

Dr. SAMUEL JELLINEK / Consideration for a Donation

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CONSIDERATION FOR A DONATION

*Future market : the sale of human body
parts*

**Guidelines for proposed legislative arrangements and
social-normative arrangements to increase and
facilitate the availability of human organs for
transplantation on the basis of economic and
commercial considerations.**



פרלשטיין-גינזברג בע"מ

"A man does not dive into the water to rescue a drowning person with such great enthusiasm as when he does so in the presence of many other who do not dare to take the risk.

F. Nietzsche

All that is not given is lost
(Indian proverb)

TABLE OF CONTENTS

Prologue	
Synopsis of the Thesis	
Introduction	
Chapter A Frustration at the beginning of the millenium – Examination of the current dilemma.....	29
Detailed Table of Contents	
1 Death and Life are in the Power of the Tongue	35
2 Organ Transplants.....	41
2.1 Worldwide Chronicle of Organ Transplants	41
2.2 Human Organs – Categorization and Classification.....	45
2.3 Success and Mortality Rate (Medical)	53
2.4 Conclusion: There is an Acute Need for Increasing the vailability of Organs for Transplant.....	58
3 Allocation of Human Organs for Transplant – The Present System.....	59
3.1 Principles for Allocation of Human Organs for Transplant in Various Countries	59
3.2 The Waiting List and Mortality Rate – A Chronicle of Preordained Mortality	68
3.3 The Present System – Immortalization Discriminatory Mortality ?	77
4 Ways to Provide Incentives for Finding and Donating Organs for Transplant.....	85
4.1 Administrative Means.....	85
4.2 Spiritual and Heroic Means	98
4.3 “Surplus” Benefits	103
4.4 Leagal Means	113

4.5 A Review of Proposals for Changing the Present System.....	123
4.6 Conclusion: The Present System Perpetuates Discrimination of the Disadvantaged Sectors	128
5 Sale of Human Organs – The Applicable Law Compared with Laws on other Topics	131
5.1 Israel	131
5.2 England – Is There an Absolute Prohibition?	147
5.3 U.S.A – Specific Prohibition alongside a Budding Trade.....	149
5.4 European Countries – and Other Countries	153
5.5 A Comparative View – Surrogate Motherhood, I.V.F Adoption, Blood Donation	155
5.6 The Position of Jewish Law – A Liberal Approach.....	160
6 Sale of Human Organs – A Worldwide Chronicle of Trade and Crime – "And The Winner is...."	167
<u>Chapter B: Moral and Ethical</u>	173
Considerations	
Detailed Table of Contents.....	177
7 Introduction	177
8 Moral & Ethical considerations -General Classifications	179
8.1 The Status of the Human Body.....	179
8.2 Informed Consent.....	187
8.3 The Living.....	190
9 Presumed consent.....	197
10. 4 Altruism	219
11 Slippery slope	235
12 Coercion & Exploitation	249

