



Andrea Tünde Barabás – Judit Szabó

Theoretical analyses of criminal cases initiated due to offences of illegal use of human body

Abstract

Although occasionally there are talks and rumours about disappearances or kidnappings in Hungary for the purpose of organ and tissue trading or trafficking, there have not yet been confirmed cases from authentic sources of such offences in respect of the country. Every so often we hear of the ever-increasing international organ trading or trafficking. The National Institute of Criminology conducted a research project in 2017-2018 with the title Theoretical analyses of criminal matters initiated due to offences of illegal use of human body. The purpose of the research was to explore and analyse the characteristic features of criminal proceedings initiated in cases of illegal use of human body, and of the underlying offences. In addition, we also aimed at identifying potential enforcement difficulties of the factual situations, as well as mapping other anomalies, and assessing the domestic status of the issue. Accordingly, the subject of our research project focused on the legislative framework of the offence of illegal use of human body, its major domestic and international aspects, the characteristics of the criminal proceedings initiated due to such offences, and the experiences of enforcement. According to the findings of our research, it is only unambiguous, consistent and seamless professional legislation together with leveraging appropriate professional knowledge that can grant real protection in the field of the procedures and interventions affected by the offence of the illegal use of human body. Even though the situation in Hungary does not seem to be worrying, some anomalies of the legislative framework are obvious in light of our findings. The below paper concludes and sums up the most important findings of the research project.

Keywords: illegal use of human body, organ trading and trafficking, organ donation, investigation, frame-disposition



The starting point and the methodology of the research

According to the EU report of 2015 on organ trading and trafficking (URL1) *‘the term ‘trafficking in organs’ groups together a whole range of illegal activities that aim to commercialise human organs and tissues for the purpose of transplantation’* and include *‘the trafficking of persons with the intent to remove their organs, transplant tourism’* as well as *‘trafficking in organs, tissues and cells.’* Organ trading and trafficking that had traditionally affected Southeast Asia and the Indian subcontinent also emerged in other parts of the world, such as China, South America, the Philippines, and Southern Europe, but since the turn of the millennium, there have been talks of cases in reference to Eastern Europe too (URL2). It is assumed that globalisation and the intensification of migration are deemed to have a significant impact on the patterns of illegal trade of human organs and tissues, therefore it seems reasonable to analyse criminal matters concerning the illegal use of human body in the light of international developments. The criminal offence of the illegal use of human body was first incorporated into the national substantive criminal law in 1998, however there has been little information on the number of criminal proceedings initiated in such cases since its introduction; we also have little information on the nature of those cases and how they were closed, respectively. Neither can we read much in the available literature on how excessive burden these cases constitute as regards the experts working in the field of criminal justice, and how they can cope with the likely procedural difficulties due to the specific nature of the offence. In accordance with the objectives of the research, we primarily relied on methods of data collection. Our examination of case files was aimed at analysing – on the basis of predefined criteria – any and all criminal cases initiated between 1998 and 2016 due to the illegal use of human body. However, the Unified Statistical System of Investigations and Prosecutions (ENYÜBS) which we relied on, contained only four such criminal cases. Since the conclusion of our research, only one additional case was recorded in ENYÜBS for the period between 2017 and 2019, thus our findings can be considered still relevant today. This very low number of cases together with the need for an authentic and thorough investigation of the research subject, and its strong interdisciplinary nature, necessitated the supplement of our research methodology. In order to clarify the research questions, we conducted group interviews with the participation of criminal justice experts – law enforcement personnel, public prosecutors – with prior experience in such criminal matters, as well as with medical profession experts, physicians/lawyers, transplant physicians and the representative of the Organ Coordination Office, a department of the Hungarian Nation-

al Blood Transfusion Service. During these interviews, we intended to obtain information going beyond the data that can be obtained from the criminal case files. By doing so, we could examine whether the number of procedures initiated due to such cases were so low indeed, and if they were not, what played a role in the resulting small number of cases. Finally, we were also interested in how the representatives of the various fields could see and assess the domestic situation regarding the offence of the illegal use of human body, especially related to organ and tissue trading or trafficking. Interviews were audio recorded, transcribed, and subjected to thematic analyses.

