

ETHICAL AND LEGAL CONSIDERATIONS ON ORGAN PROCUREMENT FROM EXECUTED PRISONERS IN CHINA

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Abstract: In the past several decades, due to the severe shortage of transplantable organs, organ procurement from executed prisoners have been used to transplant organs, which goes against international ethics standards. As of January 2015, China phased out the use of executed prisoner organs and embarked on its transplant reform. Since then, many efforts have been made to meet the international ethics guidelines on organ transplants. In this study, we aim to elaborate on the status quo of organ procurement from executed prisoners from the perspective of ethics and law. Although China has made great progress in organ donation and transplantation, some Western transplant surgeons and bioethicists still hold outdated views on organ donation and transplantation in China, which will not bring any benefits to its development and will alienate it from the international transplant community. In this study, we propose that both the international transplant society and Chinese transplant community, with mutual cooperation and trust, should jointly make efforts to advance the development of organ donation and transplantation in China.

Keywords: Organ transplant, Executed prisoners, Ethics, Law

Consideraciones éticas y legales sobre la obtención de órganos de presos ejecutados en China

Resumen: En las últimas décadas, debido a la grave escasez de órganos trasplantables, la obtención de órganos de presos ejecutados se ha utilizado para trasplantar órganos, lo que contraviene las normas éticas internacionales. A partir de enero de 2015, China eliminó gradualmente el uso de órganos de prisioneros ejecutados y se embarcó en su reforma de trasplantes. Desde entonces, se han realizado muchos esfuerzos para cumplir con las directrices éticas internacionales sobre trasplantes de órganos. En este estudio, nuestro objetivo es profundizar en el status quo de la obtención de órganos de presos ejecutados desde la perspectiva de la ética y la ley. Aunque China ha logrado un gran progreso en la donación y el trasplante de órganos, algunos cirujanos de trasplantes y bioéticos occidentales todavía tienen opiniones obsoletas sobre la donación y el trasplante de órganos en China, lo que no traerá ningún beneficio para su desarrollo y lo alejará de la comunidad internacional de trasplantes. En este estudio, proponemos que tanto la sociedad internacional de trasplantes como la comunidad china de trasplantes, con cooperación y confianza mutuas, deben hacer esfuerzos conjuntos para avanzar en el desarrollo de la donación y el trasplante de órganos en China.

Palabras clave: trasplante de órganos, prisioneros ejecutados, ética, ley

Considerações Éticas e Legais sobre Obtenção de Órgãos de Prisioneiros Executados na China

Resumo: Nas últimas décadas, devido à grave escassez de órgãos transplantáveis, a obtenção de órgãos de prisioneiros executados tem sido usada para o transplante de órgãos, o que vai contra padrões éticos internacionais. A partir de janeiro de 2015, a China eliminou o uso de órgãos de prisioneiros executados e lançou sua reforma em transplantes. Desde então, muitos esforços foram feitos para satisfazer diretrizes éticas internacionais sobre transplantes de órgãos. Nesse estudo, nós pretendemos estudar o status quo da obtenção de órgãos de prisioneiros executados desde uma perspectiva da ética e da lei. Embora a China tenha feito grandes progressos em doação e transplante de órgãos, alguns cirurgiões de transplantes e bioeticistas ocidentais ainda mantêm visões desatualizadas sobre doação e transplante de órgãos na China, as quais não trarão quaisquer benefícios para seu desenvolvimento e irão aliená-las da comunidade de transplantes internacional. Nesse estudo, nós propomos que tanto a sociedade de transplante internacional e a comunidade de transplante chinesa, com cooperação e confiança mútuas, deveriam empreender esforços conjuntos para avançar o desenvolvimento de doação e transplante de órgãos na China.

Palavras chave: transplante de órgãos, prisioneiros executados, ética, lei

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Introduction

After many efforts by Chinese medical authorities, since 1 January 2015, China ended its reliance on the use of organs from executed prisoners and set up a nationwide voluntary donation system instead. However, even after 2015, some Western colleagues still report that China continues to use executed prisoners as organ donors(1-3), which has actually been brought to an end by the Chinese government. All of this suggests that the previous procurement of organs from executed prisoners in China had attracted much attention from Western transplant surgeons, medical practitioners and bioethicists. It also indicates that the new development of organ transplantation in China has not been well known by Western communities. As Chinese bioethicists, we hold a better understanding and recognition of organ procurement from executed prisoners in China than colleagues in the West. In this study, we will elaborate on its past and present status from the perspective of international ethics and laws and discuss new ongoing trends in organ donation and transplantation in China to bring insight to the historical development of organ procurement in China, and the status of death row inmates.

