
Reviewing the Current Organ Donation System in the United States: Possibility of Adopting Presumed Consent System

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Abstract

Organ donation cannot be mandatory in the view of the current system of organ donation in The United States due to several circumstances, and factors would cause failing the system if it was adopted. Comparing with some European countries, which adopted the presumed consent in its organs donation system, The United States has its own special system. And the first obstacle is the freedom of practicing religion. In this paper, when the mandatory term indicated, it means the presumed consent. And my point is that there is no doubt that the current organs donation system in The United States is not working as it should be...¹, and what I am saying is that the change from organ donation system, built on a volunteering option to a mandatory rules would not be possible, or will say raising the system to the mandatory level will not be possible, which mean the presumed consent system will not be possible.

Keywords: Organ Donation, Life Saving, Religion View, USA System on Organ.

¹ Sean Arthurs, Comment and Casenote: No More Circumventing the Dead: The Least- The Least-Cost Model Congress Should Adopt to Address the Abject Failure of Our National Organ Donation Regime, (2005) University of Cincinnati Law Review University of Cincinnati Law Review, 73 U. Cin. L. Rev. 1101,

Introduction

When you hear that there are about six thousands of people die in on year, for almost the same reason, you will feel very bad about them. You would ask why and what should have done for stopping that? That is in The United States, there are six thousands of citizens die every twelve months waiting for receiving organs transplant. On average, nineteen people die every day because no organ becomes available for them. That creates concerns about whether the current system is good enough to help all of those who need organ be transplants to them to save their lives.²

Patients will die without lifesaving organs. They will continue to die as long as the shortage of supply of organs is a problem under the current American system, and the demand of the transplantable organs continues to be high. The shortage of organs creates a problem when there is a high demand on organs and less supply for those who are in the waiting list. “In The United States, more than eighty thousands of people are on the official waiting list, all hoping that someone will die in just the right circumstances and bequeath them the gift of life.” In 2008, only 16,517 got transplants: 10,550 with the cadaver organs allocated through the list and 5,967 from living donors. More than 4,000 on the list, or about 11 a day, died. And the list gets longer every year”.³ In front of all of these facts, and the number of citizens who die waiting for a chance could change their sadness, and give them a golden gift to live longer. It seems reasonable to think about the possibility of changing the organ donation system to be mandatory system, which means adopting the presumed consent system.

Presumed consent is one of the three solutions that most addressed to resolve the shortage of organs available for transplants and they grouped as scientific

² Bruce Patsner, M.D., J.D. Human Organ Transplantation in the United States_ Crossing New Lines.” Health Law Perspectives August 2008.

³ The Atlantic, DISPAT. Virginia Postrel. “...with functioning kidneys for all.” July 2009.

advancement, presumed consent, and incentivized donation”⁴. In my paper, I am going to discuss in part one what is the presumed consent system would be looks like. Then presumed consent as it is adopted in Austria and France, and I will give clear explanation of its two ways: the hard system and the soft system of presumed consent. In part two, I will go over the current organ donation system in The United States, and why the presumed consent possibly to fail as a solution of the shortage in the organs, and the continence of rising in demand with no increasing in the supply of organs in the United States.

Part I. The Success of the Presumed Consent System in Some Countries

Ideologically, the presumed consent is the opposite face of the informed consent. In the most states in The United States, the informed consent is adopted. Under the presumed consent donation system, Individuals are not required to do any actions to be involved in the donation system, without any showing to their desire of being organ donor, they become donors as the system of presumed consent requires. “This system seeks to remove the psychological challenges that are thought to be the reason for the lack of success of the opt-in system.”⁵

1. Presumed Consent Meaning:

In America, The system works now by doing the action of opt-in. as individuals who want to donate must “opt-in”- checking the box on their Driver’s license, by signing a Donor Card, or lastly by signing up with State Donor Registry. The Local Organ Procurement Organization contacted the family regarding their loved one’ that already opt-in. At that time, they still have the right to refuse giving consent, they do that even though they know that the deceased wanted

⁴ See Id.

⁵ Abena Richards, “Don't take your organs to heaven. . . . Heaven knows we need them here”: Another Look at the Required Response System, 26 N. Ill. U. L. Rev. 365, 2005.

and wished to donate his/her organs. That happens even in states that have “First person consent” laws, so the family always can prevent their loved ones’ desire to be organ donors from being considered. ⁶ “Public policy based on presumed consent would offer every adult the opportunity to express and have recorded by publicly accountable authorities his or her refusal to be a donor of solid organs and tissues. A clinically and legally indicated candidate for cadaveric organ and tissue recovery is presumed to have consented to organ and tissue recovery if he or she had not registered a refusal.” ⁷ In reality, the practice of the system works now in order to get the consent of the dead person is done by talking to the dead’s family. That happens by Organ Procurement Organization or the hospital itself, which means that people who work at OPO or in the hospital would talk to the family of the deceased if they have any data on their relative desire of being an organ donor, or any chance for organ donation generally.⁸

What happens is that physicians seek consent from the family rather than the donor, who confirmed his or her wishes. They do that because they are worry about their reputation, and the estimation of the medical community in general. In fact, in the current system, there is much more pressure on people who work in the emergency, the pressure is because they have to find out if the written “directives” are there. ⁹

The presumed consent would make the system works in the opposite way. Accordingly, Persons who do not desire to be involved in the organ donation by being organ donors, they must opt-out, that would be by certain procedures was

⁶ The Presumed Consent Foundation, Inc. “Your choice First” available at <http://www.presumedconcent.org/issues.htm>

⁷ U.S department of Health and Human Services, Organ procurement and ansplantation Network. Available at <http://optn.transplant.hrsa.gov/resources/ces/bioethics.asp?Index=2>.

