

# Freedom of donation and legislation: Anthropological assumptions and arguments

## Libertad de donación y legislación: argumentos y supuestos antropológicos

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### Abstract

The article shows that the best way for transplant donation is with an explicit consent. The article analyzes some arguments about transplant donation process and with some anthropological concepts specially the human act process. It begins with an introduction where it is exposed the Senatorial proposal for tacit organ donations in Mexico. In the next sections it is analyzed some assumptions and arguments of different donation systems. It is close with the conclusion.

*Key words:* anthropology, transplants, justice, argumentation.

### 1. Introduction

In Mexico, a debate was generated around the proposal to modify the General Health Law, regarding the issue of transplants, propo-

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sed by the Senate Chamber in 2018 (1). In this paper, I begin with the document presented to the Senate and I make some comments regarding the ethical principles involved (2) (3). An analysis of arguments in favor and against the legislation under consideration is made taking into account some anthropological assumptions, especially the stages of the voluntary act in order to show that it is not enough a general approval by the population, to accept a legislation of tacit consent.

In the declaration of motives of the designated law, it is specified that the objective of the Mexican State is the protection of Human Rights (1), the way it is stated in the Political Constitution of the country (4). The declaration of motives starts from a general or universal premise: The State must protect human rights. Health is considered one of them, and consequently has to foster that good. It is referred this way the advancement in the issue of transplants that leads to be a characteristic health good to be taken care of:

On this subject, in the last 30 years, the donation of organs, tissues and cells and their use in transplants, has had a substantial advance, which in turn has generated the need to legislate on the subject, taking into consideration that not only the technological advancement but also, the considerations both of the conventional principle as well as the bioethical issues. (1).

What is convenient to highlight for the purposes of this paper, is to state the boundaries of the consent concept: "... the legal theory establishes that if the agreement of two or more intents which tend to create, transfer, preserve, modify or extinguish, legal effects, and it is necessary, that those voluntary intents have an external manifestation." (1)

It is made clear in the statement of motives, that the consent must have the minimum elements of a proposal, and the acceptance (1). Here, I think it lies, the core of one of the difficulties, of

the suggested change from the explicit to the tacit consent. The presentation process is not simple, it is complex, as well as the acceptance process itself. As it is going to be seen, especially in section III, the human voluntary action is, an alternating process between will and intelligence, that by having it evident in its several stages, there can be highlighted those identifiable moments which show that sometimes, there can be a voluntary act, but not free, strictly speaking. (5).

On the other hand, it is true that, in the declaration of motives of the law itself, it is pointed out that the will to donate must be clear and unequivocal (1). But when we analyze the voluntary act moments, it will be discovered that this last one, is useful in order to show the various moments where the voluntary or blocking things are exposed in the process of acceptance as an organ donor.

The document presented at the Senate Chamber, raised the tacit organ donation of cadaveric organs, but notwithstanding, it pointed out that it required the family approval:

Article 324. There shall be a tacit donor consent when the donor would have not stated his refusal to his body or components thereof, be used for transplants, as long as it is also obtained the consent of any of the following persons that would be present: the spouse, any of the concubines, the descendants, the ascendants, the siblings, the adopted or the adoptee. If there would be present more of the above mentioned persons, the preference stated in this article shall be applied (1).

In a certain way the tacit character of it stays nuanced, for not saying that in fact it nullifies it. Nevertheless, even with that nuance, which principles must regulate organ donation? (2) (3). Henceforth some of them are analyzed, for the purpose of showing the importance of the anthropological assumptions, which will give us the hints necessary for the ethical solution of the transplants. In order to achieve this, firstly the ordinary language is analyzed, the

one who gives us the first answering guidance, when it is used in similar situations, and for us to compare what leads us in the process of the voluntary act.

## **II. The problem of the language used**

One of the essential principles in organ donation, is not to go against the will of the donor. Of course that requires additional precision. We can clear out the above by analyzing how the following expression is used:

### **1. I want to donate my organs**

When we use that idea in other contexts, it gives us hints about the scope and meaning of the expression. So for example it can be said:

### **2. I want to donate my estate to certain institution.**

Then, it can express the willingness to set the necessary means for that purpose. It is true, that the expression also refers to the vague wish to perform an action that does not materialize in the selection of the concrete means to accomplish it. (5) It seems that in this way the organ donation when we express proposition 2, notwithstanding, it can refer only to a vague desire of accomplishment, something like, as I think there would not be any opposition, at first, to perform a specified action.