Historical Development of Organ Procurement of Executed Prisoners

In 1984, the first “Provisional Regulation on the Use of Dead Bodies or Organs from Condemned Criminals” was enacted, which required that the Supreme People’s Procuratorate, the Ministry of Public Security, the Supreme People’s Court, the Ministry of Public Health, the Ministry of Justice and the Ministry of Civil Affairs follow certain actions(4). The provisional regulation stipulates that death row prisoners could be allowed to donate their organs or tissues under the condition that they make the decision at their own free will. It meant the use of organs from executed prisoners for transplants was officially permitted. However, the regulation did not indicate which kind of consent, verbal or written, should be obtained from death row inmates. Since then, the issue of organs coming from prisoners remained a sensitive topic until 2005, the year Huang Jie-fu, then Vice Minister of the Ministry of Health, reported that organ donation by capital prisoners

are the main source of organs for transplants in China(4).

In July 2006, the Interim Provisions on the Administration of Clinical Application of Human Transplant Techniques came into effect, which was characterized as the first time the Chinese government set up a special committee to regulate organ transplants(5).

In May 2007, the State Council enacted the Regulation on Human Organ Transplantation, which standardized organ transplantation in China(6). Since then, China embarked on the road to organ transplant reform. The 2007 regulation states that prior to organ donation, organ donors must provide informed written consent. Death row prisoners could also get involved in organ donation, because there was no laws that made a distinction between death row prisoners and citizens. They held the same right to donate. In 2010, the Chinese government recognized “organ trafficking” as a crime and launched its voluntary organ donation programs in parts of the country to phase out the use of organs from capital prisoners and increase the pool of citizen donated organs(7). In 2013 it extended it to the whole country.

On September 1, 2013, the Provisions on Human Organ Procurement and Allocation was put into practice(8). which demands that every donated organ must be put into the China Organ Transplant Response System (COTRS). This system is designed to manage and monitor the equitable distribution of donated organs. On November 1, 2013, transplant professionals attending the China National Transplantation Congress reached a consensus on the Hangzhou Resolution on organ donation and transplantation, and they agreed unanimously that organ procurement from executed prisoners should be abolished(4).

As of January 1, 2015, the use of organs from capital prisoners is forbidden in all hospitals in China while voluntary organ donations from the general public are the only source for transplantation(4). The use of capital prisoners as a source for organs is now, by government mandate, illegal(9). Under the leadership of President Xi Jinping, the Chinese government has strengthened its fight against medical corruption, and a

favorable domestic environment has been created to establish a new national system for organ donation and transplantation(9). Specifically, organ transplantation in China has been monitored and regulated by China's Organ Donation and Transplantation Committee, which will audit the process and outcomes of organ transplantation in China. The committee will report the number of organ transplants at regular intervals. The China Organ Donation Administrative Center is responsible for auditing the process and outcomes of organ donation and transplantation in China. The center will present the number of donated organs from the general public on its website, which could be publicly accessible.

It must be admitted that the use of organs from executed prisoners for transplantation is unethical. With respect to organ procurement from executed prisoners, China draws condemnation from both international and national scholars, who propose that China should phase out dependence on organs sourcing from executed prisoners and establish an internationally acceptable ethical donation system. International transplant society proposed many useful recommendations for weaning China off organs from executed prisoners. Chinese officials also fully realize that dependence on organs sourcing from executed prisoners is not ethically defensible. Thus, measures were taken to reform Chinese organ donation and transplantation(9). It must be acknowledged that the reform met various kinds of resistance. However, under the support of China central government, Prof. Jiefu Huang, then China's vice Minister of Health, spares no efforts to advance the reform of organ donation and transplantation. Currently, Prof. Jiefu Huang acts as chairman of the organ transplantation committee of the Chinese government, and he is leading the extensive transplantation reforms being implemented in China. By correcting errors of the past and obeying international ethics standards, China will be welcomed and respected by international transplant communities(10).

