

The Criminal Law Regulation of Human Organ Transplantation

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Abstract: Human organ transplantation technology in the past drugs can not overcome the disease has a chance to be cured, to save the organ damage of the terminally ill patients so that they restore health and even regain life, is a great medical technology for the benefit of mankind. At present, our country, like other countries in the world, is making full use of this medical technology to benefit the people. However, this technology not only brings benefits to the people and society, but also brings us ethical, moral, legal and other problems. However about organ transplantation in our country legislation still exist deficiencies, in order to protect the life and health of the people, maintain normal medical order, harmony, promote the benign development of the medical career, to ensure the maximum play to the value of organ transplant technology, crack down on exposed in the process of all kinds of crime, our country should be human organ transplant to develop more perfect criminal law, To fill the inadequacies of the existing laws.

Keywords: Organ transplantation, Organ donor, Death standard.

1. The Concept of Human Organ Transplantation and The Necessity of Criminal Law Regulation

1.1. The concept of human organ transplantation

There are concepts in medical terms and legal concepts in human organ transplantation. In medical terms, human organ transplantation refers to the process of taking all or part of the heart, lungs and other organs of the human body, and then transplanting them into another patient's body to treat or replace the damaged organs. In the concept of law, human organ transplantation mainly refers to an independent but interrelated combination of the donor's organ donation behavior and the doctor's reoperation of the donated organ implanted in the patient's body for the purpose of treatment.[1]

1.2. The necessity of criminal regulation on human organ transplantation

Human organ transplantation technology can cure diseases that previous drugs could not overcome, and save the terminally ill patients with organ damage so that they can recover their health and even regain their lives. It is a great medical technology that benefits mankind. At present, our country is making full use of this medical technology to benefit the people, just like other countries in the world that are able to complete transplant operations. However, this technology not only brings benefits to the people and society, but also brings us ethical, moral and legal troubles. Organ failure or face necrosis of the patients and their families are willing to pay high fees for transplant to save lives even to regain health, but the serious imbalance between supply and demand of organs, organs for the use of unfair profit creates an opportunity, accompanying is more related crime is developing rapidly, and even some chain has formed a complete set of crime. If this kind of behavior is not regulated, it will easily cause panic among the public and cause great harm to the society. Therefore, it is necessary to carry out legal regulation, so that the medical technology of human

organ transplantation can develop forward under reasonable constraints.

In practical ways, in the field of civil law and regulations, administrative rules and regulations can not meet the demand for regulating the human organs for transplants, civil law and administrative laws and regulations can not effectively prevent, stop and punish crime, the criminal law as the strongest line of defense in the legal system should be timely to shoulder responsibility for the regulation. In judicial practice, the current criminal legislation in the field of crime punishment does not adapt problem is outstanding, when handling the field related crime often face legislation blank, reason should be to perfect criminal legislation as soon as possible, with the help of the prevention and punishment of criminal law to protect the legitimate rights and interests of citizens and promoting the development of medical field and maintain social stability.

2. The Current Legislative Status and Shortcomings in The Field of Human Organ Transplantation in China

2.1. The legislation situation of human organ transplantation in the Criminal Law Amendment (VIII)

The Amendment to the Criminal Law (VIII) issued in 2011 clearly stipulates three types of specific behaviors prohibited by the criminal law in the process of human organ transplantation and their treatment measures:

1. The act of selling human organs by organizations is prohibited. The perpetrator of such act constitutes the crime of selling human organs by organizations.

2. It is prohibited to force or cheat organ owners to donate organs, to remove living organs from organ owners without their consent, or to remove living organs from minors (without any consent). Those who violate such prohibitive provisions shall be convicted and punished with the crime of

intentional injury or intentional homicide.

3. It is forbidden to take organs of the deceased against the will of the deceased or against the will of the deceased's close relatives. Those who violate the prohibition provisions shall be convicted and punished for the crime of stealing cadavers or insulting cadavers.

2.2. The inadequacy of China's current criminal legislation

2.2.1. The relevant provisions in our criminal law and the provisions of the Human Organ Transplant Regulations have not been unified

The failure of the relevant provisions in the current criminal law to be unified with the Regulations makes the relevant provisions in the Regulations look like a sham.

