



You have downloaded a document from
RE-BUŚ
repository of the University of Silesia in Katowice

Title: Some Criminal Law Aspects of Commercialization of the Human Body in Transplantation and Surrogacy

Author: Olga Sitarz

Citation style: Sitarz Olga. (2020). Some Criminal Law Aspects of Commercialization of the Human Body in Transplantation and Surrogacy. "International Journal of Forensic Sciences" (Vol.5 iss.1 (2020), art. no 000181), doi 10.23880/ijfsc-16000181



Uznanie autorstwa - Licencja ta pozwala na kopiowanie, zmienianie, rozprowadzanie, przedstawianie i wykonywanie utworu jedynie pod warunkiem oznaczenia autorstwa.



UNIwersYTET ŚLĄSKI
W KATOWICACH



Biblioteka
Uniwersytetu Śląskiego



Ministerstwo Nauki
i Szkolnictwa Wyższego



Some Criminal Law Aspects of Commercialization of the Human Body in Transplantation and Surrogacy

Olga Sitarz*

University of Silesia in Katowice, Poland

***Corresponding author:** Olga Sitarz, University of Silesia in Katowice, Poland, Email: olga.sitarz@us.edu.pl

Letter to Editor

Volume 5 Issue 1

Received Date: April 13, 2020

Published Date: May 01, 2020

DOI: 10.23880/ijfsc-16000181

Abstract

Bioethical considerations often prompt scientists to question whether medical ethics (deontology) is to follow the development of technology or vice versa - the technique should follow ethics. This problem also applies to transplantation and surrogacy. One of the biggest doubts concerns the paid nature of transferring the organ for transplantation or the paid birth of a child to another woman after artificial insemination. The vast majority of countries in the world do not allow this practice, often criminalizing such behavior. The publication presents Polish solutions in this area and their evaluation.

Keywords: Transplantation; Organ trade; Surrogacy; Criminalization of commercialization of trade in organs

Introduction

As noted by Polish lawyer and ethicist M. Safjan, "one of the distinctive consequences of the development of modern biology and medicine is the creation of a state in which the relevance and unambiguity of some paradigms fundamental to law that not quite recently formed a firm irrefutable basis for many legal constructions are called into question" [1]. Bioethical considerations often give rise to questions whether medical ethics (deontology) should follow the development of technology or, on the contrary, technology is to follow ethics [2]. It seems to be a wrongly propounded question given that its underlying idea presupposes the incompatibility between ethics and technology. There is no doubt that health technology must develop, but so should ethical thought. We sometimes abandon certain ethical assumptions (e.g. Hippocrates did not allow operations that are at present absolutely indisputable) not because they are at odds with technology (operations have become possible), but because those assumptions proved to be wrong. Ethics is a dynamically developing field and requires that account be taken of the progress of science and social changes. However, in consequence of those changes, societies need to develop guarantees regarding compliance with the basic principles of

ethics [3]. What societies perceive as right varies according to the different cultures, religions or beliefs. By way of example, the literature review shows that the more utilitarian the attitude towards the human body is, the smaller the number of uncertainties [4].

W. Rowiński, who specialized in organ transplantation for years, noted that the legal provisions regulating the principles of medical procedures (including transplantation) nearly always lag behind the progress of medicine. In his opinion, the result is that the introduction of new methods of diagnosis and treatment always takes place without a legal or regulatory basis and is often even on the borderline of unlawful conduct. The author therefore raised the question whether it is possible to prepare legal provisions and regulations as if "in advance," or introduce provisions that he calls "transitional" [5]. This question is to be answered as follows: although the law always applies to future states, the law governing biomedical issues will always be merely a response to another step on the road to progress [6].

The main purpose of the law regulating transplantation in the Polish legal system (Act on the Recovery, Storage and Transplantation of Cells, Tissues and Organs, Journal

of Laws of 2019, pos. 1405, hereinafter referred to as the Transplantation Act) was to define the rules for the recovery, storage and transplantation of cells, including bone-marrow hematopoietic cells, peripheral blood and umbilical cord blood, as well as tissues and organs derived from living donors or cadavers, as well as testing, processing, storage and distribution of human cells and tissues. That law is a response to the concerns and dilemmas related to transplantation in Poland. By contrast, the *in vitro* fertilization is governed at the level of administrative regulation by the provisions of the Act on Infertility Treatment (hereinafter referred to as the In Vitro Act) of 2015 (Act of 25 June 2015 on Infertility Treatment, Journal of Laws of 2020, pos. 442). That Act sets out: 1) the principles for the protection of the embryo and reproductive cells in relation to their use in biology and medicine in connection with infertility treatment; 2) methods of infertility treatment, including the use of medically assisted procreation; 3) the tasks of public authorities in the field of protection and promotion of reproductive health; 4) the conditions for the donation, recovery, processing, testing, storage and distribution of reproductive cells and embryos intended for use in the procedure of medically assisted procreation; 5) the rules of functioning of medically assisted procreation centers and banks of reproductive cells and embryos.

It is not the role of the author of this article to examine the particular provisions of criminal law relating to the issue of transplantation [7, 8] or surrogacy. At this point I aim only to present the position of the Polish criminal legislator regarding selected ethical and moral dilemmas directly related to the commercialization of the human body for the purposes of the two procedures indicated above.

It seems appropriate to start by emphasizing the subsidiary nature of criminal law in general, and thus of particular criminal provisions on transplantation and surrogacy. The main burden of governing the matters concerning transplantation and surrogacy rests on the provisions of an administrative nature, including the Act on the Recovery, Storage and Transplantation of Cells, Tissues and Organs, as well as the Act on Infertility Treatment. In short, it is only a blatant violation of certain rules that should and does give rise to criminal liability.

