

Criminal Legal Regulation of Trafficking in Human Bodies: Spanish and Brazilian Experience

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Abstract. Organ trafficking, a very profitable worldwide illegal activity today, is frequently overlooked by those involved in combating human trafficking due to its complex and covert nature. Numerous international documents underscore the importance of countering trafficking in human organs and transplant tourism. This article analyzes the legal frameworks of Spain and Brazil, with a particular focus on their compliance with international and supranational standards aimed at combating, *inter alia*, the illegal circulation of organs and other phenomena associated with it. Firstly, the article distinguishes such phenomena as transplant commercialism, transplant tourism and illegal trafficking in organs and draws attention to the fact that currently there is no uniform understanding of the clear boundaries of the concept of illegal trafficking in organs. Elaborating on the various aspects of the above-mentioned types of criminal activity may allow one to properly determine the legal interests and rights protected by criminal law and the types of behavior subject to imputation in an exhaustive way. Secondly, the authors outline a number of controversial issues that arise due to the complex nature of organ trafficking and suggest several ways to meet these challenges.

Keywords: organ trafficking; transplant tourism; organ commercialism; organ transplantation; *corpus delicti*; donor; recipient; transplantation; Criminal Code of Spain; Brazilian legislation.

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Introduction

One of the greatest milestones in the development of medicine in the 20th century was the development of the practice of organ transplantation. This has greatly increased the chances of curing many diseases. However, the shortage of organs available for transplantation frequently results in long wait times, as well as queues of people in need of transplantation.¹ This increasing demand for organs in turn has led to the emergence of a number of associated phenomena, such as a “black market” for human organs, which includes the illegal buying and selling of organs from innocent people and the forced removal of organs for transplantation. At present, there are no complete and reliable statistics on organ trafficking. A joint study conducted by the Council of Europe and the United Nations in 2009 on the illicit trafficking in organs, tissues and cells found that it is necessary to conduct a comprehensive study in order to obtain accurate and reliable data.² On 15 November 2000, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, or the so-called “Palermo Protocol” was drafted. It came into effect on 25 December 2003 and introduced a broader definition of the concept of trafficking people. Article 3 of the

¹ Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Report on the meeting of the Working Group on Trafficking in Persons held in Vienna from 10 to 12 October 2011, 15 November 2011 (Dec. 15, 2023), available at https://www.unodc.org/documents/treaties/organized_crime/2011_CTOC_COP_WG4/2011_CTOC_COP_WG4_8/CTOC_COP_WG4_2011_8_E.pdf.

² Council of Europe & United Nations, *Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs* (2009) (Dec. 15, 2023), available at <https://rm.coe.int/16805ad1bb>.

Protocol thus determines that the term “exploitation” shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude as well as the removal of organs. The latter is a core subject of study for many researchers.³

The International Summit on Transplant Tourism and Organ Trafficking was convened by “The Transplantation Society” and “The International Society of Nephrology” in Istanbul (Turkey) and took place from 30 April to 2 May 2008.⁴ This instrument firmly condemns organ trafficking and transplant tourism. It also develops proposals and action plans that governments can use as a model when establishing strategies to address organ trafficking and transplant tourism. Additionally, on 21 May 2010, the World Health Organization (WHO) developed The Guiding Principles on Human Cells, Tissue and Organ Transplantation, which establishes the principle of gratuitousness in organ trafficking. In particular, Guiding Principle 5, which prohibits the purchase and sale of human organs by live donors or by the next of kin of deceased persons, reflects that principle. A similar principle was established by the Council of Europe when it adopted the Additional Protocol to the Convention on Human Rights and Biomedicine on 24 January 2002, concerning the Transplantation of Organs and Tissues of Human Origin (4 June 1997). Articles 21 and 22 of this Protocol establish that organs and tissues of human origin cannot be used for financial gain or any other comparable advantage. The very presence of this condition clearly demonstrates the importance of a prohibition on illicit trafficking and advertising.

On 31 March 2004, the European Parliament (EP) and the Council of Europe adopted Directive 2004/23/EC, which sets the standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells. The European Commission’s Directive 2006/17/EC of 8 February 2006 implements the regulation outlined in Directive 2004/23/EC of the European Parliament and of the Council of Europe. This Directive addresses the specific technical requirements for the donation, procurement and testing of human tissues and cells. These instruments assume that donations of human tissues and cells should be voluntary and non-remunerated. In addition, the EP advocates full traceability of human material used for medical purposes.

Furthermore, the European Parliament Resolution of 22 April 2008, “On Organ Donation and Transplantation” (2009/C 259 E/01), emphasizes that social inequality underlies the buying and selling of organs, which is reflected in the creation of the market in this sphere. The European Parliament addresses its recommendations to the European Commission and member states of the European Union, urging

³ Zelalem Woldemichael, *Criminalization and Prosecution of Human Trafficking in Ethiopia: Assessing the Legal Framework in Light of International Standards*, 4(3) BRICS L.J. 110 (2017).

