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Tratado sobre as Inconsistências do Direito Penal sob os Prismas da Legitimidade e da Transdisciplinaridade

Tratado de las Inconsistencias del Derecho Penal ante los Prismas de la Legitimidad y Transdisciplinariedad

Treatise on the Inconsistencies of Criminal Law from the Perspective of the Frameworks of Legitimacy and Transdisciplinarity



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PRÓLOGO

Es un honor presentar este tratado que aborda las inconsistencias inherentes al derecho penal explorando sus matices a través de los prismas de la legitimidad y transdisciplinariedad.

Bajo la dirección científica de destacados académicos y juristas expertos en el derecho contemporáneo, como Jorge Isaac Torres Manrique, Cleide Calgaro, Deilton Ribeiro Brasil, Douglas de Castro y Prabhpreet Singh, esta obra se erige como un compendio de reflexiones profundas y análisis transversales sobre diversas temáticas cruciales en el ámbito jurídico, desentrañando las complejidades que rodean los asuntos críticos analizados.

El libro, dividido en una amplia serie de capítulos, ofrece una visión panorámica en cada uno de ellos de un aspecto específico de las tensiones y paradojas presentes en el derecho penal. El análisis se inicia con una reflexión sobre la minería ilegal como fenómeno penalmente relevante, proporcionando una visión detallada de los desafíos que este comportamiento plantea al orden jurídico. Seguido por una indagación en torno a la transdisciplinariedad en el contexto del delito por emoción violenta, el tratado se sumerge en las complejidades de las respuestas legales ante situaciones que involucran intensas manifestaciones emocionales.

A medida que avanzamos, se aborda la cibercriminalidad y la (in)seguridad de los derechos fundamentales en el contexto de la Convención de Budapest. La discriminación de género en el femicidio emerge como un tema crucial, desmenuzando los aspectos jurídicos que rodean este tipo penal específico. Los tribunales penales internacionales “ad hoc” se someten a escrutinio, explorando sus perspectivas históricas y críticas.

Las páginas siguientes analizan la constante reforma de la agravante de odio y la figura del enemigo en el derecho penal, planteando preguntas fundamentales sobre la orientación y evolución del sistema legal. La trata de órganos y tejidos humanos como delito de naturaleza transfronteriza se examina minuciosamente, contextualizando las disposiciones generales y los problemas de penalización. El uso de la “bodycam” como mecanismo de prevención del abuso de autoridad en muchos casos ostensivo arroja luz sobre la intersección entre tecnología y control policial.

Las contribuciones posteriores exploran el entorno jurídico de temas como la práctica de la crueldad animal y su relación con el delito ambiental, la tipificación del “stealththing” en el ordenamiento jurídico brasileño, y las incongruencias en los principios penales. Se profundiza en la retroactividad del acuerdo de no persecución penal y se examina la ejecución penal desde la perspectiva de la criminología crítica y la lógica de reducción de daños.

El tratado también aborda cuestiones internacionales como el proceso de quiebra personal en la Federación de Rusia y la nueva mirada a los delitos medioambientales desde la perspectiva del derecho penal internacional. Se ahonda en la intersección entre ciencia política y poder punitivo, explorando concepciones de política criminal que orientan el derecho penal.

El panorama sigue expandiéndose con análisis sobre la (in)constitucionalidad de la prisión preventiva y la problemática de la desaparición forzada, un fenómeno lamentablemente generalizado en ciertos contextos. Se examinan visiones desde el positivismo penal sobre la pena y el delincuente, así como la utilización de datos de procesos judiciales como estrategia para la concretización de derechos previsionales en la seguridad social.

Las reflexiones avanzan hacia la eficiencia y los mecanismos de terminación anticipada en el sistema penal acusatorio colombiano, destacando la importancia de las garantías específicas del sistema penal desde diversas perspectivas nacionales. Se discute el papel del poder judicial en la sociedad contemporánea y se analizan los delitos informáticos desde el prisma de la jurisprudencia española.

El “Tratado de las inconsistencias del derecho penal ante los prismas de la legitimidad y transdisciplinariedad”, fruto del esfuerzo colaborativo de académicos y expertos jurídicos, se posiciona como un recurso invaluable para quienes buscan profundizar en las complejidades del derecho contemporáneo.

Agradecemos a los directores científicos, Jorge Isaac Torres Manrique, Cleide Calgaro, Deilton Ribeiro Brasil, Douglas de Castro y Prabhpreet Singh y a los autores que ilustran la obra por su dedicación y contribución a este análisis exhaustivo, que no solo enriquece el debate jurídico, sino que también invita a la reflexión crítica sobre la evolución y coherencia del sistema legal.

PABLO RAFAEL BANCHIO

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INTRODUCCIÓN

Hablar de las inconsistencias del derecho penal desde los enfoques de legitimidad y transdisciplinariedad es un tema muy interesante y complejo.

Para empezar, las inconsistencias en el derecho penal pueden surgir de diversas fuentes, como la interpretación de las leyes, la aplicación de las penas, la efectividad de las medidas correctivas, entre otros aspectos. En cuanto a la legitimidad, es fundamental analizar si las normas penales son justas y si reflejan los valores y principios de la sociedad en la que se aplican.

Por otro lado, la transdisciplinariedad nos invita a considerar cómo el derecho penal se relaciona con otras disciplinas, como la sociología, la psicología o la criminología. Esta perspectiva amplía el análisis de las inconsistencias, ya que permite ver cómo factores externos pueden influir en la efectividad y legitimidad del sistema penal.

En resumen, abordar las inconsistencias del derecho penal desde los prismas de la legitimidad y transdisciplinariedad nos ayuda a tener una visión más completa y crítica de este importante ámbito del derecho.