It is also important to recall that statutory law, and all the more so criminal law, should leave no room for doubt. This implies that every decision of the legislator is or should be unambiguous and precise. Moreover, even “the absence of a decision” (understood as the absence of a provision) is a decision in criminal law. The lack of a given provision (commonly referred to as “crime”) means that a given act is not punishable. It should therefore be examined how criminal law responds to the aforementioned problems; in

other words, what behavior the legislator deems to be so socially harmful as to require a criminal law response.

The prohibition on commercialization related to transplantation is regulated in the criminal provisions of the Transplantation Act. It is worth noting that the criminalization of activities related to paid transplantation has a somewhat complicated and specific history. It is connected with the shifting views on the social harmfulness of prohibited acts, which in itself arouses some controversy and constitutes a sort of *signum*. There are also doubts as to the subject-matter of protection of some typifications, as well as the scope of criminalization. I have examined it extensively elsewhere [7]. It should only be pointed out here that, pursuant to Art. 44 sect. 1 of the Transplantation Act, it is a prohibited act to acquire or dispose of other person’s cells, tissues or organs in order to achieve material or personal gain, act as an intermediary in their acquisition or disposal, or take part in transplanting or making available cells, tissues or organs coming from living donors or from cadavers obtained contrary to the provisions of the Act. The provision of Art. 43 of that Act strengthens the effectiveness of the above regulation by criminalizing the dissemination of advertisements of paid acquisition, disposal or of intermediation in paid acquisition or disposal of a cell, tissue or organ for transplantation. The following four provisions of the aforementioned Act (Art. 45-46b) further strengthen the prohibition on commercialization by ensuring a high level of professionalism during transplantation procedures. The Polish criminal legislator thus confirmed almost in its entirety the view expressed by ethicists who objected to the paid disposal and acceptance of organs for the purposes of transplantation.

Out of many interpretative issues related to the above regulations, the object of this study makes it necessary to select only the issue of the subject-matter of protection laid down in the provisions criminalizing paid donation of cells, tissues and organs. In essence, this study aims to establish what value underlies the introduction of criminal provisions (the rationale behind the criminal law regulations), which tends to be defined in various ways in the case of the prohibition on commercialization of transplantation. Namely, Duda J uses a general wording such as “violation of public order” with respect to prohibited acts related to transplantation” [9]. Referring to German literature on the subject, Guzik-Makaruk EM points to the individual’s dignity as a primary legal interest to be protected, indicating further interests such as a sense of piety, respect for human cadavers, motivational freedom against unscrupulous activities of organ traffickers, integrity of transplantation medicine, bodily integrity of the donor and protection of his autonomy against “self-corruption,” as well as the health of organ donors and recipients [10]. The researcher strongly

emphasizes that the inherent and inalienable human dignity clearly runs counter to the possibility of treating a human being as a living or dead “spare parts warehouse” for others. In the opinion of Guzik-Makaruk EM, the integrity of transplantation medicine is based on the fact that all activities in the field of organ, tissue and cell transplantation are undertaken within a legally sanctioned framework, using the available instruments, and the existing system should not be interfered with by means of illegal actions which aim at improving the situation of the persons awaiting an organ transplant at the expense of offerors oftentimes compelled by financial circumstances [10]. Moreover, W. Radecki indicates that the criminalized behavior may adversely affect the individual’s health and liberty and undermine the principles of public morality which prohibit the collection of remuneration for other people’s cells, tissues or organs [11].

With respect to the above views, it should first be noted that citing “the public order” as the subject-matter of protection is utterly pointless given that every crime ultimately undermines that order. In my opinion, human liberty is not the underlying rationale of the provision of Art. 43 of the Transplantation Act. On the contrary, that provision restricts individual liberty as regards the right to self-determination. Bearing in mind that the Act allows, under defined conditions, the possibility of transplanting other person’s cells, tissues and organs, the view of the protection of cells, tissues and organs as such should consequently be considered incorrect. For the same reasons, I find it difficult to agree with the view expressed by E. M. Guzik-Makaruk that human dignity does not allow for treating a human being as a “spare parts warehouse” for others. It may naturally be expressed in other terms, but contrary to all appearances, our bodies became such warehouses quite a long time ago and the applicable legal regulations only serve to lay down the rules for making use of such parts. On the whole, it should be clearly stated that the subject-matter of protection is the non-commercial trade in cells, tissues and organs.

Moreover, the literature review shows that there are also critical views referring to the fact that the following behavior is excluded from the scope of criminal liability: 1) disposal of one’s own organs [8]; 2) intermediation in trade in organs without achieving material gain; 3) acquisition of organs without achieving material gain (e.g. for saving human life or health) [12,10].

