

The Case Against a Free Market for Human Organs in the Philippines

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The paper looks into the proposal of creating a public policy or enacting a law which allows for a free market for human organs, specifically kidneys, in the Philippine context. The paper identifies two of the most important arguments that are used by defenders of the free market proposal for human organs: the argument from personal autonomy and the argument from economic efficiency. Using the most recent data on the Philippine kidney selling experience, social justice, and Diokno's Filipino concept of justice, the paper shows that these arguments are defective and thus cannot ground the free market proposal for human organs in the Philippines.

Keywords: free market for human organs, argument from personal autonomy, argument from economic efficiency, the Filipino concept of justice, social justice

INTRODUCTION

In recent years, there has been an increasing number of discussions about the prospect of allowing (or legalizing) the buying and selling of human organs in a free market for medical transplantation purposes. From a purely economic standpoint, the obvious motivation for creating free markets in this context is the increasing demand and the low supply of available organs (e.g. kidney, liver) worldwide. According to the data as of December 13, 2014, the waiting list candidates in the U. S. for kidney transplantation alone is 100,901 (Organ Procurement and Transplantation Network [OPTN], 2014). If we compare this figure with the total number of transplants performed

in the U. S., we get the bigger picture. From January 2014 – September 2014, the number of transplants performed in the U. S. only amounts to 21,919. Of this total number, 17,625 organs came from deceased donors and the remaining 4,294 from living donors (OPTN, 2014). On the other hand, the waiting list candidates in the U. K. for kidney transplantation is more than 7,000 (National Health Service Blood and Transplant [NHSBT], 2014). Although there is a dearth of information on the current demand for kidney transplantations in the Philippines, it has been reported that in 2010, “almost 14,000 Filipinos suffer from end-stage renal disease and are undergoing dialysis” (National Kidney Transplant Institute [NKTII], 2014b, par. 1). Also, according to NKTII's Human Organ Preservation

Effort (HOPE), “approximately one person will die each week while waiting for the transplant” (NKTII, 2014a, par. 1).

Given the unfortunate scenario described above, some legal scholars such as Peter Aziz (2009) argued that a “free market in human organs needs to be established” (p. 106). For brevity, let us simply call the proposal to establish a free market for human organs as FMHO. In this paper, two arguments provided by Aziz in favor of FMHO will be critically examined using social justice as a theoretical framework (the details of which will be discussed later). For Aziz, FMHO will solve a number of difficult problems: “A free market would lead to an increase in the supply of organs, which would lead to lower costs of procurement and more transplantations. This in return, would result in more lives being saved” (Aziz, 2009, p. 106). The essence of Aziz’s argument is simple: The whole process of organ procurement and transplantation would benefit from the free market setup because such a setup is more efficient in comparison to the current organ donation setup that we have. In essence, the argument from economic efficiency (henceforth, AEE), highlights the supposed utility and economic benefits that would accrue if a free market for human organs is established. The second argument in support of FMHO relies on the concept of personal autonomy. This idea is clearly expressed in the following argument:

By barring a person from selling his or her organs, the government hinders a person’s personal autonomy. This, in effect, forces a person to either donate an organ or refrain from providing an organ. By barring an individual’s ability to sell his or her organs, less organs will be available for transplantations and therefore, less people will receive the organs they need to live. (Aziz, 2009, p. 99)

Essentially, the argument from personal autonomy (henceforth, APA) highlights the view that human beings are autonomous. As such,

they and they alone have the right to decide what to do with their lives—their bodies and their body parts included. For Aziz and other similar-minded thinkers then, FMHO is preferable over the current organ donation setup since it respects and upholds an individual’s personal autonomy. In other words, for proponents of the FMHO proposal, the individual’s decision to enter into market transactions involving the sale of his/her organs counts as one of the many expressions (or is an exercise) of personal autonomy.

In general, the paper seeks to answer this question: Given the global trend of the rapidly increasing demand and the low supply of available organs, coupled with the high costs of both procurement and transplantation procedures, should the Philippine government create a public policy (or enact a law) which allows (or legalizes) the buying and selling of human organs—kidneys in particular—for medical transplantation purposes? Given that Aziz’s proposal (i.e. FMHO) relies on both AEE and APA, the paper will also look into some of the problems that are deeply connected to these arguments. In the process of answering the main question, the paper will also demonstrate that FMHO together with AEE and APA fail to give justice to some of the ethical intuitions that we have which seem resilient to plain economic and consequentialist treatments.

