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“While the adoption of deemed consent regimes to facilitate organ donation is to be welcomed, only a market in organs will fully address the shortfall in supply to meet current demand for organs for transplantation in the UK.” Critically discuss.

Introduction

This essay will critically discuss the approaches of deemed consent and markets, in the context of organ donation. Throughout this essay, I will use the frameworks of consequentialism and deontology to identify and analyse ethical issues. Section one, details what deemed consent is, and the legislative approaches of jurisdictions within the UK. Though the terminology within these approaches differs, the practical effects are equivocal, and I will refer to this uniform practical result as deemed consent. I will then examine the ethical and legal issues with deemed consent, as well as the need for infrastructure and investment alongside legislation. Overall, I will establish that deemed consent is to be welcomed in the UK. Section two explores whether the organ shortage for transplantation (hereinafter referred to as organ shortage) can be addressed. An evaluation of potential methods to fully address the organ shortage will establish that a market is the only appropriate approach which has the potential to achieve this goal. The ethical and legal issues with an organ market will then be analysed. This discussion will illustrate that these ethical and legal issues mean an organ market would likely have insufficient support in the UK to realise its potential to address the organ shortage.

Section One: Deemed consent

a) Deemed consent and the current law

Deemed consent means that if a person does not register an organ donation decision, they will be deemed to consent to organ donation.[1] There are hard and soft substantiations of deemed consent. Soft versions such as those found in the UK include safeguards like allowing the family to veto a relatives organ donation.[2]

In the UK each jurisdiction has produced their own legislation. Wales introduced deemed consent in the Human Transplantation (Wales) Act 2013.[3] In England the

[1] Human Transplantation (Wales) Act 2013, s4; Human Tissue Act 2004, s3(6)(ba); Human Tissue (Scotland) Act 2006 (asp 4), s6D; Organ and Tissue Donation (Deemed Consent) Bill 2021

[2] Human Transplantation (Wales) Act 2013, s4(4); Human Tissue Act 2004, s3(6B); Human Tissue (Scotland) Act 2006 (asp 4), s6D(2)(d)

[3] Human Transplantation (Wales) Act 2013, s4

Organ Donation (Deemed Consent) Act 2019[4] which amended the Human Tissue Act 2004,[5] enacted deemed consent. In Scotland the Human Tissue (Authorisation) (Scotland) Act 2019[6] amending the Human Tissue (Scotland) Act 2006,[7] introduced deemed authorisation. In Northern Ireland, the Organ and Tissue Donation (Deemed Consent) Bill 2021[8] containing provisions on deemed consent, is in front of the Assembly.[9] Though the terminology differs between legislative approaches, the practical effects are equivocal, and I will refer to this uniform practical result as deemed consent.

b) Consequentialist perspective

An argument for supporting a system of deemed consent, is that organ donation and consequently the number of successful transplants will be increased. From a consequentialist perspective, this social benefit, if great enough can justify a deemed consent regime.[10] In the UK there is a large gap between demand and supply of organs for transplantation, with 6201 people waiting for transplants.[11] So, if implementing deemed consent would increase donations, resulting in saving lives or increasing quality of life, this provides a strong argument in favour of this approach.

Wales introduced deemed consent in 2015. Some studies find that deemed consent increased donor numbers and rates of family consent.[12] Other investigations argue

[4] Organ Donation (Deemed Consent) Act 2019

[5] Human Tissue Act 2004, s3(6)(ba)

[6] Human Tissue (Authorisation) (Scotland) Act 2019 (asp 11)

[7] Human Tissue (Scotland) Act 2006 (asp 4), s6D

[8] Organ and Tissue Donation (Deemed Consent) Bill 2021

[9] Northern Ireland Assembly, 'Organ and Tissue Donation (Deemed Consent) Bill 2021' (2021) <http://www.niassembly.gov.uk/assembly-business/legislation/2017-2022-mandate/primary-legislation---bills-2017---2022-mandate/organ-and-tissue-donation-deemed-consent-bill/> accessed 13 December 2021