⁴ The Declaration of Istanbul on Organ Trafficking and Transplant Tourism (2008) (Dec. 15, 2023), available at <http://files.sld.cu/trasplante/files/2010/08/declaracion-estambul.pdf>.

them to take measures to deter transplant tourism and protect vulnerable victims. It strongly states that governments should criminalize this offense.

In Spain, the laws governing donorship and organ transplantation are set forth in the Law 30/1979 of 27 October “On Procurement and Transplantation of Organs”⁵ as well as two Royal Decrees. Royal Decree 2070/1999 of 30 December regulates the activities of procurement and clinical use of human organs and territorial coordination in the matter of organ and tissue donation and transplantation.⁶ Royal Decree 1301/2006 of 10 November establishes the rules for the quality and security of donations, extractions, evaluations, processes, preservation, storage and distribution of human cells and tissues and regulates the coordination and application of these rules.⁷ All of these instruments outlined above prohibit the procurement and transportation of organs for the purpose of generating economic benefits and social assets, as well as the use of advertisements for organ transplantation.

The Spanish legislator for the first time criminalized trafficking in organs under Organic Law 5/2010 of 22 June, “On Reforming of the Penal Code” (Section 3 of Article 156.2, “On Bodily Harm”). This move was taken in response to the increasing proliferation of criminal activity in this sphere.

To be in compliance with its international obligations as stipulated in the Palermo Protocol, Brazil enacted a range of decrees to its national policy and amendments to its Criminal Code and Criminal Procedure Code over a series of six stages. Nevertheless, prior to the implementation of Law No. 13.344 of 6 October 2016,⁸ the Brazilian framework was fragmented and vague, contradicting minimum international standards.⁹ There are still some gaps in the current legislative provisions that need to be addressed.

1. Aim and Methodology

According to a 2005 study conducted by the WHO, an estimated five to ten percent of organ transplants worldwide are conducted illegally.¹⁰ A report published by the UNODC in 2020 indicates that trafficking is a complex global issue. Countries

⁵ Ley de trasplante y extracción de órganos y tejidos humanos (Dec. 15, 2023), available at <http://ont.es/SiteCollectionDocuments/amrlegethndsp.pdf>.

⁶ Real Decreto 2070/1999 (Dec. 15, 2023), available at <https://www.boe.es/buscar/doc.php?id=BOE-A-2000-79>.

⁷ Real Decreto 1301/2006 (Dec. 15, 2023), available at <https://www.boe.es/buscar/doc.php?id=BOE-A-2006-19625>.

⁸ Lei No. 13.344, de 6 de outubro de 2016 (Dec. 15, 2023), available at https://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2016/Lei/L13344.htm#art13.

⁹ Marcella R. D'Avila Lins Torres, *Human Trafficking in Brazil – Legal Remedies: Advances in National Legislation*, The Center for Civil and Human Rights (2016) (Dec. 15, 2023), available at https://klau.nd.edu/assets/331830/ht_lgl_rems_torres.pdf.

¹⁰ 85(12) Bull. World Health Organ. 959 (2007).

in Western and Southern Europe are detecting an increased number of cases where their own nationals are victims of trafficking.¹¹ The demand for an adequate response is rising. The question is whether the measures adopted are sufficient to cover every type of criminal activity related to this issue and what specific problems the legislators ought to focus on first in terms of criminalization, the latter being one of the primary means of ensuring state security.

This study is a descriptive investigation of such phenomena as organ trafficking, transplant tourism and organ commercialism. It is based on genetic and systematic-functional methodologies. The central topic of discussion is a comparative analysis of the mentioned issues on international, regional and national levels, specifically in the context of Spain and Brazil.

There is little information available about human trafficking cases occurring in Spain, particularly when the purpose is not the sexual exploitation of the victim. As for the typology of the prosecuted cases, there are no records of judgments on organ trafficking that were handed down between 2011 and 2019 available in the Spanish Judicial Documentation Centre's (CENDOJ) public case-law database at all.¹² Given these grounds, there is little opportunity to study the topics at hand in a practical context.

The Spanish model of organ donation and transplantation is based on the coordination of transplants at three levels: national, autonomous and hospital. In Brazil, the Sistema Único de Saúde (Unified Health System) funds more than 90 percent of organ transplants and operates the largest public transplantation program. Despite this, the Tribunal de Contas de União (Federal Court of Accounts) has found that the system suffers from operational deficiencies, primarily due to failures in planning, management, control and evaluation.¹³ This issue is deeply connected with a right to an essential health service.¹⁴

2. Findings

2.1. The Distinction of the Phenomena of Organ Trafficking, Transplant Commercialism and Transplant Tourism

First and foremost, organ trafficking is perhaps among the most heinous criminal phenomena in the world today. The Declaration of Istanbul defines organ trafficking as the recruitment, transport, transfer, harboring or receipt of living or deceased persons

¹¹ United Nations, *Global Report on Trafficking in Persons* (2020) (Dec. 15, 2023), available at https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP_2020_15jan_web.pdf.

