

SOME CONSIDERATIONS REGARDING THE OFFENSE OF ILLEGAL REMOVAL OF TISSUES OR ORGANS, PROVIDED IN ARTICLE 384 OF THE CRIMINAL CODE

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Abstract: Legislation generally must evolve to always be able to respond to society's needs. Obviously it is the case of criminal law field to be highly dynamic in order to protect social values enshrined in the Constitution. Due to medical progress on the removal and transplantation of cells, tissues or organs of human origin for therapeutic purposes, the legislator felt the need to create a framework of criminal rule in Art. 384 of the Criminal Code.

Keywords: removal, tissue, organ, body, crime.

Introduction

The imperative of harmonizing the Romanian legislation with the European one was impressive once Romania joined the European Union. After this point, there have been a number of changes in law through the development and adoption of numerous highly important legal acts regulating various aspects of social life.

Thus, in this last period, a new Civil Code¹ came into force in 2011, a new Code of Civil Procedure², in 2013, and recently, on February 1st, 2014, a new Criminal Code³ and a new Code of Criminal Procedure⁴ entered into force.

In this Criminal Code currently in force there were introduced a series of criminal rules hitherto found in different legal acts, transposing, moreover, the EU directives in certain areas.

The reason for such a choice of the legislator can be found in the fact that the Criminal Code, being the general law in this area, presents a high degree of stability of its rules and in the fact that there was the desire to eliminate the parallel legislation found so far by the theorists and practitioners of criminal law.

A good example in this respect, but not the only one⁵, is the Art. 384 of the Criminal Code regarding the illegal removal of tissue or organs.

¹ Represented by Law no. 287/2009, published in the Romanian Official Gazette no. 511 of July 24th, 2009, and most recently corrected in the Romanian Official Gazette no. 246 of April 29th, 2013.

² Represented by Law no. 134/2010, republished in the Romanian Official Gazette no. 545 of August 3rd, 2012, and most recently amended by the Romanian Constitutional Court Decision no. 348/2014.

³ Represented by Law no. 286/2009, published in the Romanian Official Gazette no. 510 of July 24th, 2009 and most recently amended by Romanian Constitutional Court Decision no. 265/2014

⁴ Represented by Law no. 135/2010, published in the Romanian Official Gazette no. 486 of July 15th, 2010, most recently amended by the Government Emergency Ordinance no.3/2014.

⁵ In this sense, the offenses against road traffic safety were taken from the Government Emergency Ordinance no. 195/2002 and were introduced in the Criminal Code in Chapter II of title VII, title relating to offenses against public safety. Similarly, the electoral offenses represent a distinct title in the Criminal Code in force, Title IX,

Some issues related to the criminal rules provided in Law no. 95/2006 in relation to the Art. 384 of the Criminal Code

This offense is found in Title VIII, „Offenses affecting the social cohabitation relationship”, and more specifically in chapter III of this title, chapter in which there have been included the offenses against religious freedom and respect due the deceased.

According to Art. 384 of the Criminal Code, the crime of illegal removal of tissues or organs consists in the removal of tissue or organs from a corpse, without having the right to do so, and it is punishable by imprisonment from 6 months to 3 years or a fine.

Although this crime has no counterpart in the previous Criminal Code, however, there was not a legal void regarding the issue of the removal of tissues, cells and organs of human origin for therapeutic purposes, and especially regarding the applicable penalties in the event of infringements of the law.

We take into consideration the Law no. 95/2006 on healthcare reform⁶ and the Law no. 104/2003 on handling of human bodies and the removal of organs and tissues for transplantation⁷ from corpses. It should be noted that both laws have undergone modifications by Law no. 187/2012 for implementation of Law no. 286/2009 on the Criminal Code⁸.

We believe that the analysis of those changes is particularly important in understanding the choice of the legislator to introduce the criminal rule of the Art. 384 in the Criminal Code in force.

Firstly, referring to the legal text of the article in question, we observe, along with other authors in the criminal literature⁹, that this criminal rule is a general framework.

