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WHO HAS THE RIGHT TO A DECEASED BODY?

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ABSTRACT

In the course of his life an individual has the right to self-determination and other constitutionally guaranteed personal rights that have to be respected during medical procedures. After death, his personality extinguishes, but his body, from the medical point of view, remains relevant out of, at least two reasons: 1) as a potential source of transplant organs; 2) as a corpse to be used to study anatomy at medical schools. And, while much has been said about cadaveric organ transplant, the second issue has not evoked much interest in the theory of medical law – although it represents quite a complex topic, as much significant as the first mentioned. On one hand, the education of future medical workers is of vital interest for the society and cannot be imagined without practical exercises on cadavers. On the other hand, there is the issue of pious treatment of the corpse, which also should be accounted for as both personal and public interest. In this paper the authors analyze the regulations related to acquiring cadavers for performing practical medical exercises at anatomy classes in Serbia and the countries in the region in order to determine whether the balance between the above mentioned interests have been reached, or maybe one of them has been unjustifiably favored. In that context they attempt to respond to the question who has the right to deceased body and the right to decide what will be its destiny. The results of these analyses are given in the form of recommendations for the modification of examined regulations not only for the purpose of finding the best balance between the aforementioned interests, but also in order to open the path for an easier way of obtaining cadavers used for the educational purposes.

Keywords: legal destiny of a deceased body, obtaining cadavers for anatomy classes, preserving pious treatment of the corpse, medical law.

INTRODUCTION

During his life, an individual has right on self-determination with his body (Jotanović, 2016) and other constitutionally guaranteed personal rights which must be respected during medical treatment; therefore, those treatments cannot be performed without his explicit consent (Živojinović, Planojević i Banović, 2014). After his death, individual's personality and subjectivity extinguish, but from medical and legal point of view his body remains important for at least two reasons: 1) as possible source of organs for transplantation to another individual; and 2) as a whole, i.e. the corpse which can be used to perform practical education in anatomy at medical and other health education schools. And while conditions for posthumous organs and tissues transplantation were subjects of a big attention in the last few decades all over the world (Planojević i Živojinović, 2019; Planojević, 2012), the second mentioned question was not a subject of a larger interest in the theory of medical law – although it is a complex topic which is of no less relevance then the first one.

Namely, while transplantation of organs and tissues from the deceased individual saves lives of a *certain number of individuals*, practical education in anatomy lessons performed on human cadavers represents integral element of higher education for each medical worker and this provides cadre for health protection of *all citizens* in one state. That is why acquiring of remains for the needs of medical education institutions is particularly important state interest. This, however, does not mean that body of each deceased individual would end up in anatomy class at a faculty, independently of his will and beliefs he had in life. Piety of a deceased man requires treatment of his remains with dignity and respect of his will regarding further destiny of his corpse and this is equally important general interest. Therefore, it is an important but also difficult task of every legal

system to reconciliate these two social interests which are mainly in opposition: on one side, no one would like to be a patient to a medical worker who had no practical anatomy lessons, but on the other side, it is rare that people accept possibility that their body is posthumously used as object for the same kind of education.

Having this in mind, primary subject of our research in this paper will be the way in which legislators in Serbia have regulated this matter, in order to establish whether there is a balance between the above mentioned interests of the society, or one of them is unjustifiably favourited. In order to make this assessment, we will analyse conditions under which it is possible to use human cadaver for educational purposes. We will specifically elaborate question who does the right to decide destiny of human corpse in this context belong to: only to an individual whose body is, while still being alive; or that decision can also be made by other individuals after his death and on which grounds? In order to valuate solutions offered by Serbian law, we will also compare them with solutions in other countries of the region referring to posthumous use of human body for educational purposes. In the conclusion of the paper, we will present results of our analysis, indicating inadequate solutions and proposing methods for their correction – in order to reach balance between piety of a dead man and necessity of practical education in anatomy, with easier and ethically more acceptable acquisition of human corpse for this purpose.

CONDITIONS FOR USE OF HUMAN CORPSE FOR EDUCATIONAL PURPOSES IN GENERAL

Conditions and procedures to use body of a deceased man for practical anatomy lessons in medical faculties are regulated by the Law on Health Protection (Zakon o zdravstvenoj zaštiti Srbije [ZOZZS], 2019), as it is the case in other states. These items are even stipulated with 7 articles, which is more detailed and more comprehensive regulation then in most of the countries of the region (in Croatia, for example, this matter is regulated in only 1 article, in the entity of Federation of B&H in 4 articles, in the entity of Republic of Srpska in 2 articles) (Zakon o zdravstvenoj zaštiti Hrvatske [ZOZZH], 2019; Zakon o zdravstvenoj zaštiti Federacije Bosne i Hercegovine [ZOZZFBIH], 2010; Zakon o zdravstvenoj zaštiti Republike Srpske [ZOZZRS], 2019).

