

Advisory Committee for Bioethics

***Opinion no. 43 of 10 December 2007
on the problem of commercialisation
of human body parts***

Committee Decision of 14 June 2004 and 21 April 2005

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Question put to the Committee

In the plenary meeting of the Committee on 24 May 2004 a memorandum by Jean-Noël Missa, entitled "Arguments in favour of a liberal ethic for the regulation of gamete donations" came up for discussion under the agenda point "Sundry questions". This memorandum was submitted in the framework of the select committee handling the question of gamete donations, but only the select committee dealing with surrogate motherhood had been able to take its content into consideration (see Opinion no. 30 of 5 July 2004 – point 4.3.3.2).

During the session of 24 May, M. Roelandt, the then Chairperson, deemed it advisable for a new committee to be set up on the general subject of (non-)commercialisation of human body parts, and proposed putting this point on the agenda of the following Committee meeting.

On 14 June 2004 the Committee decided to set up a select committee under the following plenary Committee, given that its mandate expired at the beginning of July 2004.

At its inaugural meeting of 21 April 2005 the new plenary Committee delegated to the executive officers authority to propose the setting up of select committees to deal with the priority issues pending an opinion.

This the executive officers did on 28 April 2005, in particular for the above-mentioned issue of commercialisation. A call was made for candidates to make up select committee 2005/1. The committee started work on 3 September 2005.

The committee began its deliberations on the basis of the memorandum that Jean-Noël Missa had submitted to the select committee handling the issue of surrogate motherhood, which reads as follows¹:

"Other members of the Committee, without therefore necessarily wishing to advocate commercialisation of the body in the case of surrogate motherhood, are of the view that the arguments cited to support the "principle of non-commercialisation of the body" should be investigated more thoroughly. The problem of commercialisation of the body is complex and should be placed in the broad context of the bio-ethical problem with regard to the human body. This problem concerns the legitimacy of and conditions under which the body and parts of the body, in multicultural societies with market economies, may be objectified and manipulated by biomedicine, with or without therapeutic objectives.

Speculative theories on ethical rules have practical consequences. These theories should be judged on their effects on the course of action taken, and more especially their consequences for people and for bio-medical practice. Rigidly sticking to the principle of non-commercialisation of the human body could have negative effects from the point of view of people's development. The blind application of the principle of non-commercialisation does indeed lead, in medical practice, to various situations of scarcity and social injustice.

Account should therefore be taken of the arguments advanced by those who, on the basis of fundamental considerations concerning the status of the body, are of the view that the body may not be placed "outside the market". A host of arguments can be cited in favour of a regulated commercialisation of the body in certain circumstances.

[for the rest of the text, see Opinion no. 30 of 5 July 2004, point 4.3.3.2.]"

¹ See Opinion no. 30 of 5 July 2004, point 4.3.3.2.

INTRODUCTION

1. Diversity of questions

Certain aspects linked either to the non-commercialisation of the body, or the opposite of this, i.e. the commercialisation of parts of the human body, lead to questions provoking a far-reaching reflection on this subject. A few examples serve to illustrate the way these questions are presented.

- Organ donations stemming from brain-dead donors still constitute the main way of providing organ transplantation teams with organs. Belgium belongs to Eurotransplant, a consortium of seven European countries that follows specific rules regarding organ distribution and is having to deal with a serious shortage of organs. There is also a shortage of organs in Belgium, despite a regulation that facilitates organ donation after death².
- Some patients who find themselves way down on the waiting list for an organ transplant go to Asia and pay large sums of money to undergo a kidney transplant there, or to receive an organ that has come from a terminally ill patient or been sold by people in need³. According to data from 98 countries, 66,000 kidneys were transplanted in 2005. This is 10% of the patients on the waiting lists. "Transplant tourism" is reported to account for 10% of all transplants. Shouldn't the debate in Belgium therefore be extended to include means of increasing organ availability, and shouldn't this debate be carried out together with other countries, for example amongst the countries involved in Eurotransplant, or even beyond Europe?
- Can we object to a situation whereby a parent of a child afflicted by a serious pathology proposes selling a kidney in order to ensure that the child receives appropriate treatment? If, on the other hand, we accept that body parts can be commercialised, what protection can we guarantee people against themselves?
- The ban on commercialisation of parts of the body makes the autonomous control over one's own body impossible. On the other hand, autonomy is permitted when a part of the body is donated as a gift. To cite an example: Eurotransplant has accepted that a mother can donate one of her kidneys so that, in return, a kidney is implanted in her son within a shorter period. Here the mother was able freely to dispose of her kidney. Some see it as an altruistic deed. Others, on the other hand, consider this as an exchange: instead of giving money to pay for an organ for her son, she has parted with an organ of her own. Who can freely dispose of their body, and when can they do this? If exchange by the mother is accepted, shouldn't this also be accepted for the sale of some parts of the body?
- If we take the logical reasoning concerning commercialisation to the extreme, we can arrive at situations that are difficult to accept. For example, if commercialisation of body parts were allowed, could we not expect a needy family to sell the organs of one of its deceased? Might it not also occur that families would be tempted to sell the organs of a deceased person in order to increase the value of the inheritance?

² See the Eurotransplant annual report on their website:

http://www.eurotransplant.nl/files/annual_report/AR2005_def.pdf

³ See, for example, the article in *Le Monde* of 25 April 2006, "Au coeur du trafic d'organes en Chine" [At the heart of the traffic in organs in China].

- Commercialisation raises the problem of the commercial value of life and the risks to which people are exposed; by way of a reminder: organ removal can potentially involve morbidity and even mortality.
- Can we consider the idea, as some suggest, of carrying out consultation within a European framework on the establishment of an organ bank with organs from living donors,⁴ which were obtained in exchange for payment? Such a bank, if necessary limited to a group of countries, would have the role of centralising the organs available, distributing them, and thus ensuring transparency and a faultless traceability which would make it possible to avoid cases of improper use. Some reject this proposal, some approve the idea, and others regard it as too restrictive on account of the concept of a single control body, or because of the limited exchange within the countries involved⁵.
- If such an organ bank were created, who would pay for the organs purchased and who would determine the price of an organ? Insurance companies? What would the possibilities be for someone without insurance? Is the kidney of a young woman worth more than that of a fifty-year-old smoker?
- What scientific data do we have on the trade in organs that goes on in various places in the world and in defiance of the law (with the exception of Iran)? Can we decide on the grounds of these data that the trade in organs is a win-win situation (from which both recipient and donor benefit), or does the reality prove to be otherwise?

On account of the wide range of problems raised regarding the question of whether or not (parts of) the human body may be commercialised, the Committee has decided in this opinion only to examine the permissibility of commercialisation of regeneratable parts of the human body (blood, bone marrow, gametes, liver lobe, etc.) or non-regeneratable parts (the kidney, for example) taken from living people.

The problems raised by people who commercialise their body in the context of prostitution, the exploitation of others in the broad sense of the word (such as, for example, illegal domestic employees), and certain contracts of employment (test pilots, etc.) are not dealt with in this opinion. The same applies to the sale of dead parts of the body (hair), tattooing of the skin as publicity, and breastfeeding. These are not examined in this opinion because they raise other ethical problems.

As regards the issue of commercialisation in the context of surrogate motherhood, the Committee refers to the recommendations in Opinion no. 30 of 5 July 2004 on surrogate motherhood.

2. History of the conception of the body

Anthropology has brought about a major change in conceptions of the body, in particular the

⁴ Ch. A. Erin & J. Harris, *J. Med. Ethics* 2003; 19: 137-138.

⁵ Savulescu, *J. Med. Ethics* 2003; 19: 138-139.
 J. R. Richards, *J. Med. Ethics* 2003; 19: 139-140.
 J-D. de Castro, *J. Med. Ethics* 2003; 19: 142-146.

idea of the link between the individual body and the social body⁶. Regulation of medicalised interventions on the body, which belongs to the key area of bio-ethics, is often limited to two opposing concepts. One compares the idea of the integrity of the body with the concept of ownership of the body, those poorly-functioning parts of which can be replaced, depending on the person's needs or indeed desires, with the aim of outstripping the biological determinisms of human existence, thanks to enhancement or genetic engineering. Others in turn attempt to safeguard the integrity of the body on the basis of biological differentiation. By allowing parts of the body to live outside that body, or to be moved from one body to another (transplant), or indeed permitting embryos to be removed from the female body and transferred to the laboratory for in-vitro fertilisation, bio-technology has shaken not only the foundations of Western law, but also notions of common sense concerning the body. The legitimacy afforded to certain biomedical interventions, and to the commercialisation of certain parts of the body or the feeling of horror that such a trade evokes, raises the question: to whom does our body actually belong, at the end of the day?

The body

Increased knowledge of our biological determinisms and the vote for women who introduced a sexual aspect into the anthropological discourse by demanding the appropriation of their reproduction rights had a striking effect on the conception of the body and the shift in the political model of the regulations of the interventions on the human body in the twentieth century⁷

The fight waged by the feminist movement with regard to the woman's appropriation of her body led in the 1970s and 1980s to a new anthropological, philosophical and legal approach to the relationship with the body and kinship, with which the bio-ethical debate is usually confronted, and which emphasises **the tension** between a cultural and a legal discourse concerning the value of the life concealed in the body itself, and the scientific description of the living being. The debate focuses all too often on two irreconcilable and limiting positions: 1) the body is the property of the individual; this idea is labelled as Anglo-Saxon thinking and is chiefly the result of a line of thought fed with the empirical data of 20th-century anthropology; 2) the body is the inextricable substrate of the person (Kant), which is an ontological position underpinning a deontological morality.

But some claim that it is precisely these two irreconcilable positions that reduce the bio-ethical debate to a conflicting, ideological debate.

When the face supplants the body

The axiology of the body changed after Dante, with the face becoming *the* place of significance. The individual was no longer considered as merely a part of the social body, but also came to be perceived as an individualised body. The body thereby even became the boundary indicating the difference between two individuals. Anatomy indicated the moment of an anthropological transformation that had bio-political consequences. With dissection, Vesalius introduced an implicit distinction in Western culture between the person and his body.⁸

⁶ See *inter alia* the essays by David Le Breton, "Anthropologie du corps et modernité" [Anthropology of the body and modernity], PUF, Quadrige, 2001, and by Michel Bernard, "Le corps" [The body].

⁷ See in this respect the works of the anthropologist Françoise Héritier, in particular "Masculin/féminin dissoudre la hiérarchie" [Masculine/feminine: Dissolving the hierarchy], Odile Jacob, 2002.

⁸ See in this respect the works of David Le Breton, in particular "Anthropologie du corps et modernité" [Anthropology of the body and modernity], PUF, 1990.

This caesura was irreversible. Vesalius made possible modern thinking about the body. The dead body could now be regarded as something unrelated to the human being – a dualism that had already been announced by some Greek philosophers.

The social meaning of the gift

It is from Mauss onwards that social sciences attempt to rethink a certain universality of the duty to give, but this duty cannot be unconditional, unless it becomes an offer⁹. The gift would lead to social cohesion, and questioning the universality of the gift would amount to reducing individualism to rational egoism. The gift only has sense in a logic of reversibility. Mauss showed that it can only occur on the basis of something other than itself. The gift therefore has to be socialised, something that cannot be limited to the universal laws of exchange¹⁰.

Is it wrong to talk about a gift? Would donation always be interested - yes, even calculated? No, because for Mauss the gift can only be a social operator if it answers to the threefold obligation of each action: giving, receiving and giving back.

The gift is termed moral or an Agape gift when this occurs unselfishly. The major religions have inspired this view. The laicisation of the gift made it possible to extend it to foreigners – feeding endless open networks in the name of universality – and ensured cosmopolitanism or the opening of the world society.

But one of the problems of organ donation is that there is no way for the recipient to be “quits with the gods”, because the gift is asymmetric.

In a recent article, kidney specialist Benjamin Hippen¹¹ questions the idea of voluntary living organ donors. He legitimises a view in which the sale of organs is regulated, with a view to the deficit between supply and demand. According to Hippen the concept of the gift does not work, since solidarity is not obligatory. A regulated market for the sale of organs would therefore be the solution. After all, this would guarantee greater safety for the sellers and recipients, and a greater institutional integrity to work together with the sellers of organs who would be subject to a legal system. Hippen criticises the anthropological model of the gift as a moral obligation, for in his view it clashes with informed consent, which, apart from the urgency of the donation, is dependent on a form of social pressure which turns the donation of organs between relatives almost into a duty. Hippen ends, like Marcel Mauss, with an indictment of the *tyranny of donation* which is ambiguous, since it presupposes a form of potlatch¹² and a moral duty vis-à-vis the donor which lasts long after the act of donation. He suggests that a regulated market in organs would remove the tyranny of

⁹ Michel Terestchenko, “Un si fragile vernis d’humanité. Banalité du mal, banalité du Bien” [Such a fragile veneer of humanity. Banality of evil, banality of good], Ed. La découverte Mauss, 2005.

¹⁰ Recurring expression in the work of Marcel Gauchet.

¹¹ Benjamin Hippen “In defense of a regulated market in kidneys from living vendors”, *Journal of Medicine and Philosophy* 30, 593-626, 2005, which adopts ideas that had already been developed by John Harris and the Anglo-Saxon liberal movement.

¹² In his “Essai sur le don” [Essay on donation], in “Sociologie et anthropologie” 1950, PUF, Marcel Mauss demonstrates that the duty to make a donation “has turned people into exchangers” because “refusal to make a donation amounts to a declaration of war”, as a result of which the donation degenerates into a legal system that demands symmetry of rights and duties and mixes the spiritual and the material system. This morality of the donation is presented as a donation economy based on exchange. The vital question at the heart of the issue of commercialisation of the body appears to be: do we have to abandon the morality of rights and duties?

donation because it offers an alternative.

This approach raises questions in these two anthropological models, in respect of a third model which Gilbert Hottois calls an anthropo-technological approach¹³, which destroys the sacred aura surrounding donation of the body, and which, according to Hottois, would be pragmatically more coherent with the legal systems of our laicised society.