The overall assessment of remuneration for activities related to transplantation and legalization of organ trafficking is by no means uniform in Poland or in the world [13]. E. M. Guzik-Makaruk perceives the postulate of liberalization of the organ market in response to the lack of necessary transplants as “a bizarre solution,” indicating that such a view is after all not isolated [10]. The need to maintain a prohibition on

trade in human organs is recognized by, among others, G. M. Danovitch and F. L. Delmonico who argue that the “regulated” organ market constitutes a risk to both donors and recipients and the argument of free will is fallacious [14]. W. Rowiński takes a cautious approach to paid donation (as opposed to trade) claiming that “the broadening of the circle of living donors in the world will inevitably accompany or will be accompanied by the introduction of specific compensations, and finally fees.” [5] J. Hartman takes a similar line [15]. Meanwhile, A. P. Monaco proposes a system of rewards for donating an organ for transplantation in order to avoid a classic commercial transaction (including bargaining for a lower price) [16]. Another proposed solution is to allow the conclusion of contracts for the sale of an organ in the event of death, whereby the donor receives remuneration during his lifetime while the organ is to be recovered from him only after his death [17]. Numerous authors emphasize the need to refrain from imposing criminal sanctions on donors selling their own organs who should not be seen as perpetrators of a criminal act, but rather as victims [18]. The first attempt to legalize organ sales was made in India. The system operated from the mid-1980s to 1995. It drew heavy criticism for its lack of effective instruments that would protect donors against exploitation and violation of their rights. Organ sellers typically lived in severe poverty, were poorly educated, and the sale of organs did not lead to a significant improvement in their living conditions. Primarily on these grounds, in 1995, the Indian Parliament passed a law which prohibits making payments to donors for their organs. A legal organ selling system currently exists in Iran, although it is a heavily regulated and limited market. Transactions are effected through the involvement of non-profit organizations specifically set up for that purpose which operate under state control. The kidney seller receives compensation financed from public funds of approximately USD 1,200, free health care for a year from the surgery, and remuneration ranging between USD 2,300 and 4,500. The system is evaluated as fairly effective given that the need to keep a waiting list for a kidney transplant has almost disappeared. Compensation for kidney donors is also provided by Saudi Arabian legislation [19].

Paid surrogacy clearly raises more doubts. Surrogacy occurs where one or more people – typically an infertile married couple – enter into an agreement with a woman agreeing to fulfill the role of a surrogate mother. The surrogate is to undergo the process of fertilization, pregnancy and giving birth to a child who is then handed over to the “target” parents immediately after birth [20]. The Encyclopedia of Bioethics says that contract pregnancy, often also called *surrogate motherhood*, consists of a complex set of practices in which women employ their distinctive reproductive powers to give birth to children on the understanding that others will take on the responsibilities and prerogatives involved in the rearing

of the children [21]. The definition of surrogate mother was proposed already in 1989 by *Ad Hoc Committee of Experts on Bioethics* [CAHBI]). From the point of view of the fertilization process, full and partial surrogacy can be distinguished. The first occurs in a situation where the surrogate mother is fertilized using embryos obtained *in vitro*, using an egg that does not come from a surrogate mother (so-called gestational surrogacy). The second type of surrogacy involves the use of the surrogate mother's egg in the fertilization process. At the same time, fertilization can occur through insemination [22] or the use of *in vitro* methods.

In both cases, the surrogate mother will be a biological mother (the person who gave birth to the child), but only the second case involves also genetic motherhood (egg donation). In view of the progress of reproductive medicine, the need to separate these two terms is rightly emphasized [23]. Moreover, surrogacy may also imply motherhood in the social (upbringing of a child) and legal (woman with parental rights) terms [24]. It is theoretically possible to separate all the above areas. The essential feature inherent in surrogacy is that the surrogate mother undertakes to give birth to a child without the intention of raising him/her or assuming parental rights to the child [25].

Previous studies have also distinguished commercial surrogacy and altruistic (non-commercial, uncompensated) surrogacy. This distinction is made on the basis of the criterion of material benefit obtained by the surrogate mother for the performance of obligations under the surrogacy agreement. In the first case, the surrogate mother receives the agreed remuneration, whereas in the second case, she receives only reimbursement of expenses incurred in connection with the pregnancy [25] (e.g. costs of gynecological consultations, prenatal examinations, etc.). This distinction is highly important as regards the legal admissibility of surrogacy. As M. Mikluszek points out, three types of legal systems can in general be distinguished in the case of surrogacy. The author distinguishes countries where surrogacy is not allowed (e.g. Germany, Italy, Spain), countries where only non-commercial surrogacy is allowed (England, Canada excluding the province of Quebec, Republic of South Africa), and finally countries which allow for both non-commercial and commercial surrogacy (Israel, Russia) [25].

The literature on the subject of English-speaking countries specifies that surrogacy is one of the most controversial procedures associated with assisted reproduction [26]. This is because the phenomenon under analysis breaks the reproduction pattern generally accepted in society and deeply rooted in human consciousness. Currently the spatial, individual and temporal separation of the individual stages of the reproductive process is possible.

One of the main objections raised against surrogacy is that the procedure violates human dignity [27] in connection with the objectification and commercialization of the human being. Feminists criticize surrogate motherhood for the objectification of women – women are treated as living incubators [28]. It is also pointed out that the awareness of the obligation to hand over the child accompanying the surrogate mother during pregnancy may negatively affect the mental and emotional sphere of her life. Another objection made in the legal writings against the phenomenon under discussion is the assumption of the devaluation of the institution of motherhood. This in turn aggravates gender inequality and reinforces paternalistic stereotypes according to which women are being reduced to the role of child-bearing for men seeking to continue their own family line [27]. One of the views on the regulation of surrogate motherhood is that it should be deemed unlawful and such procedures and acting as a paid intermediary in making surrogacy arrangements be prohibited. It is argued in support for that claim that surrogacy calls into question the existing concept of motherhood, undermines parenthood and deprives procreation of its ethical dimension of responsibility. It is also pointed out that it is in the very interest of the State that the civil status of the citizen should correspond to his true, natural origin. Awareness of the true biological bond is a good reason for the full emotional bond of parents with the child and for proper performance of parental responsibilities. The demand of a single woman or a cohabiting couple for the use of any method of non-natural insemination is evaluated negatively. In the first case, it is argued that the child is deprived of a full family (i.e. father and mother), whereas as regards cohabitants, the durability of their relationship is put into question and the issue of the protection of the child's interests in the event of its breakdown is then of primary concern [25]. The Polish legal literature on the subject recommends a total prohibition on surrogacy [29]. A good illustration of the complexity and dilemmas related to the commercial form of surrogacy is to be found in the case of Baby M. The surrogate mother, Ms. M. B. Whitehead, entered into a contract with a married couple, the Sterns, under which she undertook to give birth to a child conceived as a result of fertilization of her ovum with Mr. Stern's semen and subsequently relinquish her parental rights to the born child in favor of the Sterns for USD 10,000. Ultimately Ms. Whitehead refused to give up the child and accept the agreed amount. In a civil case, the Supreme Court declared the surrogacy contract invalid and held that such a contract constitutes either a sale of a child or a sale of rights to a child, and in both cases it runs contrary to applicable law and public policy regarding adoption [30]. At the same time, the Supreme Court in Ohio, in the *Belsito v. Clark* case, ruled that persons who provided genetic material (ordering party) should be considered legal and "natural" parents of a child born to a surrogate mother [31].