Chapter C: Consideration for a donation – A Proposed Model 261

Detailed Table of Contents

13 Fundamental assumptions 267

13.1 Life and Death..... 267

13.2. Money 268

13.3 The Right to Privacy – A Person’s Right to his/her Body 270

14 Guiding Principles for Action 273

15 The Content of Consideration for a Donation 279

15.1 Arrangements through the National Insurance Institute 279

15.2 Legal Arrangements 280

15.3 Arrangements Pursuant to the System of Taxation 282

15.4 Arrangements Pursuant to the Health System 283

15.5 Insurance Arrangements 284

15.6 Social AND Communal Arrangements 285

16 Amendments to Legislation..... 287

17 The Designated Population – Summary 291

Draft proposal for regulations..... 293

Chapter D: Practical and Economical Aspects 303

Detailed Table of Contents

18 Economic Consideration for Human Organs for

Transplant – Cost Benefit Analysis.....303

18.1 General.....303

18.2 Cost of Treatment for Various Patients Who Need Organ Transplants.....310

18.3 The Inclusive Cost to the Economy and Society.....	315
18.4 Cost of Transplant Operations and Protracted Post Operative Treatment.....	320
19 The System in Israel – Negative Incentive	325
19.1 Operation of National Health Insurance Law and Global Payment	325
19.2 Addendum for Serious Illnesses	326
19.3 Performance of Transplant – Cassation of Payment .	327
19.4 Proposals for Change and Incentive	329
20 Cost of Consideration for a Donation: Conclusions.....	331
20.1 Cost of Receiving Various Organs – The Value of the "Basket of Payments"	331
20.2 Inclusive Savings to the Economic and Social System	332
20.3 Establishment of a System to Handle Organ Donations for Payment	333
20.4 Sources of Financing; or Using the Balance from Savings as a Reserve for Payments	334

Epilogue

Bibliography

Attachments

Internet Web sites

Synopsis of the Thesis in English

SYNOPSIS

The purpose of this research is to offer a model for legislative, social-normative, economic and financial arrangements that will lead to increased availability of human organs for transplant. The motive for offering organs for transplant will no longer be solely altruistic, as is often the case, accompanied by social and family pressure; rather the motive to donate will be generated by economic and financial considerations as well, which will serve as the single impetus or as an additional impetus to expedite already existing altruistic motives, in cases where they are present, by providing financial support to an individual who desires to donate. This research has been analyzed both from the aspect of an individual, whether the donor (the seller) or the recipient, who is not necessarily the buyer(i.e., the payor), as well as from the social and economic aspect and considers both donations of organs by the living as well as donations from decedents.

The problem presented by the grave scarcity of organs for transplant is already well known and widely recognized. The extraordinary ability of modern medicine to prolong and save lives has consequently caused the continuing and increasing scarcity of organs for transplant, as a result of the ever-increasing demand, leading to the death of many a patient while waiting for a suitable organ. The entire world is seeking a solution to this ever-growing scarcity, which has grown to an ethical problem tantamount to immorality.

This study is divided into four sections. The first considers the situation as it exists in Israel and throughout the world, examining the scope of the scarcity and reasons therefor, by methodical examination and comparison of the grave data against the various existing methods of encouraging donations. It reviews and analyzes the law in Israel and selected other countries, regarding the possibility of donating organs for transplant, while simultaneously comparing what has occurred in similar sectors, where economic motives have already been put to use (such as surrogate pregnancy, adoption, etc.).

A special chapter is devoted to ethics and morals, as well as to economical issues, in addition to several special matters unique to the subject of transplants: **Altruism** – the author contends that altruism is not sufficient to cope with and solve the problem of the scarcity, or **the slippery slope**, where in the opinion of the author this argument is

unable to refute the model proposed, or **coercion and exploitation** which are frequently raised against giving consideration; however, thorough examination reveals that this is not the case. In addition, an extensive examination as presented here of the subject of '**presumed consent**' (a presumption under the law, that in the absence of prior registration of objection to use of organs for transplant, when a person who dies in a hospital, the hospital may use his organs without any further consent on the part of the family) that has been subject to criticism with regard to its implications and influence, as the central pivot in for legislation in European countries pertaining to organs for transplant, and comparison of the presumed consent principle with the model for providing consideration to donors of organs for transplant, which is the central focus of this study.

For the first time, a practical model is proposed in detail, including a code of standards and methods of operation, including a proposed text of regulations, by way of which it will be possible to offer, in an honorable and fair manner, economic and financial consideration for making organs available for transplant, which is called "the consideration package". The advantage of the proposed model is that it is based on existing 'tools', such as the National Insurance Institute, tax exemption principles and the like and therefore could be put into operation immediately, in order to obtain more organs for transplant and save many lives that are presently dangling from the waiting list. The model is based on an official body that would administer the organs made available, without any contact between the seller (the donor) and the recipient, and by adhering to strictest principles of justice and equality in allocation of the organs to needy patients, who will not have to pay a thing. This will improve the situation of patients at low-income levels, who lack the means to solve the problem of finding suitable organs by traveling abroad, which poses a great financial burden. The model is geared first to family members of deceased persons, to enable them to donate the organs of the deceased, and to relatives of patients in need of transplants, who wish to donate but have hesitations, and only thereafter to the general public.

