

Criminal Law Means of Counteracting Illegal Trafficking in Human Organs and Tissues

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Abstract: The article examines the legal regime of human organs and tissues in Russia and the problems of criminal law support for countering the illegal trafficking in donor organs. The authors' goal is to research the problems of law enforcement in the transplant industry and to develop criminal justice response to the illegal trafficking in donor organs. The tasks of the research include the study of international and foreign experience in countering the illegal trafficking in donor organs, an analysis of the legal regime for the trafficking in donor organs and the problems of domestic law enforcement practice to detect and counteract their illicit trafficking, negotiation of legal gaps and the relevance of the criminalization of offences related to the illegal trafficking in human organs and tissues. The authors drew on the comparative legal method of research on international and domestic legislation, materials of domestic law enforcement practice, expert reviews of the legal regulation problems and prevention of illegal practices with donor organs. The novelty is characterized by the criminal law provisions proposed by the authors on liability for offences related to illegal transplantation practices.

1 INTRODUCTION

The fundamental principles and legal bases of countering the illegal transplantation practice and the trafficking in human organs and tissues are reflected in international, regional (European) and national regulatory documents.


In the era of the rapid development of innovative technologies in the medical sector, the aim of criminal law protection of constitutional human rights and freedoms during the provision of high-tech medical services and prevention of crimes in this area is of extremely relevant.


According to the World Health Organization (WHO), about 100,800 organ transplants are performed annually all around the world. In the world list of countries by the number of transplants, Russia traditionally ranks in the third to fourth ten in the number of donors and operations per 100 million population.

In the current year (as of March 2021), according to the V. I. Shumakov Federal Research Center of

Transplantology and Artificial Organs, 376 transplantation operations were carried out in Russia, in 2020 - 1919 transplantation operations due to the unfavorable sanitary and epidemiological situation and the emergence of the COVID-19 pandemic. It is less than in 2019, when more than 2.4 thousand transplantation operations were performed (including 200 operations for children), while there were over 9.5 thousand patients on the waiting list.

The rapid emergence of the COVID-19 coronavirus pandemic predetermined a tense situation in various spheres of life of the state, especially in the medical sector, created new challenges for specialists in the transplantation industry of domestic medicine. In this regard, specialists from the country's leading transplant center, the V. I. Shumakov Federal Research Center of Transplantology and Artificial Organs, warn about the high risk of severe complications of COVID-19 for citizens who have undergone surgery and have chronic diseases, it is proposed to seriously evaluate

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the ratio of "potential benefits and risks of donor organ transplantation" (Gautier, 2020).

The current Russian legislation generally regulates all aspects of transplantation, however, as in the rest of the world, Russia has a pressing need for donor organs.

As State Secretary - Deputy Minister of Health of the Russian Federation

D. Kostennikov said in an interview with TASS, only about 30% of the total number of necessary transplantation operations are performed in Russia, which condemns a significant number of Russians to serious health consequences, many of the waiting list do not live up to operations.

The shortage of donor organs is a worldwide problem, which leads to a large shadow market for the purchase and sale of human organs and tissues.

The Istanbul Declaration dated 2008 prohibits all forms of trafficking in organs. However, according to authoritative international publications, with an acute shortage of organs worldwide, the illegal trade in organs amounts to about USD 1.5 billion annually and as a result 12,000 illegal transplantations.

According to the information presented in the report of Transnational Crime and the Developing World in only five main organs about 11,966 illegal transplantations are performed per year in the world, the annual profits generated by transnational crime in the field of trafficking in human organs and tissues range from 840 million up to USD 1.7 billion.

On the basis of an analysis of the results of scientific research and the state of domestic transplantation, the authors suggest that, in the context of a pandemic, crime associated with illegal trafficking in organs has an unfavorable prognosis. In this regard, we studied the problems of legal regulation and law enforcement in the transplantation industry in order to develop criminal justice response to the illegal trafficking in donor organs. The tasks of the research included the review of international and foreign experience in countering the illegal trafficking in donor organs, an analysis of the legal regime for the trafficking in donor organs and the problems of domestic law enforcement practice to identify and counteract their illegal trafficking, discussion of legal gaps and the relevance of criminalization of offences related to trafficking in human organs and tissues.

2 MATERIALS AND METHODS

An empirical study was performed by the authors in 2018-2020 by reviewing statistical data related to

transplantation activities, materials of Russian law enforcement practice on the identification, assessment and prevention of crimes in the area under consideration, analyzing of expert assessments and the results of a survey of specialists on the problems of legislative regulation of the legal regime of donor organs and tissues and problems of prevention of criminal offences in this area.

