

# Human Packages: Juridification of the Body from Empowerment to Exploitation Logics

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## I. New Forms of Slavery in the 'Trafficking in Human Beings' and 'Smuggling'

According to Global Financial Integrity,<sup>1</sup> the foundation that studies illicit financial flows, 10% of 118,000 transplants practiced every year around the world are illegal: meaning an average of 12,000 transplants funding the black market and criminal organizations with up to 1.4 billion dollars.

We are talking about estimates that show a relentless international business. A business fueled by poverty and despair, where the geopolitics of States strongly influence the organ trafficking routes. The first real organ bazaar was located in India, where in Mumbai alone some \$ 8 million were handed over from 1970 to 1980, by customers/patients to mediators.<sup>2</sup> Migrants on the Arab crossroads of Egypt, Sudan and the United Arab Emirates tell their traumatic border crossings and the risk of becoming a bargaining chip in organ trafficking, when the ransom cannot be paid in cash.

There are harrowing stories of coercion and violence, which register the existence of criminal organizations that certainly do not leave the Western world unscathed. They show a transnational structure where the 'trafficking in human beings'<sup>3</sup> is integrated in the illegal network managing the transit of migration flows.

'There are increasing numbers of migrants worldwide, many of whom are at risk of being trafficked and exploited. These growing "mixed-migration flows"

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<sup>1</sup> Global Financial Integrity, *Transnational Crime and the Developing World*, 2017.

<sup>2</sup> E. Mo, *Presentazione* to F. Porciani, *Traffico d'organi. Nuovi cannibali, vecchie miserie* (Milano: Franco Angeli, 2012), 11.

<sup>3</sup> Trafficking in persons can be conceptualized in different ways. According to the definition provided by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (United Nations, Treaty Series, vol. 2237, 2005, p. 319), there are three distinct 'constituent elements' of trafficking in persons: the act, the means and the purpose. All three elements must be present in order for a case to be defined as a trafficking in persons offence. However, each element has a range of manifestations. The UN Trafficking in Persons Protocol specifies that 'the act' means the recruitment, transport, transfer, harbouring or receipt of persons. 'The means' refers to the method used to lure the victim. Possible means are the threat or use of force, deception, coercion, abduction, fraud, abuse of power or a position of vulnerability, or giving payments or benefits. See Global Report on Trafficking in Persons,

are comprised of economic migrants, displaced persons, asylum-seekers and refugees, either on a voluntary or involuntary basis, and in both regular and irregular situations. Jobless and desperate, they become easy targets to those who exploit and abuse them in this high profit/low risk industry, operating where overly restrictive migration policies can create the perfect conditions for human trafficking and exploitative practices'.<sup>4</sup>

The latter make it possible to differentiate this transnational crime from that of 'smuggling'. Smuggling is a crime defined in international law<sup>5</sup> as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, by the illegal entry of a person into a State of which the person is not a national or a permanent resident'.<sup>6</sup> It therefore ceases its criminal conduct in the organization of transport, without providing additional benefits to the illegal immigration of the migrant. An essential point in the differentiation of the two cases is the element of consent and the active participation of the subjects: deceit, violence and subjugation are integral parts of the crime of trafficking in human beings, in which the exploitation of the migrant assumes different forms, including prostitution, labor, organ trafficking, etc.

If the 'trafficking in human beings' is a global phenomenon of different proportions ranging from the exploitation of child labor, induction into prostitution to the actual trafficking for the removal of organs,<sup>7</sup> then it is clear that we are dealing with 'new slavery'.<sup>8</sup> A slavery that lurks on all the ramifications of the black market of migrants, often hidden by the restrictive policies of the

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2014 UNODC. On these themes, see L.S. Taher, 'Moral and Ethical Issues in Liver and Kidney Transplantation', *Saudi Journal of Kidney Diseases and Transplantation*, 16 (2005); N. Larsen & Smandych R. (eds), *Global Criminology and Criminal Justice: Current Issues and Perspectives* (Toronto: University of Toronto Press, 2008).

4 OSCE, Report of the Special Representative and Coordinator for Trafficking in Human Beings 2014-2015. According to the UN Office on Drugs and Crime (UNODC) 2014 Global Report on Trafficking in Persons, one in three known victims of human trafficking is a child, a statistic underscoring this group's particular vulnerability to human trafficking in the migration process.

