

Avoiding the Commodification of Human Beings in Brain Banking

Dr Austen Garwood-Gowers
Reader in Healthcare Law

Introduction

- Healthcare international governance – emphasis on respect for the individual.
- Includes efforts to appropriately control use of the bodies of individuals to serve wider ends.
- Such use has grown exponentially, e.g. via organ transplantation and bio-banking.
- Now an integral part of both nationalised and privatised health services and of surrounding industries such as pharma and biotech.
- The body has literally become big business.

Avoiding commodification means..

- Avoiding achieving ends through use being prioritised over respect for human being, including human dignity.
- Particularly focused on those which are commerce based (e.g. paying for use of organs and tissues) or commerce influenced.

No gain from body per se

- Laws and instruments allow for reasonable expenses and remuneration for activities pursuant to use. It would be contrary to dignity to expect these to be done for free.
- However, gain from the body per se is prohibited.
- Initially focus was mainly on achieving this in transplantation (World Health Organisation Guidelines and national laws).
- Development of markets for material outside transplantation has required a broader approach to prohibition, see eg. in fields of medicine and biology as a whole Article 21 of the Convention on Human Rights and Biomedicine 1997 states that '(t)he human body and its parts shall not, as such, give rise to financial gain.'

Article 21 meaning

Article 21 recognises ‘...organs and tissues proper, including blood, should not be bought or sold or give rise to financial gain for the person from whom they have been removed or for a third party, whether an individual or a corporate entity such as, for example, a hospital.’ However, technical acts (sampling, testing, pasteurisation, fractionation, purification, storage, culture, transport, etc.) which are performed on the basis of these items may legitimately give rise to reasonable remuneration. For instance, this Article does not prohibit the sale of a medical device incorporating human tissue which has been subjected to a manufacturing process as long as the tissue is not sold as such (Explanatory report para 131).

Article 21 meaning.

Further, this Article does not prevent a person from whom an organ or tissue has been taken from receiving compensation which, while not constituting remuneration, compensates that person equitably for expenses incurred or loss of income (for example as a result of hospitalisation) (Explanatory Report para 132) .

Payment for workers and expenses etc. must remain reasonable and not become a Trojan horse for payment for material or commercially motivate participation (perhaps already happening in medical research trials)

Article 21 meaning

- Article 21 does not cover issues of patentability and patenting of biotechnological inventions (Explanatory Report para 134).
- Allowing intellectual property rights to flow unconstrained from research or other use of body material goes beyond rewarding labour and expense or even risk in enterprise. It allows for reward that is wholly out of kilter with these.
- E.g. *Moore v Regents of University of California* 793 Pd 479 (1990) a cell line developed from materials taken from the claimant John Moore estimated as having a value of \$3.01 billion dollars by 1990, way in excess of what one could call reasonable compensation for risk, labour and expense and in effect amounting to a situation in which the particular unusual characteristics of the body providing for a 'windfall gain.'

Brain banking should not be on a commercial basis.

- Prohibition should logically extend to products developed from use of the body and/or body materials.
- Entities involved in banking should act on a not-for-profit basis.
- If the state is concerned about this stultifying relevant activities it could provide stimulus through existing or newly created not for profit organisations.
- It is simply unacceptable to maintain the inconsistency of the human body and its parts being sourced on a not for profit basis only to be exploited by others on a for profit basis. The combination has, as Waldby and Mitchell have noted, 'simply rendered the body an open source of free biological material for commercial use.' (2006, 24).

Need to consider reciprocation

Article 15(1) Universal Declaration on Bioethics and Human Rights 2005: Benefits resulting from any scientific research and its applications should be shared with society as a whole and within the international community, in particular with developing countries. In giving effect to this principle, benefits may take any of the following forms:

- (a) special and sustainable assistance to, and acknowledgement of, the persons and groups that have taken part in the research;
- (b) access to quality health care;
- (c) provision of new diagnostic and therapeutic modalities or products stemming from research;
- (d) support for health services;
- (e) access to scientific and technological knowledge;
- (f) capacity-building facilities for research purposes;
- (g) other forms of benefit consistent with the principles set out in this Declaration.

Article 15(2) adds the caveat that '(b)enefits should not constitute improper inducements to participate in research.'

Broader guardianship.

- Commercial and other benefits derived cannot excuse diluting respect for the individual. E.g.
- Consent should be aligned to respect by being specific and founded on detailed awareness of the process and its potential implications.
- And bio-banks should be co-ordinated in such a way as to minimise duplication of activity and thus overall levels of harm generated to public through their participation (note bad precedent with egg donation – see Waldby, 2008).
- Banking of brain materials is focused on the deceased who have no interests in bodily functioning but do have other interests, e.g. In integrity, respect for wishes and values etc.

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