3 RESULTS AND DISCUSSION

An analysis of the results of empirical study, the state of legislation and law enforcement practice allowed the authors to identify the main problems in the research area.

In the criminological context, the impact of the coronavirus pandemic on the transplant industry is considered to be an extremely negative factor, not only creating additional tension in the functioning of this branch of medicine, and, consequently, conditions for possible abuse (negligence, medical error, abuse of authority), but also representing an additional threat to the life and health of both recipients and potential donors. Moreover, this factor increases the shortage (and therefore the "price") of transplantable organs and tissues, and greatly increases the number of patients needing transplantation.

We agree with the views of foreign experts, who rightly emphasize that "COVID-19 is an ideal storm for victims of organ trafficking.... the pandemic has not only caused devastation to millions of infected people, but also caused a deadly side effect in the form of an even more prosperous organ trafficking industry."

However, a comparative analysis of the indicators of illegal transplantation practice showed that Russia is the only country in which above-mentioned crimes have not actually been registered in the past five years, only a few facts of such offences were previously recorded (three crimes were registered under Article 120 of the Criminal Code of the Russian Federation "Compulsion to remove human organs or tissues for transplantation" (in 2005, 2006, 2015) and two cases of human trafficking for the purpose of illegal transplantation of human organs and tissues (clause "g", part 2, article 127.1).

Russian specialists are unanimous in their observation of serious gaps in the legal regulation of criminal liability for acts related to the illegal trafficking in donor organs. Scientists have paid the closest attention to these issues in scientific

publications (Nosanenko, 2019, Grishin, 2018, Popova, 2018).

Despite the acute shortage of organs received from living donors, which under the current legislation can only be the patient's relatives, the issue of so-called "intravital donation" in general does not cause problems in law enforcement and medical practice.

According to the Law of the Russian Federation No.4180-I dated December 22, 1992 "On Transplantation of human organs and (or) tissues", transplantation of organs and tissues is allowed only with the consent of a living donor and, as a rule, with the consent of the recipient (Article 1). A similar norm is reflected in the Federal Law No. 323-FZ dated November 21, 2011 "On the basics of health protection of the citizens in the Russian Federation."

In the foreign legal field, the informed consent model is interpreted within the strictly defined legal context of the algorithm and is subject to deep research analysis by the professional community (Grady, 2017), discussion and popularization in the field of social and educational work among the population.

In domestic medical practice, an insufficiently developed mechanism for implementing the "presumption of consent" in view of the low awareness of citizens, generates collisions. Thus, despite the fact that the procedure for the organization of the collection of donor organs is regulated by federal legislation and by the legal and regulatory acts of the Ministry of Health (orders, instructions, rules), the issue of the removal of organs and tissues from the deceased (decedent) donor continues to be acute and sensitive, both for the close relatives of the potential donor and for medical workers who, according to judicial practice, may be accused of violating the instructions upon the removal (collection) of an organ if they were not aware of the will of the deceased or his relatives (see: The determination of the Constitutional Court of the Russian Federation in the case of A. Sablina) or intentionally causing death for the purpose of using the victim's organs or tissues.

As evidenced by existing Russian law enforcement practice, the absence of a request from medical workers on the expression of will on the issue of possible donation from relatives of the deceased and removal by default, in accordance with the existing presumption of consent, organs and (or) tissues does not entail criminal liability, which causes a sharply negative assessment relatives.

The legal professional community is considering the concept of criminalizing the failure by medical

personnel to inform the victim's relatives about the planned removal of the donor organ.

Currently, in accordance with the legislation in force, a physician informs the spouse or other relatives only about the fact of death, not of the prospect of organ removal, and expects the donor's relatives about their refusal, and if there is no such person or if it is not possible to contact the relatives of the deceased within a specified period of time, the removal of organs is considered possible.

There are no special provisions in the Criminal Law on the criminal liability of medical personnel for committing such acts, that is, for violation of the will of the relatives of the potential (real) donor who ignores the explicit or unequivocal disagreement of relatives to the removal (exploitation) of organs.

The proposal under discussion in the legal community to hold medical personnel criminally liable for failing to notify relatives about the planned posthumous organ removal, in our view, does not have any immediate legislative prospect, since it legally contradicts to the essence of the presumption of consent, contained both in the existing legislation and in the new bill.

It seems that in a situation of acute shortage of transplants, the legislative substitution of the "presumption of consent" model by the model of "requested consent" can also have numerous negative consequences, at least to cause an increase in cases of coercion to the remove (collect) organs from living donors, and will definitely multiply the number and mortality of citizens in dire need and who have not waited for transplantation.