5 S. Negri, 'Transplant Ethics and the International Crime of Organ Trafficking', *International Criminal Law Review* 16 (2016): 287 et seq.

6 Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organized Crime, commonly referred to as the Smuggling of Migrants Protocol (United Nations, Treaty Series, vol. 2241, 2007, p. 507).

7 Article 3, paragraph (a) of the UN Trafficking in Persons Protocol defines trafficking in human beings as 'the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or 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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs'.

8 See K. Bales, *Disposable People. New Slavery in the Global Economy* (Oakland: The Regents of the University of California, 1999); T. Casadei, *Il rovescio dei diritti umani. Razza, discriminazione, schiavitù*, (Roma: Carocci, 2016).

destination countries and all united by the commodification of the person, deprived of their dignity and reduced to a pawn to be traded with.

It is undoubtedly a very large reticular system, which testifies the existence of a global market dedicated to the commercialization of the person and highlights the close relationship between poverty and the vulnerability of its subjects, between global demand and the exploitation of bodies that tell dramatic stories of subordination. In her recent book on the exploitation in advanced neo-liberal society, Saskia Sassen says that today's 'expulsions from home, land, and jobs have also had the effect of giving the expanded operational space to criminal networks and to the trafficking of people'.<sup>9</sup> This goes way past the Baumanian representation of *wasted lives* or *lives in abundance*.<sup>10</sup> Here we are dealing with lives before they are thrown on the scrapheap, they are lives placed on a circuit with further and continuous forms of exploitation, which maybe spread from the center towards the periphery. In fact, we are witnessing the 'material development of growing areas of the world into extreme zones for key economic operations. At one end this takes the shape of global outsourcing of manufacturing, services, clerical work, the harvesting of human organs, and the raising of industrial crops to low-cost areas with weak regulation'.<sup>11</sup>

While, therefore, the economic logic of the market redesigns the relationship between migration and commodification of the body, radicalizing the economic and social imbalances of extremely vulnerable people, then on the other hand, the market for organs to be used in transplants is widely practiced all over the world. As it is clear in the WHO report, 'the international organ trade links the incapacity of national health care systems to meet the needs of patients with the lack of appropriate regulatory frameworks or implementation elsewhere. It exploits these discrepancies and is based on global inequities'.<sup>12</sup>

The commodification of bodies has, therefore, extremely problematic aspects both in reference to the question of migrants – who become subject to economic transactions on the global black market when crossing national borders – as well as in relation to the problems associated with organ trafficking. Its increasing demand has fueled a thriving market that spreads from India to Latin America, from Nepal to the Philippines, from South Africa to Turkey, and from the former Soviet Union to China. Since 2000, the routes of organ trafficking have started to be chartered and become real flows from the United States and Canada, making their way to Latin America and South Africa, from Japan to

<sup>9</sup> S. Sassen, *Expulsions. Brutality and Complexity in the Global Economy*, (Cambridge – London: The Belknap Press of Harvard University, 2014), 89.

<sup>10</sup> Z. Bauman, *Wasted Lives. Modernity and its Outcasts* (Cambridge: Polity Press, 2003).

<sup>11</sup> Sassen, *supra* note 9, p. 9.

<sup>12</sup> Y. Shimazono, 'The State of International Organ Trade: A Provisional Picture Based on Integration of Available Information', *Bulletin of the World Health Organization*, 85 (2007): 956.

the Philippines and China. In the meantime, Europe pockets the misery created by wars, by ethnic clashes and alternating political events.<sup>13</sup>

Nancy Scheper-Hughes has pointed out that

‘the ideal condition of economic globalization has put into circulation mortally sick bodies traveling in one direction and healthy organs, encased in their human packages, in another, creating a bizarre Kula ring of international trade in bodies. In all these new transplants, transactions are a blend of altruism and commerce, of consent and coercion, of theft and gift, of care and invisible sacrifice’.<sup>14</sup>

Of course, an attempt to build a barrier against the spread of the global market for organs has been identified in all the rhetoric about the dignity of the body and the sovereignty of the State, but with poor results. Even in the Western world, the culture of organ transplants seems to be accompanied by a massive dose of ‘cultural immune-suppressants’, which make transplant practices acceptable and ideologically sustainable.<sup>15</sup> To this we can add ourselves, *normalizing* such practices, even in the most extreme and radical forms, resulting in the need to redefine the limits of life/death, illness/health.

