Combating French transplant tourism

(*Remarks prepared for delivery to the National Assembly 19 October 2010*)

by David Matas

I welcome the proposed law by Valérie Boyer aimed at combating transplant tourism [1]. Explaining why this law is welcome requires addressing two questions. Is there a real problem which the law needs to address, the sourcing by French nationals of organs from non-consenting donors abroad? If there is a problem, does the proposed law help to solve it?

The law has only a couple of substantive provisions. It would require any French citizen or resident who obtains an organ transplant abroad to provide to the French Biomedical Agency a certificate that the organ was provided without payment to the donor. It would also require every doctor who examines a transplant patient to report the identity of the patient to the Agency.

A. The problem

In answer to the first question, is there a problem needs to be considered from two perspectives. Is there abuse of transplantation abroad? Are French transplant tourists complicit in that abuse?

i) China

The answer to the question is there transplantation abuse abroad is decidedly yes. I and David Kilgour have focused on China. I cannot speak about other countries, but I have no hesitation in saying that China has been and remains a major centre of abuse.

China, from the very moment it began transplant surgery, killed non-consenting donors for their organs. The law even allowed for it.

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[1] No. 2797, 13th legislature, registered September 16, 2010

The Regulations on the Use of Dead Bodies or Organs From Condemned Criminals, dated October 9, 1984, contemplates involuntary organ sourcing from prisoners who die in prison. The law sets out three events which could allow for harvesting of organs.

One event is consent of the source, the prisoner. A second event is consent of the family. A third event is the failure of the family to collect the body of the dead prisoner.

The law, then, allows organ harvesting with consent, but does not prohibit organ harvesting without consent. Even where there was an express refusal of consent, both by the prisoner before death and the family after death, but the family failed to collect the body, then organs could, according to the law, still be harvested.

In 1984, when this law was enacted, China was still in the early stages of its shift from socialism to capitalism. As the shift progressed, the health system became a major part of the shift. From 1980, the Government began withdrawing funds from the health sector, expecting the health system to make up the difference through charges to consumers of health services.

Hospitals needed to find private funding to replace state funding. Foreign sales of organs became the primary money maker. Organ price lists were posted on Chinese websites. Hospitals boasted openly on their websites about the money being made from the sale of organs.

There is global demand for organs because of shortages everywhere. The sale of organs became for hospitals a way to keep their doors open, and a means by which other health services could be provided to the community.

China began the organ trade by selling the organs of prisoners sentenced to death.

But the global demand for organs and the health system need for money eventually outgrew the available death row supply. The Falun Gong community became the next source. The dire need for funds led to a rationalization that selling the organs of prisoners who would be executed anyways was acceptable and to a desire not to question too closely whether the donors wheeled in by the authorities really were prisoners sentenced to death.

Falun Gong is a simple set of exercises with a spiritual foundation which started in China in 1992. The belief behind the exercises is a blending and updating of the Chinese Buddhist and Tao traditions.

The Chinese Communist Party/state at first encouraged the exercises because they are healthful. With official encouragement, the practice of the exercises spread rapidly to the point where there were more practitioners than members of the Communist Party.

The Party then, in June 1999, out of jealousy and fear of losing ideological supremacy, banned the exercises. When practitioners persisted and protested, the Party/State in November 1999 got vicious - vilifying the practice through propaganda, arresting practitioners, torturing them to elicit recantations, and disappearing them if they did not recant.

Practitioners of Falun Gong quickly became the number one victims of repression in China - two thirds of the torture victims, according to the United Nations rapporteur in torture; one half of those in the slave labour camps, according to the United States Department of State Human Rights reports. Many of those Falun Gong practitioners who were arrested and refused to recant also refused to identify themselves, in order to protect their friends, family and workplaces back home who otherwise would have been victimized for not having denounced them. The depersonalization of the Falun Gong, their huge numbers in detention and their vulnerability as an unidentified population made it easy for them to become the next source of organs for sale.

According to research David Kilgour and I did, first in a report released in July 2006 and updated in January 2007, and then in a book titled *Bloody Harvest* released in November 2009, we concluded that Falun Gong were killed in the tens of thousands so that their organs could be sold to foreigners, generating a billion dollar business for China. In the years after our initial report came out, the Government of China both denied what we had concluded and began making changes.