The paper is organized in the following way. Section II discusses important concepts and principles drawn from different theories of justice: (1) utilitarianism, (2) libertarianism, and (3) contractarianism. The discussion in this section is primarily expository and provides the much needed background for the proper appraisal of the arguments in question (e.g. AEE and APA and whether or not they can justify proposals such as Aziz’s FMHO). Section III provides the recent data on kidney selling in the Philippine black market. Section IV identifies Jose W. Diokno’s “A Filipino Concept of Justice” as a plausible theoretical framework to assess the

correctness (or acceptability) and applicability of Aziz's proposal for FMHO in the Philippine context. Section V identifies the arguments that are particularly damaging to FMHO and the arguments that its proponents use to bolster their claims (e.g. AEE, APA). It will also show that Aziz's proposal is consistent with utilitarian and libertarian notions of justice; in fact, the proposal also relies on them. The thrust of the paper's main argument can be stated this way: On the assumption that FMHO, together with AEE and APA, are correct, it is possible for us to arrive at a contradiction. The contradiction in this case is the proliferation and legitimization of already existing *social injustices* in the Philippines. Thus, from a theoretical standpoint, and perhaps more importantly, from an ethical (or moral) standpoint, they need to be rejected. Section VI, the conclusion, summarizes the result of the discussion. It also attempts to identify the underlying reasons as to why, in the final analysis, arguments such as AEE and APA fail to justify (or ground) the creation of a public policy or the enactment of a law which allows for free trade in human organs, specifically kidneys, in the Philippines.

THEORIES OF JUSTICE

There is a deep connection between ethical theories and justice theories. As Peter Vallentyne (2007) correctly observed, "almost any theory of morality can be reformulated as a theory of justice" depending upon how the notion of justice is understood (p. 556). This observation should come as no surprise. After all, the question of justice is a question not only of law but also of ethics (or *morality*, to use a more general term). In the task of analyzing and appraising public policies then, it is important to take into careful consideration questions from both domains. In this section, three theories of justice that bear the greatest significance to the central problem

of this paper will be identified and discussed: (1) utilitarianism, (2) libertarianism, and (3) contractarianism.

Utilitarianism

Utilitarianism emphasizes the importance of maximizing happiness (or well-being). As an ethical theory, utilitarianism is categorized under *teleological* (or what is currently called *consequentialist*) ethics. For William Shaw (2006), consequentialist ethical theories are committed to the view that terms such as right and wrong are functions of the consequences of our actions. Utilitarianism, as is well-known, calls for the greatest goodness (or happiness) for the greatest number. At the outset, one might say that this idea seems to sit well with ordinary peoples' intuitions about what is right and what is wrong in the realm of human actions and decisions.

At the core of utilitarianism is an important principle: *utility*. Jeremy Bentham (1789) believed that this principle was implicit in all ethical judgments that we make. Taking human beings as governed by two sovereign masters, pain and pleasure, Bentham argued that they alone determine what we ought to do, as well as what we shall do. This means that for Bentham, the rightness of an act consists in its propensity to either bring about more pleasure than pain or prevent pain. On the other hand, an act is wrong if it either brings about more pain than pleasure or prevents pleasure from occurring. With the belief that happiness is a *measurable* quantity, Bentham devised a hedonic *calculus* that any individual might use to determine what acts to perform and what acts to avoid. Such a calculus involves adding up the quantitative scores of the seven aspects of any pleasurable or painful experience: its intensity, duration, certainty, nearness, fruitfulness, purity, and extent.

Classical utilitarianism can be divided into two types: act-utilitarianism and rule-utilitarianism. An act-utilitarian would say that we ought to

apply the principle of utility to all the possible alternatives that are open to us at any given point in time. For act-utilitarians, every act must be judged on its own merits and it is necessary for us to calculate, in every instance, the amount of pleasure and pain that they bring. Vallentyne (2006) defined act-utilitarianism as the view that an action is permissible (or right) if and only if the aggregate well-being that it produces is no less than that produced by any alternative feasible action. The focal point then is an action and the other alternatives that are open and the comparison of the total happiness (or goodness) that they bring once they are pursued. On the other hand, rule-utilitarianism focuses not on individual actions and their consequences but on rules. Human beings after all are rule-following creatures. Vallentyne (2006) defined rule-utilitarianism as the view that “an action is permissible if and only if it conforms to rules that, if generally followed (internalized, upheld, etc.), would produce aggregate well-being that is no less than that produced by any feasible alternative set of rules” (p. 21).

Utilitarianism as an ethical theory has been around for several centuries. As mentioned earlier, it generally has an intuitive appeal. Thus, its influence cannot be discounted from everyday reasoning to the more technical aspects of policy-making and assessment. As Don Welch (2014) pointed out, in the realm of public policy analysis, utilitarianism is still the most widely practiced form of consequentialism. While utilitarianism is primarily an ethical theory, the foregoing discussion shows that it can easily be transformed into a theory of justice. For instance, for an act-utilitarian, a public policy is just if and only if the aggregate well-being that it produces exceeds what is produced by any other feasible alternative. For a rule-utilitarian, a public policy is just if and only if it conforms to rules that would produce aggregate well-being that exceeds those produced by any other set of rules. It is important to note that in both types

of utilitarianism, “the worth of an act—and of a policy—lies in the results it produces” (Welch, 2014, p. 11).