## 2. Docile Bodies: Empowered and/or Exploited

In an important book written in 1992,<sup>16</sup> Zygmunt Bauman shows that the different degrees of demarcation between mortality and immortality, in the events and transitional phases from modern society to the *post-modern*, have influenced life strategies (and consequently the different perceptions of the biological body and its integrity). These strategies have either accepted or refused the idea of the naturalness of death. In the era of ‘deconstruction of immortality’, the attribution of value to life at any cost means not only establishing a degree of confusion at the level of demarcation between life and death itself, but also the subjection of disease in the category of death, such as a stage that anticipates – and in which it is inherent – death itself. In other words, the level of acceptability of a perfect body with respect to an *abnormal* body, or ulti-

<sup>13</sup> It is possible to read a detailed analysis of these fluxes in Porciani, *supra* note 2.

<sup>14</sup> N. Scheper-Hughes, ‘Keeping an Eye on the Global Traffic in Human Organs’, *The Lancet* 361 (2003): 1645.

<sup>15</sup> ‘Cultural notions about the dignity of the body and of sovereign states pose some barriers to the global market in body parts, but these ideas have proven fragile’, N. Scheper-Hughes, ‘The Global Traffic in Human Organs’, *Current Anthropology* 41 (2000): 194.

<sup>16</sup> Z. Bauman, *Mortality, Immortality and other Life Strategies*, (Stanford: Stanford University Press, 1992).

mately of a healthy body from an ill patient depends on the same degree of acceptance of the naturalness of death.

Bauman's text detects a paradigm shift in studies on bio-politics and governmentality,<sup>17</sup> brought in some way to completion by Michel Foucault, which re-defines and repositions the theme of life (illness and death) within experience and political and legal expertise.

The long and unfinished reflection on the border between life and death (and of course on the statute of illness), starting from the theme of organ transplants, has taken a special connotation in the second half of the last century, which triggered an unavoidable reflection on social and political issues, rather than its mere and exclusive biological or philosophical significance. Yet the words of Scheper-Hughes may be of great interest:

'Death is, of course, another key word in transplantation. The possibility of extending life through transplantation was facilitated by medical definitions of irreversible coma (at the end of the 1950s) and brain-stem death (at the end of the 1960s), when death became an epiphenomenon of transplantation. Here one sees the awesome power of the life sciences and medical technology over modern state'<sup>18</sup>.

This completes the process which, thanks to the relentless advancement of biotechnology, always tends to subtract the availability of bodies (sick or lifeless) from their owners, to give to the *well-being* of those in power.

It is, in other words, the process that Nikolas Rose, in resuming studies on bio-politics and governmentality, describes in a masterly way in *Politics of Life Itself*. Rose states

'politics has long been concerned with the vital lives of those who are governed (...) the vital politics of the eighteenth and nineteenth centuries was a politics of health – of rates of birth and death, of diseases and epidemics, of the policing of water, sewage, foodstuffs, graveyards, and of the vitality of those agglomerated in towns and cities. Across the first half of the twentieth century this concern with the health of the population and its quality became infused with a particular understanding of the inheritance of a biological constitution and the consequences of differential reproduction of different subpopulations; this seemed to oblige politicians in so many countries to try to manage the quality of the population, often coercively and sometimes murderously, in the

<sup>17</sup> See M. Foucault, *Security, Territory, Population: Lectures at the Collège De France, 1977-1978* (New York: Palgrave Macmillan, 2007) and *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979* (New York: Palgrave Macmillan, 2008); G. Burchell, C. Gordon & P. Miller (eds), *The Foucault Effect. Studies in Governmentality* (London: Harvester Wheatsheaf, 1991).

<sup>18</sup> Scheper-Hughes, 'The Global Traffic in Human Organs', *supra* note 15, 200.

name of the future of the race. However, the vital politics of our own century looks rather different. It is neither delimited by the poles of illness and health, nor focused on eliminating pathology to protect the destiny of the nation. Rather, it is concerned with our growing capacities to control, manage, engineer, re-shape, and modulate the very vital capacities of human beings as living creatures'.<sup>19</sup>

According to Rose, a real paradigm shift is on the cards and it will accompany the gradual transition from disciplinary techniques of the government (which objectify bodies and their countless manifestations: disciplined bodies, placed spatially, functional in power or ultimately 'docile bodies'<sup>20</sup>) into government techniques guided by security and control that take charge of the bodies, look after them, increase them and empower them.

