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THE RIGHT TO BE A DONOR IN UKRAINE: LEGAL REGULATION AND PROBLEMS OF IMPLEMENTATION PRACTICE

Миронюк С. ПРАВО НА ДОНОРСТВО В УКРАЇНІ: ПРАВОВЕ РЕГУЛЮВАННЯ ТА ПРОБЛЕМИ ПРАВОЗАСТОСОВЧОЇ ПРАКТИКИ. З прийняттям Закону України «Про застосування трансплантації анатомічних матеріалів людині» 17 травня 2018 року було запроваджено алгоритм дій щодоствореннядиної державної інформаційної системи трансплантації, яка буде складатись з таких реєстрів:1) реєстр волевиявлення особи про надання згоди або незгоди на посмертне донорство або призначення нею повноважного представника; 2) реєстр волевиявлення особи, яка надала у встановленому цим Законом порядку згоду на вилучення анатомічних матеріалів для трансплантації та/або виготовлення біоімплантатів з тіла померлої особи, яку вона представляє; 3) реєстр анатомічних матеріалів людини, призначених для трансплантації та/або виготовлення біоімплантатів; 4) реєстр живих донорів; 5) реєстр живих донорів гемопоетичних стовбурових клітин; 6) реєстр реципієнтів; 7) реєстр осіб з трансплантованим анатомічним матеріалом; 8) реєстр закладів охорони здоров'я, що надають медичну допомогу із застосуванням трансплантації та/або здійснюють діяльність, пов'язану з трансплантацією, та інших суб'єктів господарювання, що здійснюють діяльність, пов'язану з трансплантацією; 9) реєстр трансплант-координаторів. На сьогоднівже законодавчо врегулювано питання констатації смерті головного мозку. На наш погляд зроблено великий крок, якийдозволить робити операції по пересадці органів, використовуючи трупні органи, але в цьому питанні також існує багато суперечливих положень, і є недосконалим. Тому на нашу думку, законодавче положення щодо заборони прижиттєвої пожертви задля порятунку близьких родичів, особам, які відбувають покарання в містах позбавлення волі потребує перегляду, адже говорячи про заборону бути донором особи, що відбуває покарання в місцях позбавлення волі, ми говоримо про заборону особі-реципієнту на можливість стати здоровою людиною або навіть жити.

Ключові слова: *трансплантація, донор, живий донор, трупний орган, реципієнт, близькі родичі, медичне право.*

Relevance of the topic of the article. Back in 1933, Ukrainian surgeon YuriyVoronyi conducted the first in the world, a successful renal transplant operation from the deceased in Kherson. But despite this fact, according to the level of development of the sphere of transplantation in general, and the indicator of post-mortem donation in particular, as statistics of the Ministry of Health of Ukraine (hereinafter – the Ministry of Health) shows, our state is the last among the countries of Europe, in Ukraine operations concerning organ transplants from dead persons are 100 times less than in neighboring Poland.Today in Ukraine due to imperfection of legislation, economic, social and ethical problems, transplantation has no opportunities for development. To great regret, thousands of sick people are forced to spend huge amounts of money on operations abroad, investing both their own funds and the means of our state in the development of medicine of other countries.

So, in 2013-2015, the Ministry of Health transferred $ 2,431 million and 616,2 thousand euros to the medical institutions of foreign countries. 6 transplantations of bone marrow from a family donor (adult population), 8 cardiac transplantations, 5 – liver, 18 – kidneys from living donated donors and corpses were made for these funds.The Accounting Chamber has analyzed that the difference between the cost of conducting such operations in Ukraine and abroad varies very significantly. In Ukraine, about 1122 heart transplants, 116 liver transplants and 5623 kidney transplants, respectively, could be carried out for these funds.For example, in 2014-

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2015, the cost of kidney transplantation in Belarus was 60 thousand dollars, and in Ukraine – about 16 thousand, liver – 140 and 54 thousand respectively [1].

Realizing all the greatness of the problem, the Ministry of Health has actively developed and submitted to the Verkhovna Rada for consideration the bills on amendments to the Law of Ukraine "On transplantation of organs and other anatomical materials to man" for the last five years and, finally, on May 17, 2018, the Verkhovna Rada of Ukraine adopted in the second reading the Law "On the Application of Transplantation of Anatomical Materials to a Man" (hereinafter referred to as the Law), for which 255 people were elected [2], is currently signed by the President of Ukraine.Entry into force of this law will result in the need for regulating civil relations arising from one side of the relatives of the deceased person and person in need of organ transplantation from the deceased, the other – that occur between patient and medical institution that performs surgeries on transplantation and elucidation of the legal nature of these relations and the order of their realization, which is the subject of research within the limits of this article. Based on the research subject main tasks planned for execution within this article are: clarify the legal nature of the relationship transplantation, analysis of current legal basis of the regulation, regulation defects and determine specific ways to improve the regulatory bases transplantation in Ukraine.