The Status Quo of Capital Penalty in China

The first Criminal Law on death penalty was established in 1979(11). According to article 43 of this Law, the death penalty shall only be applied to

criminals who have committed extremely serious crimes. During the 1980s and 1990s, the Chinese government launched a severe crackdown on criminal offenders, that is, the Chinese government make frequent use of capital punishment. One of the important factors contributing to China's frequent use of the death penalty is that the Chinese have deep-rooted cultural beliefs about retributive justice and perceive the death penalty as a valuable deterrent to criminal behavior(9). Impelled by the call for global human rights, the Chinese government began to move toward a policy of "kill fewer" in 2000, which meant capital punishment would be used less frequently than in the past two decades. Since then, the Chinese government has taken a number of measures to ensure a fair and transparent implementation of the death penalty. For instance, the Supreme People's Court withdrew the death penalty review power in 2007(12). Before 2007, high courts of provinces, municipalities and autonomous regions were entitled to the right to review death sentences. In 2015, the Supreme People's Court issued "Measures of the Supreme People's Court for Listening to Opinions of Defense Lawyers in Dealing with Death Penalty Review Cases". According to these measures, the defense lawyers of defendants exercise their rights to defend a death penalty review case and ensure the quality of the case review(13). In 2019, the Supreme People's Court issued Several Provisions on Protection of Parties' Lawful Rights and Interests During Death Penalty Review and Enforcement Procedures. These provisions consist of 13 articles which protect capital prisoners' legal rights and interests during death penalty review and safeguard them during the death penalty process(14).

In 2007, the power of final review of death sentences was returned to the Supreme People's Court(15). Since that time, the number of executed prisoners has decreased significantly annually. Compared to the 4,000 executed Chinese prisoners in 2011, there were only 2,400 prisoners sentenced to death in 2013 according to the Dui Hua Foundation(16). All the death sentences in China were reviewed carefully by China's Supreme Court, which has issued 150 death penalty review decisions with the majority of cases involving murder and drug cases between July 2013

and September 2014(17). The present criminal policies follow a principle of “killing less and cautiously” and “combining clemency and strictness”. In 2014, the Standing Committee of the National People’s Congress of the People’s Republic of China reviewed a draft amendment for China’s Criminal Law, and one highlight was to phase out the death penalty for nine crimes (see Table.1). These included crimes related to financial fraud, smuggling weapons and nuclear materials(18).

Tab. 1: The nine crimes exempted from the death penalty under the Ninth Amendment

Nine Crimes	smuggling of weapons and ammunition	smuggling of nuclear materials	smuggling of counterfeit currency	counterfeiting of currency	fundraising fraud
	organizing prostitution	forcing others into prostitution	obstructing the performance of military duties	spreading rumors during war time	

Tab. 2: 46 crimes punishable by death in China

Crimes Endangering National Security	Treason
	Separatism
	Armed rebellion, rioting
	Collaborating with the enemy
	Spying or espionage
	Selling state secrets
	Spying or espionage
	Providing material support to the enemy
Crimes Endangering Public Security	Arson
	Flooding
	Manslaughter
	Bombing
	Spreading poisons
	Spreading hazardous substances (e.g., radioactivity) pathogenic
	Seriously endangering public safety, broadly construed
	Sabotaging electricity
	Sabotaging gas, fuel, petroleum, or other flammables or explosives
	Hijacking aircrafts
	Illegal possession, transport or selling of explosives or firearms
	Illegally manufacturing, selling, transporting or storing hazardous materials
	Theft of explosives or other dangerous material
	Theft of firearms, ammunition or other dangerous material
Crimes against people	Intentional homicide
	Intentional assault
	Rape
	Kidnapping
	Human trafficking
Crimes against property	Robbery
Crimes against public order	Prison escape, jailbreaking
	Raiding a prison
	Smuggling, dealing, transporting or manufacturing drugs
Crimes against national defense	Sabotaging weapons, military installations, or military communications
	Providing substandard weapons or military installations

Corruption and bribery	Embezzlement
	Bribery
Breach of duty by soldiers	Insubordination
	Concealment or false reporting of military intelligence
	Refusing to pass or falsely passing orders
	Surrender
	Cowardice
	Defection with aircraft or ships
	Selling military secrets
	Theft of military weaponry or supplies
	Illegally selling or transferring military weaponry or supplies
	Killing innocent inhabitants of war zones or plundering their property
Economic crimes	Production or sale of counterfeit medicine
	Production or sale of hazardous food products

In 2015, the new amendment was passed and nine offenses were abolished from capital sentences. Consequently, the number of offenses punishable by death was lowered to 46 (see Table.2), which means that the number of executed prisoners would continually decrease in the future.

Xiao Yang, the former president of the Supreme People's Court, said abolishing the death sentence or strictly limiting the use of capital punishment is a global trend that China must also work toward(19).

