

Human Organ Crimes and Criminal Liability of Doctors and Hospitals

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Abstract

China expressed its resolution to strike human organ crime by criminalizing such conducts as organizing others to sell human organs, removing an organ from a person without his or her informed consent in the *Amendment VIII to the Criminal Law* that became effective as of 1 May 2011. However, legislators did not attach sufficient importance to the crucial role of doctors and hospitals in the whole crime chain, although it is self-evident that organ removal and transplantation cannot be conducted without adequate medical training. While a doctor can be punished according to existing criminal rules, the restriction in article 30 of the *Criminal Law* protects hospitals from being accused. In order to effectively enforce the *Regulations on Human Organ Transplantation* and prevent illicit organ trading, this article proposes that the criminal liability of doctors be highlighted by creating a new crime and hospitals be made punishable for harms caused by their failure to reasonably and faithfully fulfill legal duties regarding organ removal and transplants. Meanwhile, this article holds that positive steps beyond criminal law must be done to enhance public willingness to donate because the largest cause of organ crimes is the gap between organ supply and organ demand from which huge profit worth taking the risk of being punished flows out.

Keywords: Organ Transplants; Organ crimes; Death Inmates; Organization liability

Introduction

Organ transplantation in China started in 1960s. Although number of procedures had begun falling since 2004, China still ranked second in the world with more than ten thousands organ transplants in 2006 (Huang, Mao and Michael, 2008). However, China had no special law, act or guidelines at national level regulating organ donation and transplantation until 1 July 2006 when *Provisional Regulations on Clinical Application of Human Organ Transplantation Techniques* issued by the Ministry of Health came into effect. Meanwhile, the systematic use of organs from executed prisoners has been a target of international criticism for several decades (see e.g. Foster, 1997; Burkitt, 2012). Although the real size and procedures in practice are different from hyperbolic descriptions in overseas reports (see e.g. Burkitt, 2012), it is true that executed prisoners were and remain the biggest source of transplanted organs in China (Huang, Mao and Michael, 2008), and even judicial authorities participated in illicit organ trading by allowing hospitals

to remove organs from prisoners following their executions in pursuit of high profit (Chen and Luo, 2003). What is more astonishing is that prisoners were sometimes executed in hospitals for prompt organ removal and transplantation (Zhong, 2013).

China took a ground-breaking step on 31 March 2007, when the State Council adopted the *Regulation on Human Organ Transplantation* (RHOT), laying down fundamental principles of organ donation, qualifications of organ transplantation institutions and procedures of organ removal. In order to ensure effective enforcement of the RHOT, the Standing Committee of National People's Congress (the Legislature) criminalized those conducts hampering order of organ donation, removal and transplants and endangering victims' health and even life in the *Amendment VIII to the Criminal Law of People's Republic of China (Amendment VIII)* that became effective as of 1 May 2011.

It is self-evident that organ removal and transplantation cannot be properly conducted without adequate medical training and sophisticated instru-

ments. Therefore, it is vital to stress criminal liability of doctors and medical institutions represented by hospitals to prevention of illicit organ trading. Then, whether and how can doctors and hospitals be punished according existing laws, and how should they be punished in theory to maximize deterrence effect of criminal law? In order to answer these questions, this article will analyze constitutions of specific human organ crimes in the *Criminal Law of People's Republic of China* modified by the *Amendment VIII (Criminal Law)*, explore the possibility of charging doctors and hospitals according to existing legal rules and bring forward legislative reform proposals in following three parts.

1. Human Organ Crimes in the *Criminal Law*

According to article 234(1) of the *Criminal Law*, those involved in illicit organ trading may be charged with (i) organizing others to sell human organs, (ii) intentional assault resulting in bodily injury or murder in the case of removing an organ from a person without his or her consent or from a minor under 18, compelling or cheating another person into donating organs, or (iii) stealing or insulting a corpse in the case of removing organs of a deceased person.

1.1 Organizing others to sell human organs

First paragraph of article 234(1) of the *Criminal Law* punishes those who organize others to sell human organs on the basis of prohibition of organ trading in article 3 of the RHOT.⁽¹⁾ According to the paragraph, the prosecution must prove following facts with sufficient evidences to obtain a conviction: (i) the conduct in question breached relevant State provisions, including the RHOT and the *Provisional Regulations on the Use of Executed Prisoners' Corpses or Organs* (the *Provisional Regulations*) jointly issued by the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of Justice and the Ministry of Health on 9 October 1984.⁽²⁾

(ii) The defendant 'organized' a sale of human organs with clear knowledge of the nature, purpose and consequence of his or her conduct by recruiting, hiring, leading, directing, compelling, seducing and accommodating. As will be discussed below, if D compelled or enticed V to sell his or her own organs,

D shall be charged with intentional assault or murder instead of organizing others to sell human organs. Therefore, 'compelling and enticing' here refer to compelling or seducing a person other than an organ supplier to participate in organizing activities in relation to organ trading such as contacting buyers and collecting money.

