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The Interaction Between Law and Bioethics in Addressing International Organ Trafficking

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Substantial recent developments in law and ethics to combat international organ trafficking raise the question of how the two should interact. How much should be done by law, and how much by bioethics? Is there a sensible division of effort between the two? Is there a potential conflict between the two? Do the developments in one require developments in the other?

The Council of Europe Convention against Trafficking in Human Organs now has fifteen ratifying states and eleven other states which have signed the Convention but not yet ratified it.[1] That Convention obligates state parties to prohibit its nationals and habitual residents from engaging in organ trafficking, whether inside or outside the state party's territory. Latvia, where we are today, is one of the fifteen states which have ratified the Convention and enacted the implementing legislation.[2] Five states are not party to the Convention, including Canada,[3] which has also enacted the legislation the Convention requires.

The International Society for Heart and Lung Transplantation made a statement on transplant ethics in April 2022 that -

> "The body of evidence that the government of the People's Republic of China stands alone in continuing to systematically support the procurement of organs or tissue from executed prisoners."

is sufficient to justify a prohibition on papers and publications "related to transplantation and involving either organs or tissue from human donors" in China.[4] The NGO Global Rights Compliance in April 2022 released a Legal Advisory Report and a Policy Guidance under "Do No Harm." The subtitle and subject matter of the report is "Mitigating Human Rights Risks

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[1] https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/216/signatures?p_auth=WpFvU1X7
[2] Criminal Law, Article 139
[3] https://www.parl.ca/DocumentViewer/en/44-1/bill/S-223/royal-assent
[4] https://ishlt.org/ishlt/media/documents/ISHLT_Statement_Transplant-Ethics_2022.pdf

When Interacting with International Medical Institutions & Professionals in Transplantation Medici."[5]

Law and ethics in this area are being developed piecemeal. The question becomes what a comprehensive approach would look like.

As the initiatives already undertaken indicate, a comprehensive approach requires addressing two different elements. One is transplant tourism. A second is interactions between medical institutions and professionals in countries engaged in organ transplant abuse and the medical institutions and professionals in other countries.

Each of these two elements has several sub-elements. For transplant tourism, extra-territorial criminalization of complicity in transplant abuse is essential. Also critical is mandatory reporting by health professionals and health institutions of transplant tourism to those responsible for enforcing the law. While it would be inappropriate to make public the reports of individual cases of transplant tourism, aggregates by country of destination of transplant tourism must be publicly available. Transplant tourism also relates to professional ethics because of the need for patient counselling and disincentivizing transplant tourism through such measures as denial of access to records or refusal to prescribe prescription drugs, which would facilitate the tourism.

The business aspect of organ trafficking requires separate consideration. Advertising and brokerage need to be addressed. There is also the issue of the extent to which the health insurance system reimburses transplant tourism costs.

Regarding medical institutions and professional interactions, matters to be addressed include joint research on the development of transplant technology, publication of research, hospital training, university and hospital exchanges, granting awards and honours, and conference presentations. Because the transplant profession has many sub-specialties, each with its association, each component of the system and its aggregates need to consider these matters.

All of this amounts to a lengthy list. Ideally, every component in the package should be tackled at once since dealing with the problem piece-meal will not be as effective as dealing with the problem comprehensively. Nonetheless, the reality of the geographical fragmentation of the transplantation profession, medical institutions and bioethicists by sub-specialty and institution makes the comprehensive approach challenging.

To get a sense of the dimensions of the problem and the need to do something about it systematically, consider one particular form of organ transplant abuse, the mass killing in China of prisoners of conscience for their organs, primarily practitioners of the spiritually based set of

[5] https://globalrightscompliance.com/project/do-no-harm-policy-guidance-and-legal-advisory-report/

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exercises Falun Gong, since the early 2000s, more recently Uyghurs, and, in lesser numbers, Tibetans and House Christians. The scale of the abuse is massively industrialized. Simply by adding up individual posted hospital totals, we can see that China engages in 100,000 transplants a year. The country has a worldwide multi-billion transplant tourism business, financing other parts of the health system.

One researcher after another has concluded that organ transplant abuse with prisoner of conscience victims is happening beyond any reasonable doubt. There have been various piecemeal measures to counter the abuse. Yet, the result of the sum total of these measures amounts to little. The abuse in China continues virtually unhindered.[6]

One can see why this is so. The twenty countries which have legislated against transplant tourism are a small number compared to the 193 member states of the United Nations. Yet, legislation alone cannot stop transplant tourism. The legislation has to be enforced. How can that happen? Options are these:

1) Health insurance restrictions

Israel in 2008 enacted a law which prohibits reimbursement through the health insurance system of transplantation abroad conducted in violation of the standards of the legislation.[7] Taiwan in June 2015, enacted a law requiring patients who get organ transplants overseas must provide legal proof of the source of the organs to be eligible for state-funded medical aftercare.[8]

These laws incentivize compliance with the law but do not provide an enforcement system when the law is violated. In particular, those who can pay medical expenses without the need for health insurance are not thwarted from transplantation, where the sources of organs are either improper or unidentified.

