Organ donation and presumed consent. Objetions to its implementation in Mexico

Donación de órganos y consentimiento tácito. Objeciones a su implementación en México

*Gustavo Ortiz Millán**

Abstract

In April 2018, the Mexican Senate approved an initiative to modify the organ donation system. The intention of this initiative was to pass from an opt-in or explicit consent model, in which someone who wishes to donate an organ has to register in the donor registry, to an opt-out system, in which all adults would be presumed donors, unless they expressed their refusal. However, the initiative was stopped in the Chamber of Deputies by the adverse reaction of specialists and part of the public opinion. Here I analyze some of the reasons that were given, and I criticize them in order to defend the implementation of the opt-out system in Mexico.

Keywords: organ donation, presumed consent, autonomy, distrust

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* Instituto de Investigaciones Filosóficas, Universidad Nacional Autónoma de México. gmom@filosoficas.unam.mx
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1. Introduction

On April 3, 2018, the Mexican Senate approved (with 70 votes in favor of, none against and one abstention) a reform to the Health General Law (HGL) to modify the organ donation system. The reform proposed that all adults should become assumed or tacit donors, unless they should explicitly declare their refusal against it [1]. This law initiative was looking for, to address the serious problem of organ procurement for transplants that Mexico has today. In this country there are 20,311 people waiting for an organ donation, of which 11,112 persons are waiting to receive a kidney transplant; 6721, a cornea transplant; 311 of liver; 35, for a heart transplant and 12 for pancreas, according to data from the National Transplant Center of Mexico (CENATRA) [2]. In order to have an idea of the dimension of the lack of organs, we have to take into account that in 2017, they were procured through various health institutions, both public as well as private, around 7 thousand donations, among which, there are highlighted 974 kidneys, 3,646 corneas, 182 livers, 34 hearts and 3 pancreas. As it can be seen, in the majority of cases there is a great scarcity of organs; many people see their quality of life damaged for not being able to get a transplant, and in many cases people die during the waiting process. According to SENATRA's data, in Mexico 80% of the people waiting for a donor die [3].

The law project approved by the Senate, still had to pass for its approval though the House of Representatives. Nevertheless, this last one postponed its discussion, in such a way that it would be voted by the following legislature, and for sure it will be rejected in a definite way. The main reason for postponing its discussion was, the opposition set by the physicians specialized in transplants, by analysts in the communication media, and by a part of the public opinion, that felt offended by the initiative [4]. The main problem of the law initiative was that no national institution dedicated to transplants, not even CENATRA, but neither any scientific nor academic institutions were consulted. The initiative was not the outcome of a public consulting process with the specialists. At the same time, by not stating clearly their reasons, not looking for a dialogue with all the involved, by acting in a unilateral way, by not performing a previous campaign, one of the outcomes was to create an opposition to the law.

In this paper, some of the reasons that were stated against the initiative are presented, it is analyzed if they are justified, and finally some way to improve the organ procurement in Mexico is suggested. The paper is focused in four points that should be more thoroughly discussed around the law project: 1) the lack of understanding about the tacit consent system (TCS) which promoted the reform; 2) if the State is violating the «family's right» over the body of a dead individual; 3) if the State violates personal autonomy; 4) there exists mistrust in the health institutions, that occasionally are even linked to a possible organ trafficking; and 5) if the initiative violates people's rights in a poverty situation. Surely, this listing is not exhaustive, but encloses a major part of the arguments that have been handled after the failed reform. Some of these are specific failures in the initiative's text, others have to do with a wider social context in which takes place the procurement and the organ transplant system. To be aware of what the objections are, can help to, in a not very far away future were Mexico would shift to a TCS or, in any event, a way to improve the organ procurement system.

Even though it is an issue which is not addressed here, in the public debate the limitations of the health system in Mexico were also mentioned, and particularly the one dedicated to transplants.[1] This issue would require an independent addressing. At the same time this paper is focused on the donation issue, more than the one regarding if those donations become transplants, which is a technical question. We start here with the assumption that a tacit consent policy would procure more organs than a tracking and proper assignment system, and could be translated into more transplants. Nevertheless, that issue will not be discussed here.

Finally, the purpose of this paper is not to make a complete ethical defense of the TCS. Notwithstanding, it is argued that this system would help to a larger procurement of organs that, with an efficient transplant system, could help to save more lives; it would also address in a better way the wishes of the majority part of the population –stated in various surveys–, and less mistakes would be produced regarding the respect to the person's autonomy. All of this, according to what it is going to be discussed, would constitute a moral improvement about the current system of organ procurement in Mexico.

2. The organ procurement systems

Part of the misunderstanding about the reform, came from the lack of knowledge there is in Mexico about the organ procurement systems that exist in the world and of some of their implications. Even though there exist many models for the organ procurement for transplants,[2] the issue of the consent should either be tacit or explicit is one of the most debated. There are basically two systems that regulate the organ donation in the world: the explicit consent system or by registration (*opt-in system)* and the tacit consent system, implicit or alleged (*opt-out system*). The law initiative approved by the Senate intended to pass from the explicit consent system to the tacit one.

