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Challenges in Medical Ethics:

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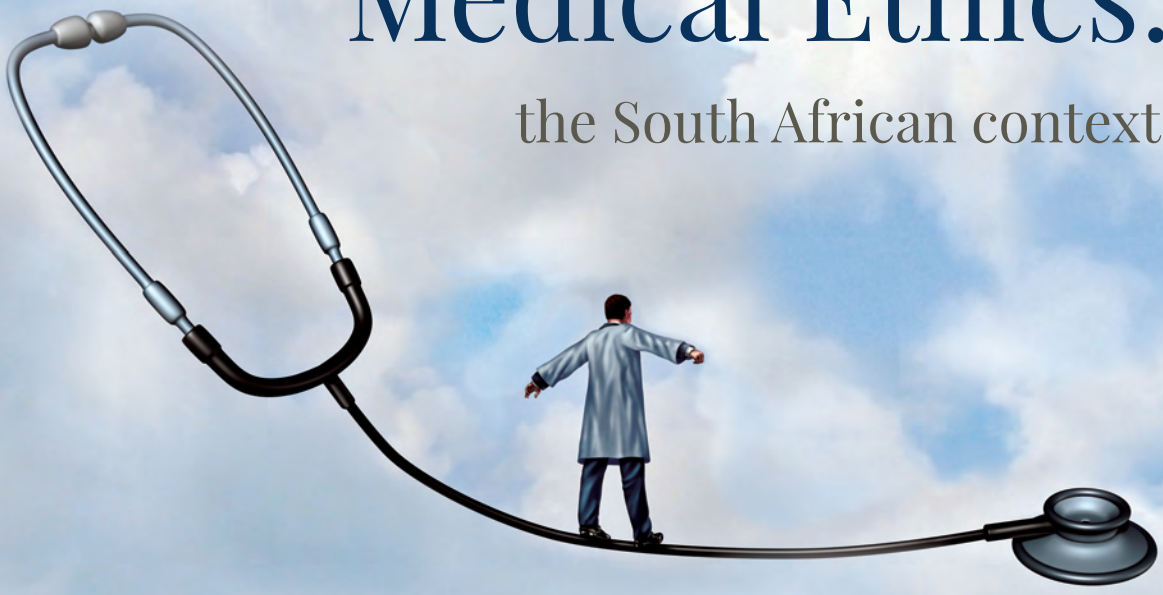

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The South African Legal Response to Organ Trafficking and Transplant Tourism in International Perspective

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Keywords: altruism in organ donations; human trafficking; non-commercialism; organ trade

7.1 INTRODUCTION: A LEGAL FRAMEWORK TESTED

Between 2001 and 2003, a record number of kidney transplantations took place in private hospitals in South Africa (Moosa, 2019:236-238). The dramatic increase over the previous years was the result of an illegal international organ and human trafficking scheme that operated at the time. It resulted in 224 kidney transplantations taking place between June 2001 and November 2003, when the scheme dramatically unravelled (Allain, 2011:117; Ambagtsheer, 2021; *Daily News* report, 2010; Scheper-Hughes, 2011:55; Slabbert & Oosthuizen, 2011:740).

In November 2003, organ broker Meir Sushan called the South African Police Service to report that a thief was about to leave South Africa for Israel with $18 000 that the thief had stolen from him. During the report, Sushan also mentioned a missing kidney. This call set in motion an investigation which uncovered an international network that facilitated illegal kidney transplants in hospitals of the Netcare private hospital group.

Sushan's phone call led to the immediate arrest and questioning of the would-be Israeli donor/seller, who fled from Netcare's St Augustine hospital in Durban

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shortly before his kidney was about to be removed, his wife, and the would-be recipient/buyer of the kidney.[1] The statements of these individuals confirmed their involvement in a scheme to buy and sell a kidney. On the strength of their evidence, the police obtained a search warrant and collected evidence from the hospital, including statements from staff, logs of operations, and details of donors and recipients. The evidence showed that an organ transplantation programme for Israeli recipients was being run in parallel with a national programme and that it involved multiple compatibility tests for Israeli recipients.

An Israeli organ broker, Ilan Perry, was the kingpin and initiator of the international scheme. Sushan, who made the phone call to the police in November 2003, joined the scheme later as a second broker. Through a liaison – nephrologist Jeffrey Kallmeyer, based at St Augustine's Hospital, Durban – Perry arranged for his clients, who were paying Israeli citizens in need of kidney transplantations, and their willing donor/sellers of kidneys, to travel from abroad to undergo nephrectomies and transplantations respectively at hospitals in the Netcare group in return for up-front payment for the operations to the hospital. Netcare was estimated to have profited by more than R22 million from the operations.

