the situation there, before the new, stricter, Transplant Act came into effect in March 2008.

All the donor has to do is convince a special committee that his motives are altruistic, and he isn’t getting paid. When the ministry published the directives in 2000, some officials warned it opened the door to government-sanctioned trade in human organs. Indeed, some of the ‘altruistic’ donations turned out to have been motivated purely by money. [10]

More rarely, stronger evidence surfaces when things have turned sour for one or another party. Reporting the post-operative death of a 38-year-old male kidney donor in September 2005, the same correspondent noted,

...there were claims that [the donor] was promised tens of thousands of dollars in exchange for donating the kidney, but [hospital] officials claimed [his] motivation was purely altruistic and that all the proper permits had been issued for the transplant. [11]

Several studies pertaining to developing countries have come up with evidence suggesting extensive fictionalization of altruistic-directed LURD [12–14].

Similar evidence from Europe and North America is lacking. However, in view of the illegality of commerce in organs and the fact that stakeholders, including the state, may have vested interests in such commerce, the likelihood

of the phenomenon must be considered in each and every country. Indeed, several authors raised concerns that altruistic-directed LURD may become a legal fiction concealing commerce (and other forms of coercion), at least occasionally [15–22].

Anecdotal failures, however, do not necessarily imply that altruistic-directed LURD is a fiction. Nor do global inferences necessarily follow from local and isolated experience, however disturbing. Indeed, there is also evidence, albeit indirect, suggesting that in some places the practice is far from being fictitious [23]. At any rate, since the clandestine nature of quasi-altruistic commercial transactions—given that they may occur—would make the true extent of the phenomenon virtually unknowable, the fiction claim could hold water, only if it rested on a stronger argument.

Conditions and criteria

With minor differences in formulation, most modern law dictionaries define legal fiction as a presumption taken to be true by the courts of law, irrespective of whether it is true or false, and even though it might knowingly be false (see ‘fiction’ in *The Concise Dictionary of Law* and *Merriam-Webster’s Dictionary of Law*) [24,25]. In the strict sense, then, every presumption is a fiction. Such generalization is not very useful, however.

For a presumption to become a legal fiction in a meaningful sense, the chances that it be true must be significantly diminished. In principle, this may happen when the presumption—in our case, ‘professed altruism reflects altruism’, or, alternatively, ‘professed altruism rules out organ vending’—does not lend itself to scrutiny, let alone serious scrutiny, and where circumstantial conditions that make it unlikely to be true apply.

Based on this premise, we suggest that altruistic-directed LURD is prone to become a fiction when *all* the following conditions are met:

- (1) Commerce in organs is a criminal offence.
- (2) There are social stakeholders who have vested interests in commerce in organs.
- (3) Altruistic-directed LURD is lawful.
- (4) The test confirming altruism is weak.
- (5) The test excluding commerce is weak.

Conditions (2) and (3) are easy to identify, and the criteria for their identification are trivial. In contrast, the criteria for establishing whether conditions (1), (4) and (5) have been met or not are debatable. As far as condition (1) is concerned, one might argue that strong enforcement plus severe penalty for breach of the law would effectively deter potential offenders (including the vendors themselves, brokers, recipients and medical institutions and staff), *even if* all other conditions applied. In contrast, one could argue that the deterrence potential of such measures could not be realised, *if* all other conditions applied.

The definition of a ‘weak’ test of altruism [condition (4)] is more problematic. It is clear that an appeal to trust alone—the presumption that the potential donor’s self-professed altruism is genuine—is too lax. When the other

conditions apply, the presumption ‘honest until proved lying’ is likely to be a fiction. Of course, trust could be supported by some positive evidence. What such evidence should be like is debatable, though. Some require that the potential donor present a judicial record and go through a ‘detailed’ psychological work-up [9]. Guidelines endorsed in 2006 by the United Network for Organ Sharing (UNOS), the American Society of Transplant Surgeons and the American Society of Transplantation regarding the latter process recommend that it include assessment by relevant professionals of the donor’s relationship with the transplant candidate and his or her motivation. The assessment requires the candidate donor to have ‘financial resources that could cover unexpected costs’. However, it does not require hard evidence of such resources. Moreover, the requirement that the candidate donor be ‘willing to sign a statement attesting that the donor is not providing the organ for monetary gain’ continues to appeal to presumptions [26].