Legislation and donation

The State has only drawn up rules in relation to the status of the body, from the moment biomedical research made possible scenarios calling into question the assumptions of natural law, with regard to the beginning and end of life, for example. Natural law is a collection of extremely wide-ranging, non-converging assumptions that can be defined by their function of "law of the law" and makes it possible to underpin the legitimacy of the content of positive law.

For that matter, the law has not always approached the body in the same way; the uses of the body answer multiple persuasions, and are not limited to a single possibility. Basing the law concerning the body on one single substance or view risks causing problems, all the more so since the integrity of the body is close to the fragmentation, and even the separation of some of its elements (hair, nails, milk, injured tissue or tissue riddled with cancer, etc.). These things appeared not to have any value before, but now, with the capacity for DNA analysis, they have been found to contain considerable information and to be exploitable.

In his *Legal history of the body*¹⁴, J.-P. Baud shows that the law, unlike anthropology, does not make any distinction between body and person. This creates all manner of ambiguity for drawing up rules with regard to parts of the body (breast milk, blood, sperm, ova, stem cells, and even the uterus). The legal system¹⁵ with regard to people is totally contrary to that pertaining to things, and is associated with the idea of inalienability of the body, the function of which is guard human dignity from any form of subjection or exploitation.

Organ donation is regulated by the State, which is legally empowered to "transfer a fragment of a dead donor to a living individual"¹⁶. Therefore, without any statement to the contrary, it is legal to remove organs in the name of the common good, in order to save the

¹³ Gilbert Hottois, "De l'anthropologie à l'anthropotechnique?" [From anthropology to anthropo-technology] in "La fabrication de l'humain" [Manufacturing the human], Tumultes nr. 25, Kimé Publishing.

¹⁴ Jean-Pierre Baud shows how many jurists claim neutrality in this debate; he leaves the controversies to the theologians and scientists in "L'affaire de la main volée, une histoire juridique du corps" [The case of the stolen hand: a legal history of the body], Seuil 1993 and "Le droit de vie et de mort. Archéologie de la bioéthique" [The right to life and to death. Archaeology of bio-ethics], Alto-Aubier, 2001. Compare with the recent interesting reflections made by Stéphanie Bauzon, "La personne biojuridique" [The bio-juridical person], PUF, Quadrige, 2006.

¹⁵ See, for example, the universal declaration with regard to the human genome and human rights, which is a good example of the resistance against anthropo-technology which already surfaced in Mary Shelley's *Frankenstein*, expressing people's aversion to - or stupefaction at - the idea of controlling life.

¹⁶ Idea criticized by the anthropologist Pierre Clastres in "l'esprit des lois sauvages ou une nouvelle anthropologie politique" [the spirit of primitive laws or a new political anthropology], Seuil, 1987, supervised by Miguel Abensour. These ideas were recently adopted by the anthropologist Stéphane Breton in the text and exhibition on Branly, "qu'est-ce qu'un corps" [What is a body?], Flammarion 2006.

life of a third person.

To avoid any misunderstanding and incorrect ideological debates connected with the conflicts of interests lurking behind the management or control of the body, from the anthropological viewpoint it is important to make a distinction between the body *as the object of a right of ownership*, and *the body as the substrate of the person*.

Human body and person, the importance of a distinction

At this stage we see that the form of a human being is therefore corporeal, but the representation of the body and its sacral character are the result of social and historical constructions that are too complex to be homogenous. Every connection and every era outlines a special knowledge of the body, even though certain shared principles see to it that its dignity is guarded from any forms of exploitation (senseless suffering, prostitution, humiliation, discrimination, violation of integrity, etc.) and thanks to the tension retained between the social body and the individual's own body.

The modern body implies the separation of the person from others. The person is indicated as an individual on account of his capacity to break away from the mother body, but also from the social body within which the person takes his place. In his essay on individualism Durkheim summarises the about-turn of modernity as follows: "The Western body is the point of caesura. It is the inseparable part of the person, the "individuation factor'." (E. Durkheim).

With the gradual dismantling of popular traditions, combined with the development of a more scientific medicine, a more objectifying knowledge of the body has come into being. In our Western societies, however, no collective, shared meaning can be given to the concept of body, other than in declarations that have no force of law.

I. LEGISLATIVE FRAMEWORK

I.1. Discussion on the principle of the blanket ban on commercialisation of the human body and/or parts and products of the human body

From the standpoint of *legal linguistics* the concept of "commercialisation" should be understood as: the placing of a product or commodity for sale, i.e. the last phase in its distribution on the market; the adaptation from cottage-industry production to a commercial distribution that makes it pay; or permission for a product to be offered for sale when said product had hitherto not been traded¹⁷. "Commerce" should be understood as meaning "trade, commercial intercourse, business that is solely aimed at profit", in other words all activities that make it possible for producers' goods to be transferred to consumers or which consists in purchased products being sold without undergoing any appreciable processing or treatment (unlike industry or manufacturing)¹⁸.

The concept of "commercialisation" has appeared recently in law, but it is not unknown, in particular in the framework of the laws on medical-scientific interventions.

Where the human body is concerned, reference should not be made to the acts of commerce referred to in the Commercial Code (Article 2 and 2b) and for which the "pursuit of profit" is an essential factor.

The reflection on the legal status of the human body is worked out with reference to the Civil Code via the concept of *res extra commercium* (things that cannot be subjects of commerce), i.e. that cannot form the subject of agreements between private individuals (such as funerals, goods of the public domain, and common goods not belonging to anyone). Thus Articles 1128 and 1598 of the Civil Code state that: "only *res in commercio* [ownable things] can form the subject of agreements" and "any *res in commercio* may be sold when there are no special legal provisions prohibiting its alienation"¹⁹.

Mention can also be made of Article 6 of the Civil Code which declares null and void, *ipso jure*, any agreement that is contrary to public order or common decency.

Trade (and all the more so trafficking) of the human body and constituent parts and products of the human body is contrary to public order and common decency, as described in this article, which at the moment refers chiefly to the concept of dignity of the (human) person.

These limitations apply both to agreements that are free of charge and to those involving the payment of a fee. They refer to the general legal meaning of the word "trade", which alludes to *exchange* not necessarily involving a profit or the pursuit of profit, contrary to the specific

¹⁷ "Vocabulaire juridique" supervised by Gérard Cornu, PUF, Quadrigue, 8th ed., 2007. In this last meaning "commercialisation" bears a close resemblance to "patrimonialisation", which is described as the tendency of an attribute of personality or an extra-patrimonial component thereof (name, image, private life) to procure a value measurable in money stemming from the person's specific value (know-how, skills and abilities, talent, reputation), but has an economic usefulness that only he can exploit by means of agreements concluded with third parties (intangible right of undisturbed possession, legal monopoly of an economic potential).

¹⁸ Idem.

¹⁹ See *inter alia* Loiseau G., "Typologie des choses hors du commerce" [Typology of *res extra commercium*], RTDciv., 2000, 4; compare recently Dijon X., "Vers un commerce du corps humain?" [Towards trade in the human body?], J.T., 2006, 501.

meaning of that word in commercial law, where the pursuit of profit is indeed required²⁰.

The traditional view is that the human body cannot be a subject of commerce within the meaning of Article 1128 and that it therefore cannot form the subject of any agreement whatsoever.

This view is based on the idea that the body is inseparable from the person, of whom it is the substrate and physical expression. And consequently the body, just like the person, is *inalienable and extra-patrimonial*. Given that the body cannot be separated from the person, the idea of a *person's right to his body* according to the traditional authors is inconceivable²¹.

Another trend in legal doctrine advances that this view of absolute inalienability of the human body does not stand up in respect of the current reality. The advocates of this trend refer to the development of biotechnology, the fragmentation of the human body and the possibilities of certain parts of the human body being used for therapeutic purposes or research²².

The development of bio-technology has created a theoretical *right to self-determination* on the part of the person in respect of his own body, a right that has its roots in the right to respect for physical integrity, which is guaranteed by Article 3 of the European Treaty on the Protection of Human Rights. Its theoretical and practical scope remains controversial, but in the form of an extra-patrimonial right of personality it would seem that today there is no escaping it²³.

The individual is increasingly aware of his *autonomy* and authority, also in respect of his body. It follows on from this that he deals with his body with greater freedom, and wants to take decisions himself (self-determination) regarding family planning, contraception, abortion, the choice to die with dignity and the request for euthanasia. This has led to the idea developing that the human body *is not purely and simply inalienable*: a person can carry

²⁰ On the fact that the human body is not on the *market*, but is not actually *res extra commercium* within the meaning considered here, see: the founding article by Hermitte M.-A., "Le corps hors du commerce, hors du marché" [The body cannot be the subject of commerce or placed on the market], Arch. philos. dr., 1988, 323 and the thesis by Moine I., "Les choses hors commerce. Une approche de la personne humaine juridique" [*Res extra commercium*: An approach of the juridical human person], LGDJ, 1997. By the same author, see "Commerce juridique", in the *Dictionnaire de la culture juridique* (Alland D. and Rials S. (ed.), PUF, Quadrige, 2003) where he sets about separating this concept from that of trading activity and the non-fee-paying character of what is not *in commercio*, whereby he describes parts removed from the body, such as organs, tissue or gametes, as 'things that by nature cannot be on sale to the general public' and recalls that it goes without saying that the person himself is *res extra commercium*.

²¹ See *inter alia* Sériaux A., "Le principe d'ordre public de l'indisponibilité du corps humain" [The public order principle of the inalienability of the human body], in "Le droit, la médecine et l'être humain, Propos hétérodoxes sur quelques enjeux vitaux du XXI^e siècle" [Law, medicine and the human being. Heterodox comments on a few vital issues in the 21st century], P.U. Aix-Marseille, 1996, 156.

²² For a more detailed philosophical and legal reflection, see: the work of Xavier Dijon, "Le sujet de droit en son corps" [The legal subject in his body], Larcier, 1982 and the collective work "Over zichzelf beschikken? Juridische en ethische bijdragen over het leven, het lichaam en de dood" [The right to have disposal of one's body? Legal and ethical contributions to life, the body and death], Maklu, 1996.

²³ For a summary, see Leleu Y.-H. and Genicot G., "La maîtrise de son corps par la personne" [A person's control over his own body], J.T., 1999, 589; Galloux J.-C., "Le corps humain dans le Code civil" [The human body in the Civil Code], in "1804-2004. Le Code civil, un passé, un présent, un avenir" [1884-2004. The Civil Code: a past, a present, a future], Dalloz, 2004, 381; Gobert M., "Réflexions sur les sources du droit et les "principes" d'indisponibilité du corps humain et de l'état des personnes (à propos de la maternité de substitution)" [Reflections on the sources of law and the "principles" of inalienability of the human body and the state of persons (concerning surrogate motherhood)], RTDciv., 1992, 489.

out acts of self-determination with regard to certain parts of the body for humanitarian, therapeutic reasons or with a view to scientific research.

Obviously the idea that *a person has a right to his body* does not mean that he or she is the *owner* of it. There is a consensus that the concept of ownership is wholly unsuitable in that context. It is more a question of a *right of personality*, as the Belgian Court of Cassation confirmed in an important ruling on 14 December 2001 relating to the fundamentals of patients' rights in medical matters²⁴. After all, every person has rights of personality, which include the right to live and the right to *physical integrity*²⁵. This implies that the patient, and he alone, with knowledge of the facts, gives free, informed and well-considered consent for any medical operation impairing his physical integrity. Following a European evolution, Article 8 of the law of 22 August 2002 on patients' rights confirmed this requirement. This also applies to operations involving disposal of the body or parts and products of the body.

According to the advocates of this trend, although acts of disposal for commercial ends with a profit motive are still banned in Belgium, it can no longer be stated that the body in itself is inalienable. *The person can therefore dispose of it and have certain parts of it circulate subject to ethical, health and legal limitations* which are clearly and succinctly laid down by special legal provisions, such as the law on blood, organs, medically assisted reproduction, and experiments on human persons (see point I.2 below).

Certain members of the Committee share this standpoint and regard it as a certain evolution in the status of the human body, **whilst other members** detect no change in it, given that the individual's autonomy is only expressed in the framework of strict specific rules which at the end of the day confirm the principle of the inalienable nature of the human body, and the parts and products of the human body.

On the other hand **all members of the Committee agree with the principle of the total ban on international trafficking (trade) in the human body**, parts of the body, organs and tissues, a principle that stems from the requirement of respect for human dignity. That is a permanent concern of Western societies that has to do with what we could call the common law of bio-ethics; there is a consensus regarding the prohibition of the rampant, uncontrolled trafficking of organs, which goes hand in hand with the exploitation of poor, weak and vulnerable people.

²⁴ Cass., 14 December 2001, Pas., 2001, 2129, pleadings by Du Jardin, J.L.M.B., 2002, 532, note by Leleu and Genicot, J.T., 2002, 261, note by Trouet, R.G.A.R., 2002, no. 13.494, R.G.D.C., 2002, 328, pleadings by Du Jardin, note by Trouet, Rev. dr. santé, 2001-2002, 239, note by Fagnart.

²⁵ On rights of personality, see in particular the right to live and the right to respect for physical integrity under a comprehensive bibliography: the summaries of Leleu Y.-H., "Droit des personnes et des familles" [Individual and family law], Larquier, 2005, 95-121; Terré F. and Fenouillet D., "Droit civil. Les personnes, la famille, les incapacités" [Civil law. Persons, family and cases of incapacity], Dalloz, 7th ed., 2005, 54-95; Cabrillac R., "Le corps humain" [The Human Body], in Libertés et droits fondamentaux [Basic freedoms and rights], Dalloz, 10th ed., 2004, 157-169.

I.2. The ban on commercialisation in Belgian bio-ethical legislation²⁶

I.2.1 The law of 13 June 1986 on organ removal and transplantation (Belgian Official Journal, 14 February 1987) makes a distinction between removal from a living donor and removal after death, and prohibits people from parting with organs or tissues for the purposes of profit (Article 4). This fundamental requirement not only applies to the relationship between donor and recipient, but also to all intermediate stages, such as in the case of organ banks. This requirement does not prevent the donor from being reimbursed for the costs he has incurred or for any loss of earnings he may have suffered as a direct result of the donation.