⁸ Committee on increasing Rates of organs, James F. Childress, Catharyn T. Liverman, Editors. “Organ Donation: Opportunities for Action.” page 96.

⁹ Sarah Elizabeth Statz. “Finding the Winning Combination: How Blending Organ procurement systems Used internationally can reduce the organ shortage.” 2006; 1678 1709; Vol.39: 1677.

mentioned in on source as the following “...By entering their names on National Registry maintained by OPTN - the same organization that now keeps the National Waiting List of transplant candidates When a person died under circumstances that would permit Organ Donation, a search would be made of the Registry. If their names did not appear in the Registry, it would be presumed they had consented to be a Donor. While the family would be advised of this information, their consent would not be required, and no one would be allowed to override the donation.”¹⁰

Aaron Spital mentioned that some say that using the organs of deceased will reduce the need to get the consent. As a result of the needless to the consent of the dead person, taking the cadaveric organs does not need to be consented by the dead. And that is because it is not acceptable to talk about “autonomy” of a dead person. However, the ethical expression has it is view. Seeking the consent is a very important ethically. It is importance comes from the protection of the body from being harmed, but the other side reply that the objectives behind the moral perspective do not have any senses, and no longer affective after death”¹¹ In the looking to organ donation, Americans do not encourage the organ donation as it might be thought, or as the percentage shows. “Under the current system in the United States, even though 85% of Americans encourage organ donation, the real rates are not high.”¹²

The reasons for the deference between the reality and what the percentage shows are: first, the family does not know about their members wishes regarding organ donation. Secondly, they never discussed the matter before the death, so, they

¹⁰ The Presumed Consent Foundation, Inc. “Your choice First” available at <http://www.presumedconcent.org/issues.htm>

¹¹ Aaron Spital. Conscripton of Cadaveric Organs for Transplantation: A Stimulating Idea Whose Time Has Not Yet Come? Perspectives. Available at <http://www.virginia.edu/ipe/docs/Spital%20Conscripton.pdf> last visit oct11,2013.

¹² See Id.

have no idea regarding would be available at the time of death. Lastly, the family always has the right to refuse their loved ones' desire or wishes to be an organ donor. In fact, family decision still considered and counted.¹³

What is different about presumed consent laws is that the responsibility will be shifted. It will put the "burden" on individuals to opt out instead of taking the action to opt in, and find the way to encourage them to opt- in. Presumed consent laws give value to the general ideas of the society. In addition, supporters of presumed consent show that these laws were successfully adopted in some countries.¹⁴ "For example, the U. S.-based Presumed Consent Foundation claims: Presumed Consent works well in other countries where it has been instituted - Austria, Spain, Portugal, Italy, Belgium, Bulgaria, France, Luxembourg, Norway, Denmark, Finland, Sweden, Switzerland, Latvia, Czech Republic, Slovak Republic, Hungary, Slovenia, Poland, Greece, and Singapore."¹⁵ In the countries which adopted the presumed consent laws, the presumed consent was formed in two different kinds, or types: hard system, and soft system. I will go over the two types by giving two examples of countries through the success of the laws in Austria and France.

2. Presumed Consent Laws in Some Countries:

A. Austria:

In Austria, the opt-out system was adopted. This system means, as mentioned in the previous section, automatically involving in the donation of organs from individuals. People in the country cannot consider themselves not organ donors except if they opt-out officially to be donors. This system comes in two forms:

¹³ See Id.

¹⁴ Kieran Healy. Symposium: Precious Commodities: The Supply & Demand of Body Parts: Do Presumed-Consent Laws Raise Organ Procurement Rates? 55 De Paul L. Rev. 1027. Spring 2006.

¹⁵ See Id.

the hard system and that is the same with what Austria adopted, and the soft system, which is used in Spain and France.¹⁶ In the soft system, even though the person did not opt out during his or her life, the family of the dead person may refuse donation of her or his organs after death. On the other hand, in the hard system, which is used in Austria, the presumed donor's family does not have any rights to decline the consent to donation that was given by its loved one. "The "opt-out" system has resulted in an overall increase in organ donation with the highest donation rate being in Austria where the number of kidney transplants performed was nearly equal to the number of people on the waiting list."¹⁷

Presumed consent adopted in Austria as a complete and absolute form of the presumed consent laws. That is the hard system. "The hospitals' laws say that it considered accepted and permitted to remove the organs from the dead persons. In addition, to refuse that the person during his life or his representative shall refuse that before the death happened."¹⁸

More than that, the refusal of being donor must be in the physician's control and the time must be certain to the death time. Otherwise, it is not possible to avoid donating the organs after death. In fact, what happens in events like accidents cause death, or in the emergency rooms, in such situations, it is not possible in many cases to find the official documents that say the dead person refuses to be an organ donor. But according to Austria law, physician would not be required to look for, or try to get the proof of opt-out desire. "Moreover, the legislation does not give the family of the deceased a say in the donation question."¹⁹

¹⁶ Tracy Pfeiffer. Organ Donation: Opt in Or Opt Out? University of Pittsburgh Journal of technology Law & Policy. Fall, 2007.

