

Review Research Paper

Ethical and Legal Issues of Presumed Consent

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Abstract

In India shortage of organ donors is a major health problem with ethical and legal concerns and requires immediate attention. Ever since the first transplants were carried out in the 1950s, there has been an imbalance between the availability of donated organs and the number of recipients. The objective of this article is to address various ethical and legal aspects of presumed consent. Presumed consent takes the onus away from the individual to register in order to become organ donor. Instead the individual must sign a register during his life if he is unwilling to donate. The argument which strongly favours this policy is thousands of healthy organs are destroyed every hour due to burial and cremation whereas innumerable people are dying because of want of these organs. The other side of this argument is organ donation should be the choice of the individual and must not be forced. Before passing legislation on presumed consent ethical and legal issues of presumed consent should be addressed and it is better to implement lesser ethically and legally debatable methods to overcome the backlog of organ donors than to introduce law on presumed consent.

Key Words: Presumed Consent, Organ donors, Ethical/Legal issues

Introduction:

Indians aren't all that generous when it comes to donating their organs. Spain has 35.1 organ donors per million, Britain (27), USA (26), Canada (14) and Australia (11) whereas India's count stands at 0.08 donors per million population. [1] It is estimated that every three minutes, a patient requires an organ transplant. Some experts say more than two lakh Indians require organ transplantation annually. But, unfortunately, not even 10% of them get it. [1]

Current practice across most part of the globe is to take consent of the donor for organ donation during life and consent of the relatives/legal heirs after death of the donor for organ procurement. But this traditional approach is not meeting the demands of organ requirement especially in developing countries like India. This has led to change in school of thought which is to presume every individual as an organ donor after his death unless an objection is made by the individual for donating his organs before death.

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This article is written with an objective to discuss various ethical and legal issues which arises once consent is presumed.

What Is Presumed Consent?

Presumed consent means an institutional policy of granting authority to health personnel to perform procedures on patients or to remove organs from cadavers for transplantation unless an objection is registered by family members or by the patient prior to death. This also includes emergency care of minors without prior parental consent.

Presumed consent takes the onus away from the individual to register in order to become an organ donor. Instead, the individual must sign a register in order to make his views known that he does not want to donate. Therefore everyone is treated as a donor unless they implicitly opt out. [2-5]

Global Scenario of Presumed Consent:

Presumed consent is practised in several countries across the world in two broad varieties. The first variety is soft or lenient system which is carried out in Spain. In this type of system even though consent is presumed, opinion of the family members is taken before procuring body organs of the donor.

The second variety is hard or stringent system as prevalent in Austria in which consultation of relatives/legal heirs after the death of donor is not done for obtaining organs [2]. However in reality even in countries where

hard system is being followed still the views of the family members is considered^[3, 4]. Till today there is no conclusive evidence regarding which of these two widely carried out systems yield in higher organ donation rate.

Issues of Vulnerable Groups:

Presumed consent poses a huge problem in persons who are incapable of making their personal decisions as in children and mentally incapacitated adults.

This can be nullified by applying the law of presumed consent only to autonomous adults who are capable of making their rational choices which will avoid the abuse of these vulnerable groups. However there is danger of discrimination of organs of these vulnerable groups as inferior as compared to others. [5]

In culmination before bringing legislation on presumed consent issues of the vulnerable should be kept in mind. The age at which a child can give consent should be reviewed.

Regarding adults who are incapable of making their choices, the level of mental abnormality, its scope, duration, nature and the effect of external agents like drugs, alcohol which render person incapable temporarily should be considered. [5]

Arguments Favouring Presumed Consent:

- At the very outset it looks very absurd as thousands of hearts, kidneys, lungs and other transplantable organs which are in good condition are destroyed by burial and cremation every day while thousands are suffering due to want of these organs for their survival.
- Shortage of organ donors may not only be due to lack of willingness of the donor but may be due to inadequate access to get register themselves during their lifetime. Presumed consent will certainly alleviate this problem.
- Most people do not expect premature death which may be the reason for not getting registered for organ donation. This can be nullified by passing legislation on presumed consent.
- Most of the times it is the relatives and legal heirs who refuse donation of organs of the dead rather than the donor. [5-11]

Arguments against Presumed Consent:

- Donation of organs should be the choice of the donor and must not be coerced. In fact many recipients will be more satisfied if the organ which they have received was given

voluntarily by the donor and was not due to force.

