

Святослав Олександрович Сліпченко,  
Олександр Романович Шишка

Кафедра цивільно-правових дисциплін  
Харківський національний університет внутрішніх справ  
Харків, Україна

## ПОСМЕРТНЕ ДОНОРСТВО: НА ШЛЯХУ ФОРМУВАННЯ НАЦІОНАЛЬНОГО ПРАВОВОГО ПІДХОДУ

**Анотація.** *Посмертне донорство органів є одним з найбільш актуальних питань в медицині. Практика використання органів померлих осіб для порятунку інших життів існує в більшості держав світу, але існують країни, які не знайшли єдиного вирішення цього питання. Тому основна мета роботи полягає у вивченні питання посмертного донорства в Україні і визначенні його відповідності європейсько-правовим стандартам. Матеріалом даного дослідження є права регламентація посмертного донорства, як певної частини медицини. Зокрема, досліджуються норми міжнародного права, а також окремі положення національного законодавства різних країн, які спрямовані на регулювання відносин в сфері посмертного донорства. Результатом дослідження стали висновки про необхідність і можливість формування єдиних міжнародних стандартів правового регулювання посмертного донорства, і розробка на їх основі національного законодавства. Тому автори вважають, що назріла гостра необхідність в розробці єдиних засад законодавства про донорство і трансплантації. Їх наявність не тільки дозволить уникнути юридичних колізій, але і дозволить визначити шляхи вдосконалення національного законодавства та єдину термінологію понятійного апарату. Встановлено, що законодавчі акти повинні розроблятися системно і повно, як і будь-який інший нормативний акт.*

**Ключові слова:** трансплантація, права охорона, трансплантологічний туризм, міжнародний стандарт.

Svyatoslav A. Slipchenko, Alexander R. Shishka

Department of Civil Disciplines  
Kharkiv National University of Internal Affairs  
Kharkiv, Ukraine

## POSTHUMOUS ORGAN DONATION: AT THE WAY OF CREATION OF A NATIONAL LEGAL APPROACH

**Abstract.** *Posthumous organ donation is one of the most actual issues in medicine. The practice of using the organs of the dead to save other lives exists in most countries of the world, but there are the countries that have not found a single solution for this issue. Therefore, the main purpose of the work is to study the issue of posthumous donation in Ukraine and determine its compliance with the European legal standards. The material of this study is the legal regulation of posthumous donation as a certain part of medicine. In particular, the norms of the international law as well as certain provisions of the national legislation of various countries which*

*are aimed at regulating the relations in the field of posthumous donation are examined. The results of the study were the conclusions about the necessity and possibility of formation of single international standards of legal regulation of posthumous donation and the development of national legislation on their basis. Therefore, the authors believe that there is an urgent necessity of developing a unified framework of legislation on donation and transplantation. Their presence will not only help to avoid legal conflicts, but will also point to the necessity and ways to improve the national legislation, change some approaches in the international relations and define a common terminology of the conceptual apparatus. At the same time, they should be developed systematically and fully as well as any other normative act.*

**Key words:** transplantation, legal protection, transplantation tourism, international standard.

## INTRODUCTION

Human life and health are the main values of any legal state and global community as a whole. Ukraine, which is trying to make every effort to achieve this goal, is not an exception. Therefore, medicine, which faces immediate task to preserve these values, is a flagship, and the state is a guarantor in this sphere [1]. Moreover, there is no need to additionally explain the fact that the legal regulation of relations in the field of medicine plays equally important role, in addition to the knowledge and experience accumulated in the field of medicine. The law is capable to stimulate and restrain development in one or another direction of the medical branch, and even consciously or unconsciously establish a ban on its individual elements development [2; 3]. Therefore, domestic jurisprudence faces challenges to develop single paradigm for the law development in this direction, which would meet European standards. Without any doubt, such guidelines are necessary for Ukraine. At the same time, domestic legislation remains imperfect and unsystematic complicating national-level program implementation in terms of its adaptation to the EU legislation. Therefore, such adaptation sometimes is made by segments.

One of the challenges on the way to Ukrainian legislation improvement is the level of legal regulation of the posthumous organ donation, as a specific part of medicine, with which this article is concerned.

An important issue of the whole legal approach is to verify compliance not only with the European legal standards, but also the ability to globally unify legal regulation of posthumous organ donation in Ukraine. This goal achievement seems possible through establishment of the key vectors for a certain countries development, including EU countries in the matter of legal regulation of posthumous organ donation, as a specific part of medicine.

Therefore, the task of the state is not only to form a public understanding of the need for legal regulation of these relations, but also a scientific idea which existing vectors for development to choose, its features, and obstacles that can arise on the way of its development and why.

The issue of posthumous organ donation has been the subject of research made by many scientists, in particular: M. Bryukhovetska [4], N. Margatskaya [5], E. Ste-

panova [6], E. Alsynbaeva [7], K. Sangster [8], K. Novotna [9], T. Godalova [10], L. Jirmářová [11], A. Nevečeřalová [12], D. Baniubala [13], T. Woo [14] et al. In general, literature review confirms that this topic is sufficiently investigated. However, it still requires a systematic study. In spite of the fact that unification in approaches of posthumous organ donation, perspectives and vector of its further development, generalization, and research of existing experience were given a sufficient attention by the representatives of various branches of science even in the last century, but the legal regulation of relations in the field of posthumous organ donation is still far from perfection in Ukraine.