Domestic and international legislative framework

Paragraph (3) of Article III of the Fundamental Law of Hungary states that the use of human body or its parts for financial gain is prohibited. Organ and tissue trading or trafficking is a gross violation of individual rights and human dignity, criminal law protection is therefore necessary (Vaskuti, 2013, 217.). The international legislative background of the regulation is contained in Articles 21 and 22 of the Oviedo Convention promulgated in Act VI of 2002, pursuant to which human bodies and their parts as such cannot give rise to any financial gain, additionally if *'any part of a human body is removed, it may be stored and used for a purpose other than that for which it was removed, only if this is done in conformity with appropriate information and consent procedures.'* Another relevant international legal instrument is the so-called Declaration of Istanbul (URL3), which was adopted to discourage the adverse effects of the worldwide shortage of organs. The significance of the declaration lies not only in its awareness-raising nature, it is also an important move forward as it contains the definitions of organ trading or trafficking and transplant tourism. Another significant international instrument is the Council of Europe Convention against Trafficking in Human Organs, published and open for signature since March 25, 2015 (URL4), which has not yet been ratified by Hungary. The offence of the illegal use of human body was introduced into Act IV of 1978 as Crimes against medical intervention, order of medical research, and medical autonomy in 1998.¹ Its immediate precedent was the establishment of Act CLIV of 1997 on Health (hereinafter referred to as: Eütv.), which regulates in detail the types of researches that can be conducted on humans, the special procedures aimed at human reproduction, as well as organ and tissue transplantations.

1 Act XXII of 1998 on the Amendment of Criminal Law.

The Act prescribes and requires strict conditionality as regards the pursuit of such activities. Since the techniques and application of the rapidly developing medical procedures and research methods are subject to a number of risks, alongside their undoubtedly great benefits, the legislative authority found it necessary to deploy their legislative instruments under criminal law when the provisions of the above Eütv. (Act) are contravened or infringed. The offences in this category are now detailed in a separate chapter of the Criminal Code in force, Act C of 2012 (hereinafter referred to as: Btk.).² The criminal offences regulated in Chapter XVI of Btk. (Act) are frame-dispositions that are given substance to by the provisions of Eütv. (Act) (Tóth & Nagy, 2014, 104.). The offence ‘*illegal use of human body*’ regulated in Article 175 of Btk. (Act) can be interpreted as a means of pursuing criminal action against organ and tissue trading or trafficking that cause growing concerns worldwide. Transplanting and implanting human organs, genes, cells, tissues, etc., or their use in other ways, raises a great many bioethical and legal dilemmas in themselves (See Sándor, 2006, 32–45.), obtaining and using them illegally will pose even more serious challenges to legislative authorities and enforcement authorities. This area requires complex regulations based on the cooperation between the health care system and civil and criminal law, which regulations comply with the defining ethical norms and standards. The offence currently in force was taken over from the previous Criminal Code and incorporated into the new version (Btk.) without any change in substance and with only minor clarifications, i.e. extending protection of criminal law to dead fetuses. The aggravating circumstances referred to in Paragraph (3) were expanded to include offences committed against persons under the age of 18, and the legislative authority decided to raise the minimum threshold for offences. Additionally, an explanatory note in accordance with Paragraph (5) was inserted into the normative text (Vaskuti, 2013, 217. see also below). The objects of offence are the human genes, human cells, human gametes, human embryos, human organs, human tissues, cadavers or part(s) of such or deceased fetuses. Section 3/A of Eütv. (Act) contains the definitions of the concepts of cells, tissues, organs, and embryos. Paragraph (5) Section 175 of Btk. (Act) defines the concept of human embryos more broadly than the clause referred to in Eütv. (Act), as it includes embryos removed from the mothers’ uteruses, as well as those produced in special procedures for the purpose of human reproduction, which are not placed into the uteruses. The passive subjects of the covered offence are the natural persons from whose bodies any of the above objects of offence are removed.

