

## **Actual Problems of Post-Mortem Organ Donation by Bequest in the Law of Succession in Russia: A Comparative Legal Analysis**

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**Abstract:** This paper presents the study of the problems of post-mortem organ donation in the law of succession of Russian Federation on the basis of the analysis of the new RF law "Donation of organs, parts of organs and transplantation," which provides for the right of the citizens to dispose of their bodies by writing a will. The problems of choice of the presumption of agreement or disagreement on the posthumous donation, the creation of a single state base of donors, the mechanism of implementation of the new law have been considered. According to statistics in 2012, when the country's population was 143.2 million people, only 408 cases of the use of organs of post-mortem donors for transplantation were recorded in Russia. The paper presents a comparative legal analysis by the example of European countries and the U.S., where the post-mortem organ donation is regulated by law and has some experience in dealing with these legal issues.

**Key words:** Testator • The heir • The will • The presumption of consent • The presumption of disagreement • The posthumous donation • Transplantology

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### **INTRODUCTION**

Beginning of the era of transplantation is considered to be the year 1954, when the future Nobel Prize winner from US Joseph Murray performed the successful human kidney transplantation [1]. One of the most common types of organ donation in the world today is the posthumous donation, that is, the use of human organs after death. The problem is that during the life, people rarely express their will about the use of organs for transplantation after death. This is explained by a number of reasons, e.g. legal norms in force in different countries that regulate the relationship on removal of body organs and religious, ethical and moral reasons.

The absence of legislation allowing citizens to dispose of their organs in case of death, in particular by incorporating this order in the will, is one of the major problems of transplantology in Russia. There is no legal basis for the establishment of a register of the wills on post-mortem donation, which will reflect agreement or disagreement to be a donor. In Russia as well, there has been no federal program for the development of organ donation and transplantation. Only 30 percent of patients, who need donor assistance to Russia, survive to transplantation due to a shortage of donor organs.

In the world there are two basic approaches to the post-mortem donation: the presumption of consent and presumption of disagreement. A special place in the market of organ donation belongs to the countries, where the bodies of all citizens without exception are recognized as state property [2].

Presumption of consent implies that a person initially agrees to any action and he expresses his disagreement in the statutory form. Presumption of disagreement involves the expression of dissent with certain actions and citizens express their will, as required by law.

The presumption of consent operates in France, Belgium, Finland, Denmark, Italy, Norway, Sweden, etc.

The presumption of dissent is in force in the USA, Australia and UK. In the United States a person who wants to be a donor should register in a special registry of his state on the Internet or by mail. It is recommended to inform the family members who also have the right to decide on the donation of organs. In most states, consent for donation can be expressed while obtaining a driver's license and then a corresponding record is made in the document [3].

In Russia today, there is a presumption of consent to donation of organs after death.

## **MATERIALS AND METHODS**

The methodological basis of the study is a set of general scientific and public-scientific methods. The method of comparative analysis with foreign experience of legal regulation of hereditary was used; the inductive and deductive method revealed specific problems by identifying common trends and common problems through the particular situations; the use of the functional method allowed predicting certain trends in the development of the law of succession and developing a series of scientific recommendations.

**The Main Part:** The State Duma approved the bill of the Russian Federation "Donation of organs, parts of organs and transplantation" in the third reading; this will allow the citizens of Russia to bequeath their organs for transplantation, for scientific and educational purposes. The project was presented in April 2013 and it may enter into force as early as 2015.

At the III All-Russian International Conference "Organ donation - the key issue of transplantology," it was noted that the number of post-mortem donors in Russia is about seven times lower than in the U.S. In 2010, there were 487 cases, i.e. 3.4 cases per 1 million people. In general, in 2010 there were 1363 organ transplantations. On average it is 9.5 cases of transplantations per 1 million people per year, which is 10 times less than in the USA [4].

Director of the Institute of Public Health Yury Krestinsky is sure that adoption of a legal act is the way in the right direction. The legal framework regulating this sphere has been recently a white spot in the domestic legislation [5].

Dmitry Kuznetsov, the President of the Inter-regional alliance of health insurers, disagrees with this point of view, "I think that everything cannot be very well, even because still the issue of organ donation meets a very tense relation in the community. In principle, all innovations are taken very seriously by individual professionals in the scientific community and in some cases, by the leadership of the country" [6].

Throughout the world the transplantation is based on voluntary donation of organs. In some cases it is done by potential donors who wish to help someone in this way, even after their death. In other cases, the responsibility is taken by the relatives of people who died suddenly in capable age. In some countries, for example, in all states of the United States, there is the law "On the

uniform anatomical gift act," which defines the rules for donation of all or part of the human body after death for special purposes. At the national level, the process is coordinated by the non-governmental joint network for allocation of donor organs, working under the contract with the government. It keeps a centralized computer database of donors and recipients. It is noteworthy that the last will of the American donors and their families is performed not only in the United States. In the years 2006-2012, the bodies of American soldiers fatally wounded in Iraq and Afghanistan and brought to a hospital in Germany, saved about 140 lives in Europe [7].