[10] W Sinnott-Armstrong, 'Consequentialism' The Stanford Encyclopedia of Philosophy (Fall edn, 2021) Zalta E (ed) <https://plato.stanford.edu/entries/consequentialism/#WhaCon> accessed 12 December 2021

[11] NHS, 'Statistics about organ donation' https://www.organdonation.nhs.uk/helping-you-to-decide/about-organ-donation/statistics-about-organ-donation/> accessed 12 Dec 2021

[12] Explanatory notes to Organ Donation (Deemed Consent) HL Bill 141 para 7

that the increases were actually a recovery from an exceptionally poor year for organ donation in 2014.[13] This demonstrates that the causal connection between deemed consent and increased organ donation is contentious.

In Spain after the introduction of deemed consent, rates of organ donation doubled.[14] Again, the conclusion that this increase was caused by deemed consent legislation is called into question.[15] Instead, it is suggested that the infrastructure and education accompanying legislation, were the operative factors in increasing organ donation.[16] In the UK these operative factors are present through the public campaigns to provide education, and the specialist staff involved in the organ donation process.[17]

An appropriate conclusion from the empirical evidence is that a deemed consent alone is not sufficiently causally linked to increased organ donation rates to be justified. However, deemed consent legislation when combined with appropriate infrastructure and investment can be justified because this would result in increased organ donation, which is of great social benefit. The UK fulfils this condition of infrastructure, therefore deemed consent should be welcomed from a consequentialist perspective.

c) Deontological perspective and corresponding legal issues

In deontology it is important to look at the virtue of a transaction rather than the result.[18] Due to this, consent, and respect for autonomy during the organ donation

[13] A Parsons, 'Welsh 2013 deemed consent legislation falls short of expectations' (2018) 122(9) Health Policy 943

[14] M Epstein, 'Pros and cons of a regulated market in organs' (2009) 374 The Lancet 2049

[15] Parsons, 'Welsh 2013 deemed consent legislation falls short of expectations' (no 13) 942

[16] Parsons, 'Welsh 2013 deemed consent legislation falls short of expectations' (no 13) 942

[17] National Institute for Health and Clinical Excellence, 'Organ donation for transplantation: Improving donor identification and consent rates for deceased organ donation' (National Institute for Health and Clinical Excellence 2011) 62, 83

[18] L Alexander, M Moore, 'Deontological Ethics' (Winter edn, 2021) Zalta E (ed) <https://plato.stanford.edu/entries/ethics-deontological/> accessed 12 December 2021; S Borna, 'Morality and marketing human organs' (1987) 6(1) Journal of Business Ethics 37–44

process will be examined. I will also examine the corresponding legal issues related to consent, and the family veto as a legal safeguard.

i) Consent

In all the legislative approaches within the UK, consent is central to the process of organ donation, and is the prime determinant on the removal and use of organs.[19]

In the UK the introduction of deemed consent allows silence to be equated to consent. This raises questions as to whether deemed consent amounts to actual consent.[20] It has been argued that silence can be taken as consent.[21] But this equivocation, has been called into question. MacKay drawing on evidence from the European Union, proposes that the public knowledge of opt out systems is insufficient to allow silence to be taken as consent.[22] A response to this criticism is that public information campaigns[23] and the focus upon public awareness[24] in the UK will ensure that it is legally appropriate to equate silence to consent. This stance is further strengthened in Scotland and Wales by the legislative duty to promote information and awareness.[25] Consequently, equating silence to consent in deemed consent legislation is justifiable.

