

The compulsory donation of organs and the death row inmates: an analysis from bioethics standpoint

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Abstract

This article aims at debating the compulsory donation of organs by death row inmates in view of the demand for organs and tissues for transplants that is far higher than their supply, which leads to necessity of finding ways to increase donations. This article advocates that compulsory donation of organs by death row inmates should be understood as human rights violation, instead of a measure to foster social justice. It discusses the scope of the principle of human respect, approaching individual self-determination and its competence, as well as the feeling of altruism in light of the Brazilian legislation and in view of death row inmates' vulnerability under the international legislation on such theme.

Key words: Organ donation. Human rights. Bioethics.



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Scientific progress has provided an increasing number of benefits, prolonging the life of several individuals and assuring to others a better quality of life, however, these progresses have generated also conflicts in the field of bioethics.

Medicine has provided, thanks to researches undertaken regarding highly complex techniques, progresses progress also in the transplant area: new technical possibilities, new drugs, and immunosuppressors have provides increasing among of successful transplantations. Recent example was the first full facial transplantation undertaken in Spain ¹. It is an extremely complex surgery that, in addition of implying linking several nerves and muscles, as well as requiring participation of several medical expertise, it may arise also new bioethical conflicts, such as, for example, related to



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a possible change in the individual's own identity.

Research undertaken in transplant area, and the success in executing procedures has generated a large demand for organs. Therefore, to discuss coercive donation of organs is to place oneself in face of the true struggle in the bioethical Field, in one hand, we have the need to have feasible organs and tissues due to current scientific progress, aiming at ensuring the protection of the right to life, to freedom, and physical integrity of those individuals in need of certain organ; in the other hand, we have the voluntariness and gratuitous principles in donation of organs, which will not be always enough to meet the demand needed for transplants.

In Brazil, the issue was initially regulated by Law no. 8,489/92 and by Decree no. 879/93, and replaced by Law no. 9,434 of 2/4/1 997 that was revoked later by Law no. 10,211, of March 23, 2001. However, in June 2004, a new Bill proposed the compulsory donation of organs by convicts with sentences above 30 years imprisonment, and it reopened ethical and ethical debates on the subject. Thus, in the field of bioethics, we can launch several questionings related to donation of organs. In this article, one seeks to analyze the main values to be considered regarding specifically to *compulsory* donation of organs by inmates sentenced to death, as exemplified by what has occurred in China, according to Paolo Virtuani's report². Concerning Brazil, where death sentencing is not foreseen, we can analyze the values implied under the perspective of compulsory donation of organs by convicts with sentence above 30 years, as intended by the mentioned Bill.

Respect for the human being

It's important to stress that, dealing particularly of organs and tissues donations, the respect for the human being is a basic ethics precept that should be considered.

Thus, one speaks about respect to individual's autonomy and real altruism; this, as the most absolute delivery or retribution to gratitude feeling.

Law no. 8,489/92 and the Decree no. 879/93, which basically established voluntary donations as the sole way for donation of organs, initiated the regulation of the subject in Brazil. Replacing these regulations, Law no. 9,434/97 dealt again with the subject, expressively establishing that donation of organs, tissues, and part of the body, in accordance to its Article 1, would have *gratuitous disposition*, and it could be undertaken in life or after death, and that the *post mortem* withdrawal would have to be, mandatorily, preceded by brain death diagnosis, in terms of its Article 3.

Law no. 9,434/97 established that conducts through payment or promises that would result in the incapacity or death of the donor would be considered as crime, observing the content of Articles 14 to 20.. Additionally, it established that, despite been voluntary and gratuitous, the desire to donate was presumed, defining that the individual would be considered automatically as donor, except reverse manifestation (principle of presumed consent). In view of the several polemics generated, in March 2001, a new Bill, Law no. 10,211, granted the family the decision of donating deceased member's organs.

Bill no. 3,857, authorship of Irapuan Teixeira³, proposed, in June 2004, the compulsory donation of organs by convicts sentenced to over 30 years of imprisonment.