In the explicit consent system (ECS), a person has to explicitly express his wish to donate his organs in case of death or of brain death and sign up in a donor registry –even though there are certain organs that can be donated while still living, here it is going to be addressed the *post mortem* donation, including the one that happens in cases of brain death–. To donate, the person must understand in what a donation consists, he must decide in which autonomous way he wants to donate, and has to inform others of his decision in order for them to know that he wanted to donate his organs after his death, and therefore take charge of his will to be fulfilled. In some cases the expression of the wish to donate happens when, before a surgery, the physicians explain to the patient the donation process, and they ask him if he wishes to donate, in a procedure of informed consent.

The core of this model is the altruistic action of a person that, in an autonomous way, decides the end that his organs will have after his death. Nevertheless, there are two serious objections to this model: the first one is that, even though people are largely prepared to donate their organs, but only a small percentage, registers as a donor. The registration procedure is dissuasive. In a study about organ donation made by Iowa residents, Sheldon Kurtz and Michael Saks concluded that:

> 97% of the surveyed people stated that in general, they are in favor of transplants. A considerable majority declared that they were interested in donating their organs and the ones of their children (if it so happened, tragic circumstances that would make that feasible). [Nevertheless] of the ones who stated their support, only 43% had it shown in their driving license. Of those who stated that they would personally like to donate their organs, only 64% had marked it and only 36% had the organ donor card. . [10, p. 802, cited in (8, p. 204)]

The data is even more dramatic in the case of Mexico. According to a survey performed by the Chamber of the Representatives [11], 86.3% of the surveyed is in favor of organ and tissue donation, 3.9% declares themselves against it, 4.6% is not in favor nor against, and 5.2% doesn't know or doesn't answer. Notwithstanding, according to the same survey, only 5.2% has an organ donor card issued by the Health Ministry. If the law is reviewed, the procedure would become even more dissuasive. The HGL establishes that "The party interested in donating shall grant his express consent before a Public Notary" (HGL art. 333, section VI, par. b). The idea of having to go to a public notary to perform the procedure of donation discourages many possible donors.[3]

Another problem of this system is that occasionally, at the time of death, there is no information about their wish to donate their organs and, given that there is no certainty about their consent to donate, their organs are not used. Occasionally, even though a person had wished to donate, if the family does not have the certainty about the will of the deceased, they decide not to donate. In order to avoid this, in many countries the driver's license shows if somebody is a donor, but as Kurtz and Saks point out, even when the law allows it, the percentage of people that indicates their wish to be a donor is low. In any event the donor's family is asked, and many times they are the ones who have the last word about if the organs can be disposed of or not. In the United States if the family does not see a donor card, they reject the request for donation in 50% of the cases [8, p. 208].

On the other hand, in the TCS, the State begins with the assumption that, the majority of the people is willing to donate their organs at the time of death. Some surveys show the high level of acceptance that the idea of donating organs after death, has [10, 11, and 12]. Nevertheless, the difference with the HCS lies in who does not want to donate his organs must expressly state it to the State. In the same way as in the HCS, all the people must understand what the organ donation is, and must decide in an autonomous way if they do not want to participate in the donation system, and have to inform others about their decision in order for them to know that they didn't want to donate his organs after their death.

There are two versions in which the TCS has been implemented [13]: one strong and one weak. In its strong version, only the rejection of the eventual donor is binding, that is to say, it completely eliminates any interference form by the donor's family. In this case, the donation process is fairly simple and direct. In its weak version, the donor's family is consulted, and they can state their preference, but the protocol turns out more complicated, because in practice the family preference can stop the donation. France is, in theory, a country with a TCS, even though the physicians usually ask permission to the donor's family and fulfill their wishes. This, in the ultimate instance, wipes out the difference between the tacit and explicit consent.

An objection that is made to the TCS, is that the term "donation" acquires a completely different meaning from the one under a HCS. While the HCS emphasizes altruism and the generosity of the donation, in the TCS the meaning of the term "donation" is diluted, because it is not any more, the altruistic personal motivation the one that moves the alleged donor, but in many cases the fact of having remained passive when he had the chance to waiver his participation in the program, and he didn't do it. It is not any more the deceased person who, generously, donates his organs, but the State the one who takes them to give them to who needs them; he who gives his organs is not anymore a donor strictly speaking, but a provider of organs [14]. But in reality, this depends on the deceased person, if he did not deny to participate in the donation program, he did it as an autonomous action or as an omission by ignorance. If he had enough information and decided not to express his wish against it, then his decision was as autonomous as the one of the donor that explicitly decides to donate under the HCS.

In a recent discussion in Mexico, the intent to go from one system to the other one, was considered as «an invasive disposition by the State over the body of his constituents, with total disdain to the citizen's individual will [15]. This is a mistake and it is necessary to differentiate the *tacit* consent system from the *obligatory* system, given that many people and some communication media, set the issue in terms that under the tacit consent system, the donation would be "obligatory" [16]. Under an obligatory system, neither the person's consent, nor the one of the family, have enough weight and everybody would be forced to give their organs after death.[4] Although it has defenders, to many people seems ethically objectionable because the obligatory system does not recognize any weight what so ever, to personal autonomy, that is to say, to each person's decision about what should be the destination he wants to give to something so personal as his body, once he has died. The TCS, on the other hand, allows the people, with the proper information in order to exert their consent, would decide that he doesn't want to donate, and then be inscribed in a register of no donors. In the following section, it will be more thoroughly analyzed the place in the TCS occupied by the autonomy.