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[19] Human Transplantation (Wales) Act 2013, s4; Human Tissue Act 2004, s3(6)(ba); Human Tissue (Scotland) Act 2006 (asp 4), s6D; Organ and Tissue Donation (Deemed Consent) Bill 2021

[20] PK Prabhu, 'Is presumed consent an ethically acceptable way of obtaining organs for transplant?' (2019) 20(2) Journal of the Intensive Care Society 94

[21] Prabhu (no 20) 94-95

[22] Prabhu (no 20) 94-95

[23] Human Tissue Authority, 'New campaign in England to raise awareness of organ donation law change, the options and how to register a decision' (02 Jun 2021) <https://www.hta.gov.uk/news/new-campaign-england-raise-awareness-organ-donation-law-change-options-and-how-register> accessed 12 December 2021; Scottish Government, 'Record your organ and tissue donation decision' (20 Sep 2021) <https://www.gov.scot/news/record-your-organ-and-tissue-donation-decision/> accessed 12 December 2021

[24] Human Tissue Authority, 'New campaign in England to raise awareness of organ donation law change, the options and how to register a decision' (no 23); Scottish Government, 'Record your organ and tissue donation decision' (no 23)

[25] Human Transplantation (Wales) Act 2013, s2; Human Tissue (Scotland) Act 2006 (asp 4), s1

ii) Autonomy

Autonomy is the ability of persons to have their freely made choices respected.[26] It is argued that deemed consent respects autonomy if there is an option to opt out which is readily available and easily understandable,[27] as this will provide a clear path for individuals to maintain their autonomy.[28] In the UK you can opt out online by answering basic questions about yourself and ticking the box which reflects the desired organ donation decision.[29] If people do not have internet access, there is the option to carry out the process by telephone.[30] Therefore, the easy to access and understand option to opt out, provides a strong case that deemed consent in the UK respects autonomy.

It can be argued that deemed consent does not respect autonomy because it facilitates interference with a person's bodily integrity.[31] Veitch and Pitt believe that the act of taking organs in error is morally worse than not taking organs in error.[32] Thus, moving to an opt out system from opt in would constitute greater moral wrongs being facilitated by the law. In particular, where consent is deemed against the wishes of the deceased which were unknown to family or close friends. Proponents of this stance contend that not taking in error is less morally wrong because the act is only an "unfortunate failure to bring about a desired outcome".[33]

However, opponents of the above argument question the soundness of the premise that taking in error constitutes a greater moral wrong. Instead, Cohen suggests the

[26] P Cotrau and others, 'Ethical, socio-cultural and religious issues in organ donation' (2019) 14(1) Maedica 13

[27] Prabhu (no 20) 96

[28] Prabhu (no 20) 96

[29] NHS, 'Register your decision' <www.organdonation.nhs.uk/register-your-decision/do-not-donate/?> Accessed 12 December 2021; Organ Donation Scotland: Scottish Government, 'Register not to be a donor' <www.organdonationscotland.org/no> accessed 12 December 2021

[30] NHS, 'Register your decision' (no 30); Organ Donation Scotland: Scottish Government (no 30)

[31] Prabhu (no 20) 94; C Cohen, 'The case for presumed consent to transplant human organs after death' (1992) 24 Transplantation Proceedings 1992 2168-2172

[32] Prabhu (no 20) 94

[33] Prabhu (no 20) 94

actions are equally morally wrong.[34] This is a more convincing position because it adequately reflects that in both cases autonomy is at stake, as regard for autonomy is not judged by the consequences of actions, rather the act of having decisions respected. Therefore, the contention that deemed consent facilitates greater moral wrongs than an opt in approach is flawed, and this opposition to deemed consent is weak. It is also worth noting that proponents of the argument that deemed consent violates autonomy acknowledge that if an overwhelming majority of the public support organ donation, deemed consent is morally acceptable.[35] The fact that 90% of the UK public support organ donation[36] would satisfy this condition. This adds further strength to the argument that deemed consent in the UK is ethically justifiable and should be supported.

