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ПРАВОВИЙ МЕХАНІЗМ РЕГУЛЮВАННЯ СТАТУСУ ДОНОРСЬКИХ ОРГАНІВ ЯК ОБ'ЄКТА ЦИВІЛЬНОГО ПРАВА

Анотація. *Якість життя населення значно залежить від рівня розвитку медицини, у тому числі і від такої її сфери як трансплантологія. Кожного року зростає потреба у донорських органах, що потребує розробки дієвого механізму регулювання правовідносин щодо них. Актуальність дослідження обумовлена існуванням низки невирішених проблем: невизначеність правовідносин в цій сфері, прогалини у застосуванні трансплантації органів і тканин людини та недослідженість співвідношення інституту трансплантації органів і тканин людини з інститутами цивільного права. Основною метою даної статті є визначення правового статусу органів і тканин людини в сфері трансплантології як об'єктів цивільного права. Основним підходом до проведення дослідження обрано сукупність методів правового аналізу, а також порівняльний аналіз. Визначено основні засади конституційно-правової сутності донорства та його цивільно-правові засади. Проведена оцінка ефективності законодавчого регулювання проблематики, що досліджується, у вітчизняному правовому полі, а також у порівнянні з нормами закордонних країн та міжнародного права. Встановлено, що міжнародне законодавство, законодавство країн СНД та розвинених країн в основному визнає органи і тканини об'єктами sui generis, обмеженими в обороті, встановлюючи кримінальну заборону на комерційне донорство. Запропоновано в межах цивілістичного підходу до правової суті донорських органів і тканин визнавати їх як особливі об'єкти цивільного права речового характеру. Розроблено авторську класифікацію донорських органів за критерієм їх доступності. Проаналізовано основні проблемні питання щодо визначення права власності на донорські органи. Визначено основні елементи механізму здійснення суб'єктивного права на донорство як форми реалізації конституційного і цивільного права людини на життя, а також форми реалізації правового статусу суб'єкта права на донорство. Запропоновано внести до Конституції України окрему статтю щодо врегулювання питання аналізу. Практичне значення отриманих результатів полягає в тому, що викладена в дослідженні інформація може бути застосована у законодавчій та судовій практиці, у викладацькій діяльності, запропоновані заходи можуть бути взяті за основу при реформуванні та вдосконаленні вітчизняної системи донорства*

Ключові слова: *об'єкт цивільного права, особливий об'єкт, донор, цивільно-правовий статус, донорські органи, трансплантація*

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LEGAL MECHANISM OF REGULATION OF THE STATUS OF DONOR BODIES AS AN OBJECT OF CIVIL LAW

Abstract. *The quality of life of the population significantly depends on the level of development of medicine, including such a field as transplantology. The need for donor bodies is growing every year, which requires the development of an effective mechanism for regulating legal relations with them. The relevance of the study is due to the existence of a number of unresolved issues: uncertainty of legal relations in this area, gaps in the use of transplantation of human organs and tissues and unexplored relationship of human organ and tissue transplantation with civil law institutions. The main purpose of this article is to determine the legal status of human organs and tissues in the field of transplantation as objects of civil law. The main approach to the study was a set of methods of legal analysis, as well as comparative analysis. The basic principles of the constitutional and legal essence of donation and its civil law principles were determined. The effectiveness of legislative regulation of the issues under study in the domestic legal field, as well as in comparison with the norms of foreign countries and international law was assessed. It was established that the international legislation, the legislation of the CIS countries and developed countries generally recognise organs and tissues as objects of sui generis, limited in circulation, establishing a criminal ban on commercial donation. It is proposed to recognise them as special objects of civil law of property nature within the framework of the civil law approach to the legal essence of donor organs and tissues. The author classification of donor organs according to the criterion of their availability was developed. The main problematic issues regarding the determination of ownership rights to donor organs were analysed. The main elements of the mechanism of realisation of the subjective right to donation as forms of realisation of the constitutional and civil right of a person to life, and also forms of realisation of the legal status of the subject of the right to donation were defined. It is proposed to include in the Constitution of Ukraine a separate article on the settlement of the issue of analysis. The practical significance of the obtained results is that the information presented in the study can be applied in legislative and judicial practice, in teaching, the proposed measures can be used as a basis for reforming and improving the domestic donation system*

Keywords: *object of civil law, special object, donor, civil status, donor organs, transplantation*

INTRODUCTION

The word “donation” comes from the Latin word “donare”, which means “to give”. Donors donate their own organs to patients in need, which in many cases saves a patient's life. Since the donation of blood and its components was the first to spread, this concept has long existed only in relation to this type of donation. However, medicine is evolving, emerging and widely used new types of human disposal of the body and its parts: by providing organs and tissues, eggs, sperm, surrogate embryos, stem cells, embryonic tissues. Donation of human organs and tissues is one of the necessary and mandatory stages of the treatment process (transplantation) aimed at saving human life, which is reflected in Part 4 Article 2. Additional Protocol to the Convention for the Protection of Human Rights and Human Dignity¹.