¹⁷ See Id.

¹⁸ Marie-Andrée Jacob, "ON SILENCING AND SLICING: PRESUMED CONSENT TO POST-MORTEM ORGAN "DONATION" IN DIVERSIFIED SOCIETIES", Tulsa Journal of Comparative and International Law: 2003 11 TLSJCIL 239.

¹⁹ See Id.

Presumed consent laws were useful, and it has given the desirable results in Austria. The effectiveness of the system in Austria could be due to the tradition believes in the Austrian society. Mostly, it accepts the idea that the removal of the body parts is the country responsibility. On the other hand, not all countries have the same tradition belief. So we can say that if there is a country that has this idea, and the society believes in it, it might work. As a result of not having such tradition thought, the people in the country would not accept presumed consent, or their believes on having the right on their bodies rather than the government will support the families right to not accept the organs removal without their consent.²⁰

In countries that adopted the presumed consent in its system, there was a potential increasing in the organs supply. “Data from countries that employ presumed consent suggest that the shift from an opt-in to an opt-out system can increase organ procurement by as much as 25-30%.”²¹

Lately, what families do is declining the organ donation. They do that even though the dead member of the family decided during his or her life to donate the organs of his or her body. In fact, the organ donation card will not have its effect till the family’s consent. That means, the families’ decision, to refuse organ donation, is effecting the rate of organ donation. Still the option would not be possible for some countries like The United States. As was indicated in the above information, Austria has its own system and believes that help succeed the presumed consent system. “Generalization of presumed consent laws leads to unpredictable results and may be potentially dangerous”²²

²⁰ Kieran Healy. . Symposium: Precious Commodities: The Supply & Demand of Body Parts: Do Presumed-Consent Laws Raise Organ Procurement Rates? 55 De Paul L. Rev. 1027. Spring 2006.

²¹ See Id.

²² Kieran Healy. . Symposium: Precious Commodities: The Supply & Demand of Body Parts: Do Presumed-Consent Laws Raise Organ Procurement Rates? 55 De Paul L. Rev. 1027. Spring 2006.

There could be other solutions. For example: “In Indiana in 2000, family members overrode a decedent's choice to donate in 74 out of 184 cases involving eligible donors who had indicated their wishes on their drivers' licenses. That 40% override rate led the legislature to modify the state's uniform anatomical gift act to make it clear that the decedent's wishes take priority over those of family members.”²³

B. France:

France is an example of the soft presumed consent system. The presumed consent system has been in France in 1976. The cause of the system to be a soft and not hard as it is in Austria is because the system came after informed consent system, which is similar to what is, now, in The United States. In addition, France changed from opt-in to opt out system.²⁴ “The relevant provision of the French Loi de Cavaillet (1976) reads simply: Organs may be removed for therapeutic or scientific purposes from cadavers of persons who have not, during their lifetime, indicated their refusal to permit such a procedure.”²⁵ In addition, there are two exceptions on that general and strict rule of donating. The first exception is minors, and the second one is incompetent individual. To remove organs from any of these two groups need authorization of their whoever represent theme, which are their representatives.²⁶ “It is evident by reading this exception for

²³ See note 31, David Orentlicher. Presumed Consent to Organ Donation: Its Rise and fall in the United States. 61 Rutgers Law Review. 295. Winter, 2009. And. Tracy Pfeiffer. Organ Donation: Opt in Or Opt Out? University of Pittsburgh Journal of technology Law & Policy. Fall, 2007.

²⁴ Marie-Andrée Jacob, ON SILENCING AND SLICING: PRESUMED CONSENT TO POST-MORTEM ORGAN “DONATION” IN DIVERSIFIED SOCIETIES, Tulsa Journal of Comparative and International Law, Fall 2003. 11 Tulsa J. Comp. & Int'l L. 239.

²⁵ See Id.

²⁶ Marie-Andrée Jacob, ON SILENCING AND SLICING: PRESUMED CONSENT TO POST-MORTEM ORGAN “DONATION” IN DIVERSIFIED SOCIETIES, Tulsa Journal of Comparative and International Law, Fall 2003. 11 Tulsa J. Comp. & Int'l L. 239.

minors and incompetent persons that dissent from the deceased's family members have no impact in regular circumstances,”²⁷

In the practice life, what providers do is seeking the consent of the family at all cases. They do not do as rules say exactly. By that practice of the rules, they are making the system to be a soft system different to Austria presumed consent.²⁸

France presumed consent was created by their medical providers who seek the consent. The consent of the dead person is considered to be available, unless the person opted out of the organ donation system during his or her life.²⁹ People could prevent to be organ donors with any way of refusal. That is what the council of the state³⁰ has pointed that “an individual could object to donation by any means, either at the time of admission to the hospital or at any other time. Objections are to be recorded in a hospital register reflecting the individual's wishes.”³¹ According to the council, anyone else, has observed the patient's refusal, is authorized to register the wishes of the patient. Checking the registry of patient is the physicians' obligation. In whole, the Law in France does not have an approved duty on tracking a consent from the dead's family.³²

It is forbidden, by the Circular of the Ministry of Health and Social Security, to remove organs when the physician had a straight awareness of the dead's refusal. That is with no need to check if the refusal has registered. And the family of the

²⁷ See Id.

