

Problems of transplantation of human organs and tissues: international standards and international experience

Problemas de trasplante de órganos y tejidos humanos: estándares internacionales y experiencia internacional

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ABSTRACT

This paper is dedicated to the issues of implementation to the national legislation of the Republic of Uzbekistan the norms of international legal standards which regulating transplantation of organs and tissues based on the study of positive international experience. At the same time, special attention is paid to the prevention of crime commercialization of human organs and tissues.

Keywords: transplantation of human organs and tissues, criminal commercialization

RESUMEN

Este documento está dedicado a las cuestiones de aplicación a la legislación nacional de la República de Uzbekistán de las normas de las normas legales internacionales que regulan el trasplante de órganos y tejidos en base al estudio de la experiencia internacional positiva. Al mismo tiempo, se presta especial atención a la prevención de la comercialización delictiva de órganos y tejidos humanos.

Palabras clave: trasplante de órganos y tejidos humanos, comercialización criminal.

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Introduction

Transplantation of human organs and tissues is one of the greatest achievements of surgery and this is vital necessary to save the lives of many people. Our population access to foreign specialized medical clinics in order to conduct this expensive and sophisticated operation. Citizens of Uzbekistan very often travel to foreign clinics in order to save their lives through organ and tissue transplantation.

This causes great discomfort and is very expensive. Large sums of currency have to be left abroad. At the same time, our patients as foreigners often find themselves in a social and legal adverse situation.

At present, transplantology is developing rapidly, rather than the laws governing them. They do not meet modern requirements and create gaps in Uzbek legislation, which leads to a significant inhibition of the development of transplantology in Uzbekistan.

Therefore, in order to protect the rights of patients of the right to health, as well as for the purpose of economic benefits for the state budget, it is necessary to adopt the law “On transplantation of organs and tissues”, which will be developed in accordance with international standards and completely excluding commercialization.

Until 2017, the national legislation of the Republic of Uzbekistan prohibited the transplantation of human organs and tissues. But after signing the Decree of the President of the Republic of Uzbekistan dated February 7, 2017 No.UP-4947 “On the Action Strategy for the Five Priority Directions of the Development of the Republic of Uzbekistan in 2017–2021”, in Annex 8, the Parliament is tasked with drafting a law providing for permission to conduct organ transplants and human tissue.

The goal of research

The complex research the problems of transplantation of human organs and tissues, international standards and international experiences and to develop scientifically substantiated proposals for advancement and establishment of national medical law in these sphere by implementing international legal norms.

Research objectives

Is a system of international legal community relationships associated with the development of medical law in sphere of transplantation of human organs and tissues Republic of Uzbekistan through the implementation of international norms.

Methods

The methods of this research are a combination of the following scientific methods of cognition: the general-dialectical method of cognition, the methods of systematization, problem-oriented, comparative legal, special legal, historical and legal, formal legal analytical and scientific knowledge. The versatile and interdisciplinary nature of the subject and object of research has led to the use of the system, comparative analytical, logical and empirical methods.

Materials

Some problems of legal aspects of transplantation of organs and tissues was carried out in monograph of Stecenko and Pelagesha (2013); Harris (2002); Sgreccia and Tambone (2002); in monograph of Kapitonova, Romanovskaya, Romanovskaya and Romanovskiy (2016) and others. But in Uzbekistan the research materials in these sphere made only by Gafurova (2015) in monograph on theme: “Topical issues of ensuring the right to health in medical law”.

Results and discussion

Of course, there was an urgent need for the development and adoption of the law “On Transplantation of Organs and Tissues”, which will be developed in accordance with international standards and completely eliminates commercialization. But the absence of a single universal standard governing this surgical procedure causes certain difficulties in the development of this law. Such a law gives rise to certain contradictions between the right to health and the prevention of human trafficking and manifest a great risk of criminalization in the transfer of human organs. In addition, when performing this manipulation, a number of bioethical problems arise.