Many countries in the world have gone from the HCS to the TCS, and have done it for various reasons: first, as it has already been pointed out, because surveys show that the majority of the people is willing to donate, but due to various reasons, does not show up to register as a donor. In second place, because it has been seen that the TCS is one of the most efficient ways to increase the number of donors, and thus solve the problem of lack of organs, which causes many deaths. Some countries that have adopted the TCS are: Austria, Belgium, The Check Republic, Finland, France, Greece, Hungary, Italy, Luxemburg, Norway, Poland, Portugal, Slovenia, Spain, Sweden and Turkey.[5] In Latin America, Argentine, Colombia and Chile also have adopted it recently. The contrast with countries that have an HCS is dramatic, even for countries relatively similar. For example, Germany, which uses an HCS, has a consent rate of 12% among its population; on the other hand, Austria, a country with a culture and similar economic development, but that uses a TCS, has a rate of 99.98% [18]. Many countries that have this system have rates between 85 and 99% of consent, while the rates under the HCS usually are much lower.

The obvious question in the case of Mexico is, why has not the TCS been adopted, if it is so successful[6]? And more specifically, why different social actors who are directly involved in the process, have declared their rejection to the law initiative? Some of the reasons that have to do with the particular characteristics of the law initiative, of how it was promoted and approved by the Senate, but other have to do with the idea that the TCS violates personal autonomy, and also it violates the alleged right of the family to decide on the body of a beloved that has died, under reliability conditions among others. Here below they are going to be analyzed with more detail.

3. Respect to the autonomy

The most relevant ethical objection to the TCS is that, if implemented, it would end up by taking organs from people that did not want to donate, and this situation is morally unacceptable, because it violates the principle of respect to the autonomy that underlies the concept of informed consent.[7] The HCS starts from the assumption that it has enough information about the organ donation and that, in executing its autonomy, decides to donate in an altruistic manner. In the TCS it can happen that many people would know enough about the donation of organs, and autonomously wouldn't to do anything, and remain in the program, but it is possible that many people would not have that information, would be ignorant of the law and in fact would oppose to donate their organs. If he dies and his organs are taken, would be operation against his wishes, violating his autonomy, and this, would be ethically inacceptable [20]. That is the reason why a TCS should not be implemented.

Those who have argued against the TCS, have done so under the basis that different surveys show that a percentage of the population opposes to donate their organs. For example, according to the Chamber of Representatives survey, cited before, the 73.8% of the surveyed would be ready to donate their organs after dying, 13.8% would not consider it and 12.5% does not answer it [11].[8] If a TCS would be implemented, and some of the people should not consider to donate, for any reason what so ever, and wouldn't have been able to express their refusal and its organs would have been taken, his autonomy would have been violated. Under the current system, this would not happen.

Nevertheless, Michael B. Gill has argued that the TCS is more respectful of the autonomy than the current system [21]. Gill sustains that the principle of respect to the autonomy, does not require the consent for the organ's recovery, but it demands that the medical attention providers act in accordance with the will of the dead person. Given that more people prefer that their organs be used instead of not being used, the TCS respects better the people's autonomy that the HCS. One of their key arguments is the one of "the lesser mistake". A 73.4% of the population wished to donate his organs, but due to several reasons he does not sign up in the registry of voluntary donors, nor communicates his wishes to his family; if at the time of death, his organs wouldn't be taken, it *could be* a mistake been made and his decision to donate would not *be honored.* Even though it is not a solid argument, because reason could be blocked by passion, and moreover in reality the law can never cover all the cases.

Comparatively, simply considering the percentage of people that do not wish to donate is less, the mistakes that would be made under the HCS would be more that the ones made under the TCS. Less organs of people who would want to donate would be taken, but he didn't say so. If would want to minimize the number of mistakes where the autonomy of people is violated, then it would be necessary to implement a TCS.

Many of the reasons given by the people in order to refuse to donate, have to do with the lack of proper information regarding the process. In order for the people to make an autonomous decision equivalent to an informed consent, they have to have sufficient and reliable information. The experience of many countries that have shifted to a TCS, is that the majority of the people decides to stay in the program. Notwithstanding, people decide under the basis of sufficient information about the program. In order for the people to make autonomous decisions, there must exist the necessary conditions to exert that autonomy. As Mark Platts has stated: "*the proper assessment of the autonomy takes with itself the assessment of the necessary conditions for its total exercise*" [22 p. 103,]. It is a must to assess the epistemic conditions necessary for the exercise of the autonomy and informed consent (even though if that consent is implicit) in the donation of organs issue.

Maybe the most important condition in this field is to have enough information on organ donation, on the procedure that is going to be followed, and what is the role that the family will have, among other questions. When that information is already available, he could decide autonomously if he wishes or not to be a donor. By providing sufficient information, and by doing educational campaigns that would inform the population of the need of donors, of the formalities to donate, about the process by which his organs will go through, etc., the State will be creating the conditions to exercise his autonomy, but also for the people to be more confident to donate.