The Serbian regulations foresee several conditions which must be cumulatively fulfilled by the medical school in order to take over the body of a deceased individual for practical lessons. These conditions are not separated and not enumerated within one article which would allow better insight, but they can be found in several places in the part of the Law which regulates this matter. We have collated them and can conclude that conditions are the following: 1) that deceased individual has been identified; 2) that there is (his) death certificated signed by the competent medical doctor; 3) that there are no other reasons prescribed by the law to do mandatory autopsy of the body in question; 4) that person did not die of contagious disease; 5) that there are no posthumous changes on the body of the deceased which do not allow embalming; 6) that permission of the local self-government to take over the body is provided; 7) that body must not be used 6 months from the takeover day; 8) that there is a consent to take over the body given by the deceased while still alive; or after his death, given by an individual who is seen by the law as legible or when circumstances foreseen by the law are fulfilled. And while the first 6 listed conditions do not require any additional explanations and analysis because they are perspicuous and logical, it is necessary to separately elaborate conditions such as consent given by an individual to use his body or time frame during which body cannot be used, which is set at six months since the takeover day. It is necessary to bear in mind that these conditions are also interlinked. The features of the consent given by individuals defined by the law depend on two facts; (1) whether the consent originates from the deceased, and it was given while he was still alive, or it is being given by other persons after his death, and (2) whether the deceased had family in the moment of death or not, and this falls under special circumstances. In the continuation of the paper, we will analyse each of these situations.

SITUATION WHEN CONSENT TO USE CORPSE FOR EDUCATIONAL PURPOSES WAS GIVEN BY THE DECEASED WHILE STILL ALIVE

From the legal point of view, the simplest and ethically most acceptable situation is when consent to use cadaver for educational purposes is given by the person whose body is in question, during his life. That sort of consent is an expression of humanity of a man and his wish to contribute to education of medical workers after his life and development of medical sciences in general for the welfare of the whole society. These are people with no prejudices, and for whom personal beliefs and religious determination do not make an obstacle for this act. Accepting performance of lessons on your own future cadaver, as well as accepting medical intervention (Mujović-Zornić, 2011) or participating in clinical researches (Živojinović, 2012; Klajn-Tatić, 2012; Ivović, 2004), is legally allowed possibility and legislators of the countries in the region have prescribed special conditions under which this consent will be fully valid. Subject of our analysis will be the way in which this area is regulated in Serbia, with comparison of these solutions with regulations in other states where there are differences between them.

1. *Who can give consent to perform practical anatomy lessons on his body*? The first question to process is: can every man during his lifetime give consent to use his body after his death for practical anatomy lessons? Serbian regulations do not contain explicit answer to this question, but the answer indirectly comes out of the fact that testament (i.e. statement of will, as it is called by the legislator) is foreseen as the only form in which it is possible to give consent to posthumous use of your body for educational purpose. This further means that this sort of consent cannot be given by every man, but only those who are capable to make will. According to Serbian hereditary law, only individuals capable of reasoning and older than 15 years have testament capability (Mitić, 1969; Đurđić-Milošević, 2013; Živojinović, 2016), (Zakon o naslednom pravu Srbije [ZONPS], 2015) which means that only people fulfilling these conditions can give consent to use their corpse for educational purposes. In Croatian law, however, this consent can be given only by adults (ZOZZH, 2019). We see Serbian solution as adequate and that 15 years old capable of reasoning is mature enough for the decision in question, equally as he is mature to dispose of his own property *mortis causa* or to give consent for medical intervention on his body; while Croatian solution is not unacceptable *per se* as higher level of maturity cannot do harm in this situation. Our opinion is that this age limit must not be below 15 years because it would be difficult for younger children to fully understand importance of such decision.

2. *Legal act by which it is possible to give consent to use corpse for educational purposes.* Solution in Serbian law according to which testament is the only legal act by which it is possible to give consent to use your own body for educational purposes we also see as acceptable. It is a unilateral legal act *mortis causa* which person who made it can at any stage also make void or amend, and this is more suitable to the nature of the statement given in it then it would be, for example, in the form of a contract with an education institution which would use the corpse. However, there are authors (Gams, 2006) who believe that contract by which one gives consent to consign its own corpse could be not only in a legal form, but that it could be also an act of benevolence and contract of mandate with or without compensation, i.e. contact on sale of future corpse to the contract party, with the reservation that sales price is more a satisfaction then equivalent for the value (Vedriš, & Klarić, 2004). It is possible that reimbursement would motivate certain number of people to give consent to use of their future corpse for educational purposes, but it is a matter of dispute whether something like that is ethically acceptable. According to some authors, this is ethically inappropriate, equally as in the case when an individual would sell his organs and tissues as a future object while he is still alive but that the buyer can do the transplantation only after his death for which it is not known when it is going to occur. In the sale of own future corpse to the educational institution, buyer is a legal entity whose life does not depend on expected transplantation and, therefore, the corpse will complete the educational purpose independently of the time when individual in question dies. Irrespective of the fact that these two situations differ, it is anyway hard to agree with the idea of the possibility to acquire corpse by means of purchase contract. Although testament as legal act was in details elaborated in the Hereditary Law and also elaborated in the legal theory (Antić, & Balinovac, 1996), it is