Today, the right to health is recognized by the international community as a major inherent right that belongs to everyone. It is enshrined in the very first international legal instruments and referred to a group of economic, social and cultural rights. When the world’s largest organizations have special units, whose duties include the legislative initiative, the development of international legal instruments to implement the right to health; oversee

the implementation of the provisions of the international instruments that perpetuate human rights and freedoms ratified by the states. The right to health is an integral part of the complex human rights recognized in virtually all countries, even in those where it is not formally recorded. In many countries, the right to health care has become part of domestic law, enshrined in the basic legal acts, provided ample opportunities for the realization of this right in accordance with internationally recognized standards. In Uzbekistan, many components of the right to health are also one of the inalienable constitutional rights, as guaranteed by the Basic Law (Art. 40) and are under the state protection. But some of the components of the right to health in the current legislation to date in implementing needed improvements and additions.

Transplantation of human organs and tissues is one of the pressing and outstanding problems of bioethics. Transplantation (from Latin *transplantare* – transfer) is a transfer of organs or tissues to the other body part of the same or of the other organism. There is no law on transplantation in our country for now and in our opinion such a law is currently necessary. First and foremost it is required to familiarize with international experience. So let's consider international legal regulation of transplantology issues. For example, according to the law of the Russian Federation "On transplantation of human organs and (or) tissues" on December 22, 1992, in the Russian Federation transplantation of organs and (or) tissues) from live donor or dead body may be carried out only, if other medical means cannot secure survival of patient (recipient) or his health resumption. Withdrawal of organs and (or) tissues from live donor is only allowed if there no material harm to his health shall be done according to medical opinion of council of physicians. Transplantation of organs and (or) tissues is admissible exclusively with consent of recipient". Human organs and (or) tissues may not be an object of sale. Purchase and sale of human organs and (or) tissues as well as advertising of such actions entail criminal liability according to the law of the Russian Federation. Withdrawal of organs and (or) tissues is not allowed from: a) donor under 18 years old (except for bone marrow transplantation) or a person rendered incapable in accordance with the applicable procedure; b) a person dependent on recipient due to his employment or otherwise. Operation of this law does not extend to organs, their parts and tissues relating to reproductive process of human being including reproductive organs (ovule, spermatic fluid, omophorion's, testes or embryos) as well as blood and its components (Large law dictionary, 2007).

It may seem that lawfulness of transfer of organs carried out for prolongation of life of patient otherwise doomed to death is taken for granted, but in the other hand in actual practice it is required to consider bioethical aspects of this problem more closely. One should not forget that in case of real benefit to patient to whom organ is being transferred, there is a high probability of causing harm to donor if he is still alive; besides when any organ is transferred for prolongation of life, by no means this prolonged life is always satisfactory by all parameters. Furthermore, in the process of surgical intervention when success is to be achieved by all means and in case of experimental nature of such intervention, patient appears to be organism under experiment exposed to trial of surgical methods.

J.S. Baumova notes that lately considerable attention has been paid in legal science to the concept somatic human rights (from the Greek. *Soma* – body) which are expressed in giving man has the full right to dispose of his body, including the right to euthanasia, change sex, sterilization, production of abortion, free use of drugs (alcohol, tobacco), even the right to trade with your body, which means legalization prostitution (Baumova, 2017). But on this occasion, from point of view S.I. Iventiev, in fact, despite the prohibitions of the international legal nature, World Health Organization directives and Russian legislation, the theory of somatic human rights authorizes trafficking in human organs and tissues (Iventev, 2012).

We completely agree with this position, since the legal regulation of the transplantation of human organs and tissues should masterfully prevent the most important problem – human trafficking. In our opinion, the confidentiality of information about his will on the donation of his organs and tissues and the ability to change it at any time should be an important guarantee to prevent the criminalization of transplantation of organs and tissues, as well as protect the somatic rights of a citizen.

According to E. Sgreccia and B. Tambone transfer of organs is lawful subject to fulfillment of the following conditions:

- a) In respect of the live donor no material or irreparable harm should be made to his life. This includes cases of transfer of one of paired organs (such as kidney) or of a part of organ (liver, lung), when donor usually can continue normal life and work appreciate to continuous improvement of methods. Correctness of position with regard to lawfulness of transfer of organs depends on achievements in this area and first of all concerns survival of donor;
- b) There should be a high probability of survival of patient-recipient: sacrificing of donator's organ should be proportional of real survival of patient who receives donator's organ.