In the last section, the author proves, relying on publicly available sources (such as reports of the State Auditor and others) and data collected specially by him, that operation of the model would not cost the public coffer a thing but rather clearly would save a great deal of financing costs from the health budget, aside from the main purpose of saving lives.

Synopsys

Under this state of affairs, it would appear that putting the model into operation is mandatory, or at least for the interim, in order to save many lives. The fact that it would not involve financing costs but would certainly save a lot of money serves to enlarge the moral dimension of the entire problem, since, there are many who contend that if only from moral considerations alone, the state does not have the authority to prohibit a person from donating or from receiving consideration for making his organs available for transplant.

INTRODUCTION

The purpose of this thesis is to propose guidelines for legislative arrangements and social-normative arrangements based on Economic and Commercial consideration aimed to increase and facilitate the availability of Human Organs for Transplantation.

All over the world the number of organs designated for transplants does not meet the need and demand for such organs and people die each year only due to a grave shortage of organs for transplants. Where society is so extreme in protecting the individual's right to privacy and allows him to make fateful decisions with regard to his body and health, such society must enable everyone so wishing to purchase or sell organs for transplants, including creating a system of giving financial consideration to anyone wishing to donate. Human life will thereby be saved on the one hand, while on the other hand the health system in particular and society in general will save large amounts of money, which will also be directed to saving the individual and his welfare.

From a moral-social viewpoint, society does not have the authority to prohibit an individual from purchasing or selling, from giving or receiving financial consideration for organs intended for transplants, whether from a living person or from his dead relative. Such a prohibition means sentencing the needy to death. Such a prohibition is similar to prohibiting the sale of a life-saving drug.

The Proposed Model examines selling of organs to a national or regional centre, which will distribute them according to criteria that shall be determined. The possibilities of consideration starting with direct money payment by the centre or through social laws, such as a National Insurance allowance a special system of pension payments, or the possibility of reduced tax rates or various insurance arrangements, starting with loss of working capacity insurance and ending with full and fair medical insurance, granting privileges for various preferential rights including an employment duty, and in particular altering the approach as to the possibility of using a deceased person's organs and giving consideration to the deceased while still alive or to his family after his death. No doubt that using financial incentives and commercial considerations will enable to save lives!

CONSIDERATION FOR A DONATION – PROPOSED MODEL

ABSTRACT

Fundamental Assumptions

This model is based on a number of fundamental assumptions; the first of which is;

Life and Death.

In virtually every country in the world there is a familiar and well-known anomaly, where on the one hand modern medicine with the assistance of the developing technology is able to work wonders and save lives and thus the list of those waiting for organ transplants in general and kidney transplants in particular is becoming longer each year, while on the other hand the number of organs available for transplants, notwithstanding all the efforts and successes in increasing the number of organs, are not keeping pace with the demand, and thus, in this simple but chilling equation, the result is that each year people are sentenced to death due to a lack of appropriate organs.

These for example include kidney patients for whom dialysis no longer works and they are therefore condemned to death, and there are others who remain attached to a dialysis machine many times a week, several hours on each occasion, incapable of productive work, whose lifestyle has sunk to the minimum and the economic price is sky high.

Everyone knows that throughout the entire world extensive and important efforts and huge budgetary investments are being devoted to the purpose of increasing the number of organs for transplants on an altruistic basis; however, despite all these efforts, many of which have been successful, and the increase in the number of organs, the need for them has increased sevenfold, and the gap between supply and demand has been widening and growing, and in the opinion of experts, it will continue to widen and grow. Apparently the many attempts that have

been made until the present time, on the one hand, and lack of success in solving the problem, on the other hand, lead to the unavoidable conclusion that a different, perhaps even an unusual approach has to be tried, for the fact is that people are dying every day and discussing the ethical principles will not keep them alive.