Although not approved and currently in archives, the Bill reopened discussions on the subject. In Brazilian legislation, the principles of voluntariness and gratuity prevail in donation of organs and tissues.

It is worth mentioning, in this sense, that the will of the individual may be different from the others (only socially competent individuals may differentiate). Respecting the feeling of altruism and solidarity is really very important. Individual's conviction is determinant in the decision of donating, even after death. It is worth remembering, still, that the non-donor also cannot be condemned for his conviction. Berlinguer⁴ states that, under such perspective, the mentioned conviction should not generate *accusations of insensibility or guilt feeling*.

For this reason, to suppress such wish or to let go the need of consent from competent individual or the family in donation of organs and tissues, ends up by generating a major bioethical debate with legal, religious, and social reflexes. The donation presumption system is adopted in several countries, inclusively in Brazil during validity of mentioned Law no. 9,434/97, currently revoked. Although this donation presumption system, for Berlinguer⁴, may actually help in availability of organs, donation is not carried out, generally, if individual has expressed his will of not being a donor.

We consider, therefore, that respect for the human being is the basic precept that should be considered, even in cases of compulsory donation, particularly those sentenced to death.

Next, a few question on the subject will be raised from this premise.

Why increase the supply of organs?

As seen, the demand for organs is increasing, and their scarcity has stimulated other forms (of collecting) *adding to the withdrawal from corpses* ⁵. The unbalance between supply and demand is a reality ⁴. In order to understand the seriousness of problem, in 2008, according to the Health Resources and Services Administration, which keeps a national listing in the United States, 50,624 Americans waited for kidneys donations ⁶. According to information published in The New York Times ⁷, until then around 16,000 people had received one kidney – while 40% of used organs came from live donors. The number of individuals waiting for organs reached 92,000 people, considering liver, lungs, and heart. The waiting time for compatible organs was from five to eight years. The forecast is that this figure would double in 2010.

What does lead to the existence of a black market for organs and tissues ?

We could point to two kinds of donations: *inter vivos* and *post mortem*. Vanessa Chandis ⁸, when denouncing the lack of incentive to foster increase in organs supply, explains that, depending on the situation, donation may be made by organs originated from corpses or living persons. However, in the later case, live donors are, usually, relatives or close friends.

Due to lack of incentives to donate, the number of live donors is low, which, for the author, has stimulated the emergence in poor countries of a black market for organs⁹. The author explains still that, in case of negotiation of organs, having sold his organ in the black market, precisely because live donors does not have access to good medical care and, less still, funds to buy medication and undertake regular post-surgical exams, the donor ends up in worse situation than that prior to the sale of his organ ⁹.

Why would free and spontaneous donation be superior to other forms of donation?

Giovanni Berlinger ⁴ warns to the fact that *biological science and professional medicine assume a special responsibility* that may provide benefits or change the body into a commodity. Society has shown great concern in face of the risk of reducing human being or his parts into mere commodities or *things* in view of evident unbalance between demand for organs and available material. The human being is not a thing (*res*) and, therefore, cannot be simply used as if he was a mere object. He is an end in himself, invested, then, with a dignity own to him, as taught by Kant ¹⁰. From this humanist notion arises, *inter alia*, the non-acceptability of slavery and, reflexively, the fact that human organs are understood normally as *res extra commercium* – untradeable things.

Another implication of this basic principle of non-objectification of the human being would be that, in addition of human body not been tradable merely as thing, it cannot be expropriated also, as it is intrinsic and very personal part of each person. This is the reason to stimulate spontaneous and gratuitous donation. This gratuitousness is directly related to satisfaction of doing good to someone to whom the *own body* or [the body] *of a relative still can be useful to someone else*, as pointed by Berlinguer ⁴.

The author explain, still in this sense, as been possible to admit the existence of a self-realization of human being by *transferring to an alien body a part of our own body (during life, by means of blood and gametes; after death, by means of organs)* ⁴. The extending of life, for him, based in donation of organs and tissues *constitutes the most positive phenomenon o four age*. However, Berlinguer and Garrafa ⁵ state that donation presupposes an *animus donandi* and that laws, generally, intend to prevent that this will to donate gets mixed up with commercial exploitation acts.