## 1. MATERIALS AND METHODS

To study the issue of posthumous organ donation in Ukraine, the authors used various theoretical methods: comparative legal method, methods of induction and deduction, analysis and synthesis, system analysis, and analogy. These methods included analysis of various literary sources and regulatory acts. The comparison method allowed to determine that the process of regulatory framework building, which regulates relationships in posthumous organ donation is still in infancy in Ukraine. But certain steps towards the national legal approach development have already been taken. As an example, it can be referred to the recently adopted Law of Ukraine “On the use of transplantation of anatomical materials to humans” [15], where approaches to relationship regulation in the field of transplantation and activities related thereto, anatomical materials obtaining for making bioimplants and xenotransplantation implementation conditions determination were updated. In particular, the basic principles of transplantation were fixed and some approaches to transplantation conditions and procedure were changed.

The formal logical method contributed to study legal nature of legal relations of donation and the right to donation. The comparative legal method was applied throughout the study, in particular, the national legislative regulation of donation and foreign countries, as well as their compliance with the international legal acts.

The statistical method allowed to determine that the main ideas of today’s concept are in the fact that: 1) removal of anatomical materials can be made both from living donors (lifetime organ donation) and from a corpse donor (posthumous organ donation); 2) person’s will to give consent or disagreement to the posthumous organ donation, as well as to removal of anatomical materials for transplantation and / or bioimplants manufacture from the body of deceased, which it represents, including subsequently the refusal of such removal shall be made in writing and registered in the Unified State Information System of Transplantation; 3) procedure for obtaining “express consent” (“presumption of disagreement”) on a posthumous organ donation is clearly detailed with possible marking of such consent in a passport or other identity document; 4) basically, transplantation is defined as free, except for hematopoietic stem cells (this can be either paid or free, depending on the will of the donor itself),

and therefore the law prohibits any commercialization in the field of transplantation, as well as advertising of organs and / or other anatomical material; 5) legislator has introduced the institution of “authorized representative”, which, after death of any adult legally capable person, the latter authorizes to give or not to give consent for anatomical materials removal from his/her body for transplantation and / or bioimplants manufacture; 6) the law provides for a special registry - the Unified State Information System of Transplantation, which contains information with limited access about donors, recipients, characteristics of anatomical materials that are collected, processed and protected in the manner prescribed by law; 7) a position of transplant-coordinator is introduced, which is entrusted with the function of transplantation process monitoring and conduct at each of its stages, including relevant information entry into the Unified State Information System of Transplantation; 8) Section 22 of the Law establishes the guarantees of the legal status of the donor and members of its family, namely, their rights and social protection in the event of anatomical materials provision and removal from the donor subsequently.

## 2. RESULTS AND DISCUSSION

### *2.1. The value and development of legal regulation of relationships in the field of posthumous organ donation*

As it was noted in the legal sources, the issue of posthumous organ donation is deeply felt in each state [16]. Moreover, it is felt even at the international level [14], about which more than one scientific work was written. It can be explained by the fact that today the skin, heart, kidneys, lungs, liver, pancreas, stomach, etc. transplantation is not surprising. And patients, most of whom could barely expect death or put up with their helpless and painful conditions until recently, get a “second life” or “chance to live”.

At the same time, one of the main issues of such operations is an insufficient number of donor organs. Ukraine also faces this challenge. The posthumous organ donation can partially eliminate current “deficit”. But international community faces the issue that it is very difficult, if not impossible, to solve this problem in a single country. And the matter is not only in the qualified specialists, clinics, equipment, etc., but as it seems in the legal basis. After all, each country gains its experience through its mistakes, takes the way which has been previously passed by other states. And it is not always positive. National legislations of various countries often develop in absolutely opposite directions, which does not contribute to effective processes regulation targeted at coping with the deficit of donor organs and ensuring stability in such relations regulation, especially in cases where private interests achievement becomes impossible due to different systems of legal relations regulation connected with transplantation. Therefore, an absolutely progressive view has been formed in the world about the need to develop unified system of international standards that

ensures stability in legal regulation of transplantation in general and posthumous organ donation in particular. This, in fact, was noted in the Resolutions WHA40.13 and WHA42.5 of the World Health Assembly, namely that different legal approaches fixed by different countries, and sometimes contradictory ones, complicate a single legal field formation. Indeed, no single legal field today makes it difficult to meet both private and public interests. This is explained by the fact that each state has its own unique model of legal regulation of transplantation issues. This is shown not only in the main aspects of the concept of posthumous organ donation introduced in a particular state (altruistic and/or compensatory idea of posthumous organ donation; posthumous organ donation is based on presumption of consent or disagreement; death of an individual is based on the concept of cerebral death (brain death) or on the basis of cardiac arrest (blood circulation)), but also which regulatory requirements (prohibitions, restrictions, permissions, recommendations, incentives, stimuli, etc.) are applied during such relationships. The following directly depends on this: 1) stability or instability of such relations; 2) level of legal protection or individual integrity and health protection, respect for human dignity, including adequate protection of privacy rights; 3) donor motivation to give its anatomical materials and / or organs, and recipient in determining to obtain not obtain treatment (for example, in its own country or in another country); 4) deficit or surplus of anatomical materials and/or organs in the country, etc. It is also important to note that the level of legal regulation may also form certain market relations in the state, regardless of whether such relations are legal or not, or whether they are prohibited or not. After all, demand generates supply, therefore, development of market relations is subject to objective laws. And here there are three options for such relations development. Excessive regulation will inevitably lead to their decline and inability to develop progressively, introducing advanced experience, technology and knowledge. Insufficient and unsystematic legal regulation gives rise to such relations development and functioning outside the legal field, when the posthumous organ donation does not differ considerably from criminal activity. The confirmation of the latter is a human body, which is very often regarded as a commercial product, even despite the fact that in most countries of the world they are outside the civil circulation. For example, in India and China there is a black market for human organs, and transplant tourism is developing. And only a systematic, based on the balance of public and private interests, legal relations regulation in the field of posthumous organ donation and transplantology will contribute to their progressive development.