Wealthy Israeli citizens who needed kidney transplantations paid up to $120 000 to the organ brokers to procure the kidneys from willing sellers and to arrange for the kidneys to be transplanted to the recipients in Netcare hospitals in South Africa. The brokers employed recruiters who would look for willing kidney sellers, initially in Israel, and later in Romania and Brazil.[2] On finding blood type matches, the brokers would arrange for the intended recipients and the would-be donors to be chaperoned during their travel to South Africa. On arrival, further tests for compatibility were conducted prior to the ultimate nephrectomy and transplantation of every kidney. The network included translators, recruiters of donors/sellers, chaperones, and local brokers, including Netcare employees, who were to ensure smooth functioning of the scheme. The Netcare employees were also responsible for falsifying evidence of family relationships between the recipients and donors of the kidneys.

1 In March 2003, the police received information from a whistle-blower doctor regarding suspected illegal kidney transplants being performed at Netcare's St Augustine's Hospital in Durban. The police set up a surveillance operation which was slow to yield results.

2 At the beginning of the scheme, donors/sellers were recruited from Israel. These participants in the scheme were paid $20 000 for a kidney. In 2002, Perry secured prospective donors/sellers from Brazil and Romania who were willing to accept $8 000 or less for a kidney, thus increasing his profit margin.

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In 2010, after an investigation that took more than seven years to complete, the prosecuting authorities in South African brought charges against Netcare Kwa-Zulu (Pty) Ltd, two of the organ brokers involved, the two transplant coordinators in the employ of the hospital, the nephrologist, four transplant surgeons, three interpreters, and a patient. An attempt to have Perry extradited to South Africa from Germany was unsuccessful. He later agreed to testify against Netcare on the condition that the charges against him were dropped.

The charges against the accused included contravening the Prevention of Organised Crime Act 121 of 1998[3] by acquiring or benefiting from the proceeds of crime, assault with intent to do grievous bodily harm, and fraud. They also faced charges relating to the contravention of the Human Tissue Act 65 of 1983 related to removing the organs of minors, in this case 19-year-old donors/sellers.[4] A further offence related to a contravention of a Ministerial Policy which required the approval of an organ donation between genetically unrelated living persons (Slabbert & Oosthuizen, 2007:307)[5] and the approval for the transplantation of an organ into a non-South African citizen or permanent resident.

In spite of having denied complicity in the scheme for years, Netcare Kwa-Zulu admitted that it played a role in facilitating the illegal transplants. It entered into a plea and sentence agreement[6] with the prosecuting authority and pleaded guilty to 109 charges, which included those listed above, namely the removal of the organs of minors, receipt of payment for the transplantation of those organs in contravention of the Human Tissue Act, the transgression of the policy requiring authorisation from the Minister of Health for the transplantation of an organ of an unrelated living person into another person, and for the contravention of the policy requiring authorisation for the transplantation of an organ into a non-South African citizen. There were another 91 charges relating to receiving the proceeds of unlawful activities as prohibited by the Prevention of Organised Crime Act. As a sanction for the criminal conviction, Netcare agreed to pay a

3 Section 6.

4 Section 19(c)(ii) read with section 34.

5 The policy applied at the time meant that South African hospitals accepted donations from living donors who were related "by blood to the patient seeking a donation, or if the patient's spouse donates an organ. If the source of the donation is a friend or an altruistic acquaintance, an application has to be made to the Department of Health, which will investigate the matter and determine that it is not for financial gain and only then will permission be granted for the operation to be carried out". Magda Slabbert and Hennie Oosthuizen "Establishing a market for human organs in South Africa part 2: shortcomings in legislation and the current system of human procurement" (2007) *Obiter* 304 at 307.

6 In terms of section 105A of the Criminal Procedure Act 51 of 1977.

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fine of R4 million and to forfeit assets worth R3.8 million to the state, being the proceeds of crime.

The charges against some of the individuals who had been arrested in 2004 and 2005 for their involvement in the scheme were resuscitated in November 2010. Kallmeyer and an interpreter concluded plea and sentence agreements with the prosecution in December and November 2010 respectively.[7] The two Netcare transplant coordinators and four transplant surgeons were similarly summoned to appear in court in November 2010. After three postponements, the surgeons and former Netcare employees approached the High Court for a permanent stay of prosecution, which the Durban High Court granted in December 2012.[8]

The criminal conviction of Netcare Kwa-Zulu (Pty) Ltd by the Durban Commercial Crimes Court is the only criminal conviction of its kind against a hospital in the world. Despite this unique feat, the investigation of the operation of the scheme and formulation of appropriate charges against all role-players were hampered by an inadequate legal framework (Allain, 2011:117; Ambagtsheer, 2021). For example, while the Human Tissue Act prohibited the sale of organs,[9] it did not prohibit the purchase of organs, nor did it regulate living donations in any way. At the time, South Africa also did not have any legislation outlawing human trafficking. Investigators and prosecutors were thus constrained in their investigation and prosecution of the case.