In addition to blood donation, organ donation and transplantation have become widespread in the world. It should be noted that the world's first organ transplant surgery was performed by Ukrainian surgeon Yuri Voron in 1933. His patient with a foreign kidney lived only two days – then they had no idea about the compatibility of organs [1]. However, so far the transplantation system has not been developed in Ukraine, and only in 2018, its legislation was adopted at the legislative level.

The practice of posthumous donation has become the norm in many countries. In Ukraine, the transplant system did not actually exist until recent years. Only in 2018 did the parliament take the first step towards its creation, passing the necessary law (Law 2427 or as

1. Additional Protocol to the Convention for the Protection of Human Rights and Human Dignity in Relation to the Application of Biology and Medicine to the Transplantation of Human Organs and Tissues. (2002, January). Retrieved from https://zakon.rada.gov.ua/laws/show/994_684#Text.

the Law “On Transplantation”) . On May 17, 2018, the Verkhovna Rada of Ukraine made a revolutionary decision for Ukrainian medicine: it allowed organ transplantation after the death of a donor with his prior written consent. 255 people’s deputies voted for the bill No.2386a-1 .

Saving lives through organ transplants is a reality in many countries, where people stand in special queues, behind someone else’s kidney or heart. Creating a full-fledged transplant system in Ukraine will save more lives. For example, severe leukaemia often requires an unrelated bone marrow transplant, previously prohibited by law. Until recently, it was necessary to go abroad for this. Treatment there costs tens or even hundreds of thousands of dollars. Most seriously ill people do not have this money. In desperation, they and their relatives are forced to turn to all possible charitable foundations to raise money. And often just do not have time to wait for surgery.

Organ donation is a very new topic for the country, which has not yet been properly substantiated in practice and in the environment. Society’s acceptance of this innovation occurs with many opposing views. In addition, the issue of the civil status of a donor body and the observance of civil rights remains unresolved. Research and scientific analysis of legal problems of donation in Ukraine and foreign countries, the state and prospects of their development were conducted by many domestic and foreign scientists.

Undoubtedly, some aspects of the researched problem have been and remain the subject of scientific interest and are one of the priority directions of research of both domestic and foreign scientists and practitioners. At the theoretical level, the legal aspect of identification of the domestic donation system is important for understanding and recognising the prerequisites for its formation, development and functioning, which provides an opportunity to outline the general patterns and prospects for its further development, identify common and different principles of identification with other legal systems and develop strategic directions of further reform and establishment of the legal status of donor bodies as an object of civil rights in order to build a system of protection of all parties to these legal relations.

1. MATERIALS AND METHODS

The methodological basis of the study was analytical and legal methods of analysis. General scientific and special methods were used. The set research tasks were solved in the study, analysis and synthesis of scientific literature on the research problem. The main provisions of the legal framework at the international and national levels were studied. The used methodology allowed developing the main directions of optimisation of the system of ensuring civil rights and obligations of the parties to legal relations regarding the removal and use of donor organs. The methods used allowed to obtain reliable and substantiated conclusions and results. The comparative method was used to compare the provisions of the domestic legal framework

with the legal framework for regulating the object of study in other countries. The descriptive method allowed presenting the results of the study in a logical sequence. The graphical method was used to present the results in a visual form.

The study also used methods of legal analysis, synthesis, analogy, system and classification. One of the methodological tools used was the typological method, which allowed identifying the types of donor bodies as objects of civil rights, ways to ensure the rights of participants in these legal relations. Used typology can further serve as a basis for further research. The integration method allowed analysing the degree of integration into the scientific context of legal materials and some legal data that reflect the features of the object of study, which were not previously subject to scientific generalisation. The method of synthesis allowed solving the research problems through its application to primary sources on this issue. The application of the analytical method to these primary sources allowed making recommendations in terms of optimising the national system of legislative support; identifying the main areas of reform experience and the conditions that justify the use of certain ways to protect the civil rights of participants. Methods of induction and deduction were used to analyse the content and structure of legislative texts, the characteristics of legal norms in the context of the research topic. In the process of analysis, the historical method was used, which allowed studying the process of formation of the institute of transplantation in Ukraine and foreign countries.

The analysis of the scientific literature on the problem of research using these methods allowed giving some recommendations in terms of terminology and legislation.

2. RESULTS AND DISCUSSION

In the constitutional and legal sense, a donation is the result of the implementation of the voluntarily conscious will of a capable person to transfer elements of his body (certain organs) to another individual (recipient) to preserve his life and health and exercise their constitutional right to life. Donation is the only possible form of realisation of the doomed person’s exercise of the constitutional right to life, the non-realisation of which (donation) leads to the termination of this right naturally, as well as the last possibility of new human life in the treatment of infertility. According to Law 2427, a special card is created for a donor, and information about him is entered into the Unified State Information System of Transplantation¹. It will consist of several registers: lists of people who have decided on a posthumous donation, their proxies, lists of living donors, registers of anatomical materials intended for transplantation or production of bioimplants. It will include a list of living donors of hematopoietic stem cells. That is, a bank of bone marrow donors is being created, which simply did not exist in Ukraine before. Saved in this database lists of recipients (people in need of donor organs)

1. Law of Ukraine No. 1007-XIV “On transplantation of organs and other anatomical materials”. (1999, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/1007-14#Text>.

as well as those who have already received a donor organ will be provided. The updated Unified Information System will be a list of medical institutions that have the right to transplant organs and tissues, and transplant coordinators – people responsible for the complex process of organ transplantation.