Money

We all work in order to earn money. There is no doubt that for a higher consideration and a higher salary, the work is better, the effort is greater and willingness improves, and there is no doubt that with money one can obtain much more. Money is not a rude word, it is the modern financial stimulus with the greatest power, only honour competes with it on occasions, without too much success - this is not the ugly world, it is the real world. There is no doubt that the giving of financial consideration in a respectable, open and recognised manner will increase the number of those willing to donate their organs for transplants, whether from those who are alive or from those who are dead, and this does not refer to an actual direct payment, but also to various arrangements of insurance, taxes or allowances, with which we shall deal in due course.

As matter of reality, today money also determines quality of life and the quality of medical treatment. There is a constant desire and attempt to provide egalitarian health care and huge budgets are invested to enable everyone so requiring to receive medical treatment at the highest level possible, but it is not a secret that private medicine is increasing and prospering and anyone who wants this and is able to acquire it, not necessarily only the wealthy, pays large amounts of money to receive private treatment and which, in his opinion, is of a higher level, whether for various heart operations, private births or any other treatment according to the supply and demand. It is impossible to prevent this and it is not right to prohibit it, although in the Israeli society private medicine has been considered for many years as undesirable and as impairing equality and justice.

It is not a secret and it is not novel that money and budgets determine the fate of one's life. A government decision to increase the defence budget and to purchase more arms or protective means for soldiers means saving life. A budget decision to open or close hospitals has a direct influence not only on quality of life, but also upon life itself. Notwithstanding, society with full awareness restricts the health budget since it is incapable of funding all the requirements and therefore any

expense which can be saved means saving further lives!

According to data of the Sick Funds and the State Comptroller in a report some two years ago,¹ the direct cost of the medical treatment for a patient who is attached to a dialysis machine amounts to some \$ 45,000 to \$ 50,000 and more, according to the patient's condition and the extent of the treatment. The Sick Funds maintain that the cost is even higher. However, this is in any event only the direct cost, which does not include the financial cost of the welfare system's care for the patient and on occasions his family, the fact that on many occasions he is incapable of working and ceases to be productive and the fact that on occasions he also receives some allowance, so that it is clear that the total annual cost is many times more each year.²

Would it not be correct, appropriate even just to permit a kidney to be bought at a full price and thereby, apart from a certain saving of a life, a very large amount of money would also be saved in many cases, which in the present situation, in view of the ever decreasing health budgets on the one hand and the increasing requirements on the other, would assist in saving many more lives!

One must also remember society's attitude when it requires volunteers in dangerous units or for special work, such as the dangerous units of the police, the border police, military career officer serving in dangerous places - does society not offer those who are prepared to risk their lives various temptations, such as higher salaries and higher consideration, including pension and other payments? Are we not tainted with a certain hypocrisy?

Right to privacy

A further assumption is based upon a fundamental value in modern culture in general and the modern western legal system in particular, which is virtually a sacred value and has therefore been the subject of legislation, constitution and basic laws, and I am referring to the individual's right to privacy.

This right of privacy gives a person the authority and right to make fateful decisions about himself and his body which are approved and

¹ State Comptroller Report No. 47 P. 225 & No. 51B

² Th. De Charro A. De Wit "*Costs of Transplantation; Procurment, Preservations & Allocation of Vascularized Organs*" Collins, Dubernerd, land & Persijn Editors, Kluwer Academic Publishers 1997 p. 233.

honoured by society and the legal authorities, so that a person can in his lifetime give instructions how he and his body should be treated in the event of a grave terminal illness, whether imminent operations be performed or whether actions be taken to prevent prolongation of life - all these are subjects that have, in the appropriate conditions, been approved and enforced by the courts in Israel and throughout the world. Within the context of the right to privacy, a woman's right to her body has been recognised and formulated, including her exclusive right to an abortion without State intervention; in the first trimester at least in the USA; while in Israel it is subject to obtaining appropriate committee approval, while the husband's demand has been totally rejected and his right to intervene, even if he is the father of the foetus, has not been recognised!!³