The legislator considers as illegal the removal of tissue or organs from a corpse if the activity is carried out „without having the right to do so”.

The phrase „without having the right to do so” means without legal compliance, both in terms of the action that represents the material element of the offense and in respect of persons who are authorized by law to conduct the removal, given the fact that in the legal text the active subject is not qualified and it can be any person who fulfills the legal requirements for criminal liability. However, these conditions are set out in the Law no. 95/2006, on the one hand, and in the Law no. 104/2003, on the other hand.

Moreover, the nature of general framework of the provisions of Art. 384 of the Criminal Code. is highlighted by the fact that the legislator did not define the terms he uses in the legal text, understanding here that their meaning is explained in these two laws we have mentioned above.

those offenses being taken from some laws governing different types of elections that are held in Romania (Law no. 3/2000 on the referendum, Law no. 67/2004 on local government election and Law. 373/2004 for the election of Chamber of Deputies and the Senate).

⁶ Corrected in the Romanian Official Gazette no. 391 of May 5th, 2006 and amended most recently by the Government Ordinance no. 4/2014

⁷ Republished in the Official Gazette of Romania no. 213 of March 25th, 2014

⁸ Amended in the Romanian Official Gazette no. 117 of March 1st, 2013 and most recently amended by Law no. 85/2014

⁹ Dobrinou, V., Neagu, N. (2011) *Criminal Law. Special Part. Theory and Practice*, Legal Universe Publishing House, Bucharest, p. 785

The Law no. 95/2006 defines the terms of „removal“, „tissue“ and „organ“ and the Law no. 104/2003 defines the notion of „corpse“.

In Art. 6 letter i) of Law no. 95/2006 it is stated that one of the main areas of intervention of public health care is the transplantation of organs, tissues or cells, also being specified in the art. 141 par. (1) of the same law that „the donation and transplantation of organs, tissues and cells of human origin have therapeutic purposes, ensuring quality and safety standards for a high level of human health protection (...)“.

Title VI of the Law no. 95/2006 is dedicated to the analysis of the conditions for carrying out the removal and transplantation of organs, tissues and cells of human origin for therapeutic purposes, the legislator choosing to give legal definitions of the terms he used in the content of the legal act in question.

„Removal“ means „harvesting of organs and/or tissues and/or morphologically and functionally healthy human cells to perform transplant procedures,“ according to Art. 142 letter q) of Law no. 95/2006. By „cell“ we understand „the basic anatomical and functional unit of living matter, this being the meaning according to this legal act, the term cell/cells referring to individual human cells or a collection of human cells that are not connected by any form of intercellular substance “[Art. 142 letter f)]. The „tissue“ is „a group of differentiated cells joined by intercellular amorphous substance, which together form a topographical and functional association“ [Art. 142 letters u)]. By „organ“ in the present law, we understand „the differentiated structure of an organism adapted to a defined function, made up of several tissues or cell types, showing their vascularity and innervation. An organ also consists of a part of a body, if the body is to be used for the same purpose as the whole body, while maintaining the requirements of structure and vascularisation“[Art. 142 letter o)].

Some aspects related to the provisions of Law no. 104/2003 by report to Art. 384 of the Criminal Code

Another legal act addressed to the removal of organs and tissues for transplantation, but this time only from corpses, is the Law no. 104/2003, a law which states in Art. 1 that the „human corpse“ is „the person which does not present any signs of brain, heart or lungs activity that has been declared medically deceased, according to law.“

The essence in understanding the mechanism of performing the removal and transplantation is referring to „actors“ involved in the case, meaning the donor and the receiver of cells, tissues or organs of human origin.

The „donor“ is, according to art. 142 letter k) of Law no. 95/2006, the person who donates one or more organs, tissues and/or cells of human origin for therapeutic use, whether donation occurs during lifetime or after her death. And the „receiver“ is, according to Art. 142 letter q¹) of Law no. 95/2006, the person receiving the transplant of organs and/or tissues and/or cells.