Since the prosecution of this matter, the National Health Act 61 of 2003 has replaced the Human Tissue Act. South Africa has also ratified the United Nations Convention Against Transnational Organized Crime and its accompanying protocols, including the protocol which prohibits human trafficking of persons for purposes of organ removal.[10] To give effect to its international law commitments under the protocol prohibiting human trafficking, Parliament enacted the Prevention and Combating of Trafficking in Persons Act 7 of 2013.[11]

7 Kallmeyer had by then fled to Canada but pleaded guilty to 90 charges and was fined R150 000 for his involvement in the scheme. The interpreter, Samuel Ziegler, was sentenced to pay a fine of R50 000 or three months' imprisonment. In addition, a five-year prison sentence was suspended.

8 *Robbs and five others v Deputy Director for Public Prosecutions, KZN* (case number 13510) KwaZulu-Natal High Court, Durban (14 December 2012) unreported judgment on file with author.

9 Section 28 read with section 34.

10 South Africa signed the Convention and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; and Protocol against the Smuggling of Migrants by Land, Sea and Air on 14 December 2000 and ratified these on 20 February 2004.

11 Act 7 of 2013. It came into operation on 18 July 2004.

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In this chapter, I outline the international standard relating to organ trafficking and transplant tourism before setting out the current South African legal framework. While the proverbial book on the Netcare organ trafficking and transplant tourism scandal was closed more than a decade ago, I conclude this chapter by returning to the scandal. With the benefit of the new legal framework, I view the charges and outcomes that those who were involved in the scheme at that time could have faced under the new legal framework. At the same time, I assess the compatibility of the new South African legal framework with the international standard.

7.2 THE INTERNATIONAL LAW FRAMEWORK

7.2.1 Altruism and non-commercialisation as the point of departure: World Health Organization Guiding Principles

Despite the absence of evidence regarding trade in organs at the time, the 1980s saw the adoption of the general principle that the buying and selling of organs is morally and ethically improper (De Jong, 2017:30).[12] This principle was first adopted in the United States of America. After a congressional hearing in 1983 to address the shortage of organs for transplantation, and in firm rejection of a proposal to permit the sale of organs, Congress passed the National Organ Transplant Act of 1984 which criminalises the sale of human organs and sets liability on conviction of a fine of up to $50 000 and/or a sentence of imprisonment of up to five years.[13] This legislation remains in place and affirms the principle that organ donation, whether from deceased or living donors, ought to be motivated by altruism alone.

Following the US example, the World Health Organization (WHO) condemned trade in organs in 1987 (De Jong, 2017:31; WHO, 1987)[14] and adopted Guiding Principles in 1991 which have served as a basis for national legal and ethical frameworks regulating organ transplants, despite being non-binding in nature (Ambagtsheer, 2021; De Jong, 2017:31). These principles were revised in 2010. Guiding Principle 5 confirms the prohibition of trade as a foundational principle.

12 Jessica de Jong "Human trafficking for the purpose of organ removal" (2017) PhD thesis, Utrecht University, p. 30.

13 Title 42 Chapter 6A Subchapter II Part H Section 274e.

14 Fortieth World Health Assembly "Developing guiding principles for human organ transplants" (Geneva, 4-15 May 1987) available at https://www.who.int/transplantation/en/WHA40.13.pdf; De Jong, p. 31.

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It prohibits payment for organs since

> payment for cells, tissues and organs is likely to take unfair advantage of the poorest and most vulnerable groups, undermines altruistic donation and leads to profiteering and human trafficking. Such payment conveys the idea that some persons lack dignity, that they are mere objects to be used by others.

The principle, however, permits the compensation of a donor for reasonable and verifiable expenses.