interesting that LHP also defines it in its text, and defines it as „...statement on testament of body for the purpose of performing practical education". This statement, according to LHP, has to be explicit and this means that statement of will that was given by silence, indirectly or as insufficiently defined and concludent actions are not acceptable in this context. We see this as an adequate solution having in mind the fact that this is atypical and rare form of statement of will in the practice which should cause significant consequences and therefore no ambiguities are desirable.

3. *The form and types of testaments* in which it is possible to give consent for posthumous use of own cadaver for educational purposes are also defined by the law; therefore, this sort of statement is possible to give only in written form and it must be stamped by the competent authority. In Serbian law, public notary or court are in charge of notarisation of the testament in ordinary circumstances. Under extraordinary circumstances, ship commander, military commander or diplomatic representative of Serbia abroad can also be in charge for such an authorisation. All mentioned testaments are called public testaments (Đurđić-Milošević, 2018). In the context of testaments which LHP talks about another question is raised: *whether all mentioned subjects and forms of testaments can be seen as competent authorities or not*? We are of the opinion that all mentioned subjects can be treated under the expression „competent authority" used by the legislator, i.e. that all forms of public testaments need to be treated as fully valid and acceptable in this context. There are at least two arguments to support this position. Firstly, it seems that purpose of prescribing written form and mandatory notarisation of such testament was to have assurance and certainty about question whether certain individual has bequeathed, and not to narrow the possibility for notarisation of such testament to the least number of authorities who could be seen as competent. Secondly, giving these statements in practice is rare and there is no dispute that they are in the general interest, so it would be inacceptable to disempower explicit written statement of the testator by narrow interpretation of the term „competent authority" and by bringing it down only to public notary or courts who do these kind of notarisations in usual circumstances. This perspective would further mean that fully valid consent to use own future corpse for educational purposes cannot be given only by private or oral forms and types of testament.

4. *Content of the testament*. The following two questions need to be considered in relation to the content of the testament. *The first is: does consent to use own corpse for educational purposes has to be given in a special testament document, as its only provision*; or it can be integral part of the testament which in addition to the statement contains also other statements of the last testator's will, no matter if they refer to assets or other issues? Although the legislator does not solve this dilemma, and even triggers it further by use of term „statement on testament of the body", we believe that there is no reason for position that consent in question has to be the only testament provision, because nothing essentially changes if the testament document contains other statements of the last testator's will which mainly refer to handling of his property. Even more so, because one part of the legal theory (Stanković, & Orlić, 1999; Kovačević-Kuštrimović, & Lazić, 2004, Planojević, & Živojinović, 2019) believes that human body ceases to be personal asset on which the subject in question has personal right in the moment of his death, and it becomes object in civil law sense which then has its new name: corpse or remains. This is the conclusion that also comes out also from the preliminary draft of the Civil Code of Serbia (art. 151).

The other question pertaining to the content of the statement on testament of the body refers to an obligation of the testator, foreseen in LHP, to name the testament executor in that statement. At the first glance, this solution seems appropriate having in mind importance of the subject question and that the executor of the testament, who usually knows that he was delegated, represents additional guarantee that it will be known on time that the testament exists, because the corpse cannot be used if major changes appear on it. The testament executor is also an additional guarantee that testament testament will be adhered to. Nonetheless, the following question also comes out of such regulation: is it sufficient that testament contains provision pertaining to naming of the testament executor in order to have fully valid consent to use body for educational purposes or it is necessary that testament executor also accepts the role he has been delegated? When we talk about the role of testament executor in general (Đurđević, 2015; Antić, & Balinovac, 1996),

hereditary regulations foresee that the testament will have legal effect independently of the fact whether testament executor accepted his role or not.. We think that there is no reason to think in different way also in the case of the statement on the testament. Namely, legislator's intention in this context certainly was not to narrow the possibility for this statement to produce legal effect, especially because this statement is specific for being of general interest and representing last will of the testator at the same time.