## *2.2. Experience of foreign countries*

Analysis of international legislation and legislation of some states allows to positively assess the trends in its formation. And in this area, US law is one of the most advanced. This is confirmed by the fact that the United States among all other countries takes the first place by the number of transplant operations. Thousands of

kidney, liver, heart, and lung transplant operations are performed every year in this country [17]. According to preliminary data of American non-profit organization, Organ Procurement and Transplantation Network (OPTN), there were 10,281 cases of posthumous organ donation in the United States during 2017. This is by 3,1% more than in 2016, and by 27% more than in 2007 [18]. Figures are impressive, and therefore it would be possible to take US legislation as a basis and introduce a system of international standards for posthumous organ donation legal regulation. This includes both control over the national registration of donors, and procedure for organs receipt by recipients and anatomical gift execution, etc. [19]

To create unified international standards for legal relations regulation in the field of posthumous organ donation, one could use not only the experience of the United States, but also other advanced countries of the world. In particular, Israel has very interesting developments, where, due to successful comprehensive regulatory framework, the health care system has risen to a high level remaining accessible to the population. In particular, according to the Israeli Law “On Anatomy and Pathology”, all persons who are waiting for any organ transplant are divided into three lines. And this order of priorities stimulates citizens involvement in organ donation [16]. Tax benefits, free travel in public transport, study grant, honorary certificate [20], etc. depend on this. The legislator has a differentiated approach to the consent to remove organs and / or tissues from corpse [21] (for example, removal of organs of the deceased is allowed only in the presence of a rabbi). This suggests the need to take into account religious and cultural features, social relationships and specifics of upbringing in a particular social community.

Also experience of Spain, which is the leader in Europe by the number of cases of posthumous organ donation, is also equally important for a uniform legal approach modelling [22]. In particular, Spanish model of organ donation regulation is recommended by the World Health Organization (WHO) as the most effective [23]. In this country, in average 39.5 donor organ recoveries are made per one million of the population for further transplantation. For comparison, in Germany – 10.4, in England – 20, 6, in Russia – 3 [24], in Ukraine – 0 [25]. In Belarus, due to successful model of legal regulation, 20 donor organ recoveries per one million of people are made annually [21]. Today it is a leader among post-Soviet countries.

Relationships of the posthumous organ donation are specifically regulated in China, where since 1984 national legislation has fixed the possibility to recover donation organs for transplantation from executed criminals, which significantly reduces organs deficit, for subsequent transplantation in this country [26]. The Ministry of Justice of Saudi Arabia took things a step further. In particular, it proposed to legalize not only donor organs recovery from the bodies of executed criminals, but even those who were sentenced to execution [27]. Experience of Iran also draws attention. This is the only state that officially adopted the regulated system of kidneys sale [28] and

thus virtually eliminated the “deficit” in donor organs in the country. In Japan, close relatives have a priority over donor consent in a posthumous organ donation [29].

Such legal approaches are different from that ones adopted in most countries of the world. Obviously, the experience of China and Saudi Arabia cannot be applied to Ukraine, since we have no death penalty. But, when modelling national legislation in order to regulate posthumous organ donation, it is necessary to take into account both positive and negative experience gained in the world. Moreover, according to the authors of this article, universalization shall allow certain deviations taking into account cultural, social, religious and legal factors that have traditionally been settled in a particular social group. And the world community is already developing in this direction.

### *2.3. International Law in the Uniform Standards of Legal Regulation of Posthumous Organ Donation*

In 1967, the EuroTransplant, non-profit organization, was established in Europe, which not only accumulates information about potential donors and recipients, but also about donor organs of deceased availability, as well as promotes international exchange, both by this information and by existing donor organs. The organization includes eight countries-members: Germany, Austria, Luxembourg, the Netherlands, Belgium, Slovenia, Croatia, and Hungary. There are 1,601 donor hospitals and 72 transplant centers on their territory. Every year, EuroTransplant provides recipients with more than 7,000 organs [30]. And it seems that Ukraine should also join this organization.