Statement of the main provisions. According to Art. 1 of the Law of Ukraine "On organ transplantation and other anatomical materials to man" of July 16, 1999 (hereinafter referred to as the Law 1999), transplantation is a special method of treatment involving the transplantation of an organ or other anatomical material taken from a person or animal [3].Article 1 of the adopted Law specifies that transplantation is a special method of treatment, consisting in the transfer of anatomical human material from the donor to the recipient and aimed at restoring human health [2].

According to the definition of the World Health Organization, transplantation is the transfer of living or dead tissue or organ between individuals of one or the same type [4, p.320]. Despite the fact that there is a medical law in Ukraine that has several definitions, one of which was given by Stetsenko S.G., namely: "medical law is a complex branch of law, which includes a set of legal norms regulating social relations in the field, in the legal literature there is no single point of view regarding the nature of the relations that arise in the provision of medical care, and in particular, in the case of transplantation"[5].

When analyzing medical law, we understand that it has as a circle of specific industry principles, concepts, terms, etc., and it applies the methods of legal regulation that are borrowed in other areas of law, including the norms of administrative law and civil law, which we think are used in greater volume, that is inter-branch law.In examining the problem of medical law, we drew attention to the fact that the opinions of scientists who studied this issue were divided, and some of them think that the relations that arise in the provision of medical care, including transplantation, are administrative and legal, and arise based on an administrative agreement, arguing that the relationship between the medical institution and the patient is of a dominant nature, since the latter is obliged to adhere to the regulations and regime of the medical institution.

M.N. Maleina, on the contrary, considers that the administration of a medical institution has powers of authority and implements them only in relation to its employees, but in relation to the service of patients, these powers can not be applied, since the obligations to comply with the regime of a medical institution arise at the will of the citizen, and may be terminated at the request of the patient at any time, which denies the administrative and legal nature of the relationship [6, p.67].In our opinion, medical law uses administrative law in matters relating to the direct management of medical institutions, licensing issues, tenders for the purchase of medical equipment and medicine, as well as other management issues, as well as norms of civil law concerning the provision of services to citizens, the provision of diagnostic services, prevention, treatment and rehabilitation. We think that the relationship between the medical institution and the patient is civil law, since the legal relationship provides freedom of choice of the behavior of the parties, but it regulates their rights, duties and responsibility.Also, in medical law, the norms of criminal law, labor law, family law, etc. are also used.

As we have already mentioned, medical law has specific sectoral principles.

It is very important to ensure the inviolability and protection of the principle of transplantology: the donor person should not be known to the recipient, and vice versa, except for marriage, family ties.

To date, only transplants from relatives are permitted in Ukraine, but from 2019, in ac-

cordance with the law on transplantology, the process of transplantation of kidneys from corpses, which in our opinion, is a great achievement.