What does one understand as altruism and which benefits could derive from flexibility and increase in the supply of organs?

The meaning of altruism can be understood differently, deserving, thus, detailed analysis. In consequence of altruism (in the sense usually

used by society) othe individual donates because he has a gratitude feeling or he has a social or religious expectation of receiving some form of gratitude. We classify this form of altruism as *social altruism*. Legislation, reflecting our current society expectations, does not mention it expressly, but we can realize that legislation shelters a social ideal of spontaneous altruism, reaffirming it by means of gratuity and voluntariness.

Nevertheless, for many, as already state, to depend essentially of altruism is not enough. For Satel ⁷, the sole way to increase the supply of organs is to offer financial and others incentives, such as fiscal, ensured health insurance, scholarships for donor's children, deposits in retirement accounts, etc. Author suggests even the establishment of a regulated market of *future* organs: a potential donor could receive compensation in advance, such as, for example, contribution to a charity institution of his choice or health insurance throughout his entire life, in exchange for permission that his organs may be withdrawn after his death.

Satel states that to think that such practices would lead to the Idea that the human body is for sale, and that this somehow would be wrong, is a surpassed view, at least for American society. In that country, eggs, sperm, and surrogate pregnancy market is broadly accepted; studies carried out in Pennsylvania show that 53% of interviewed people would accept direct payment for their organs. Finally, for the author, well done regulation by the State would ensure the

awareness of population on choices for donation, would require psychological and medical evaluation, conferring quality care in post donation follow up, preventing that some form of exploitation of the least economically favored, as well. Thus, in principle, the stimulus to meet scarcity of organs by means of regulated counterpart could inhibit the traffic of organs, since that would increase supply.

Just presumed consent is not enough to cause significant increase in number of donated organs.

Would the presumed consent and compulsory donation increase the supply of organs, while respecting the human being?

It is exactly the high search for organs and a scarce supply that have given origin to laws that provide incentives (or intend to) for donation of organs. Presumed consent is, in this sense, one of the means brought in by world legislation in order to assure the supply of organs. In presumed consent, the individual does not manifest expressly his agreement with the donation of his organs, this is presumed by Law unless he declares expressly that he is not a donor.

However, for Arthur Caplan ¹¹, Bioethics professor at the University of Pennsylvania Medical School, a Law changing presumption of donation is not enough to solve problem. Previous experiences with presumed consent in Eastern Europe showed that, according to Satel ⁷, *education of the public and constant training at hospitals* are crucial to increase the number of donors

Additionally, it worth stating that only a small percentage of the population informs on its quality as donor, and it is left to their family to deny or accept donation when death really takes place. And, besides, just an even smaller number of these donated organs is sufficiently healthy for donation. Thus, it seems that a policy fostering donation could collaborate with increasing the number of voluntary donors of organs.

Compulsory donation, in this context, would be another measure aiming at increasing availability of organs for transplant. In Brazil, in June 2004, the Bill no. 3.857, whose author is the Federal Representative and professor Irapuan Teixeira, propose the compulsory donation of organs from convicts sentenced to over 30 years of imprisonment. Among justifications presented by the Representative was to meet the need of organs for transplant, Nevertheless, compulsory donation collides with several aspects in the field of bioethics, with religious, cultural, and social reflexes. Suppressing or restricting individual's will, forcing him to hand over his organs does not seem to us the best way to solve the problem of scarcity of organs for transplants, and still it causes many other problems.

The *Universal Declaration of Human Rights*¹² brings in new ethical perception of human relationships with the acknowledgement of the dignity inherent to all members of the human family, and equal rights to life, freedom, and to safety, which imply the *respect of the other* and autonomy as individual's *basic values*¹³.