In fact, it is in the management of health, and its *use* and in medical practices that the logic of *homo oeconomicus* – 'entrepreneur of himself' –<sup>21</sup> is widely established. The logic of a person who has interest in advanced liberal societies, unlike the law subject (*homo politicus*), who is fully involved in the management of his affairs, in pursuit of his specific purposes, and his own safety. The individual is therefore a *producer* – and not just a recipient – of policies and practices for safety and health: more and more patients are involved, active and responsible consumers of products and medical services.<sup>22</sup> All in the name of management and control of risk and security, social sciences in the last decades of the last century have emphasized in particular and Deleuze has masterfully described in his work on controlling societies.<sup>23</sup>

<sup>19</sup> N. Rose, *The Politics of Life Itself. Biomedicine, Power and Subjectivity in the Twenty-First Century* (Princeton: Princeton University Press, 2007), 3.

<sup>20</sup> Cf. M. Foucault, *Surveiller et punir. Naissance de la prison* (Paris: Editions Gallimard, 1975). In Foucault's reflection on the disciplinary society, power acts on docile bodies, bodies over which it exercises a continuous coercion, ensuring their continued subjugation.

<sup>21</sup> Foucault, *supra* note 20, 226.

<sup>22</sup> 'This complex of marketization, autonomization, and responsabilization gives a particular character to the contemporary politics of life in advanced liberal democracies', Rose, *supra* note 19, 4.

<sup>23</sup> G. Deleuze, 'Post-scriptum sur les sociétés de contrôle', *L'autre journal*, n° 1, mai 1990. In his speech on Foucault's studies of discipline and security, Deleuze emphasizes on the ambivalence between forms of discipline and control and safety devices. He argues that the forms of internment (prison, schools, hospitals, factories) are joined, in the direction of their progressive rotation, as forms of unlimited 'continuous monitoring'. Hierarchical surveillance, normalizing sanctions, examination (which Foucault had identified as a means of discipline) are gradually replaced by forms of control of the population, the economy, medicine, and proceed in the direction of a paradigm shift. These new forms of control, whilst based on the ability of people to remove barriers and obstacles in the autonomy of the single name (contrary to what happens inside the tracking devices and exclusion of subjects), are inscribed inside a logic in which the control is less obvious and explicit and more pervasive and widespread: conscious and active autonomy is defined in discursive fields that normalize and require continuous adaptation of forms and lifestyles.

It should be noted that we are facing a logical increase and empowerment characterized by other methods rather than the logic of self-preservation, which in modernity had given impetus and increase to the studies on medical research. Representation in the literature of the Nineteenth century of various Dr. Frankensteins, as 'mad scientists', who in a constant delirium of omnipotence, acting on human nature, pursue *eternal life* or *unlimited strengthening* of life itself and its functions. Today it is questioned in the advanced study on biotechnology and implies some rethinking of the same concept of human nature that, in addition to the debate on the boundary between life/death, finds particular articulation in relation to cyborg theories and culture.<sup>24</sup>

It is now possible for us to say that the political and cultural reflection on organ trafficking raises the ambivalence of practices ranging from forms of exploitation and empowerment devices, both of which are confined to a broader logic that implies the control and management of people's lives, through the *selection* or – even better – the selective evaluation of bodies. These are 'Bodies That Matter' following the title of a famous book by Judith Butler,<sup>25</sup> depending on the function and weight that are attributed to them, with heavy consequences on medicine and law that are called in each time to work on concrete and specific cases. It is difficult to ascribe to general case series, but in each case they do respond to a logic of continuous and unstoppable subsumption of the biological part within law and a consequent juridification of bodies (see *infra* paragraph 3).

If we go back to the legal theme we see all the challenges of managing and understanding a complex and contradictory phenomenon. In fact, the lack of rules inevitably triggers mechanisms of exploitation and subjugation to market logic, that is often ruthless, showing (as we said above) an unbridgeable gap between *buyers* and *providers*. At the same time the attempt to lay down laws increasingly narrows the secular and Enlightenment principle regarding the availability of people's bodies. If, on the one hand, all this satisfies essential constitutional principles, then on the other, it undermines the autonomy and freedom of individuals, which undoubtedly leads to a number of issues related to sense of identity, and is inextricably linked to the anthropological and political reflection concerning integrity of the body.<sup>26</sup>

<sup>24</sup> See D. Haraway, *Simians, Cyborgs and Women. The Reinvention of Nature* (New-York and London: Routledge, 1985) and *Primate Visions: Gender, Race, and Nature in the World of Modern Science* (New York and London, Routledge, 1990); M. Benedikt (ed.), *Cyberspace. First Steps* (Cambridge Mass.: MIT Press, 1992); R. Marchesini, *Post-human. Verso nuovi modelli di esistenza* (Torino: Bollati Boringhieri, 2002).