The admissibility of surrogate motherhood only in the unpaid form was also provided – by way of exception – by the draft recommendation of the Council of Europe on human artificial procreation prepared in 1989 by CAHBI [32].

It must be acknowledged, however, that some form of surrogate motherhood was already known in antiquity and is mentioned twice in the Book of Genesis – “Now Sarai, Abram’s wife, bore him no children. She had an Egyptian slave-girl whose name was Hagar, and Sarai said to Abram: «You see that the LORD has prevented me from bearing children; go in to see my slave-girl; it may be that I shall obtain children by her.» And Abram listened to the voice of Sarai. So, after Abram had lived ten years in the land of Canaan, Sarai, Abram’s wife, took Hagar the Egyptian, her slave-girl, and gave her to her husband Abram as a wife. He went in to Hagar and she conceived” [33]. Moreover, according to the Old Testament, God did not condemn such behavior, and conceiving a child was to be a sign of heeding the pleas (Genesis 30, 6).

The Helsinki Foundation for Human Rights presented in its opinion the legal situation concerning surrogacy in Poland and the latest case-law of administrative courts in that regard. Based on that opinion, surrogacy is not expressly prohibited in Poland, however, pursuant to the Family and Guardianship Code, the mother of the child is the woman who gave birth to him/her. Moreover, surrogacy agreements are considered to be contrary to the basic principles of the legal order in Poland, and thus invalid by law [34]. At the same time, in its several judgments issued in 2018, the Supreme Administrative Court took the view that the refusal to transcribe the birth certificate of a child born to a surrogate mother is inadmissible on the grounds that it violates the rights of the child guaranteed in the Constitution and international law, including the right to a nationality and right to obtain identity documents.

Up until a few months ago, Polish criminal law did not contain any provision directly referring to the commercialization of surrogacy. The penal provisions of the *in vitro* Act cited above (Art. 76-89) refer to reproductive cells and embryos. The analysis conducted by P. Witczak-Bruś allowed her to advance the thesis that the crime of human trafficking, as set out in Art. 189a of the Polish Criminal Code, excludes the concept that surrogate motherhood is a punishable form of trafficking in a woman who gives birth to a child for consideration, nor is it a punishable form of trafficking in the child whose birth the surrogacy agreement relates to. As the author rightly points out, the Polish criminal law provisions on slavery and prostitution also do not cover surrogacy. Expressing the belief that “the financial exploitation of the reproductive capabilities of the female body is clear evidence of the reprehensibility and inadmissibility of childbirth agreements” and that the

hire of a female body for a period of 9 months demeans human dignity, she calls for changes in the Polish criminal law through the introduction of criminal liability for paid surrogacy [35].

The situation changed on 20 November 2019 when the amendment to the Criminal Code of 16 October 2019 entered into force (Journal of Laws of 2019, pos. 2128). As from then, the provision on the so-called illegal adoption defined in art. 211a (“Whoever, in order to achieve a material benefit, organizes the adoption of children in violation of the law shall be subject to a penalty of the deprivation of liberty for a term of between 3 months and 5 years”) is accompanied by two additional sections of the following wording: “§ 2. The same penalty shall be imposed on anyone who, being a person who has parental responsibility for a child, consents to the adoption of that child by another person: 1) in order to achieve a material or personal benefit, concealing that purpose from the court adjudicating in the proceedings concerning adoption, and in the event of a parent’s consent to the adoption of the child in the future without indicating an adopter – from the court receiving such a declaration of consent, 2) outside of the adoption procedure. § 3. The same penalty shall apply to anyone who consents to adopt a child under the conditions set out in 2.” In the opinion of the proponent, unlawful adoptions pose a threat to the child’s safety in numerous practical, psychological and legal terms. As observed in the explanatory memorandum to the Act, there are two types of adoption that should be considered socially harmful and therefore illegal within the meaning of criminal law. The first of these can generally be seen as carrying out an adoption procedure in bad faith, i.e. making use of the procedure introduced by the legislator by a person who is not the child’s biological parent in order to obtain parental responsibility for the child. The social harmfulness of such behavior may be seen in the perpetrator’s actions aimed at achieving a material or personal benefit, while at the same time concealing that fact from the court adjudicating in adoption proceedings. The desire to achieve any benefit should not be the motivation underlying the adoption of a child, given that such behavior jeopardizes and oftentimes even thwarts the child’s interests which lie in being adopted by persons who can genuinely create the optimal conditions for his development and upbringing and give him affection. Where such motivation comes to the fore, the child can easily become the object of a “commercial transaction,” thus dehumanizing the institution designed to ensure the child’s basic human rights. The second form of illegal adoption is carrying it out outside of the adoption procedure, i.e. when the perpetrator uses other legal institutions to obtain the result of adoption, e.g. fictitious recognition of a child (by a non-biological parent), or relinquishment of parental rights by the mother to enable another person to adopt the child. For the culpability of that behavior it is not necessary for the