In Belgium the legislation on the removal of organs after death is based on implicit consent, i.e. as long as no express objection has been made, every person who has been registered in the register of births, deaths and marriages, or in the aliens register, for at least six months, is considered a donor. The law provides for the possibility of this consent being explicitly confirmed.

As regards the promotion of organ donation, the Committee points with interest to the structured effort made in Spain year after year, which targets such groups as schoolchildren, and seems to be effective.

On 15 June 2005 the Belgian government launched a promotional campaign in aid of donation ("Beldonor") which is beginning to pay off. Whilst on this date there were only 33,000 people registered as consenting to donation, since the law of 13 June 1986 on organ removal and transplantation, Beldonor had recorded 75,996 agreements at the end of November 2007. On the other hand, the number of people explicitly opposing a donation remained fairly stable (dropping very slightly from 192,000 at the beginning of the campaign, to 191,802 at the end of November 2007). Thus, in 2007 Belgium reached the figure of 29.1 donors per million inhabitants for the first time; and, still in 2007, more donors had made themselves known, as a result of which the number of people on the waiting list for a kidney transplant fell from 922 to 840.

I.2.2. The law of 5 July 1994 on blood and blood derivatives of human origin (Belgian Official Journal, 8 October 1994) makes provision for a total ban on profit when blood and blood derivatives are removed. Blood is taken from voluntary unpaid donors, with their consent (Article 5) and the price at which blood and blood derivatives are handed over and supplied is established in such a way that any possibility of profit being made is ruled out (Article 6). Moreover, no provision is made for the donor's costs to be reimbursed.

I.2.3. The law of 11 May 2003 on in-vitro embryo research (Belgian Official Journal, 28 May 2003) makes provision for a ban on embryos, gametes and embryonic stem cells being used for commercial purposes (Article 5). That does not mean that the research itself cannot be turned to good account (which refers to the broad debate on the patentability of the living human being, but only that the substrate as such remains *extra commercium* (i.e. cannot be the subject of commerce).

I.2.4. The law of 7 May 2004 on experiments on the human person (Belgian Official Journal, 18 May 2004) is more nuanced. In the framework of participation in an experiment, the law forbids any incitement or financial incentives to minors (Article 7, point 7), to minors who are incompetent (and/or their representative, Article 8, point 6) and to participants whose consent cannot be obtained on account of the urgency (Article 9, point 5). However, for participants who are under age and competent, *there is no such prohibition*. According to

²⁶ All these laws contain punitive sanctions.

Article 11, § 4, point 10 of the law, any amounts and rules in respect of payment, reimbursement and compensation of the researchers and participants are examined on a case-by-case basis by the ethics committee of the hospital where the experiment takes place. That ethical committee should verify whether the allowance is proportional to the inconvenience the experiment will cause. According to the parliamentary preparation, there may never be incentives to take part. Seeing as any form of commercialisation has to be avoided, the participants should never be paid for their participation. The law therefore does not depart from the principle that the human body is *res extra commercium* in the sense that it cannot form the subject of a patrimonial right.

1.2.5. The law of 6 July 2007 on medically assisted reproduction and the use of surplus embryos and gametes (Belgian Official Journal, 17 July 2007) requires that donation of surplus embryos or gametes, and their use in a research programme, occurs on a non-fee-paying basis. The law expressly forbids the trade in surplus embryos (Article 19) and more generally in human embryos and gametes (Article 22 and 48), with application of the extra-patrimonial nature of the human body and of the parts and products of the human body. With regard to gamete removal, the law states that the King may determine an allowance to cover travel expenses or loss of salary incurred by the person from whom the removal is effected, and the hospital costs associated with the removal of ova in donors (Article 48). Here we thus find the classic distinction between remuneration (which is forbidden where parts or products of the human body are concerned) and reimbursement of costs (which is allowed because it does not imply profit).

I.3. Qualifications on the ban on commercialisation in Belgium

1.3.1. The nature of the isolated part of the human body justifies a (limited) legal circulation of bodily material.

Thus the following, *inter alia*, may be cited²⁷:

- *blood, organs and tissues, gametes and embryos*, as their use and circulation are regulated by the above-mentioned laws;
- *bodily material that has been subject to a process of transformation* such as the bio-active elements of placentas. That material can be freely traded because treatments are not considered as an attack on human dignity or the inalienability of the human body. The principle of the ban on commercialisation has thus been observed.
- so-called "*discarded tissues*" such as hair, nails or excrement. These always, and in every legal system, fall outside any regulation and their commercialisation is generally tolerated, since it is not in contravention of any higher requirement.
- *As regards umbilical cord blood*, the Committee refers to Opinion no. 42 of 16 April 2007 on umbilical-cord blood banks²⁸.

²⁷ Bills are regularly tabled to clarify specific aspects of the legal framework. We cite the recent bill relating to the commercialisation of human tissues and cells, tabled by Mr P. Mahoux, *Parl. St.*, (Senate, 20 September 2006, 2005-2006 session, Doc. no. 3-1836/1) and the bill for the insertion of an Article 4b in the law of 13 June 1986 on organ removal and transplantation, tabled by Mr P. Vankrunkelsven and Ms J. Leduc, *Parl. St.*, (Senate, 13 December 2006, 2006-2007 session, Doc. no. 3-1995/1).

²⁸ *Bioethica Belgica*, no. 29, December 2007, p. 16 or on the website <https://portal.health.fgov.be>.

1.3.2. The nature of the operation to be carried out can in certain specific cases indirectly lead to a commercial application thereof being set up.

Pursuant to the *law of 28 April 2005* (Belgian Official Journal, 13 May 2005) amending the law of 28 March 1984 on patents on inventions, the European directive of 6 July 1998 on legal protection and patentability of biotechnological inventions was introduced into the Belgian legal order²⁹. Article 4, § 4 of the law of 28 March 1984 is the result of a literal transposition of this incomplete text and states:

"The human body in the various stages of its formation and development, as well as the simple discovery of one of the parts thereof, including a sequence or partial sequence of a gene, are not patentable.

A part of the human body that was isolated or otherwise obtained by a technical procedure, including a sequence or a partial sequence of a gene, is open to patenting, even if the structure of that part is identical to that of a natural part.

The industrial application of a sequence or a partial sequence of a gene which serves as a basis for an invention should be specifically stated in the patent application".

Two considerations can be made in this respect³⁰:

- A patent is in essence a "negative" right that only grants rights to an invention and in particular grants the exclusive right to allow third parties to use this invention or not. The awarding of a patent is *in itself* none other than the externalisation of a social contract between society and the inventor, under which the latter publicises his

²⁹ See in this respect *inter alia* Van Overwalle G., "Van muizen en mensen. De EU-Biotechnologierichtlijn van 6 juli 1998 en de omzetting in het Belgisch octrooirecht" [Of mice and men. The EU biotechnology directive of 6 July 1998 and its transposition into Belgian law], R.W., 2002-2003, 401; by the same author, "De octrooieerbaarheid van biotechnologische uitvindingen" [The patentability of biotechnological inventions], in *Droit des brevets, éthique et biotechnologie* [Patent law: ethics and biotechnology], Bruylant, 1998, 34; in French law, Mathieu B., "La directive européenne relative à la brevetabilité des inventions biotechnologiques, le droit français et les normes internationales" [The European directive on patentability of biotechnological inventions, French law and international rules], D., 2001, 13.

³⁰ Reference is also made to Opinion no. 24 of 13 October 2003 of the Belgian Advisory Committee for Bio-ethics on human stem cells and therapeutic cloning. Among other things, this states,

▪ in Chapter III, point 2.1.:

"[...] These patents relate *inter alia* to (1) cell lines of stem cells which are considered as *products*, and to (2) *procedures* of isolation, enrichment, culture, induction of differentiation and transdifferentiation of stem cells.

Other patents relate *inter alia* to (3) cloning techniques aimed at obtaining stem cells; (4) parthenogenesis procedures to create autologous stem cells and thus avoid the destruction of potentially livable embryos created for the isolation of stem cells; (5) procedures for the transformation of somatic cells into stem cells by cytoplasm from stem cells or ova being injected into them (i.e. ovoplasmic transfer). [...]"

▪ in Chapter III, point 2.2. of the same opinion, the following is stated:

"[...] There remains the fundamental ethical dilemma raised by the patentability of inventions relating to human stem cells. Whilst the patent is a classic form of encouraging innovation in a market economy (including the scientific progress that can contribute to improvements in health care) by awarding possible financial compensation to the inventor (or the researcher who has made the discovery) in exchange for the transparency and publication of his results, the patent can also be at the root of limitations of access to health care, given that it imposes a user licence and therefore the payment of rights to the patent holder. [...]"

invention and makes it available to society in exchange for a legal exclusivity. If a patent is awarded, this in some way implies confirmation that it concerns something desirable in the light of the higher interest of society and in particular further development of technology and science.

- It is important to state that patent law requires that patented items or methods have an industrial – let's say commercial – application. When the law thus permits patents the subject of which is a part of the human body, the commercialisation of this part of the human body does not constitute an undesirable or tolerated side effect of this legislation, but is the very subject of it. This does not mean that the patenting of human bodily material, which has occurred on a large scale in recent years, does not pose problems. This practice does indeed raise objections of an ethical nature, and also a whole host of concerns with a view to the possible negative effects for scientific and technological progress in the biomedical field³¹.

I.4. Legal conclusion

In view of the way the law stands at the moment, three conclusions can be made.

1.

There is a blanket ban on profit-driven commercialisation of the human body and parts and products of the human body. This prohibition is chiefly advanced as a principle stemming from the inalienability and extra-patrimonial character of the body. As such it is seldom applied or explained in the current *bio-ethical legislation*.

2.

On the other hand specific bio-ethical legislation for particular (isolated) parts of the human body makes provision for specific legal operations that may lead to a controlled circulation of those parts, without any pursuit of profit, and to commercial applications directly or indirectly derived therefrom or based thereon (*inter alia* for patents).

It should be noted that the rapid development of bio-technology in recent decades, resulting in the fragmentation of the human body and the use of parts of the human body for therapeutic or research purposes, has led to an increase in these special laws.

These factors explain two standpoints that exist within the Committee.

Some members are of the view that Articles 6, 1128 and 1598 of the Civil Code and the traditional way in which these are interpreted are sufficient to give expression to a principle of inalienability and non-commercialisation of the human body and parts and products of the human body. They assert that the requirement laid down by these special laws, more especially as regards consent, provides a frame of reference precisely in respect of the person's autonomy vis-à-vis the disposal of his own body, and clearly reflects the principle of inalienability and non-commercialisation of the body and parts and products of the body.

Other members of the Committee, on the other hand, are of the view that it is no longer correct to brandish a general principle of inalienability of the human body that no longer corresponds to positive law (which is formed, *inter alia*, by the above-mentioned

³¹ Heller, M. en Eisenberg, R. (1998), "Can patents deter innovation? The anticommons in biomedical research", *Science* 280, 698.

special laws) or to the ethics of autonomy and self-determination which are increasingly characteristic of modern biomedical law. The ban on profit and the remunerative commercialisation of parts or products of the human body means that these are not in the *market*. However, they are *res in commercio*, in the general legal meaning of this concept, given that they can be separated from the person and can circulate in the framework of a legal operation³², by means of *informed consent* for this operation (which can be withdrawn or altered at any time) and subject to other legal, ethical and health guarantees, depending on the case.

These members therefore recommend the removal of all legal ambiguity by means of the introduction of explicit principles governing the human body and parts and products of the human body, in our legal arsenal³³.

3.

The blanket ban on commercialisation in all respects involves a total ban on international trafficking (trade) of the human body, organs and tissues.

³² Usually donation (e.g. for blood, organs, sperm or ova) or an operation *sui generis* involving, for example, a healthy volunteer agreeing to take part in an experiment.

³³ Following what occurs in France, where Articles 16-5 and 16-9 of the Civil Code formulate the principles that agreements resulting in a patrimonial value being assigned to the human body, parts of the body or products of the body, are null and void and that no remuneration may be awarded to persons making themselves available for an experiment on their person, for the removal of parts of the body or the collection (to this we can add renunciation) of products of the body. We can assume that there is unanimity on this requirement in French legal doctrine.

II. ETHICAL CONSIDERATIONS

Within the Committee three positions are apparent regarding the issue of removing the principle of non-commercialisation of parts of the human body – positions which are backed by arguments of a deontological and/or consequentialist nature. One position is in favour of lifting the ban on commercialisation (see point II.1.) whilst the other two positions are against it (see points II.2. and II.3).

II.1. Standpoint in favour of a regulated commercialisation of parts of the human body

Some members of the Committee can agree with the following sentences:

"It is clear that strong feelings against organ selling colour every aspect of the debate, giving apparent weight to arguments whose inadequacy nobody could miss in neutral circumstances."³⁴

"The current system of organ procurement which relies on donation is inadequate to the current and future need for transplantable kidneys. The growing disparity between demand and supply is accompanied by a steep human cost. I argue that a regulated market in organs from living vendors is the only plausible solution and that objections common to opponents are defeatable."³⁵

II.1.1. Selling versus not selling

Should the commercialisation of human body parts be allowed or forbidden? Advocates and opponents of the sale of human tissues or organs put forward arguments of a deontological or consequentialist nature³⁶.

Let us first look at the arguments of the opponents of commercialisation. Although positions regarding organ selling have become more flexible in recent years, the majority of the public and health workers still do not agree with the idea to any great degree. The most numerous opponents are deontologists. They see the sale of parts of the body as an evil in itself, which they therefore place in the category of the prohibited. There are also opponents of commercialisation who admittedly do not advance any objections to selling in principle, but who feel that the unfavourable consequences to be expected (fostering of exploitation, discouragement of altruism, dissuasion from donation, etc.) would be greater than the favourable effects that could be expected.

We find a similar dichotomy among those in favour of allowing commercialisation. According to the deontologists, selling, irrespective of the consequences that could be expected, should be allowed because a ban is an attack on the fundamental right of self-ownership: that is the

³⁴ J. Radcliffe Richards, "Commentary. An ethical market in human organs", *Journal of Medical Ethics*, 2003, 29, p. 139-41.