An additional problem with donation, is because of the significance that implies the act regarding our own body as a constituent of our being, it is more difficult to measure if the decision process would be in the same way the one indicated in the previous pa-

agraph. When in statistics it has been declared that the majority does not oppose to the organ donation (7) (8), maybe it hasn't been considered that it does not imply a tacit legal acceptance, but only a vague general acceptance that it is desirable to donate. In fact, if any person should listen to proposition 2 and the person who had expressed it would have not stated it legally in a will, and that it would be established that the estate of the same person be donated to the Institution in accordance with what had been expressed, even then there would remain a reasonable doubt that if the above was not the expression of a vague wish which has not been stated firmly. That said in other terms, it seems that, regarding the donation aspects which imply third parties, there must be an explicit declaration.

The voluntary act is made of the following stages where in an alternate way the intelligence and the will interact (5) (6):

<b>Intelligence</b>	<b>Will</b>
1) Simple apprehension. 3) Rationally the good that is presented is judged good for me. 5) The means to achieve that good, are searched. 7) It is judged the best means to achieve that goal (if there are several). 9) The operations to be performed are put in order. 11) Execution.	2) Simple wish or capricious. 4) That concrete good is wanted to be reached. 6) The means found are accepted.  8) The means are chosen.  10) The will puts the capabilities in motion. 12) Enjoyment of possessions.

In the first column appear the acts of intelligence, whereas in the second one, those of will. Thus, in the case of organ donation as could very well happen, it is logically possible, that the person would understand that donating is a good and be attracted by the idea of that good (moment number 2) without judging or passing to moment number 3. It is also possible that reaching up to number 5, and by considering that they are complicated or inappro-

priate the means to stop the voluntary process (5). What it is presented altogether shown in the voluntary act, is that the free moment is only been given in 8 by choosing the means, and on the other hand what we call a voluntary act does not identify itself with freedom and can be cut at any time, even though the presence of will and intelligence in the process could be established.

There exist empirical data which support this concept distinction. For example, in the Mexican case, a disparity happens between the knowledge of what brain damage is (96 to 100%), and the wish to be donors (88%), and in feeling confident in the procedures (73%) (8). The empirical datum reinforces in this way the anthropological indication that the decision to choose and be firm in the means, does not agree with the sole whim (5), as it was stated, facing the fact of being a possible donor, or stated in another way: to recognize that it would be a good thing to be a donor, without the intention to carry it out to practice.

Thus, the fact of establishing a tacit acceptance regarding the donation, based on a statistical general opinion, doesn't become conclusive in order to implement it. It seems that this condition is not sufficient, even though it is necessary. The evidence of the experience abroad the Mexican environment seems to point towards the reinforcement of the previous discussion:

At a worldwide level, from the total of the patients which are candidates to be donors, only 85% of the relatives are interviewed and from these, 47% grants their consent for the organ donation. Nevertheless, these results contradict the public opinion surveys, which show that more than 75% of the surveyed people are in favor of donation, and would accept to donate their organs (7).

But at the time of reviewing again the moments of the voluntary act, there is not necessarily a "contradiction", but as well, the difference in the percentages could be due to a simple complacency

before a good, or the acceptance of the good is stopped when carefully weighing the necessary means. Besides, for both stances, that is to say, the tacit acceptance to donate, or the refusal of this one by the relatives seems to be reasonable, not to take action in case of reasonable doubt ( ). Ultimately the ethical principle is not to act in case of a doubt<sup>2</sup>.

### **III. The tacit consent and the general good**

On the other hand, the gratuity of the donation seems to require a full conscientious act. It seems strange the idea of someone *donating* his organs without ever taking it into consideration. In that case, you are rather an organ provider. (10). Nevertheless, some others, defend a kind of collective property: "... the individual's body is a part of a global social body, considering the act of donation as "a perfect duty", men have to contribute to the benefit of others, there is a subordination of what is individual to the collective" (2).

This is the way the following argument could be considered:

1. Every case in which a greater good is promoted, is a case that should be ethically followed.
2. A greater good is that in which people would live with somebody else's organs.

Then, it is a case to be ethically followed.

The foregone assumes that statement 1 is of universal value. It seems dubious. Many goods and actions are not ethically mandatory, even though they should produce or protect a great good. Taking this to the transplants, it is true that the tacit systems tend to be the most "successful" from the practical point of view of obtaining more organs: Spain occupies the first place in the world and Uruguay the first one in Latin America by means of this sys-

tem (8). Using an argument by analogy: to save a whole crew giving up a good could be heroic, but it is questionable that it would be mandatory in every circumstance. The foregone would give the reason to the relatives in the case of not having available the will of the possible donor, and choose not to give their consent.

