

Presumed consent to organ and (or) tissues removal. Legal aspect

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Abstract. Unfortunately, nowadays it is technically much easier to remove organs from an alive (dead) donor and to carry out transplantation to a recipient than to find a legally approved basis for these actions, especially when it comes to removal of organs and (or) tissues from a corpse. The article represents an attempt to suggest improvements that could be applied to legislation concerning organ transplantation. The author suggests that, it is required that a complex approach should be applied to improve the situation with transplantation legally, socially and economically.

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Introduction

The name of the article suggests that it is closely connected with the Federal Law of the Russian Federation of December 22nd, 1992 of No 4180-1 "About organs transplantation and (or) tissues of the person" (hereinafter referred to as – the Law). Article 8 of the Law constitutes that it is not allowed to remove organs and (or) tissues from a corpse if for the moment of removal a healthcare institution has been notified about the fact that a person during its lifetime, its close relatives, or its legal representative stated their disagreement to such removal of organs and (or) tissues for further transplantation to any recipient after the person's death. All other cases fall under presumption of consent.

It is beyond argument, that sooner or later every one can come across this Law, particularly the mentioned provision, and this fact makes the research quite relevant.

The Constitution of the Russian Federation declares human rights and freedoms as supreme value. Observance and protection of human and civil rights and freedoms shall be the obligation of the state. Preamble of the Law "About organs transplantation and (or) tissues of the person" determines transplantation of organs and (or) tissues of the person as recovery aid of life and recovery of health of citizens, setting interest of the persons as prevailing over interests of society or science.

Studies of etymology of the word "presumption" turned up with the following results. Dictionaries suggest that presumption should be understood as a type of presupposition based on probability [1]. On the other hand, presumption can be defined as legal constitution of reliability of a fact, until proved otherwise [2]. It is believed that, presumption can also be defined as *a rule of law which permits a court to assume that a fact is true*

until such time as there is a preponderance (greater weight) of evidence which disproves or outweighs (rebutts) the presumption. Each presumption is based upon a particular set of apparent facts paired with established laws, logic, reasoning or individual rights. A presumption is rebuttable in that it can be refuted by factual evidence [3]. According to definition given by Oxford Dictionary, presumption is an idea "taken to be true on the basis of probability" or as "acceptance of something as true although it is not known for certain" [4].

Defining this principle as a so called *non-solicited consent*, the Law does not determine the legal form for this refusal to removal of organs and (or) tissues from a corpse. It seems it should be an official document notarized or certified in accordance with rules set forth in section 2 of the Article 53 of the Code of the Civil Procedure of the Russian Federation. Meanwhile, it should be specified that when notarizing a trust certificate by authorized persons specified in the related Article, position held by a person signing the document shall be indicated. This signature should be sealed by a corresponding institution. On the other hand, this may also be an oral refusal (expressed exclusively before witnesses).

Special attention should be paid to the fact that the Law does not imply the duty of getting assurance of the absence or presence of consent to such removal on a healthcare institution. On the contrary, the Law determines it necessary for persons to *give notice about it to a healthcare institution*".

Now we can imagine a situation, when a person goes for a holiday to some place that is far away from his native town, where he has a local physician and (or) notary officer aware of this person's disagreement to removal of his organs and (or) tissues in case of his death. However, on getting to a place of destination, the person falls victim to an

accident and dies. As the council of physicians constitute the fact of death of the person, Hospital Chief Executor Officer issues permission to remove organs and (or) tissues from the corpse. In fact, all formalities are observed. After the brain is constituted dead, doctors take their time to remove organs and (or) tissues from the corpse. However, there is small probability that any one shall try to get in touch with a physician or relatives of the dead person (especially in the absence of personal documents) to make sure if there is a living consent to such removal.

This year, according to RIA Novosti, the Ministry of Healthcare is expected to move a draft law "About donation of organs, parts of organs and their transplantation" [5]. The survey of the aforesaid project of the Federal Law allows us to support the initiative of the Ministry of Healthcare of the Russian Federation, especially its provisions concerning creation of a *system of donation of human organs and their transplantation*. Notwithstanding all positive aspects of this project, it is believed that it needs including compulsory genom record-keeping [6] of persons that express their consent to have their organs and (or) tissues removed after the death. Meanwhile, we support the ideas of creating Federal information system, or Federal records, with potential donors, and including in this law the right of access to information stored in the mentioned system by healthcare institutions exercising the right to conduct removal and transplantation of organs and (or) tissues.

Getting a person's agreement to application of its organs for the purposes of donation can give an impulse to a new system of actions. It should be mentioned that it requires maximum degree of compatibility of a donor and its recipient in a wide range of measurements, to carry out transplantation of organs. It is quite expensive to provide sampling, studying and adding to a special database of all these measurements. Meanwhile, any organ meant for transplantation is of great significance in Russia.