The study of law enforcement (judicial) practice allows us to state a very limited practice of responding to violations of the current legislation in this industry, which, of course, cannot testify in favor of the fact that there are no such violations.

Thus, the analysis of the official statistical information of the Ministry of Internal Affairs of Russia, as well as the statistics of convicted persons in the "Justice" system of the Judicial Department of the Supreme Court of the Russian Federation on cases related to the trafficking in donor organs, shows zero indicators in recent years. Moreover, the declared prohibition on the purchase and sale of human organs and tissues has not received proper criminal law support, and there is an obvious legal gap.

A study of criminal legislation showed that the Criminal Code provides norms on liability for a number of crimes related to the illegal removal of human organs and tissues, in particular for:

- compulsion to remove human organs or tissues for transplantation, committed with the use of

violence or with the threat of its use (Article 120 of the Criminal Code of the Russian Federation);

- purchase or sale of a person... other transactions with a person performed "in order to remove organs or tissues from the victim (clause "g", part 2 Article 127.1 of the Criminal Code of the Russian Federation);
- murder for the use of organs or tissues of the victim (clause "m", part 2, Article 105 of the Criminal Code of the Russian Federation);
- intentional infliction of serious bodily harm, committed in order to use the organs or tissues of the victim (clause "g", part 2, Article 111 of the Criminal Code of the Russian Federation).

The study of the above-mentioned crime elements indicates that the aim, the illegal "removal of the victim's organs and tissues" (in human trafficking), "use of organs or tissues" (in the case of murder or intentional infliction of serious harm to the victim's health) is only qualifying signs of such offences, which are subject to increased penalties. It is difficult to characterize the acts and, at the same time, to identify the elements of trafficking in persons and the purchase and sale of human organs and tissues, which are not even provided as a subject of the transaction (purchase and sale).

In this regard, a paradoxical situation emerges: currently, the doctrine of medical and criminal law considers liability for the illegal purchase and sale of organs, while the Criminal Code does not even contain a provision on liability for such acts.

In the conditions of a large number of citizens from the "waiting list" who, for medical reasons, need to carry out a transplantation operation, an acute shortage of donor organs and tissues, the absence of transparent mechanisms for their trafficking, the presence of obvious legislative gaps, complicating to identify, qualify and prosecute the perpetrators, all of this additionally generates "shadow" schemes for their resolution, contributes to the further expansion of the clandestine market for "purchase and sale" and criminal traffic of transplants, the development of transplantation tourism, fraudulent "mediation", and in essence and demand of remuneration for the allegedly prompt delivery or extraordinary receipt of a deficient organ. All markers and digital traces of such illegal activities are well traced both in the open access and in the DARKNET shadow sector.

In this regard, it seems necessary to draw on the extensive foreign experience, in which the most common criminal schemes associated with the illegal transplantation practice and the criminal trafficking in

human organs and tissues are identified and established (Ambagtsheer, 2016, Broumand, 2017).

Despite a clear lack of developed law enforcement practice, the real crime picture related to illegal trafficking, buying and selling of organs is estimated to be unfavourable, as can be inferred indirectly from numerous digital "traces" in information and communication networks.

Thus, in the Russian-language search system Yandex, the number of requests "buy kidney" (as of March 2021) was 16 million requests (8,737 shows per month), "sell a kidney" – 3 million requests (25,000 shows per month) while international and Russian legislation prohibits such commercial activities.

In accordance with Article 7 of the Federal Law dated March 13, 2006 38-FZ "On advertising" (as amended on December 08, 2020), an advertisement of "human organs and (or) tissues as objects of purchase and sale" is not allowed (part 4). In the context of an administrative claim, representatives of the Prosecutor's Office repeatedly appealed to the court for the recognition of information on the acquisition of donor organs for monetary remuneration placed on the public Internet prohibited to distribute and such claims are satisfied by the court.

In regard with the level of public risk associated with large-scale advertising on the Internet for the sale and purchase of donor organs, it seems appropriate to consider the issue of criminalizing such acts.

Simultaneously with the optimization of the legislative support for the legal regime of information about donor organs, it is necessary to strengthen social and educational activities among the population (Kovalenko, 2014), including by internal affairs officers, since the latter are most fully aware of illegal (i.e. fraudulent) schemes for the trafficking in donor organs, have the necessary professional qualifications and skills interact with citizens (Kochin, 2016).