The WHO Guiding Principles further encourage the maximum development of organ donation from deceased donors and stipulate that living donors should be genetically, legally, or emotionally related to the recipients of their organs.[15] It further emphasises the requirement of consent for removal of tissue or organs from a deceased donor,[16] the independent determination of death of a deceased donor,[17] and advocates for the prohibition of donations from living donors who are minors. Narrow exceptions to this prohibition are to be determined by national law.[18] The WHO Guiding Principles determine that decisions regarding transplantation should be guided by clinical criteria and ethical norms only[19] and that health professionals and insurance should not engage in transplantation of organs or tissue that have been obtained through exploitation, coercion, or payment to the donor or his/her next of kin.[20] Health professionals should further be prohibited from receiving any payment other than compensation for their professional services.[21] The long-term outcomes of transplantation for both donors and recipients must be monitored and measured to ensure quality and safety.[22] The organisation and execution of transplantation services and their clinical results must be transparent, while the anonymity of donors and recipients must be protected.[23]

15 Guiding Principle 3.
16 Guiding Principle 1.
17 Guiding Principle 2.
18 Guiding Principle 4. This also applies in respect of legally incompetent persons.
19 Guiding Principle 9.
20 Guiding Principle 7.
21 Guiding Principle 8.
22 Guiding Principle 10.
23 Guiding Principle 11.

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7.2.2 The prohibition of human trafficking for organ removal: Binding international law

The United Nations Convention Against Transnational Organised Crime came into operation on 29 September 2003. This Convention is supplemented by, among others, the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.[24] This Protocol is referred to as 'the Palermo Protocol'.

The Palermo Protocol recognises trafficking of persons for the purpose of organ removal as a specific form of exploitation that warrants criminalisation. Trafficking in persons is defined in broad terms and requires member states to criminalise trafficking in persons in national legislation. 'Trafficking in persons' means:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or the use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation.[25]

Exploitation is then defined to include the removal of organs. Other forms of exploitation included in the open list of articles 3(a) are "the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery [and] servitude."

De Jong (2017) explains that the definition of trafficking in persons has three elements that must be proven in the event of a victim being an adult. Firstly, the definition requires an act (that which is done) which includes recruitment, transportation, transfer, etc.; secondly, a means (how the act is done) which could be through coercion, fraud, threat, abuse of power, etc.; and thirdly, the purpose of exploitation which in this instance is for the purposes of the removal of an organ (De Jong, 2017:33). Where the victim is a child, it is not necessary to establish a means because the vulnerability that necessarily comes with being a child is acknowledged.

Importantly, the Protocol stipulates that the consent of the victim of trafficking is irrelevant in the determination of whether a crime was committed.[26] Thus,

24 The text of the Protocol can be accessed at https://www.unodc.org/res/human-trafficking/2021the-protocol-tip_html/TIP.pdf

25 Article 3(a) of the Palermo Protocol.

26 Article 3(b).

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where a would-be donor/seller agrees to the removal of his/her organ for payment, he/she is a victim of trafficking and the persons involved in arranging the recruitment, transportation, transfer, harbouring, or receipt of the victim for the purposes of organ removal are guilty of the crime of trafficking in persons, regardless of their ostensible consensus. It is important to note that the focus of the Protocol is on trafficking in persons for various exploitative purposes and in that way, it differs from the WHO Guidelines with their focus on prohibiting commercial trade in organs.

7.2.3 Non-commercialisation and altruism confirmed: The Istanbul Declaration

In 2008, the International Society for Nephrology and the Transplantation Society organised an international meeting in Istanbul, Turkey. That meeting, which was attended by representatives of more than 150 scientific and medical organisations, government officials, social scientists, and ethicists, adopted the Declaration of Istanbul on Organ Trafficking and Transplant Tourism. In 2010, the two societies established a custodian group, the Declaration of Istanbul Custodian Group, to oversee the dissemination of the Declaration to governments and professional organisations (Martin et al., 2019). The Group also oversaw the revision and updating of the Declaration. The 2018 version of the Declaration of Istanbul was released on 1 July 2018.[27]

The South African Renal Society and the Southern African Transplantation Society are two of the 128 societies, organisations, or governments which endorsed the non-binding declaration.[28]

The point of departure of the Istanbul Declaration is that of altruistic donation and non-commercialisation. The Declaration commences with definitions of "organ trafficking", "trafficking in persons for the purpose of organ removal", "travel for transplantation", and "transplant tourism". It defines organ trafficking widely. "Organ trafficking" includes the removal of organs without consent or authorisation from a living or deceased donor, or in exchange for financial gain or a similar advantage to the donor or a third person. The transportation, use and/or transplantation of such organs is included in the definition, as is payment or a request to another to enable such removal or transplantation, the recruitment of donors or recipients, and any attempt or aiding another to perform any of these acts.

27 The text of the Declaration is available at https://www.declarationofistanbul.org/the-declaration

28 See https://www.declarationofistanbul.org/endorsements

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The definition of "trafficking in persons for the purposes of organ removal" as employed by the Declaration aligns with that of the Palermo Protocol and confirms that the consent of the person recruited, transported, or received for purposes of the removal of his/her organ is irrelevant.