perpetrator to act with the intention of gaining a material or personal benefit. Criminal lawlessness manifests itself in that case by the circumvention of the law in the form of proceedings foreseen to determine the conformity of the acquisition of parental responsibility by another person with the best interests of the child, as a result evading the control of state authorities over that procedure, as well as in the use of institutions that do not serve that purpose with the simultaneous concealment from state authorities of the actual intention by the perpetrator. It should be noted that such formulation of the constituent elements of the type of prohibited act, with the emphasis on the moment of giving consent to adoption, will allow the penalization of e.g. parents who, for that purpose, consent to the adoption of their child in the future without indicating an adoptive person (Art. 119¹ § 1 of the Family and Guardianship Code), or of the surrogate mother [36]. In the case of surrogacy, the Polish legislator made that specific interest of a child born on request the subject-matter of criminal law protection.

As A. Rzepliński notes, the prohibition on profit and trade in products of human origin is not absolute – the sale of hair and nails is not inconsistent with human dignity [37]. More importantly, until 2017, in Poland, also blood donors with rare blood types and donors who had undergone immunization or other procedures to obtain plasma or diagnostic sera prior to blood donation were entitled to a cash equivalent (Art. 11 of the Act on Public Blood Service; Act of 22 August 1997 on Public Blood Service; uniform text: Journal of Laws of 2017, pos. 1371, as amended. Cf. also: Regulation of the Minister of Health of 6 February 2017 on the determination of rare blood types, types of plasma and diagnostic sera whose recovery requires undergoing immunization or other procedures by the donor prior to collection of blood or its elements and the amount of compensation; Journal of Laws, pos. 235). One may well wonder whether the term “cash equivalent” undermined human dignity. As of 1 January 2017, such persons are entitled to cash compensation (instead of the cash equivalent) “for the disadvantages due to the obligation to appear when summoned by an organizational unit of the public blood service.” It should be emphasized that the compensation is not provided for all donors, but among others, for those with rare blood types and is independent from the reimbursement of travel expenses and lost earnings (which are granted to all blood donors – Art. 9 of the above Act). The aforementioned Act does not criminalize similar conduct related to the commercialization of blood donation. In view of the fact that an exemption from the principle of unpaid honorary blood donation was made for donors with rare blood types, consideration should also be given to making such an exemption for even more valuable human organs. It could be examined whether such compensation could possibly apply to persons over 25 years of age (to exclude hasty decisions), take the form of, say, extensive

tax exemptions (it would then prevent the exploitation of extremely poor people driven to tissue or organ sale by poverty) and of facilitations in the access to public health services, with the whole program entrusted solely to State-run bodies. Consideration should also be given to the issue of paid clinical trials provided for in Polish law (cf. Art. 37e of the Act of 6 September 2001 Pharmaceutical Law; Journal of Laws of 2001, No. 126, pos. 1381) – new drugs are tested on volunteers for remuneration. The SARS-CoV-2 pandemic in 2020 prompted a search for 24 volunteers who would agree to be infected with the virus for £ 3,500 to assist the development of a vaccine [38]. The question thus arises as to the qualitative difference between selling a kidney and voluntary infection for remuneration with a potentially deadly virus.

An issue arises as to what human dignity is and whether the sale of organs actually violates it (it is raised e.g. by J. Radcliffe-Richards) [39]. Dignity is safeguarded by the Constitution of the Republic of Poland (Journal of Laws, No. 78, pos. 483, as amended), whose Art. 30 provides that “The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. It shall be the duty of public authorities to respect and protect it.” In the history of philosophy, this concept was interpreted and formulated in various ways, but it was closely related to the belief in freedom and reasonableness of the human being. In this regard, the views of Austrian constitutionalist H. Schambeck merit attention. In his opinion, the value of the individual derives from the concept of *dignitas humana*, which is to be expressed in the acknowledgement of each person’s personality and recognition of their right to free development of that personality. Human dignity and freedom are thus closely related. The recognition of human dignity and personality gives rise to the individual’s claim for specific behavior on the part of the State and appropriate organization of its system [40]. In a similar vein, the Polish Constitutional Tribunal indicated that the object of the right to dignity is in the broadest sense the creation (and guarantee) for every human being of a situation where they would be able to autonomously pursue their personality but, above all, would not become an object of action by others (in particular public authorities) and an instrument for achieving their goals [41]. At the same time, the Constitutional Tribunal cited the views of liberals who argue that the liberty of action of the individual does not deserve protection from liberal law in a situation where it jeopardizes the interests of other persons or results from ill-considered or forced decisions [42]. Therefore, assuming that the essence of humanity lies in free choice, the prohibition on selling a kidney severely limits that choice. I. Kant advised us to treat humanity “never merely as a means to an end, but always at the same time as an end” [43]. The question arises whether the prohibition on

trade makes potential donors and recipients a means used in the fight for an idealistic (altruistic) vision of the world. We admit that dignity is inalienable, but cannot indicate who and to what extent sets its limits and attributes. Neither is it clear whether dignity is an individual or collective concept. In this context, the opinion of J. S. Mill should be recalled according to which: “the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right” [44].

