NATIONAL COUNCIL OF ETHICS FOR THE LIFE SCIENCES
Presidency of the Council of Ministers

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OPINION Nº 54 OF THE NATIONAL COUNCIL OF ETHICS FOR THE LIFE SCIENCES

OPINION ON THE LEGAL REGIME OF QUALITY AND SAFETY RELATIVE TO THE DONATION, PROCUREMENT, TESTING, PROCESSING, PRESERVATION, STORAGE, DISTRIBUTION AND APPLICATION OF TISSUES AND CELLS OF HUMAN ORIGIN

(December, 2007)

The transplantation of organs and cells of human origin has become widespread and relevant as a method of treatment of conditions for which no better alternatives have been identified. In recent years, huge progress has been made in the processes for the selection of donors, in the technological procedures for the application of the grafts and the modes of controlling their rejection.

People have become increasingly aware about the donation of organs and tissues, and there is wide scale acceptance by citizens and families both of practices conforming to the principle of presumed consent, on which the procurement of organs from deceased persons is founded, and of voluntary donation, founded on the values of solidarity and altruism, which is the basis of the recent legislative alterations on transplantation with a living donor; an ethical appreciation of that legislation was the object of Opinion nº 50/ CNECV/ 2005.

The need to select the best donors using very precise technical criteria and the medical urgency which dominates the transplantation which, in some circumstances (liver, heart), may be the only resource to save the patient's life, has appealed to international solidarity and to cooperation between institutions in different countries. It frequently happens that a graft is made in a different country from that in which the procurement took place, which reveals the need to standardise technical procedures and to certify the quality of the acts that are practiced, in order to avoid the transmission of diseases and to contribute to the safety of patients.

The preliminary draft of the law, on which the CNECV was asked to give an opinion, "transposes to the Portuguese legal system" community Directives 2004/23/CE, 2006/17/CE and 2006/86/CE, which deal, respectively, with the questions relating to "the donation, procurement, testing, processing, preservation, storage and distribution of tissues and cells of human origin", and "the traceability, notification of adverse events and technical requirements for the coding, processing, preservation, storage and distribution of tissues and cells of human origin".

The CNECV has already given its opinion on the ethical questions raised in former laws regulating transplantation (Opinions nºs1/CNECV/93; 41/CNECV/2003 and 50/CNECV/2005). The preliminary draft of the decree law which is to regulate the activities contemplated in former laws has also been submitted to the opinion of the CNECV.

In this preliminary draft of the decree law, an organisational structure is defined, called the National Network of Tissue and Cells, and the respective composition is defined in "banks", "units" and "services". This Network is responsible for the "procurement, testing, processing, preservation, storage, distribution and application of tissues and cells of human origin".

In consequence, the Authority for Blood and Transplant Services has been created, henceforth referred to as the ASST, which, as it is responsible for superintending the structure of the Network, will see its respective powers defined in this preliminary draft of the decree law. As this law implements the transposition of Directives voted by the European Parliament and creates a structure so that its contents are applied in practice, one could, in a superficial analysis, admit that no new ethical questions are raised. This interpretation perhaps justifies the consideration, contained in the preamble to the law, that the hearing of the CNECV is considered "optional".

Nevertheless, from the reading and study of the law under analysis, it is considered to be the duty of the CNECV to mention some questions related with the following points:

a) General character
b) The powers of the ASST;
c) The coherence of the application of principles contemplated in former legislation, namely in matters of informed consent and the protection of personal data.

A. General character

The safeguarding of quality criteria in this field of medical activity, whose therapeutic success depends largely on the correctness of the procedures (testing of the compatibility, procurement and quality of the product of the grafting and its application) is, in itself, susceptible to positive ethical appreciation. The superior beneficial value of the donation, whether the donor be living or deceased, will be better safeguarded if the fulfilment of the requirements that will guarantee the maximum quality of the use of the transplanted structures

(organs or parts of organs, tissues or cells). It is therefore highly relevant that there be an organisation which will be held responsible for guaranteeing the quality of the transplant services provided, to better defend the rights of vulnerable citizens (the patients) and of those who act as altruistic and benevolent citizens (the donors).