In accordance with the principles which formed the basis at Convention on human rights are made its fundamental and constituent charter, the Council of Europe developed vigorous activity for cooperation between member states with regard to medical legislation. As for proclamation of general principles in European countries, first of all it is required to think of Social Charter of Europe, which in article 11 provides duty of the state to care for health of their citizens, as well as of European Code of Social Security, which guarantees taking measures of preventive, curative and rehabilitation nature (Sgreccia & Tambone, 2002).

In this context it is appropriate to mention again of the above Guiding principles, which formed the basis for legislation of Council of Europe applicable to blood transfusion (Reykjavik code of 1975), exchange of tissue cross-match tests (Agreement No 84 of 1974), problems relating to transplantation or withdrawal of human organs and tissues (Recommendation No 78/29, Recommendation No 79/5) aimed at promotion of cooperation and security in medical area and prevention of its commercialization.

In order to better provide legislative uniformity among different European countries the Recommendation No 29/79 approved by the Committee of Ministers of the Council of Europe on May 11, 1978, contains a number of regulations, definitions and wishes to member-states with respect to their national legislations.

Let's pay particular attention to the directions relating to consent to withdrawal of organs from live individuals and to definite sanctions in case of receipt of falsified death certificates with the view of early receipt of organs for transplantation. The same Recommendation contains an appeal to governments of various countries to provide for possibility of declaring by citizens in identification documents or driving licenses of willingness to provide their organs post mortem (implicit consent after death). Overall objective of the document consists in enabling member states to use "implicit consent" in cases when there is no express wish pro vita not to give organs of post mortem. This position was confirmed by the Conference of European Ministers of Health held in Paris on November 16-17 in 1987 (Bompiani & Sgreccia, 1989). Therefore a general tendency lies in considering a dead body as *communitatis* (public domain), however paying a tribute to religious convictions of liver if such convictions conflict with provision of organs post mortem.

Withdrawal of organs is prohibited in case of pronouncement of clinical death, provided that there is no nonreversible and final termination of cerebrum functions, however it is specified that it cannot be ruled out that at the same time functioning of definite organs may be supported artificially (Introna, Tantalo & Coifigli, 1992).

Articles 9 and 14 of the same Recommendation prescribe gratuitous provision of organs and tissues in the meantime recognizing reservation of rights both for reimbursement of expenses and for guarantees of social security in case of any harm to health will be caused by provision of organs. Other directions concern subsequent analyses, place and conditions of transplantation.

Recommendation No 79/5 deals with international guarantee and customs measures relating to prompt and privileged use of transport for conveyance of transplantation materials. These materials should be carried with European "label".

Based on these provisions supplemented by the Resolution of the European Parliament No 24/ 79 with regard to bank of organs, there were organized a data banks and associated international cooperation in the area of finding of organs which may be transferred, their typologization, air conveyance and if necessary transportation of bank blood and other substances required for transplantation.

Finally let's look to approval of Convention on bioethics of the Council of Europe (Committee of Ministers of Council of Europe, 1996). Although it does not examine the problem of provision of organs post mortem in detail, it confirms prohibition of trade in parts of human body.

Articles 13, 14, 15 of Ethical principles of European medicine approved by the International Conference of the Corporation of physicians of European Economic Community (EEC) on January 6, 1987, to the problem of transplantation are also dedicated. XXXIX assembly of World Medical Association (WMA) hold in October of 1987 had approved the Declaration on transplantation.

As is it obvious currently legal regulation of organ and tissue **transplantation** in international law also has rather ambiguous and delicate points. The procedure for transplantation of organs and tissues is governed by official documents of World Medical Association.

- The statement of WMA on trade in live organs (1985), which condemned purchase and sale of human organs for transplantation and called on governments of all countries to take measures to prevent this;
- WMA declaration on transplantation of organs (1987);

- “WMA resolution dedicated to issues of physicians’ behavior when carrying out transplantation of human organs (1994), which was adopted in connection with WMA concern with regard to increasing number of reports on participation of physicians in operations on transplantation of human organs withdrawn from bodies of prisoners, people sentenced to death, in case of euthanasia of human suffering from physical or physical deficiencies, poor people, kidnapped children” (Akopov & Maslov, 2002), and also stipulated in the Convention for the Protection of Human Rights and Fundamental Freedoms in view of application of achievements in biology and medicine: Convention on human rights and biomedicine (Oviedo, 1997), where the chapter 6 “Withdrawal of organs and tissues from live donors for transplantation purposes” is devoted to the problem of transplantation of human organs.