¹² Marc Salat, *Human Trafficking in Spain: A Quantitative Case-Law Analysis*, 71 *Int'l J.L. Crime & Just.* (2022).

¹³ Tribunal de Contas da União, *Relatório de avaliação de programa: programa doação, captação e transplante de órgãos e tecidos* (2006) (Dec. 15, 2023), available at <https://portal.tcu.gov.br/lumis/portal/file/fileDownload.jsp?fileId=8A8182A24F0A728E014F0AF2D74C7C4C>.

¹⁴ Ricardo Perlingeiro, *Procedural and Substantive Judicial Review of the Right to Health in Brazil*, 2(1) *BRICS L.J.* 15 (2015).

or their organs by means of threat or use of force or other forms of coercion, including abduction, fraud, deception, the abuse of power or of a position of vulnerability, or the exchange of payments or benefits to a third party to gain possession and control over the potential donor, for the purpose of exploitation by way of the removal of their organs for transplantation. One may conclude that it is closely related to human trafficking, but they differ in terms of object and aim. Trafficking in humans can involve several forms of exploitation of persons, while trafficking in organs is always associated with the transplantation of organs. The main aspect of trafficking in organs is its implementation without the consent of a victim (an organ donor). In such a case, for example, a doctor may be coerced to provide organs for transplantation by virtue of fraud or abuse of his or her vulnerability, obedience or dependence. The question that arises is whether there is a need for autonomous management of organ trafficking. The nature of human trafficking is the orientation towards human exploitation, and any action involving the trafficking in organs can constitute trafficking in persons. However, some offenses related to trafficking in organs should be discriminated against. A study on human organ trafficking carried out jointly by the Council of Europe and the United Nations (U.N.) in 2009¹⁵ underlines that trafficking in organs includes a variety of offenses that do not necessarily include trafficking in persons. Firstly, any act attempting to retrieve organs from a living or deceased person is considered trafficking in humans. Secondly, the removal of organs may be legal in certain cases, but coercion and position abuse may constitute a crime. Thus, trafficking in organs is considered trafficking in humans only in cases where there is a purposeful recruitment for organs with the specific aim of transplantation.¹⁶

Apart from the phenomenon of organ trafficking, the phenomenon of transplant commercialism is also reflected in the Declaration of Istanbul. This term refers to a policy or practice in which an organ is treated as a commodity, including being bought or sold or used for material gain. Obviously, the substance of transplant commercialism lies in its use for material gain.¹⁷ Thus, it is important to note that organ trafficking and transplant commercialism are not synonymous terms. The concept of transplant commercialism refers to a situation in which a donor gives free consent to an organ transplant in exchange for material gain. In contrast, organ trafficking entails the removal of organs against the will of the victim by means of using abuse or taking advantage of their vulnerability or dependency. One of the simplest forms of exerting influence on a victim is to offer a cash reward to gain control over their will. However, in the case of transport commercialism, material gain or reward is the only decisive element.

¹⁵ Council of Europe & United Nations, *Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs* (2009) (Dec. 15, 2023), available at <https://rm.coe.int/16805ad1bb>.

¹⁶ Carlos M. Romeo Casabona (ed.), *El nuevo régimen jurídico de los trasplantes de órganos y tejidos* (2005).

¹⁷ Silvina Bacigalupo Saggese & Manuel Cancio Meliá (eds.), *Derecho penal y política transnacional* (2005).

In recent decades, transplant tourism has become a worldwide phenomenon. It involves traveling with the specific aim of organ transplantation, i.e. the movement of organs, donors, recipients or transplant professionals across jurisdictional borders for transplantation purposes. According to the Declaration of Istanbul, any travel for transplantation is classified as transplant tourism if it involves organ trafficking or transplant commercialism or if the resources, organs, professionals and transplant centers devoted to providing transplants to patients from outside the country undermine the country's ability to provide transplant services for its own population.

Organ trafficking and transplant commercialism both contradict the principles of gratuitousness and altruism that organ donation is based on. Still, there is a difference that significantly affects public relations. In the case of organ trafficking, there is always a victim who is coerced into the donation of organs. Consequently, in this case, the focus is on organ removal rather than donation. Thus, such an act is neither altruistic nor voluntary. In the case of transplant commercialism, however, a person voluntarily donates organs in exchange for some material gain. It would be only natural to wonder, therefore, whether consent to such a deal was indeed given free of material gain and voluntarily.

From a practical viewpoint, the majority of arguments on the issue of legalizing organ trade usually claim that the legalization of such phenomena as transplant commercialism would lead to the fact that typical donors would be the persons forced to consent to the transplantation due to a difficult economic situation.¹⁸ Others claim that it would contribute to the disappearance of the black market and the illicit sale of organs at no value.¹⁹ Moreover, it would contribute to the increase in the number of organs available for transplantation while also making these resources available for people in difficult economic situations. It is believed that the ethical arguments against the possibility of the legal sale of organs are considered paternalistic in some ways. For example, in the case of giving voluntary consent to organ transplantation, a person is made aware not only of the possibility of material gain but also of the potential impact on their well-being. They possess free will. Furthermore, the government has the authority to prohibit or regulate all health-threatening activities that are aimed at material gain.