Under the new law, the information stored in this system will be confidential. And the transplant permit can be revoked by an applicant. The law also provides for a “presumption of disagreement” when a person refuses to donate posthumously in writing. It also identifies those whose organs cannot be removed for transplantation under any circumstances – children and people killed in hostilities or violently. According to the document, every citizen of Ukraine must either agree or prohibit the removal of their organs after death. If during his life he did not have time to express his opinion on this issue, the decision can be made by relatives, in their absence the principle of disagreement comes into force: no consent – no posthumous donation. The document provides for imprisonment for up to five years for forcible removal of organs and up to seven years for trafficking in organs.

However, the parliament did not support the models that work in India, Belarus, Kazakhstan, Russia [2]. There is a model of “presumption of consent”. That is, a person or his relatives are not asked for consent to donate. If a person dies, his organs are taken away to save another person. In India, it is simply a cult. People believe that this is the highest reward – if your kidneys or heart can still live after your death. But because the church was against such donations, parliament did not go for it.

Thus, the Code of the Republic of Kazakhstan provides for the possibility of removing organs and tissues from a corpse¹. Article 169 § 10 enshrines the presumption of consent. This means that the removal of organs and (or) tissues from the corpse is not allowed if the health care organisation at the time of removal is informed that during the life of this person or his spouse, close relatives or legal representative have declared their refusal to remove his tissues and (or) organs (parts of organs) after death for transplantation to a recipient. Only with the consent of the deceased, obtained in the prescribed form, given before his death, or his close relatives, the scope of which must be clearly defined by law, the medical organisation has the right to remove the organs and tissues of a deceased. Paragraph 3 of Article 169 of the Code of the Republic of Kazakhstan established that the sale of human organs and (or) tissues is prohibited, but with this prohibition the legislator excluded only one of the possible agreements with transplant objects, without specifying others, which raises the problem of recognizing the civil nature of transplantation. The Law of the Republic of Belarus “On

Transplantation of Organs and Tissues”² states that human organs and tissues may not be the subject of civil law agreements, except for agreements of a gratuitous nature, i.e. they are recognised as things restricted in circulation. The Law of the Republic of Moldova “On Transplantation of Human Organs and Tissues” prohibits the sale of human organs and tissues, it is possible to apply only to medical institutions³.

Legislation in developed countries, as a rule, contains rules on criminal liability for commercial donation:

- German legislation on transplantation [3];
- British legislation – “Act on Human Tissues” [4].

According to international legal doctrine, commercial agreements with transplant objects (*sui generis*) are also prohibited under the threat of criminal punishment:

- Declaration on human organ transplantation: condemnation of commercial donation⁴;
- A set of basic principles on transplantation: “the human body and its parts cannot be the object of purchase and sale” [5; 6];
- CoE Convention “On the protection of human rights and human dignity in connection with the application of biology” [7].

However, it should be noted that in some countries there is no ban on reimbursable donation – Iran, Turkey and India, where the field of transplant services is not criminalised [8]. Thus, international law, the legislation of the CIS countries and developed countries mainly recognise organs and tissues as objects of *sui generis*, limited in circulation, establishing a criminal ban on commercial donation. The state acts as the main regulator of legal relations in the field of organ and tissue transplantation, allowing limited use of the contractual mechanism in the field of posthumous donation. In the authors’ opinion, the most optimal choice between the “presumption of consent” and the “presumption of non-consent” for posthumous donation [9] should be considered the contractual mechanism of the “extended model”. In the case of in-life and posthumous donation, mandatory participation of an independent medical and legal commission – a representative of public authorities as a guarantor of the voluntary Donation Act – is required. According to the results of the analysis of sources, it can be concluded that in civil law, organs and tissues are considered by most researchers as things [10], special objects [11], as withdrawn from civil circulation [12] (on the basis of prohibition), simply as objects civil law [13] or sometimes as personal intangible benefits (health and the right to bodily integrity) [14]. The authors believe that within the civil law approach to the legal essence of donor organs and tissues, they should be recognised as special objects of civil law of real nature. The objects of transplantation before their removal and

1. Code of the Republic of Kazakhstan No. 193-IV “On the health of the people and the health care system”. (2009, September). Retrieved from https://online.zakon.kz/document/?doc_id=30479065.

2. Law of the Republic of Belarus No. 28-3 “On organ and tissue transplantation”. (1997, March). Retrieved from <http://pravo.levonevsky.org/bazaby/zakon/zakb1023.htm>.