2) Non-reimbursement for payment of prescription drugs

Malaysia has a policy on supplying immunosuppressant drugs from government hospitals to Malaysians who travel abroad for organ transplants provided on a commercial basis. Nationals who travel abroad for organ transplants provided on a commercial basis should not be allowed to get a free supply of immunosuppressant drugs from government hospitals.[9]

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[6] https://endtransplantabuse.org/
[7] Section 5, https://sections.tts.org/DOI/Israel%20Transplant%20Law.pdf
[8] https://endtransplantabuse.org/2015-taiwan-human-organ-transplantation-act-amended-and-promulgated/
[9] October 2011, https://www.thestar.com.my/news/nation/2011/10/17/no-meds-for-unapproved-ops/

Again here, the policy disincentives organ transplantation abroad in violation of local laws but does not provide an enforcement mechanism when the law is violated. The disincentive works against the poor more than the wealthy.

3) Insurance reporting

On November 22nd, 2012, the Taiwan Legislature resolved that the Department of Health must require major medical institutions and physicians to record the country of transplant and hospital information (including surgeons) of any patient who received an organ transplant in a foreign country. The recording must be done when the patients apply for postoperative health insurance payment after returning home.[10]

This is a requirement that patients report to doctors and hospitals, not that doctors and hospitals report to health administrators. The reporting also occurs only in the context of postoperative health insurance applications. If there is no such application, there is no reporting.

4) Customs reporting

An Australian senator, when I raised this issue at an Australian parliamentary event, suggested that it may not be necessary to impose a reporting requirement on health professionals that the information about transplant tourists could be imposed on patients by adding a question or sequence of questions to the customs declaration every person entering Australia must complete. The trouble with that suggestion is that it relies on patients' honesty.

The more aware the patients are of the abuse from which they benefit, the more complicit they are themselves in the abuse, the less likely they are to be honest. In contrast, one can rely on the honesty of local health practitioners since they do not benefit from the crime and failure to comply with the law would violate their own professional ethics.

5) Inspection

The Israeli Organ Transplant Act provides that Transplant Coordinators, the Inspecting Physician and the Quality Control Board, all appointed under the authority of the Act, may examine medical records maintained by any approved medical center relating to organ removal and transplant, including material on the medical condition of an organ recipient, and also obtain any other pertinent information they require.[11]

This system allows the designated authorities to gather information about transplant tourism. With this system, the initiative rests with the designated authorities to examine relevant records rather than the medical practitioners treating transplant tourists on return.

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[10] https://dafoh.org/taiwan-reacts-to-unethical-organ-harvesting-in-china/
[11] Section 12(b)

Patients who are transplanted abroad may not, on return, have any contact with an approved medical center relating to organ removal and transplant. They may obtain anti-rejection drugs through prescriptions from local doctors and pharmacists without contacting approved medical centers relating to organ removal and transplant. So, this system of detection of transplant tourism needs to be more comprehensive.

Patients transplanted abroad may eventually disappear from waiting lists for local transplants. However, unless the patients voluntary report their transplant tourism, the disappearance would not be immediate.

6) Anonymous mandatory reporting

Dr. Jagbir Gill, Director, Associate Professor of Medicine, University of British Columbia; Transplant Nephrologist, St. Paul's Hospital, Vancouver, speaking on behalf of the Canadian Society of Transplantation to the Canadian Senate Committee on Human Rights when considering proposed legislation on mandatory reporting said,

"I actually think mandatory reporting would work in terms of getting at the numbers. It is something that is required. I am concerned that mandatory reporting in the context of criminal legislation will get a bit dicier, and you will face more resistance from the physician groups.

However, mandatory reporting is critical as a first phase to get at the scope of the problem. The Act, in and of itself, mandates and puts in place a series of steps which requires that education piece to happen, so we have to obtain that information. There are mechanisms in existing registries, for example, to actually implement mandatory reporting, at least on a broad scale, to say whether a transplant occurred outside of the country. Even that can be robustly captured. I do actually agree. I think that would be important."[12]

Mandatory anonymous reporting would be useful. If mandatory reporting reveals large numbers of transplant tourism to countries where organ transplant abuse is rampant, that information might mobilize further action.

Yet even one instance of organ transplant abuse is one too many. Preventing organ transplant abuse is not just a future goal; it is something which should happen immediately. Anonymous mandatory reporting does not address immediate abuse, nor abuse in small numbers.