The practice of registering the lifetime consent to the removal of human organs after death is implemented in Brazil, China and Poland.

The example of the United Kingdom is illustrative. From 29 March 2010 the UK introduced new rules for the provision of donor organs, according to which every citizen of the state according to his wish can bequeath them to any person. Before that only the lifetime donation was legalized, now the British, who decided to become donors after death, are donating their organs to specific individuals, including relatives or friends in need of treatment. In addition, according to the changes of legislation, after the donor's death his family members will have the right to choose the recipient. However, this right will be granted to them only in the event that the donor organ will not need anyone for emergency transplantation [8].

In the Bundestag, on 25 May 2013 a new version of the law on organ transplantation was adopted (Transplantationsgesetz). Changes in the law, which appeared in its new version, oblige health insurance companies and founders of private hospitals to formally interview all insured, whether they agree after death - of course, if needed - to become an organ donor. Every resident of Germany will be asked to fill out a document called a "certificate of organ donation" (Organspendeausweis), in which the owner of the document can clearly express and confirm their agreement or disagreement on organ donation with the signature. The survey will cover all residents in Germany since the age of 16 [9].

In Spain and Austria it is automatically recognized that any man is an organ donor [10]. Spain according to the World Health Organization, in recent years, has taken the first place on the world in the number of post-mortem donors - 35 per 1 million people in 2011 [11].

According to public opinion polls in Spain, almost 90% of the citizens express their consent to the removal of organs of dead relatives. Transplantology in this country in terms of development is in the first place in Europe.

In the Netherlands the problem of rights to the removal of organs from deceased is solved based on the principle of the presumption of donation, that is, regardless of the lifetime will of the deceased person (or the will of his relatives). If there are indications for the donation, it must take place [12].

In Belgium, there is the law on the presumption of donation, according to which if a person dies and if, according to the doctors, he can be a donor, the organs will be removed without his permission and without permission from relatives. The number of transplants after the adoption of the law has increased by 30% [13].

In addition to inter vivo expression of the relation to post-mortem organ removal, the draft Law of the Russian Federation "Donation of organs, parts of organs and transplantation," stipulates the creation of a single state database, which will include the potential donors, as well as citizens who have expressed their refusal to the removal of organs (tissues) after death. In most civilized countries the database of potential donors does exist, first and foremost, in the countries with the requested consent. There are different mechanisms of entering data into the register. In America and in New Zealand, for example, people are asked to decide on this when receiving a driver's license. In the U.S., this mechanism covers about 35% of the population [14]. In Israel, people are surveyed in coffee shops. In some countries, a message can be sent to the register via the Internet. However, according to the data of public opinion poll specially conducted by "Levada Center," considered in the preparation of the draft law, in Russia people are not ready to register their decision to donate in the open form (in the driver's license or individual cards, which could be carried in one's pocket) [15].

The bill does not stipulate what should be a database: electronic, conventional or their combination. The experts rightly point out that after the adoption of the bill it will be necessary to make a number of amendments to the Civil Code of RF, in particular, it will be necessary to reflect that the will can contain instructions on post-mortem donation and that is the disposal of non-material nature. When data are entered in the register, the rules of Art. 1123 of the RF Civil Code will be violated since the fact of the will and the contents of the will are a legally protected secret. Perhaps, given the experience of

European countries, the will should imperatively consolidate the point about the possibility of post-mortem organ donation.

If there is a notarized disagreement of the applicant for the removal of organs and tissues after death, the medical organization should be made aware of its existence and make an appropriate note in the patient's medical records, as it is clarified by the representative of the Federal Chamber of Notaries. In this case, close relatives will be able to allow or deny an organ transplant, only if the donor's opinion is not reflected in the developed database. Now, the law of the Russian Federation "On the transplantation of organs and (or) human tissue," which does not contain these provisions, is effective [16].

The new draft Law of the Russian Federation "On donation of organs, parts of organs and transplantation" is an attempt to combine the presumption of consent and disagreement. For adults presumption of consent will be operating and for juveniles the presumption of requested consent is introduced. According to the new document if the doctors verify a brain-dead child, they must contact parents within an hour and inform them of the death and ask for consent to the removal of organs. The law first establishes time, during which the doctors are required to inform relatives of the death of a person to get a permission to use his organs for transplantation. At the same time, the law does not give legal definition of the presumption of consent, which in some cases contributes to ambiguous understanding of the law.

It should be noted that the bill provides for the presumption of adult consent for donation after death, at the same time, Article 5 paragraph 4 of the Federal Law "On the Burial and Funeral" contains a direct prohibition for the removal of organs and tissues without the consent of a human (lifetime disagreement is necessary) with or without the consent of the relatives of the deceased, so legal regulations are contradictory.

## **CONCLUSION**

Russia is in one of the last places among the developed countries in the world by the number of transplantations. Hundreds of patients in need of organ transplants, are either forced to go for it in other countries, or die before such opportunity for transplantation appears. Organ donation after death is sometimes the only way to provide patients with a transplant.

