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### Criminal aspects of organ transplantation

**Abstract:** Improving the health of the population is a set of political, economic, legal, scientific, medical, sanitary-hygienic measures aimed at protecting the physical and mental health of each person, increasing his active longevity and providing the necessary medical assistance. In Azerbaijan, social insurance is a component of social security and one of its forms. Social insurance is an integral part of the state's social policy. In Azerbaijan, this type of insurance is concentrated in the hands of the state. In order to properly organize state work in this area, a new state institution - the State Social Protection Fund of the Population was created. It is mainly created due to deductions from the wage fund of enterprises and organizations. One of the forms of social insurance is health insurance. Health insurance is a form of social protection of people's interests when they lose their health for certain reasons. Medical insurance is related to the payment of medical expenses incurred by citizens in the form of receiving medical assistance.

**Keywords:** organ transplantation; medical tourism; transnational organized crime; human trafficking.

An organ transplant is a surgical operation where a failing or damaged organ in the human body is removed and replaced with a new one. An organ is a mass of specialized cells and tissues that work together to perform a function in the body. The heart is an example of an organ. It is made up of tissues and cells that all work together to perform the function of pumping blood through the human body. Any part of the body that performs a specialized function is an organ. Therefore, eyes are organs because their specialized function is to see, skin is an organ because its function is to protect and regulate the body, and the liver is an organ that functions to remove waste from the blood.

When a person falls ill because one of his or her organs is failing, or because the organ has been damaged in an accident or by disease, the doctor first assesses whether the person is medically eligible for a transplant. If so, the doctor then refers the individual to a local transplant center. The transplant center evaluates the patient's health and mental status as well as the level of social support to see if the person is a viable candidate for an organ transplant. If the patient is a transplant candidate a donor organ must be found.

Due to the complex nature of the activities, which require patients and donors, transplants surgeons and an operating theatre, organ trafficking is said to require globally active and well-organized networks. There is a critical lack of evidence-based research, in particular, regarding the methods of actors involved through which the organizational model of the criminal activities could be explored.

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This research aims to contribute to criminological research in terms of describing and explaining organ trafficking by providing an answer to the following questions: Why is the human organ trade criminalized? What are the effects of the prohibitions? How can the crime's organizational model be defined?

For this purpose, we will analyze several literature resources and refer to Azerbaijani jurisdiction on this topic too. In the future, I intend to expand my research on this subject and compare world practice with Azerbaijan.

There are two sources for donor organs. The first source for organs removes them from recently deceased people. These organs are called cadaveric organs. A person becomes a cadaveric organ donor by indicating that they would like to be an organ donor when they die. One way to avoid the ethical problems associated with the shortage of transplantable organs is to increase the number of donor organs. However, fears abound that policies to maximize organ donations could go too far – leading to organ farming or premature declarations of death in order to harvest organs.

Many, if not most, people agree that taking organs from any source is a justifiable practice within certain ethical boundaries. Controversies result from an inability to define exactly where those boundaries lie [5, p. 1-16]. Everyone may have their own unique ideas about the boundaries they would like to see concerning the following three sources of transplantable organs: cadaveric donors, living donors and alternative organ sources.

Currently, once a person dies, his or her organs may be donated if the person consented to do so before they passed away. A person's consent to donate their organs is made while still living and appears on a driver's license or in an advance directive. After consenting to donate organs, nothing happens with that information until the person dies. A person is considered dead once either the heart stops beating or brain function ceases (called brain death). After death, the organs are taken from the deceased person's body. If possible, the deceased person may be kept on life support once they have died until the organs can be taken, in order to preserve the organs until they are removed.

If the deceased person's organ donation wishes are unknown, the hospital, physician, or organ procurement organization will approach a family member to obtain consent to remove the organs.

A person with organ damage or organ failure may look for a living donor to donate an organ, allowing the patient to bypass the national waiting pool to receive a cadaveric organ. A few medical and ethical professionals argue that living donation is inappropriate under any circumstances and should not only be discouraged but abandoned all together because of the risk and dangers associated with donating organs [18, p. 423-424].

There are a few non-financial incentives available as options to increase living donation, such as medical leave or special insurance for living donors [9, p. 2002-2005]. The idea of non-financial incentives may be rising in popularity as a way to entice people to donate their organs.

With the state of discrepancy between organ donors and people waiting for an organ transplant, researchers and advocates have begun to consider non-traditional donation. Some potential non-traditional sources of organs are: animal organs, artificial organs, stem cells, aborted fetuses.

Due to medical technological innovations of the mid-twentieth century, in particular the development of immunosuppressant drugs which prevent organ rejection after transplantation, recipients and donors no longer had to be relatives but could be biologically and geographically distant. Consequently, transplant activities were expanded, saving the lives of many people. Since the early 1980s, transplantable organs has started to outpace the supply, especially in countries where religious or cultural considerations inhibit organ donation. In 1987 the World Health Organizations de-

clared that organs should be donated without financial gain [26]. Although the commercial trade in human organs has long been the subject of rumours and unconfirmed reports, over the past fifteen years journalist and scientists have indicated that the trade occurs worldwide. The buying and selling of human organs is prohibited worldwide.