<sup>25</sup> J. Butler, *Bodies That Matter On the Discursive Limits of Sex* (New York and London: Routledge, 1993).

<sup>26</sup> In the aforementioned *The Global Traffic in Human Organs*, Scheper-Hughes brings concrete experiences to show how the integrity of the body is central to transplant issues. A retired Brazilian accountant, who under the law on presumed consent, says 'Does this law mean that when I die they can take my body, cut it up, take what they wish, even if my family does not agree? ... Put a very large stamp on my identity card, 'Fagundes will not donate anything!' (210)

To conclude on this point, we can say that we are completely immersed in a market logic that assigns a value to bodies, whether in one piece or torn to pieces: on the one hand there are *bodies* that are worth too much, and on the other, *lives* that are not worth anything, or little more than nothing, and therefore victims of racial, gender and economic exploitation.

### 3. Black and Legal Market

In a well-documented conference of the 'American Society of Transplant Surgeons' held in Boston in 2004, the question of marketability of the human body was dramatically at the center of the bioethical reflection. The idea of a charter of rights for organ donors with an economic consideration, which was brought up on that occasion and caused an outcry in every part of the globe, undoubtedly constitutes tangible evidence of a paradigm shift in the scientific community. As a matter of fact, if a few years earlier a famous Israeli<sup>27</sup> nephrologist had highlighted the existing relationship between organ trafficking and the participation and cooperation of some governments in terms of economic and health reimbursement to patients/donors, the idea of mediation and of public control in economic transactions relating to the alienation of an organ starts from wild powers of the market.

All the weight and the symbolic meaning of the gift undoubtedly loses its importance, which is the constituent element of the legal framework for transplants, in favor of a regulation based on the contract and the individual ethic selection.

If the altruistic and solidarity model seems unable to guarantee the fulfillment of the right to health of each individual, not having an incremental value,<sup>28</sup> then the possibility to tap resources from the contractual framework within the new limits drawn by the law would reduce the gap between supply and demand

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and a South African mother, who in front of the body of her son who had his eyes removed without the consent of his parents, says, 'Although my son is buried, is it a good thing that his flesh is here, there, and everywhere? That parts of his body are still floating around? ... Must we be stripped of every comfort as well as our dignity? ... How could the medical doctor decide or know what was priority for us?' (2006).

<sup>27</sup> Reference is made to Michael Friedlaender.

<sup>28</sup> For an idea of incremental resources based not on the commercialization of the body but on an option by the person consenting to post-mortem organ transplantation, see P. Becchi, *Il problema dell'allocazione degli organi. Plaidoyer per una terza via tra il 'puro' dono e il 'libero' mercato*, in *Filosofia e realtà del diritto. Studi in onore di Silvana Castignone* (Torino: Giappichelli, 2008).



and new forms of commodification would have to be rethought, and not necessarily attributable to the exploitation mode.<sup>29</sup>

In this interpretation, the concept of *choice* would allow discrimination between *commodification and the exercise of self-ownership*,<sup>30</sup> a dualism necessary to justify the possibility of having one's own body, or parts thereof, in view of a growing neoliberal recognition of freedom and the autonomy of each subject. It is no coincidence, in fact, that Gary Becker, Nobel laureate in economics, equates the donation of organs from a living person to the alienation of the eggs in surrogate motherhood. Until a few years ago, this case was considered anti-juridical as well as ethically questionable.<sup>31</sup>

Therefore, it would be reinterpreting poorly the notion of commodification attributing a partial and incomplete meaning:<sup>32</sup> commodification of individual portions of the body, fully susceptible to an assessment in terms of costs/benefits by each settlor and based, ultimately, on the absolute priority of negative freedom and self-government.

All prospects should be read in this interpretation which questions the equation of commodification/exploitation and reinterprets Kant's notion of dignity (according to which man can never be considered a means, always and only an end) as referring exclusively to the body as a unit, as a whole.