iii) Legal safeguard: The family veto

In hard law, legislation provides for the possibility of a family veto where consent has been deemed.[37] The veto will operate if the family can provide evidence which would lead a reasonable person to believe the deceased individual did not consent to organ donation.[38] This family veto could prevent violating the autonomous will of the deceased. The family veto's role in ensuring respect for autonomy is important to ensure ethical support for deemed consent from a deontological perspective. But the concern with the hard law family veto is that if rates are high, it may strip deemed consent of its utility. This was the case in the opt in system, where the family veto was viewed as one of the biggest inhibitors of increasing organ donation.[39]

[34] Prabhu (no 20) 95-96

[35] Prabhu (no 20) 96

[36] Prabhu (no 20) 93

[37] Human Transplantation (Wales) Act 2013, s4(2), s4(4); Human Tissue Act 2004, s3(6B); Human Tissue (Scotland) Act 2006 (asp 4), s6D(2)(d)

[38] Human Transplantation (Wales) Act 2013, s4(4); Human Tissue Act 2004, s3(6B); Human Tissue (Scotland) Act 2006 (asp 4), s6D(2)(d)

[39] A Parsons, 'Deemed Consent for Organ Donation: A Comparison of the English and Scottish Approaches' (2021) 8(1) Journal of Law and the Biosciences 10

The concern regarding high rates of family veto can be countered by the effects of changing the legislative default position from no consent unless a person has opted in to deemed consent. It has been shown that when presented with options people will tend towards the default position.[40] The change to deemed consent as the default legislative position will result in less incidences of family veto, and consequently higher rate organ donation rates. These effects are exemplified in Wales, where under an opt in system family consent rates stood at 44.4% in 2014.[41] This rate increased to 64.5% in 2017, after the introduction of deemed consent.[42] Therefore, while providing a vital safeguard to autonomy, deemed consent will also reduce the rates of family veto, which will positively impact organ donation rates. Therefore, deemed consent should be welcomed in the UK, and the legislative safeguard of a family veto plays a vital role in the system's utility.

Overall, the consequential benefits of increasing organ donations possess more strength than the ethical and legal issues connected to consent and autonomy. Therefore, I agree that deemed consent should be welcomed in the UK.

Section Two: Organ markets

This section will explore whether a market approach is the only way to fully address the organ shortage in the UK. Further, I will analyse the legal and ethical issues that could prevent an organ market being able to fulfil its potential with respect to addressing the organ shortage in the UK.

a) Can the organ shortage be addressed?

It is contested whether the organ shortage can be fully addressed. There is an argument that the advancement of technology making more people eligible for transplant and increasing rates of organ failure due to an aging population, mean the organ shortage cannot be addressed.[43] On the other hand, there are supporters of

[40] A Abadie, S Gay, 'The impact of presumed consent legislation on cadaveric organ donation: A cross-country study' (2006) 25 Journal of Health Economics 613

[41] Parsons, 'Welsh 2013 deemed consent legislation falls short of expectations' (no 13) 943

[42] Parsons, 'Welsh 2013 deemed consent legislation falls short of expectations' (no 13) 943

[43] AM Farrell, 'Addressing Organ Shortage: Are Nudges the Way Forward?' (2015) 7 Law, Innovation and Technology 256-258

the view that science, markets, and technologies together can address the problem.[44] This stance is supported by evidence from Iran, where a living donor kidney market fully addressed the shortage for that particular organ.[45] The potential of the organ shortage to be resolved necessitates a discussion of the merits and drawbacks of approaches which could achieve this goal.

b) Options to address the organ shortage

To assess whether an organ market is the only possible way to address the organ shortfall, I will examine five potential approaches to organ procurement for transplantation. Namely, opt in, opt out, mandated choice, organ conscription, and an organ market.