2 Chapter XVI: Medical Procedures and Criminal Offenses Against the Order of Research.

The criminal conduct concerning the illegal use of human body includes unlawful obtainment, placement on the market and trafficking for financial gain. The offence can only be committed intentionally, according to Ervin Belovics's view (2016, 143.) with exclusive direct intent. The statutory statement of the offence does not contain results, therefore the act is of intangible nature. All preparatory acts of the offence are also punishable (Belovics, 2016, 143.). In domestic legal literature, many authors have criticised the criminal offence provision of the illegal use of human body. For enforcement authorities, the detectable inaccuracies that can be established as regards the enumeration of the objects of offence may create a problem (Karsai, 2013, 348.). For instance, Gábor Kovács and his co-authors (Kovács et. al. 2007, 19-20.) raise their objections regarding the use of the concept of genes in the statement of the facts. The authors have their additional concerns pertaining to the rapid progress and development in biotechnology that may allow the use of human DNA in certain procedures, e.g. producing human insulin, particularly for generating financial gain, which in this way will satisfy the criteria of the offence in question. The authors also mention in their criticism that certain non-cellular components of blood are missing or excluded from the seemingly complete enumeration of the possible objects of the offence, thus they are not protected against unlawful obtainment, trading, and trafficking. Krisztina Karsai considers the amendment of the list of objects of offence with the deceased fetuses unjustified for several reasons (Karsai, 2013, 348-349.). The legal application of the offence of the illegal use of human body poses a significant professional challenge not only due to the dogmatic problems referred to in connection with the protected legal interest and the object of the offence, but also due to its frame-disposition nature and to the complexity of the stipulations of the Eütv. (Act) (Tóth & Nagy, 2014, 104.). The number and nature of related legislation show us the specificity and the complexity of the area protected by criminal law, which we will not include due to the obvious lack of space.

The characteristic features of the criminal cases initiated due to the illegal use of human body

In the beginning of the research, we set out our objective to review all case files of criminal proceedings initiated upon offences of illegal use of human body. Unfortunately, the number of cases in the ENYÜBS database accessible to us was no more than four. Below please find the brief summaries of the most important aspects of these four criminal cases.

*Case 1*³

The criminal case initiated in 2005 due to the offence of preparation for the illegal use of human body attracted increased interest by the public and a great deal of media attention. The action was brought by the head of the Medical and Health Center of the University of Debrecen with reference to a hidden camera footage made by the Norwegian television channel TV2. The footage showed alleged autopsies carried out at night at the Department of Anatomy, Histology and Embryology, as well as it showed those human organs and body parts medical students had allegedly dissected in their dormitory rooms. The footage was broadcasted by the Hungarian television channel TV2 on April 25, 2005. An investigation was ordered in the spring of 2005 upon suspicion of a preparatory act for the offence of the illegal use of human body. During the investigation it emerged that one of the personnel of the institute, the suspect in the case, had provided assistance to the unlawful obtainment and trafficking of human organs and body parts. Since, on the basis of the available data, it could not be established whether or not the suspect had committed the offence, the investigation against that person was abandoned and the case was dropped in the autumn 2006.