³⁵ Benjamin E. Hippen, "In defense of a regulated market in kidneys from living vendors", *Journal of Medicine and Philosophy*, 2005, 30: 593-626.

³⁶ The term deontologists is understood to denote the supporters of a standpoint in principle "for" or "against" commercialisation, who do not weigh up the consequences that this standpoint implies, unlike consequentialists who declare themselves to be favourably or adversely disposed towards commercialisation after weighing up the positive and negative effects.

extreme liberal trend. The consequentialists, for their part, defend the authorisation of selling in order to put an end to the situation of shortage inherent to non-commercialisation.

We feel that the issue of commercialisation of the body is a complex question that should be placed in the general framework of the bio-ethical problem of the human body. This problem relates to the legitimacy of and conditions governing the objectifying and manipulation of bodies and body parts, whether or not for therapeutic ends, by biomedicine in multicultural societies with a market economy. Speculative theories on ethical rules have pragmatic consequences. They should be assessed in the light of their impact on action, and more especially their consequences for people and for biomedical practice.

II.1.2. Pragmatic model versus classic model

From a pragmatic point of view, the main reason for permitting the commercialisation of organs is to make a larger number of organs available. In recent years opposition to commercialisation has softened. As early as 1998 the *International Forum for Transplant Ethics* deemed that the trade in organs should be regulated rather than banned.

In 2002 the *American Medical Association* considered awarding financial incentives for the removal of organs from corpses. Account should therefore be taken of the arguments of the growing group of people who, on pragmatic grounds (to reduce human suffering to a minimum) or on the basis of philosophical considerations (concerning the status of the body), are of the opinion that the body should not continue to be placed outside the market. We agree to call the current system of management based on organ donation and collectivisation the "**classic model**". We refer to the new system, which still has to be described in detail and is based on privatised management in accordance with all criteria of professionalism in the health field, as the "**pragmatic model**". Let us now briefly examine the pragmatic arguments of those who feel that the new liberal model could constitute a favourable replacement of or supplement to the current model³⁷. The arguments in favour of a regulated commercialisation of the body in some circumstances are legion.

II.1.3. Market surplus versus donor shortage

Commercialisation of the body could put an end to certain situations of scarcity and could, at least in part, replace illegal and clandestine practices with a legal and official market³⁸. The general shortage of organs and human body parts, which has been ongoing for years and is getting worse every year, has to be brought to an end. In France there were 12,000 people who needed a transplant in 2005, but only 4,200 transplants were carried out and 180 people died due to the lack of a transplant organ. On 31 December 2005 around 7,000 people had already been on the waiting list for a transplant for more than 12 months. Worldwide the number of kidney dialysis patients is put at 700,000. In the United States in 2004 86,000 people were waiting for an organ. Every day 17 patients die because they did not receive an organ in time. On average 115 people are added to the national waiting list

³⁷ On this, see: Hottois, G., *Corps humain*, in Hottois, G. and Missa, J.-N., *Nouvelle Encyclopédie de bioéthique*, De Boeck, 2001, p. 243-252; Hermitte, M.-A., *Commercialisation du corps et de ses produits [Commercialisation of the body and its products]*, in Hottois, G. en Missa, J.-N., *Nouvelle Encyclopédie de bioéthique*, De Boeck, 2001, p. 207-213.

³⁸ R.R. Kishore, *Human organs, scarcities, and sale: morality revisited*, *Journal of Medical Ethics*, 2005, 31, p. 362-5. "The worldwide shortage of kidneys from cadavers has resulted in illicit organ sales and even kidnapping and murder of children and adults to 'harvest' their organs" (Siegel-Itzkovitch, J., *Israel considers paying people for donating a kidney*, *British Medical Journal*, 326, 2003, p. 126-7 — cited by R.R. Kishore, op. cit.).

every day, i.e. one every thirteen minutes. India alone has 100,000 new patients every year, but only 3,000 of them receive a transplant. In Western Europe 40,000 patients are waiting for a kidney and only 10,000 kidney patients have received a transplant. In the United Kingdom 67 people donated organs in 2002, 2,055 people received an organ, but 5,165 people were still waiting for a transplant³⁹. In countries with a policy of non-commercialisation of the human body, a relative scarcity of human sperm cells and ova is noted.

All these data clearly show that there is a serious crisis and non-commercialisation levies a heavy toll in terms of waiting lists, suffering and pointless fatalities. This continuing shortage of human organs, tissues and cells has prompted some doctors, philosophers and public health managers to give consideration to the commercialisation of parts of the human body. Commercialisation of certain parts of the body is being considered more and more often and the principle has already been accepted by certain think-tanks, as we can see, for example in "*The Bellagio Task Force Report on Transplantation, Bodily Integrity, and the International Traffic in Organs*"⁴⁰, drawn up by an international team of ethicists.⁴¹

II.1.4. Market for human organs or tissues

Many authors have recently defended the idea of commercialisation⁴². In an article entitled *An Ethical Market in Human Organs* Charles Erin and John Harris propose the establishment of a market for human organs and human tissue (bone marrow, gametes, genetic material, etc.)⁴³. The main reason for such a market would be to increase the availability of organs in response to a need which cannot currently be met and which is resulting in tens of thousands of deaths worldwide every year. The model proposed by Erin and Harris is not strictly liberal⁴⁴. They feel that the organ market should be strictly regulated in order to establish what they call an "ethical market". According to Erin and Harris five rules should place some restraints on the market mechanism:

1. The market would be limited to a geopolitical area with self-government (such as the nation state or the European Union).
2. Only citizens resident in these geopolitical entities would be able to sell their organs, and only citizens resident in these geopolitical entities or their relatives would be able to

³⁹ Source for figures: see footnote 2.

⁴⁰ See D.J. Rothman, Rose, E., Awaya, T., Cohen, B., Daar, A., Dzemeshevich, S.L., Lee, C.J et al., *The Bellagio Task Force Report on Transplantation, Bodily Integrity and the International Traffic in Organs, Transplantation Proceedings*, 29, 1997, p. 2739-45.

⁴¹ "The more deeply the Task Force examined the sale of organs, the more complex the issue became. For example, the sale of body parts is already so widespread that it is not self-evident why solid organs should be excluded. In many countries, blood, sperm and ova may be sold. So too, an international trade exists in cadaveric body parts for medical education and research and pharmaceutical companies purchase large quantities of tissue for commercial purposes. Other companies openly purchase and sell tissue such as dura matter and fascia lata. (...) The Bellagio Task Force weighed all these considerations and found no unarguable ethical principle that would justify a ban on the sale of organs under all circumstances."

⁴² See for example, R.R. Kishore, Human organs, scarcities, and sale: morality revisited, *Journal of Medical Ethics*, 2005, 31, p. 362-5; Erin, C.A., J. Harris, An ethical market in human organs, *Journal of Medical Ethics*, 2003, 29, p. 137-8; Hippen, B.E. In defense of a regulated market in kidneys from living vendors, *Journal of Medicine and Philosophy*, 30, 2005, p. 593-626; Veatch, R.M., Why liberals should accept financial incentives for organ procurement, *Kennedy Institute of Ethics Journal*, 13, 2003, p. 19-36; Gill, M.B., and Sade, R.M., Paying for kidneys: The case against prohibition, *Kennedy Institute of Ethics Journal*, 12, 2000, p. 17-45; etc.

⁴³ Erin, C.A., J. Harris, An ethical market in human organs, *Journal of Medical Ethics*, 2003, 29, p. 137-8.

⁴⁴ The term "liberal" is taken to mean "being in favour of individual freedoms".

receive these organs.

3. Every organ for sale would have to be sold through a state purchasing agency, which would redistribute the organs "according to a fair appraisal of the medical priorities". A ban on private transactions would ensure that exploitation of the population of low-wage countries is avoided.
4. The quality of the organs would have to be tested (AIDS, hepatitis, etc.), their origin would have to be made known, and there would be penalties for any infringement in this respect.
5. The price of the organs on the "ethical market" would have to be attractive for potential sellers, so that they are reasonably compensated for the risks they run.

Erin and Harris do not refer to the right of ownership. They advocate a consequentialism of common sense. The sale would have to be allowed by law because, if a ban on selling is maintained (as is the case at the moment in Great Britain, Belgium and in most countries), thousands of potential recipients (purchasers) will die. If the legislator sees no objections in principle in allowing organs to be sold, he must be prepared not to subject this selling to more impediments than is necessary. He would then have to ascertain whether the advantages of a controlled market are greater than those of a free market, something he should not weigh up in philosophical terms, but in empirical – and extremely complex – terms of costs/benefits (harmful effects to be expected/favourable effects to be expected). According to Erin and Harris the free market would have many harmful effects. Therefore they suggest prohibiting any de-regulated sale of organs, and put forward as an alternative a regulated (i.e. restrictive) market which would be set up in such a way as to make any such development of the free market impossible. Erin and Harris are not the only ones to have come forward with the solution of a regulated market. The American nephrologist Benjamin Hippen also declares himself in favour of an organ market characterised by four basic traits: 1. Priority given to criteria of health safety for sellers and buyers; 2. Transparency as to the risks; 3. Institutional integrity based on a code of good clinical and commercial practices; 4. Operation within a legal framework. The bio-ethicist Robert M. Veatch also feels that liberals should go along with the idea of an organ market.

From a liberal standpoint criticism can be directed at Erin and Harris' solution. Some feel that this solution is too restrictive and that limiting the market to a political region with self-government does not seem very realistic in a globalised world.⁴⁵ J. Radcliffe Richards has also taken that view. In a critical commentary on Erin and Harris' article, she confirms⁴⁶: "Once you get beyond the idea that organ selling is wrong in itself, you are into the terrain of highly complex empirical questions, and there is no point in philosopher's (or anyone's) engaging in armchair speculation about them. Recognition of how this proposal fits into the debate as a whole does suggest, however, the kinds of question that should be raised about it. If it is presumptively bad to prevent sales altogether, because lives will be lost and adults deprived of an option some would choose if they could, it is for the same reason presumptively bad to restrict the selling of organs. Once you recognise that the default presumption is in favor of any such transaction, you should be reluctant to prevent any more sales than necessary."

It is indeed not desirable for organ transfer to turn into one-way traffic from poor countries to rich countries. But that consideration alone does not solve the problem. That objection concerning exploitation could be applied to just about all areas of international trade, but

⁴⁵ See for example J Radcliffe Richards' criticism of John Harris: Radcliffe Richards, J., Commentary, An ethical market in human organs, *Journal of Medical Ethics*, 2003, 29, p. 139-41.

⁴⁶ Ibid.

limiting the transfer between poor and rich countries would probably prove more harmful to the poor countries than the rich. Would it not be better to try to improve the conditions under which transfer is effected (for example by specifying the amount that represents "fair" compensation) rather than prohibiting all free transfer?

The idea of a state or supra-national agency automatically having a monopoly on purchase and "the fair redistribution of organs in view medical priorities" is not per se the wisest if we opt for the market notion. On what moral grounds can you prohibit anyone from exercising his right of self-ownership when he tries to exchange a kidney, stem cells or gametes for money? In actual fact there does not appear to be any irrefutable argument at all against commercialisation of parts of the body. The opponents of selling are mostly deontologists who feel that commercialisation in itself is bad. Commercialisation is then "contrary to human dignity" and "a violation of ideals of equality". Authors such as Kishore and Radcliffe Richards have taken the trouble to refute the deontologists' arguments and simultaneously advocate pragmatic solutions. So it is that in Kishore⁴⁷ we read: "Despite stringent and fine-tuned laws most jurisdictions are not able to curb organ trafficking. Nor are they able to provide organs to the needy. There are reports of the kidnapping and murder of children and adults to 'harvest' their organs. Millions of people are suffering, not because their organs are not available but because 'morality' does not allow them to have access to the organs. Arguments against organ sale are grounded in two broad considerations: (1) sale is contrary to human dignity, and (2) sale violates equity. These objections (...) reflect a state of moral paternalism rather than pragmatism. It is argued that a live human body constitutes a vital source of supply of organs and tissues and that the possibilities of its optimum utilisation should be explored. Commercialisation should be curbed not by depriving a needy person of his genuine requirements but by making the enforcement agencies efficient."

II.1.5. Other reasons for not sticking to a gift ethic

The gift ethic has pernicious effects.

It leads to problems in procuring the body part wanted, creates expectations and frustrations, and so forth. Non-commercialisation implies a de facto inequality. After all, non-commercialisation is only imposed on those who do not have access to a foreign country that is receptive to a market in body parts (or a parallel clandestine market). Most well-off people will always have the possibility of flying to a country where the organ market is accepted or tolerated, or finding a Mafioso intermediary to obtain the very expensive body part they want for them. The donation system thus creates a paradoxical situation. That system appeals to an ethic of equity and solidarity, yet condemns poor people to be dependent on love and altruism, whilst the rich continue to have access to the "commercialised body".

Moreover the ethic of non-commercialisation leads to ambiguous situations and hypocritical positions in which the terms donation and altruism conceal commercial practices.

For example in the case of clinical trials with healthy volunteers, most trials make provision for a "payment" to be made to the volunteers, despite the principle of non-commercialisation of the body⁴⁸. How could this be otherwise? What volunteer would come along to the clinical trials carried out by pharmaceutical companies? For a more in-depth ethical debate on this subject, the Committee refers to previously published opinions relating to experiments with

⁴⁷ R.R. Kishore, Human organs, scarcities, and sale: morality revisited, *Journal of Medical Ethics*, 2005, 31, p. 362-5.

⁴⁸ See Prescott, H.M., Using the student body: college and University students as research subjects in the United States during the Twentieth Century, *Journal of the History of Medicine*, 2002, 57, p. 3-38.

people⁴⁹.