(iii) The 'organ' that was or is to be traded is part or all of an organ with a specific function provided in article 2 of the RHOT, including heart, lung, liver, kidney and pancreas. It should be noted that organizing other persons to sell body tissues such as stem cells, cornea and marrow is not punishable according to article 234(1) of the *Criminal Law* currently, although harm the act may cause is no less than that of organizing others to sell organs.

1.2 Intentional assault and murder

Second paragraph of article 234 of the *Criminal Law*, responding to prohibitive norms in article 7⁽³⁾ and article 9⁽⁴⁾ of the RHOT, provides that anyone who removes an organ from a person without his or her informed consent or a minor under 18 or compels or cheats another person into donating organs shall be charged with intentional assault causing bodily injury or murder, both of which are punishable by death. Removing an organ from a person without his or her informed consent is intrinsically illegal and punishable by criminal law. Therefore, a consent can function as a justifiable defense only when it is made (i) by a person who is legally capable to authorize the conduct in question (ii) when s/he is fully informed of the nature of the conduct, potential harm it may cause, etc. and (iii) free to make a choice (see e.g. Han, 2002: 122-5; Martin and Storey, 2007: 272-8). It follows that a consent given by a person below the age of consent, unable by reason of youth, mental or psychological disease or intoxication or known by the defendant to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct in question or obtained by force, duress or deception should be ineffective.

Two questions must be answered here. One is how we shall interpret 'without his or her consent'? Zhao (2011) holds that, on the one hand, the consent in question should be expressed in a written and explicit way and no oral, presumed or implicit consent shall be considered effective. On the other hand, con-

tents of the consent should be expressed in detail, specifying which organ or which part of an organ is allowed to be removed. If V consented to donate his or her lung or one third of his or her lung, but D intentionally removed V's liver or half of V's lung without informing him or her, D cannot be said to have acted with V's consent. In addition, the consent must be made before removal and those made during and after a removal operation cannot lead to exoneration.

Judged from the purpose to safeguard human health and protect legal interests of citizens declared in article 1 of the RHOT, above interpretation is pertinent. However, it might be possible for a consent to be given in the very beginning of removal operation if the donor is mentally and physically capable of making a free choice at the moment. For example, X consented to donate one fourth of his lung to save his father, and was told that one third would be necessary to ensure the success of his father's operation when the removal operation began. If X signed the written consent all by his own will, the doctor shall not incur criminal liability either.

The other is 'a minor under 18' is a subjective constitutive element of the crime or an objective one? If it was the former, the prosecution must prove that the defendant removed with the knowledge of the victim being under 18; if it was the latter, a crime would have been committed as long as an organ of a minor under 18 was removed, whether the charged was aware of the victim's age or not at the moment of removing. Zhao (2011) insists that the knowledge of the charged should be proven because the age requirement reflects or to a certain degree decides the extent to which the conduct in question is illegal and the knowledge of the victim's age manifests the defendant's personal dangerousness.

The wording that whoever intentionally inflicts bodily injury upon another person should be punished in article 234 of the *Criminal Law* means that the injury must be intended. Therefore, the prosecution must prove that a defendant intentionally removed an organ from a minor. However, it is arguable whether the prosecution must prove the defendant's knowledge of the victim's age at the moment of removing. Article 16 and article 18 of the RHOT require a doctor to ensure that the donor is fully informed when granting his or her consent before removal operation. Obviously, to ensure that the donor is beyond the age of

consent is an inherent part of above responsibility. If the charged did not faithfully fulfill this responsibility, intentionally or recklessly, it can be presumed that s/he let be the possibility of the victim being under 18. Accordingly, it is sufficient to prove (i) an organ was removed from a minor and (ii) the defendant did not fulfill his or her responsibility to ensure that the victim is beyond 18 for the prosecution. The defendant shall of course be allowed to raise the defense of due diligence.

It should be noted here that although organizing other persons to sell body tissues such as stem cells, cornea and marrow is not punishable according to article 234(1) of the *Criminal Law*, the organizers might be punished as accomplice or instigator of intentional assault or murder in the case where a bodily injury or a death happened because the act of organizing constitutes an indispensable and substantial part of assaulting or killing.