*Case 2*⁴

The National Bureau of Investigation at the Rapid Response and Special Police Service opened an investigation due to the offence of preparation for the illegal use of human body. The action was brought in 2013 upon the report of the director of the Organ Coordination Office (Hungarian National Blood Transfusion Service), who forwarded a message received by the director of Eurotransplant that raised concerns. The perpetrator from a newly created e-mail address had sent several messages to various domestic and foreign medical institutions and organisations for organ transplantation and offered one kidney for transplantation in return for payment of one hundred thousand Euros. Additionally, the perpetrator also had used classified ads on an advertising space. The identity of the perpetrator was revealed during the investigation. The accused was a college graduate educator with no previous criminal background; he admitted the perpetration of the act and fully cooperated with the authorities during the investigation. As the reasons for committing the offence, he mentioned his family's

3 Chief Prosecution Office of Hajdú-Bihar County, B.1632/2005.

4 Chief Prosecution Office of Békés County, 2249/2013. (Chief Prosecution Office of the Capital, Nf.17930/2013.)

hopeless financial situation and his inability to keep up with the repayments of his mortgage. Since the perpetrator's act was considered such a slight danger to society that even imposing the lightest penalty applicable by law or taking any other measures proved unnecessary, the investigation was abandoned, the case was dropped, and the perpetrator was reprimanded.

Case 3⁵

The criminal proceedings were initiated in 2010 by the report of the director of the Organ Coordination Office (Hungarian National Blood Transfusion Service) against unknown persons, who had offered their organs for transplantation in return of financial support on a newly set up website. By this act the accused had committed the offence of preparation for the illegal use of human body. The identity of the perpetrator was revealed during the investigation; the perpetrator admitted the perpetration of the act, in his defence he argued that he had requested the financial support to alleviate his difficult financial situation and not in return for his organ. The perpetrator was fully cooperative, terminated the website together with the ad found on the website. The prosecution against the accused was postponed in 2011 for a year, with maintaining the application of probation supervision, and the person concerned later lodged a complaint against that decision. The complaint was upheld, and the authority finally abandoned the investigation and the perpetrator was reprimanded.

Case 4⁶

In this case the investigation was ordered against persons unknown due to the offence of the illegal use of human body and of the violation of the rules of experimental research on humans. Based on the available data it could be presumed that for research purposes ovarian tissue samples were intended to be secured during the patient's ovariectomy carried out due to her tumorous disease; the ovarian tissue samples were stored in a stem cell bank even on the day when the police report was filed. According to the accuser, the surgical procedure had once even been postponed on grounds that no personnel from that institute could be present at the hospital on that day. According to the expert opinion, although there was no medical reason for the postponement of the surgery, the provision, transfer, and acquisition of the ovarian tissue samples could not be established,

5 Chief Prosecution Office of Bács-Kiskun County, B.6202/2010.

6 Chief Prosecution Office of the Capital, NF.8616/2014.

nor could they be ruled out. Either the physician carrying out the surgery or the employee of the institute could carry out the unlawful obtainment of the human tissue, however, the act had become time-barred. Due to the act being time-barred, the National Bureau of Investigation then abandoned the investigation conducted against persons unknown on the grounds of the offence of the illegal use of human body; additionally the National Bureau of Investigation also abandoned the investigation conducted against persons unknown on the grounds of violation of the rules of experimental research on humans. Since upon the findings of the investigation, committing the offence could not be established, nor could they expect any result from conducting the procedure in its entirety. It is apparent that the cases initiated domestically are not the ones considered classic in international literature; they are typically minor cases representing low danger to society and mainly acts of preparatory nature from which little information can be revealed as regards the procedures initiated due to the illegal use of human body and the offences that serve as their bases. The bulk of the data gathered in reference to the offences under consideration, their background and in respect of enforcement were extracted and derived from group interviews conducted with prosecutors, law enforcement personnel (police at the National Bureau of Investigation) and experts in the field. Below discussed are the most important findings of the interviews.