If, in fact, there is a massive presence of supporting bioethics to this process of commodification and that ethical buying, selling, hiring and lending of the human body is legitimate, and risks becoming final goods with the consent of medical profession, with the permission of the law, with the approval of philo-

<sup>29</sup> Literature is vast on the possibility that the market does not necessarily imply exploitation. See, for example, P. Sommaggio, *Filosofia del biodiritto, Una proposta socratica per società post-umane* (Torino: Giappichelli, 2006), 9.

<sup>30</sup> See the essay by P. Halewood, 'On Commodification and Self-Ownership', *Yale Journal of Law & the Humanities* 20 (2008), 131 et seq.

<sup>31</sup> J.J. Becker & J.J. Elias, 'Introducing Incentives in the Market for Live and Cadaveric Live and Cadaveric Organ Donations', *Journal of Economic Perspectives* 21 (2007): 21: 'Proposals to pay for organs, even from cadavers, have been sharply criticized on several grounds. One common criticism is that payment is 'immoral' because it involves the 'commodification' of body parts. But if women can be paid to host the eggs of other women and bear their children – as they can in the United States – why cannot men and women get paid for selling their organs to save the lives of others? Surely, the moral considerations supporting pay for organs that save lives are no weaker, and for many persons would be stronger, than those supporting pay for the use of wombs to create lives. In considering the arguments against payment for organ donors, it's illuminating to compare them with the arguments about paying market wages to attract a voluntary army. For exam a first argument against monetary payments for organs is that such payment is undesirable because it involves commodification of body parts. But the voluntary army used by the United States and many other nations allow the commodification of the whole body, since volunteers expose themselves to injury and death if they are sent into conflict. In general, our workplace lets many workers take on jobs that involve higher pay as compensation for some physical risk'.

<sup>32</sup> In this sense: M.J. Radin, 'Market- Inalienability', *Harvard Law Review* 100 (1987): 1849, 1937.

sophy,<sup>33</sup> there is no doubt that transforming the human body into a reserve of spare parts to be delivered to the contingency throws a dramatic shadow on the concept of a person, by giving it to the contingency of an omnivore market.

To what extent is legalization of the body thinkable? Where can the eye of the law push itself in regulating the ways in which acts of disposition of one's body are possible in order to make a profit and which limit the subordination of the right itself to a purely economic logic?

Undoubtedly increasing the value of the contract rather than the gift would mean a total functionalization of rights to set policy objectives, radically sacrificing the value of human dignity to the allocation of resources: resources coming mainly from the pockets of global poverty, with the outcome of an exponential reproduction of inequalities and asymmetries. Behind the economic transaction lies instead of a solidarity gesture due to the emotional map of the receiving, there is the despair of difficult survival if not totally denied: so are evident all the risks arising from the rhetoric about solidarity.

Domesticated, docile, manipulable bodies, bodies that are containers which deliver portions of themselves to the contingency, decomposed bodies, bodies of law,<sup>34</sup> bodies that narrate the surplus of life compared to the rules and that enter into an asymmetrical relationship with other bodies which inevitably mark destiny. Thus the body becomes a visible place of inequality.<sup>35</sup>

And the body, as it dramatically enters the legal dimension since its legalization tells stories of punishment, subordination, discrimination, to force the philosopher of law to question as to what the boundaries are, or rather the limits related to the need to control and contain the risk dictated by the opening of a market for organs.

Certainly the need for neutralization of the conflict expressed by modern law is based on secularism and the secular state, and gives the foundations to the intervention of criminal law on a precautionary principle and the offensive nature of the crimes in the protection granted to legal interests.

In a complete logical medicalization of the vital function of neutralization of conflict absolved by law, it would result as being unbalanced in favor of security needs and risk control that, if on the one hand, enables a greater allocation of resources, on the other hand, it would result in forms of discrimination, inequality, injuries. It would mean sacrificing pillar fundamental rights of our democratic societies, and giving up at the same time, *a minimum of natural law content* expressed in the law.

<sup>33</sup> G. Berlinguer & F. Rufo, *Mercato e non mercato nel biodiritto*, in C. Canestrari, G. Ferrando, C.M. Mazzoni, S. Rodotà & P. Zatti (eds), *Trattato di biodiritto*, 1 (Milano: Giuffrè, 2011), 1011.

<sup>34</sup> Reference is to A. Hide, *Bodies of Law* (Princeton: Princeton University Press, 1997).