Brief background of the instruments targeted to ethics in research

Another important aspect to be discussed is precisely the individual's autonomy in face of vulnerability to make decisions. Item II.15 of Resolution no. 196/96¹⁴ of the National Health Council, which deals about researches involving human beings, sets forth that vulnerability refers to *people or groups status that, for any reason or motive, have their self-determination capability reduced*. The individual's vulnerability, therefore, is the key issue in this discussion.

And a vulnerable group, historically subject to the most diverse atrocities, is precisely that of prisoners, particularly those sentenced to death.

Modern history shows that prisoners, sentenced to death or not, were the object of scientific research in Exchange for a reduction of sentence, for example. Those sentenced to death, however, were submitted to scientific researches with religious justifications or in view of their usefulness offered to society, that is, as a way of *settling their debt toward society*. The premise that research in

And vulnerability of these individuals was precisely that made research with this group were not uncommon. In Nazi Germany, during World War II, for example, concentration camps turned into true scientific research laboratories, whose abusive and inhuman practice ended by arousing indignation in the post war world, stimulating the formulation and adoption of several regulatory instruments. The knowledge on the content of these researches contributed to set ethical principles that would guide and lead scientific studies in human beings.

Because of it, the recommendation of the individual's express agreement began to integrate the roll of scientific research guiding principles, as set forth in item 1 of the 1947 *Nuremberg Code*¹⁵, the first international document of ethics dealing with research with humans: the consent must be free, and the research subject must be legally capable of providing his consent, and he may, inclusively, give up at any time of the research.

The *Nuremberg Code* establishes also the need of transparency of methods to be used and the

risks deriving from the research to which the individual will have to undergo, instituting true personal accountability of the researcher. Curiously, it bans the possibility of carrying out research that may cause death or irreparable harm *unless, perhaps, in those experiments in which their designers are also research subjects*¹⁶.

Additionally, the document states that research outcomes must be beneficial to society without, nevertheless, implying greater personal risk for the subject that submits himself to it. It specifies that research can be undertaken only if outcomes cannot be achieved otherwise. It mandates that it is necessary to avoid unnecessary harm and suffering, both physical and mental, also stipulating that researches should not be carried out if one may suppose that they will result in death or permanent disability for their participants, inclusively they could be interrupted by researcher himself at any time, if He considers as necessary. Additionally, researcher should interrupt the experiment if he realizes that its continuity may result in lesion, incapability or death for the subject ¹⁵.

The document that follows, produced at world level to regulate ethics in researches is the *Helsinki Declaration* ¹⁶, prepared in 1964 within the scope of the World Medical Assembly (AMM), and reviewed several times in 1975 (Tokyo/Japan), in 1983 (Venice/Italy), 1989 (Hong Kong/China), 1996 (Somerset West/South Africa), 2000 (Edinburg/Scotland), 2002 (Washington/USA), 2004 (Tokyo/Japan), and 2008 (Seoul/South Korea).

In addition to reiterate principles consecrated by the Nuremberg Code, the *Helsinki Declaration* deals – already in the introduction of the original version – on the importance of research for the *increment of scientific knowledge and to help humanity*. It presents recommendations for clinical research, particularly, differentiating researches with *essentially therapeutic* purpose from those of *purely scientific* aim, setting out protection for patient's life and health, axioms that must be respected by researcher. It must be highlighted, however, that the last change in 2008 provided precedent for double standard with the review of Articles 29 and 30.

The United Nations General Assembly prepared, in 1966, the *International Covenant for Civil and Political Rights* (CCPR) ¹⁷, in force since 1976, which established in Article 7 (...) *no one will be submitted, without his free consent, to medical or scientific experimentation*. The *International Ethical Guidelines for Biomedical Research Involving Human Beings* ¹⁸ were prepared in 1993 by the Council for International Organizations of Medical Sciences (Cioms) with collaboration of the World Health Organization (WHO), in Geneva, requiring that researches with human beings must undergo review by an ethics commission on research always. The *Universal Declaration on Bioethics and Human Rights* ¹⁹ sought, In 2005, to identify universal principles guided by ethical values regarding scientific and technological development, that is, assuring the

freedom of research without losing sight of the protection of human beings' basic rights, inclusively of most vulnerable population.