The principle of non-commercialisation has led to other aberrations. As Hermitte explains: "A mixed system seems to be gaining ground: the original product is given free of charge in the name of an ethical requirement, but its industrialisation leads to profits. The financial incentive thus reappears to the benefit of the manufacturers. One might wonder whether donors in the long term will accept that the ethical imperative could have an impact on the collection of the original product, implying that the raw material is free of charge, and that the product derivatives disappear into the industrial circuit from the beginning. The commentators who try to justify that conjuring trick will advance sophistic arguments"⁵⁰.

What is striking in the system of non-commercialisation is the fact that the donor is the only party who is not compensated. The surgeons and the medical team are paid. The staff of the transplant agency are paid. The only one who does not end up with any benefit whatsoever from the transfer is the donor himself⁵¹. For that matter voluntary donation and a morality of good intentions are not the best guarantees for the quality and safety of the trade in body parts. After all, it seems more difficult to impose requirements on a voluntary donor. We can assume that someone who is bound by a commercial contract will more readily agree to the comprehensive medical examination needed to ensure the safety of the body parts involved in the transaction.

II.1.6. Freedom of trade: an essential characteristic of human dignity

The favourite deontological argument advanced by the opponents of commercialisation is that commercialisation of body parts is contrary to human dignity. On closer examination, that argument does not stand up at all. Firstly, from a philosophical standpoint the concept of "human dignity" is a very vague one. The concept of human dignity is interpreted very diversely according to the ethical values defended. The concept of human dignity certainly does not provide for any greater clarity in the ethical debate. In fact there is no rational grounds for connecting the concept of human dignity with a ban on commercialisation of the body. This link is based on intuitive or emotional considerations that are not subject to universal application. But if there is nonetheless a stubborn adherence to the concept of "human dignity", you could argue that the concept of autonomy should play a key role in the concept of "human dignity". Some philosophers have deemed that the notions of exchange and market constitute the very core of human dignity. Adam Smith said that the pursuit of personal interest by means of exchange and trade is precisely what distinguishes humans from animals, and specifically accords him human dignity: "Nobody ever saw a dog make a fair and deliberate exchange of one bone for another with another dog."

In this view, freedom, and in particular freedom to "trade", including trade in body parts, is inextricably linked to human dignity. Commercialisation provides for better respect for the freedom of individuals and their rights to their body. In the tradition that we have inherited

⁴⁹ See Opinion no. 13 of 9 July 2001 on experiments on people and Opinion no. 31 of 5 July 2004 on experiments on pregnant and lactating women.

⁵⁰ Hermitte, M.A., Commercialisation du corps et de ses produits, *in* Hottot, G. et Missa, J.-N., Nouvelle Encyclopédie de bioéthique, De Boeck, 2001, p. 207-213. See also on this subject the dossier compiled by Rebecca Slood, Body-stuff politics. Taking the least of you, The New York Times Magazine, April, 16, 2006, p.38-45. "Those blood and tissue samples you routinely give – where are they? Who owns them? What are they being used for? And how come you don't know?"

⁵¹ Erin, C.A., J. Harris, An ethical market in human organs, *Journal of Medical Ethics*, 2003, 29, p. 137-8.

from Locke, the individual is the owner of his own body, and should be able to dispose of it freely. The principle of non-commercialisation, on the other hand, is paternalistic insofar as its obligatory application leads to a situation in which the general will (or the will of the representatives of the institution responsible for organ distribution) takes precedence over individual freedom (in this case the freedom to dispose of one's own body parts). This principle is paternalistic to the extent that a benefaction imposed by society is chosen over and above autonomy. The principle of non-commercialisation is also bio-politically oriented: it nurtures an unfounded suspicion of a market that nevertheless plays such a salutary role in technological innovation and the welfare of our developed societies. Liberalism does not spread an egoistic ethic limited per se to the mere fostering of negative rights. Quite the contrary, in fact: a kind of liberalism exists with a human face that is receptive to the boons of the market, but also champions the notion of equality, perceived in the sense of equal opportunities.

The relationship with the body is a private matter, a question of personal morality. The prohibition of commercialisation is based on an undeserved entanglement between morality and law. The idea that my body is my property does not infringe free moral choices made by individuals. This idea makes co-existence of the donation system and the selling system possible. In a market system donation always remains possible. You could even imagine liberalisation of the market heightening the value of donation. For that matter, it would be naïve to believe that altruism, love and solidarity are always the main motives for donation⁵². Throwing the body open to the market does not imply public regulation. That specific regulation would have to be geared to the specific situations and kinds of body parts involved in the transaction.

II. 1.7. Conclusion

All these considerations prompt some members of the Committee to reject the principle of non-commercialisation and to defend the possibility of commercialisation of the human body. These members are of the view that adapted and specific regulations have to be introduced for the issue of commercialisation, depending on the specific context and the body part involved in the transaction.

⁵² In his book *The Gift Relationship* (Pantheon Books, New York, 1971), Richard M. Titmuss defines 10 types of donor: 'the paid donor, the professional donor, the paid-induced voluntary donor, the responsibility fee donor, the family credit donor, the captive voluntary donor, the fringe benefit voluntary donor, the voluntary community donor'. Only this last type responds to altruistic donation. Various motives underlie the other types of donation.

II.2. Standpoint against commercialisation: classic arguments in favour of maintaining a strict ban on commercialisation of the body

Other members of the Committee defend the principle of non-commercialisation. They recognise that in current medical practice the transfer of bodily material (both organs and tissues) is inherent to specific therapies and specific forms of biotechnological research. At the same time they currently note that in this public morality there is considerable reserve vis-à-vis the “commercialisation of the body”, which is taken to mean: making available and distributing bodily material according to the market principle, with the pursuit of profit on the part of the parties involved in this transaction.

According to these members, this reserve should be maintained wholly intact, both from a strictly ethical point of view and a more prudential standpoint.

II.2.1. General considerations

In fact this “ban” on commercialisation of the body is based on a conviction that the body of a human being is owed a specific respect.

This respect concerns first and foremost the body as such, as the externalisation of the human person. Respect for a person’s body involves the manifestation of respect for who he or she is, as a person, and as a “living” being with a life history, a unique identity, and wishes and desires that are recognised as inalienable, as part of the person’s autonomy. On the basis of this, a deep moral indignation exists within public morality in respect of sexual exploitation and prostitution, for example.

Respect for the body also implies that the way in which parts of the body, especially organs, are transferred, in specific circumstances, is surrounded by an attitude of moral respect. Insofar as this organ transfer is or could be a risk to the individual’s general wellbeing or could attack his dignity, such a transfer is not seen as self evident. Therefore, an organ is not removed from someone just like that, unless permission has been given by the person concerned or his nearest and dearest, and unless that operation can also have an unambiguously beneficial and salutary effect in a third party or can serve such a purpose for the advancement of science. The consideration of morally acceptable medical and/or scientific usefulness is in some people’s view decisive, not only in the case of organ transfer, but also as regards the transfer of other bodily materials, such as gametes. In particular the removal or “harvesting” of ova in women is deemed by some to be morally acceptable, when this method can at least help in a fertility problem or further basic scientific research. But the fact that such a transfer of female bodily material requires a justification indicates that at least the possibility of moral harm and an attack on the woman’s physical integrity is recognised.

Even a transfer of bodily material which at first sight does not constitute an attack on dignity is often surrounded by a certain moral hesitance. After all, such an exchange of bodily material often nonetheless indirectly refers to human relations which as such are also interwoven with a human person’s dignity and a person’s own life history and identity. Sperm, for example, is on the one hand a material produced in abundance by the male body, which can ostensibly be transferred, stored or destroyed without any problems, without this constituting an attack on the man’s dignity. However, this same sperm is the source of new life, and if it is used in the context of a successful fertility treatment, at least provides a blood tie (genetic kinship) with a person. Similarly, some argue that blood donation, insofar as it can be a life-saving agent in medical practice, implies a reference to human relations that are best not considered merely instrumental and commercial: in the collection, storage and transfusion of blood, a form of transfer of bodily material is created which at the end of the day also aims at saving a human being, and as such accords a special symbolic

importance to the way blood is dealt with.

For this reason it is not surprising that in medical practice, in the way in which this has gained form in the Western world over a long tradition, there is a deeply entrenched spontaneous moral respect for the human body and the way bodily material is handled. After all, medicine strives to restore to health people of flesh and blood, "persons embodied": its purpose is not only to restore a body to health, but to heal a person, one and the same human being: for these reasons one can talk of the intrinsic ethical finality of medicine. Respect for the body and the transfer of bodily material is interwoven here with respect for the entire human being. For these reasons there has hitherto been a major moral reserve in the medical practice as regards any commercialisation of the body.

This reserve is reflected in a prohibition in principle of the commercialisation of the transfer of any bodily material whatsoever, a prohibition which we could call the core of the *classic* position in the medical fraternity regarding the question of what respect for the human person (and therefore his/her body) entails. Some members regard it as advisable for this prohibition to remain wholly intact.

These members are also convinced that it is precisely within the bounds of a prohibition enforced by the public order (the state) that regulation of the transfer of bodily material in function of specific therapies can be refined and optimised from a medical viewpoint. This refinement not only calls for legislative work, but also requires the population to be well informed of the ethical-social dimension of the "gift" logic on which the transfer of bodily material is based.

II.2.2. The body in public morality and the law

The classic view of the intrinsic moral status of the human body is reflected in the Western world in public morality and legislation⁵³. Hitherto the human body has been considered as an economically "inalienable good": the body (or parts of it) may in principle not be the subject of commercial exchange or be made available as a commodity on the market⁵⁴. Although in this respect the Anglo-American culture appears to leave more leeway for commercial initiative (e.g. the sale of gametes on the Internet), as regards organ donation strictly speaking, the law in the USA is also clear: "(...) the law of the United States prohibits the interstate sale of several organs and body parts for purposes of transplantation"⁵⁵. The sale of gametes between private individuals is therefore evidently in the twilight zone, *inter alia* due to the need for clarification of the legal status of this kind of bodily material. Here we can nonetheless point to the fact that the European Parliament recently issued a resolution arguing in favour of a prohibition of the commercialisation of gametes (ova) on the grounds of proven cases of young East European women having been subject to exploitation. Also well known are the alarming cases of the organs of executed prisoners being sold in China, and the problematic practices characterising the sale of organs (kidneys) in India and Iran. As regards Iran, reference should be made to the extensive empirical research undertaken by Javaad Zargooshi, published in the *Journal of Urology*. In the framework of one of his studies, Zargooshi concluded that 76% of those who had sold their kidney were of the view that selling kidneys should be prohibited and that they would not have sold their kidney if they had been able to earn money in any other way. Seventy-five percent of the interviewees in this study also said that the objectives they had been striving for by selling their kidney had not been attained at all⁵⁶. Another empirical study by

⁵³ For the Belgian legislation on this point, see this Opinion, Chapter I.

⁵⁴ For the notion of "inalienability" of the body, see: Margaret Jane Radin, "Market-Inalienability", in *Harvard Law Review*, vol. 10, June 1987, n° 8, 1849-1937.

⁵⁵ 42 U.S.C. 274 (1984). Cited from: C.B. Cohen, "Public Policy and the Sale of Human Organs", in *Kennedy Institute of Ethics Journal*, vol. 12, n° 1, p. 47

⁵⁶ Zargooshi, J. "Iranian kidney donors: motivations and relations with recipients", *Journal of Urology*,

Zargooshi on the sale of kidneys in Iran reveals that many sellers subsequently experience health problems which they do not manage to solve because, on account of their poverty, they do not have access to the necessary care. A large majority of the sellers were also found to have subsequently suffered serious psychological problems (chiefly depression and anxiety). Eighty-five percent of this sample of 300 interviewees stated that, if they could turn back the clock, they would certainly not sell their kidney⁵⁷.

At the heart of the ban on commercialisation lies a fundamental moral position towards the human being as a "person incarnate". This stance is not only taken into account in the public morality and law that has grown up over time, but also determines the ethical principles on the basis of which people have *hitherto* operated in medicine and bio-technological research when it comes to the transfer of bodily material in function of specific therapies, in particular in the field of organ transplants, reproductive medicine and stem cell therapies.

The ban on the commercialisation of the human body today therefore also forms a cornerstone of medical ethics. Now, in recent years, due to increased medical "capacity", the question is being increasingly asked as to whether the time is not ripe for a relaxation of this prohibition, if only for the sake of the fact that in practice it is trampled on all too often (see the "twilight zone" referred to above) or it is seen that the medical treatment relating to the transfer of bodily material has undeniably become a lucrative 'business'⁵⁸. The question is whether an (inadmissible) situation that has developed *de facto* is a legitimate reason for (a) altering the fundamental moral position *vis-à-vis* the human body; and (b) adapting the legislation so that the morally reprehensible comes "legal".

II.2.3. Human dignity and the symbolic status of the body

The fundamental moral stance in respect of the human body (on which the aforesaid prohibition is based) is a "primary fact" of ethics *as such* and in that sense no further grounds can be given to it. After all, ethics presupposes the unconditional recognition of the human person as a constitutive reality of the moral relationship between people among themselves and the fact of living together in society⁵⁹. "Being constitutive" here means that morality is inconceivable without a unique, inalienable status being accorded to every human being, every "person incarnate". But it also means that social relations between people (inter-subjectivity) are always "incorporated" relations. For this reason in public morality the human person – i.e. the legal subject *and* the morally responsible "I" – is recognised as having an inalienable dignity and that dignity is transferred, automatically as it were, to the body. In other words, *human dignity* as an absolute value, in equally unconditional respect for the body, is given a specific, but essential expression⁶⁰. Turning the body (or even part of it) into a *commodity* is therefore regarded by the law and public morality as an attack on the person's dignity. Every intervention affecting the integrity of the body should remain an exceptional occurrence, which in fact can only take place within the ambit of medical treatment, which is where its purpose lies. In other words medical care/therapy is the starting point and finality of the transfer of body parts. Insofar as, until further notice, medicine is *not* considered as an economic activity aimed at profit and the production of

2001, 165, p. 386-92.

⁵⁷ Zargooshi, J. "Quality of life of Iranian kidney 'donors' ", *Journal of Urology*, 2001, 166, p. 1790-99.

⁵⁸ Leon Kass, "Organs for Sale? Propriety, Property and the Price of Progress", in *Life, Liberty and the Defense of Dignity. The Challenges for Bioethics*, Encounter Books, 2002, p. 177.