Libertarianism

As a political philosophy and a theory of justice, libertarianism focuses on two things: (1) the liberty of the individual, and (2) freedom from interference. Thus, for a libertarian, “an action is just if and only if it violates no one’s libertarian rights” (Vallentyne, 2007, p. 558). It is important to note that these libertarian rights are construed as negative rights. “Negative or liberty rights are simply rights to be left alone to act in certain ways, provided those actions do not conflict with the rights of others” (Sample, 2002, p. 308). Consider the right to freedom of expression—a right that any democratic political setting should recognize:

My right to freedom of expression, thus conceived as a negative right, is a right not be interfered with by violence or the threat of violence, as I engage in certain communicative activities. As a negative right, my right to freedom of expression is *not* a right not to have my communicative activity limited in any way whatsoever. For example, if I somehow gain access to a broadcast microphone without paying for air-time, you, the owner of the network, may cut off the power. In such a case you would be interfering with my communicative activity, but not in a way which violates my right to freedom of expression. (Buchanan, 2002, p. 101)

The foregoing passage not only explains how to view the right of freedom of expression as a negative right. More importantly, it provides an example of the proper application and *limitation* of such rights in actual scenarios. There is, however, another important point that Buchanan’s example provides that is beneficial for a fuller understanding of libertarianism: If

the owner of the network does not have any contract with the person who gained access to a broadcast microphone, then that person cannot complain if the owner decides to cut off the power. The idea is that libertarians also value and consider our contracts with one another as negative rights. “Contracts confer rights to specific objects or benefits and thus may be construed as a specific class of negative rights: they are rights not to be deprived of something to which one is entitled” (Sample, 2002, p. 308). The foregoing discussion concerning contracts is important since libertarian rights are grounded on two other important concepts: (1) full self-ownership, and (2) property rights. To expound on these concepts, Vallentyne (2007) wrote:

[F]ull self-ownership entails that agents own themselves in just the same way that they can own inanimate objects. This maximal private ownership includes (1) full *control rights* over (i.e., the power to grant and deny permission for the use of their persons; (2) full *compensation rights* (which require others to compensate them); (3) full *rights to transfer* the rights they have to others (by sale, rental, gift or loan). It also includes various enforcement rights and immunities to loss. (p. 558)

The relationship between individual liberty and justice may be summed up by saying that for libertarians, “respect for individual liberty is the central requirement of justice. They believe human relationships should be based on mutual consent. Libertarians advocate a free society of cooperation, tolerance, and mutual respect” (Brennan, 2012, p. 1). For these reasons, libertarians insist on a very minimal role for the state (or government):

[T]he only morally justifiable state is one whose functions are limited to the enforcement of voluntary contracts, and to protecting citizens against bodily injury, theft, and fraud. Libertarians contend that any state which exceeds these minimal functions violates

individuals’ moral rights. (Buchanan, 2002, p. 234)

Libertarianism is usually divided into two: (1) right-libertarianism, and (2) left-libertarianism. It is important to note that both versions uphold the idea that agents fully own themselves in the sense explained earlier. They differ in terms of the “powers agents have to acquire private property in the rest of the world” (Vallentyne, 2007, p. 558). For right-libertarians, natural resources “may be privately appropriated without the permission of, or any significant payment to, the members of society” (Vallentyne, 2007, p. 558). On the other hand, left-libertarians hold the view that “natural resources are owned in some egalitarian manner” (Vallentyne, 2007, p. 559). From their different views on the powers that agents have to acquire private property, it can be observed that left-libertarianism is more sensitive to concerns related to social (or distributive) justice as compared to right-libertarianism.

Contractarianism

In general, contractarian theories of justice select principles based on *hypothetical* (as opposed to actual) agreement. They then proceed to assess the correctness of certain actions in terms of their conformity (or compliance) with the identified principles. A contractarian theory of justice holds the view that “an action is just if and only if it, or principles to which it conforms, would be agreed to (or at least not rejected) by the members of society under certain specified conditions” (Vallentyne, 2007, p. 557). The most prominent example of a contractarian theory of justice is John Rawls’ theory of justice, commonly referred to as *justice as fairness*. As a contractarian theory, Rawls’ conception of justice is developed around the idea of a social contract where the contractors freely enter into an agreement with one another (in what Rawls refers to as the *original position*) to select and

follow certain rules for the benefit of everyone in society. The distinct aspect of such an agreement is that contractors choose behind what Rawls calls a *veil of ignorance*. This means that the contractors are not aware of their capabilities and their place in society. The import of such a condition is crucial for Rawls' conception of justice, most especially in terms of how the principles of justice are *arrived* at: It is natural to expect that the contractors will choose on the basis of their self-interests but since they are behind a veil of ignorance, they will choose "on the basis of general considerations that apply equally to all" (Vallentyne, 2007, pp. 557-558). Rawls' theory of justice can be summarized with the following principles:

FIRST PRINCIPLE

1. Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

SECOND PRINCIPLE

2. Social and economic inequalities are to be arranged so that they are both:
 - a. to the greatest benefit of the least advantaged, consistent with the just savings principle, and
 - b. attached to offices and positions open to all under conditions of fair equality of opportunity. (Rawls, 2003, p. 266)

The first principle is usually referred to as the *liberty principle*. The second principle is composed of two parts: (1) the *difference principle*, and (2) the *fair equality of opportunity principle*. Another important point to consider is that for Rawls, the abovementioned principles are ordered:

These principles are to be arranged in a serial order with the first principle prior to the second.

