

Whose Organs are they, anyway?

The answer to the question raised is of importance when considered within the scope of using a human body or *human body parts (HBPs)* for the health of society. This fundamental question has never been properly answered, and this lack of answer partly explains the difficult position of those who are in need of an organ or a tissue transplant. In fact, only owners of goods are allowed either to give them or to sell them, and even to spoil them. The actual question is to know whether HBPs are personal property, which should give to their owner the right to dictate the conditions of their use, or whether they do not belong to anyone and could be considered as societal resources, thus allowing society to decide about their outcome. Of course, the answer will depend upon whether the organs are from a cadaver or from a living person.

The question of HBPs property surfaces today because of the recent birth of a new type of medicine: replacement medicine. Until the middle of the past century, therapeutic was only made of specific molecules shaped by pharmaceutical industry according to the needs. *A few decades ago, it became obvious that the human body was able to offer cells, tissues and especially healthy organs in replacement of similar organs irremediably destroyed by a disease.* Replacement medicine suddenly stirred up medical behaviour. It was no longer possible to hinge on pharmaceutical industry to get the necessary pills. *Patients and doctors have now to ask a third party for organs - the organs' owner.* Nevertheless, for about half a century, **organs ownership was not questioned, implicitly assuming that organs belong to the person. It is highly probable that this assumption led, at least for a part, to the present organ shortage as human charity is limited and unpredictable. In such conditions, it doesn't seem very easy to fund a large therapeutic program on public goodwill that is in fact charity.**

But, to be charitable presupposes to be able to give, and to give implies that you own what you want to give. Concerning HBPs, it is clear that it would be of importance to define who their owner is. *In many countries, the body's owner is not defined to avoid considering the human body as a thing, which could then be given or sold.* Despite this, it is generally accepted that the person can give or refuse to give his/her organs. If this is relatively easy to understand when the person is alive, after his/her death the situation needs to be clarified.

While the person is alive, it looks as if he/she was the owner of his/her body. However, this assumption is probably erroneous and, *in fact, no one is allowed*

to freely dispose of his/her body. The person cannot commit suicide; mutilate his/her body unless it is a question of health. The human body cannot be sold, as a whole or by parts, and even if someone decides to give an organ to another person who needs it, permission must be given by society. How could the living person be considered as having the property of his/her body when he/she is not allowed to dispose of it? **In fact, the human being has only the usufruct of his body.** The usufruct is understood as *the right to enjoy the use and advantages of another's property, short of the destruction or waste of its substances.* Therefore, if we accept the fact that the person has only the usufruct of her body, we must consider that her body belongs to someone else. *As society decides what the person is allowed to do with his/her body or with its parts, society could be deemed to be the actual owner of a living person's body. However, by recognising the person as having the usufruct of her body, democratic societies leave the decision to donate, but not to sell, his/her organs during his/her lifetime to the person according to local regulations defined by society itself.*

When the person has died, the problem of body ownership becomes a tricky one, which implies to define death and the relationship between the person (the thinking thing) and his/her body. Nevertheless it has to be solved without ambiguities if we want to obtain all the organs needed by the patients who are waiting for a transplant. In some countries the family has been designated as having the property of the deceased relative's body. But even in such cases, the actual owner cannot be the entire family and one of its members should be defined as the only owner to avoid conflicting decisions on the fate of the body.

However, in many countries, the property of the corpse is not defined to avoid its reification, and as such it does not belong to anyone. *But if the body is not a thing after the death of the person, who can decide to use it? Neither the person who is no longer there, nor her family, as the body is not a thing and cannot be inherited.* **In fact, no individual entities can act as if they had the ownership of a corpse and, as a result, no individual entities can use HBPs either to sell or even donate them.** Some of our societies using *a more utilitarian approach* have decided, when the wishes of the deceased person were not known, to *presume* that he/she was in favour of having his/her organs removed. Others leave to an *ill-defined family* the right to decide the fates of the corpse. Faced with all these contradictory situations, it is clear that *individuals have some difficulty understanding clearly what their rights are.* It is probable that such a confused approach is, at least partly, responsible for the present organ shortage.

