

Юлія ХРИСТОВА, Валентин ЛЮДВІК
ЗАРУБІЖНИЙ ДОСВІД КРИМІНАЛЬНО-ПРАВОВОЇ ОХОРОНИ
НЕДОТОРКАНОСТІ ПРИВАТНОГО ЖИТТЯ

У статті досліджено міжнародну практику, а також досвід деяких зарубіжних країн-учасниць Європейського Союзу щодо кримінально-правової охорони недоторканості приватного життя. Встановлено особливості регламентації об'єктивних ознак складу кримінального правопорушення «Порушення недоторканості приватного життя» в Кримінальному кодексі України, а також у кримінальному законодавстві Сполучених Штатів Америки, Французької Республіки, Швейцарії, Королівства Іспанія, Республіки Польща, Республіки Болгарія. За результатами проведеного аналізу наявних наукових досліджень, довідкової літератури, відповідних положень чинного законодавства України про кримінальну відповідальність за порушення недоторканості приватного життя, а також судової практики додатково обґрунтовано потребу щодо удосконалення нормативно-правового визначення їх кримінально протиправних форм, запропоновано нову редакцію ст. 182 КК України «Порушення недоторканості приватного життя»: «1. Незаконне отримання, зберігання, використання, знищення, розголошення конфіденційної інформації про особу або незаконна зміна такої інформації, крім випадків, передбачених іншими статтями цього Кодексу».

Наголошено на багатоаспектності права на недоторканість приватного життя відповідно до положень міжнародних нормативно-правових актів у сфері прав людини, а також на потребі удосконалення вітчизняного законодавства у цій сфері шляхом впровадження уніфікованої термінології.

Ключові слова: приватне життя; порушення недоторканості приватного життя; порушення недоторканості житла; кримінальні правопорушення, що посягають на недоторканість приватного життя; конфіденційна інформація про особу.

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Oksana MYSLIVA[©]

PhD in Law,
Associate Professor
(Dnipropetrovsk state
University of Internal Affairs,
Dnipro, Ukraine)

CRIMINAL OFFENCE AND PUNISHMENT IN THE FIELD OF
TRANSPLANTATION: A COMPARATIVE ANALYSIS

Abstract. In modern medicine, the health or death of one person is effectively used to save the life or treatment of diseases of another, in science, cosmetology, pharmacology. This is a special method of surgical intervention, which consists in the removal of organs and (or) other anatomical material from the donor with simultaneous implantation of the recipient. Medical progress is inevitably accompanied by legal, economic, social and moral factors. Undoubtedly, from a moral and social point of view, the goal of saving the life and health of the person (recipient) is noble, but the deterioration of health or deprivation of life of the donor - legally ambiguous, even despite his wishes or consent, because undoubted damage to life and health. In addition, cases of consumer attitudes towards the human body have led to the emergence and spread of illegal transplant activities.

The article notes the causes and conditions of the emergence and spread of illegal activities in the field of transplantation, provides known forms, methods and participants. Based on a comparative analysis of legislative models of crimes and punishments in CIS countries with identical legal systems, attention is focused on the need to unify the legal definition of forms and types of criminal activity in the field of transplantation, in particular, ensuring interaction and cooperation with law enforcement agencies.

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ORCID iD: <https://orcid.org/0000-0002-0181-9603>

omaxah@gmail.com

Ways of counteracting crimes in the field of transplantation are considered. Ways of borrowing positive international experience.

Keywords: *illegal activity in the field of transplantation, donation, organs and other human anatomical material, crime, punishment.*

Relevance of the study. Illegal activity in the field of transplantation in the twentieth century is a modern criminal phenomenon, one of the complex social problems of the world community. There is various information about the scale of illegal activity in the field of transplantation, but researchers unanimously argue that there is a network of criminal gangs specializing in the receipt and delivery of donors and their organs, and the "shadow" business in this area is transnational in nature.

The high level of unemployment and low income of citizens undoubtedly contributes to the attraction of illegal activities in the field of transplantation, which makes it possible to obtain illegal "earnings", pushes citizens to search for illegal work abroad without knowing the language and qualifications, creates a channel for sending them as potential donors to the crime scene, determines the development of transplant tourism, since the delivery of the canned transplant itself to another region of the country, and even more so outside of it, is less expedient due to the limited shelf life, and requires the presence of air transport and special containers.