The quality of the medical act of transplanting, which has a complex chain of antecedents (procurement, preparation, storage), is justified by the values of beneficence and justice in the equal treatment of citizens, irrespective of their origin. It is therefore not acceptable that the preamble of the preliminary draft of the decree law makes the justification that, as "the therapeutic use of tissues and cells constitutes a field in which an intense international exchange is registered, it is important to make safety and quality standards available as soon as possible". The concern over preventing potential harm to the patients, promoting standards of quality and safety in medical acts, can not have a different value if the same acts are practised in national institutions or in those of other countries.

B. The powers of the ASST

It is ascertained that the ASST, the body responsible for the National Network for Tissues and Cells, has ample powers, namely:

- it operates at the executive level, as a regulating body;

- it has multiple duties at the level of assistance and in clinical research related to tissue and cell transplantations;

- it interferes in all activities related with the transplantation of organs and tissues to be used in human beings, as well as grafting procedures which use hemaopoeitic stem cells, reproductive cells, foetal tissues and cells, and also embryonic stem cells, "without prejudice to the provision in specific legislation";

- in an executive capacity, it is responsible for the licensing of "tissue and cell banks", "harvesting units" and "services where tissues and cells harvested for transplantation are applied", just as it is responsible for assessing the management of those structures, by means of the approval of the respective annual plan of activities;

- it has a regulatory activity over all the technical procedures involved in acts of transplantation, as far as their quality and safety are concerned, proceeding to the imposition of fines, defined in accordance with specified types, for deviation or failure to comply with the regulations;

- it is answerable to the Ministry of Health, but also directly informs the European Commission or any Member State which requests it to do so.

Within this set of ample powers, some relevant ethical questions are identified, which are not adequately clarified in the preliminary draft of the law under appreciation. Thus:

- The use of embryonic stem cells for research purposes or eventual medical treatment has still not met with broad consensus in the scientific community and in society in general. The theme has given rise to controversy, reflected in the public debate mirrored by recent legislative initiatives.

- The use of parent cells for artificial reproduction is subordinate to the authority of the *Conselho Nacional da Procriação Medicamente Assistida (CNPMA)*, (The National Committee for Medically Assisted Reproduction), and it is unclear how this dependence is articulated with the specific duties of the ASST.

- The powers of the ASST to inspect the units that practise assisted reproduction (installations, procedures, etc.) are defined, but there is no mention of how they relate to or are subordinate to the powers attributed to the CNPMA in regard to the donation of gametes.

- There is no definition of the principles of the ASST's recognised superintendence over clinical research for the therapeutic use of transplanted tissues and cells or whether the research projects should obey the same rules of technical and ethical assessment (Ethics Committees, namely) by which all other clinical research involving patients is governed.

- The principle of anonymity between the transplant donor and receiver is generalised, without taking into account that that principle is not applicable in donations involving a living donor (see Opinion 50 /CNECV/2006) in which there is an evident need for the donor to identify the receiver.

C. The coherence of the application of the principles contemplated in former legislation, namely in matters of informed consent and the protection of personal data.

The respect for the wishes of patients and donors, safeguarding any form of coercion, is a central ethical question in the issue of transplants. The existence of a national body to coordinate transplant activities, and, very specially, the nature of the donation in question, would justify the standardisation of procedures leading to consent, which should not be mere form repositories. For this reason, the "details of consent" stated in the preliminary draft of the law prove inadequate, and should be corrected.

The legislation at present under analysis contextualises, among others, the creation and maintenance of human cell and tissue banks. It happens that many of the ethical and juridical principals applicable have already been duly defined in Law nº 12/2005 of 26th January (Personal genetic information and health information), which establishes rules for the procurement and preservation of biological products for genetic testing or research. These principles are in fact stated in opinion 43/CNECV/2004, which assesses, from an ethical perspective, the preliminary draft which gave rise to that legislation.

In article 19 of that law (DNA Banks and other biological products), the requirements for informed consent and the privacy and confidentiality of donors are duly developed. However, the principles governing the purposes of the cell and tissue banks, the functions of the authority responsible for it, the types of research that may come to be developed, the potential risks and benefits of its constitution, the conditions and duration of the storage of the samples, the measure to guarantee the privacy and confidentiality of the persons participating and the prediction, as to the possibility of communicating or not the results obtained with biological material, are not contemplated within the present legal framework.