Statement 2 also implies another problem, by breaking the formal principle of integrity: “The end does not justify the means” (9). There is no doubt that it is better that the organs availability be increased, but never in exchange for cutting the delivery as a gift from the body itself.<sup>3</sup>

#### **IV. The body as a public good**

The considerations in the previous sections, assume that the body is not a public good, but you own it, even though it is not a possession strictly speaking (8), but it is a guardianship over it. Nevertheless, some people, have proposed the following argument:

Due to the fact that, facing the serious problem of organ scarcity, there are people who have proposed the need to introduce the confiscation model. For what reason should we respect the late wishes regarding our body once we are dead, and for what reason should we respect the decision not to donate of a person which benefited from somebody else’s solidarity? Let’s imagine...that a person which is transplanted with an organ declares while alive, his will of not being a donor. It seems there is no moral reason, which would force us to accept such will (2).

In a formal way:

1. Every object is a subject of confiscation, in case of a good of a greater interest.
2. The corpse’s organs are objects.

Therefore,



The corpse's organs are subject for confiscation.

The first statement seems incontrovertible. But the General Health Law in Mexico establishes in article 246 that: "Corpses cannot be a property object, and always should be treated with respect, dignity and consideration" (11). It is interesting to point out the limitation in negative: they are not a property object, things, but it does not state what they are from the judicial point of view. The controversy with statement 2, is that if we really consider corpses as mere objects. The law, notwithstanding, allows to dispose of unknown people's corpses (11). This raises interesting ethical problems. The law states on one hand, that every corpse must be treated with consideration and respect, but unknown people's corpses can be used for research and teaching. Wouldn't this convey a loss of respect for them?

Somebody could insist that the research and teaching uses, should not be considered disrespectful. But somebody could point out that there can be disrespectful uses *within* research and teaching, as for example, taking pictures to show them publicly. Thus it is possible to dispute that if we consider them as mere objects that should not be an impediment to the commercialization of the same (12).

Leaving aside sentimentalisms, why do we think that there is a limit in the intervention on the same bodies? I propose that the objection to statement 2, is the understanding of the concept of human dignity, as the conditions that make us more human. The foregone means that if a corpse has already ceased to be a person strictly speaking, the human dignity which existed before the death, makes us to consider that the bodies must be treated as the image of the person who used to exist.

Nevertheless, the confiscation's defendant, could argue that the reason stated above proves too much, that is to say, that, using the same principle, the distribution of organs to whom they require them, it would be a benevolent act that makes us in the same way more human. Moreover, for the effects, it could be insisted

that the bodies of the deceased should be converted *de facto* in confiscated bodies, or at the State availability, for educational and scientific ends. Could donation be considered a scientific end?

Now, we could insist that the foregone criteria of “enhanced benevolence” is not totally exact, because the distribution of goods among the people as an act of benevolence remains ruled, in order to be considered a truly virtuous act, a deliberated act of will, by knowing the end through the practical reason.<sup>4</sup> This conscientious and deliberated act is an expression of our absolute humanity. That justifies that the State sees itself limited in the disposition of the deceased people’s bodies. Let us not forget that, even if it can be determined what organs to donate, which reinforces the idea that a person should perform that election with sufficient evidence of having a true election of the means to express that will. (13) (5).

Furthermore, it can be argued that, even if the body would be considered as an inheritable object, the same as other properties, usually the decease is taken into consideration, or otherwise, the relatives, and only in a third moment common usefulness. To the above it can be added that the body was a member of the person, thus we have to limit ourselves in its intervention for any kind of activity. It is something similar to when a person asks another one, to be injured by the other one: both are punished due to the fact that we consider that the State fosters people as valuable as a whole, and what keeps him away of that ideal, it is then proper to limit the individual freedom. In ethical terms, it is clear to constrain evil and prohibit it, but it is not totally clear what we must virtuously allow.

With more precision we recall the principle that states “to prohibit evil and allow the good” (9). The second part of the principle does not tells us how much, but to encourage it. For example, the foregone applied to the case of transplants, we must prohibit their marketing, but we cannot enforce heroism and virtue by donating them.

As a summary, the confiscatory argument that has acted beyond what is acceptable, due to an objectivist interpretation of the body, which violates the principle of integrity; the end does not justify the means (9).

## **V. The principle of reciprocity**

Another strategy has been proposed to increase the number of donations:

...Under the policy of reciprocity, those who committed themselves to donate, will get a significant advantage in the assignment of organs, if they eventually would need a transplant... in case that several people are in similar conditions for the reception of an organ, the fact that not being a donor will have to be taken into account, remaining in a lesser priority scale related to who is going to be the receptor (2).