3. Law of the Republic of Moldova Nr.473-XIV “On transplantation of human organs and tissues”. (1999, June). Retrieved from <http://www.law-moldova.com/laws/rus/transplantatsii-organov-ru.txt>.

4. Declaration on human organ transplantation. (1987, October). Retrieved from https://zakon.rada.gov.ua/laws/show/995_330#Text.

after transplantation are essentially intangible benefits, expressed in the right to health, bodily inviolability, and dignified treatment of a body after death. From the moment of seizure there is a new object, which due to close personal connection with a donor (genetic code) cannot be unambiguously considered a thing, but, no doubt, it has a material nature, because it is the subject of the material world, which is in human possession and serves to meet her needs.

If to consider a thing as an object of civil law, then among its main features are materiality and accessibility, and as an additional – usefulness. These characteristics of the thing are applied only to the independent organs and tissues of man, that is, already separated from it. Organs and tissues, no doubt, are objects of the material world and are useful in meeting human health needs. However, this does not give grounds to consider them things. Biological objects differ from ordinary things by a special origin (they are part of the human body). As the list of objects of civil law is not exhaustive, it, in the authors' opinion, allows allocating bodies and fabrics in separate groups of objects of civil law. V. Skrypyuk holds a similar position, believing that donor bodies under no circumstances can be recognised as things, should be included in a specific independent subject of civil law agreements, limited in civil turnover [15].

Donor organs can be classified on the basis of availability. In particular, D.S. Dontsov [16] offers the following:

1. Organs and tissues, “in the separation of which either there are no adverse changes in the human body (e.g., nails, hair, excretion products, etc.), or, if changes occur, they are temporary and not have serious consequences for human health”.

2. “Organs and tissues, the removal of which is either impossible at all, as it will inevitably lead to death, or such removal can have significant adverse health consequences”.

The parts of the body belonging to the first group are classified as full-fledged revolving objects without any restrictions. Other organs and tissues must be classified as restricted or withdrawn from circulation.

The division of donor bodies into two groups in determining their legal status as objects of civil rights is supported by other scholars [17]. But such a typology from a legal point of view is illegal and inaccurate.

The authors believe that the division is best done in three groups:

1. Parts of the human body, the removal of which does not cause any adverse changes in the human body (nails, hair, blood within acceptable limits) – property, limited in civil circulation.

2. Parts of the human body that can be removed in a lifetime (paired organs, such as the kidneys), but are painful and have various adverse effects on the health of the donor, as well as

3. Parts of the human body that cannot be removed during life (heart), as it will lead to the death of a donor.

With regard to the first selected group, the civil legislation should contain rules on permission to buy and sell these objects of a human body, the removal of which is not associated with danger to human life and health.

The second group allows the emergence of civil relations only between a donor and a recipient, and lists the objects restricted in circulation. The third group consists of objects withdrawn from circulation. The issue of ownership of donor organs is also becoming relevant. As for the parts of a body that are not removed from it, there is no doubt that they are not independent objects of rights. The position on the recognition/non-recognition of human organs as property objects after death is controversial. There are court decisions that deny the material nature of human organs. Thus, the judicial panel refused to satisfy the requirements to declare the surgery on organs remove illegal, to recover compensation for non-pecuniary damage, because at the time of biological death and at the time of the procedure of removal of organs for transplantation none of the relatives or legal representatives of the deceased had not informed about non-consent of posthumous removal of organs [18; 19]. The judicial panel justified the decision by the fact that the human organs, which it has from the moment of birth, the current legislation does not refer to things, therefore, they cannot be part of the hereditary mass. However, this position is controversial, as the current legislation actually recognises that the fate of human body parts can be determined at the discretion of the “right holder” during his lifetime. Thus a person has the right at any time to express his will to consent or disagree with the removal of organs and tissues from his body after death [20; 21].

In the authors' opinion, the removal of human organs during life should be at person's full disposal and take place at the will of a person. The law stipulates that the removal of an organ from a living donor is permitted if he is genetically related to a recipient. Therefore, the authors consider the legal permission of only related lifelong donation as a diminution of a citizen's rights. For many patients or victims of accidents, donor organs become the only hope for life. In Belarus, the number of organ transplants has increased 40 times due to the presumption of consent, i.e. a person becomes a default donor if he/she does not report a ban on posthumous donation. In Catholic countries, the boom is largely due to the Pope's call “not to take a body to heaven”. Despite the fact that the state budget for 2018 was laid the first time including transplantation (UAH 112 million), it is still a drop in the ocean. According to the Association of Surgeons, the annual need for organ transplantation in Ukraine is as follows: kidneys – 2500, heart – 2000, liver – 1500. But today only 2% of the necessary surgeries occur [22]. That is why it is so important to develop Ukrainian transplantology. However, opponents of the new transplant law believe that the unpreparedness of the health care system leads to the flourishing of “black transplantology” [23]. Especially in situations where medical reform is not complete and a military conflict is raging in the east of the country. After all, under similar circumstances, there were terrible crimes in this area. Thus, in the book “Hunting. Me and the War Criminals”, Carla de Ponti, prosecutor at the International Criminal Tribunal for Yugoslavia, said that in 1999, young Serb prisoners of war had not been beaten in Kosovo and had been well fed. And then qualified medical workers took organs from them for transplantation

to foreign customers [24; 25]. In the authors' opinion, the new law places more restrictions on the development of black transplantation, despite its shortcomings. But even on the "black" Ukrainian market, the cornea costs 5 thousand dollars, the heart – 250 thousand dollars. Ukrainians sell their organs abroad. To prevent this, the law increases criminal liability for violating the order of organ transplantation. Relevant changes are made in Art. 143 of the Criminal Code [18], which will maintain the state monopoly on such operations.

