

# ORGAN TRANSPLANT IN BANGLADESH: LAWS, ETHICS AND PRACTICALITIES: A COMPARISON WITH THE WORLD

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## ABSTRACT

Bangladesh has a legal framework allowing for organ donations and transplants. However, the rate of such transplants remains extremely low. In this paper, we will discuss the principles behind organ donation laws around the globe by citing issues about personal autonomy, property law, public morality and also public sentiments, and will try to find out why the rate of transplant in Bangladesh is so poor. We will examine the differences between the Bangladeshi law and transplant laws elsewhere, and will then look into the socio-cultural scenario of Bangladesh to suggest how legal and non-legal aspects may be enhanced to allow for more donations. Since Bangladeshi law is derived from UK laws, examples from the UK common law and concepts of the UK common law are referred to frequently. Recent cases from around the globe are also considered, as well as concepts from classical and modern theories of jurisprudence, to gain a full understanding of concepts.

## INTRODUCTION

In Bangladesh, the prevalence of chronic ailments such as hepatitis and kidney disease has created a large demand for organ transplants. On an average, 800000 patients have end stage kidney disease [1]. Organ donations are legally possible. The original Organ Transplant Act was drafted in 1999 and amended in 2018. When conditions are satisfied, organs may be transplanted from living persons or cadavers. Yet, unfortunately, only 130 kidneys are transplanted per year [2]. In this paper, to understand the disparity between supply and demand, we shall analyse the concepts of autonomy, the notions of private and public property and greater needs when we compare the local laws with those existing in several other countries. Factors specific to Bangladesh will be assessed to understand how other jurisdictions' laws may fit the local scenario or not, and whether it is possible to define universal ethical obligations or legal rights.

## PERSONAL FREEDOM AND RIGHTS FROM THE VIEW OF JURISPRUDENCE

As John Austin would claim, the purpose of law is to maximize happiness [3]. If that is the golden rule, then one should be forced by law to provide services as long as that is for the benefit of the most. However, fundamental rights, such as the right to pursue happiness and the existence of rational agency in humans were recognized even in medieval jurisprudence theory [4] to counteract mass whims and to protect the individual.

Ibrahim et al [5] showed that the possibility of acquiring end stage kidney disease does not depend on whether a person has one kidney or two kidneys. Hence donating a kidney saves another, and this is also a type of service one might carry out with a very low risk to oneself. But in many common law countries, tort law does not always require one to be a Good Samaritan. Autonomy and choices have high weights, and as American jurisprudent Dworkin would like to put it, rights trump public welfare in most cases [6]. Fundamental freedoms of individuals are also described in part 3 of the Constitution of Bangladesh. According to Mill, one should be allowed to choose one's action as long as the risk of hurting another is not high [7]. In that case, while organs cannot be taken from a non-consenting person, one should be

free to donate his or her organ. However, in the case of organ donation, that freedom is not acknowledged.

While in the famous debate between Hart and Devlin [8][9], Hart emphatically argued that laws should not take morality into account, organ donation laws often do consider both public morality and sentiments to seriously take note of the effects of the law within the social fabric. Even altruism is not always allowed in most jurisdictions and very strict conditions are imposed for such donations.

## **ORGAN DONATION LAWS**

Technically, a living person can donate a kidney, a large fraction of the liver, bone marrow etc. From cadavers, organs can be harvested when the person is either brain dead or suffers a cardiovascular death. A 1968, ad hoc Harvard committee defined brain death as the “irreversible cessation of the function of the entire brain [10].

Circulatory death (DCCD) involves cessation of circulation (no pulse and ECG) for a certain period to ensure that auto resuscitation will not occur. Maastricht criteria [11] defines DCCD as controlled (in hospital ICU setting) or uncontrolled (emergency room setting). Some countries (UK) allow organ donation in controlled setting while others (Spain) allow organ donation in uncontrolled setting.

In Bangladesh, the 1999 Act allowed for harvesting of organs from restricted close relatives. In 2018, the list of close relatives was expanded. Also, new requirements were set: Besides having medical teams in every certified organ transplant hospital, a national committee would oversee cadaveric transplants. No lone doctor was allowed to proclaim a person brain dead in the ICU setting.

In Dec 2019, the High Court, though, further allowed for organ donation from known people on emotional grounds and instructed the parliament to amend the 2018 amended Act. This issue will be discussed in further details later.