Within the framework of the Council of Europe, in 1978, Recommendation R (1978) 28 was adopted regarding organs transplantation and legislation harmonization related to the organs transplantation. In 1985, the International Organization “Transplantation Society” developed recommendations on the organs distribution and use extracted from dead bodies at the level of the regulation [31]. In 1987, again within the framework of the Council of Europe, a Recommendation was issued on the international exchange of organs for transplantation. In the same year, the Council of Arab Ministers of Health adopted a draft law on the human organs transplantation, unified for all Arab countries [29], and the document on non-commercial approach to human organs donation was adopted at the Conference of European Ministers of Health [32]. In 1991, the World Health Organization (WHO), taking into account the diversity of health systems and rights, as well as the circumstances in which these systems operate in different countries, and social, cultural and religious characteristics, develops the Guiding Principles on Human Organ Transplantation [33] after a lot of consultations held. In the same year, the XLIV World Health Assembly approves these principles and recommends Member States to take them into account when formulating legal policies in this field. Considering that various centers licensing and accreditation for the human tissues use also take the way of free advancement in posthumous organ

donation, and international standards for transplantation centers, blood transfusion services, tissue banks and laboratories accreditation have been developed within the European Community [34]. In 2002, the Additional Protocol to the Convention on Human Rights and Biomedicine regarding human organs and tissues transplantation was adopted [35]. In 2008, the “Declaration of Istanbul on Organ Trafficking and Transplant Tourism” was adopted, which proposed standards for the transplant tourism regulation and the ways to overcome donor organs deficit [36].

Obviously, this is not the full range of efforts aimed at a unified international standards formation for the legal regulation of relations in the field of posthumous organ donation, but even it sufficiently illustrates the result of titanic work resulted from international cooperation.

#### *2.4. Obstacles in the unified international standards formation for the legal regulation of relations in the field of posthumous organ donation*

Despite of significant achievements of the world community, significant obstacles in the unified international standards formation for the legal regulation of relations in the posthumous organ donation are created by the differences in religious, cultural and philosophical views, difference in the legal systems and health care systems, and the circumstances under which they operate in different countries and regions. Ukraine, as a multinational country, in which various cultures, religions, philosophies, etc. have united, cannot ignore such obstacles even when forming its domestic legislation.

For example, different religions differently treat posthumous organ donation. Let's illustrate this.

At the General Assembly of the Church of England, it was proposed to recognize the donation of blood and organs as a duty of a Christian, like a material and monetary donation. And the Church of England submitted its attitude towards organ donation in its appeal to the House of Lords [37]. In turn, Pope Benedict XVI, speaking in 2008 at the meeting organized by the Pontifical Academy of Life, stressed on organ donation which can be a form of charity, generosity and fraternal love [38]. Section XII.7 of the Fundamentals of Social Concept of the Russian Orthodox Church suggests that modern transplantology can provide effective assistance to many patients who were destined to inevitable death or severe disability. The consent of informed person to organ recovery is a manifestation of love and sympathy [39]. Similar decisions in the last third of the 20th century were made by official bodies of the Lutheran, Episcopal Church, a number of other Orthodox churches and movements in Christianity [40].

Judaism has prohibitions to desecrate the dead bodies, to receive benefits from the body, as well as Commandment of the Grave, according to which all parts of the body should be buried. But all these factors are cancelled by the situation when it is required to save someone's life [41], since life saving (*pikuach nefesh* (Heb. פיקוח נפש



נפש, “saving a life”) is a basic principle in Jewish law, more important than other commandments of the Torah. But in general, Judaism accepts organ donation. Moreover, when determining the time of death of any donor, a number of religious legal conflicts arise. Many Jewish authorities believe that the criterion for any person death is not brain death, as considered in most parts of the world, but heartbeat arrest. Up to this point (even if the heartbeat is maintained artificially) organs cannot be removed, since this will cause immediate donor’s death, and in fact, murder [40]. The Ultra-Orthodox religious Jewish community “Haredi” does not accept posthumous organ donation in principle, as it is considered to be desecration of the dead body [40].

The attitude of Buddhism to posthumous organ donation is ambiguous. The matter is that Buddhists have no centralized religious authority, which would declare doctrine and ethics in the human organs donation [42]. Therefore, their attitude to organ donation may differ significantly depending on the culture in which it is acceptable. So, Western Buddhists believe that death follows after consciousness disappears from the physical body, which is destroyed by various factors. Physical body degradation is inevitable, its preservation is useless, and therefore, if it can be used to save the lives of other people, then the wisest and rational people, including Buddhists, should voluntarily agree to a posthumous organ donation, if necessary. [43]. Most of Eastern representatives of this religion assume that organ transplantation, like blood transfusion, is possible only from a living donor, provided that it was a gift (donation) to the patient, i.e. the donor did not receive any funds for [44]. Therefore, posthumous organ donation is condemned by them.

In Islam, the relation to organ transplant is also complicated. In a number of Arab countries, it is absolutely prohibited. For example, Sheikh Ibn Uthaymin said: “It is prohibited for any person to give part of his body (except for blood) to anyone, either during his life or after death”[45]. Abdullah bin Yazid al-Ansari believed: “The Prophet ... prohibited robbing and corpses disfiguring [46], i.e. the body of deceased should remain intact. Sheikh Ibn Baz stated: “If deceased was an apostate or enemy adherent of different faith, then I don’t see the problem to expose him for a medical benefit” [46]. But in general, Islamic theologians and scholars recognize posthumous organ donation. So, in cl. 5 of Sharia provisions of the Resolution No. 26 (1/4) “On Organs Transplantation of a Living or Dead Person”, adopted on February 06-11, 1988 The Council of Islamic Academy of Law (Fiqh) at the Organization of Islamic Conference, during the Fourth Session, convened in Jeddah (Kingdom of Saudi Arabia), determined that organ transplantation from the body of deceased person is permitted if life or one of the main vital functions of the patient’s body depends on [47].