Any legal restrictions of autonomy, such as the provisions of criminal law, must raise the issue of the mandatory protection of fundamental rights. The restrictions cited above are justified precisely by human dignity. Thus, an interesting point in this regards is raised by A. Podolska who wonders whether the interference of a sovereign, from whom dignity does not come, in the liberty to dispose of dignity constitutes its violation [45].

It is easy to justify the criminalization of certain types of behavior by citing human dignity; this formula is being invoked more and more often (cf. e.g. making homosexuality punishable). In my opinion, it would nonetheless be wrong to accept the thesis that dignity underpins the prohibition on trading in human organs. Trade in organs, i.e. a transaction between donor and recipient, should be subject to strict controls not with the intention of protecting the dignity of one of the parties, but to combat the ruthless exploitation of the weaker party by the stronger. Liberty and the right to self-determination are also human rights – but the decision should be free from any pressure or manipulation. It is hard for me to come to terms with a paternalistic vision of criminal law [46], which, in order to save human dignity, does not allow a person in a crisis situation to take actions that do not harm others.

Criminal law must exceptionally include typifications where the lack of consent does not affect the existence of the crime – thus it does not matter that the victim in fact agreed to a specific action against him. These are in essence crimes against children and persons in an equally weak position – paternalism in such cases is even linguistically justified. A second category of such crimes consists of crimes committed against persons who (occasionally) find themselves in a weaker position. Although they do not normally belong to the first group of victims, their weaker position seems to be

a statutory element (e.g. the offense of usury under Art. 304 of the Criminal Code). In such cases, the will expressed by the injured party is not free, so the victim’s consent cannot exculpate the offender. Finally, the third group includes crimes in respect of which the legislator assumes a priori the weaker position of the victim, regardless of the situation, conditions or position of the victim. Thus, against his will but in an attempt to save his dignity, the legislator makes him a victim of crime (e.g. under Art. 189a of the Criminal Code – human trafficking), or a perpetrator (e.g. under Art. 43 of the Transplantation Act, or even Art. 44 thereof should the *de lege ferenda* postulates on the criminalization of the sale of one’s own organs proposed and indicated above be satisfied). That approach of the legislator – the third group of crimes indicated above – exceeds the limits of reasonable criminalization and is a breach of the principle of proportionality, unduly restricting the freedom of both potential donors and recipients.

There is another issue worthy of note. A conflict of interests occurs when reference is made to dignity as the rationale behind making paid transplantation activities punishable: the right to life of a potential recipient (or more precisely – the right to take all life-saving measures) and the dignity of a potential donor. Provided that we approach transplantation issues with respect for the individual’s right to self-determination and respect for human autonomy, while at the same time ensuring protection against exploitation, then it appears that the donor and recipient do not in fact have contradictory interests.

The prevalent view is that paid donation of cells, tissues and organs contradicts the altruistic vision of transplantation. Donation of a kidney is to be a gift of life. However, such a vision denies a potential donor the right to sell his kidney, even where for altruistic reasons he intends to use money thus obtained to meet the needs of his close relatives. The question is why altruism is to consist exclusively of gratuitous sharing of organs with a close relative (T. Zimny calls that approach precaution arguing that it is not a less socially useful characteristic than altruism. In my opinion, however, it is altruism identical to unpaid donation of a kidney.) [47]. Part of the solution to the above difficulties could lie in the so-called cross or chain transplantation [48]. It is also difficult to answer the question posed by scientists whether the price of striving to build an ideal, virtuous society in the form of hundreds of deaths that occur every year due to lack of organs is too high [47].

More importantly, the arguments against commercialization do not in fact relate to commercialization itself, but to the transplantation procedure as such. At the same time, altruism accompanying the procedure in some measure removes those defects. Regardless of whether

it is the medical risk, objectification of the human body or its integrity, these aspects should after all be equally important, irrespective of the altruistic or commercial nature of the procedure. This means that they cannot be a counterargument for the commercialization itself.

My *de lege ferenda* postulates regarding the issues related to transplantation comprise two areas. First of all, in my opinion, dissemination of advertisements for the purchase or disposal of cells, tissues and organs should be decriminalized right now. Secondly, in the further future, the sale or purchase of cells, tissues and organs of other people for oneself or a close relative should not be punishable. Such behavior should be unlawful but not punishable. At the same time, the high standards of control and supervision provided for in the Transplantation Act would ensure proper health protection and prevent access to organs of unknown origin. Moreover, acting as an intermediary in transactions relating to transplantation, transactions with minors and those in which advantage is taken of the unfavorable position imposed by circumstances on one of the parties should be punishable. This form of criminalization respects the right of everyone to self-determination, and at the same time supports persons particularly vulnerable to exploitation. E.A. Friedman, A.L. Friedman cite R. Berman's words: "The choice before us is not between buying or not buying organs. This is happening regardless of the law. The choice is whether transplant operations and the sale of organs will be regulated or not" [49].

It appears that even the Polish legislator slightly softened its principled stance on the prohibition on commercialization of organ donations by introducing in 2017 (Journal of Laws of 2017, pos. 798) the following provision: "If the perpetrator of the act specified in sect. 1 acted in relation to the critical situation which he or the person closest to him encountered, the court may apply an extraordinary mitigation of penalty or waive its imposition" (Art. 44 (2) of the Transplantation Act). The Polish legislator acknowledged that there is a generally applicable standard by which all donations should be honorary, altruistic and should not involve any material or personal benefit. Nonetheless, in the case of persons who acted in connection with a critical situation they or their relatives faced, the possibility was introduced for the court to apply an extraordinary mitigation of penalty or waive its imposition [50].