1.3 Stealing and insulting a corpse

Article 8 of the RHOT allows spousal, adult children and parents of a deceased person to donate his or her organs by signing a joint written consent where s/he did not express an objection to the donation when alive, while banning organizations and individuals from donating or removing his or her organ when s/he has expressed such an objection when alive. To ensure the banning is strictly observed, third paragraph of article 234(1) of the *Criminal Law* punishes anyone who removes an organ from a deceased person against his or her objection or without his or her consent made when alive under the charge of stealing or insulting a corpse, which may lead to an imprisonment of as high as three years.

It is noteworthy that the 'deceased' referred to here include both adults and minors, although removing a living organ from those under 18 is completely banned by the RHOT. For example, according to the *Legal Evening* published on 17 May 2012, a mother volunteered to donate all organs of her 11 years old son after he lost his life in a car accident in Shenzhen with the hope to continue his life in another form and thereby saved an adult patient in Guangzhou, Guangdong province.

Sophisticated instruments are undoubtedly necessary to removing and transplanting organs. What is more important is adequate medical training and skills.

For example, the *Yangzhou Times* published on 2 March 2012 reported that 16 defendants rented a villa in the suburb of Beijing and transformed it into a kidney-removing base equipped with advanced instruments, but they had to hire licensed doctors and nurses from a public hospital to carry out removal operation. Therefore, to impose proper criminal liability on doctors and hospitals is one of the keys to effective prevention of organ crimes. Then, can doctors and hospitals be held criminally liable according to existing laws?

2. Criminal Liability of Doctors under Existing Law

Doctors involved in organ crimes can be held criminally liable not only according to aforementioned article 234(1), but also according to article 233 and article 235 of the *Criminal Law*. However, as will be discussed below, the deterrence effect of these articles is doubtful as they are not directed at and severe enough to offset doctors' motivation to extract monetary advantage from engaging in illicit organ trading.

2.1 Criminal liability of doctors under article 234(1)

A doctor can undoubtedly be charged with organizing others to sell human organs, intentional assault, murder or stealing or insulting a corpse provided in article 234(1). However, s/he can only be charged as an accessory in most cases according to article 26 of the *Criminal Law* because s/he is usually not the 'organizer' but a hand hired to finish the last step of the crime, removing organs and does not organize or lead a criminal group. Therefore, doctors are in principle sentenced to punishments less severe than those imposed on organizers of organ sale in practice, although they play such an irreplaceably decisive role in the whole chain of human organ crimes from looking for organ suppliers, finding buyers to transplantation that it can even be said the majority of organ crimes in China would not have been committed without their involvement. Meanwhile, despite that the absolute majority of doctors who took a part in the commission of organ crimes are in pursuit of financial advantage, property-related penalties are not available in cases of murder, intentional assault and stealing or insulting a corpse.

2.2 Criminal liability of doctors under article 233 and article 235

In addition to newly created organ crimes in article 234(1), a doctor who is involved in living organ removal may be charged with negligently causing death to another person in article 233 and negligently causing severe injuries to another person in article 235 of the *Criminal Law* if s/he removes or transplants breaching his or her legal duty.⁽⁵⁾ According to the articles, the prosecution should prove with sufficient evidences following facts to obtain a conviction against D: (i) a death or a severe injury was caused; (ii) D's failure to reasonably and faithfully fulfill a duty within his or her capability; and (iii) a blameworthy causation between the death or the injury and the failure. It is easy to prove the first one as the loss of an organ, be it a kidney or part of lung, is apparently a 'severe injury' according to article 95 of the *Criminal Law*⁽⁶⁾ and the consequence of death is self-evident. Therefore, Problems lie in proving the latter two.

2.2.1 D's failure to reasonably and faithfully fulfill a duty within his or her capability

Only if all answers to following questions were 'Yes' can the conclusion be drawn that D failed to reasonably and faithfully fulfill a duty within his or her capability: (i) Is there a duty that D is supposed to fulfill to avoid the injury or the death in question? The answer to this question is yes. Removing an organ from a person is always illegal and therefore prohibited unless the person consents to the removal. Doctors are responsible to ensure that the consent of the person is true and informed in the way article 19 of the RHOT provides.⁽⁷⁾ Meanwhile, the same article requires doctors to confirm that normal physical functions of the donor will not be impaired except for the direct effect from the removal of the organ. Therefore, a doctor would have violated his or her legal duty if s/he removed an organ from a person without obtaining his or her informed consent or confirming that s/he is fully aware of possible harmful effects on his or her normal physical functions.