The analysis of empirical materials, including the study of investigative and judicial practice in this category of cases shows that the criminal phenomenon we studied, although manifested in various forms, depending on commercial demand for a particular type of donor material, and criminal activity is constantly improving recruitment of victims, there are obviously the most common models of criminal activity and ways to detect, document and investigate it. And the more uniformly they are reflected in the legislation of neighboring countries and approved by the international community, the more likely it is to prosecute criminal groups operating in the field of transplantation at the transnational level.

Recent publications review. Problems of law regulation of transplantation, some criminal law and forensic aspects of liability for illegal activities and criminal offence in this area have long been the subject of scientific research of scientists: M. Avdeev, F. Berdychevsky, I. Gorelik, V. Glushkov, Ya Drgonets, A. Krasikov, M. Malein, M. Maleina, M. Shargorodsky, P. Hollender, P. Holmes. In the field of modern domestic science of criminal law, crimes in the field of transplantation were investigated by S. Hrynychak, V. Gryshchuk, A. Musienko, D. Protsenko, O. Sapronov, G. Chebotaryova and foreign – Z. Volozh, D. Kobayakov, O. Kustova, N. Pavlova, S. Tikhonova. Issues of criminal liability and combating trafficking in human beings, in particular, for the purpose of human exploitation as a donor are mentioned in the scientific works of A. Wilks, T. Voznaya, S. Denisov, V. Ivashchenko, V. Kozak, V. Kuts, Yu. Lyzogub, A. Orleans, V. Pidgorodinsky, S. Kapitanchuk and others [1-14].

The works of these scientists, of course, have significant scientific and practical significance, although in fact they have lost their relevance, because they rely on outdated legislation in the field, do not take into account their criminological conditionality, new methods and technologies for detecting and investigating crimes.

The article's objective is criminal offence and punishment in the field of transplantation in the same country in a visual comparative analysis.

Discussion. The fundamental principles of the legality of transplantation are enshrined in such international legal documents as the Resolution on the Harmonization of the Legislation of the Member States on the Seizure, Transplantation and Transplantation of Human Body Materials No. (78) 29 (11.05.78), Venice Declarations on Terminal State (01.08.68) and incurable diseases (01.10.83), Sydney Declaration on Death (03.10.83), Council of Europe recommendations on the use of human embryos and fetuses for diagnostics, therapy, research, industry and trade (24.09.86), Declaration on transplantation human organs (10/30/87), Regulation on in-vitro fertilization and embryo transplantation (10/01/87), Regulation on fetal tissue transplantation (09/01/89), Resolution on the attitude of doctors to the problem of human organ transplantation (09/01/94), Convention on the protection of human rights and dignity in relation to the application of the achievements of biology and medicine: the Convention on the Rights of Life and Biomedicine (04.04.97), and Additional Protocol Against the Cloning of Human Beings (01.12.98). These documents recommend to the governments of all countries to provide for legal and disciplinary responsibility for obtaining financial or other benefits from the human body or its embryos; taking organs and

tissues of a person without written consent, under pressure, to ascertain the death of the brain or with a purpose, is not curative; abortion for the purpose of taking fetal materials; the use of transplantation instead of another effective treatment; human cloning.

UN Convention on the Rights of the Child (20.11.89) with the Optional Protocol to it on the sale of children, child prostitution and pornography; The UN Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (15.11.2000) also calls for the criminalization of the exploitation, smuggling and trafficking of children for any purpose, including offering, transfer or receipt of a child by any means for the purpose of transferring her organs for reward, attempt to commit these acts, aiding and complicity in them, as well as participation in crimes that are of a transnational nature.

In the legislation of each individual country in the world, these principles and requirements are introduced in various aspects, in connection with which, unequal manipulations in the field of transplantation are criminalized, and therefore the accompanying previous or subsequent illegal actions, as well as significantly different penalties. Moreover, it is inexplicable, but it is a fact that the punishment in neighboring countries with the same legal system and common historical roots can be diametrically opposite.