²⁸ Sarah Elizabeth Statz, “FINDING THE WINNING COMBINATION: HOW BLENDING ORGAN PROCUREMENT SYSTEMS USED INTERNATIONALLY CAN REDUCE THE ORGAN SHORTAGE”. 39 Vand. J. Transnat'l L. 1677, 2006. And, Id.

²⁹ See Id

³⁰ France's highest advisory and dispute-resolving judicial body, the authority to determine how the law is administered

³¹ Sarah Elizabeth Statz, “FINDING THE WINNING COMBINATION: HOW BLENDING ORGAN PROCUREMENT SYSTEMS USED INTERNATIONALLY CAN REDUCE THE ORGAN SHORTAGE”. 39 Vand. J. Transnat'l L. 1677, 2006

³² See Id.

dead person can decline even their own wishes on the deceased according to that. Family members could easily impose their own wishes on the decedent. It could do that as a way to express the dead's wish even though it was not true.³³ In addition, there was another decision from the Council of the State, in regard to prohibition the decline to organ donation when the decedent agreed and wished to donate, the decision was issued in 1983 to forbid the families members to stop donating their loved ones who had wished, during their lives, to be organ donors.³⁴ Consequently, the family cannot stop the donation process in the fact that the donor gave his/her desire to donate before death. And this would not be easy to be accepted publicly in the United States.

Physicians are still seeking the family consent even when the law does not require them to do so. Some mentioned³⁵ that there are three reasons for continuity seeking the consent form the medical providers: first reason is they are afraid of legal liability, but this is unfounded, and that is due to the "immunity clause that specifically protects medical personnel connected with organ donation procedures and because of the sparsity of litigation."³⁶ The respect of the deceased family's right on the body of their diseased body after death. Finally, the emotional impacts on the family as well as on the medical staff. The emotional stress will make the medical staff ask for the family consent even when

³³ Sarah Elizabeth Statz, "FINDING THE WINNING COMBINATION: HOW BLENDING ORGAN PROCUREMENT SYSTEMS USED INTERNATIONALLY CAN REDUCE THE ORGAN SHORTAGE". 39 Vand. J. Transnat'l L. 1677, 2006.

³⁴ Sarah Elizabeth Statz, "FINDING THE WINNING COMBINATION: HOW BLENDING ORGAN PROCUREMENT SYSTEMS USED INTERNATIONALLY CAN REDUCE THE ORGAN SHORTAGE". 39 Vand. J. Transnat'l L. 1677, 2006

³⁵ Daphne D. Sipes, DOES IT MATTER WHETHER THERE IS PUBLIC POLICY OR PRESUMED CONSENT IN ORGAN TRANSPLANTATION? Whittier Law Review, 1991, 12 Whittier L. Rev. 505.

³⁶ See Id.

the organ donation card is available.³⁷ And that what makes the France presumed consent is deferent than what it is in Austria. In France, the consent of the family still has a strong impact the decision of being an organ donor.

Since 1990, there were two different systems on the term of organ donation. A non-donor registry that was settled in 1990 and a donor card system. And so, it would be easy, for the medical institution, to know by using the computer to figure out if the patients opt-out or not. “The computerized refusal system, set up by the Etablissement Francais des Greffes, allows hospitals to know instantly whether a patient has opted out of donation.”³⁸

In addition, people whose ages more than thirteen are should have their donor card with them. In case of opt-out, they should have a proof regarding that available with them. Additionally, doctors will still want to know the family decision on organ donation.³⁹

In addition, the system in France has its own practice as it is different than what is clearly strict in Austria. Seeking the family consent even with the donor card, this is on one hand, and the special situation for the minors and people who have a mental disability is another deference.⁴⁰

As we got to the end of the explanation of the presumed consent system, with both the hard and the soft system, the main statement I had mad is still that presumed consent would not fit in The United States and that is due to several considerations. These are resulted from the current system of organ donation in The United States.

³⁷ Daphne D. Sipes, DOES IT MATTER WHETHER THERE IS PUBLIC POLICY OR PRESUMED CONSENT IN ORGAN TRANSPLANTATION? *Whittier Law Review*, 1991, 12 *Whittier L. Rev.* 505.

³⁸ See *Id.*

³⁹ See *Id.*

⁴⁰ Melissa N. Kurnit, ORGAN DONATION IN THE UNITED STATES: CAN WE LEARN FROM SUCCESSES ABROAD?, *Boston College International & Comparative Law Review*, 17 *B.C. Int'l & Comp. L. Rev.* 405

Part II. Mandatory Level Would Not be Possible to Succeed

From the current system, it is obvious that the voluntarism intensives are behind the continuity of the organ donation in The United States. Therefore, it is generally an ethical situation where there is no law enforcement on people to opt in. The system is built on “the ethical principles of voluntarism and altruism”⁴¹

1. The Current Donation System:

So, we have the idea of helping people who need that help, and the individual desire is highly respected. He or she much consents before death. More than that, their family desire will be considered always, and the desire of the deceased itself could be ignored if the wants to decline the organ donation decision.⁴²

By looking at the system that is working right now, in The United States, it is totally volunteering system. The organ donation system in The United States is clearly depending on volunteers. Patients who have friends, and they are willing to donate their organs, have the opportunity to benefit from that relationships. As well as the rich citizens, they have another option, which is traveling outside The United States, where buying the organs from others is being available.⁴³

Therefore, the gap between what is available for the individuals on the waiting lists and what should be available creates a debate regarding what could change to resolve and reduce the gap in view the view of decreasing the patients on the waiting lists by increasing the supply of organs available for them. Some⁴⁴ added that changing the organ donation rules in order to meet the high demand on organs

⁴¹ Arthur Caplan, “Organ Procurement and Transplantation: Ethical and practical Issues” Valium 2, number 5; September 1995.