The critics of the legal organ market further contend that the existence of a normative framework governing its functioning does not rule out the risk of the emergence of unethical donor practices driven by people seeking material gain. Obviously, the consent of these people can be considered free and sincere. Moreover,

¹⁸ Juan C. Carbonell Mateu & José L. González Cussac (eds.), *Derecho Penal: Parte Especial* (2010); Francisco J. Álvarez García & José L. González Cussac (eds.), *Comentarios a la reforma penal de 2010* (2010).

¹⁹ Sonia García Vázquez, *Inmigración ilegal y trata de personas en la Unión Europea: la desprotección de las víctimas*, 10 *Revista de Derecho Constitucional Español* 231 (2008); María T. López de la Vieja & María C. Velayos Castelo (eds.), *Educación en bioética: donación y trasplante de órganos* (2008).

economic disparity affects both the potential donors and the people receiving organs for transplantation. Thus, only the wealthiest individuals would have access to the legal organ market.²⁰ Furthermore, determining the pricing of different organs can be a difficult and complicated process. These prices would be determined by government policy in the case of legalization. In addition, the comparison of the legal organ market and respect for human dignity to the principles of gratuitousness and altruism are doubtful.

2.2. Spanish Regulations and Problems

Since 1992, Spain has maintained the world record for organ donors. Every deceased person is presumably an organ donor unless they have expressed explicit refusal. In practice, however, families are systematically consulted.²¹ As for criminalization, Article 156 bis of the Criminal Code of Spain is devoted to trafficking in organs.²² There are four distinct groups of *corpora delicti*:

- removal or illegal procurement of human organs;
- engaging in organ trafficking through activities such as planning, preserving, possessing, transferring, receiving, importing or exporting illegally removed organs, with the intention of using them for transplantation or other purposes;
- promoting, endorsing, facilitating or publicizing the illegal acquisition of organs or the practice of organ trafficking;
- inciting, conspiring and soliciting the commission of a crime.

Not only does this set of *corpora delicti* correspond with Articles 4–8 of the Council of Europe Convention against Trafficking in Organs at first glance, but it also covers additional issues such as the publicization of the illegal acquisition of organs or involvement in organ trafficking.

This doctrine also suggests that it might be useful to refer to other normative acts to clarify the term “organ of a human,” especially Act No. 30 of 1979, On Organ Extraction and Transplantation, and Royal Decree No. 2070 of 1999, On Collection and Clinical Use of Human Organs. In other words, there is a need to further develop the concept of a human organ.²³ In addition, there is debate over whether the *corpus delicti* covers the transfer of a part of an organ’s remains. For instance, in the case of liver transplantation, it is possible to transplant only a part of this vital organ. Garcia Albero has reasonably pointed out that trafficking in blood and its components, in human cells and tissues and trafficking in organs, cells and tissues of animals

²⁰ Carbonell Mateu & González Cussac (eds.) 2010; Álvarez García & González Cussac (eds.) 2010.

²¹ Gustavo H. de F. Coelho & Alcino E. Bonella, *Organ Donation and Human Tissues: Transplantation in Spain and Brazil*, 27(3) Rev. Bioét. (2019).

²² Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (Dec. 15, 2023), available at <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444&p=20190302&tn=1#a156bis>.

²³ Manuel Gómez Tomillo, *Artículo 156 bis: Comentarios al Código Penal* (2011).

do not fall under the categories outlined above. He further suggests designating kidneys, heart, lungs, liver, pancreas, intestine and other organs that can be removed and transplanted by means of scientific advancements as organs protected by this article.²⁴ The main organ is typically an organ that is functionally independent and important to the life, health and normal development of an individual unlike the paired organs, the loss of which results in disability. That means that the liver would be defined as one of the main organs, similar to the lungs and heart. However, it is not uncommon for case law to consider all organs suitable for transplantation as the main organs.²⁵ Unlike the sentence established against the donorship, the sentence for the recipient should be established personally. The punishment should also be less severe in the case of an organ from a deceased person.

Here, we should mention Article 177 bis of the Criminal Code of Spain, which covers the competing rule and states,

The penalties ... shall be imposed without prejudice to the relevant one, as appropriate, for the offense of Article 318 bis of this Code and for other offenses effectively committed ...²⁶

Therefore, if trafficking in humans is aimed at the exploitation of people through organ removal, according to the Code, a cumulative sentence including both trafficking in humans and trafficking in organs is imposed.

Gurdiel and Cortes describe transplantation as the therapeutic use of human organs, which consists of the replacement of dysfunctional organs with healthy ones received from a live or deceased donor.²⁷ Trafficking in organs is a broad concept that covers not only the receipt of organs in exchange for remuneration and transportation with the consent of all parties involved but also the situation in which the legality of trafficking in organs is dependent upon the execution of the regulatory framework that governs it.