It has been objected that such principle distorts the allocation, because it establishes non clinical principles in the same. Nevertheless, it can be argued, in its favor, that the allocation “only” with clinical criteria is deceptive. Already the sole fact of establishing waiting lists (14), is an ethical criterion: the randomness as a mediator between the need and the clinical conditions of the receptor and the donor. Consequently it can be defended, in favor of the reciprocity principle, that only an additional non clinical factor has been added to the others which are already given, adding only a sort of anticipated reward, if a future donation would be required. Moreover, it is not at conflict with transparency in the assignment, and seems to be compatible with other clinical criteria, in order for not becoming an arbitrary decision. (7).

The principle of reciprocity seems not to infringe upon justice, because the same must be applied in proportional manner, and not

only in a commutative way (15) (9). The fact of adding additionally a factor of merit, is not only an utilitarian cut, that is to say, the sole fact of increasing the quantity of available organs for transplants, but to recognize that the one who waives to more goods for other greater ones, acquires more merit, and it can and should be rewarded. (13)

That said in other words, adding that additional factor to reciprocity, can make the system more efficient and fair.

It is considered that the concept of gratuity implies full consent. To donate, philosophically speaking, *to donor himself* implies full knowledge of the end and the means for the same. It implies not only the view that there exists a good, but also an act of intelligence. Someone can dazzle himself with a good and nonetheless, not having and searching the means towards the same (5) (6). Within the complete voluntary act (5), it is implied a full knowledge about the good. To donate, give away a good, it is only possible in fullness of faculties. It is not enough to declare that having the information of a good and not performing the statement towards its delivery, is enough. In other words, a donation is complete, that is with full conscience of the good and the placement of the means or it is not a donation in reality.

Now that said, there are organization elements, which without implementing a tacit nor a confiscatory system, improves the donation. For example, taking the Spanish model, the use of the donor cards that are promoted in public spaces, and universities, is an effective and fair strategy (8). Also it is key to improve hospital organizational aspects:

The implementation of transplant coordinators in each hospital is a key element in the Spanish system. Additionally, the transplant coordinators in Spain have a unique profile that makes easier the early identification of potential donors, especially at small hospitals. The majority of transplant coordinators are intensivists physicians that dedicate part of their time to activities of organ

donation, they perform an active part in coordinating all aspects of the organ donation process, and in particular in the contact to the potential donor family.(8)

In summary, a full training at all levels. This implies resources and time. Also there can be enhanced public campaigns using the official times to promote this culture.

Also, it needs to be publicized the diversity of organ and tissues that can be donated, because there exists a lack of knowledge (16) about the multiplicity of organs and tissues that can be donated. The knowledge of the above, probably would allow the increment of specific donations by the population.

## **VI. As a summary**

Returning to the Law presented to the Senate, it is indicated that:

Within the various courses of action, it is implemented the establishment of inter-ministerial links in order to promote the culture of donation, as well as in its Strategy 1.11. To create awareness among the population, knowledge about the need and importance of Donation in the country, for which, the linkage with the Civil Society organizations, as well as the strengthening of the inter-ministerial relationships is fundamental to generate and consolidate an organ, tissues, cells and corpse's donation culture, as well as all what is related to transplants (1).

A culture of organ donation, seems to imply that, again, the complete willfulness act in accordance with what is pointed out with respect to all the stages of the act. The probable right path should be, that, educate, instruct and facilitate the means for people to take a decision about the possibility to donate an organ.

The arguments presented for the tacit proposal seem insufficient in order to justify it. In all the cases seen, it seems to collide with the fundamental intuition that human dignity which was present in the living person, is a criterion that imitates the availability over their body. In the case of Mexico, as it has been stated, in fact it is not anybody's property, at least judicially. Nevertheless, a problem in the legislation arises, that was opportunely noted; it is not at all clear what kind of nature is given to the corpse, because it is not an object, but strictly speaking, it neither is a person. Maybe the legislation needs to be improved about this subject matter.

Moreover, by studying the voluntary act, it is discovered that promotion of organ donation can be performed with an emphasis in the various moments of the voluntary act. For example, some campaigns can be focused on the means, their easiness to become a donor, and others in the knowledge of what kinds of transplants there are among them.

It is not only with pragmatic criteria, the way to obtain organs at any cost, as the way in which a donation culture is promoted. The strategy, which remains within the rigorous ethical limits, implies to demonstrate that donation enhances the capabilities of showing ourselves to the others, as people who donate among themselves. In this case, using the proper means, always respecting people.

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<sup>2</sup> Hence, organ marketing goes against that fundamental principle.

<sup>3</sup> It is the subject matter of another research, the virtues involved in the whole organ donation process. Here we just want to point out that the donation in order to be called that way, must be established in a full voluntary act.

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