It has been shown above that an opt in approach did not fully address the shortage of organs, and this was a key reason why deemed consent was or is about to be adopted in the UK.[46] Deemed consent is a second approach which may be thought to address the organ shortage. But even where deemed consent has been most successful, there remains a shortfall of organs for transplant.[47] A further possibility to address the organ shortage is through introducing mandated choice. This approach has had mixed results where it has been implemented, and empirical evidence is lacking to back up claims that it could "save thousands of lives".[48] As such this approach would not fully address the organ shortage. Organ conscription has been proposed as a possible method which would address the organ shortage. But this approach would oppose the principles of the democratic system in the UK by introducing state ownership of organs, therefore making this option unsuitable for

[44] Farrell (no 43) 256-258

[45] A Ghods, S Savaj, 'Iranian Model of Paid and Regulated Living-Unrelated Kidney Donation' (2006) 1 Clinical Journal of American Society of Nephrology 1136

[46] Explanatory notes to Organ Donation (Deemed Consent) HL Bill 141 paras 6-9

[47] Spanish National Transplantation Organisation, 'Spain posts new all-time record with 48.9 donors per million population and approaches 5,500 transplants' (2020) Government of Spain <www.lamoncloa.gob.es/lang/en/gobierno/news/Paginas/2020/20200110organ-donation.aspx> accessed 12 December 2021

[48] R Truog, 'When Does a Nudge Become a Shove in Seeking Consent for Organ Donation?' (2012) 12 (2) American Journal of Bioethics 42; Farrell (no 42) 268

consideration.[49] An organ market is another method that may be able to fully address the organ shortage, with the evidence from Iran discussed above,[50] suggesting they have the potential to alleviate the organ shortage.

Due to this capability of organ markets, it is necessary to explore whether the legal and ethical issues from a UK perspective would allow the potential to fully address the organ shortage to be realised. The discussion which follows will focus on living donor markets to explore this question. Adopting this focus is suitable to address the suitability of living and cadaveric markets. This is because if living markets cannot be accepted, cadaveric markets would not be, as it is much more difficult to justify payment in the second case.[51]

c) Support for organ markets?

Iran's living donor kidney market has alleviated the kidney shortage in Iran completely.[52] Though this consequence of organ markets is beneficial and will generate support, it is necessary to determine whether this support persists in light of ethical and legal issues. Since markets depend on people being willing to use them, if there is a lack of support, they would be unable to fully address the organ shortage. This necessitates an examination of problems with organ markets, linked to commodification and exploitation, that may prevent them from being able to address the organ shortage in the UK.

i) Commodification

Adopting an organ market in the UK would be a shift away from the current legislative prohibitions against the commodification of organs in the UK.[53] From a

[49] AR Dalal, 'Philosophy of organ donation: Review of ethical facets' (2015) 5(2) World Journal of Transplantation 46; M Potts and others, 'Normative consent and presumed consent for organ donation: a critique' (2010) 36(8) Journal of Medical Ethics 498

[50] Ghods and Savaj (no 45) 1136

[51] GT Laurie, SHE Harmon, ES Dove, *Law and Medical Ethics* (11th edn, Oxford University Press 2019) Para 18.53

[52] Ghods and Savaj (no 45) 1136

[53] Human Tissue Act 2004, s32; Human Tissue (Scotland) Act 2006 (asp 4), s20

deontological perspective support depends on the virtues of the decision to give an organ rather than the consequences.[54] Therefore, I will address three issues raised by commodification, namely, undermining the idea of donation as a gift, using the human body as a means to an end, and religious opposition.

The main ethical objection to commodification is that the organ is given for payment rather than an altruistic purpose or as a gift.[55] The foundations of this deep-rooted support for the gift relationship are found in the work of Titmuss.[56] In the context of blood donation Titmuss set out that a gift requires altruism which is demonstrated through donation without an expectation of a reward.[57] Due to commodification, expressions of altruism would be suppressed, as the act of giving, cannot be separated from the social context of receiving a financial reward.[58] Therefore, a market would be unlikely to fully address the organ shortage, given a lack of support for an approach which suppresses the widely supported[59] principle of altruism.[60]