Law 2427 requires the diagnosis of brain death. Posthumous organ donation and transplantation is a transparent procedure involving more than 10 specialists, it is controlled by the prosecutor's office. It is forbidden to just take a kidney out of a person and put it in the fridge. The new law has several serious differences from the law "On transplantation of organs and other anatomical materials" adopted in 1999 [5]. First, if earlier only state institutions could be involved in the removal of organs, now this right is granted to all, even private, and not accredited in the manner prescribed by the Cabinet of Ministers, contrary to part 5 of Article 16 of the Fundamentals of Health Legislation of Ukraine¹. Secondly, the new version provides for the establishment of a central executive body that ensures the formation of state policy in the field of health care and prescribes some mechanisms for obtaining consent to take organs, which was not the case before.

The urgent issue for Ukraine is the organisation of the transplantation system. It consists of specialised, well-equipped transplant centres with good doctors, a secure database. Organisational reserves and forces play a very important role: choppers, machines, specialists in organ transportation, means of transportation. There is nothing like that. It is noted that in Ukraine now, in fact, 7 transplant centres. A surgeon can perform several dozen, a hundred surgeries a year. And organisationally less surgeries can be provided. This is resuscitation, anaesthesiologists. An organ transportation service should be created. That is, in the authors' opinion, the country is not prepared for this process at all. This is a law about the future of medicine and the future of people, because there are many diseases that we have not learned to treat. For example, myocardial infarction is the local death of a small area of the heart. The living tissue of the heart is replaced by a scar, and as a result a person stays with a part of the heart for life that does not allow him to work properly as a pump. But in the future, it will be possible to transplant "patches" of myocytes of heart cells instead of a scar. It will also be possible to make 3D frames of organs. For this the law is needed, which opens the way to a civilised world. The authors of the bill, adopted by the Council, claim that it will save the lives of more than 5000 Ukrainians who need a transplant every year. However, the director of the Heart Institute, Borys Todurov, calls for restraint in forecasts: "I think that in the version in which this law was adopted, it will not change anything during the year. After all, the

main norm, which is very necessary, was not adopted – the presumption of consent"². However, not all organs can be suitable for this or that patient due to certain indicators. Before transplantation, doctors must perform typing.

Ukrainians are wary of organ transplants. Meanwhile, in many countries, it is already a public norm. Thus, in Austria, Poland, Belgium, Portugal, Sweden, France, more than 80% of the population is ready to help save someone's life. However, the British, Germans or Danes consent to posthumous donation in only 12-20% of cases. According to psychologists, the reason is not that one nation is "kinder" than another, a snag is in the form of a special questionnaire. In the UK, for example, it is needed to check the box that allows posthumous transplantation. And in France, on the contrary, it is necessary to note the column of refusal. According to psychologists, when making such a decision, people more often choose the opportunity to help the dying survive [26; 27]. But experts note that it will not be easy for Ukrainians to decide on a posthumous donation. Ukrainians are afraid of falling victim to black transplantologists. It should be borne in mind that for a transplant operation, the body must be technically alive and viable. That is, it is possible to remove an organ for transplantation and transplant it to a recipient only if a potential donor is in a health care facility, on a ventilator, he has been diagnosed with brain death. Only in this case, in the operating room, an organ can be removed for transplantation. In a morgue, for example, it is absolutely impossible to do so, because the organ will be dead and unsuitable for transplantation. A man full of energy is afraid to think of a sudden demise. And it will be difficult for relatives to give permission to remove organs: there is some stinginess in Ukrainian mentality. In addition, citizens do not trust the state. They may also refuse for religious reasons. To get rid of fears and complexes, people need a well-structured information campaign [28].

The presence of organs and the compatibility of a recipient and a donor are not the only components of a successful operation. Unfortunately, in recent years, transplantation as a field of medicine in Ukraine has receded into the background and declined. If earlier Belarusian doctors came to learn from their Ukrainian colleagues, now Ukrainians go to Belarus for heart transplants. It is stated that there are only 5 specialised institutions in the country: in Kyiv, Donetsk, Odesa, Lviv and Zaporizhia. The mechanism of the implementation of the subjective right to donation as a form of realisation of the constitutional and civil right to life includes the following elements (Fig. 1).