Although existence of an institute of testament executor can be useful, both in terms of hereditary rights in general and in the subject context, we see the conditioning full validity of the testament of the body for educational purposes with naming executor of the testament as a solution that needs to be changed. Reason for this is that we have no tradition of naming testament executor, and only small group of people is aware at all that this possibility exists, while competent authority is not obliged to notify the testator about this obligation when the testament is being notarised. For this reason, this solution given by Serbian legislator can lead to the situation where already small number of cases of corpse bequeathal becomes even smaller, because some of them will not be fully valid as there was no named subject individual. Full validity of the statement on body testament should not be conditioned with naming of the testament executor also because he does not have to accept this role, and it can happene that no wanted result is achieved in spite of law adherence.

5. *Situation in other countries of the region.* Solutions similar to the Serbian one can be found in the laws of other countries of the region. Nearly identical formulations in respect of the form and content of the statement on testament of own body for educational purposes are contained in regulations of entities of the Republic of Srpska (ZOZZRS, 2019), and Federation of B&H (ZOZZFBIH, 2019), although in the latter it is not a requirement to name testament executor. In the Republic of Srpska law, however, the court is named as the only authority competent to notarise the subject testaments.

In the Croatian law it is specific that details of consent for posthumous use of someone's body for educational purposes is not regulated by a specific Law, but special rulebook adopted by executive not legislative branch of the government (ZOZZH, 2019), Croatian regulations contain also a provision from which it can be concluded that a certain educational institution is not obliged to take over the cadaver of a certain individual, irrespective of the fact that he gave consent to use it for educational and scientific purposes. We believe this is also meant in other states, although it is not explicitly regulated. Unfortunately, in practice the testament is the rarest method used to obtain corpse for performance of practical lessons, and it is even rarer that bequeathed corpse is not needed by the faculties.

SITUATION WHEN THE DECEASED DID NOT GIVE CONSENT FOR USE OF HIS COPRSE FOR EDUCATIONAL PURPOSE DURING HIS LIFE

As it happens rarely in the practice that someone during life gives consent to use his future corpse for educational purpose, and medical schools have to anyway perform practical anatomy lessons, the question is raised: can someone else give that kind of consent after the death of that individual instead? This is possible according to regulations of many countries, although this is in opposition with the rule that everyone decides independently about the destiny of his own deceased body, possibly with his testament, and if he doesn't do so the corpse is buried or cremated following the wish of the deceased, i.e. the family. It is clear that deviation from this rule is motivated by the state of exigency where education system and the whole society can find themselves if future medical workers would not have material to study human anatomy; therefore, legislators have regulated possibility for another subject to approve use of other's corpse for educational purposes under certain circumstances. It is a solution that is not unknown in the law, because other persons can also, under conditions prescribed by the law, give consent to take organs and tissues from a deceased person for the purpose of transplantation in the situation when the deceased did not give any statements about this during his life.

Number and sort of conditions under which it is possible to continue using human corpse based in other's people consent if the deceased did not give it for life, in Serbian regulations

depend on the fact whether the deceased have had family or not in the moment of death. In our further discussions we will comment on how those two situations are regulated; and also comment on this solution in general, i.e. properness of legislator's decision to take as criteria the fact whether the deceased has left any members of the family behind or not while prescribing different conditions under which someone's corpse can be used.

SITUATION WHEN THE DECEASED HAD FAMILY AT THE TIME OF DEATH

If a person did not bequeath his body for educational purposes, according to the law, consent to use his corpse can be given by members of the family who have outlived the deceased. The only condition to give such consent, according to the law, is that the deceased, while still alive, did not explicitly, in written form, express anything against posthumous use of his body. If you really want to adhere to the will of the deceased, we think that his opposition should be taken into account irrespective whether it was in written form or orally to some other person, if it can be confirmed. The emphasis should be on the will of the deceased, not on a form in which it was expressed, because it is inacceptable to deny the claim of individuals who were close to the deceased that he had negative statements about posthumous use of his body only because he (the deceased) did not put it in writing, and therefore it would be good to amend mentioned solution in this context. People who are thinking of these things at all, while alive, and people who leave letter of opposition to posthumous use of their bodies are rare; therefore, families of the deceased are often in the position that they need to make this decision independently.

1. *Who is considered to be a member of the family of the deceased*. The first question raised in this context, and is particularly important in practice, is: who is considered member of the deceased's family, who needs to be addressed after his death for subject consent? The Serbian legislator regulates this question by naming the following individuals: spouses, civil law partners, children born in the marriage or out it, adopters and adoptees, guardians and proteges; foster parents and foster children, parents and other first bloodline kins irrespective of the degree of kinship and kins from side bloodline ending with the third-degree kinship.

If we compare the list of family members who could be asked about the use of human corpse for educational purposes with the list of family members whose will is, according to certain laws, relevant for taking organs and tissues from a deceased person for the purpose of transplantation, we can conclude they are different both in number and order of these individuals. In the case of transplantation the will of the following is taken into account: parents, spouses, civil law partner, adult child or if an individual did not have children, will of side bloodline kin ending with the second-degree kinship (Zakon o transplantaciji ljudskih organa [ZOTLJOS], 2018; Zakon o ljudskim ćelijama i tkivima [ZOLJĆT], 2018). The parents are here the first on the list, before spouses and children, while adoptee, guardian, foster parent and other first line kins are excluded from the decision making and, therefore, this list is significantly shorter.