If this is the situation, what is society's moral position to prohibit a person, who has the right to his body and his privacy, from selling or donating one of his organs for a transplant for financial consideration, where the law even recognises this in related spheres, such as a blood donation which entitles the donor to blood insurance for a year, lawful appointment of a surrogate, which contains many characteristics of trading and consideration, and also various adoption proceedings pursuant to the recent regulations. It is all a question of adaptation and appropriate terms.⁴

The previous basic assumption also naturally includes a further assumption that human organs are recognised by the law as being transferable property and that a person has the right to trade in them and thereby profit, an assumption to which we are a party, but one that has undergone many incarnations and discussions and is today recognised by the majority of legal systems in the world.

I wish to present a possible model or an assembly of ideas through which society in general and the legal system in particular can, and in my opinion, must create and legislate for, so that anyone so wishing will be able to sell or purchase or receive or give financial consideration in order to obtain organs for transplants, particularly those which can save lives.

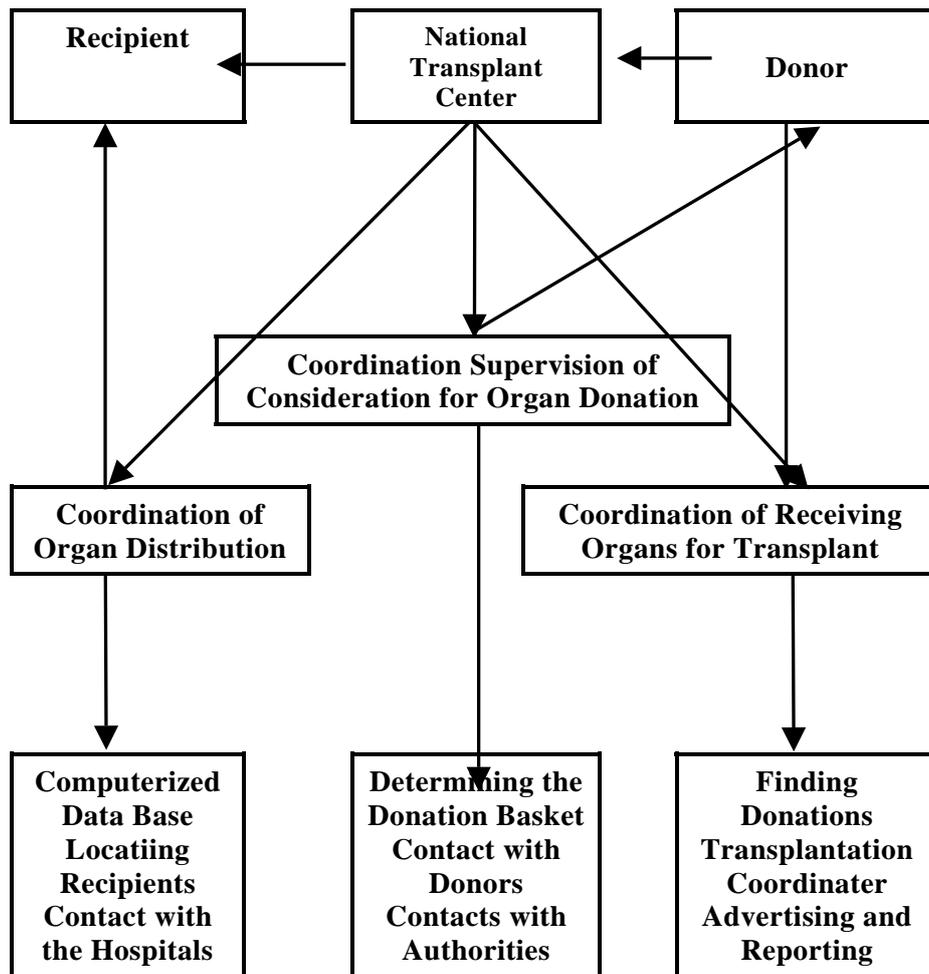
³ Nancy E. Field "Evolving Conceptualization of Property; A Proposal to De Commercialize the Value of Fetal Tissue" *99 Yale Law Journal* (10/1989) 169.