Theoretical and practical aspects of the criminal offence of 'illegal use of human body': The findings of the group interviews

Several major topics unfolded from the interviews: 1) Observations, remarks, information, and viewpoints concerning the ENYÜBS case numbers and regarding direct concern about our country's involvement in organ trading or trafficking; 2) observations, remarks and criticism by enforcement authorities as regards the facts; 3) issues concerning the regulations and practice of health interventions and researches. Below we will discuss the major findings of the interviews accordingly. From the interviews conducted with the enforcement authorities it was revealed that despite the low number of criminal proceedings initiated with regard to the illegal use of human body, the data in ENYÜBS do not fully reflect reality. The reasons for discrepancy can be varied, for instance many acts are later reclassified during the procedures, or they do not get to the stages of accusation or prosecution. Additionally, among notification obligatorily received by the National Bureau of Investigation it can very soon be found

that the factual elements necessary to initiate the criminal proceedings in the cases are missing. According to the experience of the prosecution, classic organ trading or trafficking as well as criminal proceedings in their respect rarely occur; different types of acts do occur, although in small numbers, which are assessed and investigated under these statements of the facts. According to our interviewees' concordant opinions, it is not latency that is behind the remarkably low number of cases.⁷ Although considering the international trends and the current mass migration, it has now become justified and timely to start investigating and analysing the domestic situation regarding organ trading or trafficking, the abovementioned have not yet had adverse effects in Hungary. Our country is still not a target country regarding illegal organ transplantations. The representatives of the medical field highlighted that providing the special surgical conditions required for organ transplantations, including the specially trained medical personnel – both surgeons and nurses – as well as after-care, etc. and the extremely high costs of the surgical interventions and their after-care together with the lack of demand with the ability to pay for the services all do not make it worth running such a network. According to a representative of the investigative authority, in Hungary there had been no indication whatsoever that the persons missing had become victims of organ trading or trafficking; mostly there had been fatal offences in the background. As regards the potential effects of migration, Hungary is primarily a transit country, it is highly unlikely, mainly for the reasons mentioned above such as the nature of intervention and the assumable reservations of the potential recipients that unlawful removal of organs would happen here. The low case numbers may be explained by the EU directives issued in the early 2000s, which among others regulate the quality and safety issues of organ transplantations. In Hungary, all hospitals and health care facilities must be inspected in accordance with the European Union regulations, which regulations constitute a significant safeguard against certain offences concerning the offence of the illegal use of human body. The interviewed expert of the Organ Coordination Office highlighted that Hungary's joining the organisation Eurotransplant in 2011 opened up the possibilities to monitor the entire process of organ-exporting and importing for the purpose of organ transplantation. Hungary will not have to worry about illegal organ trading or trafficking, since organ transplantation processes are very well regulated here and, apart from some minor organisational or scheduling shortcomings,

7 According to experts, in the process of the removal, storage and transplantation of tissues, as well as in relation to the genetic data carriers under the act on human genetics, there may be cases that remain hidden for good.

they function properly, therefore they are not adversely affected by international processes. There are, however, some acts occurring in the system, which meet the provisions of the offence discussed, but pose only a slight danger to society. This finding was supported by the reviewed criminal cases; it turned out that the application of the provisions of the examined offence resulted in quite heterogeneous, and typically less serious, acts not slipping through the cracks. Therefore, it is not that surprising that the surveyed enforcement authorities all reported interpretation and application difficulties in relation to the facts, which difficulties seem to correlate closely with the status of non-criminal law regulations relevant to the frame disposition of the illegal use of human body. The application of the disposition requires and necessitates the intense and effective cooperation between various special fields, thus making it indispensable that interdisciplinary approaches be encouraged. It is not only the interdisciplinary nature and the complexity of the criminal proceedings initiated in relation to the offence studied that present difficulties for the enforcement authorities in relation to their application, it is also due to the issue of legal dogmatics identified and described in relation to the legislative text and the protected legal interest. During the interviews there were opinions expressed that it is not only the investigated criminal facts that constitute problems, it is rather the incoherent nature of the legal background and its casuistic characteristics that do so. If the latter issue could be solved, and a final and definitive agreement on the protected legal interest could be reached, the criminal offence of the illegal use of human body would be functional, because it can then be clearly decided whether or not the circumstances of the facts are satisfied. In this way only those cases could be prosecuted in the criminal proceedings whose risks posed to society would justify the strictness of the enforcement authorities. During the interviews there were several suggestions made not only about the appropriate and necessary modifications of the legal background in general – e.g. Eütv. (Act) –, but also about settlements of specific practical legal problems through appropriate legal means, including the creation of a national register verifying eligibility, and the creation of a mandatory and comprehensive control system, respectively. Ensuring the priorities in quality assurance and professional traceability could be done by implementing a transplantation traceability register, which is now technically available, it is only legal regulations that are awaiting adoption. Further issues to be examined, including the traceability register of living donations, can be found in a 2010 report on transplantations (URL5) made by the State Audit Office. Our experts also suggested the need for subsequent amendments of legislation aimed at detecting and eliminating any potential abuses of living donations for transplantation, which amendments