Having this in mind, we can conclude that the notion of family is very widely defined in the context of use of cadaver for educational purposes. This, however, we see as an adequate solution for twofold objective. Firstly, no persons is omitted from the list who is close to the deceased and whose emotions could be hurt if he would not be asked for the consent, in particular if this person has negative attitude towards what anatomy lessons on human cadaver mean. Namely, it is clear that the family makes decision taking care of the hypothetical will of the deceased although this is not as such prescribed, but also taking care of their own view on this matter. The other objective achieved by the wide definition of family is to exhaust all possibilities to obtain at least someone's consent to use corpse of a man for educational purposes which is in the interest of the entire mankind.

What we see as inadequate in the regulations around this question is the order in which family members from who consent is asked for are named. It is justified to have marriage and civil law partners and children on the first place, as they are, by the rule, individuals with who the deceased lived, who know him best and with who he had strongest emotional bonds. The next should be parents of the deceased, because most of the people are raised by their biological

parents, not by adopters, guardians and foster parents, which are rarer situations, and these individuals should be listed after parents..

Order of listing family members becomes even more important when we ask the question *in which way the consent from these individuals should be obtained*: from all mentioned individuals cumulatively or the consent of the first individual on the legal list who is left behind the deceased will suffice, in which case others are not being asked anything further? This would mean that if a spouse gives consent, children will not be further asked for it, or if a parent gives consent no other side bloodline kins will be asked, etc. If we decide to follow this line of interpretation, which is more realistic taking into account short period of time in which corpse is usable, the question is raised: is the same applicable also in the situation when the first on the list does not give consent, i.e. whether in this case also other members of the family will not be further asked or consent will be further asked from the next one on the list until there is a member of the family who will give consent or till all members of the family reject to give the consent? It seems that the same approach should be taken both with giving and rejecting consent, i.e. that when a member of the family who is precedent on the legal gives or rejects consent, no following members on the list is further asked, but this is taken as the final answer. Since the time to get subject consent is very short, it would be good for the legislator to define in more precise way how this consent should be obtained, because current solution creates dilemmas and can create different interpretations.

2. *Grounds on which the family makes decision about consent giving.* The next question to raise in relation to requesting consent from the family of the deceased to use his corpse for educational purposes is: on which ground they have the right to make decision about this if it was not already expressed as will of the deceased while he was still alive? In essence, this is about something that we could name „humanity on other's behalf ", because one person makes an unauthorised decision on the destiny of remains of another person. In the theory of medical law there are different understandings (Radišić, 2004) of this question in cases of taking body parts for transplantation which, in our opinion, are applicable in the situation when the cadaver as a whole is posthumously used for educational purposes. According to the theory of the state of exigence, *urgent need* for a part of the deceased's body is sufficient to take the part independently of his will or the will of his kins. According to another understanding, *the kins have their own personal right* to decide on the destiny of the deceased body. According to the third view, expressed will of the deceased has to be respected and kins cannot change it because it is the *personal right of the deceased to his own body that outlives him (*Radišić, 2004). This third position is dominant, and it is considered (Čolaković, 2011) that it has two models: system of explicit (it is accepted in: Denmark, Germany, Holland, Switzerland, USA, Australia, part of B&H) and presumed consent (it is accepted in: Italy, France, Spain, Belgium, Poland, Austria, Sweden, Croatia) to posthumous donation of own body, but there are also mixed solutions. It is assessed that the system of presumed consent is more prevalent, but their differences in practice are not big, because in both systems the third person can give consent to take body parts if there is no explicit consent in the first system or expressed disagreement of the deceased in the second system. Based on the presented and reflected on the topic we are writing about, we can conclude that a third model, which is a mixed variant, is accepted here and this means that only if the will of the deceased is not expressed by explicit consent or ban to use corpse for educational purposes, the decision on donation belongs to the family which means true respect of the deceased's will, and after that will of his kins.

According to presented understanding (Radišić, 2004) right of decision about the use of corpse for educational purposes belongs to a category of personal rights subject of which is either member of the family or the deceased one. It is nearly unnecessary to prove that none of these positions is acceptable (Planojević et al., 2019). Firstly, because one cannot have personal right on other's body (live or dead) and this 'abates' theory about personal right of the next of kin; and secondly, because there cannot be subjective right without a subject and this 'abates' theory of personal right of the deceased that outlives him via his kins. Base for making decision about the body cannot be found in the field of personal rights, but, in our opinion, in the field of property and hereditary law. Third parties can decide about donation of the deceased's body only based on

ownership on it (Stanković, & Orlić, 1999; Kovačević-Kuštrimović, & Lazić, 2004), which they get by inheritance, in the moment of death of the subject individual; and this is when object of that ownership is created – the corpse who is no longer body of a live man but his remains, an asset.