4. The role of the family

One of the variations among the world's donation systems is the one if the consent must be *absolute* or *restricted*. If the consent is absolute, the donor's will cannot be modified in any way by anyone after his death; if it is restricted, it can be modified and typically the closest relatives are the ones who can do it. Article 324 of the GHL that was pretended to be modified, specifies that there should be a donation by tacit consent, *as long as* the family consent is also obtained –which, again, erases the meaning of the tacit consent–.[9] What the Senate's reform tried to eliminate, was precisely the explicit consent of the family. The law initiative stipulated that, in order for the presumption of donation would be valid, the family would have to have access to sufficient information about the person's death and the donation process, and would be consulted. Nevertheless, for a good part of public opinion, it wasn't clear what would happen if the family refused to donate. If the family would oppose, and if there would not be any document whatsoever that would show the refusal of the deceased person to donate his organs, it would seem as if the State would assume that there would be a tacit consent, and that consent maybe might overcome the family's wish, if this last one should oppose. The relative's opposition to the organs donation would only be supported if the deceased person would have stated in writing against the donation of his organs, and would have signed up in a no donor register.[10]

The reaction by the public opinion before this lack of explicit acknowledgement of the family's rights was, to think that, when a person dies, the State would expropriate the body to the family, in order to later on take the organs and tissues of the people's body, that didn't previously give their consent.

It is understandable that a system that does not recognize the right of a family, would face a lot of public opposition.[11] But, what are the bases under which the idea of the family having rights to decide the deceased organ's destiny, and that this decision can also invalidate the person's decision? Even though in theory some organ procurement legislations do not recognize any right whatsoever to decision, to the family –as theoretically it is the already mentioned case of France–, in practice the physicians and the transplant associations always ask the relatives, and usually follow their decision, even in cases in which the family's decision opposes the expressed will of the deceased person.[12]

Typically, it is thought that a deceased person's relatives are the ones that should take charge of the body and bury it. There are certain moral obligations that are present by virtue of the relatives and sentimental relationships, and that is one of them; there are links that in some way survive after death, and that impose certain obligations to the deceased person. Unless there exist exceptional circumstances –as a pandemic in which the funerary practices must be altered–, this is a private domain which is thought to be protected from the State intervention, or from other social institutions, and therefore it is stated that the family has the right to decide what should be done with the body of somebody who has died. In any event, it is a right derived from the right to privacy. If the State pretends to intervene in this domain, it is thought to be an unjustified interference in a private domain which corresponds exclusively to their individuals and their families. As a whole, this is not a right recognized judicially.

If it is thought about the hypothetic case in which a person has explicitly stated his informed and autonomous wish to not donate and, not withstanding, the family wished to donate, it will be thought that they have no right to impose their opinion: the deceased person's decision should have preeminence. But, as Rivera López [25], has argued, it is not clear why in the reverse case should not occur the same thing: if somebody has decided tacitly to donate his organs, there seems to be no reason to think that the family would have a right to veto that decision.

It is a system that recognizes the autonomy in order to decide what destiny should our own body have when we die, the acknowledgement of the alleged right of the family seems to be in conflict with that autonomy. If in the end, as it is a common practice among physicians, these last ones consult with the family and abide their decision, even though this last one should contradict the one of the deceased person, what meaning thus the informed consent has (either explicit or tacit) when somebody has decided that is going to donate his or her organs? This type of protocols followed by the physicians and transplant of organs associations, of always abide by the will of the relatives, violates the ethics of the autonomy –and in many cases the regulations about organ donations–. It seems then, that the informed consent will not be considered binding, and that the altruistic decision by the donor would be ignored, if third parties object and the donor cannot make his will fulfilled [13]. Why bother in doing all the procedures to donate organs, if in the end the physicians will ask the ratification of this decision by the family, and this last one could oppose to the wished of the deceased person and stop the donation process? The protocols from the physicians and the transplant associations, of always asking the family consent, seems to throw down the drain the ethics of respect to the autonomy. It could be said that this makes sense under a ECS, where the donor has explicitly accepted, through an informed consent, to donate his organs, and, when asking for the family's consent and abiding their decision, this goes against the informed consent and the person's autonomous decision; nevertheless, in a TCS, it will be asked because there would be reasons to ask the family's consent, given that it can happen that the person did not stated whether he wanted to donate or not. But if it is wished to avoid the probability of making a mistake and go against the will of the deceased person, if she didn't express that, it is highly probable that he or she belonged to the majority of people who want to donate their organs, and in that case the family's wishes, might not be considered. After all, there are reasons for considering it.

If the right of the family is recognized, at the time of making a decision about the organs of the deceased relative, it is for consequential reasons, as it has been stated by Rivera López. If no role is recognized to the family, it is possible that these would refuse to collaborate, and that help might be necessary for the ablation procedure. The family can provide information about which was the life style of the donor, some of his medical background, etc., that can be very useful for the procedure. On the other hand, not recognizing the family's right, can provoke outrage and reduce the number of donors (or increase the number of no donors in a TCS). In 2007, in Singapore when the physicians decided to extract the kidneys and the corneas of a deceased patient, against the wishes of his mother, there was a very adverse reaction in the communication media, a great public outrage, which lead to an increase in no donors (Singapore has a TCS), and to a decrease in the donation rate in subsequent years [25 and 26]. Certainly, those reasons are heavy weight. Therefore, even though occasionally it would result counterproductive, a legislation must recognize the role of the family at the time of making decisions about the destiny of the organs. As a last resource, it can result even more counterproductive a public policy that, in order to procure more organs for transplants, would end up provoking that people would decide not to donate if it thinks that the process will harm in a way their families.