In Shintoism, traditional and fairly common religion in Japan, any violation of dead body integrity is treated as a very serious crime (sin). Moreover, everything related to the body of deceased person, namely, his death is considered filthy, and the main offense of faith, which should be avoided, is filthiness. Death or, rather, desecration by death is unacceptable to Shintoists and requires purification [48]. Therefore,

the organs transplantation of the dead person into the body of the persons who practise this religion is unacceptable for religious reasons. This also applies to a Shinto doctor who will not extract organs from the dead body since it will be treated as sin, i.e. desecration of itself by death becoming filthy.

The dead body is treated as a strongest source of filth requiring subsequent ritual purification in Zoroastrianism. Moreover, representatives of this religion believe that a human can give only what belongs to him. And nothing belongs to him in the human body. Therefore, he cannot donate anything, since it will look like theft. The only thing permitted in Zoroastrianism is to give dead body as a food to the vultures [49].

Obviously, when creating unified international standards for legal regulation of posthumous organ donation, to which Ukraine seeks to join, it is necessary to consider different religious views on the dead body and to balance public and private interests.

As to the issue of posthumous organ donation perception by the representatives of various social groups, cultures, nations, and nationalities, it should be noted that it also has no common view. For example, organ donation and donor organ transplantation are prohibited in many traditional communities of original residents from North and South America. The Romani usually reject organ donations by observing national traditions, and their traditions require dead body preservation intact [50]. In philosophical Taoism, which is highly developed in China, to take as a given is the only way to react to the approaching death, and all artificial measures contradict natural course of events [51]. Therefore, they consider organ donation and organ transplant unacceptable. Neighbouring countries also have different attitude to posthumous organ donation, which have the same religion and close culture. For example, in Austria, the level of consent for a posthumous organ donation among the population achieved almost 100%, but in the neighbouring Germany only 12% [52]. Different attitude is observed even within the same country, religion and culture, for example, in Italy.

Negative attitude to the posthumous organ donation, even within a single culture, religion, and nationality can be illustrated with quotations from a publication. The author advances an idea that brain death is not equal to human death. In case of posthumous organ donation, it is fundamentally necessary that the person was still alive with heartbeat, blood circulation and breathing to continue. In Germany, some doctors, who do not wish to deal with convulsions of the so-called “dead body” during its organs extraction, apply anaesthesia or anaesthetics. And the author put the logical question: if it is a dead body, then why does it need anaesthesia, and if they apply anaesthesia, if it is a dead body? [53] With good reason German law establishes a more flexible model for determining the fact of person’s death. So, German Law “On Transplantation” (TPG) in § 3 of Section 2 establishes two criteria to determine death. First, the fact of death of a potential donor should be determined in accordance with the level of knowledge of medical science about. Secondly, the death of potential

donor shall be determined in the event of a final and irrevocable loss of the whole brain function, and the fact of such establishment should correspond to the level of knowledge of medical science about [54]. When creating national standards for legal regulation of posthumous organ donation, we believe that the German model (based both on brain death and relied on the level of knowledge of medical science) is more acceptable and flexible legal model. It can: cover unusual cases outside the ordinary ones; provide an opportunity for the doctors to apply contemporary and advanced methods of treatment in order to save human life; to better respond to the medical science development and create legal frameworks ensuring to proper protect the highest social values (human life and health).

In general, the issue on death criteria was widely and publicly discussed and covered due to the fact that the interests of recipients who try to obtain the most viable organ may conflict with the interests of donor whose organs are still viable at the point of death [55]. However, the moment and criterion of death are defined at the regulatory level. And this can be treated as a generally accepted standard. So, in 1968, the Harvard Committee adopted the criteria for death based on irreversible cessation of brain activity but not heart and lungs including irreversible coma [56]. In the same year, the World Medical Association adopts Declaration of Death as amended in 1983 [57]. In 1972, the American Neurological Association recognized the basic concept of brain death as the only possible fact determining human death. In 1983 was adopted the Venice Declaration on Terminal State [58].

When creating unified both international and national standards for the legal regulation of posthumous organ donation, one more thing should be taken into account. The matter is that the different legal systems have different approaches to regulate certain relations. This also applies to posthumous organ donation. For example, according to the Model Unified Law "On Anatomical Gift" [59] adopted in the United States, the consent to a posthumous organ donation is regulated through the structure of organ donation contract [60]. At the same time, for the most countries of the continental legal system, this approach is not typical. Despite of in theory where these issues are discussed, however, the national legislation of the most countries directly avoids solving this issue. This can be explained by the fact that traditionally for the continental law system, the human body as a whole and any thereof cannot be treated as objects of civil (private) legal relations, and therefore, no deal can be concluded with them. It is obvious that contemporary social challenges require to revise established views in jurisprudence and to rethink traditional approaches taking into account new conditions for mankind development.

Also, one should take into account specific features of the system of Islamic law. After all, its sources are the Quran (the holy book of Islam and the basis of Islamic law) and the Sunna (a set of legends about statements and deeds of the Prophet Muhammad) that have important legal significance. Obviously, these sources are not

subject to change, revision and amendment, but their truth cannot be even questioned. And only *Ijma*, as a general and unanimous opinion of authoritative legal scholars of Islam living in the same period of time, and *qiyas* - judgment by analogy in the matters of law, can be changed and amended in accordance with the time and legal consciousness requirements. But they regulate relations only in the matters in which the main sources are silent and do not contradict. In fact, they play a single role in ensuring gap free Islamic law.