⁵⁹ This idea is defended in many guises in modern ethics and legal philosophy. Kant is one example. For a more contemporary treatment, see the work of Jürgen Habermas and John Rawls.

⁶⁰ Wat X. Dijon, an expert interviewed by the select committee that prepared this Opinion, calls it "the necessary symbolic dimension of the human body".

goods, fearfulness as regards the instrumentalisation of the body (including commercialisation) is in fact well entrenched in the medical ethos, albeit often implicitly.

In fact current legislation and public morality express a deep-rooted position of respect vis-à-vis the human body, an attitude that in the past was mainly underpinned by religion, but which is also still generally present in our secularised culture. Buddhism, Islam, Christianity and the Jewish faith have all generally stated that the body is not merely a collection of organs that is available for economic exchange: the body is, as it were, the “temple” of the soul and the identity of the person⁶¹.

However, it would be wrong to understand this position in respect of the sacred nature of the body as the product of what contemporary empiricists regard as an “erroneous” metaphysical view of the status of the person. The view of the human being as “having a soul” is seen by Wittgenstein, for example, as an anthropological constant that *precedes* any metaphysical reflection.

II.2.4. The inalienability of the body: a legal-cum-deontological viewpoint

Law and the history of thought show us many examples that make the fundamental moral attitude towards the human body more explicit by demonstrating the importance of the intrinsic dignity and constitutive moral significance of the human body. The forms of transfer of body parts and bodily material made possible by contemporary medicine and biotechnology call for an extension and adaptation of the law and medical ethics. However, such an adaptation does not have to be at odds with the recognition of the body’s intrinsic dignity and moral significance.

Roman law dictated that a person did not have a relationship of ownership with his own body (“dominus nemo membrorum suorum videtur”): after all, the body is a constituent part of the person. A contemporary utilitarian-liberal discourse sometimes fails to appreciate this legal distinction, since this discourse is based mainly on the idea that the way in which a person can (or is allowed to) relate to his own body is in his capacity as owner of it. This conclusion leans neither towards the classic natural-law tradition nor the modern natural-law tradition.

Kant in any case is of the view that the subject/body relationship is not one of ownership. The rights of the autonomous legal subject (e.g. to recognition of his property and free disposal) are counterbalanced by this subject’s duties to others and to himself, *inter alia* as a physically embodied moral person. Kant legitimises this respect for the body from the point of view of the rational subject’s duty *towards himself*: “Depriving oneself of an integral part or organ (self mutilation) – for example by giving away or selling a tooth for transplantation in the mouth of someone else, or having oneself castrated in order to have an easier life as a singer, and so on – are forms of partial suicide”⁶². In Kant’s view, the person is obliged not to violate the necessary conditions of his existence as a *noumenal* being (a moral subject): and maintaining himself as a *phenomenal* (physical) being is part and parcel of that. “The body is part of the subject; this fact of belonging with the subject constitutes the person” (*Vorlesungen über Ethik*)⁶³. Therefore the human being can have no relationship of ownership vis-à-vis his own body or turn it (or even part of it) into a commodity, according to Kant. Existence as regards the person is necessarily existence incarnated in a body: the

⁶¹ C.B. Cohen, *opus cit.*, p. 59.

⁶² I. Kant, *Metaphysik der Sitten*, II.I.1, 6.423 [English translation: *The metaphysics of morals* (Mary Gregor, R. J. Sullivan (eds.), Cambridge University Press, 1996, p. 177].

⁶³ Cited in C.B. Cohen, *opus cit.*, p. 55.

body should therefore be considered as a condition that *precedes* any moral relationship whatsoever (e.g. ownership). Anyone failing to appreciate this condition is attacking his own status as a moral being⁶⁴.

There might be an inclination to think that in Hobbes, that champion of a purely conventionalist proto-liberal morality, the "right of nature" – which is unlimited in the natural situation – allows the human being to do with his body "what he wants". However, in Hobbes' view, the "right of nature" is based on the unconditional inclination towards self-preservation and self-maintenance, which itself is again seen as "natural law" insofar as the human being should do everything in his power to ensure his self-preservation. On the basis of this idea, wanting to weaken oneself or make oneself vulnerable, for example by selling all or part(s) of one's own body, runs counter to the Hobbesian logic. Here abstraction needs to be made of Hobbes' idea that the human being's pursuit of self-preservation in and by means of cooperation with others should be seen as based on regulative *moral* precepts (the so-called first two "Natural Laws" or "Laws of Nature"), which even apply in binding form as a "Divine Law" *in foro interno*, i.e. from the conscience itself, and thus have the status of an unconditional duty⁶⁵.

Although Hobbes' and Kant's points of view differ substantially, we note that they converge in confirming a person's duties towards himself, in particular as regards the integrity of the body, which has an immediate repercussion on its inalienability. This convergence forcefully underlines the importance of the fundamental moral attitude towards the body. Even if the latter tends today to be obscured by utilitarian and liberal considerations, it seems necessary to reflect on what respect owing to the body can mean today, in an historical and social context very different from that of classical antiquity and of the 16th and 17th centuries. Natural law is certainly not a complete set of trans-historic values. But its history gives us specific clarifications that should pose us questions when we attempt today to guarantee the legitimacy of positive law.

II.2.5. The transfer of bodily material and the gift logic

The transfer of human bodily material in medical practice is compatible within current public morality with the dignity of the person provided this transfer respects the moral value of social or inter-personal relations between people. *This occurs when this transfer is based on an appeal to a sense of solidarity*⁶⁶. This interpretation of solidarity - the spontaneous

⁶⁴ Kant's rigorism of course does not take account of what medicine in the 20th century has made possible: the transfer of bodily material with a view to life-saving therapies. However, the practice of organ donation within the bounds of the medical ethos does not have to imply a violation of the principle of absolute respect that the human being owes the body (respect to which the surgeon, too, for example, is also bound).

⁶⁵ Thomas Hobbes, *Leviathan*, Ch. 15, p. 215 (Penguin Edition, with an introduction by C.B. McPherson, 1985).

⁶⁶ As the American medical sociologist Renée Fox puts it:

"It is neither accidental nor gratuitous that from its inception, human organ transplantation has been based on the belief that the human body and the extraordinary generosity inherent in donating organs are altogether too precious to be commodified ... Because transplantation is institutionalized around the concept that donation is a gift of life, even though the process involves invading and using the body in ways that violate important taboos, donation has attained high moral status and transcendent meaning. Its very legitimacy and what it stands for derive from its association with the values of altruism, solidarity and community. These are not only the quintessence of the vocation of medicine, but also what it means to belong to human society and to contribute to it in a self-surpassing way." (Renée Fox, UNOS Update 8 (11), p. 13 (1992). Cited in: C. B. Cohen, *opus cit.*, p. 60.

supplement, as it were, to respect for the body – is given concrete form for example in the practice of organ donation *after* death or in the case of interventions based on bone marrow donation (to give but two examples). Here the moral position vis-à-vis the body is included in a kind of “gift logic”, a principle produced by social cohesion which is as old as mankind itself and is not subject to the logic of the market mechanism driven by self interest (market logic). The gift logic is also the structuring principle for the transfer of reproducible bodily material such as blood, but also gametes. Note that the gift logic is not based on naive philanthropy or a disinterested love of one’s fellow men, but rather on a general sense of humanity which can even be interpreted as an “imperfect duty” (to use a concept that Kant, among others, also uses in other contexts)⁶⁷.

Clearly an initial point of uncertainty/lack of clarity arises here with regard to the current practice of transfer of human bodily material – a lack of clarity which also leads to the aforementioned “twilight zone” appearing. After all:

a) not all kinds of bodily material have the same status: gamete donation is not yet accepted as self evident by public morality and would appear to require the application of special provisions (although some are convinced that the status of gamete donation is no different to that accorded to the giving of blood, for example). At the same time gamete donation is intrinsically by no means such an invasive bodily intervention for the donor and recipient concerned, as organ donation (although we should point out here the difference between men and women when it comes to the way in which donation and reception are experienced in these cases). However, in reproductive medicine (by means of gamete donation) the creation of *a new person* (in principle the holder of an intrinsic dignity deserving of unconditional respect) is brought into discussion and therefore it seems inevitable that gametes are assigned a different status to that accorded to bodily material which has nothing to do with reproduction;

b) the donation of organs which do not substantially undermine the donor’s viability appears to conform to the “gift logic”, but nonetheless presents a legitimacy structure of its own. Within public morality an appeal can be made to solidarity for organ donation upon death (whereby each of us is “addressed” by this appeal as a moral call). But to what degree can public morality ask us to make our own body available during our own lifetime on the grounds of solidarity? *The very fact that this is not obvious explains why immoral reasons (namely the pursuit of profit) are used to prompt people to sell organs.* The question is whether, in the case of maintenance of the prohibition being advisable and the “gift logic” being reinforced, additional rules and laws are necessary to curb the so-called spontaneous donation by living donors, precisely to avoid the creation of twilight zones. In this way donations between blood relatives or family members can be accepted, or between people who know each other and thereby arrive at a mutual agreement with regard to the organ donation (or gamete donation), subject to the observance of well-defined rules.

II.2.6. Limits to self-determination: the economisation of medicine

To the extent that medicine is increasingly determined by economic logic, the boundary between gift (donation) and economic transaction in the various fields in which the transfer of bodily material forms part of a medical operation, is systematically becoming blurred.

⁶⁷ Duties are “imperfect” if they are not enforceable, but stem from the benevolence of the individual. For example one can talk of a “duty” to show solidarity, without it being possible for this duty to be enforced or strictly “quantified” (to what extent am I under an obligation to help the Third World?). Nevertheless in the field of organ donation public morality can prompt people to have themselves recognised as potential donors when they die.

What is more: arguments are being heard, in particular among bio-ethicists of utilitarian-liberal tendencies, in favour of wholly or partially lifting the fundamental ban on commercialisation of the human body. The arguments in favour of such a liberalisation are:

- a) the right to free self-determination in respect of the body and the right to maximum self fulfilment;
- b) the de facto existence of a shortage of organs, gametes and tissues in clinical practice (and research?);
- c) the fundamental questioning of the hitherto widely accepted public morality, or as the case may be, the connection of the ban on commercialisation of the body with human dignity. After all, this is seen as containing a paternalist position, which does not tally with the moral pluralism of contemporary, secularised society.

Do these arguments cut ice? What can be said against them?

a) The desire to appeal to the freedom of being able to dispose of one's body oneself springs from a moral-political view in which the subject is disconnected from the symbolic dimension of his bodily existence and from inter-subjectivity as a dimension making up his existence as a person (e.g. belonging to a family, sex, identification with a tradition). For the libertarian utilitarian or contractualist, the subject is a rational decision-maker who understands his own preferences and may in principle follow these in unlimited fashion – as long as he does not harm others. Moral interaction is in this standpoint *always* conditional, or rather contractual, i.e. the result of free choice. Apart from the fact that this concept of the context-less subject (the *solitary homo economicus*) is a fiction, it also clashes with other views. Freedom understood as unlimited self-determination is negative freedom: should the state (public morality) safeguard this freedom totally? Is this the tailpiece of the common good (*bonum commune*) onto which morality should be grafted? After all, are all preferences of "atomic" rational decision-makers equally rational, or rather, moral?

With regard to the possible commercialisation of organ donation, the question can at least be raised as to whether "free choice" in this matter is not a cynical cover for either wanton profit seeking, or behaviour prompted by difficult or even hopeless circumstances. Not surprisingly, there is *not a single* society or culture in which public morality does not act as a regulating body with regard to individuals' preferences that are unacceptable, morally problematic or a threat to the common good (*bonum commune*). If a person's freedom to dispose of his own body is taken further in absolute terms, "freely chosen" slavery, for example, would be conceivable, as would extreme forms of sadomasochistic behaviour (e.g. cannibalism with mutual consent). In the same line of thinking, in medical practice a freely chosen amputation or a serious mutilation "of one's own free choice" would then become an act against which no objection in principle could be raised.⁶⁸ In short, public morality (whether or not through jurisprudence) has curbed absolute self-determination, including that in respect of the body, since time immemorial precisely because it has to safeguard the conditions making it possible for there to be a constructive public morality which is necessarily inter-subjectively developed and specifically (and thus also "physically") embodied. Absolute respect for a degree of *give*, or the physical, is from this viewpoint (paradoxically enough) a necessary condition for moral autonomy and genuine self-fulfilment.⁶⁹ It is no exaggeration to say that an argument in favour of unlimited free self-

⁶⁸ For more on this, see: Carl Elliott, "Amputees by Choice", in *Better than Well. American Medicine Meets the American Dream*, Norton & Company, 2003, pp. 208-236.