In any event, whatever it would be the decision that an individual should make regarding the future of his organs after his death, the ideal thing would be that he should communicate that decision to his family. It is of little use that people should decide autonomously if when he is not here any longer to defend his will, the family would ignore what was it, and would decide against the donor's decision.

5. Distrust in the institutions and organ trafficking

To the above stated objections, two issues should be added, that contributed to the mistrust in the implementation of a TCS: the lack of confidence there exists in the health institutions in Mexico, as well as the idea –promoted basically by the communication media and the social networks– that in Mexico there exists and organ trafficking linked to the health institutions. In fact, in a study performed in Mexico in 2017, the reasons of the people for not willing to donate their organs after their death, are related to the lack of confidence in the health system: the most important answer in order to refuse to donate is "corruption", followed by "organ trafficking" [5].

Trust in the institutions usually is something complex, as a product of a diversity of factors, but among others, trust in the health institutions is based on the technical capabilities, the quality of medication, and personalized attention, as well as family, personal and social referrals of the care systems [27]. To all of this it must be added that people have to wait a long time to be taken care of, and that there is a lack of medications. In many of these areas the health system in Mexico has not been able to generate reliability conditions nor, in consequence trust among the population, as it is shown in some surveys regarding satisfaction levels among the system users. In the national survey about the health system in Mexico, performed by the Chamber of Representatives in 2018, the users were asked about some of these aspects from the health institutions, were they were taken care of: 50.1% of the interviewed, graded as bad or regular the current cover of the public health system in Mexico [11].[13] The survey doesn't exactly contemplate the confidence levels in the health sector institutions, but when the satisfaction levels on the health services are so low, this is a mark that there is very little confidence in those institutions. If in this confidence it is told to the users, that this same health system is going to take charge of procuring the organs of deceased people, then doubts arise about how the organs are going to be procured, preserved and transplanted.[14]

As Onora O'Neill has stated, it is crucial that the institutions, in this case the sanitary ones, generate reliability conditions. These consist of the practices and regulations that have been implemented by the institution to generate trust among public opinion, but particularly among the users. "A good legislation, a good regulation, good policies, good practices and a consistent professionalism are the beginning; these, need to be reinforced with the means to guaranty the fulfillment, and to prove that it is achieved in reliable manner. All of this is easy to say and difficult to do" [30]. Reliability can also be achieved by means of audits, an increased openness and transparency. If an institution generates reliability conditions, it is more probable that there would be trust in it. Occasionally it happens that reliability and trust do not concur, so there is reliability, but not trust, or vice versa. The sector in charge of donations and transplants in Mexico, has searched to generate reliability conditions, but many times these are undermined by bad interpretations of certain aspects of the policies that rule them –specially on behalf of the press and social networks–, but also they are undermined by myths and rumors, such as organ trafficking.

A bad interpretation was given beginning with the initiative of law approved by the Senate, which proposed that none of the two parties in the transplant process should know the identity of the other party involved, that is to say, that the transplant process would be anonymous. Nevertheless, the ones who reacted negatively to the law project, thought that "if something is needed in Mexico is transparency, and in a case such as this, secrecy [*sic*] would cover all kinds of irregularities", above all, states a commentator in a national newspaper, covers a possible organ trafficking, in a way that it is being «launching the black market of organs from living, and deceased bodies to colossal dimensions» [15]. Several communication media linked the issue of the reform in the subject matter of donation of organs to the organ trafficking. This is something that was already in the minds of some people, before the law initiative was presented. In a survey about health services in Mexico, 3.6% of the interviewed people said that they were not willing to donate their organs "because there is organ trafficking in Mexico" [11]. It is necessary to make clear these two points: (i) the anonymous character of the transplant process and (ii) the idea that the TCS would promote organ trafficking.

The majority of the legislations on organ donation in the world, have a clause that guarantees the anonymous character of the donation. Anonymity is sought to protect both the family of the donor as well as the receptors, against possible abuses and manipulation. Belgium in 2006, tried to increase the number of donations by proposing to modify that their anonymity policy be modified, in order to facilitate the contact between the families of the donors and the receptors. Nevertheless, a survey performed among donor and receptor families showed that 70% were satisfied with the anonymous character of the process, due to the anxiety for the emotional implications, or by feeling forced to do something in return, guilt feelings, and for a respect to mutual privacy. 19% wanted to obtain information about the donor and express their gratitude directly. The rest were not in favor nor against it [11]. The anonymity policy in organ donations –which is guaranteed mostly by the legislations on this issue in the world– is not trying to cover irregularities, but to protect the families and the receptors. Certainly, it is not trying to cover a possible organ trafficking.

Organ trafficking is a reality both in Mexico and in the world, according to what is reported in the *Transnational Crime and the Developing World*, published in 2017 by the Global Financial Integrity. Nevertheless, as this report states: "organ trafficking or people trafficking for the purpose of organ ablation… *mainly implies the transfer of people more than the organ gathering*" [32, p. 29].[15] That is to say, those who dedicate themselves to organ trafficking, get people, typically poor and uneducated, in developing countries and many times migrants, to sell their organs. Currently a large part of these operations are made in the Internet, and through the medical tourism agencies which take care, among other things, to check compatibility with the buyers. The buyer then travels to the place in which the transplant is going to be performed. Then, the people who sell their organs are taken to hospitals technologically equipped, where a medical team performs a transplant; many times neither the hospital nor the physicians are aware of the illegal character of the operation.