Differences between the Anglo-Saxon and continental system of law also require considerable attention. They differ not only in their sources, but in their internal structure, basic legal institutions, structures, legal technique, etc.

It should be noted that different legal systems and different approaches intended to regulate relations in the field of posthumous organ donation, and diverse religious, cultural, national, and ethical views do not detract the need to create unified international standards for the legal regulation of relations in the field of posthumous organ donation. And as a result, national legislation to be formed on their basis. Moreover, such a diversity is not an irresistible problem. For example, in Ukraine organ transplantation is allowed after death of donor only if he/she gave his/her appropriate consent in advance, i.e. with effect of presumption of disagreement [61]. At the same time, legislative consolidation of presumption of consent allows to achieve higher efficiency in overcoming deficit in donor organs. Therefore, we believe that it should be used in the unified national standards creation for the legal regulation of relations in the field of posthumous organ donation. In the same case, when organs extraction contradicts religious, cultural, national, moral and social views of the future donor, he/she can freely express his/her disagreement. However, presumption of consent should be differentiated. It should not apply to the persons under the age of adult and persons suffering from mental diseases. Such approach makes it possible to reject the arguments of those who believe that this category of persons is not able to realize the significance of their consent, and therefore abuses are possible.

## CONCLUSIONS

So, the need and possibility to create the unified international standards for the legal regulation of posthumous organ donation and development of national legislation on their basis are obvious. Moreover, such approach will correspond to the modern law development at the global level, its universalization and unification. Certain steps in this direction have already been taken. But in terms of globalization, we believe that there is an urgent need to develop unified framework for the legislation on organ donation and transplantation. Their availability will not only allow to avoid legal conflicts, but also indicate the need for and ways to improve national legislation, to change some approaches in the interstate relations and to define common terminology within conceptual framework. Common framework for legislation on organ do-

nation and transplantation will realize, in essence, the Voltaire's wishes expressed by him in the 18th century: "Let's make all the laws clear, uniform and precise". They should be developed systematically and fully, like any other regulatory act.

## REFERENCES

- [1] Rex, J. (2018). *Anatomy of agency capture: An organizational typology for diagnosing and remedying capture. Regulation and Governance*. Retrieved from <https://onlinelibrary.wiley.com/doi/10.1111/rego.12209>
- [2] Bonica, A., Chilton, A., Rozema, K., Sen, M. (2018). The Legal Academy's Ideological Uniformity. *Journal of Legal Studies*, 47(1), 1–43
- [3] Rao, R. *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*. Retrieved from <https://www.gwlr.org/rao/>
- [4] Bryukhovetska, M. S. (2017). *Civil-legal regulation of post-mortem donation in Ukraine* (Doctoral thesis, Kiev University of Law, Kiev, Ukraine).
- [5] Margatskaya, N. A. (1984). *Civil law problems of donation and transplantation*. (Moscow State University named after MV. Lomonosov, Moscow, Russian Federation).
- [6] Stepanova, E. N. (2004). *Human organ transplantation: world experience and Russia*. (Moscow University of the Ministry of Internal Affairs of the Russian Federation, Moscow, Russian Federation).
- [7] Alsynbaeva, EM. (2013). *Civil law regulation of the provision of medical services for the transplantation of human organs and tissues* (Bashkir State University, Ufa, Russian Federation).
- [8] Sangster, C. (2007). *A legal assessment of the impact of the Human Tissue Act 2004 upon unplanned non-heart beating donation and elective ventilation*. Retrieved from <http://ethos.bl.uk/OrderDetails.do?uin=uk.bl.ethos.486449>
- [9] Novotná, K. (2012). *Transplantační zákon – právní a etické problémy při jeho aplikaci*. Retrieved from <https://is.cuni.cz/webapps/zzp/detail/97991/28550916/>
- [10] Godalová, T. (2012). *Transplantační zákon – právní a etické problémy při jeho aplikaci*. Retrieved from <https://is.cuni.cz/webapps/zzp/detail/116519/28550916>
- [11] Jirmářová, L. (2013). *Transplantační zákon; etické a právní aspekty. Teorie a praxe v České republice v komparaci s právní úpravou ve Spolkové republice Německo*. Retrieved from <https://is.cuni.cz/webapps/zzp/detail/96280/28550916/>
- [12] Nevečeřalová, A. (2010). *Soukromoprávní dispozice s lidskými orgány*. Retrieved from <https://is.cuni.cz/webapps/zzp/detail/87239/28550916/>
- [13] Divine, N. B. (2014). *Organ transplants in ghana: finding a context-appropriate and practically workable ethico-legal policy framework*. Retrieved from [https://www.research.manchester.ac.uk/portal/files/54561032/FULL\\_TEXT.PDF](https://www.research.manchester.ac.uk/portal/files/54561032/FULL_TEXT.PDF)
- [14] Chuan, V. T. (2014). *Altruism and ownership: justifying payment for organ donation*. Retrieved from [https://www.research.manchester.ac.uk/portal/files/54556226/FULL\\_TEXT.PDF](https://www.research.manchester.ac.uk/portal/files/54556226/FULL_TEXT.PDF)
- [15] *About zastosuvannya transplant anatomy of anatomy materiv lyudini. Law of Ukraine dated 05/17/2018 No. 2427-VIII*. Retrieved from <http://zakon3.rada.gov.ua/laws/show/2427-19>
- [16] Bryukhovetska, M. S. (2017). *Civil-legal regulation of post-mortem donation in Ukraine* (Doctoral thesis, Kiev University of Law, Kiev, Ukraine).
- [17] Vasylyeva, L. I. (2015). *Fundamentals of transplantology*. Dnipropetrovsk: Accept PP.