For example, in order to ensure liability for transplant-related criminal activity, the Criminal Code of Ukraine provides for a system of actions including receipt, circulation (trade or sale, movement, storage, exchange) and use (transplantation, production of bioimplants) of human organs or tissues (Art. . 143), as well as forced donation of human blood (Art. 144). While in Ukraine only a living donor is recognized as a victim, in a number of neighboring countries both the deceased donor and close relatives are recognized as victims of crimes in the field of transplantation (Art. 348 of the Criminal Code of Belarus [2], Art. 133 of the Criminal Code of Uzbekistan [3], Art. 139 of the Criminal Code of Latvia [4], Part 1 Art. 163 of the Criminal Code of Belarus, part 1 of Art. 114 of the Criminal Code of Kyrgyzstan [5]).

In the tables below, we have shown a variety of legal models of punishable behavior in the field of transplantation and punishment measures for them in the neighboring countries of Ukraine, which are comparable in terms of the legal system, the content of public relations and the time of criminalization of similar acts, in order to visually make sure that there is no consistency in the issues under consideration, which can negatively affect law enforcement activities in the fight against transnational crime (Tables 1-6).

Table 1

Crime and punishment for violation of the order of transplantation

<i>Article Of the Criminal Code</i>	<i>The term of imprisonment for criminal offence in the area of transplantation, which caused by negligence</i>	
	<i>severe or moderate injuries</i>	<i>death</i>
Art. 164 Republic of Belarus	up to 3 years (part 1)	from 3 to 7 years (part 2)
Art. 125 Republic of Armenia [6]	up to 2 years (part 1)	up to 3 years (part 2)
Art. 115 Kyrgyz Republic	up to 3 years (part 1)	up to 5 years (part 2)
Art. 121 Republic of Tajikistan [7]	up to 3 years (part 1)	from 3 to 5 years (part 2)
Ukraine	up to 3 years (part 1 Art. 143)	
	up to 2 years (Art. 128)	from 3 to 5 years (part 1 Art. 119)

Table 2

Crime and punishment for premeditated murder of a donor

<i>Article Of the Criminal Code</i>	<i>The purpose of the murder</i>	<i>Punishment in the form of imprisonment</i>
120.2.5 Republic of Azerbaijan [8]	use of organs or tissues of the victim	from 12 to 15 years
p. 9 of Part 2 of Art. 139 Republic of Belarus	obtaining a transplant or using anatomical materials from a corpse	from 5 to 25 years
p. 14 of Part 2 of Art. 104 Republic of Armenia	use of body parts or tissues of the victim	from 8 to 15 years
p. N of Part 1 of Art. 109 Georgia [9]	transplantation or other use of organs, parts of organs or tissues of the victim's body	from 10 to 20 years
p. M of Part 2 of Art. 96 Republic of Kazakhstan [10]	use of organs or tissues of the victim	from 10 to 20 years
p. 12 of Part 2 of Art. 97 Kyrgyz Republic	use of the victim's organ or tissues	from 12 to 20 years
p. 12 of Part 2 of Art. 129 Republic of Lithuania [11]	obtaining any organ or tissue of the victim for transplantation	from 5 to 20 years
p. 1 of Part 2 of Art. 145 Republic of Moldova [12]	taking and (or) using or selling organs or tissues of the victim	from 20 to 25 years
p. M of Part 2 of Art. 105 Russian Federation	use of organs or tissues of the victim	from 8 to 20 years
p. N of Part 2 of Art. 104 Republic of Tajikistan	use of organs or tissues of the victim	from 15 to 25 years
p. N of Part 2 of Art. KK Republic of Uzbekistan	obtaining a graft or using corpse parts	from 15 to 20 years
p. 6 of Part 2 of Art. 115 Ukraine	qualifies as selfish purpose	from 10 to 15 years life imprisonment, confiscation of property