(ii) Is D capable of fulfilling the duty? The answer to this question is also yes. Article 11 of the RHOT requires that medical institution that is to engage in human organ transplantation have licensed doctors and other medical personnel who are suitable

for engaging in human organ transplantation. According to article 9, article 13 and article 14 of the *Law on Medical Practitioners* that became effective as of 1 May 1999, doctors are not qualified to work in institutions of medical treatment unless they are registered in the administrative department of health under the local people's government at or above the county level, to which the qualification of doctor is a precondition. And anyone who wants to attend the qualification examination should satisfy one of the following conditions: (i) having received at least regular medical college education in an institution of higher learning, and has served at least one year in an institution of medical treatment, prevention or health care under the supervision of a medical practitioner; (ii) Having received junior college medical training in an institution of higher learning and served at least two years in an institution of medical treatment, prevention or health care since being awarded the practicing certificate of assistant medical practitioners; or having received medical training in a secondary training school and served at least five years in an institution of medical treatment, prevention or health care. Apparently, the doctors who are permitted to conduct organ removal operation should have satisfied aforementioned conditions and therefore are capable of fulfilling relevant duties provided in the RHOT.

(iii) Has D reasonably and faithfully fulfilled the duty or not? The answer to this question depends on whether or not a doctor has strictly observed procedures provided in the RHOT and *Provisional Regulations on Clinical Application of Human Organ Transplantation Techniques* when conducting organ removal and transplantation with due diligence. If the doctor did not observe legal procedures with due diligence, such as making the donor sign the consent form without giving sufficient explanation, it is evidently that s/he has not reasonably and faithfully fulfilled legally prescribed duty.

2.2.2 Causation between a death or an injury and D's failure to fulfill a legal duty

In order to establish a causation between an injury or a death and D's failure to fulfill a legal duty, it must be proven that (i) there exists an objective link between the death or the injury and D's failure to fulfill the legal duty and (ii) D has foreseen the death or

the injury or should have foreseen it but failed to do so due to negligence. The former is self-evident as it is the conduct of removing a human organ that results in victim's injury and that the removal is illegal until legally prescribed procedures are strictly observed. To put it in another way, if an injury or a death is caused, the failure to observe legal procedures itself is the evidence of the objective link between the injury and D's failure to fulfill his legal duty. Then, how to establish that D has or should have foreseen the death or the injury?

Whether or not D has foreseen an injury or a death can be established on the fact whether s/he took necessary steps to prevent the death or the injury from happening. The reasons that D would do what s/he can to prevent the forbidden consequence include, (i) s/he would be exempted if the injury was finally prevented as criminal law does not punish a negligent conduct causing no harm, (2) his or her conduct that was caused through negligence would be punished as intentional crimes if s/he had foreseen the injury but done nothing to stop it and in turn be given a higher sentence according to article 14 of the *Criminal Law*,⁽⁸⁾ and (iii) his or her efforts to prevent the injury may be considered a mitigating circumstance even if the injury or the death eventually was caused.

The conclusion that 'D should have foreseen but failed to do so due to negligence' has two-fold implications. One is that D is responsible to foresee the injury or the death in question. The other is that D is able to foresee it in the then circumstances. D's responsibility to foresee and prevent potential risk has been analyzed in previous part. Therefore, the only problem left here is by what standard we shall decide D is able to foresee the injury or death in question in then circumstances.

Three standards have been proposed in academic works (see e.g. Gao and Ma, 2000: 119-20; Zhao, Bao, Zeng and Wang, 2010:127-8). The 'subjective standard' proposes that whether D is able to foresee the risk of an injury or a death should be decided on the basis of D's own situation, such as whether s/he was psychologically competent and experienced an emotional disturbance prior to the moment that s/he was expected to exercise due diligence. On the contrary, the 'objective standard' holds that the decision depend on the answer to the question whether a reasonable man is able to foresee the risk if s/he was in D's situa-

tion. Between the subjective standard and the objective standard is the ‘mixed standard’, suggesting that D can be said to be able to foresee the risk if a reasonable man with D’s particular characters such as age, sex and professional training is. Then, which one is preferable?

The first one is so subjective that it would be extremely hard to obtain a conviction if D remains silent as whether s/he has foreseen the risk of a harm and in turn the existence of a blameworthy causation totally depends on his or her confession. The second one would in fact exonerate doctors from criminal liability because it is almost impossible for a reasonable man to foresee the risk due to the shortage of medical knowledge and training necessary to assess potential influence and risk in removing a human organ and therefore undermines the deterrence value of criminal punishment. The ‘mixed standard’ is relatively reasonable and practical. On the one hand, it is not so subjective as the first one because it is not whether D but a reasonable man with D’s age, sex, medical qualifications, etc. is able to foresee the risk of a harm that matters. On the other hand, it is not unfair to D because the reasonable man would be put into the situation where D was in.