What could be done to stay away from ambiguities and obtain as many organs as possible? **What could be done to avoid funding on charity a therapeutic as important for society as transplantation and at the same time respect the autonomy of the living person regarding the body's fate?**

There is one and only one approach, which can be regarded as a *"conditional" societal appropriation of the body*. Human organs, in the context of replacement medicine, must be recognised as a scarce societal resource, which must not be spoiled. **If there is no legally defined owner, then society must either decide that, in the absence of owners, organs are not things and, therefore, cannot be used. Thus, replacement medicine would disappear. Or, on the contrary, society might be considered, because of the recognised importance of replacement medicine in health, as having the right and even the duty to use them for the best of human beings.** Society appropriates HBPs in the context of a *true "societal contract"* for the benefit of all those who are in need of them.

One can move no further in the process of finding the best approach. But, doing so would lead to what has been defined as conscription of the body¹, or what has been called by S. Giordano the "body republic" (*res publica*)². This concept can certainly be discussed for society's sake, when the conscription of the person itself is not widely debated during wartime. When considering organ procurement, the only insult made is to a corpse, and not to a person. And even then, it merely represents a surgical procedure similar to the one that might have been justified before the death of the person if, for example, a severe trauma had injured some of his/her internal organs. However, implementing this concept would indeed raise a number of protests arguing that the alleged right of the person to decide of the future of his/her corpse was not taken into account.

Whether this is based on a wrong assumption, it is clear that to be efficient it is better to acknowledge the principle of the autonomy of the person, and to accept the possibility for any individual to refuse *post-mortem* organ removal. However, **this can be accepted only if the refusal was pronounced by the individual while alive and by no one else after his death.** Thus, after the person's death, in the lack of an explicit refusal, society will decide what should be done with the organs. This is also *societal appropriation of the body, but conditional to a refusal by the person itself*.

At first, this concept *resembles* that of presumed consent. In fact it is basically *different*. *Organ procurement, and as a consequence, transplantation, will no longer depend on gift and charity.* **Without the necessity for organs to be given before they can be used, consent is no longer needed, and the hypocritical as well as rather unethical presumption of the will of somebody can be forgotten. It becomes also futile to upset the relatives by asking them to take a difficult decision at the worst period.**

Why would it be difficult for members of our society to accept this concept of conditional societal appropriation when they accept forensic autopsy without any claim? Medical examiners have an unrestricted right to remove the organs from cadavers. This is true even if the decedent, or his family, had personal, religious, cultural or philosophical reasons for strongly opposing being autopsied. Organs, including the brain can be retained for as long as necessary to further a potential criminal investigation. These practices are usually justified by arguing that the benefits to society of forensic autopsy are more important than our desire to comply with the principle of autonomy. This clearly demonstrates that in certain circumstances, subjugating the wishes of the decedent to the larger purposes of the community can be accepted. To solve a criminal investigation is with no doubt of importance. Would rescuing the life of many patients be less?

Finally, organ property has to be defined by each society, and the person has no innate rights on his/her corpse. This is already true for the living individual who has only the usufruct of his/her body and no property on it or on its parts. *Therefore, organ property depends on whether you are alive or dead, whether you believe in God or whether you are atheist, whether you accept brain death as death criteria or you do not acknowledge brain death to be death, and also in which country you are living. In many countries society has not be willing to define a specific owner of the body after the person's death to avoid putting the human body under the market laws.*

Nevertheless, *due to the present value of the human body for health it appears mandatory for society to define precise rules.* Societal conditional appropriation of body parts could well be the best answer to society needs along with the respect of individual autonomy. **Society becoming the owner of the corpse, but respecting the autonomy of the person, might be the real answer to all major questions raised today: organ procurement, organ allocation, organ trade, consent, and family involvement.** Based on this concept, society might declare that after the person's death HBPs belong to it without requiring any permission, and without presuming the decedent's will. However, *in order to acknowledge the principle of autonomy, a society willing to use the concept of appropriation to favor organ procurement, should accept individual, but not family, refusal to donate, making this appropriation conditional to individual refusal.*

Decision will derive from *a societal imbalance between individual and collective liberty.* It is a true societal choice.

Currently, in view of other public responses, there is little reason to believe that this concept would be easy to introduce politically, prior to society becoming fully informed and accepting its benefits. **The 'goodwill' pathway, however, appears to have reached a dead end. Replacement medicine may not survive if we continue to repeat the same mistakes over and over again.** Let us *keep asking our societies these difficult questions*, and hopefully this will generate appropriate responses, even if the process takes some time.

References

1. Spital, A. & Erin, C.A. "Conscription of cadaveric organs for transplantation: Let's at least talk about it." *Am J Kidney Dis* **39**, 611-615 (2002).
2. Giordano, S. "Is the body a republic?" *J Med Ethics* **31**, 470-5 (2005).