As seen, even though all these documents specify ethical Standards that must guide research with human beings, we believe that the same rationale may be applied to the issue under consideration in this article – the compulsory donation of organs by death row inmates. One verifies in both cases that the respect for autonomy should guide the project and practice. Concerning specifically the focus of this article, one should consider that, even though death sentence is not applied in Brazil, and that Bill no. 3,857/04 was archived, it is relevant for the study of the bioethical concepts of autonomy and vulnerability to reflect on compulsory donation of organs, concerning death row inmates, as well as on significant ethical conflicts that arise from this possibility.

What could justify ethically the compulsory donation of inmates' organs?

Berlinguer and Garrafa ²⁰ warns about the fact that the *high price of organs in the international market could cause a monetary stimulus to multiplication of executions*, and they denounce the sale of prisoners sentenced to death organs in Canton (China), broadly disseminated by the magazine Lancet, by the Italian press, and by a documentary produced by the British Broadcasting Corporation (BBC) ²¹. They explain that, due to religious reasons, transplants in Hong Kong were especially difficult. Local

religious convictions were that the soul of an individual whose body had been dismembered would not find peace after death. According to authors, China did not deny that executions may have increased in order to help meet the local demand of organs, but argued that they were isolated cases. Chinese authorities stated that sentenced prisoners had agreed to organs withdrawals before death sentence execution.

In view of situations such as this, which point to scarcity of organs for transplants, the main argument presented by the advocates of compulsory donation, specifically related to death row inmates, is that a death sentenced individual could, thus, contribute to society donating his organs. Since his death is certain, at least other lives could be saved. Could this conduct be considered ethical? Would it be abuse against individual freedom or social justice?

The ethical-philosophical trend that could be used to base such conduct is known as consequentialist ethics. It is worth saying, however, that referred action would be allowed only if some conditions were observed. Peter Singer ²² explains that living ethically is linked to justifications and the essence of certain conduct. A conduct to be considered as ethical should observe the universal benefit, not just for a certain group or. For Singer ²³, *ethics is based in an universal standpoint, which does not mean that a particular ethics opinion should be universally applicable*, admitting an-

utilitarianism form. According with the utilitarian ethics (or similar, for example, the consequentialist ethics), compulsory donation of organs would be justifiable and ethically correct since the benefits yielded from it would overcome the damage caused by its imposition. In such case, we should consider not just the benefits achieved for society by means of certain conduct, but the damages as well and, therefore, it is indispensable to weigh them in order to check what would be, in the end, the best.

However, as we have seen, such justifications were widely used in experimentations with human beings throughout history, experimentations that certainly violated the individual's basic rights, such as, for example, to dispose own life and own body (autonomy), as well as principles, in this case minors, of altruism and solidarity. Finally, it was violated the minimum respect that a human being owes to the other. One cannot state that the benefits yielded from such abuses would have compensated their damages. Equally, it does not seem to us that utilitarianism would support, in general, the compulsory donation of organs, particularly of sentenced or imprisoned (sentenced or not to death), precisely in view of his vulnerability and the ill-fated consequences that could derive from such policy. Accepting such conduct could lead us until complicity in execution of crimes against humanity, according to stand of some. Since, as assures Kant, the categorical imperative implies in the duty of acting only in accordance to an axiom in such manner that one may desire to become universal Law ²⁴.

Final considerations

In view of already described, we can now foresee the hindrances that may come from a presumption of donation by anyone. Concerning inmates, the case becomes even more complex. Is it really a presumed consent as indicated by many? To impose on inmates a presumption of organs wouldn't it, actually, consecrate a compulsory donation in face of their special vulnerable status? Wouldn't it be in itself a new punishment for a crime that they had been already sentenced, a truly *bis in idem*, in addition to sentence already received, particularly in the case of death sentence? The State restricts, then, citizen's autonomy by imposing maximum sentence (attempting against their own lives), and still withdrawing organs against their Will (or in face of a synthetic built will). By accepting such conduct, wouldn't it be accomplice of crimes? Would it be really social justice?