⁴² See Id.

⁴³ Bruce Patsner, M.D., J.D. Human Organ Transplantation in the United States_ Crossing New Lines.” Health Law Perspectives August 2008.

⁴⁴ James F. Childress, Catharyn T. Liverman, Editors. Committee on increasing Rates of organs “Organ Donation: Opportunities for Action.” At page 93.

supplies, need to be sought by improving the whole health care system, which is “overburdened, inefficient, and often inequitable” and changing it as one unit.⁴⁵

A. The Historical Legislation of the System

Until the Second World War, organ donation was still not regulated. And what was regulated by the 19th century rules is the use of deceased’s bodies. Additionally, that was through the concerns about the grave steeling. After the Second World War, and the raise of demand on human organs and tissues, the state of California puts the first organ donation laws.⁴⁶ The demand was by an academic staff who are doing researches and academic works, after California step toward the organ donation laws, and within two decades, other states follow the California step.

They passed legislation that was just like California’s. But the problem was that these laws were not as good outlined as they should be, also, the area and what included were very different between the states, which made the first existence to the organ donation system, as it was a response to researchers and academic workers, incompetence work in the system.⁴⁷ In regard to organ donation from deceased’s, all the courts, in most of the time during 1960s, depended on the explanation of the state to the legislation of deceased’s organ donation. After that they did the same thing in regard to the donation of organs from alive donors.⁴⁸ In addition to what have done, “when the Commissioners on Uniform State Laws proposed the Uniform Anatomical Gift Act (UAGA)

⁴⁵ See Id.

⁴⁶ Sean Arthurs, COMMENT AND CASNOTE: NO MORE CIRCUMVENTING THE DEAD: THE LEAST- THE LEAST-COST MODEL CONGRESS SHOULD ADOPT TO ADDRESS THE ABJECT FAILURE OF OUR NATIONAL ORGAN DONATION REGIME, (2005) University of Cincinnati Law Review University of Cincinnati Law Review, 73 U. Cin. L. Rev. 1101,

⁴⁷ See Id.

⁴⁸ Denise Spellman, ENCOURAGEMENT IS NOT ENOUGH: THE BENEFITS OF INSTITUTING A MANDATED CHOICE ORGAN PROCUREMENT SYSTEM, 56 Syracuse L. Rev.353, 2006.

of 1968, the state legislature responded enthusiastically”.⁴⁹ The Uniform Anatomical Gift Act stated that people have a legal right to determine the disposition of their bodies when they dead, and their families have the right to donate the dead body organs following death in cases when the deceased did not decide to be an organ donor during his or her life.⁵⁰

All the American states during the next five years took “the statute's principal provisions.” And the result of that was a big worry fair regarding two things: the system of organs allocation, and the major progression in marketing the organs. These two particular points made the federal government, in 1984, passes the National Organ Transplant Act (NOTA). By then, both: the Uniform Anatomical Gift Act, and the National Organ Transplant Act, set the American legal and “institutional parameters” in the current organ donation system.⁵¹

The Uniform Anatomical Gift Act had two goals: the first goal was that it gave the automatic of the work or in other work, how the system should work. For example, is it more appropriate to be just a desire, or to be officially expressed? The second goal was removing the civil liability and the illegal act from Staff who act in “good faith” in the area of organ transplantation procedure, when they are trying to get the consent of the dead person’s family. The problem⁵² was that the Uniform Anatomical Gift Act did not cause increasing enough in the organs to be donated, and as response to that “Congress reviewed the Act, enacted the National Organ Transplant Act of 1984 (“NOTA”), and

⁴⁹ Sean Arthurs, Comment and Casenote: No More Circumventing the Dead: The Least- The Least-Cost Model Congress Should Adopt to Address The Abject Failure Of Our National Organ Donation Regime, (2005) University Of Cincinnati Law Review University Of Cincinnati Law Review, 73 U. Cin. L. Rev. 1101,

⁵⁰ Denise Spellman, ENCOURAGEMENT IS NOT ENOUGH: THE BENEFITS OF INSTITUTING A MANDATED CHOICE ORGAN PROCUREMENT SYSTEM, 56 Syracuse L. Rev.353, 2006.

⁵¹ See Id.