Article 156 bis of the Criminal Code of Spain also establishes the miscellaneous alternative *corpus delicti*.²⁸ Accordingly, the Criminal Code outlines four types of actions, each of which refers to three different patterns of behavior that are punishable. Thus, the promotion, assistance, facilitation or advertising of the

²⁴ Ramón M. García Albero, *El Nuevo delito de tráfico de órganos* (2010).

²⁵ Pablo Marina Riopérez, *El jurista ante el trasplante de órganos humanos: Régimen jurídico – administrativa* (2006).

²⁶ Juan Pérez Alonso, *Tráfico de personas e inmigración clandestina (Un estudio sociológico, internacional y jurídico – penal)* (2008).

²⁷ Manuel Gurdiel Sierra & Emilio Cortés Bechiarelli (eds.), *Estudios penales en recuerdo del Profesor Ruiz Antón* (2004).

²⁸ Bacigalupo Saggese & Cancio Meliá (eds.) 2005.

receiving, trafficking and transplantation of organs are all punishable. K. Himenez believes that trafficking in organs comprises the transfer of organs from one place to another, i.e. from the donors to the recipients.²⁹ This process also includes the removal, transfer, preservation, possession and finally the transplantation of organs. Trafficking encompasses all these acts or any aspect of them, despite the fact that each of them can be carried out independently by multiple criminal organizations or through a combination of several acts. Still, it is a significant part of the illicit market where everybody meets their own needs.

The receipt of an organ is a process in which the submitted organ is donated to someone. It covers both the removal and the transfer of an organ to a third person, regardless of whether it was aimed at gaining benefit or at transplantation to the recipient.³⁰

Alberto Garcia has pointed out that the criminalization of organ donation advertising is a deliberate step given the global lack of organs and the capabilities of the Internet, which exacerbate issues such as organ trafficking and transplant tourism as global problems.³¹

As for illegality, it refers to the absence of the voluntary, informed and explicit consent of a living donor in accordance with the requirements and the form established by the law or permission required in accordance with the law, especially in the event that the donor is a deceased person.

The aggravating circumstances include the victim's life or physical or mental integrity being put in grave danger and a position of vulnerability because of age, incapacity, illness, current situation or involvement in a criminal group or organization. Furthermore, if the persons who participated in such an organization or group are directors, supervisors or any other persons of authority, their sentence may be raised by another half. Article 13(d) of the above-mentioned Convention has been transformed into the following:

Penalties imposed by foreign judges and courts for similar crimes as those provided for in this article shall be treated as second offenses, except for cases when the conviction has been struck or may be struck from the record, in accordance with Spanish law.

As for the perpetrators, regardless of whether they are a physical or legal person, they shall be subject to sentencing. They may include persons who served as receptors, donors, medical practitioners, officials or private individuals performing professional responsibilities or official duties of any form in a medical practice, such as in public or private medical facilities, clinics or consultation offices.

²⁹ Joan J. Queralt Jiménez, *Derecho penal español: Parte especial* (2015).

³⁰ Gurdiel Sierra & Cortés Bechiarelli (eds.) 2004.

³¹ García Albero 2010.

2.3. Brazilian Situation in Organ Trafficking

There is no separate *corpus delicti* in terms of organ trafficking in Brazil, although donors from Brazil are frequently recruited and involved in transplant schemes because of their socio-economic vulnerability, lack of decent employment opportunities and, as a consequence, the low cost of organs. For instance, the controversial Netcare case may serve as evidence of this.³² The incident, in which Brazilian doctors killed a patient by wrongfully removing both kidneys took place on 16 December 1986 and was one of four similar cases.³³ Nevertheless, the prosecution process was complex and prolonged due to the absence of a clear-cut connection and the lack of necessary transactional evidence. Still, this is a common situation when there is no clearly established connection between a criminal activity and the organ trade. Only transnational patterns involving private clinic services being investigated in cooperation with other forces abroad tend to become widely known. There is also a significant discrepancy in the available data. Some research studies claim that Brazil ranks second in kidney and liver transplants worldwide, but the same resources show a smaller percentage of effective transplantations from a deceased donor.³⁴

Law 9.434/1997 abided everybody to formally express their opinion on organ donation, which would be marked on their identification cards or driver's licenses; however, Law 10.211/2001 reversed this system. Donation is only presumed, and a written authorization from first- or second-degree relatives or the spouse may prevent organ removal regardless of the *inter vivos* potential donor's wish.³⁵

Under Article 149-A of the Criminal Code of Brazil, as amended by Law No. 13.344/2016, the removal of organs, tissues or body parts for any purpose may constitute trafficking in persons.³⁶ The minimal penalty threshold is a bit higher in contrast to Spanish regulations, ranging from 4 to 8 years of imprisonment (as opposed to 6 to 12 years). The objective side is to perpetrate, attract (seduce), recruit,