- [18] U. S. Department of Health & Human Services, *Organ Procurement and Transplantation Network. Organ Procurement & Transplantation Network*. Retrieved from <https://optn.transplant.hrsa.gov/news/deceased-organ-donors-in-us-exceeded-10-thousand-for-first-time-in-2017>. Published on: Tuesday, January 9, 2018.
- [19] *Anatomical Gift Act (UAGA). National Conference of Commissioners on Uniform State Laws (NCCUSL)*. Retrieved from [http://www.uniformlaws.org/Committee.aspx?title=Anatomical%20Gift%20Act%20\(2006\)](http://www.uniformlaws.org/Committee.aspx?title=Anatomical%20Gift%20Act%20(2006))
- [20] Hentrich, M. *Health Matters: Human Organ Donations, Sales, and the Black Market*. Retrieved from <https://arxiv.org/vc/arxiv/papers/1203/1203.4289v1.pdf>
- [21] Dorfman, M. (2003). Transplantation of human organs and tissues from the perspective of Israeli law. *Law and Life*, 4, 199-204.
- [22] *Will Switzerland enter organ donation by default?* Retrieved from [https://www.swissinfo.ch/rus/politics/вопросы-этики\\_в-швейцарии-введут-донорство-органов-по-умолчанию-/43828310](https://www.swissinfo.ch/rus/politics/вопросы-этики_в-швейцарии-введут-донорство-органов-по-умолчанию-/43828310)
- [23] Shestakova, G. N., Lysak, M. M., Darwin, V. V., Krasnov, E. A., Kolesnikov, S. D. (2015). The donation of organs in the world and the Russian Federation. State of the problem today. *Public Health of Ugra: Experience and Innovation*, 3, 28.
- [24] *Doctors of the Grodno region: "Doctors are not sufficiently informed about the post-mortem donation"*. Retrieved from <https://grodno.in/news/18514/>
- [25] *Life after death: donation and transplantation in Belarus*. Retrieved from <http://www.ctv.by/zhizn-posle-smerti-donorstvo-i-transplantaciya-v-belarusi>
- [26] Beholz, S., Kipke, R. (2007). The death penalty and organ transplantation in China: the role of academic heart surgeons. *Journal of Heart Lung Transplant*, 26, 873-5.
- [27] *Saudi Arabia has resolved the organ donation of those sentenced to execution. RIA News*. (2009). Retrieved from <https://ria.ru/society/20090618/174724563.html>
- [28] Hentrich, M. *Health Matters: Human Organ Donations, Sales, and the Black Market*. Retrieved from <https://arxiv.org/vc/arxiv/papers/1203/1203.4289v1.pdf>
- [29] Timashova, N. (2007). The main transplantologist of Russia Valery Shumakov "You can play football with a donor heart". *New News*. Retrieved from <http://www.newizv.ru/society/2007-03-12/65162-glavnyj-transplantolog-rossii-valerij-shumakov.html>
- [30] *Eurotransplant region. Eurotransplant. Eurotransplant International Foundation*. Retrieved from [http://www.eurotransplant.org/cms/index.php?page=et\\_region](http://www.eurotransplant.org/cms/index.php?page=et_region). (21.01.2018)
- [31] Koga, Y. (2016). Between the Law: The Unmaking of Empire and Law's Imperial Amnesia. *Law and Social Inquiry*, 41(2), 402-434.
- [32] Fluss, S. S. (1991). Trafficking in human organs and the WHO response. *World Health Forum*, 3(12), 49.
- [33] *Information regulation of international legal acts transplantation of bodies and human tissue*. Retrieved from <http://ippi.org.ua/sites/default/files/11mivotl.pdf>
- [34] Roscam, A. H. D. C. (1995). Human tissue and consumer protection from a European perspective. *European Journal of Health Law*, 2, 298.
- [35] *Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin: Explanatory Report. Council of Europe*. Retrieved from <http://conventions.coe.int/Treaty/EN/Reports/Html/186.htm>
- [36] The Declaration of Istanbul on Organ Trafficking and Transplant Tourism. *Clinical Journal of the American Society of Nephrology*. Retrieved from <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4571160/>