Table 3

Crime and punishment for inflicting bodily harm on a donor

<i>Article Of the Criminal Code</i>	<i>Purpose</i>	<i>Punishment in the form of imprisonment</i>
Art. 126.2.5 Republic of Azerbaijan	use of organs or tissues of the victim	from 6 to 11 years
p. 4 of Part 2 Art. 147 Republic of Belarus	obtaining a transplant	from 5 to 10 years
p. 13 of Part 2 Art. 112 Republic of Armenia	use of body parts or tissues of the victim	from 5 to 10 years
p. H of Part.2 Art. 117 KK Georgia	transplantation or other use of organs, parts of organs or tissues of the victim's body	from 5 to 12 years
p. H of Part 2 Art. 103 Republic of Kazakhstan	use of organs or tissues of the victim	from 4 to 8 years
p. 7 of Part 2 Art. 104 Kyrgyz Republic	use of organs or tissues of the victim	from 6 to 10 years
p. 12 of Part 2 Art. 135 Republic of Lithuania	obtaining any organ or tissue of the victim for transplantation	from 2 to 12 years
p. D of Part 3 Art. 151 Republic of Moldova	seizure and (or) use or sale of organs or tissues of the victim	from 8 to 15 years
p. Ж of Part 2 Art. 111 Russian Federation	use of organs or tissues of the victim for transplantation	from 3 to 10 years
p. O of Part 2 Art. 110 Republic of Tajikistan	use of organs or tissues of the victim	from 8 to 15 years
p. H of Part. 2 Art. 104 Republic of Uzbekistan	obtaining a transplant	from 8 to 10 years

Table 4

Crime and punishment for coerced organ or tissue donation

<i>Article Of the Criminal Code</i>	<i>The offence</i>	<i>Punishment in the form of imprisonment</i>
Art. 137.2 Republic of Azerbaijan	coercion to take human organs or tissues for transplantation through violence or threat of use	up to 4 years
Art. 134 Georgia	coercion to take human organs, parts of organs or tissues to be taken for treatment, transplantation, experimentation or the manufacture of medicinal products	up to 4 years
Art. 163 Republic of Belarus	coercion a person to donate his or her organs or tissue for transplantation with the threat of violence against him or her relatives	up to 2 years
Art. 126 Republic of Armenia	coercion a person to donate for the purpose of transplantation or scientific experiments of parts of the body or tissue (donation), committed through the use of violence or the threat of its use	up to 4 years
Art. 113 Republic of Kazakhstan	coercion to the seizure or illegal removal of human organs or tissues for transplantation or other use, and the conclusion of illegal agreements concerning human organs and tissues	up to 5 years
Art. 122 Republic of Tajikistan	coercion to the taking of organs or tissues of a victim for transplantation committed with violence or the threat of its use against him or his relatives, or the threat of destruction of his property	up to 3 years
Art. 158 Republic of Moldova	coercion a person to the removal of organs or tissues for the purpose of transplantation or other purposes, committed through violence or with the threat of its use	up to 5 years
Art. 120 Russian Federation	coercion to the taking or threat of transplantation of human organs or tissues for transplantation	up to 4 years
Art. 139 Latvian Republic	illegal taking of tissues and organs of a living or dead person for the purpose of their use in medicine	up to 5 years
Part 2 Art. 143 Ukraine	removal from a person by coercion or acted fraudulently his organs or tissues for the purpose of their transplantation	up to 5 years

Our research of investigative and judicial practice shows that the variety of corpus delicti (ways of describing the legislative model, qualifying features, especially the purpose of the crime that is part of it) significantly affects the variety of qualifications of criminal activity in different countries. On the one hand, it helps in documenting more forms of criminal activity and holding the perpetrators accountable for it, on the other hand, it complicates international law enforcement cooperation, strengthening the "niche" for transnational forms of crime.