³² Frederike Ambagtsheer, *Understanding the Challenges to Investigating and Prosecuting Organ Trafficking: A Comparative Analysis of Two Cases*, Trends Org. Crime 1 (2021); Jessica de Jong, *Human Trafficking for the Purpose of Organ Removal*, Ph.D. Thesis, Utrecht University (2017) (Dec. 15, 2023), available at <https://www.organtraffickingresearch.org/wp-content/uploads/2022/07/PhD-Thesis-Jessica-2017-Human-Trafficking-for-the-purpose-of-Organ-Removal.pdf>; Nancy Scheper-Hughes, *Mr. Tati's Holiday and João's Safari – Seeing the World Through Transplant Tourism*, 17(2–3) Body & Soc'y 55 (2011); Frederike Ambagtsheer & Roos Bugter, *The Organization of the Human Organ Trade: A Comparative Crime Script Analysis*, 80 Crime L. Soc'y Change 1 (2022).

³³ Juliana Barbassa, *Brazil Jury: Doctors Killed Patients by Taking Organs*, NBC News, 21 October 2011 (Dec. 15, 2023), available at <https://www.nbcnews.com/id/wbna44995483>.

³⁴ Fernando Gonzalez Botija & Pedro D. Peralta, *Alignment of Brazil to Convention 216: Trafficking in Human Organs, under a Comparative Public Law Perspective Between European Union and Brazil*, 8 Cadernos de Dereito 205 (2017).

³⁵ Coelho & Bonella 2019.

³⁶ Decreto-Lei No. 2.848, de 7 de dezembro de 1940 (Dec. 15, 2023), available at https://www.planalto.gov.br/ccivil_03/decreto-lei/del2848compilado.htm.

transport, transfer, procure (bribe, corrupt, buy), house (accommodate) or shelter a person through serious threat, violence, coercion, fraud or abuse. The subject matter is wider and includes “organs,” “tissues” or “body parts.” The subjective side is the use of deception in order to obtain a person’s willing participation. The aim of either of the above-mentioned two aspects is the removal of organs, tissues or body parts, to force people to work in conditions comparable to slavery or any type of servitude, to participate in illegal adoption or to engage in any form of sexual exploitation.

Despite the fact that Brazil has not ratified the Council of Europe Convention, the aggravating circumstances are more complex and may involve:

a public official while performing his or her duties or under the pretext of performing these functions; an offence against a child; an adolescent or elderly person or person with a disability; a position of authority due to family, domestic arrangements, cohabitation, hospitality and economic dependence relationships; a position of authority or hierarchical superiority inherent to the exercise of employment, position or function or a victim removed from Brazilian territory.

The violations of Law 9.434/1997 are listed in Chapter V and are more similar to the *corpus delicti* mentioned in Article 156 bis of the Criminal Code of Spain. These violations include: the removal, buying, or selling of organs; the promotion, mediation, facilitation or gaining of any advantage from such transactions; the performing of transplantation or grafting, collection, transportation, storage or distribution of human body parts known to have been obtained against the provisions of the law; advertising of establishments authorized to perform transplants and grafts, including those related to these activities or public appeals for the donation of tissue, organ or part of the human body to a specific person identified or not; or the collection of funds for the financing of transplantation or grafting for the benefit of individuals.³⁷ The aggravating circumstances differ and include: inability to perform regular occupations for more than thirty days; danger to life; permanent impairment of limb, sense or bodily function; premature delivery; incapacity for work; incurable disease; loss or destruction of limb, sense or function; permanent deformity; abortion; or death.

One of the latest developments in Brazil is the prohibition on removing organs from unidentified bodies. The Brazilian legislation also discriminates against the person who “sells” his or her organ in an illicit act, placing the victim on the same level as the buyer or facilitator, thus further oppressing his or her condition of vulnerability and,

³⁷ Lei No. 9.434, de 4 fevereiro de 1997 (Dec. 15, 2023), available at http://www.planalto.gov.br/ccivil_03/leis/19434.htm.

consequently, the victim. In such a scenario, where the “victim” is equated to the buyer, the victim is unlikely to disclose the details of what happened to the authorities, even if there are complications after the surgery, since he or she feels repressed by the law. Such actions, however, make it difficult to investigate this type of crime.³⁸

Discussion and Conclusion

This study examined three distinctive concepts, namely organ trafficking, transplant tourism and organ commercialism. The perception of their specificity in criminal law is of paramount importance. It would therefore be desirable to develop a uniform definition of these phenomena at the international level. However, a consensus is unlikely to be reached if any arrangement involving an organ transplant is treated as trafficking in organs. The umbrella term used to describe this practice is sometimes referred to as “organ trade.”