Article 335 of the GHL establishes that the medical personnel involved in the ablation of organs and tissues or in transplants, must go under a specialized training, besides being enlisted in the Nacional Transplant Register. The organ transplants are surgical procedures that require highly qualified physicians, that is to say, a non-specialized surgeon and, lacking the necessary technological support, it is highly difficult he could perform them. It is calculated that in a transplant, around one hundred medical specialists and paramedics could intervene in the process [34]. The equipment involves very sophisticated technology. Finally, people who receive an organ in a transplant, requires a follow up for life, that only specialized medical personnel can provide him, and with very specific medication.

On the other hand, in Mexico, the CENATRA, carries a supervision and specific follow up of the organ's process, that is to say, identifies the origin and the different stages in a procurement, preservation, transportation and organ transplant process. The hospitals handle deceased donor organs, and by law, he who receives an organ must be registered in the CENATRA's waiting list; if he is not enlisted, then a crime is being committed. Furthermore, in each hospital were transplants are being performed or where organs are procured, there are committees that supervise that not any kind of irregularities are performed, and also that the corresponding protocols are to be followed. It is very unlikely that hospitals which have a technological capability to perform transplants, expose themselves to a government fine or shot down due to this type of crimes. Even though there could be irregularities, it is highly unlikely, according to specialists in this subject matter, that organs of donors be illegally extracted for later transplant them, to people which are not enlisted in the waiting list of the CENATRA [35, 36].

In summary, there are no real bases to think that the TCS if going to benefit the illegal traffic of organs in Mexico. Neither to think that the anonymous character of the donation and transplant process, is going to benefit that type of illicit operations. Organ trafficking linked to organ donation is a myth more than a reality. In fact, notwithstanding that organized crime has increased in Mexico, there are no proven cases of organ trafficking in the country [5]. Nevertheless, this is the type of myth which undermines the trust in the sanitary institutions and in the public policies that can benefit many people.

6. Vulnerable Groups

One of the objections to the TCS in Mexico, was the one presented by Arnoldo Kraus,[16] but it probably was common to the ones stated by other objectors to the law. According to this objection, "by lacking a voice and be ignorant of their rights, and also by not having an idea about the presumed consent, I have no doubt about, that the ones who are mostly going "to provide" the organs, are going to be poor people. […] Where injustice and poverty rule, and are rampant, it is impossible to disseminate validated information" [37].[17] According to the above stated, to establish a TCS in Mexico, will end up accentuating social inequalities because, given the ignorance of their rights, which rules among poor people, it will be among them, where the organs will mostly be obtained, whereas –it is inferred from the argument–, that the more the people know their rights, and the more they would understand the concept of presumed consent, the more they would be able to refuse to participate in the program, and will not donate.

Given that there is no organ donation culture in Mexico, nor there is sufficient information with respect to donation, it is probable that many families that ignore their rights, could end up stunned if they are told, for example, that their deceased relative did not state while alive against the donation of his organs, and therefore he is a presumed donor, and organs will be taken from him. Nevertheless, typically the physicians will ask for the family consent that even if their economic situation is too pressing and their educational level is low, they could decide if they would donate the organs or not. What is doubtful is that the people with a better economic situation, that would know better their rights and would understand the concept of presumed consent, will refuse to participate in the program. On one hand, myths, fiction and rumors do not distinguish between socioeconomic levels; although it is more probable that people with a higher educational and economic level could have access to more information. On the other hand, there are no bases to assume that a higher educational and economic level, or to have a higher knowledge about organ donation, consequently, people will be more reluctant to donate. In fact, in the USA, the middle class and the people with a higher education, support more the organ donation programs [38]. The TCS by itself, has no influence in accentuating social injustice situations.

In order for these possible social injustices not to happen, it is necessary that there should be enough available information for people of any social class to be able to exert their autonomy and make informed decisions. The experience of many countries is that the more information there is about organ donations, about how to register in donation programs, and while more facilities are given to people to register as donors, more they will do it, regardless of their social economic situation. But, the spreading out of that information among all the population is pending, especially among the ones of less educational and socioeconomic level.

7. Proposals for improving organ procurement

When the Senate's law Project was approved, some specialists suggested that approving a reform of this kind without having the proper conditions, it could be counterproductive, and that is to say, that in place for the people to accept to donate their organs at the time of death, they would be massively refusing to donate. For example, according to declarations by Josefina Alberú, who is the president of the Mexican Transplant Society, after the reform was approved in the Senate, many people contacted CENATRA to request information to register as no donor [34]. Nevertheless, there are also bases to think that, if the reform should pass, the rate of donation would increase. Abadie and Gay sustain that going from an ECS to a TCS, even if the rest of the factors remain equal, the rate of donation in a country will increase in 16% [39]. In any event, the conditions in order for the donation rate to be increased to the levels of countries like Belgium, Spain or Portugal –that have a TCS and have the highest donation rates in Europe–, must be created.