- Just like people who do not get access to register for voluntary donation, same thing holds true for individuals who wish to register for their unwillingness to donate organs.
- There are lots of controversies regarding criteria for declaration of donor death and time during which organs can be removed for transplantation.
- The state should not presume ownership of an individual's body after death.
- Various religions across the globe have their own beliefs and practices in treating the body after death. Presumed consent would definitely hurt the sentiments of several religions.
- The greatest drawback of presumed consent is it gives right to the state to remove all the organs after death and individuals are deprived of their choice to donate selected organs according to their will. [5, 12-18]

Alternatives to Presumed Consent:

- Increased promotion/ education.
- Paid or compensated donor schemes.
- Priority for transplants given to those that have agreed to donate.
- Mechanical engineered organs.
- Biologically engineered organs.
- Living donors.
- Paired/pooled schemes.
- Required referral.
- Aggressive consent pursuit.
- Forced donation.
- Donation after cardiac death donation (DCD). [5, 19-21]

Conclusion:

Even though presumed consent may reduce shortage of donor organs, it certainly leads to number of ethical and legal complications. The factors that influence organ donation rates have not been clearly identified.

An attitude regarding presumed consent among various sections of the society needs further investigation. Presuming consent implies body organ function has higher priority over consent of the donor which again raises ethical and legal complexities.

Measures to protect the most vulnerable group should be addressed before passing legislation on presumed consent.

Religious and cultural factors which have an impact on acceptance of presumed consent should be given due consideration. In culmination, it is wiser to implement less ethically and legally debatable measures to

increase organ donation before proceeding towards controversial issues like presumed consent.

References:

1. Kounteya Sinha, Drive to right India's organ donation record, TNN Nov 27, 2010.
2. **Haddow G.** "Because you're worth it?" The taking and selling of transplantable organs. *J Med Ethics* 2006, 32:324-328.
3. **Price D.** From Cosmos and Damian to Van Velzen: the Human Tissue Saga continues. *Medical Law Review* 2003, 11:1-47
4. **Abadie A, Gay S.** The impact of presumed consent legislation on cadaveric organ donation: a cross-country study. *Journal of Health Economics* 2006, 25:599-620
5. **Barbara K Pierscionek.** What is presumed when we presume consent? *BMC Medical Ethics* 2008, 9:8
6. <http://apnews.myway.com/article/20080814/D92I8TC00.html>
7. <http://www.uktransplant.org.uk/ukt/statistics/statistics.jsp>
8. Singapore Ministry of Health. Human Organ Transplant Act
9. Caplan A.L. Organ transplants: The costs of success. *Hastings Centre Report*, 1983; 13, 23–32.
10. Cohen C. The case for presumed consent to transplant human organs after death. *Transplantation Proceedings*, 1992; 24, 2168–2172.
11. Council on Ethical and Judicial Affairs, American Medical Association. Strategies for cadaveric organ procurement: Mandated

- choice and presumed consent. *Journal of the American Medical Association*, 1994 272, 809–812.
12. **Erin C.A., Harris J.** Presumed consent or contracting out. *Journal of Medical Ethics*, 1999; 25, 365-366.
13. **Franz H.G., Drachman J., DeLong W., Beasley C., Gortmaker S.L.** Public attitudes toward organ donation: Implications for OPO coordinators. *Journal of Transplant Coordination*, 1995; 5, 50–54.
14. Gallup Survey: The American public's attitudes toward organ donation and transplantation; 1993. http://www.transweb.org/reference/articles/gallup_survey/gallup_index.html.
15. **Kennedy I., Sells R.A., Daar A.S., Guttman R.D., Hoffenberg R., Lock M., Radcliffe-Richards J., Tilney N.** The case for 'presumed consent' in organ donation. *The Lancet*, 1998; 351, 1650-1651.
16. **Kluge E.H.** Improving organ retrieval rates: Various proposals and their ethical validity. *Health Care Analysis*, 2000; 8, 279–295.
17. **Loewy E.H.** Presuming consent, presuming refusal: Organ donation and communal structure. *Health Care Analysis*, 2000; 8, 297–308.
18. **Michael B. Gill Matas A.J., Veith F.J.** Presumed consent for organ retrieval. *Theoretical Medicine*, 1984; 5,155–166.
19. **Moustarah F.** Organ procurement: Let's presume consent. *Canadian Medical Association Journal*, 1998; 158, 231–234.
20. **Sade R.M., Kay N., Pitzer S., Drake P., Baliga P., Haines S.** Increasing organ donation: A successful new concept. *Transplantation Proceedings*, 2000; 74, 1142–1146.
21. **Spital A.** Mandated choice: The preferred solution to the organ shortage? *Archives of Internal Medicine*, 1992; 152, 2421–2424