The Istanbul Declaration on Organ Trafficking and Transplant Tourism uses the term “travel for transplantation” for legitimate travel for organ and tissue transplantation and uses the term “transplantation tourism for organ trafficking and/or transplant commercialism”, the practice of which the Declaration strongly condemns.³⁹

According to World Health Assembly Resolution No. 57.18, “On Human Organ and Tissue Transplantation” dated 22 May 2004,⁴⁰ there are no international regulations that condemn or prohibit transplant tourism.⁴¹

With regard to the national law of Spain, we should take into consideration the Spanish prohibition on the acquisition of material gain from the sale or exchange of organs. Organ donations should be carried out for free. However, it does not mean that any trade of organs should be equated to trafficking in organs. It is clear that the legislator should criminalize any act that goes against the principles of altruism and gratuitousness. Human organ commercialism, that is, the legal buying and selling of organs, is generally allowed. Therefore, organ transplantation in exchange for remuneration cannot be considered an assault on human dignity if the person voluntarily consents to it. The question is whether it is an assault on human dignity to place a value on their organs. This matter is also contentious due to the fact that,

³⁸ Souza I.L. Santos et al., *O tráfico de órgãos no Brasil: legislação brasileira versus Protocolo de Palermo* (2022) (Dec. 15, 2023), available at <https://repositorio.uniube.br/bitstream/123456789/1964/1/TCC%20Layla%20e%20ThallesV2.pdf>.

³⁹ Alireza Bagheri, *Child Organ Trafficking: Global Reality and Inadequate International Response*, 19 Med. Health Care Philos. 239 (2016); Francis L. Delmonico, *The Implications of the Istanbul Declaration on Organ Trafficking and Transplant Tourism*, 14 Curr. Opin. Organ Transpl. 116 (2009).

⁴⁰ World Health Assembly Resolution 57.18, Human Organ and Tissue Transplantation, 22 May 2004 (Dec. 15, 2023), available at http://www.who.int/gb/ebwha/pdf_files/WHA57/A57_R18-en.pdf.

⁴¹ Frederike Ambagtsheer et al., *Cross-Border Quest: The Reality and Legality of Transplant Tourism*, J. Transplant. 1 (2012).

nowadays, such an assessment is, explicitly or implicitly, routinely conducted during the determination of the amount of remuneration.

Article 156 bis of the Criminal Code of Spain was incorporated under the title “On Bodily Harm,” a decision that has been highly criticized. One might assume that it aims to protect personal health. In a publication titled “The Importance of Compliance with Regard to the Reform of the Spanish Criminal Code,” the legislator acknowledged that this amendment promotes the prevention of organ trafficking and their subsequent transplantation.⁴² Trafficking in organs affects both the health of the donor and the health of the recipient of the organ. Furthermore, it also has an impact on their other related interests and activities. At the same time, the freedom and dignity of the donor are jeopardized if the organ donation was not voluntary. Moreover, such actions violate the principles of gratuitousness and solidarity in organ donation as well as those of the healthcare system, which guarantees adequate provisions for the services.

Both Brazilian and Spanish legislators are primarily focused on the protection of freedom and identity rather than the health system or regulation of organ donorship and transplantation. The confusion surrounding the object of criminal protection further complicates the search for a resolution to the conflict between this *corpus delicti* and trafficking in humans. The constituent element of the illicit trafficking of human beings themselves for the purposes of organ removal is the attack on the human dignity of the trafficked person.

Article 156 bis of the Spanish Criminal Code refers only to trafficking in organs. This means that trafficking in cells and tissues is not regulated. There are several ways to resolve this problem, including by referring to other acts or establishing a more precise definition. For these reasons, it is also advisable that the competing rules (Article 177 bis) be reviewed to clarify which legal rights are protected in each case. Brazilian legislation does consider tissues and body parts as objects of a crime; however, the latter appears to be too broad a concept.

In general, it is widely accepted that the objective of an organ transaction is handing over consideration for the action to the donor or the person connected to him, the mediators, medical officers or the officials who permitted such activity. Trafficking in organs can be explicit or implicit. For instance, it can be expressed in gratitude, such as covering the agreed amount of payment for medical care.

It is also believed that the establishment of punishment for the promotion or facilitation of this type of crime ultimately resulted from the ease of using the Internet to carry out illegal activity. The expansion of networks has greatly facilitated the process of maintaining the liaison between the trafficking-in-organs members. Through these networks, mediators such as “the international transplant coordinators” are able to

⁴² Ley Orgánica 5/2010, de 22 de junio (Dec. 15, 2023), available at <https://www.boe.es/buscar/doc.php?id=BOE-A-2010-9953>.

virtually communicate and offer their services. Moreover, forums where private persons can offer their organs in exchange for consideration are becoming popular. In this sense, such an offense now has the potential to facilitate several other different kinds of illegal activities within this domain. Therefore, as per the Spanish Criminal Code, any form of participation in the trafficking of organs shall be punished as joint participation. It can be the recruiting and screening of donors and recipients, the organization of trips to overseas clinics, the medical examination of potential donors, the provision of surgery insurance etc. The *corpus delicti* also covers the actions that were taken prior to organ trafficking. For instance, advertising and participating in any other supporting activities related to organ transplantation are considered illegal.