⁵² Denise Spellman, ENCOURAGEMENT IS NOT ENOUGH: THE BENEFITS OF INSTITUTING A MANDATED CHOICE ORGAN PROCUREMENT SYSTEM, 56 Syracuse L. Rev.353, 2006.

supplemented the UAGA with the 1987 Amendment to the Uniform Anatomical Gift Act”⁵³

B. The National Organ Transplantation Act (NOTA)

This legislation created the portion of the organ donation system that works now. Some discussion were going on, before the National Organ Transplantation Act’s text, regarding the authority of The United States Food and Drug Administration on regulating the human organs. And there was the regulation of solid organ transplantation from living and from deceased persons, “Congress removed the jurisdiction of the United States Food and Drug Administration with the passage of the National Organ Transplantation Act.”its authority has to be under the law that works, that is in order And ⁵⁴ to control the organ donation system as a whole unit. ⁵⁵

Although most states had somewhat of organ donation laws in its legal system during 1968, where a person could donate some of his or her organs, they were very poor in the details of the issues that could rise while practicing organ donation laws, so with the quick increasing in demand of organs, the Uniform Anatomical Gift Act was drafted, after that, in the eighties, the National Organ Transplant Act of 1984 was legally existed. ⁵⁶

The National Organ Transplantation Act prohibits the selling of organs, or any commercial transactions. That what the legislative history shows. The cause of that is to prevent the “destructive impact”.This impact would affect the ⁵⁷ type of the market with the volunteering and charitable system. “Congress was

⁵³ See Id.

⁵⁴ Bruce Patsner, M.D., J.D. Human Organ Transplantation in the United States_ Crossing New Lines.” Health Law Perspectives August 2008.

⁵⁵ See Id.

⁵⁶ See Id.

⁵⁷ Sarah Elizabeth Statz. “Finding the Winning Combination: How Blending Organ procurement systems Used internationally can reduce the organ shortage.” 2006; 1678 1709; Vol.39: 1677.

worried that a market-based system would create opportunism against indigent members of our society of developing nations. This legislation clearly reflects Congress's disapproval of compensation organ donation."⁵⁸

The consent in the United States' current system works as informed consent, or expressed consent, which mean opt-in. It has been practicing in most states. It depends on the consent from the donor or his or her family as the first clear consent before getting the organ. The obvious and clear consent must be obtained. That is because the organs belong to the persons or their families when they die, so it is not possible to be taken with no acceptance and approval.⁵⁹

As we mentioned in the Current System part, the donation could be by stating the desire to donate during the lifetime, when the donor tells his or her family about his or her wish to donate his organs. Or that could be indicated in the driving license. In some cases, if the person died without deciding his position regarding donating his or her organs, and his organs were suitable to be used to someone, in this case the family might be asked from the physician to donate the organs of their loved one.

2. Reasons For Presumed Consent Refusal:

The presumed consent system would - possibly- be refused in The Untitled States due to several obstacles. Some of them are ethical, others are social, and even legal challenges.⁶⁰ For the importance of the last one, let us see what kind of challenges would be faced in case of adopting the presumed consent system in The United States' organ donation system.²³

⁵⁸ Sarah Elizabeth Statz. "Finding the Winning Combination: How Blending Organ procurement systems Used internationally can reduce the organ shortage." 2006; 1678_1709; Vol.39: 1677.

⁵⁹ School of medicine, University of Missouri. Center for Health Ethics. "Organ Acquisition" February 2009. Published by Office of Communication and innovations

⁶⁰ Melissa N. Kurnit, "Organ Donation In The United States: Can We Learn From Successes Abroad?" 17 B.C. Int'l & Comp. L. Rev. 405,1994.

Under the current legal system in The United States, there is the freedom of a religion. This freedom was set by the first amendment that prohibits the government to interfere with this free exercising of religion. Moreover, there is the protection of private property that was set by the Fifth Amendment; as a result, the government cannot take a private property without a fair compensation. “If the U.S. government takes private property for public use without providing just compensation to the citizen from whom the property is taken, the government has violated the takings clause of the U.S. Constitution.”⁶¹

Although there is argument that says: if organs removed from deceased without a clear and obvious consent that would be against the constitution, the property rights on the dead body is not considered or recognized from the courts in general. Regarding the families’ “quasi property right” to have the control on their dead member’s body, this could be recognized depending on the state laws, and still is not protected to be a violation to the constitution law. So what has been recognized now by the courts, is not the property rights. On the other hand, the law considers and recognize a special kind of property which is “quasi property right” and this right is for the family to dispose the organs from their relative, and that is upon the laws of the state.⁶²

“In 1984, the Michigan Court of Appeals rejected a Fifth Amendment challenge against the state's limited presumed consent law, holding that constitutional rights regarding the integrity of one's body end at death.”⁶³ In addition, The Florida Supreme Court, as in the case of State v. Powel⁶⁴, in the 1986, put a rule that “nonconsensual removal of corneal tissue for transplantation during statutorily

⁶¹ See Id

⁶² See Id.

⁶³ Melissa N. Kurnit, “ORGAN DONATION IN THE UNITED STATES: CAN WE LEARN FROM SUCCESSES ABROAD?” 17 B.C. Int'l & Comp. L. Rev. 405,1994.

⁶⁴ Available at State v. Powell: 1986: Florida Supreme Court Decisions: Florida Case Law: Florida Law: US Law: Justia, last visit Aug, 28, 2024.

required autopsies was not a constitutionally protected taking of private property.”

In addition, as it is prohibited by the federal law to sale human body parts, it would be even impossible to get fairly compensation. Even the attempts to find kind of presumed consent law was unsuccessful.⁶⁵ In the same case the court set that the family’s right was not to dispose of a member’s body was not a major right in the view of federal law, and state Florida law.