An attempt to resolve the existing gaps in the legal regulation of transplant activities and the trafficking in donor organs was the adoption and discussion of a new draft law "On donation of human organs and their transplantation" which is scheduled for adoption and entry into force in June 2021.

The new draft law that "enshrines the presumption of consent for posthumous organ donation, the establishment of a federal register of donors and the principles of transplantation services, however, as rightly emphasized during the discussion, the issue of a unified Federal register of people ready for posthumous donation, as well as patients, who need

organ transplantation, how and where the decision of people who refuse posthumous donation will be recorded, where and how donor organs are received has not yet been resolved. It is obvious that any "non-transparency" in the solution of these issues creates additional preconditions for their abuse in the course of transplantation activities.

In this regard, it is also proposed to use a foreign algorithm for organizing and distributing donor organs, taking into account utility and fairness (Schulte, 2018).

Transplantation of human organs and tissues is a high-tech type of medical care and it is obvious that medical manipulations can be carried out by highly qualified specialists, and the support of such activities should have powerful financial support.

By the order of the Ministry of Health of the Russian Federation No. 365 dated June 04, 2019 (as amended on November 09, 2020) "On the approval of the departmental target program "Organ donation and transplantation in the Russian Federation", the goals and objectives of the departmental target program were announced, in accordance with which medical assistance by the method of transplantation (transplants) of human organs will be able to receive more than 15 thousand citizens, including children.

However, as foreign experience has shown, the implementation of the national transplantation program can significantly reduce, but not stop, the illegal practice associated, in particular, with transplant tourism (Ratkovic, 2018).

In this regard, legislative issues related to the responsibility of the subjects of such activities and the prevention of abuse should be resolved.

On the basis of international imperatives and norms of Russian legislation, which directly prohibit the commercialization of medical activities in transplantation and trafficking in donor organs, taking into account the problems of law enforcement practice in identifying, investigating, qualifying and prosecuting of perpetrators, criminologically based forecasts of a sharp demand for donor organs and an increase in the need for transplantation operations under the impact of the negative consequences of the coronavirus pandemic COVID-19, it seems reasonable to apply a comprehensive approach, which should include: optimization of the legal regulation of medical activities in donor organ transplantation, improvement of the criminal legal provision to counteract the illegal trafficking in human organs and tissues and the commercialization of transplant medical manipulations, wider use of operational search methods to detect criminal offenses, including the use of information and communication

technologies, prosecution of perpetrators, intensification of social and educational work with the population in order to popularize knowledge and awareness of the social value of organ donation and risks (threats) participation in illegal schemes.

The mechanism of criminal law response to the socially dangerous acts prohibited in legislation on the transplantation and illegal trafficking in human organs and tissues should include the optimal criminal law instruments to protect citizens from the criminal offences under consideration and to prosecute those responsible.

4 CONCLUSIONS

The norms presented in Russian legislation prohibiting the illegal trafficking in human organs and tissues, as well as the commercialization of transplant medicine, are more declarative in nature and should be accompanied by standards, specifically provided for in the criminal law.

In this regard, the authors consider it necessary to submit for discussion a list of socially dangerous acts that should be criminalized, including:

- purchase and sale of human organs and tissues, other transactions with donor organs for the transplantation purposes;

- purchase and sale of human organs and tissues not specified in the transplant list of the Ministry of Health of the Russian Federation as transplantation objects;

- removal (exteriorization) of organs and (or) tissues after receiving information that the deceased and (or) his relatives disagree with the removal of organs and (or) tissues for transplantation, or willfully ignoring it.

- removal (exteriorization), procurement, conservation, storage, traffic of transplants, transplantation of human organs and (or) tissues in organizations and institutions outside the (list) system of State and municipal health-care institutions, established by law;

- illegal removal of human organs and (or) tissues for the purpose of conducting experiments, ritual and religious ceremonies;

- repeated advertising of human organs and (or) tissues as objects of sale and purchase in the mass media and/or placement and distribution in the information and communication network Internet of information declared prohibited in accordance with the current legislation;

Maintenance of records, registers, coordination of "waiting list", transplantation logistics by commercial institutions, including medical profiles;

In the context of the unprecedented development of the coronavirus pandemic, which has exposed a large-scale threat to the health of the country's multimillion population and the normal functioning of the entire health care system, the issues of improving the legal provision of life and health of citizens and their criminal legal protection from unlawful encroachments are a priority task of the state. In this regard, the recognition of the humanitarian value essence of transplantation of human organs and tissues for medical reasons and the noble mission of gratuitous donation of donor organs in order to save the recipient's life should form the basis of state policy in resolving legal, administrative, medical, ethical problems of domestic transplantation.

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