It is interesting that even British common law which used to be in force in many USA states between 17th and mid-20th centuries, gives answer to the question we deal with, i.e. that it is about the property of the inheritor of the corpse (Čolaković, 2011; Nikolić, 2008). One author in Serbia also (Gams, 2006), half a century ago, asked whether third parties, who will decide about parts of the deceased's body in the case there was no his explicit will, should be marked as his kins (which is the case in most of the countries, and also in our), or as his inheritors. This question is not of relevance, he believes, if features of inheritor and kin match, but in opposite case it should be determined. In his opinion, which we also support, they are inheritors, because the dead body is an item over which one gains ownership, not personal right.

This means that answer to the question we raised is the following: listed members of the family make decisions about the use of the deceased's body for educational purposes based on the ownership on it, which they gain by inheritance at the moment of his death. This formulation sounds unusual, but no other conclusion can be made from everything that was said. This position is supported by many legal theoreticians, but also legislators in certain countries (see, for example, US Uniform Anatomical Gift Act from 1968).

3. *Situation in other countries in the region.* When it comes to countries of the region, the legislator of the *Federation of B&H* (ZOZZFBIH, 2010), foresees solution nearly identical to the Serbian one. The only difference is that it names guardians, proteges, foster parents and foster children as persons who should be asked for consent, and children are asked for consent only if they are adult, which is a logical solution that should be adopted in Serbian law, too.

The legislator of the *Republic of Srpska* (ZOZZRS, 2019), does not define at all who is considered to be a family of the deceased, which is not a good solution because it can create dilemmas which we have indicated and can create variegated interpretations in practice.

In Croatian Law (ZOZZH, 2019), there is no mention of family's consent to use corpse of an individual who hasn't already bequeathed it for that purpose, but it is foreseen that corpse of this person can be used only if within 48 hours there is no request for its burial or cremation, and if Ethical Committee of the competent high education institution agrees with the use of the corpse for educational purpose. Since burial or cremation is primarily requested by the family, it can be concluded from this formulation that in Croatian law family also indirectly makes decision about the destiny of the deceased's body, i.e. disables its use for educational purposes by submission of the subject request. If they do not submit the request, the family opens possibility to use corpse for mentioned purpose. Of course, the fact that there is no burial request can mean that subject individual did not have any family. We would point out as good solution the one that Croatian law gives, where Ethical Committee must agree with the use of the corpse in the situation where there is no burial request. Cogently, estimation of an independent body as such could contribute to additional protection of deceased's right to piety.

Ethical Committee of a medical institution in Serbia also has its role (Mujović-Zornić, 2007) and makes decision in relation about the takeover of the cadaver by a faculty but in the sense whether there is a need for that at all, not whether remains of an individual are going to be used if no one submitted a burial request, as it is the case in Croatia.

SITUATION WHEN THE DECEASED HAD NO FAMILY AT THE TIME OF HIS DEATH

Laws in Serbia (ZOZZS, 2019) and in Federation of B&H (ZOZZFBIH, 2010) allow use of cadaver for educational purposes also when consent for that was not given neither by the deceased by testament of his body nor by his family after his death because he did not have it. In this situation, it is enough that the deceased was not explicitly, in written form, against this during his life, which is something that people, as we earlier concluded, usually do not do, so corps can be used for anatomy lessons with no one's consent. It is about absence of opposition which is actually

treated as assumed consent of the deceased. In Croatian law (ZOZZH, 2019), in the case when no one submits request for burial of a certain individual (which can mean that the individual had no family), at least Ethical Committee will take situation into consideration and give consent to use corpse, which is also not an ideal solution but is slightly more human than solutions in Serbia and Federation of B&H. The law of the Republic of Srpska does not foresee use of corpse with no one's consent.

We think that these solutions are not good, because they are actually a posthumous discrimination of people who didn't leave any family behind them. A person can stay with no family at the time of death in many ways, especially if they are people of late age. They have no family either because they outlived all close individuals, or because they didn't make their own family (at the time of death they have no spouse or children) and members of their primary family died (parents, grandparents, brothers and sisters). Unlike people who had family at the time of death who will decide whether they will give consent to use deceased's body for educational purposes, corpse of individuals who did not have family nearly automatically becomes material for practical anatomy lessons. This no longer depends on no one's consent, but only on that whether a medical school has the need for that or not. If the use of corpse of people who had family requires consent (their own given during life or consent of their close people), it is more logical to bury deceased who did not give such consent and there is no one to give it on his behalf after death, then to treat no existence of someone's consent as consent to use corpse. This is a fiction which means no respect of the deceased's piety and means his posthumous discrimination; therefore, our opinion is that subject solution needs to be changed. It should be regulated that corpse of deceased persons who did not bequeathed their bodies and have no family to give consent for this, cannot be used for educational purposes, and should be buried instead.