The article 58 of the above mentioned draft law of the Republic of Uzbekistan “On medical activity” dedicated to the aspects of transplantation of human organs – “Withdrawal of human organs and (or) tissues for transplantation” states: “It is permitted to withdraw of human organs and (or) tissues for transplantation in the manner prescribed by the laws of the Republic of Uzbekistan”.

At the same time it is required to remind that article 113 of the Criminal code of Republic of Uzbekistan “Withdrawal of human organs or tissues” provides it as follows: “Withdrawal of organs or tissues of decedent with a view of their transplantation, conservation for scientific or training purposes without intravital consent of decedent or without agreement with his close relatives is subject to punishment in the form of penalty from 25 to 50 minimum wages or deprivation of definite right for a term up to 5 years or corrective labor for a term up to 3 years”. The same acts performed

- a) Venally or from base motives;
- b) Repeatedly or by dangerous recidivist, are the subjects to punishment in the form of arrest up to 6 months or imprisonment from 3 to 5 years.

Also the article 97 “Intentional homicide” takes into account the following circumstance: “Intentional homicide is subject to penalty of confinement for a term from 10 to 15 years. Intentional homicide under aggravating circumstances, such as: ...) with a view to receive transplant or to use parts of dead body”, also the article 104 stipulates: “Intended bodily harm threatening life at the moment of causing or entailing loss of vision, speech, hearing or any of organs, or complete defunctionalization, mental disease or other impairment of health related to permanent loss of faculty above 33 % or termination of pregnancy, or lasting disfigurement of body is subject to penalty of confinement for a term from 3 to 5 years. Intentional grave bodily injury done: ...and) with a view to receive transplant is subject to penalty of confinement from 5 to 8 years” (Rustambaev, 2004). Therefore this discloses inconsistency of this article of draft law with the above articles of the Criminal code of the Republic of Uzbekistan, and respectively when passing this draft law the to the introduction of appropriate changes to the Criminal code of the Republic of Uzbekistan is required.

But nevertheless it is not a secret that transplantation for survival of many people is required. In our opinion it is advisable to permit transplantation of some organs (liver, kidney, lungs and some others) between relatives. Moreover the problem of commercial transplantation is the subject of consideration and discussion. From bioethical point of view commercialization of this type of medical services (sale of organs) is inadmissible and therefore sale of organs should be excluded as less as possible and such operation between relatives on a gratis basis should be carried out. In our view the example of the above Law of the Russian Federation “On transplantation of human organs and (or) tissues” of December, 22, 1992, also have some unethical aspects, for example, “... Withdrawal of organs and (or) tissues is not allowed from: a) donor under 18 years old (except for bone marrow transplantation) or a person rendered incapable in accordance with the applicable procedure; ...”. Use the organs of under-age incapable donor infringe a number of human rights, such as rights of the child; it trespasses against the principle of informed consent of patient and creates discrimination because of one’s health condition.

Conclusion

Thus, the development and transformation of legal regulation of transplantation will increase the number of saved lives of patients who were previously doomed to disability or death, therefore the main goal is to improve the mechanism of legal regulation of organ transplantation, to ensure the further development of transplantology in Uzbekistan, to improve the mechanism for implementing the norms of right to health in medical care and strengthening the guarantees of the constitutional rights of citizens.

With due regard for examples from world experience, the procedure for transplantation of organs and tissues governed by official documents of World Medical Association, the draft law “On transplantation of organs and tissues” being under consideration of the legislative house of Parliament of Uzbekistan with making some additions

it is required to pass. Having examined this draft law we have come to a conclusion that this draft law does not provides for the following crucial points:

- Prohibition of trade in organs and tissues (the organization of the market of donor organs is prohibited);
- Live donor has a right to provide paired organs and liver only;
- The confidentiality of information about his will on the donation of his organs and tissues and the ability to change it at any time
- In order to prevent criminal commercialization of transplantation of human organs and tissues, financing should be extended exclusively by the state.

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