Table 5

Crime and punishment for using a corpse as a donor

<i>Article Of the Criminal Code</i>	<i>The offence</i>	<i>Punishment</i>
Art. 348 Republic of Belarus	illegal removal of organs or tissues from an inanimate donor	imprisonment for up to 3 years
Art. 133 Republic of Uzbekistan	removal of organs or tissues of a deceased person for the purpose of their transplantation, conservation for scientific or educational purposes without his lifelong consent	penal servitude up to 3 years
Art. 139 Latvian Republic	illegal taking of tissues and organs of a living or dead person for the purpose of their use in medicine, committed by a medical person	imprisonment for up to 5 years

Table 6

Crime and punishment for trafficking in human transplants

<i>Article Of the Criminal Code</i>	<i>The offence</i>	<i>Punishment in the form of imprisonment</i>
Art. 137.1 Republic of Azerbaijan	illegal purchase and sale of human organs or tissues	up to 3 years
Part. 4 Art. 143 Ukraine	trafficking in human anatomical materials	up to 5 years

Inconsistency in legislative issues always impedes uniform law enforcement practice. Criminals enjoy a liberal attitude towards a certain type of activity in the field of transplantation, gaps in legislation or the lack of responsibility in it for a certain type of illegal activity in a particular country. We are to regret, the states into which donors or donor material are "imported", this criminal business supports the economy, as it helps to develop the market for medical and pharmaceutical services. It seems that the countries-suppliers of "human goods" also have their own interest, since the victims of crime, as a rule, become socially unprotected, marginal or psychologically unstable members of society, whose disappearance reduces the need to provide jobs and social assistance.

These facts further complicate the prosecution of criminal activity in the field of transplantation, which is characterized by the stability, isolation and cohesion of the circle of criminals associated with official and professional duties, their corporatism, which ensures its latency. The analysis of empirical material shows that in most cases illegal activity in the field of transplantation was committed by a group of people in organized forms, in which not only a clear structure and role distribution is carried out, but also professionalization is traced: organizer; customer (recipient, his relatives); a group of medical workers (surgeon, resuscitator, anesthesiologist, operating nurse) and technical personnel; a group of accomplices (statisticians of medical institutions, workers of cemeteries and crematoria, employees of the morgue, prenatal center, forensic medicine bureaus, drivers of vehicles, dealers / traffickers, mercenary kidnappers, recruiters of donors); "Cover" (lawyers, civil servants).

Improving the technical resources of criminal groups and their skills in using information technologies creates conditions for unauthorized interference in confidential donor databases and their use for criminal purposes. Obviously, with the development of mobile Internet technologies and VoIP telephony applications, criminals are becoming less accessible to law enforcement agencies, since modern details of criminal activity are discussed by messengers that have serious connection protection (for example, WhatsApp), and international payment systems Global Money are used in financial transactions and cryptocurrency.

An important area of detecting and preventing crimes in the field of transplantation is both the joint unification of the definition of crimes in the field of transplantation and donation of a representative of the international community, as well as ensuring the interaction of special law enforcement units at the international level, improving their qualifications, joint training and conducting special operations. State policy should be aimed at solving housing problems, education and legal propaganda, providing jobs in the specialty, forming competent state bodies, fighting corruption, stopping illegal migration, without which it is impossible to shade the "black market for human goods".

Systematic ideological influence on the scale of each country should be aimed at replacing consumer psychology, restoring culture, overcoming permissiveness and cruelty, legal nihilism and social alienation. Without this, the potential for each person in the embryo, during life or after death to become a victim of donation for illegal transplantation forms a high level of victimization, and the possibility of complicity in the crime of a potential victim (her desire and consent to illegal donation) mediates the self-reproduction of illegal activities in this area. To identify and prevent the commission of illegal activities in the field of transplantation, it is advisable to carry out operational support for the provision or exchange of transplants of human origin from the point of view of their sources and destination, check the facts of providing loans for the purchase of special medical equipment for the transportation of human organs and tissues; check the legality of the use of targeted funds received from commercial structures; check the activities of business entities that have received or tried to obtain a license to carry out activities in the field of transplantation, including private entrepreneurs in the

medical and cosmetic field, collect materials on their financial condition, the legality of their sources of income; check compliance with the adoption procedure for minors diagnosed with an incurable disease, especially by foreign citizens; carry out a constant exchange of operational information between special units for joint activities.