2.3 Legislative proposals

Two defects can easily be seen in laws regarding the criminal liability of doctors. One is that they can only be convicted as accessory in most cases according to article 234(1) of the *Criminal Law*, and this severely weakens the general deterrence of criminal punishment when the irreplaceable crucial role they play in the whole crime chain is taken into account. the other is that they cannot be subjected to property-related punishments. Practice has proven that perpetrators of organ crimes, either doctors or other ones, take the risk of being punished mainly for monetary advantage. Accordingly, deprivation of financial gains can effectively offset criminals’ motivation and in turn increase special deterrence effect of punishment.

Therefore, this article proposes that the role of doctors be highlighted by either (i) creating a new crime in the *Criminal Law* that particularly applies to doctors such as illegally removing and/or transplanting human organ, or (ii) adding a new paragraph into article 234(1) of the *Criminal Law* providing that a

doctor whose act is a substantial part of commission of an organ crime should be punished as a principal. Relatively, the first choice is preferable because separated punishments same as or even more serious than those provided in article 234(1) can be stipulated and a separate article is a much sharper warning to those potential to take advantage of their professional convenience to become a part of the chain of organ crime. Meanwhile, this article proposes that property-related penalties including confiscation of criminal proceeds and fine be made available so as to decrease doctors’ criminal motivation.

Finally, this article suggests that suspension and revocation of practicing certificates be applied to convicted doctors. Currently, practicing certificate of a doctor may be suspended and revoked according to article 28 of the RHOT.⁽⁹⁾ However, two problems remain when it comes to criminal law. One is that the suspension and revocation in the article are administrative penalties and cannot automatically be applied in criminal cases. The other is that the article does not clarify whether a convicted doctor whose practicing certificate is revoked is allowed to apply for a new one or not. Therefore, it would help to maximize special deterrence value of criminal punishment to provide in article 234 (1) that practicing certificate of a convicted doctor shall be suspended for a period of more than one year but less than five years and be revoked when the circumstances are serious, and s/he shall not be allowed to apply for a practicing certificate again if the practicing certificate is revoked due to an intention crime.

3. Criminal Liability of Hospitals under Existing Law

While doctors can be held criminally liable under existing laws, hospitals cannot because neither article 234(1) nor article 233 and article 235 of the *Criminal Law* provide any punishment for organizations. However, this does not mean that a hospital cannot and should not be held criminally liable in theory. One the one hand, the people’s court punished those who organized others to sell organs under the charge of illicit trading in article 225 of the *Criminal Law* before the entry into force of the *Amendment VIII* in 2011,⁽¹⁰⁾ which can be applied to hospitals that play a part in organizing others to sell organs.⁽¹¹⁾ This is a solid proof that a hospital can incur criminal liability for illicit

conducts relating to human organs. On the other hand, hospitals are supposed to assume almost the same duties regarding organ removal and transplantation as doctors do according to the RHOT. Their recklessness and negligence to faithfully and reasonably fulfill legal duties are as harmful as those of doctors are. For example, reports have disclosed that doctors and organ transplantation centers conspired with agencies to fake materials proving donors and recipients are lineal relatives in order to make illicit profits (see e.g. Zhong, 2013). Therefore, hospitals should be punished too for the purpose of preventing illicit organ trading and personal harm.

Considering that the absence of punishment for hospitals does not accord with legislative intent to enforce the RHOT through criminal punishment and the harm they are potential to cause, this article holds that criminal sanction should be imposed on them in the case where they (i) engage in human organ removal or transplantation without official permission of authorities in charge. According to article 11 of the RHOT, all medical institutions that are to conduct organ removal and transplantation must apply for registration of a clinical department related to human organ transplantation with the competent health department of the government of the province, autonomous region, or municipality directly under the Central Government where it is located. If a hospital conducted organ removal and transplantation operations without registration and charged patients, it may be charged with organizing others to sell organs, intentionally or negligently causing injury to others, etc.;

(ii) transplant an organ in violation of ethical principles and technical rules. For example, article 15 of the RHOT requires all medical institutions and their medical personnel to comply with ethical principles and technical rules for administration of human organ transplantation in engaging in organ transplantation. If a hospital transplanted an organ in violation of particular ethical principles or rules and thereby resulted in an injury or a death, it may be charged with causing an injury by negligence or intentionally assault resulting in an injury or a death;

(iii) transplant or remove an organ in violation of procedures in the RHOT. For example, a hospital should make a decision on organ removal following strict procedures according to article 29 of the RHOT.⁽¹²⁾ If a hospital made a decision without respect-

ing legally required procedures and thereby caused an injury or a death, it may be charged with intentional assault or causing a severe injury by negligence. A more concrete example is article 10 of the RHOT. The article restricts the scope of recipient of a living organ within a donor's spouse, lineal relatives, collateral relatives by blood up to the third degree of kinship and a person for whom there is evidence to prove that he has developed a kinship with the donor due to his supporting or other reasons. Therefore, if a hospital authorized an organ transplantation for a financial reason knowing that the recipient is not in the above scope, it may be charge with the crime of organizing others to sell human organs; or