1. The provisions on the prohibition of the sale of human organs are not unified. Article 3 of the Regulations describes in detail the ban on the sale of human organs. However, there is no legal basis for the perpetrator to bear criminal responsibility in our criminal law. In practice, the illegal trading of human organs is increasingly rampant. However, due to the lack of relevant charges, the definition of such acts and subsequent conviction and sentencing are usually difficult.

Second, there is no unified regulation on the confidentiality of personal information of organ donors and recipients by medical staff. The Regulations stipulate that medical personnel engaged in human organ transplantation should abide by the obligation of confidentiality. However, the criminal law does not stipulate that the perpetrator should bear criminal responsibility in case of violation of the obligation of confidentiality, so it is difficult to investigate the criminal responsibility in such case.

2.2.2. The definition of what "organ" means is too narrow

At present, the meaning of "organ" is not clearly defined in our criminal law. At present, the regulations in the law meaning of the definition is almost sure "organ" the only basis, but the narrow scope of the regulations, the term "organ" contains only the heart of the human body, to the familiar viscera organs such as lung, does not leave the body's tissues included, the meaning is not conducive to problem of dealing with both in our criminal law. In 1999, for example, the "eyeball lost case" a Beijing hospital ophthalmologist, in saving the patients' vision, it found that previously saved retention cornea is damaged and cannot be used without authorization to the morgue to find a new departure of the deceased, without the permission of the deceased relatives to remove the dead eyes and mount the eye, then remove the cornea transplant to two patients, The bereaved family members reported the loss of the eyeball when they were bidding farewell to the body. After that, the investigation organ for procuratorate approved the arrest of the doctor, at a time when the charges of which is the basis of the request for approval of arrest "insulting corpse", but our country hasn't consistent with the to gather the behavior of related legislation, people's procuratorate face when review the legislative blank, the doctor's behavior does not belong to insult a corpse, also do not conform to the theft of a corpse, Finally, the procuratorate did not agree to approve the arrest of the doctor. Similar cases and "theft" shenyang bone marrow in shenyang, a hospital to undergo surgery for a female patients, hospital doctors in did not inform the other departments under

the condition of patients and their families, in the patient is in a state of anesthesia, secretly took the 16 ml bone marrow for the hospital patients with bone marrow stem cells in vitro experiment, the hospital and the patients in consultation, The hospital settled the dispute after reimbursing the patient 500,000 yuan. The act originally caused great harm to the society and should bear criminal responsibility, but based on the principle of legal punishment, there is a gap in our legislation and we have not given criminal punishment to it, so this kind of crime has not been punished. As mentioned in the case, you can see that human tissue is a part of the human body has a particular function, is a necessary part of the individual, the use of human tissue is illegal trading profit behavior has a great deal of space operation, so the behavior related to the transplanted tissue should also be brought to the attention of the law, and be included in the scope of criminal law regulation. In recent years, in practice, the handling of theft, illegal trading of corneas and bone marrow events often has difficulties in conviction and sentencing. Different courts may have different results in conviction and sentencing for the same behavior, and it is included in the scope of "organ", which is combined with heart, liver, kidney and other organs. It can provide a reasonable legal basis for the treatment of such illegal acts in practice, and also improve the efficiency of our criminal legislation.

2.2.3. The charge rules are too one-dimensional

At present, China only stipulates the following categories of crimes related to human organ transplantation in the Criminal Law Amendment (VIII).

1. Regarding the act of selling human organs by an organization, it is stipulated that the act constitutes the crime of selling human organs by an organization.

2. Illegal harvesting of living organs. "Criminal law" general provisions of the act of intentional injury, murder, criteria for the conviction has not set up and its constitutive requirements completely consistent specific charges, convicted and punished according to the existing provisions though gives prominence to the behavior infringes on the personal right of negative evaluation, but did not show the health management order of the object of our country of the negation.