Hardiman R. "Toward the Right of Commerciality; Recognizing Property rights in the commercial value of human tissue" *34 UCLA L.Rev* (1986) 207.

⁴ Crespi G. S. "Overcoming the legal obstacles to the creation of a future market in bodily organs" *55, Ohio State Law Journal* (1994) 2.

CONSIDERATION FOR A DONATION - PROPOSED MODEL

It appears that the time has come to openly and courageously recognise the need to provide fair financial consideration to find organs for transplants.



Guiding Principles for Action

The proposed model should operate according to a list of guiding principles of operation, so that adhering to them will ensure a high ethical and moral level and at the same time save lives.

1. The first principle is that at this stage purchasing and buying the organs shall be done exclusively by a single official body authorized to do so – in Israel, the National Transplants Center – in other, larger countries, it is possible that there will be exclusive regional centers. There will not be, at least at this stage, trade or any direct contact between a voluntary buyer and a voluntary seller. The donor of the organs for consideration will have contact only with the official organization that will coordinate all of the organs from all of the sources.
2. Distribution of these organs to those who need them will continue to be done according to the same criteria that exist today, i.e., without regard to the financial ability of the recipient but according to the criteria established in each country, which are already in effect and in operation at present, together with existing criticism thereof. It should be emphasized once more that the receipt of the organs will not be conditional upon any payment.
3. The financing for obtaining the organs will be carried out through the budget of the country and/or the budget of the said official authority and will be covered mostly or totally by the vast saving to be achieved in the health budget in particular and in social resources in general, as we pointed out in the previous section. (In addition, potential reduction in the number of disability pension payments and the number of persons requiring service from welfare authorities should be taken into account and further means of saving money.)¹
4. It should be stipulated that the consideration will be paid automatically to each donor regardless of who he/she is. Someone who expresses his intent to donate an organ for free will receive the consideration and transfer it to charity or to another worthy cause as he/she deems suitable; however, it is

¹ Barnett A.A. & Kaserman David "The Shortage of Organs for Transplantation; Exploring the Alternatives" *9 Issues L & Med.* (1993) 117, 123.

very important, to avoid persons from being recalcitrant about donating organs for money, that they know that "everyone" gets paid, so that the matter will be more acceptable.

5. The proposed model will deal both with living donors from decedents, whereby contact was made with the donor while still living, or following death, with some member of the family, and whereby there will be a special incentive to encourage families of decedents to donate organs.
6. Preference should be given to making a donation for payment in kind rather than for "cash payment", and even if there will be a cash payment it should properly not be especially big, particularly in order to negate or reduce to a minimum accusation of "cajolement".
7. There should be a statutory provision to the effect that the donor bears no "personal" "product" liability for the organ toward the recipient and the authority that examined the donor and approved the donation.
8. It is important that there be accompanying "spiritual" support to the donors, whether by clergy persons, psychologists, philosophers and even public relations, in order to arouse the donors to realize that even if donations are made for money or payment in kind, the actual result in effect is to save lives.
9. The course economic and financial consideration should be offered under several acceptable formats, each having a common denominator, which is guarding the health of the donor and his/her family; and the rest of the economic terms may be tailored to a donor along the lines of the various formats, as chosen by the authority in charge of coordinating receipt of the donated organs.
10. There shall be no specific performance of a contract for sale of an organ, and the donor may rescind it at any stage of handling it; however, if the donor received payments or payment of consideration "on account", he/she will be required to return them.
11. A statutory provision shall make clear, in order to avoid doubt, that any consideration received by the seller-donor shall be exempt from any lien or attachment and shall not be transferable to a trustee in bankruptcy, but shall be for the use of the donor

and his/her family only. Such legal status in effect corresponds to the law currently existing in Israel regarding compensation for personal injury damages, which belong to the injured party and are not included among his/her assets for the purpose of covering his/her debts in bankruptcy proceedings.²