This ordering means that infringements of the basic equal liberties protected by the first principle cannot be justified, or compensated for, by greater social and economic advantages" (Rawls, 2003, pp. 53-54).

Moreover, Rawls (2003) maintains that "fair opportunity is prior to the difference principle" (p. 266). Commentators correctly note that the foregoing passage should be taken to mean that for Rawls, justice takes priority over efficiency:

The first priority within the difference principle is assigned to liberty, which means that liberty cannot be restricted in pursuit of any other goal except liberty itself...Once these conditions for liberty are established and maintained, then society can consider the goals of equality and efficiency. Here also, Rawls argues that equality should have a clear priority over efficiency, and that equality should be compromised only if the least well-off benefits. (Bellinger, 2007, p. 33)

As might clearly be noted from the foregoing discussion, the second principle of justice is one of the most significant contributions of Rawls' theory of justice as fairness. In a nutshell, it can be expressed in the following way: Inequalities are permitted only if they benefit the least well-off members of society. The following section provides the recent data on kidney selling in the Philippine black market. The data is crucial for the arguments that will be presented later on against AEE and APA—two of the most important arguments at the foundation of the FMHO proposal.

KIDNEY SELLING: THE PHILIPPINE EXPERIENCE

Roger Lee Mendoza (2010) conducted a study concerning Filipinos who sold their kidneys in exchange for cash and other forms of

compensation. All 121 participants are living Filipino kidney vendors from Metro Manila and the CALABARZON Region—two of the most populated and largest kidney supplier regions in the Philippines. The study shows that 98.4% of kidney vendors are males with the median age at 31.0 (Mendoza, 2010, p. 102). More importantly, the study reveals the following:

[B]etween 84.5% and 92.5% of these vendors belong to the lower-income Class D (e.g. farmers, drivers, servants and construction workers who live from day to day) and Class E (extremely poor, such as street peddlers, temporary laborers and beggars)...The vast majority of the surveyed vendors reported annual incomes below the poverty line. (Mendoza, 2010, pp. 103-104)

While the foregoing result is more or less expected since the primary motivation for selling kidneys is the financial gain that would result from the activity, the idea that a great majority of kidney vendors in the Philippines belong to Class D and Class E certainly merits policymakers' serious attention. The study also aims to accomplish two other things: (1) to understand the level of knowledge that kidney vendors have in regard to Philippine laws and regulations related to kidney selling, and (2) to understand how the organ trade system operates in the country. Mendoza (2010) reported the level of knowledge and the relatively open process of vendor introduction and entry into the black market in the following:

At least 75.3% - 83.3% of surveyed kidney vendors indicated that they either did not know it was illegal to sell their kidneys or were unaware of the existence of anti-trafficking and anti-trading legislative measures, which are written in English and strict *legalese*. Among the most common voluntary search strategies employed by vendors were publicly displayed posters, word of mouth, and Internet postings. Two-thirds (65.4% - 73.4%) indicated that

they were directly and openly approached by third parties, which included brokers, syndicates/gangs, matching agencies and some physicians. One-half (45.6% - 53.6%) were also recommended by family members, friends and local officials to these third parties. (p. 102)

As the data above shows, there are many parties involved in the organ trade system in the Philippines. This suggests that there are many people (and this includes some physicians, local officials, and police) who derive profit from the said activity. As might easily be noticed, the more serious problem though is the high percentage (i.e. 75.3% - 83.3%) of surveyed kidney vendors who are unaware that kidney selling is prohibited by law. If such a basic information is unknown to the kidney vendors, it is also understandable if they are also unaware of the fair rate or the proper compensation that they should receive for selling their kidneys. There is thus an information asymmetry in these transactions at the expense of the kidney vendor:

[T]wo thirds of the vendors were paid less than US \$3000.00 (in 2008 market values) for selling their kidneys. The median cash compensation for sold kidneys was approximately US \$2133.00...These findings confirm that Philippine black market prices for kidneys are among the lowest globally...When asked why they accepted the low prices they were offered, almost everyone indicated a desperate need for cash and lack of pricing information (e.g. did not know the fair rate, personally thought the price was high enough or the 'going rate', used their low incomes as reference point etc.). (Mendoza, 2010, p. 103)

The information asymmetry mentioned above can be explained by Filipino kidney vendors' limited education. Of the 121 Filipino kidney vendors included in the study, 37.3 - 45.3% did not reach high school despite the fact that there exists a public educational system in the Philippines up to the secondary level (Mendoza,

2010, p. 102). It is important to note that this result is consistent with studies done in other developing countries (e.g. India, Pakistan), which attribute the high degree of vulnerability of the poor to exploitation by organ trafficking syndicates due to their limited education (Goyal, Mehta, Schneiderman, & Sehgal, 2002; Naqvi, Ali, Mazhar, Zafar, & Rizvi, 2007). Knowing the profile of the Filipino kidney vendors and the prevailing conditions in the Philippine black market help explain the low price of kidneys in comparison to their purchase prices in other parts of the world: “The study finds that deflated vendor compensation, lower than global kidney purchase prices, and relative stability in kidney supply obtain from a combination of the socio-economic characteristics of Filipino vendors and the asymmetric information available to them” (Mendoza, 2010, p. 101).