En ese sentido, a efectos de llevar a cabo el desarrollo que desentrañe los diversos extremos y sentidos de las inconsistencias del derecho penal ante los prismas de la legitimidad y transdisciplinariedad, para la presente obra hemos convocado a los profesores más importantes y representativos del orbe.

Agradecemos enormemente la muy valiosa participación del reconocido jurista argentino, Dr. Pablo Rafael Banchio, por haber tenido a bien elaborar el importante, agudo y generoso prólogo.

Igualmente, expresamos nuestro indeleble agradecimiento a la prestigiosa firma brasiliana Conhecimento Editora, por la confianza, pues, sin su decidida participación, la presente entrega no hubiera podido salir a la luz.

Finalmente, y al igual que nuestras anteriores propuestas esperamos que la presente obra colectiva: “Tratado de las inconsistencias del derecho penal ante los prismas de la legitimidad y transdisciplinariedad”, sea de gran acogida e interés por parte de la comunidad jurídica y no jurídica.

LA DIRECCIÓN CIENTÍFICA

TRANSPLANT TOURISM AND TRAFFICKING IN HUMAN ORGANS AND TISSUES AS CRIMES OF CROSS-BORDER NATURE. GENERAL PROVISIONS. ISSUES OF PENALIZATION OF TRAFFICKING IN HUMAN ORGANS AND TISSUES

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I. INTRODUCTION

The human organ, tissue, and cell transplantology involves some specific concepts and terms. Transplants from a dead donor are the most controversial, since it is easier to establish the actual will when the donor is alive. The presumption of disagreement is quite common in many countries. A presumption of non-consent recognizes that a person is not willing to have his or her organs transplanted to another person; organs can be removed for transplantation if the person was still alive and consented to the procedure, or if relatives consent after the death. A distinction is made between “narrow consent” and “extended consent”. Narrow consent requires the expressed will of the donor while he is still alive to donate his organs; broad consent requires not only the consent of the donor established while he is still alive, but also the consent of his relatives established after the donor’s death.

These approaches to transplantology are primarily aimed at protecting human rights, namely the right to health, one manifestation of which is the right not to undergo any medical intervention in the absence of free consent. Otherwise, medical personnel and others could engage in the trafficking of organs, tissues and cells.

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There is also a presumption of donation, which applies in the Netherlands, for example. The presumption of donation implies that an organ can be removed from the body of a dead donor if there is a recipient in need of such an organ, regardless of the will of the dead donor and his relatives. Thus, the Dutch legislator considers it fair to perform a medical intervention to transplant a donor's organ to a recipient regardless of the will of the donor and his relatives, since the recipient's life and health are more important than the honor and dignity of an already dead donor. This principle inherently inhibits the development of criminal transplantation services, since under such conditions the "legitimate supply" of donor organs increases.

Trafficking in human organs is one of the manifestations of exploitation against human beings, namely human trafficking. Thus, human trafficking is "the recruitment, transportation, transfer, harboring or receipt of persons by means of the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability, or by means of bribery, payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs". It is especially noteworthy that according to Article 3(c), "the recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if it does not involve any of the means set forth in subparagraph (a) of the same article.

Trafficking for the purpose of removal of organs is also reflected in the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. According to Article 2, "trafficking in children shall mean any act or transaction by which a child is transferred by any person or group of persons to another person or group of persons for remuneration or any other consideration". According to Article 3(1), States Parties undertake to criminalize a number of acts under their criminal or penal legislation, regardless of where the acts are committed (whether at the national or transnational level), and regardless of the number of perpetrators (whether individual or organized group). Trafficking of children for the purpose of "transfer of organs for profit" is included in this list. Furthermore, attempt, complicity or participation in the commission of such an offence must also be criminalized under the national legislation of the State party.

The 2015 Council of Europe Convention against Trafficking in Human Organs, adopted in Santiago de Compostela, also aims to combat trafficking in human organs. One way to combat this criminal activity is for states parties to criminalize acts of organ trafficking at the national level. Moreover, according to

Article 4, it is a crime to remove an organ from both the body of a living and a deceased donor in the following cases:

(a) The removal of an organ takes place without the free, informed and specific consent of both the living and deceased donor, or, in the case of a dead donor, the removal of an organ that is not permitted under national law;

(b) The living donor (or a third party in the case of a deceased donor) is offered a financial benefit (or other comparable benefit) in return for the organs withdrawn, or directly receives such benefit;

(c) in return for the organs removed from the deceased donor, the third party has received an offer or directly received a financial benefit or other comparable advantage.

However, according to Art. 4 para. 3, financial benefit and other comparable advantage cannot be considered as payments compensating loss of income or other justifiable expenses resulting from the removal of the organ or related to medical examinations, as well as compensation in case of damage which is an integral part of the removal of the organ. States parties also undertake to penalize the removal of organs for transplantation when it takes place outside their national transplant systems, and when the removal is contrary to the basic principles of national law and regulations governing transplantology (Article 4, paragraph 4).

Organ, tissue and cell trafficking often involve trafficking for the purpose of extraction, so our study addresses both of these issues together. In addition, illegal transplantology can also occur as part of transplant tourism. The study of illegal transplantology and the compilation of statistics is complicated by the fact that often those involved in organ trafficking do not report the crimes committed (while donors are afraid to share information, recipients and intermediaries do not benefit from talking about it).

The Council of Europe Convention on Action against Trafficking in Human Beings is one of the international acts designed to combat human trafficking. Its provisions are largely similar to those of other international anti-trafficking instruments. According to Article 4 (a) "Trafficking in human beings" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or organ removal".