"Travel for transplantation" is defined as the movement of persons across jurisdictional borders for purposes of transplantation. This includes movement across state or provincial lines. While "travel for transplantation" is not *per se* prohibited, "transplant tourism" is defined as unethical and involves trafficking in organs, trafficking in persons for purposes of organ removal, or the movement of resources, including organs, the professionals, and centres to provide transplantation to non-resident patients thus undermining the country's ability to provide transplantation services to its own population.

The Declaration advocates for adequate programmes within states to prevent organ failure.[29] The overall health and well-being of both donors and recipients should remain the primary goal of any transplantation programme.[30] It affirms the prohibition and criminalisation of trafficking in human organs or trafficking in persons for purposes of organ removal.[31] Commercial trade in organs and trafficking in persons exploit the vulnerable in society as it "targets the poor as a source of organs and stigmatizes donation". It justifies its opposition to commercialisation as the latter disincentivises altruistic donation and jeopardises the sustainability of donation and transplantation programmes which operate on that basis. The Declaration acknowledges that the costs relating to donations may be prohibitive and that authorities should legally permit recovery of expenses on the principle of financial neutrality, i.e., with no financial gain for either donor or recipient or their families.

The Declaration stipulates that each country should develop a legislative and regulatory framework to govern the organ transplantation from deceased and living donors in line with international standards.[32] Authorities overseeing the implementation of this regulatory framework must be accountable for donation, allocation of organs, and transplantations to ensure standardisation, traceability, transparency, quality, safety, fairness, and public trust.[33] Every resident in a country should have equitable access to donation and transplantation services

29 Principle 1.

30 Principle 2.

31 Principle 3.

32 Principle 5.

33 Principle 6.

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and to organ allocation in their country of residence.[34] Significantly, and to curb transplant tourism, the Declaration sets as a standard that the allocation of organs are guided by clinical and ethical norms within a particular jurisdiction or country.[35] Similarly, governments and health care professionals are to play active roles in discouraging and preventing transplant tourism.[36]

7.2.4 International standards: Key points

In the absence of a comprehensive international convention, setting a binding standard to be adhered to by member states, the standards gleaned from the non-binding and binding international law documents provide guidance to states in formulating their national regulatory frameworks.

The Declaration of Istanbul focuses attention on national or jurisdictional self-sufficiency in respect of organ donation and transplantation to discourage transplant tourism. It shares with the WHO Guidelines and the Palermo Protocol the commitment to altruism in organ donation, the principle of non-commercialism, and the prohibition of human trafficking, all bolstered by criminal sanctions. The international standards further highlight the importance of national regulatory frameworks which require consent to donation, transparency in the regulation of donation, organ allocation, and transplantation and application of clinical and ethical norms in fairness to all citizens. Medical professionals carry a specific obligation to uphold the commitment to non-commercialism in organ transplantation.

While the congruence between the international law documents outlined above is attractive in its simplicity, it does not have universal support. Ambagtsheer and Weimar (2012:571) warn that international laws' identical treatment of commercialism (buying and selling of organs) and trafficking (coercion and exploitation of donors) fail to take account of the existing challenges of enforcement. It also fails to acknowledge that prohibition of trade necessarily creates a black market for organs which in turn encourages trafficking in persons. To curb exploitation, these authors suggest that the supply of organs must be increased. To achieve this, they recommend that living donations should be encouraged as a matter of principle, and that incentives to living donors should be permitted. Neither the WHO Guiding Principles nor the Declaration of Istanbul encourage living donations, leaving no guidance to states but the accepted truism that living donations encourage trade and exploitation.

34 Principle 7.

35 Principle 8.

36 Principles 9 and 10.

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Against the background of the international framework and its contestation referred to above, I turn to outline the provisions of the South African law as it relates to organ trafficking and transplant tourism.

7.3 THE SOUTH AFRICAN LEGAL FRAMEWORK

7.3.1 The National Health Act and its regulation of organ transplanting

The National Health Act (hereinafter referred to as NHA) was enacted in 2003 to provide for a structured, uniform health system which takes account of the socio-economic disparities in South African society and the inequity in the provision of health services, the legacy of apartheid, and colonialism.[37]

It deals with tissue donation and use, including transplantation, from living and deceased donors, together with the donation and use of blood and gametes in a single chapter. Chapter 8 of the NHA brings these different aspects together but provides for differentiated regulations to deal with practical matters in relation to some of these. So, for example, specific regulations to regulate blood and blood products,[38] tissue banks,[39] stem cell banks,[40] and artificial fertilisation of people[41] were published separately. However, as far as organ donation and transplantation is concerned, the Regulations: General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes, relating to the chapter of the NHA as a whole, provide the practical regulatory details.[42]

The Act defines "tissue" to include "an organ".[43] "An organ", in turn, is defined as a part of the human body "adapted by its structure to perform any particular vital function", including the eye.[44] In what follows, I refer to 'organ' where the Act uses the phrase "tissue, blood or gametes".