The legal status of the subject of the right to donate includes rights, freedoms, responsibilities and their guarantees that correspond to the general constitutional and legal status of a person and a citizen of Ukraine, burdened by their special legal status, which is an objective danger that is not eliminated, for life and health. This status is implemented in four forms (Fig. 2).

1. Law of Ukraine No. 2801-XII "Fundamentals of the legislation of Ukraine on health care". (1992, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/2801-12#Text>.

2. Criminal codex of Ukraine. (2011). Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14>.

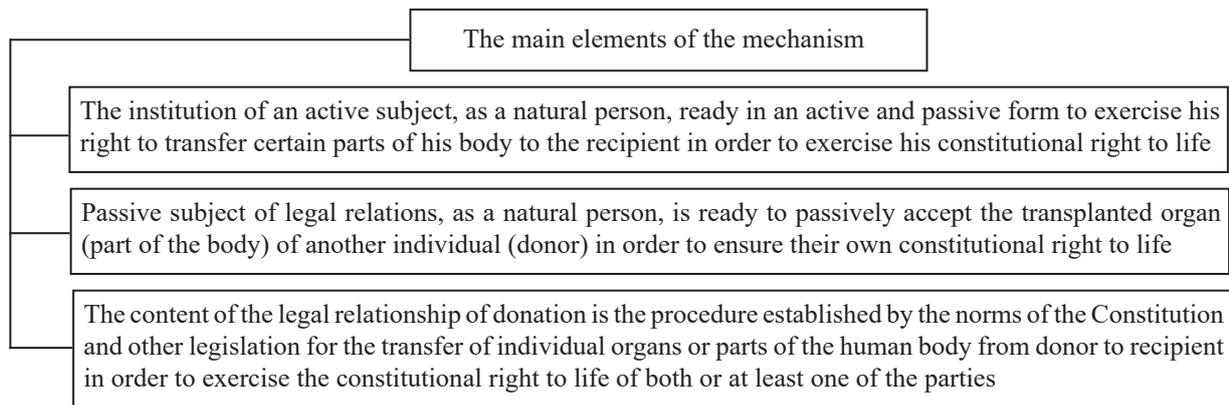


Figure 1. *The main elements of the mechanism of exercising the subjective right to donation as a form of realisation of the constitutional and civil right to life*

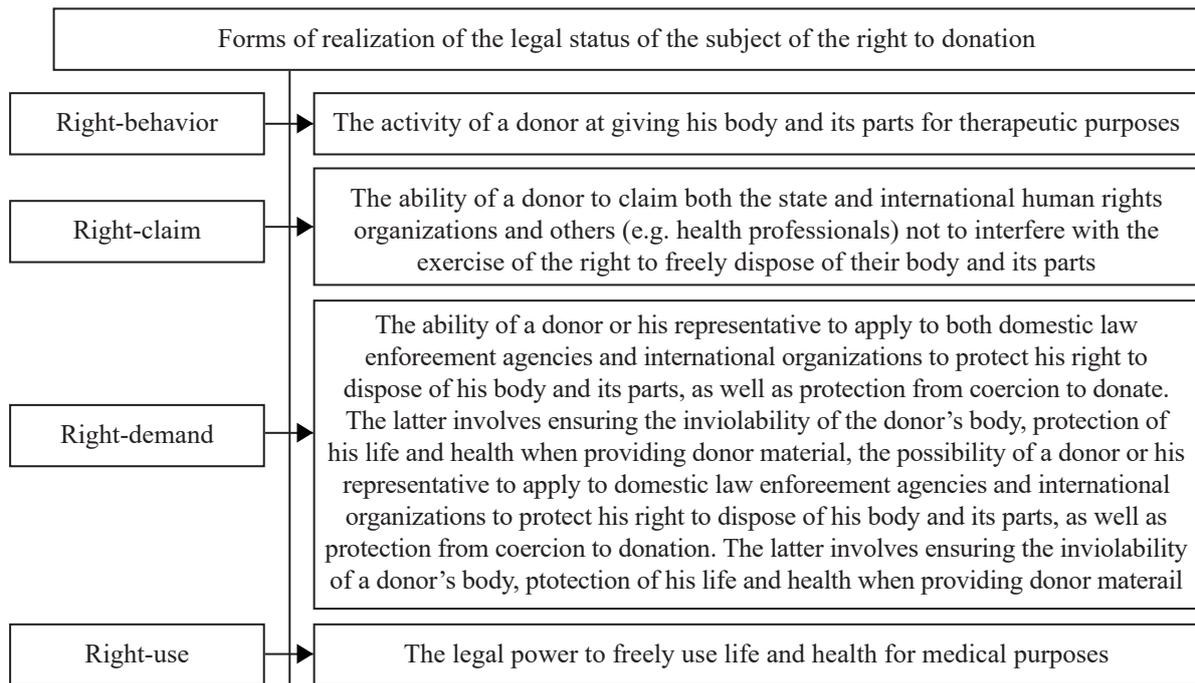


Figure 2. *Forms of realisation of the legal status of the subject of the right to donation*

The right to physical freedom is the right of every person to freely use and dispose of his organism and its parts both during life and to predict their fate in the event of death. One of the components of this authority is the right to donate. In this connection, it is proposed to supplement Section 2 of the Constitution with the following article:

1. Everyone has the right to physical liberty.
2. Donation in Ukraine is encouraged. No one can be forced to remove organs and tissues.