In terms of methods of execution in China, a bullet to the head has been gradually replaced with lethal injection. In September, 2001, a national conference in Kunming held by the Supreme People's Court reached a consensus that the use of lethal injection deserved a higher priority than other methods of execution. In 2009, China's Supreme Court issued a rule that the use of lethal injection should come into effect immediately and gradually replace executions by firing squads throughout the nation. On December 2, 2009, Liaoning Province became the first province to execute capital prisoners via lethal injection(20). In the same year, lethal injection rooms were set up in Beijing. After many efforts, the lethal injection has gradually taken over in places like Kunming, Beijing, Shanghai, Guangzhou, Nanjing, Chongqing, Heilongjiang and other cities. The cost of a single dose is also more cost effective—at 300 yuan—than the 700 yuan cost to hire a firing squad(21). It has thus been stated that lethal

injections are preferable to executions by bullet because shootings may disfigure a prisoner's head and lead to complaints from grieving family members(22). Lethal injections in China have matured and developed in the last decade, in part due to its cost effectiveness, but also because China has made it a priority to use more humanitarian forms of punishment.

As bioethicists, we believe the killing of prisoners, no matter how cruel, is unethical. We also call for the government to end the use of capital punishment. To our relief, the Chinese government is gradually reducing usage of the death penalty. It is believed that China will phase out its implementation in future. Many individuals and governments outside of China still believe that shooting is the primary method of execution in China. There are some who also believe that prisoners are purposely met with severe brain injury via gunshot to the head to sustain them long enough for doctors to remove their organs. In fact, since January, 2015, China has banned the use of organs from executed prisoners for transplantation.

So while the use of bullets for execution is drastically decreasing, at present, legal injection has become the primary method of execution in China. In this study, we aim to provide a detailed account of the current state of execution in China and eliminate any misunderstanding of organ procurement in China, that is, China's use of organs from prisoners who are falsely executed by bullet.

Ethical and Legal Consideration on Organ Procurement from Executed Prisoners

It is without doubt that the forced organ procurement from executed prisoner without consent should be legally prohibited. However, determining whether organ procurement from prisoners who provide consent as ethical is still a widely debated issue. In the United States and China, proponents of organ procurement from executed prisoners have argued that prisoners should be allowed to donate their organs if they make the decision out of their own free will(23,24). It is clear that there also exist two contrasting views of organ procurement from executed prisoners in America.

Transplant surgeons propose that executed prisoners should be allowed to donate their organs(25). The main reasons are as follows: 1) one more organ donor means at least one life, and typically more lives, saved; 2) it could help individuals suffering from end-stage organ disease; 3) in a patient-centered care mode, healthcare providers should try their best to help their patients; 4) it may provide donors or their families solace and an opportunity for moral, spiritual or social redemption. In addition, the general public in America also seems to see these death row inmates as potentially acceptable donors for those who are in dire need of transplantable organs(21).

Artur Caplan, a famous American bioethicist, is one of the representatives who opposes the organ procurement of death row inmates(26). His counterarguments are as follows: 1) most of death row prisoners would not be eligible to serve as organ donors due to age, ill health, obesity, or communicable disease; 2) organ procurement from capital prisoners would lead to increase the image or social acceptability of the death sentence; 3) since organs from capital prisoners could save the lives of patients with end-stage diseases, prosecutors, judges, or juries are more likely to declare death sentences acceptable in some cases.

In the past few years, the use of executed prisoners as a source of organ transplantation also has been a controversial issue in China. Proponents of organ procurement from executed prisoners argue that it could provide more transplantable organs

whereas opponents argue that it is very likely to bring about judicial corruption or injustice(27). Reasons for supporting organ procurement from executed prisoners could be summarized in the following two points. First, no law prohibits the executed prisoners from donating their organs. According to the General Principles of the Civil Law of the People's Republic of China, prisoners also have full capacity for civil rights like ordinary people and thus they should not to be treated differently from the general public only in terms of their capacity for civil rights. Restrictions on their freedom of association with people outside the prison are justifiable because these restrictions follow the law(28). Apart from those that are mandated by the regulation and the law, any restrictions should be viewed as unethical and unjustifiable. The human organ transplant ordinance enacted in 2007 states that all Chinese citizens have the right to donate their organ as long as they meet the requirements that donation should be voluntary and without payment; meanwhile, the donor should be with full capacity for civil conduct and provide written informed consent. Consequently, there is no law or regulation that prevent the capital prisoners from donating their organs. It thus seems that prisoners on death row could be entitled to donate their organs on the condition that they are at their own will.