The current Azerbaijan Republic policy and the law -“On donation and transplantation of human organs and tissues” of Azerbaijan Republic adopted 20 October in 2020 [22] doesn't allow the sale of human organs. Paying people to donate their kidneys is one of the most contentious ethical issues being debated at the moments. The most common arguments against this practice include: donor safety, unfair appeal of financial incentives to the economically disadvantaged, turning the body into a money-making tool and wealthy people would be able to access more readily.

Abovementioned law prohibited organ or tissue transplantation from persons under age of 18, as well as, from the persons who physical, spiritual under the care of recipient and material-dependent persons, prisoners, military prisoners.

Organ donation laws at the state exist for two primary purposes. The first purpose of organ donation laws is to help ensure a safe and fair organ donation collection and distribution practice. The second type of organ donation laws have been enacted to widen the pool of potential donors in an effort to increase the number of organs available for transplant.

#### **The meaning of medical tourism.**

Although act as intermediary and the receipt of a financial gain for brokerage activity are generally legal phenomena also in the field of medical tourism [17, p. 3]. In fact, the financial gain for the middle-man activity surely affects the price of the organ, thus creating an unnatural distortion in the process of will formation of concerned parties, which had already been influenced by condition of economic or physical need.<sup>1</sup> The devaluation of their business also depends on the fact that brokers involved in organ trafficking might be parts of international criminal organizations that traffic in human beings and make huge illegal profits.<sup>2</sup>

So-called “organ transplant tourism” occurs when potential organ recipients cross national borders to undergo organ transplantation. Medical tourism generally occurs for many reasons, including the comparative quality of care at home and abroad, unavailability or unacceptable waiting times for care at home, and relative costs of care. Growing rates of medical tourism raise concern about justice to patients in both home jurisdictions and jurisdictions in which the care is provided, about the ability of home jurisdiction to maintain cost and quality control over the care patients receive, and about the adequacy of informed consent across borders.

Israel has a good practice example, before the Israel adopted the Organ Transplant Act of 2008, many Israelis went abroad, to receive illicit organ transplants. And Israeli health insurance providers reimbursed significant part of the transplant expenses to organ transplants recipients.<sup>3</sup>

The term of ‘transnational crime’ now being used in everyday lexicon of criminologists, law enforcement officials and the public. Also the concept of ‘organized crime’ consists of organizations that have durability, hierarchy and involvement in a multiplicity of criminal activities. According to the United Nations Convention against Transnational Organized Crime (paragraph 2.1.2) and included in article 2 of the Convention [24]. “Organized criminal group’ shall mean a structured group of three or more persons, existing for a period of time, with the aim of committing

<sup>1</sup> See H.T.Engelhardt, *IL corpo in vendita:dilemmi morali della secolarizzazione*, in *Questioni di bioetica*, cit., p.131.

<sup>2</sup> On trafficking in organs as a goal of the new organized crime, see S.Meyer, *op.cit.*, p.208 et seq.

<sup>3</sup> See PACE-Doc. 15029 (2020)- Organ transplant tourism

one or more serious crimes or offences established in accordance with this Convention, on order to obtain, directly or indirectly, a financial or other material benefit.

Some scholars make use of the term 'transnational organized crime' because they claim that some degree of organization is required for criminal activities that cross national boundaries [3; 4], such as the globalized organ trade.

Many scholars argue that an all-encompassing prohibition of the organ trade is not justifiable under all circumstances. The ethical debate revolves around the questions whether a regulated system of incentives for donation would be ethically justifiable and would increase the supply of organs. A continuing high demand for organs will make it difficult to restrain the underground market by means of future repressive action, whereas a properly controlled regulated system has the potential to increase living and cadavric donation, while reducing or eliminating the harms associated with illegal markets.

In summary, the subject of organ transplantation obviously create a number of ethical issues and which in many countries are not regulated by any scientific and rational legal system, especially, the criminal law system whereas in other countries donor pools and transplant centers are created. In some countries, even people from other nationalities can be organ transplant recipients. As we can see, there is no ubiquitous jurisdiction or research literature on this particular topic so that we can refer to. This research paper aims to compare experience, regulation systems, case studies of different countries including Azerbaijan.