⁶⁹ This idea is also championed by the social-liberal democrat and advocate of a secularised morality Jürgen Habermas. See his *The Future of Human Nature*, Polity Press, 2003. See also in this respect the expert X. Dijon, who was interviewed: "Saying that everyone can do with his body what he wants constitutes a violation of the bonds that form us: the bonds with others, the bond with the body itself."

determination, when this will be applied *in concreto* to all kinds of spheres of social life, for example the way one's one body and other people's bodies are treated, in fact turns into an unintentional argument in favour of undermining public morality itself. Challenging the inalienability of the body is to turn people's very *Humanitas* into a relative value. This gave rise to Paul Ramsey's warning in 1970: "we cannot too strongly oppose 'the potentially dehumanizing abuses of a market in human flesh'"⁷⁰.

b) But what if the curbing of freedom here leads to shortage in bodily material for specific needs in the medical field? Shouldn't public morality be adjusted in that case, so that this need is met? The question here involves weighing up end purposes and values, but also effectiveness. In principle it should be pointed out that in any case commercialisation of the body puts the idea of unconditional respect vis-à-vis the person, *in and through respect for his bodily integrity*, into perspective. This putting into perspective has a public symbolic value: not only does it put into perspective the gift logic and bring the market logic into medical practice. It also sends a signal to specific groups (the socially weak, the marginalised, and unscrupulous doctors) that engaging in contractual transactions on this market can be profitable. This will undoubtedly lead to a fundamental shift in the doctor-patient relationship and the meaning attached to medicine as an intrinsically ethical activity. However, shouldn't the relationship between patient and doctor essentially be one of trust and care, and not a purely contractual obligation based on the market logic (customer/seller)? Is it desirable for the pursuit of profit and commercialisation to find unlimited acceptance precisely in the symbolically charged sphere of organ donation (which hitherto, at any rate, has been interwoven with tragic deaths), reproductive medicine and possibly life-saving stem-cell therapies? The argument that the *de facto* situation already points to a creeping commercialisation is not an ethically legitimate argument: slavery had also once become *de facto* a generally established practice! And does the *de facto* existence of prostitution legitimise the exploitation of women? *The question might even be asked as to whether ethics here ought not to dare to swim against the tide, rather than serve as a lubricant for the economic interests of a medical/scientific/industrial global system manifesting itself more and more strongly all the time.*

There are also practical objections. There seems to be a well-founded fear that if commercialisation of the body were to take off, the quality of tissues and organs would fall. For example, actually eliminating the real shortage in the field of the organ market will in any case call for strong "marketing" to which precisely the socially weak and marginalised will react (who can actually doubt that?). The argument in favour of a restricted organ market (Harris) - as a solution for the need for monitoring and quality supervision - is not really realistic, given the intrinsically globalising dynamic of the market. For the same reasons the assertion that the creation of such a *restricted* market would lead to the twilight zone and *mala fide* practices disappearing is also perhaps too naive. On the contrary, opening the door to profit seeking inevitably creates a back door, through which the trafficker's greed seeks greater profit.

c) There remains the position that the argument in favour of keeping the ban on commercialisation of the human body is testimony to a paternalism from a moral and

Because it is expressed in the way in which we look at each other, human dignity appeals to a common recognition of the physical and social conditions of our freedom. *For again, we have not chosen to be here, either in our body or in the bond that binds us with others. But without them, we would not be free.*" (italic part inserted by the Advisory Committee for Bio-ethics) CR 2005/1 - Doc III, 24.

⁷⁰ Paul Ramsey, *The patient as person*, New Haven: Yale University Press, 1970.

political viewpoint which is no longer acceptable today. This argument is sometimes linked to the suggestion that this kind of paternalism unacceptably perpetuates the suffering of patients who are the victims of the shortage of organs and/or bodily material (a similar "argument" is sometimes advanced in the euthanasia debate).

The criticism of paternalism presupposes that ethical discussions in our modern, liberal-pluralist society can/may in principle no longer have an essential character in the name of the "neutral state" (or the desired neutrality of the public arena). The procedural ethic espoused by Habermas and Rawls, for example, does indeed ask for the call for fair institutions (the sphere of the law) to be disconnected from the essential call for a good life. But both also recognise that specific parts of discussions on essential moral issues are necessarily fed by arguments, positions and convictions that fall under more essential moral traditions of groups and ideologies. How could this not be so? After all, the liberal democratic state is, thanks to its very nature, a formal framework within which individuals and groups build their personal existence according to their own traditions and essential views of "the good life". Moral discussions in the public arena can thus not help but be fuelled by these views. The concrete development of a democratic state will always be historically determined by these more intrinsic discussions and the legislative decisions stemming from them: the perfect neutral state therefore does not exist (something that Rawls and Habermas acknowledge). More than that: the argument advocating the neutral state, linked to the absolute expression of negative freedom and self-determination, is itself the expression of a particular morality that has grown up over history and dates back to a specific interpretation of the ideas of the Enlightenment, or rather, the 20th-century libertarian interpretation of them. Why should arguments and intuitions from this tradition alone be accorded a place in public discussions on moral issues of essence, e.g. in the field of bio-ethics?

Were public morality, in this case *the ban on commercialisation of the body as a matter of principle*, to prove to be consistent and defensible upon reflection and after all the pros and cons have been weighed up, it would not be advisable to reform this morality in essence on this point.

On the grounds of these considerations, in ethical/social discussions on commercialisation of the human body it is advisable to use as a basis precisely those intuitions and convictions that are still commonplace and - albeit somewhat implicitly - believed in *now* in public morality.

So democracy is the place within which those discussions should be conducted and, in the end, will lead to legislation adopted by majority or an upholding of the current law.

Finally there is the question of whether the so-called "paternalistic" ethical position is blind to the suffering of particular patients. Viewed on its own merits, this is a rather malicious argument. As if the current legislation (it should be reiterated: *in which the ban on commercialisation is until further notice a key moral principle*) is not the reflection of medical practice and wisdom formed by generations! Or is elimination of the shortage - which has come about on account of fate (illness, inadequate or poorly organised solidarity on the part of fellow citizens when it comes to donation) - the only good that should be balanced with human dignity and the requirement of justice? In other words, does the headlong rush in economic-instrumental rationality lead to justice here? Does it not rather mean an attack on a cornerstone of morality itself, namely the recognition of the unalienable dignity of the person and the right to equal treatment for all on the basis of care and compassion? The possibility that the argument in favour of even a relative commercialisation of the body stems from the defence of interests and profit seeking on the part of certain representatives of the medical world cannot be ruled out, either. In particular: does removing the shortage

of organs justify the creation of injustice in respect of the weak members of this society?

II.2.7. Conclusion

It is no coincidence that in public morality the human body has hitherto been considered as an integral part of the human person. For this reason the body is an unalienable good that cannot be the object of economic exchange and profit seeking (or marketing), but deserves special moral respect. Up until now this respect for the body has continued to form the basis, in public morality and in contemporary medical practice, for the ban on commercialisation of (the transfer of) bodily material, in particular organs and tissues. It is recommended that this prohibition be maintained: this prohibition gives expression to a fundamental recognition of the unicity of each human being, a recognition that is not only constitutive for ethics as such, but also for the regulation of medical practice and research. After all, it is clear that the transfer of parts of the body and particular bodily tissues is indispensable for specific medically curative therapies and specific biomedical research. However, an adaptation and assimilation of the law, and therefore aspects of public morality if necessary, should ideally be based on this prohibition of marketing, and the fundamental moral position vis-à-vis the body that it reflects. Only in this way can current medical practice, and the biomedical research interwoven in it, further develop in an ethically responsible fashion and continue to respect medicine's intrinsic ethical finality.

II.3. Standpoint against commercialisation: a consequentialist approach

II.3.1. Introduction

Other members advance consequentialist arguments against commercialisation. They expressly recall that every bio-ethical standpoint is grounded first and foremost in the compromise that has been worked out within the public debate on which the Committee should focus its attention. In this sense these members distance themselves from any "realistic"⁷¹ standpoint according to which there are values *which precede the debate*.

II.3.2. What morality to choose?

In the debate between supporters and opponents of the principle of inalienability of the body, at first sight a *consequentialist* morality (what social benefits can we expect from a break with the principle of inalienability?) appears to be opposed to a deontological morality (is it not so that the person's specific relationship with his body in principle, and aside from all social consequences, forbids departure from the principle of inalienability?).

The deontological arguments exchanged are all apparently based on a *view of the body* in which the body is presented in relation to the person as something that requires no explanation, which precedes any debate and which in the end, as was suggested above, can only be "ascertained".

Conversely, in the consequentialist arguments advanced, every decision to limit people's freedom of choice in the name of their own welfare should be deemed "paternalistic".

The view of the body advocated in the debate, however respectable it may be, seems to contain a "hard core" which is not amenable to rational discussion (see point II.2): you either agree or disagree with this hard core, and the rational discussion only relates to the consequences of that initial choice. However, there does not appear to be unanimity concerning this "hard core" in our society.

The general idea that protecting people from the consequences of their own actions is "paternalistic" also appears, on closer inspection, not to cut ice. After all, this view passes over all those situations in which the individual's very freedom ensures that he is subject to an obligation: is voting secrecy a "paternalistic" measure because it violates every citizen's freedom to demonstrate, if he so wishes, the party for whom he has voted? Is it not rather a *protection of the real freedom* that everyone has to vote for whom he wishes?

That argument is probably implicitly recognised when, for example in point II.1.4, a "*degree of commercialisation*", and not the idea of unimpeded commercialisation, is advocated. The question that arises here is thus whether it is possible from a consequentialist standpoint to advocate not only the rejection of a total liberalisation of the trade in body parts (a standpoint which, it would seem, is not asserted by any member of the Committee) but also (which is more awkward) the preservation of the principle of inalienability.

We can advance arguments in two steps in favour of this standpoint:

⁷¹ More particularly, they distance themselves from any "hard" realistic standpoint according to which these prior values could be "brought forth" in a manner other than by means of public debate.

- are there consequentialist reasons for adopting a distrusting approach to the trade logic?
- Are these reasons sufficient to justify preservation of the principle of inalienability?

II.3.3. Legitimate distrust of the market

• The market may not merely be seen as a more or less effective mechanism for the allocation of resources – an area in which the market undeniably operates very well. The market fulfils at least two other functions:

- the market is a mechanism for the distribution of income and, more generally, for the distribution of "personal destinies".
- the market is a mechanism for cultural creation: the trade system is an excellent creator of moral and cultural values, as Michael Walzer, for example, demonstrates to excellent effect.

It is possible to acknowledge the general effectiveness of the market's *allocating* function and at the same time make serious reservations regarding its *distributing* and *cultural* function.

• ***Let us first look at the distributing function.*** In a market relationship taken out of its context, everyone seems to be a "winner", but very often that is because the initial conditions of the exchange are obscured. Certainly, at a particular point in time anyone can be so destitute as to be happy to be given the chance to sell a kidney. *Without regard for the initial circumstances*, everyone will thus be happy: the donor (if he sells his kidney "freely", it is because the price he gets for it is in his view higher than the value he attaches to the kidney he has sold), the recipient (for a similar reason) and the intermediary, if there is one (who is paid for his work). But why is the donor happy to be able to sell his kidney? Because the way the market society works has not left him any other more satisfactory solution for meeting his basic needs. Can we imagine someone selling his kidney in order to be able to afford to go on a cruise? Or, more prosaically still, would a student sell her ova if she had all the financial facilities needed to follow her course of study at a renowned university?

Empirical research on the trade in organs, commonly published in medical journals, reveals a number of alarming findings:

The circumstances in which transplants are performed are often less than optimal⁷², and the transmission of infections (including HIV and hepatitis) and high short-term mortality are reported in leading trade journals⁷³.

⁷² Chugh, K.S. & Jha, V., "Problems and outcomes of living unrelated donor transplants in the developing countries", *Kidney Int*, 2000; 57: 131-35.

⁷³ See Salahudeen, A.K., Woods, H.F., Pingle, A. *et al.*, "High mortality among recipients of bought living-unrelated donor kidneys", *Lancet* 1990; 336: 725-28. See also Higgins, R., West, N., Fletcher, S. *et al.*, "Kidney transplantation in patients travelling from UK to India or Pakistan", *Nephrology Dialysis Transplantation* 2003; 18: 851. See also Jha, V., "Paid transplants in India: the grim reality", *Nephrology Dialysis Transplantation* 2004; 19: 541-43.

An analysis of 305 cases of kidney sales in Chennai (India), published by four doctors in the *Journal of the American Medical Association* in 2002, revealed that: 96% of the people involved sold their kidney in order to pay off debts; they received on average \$1,070 for their kidney; the average family income of the people involved *fell* by a third after the nephrectomy; the percentage of these people who were living under the poverty line *increased* from 54% to 71% (incapacity for work due to health problems perhaps explains this); three quarters of the people involved still had sizeable debts; 86% of the people involved reported a worsening of their state of health after the nephrectomy (in the case of 48% of the respondents a worsening of as much as three to four points on a scale of five); and 79% said that they would certainly not recommend another person to sell a kidney⁷⁴.

As David Rothman, first author of the *Bellagio Task Force report on transplantation, bodily integrity, and the international traffic in organs*⁷⁵, remarks:

*"As the economist and Nobel Prize Winner Amartya Sen has argued, economic development is too easily ruined by notions of "false freedom", of the kind implicit in a so-called right to sell a kidney. Such practices divert the attention from and even undermine the vital structural changes to modernise an economy. The sale of a kidney will neither save an individual from poverty nor simulate overall economic development"*⁷⁶.

The effectiveness of the market as a mechanism for *allocation of productive resources* therefore has a price, which the advocates of that market systematically underestimate. From a distributive standpoint that market only gives a fair impression if we close our eyes to the **inequalities** which are the historical reflex of former trade. In this way you are always reasoning "in the margin". Every exchange is fair on the face of it, because those effecting the exchange each have their interest in the circumstances with which they are faced. But in our view, the Advisory Committee for Bio-ethics cannot adopt this "marginalist" standpoint when giving its opinion. The Committee cannot limit itself to the question of whether some people in current circumstances do not genuinely want to sell parts of their body (and whether others genuinely want to buy body parts). The Committee should also wonder *to what degree abandoning the principle of inalienability in the future would not risk leading to a worsening of the inequality that characterised the initial circumstances of such exchanges*⁷⁷.

Precisely this argument justifies - without paternalism, in our view - a government being able to curb people's freedom "for their own welfare": the profound inequality in power relations can prompt people to *agree to* an exchange which they would definitely refuse if circumstances were to enable them to do so. Where is the freedom here, and where is the compulsion? And from what degree of material pressure will we say that someone was not

⁷⁴ Goyal, M. *et al.*, "Economic and health consequences of selling a kidney in India", *JAMA* 2002; 288 (13): 1589-93. See also the research carried out by Jarvaad Zargooshi (Iran – see above). See also Scheper-Hughes, N., "Rotten trade: millennial capitalism, human values and global justice in organs trafficking", *Journal of Human Rights* 2003; 2(2) : 197-226.

⁷⁵ D.J. Rothman, Rose, E., Awaya, T., Cohen, B., Daar, A., Dzemeshevich, S.L., Lee, C.J et al., The Bellagio Task Force Report on Transplantation, Bodily Integrity and the International Traffic in Organs, *Transplantation Proceedings* 1997; 29: 2739-45.