Now we should come back to the given example, when the aforesaid potential donor dies of an accident, all his documents are lost, and he is unconscious. According to provisions of Article 9 of the coming Law, removal and application of organs of any person whose identity is not confirmed, fall under the criminal prohibition. Thus, the state loses one of its citizens, while healthcare sphere loses a potential donor. Therefore, we believe, that in such cases genom record-keeping may be of much service, for it helps to identify a person, to learn if it has illnesses listed as dangerous for live and health of a recipient, and what is more important, to find out if the dead person expressed consent during its lifetime for removal of its organs and (or) tissues after the death.

We should take into account the possibility of conflict of interests that may take place between a resuscitator, who is supposed to fight for the life of a patient, and a transplant surgeon, who obviously takes professional interest in getting an organ adaptable to somebody else's organism, and thus tries to save somebody's life.

At times some of us sacrifice their lives for the sake of our relatives, while others, however, try to make their living on that. It is said that demand breeds supply. Today, the Internet advertises different organs, such nephros [7] or part of liver, etc. for sale. It should be noticed, that Article 127.1 of the Criminal Code of the Russian Federation determines that (and thus correspondingly prohibits) a crime is selling or buying a human being for the purposes of removal of its organs or tissues. In other words, any person's decision to sell its organ, as well as any subsequent actions to perform this decision may cause responsibility for a doctor carrying out the corresponding procedure only. Certainly, it would be desirable that developing, transplantation shall not become one day a way of making business for those who can do whatever possible for the sake of profit. In this respect, we consider it relevant to mention R. Alexy's, who suggests that *the importance of realization of one right can justify the damage caused by failure to exercise another right* [8].

Though it is quite debatable, but it seems that the people of Russia, making part of Europe, has got a particular mentality and way of thinking that can be considered at times as far from being European. When we get an opportunity of saving somebody's life with the help of transplantation of organs from our dead relative, we remain untouched to somebody's grief.

From all opinions of the Internet users on the topic under the survey, we have gathered that there is some kind of double standards, when related to the problem of transplantation. Take for instance a case, when a person, having a dead relative, gets a chance to save somebody's life by allowing removal of organs for transplantation purposes, but refuses to do that. However, at the same time this very person considers the possibility of getting organs transplanted to him from somebody else, as a reasonable and a necessary action which helps to save his life.

One of the reasons for the slow development of the institute of transplantation is the lack of confidence of people to doctors. It is still in minds of everyone in Russia, that in 2003 a staff member of Clinical Hospital No 20 in Moscow was accused of trying to remove organs from a person that was still alive. Last summer in 2013, in the Republic of Tatarstan, for instance, two officers of the Bureau of Forensic Medical Examination were detained for transporting human heels for selling them in the

Russian Eye and Plastic Surgery Center in Ufa. All these cases became talking points in mass media. However, it was omitted somehow, that in the first case of 2006, the Supreme Court of the Russian Federation was acquitted by the jury, while the second case of 2013 that took place in Tatarstan was dismissed for active repentance according to Article 75 of the Criminal Code of the Russian Federation. It is believed that these facts could persuade citizens of Russia that the institute of transplantation needs to develop.

We should refer ourselves again to the project of the new Federal Law "About donation of organs, parts of human organs and their transplantation". Article 5 of the aforesaid Law determines that donation of organs for the purposes of transplantation can be carried out on the basis of freewill, solidarity and sympathy. The question arises, how can we develop the feelings of solidarity and sympathy in the Russian citizens? How did European states manage to develop in the minds of their people the ideology of donation based on the idea of helping each other even after the death?

In 2008, it became shocking for everyone that Roman Pontiff Benedict XVI held a Donor certificate, which means he can be a donor of organs and has a so called donor card. As announced by The Times, The Roman Pontiff is famous for his support to donation.

With reference to the mentioned facts, it seems reasonable to make the following conclusions. In the first place, notwithstanding adoption of the new law concerning transplantation, agitation and information campaign should be held to raise confidence in representatives of healthcare institutions and show necessity for modern society to develop transplantation.

Thus, for instance, all educational institutions, starting from schools, should include in their curricula lessons on ethics. During biology lessons, children should be instructed not only on the structure of a human body, but on the possibility they might have after getting majority age of helping others on the level of donation. It is natural that these lectures should be approved by psychologists so as not to affect minds of children. Making people well informed about the issue, it would be necessary to provide a detailed scheme of legitimizing of a person's desire to donate organs after the death.

In the second place, after analysis of the Russian legislation in the field of transplantation, we can make a conclusion that the current legislation requires development and some updates, which is impossible without support, special knowledge,

surveys and publications of experts in law and transplantation. The results of this work should be by all means represented in the corresponding legal acts.

In the third place, we would like to support the idea that if the presumed consent is captured in national legislation concerning issues of transplantation, it can increase the number of donors in several dozens [10], and, in fact, help to introduce into practice donation of organs after the death arranged in a way of deed of gift. This could help not only save hundreds of human lives, but to get more profit out of it for the state. Thus, execution of 10000 surgeries on hepatic transplantation, helps in Spain to save about 207 mln dollars annually [11].

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