There is no doubt that, the most important factor in order to increase the organ procurement rate is that there should be permanent campaigns of awareness about the need to donate organs, campaigns that would provide clear and accessible information about the process, and that tear down the myths and rumors around the issue. That will create reliability conditions in the institutions in charge of the procurement and transplant of organs. Besides the information, it is necessary that there should be full transparency in the procedures, that is to say, that the people should know that their organs are going to be handled by an institution accountable through auditing or through some type of certification process. To create reliability conditions will imply that, at the same time, conditions be created in order for the people to be able to make informed decisions in an autonomous manner. There cannot be true autonomy to make decisions about the donation of organs, in contexts where disinformation is rampant, and there is a lack of confidence in the institutions.

There are many proposals to promote the organ donation. One of the proposals that has been implemented in several countries is the *mandated choice*, which consists in making people to decide if they want to donate when they get their driving license, or when they get their voter identification card, –documents that people usually carry with them, and that can give instructions on how to proceed in case of death–.[18] In 2008, in the State of Illinois in the United States, a version of this procedure was adopted: when somebody goes to get his driving license, information about donation is given to him, he is asked if he wants to be a donor, but then he is told that, if becoming a donor, his family would not be able to refuse to fulfill his wishes, and they insist on him to reconsider his decision. The results have been positive [8]. Something similar could be done in Mexico, by means of the voter identification card that in lack of an identity document, is one of the few official documents which most of the people have.

Another proposal that has been carried out in several countries, is the one that gives a preferred access to donors, if they themselves require a transplant. In Mexico, in the current system the donors are not recognized, and they are given the same status as the ones who are not donors. Who defend this proposal sustain that the preferential access would increase the number of donations and would send a message that, with the donation, an important service is being performed to society [41]. Israel, historically one of the countries with the lowest rate of donation –due to the common belief that donation is forbidden by the Jewish religion–, changed its laws regarding this issue in 2008. Before the enforcement of the law, a campaign called "you don't give, you don't get", was carried out, in which a message was sent that a preferential status would be given to the people who would donate, over the ones who would not. During the 10 weeks that the campaign lasted, the number of donors went from 3,000 to 5,000 registers a month to 70,000 [42].[19]

There are several ways to incentive the organ donation that can be implemented, before there are conditions to go to a TCS –that, among all the proposals, is the one that, in the international experience, has served the best in order to increase the number of organ donations–. These conditions have to be built little by little, specially, creating an awareness in society of the need for organs, spreading out information and refuting myths and rumors, simplifying the procedures among the most important. Basically, the conditions for the people to be able to exert their autonomy have to be created. To proceed in another way, based solely on legislative changes that are not accompanied by the creation of these conditions, can have a very limited effect and even be counterproductive. The problem lies not in the possible objections to the procurement systems of organs for transplants, but in the way in which some legislators want to change the reality.

8. Conclusions

The reform to the GHL, that was tried to pass through the Mexican congress, found a lot of resistance on behalf of the public opinion, that didn't have the necessary information about the implications about the TCS. It was speculated and used fake news about the TCS, such as it could promote organ trafficking, affect vulnerable groups, as well as to step over a family's decision. It was also said that it violates personal autonomy. In this paper it has been discussed that nothing of all of this is true: there are no bases to link organ trafficking to TCS, and neither to think that it could affect wrongly vulnerable groups. The tacit consent is compatible with the exercise of personal autonomy, and it is less probable mistakes will be made that violate people's will, that does not explicitly declares about the destiny of their organs. The TCS is independent of what would be decided about the role the family will have at the time of making decisions about the donations of organs of a deceased relative. Notwithstanding, there are reasons to think that the veto exerted by the family should be respected.

Finally, the TCS is morally superior to the current system given that, according to what it has been seen in other countries, achieves to increase dramatically the rate of donations, and that helps, in the last instance to confront the great scarcity of organs for transplants that there exists in Mexico. Nevertheless, it is necessary to point out that the donation system is only a part of the transplant process. It is not of great use to increase the number of donors, if those donations do not translate in transplants; for that, it is necessary that the State should invest much more in the health system, in order for there to exist technical conditions, as well as sufficient medical personnel properly trained, in order to carry out the transplants. Notwithstanding, increasing the number of donations is an essential first step, and to switch to a tacit consent system can help a lot.[20]

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[1] Mexico has an heterogeneous medical system: 10% of the population has a private medical insurance, 40% counts with social security, and 50% does not have a medical insurance, or else, goes to a limited public medical insurance called “Seguro Popular” (popular insurance), that in fact does not cover organ transplants [5]. This, makes more difficult the distribution of financial resources in order to cover the cost of the transplants. Moreover, if the number of donors would be increased to the majority part of the country’s population, there still would be needed to enhance also the specialized medical services, otherwise it would not be possible that the donations would translate into transplant. From 523 authorized establishments, 407 can perform organ procurement, and 389 have a transplant license [6]. These medical centers are insufficient, especially if all of a sudden the number of donors is increased. On the other hand, currently, every hospital institution which performs a transplant, pays for it from its budget; the federal government does not tag resources specifically for that purpose. In the new legal dispositions it is not said that resources will be tagged, or that changes in the infrastructure will be made. Neither it is specified that a larger budget will be for the training or educational formation for specialist physicians [7]. There is a lack of specialists, as well as from hospitals prepared for this type of surgeries. If the State is thinking about modifying the way in which these donations are made, it must begin by economically supporting the centers in which transplants are performed. Furthermore, more resources have to be assigned to plan an integral logistics, which would include safe, efficient and immediate organ transportation, the surgical capability and the availability of immunosuppression drugs in each entity in the country. The donation and transplant rate in some countries which have an explicit consent system, is higher than in some with a tacit consent, due to the efficiency of the medical system to rapidly designate and match donors to receptors, organ transportation and transplant performing, as it happens in the United States [8], p.207.