This altruistic approach is not without criticism. There are contentions that there could be another more suitable basis for donations, like reciprocity.[61] But the deep-rooted nature of altruism, and the public support for it, make it unlikely that another basis would garner sufficient support to be implemented in the UK.[62] As such altruism remains the criteria for determining the ethical acceptability of a strategy to encourage human tissue donation in the UK.[63] Consequently, the commodification caused by markets means they lack sufficient support, due to the commitment to the concept of altruism as the basis for organ donation. This lack of support means

[54] Alexander and Moore, (no 18); Borna (no 18) 37–44

[55] Dalal (no 49) 45; R Titmuss, *The Gift Relationship: From Human Blood to Social Policy* (London, George Allen & Unwin 1970) 237

[56] Titmuss (no 55); Farrell (no 43) 258-259

[57] Titmuss (no 55) 237; Farrell (no 43) 258-259

[58] Titmuss (no 55) 224-225, 241-243; Farrell (no 43) 258-259

[59] Farrell (no 42) 276

[60] Titmuss (no 55) 224-225, 241-243; Farrell (no 43) 258-259

[61] Farrell (no 43) 253, 275

[62] Farrell (no 43) 276

[63] Farrell (no 43) 255, 258

organ markets would be unlikely to fulfil their potential to address the organ shortage in the UK.

The second issue with commodification from a deontological perspective is that it treats humans as a means to an end. In deontology, to be acceptable a market should allow for conformity to a standard of norms or code.[64] One such norm comes from the directive that people should only be treated as an end never as only a means.[65] It is contended that a market violates this norm and therefore cannot be supported.[66] A counterargument to this claim is that in altruistic donation and organ markets, people giving organs are treated as a means to the end of enabling emotional and psychological benefits. [67] As such, if altruistic donation is acceptable, a market should be too,[68] as arguing that a market is morally dissimilar to altruistic donation, would be flawed.[69] Therefore, treating the human body as a means to an end is not the strongest argument that a market would lack the support needed to achieve its potential of addressing the organ shortage. The strongest argument for the inability of a market to address the organ shortage in the UK because of commodification remains the lack of altruism.

[64] Alexander and Moore (no 18); Borna, (no18) 38

[65] S Kerstein, 'Treating Persons as Means' (Summer edn, 2019) Zalta (ed) <https://plato.stanford.edu/entries/persons-means/> accessed 12 December 2021

[66] R Timmins, M Sque, 'Radical actions to address UK organ shortage, enacting Iran's paid donation programme a discussion paper' (2019) 26 Nursing Ethics 1938

[67] H Agerskov and others, 'Living kidney donation: considerations and decision-making' (2014) 40 Journal of Renal Care 88–95; H Agerskov and others, 'From donation to everyday life: living kidney donors' experiences three months after donation' (2016) 42(1) Journal of Renal Care 43–52; Timmins and Sque (no 66) 1940

[68] Agecroft and others 'Living kidney donation: considerations and decision-making' (no 67) 88-95; Agecroft and others, 'From donation to everyday life: living kidney donors' (no 67) 43-52; Timmins and Sque (no 66) 1940

[69] Agecroft and others 'Living kidney donation: considerations and decision-making' (no 67) 88-95; Agecroft and others, 'From donation to everyday life: living kidney donors' (no 67) 43-52; Timmins and Sque (no 66) 1940

The final barrier to introducing a market based on commodification is the religious opposition to a system not predicated on altruism.[70] In the UK this is a particular challenge given the pluralistic nature of society.[71] This again highlights why an organ market could lack the support needed for it to fully address the organ shortage in the UK.