In any case, when the recipient of an organ is punished according to Article 156.2 bis of the Criminal Code of Spain, it implies that he or she was cognizant of the organ's illicit origin. However, it is unclear whether the punishment should be equal to the punishment administered against the one who was the direct participant in the trafficking in organs because the recipient may have been in a coerced position.

The European Union's policies, recommendations, and principles addressing organ trafficking have greatly contributed to the criminalization of this illegal activity. The practice of compensatory transfer of organs is also now prohibited in many countries because it can be aimed at the exploitation of vulnerable social groups. It jeopardizes the principle of altruism in donorship and encourages unmanaged profit and trafficking in people.

When using the term "recipient," the legislator means the direct receiver and beneficiary of the removal and transplantation of an organ. That is, the person who receives an organ transplant for curative purposes. In this regard, it is important to understand that the persons who are awaiting transplantation remain in a condition equal to an emergency. Moreover, such persons suffer from irresistible fear. The ability to lower the sentence by one or two degrees should not be an obstacle to the full exemption from punishment according to Article 20 of the Criminal Code of Spain.

As for Brazil, we may assume that the reasons for sentence reductions and penalty increases are more logical; however, the most notable disparity is that the subject is not limited to a living person. In some circumstances, not only do the illegal and inappropriate disposal of corpses, tissues, stem cells and deceptive practices constitute a separate *corpus delicti*, but under Law 9.434/1997, even a victim may be considered an offender. In order to guarantee that the victims of crimes of organ trafficking are not punished, one could, alternatively, refer to section 5 of Article 121 of the Brazilian Penal Code, which allows for the possibility of judicial pardon in culpable homicide, since the consequences of the infraction on an agent can be so severe that the penal sanction becomes unnecessary.

As a general rule, in *corpus delicti* involving bodily harm, the punishment is reduced by one or two degrees if there was legally valid, voluntary, spontaneous and directly expressed consent from the victim. This provision does not apply if

the consent was given by an underage or disabled person. However, the action previously mentioned is fully exempt from punishment in the event that the organ transplantation was carried out in accordance with the law No. 2/2020 dated 16 December of 2020 on Sterilization and Surgery against Transsexuals. But what about the cases in which the consent was given with defects, in exchange for consideration or for another benefit, and if the person who gave the consent was underage or was incapable of giving such consent? In such a case, it is equivalent to having no consent at all. Furthermore, the consent given by a legal representative is also not considered legally valid. Such provisions protect the guiding principles of organ transplantation and justify their place in the Spanish Criminal Code.

When it comes to Brazilian Law No. 13.344/2016, it is completely remiss in terms of consent, which should serve as grounds for its reforms, although scholars have already elaborated an unambiguous way to deal with it.⁴³ The same provision is also addressed in Resolution of the Federal Medicine Council No. 1.480/97. The general provisions are outlined in Law No. 9.434/1997, among which it is mentioned that authorization regarding *inter vivos* donations must be made through a written instrument in the presence of two witnesses. However, this requirement cannot be applied in all cases as per Article 149A of the Brazilian Penal Code since they concern only transplantation and donation issues, notwithstanding the circumstances.

It is recommended by experts that criminal justice and medical professionals collaborate to produce a detailed, step-by-step breakdown of the entire legal transplant process, encompassing initial assessment practices, procedures, actors and documentation for the whole process.⁴⁴ There remains a lack of hard laws addressing the issue of transplant tourism.

Donorship, as a form of consideration, is not typically punished in Brazil. However, the presence of consent with such a defect as receiving consideration does not exempt third persons from criminal liability. It is widely believed that donors frequently run the risk of self-harm and put themselves in danger, so the punishment of third persons is deemed acceptable. This approach reflects moderate government paternalism. Thus, only the third persons who have benefited from the donorship are punished. One may assume that the legislator protects the rights of a victim against their will, since the victim puts the legitimacy of the legal system and the legal system itself at risk by offering their organs in exchange for consideration. The state must actively promote social benefits that guarantee the citizens the minimum for survival and well-being, so that they can enjoy their right to autonomy and respect without putting themselves in a perilous situation just to guarantee their own survival. The more controversial issue arises when a donor is not short on money but rather is

⁴³ Waldimeiry Correa da Silva, *The New Brazilian Anti-Trafficking Law: Challenges and Opportunities to Cover the Normative Lack*, 18(1) *Revista de Direito Internacional* 242 (2021).

⁴⁴ Paul Holmes et al., *Establishing Trafficking in Human Beings for the Purpose of Organ Removal and Improving Cross-Border Collaboration in Criminal Cases: Recommendations*, 2(2) *Transpl. Dir.* e58 (2016).

donating out of ethical concerns. It is important to take into account both the right to one's autonomy and free development of personality on the one hand and, on the other, the value of human dignity and the sanctity of life. In such a case, however, the principle of adequacy shall be applied, which calls for further research.

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