China set up an organ donation system as a pilot project in ten cities in March 2010. Regulatory change required organ transplants to be done only in registered hospitals.

The Government ordered hospitals to give first priority to Chinese patients, putting a substantial damper on the international transplant tourism business. The Government, which had previously taken the position that all organs came from donations, even though there was at the time no donation system, eventually acknowledged that almost all organs for transplants were coming from prisoners, though they contest the sourcing from Falun Gong prisoners.

Chinese health professionals also concede that sourcing organs from prisoners is wrong and should cease. Deputy Health Minister Huang JieFu, in a talk he gave in Madrid in March 2010, stated that executed prisoners is "a source that does not comply with international ethical and standard of practice".

The Government of China, in June 2007, ordered the hospitals to give priority to local patients[2]. What before was a foreign flow became a trickle. Transplant volumes today are at traditional levels. So, with minor variations, are the sources. However, the patient composition has changed dramatically.

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[2] Jim Warren *China moving rapidly to change transplant system* Transplant News, September 2007

The policy and then the law on sourcing of organs changed, banning the sale of organs. Banning the sale of organs, though, was an empty gesture since those who did not consent to the sourcing of their organs were, it should be apparent, not selling them. And the ban on the sale of organs did not prevent hospitals from charging for organ transplants.

The policy and then the law on sourcing of organs changed to require consent of the donor. A 2006 policy provided that medical institutions engaging in organ transplants must obtain the written consent of donors. The policy added that donors have the right to refuse to donate their organs[3].

All this was repeated in a law a year later. Regulations on Human Organ Transplant, effective May 1, 2007, prohibited harvesting organs from the living without consent and from the dead who did not want to donate their organs when they were alive[4].

The shift in priority for organ transplants from foreign to local patients was real. There was more than just an announcement of a policy change. The shift actually happened.

Chinese nationals who needed transplants were understandably miffed at having to wait months and years for transplants when foreigners were being put at the front of the queue. To manage local discontent, priorities had to shift. As well, the advantage of replacing talkative foreign patients with circumspect local patients could not have been lost on those attempting to disguise their abusive practices.

The shift in transplants from whatever hospital wanted to get into the transplant business to registered hospitals was also real. Localising transplants in registered

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[3] Articles 27 and 30 in Health Ministry Notice number 94.

[4] Article 25.

hospitals meant increasing the control of the Party and State, something dear to both.

Requiring the consent of sources for organ transplants though was not real. Consent from prisoners who are, by definition, being coerced by the state, is not meaningful and, after death, in any case, not verifiable. As well, what the laws mean is in China very much a theoretical exercise.

The Chinese Communist Party/state did not change its policy and law to end the sourcing of organs without consent. Rather the law and policy were changed to silence criticism of sourcing organs without consent.

In China, the law has no meaning independent from Party dictates, since the law can not be enforced against the Party/state. The law exists as a means of communication from headquarters to the field and as an exercise in cosmetics. When the Party/state feels the heat of criticism, it often changes the law without changing practices as a means of countering the criticism.

Statistics and the law tell opposite stories. China has been able to hold down in 2007 its reduction of transplant volumes in the face of the imposition of a licensing requirement for non-military hospitals doing transplants and a reduction in what Chinese officials claimed to be their almost exclusive source or organs, prisoners sentenced to death and then executed. China been able to return to historically high transplant volumes in 2008 and later years in the absence of a commensurate increase in execution of prisoners sentenced to death. The only plausible explanation for this phenomenon is an increase in sourcing of organs from the only other significant available source, Falun Gong practitioners.

Given current transplant volumes and the substantial death penalty decrease, is that matters have got worse, that sourcing of organs from non-consenting donors has increased. More Falun Gong practitioners are being killed today for their organs than

at any time in the past.

ii) France

How many French citizens and residents go abroad for transplants? Right now, we do not know. There is no comprehensive collection of statistical data which allows us to answer this question.

Up to now, information has been collected by way of questionnaires sent by the Biomedical Agency to dialysis centres and transplant teams. The questionnaires have asked about kidneys only. The response rate for dialysis centres was 63% and for transplant teams 71%. This form of data collection identified 30 foreign transplant cases during the period 2000 to 2008[5]. Four more cases were identified in 2009[6].