The assessment of the commercialization of surrogacy should be shaped in a similar vein. The starting point is that many doubts and objections raised in the literature on the subject are not solely related to surrogacy. For instance, children of one father (multiple semen donor) who do not know of each other's background may unknowingly start a relationship and produce offspring beset with problems

of a genetic nature – a complication existing since the earliest times (although, of course, to a much lesser degree). Enforcement problems regarding the return of a child in the event of disputes between genetic, biological and social mothers (parents) are encountered in many divorces or separations of parents. The child's inability to get to know his or her genetic parent (typically the father) accompanies humanity almost since the dawn of time. For this reason, these considerations alone cannot constitute a negative premise for the recognition of any behavior as illegal.

In the case of paid surrogate motherhood, the arguments raised above regarding the right to self-determination and the individual's free will, as long as his behavior does not harm other people, should be reiterated. As is the case with transplantation, the State and the law should ensure that exploitation of any human being because of their weaker economic or social position does not occur. On top of that, in the case of surrogacy, there is an issue of protecting the interests of the born child. The State should therefore not so much prohibit paid surrogate motherhood, but protect the child's interests, in particular in a situation where there is a conflict between broadly understood "parental persons" [51,52].

I am aware that surrogacy (like adoption) leads to some paradoxes. "Classic" parenting does not require licenses, evaluation of the parents or the living conditions of the future child. It is only an extremely pathological situation that triggers a reaction of the State (including even the deprivation of parental rights). Whereas in the case of surrogacy, control of the child's living conditions (in a very broad sense, corresponding to the term 'interests of the child') is introduced *a priori* instead of being a *post factum* response. As a consequence, we set higher requirements for an adoptive or social family (based on earlier surrogacy). It is understandable given the fact that where violations of children's rights can be prevented, if for no other reason than the manner in which a child appears in the family, such preventive measures must be taken. In other words, only the interests of a born child can be a limitation on the autonomy of a woman who undertakes to give birth to someone else's child for remuneration.

References

1. Safjan M (1998) Prawo i Medycyna, Warsaw.
2. Kowal K (2011) Between altruism and egoism. Socio-cultural conditions of family transplants, Toruń.
3. Ghahramani N (2010) Living Organ Donation: An Ethical Evolution or Evolution of Ethics?. International Journal of Organ Transplantation Medicine 1(2): 57-62.

4. Nowacka M (2013) Transplant ethics. In: Różyńska J, et al. (eds.), *Bioetyka*, Warsaw.
5. Rowiński W (2003) Legal and ethical aspects of organ transplantation in Poland. History, current state and problems awaiting us in the near future. In: Łopatka A (ed.), *Law-Society-Unit. Jubilee book dedicated to Professor Leszek Kubicki*, Warsaw.
6. Nesterowicz M (2006) Medically assisted procreation and genetic engineering - the need for legal regulations. *Law and Medicine* 2(23): 8.
7. Sitarz O (2011) Criminalization of paid activities related to transplantation on the collection, storage and transplantation of cells, tissues and organs). In: Lasocik Z, et al. (eds.), *Trade in organs. Disputes over the interpretation of the criminal provisions of the Transplant Act*, Warsaw.
8. Haberko J (2014) In: Haberko J, et al. *Commentary to the Act on the collection, storage and transplantation of cells, tissues and organs*, Warsaw.
9. Duda J (2004) *Transplantation in Polish law. Criminal law aspects*, Cracow.
10. Guzik Makaruk EM (2008) *Legal, criminological transplantation of organs, tissues and cells*, Białystok.
11. Bojarski M, Radecki W (1998) *Guide to extra-cod criminal law*, Wrocław.
12. Liszewska A (1999) *Criminal law evaluation of organ transplantation procedures*, *Prawo i Medycyna*.
13. Friedman EA, Friedman AL (2006) Payment for donor kidneys: Pros and cons. *Kidney Int* 69(6): 960-962.
14. Danovitch GM, Delmonico FL (2008) The prohibition of kidney sales and organ markets should remain. *Current Opinion in Organ Transplantation* 13(4): 386-394.
15. Hartman J (2009) *Bioethics for doctors*, Warsaw.
16. Monaco AP (2006) Rewards for organ donation: the time has come. *Kidney Int* 69(6): 955-957.
17. Zimny T (2013) *Commercialization of the human body*. In: Różyńska J, (eds.), *Bioetyka*, Warsaw.
18. Lasocik Z (2011) *Debate on the interpretation of criminal provisions Transplant Act*, University of Warsaw, In: Lasocik Z, et al. (Eds.), *Organ trade. Disputes over the interpretation of the criminal provisions of the Transplant Act*, Warsaw.
19. Zimny T (2013) *Commercialization of the human body*. In: Różyńska J, et al. (eds.), *Bioetyka*, Warsaw.
20. Rosemarie Tong (2020) *Surrogate Parenting*. *Internet Encyclopedia of Philosophy*
21. (2020) *Reproductive Technologies: VI. Contract Pregnancy*.
22. Lebensztein MA (2014) *Surrogacy - an ethical and legal problem*, *Miscellanea Historico-Iuridica* , XIII, z. 2.
23. Fras M, Abłażewicz D (2008) *Comparative motherhood legal regime*, *Problems of Contemporary European and Comparative International Law*, VI A.D.MMVIII.
24. Mirocha L (2018) *Surrogacy in the current jurisprudence of the European Court of Human Rights*, *Law in Action. Civil Matters* 34.
25. Mikluszka M (2017) *Foreign procedures so-called surrogacy motherhood in the light of the principle of human trafficking - nodal issues*, *Institute of Justice*, Warsaw.
26. Jadva V, Murray C, Lycett E, MacCallum F, Golombok S (2003) *Surrogacy: the experiences of surrogate mothers*. *Human Reprod* 18(10): 2196-2204.
27. Żukowski Ł (2013) *Legal and ethical problems of surrogacy contracts - comments on the background of solutions adopted in Israel*. In: Bator A, et al. (Eds.), *Contemporary concepts for the protection of fundamental freedoms and rights*, Wrocław.
28. Soniewicka M (2010) *Medically assisted procreation*. In: Stelmach J, et al. (Eds.), *Paradoxes of legal bioethics*, Warsaw.
29. Nesterowicz M (2006) *Medically assisted procreation and genetic engineering - the need for legal regulations*, *Law and Medicine* 2(23): 8.
30. <https://law.justia.com/cases/new-jersey/supreme-court/1988/109-n-j-396-1.html>
31. <https://www.leagle.com/decision/199412167ohiomisc2d541112>
32. (2020) Cf. inter alia. "In conclusion, under Ohio law, when a child is delivered by a gestational surrogate who has been impregnated through the process of in vitro fertilization, the natural parents of the child shall be identified by a determination as to which individuals have provided the genetic imprint for that child. If the individuals who have been identified as the genetic parents have not relinquished or waived their rights to assume the legal status of natural parents, they shall be