Additionally, families have the right to funeral their dead members. So, if at any case they have a stress or emotionally reflections they could claim their right of burial. And that’s what happened in Florida in 1988. In defining the family's right of burial, the Florida Court of Appeals, considered the right with respect to “the effect of the same on the feelings and emotions of surviving relatives, who have the right to burial.”⁶⁶ not on the good faith work of the medical provider, but in the same time, proving the fatal to presumed consent laws could be possible by tort claims.⁶⁷

Moreover, the presumed consent system would decrease the value of making a free choice about donation of organs. It seems that the mandatory level on the organ donation as of the presumed consent is against the democratic society’s ideas and freedoms. In whole, the situation looks more democratic if individuals make their decision to opt –in after they choose to do so, than if they had to opt-out, which, in my view, give them less freedom. That is because they are already in the system unless you opt-out.⁶⁸ Also, this system, presumed consent, requires,

⁶⁵ See Id.

⁶⁶ In the fotenote of Westlaw: “See Mehlman, supra note 6, at 44; see also Kirker v. Orange County, 519 So.2d 682, 684 (Fla. Dist. Ct. App. 1988) (quoting Jackson v. Rupp, 228 So.2d 916, 918 (Fla. Dist. Ct. App. 1969), aff’d 238 So.2d 86 (Fla.1970); Kirksey v. Jernigan, 45 So.2d 188 (Fla. 1950)).”

⁶⁷ See Id.

⁶⁸ Melissa N. Kurnit, “ORGAN DONATION IN THE UNITED STATES: CAN WE LEARN FROM SUCCESSES ABROAD?” 17 B.C. Int’l & Comp. L. Rev. 405, 1994.

from the country, many responsibilities to increase the acknowledge of people to be aware of the new system Because in presumed consent system, not taking an action under this system means you are a donor, however, the same thing would not put you as a donor under the current system, which is the informed consent. Or, in other word, that is not the necessarily the result of not taking an action in the informed consent system. The freedom issue was indicated as one important point against the presumed consent, and the idea of that donation by informed consent is more likely to be accepted by the public opinion. “Some critics of the presumed consent model have claimed that a presumption of organ donation takes away an individual's freedom. Polls have shown that, in general, society accepts the idea of organ donation and supports transplantation as a therapy for organ failure”⁶⁹

In addition, presumed consent is not acceptable on the ethical level. What the system of presumed consent is going to do is taking off the meaning of donation. Although the system could increase the organs available to transplants, it would reveal the value of charity and other moral meanings related with donation. Also, morally, a person who make a decision to be an organ donor under the informed consent feels that he is acting with full happiness and willing to help and save other's life. However, in the presumed consent system, the decision will drive to the opposite side.⁷⁰

What kind of right do we have on our bodies? And if it was a property right, does it have the same idea of doing whatever you want to do with your properties? It could be a considerable question in term of organ donation system, in the United States. If our bodies were not ours after death, and they did not belong to us, so

⁶⁹ Sarah Elizabeth Statz, “FINDING THE WINNING COMBINATION: HOW BLENDING ORGAN PROCUREMENT SYSTEMS USED INTERNATIONALLY CAN REDUCE THE ORGAN SHORTAGE”. 39 Vand. J. Transnat'l L. 1677, 2006

⁷⁰ See Id

have government had the right to use them as in organs supply for transplants? In the United States, it is not obvious, with looking of the American history that individuals have property right on their bodies. Or the right would allow them or not to decide what their bodies would be treated as, which is happened in many cases in America. “The English common law set the precedent for many cases in the United States”⁷¹ according to English law during 1749, the dead body does not belong to any one, and no one had the right on it. That was the decision made in many cases in England. Some courts did grant a vague right for the next of kin to make burial decisions, but all of this uncertainty made it almost impossible to determine who had rights to make decisions regarding organ donation.”⁷²

In the United States, there was an attempt to adopt the system; it was not on a very big grounds, however, it was not as successful as it is in other countries. The United States tried presumed consent, for four decades, on a restricted groundwork, where in a lot of states, when decadent is being with the medical official custody or medical official who could have the authorities for organ donation. That is if there was not refusal available from either the dead person, while his life or his family after death. However, that adoption to the system did not last for a long time. The Uniform Anatomical Gift Act was oppose to presumed consent. “In 2006, the Revised Uniform Anatomical Gift Act recommended against presumed consent, and most states have followed its lead.”⁷³

People concern about their religions, and when it comes to a decision related to organs after death, they would think, even more, about whether their believes

⁷¹ Sean T. Gallagher. THE SPANISH MODEL'S CAPACITY TO SAVE LIVES BY INCREASING ORGAN DONATION RATES. 18 Temple International and Comparative Law Journal403. Fall, 2004.

⁷² Sean T. Gallagher. THE SPANISH MODEL'S CAPACITY TO SAVE LIVES BY INCREASING ORGAN DONATION RATES. 18 Temple International and Comparative Law Journal403. Fall, 2004.

⁷³ David Orentlicher. Presumed Consent to Organ Donation: Its Rise and fall in the United States. 61 Rutgers Law Review. 295. Winter, 2009.

accept that or that will not be possible. Presumed consent, as a system might be adopted in any country in order to face the problem of waiting lists of thousands of patients who need organs to be transplanted to them, to give them another chance for living healthy. However, religion may not accept the mandatory donation of organs.

Donation is a positive concept in the religious views; however, when it comes to the body parts the idea could be sensitive due to the differences in the religious views. “The General population tends to feel positively toward donation.”⁷⁴

The discussion starts with the variety of explanation of what kind of right does human have on his or her body? And on the light of the answer of this question we probably will find more than one belief that reflect the culture and thoughts of people in the society. That reflection could be hard to remove according to a legal system has rules do not go in the light of people believes.