3. The act of illegally removing the organs of the deceased shall be convicted and dealt with as the crime of stealing and insulting the corpse. This kind of treatment method is too sketchy and general, and the act usually does not meet the constitutive requirements of the crime of stealing corpse and insulting corpse, which needs to be further refined and perfected in our legislation.

2.2.4. The range of living organ donors is unclear

According to the Regulations, a man and a woman can become living organ donors and recipients as long as they have registered their marriage in accordance with national regulations and have a "spouse" relationship. There are no other restrictions on "spouse", which leaves room for organ trading to become legal. Because the "spouse" relationship is easy to establish, the man and woman who have reached the legal age of marriage in China and have full capacity for civil conduct, on the basis of voluntary, do not have the prohibited marriage of relatives, do not suffer from the prohibition of marriage disease, can register in accordance with the legal procedures, so as to establish a legal relationship between husband and wife. Organ buyers and sellers can use the operating space to register as a legal husband and wife in

order to have a marital relationship. After the organ transplant operation is completed, they go through the divorce formalities, and the organ seller gets the "marital common property" equal to the organ sale price. This series of behaviors gives the living organ trade a legal coat [2]. Therefore, the criminal law of China should further restrict the "spouse" in organ transplantation and further clarify the scope of donor.

2.2.5. Lack of special protection for the mentally ill

Both the Eighth Amendment to the Criminal Law and the Regulations provide special protection for minors, prohibiting the transplantation of living organs from minors under any circumstances. This regulation is mainly due to the fact that minors do not have complete behavioral capacity, and their ability to identify and control their own behavior is relatively limited. This regulation is mainly based on the legislative spirit of protecting the weak. However, the criminal law does not provide special protection for the mentally ill who are also vulnerable. Mental patients and minors are also defective in the capacity of conduct, if it is not given special protection, mental patients are easy to become the object of lawbreakers, we should supplement the special protection provisions for mental patients.

2.2.6. Lack of regulations on unit crime

At present, the existing crimes of human organ transplantation in the criminal law of China can only be committed by natural persons as the subject of the crime, that is, the criminal law does not include the unit in the subject scope of such crimes. However, in the process of human organ transplantation crime, some medical institutions often take advantage of their own convenient conditions, such as financial resources, material resources, medical resources, patients, relevant information, etc., to obtain huge profits to carry out illegal organ harvesting, trading, and implantation. Since our criminal law does not take the unit as the subject of this kind of crime, then the unit will not bear the problem of criminal legal liability, that is, the unit engaged in this kind of behavior will not be subjected to the criminal law sanctions. This is clearly our country present criminal law loophole, once the medical institutions and other units involved in the crime its consequence is unimaginable, medical institutions, when conducting crime more convenience and maneuverability, and can use their own advantages forged documents to cover up the crime fact, compared with natural person crime are more harmful to the society, Once the crime is exposed, it is easy to cause people's distrust of the medical system, and more likely to cause social chaos and panic. Therefore, it is necessary to include the unit into the main scope of this kind of crime to crack down on the crime of human organ transplantation, safeguard the personal rights of Chinese citizens, and ensure the normal operation of medical and health management order in China.

2.2.7. The provision of death standards is imperfect

However, in the past practice, the standard of cardiopulmonary death was mostly adopted. However, with the progress of science and the development of medicine, the Chinese theoretical circle gradually questioned the standard. The standard of death is of great significance for the correct conviction and sentencing, and the unification of the standard of death can avoid the embarrassing situation of "different judgments for the same case" in trial practice. At present, most countries have adopted standard of brain death in the world, in terms of the current medical conditions, brain

death standard cardiopulmonary death than standard more scientific, brain death standard refers to the irreversible loss of brain function, including the brain stem state of [3], cardiopulmonary function depends on the state medical equipment may still exist, but no matter what treatment, The death of the patient is inevitable. Adopting the criteria of brain death can maintain the vitality of organs to a greater extent, improve the utilization rate of organs, save medical resources, relieve the economic pressure of family members, and enable doctors to have a legal basis for harvesting donor organs. If the criteria of brain death is adopted instead of cardiopulmonary death, If the brain death criterion is adopted instead of the cardiopulmonary death criterion, the doctor may harvest the donor's organ when the heart rate and respiration of the donor may still exist, which may make the donor suspected of intentional injury or even intentional homicide, and be negatively evaluated by the law and morality. In terms of social ethics, donor families based on the traditional psychological recognition standard cardiopulmonary death mostly, its thought brain death standard means giving up treatment ahead of time, accept the fact of death in patients with early move, families based on ethics may not be willing to accept, but through the social public thought progress, national publicity, explain two death standard, It is believed that the family members will understand and accept the criteria of brain death to a greater extent in the future.