37 Preamble.

38 *Government Gazette*. Regulation Gazette No. 35099 of 2 March 2012. Vol. 561 No. 9699, Government Notice R179 under the NHA.

39 Ibid. Government Notice R182.

40 Ibid. Government Notice R183.

41 Ibid. Government Notice R175.

42 Ibid. Government Notice R180.

43 Section 1 defines tissue as "human tissue, and includes flesh, bone, a gland, an organ, skin, bone marrow or body fluid, but excludes blood or a gamete".

44 Section 1: organ is defined as "any part of the human body adapted by its structure to perform any particular vital function, including the eye and its accessories, but does not include the skin and appendages, flesh, bone, bone marrow, body fluid, blood or a gamete".

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Section 55 of the NHA prohibits the removal of an organ from the body of a living person without the person's written consent and in accordance with prescribed conditions. Section 56 stipulates that the removal of an organ may only take place for medical (or dental) purposes as prescribed, which may include transplantation. The Minister is empowered to authorise the removal of an organ and may impose necessary conditions in respect of such removal. Section 56(2) further prohibits the removal of an organ from a person who is mentally ill as defined in the Mental Health Care Act 17 of 2002.

Similarly, it prohibits the removal of an organ which is not replaceable by natural processes or a gamete from a minor. Regulation 2(1)(a) of the General Control of Human Bodies regulations provides that a person older than 18 must consent in writing to the removal of an organ for purposes of transplantation into the body of another person for the production of a therapeutic, diagnostic, or prophylactic substance, as designated permitted purposes by regulation 3(1). A donation made for any other than the permitted purposes is of no force and effect.[45] Where the donor is under the age of 18, the written consent of his/her parents is required.[46] The requirement of written parental consent may seem to contradict section 129(3) of the Children's Act 38 of 2005 (Slabbert, 2018:75).

This section of the Children's Act provides that a child over the age of 12 may consent to surgery if he/she is of sufficient maturity and has the mental capacity to appreciate the benefits and risks and consequences of the operation, provided that he/she is assisted by his/her parent or guardian. A cursory reading of the health regulation may lead one to conclude that the regulation denies the child's right to consent to surgery. However, section 129(3) of the Children's Act requires that the child be assisted by parent or guardian. Thus, a harmonious reading of the consent requirements means that a minor donor above the age of 12 with sufficient maturity may consent to the removal of an organ for purposes of transplantation but that the assistance of the parents or guardian in such an instance must take the form of written consent.[47]

45 Regulation 7 of the Regulations: General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes.

46 Ibid. Regulation 2(1)(b).

47 CJ Davel and A Skelton *Commentary on the Children's Act* (2007) Revision Service 13-2013 at 63: "The phrase 'duly assisted' seems to presuppose concurring parental acquiescence or agreement, if not actual 'consent' in the legal sense (i.e., a parental signature on the relevant authorisation form, the place of which can now be taken by the signature of the child)."

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The removal of organs from living donors for purposes of transplantation may only be carried out in hospital or in an authorised institution.[48] The removal must be authorised in writing by the medical practitioner in charge of clinical services at the hospital or institution, or the medical practitioner designated by that person. Where a hospital or institution does not have a practitioner in charge of clinical services, the removal must be authorised by a medical practitioner authorised to do so by the person in charge of the hospital.[49] The medical practitioner who authorises the removal of an organ for purposes of transplantation may not participate in the transplant of that organ into another human being.[50] Only registered medical practitioners may remove an organ from a living person.[51]

While not included as a legal requirement in the Act or regulations, living donations from an unrelated donor must be approved by the Ministerial Advisory Committee on Organ Transplantation (Moosa, 2019:238).

Regulation 4 lists the institutions that may receive donations from living donors. A donor may donate an organ to a hospital, a university, an authorised institution, a medical practitioner or dentist or a tissue bank or person who requires therapy in which the organ can be used.

Organ donations of deceased donors may be made by the donor in his/her will or in a document or by an oral statement in the presence of two witnesses.[52] The donor may donate his/her body or specified tissue such as an organ to be used after his/her death as provided for in the NHA, and in the case of an organ for transplantation into another person. Regulation 14(3) permits a medical practitioner to act upon the will or a document in which the organ donation was made on the face of it as if valid.