Instead of such a non-ethical solution, we think it would be more acceptable to see the state more intensively promoting significance of own body testament or for families to give such consent. In that sense it is necessary to inform people about the importance of such a human act for the health system and the entire society. They need to be edified about goals achieved with this, and not allow the state to make decision in the form of law instead of the deceased who had no family to decide destiny of his corpse, as if citizens are its asset. The interest of the society, in this situation, unjustly becomes priority over the protection of piety and dignity of the deceased. Without someone's consent it cannot be presumed that a person wants to see hundreds of students for many years studying anatomy of his body after his death, disassembled in parts, embalmed in adequate solutions and exposed to sights until it decays when it will finally be buried.

The only good solution in this context is that regulations of Serbia and Federation of B&H foresee (ZOZZS, 2019; ZOZZFBIH, 2010), that body of the deceased person with no family cannot be used for practical education for six months from the day when it was taken over. According to Serbian regulations, this is also at the same time deadline in which a member of the family of the deceased who was not known at the time of the death can submit written request to a medical faculty and seek for return of the deceased's body. In this way a chance has been given to the family to impact the destiny of a body of the deceased, but this does not change the fact that its use with no one's consent is inacceptable, only because he had no family.

CONCLUSIONS

Based on everything presented we would conclude that conditions under which a body of the deceased can be used for educational purposes in Serbia and other states of the region are very similar and adequately set. Certain differences exist only regarding the way in which giving consent to use corpse for practical anatomy lessons is regulated, and this was object of the analysis in the paper. Elementary way in which medical faculties in all countries of the region obtain needed corpse is by the consent given by the deceased in the form of testament where testament executor is also named. The deceased's statement needs to be written, explicit and notarized by the competent authority. Although there are opinions in legal theory that contract between the deceased and the faculty could also be ground to obtain future corpse, our position is that testament

is a more favourable form for subject individual as he can unilaterally renounce or amend it at any moment, which is not the case with the contract.

In relation to the notarization of the testament, we also think that it is more favourable to use expression „competent authority" which has wide meaning that includes all forms of public testaments, and this is done by legislators in Serbia and Federation of B&H. It is more favourable then keeping notarization only for Court, as it is the case in the Republic of Srpska. Because aim of notarization of the testament is to reach certainty that an individual has designated his corpse for educational purposes, not to make only Court testaments fully valid.

Regarding the testament executor, although we see it as useful institute, we think that his naming should not be mandatory element of the content in corpse testament as it is foreseen in Serbia and the Republic of Srpska, because it can happen that the testament of individual's corpse, which is anyway rare in practice, is not fully valid only because no executor is named who, by the way, does not need to accept this role. When it comes to the age of individual who can bequeath his corpse, we think it is adequate to require this person to be capable of making the testament, i.e. person over 15, as it was determined by some countries in the region, including Serbia. It is acceptable if this age are even higher so that such statement could be given only by adults, as it is foreseen in Croatia, but it certainly should not be persons under 15 as they are not capable to understand significance of the decision they make.

Having in mind large interest of the whole society to have undisturbed anatomy lessons in faculties, we think that solution in some countries of the region where the consent can also be given posthumously by the family of the deceased is also acceptable, if he did not give consent during life or if he didn't express anything against that explicitly in written form. Specific solution in this context is contained in Croatian law, according to which consent is not being requested from the family, but it is sufficient that there is no request for burial so that the Ethical Committee can give subject consent. The family needs to be defined in the widest possible sense as it was done in Serbian law, and it is necessary to also solve issue whether all members of the family need to give consent or consent of the family member preceding in the law excludes the need to ask other members, which we see as a better solution.

We think that the ground for family members to make these decisions is not their personal right over the body of the deceased, because you cannot have personal rights over other's body. The ground is their property which is gained by inheritance at the moment of death of a certain person whose body, in civil law sense, from the moment of his death is seen as item and this item has new name – corpse. As the most problematic we see solution existing in the countries of the region (excluding the Republic of Srpska) where corpse of an individual who did not in written form express anything against use of his body for educational purposes and who had no family at the time of the death, can be used with no one's consent for this purpose. We think that such solution is not ethical and it is discriminatory because the fact that someone does not have family does not mean that his corpse becomes property of the state, but should be buried due to no existing consent to use it for educational purposes. Solution how to obtain cadaver for educational purposes should be looked for in the more intensive promotion of the idea of corpse testament or idea of the consent of the family to its use and edification of people on the importance of this human act for the whole society.