This form of data collection is severely limited, giving us only a partial glimpse of the problem. First it is restricted to kidneys only and tells us nothing about the transplantation of other organs.

Second, the questionnaire is voluntary with only a partial response. One would have at the very least to extrapolate figures to the whole questioned population based on the partial response.

Third, the questionnaire is directed only to dialysis centres and transplant teams and not to relevant specialists in the medical profession. A person who has a transplant abroad will need anti-rejection drugs but can get those drugs from any pharmacist with a prescription from the relevant specialist doctor. Kidney transplants patients can get prescriptions from nephrologists; liver transplant patients can get presecriptions from liver specialists and so on. There is no need to go to a dialysis centre or a transplant

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5 Report of activity of the Biomedical Agency 2008 page 49

6 Report of activity of the Biomedical Agency 2009 page 57

team for such a prescription.

One value the proposed law has is that it will give us complete information. The law, in addition to requiring the reporting of all transplants, states the form of the application of the law is to be determined by regulation. The regulations should require doctors, when reporting on transplants to the Biomedical Agency, to report on the country of origin of the transplants and the type of organ transplanted. Only once the law is enacted and the reporting begins will we know the true dimension of the problem.

B. The French solution

To understand the significance of the proposed law requires an explanation of the different ways civil and common law countries treat criminality. Common law countries have a criminal law jurisdiction principle of territoriality. Civil law countries have a jurisdiction principle of nationality.

Though the Province of Quebec uses the civil law, the criminal law in Canada falls within the jurisdiction of the federal Parliament and not the provincial legislatures. The federal criminal law adopts common law principles.

If a Canadian commits a murder outside of Canada, the person can not be prosecuted in Canada. The Canadian Criminal Code provides that subject to specific exceptions, no person shall be convicted of an offence committed outside of Canada[7].

In France, it is the opposite. If a French national commits a murder outside of France, the national can be prosecuted for the murder in France. The French penal code provides that it applies to every crime committed by a French national outside of

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[7] Section 6(2).

France[8].

Because common law jurisdictions are territorial, it becomes necessary, to combat transplant tourism, to enact extra territorial legislation. So we have in Canada the proposed legislation of Canadian Member of Parliament Borys Wrzesnewskyj to penalise any transplant patient who receives an organ without consent of the donor where the patient knew or ought to have known of the absence of consent[9].

In France, such legislation is unnecessary because of the nationality jurisdiction of the penal code. The penal code already forbids paying someone for their organs[10], organ brokerage[11] and sourcing organs without consent of the donor[12]. These prohibitions apply extra-territorially without the need for specific legislation to say so.

The problem France faces in dealing with transplant tourism is not a gap in the penal code but rather a dearth of information. How can officials know whether the penal code provisions on purchase, consent or brokerage have been violated when the act occurs abroad? The answer is that now they do not know. They do not even know where to look. That is the problem the current draft law addresses.

The current Biomedical Agency questionnaires do not identify the patients. The purpose is to get numbers only.

The proposed law, by requiring certification from the patient and reporting from the

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8 Article 113-6.

9 Bill C-500 second session 39th Parliament, first reading February 5th 2008

10 Article 511-2

11 Article 511-2

12 Article 511-3

doctor, will be able to capture the information which would allow an investigation whether the law has been violated. Right now the law can be violated with impunity abroad because there is no way of determining if the law has been violated. If the proposal were to become law, that would end.

We can not say that because the patient composition is now mostly local, Chinese organ transplant abuse has ceased to be an international problem. If a pusher gets a client addicted heroin, the pusher can not claim innocence because the client now grows his own opium. If a bartender plies a client nightly with drinks and the client becomes an alcoholic, the bartender can not later plead that the client now uses only his own home made moonshine.

Learning from the Chinese experience and reacting now is more than just shutting the barn door after the horses have escaped. Even a small volume of transplant tourist abuse justifies concern.

One can not say that, if French nationals commit only a few murders abroad each year, we can ignore the murders, do nothing to investigate them and let the murderers go free. One has to say the same about organ transplant abuse abroad.

Abuse happens when the mechanisms to prevent abuse are not in place. The absence of mechanisms to prevent the sort of abuse of organ transplantation which David Kilgour and I identified in our two reports and book remain. The draft law proposed by Valérie Boyer is an abuse prevention mechanism which I encourage the French National Assembly to adopt.

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