The rigor of the test that purports to exclude commerce in organs varies as well. Some countries forbid public solicitation for living donor organs, insist that there be no financial transaction, inform the parties in advance that the surgical procedure will be cancelled if such transaction is found, and require that the assessment and approval processes be done by a body independent of the clinical team [9]. In the United States public solicitation of living donor organs cannot be regulated or restricted as long as no felonious or illegal activity is involved, although the nature of the efforts that need to be undertaken to assure the absence of such activities is not specifically defined. The determination of eligibility of potential living donors becomes the responsibility of the clinical team. Judgment is based upon assessment of the prospective donor’s financial stability, and his or her willingness to sign a statement attesting that they are not providing the organ for monetary gain [26]. It may be argued that none of these measures can effectively rule out commerce, let alone that their effectiveness must be greatly diminished when all other conditions apply.

Why does it matter?

In 2007, the World Health Organization estimated that organ trafficking accounts for 5–10% of the kidney transplants performed annually throughout the world [27,28]. Instances where altruistic-directed LURD is shown to be fictitious suggest that the rate may be even higher.

Albeit for different reasons, most proponents and opponents of transplant commercialism should welcome the exposure of such instances. Proponents of the market could argue that they reflect the hypocrisy of a system that *rightly* supports commerce, but is insufficiently bold to say so in public. They could add these instances to the expanding list of precedents of legitimized commerce in body parts, and use them to discredit altruism and normalize commercialism in transplant medicine. Opponents of the market may argue that such instances reflect the hypocrisy of a system that *wrongly* supports commerce, but is insufficiently bold to say so in public. They may add that a critical approach to altruistic-directed LURD has become the litmus test of both

the sincerity and the prospects of any anti-market transplant law or campaign [29].

Of course, not everybody would be happy with the exposure of instances where altruistic-directed LURD is shown to be fictitious. Some commercialists could think that the compromise that such instances reflect is satisfactory precisely because it conceals and thus reaffirms their hegemony. Some anti-commercialists might equally feel comfortable with this silent compromise with what they normally depict as the devil incarnate, because it allows them to pretend that they have made no such compromise. For these players, increasing the organ pool seems to be of greater importance than preventing commercialism from entering the gates of transplant medicine.

Remedies and adverse effects

In principle, the remedies against the fictitious practice are derived from and require elimination of its underlying conditions. Needless to say, legalization of commerce in organs would do away with the fiction in an instant. Elimination of the various interests in organ commerce would eventually do so, too. In the meantime, outlawing directed LURD, while allowing LURD to take place only if it is truly non-directed, would equally stamp out the fiction. Similar effect is likely to result from making the tests of altruism and non-commercialism more rigorous. Indeed, they can be made more rigorous. Strict application of the recommendations made by Dew *et al.* could be made mandatory [26]. The donor’s professed motivations could even be subjected to the scrutiny of a lie detector (reflecting the presumption ‘lying until proved honest’). Equally, the donor could be asked to produce proof of wealth as a necessary precondition for the donation to go ahead (reflecting the plausible presumption that the rich do not tend to sell their organs).

For proponents of transplant commercialism the most straightforward remedy—legalization—would probably entail no costs that they would not be willing to bear. In contrast, for those who reject commerce in body parts, the relevant remedies are likely to entail some serious adverse effects. Elimination of the various interests in organ commerce, for example, is undoubtedly the most radical and most controversial challenge. It entails a fundamental transformation of the entire political economy of our society. The more conservative steps—making the tests of altruism and non-commerce more rigorous—entail some trade-off as well. They would likely diminish the supply of organs, including those that are obtained from genuinely altruistic donors. Whatever the choice of the anti-commercialists, it will inevitably reflect the relative importance they attach to the prevention of transplant commercialism versus the urge to quench the intensifying demand for organs.

In lieu of conclusion: more fictions?

This discussion has drawn attention to the commerce-concealing potential of the presumption that characterizes the lawful variant of LURD—‘directed LURD that is said to be motivated by altruism, good will, and social solidarity is indeed so motivated’. Beyond that, however,

it has also provided a methodological blueprint for a far more ambitious enterprise, namely the systematic scrutiny of the fictitious potential of all the explicit presumptions involved in organ donation and procurement and those that are implicit in the prevailing classifications, concepts and procedures. (Examples include the presumptions that professed non-directed LURD rules out commerce, that living related donation rules out coercion, that pronouncement of death and the choice of its criteria are made independently of any interests in organs for transplantation and that the official dissociation between the death-pronouncing professional and the organ procurement team rules out conflict of interests. The presumption that legally valid consent to donate rules out any coercion, which lies at the heart of both commercial and non-commercial transplant ethics, deserves a special discussion.) For one thing is sure: healthy transplant practice must be based on the truth, the whole truth and nothing but the truth.

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