### References

1. Becker, H.S. *Outsiders: Studies in the Sociology of Deviance*. New York: The Free Press, 1963.
2. Bilgel, F. *The law and economics of organ procurement. Een rechtseconomische analyse van organverkrijging*. Thesis. Universita di Bologna, Universitat Hamburg & Erasmus Universiteit Rotterdam, 2011.
3. Beare, M. Introduction. In M. Beare (Ed.), *Critical reflections on transnational organized crime, money laundering, and corruption*. Toronto: University of Toronto Press, 2003.
4. Berdal, M., & Serrano, M. (Eds.) *Transnational organized crime and international security: Business as usual?* Boulder CO: Lynne Rienner, 2002.
5. Childress JF. *The Failure to Give: Reducing Barriers to Organ Donation*. *Kennedy Institute of Ethics Journal*. 2001. No. 11(1), pp. 1-16
6. Caplan, A., Dominguez-Gil, B., Matesanz, R. & Prior, C. *Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs*. 2009.
7. Cohen, L. *Medical tourism, access to health care, and global justice*. *Virginia Journal of International Law*. 2011. No. 52(1), pp. 1-56.
8. Columb, S. *Beneath the organ trade: a critical analysis of the organ trafficking discourse*. *Crime, Law and Social Change*. 2015. No. 63, pp. 21-47.
9. Delmonico FL, Arnold R, Scheper-Hughes N, et.al. *Ethical incentives – not payment –for organ donation*. *New England Journal of Medicine*. 2002. No. 346(25), pp. 2002-2005.
10. Efrat, A. *Combating the kidney commerce: Civil society against organ trafficking in Pakistan and Israel*. *British Journal of Criminology*. 2013a. No. 53, pp. 764-783.

11. Efrat, A. The rise and decline of Israel's participation in the global organ trade: causes and lessons. *Crime, Law and Social Change*. 2013. No. 60(1), pp. 81-105.
12. Kierans, C. Anthropology, organ transplantation and the immune system: resituating commodity and gift exchange. *Social Science&Medicine*. 2011. No. 73(10), pp. 1469-76.
13. Mendoza, R.L. Colombia's organ trade: Evidence from Bogota and Medellin. *Jornal of Public Health*. 2010. No. 18(4), pp. 375-384.
14. Moazam, F., Zaman, R.M. & Jafarey, A.M. Conversations with kidney vendors in Pakistan: An ethnographic study. *Hastings Center Report*. 2009. No. 39(3), pp. 29-44.
15. Padilla, B.S. Regulated compensation for kidney donors in the Philippines. *Current Opinion in Organ Transplantation*. 2009. No.14(2), pp. 120-123.
16. Padilla, B., Danovitch, G.M. & Lavee, J. Impact of legal measures prevent transplant tourism: the interrelated experience of The Philippines and Israel. *Medicine, Health Care and Philosophy*. 2013. No. 16(4), pp. 915-919.
17. Roy G. Spece, Jr. Medical Tourism: Protecting from Conflicts of Interests in Broker's Fees Paid by Foreign Providers, 6 *J. Health & Biomedical L.* 2010.
18. Ruggiero, V. Criminals and service-providers: cross national dirty economies. *Crime, Law and Social Change*. 1997. No. 28, pp. 27-38.
19. Spital A. Justification of living-organ donation requires benefit for the donor that balances the risk: Commentary on Ross et al. *Transplantation*. 2002. No. 74(3), pp. 423-424.
20. Scheper-Hughes, N. Commodity fetishism in organs trafficking. *Body & society*. 2001. No. 7(2-3), pp. 31-62.
21. Scheper-Hughes, N. Mr Tati's holiday and Joao's safari-seeing the world through transplant tourism. *Body and Society*. 2011. No. 17(2-3), pp. 55-92.
22. Shimazono, Y. The state of the international organ trade: a provisional picture based on integration of available information. *Bull WHO*. (2007). No. 85(12), pp. 955-962.
23. "The Law of Azerbaijan Republic "On donation and transplantation of human organs and tissues" adopted 20 October in 2020. Available at: <https://e-qanun.az/framework/46447> (in Azerbaijani).
24. United Nations. Economic And Social Council. Preventing, combating and punishing trafficking in human organs. Vienna: United Nations. 2006.
25. United Nations. United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Conventions against Transnational Organized Crime. Vienna: United Nations Office on Drugs and Crime, treaty series. 2000c, vol. 2237.
26. Vermot-Mangold, R.G. Trafficking in organs in Europe. Council of Europe, Parliamentary Assembly. 2003.
27. World Health Assembly Development of guiding principles for human organ transplants. 1987.
28. Walklate, S. *Understanding Criminology*. Maidenhead: Open University Press. 2007.
29. Yea, S. Trafficking in part: the commercial kidney market in a Manila slum, Philippines. *Global Social Policy*. 2010. No. 10(3), pp. 358-376.

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### Криминальные аспекты трансплантации органов

**Аннотация:** Трансплантация органа - это хирургическая операция, при которой неисправный или поврежденный орган в теле человека удаляется и заменяется новым. Орган - это совокупность специализированных клеток и тканей, которые работают вместе, чтобы выполнять определенную функцию в организме. Сердце - это пример органа. Он состоит из тканей и клеток, которые работают вместе, чтобы перекачивать кровь через тело человека. Любая часть тела, выполняющая специализированную функцию, является органом. Следовательно, глаза являются органами, потому что их особая функция - видеть, кожа - это орган, потому что их функция заключается в защите и регулировании тела, а печень - это орган, который выполняет функцию удаления отходов из крови.

**Ключевые слова:** трансплантация органа; медицинский туризм; транснациональная организованная преступность; торговля людьми.

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