12. Designating a specific donation (a sale for a specific person) is likely to raise a difficult problem and therefore this should be limited to first degree family relatives only. It should be prohibited in respect to third parties; otherwise, it is likely to develop into "unsupervised trading". Allocation of the organs will be done, as noted above, as is customary today, including donations deigned for transplant in a certain, specified individual for relatives only.
13. It is important to grant the authority responsible for coordinating gathering the organs and allocating them to patients, the power to refuse, in its discretion and without being required to give grounds, to receive or purchase any organ whatsoever tendered; this matter is important to prevent a situation whereby the donors-sellers come from a certain ethnic group, or from a certain social strata or certain village, etc . It would be desirable to generate so far as possible sale and acceptance of the organs from the widest possible social spectrum.

The Content of Consideration for a Donation

There is no doubt that the seller of an organ to save life for monetary consideration or economic support is also entitled to every praise, blessing and gratitude exactly like a soldier who gives his life in battle or other heroic examples. Therefore, they should continue to be called donors. The content of possible kind of consideration according to different subjects is outlined below and it is clear that the list of ideas and possibilities is not final, is not closed and is likely to differ from country to country.

1. Arrangements through the National Insurance Institute

- a. There is no doubt that this is already a body with considerable power and great importance today, and may be used it

² See C.A.38/68 Yedidia Reuven v. The Official Receiver, 22 (2) P.D. 141

immediately for granting consideration to donors pursuant to the model.

- b. It is possible to pay an automatic monthly pension to the donor of an organ for consideration.
- c. The amount of the pension would be set according to the type of organ donated and could be set off against anything whatsoever, including other pensions from the National Insurance Institute (today, the recipient of a disability pension loses an old age pension, for there are no multiple pensions from the National Insurance Institute).
- d. In the case of decedents, the widow(er) or children could be offered a double survivors' pension or dependents' pension (or any other rate that would be set).
- e. It would be possible to execute a one time first payment upon performance of the organ donation.
- f. The National Insurance could also offer services for rehabilitation and training to change professions to a person who donates his/her organs and it could be stipulated that his/her status and rights are like that of any disabled person.

2. **Legal Arrangements**

- a. Several legal arrangements could be set up immediately to obtain organ donations for consideration and in effect would enable granting indirect consideration under the law as it exists today.
- b. The first possibility would be, by adapting the case law of the District Court of Jerusalem, to recognize someone who donates an organ to a person injured in accident as a compensatory damage benefactor who as such is entitled to his/her expenses, damages and savings by mitigating the damages of the injured party from the tortfeasor or insurance company, so that the donor of kidney to a sibling injured in a road accident could lodge a claim directly against the insurance company.³
- c. The Succession Law could be amended immediately to enable every person while still alive to make an obligation to donate his/her organs following his/her death for consideration to his/her

³ Civil Case 782/95 *Naftaly Ayub v. The Israel Phoenix Ins. Co.* (Dist. Ct.-Jeusalem – 26 June 1997).

family and/or estate and it would be stipulated that this instruction would be separate from the estate and/or from his/her will.

- d. Recently a new law⁴ was enacted in Israel that promulgates the "rescue" principle also toward a person to whom there is no duty. A similar legal principle exists in many countries of the world. This law could be used, with necessary amendments, to put the proposed model into operation.

3. **Arrangements Pursuant to the System of Taxation**

- a. All receipts a person gets for his/her organs would be exempt from payment of any tax whatsoever (identical to the law existing today regarding compensation for personal injury!).
- b. There is the possibility of granting a total exemption from tax on work income of the donor for a period of one year or other stipulated period.
- c. Another possibility is to give a tax cut by stipulating a lower tax rate for some extended period of time.
- d. An exemption from municipal taxes or other indirect taxes.
- e. An exemption from certain customs duties, perhaps only for personal items, as well as an exemption from or credit against value added tax.
- f. Especially popular in Israel is an exemption from purchase tax at the time of purchasing a vehicle for personal use.