Some have approved of the sale of human organs, tissues and cells, arguing that human beings are inherently free to dispose of their lives and their bodies according to their own will, and therefore that limiting the “extent of their control” over their own bodies is unacceptable. For example, Michael Gill and Robert Sade believe that the sale of a person and the sale of a human organ are not related phenomena, so that organ trafficking should not be prohibited. A person, when selling his organ, is guided by his own will regarding his own body. After the sale of a kidney, the donor’s body remains, and such a donor seals his own fate, both when the kidney is sold and after the sale has taken place. Moreover, the money that can be obtained from the sale of a kidney helps the donor to increase the “amount of control” over his life. The sale is only one means of influencing a person’s fate and, therefore, his life. But it should be emphasized that in this case we are talking about a sale that is not connected with the exploitation of the donor - otherwise such a sale of an organ, tissue or cell is directly related to human trafficking (based on the definition given in Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000). The sale of a human organ, tissue, or cell at the free will of the donor is thus essentially an example of the use of somatic human rights, which cannot be considered an interference with the public interest or a criminal act.

However, many people are guided by the fact that even with the expression of the donor’s will, the sale of a human organ and tissue remains a violation of human rights. For example, the life of one person (the recipient) cannot matter more than the life of another person (the donor), since, in any case, when the organ is removed, the donor’s body will not function as well as it did before the surgical intervention, while the physical condition of the recipient will be dramatically improved (in fact, by causing irreparable changes to the donor’s body).

To combat human trafficking for the purpose of removal and sale of organs, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the 2000 United Nations Convention against Transnational Organized Crime, has been developed, the provisions of which obligate state parties to criminalize at the national level certain acts (including trafficking in persons for the purpose of organ removal) when committed intentionally, as well as to criminalize attempts to commit these acts.

The Global Initiative to Fight Human Trafficking has described 3 main types of trafficking in organs:

- When a person is coerced by deception, or by being forced to “give up” an organ;
- When a person, for financial reasons, consents to the removal of an organ, but in the end the payment they receive for their organ is disproportionately small compared to what was promised, or there is no such payment at all;

- When an organ is removed from a person without their knowledge during an allegedly therapeutic intervention.

In all three cases, donors can be considered the victims, since in none of the above-mentioned types of organs trafficking the donor receives adequate material support, and in some cases, he acts against his will; intermediaries and doctors who mislead donors should be considered liable.

II. ISSUES OF CRIMINALIZATION OF TRANSPLANT TOURISM

The so called “transplant tourism” is one of the most widespread forms of organ trafficking: when the system of organ transplantation is not well regulated in a state and there is no donor for the necessary organ, a person decides to illegally “search” for an organ in other countries. The 2008 Istanbul Declaration on Organ Trafficking and Transplant Tourism deals with this phenomenon, which also addresses human trafficking for the purpose of organ removal. Transplant tourism can be considered as “travel for the purpose of transplantation, which is associated with human trafficking or with trafficking in human organs, or if resources (organs, medical personnel, transplant facilities) are used to transplant organs to non-resident patients, while undermining the country’s ability to provide its own population with donor organs”. It is not uncommon for foreigners to be recruited for transplants through special offers posted on the Internet. The majority of recipients are from Northern Europe, North America and wealthy Asian countries; they travel as part of transplant tourism to poor countries in Asia and Eastern Europe, South America and Africa, where they buy organs from impoverished donors.

The forms of transplant tourism may take are as follows:

- A recipient from a high- or middle-income country is sent to a low-income country, where a suitable donor (most often poor and socially vulnerable) is found. All medical procedures for transplantation take place in that country;
- The donor and recipient from the same country are transferred to another country, where the medical procedures of transplantation take place;
- The recipient and the donor, who are not residents of the same country, move to a third country, where the medical transplant procedures take place;
- The recipient is moved to the country where both the recipient and the clinic providing medical care are located.

The recipient or donor is relocated depending on the laws of the countries in which they reside. If, for example, the recipient does not have the necessary organ donor in the country in which he lives, or if the waiting list for a transplant is

too long, and the recipient is afraid of dying before his turn comes, he can start looking for a suitable donor in a country where organ trafficking is not banned, or in a country where even if it is banned, such services are available illegally on a large scale. The recipient can also find a donor in a country where illegal transplantation is not possible, and travel with him to a third country where organ trafficking is common.

Cross-border transplant tourism poses a particular danger to the global community because, unlike other forms of human exploitation (such as sexual exploitation or forced labor), organ trafficking through transplant tourism directly threatens physical integrity; in addition, its implementation is reflected in the complex and complicated nature of the organizational structure, since all related manipulations require the involvement of a large number of people (including medical personnel, employees, and others).

Organ trade does not take place exclusively between the donor and the recipient, but with the participation of intermediaries, who are the ones who receive the largest part of the profits from transplantation. According to research by Claire Nullis Capp, intermediaries receive between \$100,000 and \$200,000 for their services, while the donors themselves receive about \$1,000 (although the real price of an organ is about \$5,000). The donor is obviously at a disadvantage and even vulnerable. This case may also raise the question of not only the legitimacy of the organ trade, but also its ethics.

In Roberto Andorno's view, trafficking in organs, tissues, and cells can constitute "self-transfer into slavery", in which the donor chooses to sell his or her organ. Although the donor does not sell all of himself, it is nevertheless done with part of his body, which only exacerbates the exploitation of poor and uneducated people. Equally important, organ trafficking, even with the express will of the donor, diminishes human dignity, since the principle of human dignity is incompatible with the commercialization of the human body and its parts. A person is a human being, and therefore neither the person nor his or her parts can be considered a commodity.

In India, transplant tourism is well developed, although as early as 1994 the "Human Organ Transplantation Act" was published, making it illegal for anyone to offer or receive payment for providing an organ or tissue for transplantation. Nevertheless, since 2000 India has been among the countries with the highest number of organ and tissue transplants performed on patients from the United States, Western Europe, Japan, Australia, South Korea, Taiwan, and the Middle East. In some countries (one of which is India), even with a law prohibiting organ trafficking, the criminal practice of performing organ, tissue and cell transplants from donors in exchange for payment for their "services" has become a frequent

occurrence over the years. The donor and recipient may, for example, draw up documents according to which the donor acts out of altruistic motives, or is a relative of the recipient, as a result of which it is necessary to especially carefully monitor the basis for transplantation of donor organs from living donors.