In addition, it is undoubtedly necessary for the governments of most states to take measures aimed at improving the well-being of citizens by stabilizing the economy, solving social problems, improving the ideological atmosphere in society and improving the legal field, especially the introduction of positive legislative experience, taking measures to unify the requirements for the use of transplantation and donation, as well as legal models of criminal responsibility for their violation. For example, the experience of individual countries in reducing the shortage of transplants, and hence the conditions for their illegal receipt, has proven itself positively, by legalizing non-genetic donation with material compensation to the donor for damages caused, "cross" donation (providing benefits in a checklist for waiting for a transplant to a donor's family member), as well as the recognition of the criminal innocence of victims of trafficking in persons recruited as donors regardless of their consent due to their vulnerable state.

Conclusion. In conditions of unsatisfactory financing of medicine, its employees focus on self-sufficiency. Modern transplantation has become an area in which, by making illegal transplants, recruiting donors, concluding commercial transactions with them regarding their organs or tissues, it can increase material security against the background of an unfavorable social and unstable economic situation in the state. Therefore, it is relevant to develop a multi-level system of state and public events aimed at eliminating, weakening or neutralizing the causes and conditions for committing crimes in the field of transplantation, material support, training and advanced training of law enforcement officials, as well as the establishment of international cooperation in the fight against organized and transnational crime, including the unification of the legislative definition of crimes in the field of transplantation and the amount of punishment.

Conflict of Interest and other Ethics Statements

The author declares no conflict of interest.

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Оксана МИСЛИВА
ЗЛОЧИНИ ТА ПОКАРАННЯ У СФЕРІ ТРАНСПЛАНТАЦІЇ:
ПОРІВНЯЛЬНИЙ АНАЛІЗ

Анотація. У сучасній медицині здоров'я або смерть однієї людини ефективно використовується заради порятунку життя або лікування хвороб іншої, у науці, косметології, фармакології. Йдеться про спеціальний метод хірургічного втручання, що полягає у вилученні органів та (або) іншого анатомічного матеріалу у донора з одночасним його вживлянням реципієнту. Медичний прогрес неминуче супроводжують правові, економічні, соціальні та моральні фактори. Без сумніву, з моральної та соціальної точки зору мета порятунку життя і здоров'я людини (реципієнта) благородна, але погіршення стану здоров'я чи позбавлення життя донора – з юридичної точки зору неоднозначна, навіть, незважаючи на його бажання чи згоду, оскільки заподіюється безсумнівна шкода життю та здоров'ю. Крім того, випадки споживчого ставлення до тіла людини призвели до виникнення та поширення незаконної діяльності в сфері трансплантації.

У статті зауважено на причинах і умовах виникнення та поширення незаконної діяльності у сфері трансплантації, наведено відомі форми, способи та учасники вчинення. На підставі порівняльного аналізу законодавчих моделей злочинів та покарань у країнах ближнього зарубіжжя з ідентичною правовою системою акцентовано увагу на необхідності уніфікації законодавчого визначення форм та видів злочинної діяльності у сфері трансплантації, зокрема, забезпечення взаємодії та співпраці з правоохоронними органами інших країн. Розглядаються шляхи протидії злочинам у сфері трансплантації шляхи запозичення позитивного міжнародного досвіду.

Ключові слова: *незаконна діяльність у сфері трансплантації, донорство, органи та інший анатомічний матеріал людини, злочин, покарання*

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Victoriia RUFANOVA®

PhD in Law, Associate
Professor
(*Dnipropetrovsk state
University of Internal Affairs,
Dnipro, Ukraine*)

VICTIMIZATION OF A WOMAN VICTIM OF GENDER-BASED VIOLENCE

Abstract. The article analyzes the properties of a woman - a victim of gender-based violence. The author notes that the origins of gender-based violence stem from the historical inequality of women and men. The most common type of gender-based violence is intimate partner domestic violence. Gender-based violence is not only the product of marginalized environments. Any woman, regardless of her status and position in society, can become a victim of violence. Women suffer four times as much from such violence as men. The victimization of a victim of gender-based violence is manifested in a conscious finding in a social situation in which she exposes herself to the risk of becoming a victim of a crime by her actions.

Keywords: *gender, conditional violence, domestic violence, victim, victimization, victimology.*

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ORCID iD: <https://orcid.org/0000-0002-1125-6277>

mail@dduvs.in.ua