(iv) participate in commission of an organ crime as accomplice by leasing medical equipments or facilities to a person or an organization knowing that latter may utilize them to commit an organ crime. For example, the defendants in a case reported by the *Yangzhou Times* on 2 March 2012 contracted with a local hospital in Xuzhou, Jiangsu province and hired licensed doctors there to remove kidneys in contravention with the RHOT. Theoretically, it is possible to charge the local hospital as an accessory with organizing others to sell organs because it did not reasonably fulfill its duty to ensure the lawfulness of medical conducts carried out under its supervision.

4. Efforts beyond Criminal Law

However severe it is, criminal law alone can never succeed in achieving the ultimate goal of protecting victims' fundamental rights and ensuring the order of organ removal and transplantation because it cannot resolve the insufficiency of organ supply. Therefore, more efforts beyond criminal law should be made to increase organ supply, among which to promote transparency in organ donation and organ allocation and protect legal interests of death inmates are relatively urgent, because public trust in authorities's effort to ensure fair use of donated organs and respect for vulnerable persons is the key to enhancing public donation willingness.⁽¹³⁾

4.1 Promotion of transparency in organ donation and use

Criminals commit organ crimes mainly for the purpose of making profit at underground market of human organs, which has become a thriving and seem-

ingly ineradicable existence because of the ever increasing gap between organ demand and organ supply. According to the Ministry of Health, about 1.5 million Chinese need organ transplants every year, but only around 10,000 transplants are performed annually due to a lack of donors (Cao, 2012). Therefore, a fundamentally effective way to reduce organ crimes is to increase organ supply, which to a high degree depends on citizens' willingness to donate. It is regretful to see that potential donors in China are more willing to 'sell' than to 'donate' their organs for monetary advantage although relevant authorities have been calling for voluntary and gratuitous donation.⁽¹⁴⁾ For example, the majority of victims volunteered to sell their kidneys for money in the beginning in a case of forcing others to sell kidneys heard at the People's Court of Haidian District of Beijing in April 2010 (Ji, 2010).

In addition to the desire for monetary advantage, the erosion of public trust in Red Cross Society of China (RCSC) commissioned by the Ministry of Health to run organ donation system and play the role of watchdog has also contributed to the decrease of public donation willingness, especially after the well-known Guo Meimei Scandal in June 2011. Guo Meimei, a 20-year-old woman, posted a number of photos showing off her lavish lifestyle with luxury sports car and designer bags and identified herself as 'commercial general manager' for 'China Red Cross Chamber of Commerce' on Sina Weibo. Public wonder was quickly raised and spread all over China: What is the connection between Guo Meimei and the RCSC, did its staff abuse the public funding of the charity organization, is the RCSC making profit from our donation? These wonders in turn led to sharp decrease of public trust in the RCSC (see e.g. Shang-guan, 2011).

Moreover, the RHOT allows hospitals to charge a recipient for fees for removal and transplantation of a human organ while prohibiting them from charging the recipient for an organ transplantation operation.⁽¹⁵⁾ To a degree, this article opened the Pandora box and has led to disorder and corruption in practice, just as a commentator once stated, although 'China's central government issued its first national level regulations on human organ transplants in 2007, banning organizations and individuals from trading human organs. But there are still some loopholes in the supervision of hospitals (Cao, 2012), and impressed the public in the

way that hospitals are harvesting huge profit from donated organs.

The distrust in the RCSC and hospitals in turn led to widespread reluctance to donate organs. For example, a survey of 606 undergraduate students in two major cities of Wuhan and Guangzhou show that only 34 percent of the interviewees are willing to be organ donors (Huang, Millis, Mao, Millis, Sang and Zhong, 2012). Therefore, the transparency and fairness in organ donation and use must be promoted by establishing and strictly implementing procedures of donating and allocating organs, making statistics regarding organ donation accessible to the public, inviting a third party to supervise organ donation, procurement and allocation informing the public of rates for relevant fees, providing sanctions against procedural violations, etc. in order to enhance public willingness to donate organs and public trust in RCSC and hospitals certified to conduct organ removal and transplantation operation.