7) Voluntary reporting

It is theoretically possible to have voluntary reporting. Patient health practitioner confidentiality is a right of patients and a duty of health practitioners. Patients can waive this right. If patients want to report, they can do so. Also, medical societies, hospitals, and even health ministries

[12] https://sencanada.ca/en/Content/SEN/Committee/421/ridr/29ev-54078-e

could adopt policies that reporting transplant tourism is not an actionable breach of doctor-patient confidentiality.

There should at least be this possibility, of voluntary patient or health practitioner reporting by establishing registries to which patients or health practitioners could report. Yet, this mechanism, like customs reporting, is unlikely to be comprehensive. Those who knowingly engaged in wrongful activity abroad are unlikely to report. Health practitioners may consider it not to be in the best interests of their patients to report, even if they are explicitly allowed to do so.

8) Ethical reporting

The World Medical Association International Code of Medical Ethics provides:

"The physician must respect the patient's privacy and confidentiality, even after the patient has died. A physician may disclose confidential information if the patient provides voluntary informed consent or, in exceptional cases, when disclosure is necessary to safeguard a significant and overriding ethical obligation to which all other possible solutions have been exhausted, even when the patient does not or cannot consent to it. This disclosure must be limited to the minimal necessary information, recipients, and duration."[13]

Disclosure of transplant tourism to relevant authorities is necessary to safeguard a significant and overriding ethical obligation to which all other possible solutions have been exhausted, even when the patient cannot or cannot consent. Consequently, applying this ethical standard would obviate the need for mandatory reporting. If the medical profession agrees, reporting need not be required by law.

9) Prohibition without penalty

Israeli law has imposed a legal obligation on patients not to participate in organ transplant abuse, but providing no punishment for patients should they break the law.[14] There is no need to replicate the Israeli law. Patient immunity need not be written into the law. The matter could be handled by police and prosecutorial discretion.

As well, there are potentially some circumstances where patient immunity would be improper. Granting a blanket immunity prevents consideration of individual circumstances.

10) Mandatory reporting by health professionals

In principle, law and bioethics could work in tandem. A law criminalizing cross border transplant abuse supports health professional patient counselling.

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[13] Paragraph 22, https://www.wma.net/policies-post/wma-international-code-of-medical-ethics/
[14] Sections 3(b) and 36(2)

With such a law in place, medical practitioners could advise patients in need of transplants that they may be violating the local law if they go to China for a transplant. Medical practitioners could advise patients that willful blindness is not a defence to violation of the law, that they can not pretend they did not know, when the sourcing in China of organs from prisoners of conscience for their organs is widely available public information, substantiated beyond any reasonable doubt.

Anyone who gets a transplant abroad needs aftercare back home. Health professionals know about transplant tourism because transplant tourists are their patients.

Transplant patients do not have the option of avoiding medical care on return from transplant tourism. They need anti-rejection drugs indefinitely after transplants. So, the disincentive to seeking medical care created by compulsory reporting would have to be small to non-existent.

Without mandatory reporting by health professionals and institutions to government authorities of transplant tourism, the laws which have been enacted have been largely inoperative and ineffective. The only persons who know systematically about transplant tourism are the health professionals. For the law to workable, either ethical standards or the law need to be changed to overcome hesitations from medical professionals about confidentiality, mandatory reporting should be legislated.

A medical practitioner or health institution who reports their patients to the authorities as having been engaged in transplant tourism may feel that they would be violating confidentiality ethics. Yet, that reporting is essential to make the law workable.

Some medical practitioners are opposed to this sort of legislation, on the basis that they do not want to criminalize their patients. Yet, mandatory reporting would not necessarily mean that.

Not every transplant tourist has organs from a non-consenting or exploited source. As well, police have a discretion not to charge and prosecutors have a discretion not to prosecute even where a conviction is possible.

The purpose of mandatory reporting is not to criminalize patients but rather to set up an investigatory trail. Those enforcing the law do not have a place to start unless they can talk to the patients who received the transplants abroad. And those enforcing the law can not talk to the patients who received the transplants abroad unless the enforcement system knows who the patients are.

There is a parallel here between organ trafficking and drug trafficking. Often police will not charge drug users or prosecutors will not bring drug users to court if they cooperate with the enforcement system to identify the source of their supplies. Mandatory reporting could lead to a similar situation. Patients would become a source of information about organ trafficking rings, rather than the objects of charges and prosecutions.

Another parallel worth noting is compulsory bank reporting of certain financial transactions to get at money laundering. The banks who comply with the reporting requirements are not themselves charged or prosecuted for money laundering, even though they are part of the money laundering system. The information they provide is essential to make possible the enforcement of the money laundering law.