Moreover, traditional Chinese cultural values motivate the death row prisoners to donate their organs. Death row prisoners show more favorable attitude toward organ donation than the ordinary persons under the influence of Chinese cultural values (i.e self-reflection in Confucianism; repentance in Buddhism). Death row prisoners' organ donation can reduce their uneasy consciences and smooth over their fault, and their activity will bring themselves, especially their relatives, out of the shadow of crime and mental depression. Thus, organ donation from executed prisoners not only benefits the organ recipients, but also the executed prisoners themselves, as well as their family. In general, the use of organs from executed prisoners for transplants, on the one hand, can to some extent ease the severe shortage of transplantable organs in China, and on the other hand, could show our respect for the executed prisoners' autonomous and voluntary decision and embody the values of their lives.

Based on a detailed review of previous studies on organ transplants in China(6,9,15), we conclude three main reasons why organ procurement from executed prisoners in China has been opposed. First, legal practitioners suggest that allowing death row prisoners to be organ donors is more likely to induce some grass-roots courts to loosen the criminal policy, this is, the courts will not be strict in their use of the death penalty. This thus may increase the number of executed prisoners for organ transplant. Second, death row prisoners are less likely to display the same understanding and judgement of the world as the general public. Death row prisoners, deprived of their liberty, live in an isolated environment with heavy psychological pressure and thus their decisions to become organ donors may not be out of their own will. Third, theoretically, each individual has the possibility of becoming a death row prisoner and thus each person's organ is at risk of being illegally abused. Therefore, it is in the interests of each individual to prevent death row prisoners from registering as organ donors.

Organ procurement from executed prisoners could give rise to a series of social problems, among which judicial corruption is the most salient one. In order to increase the potential donor pool, the courts will authorize the death penalty in a loose way. In this sense, some capital murder suspects whose criminal evidences are not very convincing will be sentenced to death without further confirmation. In other words, organ harvesting from executed prisoners may involve the wrongful use of the death penalty. Death row prisoners will even be forced to donate their organs within coercion. Such conflicts of interest may not only undermine social trust in the integrity of the criminal justice system, but also in organ procurement programs that rely on citizen donation(9). Citizens may claim that people who commit serious crimes should be forced to donate their organs to atone for their crimes(9). In turn, this will hamper the willingness of ordinary people to donate their organs and thus limits the potential donor pool.

Moreover, due to the restrictions on liberty in a prison environment, it is unlikely that death row prisoners are truly free to make independent decisions and thus an autonomous informed con-

sent for donation cannot be obtained(29). It is even difficult for bioethicists to judge whether the death row prisoners who would like to donate their organs after execution are due to passive decision-making under great psychological pressure or autonomous decision-making. Under such an uncertain condition, it is a preferred action not to use organs of executed prisoners for transplant. After stopping the use of executed prisoners for organ transplants in China, there are an increasing number of the general public who would like to donate their organs after death. It suggests that transparent and ethical organ sources could contribute significantly to the development of organ transplantation in China.

After stopping the use of organ procurement of executed prisoners, China has achieved great progresses in organ donations and transplantation. In 2016, there were 4,080 cases of organ donations from cadaveric donors, and over 13,000 organ transplants performed, which ranked China as the second largest organ transplant country in the world(30). In 2017, 5,135 cases of organ donations from cadaveric donors were achieved, and 16,000 organ transplant were conducted, which increased by about 20% compared to that of 2016(30). Jeremy Chapman, the former president of the Transplantation Society, said there has been a substantial change in China which has been going in the right direction(31). Now, organ transplant programs in China strictly follow the international ethics guidelines, that is, safeguarding donors' rights and interests, and ensuring transparent and equitable organ donation and allocation of voluntary and free of payment donations(31).

Conclusion

Due to the severe shortage of transplantable organs, the procurement of organs from the executed prisoners served as an expedient to increase the organ pool in the past few decades. It should be admitted that the use of organ procurement from executed prisoners is full of ethical controversies. It has been condemned by international societies since its inception. We sincerely appreciate the invaluable suggestions from the international community on China's organ transplants in past years, which motivates China to meet the

international ethics standards. In recent years, the Chinese government and the Ministry of Health have taken great efforts to regulate and manage the development of organ transplantation in China. To make organ procurement and allocation fair and transparent, a national organ donation and allocation system was established in China in 2013. As of January, 2015, China stopped using executed prisoners as a source of organs for transplants. The “Chinese Mode” of organ donation and transplantation has been established(32).

Although China has made great progress in organ donation and transplantation, some western transplant surgeons or bioethicists still hold outdated views on organ donation and transplantation in China, which will not bring any benefits to its development and will alienate it from the international transplant community. We propose that both the international transplant society and Chinese transplant community, within mutual cooperation and trust, should jointly make efforts to advance the sustained and healthy development of organ donation and transplantation in China.

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