The death of a deceased donor must be established by at least two medical practitioners. One of these practitioners must have been in practice for at least five years at the time of the certification of the person's death. Neither of the certifying practitioners may be involved in the transplantation of organs removed from the deceased into a living person.[53] Death is defined in the NHA as brain death.[54]

48 Section 58(1)(a).
49 Section 58(1)(b).
50 Section 58(2).
51 Section 59(1).
52 Section 62(1).
53 Regulation 9.
54 Section 1.

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A recipient of a post-mortem donation of a specific organ has 24 hours after the death of the donor to remove the organ or to cause it to be removed. Should the recipient fail to have the organ removed within 24 hours, the body may be claimed for burial or cremation by the family of the deceased.[55] Authority shall not be granted to remove an organ unless the medical practitioner is satisfied that the organ was donated.[56]

A living donor may revoke his/her consent to the transplantation of his/her organ prior to the transplantation thereof. A will or document giving consent for the donation of a body or organ may be revoked by intentional destruction of the will or document.[57]

Section 60 of the NHA regulates payment of costs in connection to bring an organ to a hospital or authorised institution. It restricts this to compensations for costs reasonably incurred. Section 60(3) further permits remuneration of health care workers for professional services rendered.

Section 61(3) requires the written permission of the Minister of Health for the transplantation of an organ into a person who is not a South African citizen or permanent resident. A person who transplants an organ to a non-South African citizen or resident without the requisite permission, or who charges a fee for the organ is guilty of an offence. The penalty on conviction is a fine or imprisonment of up to five years, or both.

The sale of or trade in organs is explicitly criminalised by section 60(4)(a). Conviction on such a charge carries a penalty of a fine or a sentence of imprisonment of up to five years or both. Regulation 25 of the General Control Regulations under chapter 8 of the NHA similarly creates a criminal offence in that it provides that any person who, unless as permitted by the Act and these regulations or in terms of any other law acquires, uses, or supplies an organ of a living or deceased person in any other manner or for any other purpose than permitted by the Act and the regulations, commits an offence. Non-compliance with a demand or requirement of a health officer in relation to provisions of the NHA and regulations similarly constitutes an offence, as does hindering a person in the performance of his/her duties in terms of the Act and regulations. Conviction on these charges may result in a fine and/or imprisonment of up to 10 years.

55 Regulation 8.

56 Regulation 14(1).

57 Section 65.

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Regulation 16 provides for recordkeeping by the medical practitioner who removed an organ from a deceased donor, including the nature of the donation and the details of the donor and the receiving authorised institution.

Chapter 8 of the NHA and its regulations set out clear consent requirements for living and deceased organ donation. In respect of the latter, it gives families the last say. This may limit the number of donations from deceased donors, as families may for religious, cultural, or other reasons refuse to disclose consent communicated to them by the deceased or refuse their permission for donation. To ensure optimum donations from deceased donors, a written donation signed by the donor and witnesses is thus advised (Etheredge, 2019).

The NHA casts its criminal net of prohibitions far wider than the Human Tissue Act. Buying and selling of organs, and the use of organs other than permitted in terms of NHA and its regulations are criminalised and those convicted face harsh penalties.

It is a concern that the regulatory framework for organ donation and transplantation is included in a general framework, rather than being dealt with separately and with greater specificity tailored particularly to the requirements of organ donation and transplantation. However, this seems to be by choice. A draft focused policy framework for organ transplantation was published in 2002 for comment, and a related focused draft set of regulations were published in 2008 for comment, but these focused frameworks fell by the wayside when the Minister published the General Control Regulations in 2012 (Slabbert, 2018:72-73).

7.3.2 The Prevention and Combating of Trafficking in Persons Act

As pointed out above, South Africa signed and ratified the United Nations Convention Against Transnational Organised Crime and its supplementing Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.[58] To give effect to the Protocol, the legislature passed the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (hereinafter referred to as PCTPA). It came into operation on 9 August 2015.

58 South Africa signed and ratified the Protocol against the Smuggling of Migrants by Land, Sea and Air on the same dates. The third protocol to the Convention, the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition was signed on 14 October 2002 and ratified on 20 February 2004.

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Section 4 of the PCPTA creates the offence of trafficking in persons in the following terms:

> *Trafficking in persons*
>
> (1) Any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases, or receives another person within or across the borders of the Republic, by means of –
>
> (a) a threat of harm;
>
> (b) the threat or use of force or other forms of coercion;
>
> (c) the abuse of vulnerability;
>
> (d) fraud;
>
> (e) deception;
>
> (f) abduction;
>
> (g) kidnapping;
>
> (h) the abuse of power;
>
> (i) the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or
>
> (j) the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage,
>
> aimed at either the person or an immediate family member of that person or any other person in a close relationship to that person, for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons.