⁷⁶ Rothman, D., "Ethical and social consequences of selling a kidney", *JAMA* 2002; 288 (13): 1640-41.

⁷⁷ In this way it amounts at least to switching from a *deed consequentialism* to a *rule consequentialism*, to use a distinction often made regarding utilitarianism. We can imagine that a rule does not provide the solution that is most ethically acceptable *in all circumstances*, but that the preservation of that rule is nonetheless regarded as more ethically acceptable, *on the whole*, than its renunciation.

really free to sell one or other body part? We feel that there is no absolute answer to this question, but that the answer depends on the way in which we appraise the degree of injustice in the initial circumstances of the exchange.

On the basis of similar considerations, the *Bellagio Task Force on transplantation, bodily integrity, and the international traffic in organs* came to the conclusion that a ban on the commercialisation of organs should be maintained:

"The Task Force came to the conclusion that existing social and political injustices are of such a nature that commercialisation places powerless and needy people at an even greater risk. The physical wellbeing of peoples placed at a disadvantage, mainly in developing countries, is already threatened by a wide range of causes, in particular the risks of maladjusted nutrition, inadequate housing, impure water, and parasitic infections. In these conditions, adding the sale of organs to this series of circumstances would subject an already vulnerable group to an extra threat to their physical health and bodily integrity. Since people who sell their organs would only be found among the needy, regulation cannot avoid fundamental abuses. Transparency and fairness cannot be guaranteed. [...]
On the whole, the injustices in political power and social welfare are so far-reaching and poverty and hardship so extreme, that the voluntary nature of the sale of an organ remains doubtful. Neither does it justify a scenario whereby economically disadvantaged people, who now have to run risks that others can refuse (such as working in dangerous trades and professions), are subject to an extra danger in addition to those with which they are already confronted"⁷⁸.

• **Let us now look at the cultural function of the market.** As and when the market relationship extends in our society, an instrumental and calculated rationality appears to replace any other form of rationality in dealings between people⁷⁹. The non-paying relationship seems to be disappearing, which many see as a form of hardening and artificiality of social relations. We also know that a number of disinterested deeds provide the giver with a satisfaction that *disappears or at the very least decreases* when that same deed is paid for.⁸⁰ We can most certainly agree that the fact that something is free and authentic does not justify everything – and that these characteristics are moreover often affected. We can also agree that altruism is a complex matter: the "pure" giving away of something can always be suspected of concealing an interested "bias", albeit only symbolic.⁸¹ Nevertheless we *cannot wholly minimise* the disappearance of the notion of the non-paying character of an act. That is a moral cost price, which someone else will assess, depending on his moral point of view, but which you cannot simply shove under the table. Forgetting the cost price in a cost-benefit calculation is to show, at the least, inconsistent consequentialism.

These arguments are indeed of a consequentialist nature. Whilst they recognise the market's legitimacy as a useful regulator of social relations, they emphasise the need also to take account of the social costs of extending this logic outside its own sphere. That does not detract from the fact that, in our view, these costs (hardening of inequalities, alteration of

⁷⁸ D. J. Rothman, Rose, E., Awaya, T., Cohen, B., Daar, A., Dzemeshevich, S. L., Lee, C. J et al., *The Bellagio Task Force Report on Transplantation, Bodily Integrity and the International Traffic in Organs, Transplantation Proceedings* 1997; 29: 2741-42. (original text)

⁷⁹ That is the criticism of the Frankfurter Schule, very clearly re-updated in *Métamorphose du travail, quête du sens* [Metamorphosis of work. A search for meaning] by André Gorz (Paris, Galilée, 1988).

⁸⁰ "Market Justice, Political Justice", *American Political Science Review*, Vol. 80, 383-401.

⁸¹ The "purely altruistic" donor can for example always be accused of profiting from a reinforcement of his self-esteem.

human relations) should be assessed in the light of the benefits brought about, and therefore cannot per se justify a general principle of inalienability of the human body.

To defend this standpoint, we need to go a step further.

II.3.4. Pandora's box

Commercial rationality shows a final characteristic which is a major reason for displaying distrust on principle. In "*our liberal and technological society*" (see point II.1.) it is difficult for this trade logic to be turned back once it has taken root in a particular area. Utilitarian calculation is an extremely powerful social norm which it is difficult to extricate once it has taken root in social forms of relationship: the utilitarian norm works step by step.⁸² In the area that concerns us, this utilitarian calculation also finds a very strong ally in the "*ethic of scientific curiosity*" which inspires the research community. It can be mentioned in passing that this also works in a step-by-step fashion: once a technique has been developed, you can try to regulate its uses and applications, but it is much more difficult to "forget" that technique. In a context in which both commercial logic and the curiosity ethic are in expansion (and become even more dynamic when their forces are pooled), it is not unreasonable to think that society needs boundaries and – we risk using the word – "bars".

Precisely on account of the *risk of irreversibility* we therefore advocate that the inalienability of the body be maintained, at least for the time being, as long as society has failed to find a better means of guaranteeing a supply of organs without the risk of a class of "sellers" and a class of "buyers" being created.

This is not a matter of defending inalienability of the body *sub specie aeternitatis* in the name of social justice or authenticity. It is question of defending this inalienability of the body *hic et nunc* in a specific context in which both people and institutions often see their own productions rush past them and are totally unable to guarantee any longer that they can still undo what they have done, or that they can go back, if necessary, to the original bounds once they have initially lowered these.

What is therefore proposed is a position of *prudence*, not prohibition. It does not seem advisable to open the Pandora's box of inalienability without first being able to make an inventory of the contents of that box.

II.3.5. Why the body?

In the general argument we are supporting here, we still specifically have to explain the legitimacy of this standpoint with regard to the body. A twofold criticism can be made of this legitimacy:

- from a liberal standpoint, since we are not bringing up any specific view on the relationship between body and person, we could be asked whether the argument advanced here is not quite simply a way of implicitly heaping shame on the whole

⁸² On utilitarian calculation as a social norm, we can refer to the very interesting, already old works of social psychologist Melvin Lerner. We draw attention to the fact that the utilitarian norm can indeed be difficult to remove, but sometimes also finds very difficult acceptance: let us not underestimate how much *violence* has been needed to "convert" some populations, both in the history of the Western world and where the Western world has met with other cultural traditions.

market.

- from a point of view that we could describe here as "essentialist", a parallel objection can be made: if we reserve inalienability for the body and not for all goods, does that not implicitly reflect an "underlying philosophical view of the body"?

It seems to us that we can respond to these two objections with one and the same answer, based on Walzer's notion of "blocked exchange". In order to establish social justice in complex societies, it is necessary (pursuant to our own shared moral intuitions) for a number of goods to be withdrawn from the market. A world in which all goods are distributed by the market would be "tyrannical", because money would then secure exclusive power over everyone's lives. Conversely, if you wanted to abolish the market in our societies, you would be ignoring the complexity and diversity of our views on what a good is - views calling for a multitude of distribution mechanisms, amongst which the market plays a central role. *"It's one thing to want to chase the merchants out of the temple, and quite another to chase them off the streets."*⁸³. Negation of the market could lead to a tyranny of policy, something that would no longer be desirable.

In this view of what is just, the concern that some goods should escape market distribution is in no way based on the idea that those goods are in an "essential" relationship with the person, a relationship that precedes any moral and political discussion. On the contrary, this concern is based on an emphasis of our moral intuitions as to what is for sale and what is not for sale, and what you can appropriate and what you cannot. We would all go along with the idea that it should not be possible to sell a political mandate, for example, or a diploma. Nonetheless, good arguments might be found for the effectiveness of a market in diplomas⁸⁴ or a market for political mandates. But it seems to us that we would be checked by the idea that such markets *would apportion too much power to monetary resources*. The American legislator, that cannot exactly be accused of hostility towards market mechanisms, favours the lottery system as a way of enabling people to obtain American nationality. By not offering nationality to the highest bidder, it illustrates an intuition (which is not per se shared by everyone in our society) that nationality at least partially escapes the commercial sphere. Nationality is not something you can pay for.

Inalienability of the body is thus *one* of the areas of inalienability that we feel it is worth fighting for, precisely in order to protect the weakest. In an identical perspective of *complex equality* we could assert that it is just as important to protect a number of intellectual creations against private appropriation. It is recognised that the discussion on the limits of patentability of ideas in principle contains no reference whatsoever to "the essence of the human being". These limits can perfectly be discussed in a consequentialist perspective. However, this issue seems to us to fall under the same problem as the one we are defending here.

It is thus indeed a matter of defending a pragmatic view and building on social justice – a value which, subject to specific definition of course, is certainly common to the different parties intervening.

⁸³ Extract from Walzer, Michael (1983): *Spheres of Justice. A defense of pluralism and equality*, Basic Books (USA).

⁸⁴ Here we are talking about a market of *certifications* and not a market of *education*, which already exists.

II.3.6. Conclusion: between a liberal ethic and an essentialist conception of the body

The standpoint defended here thus stands midway between a "liberal"⁸⁵ ethic, which would take account of each individual's freedom "in the margin", i.e. without giving consideration for the initial circumstances of the exchange, and any view of the body which regards the inalienability of the body as consubstantial for the moral definition of the person.

In the point of view defended here the commercialisation of organs is rejected on the basis of the values of **social justice** and **authenticity of social relations**. These values of course do not themselves claim any preponderance with regard to the democratic debate: they form arguments in the discussion and should be weighed up against other arguments, which may be more direct and more pragmatic, but perhaps not have the same general scope.

However, this ethic seems to us to be more promising as a starting point for a practical compromise, if it were necessary for the debate to be opened.

⁸⁵ We think this is then defined in a fairly narrow sense. Only extreme liberals refuse to recognise at least to some degree the inequality of the initial conditions of the exchange.

III. POSITIONS AND RECOMMENDATIONS

The ethical considerations of this opinion chiefly related to whether or not it was acceptable for certain parts of the body to be commercialised when these body parts are taken from living persons.

Vis-à-vis this problem the Committee has come to a conclusion and an agreement in principle and has developed three positions.

The members of the Committee **are unanimously of the view** that more measures to encourage organ donations after death, but also among living donors, would go a long way to making good the shortage of organs.

The Committee therefore underlines the importance of supporting every initiative such as "Beldonor" (see above, point I.2.1.) that makes it possible to sustain and even strengthen social and individual access to organ donation.

All members agree in **rejecting a full liberalisation of the market**, where only the law of demand and supply regulates the cost price and transactions.

Subsequently three positions are adopted, with their respective recommendations as a logical consequence.

III.1.

Some members think that a commercialisation of certain body parts can be considered. They choose a pragmatic approach, and base themselves on consequentialist arguments. In their view the commercialisation of certain body parts (gametes, cells, tissues, organs, etc.) makes it possible to put an end to certain shortages and for illegal and clandestine practices at least partially to be replaced by a legal and official market. These members are of the opinion that non-commercialisation has perverse effects, since it causes difficulties in procurement of the desired body part and implies a de facto inequality, given that non-commercialisation is only imposed on those unable to travel to a foreign country which does have access to the market (or a parallel clandestine market) in body parts. They also feel that the current ethic regarding non-commercialisation leads to ambiguous situations and hypocrisy, in which commercial practices are masked under the guise of donation and altruism.

For that matter these members also opine that commercialisation of the body does not imply the lack of any public rules. These specific rules would have to be adapted to the particular situations and types of body part involved in the transaction. They reject the idea of uncontrolled commercialisation and propose having restraints imposed on it by means of a set of rules and regulations which could be used to avoid exploitation of the weak and would guarantee donor and recipient traceability.

They therefore recommend changing the legal framework, further to which the ban on the commercialisation of body parts could be lifted.

III.2.

Some members oppose any form of commercialisation of body parts. In their opinion, reducing the body to a commodity (even partially) constitutes a violation of the person's dignity.

This position is based on classic natural law and states that the person/body relationship is not one that expresses ownership. In this view the human being cannot and does not have the right to have a relationship of ownership with his own body.

The body is in a sense the "temple" of the soul, the identity of the person; body and person form one whole. Removing parts of the body with the aim of making a profit is inadmissible. Free disposal of parts of the body is only conceivable in the context of a gift. The moral attitude towards the body should be placed in the context of a kind of "*gift logic*". The gift logic is a principle connected with the generation of social cohesion; it is the principle around which the transfer of reproducible bodily material (for example blood) is structured.

These members therefore recommend that the current legislation not be altered and that the ban on commercialisation of body parts be kept in place. According to the advocates of this position, this prohibition creates the space within which medicine, which is based on such principles as care and solidarity, can continue to exist as a service to society, governed by ethics.

III.3.

Other members recommend that the statutory prohibition of commercialisation of parts of the human body be kept in place in the current socio-economic context, and that this standpoint subsequently be reviewed if necessary.

These members do not want any change to the ban on commercialisation of body parts for consequentialist reasons. Indeed, these members feel that liberalising the sale of body parts would help the strong and lead to exploitation of the weak. Human society should protect its relations on the basis of reciprocal gifts and not only rely on what is saleable.

The opinion was prepared in select commission 2005/1 – consisting of:

| Joint chairmen | Joint reporters | Members | Member of the Bureau |
|-------------------------|-------------------------|---|-----------------------------|
| E. Heinen S. Sterckx | E. Heinen S. Sterckx | M. Baum P. Beke P. Cosyns K. Creyf (resignation on 9/3/07) M.- L. Delfosse F. Demeyere V. Draulans M. Jacquemain W. Lemmens J.- N. Missa Y. Oschinsky | P. Schotsmans |

Member of the secretariat: M. Bosson

Interviewed experts

- Xavier Dijon, Professor at the F.U.N.D.P., Namur
- Max Freson, Department Head at the AZ-VUB (Academic Hospital of the Free University of Brussels) and Doctor in Philosophy and Humanities

Consulted expert

- Gilles Genicot, member of the Advisory Committee for Bio-ethics, Lecturer at the University of Liège, lawyer

The working documents of select commission 2005/1 – request for opinion, personal contributions of the members, minutes of meetings, documents consulted – are stored as Annexes 2005/1 at the Committee’s documentation centre, where they may be consulted and copied.