In order to protect the constitutional rights to life, liberty and security of person, health care and medical care of minor donors, the Law on Organ Transplantation must provide for the following restrictions on the donation of minors:

- a) the removal of bone marrow from a minor is allowed subject to the approval of authorised state bodies, such as guardianship and custody authorities and the court;
- b) the removal of bone marrow from a minor is allowed only with the knowledge of his legal representatives;
- c) in cases when the donor has reached the age of 15, it is necessary to take into account the donor's own opinion;

- d) the recipient can be only a brother or sister of a donor;
- e) bone marrow donation may take place only in the event of an imminent threat of loss of life for a recipient, which cannot be avoided by any means other than bone marrow transplantation;
- e) the removal of the bone marrow from a minor will not cause the alleged harm to health, which must be confirmed by a decision of a medical council.

The legal requirement that there be only a genetic link between the organ and tissue donor and the recipient does not seem reasonable and fair. This hinders the realisation of the constitutional right to life of people in need of transplantation, as well as unreasonably limits the subjective human right to organ and tissue donation. As a condition for the removal of organs and tissues for transplantation from a living donor, in addition to the genetic link, the Law on Transplantation would provide for other links that may exist between spouses, loved ones, friends and provide additional medical examination for survival (compatibility) of the organ or tissue. Since the donation of organs and tissues for transplantation is associated with

a risk to life and the possibility of negative consequences for the health of a donor, the state is obliged as a guarantee of the subjective right to donation, to provide donor social support. Currently, such measures are assigned only to blood donors and their components, which, in the light of public interest, does not seem fair and rational. Social support measures include, in particular, priority allocation at the place of work or training of preferential vouchers for sanatorium treatment; extraordinary treatment in state or municipal health care organisations within the framework of the Program of state guarantees of free medical care; granting annual paid leave at the appropriate time of year, etc. By adopting a law on transplantation of anatomical materials, and not making a system of protection as objects of civil law, the Verkhovna Rada created a serious risk to the lives of those who agreed to posthumous donation.

Authorities plan to create a single state information system for transplantation, many of which will be confidential. However, there will be categories of people who will be able to recognise absolutely all the information: after the law comes into force in Ukraine, it is worth noting that this law has been in force since 2018. They will receive the consent of relatives for posthumous donation, enter data into the register, organise the removal, storage and transportation of anatomical materials. If desired, they will be able to sell personal data of potential donors and physiological parameters of organs. The opposite situation can happen: relatives of patients can arrange a hunt for valuable information carriers to go directly to donors. In addition, a separate line of the law prescribes the possibility of selling anatomical materials abroad, if there are no suitable recipients in Ukraine. That is, now would be possible not to smuggle, but to declare the absence of a person who will fit the removed organ, and legally take him abroad and get much more money. Thus, renouncing the state's monopoly on organ transplantation, the authorities lifted all restrictions on the removal of organs abroad. At the same time, hundreds of Ukrainians are waiting, hoping for a suitable donor.

In the context of a complex legal relationship between

a donor and a recipient and a possible conflict of interest, the content of the Law on Transplantation, which provides for the presumption of consent to the removal of an organ or tissue after death, should promote the constitutional right to life and not violate balance of constitutionally significant values and rights of any of them, of which: a recipient – in terms of ensuring the realisation of his right to life and human rights (donor) to a dignified treatment of his body, i.e. the right to physical integrity as an element of the right to personal integrity and protection of the dignity of a person after death.

CONCLUSIONS

Thus, donation occupies an important position in the system of realisation of constitutional rights and freedoms of both a donor and other persons, as well as in the system of realisation of civil rights and responsibilities:

- it ensures the realisation of the constitutional right to life, saving it and restoring human health, as well as creating a new life.

- it provides protection of physical and moral inviolability of a donor;

- it ensures the restriction of the donor's right to dispose of their bodies in its interests;

- despite the absence of provisions on donation in the text of the Constitution, they have a constitutional and legal status;

- civil law aspects of the right to donate are based on the constitutional human right to dispose of their body and its parts.

The rights to donor organs are in practice exercised without the exercise of real authority by both donors and recipients, with the participation of medical institutions that in some sense own these facilities. The authors believe that with regard to donor bodies, it is possible to talk only about property rights of a special type, which are more limited in circulation and have some common features with property rights. The donor's right to own organs can be characterised as a right of disposal.