<sup>35</sup> S. Rodotà, 'Il corpo giuridificato', in *Trattato di biodiritto*, *supra* note 33, 51.

That minimum content of natural law mentioned by Hart in *The Concept of Law*<sup>36</sup> aims to ensure the survival of human beings before truisms, obvious truths, structural to human nature, in which human vulnerability is identified, approximate equality, limited altruism, limited resources, limited understanding and freewill, highlighting the important need for law and morality. Evidence of the characteristics of the human species stems from these truisms, exposed to bodily attacks and normally vulnerable to these, it is essential that law and morals have a specific content, without which the survival of the species would be at risk.

Starting from the recognition of human vulnerability, you can replicate the hypothesis of a legalization of the organ market. A mutual vulnerability of those who offer an organ for economic consideration and who renews his life by using that organ, for which he is willing to pay any price. There are lives that are worth too much and lives that are not worth anything and make people extremely vulnerable and willing to play anything and everything in the hands of clandestine transnational organizations.<sup>37</sup>

*Staying human* must mean ensuring that ethical and legal core does not make sense without which the artifice itself, but would remain an ineffective means of regulation compared to the primary purpose assumed and intended as a guarantee of the survival of individuals.

Preserving the legal instance of neutralization of conflict before the lesion of primary goods being part of oneself, portions of identity, and giving up the incremental value of the contract is the only way possible.

It is the limited altruism of individuals that is masterfully recognized by Hart when he creates the foundation of the transplant discipline, linked as it is known, to biological or affective sphere.<sup>38</sup>

In relation to these aspects, it is observed that the so-called Samaritan donations implemented in Great Britain, Switzerland, Netherlands, Norway, Sweden, Israel, North America, Canada, Japan, Korea and that has recently been tested in Italy, allows a kidney transplant out of kinship or affective relationship, through the donation of an organ from transplant centers, universities and hospitals, preserving the anonymity between donor and recipient, the risk

<sup>36</sup> H.L. Hart, *The Concept of Law* (London: Oxford University Press, 1961).

<sup>37</sup> The concept of vulnerability, as well as the Hartian elaboration in terms essentially ontological, has a special interest in its interpretation as a political category (in this sense: J. Butler, *Precarious Life: The Powers of Mourning and Violence*, Verso 2006; J. Butler, Z. Gambetti, L. Sabsay, *Vulnerability in Resistance*, Duke University Press, 2016; A. Cavarero, *Orrorismo ovvero della violenza sull'inerte*, Feltrinelli, Milano, 2007; from a feminist perspective: C. Mackenzie, W. Rogers, S. Dodds (eds), *On vulnerability. New essays in ethics and feminist philosophy*, Oxford University Press 2014) and social, related to the proliferation of economic disadvantages and marginality (N. Negri, C. Saraceno, (eds), *Povert  e vulnerabilit  sociale in aree sviluppate*, Carocci, Roma; C. Ranci, *Le nuove disuguaglianze sociali in Italia*, Il Mulino, Bologna, 2002).

<sup>38</sup> In this sense, see the Italian Law No. 91 of 1 April 1999, Provisions concerning the removal and transplantation of organs and tissues.

of turning into a concealed instrument of alienation, given the difficulty of objectifying the gratuity criteria, the non-futility and gratuity of the gesture.<sup>39</sup> A strategy which undoubtedly increases all the more with an act of super allocation of the organs, formally preserving the symbolic element of the gift, but that is not entirely free from risks of commercialization. A commercialization that could assume different modes and forms of economic benefit in a broad sense, on the assumption that the 'commodification insists upon objectification in some forms, transforming persons and their bodies from a human category into objects of economic desire'.<sup>40</sup>

Thus the hypothesis of a legal commodification, based on the fragmentation of the bodies, inevitably involves hot and urgent moral terms as hot and as urgent as the definition of human nature, with the risk, however, of depriving the law of its primary function, which stabilizes social requirements and justice, always contingent and never absolute.

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<sup>39</sup> Expressed herein: F. D'Agostino, *Postilla to La donazione da vivo del rene a persone sconosciute (c.d. donazione samaritana)*, Italian National Committee for Bioethics, 23 April 2010.

<sup>40</sup> L.A. Sharp, 'The Commodification of the Body and its Parts', *Annual Review of Anthropology* 29 (2000): 293.