As a result, the basis for transplantation of living donor organs must be particularly carefully monitored. Transplant tourism is possible only if intermediaries and medical personnel who organize and carry out transplant tourism work well together. Such individuals can, for example, advertise their services by placing relevant advertisements on the Internet. For example, according to data published by Yosuke Shimazono, some websites advertise their services for a full kidney transplant with the condition that all expenses are paid for \$70,000 to \$160,000. Yosuke Shimazono also notes that some countries use transplant tourism as a tool for economic development, and the provision of paid services of this kind can express both an “unfair distribution” of postmortem organs and the ethical component of the procedure itself (especially if the transplant is performed in a country where legislation contains underdeveloped provisions to protect living donors from coercion, exploitation and physical harm, or if such provisions are not actually implemented).

Human organ and tissue transplantation is regulated by various legal provisions and receives different legal and social evaluation depending on a number of factors. Firstly, transplantation can take place using organs and tissues of either already deceased people or living donors. Secondly, the provision of organs, tissues and cells for transplantation is either free of charge or on a paid basis. Organ, tissue and cell donation for remuneration is often directly related to the trafficking of human organs, tissues and cells. One of the most common problems is that such trade may be illegal; in addition, donors who intend to sell their organs and tissues while alive, after all the necessary procedures to transplant an organ or tissue, receive little or no payment, while intermediaries and medical personnel provide the bulk of the income.

Organ donors involved in transplant tourism sometimes leave their country for organ and tissue transplants in another country. As part of organ trafficking, donors may have their passports taken away (in order to limit their freedom of movement); in addition, most donors are misled by both doctors and intermediaries about the nature of transplant operations, assuring them of either minimal or no risks of deteriorating donor health. Post-transplant medical follow-up of donors may be short-lived and inadequate, or completely absent, resulting in significant harm to their health (not to mention their mental well-being).

Sick people resort to transplant tourism when there is a shortage of donor organs in their own country, or the waiting list for a donor organ and surgery is too

long. In many countries organ trafficking is prohibited, and as a result, citizens of such countries can potentially resort to transplant tourism: the principle of non-commercial approach in transplantology can be seen in Denmark, Italy, Hungary, Bulgaria, Argentina and many other countries.

Article 21 of the Convention for the Protection of Human Rights and Dignity in Relation to the Application of Biology and Medicine: The 1996 Convention on Human Rights and Biomedicine plays an important role in transplantology, in accordance with which the human body and its parts must not be a resource for material gain. A similar provision is traced in Article 21 (neither the human body nor its parts shall be used for financial gain or other similar advantages) and Article 22 (trade in organs and tissues is prohibited) of the 2002 Additional Protocol to the Convention on Human Rights and Biomedicine concerning the transplantation of human organs and tissues. The above provisions are based on the premise that human beings and their “constituent parts” (namely organs, tissues and cells) cannot be commodities and cannot be the object of market relations. Humans, as well as human organs, tissues, and cells, should not be considered by either legislators or society as a commodity capable of serving as an object of commercialization, for such a relationship constitutes commercialization. While some argue that a person, having rights over his own body, should be able to dispose of it (and its parts) as he sees fit, this approach is beneficial to the wealthier segments of the population, since this attitude to the body will necessarily encourage poor people to trade their own organs, which in fact almost never ends well for such donors. The seller (be it a donor, a doctor, or an insurance company employee) automatically equates the aforementioned parts of the human body with a thing or a commodity when stating the price of an organ, tissue, or cell.

The Convention on Human Rights and Biomedicine mentioned above contains a number of other important provisions:

- “the interests and benefit of the individual shall prevail over the interests of society or science” (Art. 2). This article may contradict the principle of presumed consent, which is aimed primarily at helping society (namely, helping the health care system find donor organs);

- “A medical intervention may be carried out only after the person concerned has given his or her voluntary informed consent. That person is informed in advance of the purpose and nature of the intervention, as well as of its consequences and risks. This person may freely withdraw his or her consent at any time” (Art. 5). This approach to transplantation also contradicts the principle of presumed consent that is common in some European countries. However, this provision also targets the exploitation of living donors in matters of forced medical manipulation of organ removal;

- Chapter 6 protects from exploitation persons whose physical and mental abilities, as well as their age, do not allow them to give a reasonable and informed consent. Such persons may be subjected to medical interventions within the framework of transplantology only in cases where these interventions are required to improve the physical health of these persons.

Organ trafficking may also take place during armed conflicts. Thus, Russian Foreign Ministry spokeswoman Maria Zakharova said at a briefing on August 31, 2017 that there are reports according to which the Islamic State “increases income from the so-called “taxation” of controlled territories, extortion, kidnapping for ransom, and trade in antiquities. Unfortunately, there is increasing evidence that human organs are being actively trafficked....” And in 2016 RIA Novosti published an article “Residents of Aleppo told how the militants sold wounded for organs for \$290”, according to which the militants attacked local residents in order to extract organs and their parts for sale, and the wounded and dead were sold for their further use in transplantology (“fair” was located on the Syrian-Turkish border).

A vivid example of transplant tourism is a clinic in Kosovo that sold human organs. In 2013, the clinic director Lutfi Dervishi, his son Arban Dervishi, chief anesthesiologist Sokol Najini and two other accomplices were convicted. The traffickers in this illegal transplant network offered payments of up to \$26,000 to Turkish, Moldovan and Russian residents to come to Kosovo and sell an organ. The victims signed false documents, according to which they allegedly donated their organs to their relatives for altruistic reasons (a total of 24 donors were involved; many of them did not receive payment and proper medical care). Thus, in November 2008, a suspicious Turkish resident was spotted at Pristina airport. He was weak, trembling, and had a large scar on his body (he later said that his kidney had been “stolen” from the clinic where the aforementioned doctors worked).