4.2 Protection of fundamental rights of death inmates

According to Huang, Millis, Mao, Millis, Sang and Zhong (2012: 862), China is the only country that systematically uses organs from executed prisoners in transplantation procedures. 65 percent of organs that are transplanted in China are from deceased persons, and over 90 percent of organs from deceased persons are from executed prisoners. It is right because of available organ source and cheap operation cost that a big number of patients from other parts of Asia, including Malaysia, Singapore, Taiwan, and Thailand rushed into China for organ transplantation in 1990s. A leading kidney specialist in Malaysia even estimated that over 1000 Malaysians alone have had kidney transplants in China by the beginning of the new century (Parmly, 2001). Although the Ministry of Justice mandated that the removal of prisoners' organs cannot proceed until informed consents have been obtained from the prisoners or their families, the effectiveness of the mandate has yet to be determined, not only because the dissemination of orders of central authorities to local level authority in a developing country as large as China is a hard task, but also because the enormous profit of using organs from executed prisoners makes relevant State functionaries and public authorities reluctant to enforce the mandate strictly.

The use of organs from death inmates may undercut the morality of execution and face a number of practical obstacles that Aruthur Caplan (2011) once observed in the US. Meanwhile, a number of serious problems have been disclosed in the use of organs from death inmates. For example, it is reported that an intermediate people's court executed a death prisoner without arranging a last meeting for the prisoner with his families or even informing them of the execution. The main reason is said to be that the death prisoner has 'voluntarily' signed the consent to donate his organs and a delayed execution may affect the quality of organs to be removed (Zhong, 2012). As a consequence, researchers have proposed that death inmates should be banned from donating their organs except to their spouses and blood families because they are in such a vulnerable and compelling environment that their 'voluntariness' cannot be guaranteed at all (see e.g. Qu, 2005).

Allowing death inmates to donate their organs post-execution, however, is still a practical choice both to the society and to death inmates themselves. The fact that death inmates are and may continue to be the largest group of organ supplier and the willingness of the public are not as high as expected in China implies that the gap between organ demand and organ supply will become even larger if the donation of death inmates were completely banned, which will in turn increase the pressure of preventing organ crimes. Meanwhile absolute majority of death inmates are those convicted of such violent crimes as murder, rape resulting in death, robbery resulting in death and drug crimes in China. Some leave their families with nothing but misery and poverty after being executed. Therefore, it is beneficial and a psychological relief to a death inmate if his or her families can benefit from their organ donation (see e.g. Liu, 2012). In addition, there are death inmates who truly want to expiate their crime by donating their organs. For example, the *Legal Daily* published on 1 June 2005 reported that Wang Jihui, a defendant sentenced to death at the first instance, voluntarily applied to donate his kidney to save a middle school student suffering from a renal failure.

To stress practical needs does not mean that the protection of legal interests of death inmates can be neglected. Instead, this article suggests that no organ should be removed from an executed prisoner until

following requirements are met: (i) the executed prisoner granted his or her consent when alive and reached an agreement with the recipient on compensation with his or her families being present and under the supervision of a third party beside execution authority and the hospital that is to conduct organ removal and transplantation operation, (ii) all the compensation is directly given to the families of the executed prisoner, and (iii) statistics and records of removal and use of organs from death inmates are made accessible to the public. Meanwhile, in order to ensure fairness and justice in using organs from death inmates, as Liu Renwen, a leading criminal law expert at Law Institute of Chinese Academic of Social Sciences, suggests (2012), no judicial authority, medical institution and person should be allowed to make profit from using organs from executed prisoners.

5. Conclusion

Human organ crimes attract increasingly intensive criminological, political and legal attention along with the gap between organ supply and organ demand enlarging continuously. According to the World Health Organization, more than two thirds of the 106,879 organs known to have been transplanted in 95 Member States in 2010 are kidneys. But those 106,879 operations satisfied only ten percent of the global need (Aronowitz and Isitman, 2013). The shortage of organ supply led to a rapid increase in transnational human organ trafficking. Unsurprisingly, the trade in human organs, mostly kidneys, from live donors generally flows from poor, underdeveloped countries to rich, developed ones, and China has for a long time been one of the countries of origin for those selling kidneys. Considering the fact that governments of almost all western countries had passed laws to penalize sale and purchase of organs for transplantation by mid-1990s (Foster, 1997), the criminalization of conducts relating to organ removal and transplants in the *Amendment VIII*, although it should be welcomed, is actually a late move.

Meanwhile, two major defects, the insufficient importance on the role of doctors and the absence of criminal sanction for hospitals, can be easily seen in existing laws from the point of view of crime prevention.⁽¹⁶⁾ These two defects are even more dangerous and larger than expected if the fact that China still allows systematic use of organs from executed prisoners was

taken into account because hospitals have the biggest, if not exclusive, access to those organs. This article proposes to highlight the role of doctors by creating a crime and punish hospitals for harms resulting from their failure to reasonably and faithfully fulfill their legal duty.