The decision to sell their kidneys is just one part of the Filipino kidney vendors’ story. Mendoza’s study also reveals the following post-transplant outcomes in relation to the improvement of the kidney vendors’ financial condition:

[T]he need for (immediate) cash was undoubtedly the primary consideration for kidney selling (86.1% - 94.1%) due to heavy debts, unpaid bills and financially dependent family members. Ironically, when asked if they felt their total compensation (including any gratuities) improved their financial condition (savings, income, employment prospects and overall economic outlook), between 76.2% - and 90% replied in the negative...The cash compensation they received was mostly used to pay debts and household expenses in a matter of days or weeks following nephrectomy... In addition...organ sales yielded neither material nor lifestyle improvements from the perspective of over 84% of sampled vendors. (Mendoza, 2010, p. 104)

Given the fact that organ selling is illegal in the Philippines, kidney selling often takes

place under the pretense of *organ donation*. Another important finding in Mendoza’s study concerns the blatant violation of Philippine laws and regulations on organ donation. The study further reveals the following:

Philippine health policy prohibits kidney donations to (genetically and emotionally) unrelated recipients...only 3.5% - 11.5% donated to whom they claimed were related recipients (mostly family members and friends). In contrast, 85.2% - 93.2% of vendors and recipients were unrelated...between 56.3% and 64.3% of surveyed vendors sold their kidneys to foreign buyers or buyers of foreign descent. Only 18.3 - 26.3% sold to Filipinos or buyers of Philippine descent. (Mendoza, 2010, pp. 103-104)

From the data above, the underground kidney trade in the Philippines may generally be described as “a publicly visible, brokered and compensation-based system that generally involves unrelated sellers and buyers, most of whom are foreigners” (Mendoza, 2010, p. 104). In the following section, the paper identifies and describes the theoretical framework which will constitute the main thrust of the paper’s argumentation.

JOSE W. DIOKNO AND THE FILIPINO CONCEPT OF JUSTICE

While contractarianism in the form of John Rawls’ theory of justice as fairness is considered as the theory that is most sensitive to issues of social (or distributive) justice, it can also be said that the theory itself contains traces of both utilitarian and libertarian elements despite the fact that Rawls is highly critical of these theories. For this reason, the paper considers Jose W. Diokno’s (1987) “A Filipino Concept of Justice” as a plausible theoretical framework to assess the correctness (or acceptability) of Aziz’s

proposal (i.e. FMHO) in the Philippine context. While Diokno's concept of justice is undeniably inspired by Rawls' theory of justice as fairness, it clearly identifies the Filipino concept of justice as a highly *moral* concept.

Diokno forcefully argued that Filipinos have an indigenous concept of justice in the word *katarungan*. What is distinctive in Diokno's approach is that he used language to find similarities and differences between our native concept of justice and the Western concept of justice. Diokno pointed out that the word *katarungan* comes from the word *tarong* which is of Visayan origin, which means straight, upright, appropriate, or correct. Our language also provides us with a word for the concept of right: *karapatan* (from the word *dapat* whose meaning is closely related to *tarong*). Diokno (1987) summarized the Filipino concept of justice in the following:

[O]ur language establishes that there is a Filipino concept of justice; that it is a highly moral concept, intimately related to the concept of right; that it is similar to, but broader than, Western concepts of justice, for it embraces the concept of equity; that it is a discriminating concept, which distinguishes justice and right, on the one hand, and law and argument, on the other; that its fundamental element is fairness; and that it eschews privilege and naked power. (pp. 19-20)

That the Filipino concept of justice is a highly moral concept may be explained in the following way: Diokno pointed out that the Filipino word for *law* is *batas* which in essence refers to a command. *Batas*, however, can be subject to scrutiny and assessment (e.g. from the standards of *pagiging makatarungan, pagiging nararapat*). In the Filipino language, the underlying intuition may simply be put this way: *Hindi lahat ng batas (o utos) ay makatarungan; hindi lahat ng batas (o utos) ay nararapat talimahin*. Given the intimate

relationship between *tarong* and *dapat*, one can therefore say *à la* Diokno that the Filipino concept of justice is broader than its Western counterpart.

FMHO IN THE PHILIPPINES: SOME PROBLEMS FROM THE PERSPECTIVE OF SOCIAL JUSTICE

We now turn to the issue at hand: Given the global trend of the rapidly increasing demand and the low supply of available organs, coupled with the high costs of both procurement and transplantation procedures, should the Philippine government create a policy or enact a law which legalizes the buying and selling of human organs—kidneys in particular—for medical transplantation purposes? Given that the proponents of FMHO rely on AEE and APA to bolster their claims, it is but fitting to assess the soundness of these arguments.