The WHO Guidelines for Transplantation of Human Cells, Tissues and Organs were approved by the Sixty-third World Health Assembly in May 2010.

Guideline 1 establishes specific rules governing the transplantation of cells, organs and tissues from deceased persons, according to which such medical interventions should only be performed when there is consent for the procedure (consistent with the law) and there is no reason to believe that the deceased person was against the removal of their cells, tissues and organs.

Guideline 2 affects the range of persons who certify the death of a possible donor. Such physicians should not be directly involved in the transplantation of cells, tissues, and organs (they should neither remove nor transplant tissue, cells, and organs from the donor they have deemed deceased). In addition, these medical professionals must not be the treating physicians of potential recipients. This principle helps to reduce the possibility of falsification of the donor’s death,

since physicians involved simultaneously in declaring a person dead, removing tissues, cells and organs and transplanting them to a recipient may have a financial interest in obtaining donor organs and subsequently performing a transplant.

Guideline 3 contains the following main provisions:

- it is recommended that transplants from deceased persons be performed first;
- transplantation from living persons should be carried out provided the donor is of legal age;
- The living donor should have at least one of three types of relationship with the recipient: genetic, legal or emotional;
- living donation must be on a purely voluntary basis;
- the donor must receive professional care, as well as be under further observation (after the transplantation operation);
- the selection of donors must be controlled according to established criteria;
- the donor cannot be an incompetent person;
- the donor must be fully informed both about the risks and all possible consequences of transplantation.

Organ trafficking is excluded by this principle: emotional, legal and genetic ties between the donor and the recipient are often absent; the donor in the cell, tissue and organ trade acts primarily out of material rather than altruistic motives; as shown in the above-mentioned cases, donors are often misled about the nature of the transplant process and do not receive full medical care. There may also be a disregard for the will of the donor in organ trafficking (as in the Aleppo cases).

Guideline 4 sets an age limit for donors. The living donor of tissues, cells and organs, for example, must be of legal age (with some exceptions specified in the national legislation). In this way, the life and health of minors are protected. In addition, even if an adult becomes a donor, it is strongly recommended to obtain his or her consent before carrying out a medical intervention to remove a tissue, cell or organ. The provisions of this principle are also of direct relevance to incompetent persons. If this principle is respected, acts of trafficking in tissues, cells and organs from minors and incompetent persons are excluded, since they are often in the most vulnerable and unprotected position, making them more likely to suffer from illegal transplantation.

Guideline 5 completely precludes the commercialization of donation by prohibiting the provision of an organ to the donor; nevertheless, the donor can expect to be reimbursed for “reasonable and controllable expenses” incurred by

the donor (for example, this could be donor care fees, compensation for incapacity or loss of income and other similar expenses). Thus, the need for altruistic motives inducing the donor to act appropriately in the context of transplantation is again emphasized. Payments made to the donor must be as transparent as possible in order to eliminate the possibility of organ trafficking. This principle aims to protect the poor and vulnerable, who are potential victims of illegal transplantation. States, for their part, can monitor the transparency of transplant surgeries in order to prevent and suppress possible crimes. The commentary touches on the possibility of gifts to the donor by the recipient. It is noted that such actions should also not be a disguised payment for the “services” of the donor.

Guideline 6 specifies the need to advertise the need for both donors and recipients exclusively in accordance with national law. Advertising of the need for organs, tissues and cells, the receipt of which is conditional on material payment, should be prohibited. Advertising for the provision of cells, tissues and organs for a fee must also be prohibited. Advertising of offers to pay a relative of a deceased person or other parties with access and thereby possessing donor organs, tissues, and cells should also be prohibited. The performance by a person of intermediary services in this sphere should also be prohibited. Certain types of advertising should be prohibited, including advertising to sell cells, tissues and organs for transplantation, advertising to buy cells, tissues and organs for transplantation, advertising to find the next of kin of a deceased donor, and some others.

Guideline 7 addresses the activities of those directly involved in organ, tissue and cell transplants, namely medical personnel: these individuals should not perform transplant manipulations, and health insurers and other possible payers should not pay transplant costs if the tissues, cells or organs for transplant were not obtained in good faith (by coercing a donor to transplant, or by coercing an immediate family member of a deceased donor).

Guideline 8 calls for prohibiting both transplant clinics and medical institutions and their employees from receiving disproportionate fees (fees in excess of reasonable remuneration for services rendered) in connection with the performance of transplantation or provision of organs, tissues and cells.

Guideline 9 is intended to regulate the development and application of methods and criteria for the distribution of donor organs, which should not have as their main aim the financial enrichment of any person, and the rules for the distribution of donor organs should be fair and transparent.

Guideline 10 focuses on the physical well-being of the donor and the recipient. Thus, the medical procedures they provide must be of high quality, safe and effective. An assessment of the possible effects and outcomes of transplantation is required in order to document the benefits and harms of the medical intervention,

respectively. Moreover, the obvious value and vulnerability of human tissues, cells and organs are emphasized, making it necessary to pay special attention to them, as well as increased precautions and preservation measures in relation to them. This requires the use of quality assurance systems that incorporate traceability and vigilance, followed by notification of adverse events and reactions to human tissues, cells and organs, whether derived “from domestic resources” or from foreign countries.

Guideline 11 recommends that transplant-related activities be conducted in an open and transparent manner and that the results not be concealed (openness does not extend to confidential information about donors and recipients to ensure their anonymity).

Human trafficking for the purpose of organ removal is also reflected in the legislative acts of the European Union bodies, namely Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting victims 2011. The Directive states that trafficking in human beings for the purpose of removal of organs constitutes a serious violation of human dignity and physical integrity.