Overall, public support for, and legal commitment to altruism, exist within the UK. This means an organ market would be unlikely to fulfil its potential to address the organ shortage. This is because a market depends on people being willing to use the market, and from the evidence above, this would likely not be present in the UK.

ii) Exploitation, consent, and autonomy

A significant concern with introducing an organ market is the exploitation this would promote which would disproportionately impact the poor.[72] This exploitation occurs because of commodification making organs economic resources.[73] It is inevitable that those in need of money will be more likely to use the market. The monetary reward for donating organs will be a greater incentive to those with little money available to them. Evidence from India exemplifies this concern, as there is evidence that 96% of those who donated to the market did so to try and settle debts.[74] An organ market will therefore exploit the existing economic, social, and cultural inequalities in the UK. With organs becoming a financial resource, this would introduce a new avenue for people to be legally and socially pressured to go down should they owe money. This pressure would again disproportionately impact the

[70] A Caplan, 'Finding a solution to the organ shortage' (2016) 188(16) Canadian Medical Association Journal 1182

[71] Office for National Statistics, 'Exploring religion in England and Wales: February 2020' (Feb 2020) <www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/religion/articles/exploringreligioninenglandandwales/february2020> accessed 12 December 2021; Scotland's Census, 'Religion' (Aug 2021) <www.scotlandscensus.gov.uk/census-results/at-a-glance/religion/> accessed 12 December 2021

[72] S Rippon, 'Imposing options on people in poverty: the harm of a live donor organ market' (2014) 40 Journal of Medical Ethics 148

[73] Rippon (no 72) 147

[74] Rippon (no 72) 148

poor. It is this unfairness and inequality caused by commodification, which would intuitively lead to a lack of public support for a market. The exploitation of the poor via commodification also runs counter to the UK's support for the Declaration of Istanbul.[75] This overall lack of public and institutional support, could prevent an organ market reaching its potential of fully addressing the organ shortage in the UK.

A response to the above, is that without a legal market in the UK there is a black market.[76] It is argued that a legalised market is a desirable alternative which should be supported, given the impacts of exploitation on the poor in a black market.[77] Black markets have few safeguards to protect donors, who also receive poor healthcare and treatment.[78] The argument follows that an organ market should be supported as it can address the extreme substantiations of exploitation of the poor on the black market. But this argument does not necessitate that an organ market is introduced, as the change from exploitation on the black market to a legalised market, does not address the ethical issue of exploitation.[79] Consequently, a market could be seen as a legal endorsement of a system which exploits the poor. This position would not garner support, given the UK's support of the Declaration of Istanbul[80] which states that commodification should be prohibited to prevent inequality. As such, an organ market would likely lack the backing which is needed for it to fully address the organ shortage.

A related issue to exploitation in organ markets, is consent. Consent is the fundamental requirement to allow organ transplantation to be allowed.[81] For consent

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[75] The declaration of Istanbul on organ trafficking and transplant tourism (2008 Edition) <https://www.declarationofistanbul.org/images/documents/doi_2008_English.pdf> accessed 14 December 2021

[76] B Bastani, 'The Iranian model as a potential solution for the current kidney shortage crisis' (2019) 45(1) International Brazilian Journal of Urology 194

[77] J Taylor, 'Black markets, transplant kidneys and interpersonal coercion' (2006) 32(12) Journal of Medical Ethics 698-699

[78] Rippon (no 72) 145; Bastani (no 76)194

[79] Taylor (no 77) 698-699

[80] The declaration of Istanbul on organ trafficking and transplant tourism (no 75)

[81] Human Tissue Authority, 'Code A: Guiding Principles and the Fundamental Principle of Consent' (Human Tissue Authority May 2020) para 20-22; Human Transplantation (Wales) Act 2013, s4;

to be valid it must be free, informed, and voluntary.[82] The social and legal pressures which would exist in the market caused by the introduction of financial rewards,[83] mean consent would not meet these criteria. Therefore, a market's undue exploitation of the poor through the pressures to donate, and the presence of a financial incentive, would result in consent not being genuine. This lack of genuine consent would undermine a fundamental principle in legal and clinical approaches to medical procedures, and as such could lose organ market's support. This highlights another reason exploitation may lead to a market lacking the support which is needed if it is to fulfill the potential of addressing the organ shortage.