As can be seen from the legal definition, the donor can be both a living person and a dead person, respecting, of course, all other conditions imposed by this law, which is the general framework in conducting the procedure in question in the legal parameters.

Although in Law no. 95/2006 it is stated that cells of human origin can also be removed, the provisions of Art. 384 of the Criminal Code do not make reference to their illegal removal. From here we can deduce, as a first observation, that whenever we have to deal with illegal removal of human cells from a corpse, we will not apply the rules stated in Art. 384 of the Criminal Code, but the provisions of Law no. 95/2006.

This law describes a series of crimes, thus ensuring legal protection of the entire spectrum of activities that make the removal and transplantation of cells, tissues and organs of human origin.

Thus, in Art. 155 it is provided that: „(1) Taking or transplantation of organs, tissues or cells of human origin from living donors without their consent given under the law is a crime punishable by imprisonment from 2 to 7 years and interdiction of certain rights. (2) The attempt shall be punished”.

These provisions are supplemented by those of Art. 156, meaning that „making a removal thereby compromising the forensic autopsy, required by law, is a crime punishable by imprisonment from 6 months to 3 years or a fine”.

In the Art. 157 it is provided that: „(1) Any person who donates organs, tissues or cells of human origin in order to obtain financial benefits for himself/herself or for another one, commits an offense punishable by imprisonment from 3 months to 2 years or a fine. (2) Forcing a person to donate organs, tissues or cells of human origin is an offense punishable with imprisonment from 2 to 7 years and interdiction of certain rights. (3) Publication and dissemination of advertisements on the donation of organs, tissues or cells of human origin, donation which would be made in order to obtain financial benefits for oneself or for another one, are an offense punishable by imprisonment from 6 months to 3 years or a fine. ”

Two other offenses are described in the Art. 158 and 159. In the Art. 158 it is provided that „(1) Organization and conduct of the removal of organs, tissues or cells of human origin for transplantation, in order to obtain a material benefit to the donor or for the organizer, is a crime punishable by imprisonment from 2 to 7 years and prohibition of certain rights. (2) The same penalty set out in par. (1) will be the sanction for any purchase of organs, tissues or cells of human origin for resale purpose. (3) The attempt is punishable”. The last offense related to the analyzed crime is stipulated in Art. 159, as follows: „ (1) Inserting or removing in/out of the country of organs, tissues or cells of human origin without special authorization issued by the National Transplant Agency is a crime punishable by imprisonment from 2 to 7 years and the prohibition of some rights. (2) The attempt shall be punished”.

Another observation we make is that even if there are illegally collected tissues or organs from a living donor, the provisions of Art. 384 of the Criminal Code will not be applied because they refer to a deceased person.

It is interesting to see that the legislator chose to create a standard framework for criminalizing the illegal removal of tissues or organs from a corpse, but he did not do the same thing on the activity of removal from a living person.

As seen from the provisions of Law no. 95/2006, closely related to the work of removal is the transplantation of tissues, organs or cells.

This time as well, if an illegal transplant is performed, the provisions of Art. 384 of the Criminal Code will not apply, not even if the transplanted tissues or organs were illegally removed from a corpse because the material element of the offense of the above mentioned article does not refer to the act of „transplant" but only to that of „removing". Again, the situation will be governed by the provisions of Law no. 95/2006.

On the other hand, the Law no. 104/2003, as before the amendments by Law no. 187/2012, contained two offenses found in art. 27, namely the handling of corpses, and the removal of tissues and organs from cadavers in violation of this law, offenses punishable with imprisonment from 1 to 3 years, also providing in Art. 26, at the time, that „the removal of tissues and organs from dead bodies are to be performed in such way as not to prejudice the autopsy or forensic autopsy".

After the amendments given by Law no. 187/2012 the two offenses no longer appeared in the law in question and the reasons for this are various.