Article 2 par 1 establishes that all Member States shall take the necessary measures to ascertain that certain acts of an international nature are punishable. These acts are: the recruitment, transportation, transfer, harboring or reception of persons (including the exchange or transfer of control over these persons) for the purpose of exploitation, through the threat or use of force or other forms of coercion, abduction, deception, abuse of power or a position of vulnerability or giving or receiving payments or benefits to achieve the consent of a person having control over another person.

Under Article 2(3), exploitation includes at a minimum the following forms: prostitution or other forms of sexual exploitation; forced labor, including begging, slavery or other forms of exploitation similar to slavery and servitude; exploitation in the context of criminal activities; and removal of organs.

Pursuant to Article 3, incitement to commit the acts described in Article 2, aiding and abetting the commission of the same acts, and attempting to commit the same acts must be punishable by States Parties.

This Directive also specifies the penalties for the above-mentioned acts.

Particularly noteworthy is the fact that this Directive, in art. 5, recognizes the possibility of including legal persons among the circle of those liable for the acts described (whereas the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, 1997, and the

Additional Protocol to the Convention on Human Rights and Biomedicine concerning the Transplantation of Human Organs and Tissues does not directly include legal entities as liable persons).

From the material examined, we can conclude that transplantology should be purely voluntary and altruistic. Yet, some advocate commercialization of the industry.

Amy Friedman (a transplant surgeon in the U.S.) believes that the commercialization of donation is necessary, because it will help combat both the black market in human organs and the shortage of donor material that affects most of the world. Her position is that the development of a clear scope of compensation due to a living donor for his organ will, in fact, be able to exclude exploitation as such, which occurs, *inter alia*, due to transplant tourism. Permanent legalization of payment for the “services” of a living donor would prevent exploitation, as well as serve to establish equal treatment for both donor and recipient. However, voluntary paid donation should be limited to a single state in order to exclude possible exploitation. The donor should provide his material only to legal residents of his own country, which would negate the exploitation of donors from low-income countries.

Anthony Monaco (American geneticist and former president of the American Society of Transplantation) does not condemn the arguments of the proponents of commercialization of transplantation. On the contrary, he compares the financial benefits of organ donation to military service. Thus, in his opinion, volunteers enlisting in the U.S. Army are motivated by idealism and patriotism, but we should not forget that they are attracted by college tuition, service-related allowances and bonuses, significant financial payments due to injury and loss of life.

Therefore, when examining the problem of illicit trade in human organs, tissues and cells, it can be seen that two main positions collide when trying to regulate this sphere. On the one hand, one cannot deny the existence of somatic rights, which are as important as other fundamental human rights and freedoms. On the other hand, the direct guarantee of somatic rights may in fact be a disguised exploitation of human beings. The demand for human organs, tissues and cells cannot be reduced to zero, which, in fact, serves as an endless resource for crime. Minimizing the risks and scope of the criminalization of transplantology can be accomplished by detailed elaboration of the legal and regulatory framework governing transplantation not only at the international level, but also at the national level. As indicated in Chapter 2 of our study, even in countries where trafficking in organs, tissues and cells is strictly forbidden, the black market can flourish; this trend can be broken if international organizations and other structures, whose representatives would have access to national archives and databases that process information in the health system, are active. Allowing

access to foreign independent experts to monitor every case of human organ, tissue, or cell transplantation would help to establish the true reasons for a donor's consent to have his or her organ, tissue, or cell harvested, which would help to identify criminal cases of organ, tissue, and cell trafficking.

The international legal acts studied show that most states still consider trafficking in human organs, tissues and cells to be a criminal offense. In our opinion, the main problem in combating this type of crime is precisely the lack of such an international mechanism that would monitor the true causes of donation.

III. SOMATIC RIGHTS AS A NEW GENERATION OF PERSONALITY RIGHTS

Internationally, most states have concluded that a certain set of basic human rights and freedoms, including reproductive rights, must be guaranteed. Some international treaties do provide some kind of guarantee for reproductive rights, but the problem of conflicts between the provisions of international law and national law is relevant, because there are no international legal acts unifying the regulation of social relations related to reproductive rights at the national and international levels. Failure to unify international and national law leads to a constant source of conflicts and criminal situations. The problem originates in the fact that the majority of international treaties, while referring to the guarantee of certain fundamental human rights and freedoms, nevertheless it is often possible to find a provision, according to which, due to disagreements between representatives of different countries, the regulation of certain issues is left to national lawmakers. International law provisions are rather mild and general, perhaps even more of a recommending nature, due to which the protection of reproductive and other basic human rights in the presence of a foreign element is very controversial and difficult, as national and international law clash.

Provisions can be found in international law to regulate and protect private and family life, but there is no clear framework to help both the legislative and executive branches of the national government to define the very boundaries and constituent elements of family and private life that are worth protecting. It is impossible to guarantee non-interference in private and family life in the absence of a clear framework.

The clash of public and personal interests in the protection of basic human rights and freedoms is difficult to avoid. Although there are ideas that human rights should take precedence over public morality, this approach is controversial because the definition of morality in the international arena is problematic due to the fact that in the international arena there is a clash of different societies interpreting the concept of morality in different ways. This is also one of the

reasons why it is difficult to unify international and national law in terms of guaranteeing and protecting the fundamental human rights and freedoms.