- [37] Donating organs and blood is Christian duty, C of E synod to be told. *The Guardian*. Retrieved from: <https://www.theguardian.com/world/2016/feb/15/donating-blood-organs-christian-duty-synod-church-of-england>.
- [38] Ask A Priest – Is Organ Donation Allowed In The Catholic Church? What about Donating Sperm/Eggs? *Australian Catholic Youth Festival*. Retrieved from <http://www.xt3.com/library/view.php?id=13901>.
- [39] The foundations of the social concept of the Russian Orthodox Church, adopted by the Sanctified Bishops' Council of the Russian Orthodox Church. (2000). *Russian Orthodox. The official website of the Moscow Patriarchate*. Retrieved from <http://www.patriarchia.ru/db/text/419128.html>.
- [40] Russo, M. *Donation and religion of the world*. Retrieved from [http://polit.ru/article/2016/02/22/ps\\_organ\\_donation/](http://polit.ru/article/2016/02/22/ps_organ_donation/). (21.01.2017).
- [41] Broin, R. J.-I. *About organ transplantation in Jewish law*. Retrieved from <http://www.moshiach.ru/view/medicine/12394.html>.
- [42] Blewett, L. A., Smoida, S. A., Fuentes, C., Zuehlke, E. U. (2003). Health care needs of the growing Latino population in rural America. *J Rural Health*, 19, 33-41
- [43] *The ratio of Buddhism to the donation of human organs in the book: What do Buddhists believe*. Retrieved from <https://www.theravada.su/node/650>.
- [44] *Bioethical Forum*. Retrieved from <http://www.bioethics.ru/rus/projects/id/235/>
- [45] *Donation*. Retrieved from <https://aminavra.livejournal.com/72078.html>.
- [46] *About organ donation and photographing of corpses*. Retrieved from <https://russ-muslim.livejournal.com/147052.html>.
- [47] *On the transplantation of organs of a living or deceased person: Decree No. 26 (1/4) of the Council of the Islamic Academy of Jurisprudence (Fiqh) at the Organization of the Islamic Conference. Academy Fiqh. Fourth session. Jeddah, Kingdom of Saudi Arabia*. (1988). Retrieved from <http://www.islam.uz/fikh/akademiya-fikxa/2285-o-transplatasi.html>.
- [48] Verisotskaya, E. *Century. The phenomenon of Shinto*. Retrieved from <https://cyberleninka.ru/article/n/fenomen-sinto>.
- [49] *Donation and religions of the world*. Retrieved from [http://polit.ru/article/2016/02/22/ps\\_organ\\_donation/](http://polit.ru/article/2016/02/22/ps_organ_donation/).
- [50] *Donation and religions of the world*. Retrieved from <http://funeralportal.ru/library/1061/38831.html>.
- [51] Bulow, H.-H., Sprung, C. L., Reinhart, K., Prayag, S., Du, B., Armaganidis, A., Abroug, F, Levy, M. M. Point of view of major world religions on decisions regarding the end of life in the intensive care unit. *Intensive Care Med*. Retrieved from <http://www.critical.ru/actual/etica/religion.htm>. (2008).
- [52] *Leave organs on earth”: will posthumous donation appear in Ukraine*. Retrieved from [https://www.bbc.com/ukrainian/ukraine\\_in\\_russian/2015/08/150820\\_ru\\_s\\_donors\\_organs\\_transplantation](https://www.bbc.com/ukrainian/ukraine_in_russian/2015/08/150820_ru_s_donors_organs_transplantation)
- [53] Ryabichenko, L. (2016). *Cut to the living. Centenary: information and analytical publication of the Foundation historical perspectives*. Retrieved from [http://www.stoletie.ru/vzglyad/rezhut\\_po\\_zhivomu\\_624](http://www.stoletie.ru/vzglyad/rezhut_po_zhivomu_624).
- [54] *Gesetz über die Spende, Entnahme und Übertragung von Organen und Geweben (Transplantationsgesetz) in der Fassung der Bekanntmachung*. Retrieved from <https://www.gesetze-im-internet.de/tpg/TPG.pdf>
- [55] Moroz, V. A. (2011). *Modern problems of bioethics*. Kharkiv: NFaU.

- [56] *Report of the Ad Hoc Committee of the Harvard Medical School to examine the definition of brain death. A definition of irreversible coma.* Retrieved from <https://www.ncbi.nlm.nih.gov/pubmed/5694976>
- [57] *Sydney Declaration regarding death. Vsesvitnya medichna asotsiatsiya.* 22nd World Medical Assembly. Retrieved from <https://законодавство.com/medichna-asotsiatsiya-vsesvitnya/sidneyskaya-deklaratsiya-otnositelno-smerti193296.html>.
- [58] Vukmir, R. B. (2018). *Legal Issues in Emergency Medicine.* Cambridge: Cambridge University Press.
- [59] *Revised Uniform Anatomical Gift Act.* (2006). Retrieved from [http://www.uniformlaws.org/shared/docs/anatomical\\_gift/uaga\\_final\\_aug09.pdf](http://www.uniformlaws.org/shared/docs/anatomical_gift/uaga_final_aug09.pdf).
- [60] Tanasiychuk, I. M. (2016). Legal regulation of the donation of foreign countries. *Bulletin ONU named after I. I. Mechnikov. Law*, 21(2(29)), 130. Retrieved from <http://dspace.onu.edu.ua:8080/bitstream/123456789/10711/1/128-137.pdf>
- [61] *About zastosuvannya transplantation of anatomical materials of people. Law of Ukraine dated 05/17/2018 No. 2427-VIII.* Retrieved from <http://zakon3.rada.gov.ua/laws/show/2427-19>

**Svyatoslav A. Slipchenko**

Doctor of Law, Professor  
Department of Civil Disciplines  
Kharkiv National University of Internal Affairs  
Kharkiv, Ukraine

**Alexander R. Shishka**

Candidate of Juridical Sciences, Associate Professor  
Department of Civil Disciplines  
Kharkiv National University of Internal Affairs  
Kharkiv, Ukraine

**Suggested Citation:** Slipchenko, S. A., & A. R. Shishka. (2018). Post-mortem donation: on the way of forming a national legal approach. *Journal of the National Academy of Legal Sciences of Ukraine*, 25 (4), 126–141.

Submitted: 26/08/2018

Revised: 05/10/2018

Accepted: 07/12/2018