The issue at hand is clearly *multidimensional* and *multidisciplinary*. As such, it is but natural to expect that discussions and arguments come not only from the fields of law and public policy analysis, but also from ethics. To highlight the multidimensional and multidisciplinary character of the issue, it is important to consider that there are those who forcefully argue that human beings should be allowed to sell their body parts:

People have a right to make a decision to sell a body part. If we should be allowed to sell our labour, why not sell the means to that labour? If we should be allowed to risk damaging our body for pleasure (by smoking or skiing), why not for money which we will use to realise other goods in life? To ban a market in organs is, paradoxically, to constrain what people can do with their own lives. (Savulescu, 2003, pp. 138-139)

As mentioned at the introductory portion of the paper, Aziz argued that a free market for

human organs needs to be established. This claim is grounded on the assumed efficiency of the free market setup over the *status quo* to respond to the increasing demand for human organs needed for medical transplantation purposes—what we referred to earlier as AEE. The earlier cited argument (i.e. Savulescu's) is another version of APA and is clearly beneficial for the FMHO proposal. At the very least, it provides the proposal with the needed argument from the standpoint of ethics (or morality), an undoubtedly important consideration for assessing the correctness of a public policy or a law. From the foregoing discussion, it is clear that AEE and APA are mutually supporting and serve as the arguments that *ground* the FMHO proposal.

At this juncture, let me articulate some of the reasons why APA and AEE are *deficient* in responding to the problem that this article is trying to deal with. Let us begin with APA. Take note that Savulescu's argument for selling body parts (or organs) is founded on libertarian notions of full self-ownership and ironically personal autonomy. For instance, even Aziz used the notion of personal autonomy for FMHO: "By barring a person from selling his or her organs, the government hinders a person's personal autonomy" (Aziz, 2009, p. 99).

As might easily be noted, limiting personal autonomy in the abovementioned sense shows a clear violation of individual liberty and freedom from interference that libertarians highly value. A public policy (or a law) therefore which provides the state with the power to bar a person from participating in free market transactions involving the selling of his/her body parts (e.g. kidney) violates the individual's moral rights. The import of the foregoing point is that FMHO is consistent with libertarianism—especially the kind (i.e. right-libertarianism) that fully endorses the free market ideology. As John Tomasi (2013) pointed out, libertarians like Robert Nozick "sees market outcomes as...definitive of justice (even

when those market exchanges would result in the alienation of other basic rights and liberties" (p. 47). This is because libertarians like Nozick "take the idea of self-ownership to generate absolute rights of holding in one's own body. Combined with absolute rights of transaction, these rights of holding allow citizens to control and dispose of one another's bodies and persons in much the same way they might control and dispose of any other good" (Tomasi, 2013, p. 48).

The problem with APA as an argument for FMHO is that it has a very *simplistic* view of the concept of personal autonomy. To simply say that the decision to sell his/her kidney is an exercise of personal autonomy and so must be allowed and respected is tantamount to *reducing* such an important concept to a mere capacity for making choices in the face of possible options. This neglects important reasons why personal autonomy is valuable in the first place. For instance, one of the reasons why we respect and value an individual's decision to do, say, act A as opposed to act B is that the individual chose and acted on the basis of reasons which for him/her constitute a good justification for his/choice. This is to say that there is a significant difference between: (1) choosing A, and (2) choosing A because (or on the basis) of reason R. In my estimation, the concept of personal autonomy cannot simply be equated with (1). It should rather be construed along the lines similar to (2). Take note that by construing personal autonomy in the sense of (2), we are better able to highlight *human agency* and the *purposive* feature of (human) actions. Moreover, by construing personal autonomy in the sense of (2), we are able to recognize that an individual's reason (or purpose) for doing act A matters in our assessment of his/her decision. Take note that in many cases, the very same acts can be viewed (or assessed) differently depending on the purpose that the agent has in performing them.

Another important point worth mentioning is that by construing the concept of personal

autonomy in the sense of (2), we also highlight the fact that the reasons we provide for doing something are amenable to scrutiny. For instance, one might ask á la Diokno whether these reasons pass the standards of being just and being right (i.e. *pagiging makatarungan* or *pagiging nararapat*). As pointed out by Mendoza (2010), the primary reason for 86.1% - 94.1% of Filipino kidney vendors for selling their kidneys is the need for immediate cash due to heavy debts, unpaid bills, and financially dependent family members. In addition, between 84.5% and 92.5% of these kidney vendors belong to Class D and E sectors of Philippine society. For a great majority of these Filipino kidney vendors therefore, it is poverty which leads them to sell their kidneys. Take note that if we have a simplistic view of personal autonomy, then we can say that there is nothing wrong with what these statistics tell us—market transactions after all are voluntary transactions. However, an enhanced concept of autonomy in the sense of (2) would at least render the APA problematic (if not highly mistaken). For instance, the data above from Mendoza's study can be taken to mean that instead of maximizing personal autonomy, FMHO will undermine (or compromise) poor people's autonomy (Hughes, 1998, p. 89). This means that the real issue concerning APA as a justification for FMHO is not really a question of whether or not disallowing kidney selling deprives poor people of their right to decide on what to do with their lives; but something much more serious: exploitation. If the Filipino concept of justice is a highly moral concept as Diokno maintains, then it cannot possibly endorse the further exploitation of Class D and E sectors of the Philippine society by adopting FMHO. To expound on the real issue concerning the role of the poor and the very possibility of FMHO, consider the following:

[T]he poor are essential to the existence of a market in organs, which in turn means that

for such a market to achieve one of the chief ethical goods... (namely, increasing available organs), it is necessary that the poor participate as the vendors of the organs. Put differently, it is necessary that there be poor people and that we allow them to participate in such a market, for otherwise neither the market for such organs will exist, nor the moral good to be accomplished thereby attained... The real problem with excluding the poor from participating in a free market in organs is that the market can't exist without them, not that we are somehow infringing their "liberty" by not letting them participate. (Hughes, 1998, p. 94)

At this point, we can say that APA together with its simplistic concept of personal autonomy cannot ground FMHO most especially in the Philippine context. Aside from Aziz's employment of libertarian notions (e.g. full self-ownership, personal autonomy), it is also worth mentioning that his arguments for FMHO also rely on the supposed benefits that would accrue from the adoption of such a proposal. Essentially, this means that for Aziz, establishing free markets in this context would lead to more lives being saved. This is what we referred to as AEE in the introductory part of the paper. AEE is clearly an argument which adheres to a *consequentialist* ethical framework like utilitarianism. Consequentialist ethical frameworks like utilitarianism are however subject to a very powerful objection: There are actions whose correctness do not rely on their consequences. To further this point, consider the case of actions and how we assess them. As is well-known, actions are *purposive*, and as such, are amenable to praise and blame. To be sure, some actions are praiseworthy on account of the positive results that they bring. Some actions, however, are deemed praiseworthy, not for the positive results that they bring, but merely for their own sake. Consider acts that exhibit what we call *conscientiousness*. Are conscientious acts amenable to the

consequentialist requirement subscribed to by utilitarians? Singer (2011) examined the point that conscientiousness can be praised and encouraged only for its own sake. Consider what Singer (2011) says in the following:

To praise a conscientious act for its consequences would be to praise not conscientiousness but something else altogether. If we appeal to sympathy or self-interest as a reason for doing one's duty, then we are not encouraging people to do their duty for its own sake. If conscientiousness is to be encouraged, it must be thought of as good for its own sake. (p. 285)

It must be mentioned that Singer accepts a version of utilitarianism and so the foregoing argument only serves as a problem that needs to be overcome if utilitarianism is to count as an acceptable theory (or framework) not only for assessing actions but also for assessing public policies. In fact, Singer (2011) himself questioned the obvious Kantian element embedded in the foregoing argument (p. 286). Be that as it may, there are many other candidates aside from conscientiousness. Consider for example, *respect*. Just like the case of being conscientious, we also promote being respectful not only to others but also to ourselves. Also, a respectful act is not praised for the possible positive consequences that it may bring but for its own sake. In line with this other candidate, it is important to note that social justice requires that we *respect* the inherent *dignity* (or intrinsic worth) of every person—an important concept in human rights. This means that “individuals are not to be perceived or treated merely as instruments or objects of the will of others” (Anton & Shelton, 2011, p. 216). If the foregoing discussion is correct, we can thus say that Aziz cannot easily appeal to a consequentialist justification like AEE for establishing FMHO.

The foregoing critique of AEE focuses on the consequentialist framework that it adopts for the

FMHO proposal. The following critique focuses on the problems with *economic efficiency* itself and whether or not it is sufficient for establishing the correctness of creating a public policy or the enactment of a law for FMHO in the Philippine context. Based from the evidence at hand, the Philippine experience on kidney selling generates difficult problems for AEE and FMHO. These problems suggest that the issue cannot simply be decided by appealing to economic efficiency. To appreciate the complexity of these problems, several points are in order. First, given that the underground kidney trade in the Philippines is practically *open* and *visible*, then the current situation is no different from the free market proposal that Aziz pushes for. For instance, a foreigner who needs a kidney and has the capacity to pay may hire scouts or agents to find prospective kidney sellers in the Philippine black market where “market prices for kidneys are among the lowest globally” (Mendoza, 2010, p. 103). Compared to the United States where the reported asking price for kidneys is approximately \$30,000.00 (in 2007), kidney vendors in the Philippines who participated in the study reported a measly \$2,133.00 compensation for selling their kidneys (Mendoza, 2010, p. 103). It is important to note that between Aziz's proposal and the *status quo*, the obvious difference would simply be the protection that the policy or enacted law would provide to secure everybody's (e.g. seller, recipient, government) interests. The situation is comparable to legalizing, for instance, gambling activities. To be sure, legalizing an activity, say *A*, makes it easier for the government to monitor and regulate *A*. It also allows for the government to have additional sources of its much needed revenue. The foregoing discussion does not mean to imply that the additional protection (which can be provided for by a law that allows for FMHO) to people (e.g. vendors, recipients) and their rights are not important. The problem simply put, is this: There is empirical data on the current activity of selling kidneys in the Philippine black

market. As discussed earlier, the data shows that 75.3% - 83.3% of the surveyed kidney vendors were not aware that it was illegal to sell their kidneys (Mendoza, 2010, p. 102). If this is the case, then from a *practical* standpoint, there is not much difference between Aziz's free market proposal and the *status quo*. While it is possible for the supply of kidneys to increase, it is highly unlikely that the affected sector of Philippine society would, in significant ways, be different.