But the issue of donation from relatives also remains relevant, although it is not clear who is a close relative. Analyzing family law, we understand that the concept of marriage – a family union of woman and man, registered in the state registration body of civil status, it is defined. But, unfortunately, there is no clear definition of the concept of "close relatives"[7].The most precise definition of the concept of "close relatives" is, in our opinion, contained in the Criminal Procedure Code, Article 3, paragraph 1, subparagraph 1, namely: "close relatives and family members – husband, wife, father, mother, stepfather, stepmother, son, daughter, stepchild, stepchild, brother, sister, grandfather, grandmother, great-grandfather, great-grandfather, grandchild, granddaughter, great-grandson, grand-daughter, adopter or adopted, guardian or trustee, person under guardianship or care, as well as persons living together, connected by common way and having mutual rights and obligations, including those who live together but who are not married" [8].There are three main types of donation. The first is the donation of organs from a living person: the removal of anatomical materials from a living donor is possible in the case of family donation or cross-donation. The second is donation from a living person, but it is the removal of anatomical materials capable of regeneration (self-reproduction), including hematopoietic stem cells, which can be carried out from a living donor who is not a close relative or a family member of the recipient. And the third is the donation of corpses, which consists in the fact that every adult capable person has the right to provide written consent or disagreement with the removal of anatomical materials from his/her body for transplantation and/or production of bioimplants after determining her condition as irreversible death (brain death or biological death) in accordance with the law (hereinafter – consent or disagreement with the post-mortem donation).The person who submitted the application has the right to withdraw, or to submit the next, which is entered in the register, automatically excluding the previous one. Every adult legal person has the right to appoint an authorized representative who, after the death of this person, will give his/her consent. Only an adult capable person who consciouslyand voluntarily gave consent to this can be a plenipotentiary representative. If the deceased person has not expressed his/her consent or disagreement with the post-mortem donation, has not determined his/herauthorized representative, the consent is requested from the second spouse or one of the close relatives of this person (children, parents, siblings) who is available to ask for such consent and written confirmation of its delivery. In the absence of the said consent, a person who undertakes to bury him/her is requested. In case of death of a person under 18 years of age, consent may be given by the parent or other legal representatives of this person.Of course, in order to prevent abuse, minimize unlawful transplantation, the law provides for a number of bans on donation, both from living donors and for cadaverous donations that need to be improved.For example, in our opinion, the issue is not resolved in relation to cadaverous donation, in the event that an adult, capable person has given consent to the removal of anatomical materials from his/her body for transplantation and/ or production of bioimplants after determining his/her condition as irreversible death (brain death or biological death) in accordance with the law, made it consciously, immediately before voluntarily taking part in hostilities, understanding the full risk.This person died or his/her consent to donation would be considered whether this consent would be invalid, since Article 17, paragraph 4, of the Act prohibits the removal of anatomical materials from his/her body for transplantation and/or bioimplant production after determining his/her condition as irreversible death (brain death or biological death) in accordance with the law, who died during an anti-terrorist operation and other military operations during direct involvement in the implementation of measures for the national security and defense, repression and deterrence the armed aggression of the Russian Federation in the Donetsk and Luhansk regions, being directly in the areas and during the period of implementation of these measures, and other military actions [2].But some of the prohibitions in our opinion are unfounded and contradict common sense. One such prohibition is the prohibition on being a donor to a person serving sentences in places of deprivation of liberty.

According to Article 3 of the Constitution of Ukraine, a person, his/her life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the content and direction of the state's activities. The state is responsible to a person for its activities. The assertion and guarantee of human rights and freedoms is the main responsibility of the state [9].Article 27 of the Constitution of Ukraine states that every person has an inalienable right to life. No one can be arbitrarily deprived of life. The duty of the state is to protect human life. Everyone has the right to protect his life and health, life and health of others from unlawful encroachments [9].

We must understand that these rights – for life and health, the right to fatherhood, motherhood, the right to the protection of the life and health of their children, parents – are inalienable human rights, that is, they protect even persons serving a sentence of imprisonment. And the state is the guarantor of these rights, and the state's duty to protect human rights.If a person serving a sentence in a place of deprivation of liberty is ill, he/she needs an organ transplant operation and a close relative agrees to be a donor, then in these circumstances the legislator says that the operation can be done and the state will find the opportunity to provide the necessary conditions, to comply with a special regime regarding the person of the recipient (convicted) during the operation.

But for some reason to become a donor to his/her close relative, parent or child, a person serving sentence in places of deprivation of liberty can not.We consider this ban to be unwarranted because the legislator has determined that the removal of anatomical materials from a living donor is possible in case of family donation or cross-subsidization, which makes it impossible for any abuses, since in any case the person becomes a donor in order to save his close person, and in our opinion, the state should allow persons serving sentences in places of deprivation of liberty, if necessary, to become a donor to their close relative, and to provide all the necessary conditions for this.Of course, when it comes to extracting anatomical materials that are capable of regeneration (self-reproduction), including hematopoietic stem cells, it can also be done by a living donor who is not a close relative or a family member of the recipient, then this should include a prohibition, on the donation of a person serving sentences in places of deprivation of liberty.According to the statistics of Ministry of Health, each year in Ukraine about 5000 people require transplants of organs and cells, of whom more than 3400 die without waiting for surgery.

Conclusion. It should be noted that according to the sociological group "Rating", which conducted a survey among Ukrainians in July-August last year, 63% of respondents supported the human right to donate their organs after death in order to save or improve the lives of other people [1]. Therefore, in our opinion, the legislative provision on the prohibition of life support for the sake of rescuing close relatives, persons serving sentences in the places of deprivation of liberty needs to be revised, because speaking of the prohibition of being a donor to a person serving in places of deprivation of liberty, we are talking about the prohibition of the person-recipient of the opportunity to become a healthy person or even to live.

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Summary

With the adoption of the Law of Ukraine "On the application of transplantation of anatomical materials to man" on May 17, 2018, an algorithm for the creation of a unified state information system of transplantation, consisting of the following registries.

To date, the issue of establishing death of the brain has already been regulated by law. In our opinion, a major step has been taken to allow organ transplants to be performed using body organs, but there are also many controversial provisions on this issue, and it is imperfect.

***Keywords**: transplantation, donor, living donator, corps organ, recipient, close relatives, medical law.*