It should be added that, in the terms of the aforementioned Law nº 11/2005, in the case of the retrospective use of samples or in situations in which the consent of the persons involved has not been obtained due to the quantity of data or of subjects, to their age, or some other comparable reason, there is restriction of the use of samples and of the data obtained from them, such that it is only admissible for scientific research purposes, or for obtaining epidemiological or statistical data.

These specific requirements for the functioning of a human tissue bank do not figure in the text of the law under appreciation, which is very reductive, and which does not even refer to the provisions of Law nº 12 /2005. In fact, on the subject of consent, the law under analysis is limited to regulating consent relative to the donation of tissues and cells, overlooking one of the equally essential aspects which is, precisely, the "storage, distribution and application of human tissues and cells", which has particular specificities and particular ethical requirements.

The approach which the CNECV will now take is not limited to a mere assessment of the application of the legislation in force, but reflects a significant apprehension towards the absence of ethical requirements underlying informed consent and towards the lack of standardisation of the provisions applicable to this matter, which, instead of facilitating the legitimate and necessary uses of human tissue banks, raises doubts and hampers an understanding of how it should be used.

Still as regards consent for the storage and application of tissues and cells, no particular attention is given to cases when they are donated by minors or by adult persons incapable of consent. In fact, similarly to CNECV's recommendation in its Opinion 50/CNECV/2005 (point 7), relative to the harvesting of organs and tissues for transplants, here one should also reiterate the exceptional nature of their harvesting and storage, and, consequently, more restricted criteria should govern their application.

An identical situation occurs regarding the recording system and the safeguarding of the confidentiality and privacy to which the aforementioned Law nº 11/2005 refers and which states some measures that should be applied to them.

Bearing in mind the values in question, including the omitted question of the destination of the identity of the donors, which are "excluded from the records as they have been on file for over 30 years", the recording system and the safeguarding of donor and receiver confidentiality are not given adequate regulation, in the part that is not covered by the aforementioned law nº 12/2005.

For all of these reasons, and considering that:

- The proposal to promote legislation to guarantee the quality of the acts of transplanting organs, tissues and cells is of ethical value;

- The beneficial value of the donation is better safeguarded by the regulation of transplanting activities that ensure the safety for the health of the receivers benefiting from the transplant;

- It is also necessary, from an ethical point of view, for there to be standardisation and coherence of the principles that are applied to identical situations,

the CNECV is of the opinion that:

1. It is necessary to clearly define the powers of the ASST in the ambit of clinical research of transplantation. Although it does not appear to assume a technical nature, given that it is not a financing agency for research activities, it is not clear whether this could occur at the level of ethical assessment of projects, which would confront prior provisions on clinical research.

2. The adaptation of the powers of the ASST to those attributed to other bodies, namely those of the National Committee of Medically Assisted Reproduction with regard to parent cells, needs to be defined, so that situations which may be prejudicial to patients can be avoided.

3. The ASST's intervention in the use of embryonic stem cells for research purposes or medical treatment raises concern and should be subject to reservations. The majority of its applications require careful ethical assessment, which should not fall within its own powers but should be subject to reflection by autonomous and qualified bodies.

4. The setting up of tissue and cell banks for transplantation purposes should be consistent, as far as ethical principles are concerned, with those on which the rules

regulating the harvesting and preservation of biological products for genetic testing and research.

5. The special nature of the procedures for harvesting and storing tissues and cells for transplantation should be stressed, and the criteria for consent to their application should reflect that same nature, namely in so far as minors and those incapable of consent are concerned.

6. The recording system and the safeguarding of the confidentiality of the identification of donors and receivers should be given appropriate legislation, in the part that is not covered by Law nº 12/2005, and, namely, as regards the destination of the identification of the donors that have been excluded from the records.

Lisbon, 11th December, 2007

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This Opinion was related by the Council members Rita Amaral Cabral and Jorge Soares.

This opinion was approved at the pleneary session on the 11th December, 2007, at which the following were present: Paula Martinho da Silva, Agostinho Almeida Santos, Daniel Serrão, João Lobo Antunes, Jorge Soares, José de Oliveira Ascensão, Maria do Céu Patrão Neves, Fernanda Henriques, Michel Renaud, Rita Amaral Cabral, Salvador Massano Cardoso.