The development of a new method of saving lives can not remain outside the scope of legal regulation, this article analyzes some regulatory issues in transplantation. To sum up, it can be concluded that the overall design of the new Law of the Russian Federation "On donation of organs, parts of organs and transplantation" needs to be improved to address the gaps, contradictions and specifying certain standards.

**Findings:** The draft law on transplantation regulates the presumption of consent on organ removal. Organs may be removed if the potential donor has not stated his disagreement. At the same time, the Federal Law "On the burial and funeral" proposes the presumption of dissent. Under the provisions of the Law the organs and tissues may be removed only with the consent of the donor. Thus, there is a contradiction that can complicate the judicial practice.

It should be noted that the legislation does not disclose the concept of the presumption of consent. One legal act clearly states that written consent is required and the other points out to a "presumption of consent". Thus, the "presumption of consent" should assume an obligatory written consent to be a donor and this provision should be legally secured.

Additionally, you must solve practical issues on the form of documents, which should be used when presenting the wording of the last will of the testator. There is an inevitable question that in the legal sense the body cannot be called the property, as in this case, it will be subject to the rules of the date of entry into legacy for heirs and so on. No, the body is not the property and this should be reflected in the law. If no one claimed the body after death, it is also possible to make it serve the science. The procedure and conditions for the transfer of unclaimed bodies, organs and tissues of a deceased person for use in medical, scientific and educational purposes, in accordance with the law, will be established by the government.

Organ removal is possible only in the case of the verified brain death, but the concept of brain death in the current legislation is absent.

The bill proposes the creation of a Russian united federal bank of potential donors and the detailed mechanism of entering data into the register will be described in a separate act. Experts point out that the database can be electronic and conventional, that has not been yet specified in the bill. The bill provides for that the decision on the post-mortem donation should be recorded

when making a will, which will include the bequest on the possibility of using organs (tissues) for transplantation according to the citizen's wish. This provision should be enshrined in the rules of the RF Civil Code; besides, this could be imperatively included in the will and the testator could be offered to express his will about the possibility of post-mortem organ donation. It should be noted that this bequest should be reflected in a single register of potential donors, but from a legal point of view, in this case, there will be a violation of the norms of Art.1123 of the Civil Code implying that not only the content but also the fact of making a will is a notarized secret.

## REFERENCES

1. Physiology or Medicine in 2011. Press Release. The Nobel Assembly at the Karolinska Institute.
2. Duin, J., 27.04.2010. Chinese accused of vast trade in organs. The Washington Times.
3. Roberts, M., 23.12. 2012. Kidney transplants 50 years on. BBC News.
4. Sergey Gautier accused "Komsomolskaya Pravda" in the spread of "horror stories" about the transplantology on June 2, 2010. [Electronic resource]: Access. URL: <http://www.medportal.ru> (date accessed: 27.02.2013).
5. Dickov, S. Russians will be able to bequeath their bodies. Interview of Krestinsky, Yu., [electronic resource]: "Vesti FM". Access mode. URL: <http://www.radiovesti.ru/articles/2011-11-08/fm/18196> (date accessed: 23.02.2013).
6. Russian newspaper. 08.11.2011. [Electronic resource]: The article is a commentary on the Federal Law "On the basis of health protection in the Russian Federation." Dostupa.URL mode: <http://ww.rg.ru> (date accessed: 22.12.2012).
7. Cohen, Robin A. and Michael A. Martinez, September 22, 2010. Health insurance coverage: early release of estimates from the National Health Interview Survey, January-March 2010. Hyattsville, Md.: National Center for Health Statistics (NCHS).
8. Transplant 'Will' The Daily Mirror. 29.03.2010.
9. Healthcare Ministry to submit organ transplant bill in 2014. URL: [http://rapsinews.com/legislation\\_news/20130305/266610534.html](http://rapsinews.com/legislation_news/20130305/266610534.html).
10. DeNavas-Walt, Carmen, Bernadette D. Proctor and Jessica C. Smith, 2009. Income, Poverty and Health Insurance Coverage in the United States. Journal of American Science, 3: 63-65.

11. The National Organ Transplant Act PL98-507. Online "The Office of History".
12. Roberts M., 23.12.2012. Kidney transplants 50 years on. BBC News.
13. Latov, Yu., Health care: organization, management and levels of responsibility. [Electronic resource]. Access mode. URL: <http://ecsocman.hse.ru/text/16206634/> (date accessed: 08.07.2012).
14. DeNavas-Walt, Carmen, Bernadette D. Proctor and Jessica C. Smith, 2009. Income, Poverty and Health Insurance Coverage in the United States. *Journal of American Science*, 3: 63-65.
15. Latov, Yu., Health care: organization, management and levels of responsibility. [Electronic resource]. Access mode. URL: <http://ecsocman.hse.ru/text/16206634/> (date accessed: 08.07.2012).
16. The Law of the Russian Federation of December 22, 1992 No. 418101 (amended on 29.11.2007). "Transplantation of organs and (or) tissues." SCPD RF and SC RF, 1993, N 2, Art. 62.