Doctrine offers the following definition of somatic rights: “this group of such [rights], which are based on a fundamental worldview certainty of the ‘right’ of the individual to independently dispose of his body: to carry out its “modernization”, “restoration”, and even “fundamental reconstruction”, to change the functional possibilities of the body and expand them with technical and aggregative or pharmacological means”. In other words, somatic rights include those rights that are inherent to every human being; they relate primarily to those opportunities that allow a person to make certain changes to his body with the help of medicine and science: euthanasia, positive and negative reproductive rights (artificial insemination and sterilization, respectively), changing biological sex, organ and tissue transplants³. Boundaries and principles defining somatic rights vary from society to society, as they are determined not so much by technical aspects (the objective capabilities of medicine) as by the oldest social measures of right and wrong: religion, ethics, traditional and philosophical views of human life and its value. The most common sources of conflict are the trade and donation of human organs and tissues, surrogacy, and termination of pregnancy: these “services” have a direct bearing on human reproductive rights, as they fundamentally alter the integrity of the human body, and those who choose to receive any of these “services” are often limited by the legal as well as the moral and ethical framework of their society. In order to avoid this, some people decide to provide or receive services outside of their home country or country of residence. This leads to instances of collisions not only between private and public law within the same country, but also between the legal norms of two or even more countries. Cases are possible where there is a conflict of both civil and criminal laws of two or more countries, examples of which can be found in the following chapters of our work.

Somatic rights generation is regulated by a number of international legal acts, among which the most important are the following:

- The Convention for the Protection of Human Rights and Dignity with regard to the Application of Biology and Medicine, adopted by the Council of Europe in 1997.
- Resolution 2001/39 of 26 July 2004. “Genetic privacy and non-discrimination”
- Resolution 2003/69 of 25 April 2003 on “Human Rights and Bioethics”.

² Kruss V. I. Personal (“somatic”) human rights in the constitutional and philosophical-legal dimension: to the problem statement / V. I. Kruss // State and law. - Moscow: Nauka. - 2000. - № 10. - P. 43-50.

³ Kokambo Y. D. Human somatic rights as a new generation of personality rights // Bulletin of the Amur State University. Series: Humanities. 2015. № 68

- The United Nations Declaration on Human Cloning, which was adopted by the United Nations General Assembly in 2005.

Somatic rights differ from other rights in that they are simultaneously related to a person's physical integrity, his psychological and spiritual state, and his personality. Alexander I. Kovler includes to somatic rights the right to life and dignity of a person, freedom of conscience, the right to freedom and personal inviolability, as well as some other rights, considering that these rights are the root of all personal rights, namely, he believes that somatic rights are one of the types of personal rights⁴. Some legal scholars, however, believe that somatic rights are derived from socio-economic and cultural rights (for example, the conditioning of organ trafficking on the right to health and medical care).⁵

A clash of public and private interests in the exercise or infringement of somatic rights can occur if there is a case of injury to health. Cases fall under the public-law sphere in the event that such harm to health is considered severe or moderate in severity (which, in turn, entails criminal prosecution). This situation is possible only if the subject who inflicted harm to health is not the person whose health was harmed (i.e., we exclude cases of suicide and the like)⁶.

Mikhail A. Lavrik developed one of the most popular classifications of somatic human rights:

- The right to death;
- Human rights in relation to his organs and tissues;
- Sexual human rights;
- Reproductive human rights;
- the right to gender reassignment;
- The right to clone an entire human body or individual organs;
- The right to use drugs and psychotropic substances⁷.

We examine somatic and reproductive human rights in connection with crimes of an international character and transnational crimes, which are the very objects of these rights.

The doctrine of international law distinguishes between two "concepts" that are important to our work: international crimes and crimes of an international nature (or conventional crimes).

⁴ Kovler A. I. *Anthropology of Law*. M., 2002.

⁵ Lavrik M. A. To the theory of somatic human rights // *Siberian Law Bulletin*. 2005. № 3. (Pp. 24-25).

⁶ Pikurov N. I. *Private life and criminal law: the search for a balance between the interests of the state and the individual: a monograph*. Moscow: Yurite. 2021. P. 127

⁷ Lavrik M. A. To the theory of somatic human rights // *Siberian Law Bulletin*. 2005. № 3. P. 24-25.

International crime is a culpable unlawful act infringing upon international security, the world legal order, and its separate spheres. It is unlawful because of the agreed will of sovereign states that recognize this crime as a criminal offence⁸. Examples of international crimes are genocide, crimes against humanity and others. On the basis of the works of I.I. Karpets, crimes of international character are “acts provided for by international agreements (conventions) which do not constitute crimes against humanity, but which encroach on normal relations between states and damage peaceful cooperation in various fields of relations (economic, socio-cultural, property, etc.), as well as to organizations and citizens, punishable according to the rules set forth in international agreements (conventions) ratified in the established order”⁹.

V. P. Panov considers crimes of international character to be common crimes “complicated by a foreign element” (either the subjects are citizens of different countries, or the object of the crime is not the same as the place of its commission, or the objective side is recognized as socially dangerous in an international treaty). Furthermore, according to his works, crimes of an international nature do not have a direct link with a particular state, which acts as the subject of the crime; such a crime infringes on both international and domestic legal order¹⁰.

C. V. Cernichenko believes that crimes of an international nature are torts recognized by countries as crimes committed by specific individuals.¹¹ The international crimes, however, do not threaten only a particular state, but the world community as a whole, which is why joint efforts are needed to combat them.

Somatic rights form a distinct generation of human rights, the study of which is highly relevant for the twenty-first century because of technological and medical advances, whose fruits and services are becoming more and more popular by the day. In the doctrine, we can find the following definition of somatic rights: “this group of such [rights], which are based on a fundamental worldview confidence in the “right” of the individual to independently dispose of his body: to carry out its ‘modernization’, ‘restoration’ and even ‘fundamental reconstruction’, to change the functional possibilities of the body and expand them with technical-aggregative or medicament means”. That is, somatic rights encompass those rights that are inherent to every human being; they are primarily related to those opportunities that allow a person to perform certain changes to his body with the help of medicine and science: euthanasia, positive and negative reproductive

⁸ Spiridonov A. P., Baburin V. B. Types of Crimes in International Criminal Law // Scientific Vestnik of the Omsk Academy of the Ministry of Internal Affairs of Russia. 2012. № 2. p. 3

⁹ Karpets I. I. Crimes of international character. P 48 // Crimes of international character / Karpets I.I. - M.: Yurid. lit., 1979. - 264 p.