Finally, this article holds that to increase organ supply is a more effective way than criminal law to reduce organ crimes, and transparency in organ donation and allocation should be promoted as soon as possible to enhance public willingness to donate. Meanwhile, this article suggests that the protection for fundamental rights of death inmates should be strengthened due to the fact of death inmates remaining the largest source of organs. Briefly, China has taken meaningful and positive steps by implementing the RHOT and penalizing human organ trading, but more laborious works are still waiting to be done.

NOTE

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- (1) The article provides that no organization or individual may, in any form, trade in human organs or engage in any activities related to such trade.
- (2) The use of organs from executed prisoners shall also be subject to article 234 (1) as long as no law or act provides otherwise.
- (3) The article explicitly declares that no organization or individual shall compel, seduce or cheat others into donating human organs.
- (4) The article forbids anyone to remove a living organ from a minor under 18 for the purpose of organ transplantation.
- (5) The article provides that whoever negligently injures another person and causes severe injury to the person shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention, except as otherwise specifically provided in this Law.
- (6) According to the article, "serious injuries" refers to any of the following: (i) injuries resulting in a person's disability or disfigurement; (ii) injuries resulting in a person's loss of his hearing, sight or the function of any other organ; or (iii) other injuries that cause grave harm to a person's physical health.
- (7) The article requires that the medical institution engaged in human organ transplantation and its medical personnel shall fulfill the following duties before removing a living organ: (i) informing the donor of the risks of the operation, matters needing attention after the operation, possible complications and preventive measures therefor, and sign an instrument of informed consent with the donor; (ii) examining the written consent given by the donor to the donation of his organ and the materials proving that the donor and the recipient have a relationship prescribed in Article 10 of these Regulations; and (iii) confirming that the normal physical functions of the donor will not be impaired except for the direct effect from the removal of the organ.
- (8) The article provides that an intentional crime refers to an act committed by a person who clearly knows that his act will entail harmful consequences to society but who wishes or allows such consequences to occur, thus constituting a crime.
- (9) The article provides that where any of medical personnel is found in any of the following circumstances, he shall be given a sanction in accordance with law; if the circumstances are serious, the competent health department of the local people's government at or above the county level shall suspend his practice of medicine for a period of not less than six months but not more than one year in accordance with its functions and duties; and if the circumstances are especially serious, his practice certificate shall be revoked by the department that issued the certificate: (i) removing a human organ without consent given upon examination by the committee on clinical application and ethics of human organ transplantation; (ii) failing to fulfill the duties of information, examination and confirmation in accordance with the provisions of Article 19 of these Regulations before removing a living organ; or (iii) failing to medically treat a cadaver in an ethical manner after removing an organ therefrom and to restore it to its original appearance.
- (10) According to the article, those who commits illegal acts in business operation in the article and thus disrupts market order in violation of State regulations shall be sentenced criminal detention, imprisonment or/and fines.
- (11) The article provides that where a unit commits the crime mentioned in the Articles from 221 through 230 of this Section, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the crime shall be punished in accordance with the provisions of the Articles respectively.
- (12) The article provides that a hospital should be sanctioned if it made a decision on removing a human organ without consent given upon examination by the Committee on Clinical Application and Ethics of Human Organ Transplantation or coerced its medical personnel into removing a human organ.
- (13) Professor Huang Jiefu, the Director of China Association of Organ Donation and Transplant declared at a seminar organized by China Organ Procurement Organization on 3 December 2014 that only use of donated human organs would be legally allowed since 1 January 2015 (<http://news.qq.com/a/20141204/029826.htm>). However, the low donation rate and the large gap between organ supply and organ demand makes it highly doubtful that the prohibition of use of organs of death inmates will be strictly observed in practice and the possibility remains that the banning further leads to a sharp increase in organ demand at black market.
- (14) According to article 7 of RHOT, donation of human organs shall follow the principles of voluntariness and gratuitousness.
- (15) Article 21 of the RHOT provides that a medical institution

engaged in human organ transplantation, which performs a human organ transplantation operation, may not charge the recipient for the transplanted organ or do so in a disguised form, except for the fees as follows: (i) operation fees for the removal and implantation of the human organ; (ii) fees for the preservation and transport of the human organ; and (iii) fees incurred by medicines, tests and medical materials consumed for the removal and implantation of the human organ. The charging rates for the fees prescribed in the preceding paragraph shall be set in accordance with the relevant provisions of laws and administrative regulations and made public.

- (16) Proposals that criminal liability of doctors and hospitals should be stressed were once brought forward when the Standing Committee of National People's Congress reviewed the draft of the *Amendment VIII to the Criminal Law*. Unfortunately, they were finally declined (see e.g. Zhao, 2011).

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