Organ markets would garner support from those who believe a prohibition on markets is unduly paternalistic towards the poor, by preventing them the option of selling their organs. [84] Advocates of this view would argue people should be allowed to exercise their autonomy and be free to choose to sell their organs[85] to meet the organ shortage. Supporters of this view point to the fact that undermining bodily integrity is allowed in other contexts such as labour.[86] But it could be argued that these other contexts can be distinguished as there is an option to abandon at any point, whereas in organ markets there is not, once the organ is transplanted.[87] Those who support the paternalistic prohibition of organ markets would argue that the premise that we should not prohibit bad choices for the poor is false. [88] Rather, we ought to prohibit bad choices for the good of the poor, especially when there are strong links to exploitative practices.[89] Therefore, it can be argued that paternalism

Human Tissue Act 2004, s3(6)(ba); Human Tissue (Scotland) Act 2006 (asp 4), s6D; Organ and Tissue Donation (Deemed Consent) Bill 2021

[82] Human Tissue Authority, 'Code A: Guiding Principles and the Fundamental Principle of Consent' (no 81)

[83] Rippon (no 72) 148

[84] Rippon (no 72) 145

[85] R Major, 'Paying kidney donors: time to follow Iran?' (2008) 11(1) McGill Journal of Medicine 68

[86] H Hansmann, 'The economics and ethics of markets in human organs' (1989) 14(1) Journal of Health, Politics, Policy and Law 73

[87] Hansmann (no 86) 73

[88] Rippon (no 72) 146

[89] Rippon (no 72) 146

can be justified to prevent exploitation. This exploration demonstrates that there will be support for markets from those who see their prohibition as an unduly paternalistic restriction of autonomy. But this support will not be unanimous, given the possibility of justifying the paternalistic prohibition because of the exploitation in organ markets. As such, this point casts further doubt upon whether support for an organ market would be sufficient for it to fully address the organ shortage.

iii) Legal regulation

Having explored the issues that exist with organ markets, I now consider whether legal regulation could temper these problems to ensure sufficient support to make an organ market effective. Proponents of organ markets argue that the experimentation and time to get legal regulation right would be worthwhile, for the result of increased rates of organ donation.[90] There have been suggestions there could be regulations upon price, who can buy or sell, the type of organs that can be sold, and guidelines to ensure the process minimises exploitation.[91] But regulations in these areas would either be ineffective or lead to markets lacking the utility which makes them attractive.[92] This can be illustrated by the example of regulating who may donate. If a minimum income threshold to be able to donate is introduced to stop the poor being exploited, the poor who make up the large majority of those who donate in markets would be unable to do so. This regulation while addressing the unequal exploitation of the poor, does so at the potential cost of failing to meet the required number of people using a market needed to fully address the organ shortage. Therefore, legal regulation would strip markets of their utility or fail to temper problems with organ markets to ensure sufficient support to make a market effective.

[90] L de Castro, 'Commodification and exploitation: arguments in favour of compensated organ donation' (2003) 29 Journal of Medical Ethics 146

[91] G Cohen, 'Regulating the organ market: normative foundations for market regulations' (2014) 77(3) Organs and Inducements 80-84

[92] Rippon (no 72) 148-149

Conclusion

Deemed consent results in the great social benefit of increased availability of organs for transplant. It has been shown that this benefit outweighs the ethical and legal concerns, connected to consent and autonomy. The legal safeguard of a family veto was also shown to be vital in ensuring that autonomy is safeguarded. Therefore, I agree that deemed consent should be welcomed in the UK. Further, I have demonstrated that organ markets are the only appropriate method which could fully address the organ shortage in the UK. I established that the concerns linked to commodification and exploitation in organ markets may cause a lack of public, legal, and ethical support for a market in the UK. It was also illustrated that legal regulation would strip markets of their utility or be ineffective in reducing concerns caused by organ markets. The potential absence of support would negate the potential of an organ market to address the organ shortage, as this requires a willingness to support and use the market.

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