

Artículo de investigación

Problems of criminalization of violations of patients' rights: international experience and current situation in Ukraine

Проблеми криміналізації посягань на права пацієнта: міжнародний досвід та сучасний стан в Україні

Problemas de criminalización de las violaciones de los derechos de los pacientes: experiencia internacional y situación actual en Ucrania

Recibido: 28 de julio del 2019

Aceptado: 28 de agosto del 2019

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Abstract

The relevance of the article is in the need to regulate the issue of transplantation of human organs and tissues, protection against illegal transplantation and protection of human reproductive rights. The object of this article is to investigate criminal relationships arising from the illegal transplantation of human organs and tissues and criminal offenses against reproductive rights. The methods of analysis, synthesis, induction, deduction, etc. were used in the article. The authors concluded that on the one hand, the possibility of creating a bank of genetically identical donor organs and extending the life of a particular person, on the other, the danger of changing the nature of humans, which will lead to the complete death of modern Homo sapiens. Today, due to a lack of regulation, reproductive rights in Ukraine remain virtually unprotected. Thus, there is a need to include a separate article in the Criminal Code of Ukraine, which will

Анотація

Актуальність статті полягає у необхідності регулювання питання укладання трансплантації органів і тканин людини, захист від незаконної трансплантації та захист репродуктивних прав людини. Об'єктом дослідження даної статті є кримінальні правовідносини, що виникають з приводу незаконної трансплантації органів і тканин людини та кримінальні злочини проти репродуктивних прав людини. Методи аналізу, синтезу, індукції, дедукції тощо були використані в дослідженні. Авторами був зроблений висновок про те, що з одного боку, можливість створення банку генетично ідентичних донорських органів і продовження життя конкретної людини, з іншого – небезпека зміни природи людини, яка призведе до повної загибелі або, по крайній мірі, до виродження сучасного Homo sapiens. На сьогодні, через відсутність

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provide punishment for violations of human reproductive rights.

Key words: Criminal punishment, transplantation, organs, tissues, reproductive rights.

регулювання, репродуктивні права в Україні залишаються практично незахищеними. Таким чином, необхідно включити до Кримінального кодексу України окрему статтю, яка передбачатиме покарання за порушення репродуктивних прав людини.

Ключові слова: кримінальне покарання, трансплантація, органи, тканини, репродуктивні права.

Resumen

La relevancia del artículo radica en la necesidad de regular el tema del trasplante de órganos y tejidos humanos, la protección contra el trasplante ilegal y la protección de los derechos reproductivos humanos. El objetivo de este artículo es investigar las relaciones criminales derivadas del trasplante ilegal de órganos y tejidos humanos y los delitos contra los derechos reproductivos. Los métodos de análisis, síntesis, inducción, deducción, etc. se utilizaron en el artículo. Los autores concluyeron que, por un lado, la posibilidad de crear un banco de órganos de donantes genéticamente idénticos y extender la vida de una persona en particular, por el otro, el peligro de cambiar la naturaleza de los humanos, lo que conducirá a la muerte completa de Homo sapiens moderno. Hoy, debido a la falta de regulación, los derechos reproductivos en Ucrania permanecen prácticamente desprotegidos. Por lo tanto, es necesario incluir un artículo separado en el Código Penal de Ucrania, que impondrá castigos por las violaciones de los derechos humanos reproductivos.

Palabras clave: Castigo penal, trasplante, órganos, tejidos, derechos reproductivos.

Introduction

Establishing a state of criminal protection of the rights of the patient in Ukraine is impossible without an analysis of criminal policy in this area. The Criminal Code of Ukraine (2001) contains several norms that provide for liability for crimes that violate the rights of the patient, in particular, Art. 131, 132, 139-145. However, these norms are figuratively “dead,” as a result, the guilty persons are left unpunished, and patients' rights are unprotected. This is due, on the one hand, to the high corporate nature of these crimes and, on the other, to the imperfection of criminal policy in this area, in particular, to the poorly implemented use of such means as criminalization and decriminalization. Moreover, the emergence of a new type of person led to the high requirements of civil society for its citizen (Kharytonov, Kharytonova, Tolmachevska, Fasi & Tkalych, 2019).

The purpose of this article is to investigate the international experience and current state of the problem of criminalizing violations of patient rights in Ukraine.

To achieve this goal, the following tasks were set:

- To research international experience and to analyze norms of the current legislation in the sphere of medical activity;
- To establish the grounds and main directions of criminalization of actions in the sphere of encroachment on the rights of the patient;
- To identify, based on the conducted research, the existing defects of the legislation in the field of criminal-law protection of the patient's rights and to suggest ways of their elimination.

Methodology

In the article, general scientific methods and special scientific methods were used to study the issues. As for general scientific methods, the methods of analysis, synthesis, induction, and deduction should be named.

During the research, the authors used the method of systematic research to study the problem of organs and tissue transplantation.

Moreover, in the article, the method of comparative law helps to identify positive

experience in the "fight" of the government of the country with illegal organ transplantation in Ukraine and foreign countries.

The method of complex analysis made it possible to analyze the issue of illegal organs and tissue transplantation in Ukraine.

Analysis of recent research

Criminal liability issues for criminal violations of patients' rights have been subjected to quite extensive research in the legal literature. The issue of criminal liability of medical professionals for crimes against the life and health of a person was investigated by Antonov, A., Antonyuk, O., Boshuk, V., Brednikova, O., Cohen, P., Glushkov, O., Gushchesova, T., Korobeev, A., Melnik, E., Myslyva, O., Romanovskyj, G., Svytnyev, K. and others. However, the change in social relations in this area requires a fundamentally new approach to the problems identified, which is the reason for addressing the problem in this article.

Presentation of key research findings

Criminalization is the process of identifying socially dangerous forms of behavior, recognizing the admissibility, the possibility of combating it and fixing it in law as criminal and criminally punished (Boshuk, 2006).

As the scientific literature rightly points out, "the only basis for the criminalization of actions is the appropriate degree and nature of their social danger, which is characterized by the ability to cause significant (and not any other) harm on the objects of criminal defense (and not on any other object)" (Melnik & Klimentko, 2004).

Concerning crimes in the field of medical activity, the causes of criminalization of these acts are characterized by some specificity. Thus, in criminal law literature, there is an opinion that criminalization is permissible in cases where socially dangerous acts are relatively common and typical (Antonov, 2000, p. 85). Today, it should be noted that the number of crimes committed by medical and pharmaceutical professionals is steadily increasing. However, this phenomenon is characterized by stable, traditional, professional corporate identity. Therefore, the number of criminal cases committed by healthcare professionals against patients' legal rights is extremely small. This number does not reflect the real situation in the medical field.

This problem is typical not only for Ukraine. For example, publicly dangerous activities in the field of medical activity, which are becoming more widespread. There is the sale of organs and tissues for transplantation, as well as the abduction and murder of people for removal of such organs and tissues. As Glushkov V. states, the degree of public danger of these actions is quite large, and Ukraine has become one of the illegal markets from where human organs and tissues come for transplantation (2004, p. 91). This is facilitated by a number of objective and subjective factors. The main ones are: 1) growing shortage of transplant material; 2) high profitability of criminal activity; 3) the indifference of a wide range of society to the problems of transplantation and, for the most part, lack of trust in medicine; 4) lack of mechanism for transplantology protection and impunity for socially dangerous acts (Myslyva, 2001, p. 476).

Responsibility for the trade of human organs and tissues is enshrined in the criminal legislation of Ukraine in Part 4 of Art. 143 of the Criminal Code of Ukraine.

Also, some authors propose to provide in Part 2 of Art. 115 of the Criminal Code of Ukraine an independent qualification as a premeditated murder to obtain a human organ or tissue for transplantation of a donor or the purpose of trade of such organs (Gushchesova, 2004; Myslyva, 2001). The Criminal Code of the Russian Federation, for example, provides for responsibility for murder (paragraph "m" Part 2 of Article 105) and intentionally causing grievous harm to health, which is dangerous to human life (Section "ж" Part 2 Article 111), committed for the purpose of using the organs or tissues of the victim. Similar articles are in the Criminal Code of the Kyrgyz Republic, the Criminal Code of the Republic of Kazakhstan, the Criminal Code of Uzbekistan (Myslyva, 2002). Similar norms should be prescribed in the criminal law of Ukraine.

The expansion of the scope and deepening of scientific activity in the field of transplantology led to the emergence of crimes related to violation of the established procedure for the transplantation of human organs and tissues (Article 143 of the Criminal Code of Ukraine), which A. Korobeev predicted in the 80's of the twentieth century (1989), when these crimes were not contained in the Criminal Code.

It should be noted that the organ donation and transplantation of part of the anatomical

materials, such as glands, reproductive cells and living embryos, and the unlawful acts of their removal are not regulated by Art. 143, no Art. 144 of the Criminal Code of Ukraine. The Law of Ukraine “On Transplantation of Organs and Other Anatomical Materials to Man” does not extend its effect on the transplantation of these anatomical objects. Therefore, they are not included in the object of the criminal offense under Art. 143 of the Criminal Code of Ukraine. Quite a different attitude to this issue is typical of some Western European countries, where the use of assisted reproductive technologies is generally prohibited. First of all, it is Italy. Law No. 40, passed in 2004, prohibits the donation of gametes and embryos, pre-implantation diagnostics and cryopreservation of embryos, as well as surrogate motherhood. All embryos received should be replanted with a biological mother. Reproductive services can only be used by married couples. Penalties of up to € 300,000 may be imposed for the violation. In Germany since 1990 the law "On the protection of the embryo". The use of donor embryos and oocytes is prohibited. Sperm donation is allowed but not anonymous. This law also prohibits surrogate motherhood as "contrary to human dignity" and "degrading woman". The violation provides for up to three years in prison and significant fines. Unlike in Italy, the parents themselves - the customers of the surrogate program and surrogate mothers - are not punished. Similar legislation, which provides for three years' imprisonment and a fine of € 45,000 for “brokering a fetus to another person” and “simulation that diminishes a child's civil status”, is in force in France.

The legislation of Great Britain, Belgium, Greece, and Spain is much more liberal. However, the real oasis for reproducers in the post-Soviet countries, in particular, Russia, Ukraine, Belarus, and Kazakhstan (Svytnev, 2007).

Internationally, reproductive rights have been enshrined in the 1995 Beijing Platform for Action (Fourth World Conference on Women, 2019). However, the status of the Beijing Platform should be taken into account. It is not a universal convention or act containing the rules of jus cogens. At the same time, one should not fail to realize that if there is a formalized concept of reproductive health, reproductive rights, it means that in one way or another, these categories should be regulated at the state level – the internal legislation of Ukraine. In addition to asserting such rights, the legislation should also set limits on the realization of reproductive opportunities. Reproductive processes cannot be

outside the scope of regulation. The state reserves the right to regulate the relations arising from the artificial termination of pregnancy, the complete rejection of the possibility of reproduction (sterilization), artificial insemination, etc. Direct methods of regulating population reproduction are the prerogative of the state, but they must comply with the general principles of human rights protection (Romanovskiy, 2003, p. 13).

When referring to reproductive rights, they are understood to mean a set of human rights and freedoms that ensures the realization of the fundamental inalienable human right to procreation - regardless of age, gender, nationality, marital status and health status, including the right to use assisted reproductive technologies, including the number of donor and surrogate programs, as well as the right to self-planning for the family, including the freedom to determine the number and gender of children, and the time intervals between their births (Svytnev, 2007). According to the enshrined reproductive rights, every person or couple has the right to an independent decision on paternity and to provide this decision in legally permissible ways. No one is entitled to compel an individual not only to birth or to rejection of birth, but also to the ways in which childlessness can be overcome. Each individual has the right to independently decide and choose the optimal way for him to solve the problem of childlessness, including the method of conception and pregnancy (Brednykova & Nartova, 2019).

According to the Beijing Platform, reproductive rights derive from the notion of "reproductive health". The latter refers to the state of complete physical and social well-being, and not simply the absence of disease or illness in all matters related to the reproductive system and its functions and processes. And reproductive health implies that people have the opportunity to have a safe sex life and the ability to reproduce themselves and that they are free to decide whether to do it, when to do it and how often.

Unfortunately, the legislation of Ukraine in the sphere of reproductive rights and the use of assisted reproductive technologies is not fully formed. These issues are generally regulated by Art. 48-51 Basics of the Ukrainian legislation on health care. Further development of the Basics provision is found in a few regulations of the Ministry of Health of Ukraine, for example, On approval of the Instruction on the procedure for the use of assisted reproductive technologies

(2008). According to the Instruction, assisted reproductive technologies (DRT) are techniques for the treatment of infertility, in which the manipulation of reproductive cells, some or all stages of preparation of reproductive cells, the processes of fertilization and development of embryos to transfer them to the uterus of the recipient. DRTs are performed exclusively at accredited healthcare facilities by professionals. The instruction stipulates that DRTs are used according to medical indications with the written, voluntary consent of patients and at the request of the patient/patients regarding the use of DRT. Adult women and/or men have the right, according to medical indications, to carry out treatment programs for them under Art. 281 of the Civil Code of Ukraine (2003). However, Ukrainian legislation does not contain any responsibility for violations of the requirements for the use of DRT, voluntariness, and awareness. Given the ban in Western European countries on the use of these technologies, Ukraine may become an "incubator" for such countries, which in turn may violate the reproductive rights of its citizens.

Thus, today, due to lack of regulation, reproductive rights in Ukraine remain virtually unprotected. The situation is similar in other post-Soviet countries, among which one can mention only the Criminal Code of the Republic of Azerbaijan, which in Art. 136 provides for liability for violation of the procedure of artificial insemination and embryo implantation, as well as medical sterilization. Given the importance of the reproductive health of the population of Ukraine as a whole and the individual, reproductive right must be protected, including through criminal law.

The Criminal Code of Ukraine provides liability only for an illegal abortion, and this norm is far from perfect. Therefore, there is a need to include a separate article in the Code, which will provide punishment for violations of human reproductive rights. It appears that this article may be revised as follows:

"Article 140-1. Violation of reproductive human rights.

Violation of the established procedure of artificial insemination and implantation of the embryo, the use of sterilization and change (correction) of sexual identity, as well as other violations of reproductive human rights - must be punished ...".

Today, issues related to criminal liability for human cloning are becoming increasingly relevant. Human cloning causes a lot of unsolved problems and unclear questions before science. Humanity here is confronted with a phenomenon not only unknown but also dangerous.

As notes by Fedorov, G. (1998) the process of creating norms of law is usually preceded by the identification of the need to regulate a certain sphere of social relations. It carries out scientific analysis, assessment of reality, development of views and concepts about the future legal regulation, maximum consideration of public opinion and opinions of individual specialists. However, in this situation, it seems that, although cloning operations are not widespread at present, and human cloning is generally only possible hypothetically, the lack of reliable data on the consequences of such operations requires preemptive legal regulation, including the use of criminal law prohibitions. The need for preventive legal regulation in this area is linked to the risk and consequences of the use of cloning technology that affect not only present but future generations (Antonyuk, 2008).

Thus, the criterion of prevalence or, conversely, non-prevalence of certain acts should not be considered decisive in criminalizing acts. As the scholars rightly point out, "the prevalence of actions is significant, in fact, only for minor crimes. Rather, their prevalence is an argument in favor of persecution, not in criminal, but in administrative, disciplinary, etc. order... As for more serious crimes and especially grave crimes, then their prevalence does not play a role in the criminalization process (Kuzneczova & Tyazhkova, 2002).

The term cloning ("cloning" from the Greek. Κλων - a branch, a sprout) in the most general sense means the exact reproduction of any object a certain number of times. The objects obtained by cloning are called clones. Human cloning involves the manipulation of female germ cells and the actual cultivation of embryos.

In 2001, an American company, Advanced Cell Technology (ACT), reported the successful cloning of a human embryo. ACT stopped the development of the embryo before tissue differentiation began, trying to avoid moral and legal problems. At the same time, CLONAIID stated that its scientists had a human embryo cloned earlier than the ACT, but unlike ACT, it does not intend to destroy cloned embryos, but rather intends to implant them with women who

will agree to give birth to a cloned baby (Cohen, 2003).

Considering the problems of cloning the attention should be paid that there are two types of cloning: therapeutic and reproductive. In reproductive cloning, a baby is born who has been implanted at the embryonic stage of development. Such cloning eliminates the natural and free fusion of the genetic material of the father and mother. Therapeutic cloning involves performing studies on the resulting embryo up to 14 days of its development, after which the embryo is destroyed. In therapeutic cloning, its main result is the production of stem cells that can restore the function of virtually any organ, as well as become the basis for the cultivation of these organs, which will revolutionize transplantology (Romanovskiy, 2006).

Conclusions

On the one hand, the possibility of creating a bank of genetically identical donor organs and extending the life of a particular person, on the other, the danger of changing the nature of humans, which will lead to the complete death of modern Homo sapiens. Which of these arguments "outweighs" in one country or another, respectively, determines the direction of legal regulation of cloning in that country.

The expansion of the scope and deepening of scientific activity in the field of transplantology led to the emergence of crimes related to the violation of the established procedure for the transplantation of human organs and tissues.

Thus, today, due to lack of regulation, reproductive rights in Ukraine remain virtually unprotected. The situation is similar in other post-Soviet countries. The Criminal Code of Ukraine provides liability only for an illegal abortion, and this norm is far from perfect. Therefore, there is a need to include a separate article in the Code, which will provide punishment for violations of human reproductive rights.

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