3. The Foreign Criminal Law Regulation of Human Organ Transplantation and Its Enlightenment for China

3.1. The legislative situation of the crime of human organ transplantation in Germany

As the country with the most mature human organ transplantation technology in Europe, Germany's organ transplantation legislation is increasingly complete with the rapid development of its medical technology, which has reference significance for the perfection of our legislation.

Provisions on transplant objects: The scope of transplant objects in Germany is more extensive than that in China, including Chinese organs and human tissues excluded from the meaning of organ. This provision is more conducive to protecting the life and health of citizens from illegal infringement, and is more conducive to punishing crimes.

Provisions on the scope of living organ receptors: According to the provisions of the German transplantation law, non-renewable organs can only be transplanted to first blood relatives, second blood relatives, spouses, registered life partners, unmarried couples or other particularly close relations. [4]

Concerning the provisions of death criteria: Germany believes that irreversible loss of brain function as the death criterion is more scientific and reliable than cardiopulmonary death, so in 2000, Germany legislated the brain death criterion as the unified death criterion.

Because our country with German law, moral and ethical cognitive differences, so the perfection of the legal system of human organs for transplants in China cannot copy the German, but for the advanced German legislation of some suitable for China's national conditions, for example, in

Germany on transplantation on the object's rules, we can study reference.

3.2. The legislation of the crime of human organ transplantation in Japan

In 1958, Japan passed the Corneal Transplantation Law, which was the first domestic law in the field of human organ transplantation. The law only stipulated corneal transplantation. Along with the rapid development of medical technology, more and more to transplant organs, in order to fill the blank of the legislation, in 1997, Japan enacted the organ transplants, the natural person and unit can become the subject of organ transplant type of crime, there are rules and conditions for the use of brain death standard, namely only unified use brain death standard in the field of organ transplantation, It was not until 2009 that Japan clearly stipulated the comprehensive use of the criteria for brain death.

The practice of including the unit as the subject of crime and gradually applying the brain death standard in Japan is worthy of reference and reference in China.

4. The Improvement of The Criminal Law Regulation on Human Organ Transplantation in China

4.1. Expanding the scope of the meaning of "organ"

The current law on the meaning of "organ" is too narrow, only including the heart, liver, kidney and other organs, while human cells, corneas, bone marrow and other organs are excluded. With the progress of medical technology, the development, the human body, such as bone marrow cells and cornea tissues can be transplanted to treat related diseases, and that the body's tissues and organs organ also a rarity, individual irrefragable, not human tissue should be brought into the scope of criminal law protection will give criminals to seek illegal profits left living space, which can develop a series of crime. Patients and their families, for example, pressing for treatment, takes the high price of gold buying treatment needed to human tissue, but due to various reasons, the body's tissues provider or is forced to, or being deceived, or illegal under economic pressure to betray the body's tissues, intermediary institutions through the search a lot of information to facilitate the illegal trade get mediation of high cost, Thus, a relatively complete operation mode of "illegal trafficking of human tissue" has been formed. If not to human tissue contains, within the scope of the "organ" in the real trial practice, may convict process will be difficult, and the meaning of "organ" expanded to include some portable human tissue, the part of the natural into the regulatory scope of criminal law, a merger with viscera organs such as processing, is conducive to improve the efficiency of legislation, increase the intensity of a crackdown on crime, To close legal loopholes and improve China's socialist legal system.

4.2. Appropriately add new charges to the Criminal Law

In view of the new type of crime, the adjustment of law often with a lag, "criminal law amendment (eight)" regulation of human organ transplant crimes, this is undoubtedly a great progress in criminal law, but the current rules and regulations

are sketchy, involves only organization to sell human organs, will be treated as illegal trade in live organ for intentional injury or murder, And the illegal trading of the organs of the dead is treated as the crime of theft and insult to the corpse. The process of human organ transplantation roughly includes four links, including organ seeking, obtaining, transportation and implantation. Each of the above links may have criminal behaviors, but there is no corresponding charge in the criminal law to regulate it. Aiming at the lack of legislation, the following suggestions are put forward:

1. the crime of illegally providing organ information service should be added in the link of organ seeking. Patients search for matching the organ is not a single natural person can do, usually black intermediary and medical institutions are usually such information providers, medical institutions with a large database of patient information and convenient medical conditions, can find possible for patients with a wide range of organs, if the unit or other intentional use of the unique advantages for others who provide information, If it creates a prerequisite for the subsequent organ crime of others, the preparatory act should also be subject to criminal punishment. Therefore, it is suggested that the crime of illegally providing organ information service should be added to the criminal law.

2. In the link of organ acquisition, the crime of illegal harvesting of living organs, the crime of illegal harvesting of cadaver organs, and the crime of buying and selling organs should be added. Although our country "criminal law amendment (eight)" clear rules of illegal harvesting living-organ behavior according to avail himself of the intentional injury or murder plot convicted and punished, but from the object of the illegal harvesting living-organ actions rather than the objective aspects of crime, the infringement is a citizen's body and health and social health management order, Its objective aspects are the behavior of forcing or deceiving others to donate organs, the behavior of harvesting organs from minors, and the behavior of harvesting organs without the permission of the organ owner. In terms of the constitutive elements of the crime, the act is significantly different from the crime of intentional injury and intentional homicide. According to the Criminal law, the act of illegally removing the organs of the deceased is treated as the crime of stealing and insulting the corpse, but the act of illegally removing the organs of the deceased is not consistent with the constitutive elements of the crime of stealing and insulting the corpse. It is more appropriate to add a new crime that is in line with the constitutive elements of the crime, although the current treatment method can also make such acts of illegal organ harvesting punishable by criminal punishment. In addition, driven by high profits, organ buying and selling is increasingly rampant. The criminal law only stipulates the crime of selling human organs for organ buying and selling, which is mainly used to standardize the punishment of the behavior of organizing or selling human organs to obtain illegal benefits when obtaining the victim's permission. However, there is no clear stipulation on the voluntary sale of organ donors and organ recipients in our criminal law. However, since the objects of sale are human organs, which belong to the category of objects prohibited by law, the person who buys or sells human organs cannot help but be punished. But since has been regulated in our country has not set up special charges, so in practice, it is with illegal business crime convicted and punished, target of criminal offense of illegal operations including franchised, monopoly

and restrictions on the sale of goods, object of the crime of illegal business has is the socialist market order, and does not belong to human organs "items", The act of buying and selling them will not disturb the usual market order, so it is obviously not in line with the principle of legal punishment to use the crime of illegal business to deal with. Therefore, the crime of buying and selling organs should be added to legally restrict the purchase and sale of organs.

3. In the link of organ transport, the crime of organ smuggling should be added. Due to the serious imbalance in the supply and demand of organs worldwide and the obvious scarcity of organs, it is not uncommon for organs to be smuggled internationally to make huge profits and even form an international organ smuggling black market. Organ smuggling has seriously disturbed the order of the international community and should be regulated by criminal law. However, at present, any of the specific crimes of smuggling in our criminal law can not cover the behavior of smuggling organs, that is to say, when facing the behavior of smuggling organs, there will be a legal gap, which makes the trial work difficult. Therefore, China should add the crime of smuggling organs to the crime of smuggling organs.

4. the crime of illegal transplantation should be added in the link of organ implantation. China's criminal law provisions of the subject of the crime of illegal medical practice is not any natural person having a doctor qualification, and have the doctor qualification, transplant qualification of doctors and hospitals is a transplant for seek improper interests intentionally for illegal migration, although similar social harmfulness, but clearly does not belong to this category. At present, China's criminal law does not have a suitable crime to deal with the illegal transplant behavior, so China should add the crime of illegal transplantation.

4.3. To reasonably determine the range of living organ donors

As mentioned above, China's regulations on the scope of living organ donors are rather sketchy, and the law should properly improve the provisions in this part. As mentioned above, there is room for manipulation of the "spouse" regulation, which should be appropriately restricted, such as stipulating that the couple must have children jointly conceived for organ transplantation or have been married for at least two years, so as to control the clandestine organ trade in the mode of sham marriage. In addition, should be appropriate to allow switched transplantation, switched transplant refers to the two live organ donor organs do not match with their loved ones, loved ones match with each other, and exchange migration behavior, but allow switching transplantation should be carried out by the hospital's ethics committee scrutiny, to ensure that there is no organ trading behavior can.

4.4. Increase the provisions on the protection of mental patients

As mentioned above, as Chinese citizens with defects in identifying and controlling their own capacity for conduct, the rights and interests of mental patients are more vulnerable to unlawful infringement than those of persons with full capacity for conduct, and they should be given special protection by law like minors. For the improvement of criminal legislation, the following content can be added to the criminal law: The act of organ harvesting from mental patients shall be punished

by referring to the treatment of organ harvesting from minors. This move is intended to reduce the situation that mental patients are deceived into "voluntary" organ donation because they cannot understand the importance of organs, so that mental patients can also get social attention and legal protection as much as possible.

4.5. To include work units in the scope of relevant crimes

Medical institutions are equipped with convenient and complete operating sites and medical equipment, as well as professionals with mature medical technology who hold a large amount of patient information and are in close contact with patients, and are generally fully trusted by patients and their families. If a medical institution engaged in organ transplantation kind of crime, with unique advantages, participation, formed a complete chain, crime social harmfulness is great, but not in the current criminal law will be units included in the scope of this kind of crime subject, only in the regulations stipulated in the medical institutions in violation of regulations in some behavior of the administrative liability and civil liability, practice, In practice, in the face of such crimes, only the relevant responsible personnel of the unit can be sentenced to punishment, and the unit is in a state of exemption, which is not conducive to the fight and prevention of such crimes, and is not conducive to prevent the medical institution from becoming a hotbed of crime again.

4.6. It is suggested that China adopt the "brain-death standard" in the field of organ transplantation in line with international standards.

The advantages of "brain death criteria" have been explained above and will not be repeated here. In view of our country people's long-term ethical and moral cognition is usually easier to accept the "standard cardiopulmonary death", therefore, by "cardiopulmonary death standard" to "brain death standard" change will not happen overnight, but in order to maintain the vitality of organs, improve the distribution of organs, organ harvesting doctor from criminal liability, resistance but doctors gather the brain dead donor organs behavior illegality, It can be separately stipulated to take the lead in adopting the "brain death standard" in the field of human organ transplantation, which will not only improve our criminal legislation, but also have certain positive significance for our laws to be in line with international standards.

5. The Conclusion

With the progress of science and the improvement of medical level, the medical means of human organ transplantation have been widely used in the world, bringing the possibility to restore health and even regain life for the patients with irreparable organ damage. As a new type of treatment, the human body organ transplants for humans bring various welfare at the same time, due to the organs of scarce resources, the operation cost of expensive, people ethical cognitive differences, and so on and so forth, also led to a series of social problems, so the human organ transplants of criminal law is necessary.

Starting from the concept of human organ transplantation, this paper explains the reasons for the criminal law regulation

of the process of human organ transplantation. The purpose of criminal law regulation on human organ transplantation is to protect citizens' right to life and health, maintain social normal medical order and maintain social stability by giving play to the prevention and punishment functions of criminal law. Then, the paper analyzes the situation of our criminal legislation in the field at present, looking for the shortcomings of legislation and puts forward the way to improve it.

The criminal regulation of human organ transplantation needs to consider many social and ethical factors, which can not be accomplished overnight, but the improvement of the legislation in this field will be inevitable.

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