This brings us to the second point: If the Philippine government will choose to adopt the FMHO proposal, it is highly probable that the increase in the supply of kidneys available in the market would be sourced from the very *same* sector of Philippine society—the classes whose annual incomes are below the poverty line. Take note that between 84.5% and 92.5% of the surveyed kidney vendors in the Philippines belong to Class D and Class E (Mendoza, 2010, p. 102).

Third, regardless if a free market approach to human organs can deliver its promises (e.g. lower procurement and transplantation costs), the *basic worry* is whether or not it is right for a public policy or a law to *target* people from the lowest income classes and make them even more vulnerable to exploitation. Clearly, this is not a situation where the least well-off members of society benefits. It is important to note that even if kidney vendors get compensated fairly, the problem still remains. It is not a question of whether or not people from the lowest income classes will sell their kidneys; the question is “When?”

Fourth, while a public policy or a law which allows for a free market for kidney selling will make much more economic sense (e.g. it will maximize wealth), the foregoing points show that it can, at the same time, lead to certain social injustices by *targeting* specific portions of the population as the most likely *sources* of kidneys for medical transplantation purposes. This makes AEE problematic. The foregoing arguments prove to be crucial especially if we

take into account that *wealth* is usually defined in the following way:

Wealth is the value in dollars or dollar equivalents (an important qualification, as we are about to see) of everything in society. It is measured by what people are willing to pay for something or, if they already own it, what they demand in money to give it up. The only kind of preference that counts in a system of wealth maximization is thus one that is backed up by money – in other words, that is registered in a market. (Posner, 1979, p. 119)

Fifth, if it is true that the only kind of preference that counts is one that is backed up by money, then it cannot possibly account for many of our ethical intuitions. Take note that for Diokno, the Filipino concept of justice is highly moral and is intimately related to the concept of right. Moreover, AEE is susceptible to an important objection—that everything that has a price tag is *replaceable*. This argument is called the *Objection from Substitutability*:

At the heart of the objection is the idea that pricing of intrinsically valuable things is morally pernicious because it insinuates attitudes of substitutability towards objects and goods where such attitudes are inappropriate. When one imputes a price to one's five-year-old daughter *in a certain sense* the child becomes substitutable *qua* commodity for either an amount of money or other bundles of goods of an equivalent monetary price. Any moral disquiet arises from the fact that she can now be viewed as replaceable. (Walsh & Lynch, 2008, p. 177)

Finally, a public policy or a law that relies on AEE alone is prone to generate conflicts not only to some of our ethical intuitions but also with fundamental aspects of a society with a democratic political setting. For instance, it is not difficult to find certain conflicts that arise between economic efficiency and our

fundamental human rights: “Economic and social rights of the elderly, people with disabilities, the unskilled, and many others may not pass the test of economic efficiency” (Simma & Zöeckler, 2003, p. 473). Another example is also worth mentioning to further this last point: “Some economists and policy advisors have argued that banning child labor is a mistake because some families rely for their survival on the labor of their children” (Satz, 2010, p.4). As might be observed, the reasoning involved in this example employs AEE’s consequentialist framework. It also highlights the idea that AEE encounters difficulties in accommodating the demands of social justice (e.g. the recognition and protection of children’s rights in this case).

CONCLUSION

Should the Philippine government create a policy or enact a law which legalizes the buying and selling of human organs—kidneys in particular—for medical transplantation purposes? Whatever one’s stance might be on the issue, such a stance must first and foremost be coherent. Its foundations must be strong and should not lead to absurd consequences. In this paper, it has been shown that the arguments used by proponents of the FMHO proposal are prone to serious objections. In particular, the argument from personal autonomy employs a very simplistic concept of personal autonomy. Such being the case, it fails to account for some of the important reasons why we value the concept of personal autonomy in the first place. The paper has also shown that a very simplistic concept of personal autonomy can lead to exploitative arrangements as might be observed in the case of Filipino kidney vendors from Metro Manila and the CALABARZON. As opposed to the simplistic concept of personal autonomy, the paper also argued for an enhanced concept of autonomy which makes an individual’s decision

to sell a kidney amenable to scrutiny—whether or not it is, for instance, to use Diokno’s words, *makatarungan* (just) and *nararapat* (right). Moreover, it was also shown that the argument from economic efficiency is prone to a number of serious objections due to its consequentialist framework and its tendency to further proliferate and legitimize already existing social injustices by targeting specific portions of the population as the most likely sources of kidneys for medical transplantation purposes. While we can only speculate if more people from the middle and upper middle class sectors of society will choose to sell their kidneys in the event that a policy or a law is put in place, we cannot ignore the current evidence that we have: that between 84.5% and 92.5% of the surveyed kidney vendors in the Philippines belong to Class D and Class E (Mendoza, 2010, p. 102). From social justice’s standpoint, this situation can be described as *exploitative* and *unjust*. If this situation is not a clear case of exploitation and injustice, it is difficult to see what can count as one.

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