"Exploitation", in turn, is defined to include "the removal of body parts".[59] The "removal of body parts" is explained to "mean the removal or trade in any body part in contravention of any law". It thus includes the removal of an organ for purposes of transplantation.

It is not a defence to a charge of trafficking that the victim has consented to the intended exploitation or that the person who has authority of the child who was trafficked has consented to the intended exploitation.[60]

59 The full definition reads: "exploitation includes, but is not limited to –
(a) all forms of slavery and practices similar to slavery;
(b) sexual exploitation;
(c) servitude;
(d) forced labour;
(e) child labour as defined in section 1 of the Children's Act;
(f) the removal of body parts;
(g) the impregnation of a female person against her will for the purpose of selling her child when the child is born."

60 Section 11(1) of the PCPTA.

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Section 4(2) of the PCPTA prohibits the adoption of a child, legally or illegally, and forced marriage of a person for purposes of exploitation and criminalises it. The offences created by section 4 carry harsh penalties. In addition to attracting a discretionary minimum sentence of imprisonment as provided for in section 51 of the Criminal Law Amendment Act 105 of 1997, a person convicted of trafficking in persons is liable on conviction to the payment of a fine of up to R100 million or imprisonment, including life imprisonment or both.[61] Conviction of the offence of adopting of a child or the forced marrying of person for purposes of exploitation may result in a fine of up to R100 million, imprisonment, including life imprisonment, or both.

The PCPTA also creates offences related to trafficking in persons by criminalising possession, destruction, confiscation, and concealment of or tampering with the identification, passport or travel documents of a victim.[62] A conviction of this offence carries a penalty of up to 15 years imprisonment without the option of a fine.[63] A person who intentionally benefits financially or otherwise from the services of a victim of trafficking is guilty of an offence and liable to a fine or a sentence of imprisonment of up to 15 years, or both.[64] The facilitation of trafficking by intentionally leasing premises enabling trafficking in persons and printing or advertising information to facilitate or promote trafficking and financing of trafficking are similarly criminalised.[65] Conviction on facilitation of person trafficking carries the penalty of a fine or imprisonment of up to 10 years, or both.[66] Electronic communications service providers are obliged to take reasonable steps to prevent the use of their services for advertisement or promotion of trafficking in persons. When such a service provider becomes aware of any communication aimed at the promotion of trafficking in persons, it must report such use to the police service, preserve any evidence it may have regarding the promotion of trafficking in persons, and prevent continued access to such information by its customers. A service provider's failure to comply with the provisions amounts to an offence,[67] and a service provider so convicted is liable to a sentence of imprisonment of up to 5 years or a fine, or both.[68]

61 Section 13(1)(a) and (b) of the PCPTA.

62 Section 6.

63 Section 13(1).

64 Section 7 read with section 13(1)(c).

65 Section 8(1).

66 Section 13(1)(d).

67 Section 8(3).

68 Section 13(1)(e).

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The PCPTA prohibits human trafficking in wide terms. It criminalises trafficking of persons for the purposes of removing body parts which go beyond the prohibition of the Palermo Protocol to include the use of body parts in African traditional medicine or *muti* (see Labuschagne, 2004:19; Mswela, 2017:114).

7.3.3 Revisiting the Netcare scandal: An improved legal response compliant with international standard?

With the benefit of the current legal framework, prosecutors in the Netcare kidney trafficking matter would have had clarity on several issues that presented as challenges in their investigation and prosecution of the matter more than a decade ago. These include the explicit prohibition and criminalisation of trade in organs, the explicit criminalisation of transplanting an organ into non-citizens or non-permanent residents, and the prohibition and criminalisation of trafficking in persons and related activities which strike widely to include all the role-players in an organ trafficking and transplant tourism network. As such, the regulatory framework relevant to organ trafficking and transplant tourism has been adapted and provides legal certainty to meet the wide criminal prohibition required by the binding and non-binding international law.

7.4 CONCLUSION

The WHO Guidelines encourage states to maximise the donation of organs from deceased donors while the Declaration of Istanbul advocates for self-sustainability within states in respect of donations and transplantation to curb organ trade and transplant tourism respectively. In doing so, these international instruments address the need to increase the source of organs for transplantation in line with the Declaration's principled commitment to altruism and non-commercialism. While the South African legal framework reflects its commitment to the principles of altruism and non-commercialism in its clear criminal prohibition of trade and trafficking in organs, it lacks commitment to the principles of the Declaration in its encouragement for donations, particularly for donations from deceased donors.

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