[2] Rivera López [9 pp. 73-74] enlists eight different models that depend on the type of consent by the donor. The types of consent can be universal or conditioned (that is to say, if there can be conditions established for his organ donation or not), absolute or restricted (if the decision to donate can be modified or not, after the person’s death, especially by the family), and tacit or explicit, which is the subject to be analyzed.

[3] Even though if that is what the law specifies, it is possible to register as a donor in the Internet Page from CENATRA, and to get right there the donor card.

[4] For a comparison of the different models, as well as for an analysis of the arguments in favor or against, see [9], specially pages 79-85, for a discussion about the obligatory model.

[5] Surely the United Kingdom would be added to this list, where the House of Commons voted unanimously (on February 2018), to approve a law that will establish the TCS in England [17]. Wales has adopted this system since 2015, and Scotland is considering adopting it.

[6] Even though there have been steps forward regarding organ procurement in Mexico, where there basically exists an HCS, the corpse donation rate keeps being low: 4.5 transplant per million inhabitants, which compared to Spain, that is the world's leader in organ procurement with a TCS, and where the rate is 40 per million. [7].

[7] An objection in these terms was used against the reform by María de Jesús Medina Arellano, in her participation in the program "Juridicas Opina" [19].

[8] These data are not very different of the ones of a survey performed in Guadalajara in 2002, which show that 66% of the surveyed would be ready to donate, 16.5% would not do it, and 17% were indecisive [12].

[9] Article 342 of the GHL already states that there shall be a tacit consent, as long as the donor would have not expressed clearly, his refusal to donate his body or its components. Nevertheless, given that the two ways of consent are included in the law, this contributes to the ambiguity and the judicial uncertainty. It is very difficult that physicians will proceed to an ablation of organs, if they are not completely certain about the decision, either positive or negative, of the deceased person. In this way, it makes no sense to introduce the figure of the tacit donation in this context.

[10] It wasn't clear either what would happen if there would not be relatives to whom to request their consent. In Mexico, the Forensic Science Institute calculates that annually, there are on the average, 470 bodies without a claim. If nobody it claims within three weeks, their destination is the common grave [23], and their organs are wasted.

[11] Some people prefer in order for their family not to have to go through an annoying situation facing the medical personnel which puts on pressure on them in order to accept to donate, or even to go over the will of his family. 26% of the people who do not wish to donate their organs in Mexico, do it "because I don't want my family to be bothered when I die" [11]. Strangely enough, people seem to prefer to forego to donate, rather than having to write a document were they express their specific wish, which it is something permitted by articles 322 and 323 of the GHL, which talk about expressed wish.

[12] It is estimated that, in Canada, between 35 and 38 of the organs that could be available for a transplant, are lost due to difficulties in obtaining the family consent [13]. In the United States, families approve organ donation only in a 47.3% of the times in which they are requested [24].

[13] In more specific points, 45.1% answered that the quality of the medical care had been bad or regular; 44.7% said that the availability of medication was bad or regular; 56.2% that the waiting time was bad or regular; 19.9% that the specialty physicians training was bad or regular; 33% that the infrastructure was bad or regular [11]. These data are similar to the ones we find in the National Health Survey performed by the National Autonomous University of Mexico (UNAM) in 2015; even though there is not an explicit question about the satisfaction with the health system, only 49% of the interviewed reported being satisfied with the care received from the physician, which is a low percentage [28].

[14] In studies carried out in the United States, it has been seen that the reasons given by the people for not donating, seem to reflect distrust in the medical institutions and in the donation process [29].

[15] The italics have been added. Many articles try to expose the myths and rumors that there are around organ trafficking related with transplants; one of them is the one from Matesanz [33].

[16] Professor of medical ethics at the National Autonomous University of Mexico.

[17] For example, Santillan-Doherty [14] has sustained that, in Mexico, it would be difficult to implement a Tcs due to the high percentage of the population that has a very low educational level.

[18] A defense of this option can be found in the text by Gill, mentioned before [21], as well as in [40].

[19] Nevertheless, even though it has demonstrated to be effective, this proposal has been ethically objected. Kluge [13], for example, sustains that the proposal is objectionable because (i) is equivalent to a *de facto* institutional payment for the organs; (ii) it seems to assume that people are motivated in a last instance due to egotistical considerations, but this is questionable, as the blood donation shows; (iii) only the people that believe that in the future will need a transplant will register as a donor and, if this is like that, then the number of donors would not increase, but even it could be reduced; and (iv) people could ignore warnings about a healthy lifestyle if they know that, in case of need, if going to receive organs given that they have registered as donors and, therefore, will have a preference within the system.

[20] I Appreciate and thank comments from Asunción Álvarez Del Río, Patricio Santillan-Doherty and Martha Tarasco to previous versions of this text.

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