¹⁰ Panov V.P. International Law. - Moscow: Infra, 1997. - P. 13.

¹¹ International Criminal Law / ed. by V.N. Kudryavtsev. - Moscow: Nauka, 1999. - P. 149.

rights (artificial insemination and sterilization, respectively), changing biological sex, organ and tissue transplants. Controlling the boundaries and principles defining somatic rights varies from society to society, as they are determined not so much by technical aspects (the objective capabilities of medicine) as by the oldest social measures of right and wrong: religion, ethics, traditional and philosophical views of human life and its value. Human trafficking, organ and tissue donation, surrogacy, and termination of pregnancy are the greatest sources of conflict: these “services” have a direct bearing on human reproductive rights, as they fundamentally alter the integrity of the human body, and those who choose to receive any of these “services” are often constrained by the legal as well as the moral and ethical framework of the society of which they are a part. To avoid this, some people decide to provide or receive services outside of their home country or their country of residence. This results not only in the collision of private and public law within the same country, but also in the collision of the legal norms of two or even more countries. Possible cases are those in which there is a conflict between both the civil and criminal laws of two or more countries, examples of which can be found in the following chapters of our work.

The generation of somatic rights is regulated by a number of international legal acts, among which the most important are the following:

- The Convention for the Protection of Human Rights and Dignity with regard to the Application of Biology and Medicine, adopted by the Council of Europe in 1997.
- Resolution 2001/39 of 26 July 2004 “Genetic privacy and non-discrimination”
- Resolution 2003/69 of 25 April 2003 on “Human Rights and Bioethics”.
- The United Nations Declaration on Human Cloning, which was adopted by the United Nations General Assembly in 2005.

Somatic rights differ from other rights in that they are simultaneously related to a person’s physical integrity, his psychological and spiritual state, and his personality. A. I. Kovler includes to somatic rights the right to life and dignity of a person, freedom of conscience, the right to freedom and personal inviolability, as well as some other rights, considering that these rights are the root of all personal rights and he believes that somatic rights are a type of personal rights.

Yet some legal scholars believe that somatic rights are derived from socio-economic and cultural rights (for example, the conditionality of trade in organs on the right to health and medical care).

The public and private interest in the exercise or impairment of somatic rights can collide if there is a case of injury to health. The respective cases fall under the public-law sphere, if such harm to health is considered to be of grave or medium

gravity (which, in turn, entails criminal prosecution). This situation is possible only if the subject who inflicted harm to health is not the person whose health was harmed (i.e., we exclude cases of suicide and the like). M. A. Lavrik developed one of the most popular classifications of somatic human rights:

- The right to death;
- Human rights in relation to his organs and tissues;
- Sexual human rights;
- Human reproductive rights;
- the right to gender reassignment;
- The right to clone an entire human body or individual organs;
- The right to use drugs and psychotropic substances.

We examine somatic and reproductive human rights in connection with international crimes and transnational crimes, the objects of which are precisely these rights.

Two concepts important to our work are distinguished in the doctrine of international law: international crime and crime of an international nature (or conventional crime). Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide defines “international crimes” as crimes against international security, the international legal order, and its separate spheres. International crime is unlawful because of the agreed will of sovereign states that recognize this crime as criminally punishable. Examples of international crimes are genocide, crimes against humanity and others.

On the basis of the works of I.I. Karpets, crimes of international character are “acts provided for by international agreements (conventions), not related to crimes against humanity, but encroaching on normal relations between states and causing damage to peaceful cooperation in various fields of relations (economic, socio-cultural, property, etc.), as well as to organizations, citizens, punishable according to the rules established in international agreements (conventions), ratified in the prescribed order”.

Panov V. considers crimes of an international nature to be ordinary crimes “complicated by a foreign element” (either the subjects are citizens of different countries, or the object of the crime is not the same as the place of its commission, or the objective side is recognized as socially dangerous in an international treaty).

Besides, according to his writings, crimes of an international nature have no direct connection with a particular State as the subject of the crime; such a crime infringes upon both the international and the domestic legal order.

C. V. Chernichenko considers crimes of international character to be torts recognized by countries as crimes committed by specific individuals. In this case, crimes of international character are not only dangerous for a particular state, but for the world community as a whole, in view of which joint efforts are required to combat them.

Crimes of an international character are torts in which the objects of the crime are certain interests and prerogatives that are of uniformly high value to a number of States, as reflected in the relevant international treaty or agreement. A number of States, for example, may recognize an act as prejudicial to the interests and values of those States when they sign a convention, whereby the parties to that convention undertake to amend national criminal laws accordingly, making the act (or omission) a criminal offence. The act itself is not politically motivated when such torts are committed, but becomes international in that it is criminalized by several states, which is reflected in their jointly negotiated agreement.

Persons (or groups thereof), rather than states themselves, are the subjects of crimes of an international character. They are subject to criminal responsibility under national criminal law, which in turn reflects certain specific provisions of certain international treaties.

The doctrine also separately distinguishes so-called cross-border or transnational crimes. The difference between transnational crimes and international crimes is that they fall under the jurisdiction of two or more states, since the illegal act is committed on the territory of one state, and dangerous consequences are expressed on the territory of the second state, or the criminal acts are committed by the subject of the crime on the territory of more than one state. Crimes of this kind are usually not criminalized in international conventions; they do not infringe on the general world order and do not affect the global interests of mankind. Two or more States involvement in the administration of justice is based on the fact that the crime is inherently characterized by the presence of a foreign element, so that adequate and full proceedings cannot be carried out without the cooperation of the States involved. Likewise, such cooperation may also be necessary in the preventive fight against crime. Transnational crimes are also possible if the crime in the territory of a state is committed by a foreigner or a stateless person.