It does not seem to us to be the case, since we understand that the rationale presented throughout the text should always observe the respect for the human being and his autonomy as parameter for social justice. Even if one admits that compulsory donation of organs would meet social justice under some sort of utilitarian rationale, it only could be acceptable if it provide more universal benefits than damages. However, it is very difficult to quantify such benefits and damages, taking society in consideration (*pro societatis*) or the individual.

Respect for the human being is the basic precept to guide human beings' conduct, and we need to consider its two core aspects – individual's autonomy and the altruism feeling that exists (or should exist) in donation of organs and tissues – to identify the circumstances in which it is ethically correct to withdraw their organs for transplant. In face of these aspects and their relevance in building up the notion of human respect, the withdrawal of organs from death row inmates could be admitted only after their free and express consent, which, in such a priori coercion situation, could be extremely difficult or even impossible to get. The same is applied in the case of those sentenced to over 30 years of imprisonment.

In face of the *per se* value that each individual has, in view of the need to strengthen individual freedom, physical integrity, and dignity of the human being, and due to the risk of abuse and injustice that compulsory donation of death row inmates' organs (and the same could be said for those sentenced to over 30 years, as intended by the Bill in Brazil) may cause in this extremely vulnerable group, we believe that it is not possible to admit it without donor and his family are duly clarified in its respect, and expressly give consent for donation, in such way that his vulnerability does not constitute a hindrance to his free conviction.

In other words, regarding donation of organs, it does not seem justifiable to us to apply a different regimen to inmates than that applied to citizens in full exercise of their rights – which would be a discriminatory practice. Free and Express consent of any individual should be always autonomous and based in his own convictions. However, it cannot be forgotten also that this group lives an actual unequal situation in relation to other citizens since they are deprived of freedom and imprisoned in an institution. Under such conditions, inmates should be seen and dealt in the singularity of their inequality regarding full citizenship, at least concerning donation of organs. They should be protected from any coercive action from the State as way to ensure them social justice, considered, in this case, the peculiarity of their status.

Concerning the difference between supply and demand of organs for transplants, we consider that individual and collective information and awareness would be, actually, the Best ways to increase the supply of organs, not Just *post mortem*, but also *inter vivos*. These spontaneous forms of donation, having a crucial role in the construction of social ideal of solidarity and altruism feeling that could contribute not only to save lives but to foment mutual respect among human beings.

Resumo

A doação compulsória de órgãos e os prisioneiros condenados à morte: uma análise sob o ponto de vista da bioética

O artigo visa debater a doação compulsória de órgãos de prisioneiros condenados à morte frente à demanda de órgãos e tecidos que ultrapassa em muito a oferta e leva à necessidade de encontrar medidas para aumentar o número de doações. Argumenta que a doação compulsória de órgãos de condenados à morte deve ser entendida como violação de direitos humanos e não como medida de justiça social. Discute a abrangência do princípio do respeito ao ser humano, abordando a autonomia do indivíduo e sua competência, bem como o sentimento de altruísmo à luz da legislação brasileira e em face da vulnerabilidade dos condenados diante da legislação internacional sobre o tema.

Palavras-chave: Doação de órgãos. Direitos humanos. Bioética.

Resumen

La donación compulsoria de órganos de presos condenados a muerte: un análisis desde la perspectiva de la bioética

Este artículo pretende debatir la donación compulsoria de órganos de presos condenados a muerte en vista de la demanda de órganos y tejidos que ultrapasa mucho la oferta y genera la necesidad de encontrar medios para aumentar el número de donaciones. Defiende que la donación compulsoria de órganos de condenados a muerte debe ser entendida como una violación de derechos humanos y no como un medio de justicia social. Discute la amplitud del principio del respeto al ser humano, abordando la autonomía del individuo y su competencia, y el sentimiento de altruismo en vista de la legislación brasileña delante de la vulnerabilidad de los condenados delante de la legislación internacional sobre este tema.

Palabras-clave: Donación de órganos. Derechos humanos. Bioética.

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