On the one hand, we have a situation of decriminalization. It is about handling bodies with violation of this law that has been transformed into a misdemeanor under Art. 25 of Law no. 104/2003, republished, now sanctioned with a fine from 500 lei to 3,000 lei. Finding and punishing it is being done by the police, applying to this misdemeanor the provisions of the Government Ordinance no. 2/2001 on the legal regime of minor offenses¹⁰.

On the second offense, we believe that the text of Law no. 104/2003 was properly moved in Art. 384 of the Criminal Code, the phrase „in violation of this law" becoming that of „without having the right to do so", situation justified by the fact that the Criminal Code is not the act in which there are described the conditions required in order to legally perform the removal and transplantation of tissues and organs, even from a deceased person.

A second corresponding change in the new legal text, meaning the text of Art. 384 of the Criminal Code, is relative to punishment. In order to ensure the Criminal Code in force legislator's desire to reduce the limits of punishments for all crimes of its contents in order to guide the courts to apply them, the special minimum prison sentence for the offense set out in Art. 384 of the Criminal Code was reduced from one year to six months and, further more, the fine has been provided as an alternative punishment.

The content of former Art. 26 of Law no. 104/2003 preserved after republishing the law in question, but because of the renumbering of the articles, today it is found in Art. 24.

This new article 24 is also important in terms of the rules of criminal law because its violation attracts the provisions of Art. 156 of Law no. 95/2006, article described above.

Conclusions

At the beginning of our research we stated that the criminal rule set out in Art. 384 of the Criminal Code. is a general framework. We believe that the criminal rules contained in Law no. 95/2006 have a special character to the provisions of Art. 384 of the Criminal Code and they shall apply as a priority, as the principle *specialia generalibus derogant* says, whenever the particular case brought before the Court could attract the application of both

¹⁰ Corrected in the Romanian Official Gazette no. 584 of 18 September 2001, most recently amended by Government Ordinance no. 17/2014

rules, that of Art. 384 of the Criminal Code, as well as that of any of the items mentioned above, from the Law no. 95/2006.

On the other hand, we believe that the need to take over the offense from the second sentence of former Art. 27 of Law no. 104/2003 in Art. 384 of the Criminal Code was dictated by logical reasons. The scope of Law no. 104/2003, republished, was the same before and after republishing it, that of handling of corpses and only tangentially was specified before the amendment introduced by Law no. 187/2012 that the removal for transplantation of organs and tissues from cadavers is done according to the law, under the direction and supervision of the Commission for Transplantation of Tissues, Human Organs of the Ministry of Health and Family, established by law. The general framework for the removal and transplantation of tissues, organs and cells of human origin for transplantation in therapeutic purposes, whether the donor is a person alive or deceased is established by Law no. 95/2006.

Since the removal of tissues or organs involves manipulation of the corpse, if the donor is deceased, we believe, therefore, that the phrase „without having the right to do so" established in Art. 384 of the Criminal Code refers both to the provisions of the Law no. 95/2006 and of the Law no. 104/2003.

References

- Government Ordinance no. 2/2001 on the legal regime of contraventions, corrected in the Romanian Official Gazette no. 584 of 18 September 2001, most recently amended by Government Ordinance no. 17/2014
- Law no. 104/2003 on the handling of human bodies and the removal of organs and tissues for transplantation from cadavers, republished in the Official Gazette of Romania no. 213 of March 25th, 2014
- Law no. 95/2006 on healthcare reform, as corrected in the Romanian Official Gazette no. 391 of May 5th, 2006 and amended most recently by the Government Ordinance no. 4/2014
- Romanian Criminal Code, represented by Law no. 286/2009, published in the Romanian Official Gazette no. 510 of July 24th, 2009 and most recently amended by Romanian Constitutional Court Decision no. 265/2014
- Law no. 187/2012 for implementation of Law no. 286/2009 on the Criminal Code, amended in the Romanian Official Gazette no. 117 of March 1st, 2013 and most recently amended by Law no. 85/2014
- Dobrinoiu, V., Neagu, N. (2011) *Criminal Law. Special Part. Theory and Practice*, Legal Universe Publishing House, Bucharest, p. 785