4. **Arrangements Pursuant to the Health System**

- a. First of all highest first advance preference should be guaranteed to every person who donates an organ and to his close family to be put at the head of the line for receipt of organs in case they need them.⁵
- b. National health insurance without payment for his/her entire life to the donor only or to his/her family as well.
- c. In addition, the national health authority would bear the entire medical cost, whatever it may be, arising from donation of an

⁴ "Thou shalt not ignore your brother's blood" Law 1998 (a.k.a. "The Good Samaritan Law").

⁵ Jefferies, David E. "The Body in Commodity, The Use of Markets to Cure the Organ Deficit" *Indiana University School of Law* (<http://www.indiana.edu>).

organ (in a case where there are any complications whatsoever or the need for medications as consequence of the organ donation).

- d. The organ donor will be deemed "a dear friend" of the health system and would receive service and care accordingly.
- e. An incentive to hospitals to assist in finding donors for growing organs.

5. **Insurance Arrangements**⁶

- a. An offer could be made to families of decedents to donate their organs for a one time payment as a life insurance alternative, i.e., it would be possible to regard the organ donor after the fact as if he/she had had life insurance.
- b. Someone donating an organ for compensation, could receive, for his entire life, insurance against loss of fitness to work.
- c. The donor should at least be paid to cover the increase in the costs of insurance between life insurance and the loss of fitness to work that is certainly caused due to the donation and "loss" of the organ.
- d. Special life insurance could be offered to an organ donor.
- e. Offer a special pension arrangement to an organ donor for compensation, whereby the payment to the fund will be made by the authority receiving the organ and guaranteed by the state.

6. **Social Arrangements**

- a. Give a right of preference to a donor for being accepted for a public service job.
- b. Give a right of preference to a donor who participates in public tenders.
- c. Grant public works to a donor in his profession/vocation without a tender.
- d. Rehabilitation services and retraining to change profession/vocation by state authorities without payment and without a time limit.

⁶ Daar, A.S., Gutmann, Th. & Land, W., "Reimbursement, rewarded gifting, financial incentives and commercialism in living organ donation" *Procurement, Preservation and Allocation of Vascularized Organs*, Collins, Dubernd, Land and Persijn Editors, Kluwer Academic Publishers, (1997) 301.

- e. Refund of death and burial expenses and expenses the family had during the illness of their beloved organ donor – who passed away.
- f. Generous scholarships to the family members of a decedent who organs were used or to the family members of a living donor!
- g. A one time payment, that is not large, to a living donor or his/her family and it would be possible to do so by using state bonds or a bank savings plan.
- h. Erasing debts or vacating attachments could be considered, at least by state authorities in an acceptable manner and even in the private sector, while making arrangements for subrogation.

Summary

There is no doubt that everything brought forth and suggested above is subject to argument and open for discussion and the many paragraphs have been brought in extracted fashion and by way of example. There are many subjects that require further elaboration.

In any case of giving economic or financial compensation for human organs for transplant there are certain ethical problems, but analysis of the model reveals that in the many proposed the extent of the problems and their severity are considerably less than anticipated and appraised, and often even less acute than in the case of a living altruistic donor at present.

Objectors would say that altruism is the possible solution. Only those who volunteer to donate their organs should be recognized and respected, but with all respect to the latter they are not sufficient in number and those requiring organs are waiting and their fates have been sealed, but it is also doubtful today whether altruism is as it appears, since recent research works and articles assert that on more than one occasion, the altruistic donation is merely the by-product of a moderate or fierce environmental pressure totally contrary to the donor's wish, since imagine, the situation of one of a family of six children whose mother is on her deathbed requiring a kidney transplant and he is the only member of the family, including his father, who has been found compatible - from the aspect of tissue compatibility - to donate a kidney to save his mother's life - is his consent really given without any pressure?

The relative advantage of the proposed model and consequently its great advantage is that it could be put into operation, to a great extent, already "tomorrow morning", and thereby begin saving lives immediately. After all, **saving lives** is what is at stake, is it not?!

All that is not given is lost

(Indian proverb)