considered the natural and legal parents of that child.

33. Applying the foregoing law to the case at bar, this court has found that Anthony Belsito and Shelly Belsito are the genetic parents of the unborn child carried by Carol S. Clark, a gestational surrogate who was impregnated by in vitro fertilization. This court further finds that Anthony Belsito and Shelly Belsito have not waived their rights to be the natural and legal parents of that child. Therefore, this court must find, as a matter of law, that Anthony Belsito and Shelly Belsito are the natural and legal parents of the unborn child now carried by Carol S. Clark.”
34. Chapter IV. Principle 15.4: However, states may, in exceptional cases fixed by their national law, provide, while duly respecting paragraph 2 of this principle, that a physician or an establishment may proceed to the fertilisation of a surrogate mother by artificial procreation techniques, provided that: a. the surrogate mother obtains no material benefit from the operation; b. the surrogate mother has the choice at birth of keeping the child. Cf. <https://rm.coe.int/16803113e4>
35. The Book of Genesis 16: 1- 4.
36. The commentary on that passage prepared by the Pallottines specifies that „Act consistent with the Code of Hammurabi in force at the time,”
37. <https://www.hfhr.pl/opinia-do-etpc-w-sprawie-transkrypcji-aktow-urodzenia-dzieci-urodzonych-przez-surogatk/>,
38. Witczak Bruś P (2019) The criminal law aspects of surrogacy, Cracow.
39. <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=3665>,
40. Rzepliński A (2002) Legal limits of the acceptability of human organs and tissue transplantation in accordance with the provisions of the Council of Europe. Law and Medicine12.
41. <https://www.thetimes.co.uk/article/coronavirus-vaccine-race-volunteers-to-be-infected-in-the-uk-ck0s72x8k>,
42. Radcliffe-Richards J (2006) Organ trafficking - philosophical and ethical aspects, In: Lasocik Z, et al. (ed.), Trafficking in human organs. Ethics, law and practice, Warsaw.
43. Schembeck H (2001) On fundamental human rights in Austrian constitutional law. In: Complaka K (ed.), Human dignity as a category of law, Wrocław; as cited In: Sadowski M (2007) Human dignity - the axiological basis of the state and the law, “Wrocław Erasmus Studies.
44. Judgement of the Constitutional Tribunal of 9 July 2009 (SK 48/05), OTK-A 2009/7, pos. 10.
45. After: Complak K (2006) The principle of protection of human dignity is a normative requirement for lawmakers and law enforcement bodies, In: Wiśniewski L (ed.), Freedoms and rights of the individual and their guarantees in practice, Warsaw.
46. Mill JS (1959) Judgement of the Constitutional Tribunal, Warsaw.
47. Podolska A (2013) A brief reflection on dignity in the light of the ruling of the Court of Justice. Sprawy rw C-36/02 Omega Spielhallen-und Automatenaufstell-GmbH przeciwko Mayor of the Federal City of Bonn. Aequitas 1
48. Cf. Preisner A (2014) Paternalism and freedom, in: M. Jabłoński, S. Jarosz-Żukowska (eds.), Current challenges of protecting individual freedoms and rights. Works of students and associates dedicated to Professor Bogusław Banaszak, Wrocław.
49. Zimny T (2013) Commercialization of the human body. In: Różyńska J, (eds.), Bioetyka, Warsaw.
50. Cross transplantation means that the patient does not receive a kidney from the closest person (e.g. due to genetic incompatibility), but from the person closest to another patient who also needs a kidney for transplantation and cannot get it from his closest person. The closest patient to the first patient becomes the kidney donor for the second patient. With chain transplantation, the number of donor-recipient pairs increases. Such pairing is possible thanks to the creation of databases of potential recipients and their relatives who are ready to donate their kidneys for transplantation.
51. <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20170000798>, viewed 26.03.2020.
52. Paradiso Cf, Campanelli I (1991) Italy, judgment of the European Court of Human Rights of 24 January 2017, Grand Chamber), acceptance of the application for consideration upon request of the government, also: Grodin MA, Surrogate Motherhood and the Best Interests of the Child, WHI 1(3) Summer.