In Canada proposed legislation passed the Senate with a provision imposing a reporting obligation. The provision required that any medical practitioner:

> "who treats a person in relation to an organ transplant must, as soon as reasonably practicable, report to the authority designated by order of the Governor in Council for that purpose the name of that person, if known, and the fact that the person has received an organ transplant."[15]

The House of Commons, in adopting the Bill in 2019, amended it to remove the reporting obligation, partly on the basis that enacting a reporting obligation fell within provincial jurisdiction. The Bill went back to the Senate for adoption in the same form as adopted by the House of Commons.

A 2010 private member's bill in the National Assembly by Valerie Boyer in France proposed a reporting obligation.[16] The bill stated:

> "Tout médecin a l'obligation de signaler à l'agence de biomédecine l'identité de toute personne ayant subi une transplantation qu'il a examinée dans le cadre de ses fonctions.
>
> L'ensemble des certificats visés par le premier alinéa et des signalements du deuxième alinéa du présent article sont inscrits sur un registre centralisé par l'agence de biomédecine.
>
> L'agence de biomédecine signale au Ministère public toute personne dont il existe des motifs raisonnables de croire qu'elle a été impliquée dans une opération financière en vue d'obtenir un organe du corps humain ou ses produits."

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[15] https://www.parl.ca/DocumentViewer/en/42-1/bill/S-240/third-reading

[16] Bill no. 2797 Assemblée nationale treizième législature Enregistré à la Présidence de l'Assemblée nationale le 16 septembre 2010. Proposition de loi visant à lutter contre le tourisme de transplantation d'organes, http://www.assemblee-nationale.fr/13/pdf/propositions/pion2797.pdf

Australian proposed legislation in 2015 in the state of New South Wales included within it a reporting obligation.[17] The proposal stated:

(1) A registered health practitioner has a duty to provide a report to the Secretary [of the Ministry of Healthy] if he or she has a reasonable belief that a patient or other person has been transplanted with or received tissue that was removed from the body of another person (whether living or deceased):
    (a) under a commercial transplant arrangement, or
    (b) without the appropriate consent to the removal or to its use in that patient or other person.
(2) A registered health practitioner is only under such a duty if that reasonable belief arises during the course of or from the health practitioner's work.
(3) That report must:
    (a) be provided as soon as practicable and in the manner required by the regulations, and
    (b) include the name, or a description, of the patient or other person, and the grounds for the registered health practitioner forming that reasonable belief.
11) If a registered health practitioner makes a report in good faith to the Secretary:
    (a) the making of the report does not constitute a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct, and
    (b) no liability for defamation is incurred because of the report, and
    (c) the making of the report does not constitute a ground for any civil proceedings, including proceedings for malicious prosecution or for conspiracy or for breach of any duty of confidentiality, and (d) the registered health practitioner is not subject to any criminal liability in relation to the making of the report."

Whether or not patients are prosecuted, the brokers and others either facilitating or participating in the abusive transplants certainly should be. Patients are typically given a runaround and told a phony story about which they do not ask too many questions. While they are arguably guilty of willful blindness, they live in circumstances that blur their judgment.

Ontario's College of Physicians and Surgeons has a long list of compulsory reporting requirements.[18] Mandatory reporting is imposed for child abuse or neglect, impaired driving ability, long-term care and retirement homes, sexual abuse of a patient, facility operators: duty to report, incapacity, incompetence and sexual abuse, terminating or restricting employment, privileges and partnerships, births, stillbirths and deaths, communicable diseases and diseases of public health significance, controlled drugs and substances, community treatment plans, gunshot wounds, pilots or air traffic controllers, maritime safety, railway safety, occupational health and

[17] Parliament of New South Wales, Human Tissue Amendment (Trafficking in Human Organs) Bill 2015, Progress, https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=2953

[18] https://www.cpso.on.ca/Physicians/Policies-Guidance/Policies/Mandatory-and-Permissive-Reporting

safety, correctional facilities, preferential access to health care, health card fraud, privacy breaches, offences, professional negligence and malpractice, findings by another professional regulatory body, and charges and bail conditions.

Other provinces have similar compulsory reporting requirements. Given this long list, saying no to mandatory reporting of transplant tourism seems out of place.

In these other mandatory reporting cases, the value of say defence against gun and knife violence or protecting children from abuse or neglect have prevailed over the value of health professional patient confidentiality. It should be the same for organ transplant abuse.

There is some worry in these areas that mandatory reporting may adversely affect patients. However, on balance, the decision has been that we are better off with mandatory reporting than without it. The overall interest society has in preventing gun battles and child abuse predominates. One can say the same about organ transplant abuse.

Conclusion

Transplant abuse occurs under cover in darkness. Perpetrators give out as little information as possible. Participants in the abuse are typically willfully blind. Shining a light on the abuse is an essential aid to ending it.

We need knowledge of transplant tourism to avoid getting caught in a vicious circle. We do little about the problem because we need to know how big it is. We do not know how big it is because we need to do more about the problem. Without awareness of transplant tourism, the black market in organs will continue to be pitch dark.

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