LITERATURE

Antić, O., & Balinovac, Z. (1996). *Komentar Zakona o nasleđivanju*. Beograd.

Babić, I., & Jotanović, R. (2020). *Građansko pravo (knj. 2) – Stvarno pravo*. Banja Luka: Pravni fakultet Univerziteta u Banjoj Luci.

Čolaković, M. (2011). Pravo na odlučivanje o *post mortem* davanju dijelova tijela za transplantaciju (uporednopravni prikaz). *Pravni život*, *9*, 409-424.

Đurđić-Milošević, T. (2013). Neki aspekti zaveštajne sposobnosti, *Pravni život*, *10*, 565-577.

Đurđić-Milošević, T. (2018). *Ograničenje slobode zaveštajnih raspolaganja.* Doktorska disertacija. Univerzitet u Kragujevcu, Pravni fakultet, Kragujevac, Republika Srbija.

Đurđević, D. (2015). *Institucije naslednog prava*. Beograd: Pravni fakultet u Beogradu.

Gavella, N., Josipović, T., Gliha, I., Belaj, V., & Stipković, Z. (1998). *Stvarno pravo*, Zagreb: Informator.

Gams, A. (2006). Ljudsko telo i njegovi delovi kao stvari u građanskom pravu. *Arhiv za pravne i društvene nauke*, *1*(2), 189-210.

Ivović, N. (2004). Saglasnost za eksperimentalne medicinske tretmane. *Pravni život*, *9*.

Jotanović, R. (2016). *Pravo na fizički integritet kao osnova drugih prava ličnosti*. Banja Luka: Pravni fakultet Univerziteta u Banjoj Luci.

Klajn-Tatić, V. (2012). Informisani pristanak na učešće u nasumično kontrolisanim kliničkim ogledima. *Strani pravni život*, *2*.

Kovačević-Kuštrimović, R., & Lazić, M. (2004). *Stvarno pravo*. Niš: Zograf.

Mitić, M. (1969). Testamentalna sposobnost maloletnika. *Jugoslovenska advokatura*, *3*(4), 33-47.

Mujović Zornić, H. (2011). Pristanak na medicinsku intervenciju kao izjava volje u pravu. *U Zbornik radova savetovanja Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse*. Split: Pravni fakultet; Mostar: Pravni fakultet.

Nikolić, K. (2008). Pravo vlasništva nad ljudskim tijelom. *Pravni život*, *9*, 365-370.

Planojević, N. i Živojinović, D. (2019). Promet delova čovekovog tela u našim novim propisima i prednacrtu Građanskog zakonika. *Pravni život, 616*(10), 413-433.

Planojević, N. (2012). *Stvarno pravo u praksi*. Kragujevac: Pravni fakultet u Kragujevcu, Institut za pravne i društvene nauke.

Radišić, J. (2004). *Medicinsko pravo*. Beograd: Fakultet za poslovno pravo, Nomos.

Stanković, O., & Orlić, M. (1999). *Stvarno pravo*. Beograd: Nomos.

Stojanović, D., & Antić, O. (2004). *Uvod u građansko pravo*. Beograd: Pravni fakultet Univerziteta u Beogradu.

Vedriš, M.,& Klarić, P. (2004). *Građansko pravo*. Zagreb: Narodne novine.

Zakon o naslednom pravu Srbije, Službeni glasnik Srbije 46/95, 101/03, 6/15.

Zakon o transplantaciji ljudskih organa, Službeni glasnik Srbije 46/18.

Zakon o ljudskim ćelijama i tkivima, Službeni glasnik Srbije 46/18.

Zakon o zdravstvenoj zaštiti Srbije, Službeni glasnik Republike Srbije, 25/19.

Zakon o zdravstvenoj zaštiti Hrvatske, Narodne novine Republike Hrvatske, 100/18, 125/19.

Zakon o zdravstvenoj zaštiti Federacije Bosne i Hercegovine, Službene novine Federacije BiH, 46/10.

Zakon o zdravstvenoj zaštiti Republike Srpske, Službeni glasnik Republike Srpske, 106/09, 44/15.

Živojinović, D. (2016). Zaveštajna (ne)sposobnost de lege lata i de lege ferenda. *U Zborniku radova Dvadeset godina Zakona o nasleđivanju Republike Srbije* (str. 151- 166). Niš: Pravni fakultet Univerziteta u Nišu.

Živojinović, D., Planojević, N. i Banović, B. (2014). Terms of clinical research consent's validity. *Vojnosanitetski pregled, 71*(6), 588-595.

Živojinović, D. (2012). *Pristanak na kliničko ispitivanje: pojam i osnov pristanka i sadržina informacija za ispitanika*. Kragujevac: Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke.