

HUMAN ORGANS DONATION AND TRANSPLANTATIONS FROM THE POINT OF VIEW OF LEGAL NORMS OF ADMINISTRATIVE LEGISLATION

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An important part of the material administrative law are, apart from others, also legal norms that relate to legal relations in healthcare. Even though we cannot talk about codification yet, a set of these norms is more and more frequently regarded as healthcare law, or medicine law. Specialised literature also uses the term European healthcare law, due to the impact of European international and supranational law on internal healthcare of the EU member states.

The abovementioned legal norms form a part of a number of legal provisions with various legal forces. In spite of the fact that majority of them is a source of administrative law, healthcare law also has civil law elements. Moreover, legal provisions from the area of material criminal law, process criminal law, etc., have a significant influence on this area, too.

A specific part of healthcare law – excision and transplantations of organs, tissues and cells – also has such multidisciplinary character.

This multidisciplinary character does not stem only from the fact that this legal area is regulated by several legal areas. The questions arising with the issue of excisions and transplantations are not merely medical and legal, but also ethical, moral and religious.

It is possible to deduce opinions, approach and a certain level of development of a nation that adopted the given legal norm from the legal norms regulating the regarded issues.

Thus, a quality of transplantation programme is influenced also by the legal organisation of the given state and traditions of the nation. Apart from this, important is also public opinion, as no other issues engage public opinions as strongly as organ excisions and transplantations.

However, it needs to be remembered that the public opinion represents a mirror, reflecting

ethics, morale, religion and all areas, in which opinions of people forming the nation and creating its ideological basis cumulate.

Donation, excision, testing, processing, conserving, storing, transport or distribution of tissues or organs is, within the meaning of effective Act No. 576/2004 of the Statute concerning healthcare, services related to providing healthcare and concerning change and amendments to some acts as amended, together with biomedical research and sterilisation, considered healthcare in special cases.

Even though law does use the term transplantation, it does not define it. Experts in medicine distinguish between the terms excision and transplantation, where transplantation replaces the so called transfer, defined in Act no. 576/2004 of the Statute as a process, in which tissues, organs or cells are transferred to the organism of a recipient.

Semantic difference between excision and transplantation results also from the way these terms are used by experts: the so called transplantation activity and excision activity.

However, the aim of this article is not to discuss terminology, but to explain basic terms and differences in their legal definition and provisions in legislation of the Czech Republic and the Slovak Republic. We consider this as a basic condition for explaining issues of transplantations ‚ex morturo‘, which is the main objective of this article.

Transplantations ‚ex morturo‘ are connected with many legal and ethical questions. The basic problem is, above all, the issue of death of an individual, particularly, what is considered a death of a human being – whether it is death of brain or arrest of heart activity and, consequently, of blood circulation.

Another basic predisposition in expression of consent of the person with excision after his/her death, alternatively a question of replacing on this consent with consent of other persons.

As concerns the first round of problems, the current legal state is clear. It is regulated by the Act no. 576/2004 of the Statute and by the Special Regulation of Ministry of Healthcare of the Slovak Republic concerning donation, excision of human organs from bodies of living and deceased donors; testing of donors and transfer of organs from bodies of living and deceased donors to recipient no. 28610/2006 OZSO. This Special Regulation cancels the Special Regulation from 1996.

A significant change, introduced by the Special Regulation, is that it regulates not only excisions from deceased but also living donors. Another change that, within the meaning of the Special Regulation, this regulation stresses clinical diagnostics of brain death without a necessity of its validation by the so called brain panangiography. The aim of this change is the possibility to clinically diagnose brain death in potential donors, in case of which, even in case of major brain damage incompatible with life, a complete arrest of brain circulation does not take place.

In relation with giving consent with excision after death, two systems are used: the so called opting-in system and opting-out system. In majority of the European countries, a system of assumed consent applies. This system is based on a premise that if a person does not agree with excision of his/her organ after his/her death, he/she has to state this during his/her life, either in writing or by some other documented means.

The advantage of such principle is mainly the more frequent and faster utilisation for transplantation, which increases the chance for saving lives. However, the mere application of the principle of assumed consent is not enough. At present, there are not enough suitable donors of organs and tissues for transplantations in Slovakia. Therefore, the Slovak Government passed the so called, National transplant program' in March 2008, the aim of which is to help eliminate losing of suitable deceased donors of organs or tissues. This can be done by the so called transplant coordinators – hospital coordinators, whose task it is to look up a potential donor and his/her entering into a regional transplant centre.

The main question in case of the , ex morturo' transplants is the question whether relatives of the deceased potential donor have the right to refuse excision of an organ or not. From the formulation of the cancelled Special Regulation, as well as from the formulation of the § 37 of the Act no. 576/2004 of the Statute it results that, unless the deceased left any document, relatives do not have the right to refuse the excision of organs. Consequently, excision indication then strictly follows medical criteria.

The current practice is that a transplant coordinator will contact relatives of the deceased only because of the last will of the deceased, but without their legal right to refuse the excision of organs.

Doctors follow this procedure due to existence of the § 15 of the Civil Code, pursuant to which, After the death of an individual the right for personal protection belongs to a spouse and children, and if there are none, to the individual's parents.' § 15 deals with protection of physical integrity; with dead body as an integral part of a person. This applies at all times when the physical remains of a person are able to be individualised.

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