REFERENCES

- [1] Shchastny, A.T., & Mikhnevich, E.V. (2018). Achievements and problems of transplantology at the present stage. *Bulletin of Vitebsk State Medical University*, 17(5), 7-16.
- [2] Orlovetskaya, A.G. (2017). Blood donation as a form of altruistic behaviour: Russian specifics. *Journal of Social Policy Research*, 15(1), 7-20.
- [3] Dubovik, O.L., & Zhalinskaya, A.A. (1998). Legislation of Germany on organ and tissue transplantation. *Journal of Russian Law*, 10, 206-212.
- [4] Human tissue act. (2004). Retrieved from http://www.opsi.gov.uk/acts/acts2004/ukpga_20040030_en_1.
- [5] WHO guidelines for transplantation. (1991). Retrieved from http://158.232.12.119/transplantation/Guiding_PrinciplesTransplantation_WHA63.22ru.pdf.
- [6] WHO guidelines for transplantation of human cells, tissues and organs. (2010). Retrieved from https://www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22ru.pdf
- [7] Wall, J. (2011). The legal status of body parts: A framework. *Oxford Journal of Legal Studies*, 31(4), 783-804.
- [8] Stepanova, E.N. (2004). *Human organ transplantation: World experience and Russia (civil law aspect)*. Moscow: Moscow University.
- [9] Galeeva, G.R. (2015). The model of "requested consent" in Russian and foreign legislation in the field of transplantation of human organs and (or) tissues. *Bulletin of the Volzhsky University after V.N. Tatischev*, 4(83), 42-49.

- [10] Maleina, M.N. (2003). The status of organs, tissues, the human body as objects of property rights and the right to physical integrity. *Legislation*, 11, 22-49.
- [11] Apolinskaya, N.V. (2009). *Biological objects of human in the civil law of the Russian Federation*. Irkutsk: Irkutsk State University.
- [12] Bezverkhov, A.G. (2002). *Property crimes*. Samara: Samara University.
- [13] Kudashova, T.G. (2012). Recognition of human organs and tissues as objects of civil law: Pros and cons. *Proceedings of the Orenburg State Agrarian University*, 3(35-1), 268-270.
- [14] Krasavchikova, L.O. (1994). *The concept and system of personal non-property rights of citizens (individuals) in the civil law of the Russian Federation*. Yekaterinburg: Publishing House of the Ural Law Academy.
- [15] Skrypnyk, V. (2018). Donor bodies as objects of civil legal relations. *Entrepreneurship, Economy and Law*, 5, 62-67.
- [16] Dontsov, D.S. (2009). Human organs and tissues as objects of property law in the Russian Federation. *Medical Law*, 2, 43-46.
- [17] Dautbaeva-Mukhtarova, A.E. (2014). The use of human organs and tissues in transplantology as special objects of civil law. *Bulletin of the Institute of Legislation and Legal Information of the Republic of Kazakhstan*, 1(33), 35-39.
- [18] Appeal ruling of the Moscow City Court of September 16, 2013, in the case No. 11-27391. (2013). Retrieved from <http://base.garant.ru/119282608/>.
- [19] Ninko, D. (2016). The right to life: What prevents transplantation legally and why it is difficult to become a donor in Ukraine. *Today*, 3, 12-14.
- [20] Tasbulatova, G.S., Umbetov, A.U., Sadykova, B.S., Uzakova, B.Z., & Abdrakhmanova, M.T. (2020). Comparative characteristics of the cardiovascular parameters in 7-11-year-old boys residing in northern and southern Kazakhstan. *Zeitschrift fur Gefassmedizin*, 17(2), 13-15.
- [21] Kostruba, A.V. (2018). Law enforcement as a form of realization of right: Phenomenological analysis experience (Civilized aspect). *Revista de Derecho Civil*, 5(1), 177-190.
- [22] In Ukraine, from 2018, organs from “non-native corpses” will be transplanted. (2017). Retrieved from <https://tsn.ua/ukrayina/u-2018-roci-v-ukrayini-startuye-masshtabna-programa-z-peresadki-organiv-vid-chuzhjih-mertvih-donoriv-1039020>.
- [23] Ptashnyk, I.R. (2016). *Civil law regulation of transplantation in Ukraine*. Kyiv: National Academy of Internal Affairs.
- [24] Kurakin, M. (2017). Yugoslav blood. Retrieved from <https://lenta.ru/articles/2017/12/07/mtbubgeroi>.
- [25] Giallongo, A., Parisi, G.F., Licari, A., Pulvirenti, G., Cuppari, C., Salpietro, C., Marseglia, G.L., & Leonardi, S. (2019). Novel therapeutic targets for allergic airway disease in children. *Drugs in Context*, 8, Article number 212590.
- [26] Ustinov, O.V. (2018). Active life with a transplanted heart in Ukraine and in the world. *Ukrainian Medical Journal*, 4, 3-5.
- [27] Kostruba, A.V. (2018). Right deprivation in the legal regulation mechanism of civil property relations. *Journal of Legal, Ethical and Regulatory Issues*, 21(Special Issue 1), 1-15.
- [28] Aringazina, A.M., & Kurmanguzhina, M.Sh. (2014). Modern approaches to the implementation of donor programs in transplantation. *Clinical Medicine of Kazakhstan*, 32(2), 14-20.

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