In the countries like United States, there are many and different religions they will influence in their follower's position in regard of organ donation. Individuals keep thinking if it is acceptable in their religion to donate their organs after death or not, thinking about the religion view regarding organ donation, is a question raises in mind of individual in regard of organs donation a person would think weather donating his/her body parts is not against religion basis.

So, one's religion may affect his or her decision, and the idea of switching the donation from being just a personal decision to be a mandatory will be affected too. The idea of mandatory organ donation will bring to the discussion the question of whether to consider the body as a property⁷⁵, so the person owns his body, and can do whatever he wants to do, or body is not a property with the

⁷⁴ Danielle Cameron, a college student, Philosophy Senior Essay, “Ethical and Philosophical Barriers to Organ Donation”, April 2005.at p 16.

⁷⁵ See Id.

meaning of property, which one could do whatever he or she wants to do including donation.

Even though the historical no-property rule is maintained, the rules in states arrange the right of the relatives to bury the deceased's body in applicable custom. On the other hand, the right is a "quasi-property interest,"⁷⁶ What the family and all who concern about the deceased will get an extremely emotional feeling that make them happy just by seeing their loved one passed quietly and peacefully. Religions have an importance of the process need to be taken in order to satisfy the religious belief. The family or the relatives have to take these steps. And they have the right to prevent donation in both kinds of the presumed consent systems. So the cultural, or the ethical, and religious ideas are still considerable factors in the view of the state even in the governments where they adopt presumed consent as their system in organs donation.

What we can notice about that the necessity and saving life are what must be considered⁷⁷ on transplantation. In Islamic practice, necessity allows for doing forbidden things and violating religious laws. "In other words, organ donation (a necessity) would be acceptable even though it may violate some essential teachings of the religion."⁷⁸

Indeed, saving life is what must be considered in transplantation form deceased⁷⁹, So if it was essential for saving a human life, by transplanting organs from dead persons, and then the family permit to donate their relative organs would not be

⁷⁶ Jeremy Gantz, Last of 4 parts: Religious groups disagree on medical donations, Middle Reports Chicago, 2007. Available at <http://news.medill.northwestern.edu/chicago/news.aspx?id=37151&print=1>. last visit 06/29/2010.

⁷⁷ The Islamic Prospective

⁷⁸ Managing Editor, Mark E. Ware, Managing Editor- Elect, Associate Editors: Julie Allison Christie Cathey Stephen F. Davis William J. Lammers, Jeffifer L. O'Loughlin-Brooks, and Special Features, effect of Religious Attitudes on Approval of Organ Donation, Journal of Psychological Inquiry, 2007, Vol. 12, No. 2, 63-68.

⁷⁹ Islamic view on the issue، (فمن أحيائها فكأنما أحيأ الناس جميعا).

important as long as the bodies belong to God.⁸⁰ “However, this ideated idea still not objected in Islam by the meaning of presumed consent.”⁸¹

On the other hand, the story will not end by that simple end, there is other social and cultural views related strongly with the death. They have a pressure on the family to take steps for burial and because of that, it would be even more difficult and impossible in some cases to complete even the desire of the deceased to be an organ donor.

Similarly in the U.S there is an acceptable view that would be followed “Because the principle of autonomy is so highly prized in United States culture, religion and professional

As it was mentioned, regarding the view of the law in the United States the family could have the right to make sure about the proper burial. The religion perspective on the importance of burial like in Islam, so the Islamic view on that is body is not a property and it could not be.

Conclusion

We conclude in term of organs donation switching to be a mandatory (presumed consent) is highly prevented in America due to legal obstacles. According to What Americans think about the freedom of practicing religion, presumed consent will not be acceptable or successful if it was attempted to adopt. This freedom is protected by the constitution law. People’s right to practice their religion would give them a power to not accept and raising to the system to a mandatory level.

The growing of the waiting list, and people who dies every single day because of that is the realty, which should take a place in legal discussions in order to overcome by alternative solutions rather than adopting a mandatory system (presumed consent)

⁸⁰ George M. Abouna, Ethical Issues in Organ Transplantation, Debate: Medical Ethics Series 1, 2002 at p

⁸¹ See Id.

which likely to fail. Presumed consent system is a successful system in countries such as Austria and France, however, that does not mean that the system will have the same successful results if adopted in The United States. They have different cultures and their legal systems are different too. The system in which countries have adopted presumed consent, people used to a totally rules that are generally not same with The United States system.

The solution that would help make enough organs supplies for the people who are waiting for the gift of life could be encouraging the donation by the media. Media with all its ways is very effective method to give and highlight matters. I think organ donation did not have its place on the media yet. There should be more concern from on the TV, newspapers, and even free classes..., which help individuals understand organ donation. Education is another tool to change people's thinking about organ donation.

Also, instead of force a person to make a major decision in his life which is to opt out, otherwise he considered opting in, this way would not be accepted in The United States society where the individual freedom and their choices are highly respected. They would not accept that just the lack of giving their desire to be not donor; they will be part of the donation process.

In addition, mandatory organ donation or presumed consent is affected by cultural, ethical and religious beliefs. These thoughts have influenced in people's lives long time ago. So, generally speaking if the organs system adopts the presumed consent systematically the practice will last the same. That means the medical official will continue to seek the family consent as it's in the current system.

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