would enable and facilitate the information exchange between ethics committees at universities. They also emphasised that Hungary is lacking a powerful health authority that could and would ensure prevention and early intervention by continuously monitoring health service providers and researchers. Screening procedures would be necessary to ensure intervention during the time of irregularities, prior to those irregularities becoming committed offences, so that these activities could be corrected and forced back to legality. A novelty of the research is the finding that the process of removal, storage and transplantation of tissues is unregulated in Hungary, which may give rise to abuses indeed. According to the estimates by our interviewed experts, the number of cases not yet identified and disclosed can indeed be significant, so latency is high. Thus, the elimination of such cases can be carried out partly by legal regulations, and partly by creating and operating the proper register. According to their proposal, it should be made mandatory that the service providers' teams – both the team of donations and processing – document into a register set up for this purpose, so the entire process can become traceable. Additionally, the experts highlighted the importance of coordinating Eütv. (Act) and Act XXI of 2008 on human genetics⁸, the timeliness of which is also reflected in the remarks made by the enforcement authorities, namely that cases in relation to human reproduction procedures have presently begun to appear in the current legal proceedings initiated upon the illegal use of human body.

Conclusions

Our research conducted on the subject of the illegal use of human body was justified by the increasing global issue of illegal organ trading or trafficking. According to the findings and considering the official statistical data as well as the information shared by the enforcement authorities and the experts, the domestic situation does not seem worrying. Greater and lesser anomalies of the legislative framework, however, did surface during the research, among which were the issues of legal dogmatics in relation to the investigated criminal offence. As regards international experience and our research, it can be established that inadequate legal regulations serve as the breeding ground for illegal deals, therefore the appropriate legislative framework may serve as a powerful weapon against tissue trading or trafficking. Criminal law, however, can only mean

8 Act XXI of 2008 on the Protection of Data on Human Genetics, on the Rules of Research and Examinations of Human Genetics, and of the Functioning of Bio-Banks.

a fraction of this legislative framework, and on the basis of the principle of ultima ratio it can only be applied when the infringements have already occurred anyway. Another important aspect in the application of the studied criminal offence is its specificity, meaning that trivial cases that only pose a low degree of danger to society should not unnecessarily occupy time, and tie up capacities of the criminal justice system and, at the same time, major offences should be sanctioned. The applicability of the frame-disposition is closely linked to the qualities of legislation. According to the findings of our research, it is only unambiguous, consistent and seamless professional legislation together with leveraging appropriate professional knowledge that can grant real protection in the field of the procedures and interventions affected by the offence of the illegal use of human body. New advances and improvements in science, however, will result in new issues time and time again in relation to acts of the illegal use of human body. Legislation, namely Eütv. (Act) did not follow these changes, therefore its regulations became obsolete from a number of aspects. Regarding our interviewees, a major objective was formulated in relation to updating and standardizing the legislative framework in reference to medical interventions in line with the developments in science.

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