## THE RIGHTS OF THE DEAD

In common law jurisdictions, dead bodies or body parts are not properties (**Moore v Regents of the Uni. Of California**). However, in light of cases of medical use of human tissue especially in the context of high profit patents, the need to prescribe rights of discarded tissue to the original owners is hotly debated [12]. A dead body does not equally belong to any of the deceased person's relatives. However, dead bodies deserve respect and dignity if not autonomy. While many countries have laws regarding necrophilia or desecration of corpses, Bangladesh only restricts trespassing of burial grounds (**s297 of Penal Code**). In the US and UK, common law assigns a quasi-property law to dead bodies [41][42] so that the next of kin has the right to proper burial. In Bangladesh, no such law exists, though these rights are taken for granted within the social framework.

Morality and law, even if often overlapping, are not interchangeable. While strong sentiments might exist, there is also no law regarding maintaining the integrity of a dead body universally. Autopsies and dissections are carried out in accordance with the need of the modern world. There is no specific time limit for bones to decay after one is buried [43]. In reality, in Bangladesh, because of the lack of space, many interred bodies are dug out after a duration [13]. This would imply digging out skeletal remains in many cases, and discarding those.

While expropriating body parts or tissues for lucrative purposes might be a contentious issue even regarding the dead, a relevant issue might be that of necessity. The defence of necessity is used sparingly even as a murder defence in common law jurisdictions. While eating live people to survive a shipwreck is not seen with mercy in UK common law (**R v Dudley and Stephens**), in the UK case of conjoined twins, **reA**, the court consented to the severance of twins even though that action would result in the death of the weaker baby. This event was seen as a side effect of saving the stronger one given both would have inevitably died without the operation.

However, the concept of autonomy protects a living person's control over his or her body. Laws exist regarding trespass into a person (**s351 of Bangladesh Penal Code, 1860**). Hence, even if a person is dying, another cannot be compelled to donate his body part to save. Many countries have clauses in tort law about being a good Samaritan [44]. In the UK, a person is not required to save even a drowning person. India has introduced a good Samaritan law to

excuse people of negligence in specific cases [47]. In Bangladesh, the structure of tort law is weak, and no duty exists regarding saving others' lives.

While, the issue of autonomy and the right on dead bodies separate the cases of donation from living people and the newly deceased, a more serious issue would be the demarcation between life and death. In case of circulatory death, a certificate is often issued within a few minutes of the cessation of circulation. However, it might be possible to artificially resuscitate a person after 15 minutes [14]. The brain stem may maintain some homeostatic functions even when other critical functions are lost.

In the context of medical science, the removal of life support from a person in deep coma resulting in death requires informed consent from the patient or surrogates. However, a brain-dead person is in an irreversible state of whole brain loss of function. No EEG should be detectable, and no brain stem function is to be seen. In such cases, life support can be withdrawn by doctors without consent of family in many jurisdictions (**NHS v Midrar**).

## **ORGAN DONATION AND CONSENT**

In most parts of the world, three different types of consent are in place with respect to organ donation from a cadaver [38]:

1. Assumed consent: eg. in Spain, unless the patient opts out
2. Requirement of family consent: eg. UK until spring 2020, when the UK shifted to the opt out system
3. Required notification: in US hospitals with potential donors are required to contact the organ donor agency which gets in touch with family to obtain consent

In Bangladesh, family consent is required to procure organs from any dead person.

## **NUMBER OF DONATIONS**

In Bangladesh, organ donation began in 1982 [16] when kidney transplants were possible from living relatives. Between then and 2021, only 2000 kidney transplants have taken place [17].



Starting from 2010, only six livers were transplanted [18]. The only organs used from deceased persons so far had been corneas [19].

One reason for such low rates might be a lack of faith in the medical system so a healthy person is reluctant to undergo a procedure.

This objection does not justify the absence of transplants from cadavers.

## **BANGLADESH HIGH COURT DECISION**

In Dec 2019, the High Court of Bangladesh issued an order to amend the 2018 law so kidney donations by known persons other than relatives can be made [22]. A nine-point guideline was issued. Physical and mental check-ups and an “authenticity of emotional donation of a known or related donor,” old photographs, record of finances in the past three years to look for gross anomaly in income etc. were required.

In light of the high court’s plea for such relaxation of the rule of Bangladesh, and its contrast with laws existing in many other countries, it is of interest to look into the possible and known arguments for the restriction in the act of organ donations.

### ***Arguments for Restricting Donation-***

Restrictions in organ donation are supported usually by several arguments [23]:

***Corruption and Commodification:*** If a price can be attached to organs, human trafficking may increase. Indeed, organ black markets is a problem in countries like Bangladesh [24]. It has been shown that even when organs are exchanged between known people it is likely that money is exchanged [25]. It is almost impossible to impose a restriction on any dealings behind the scene.

***Exploitation:*** An organ open market would lead to the exploitation of weaker parties for harvesting organs. Unevenness of relations does not have involve money.

***Coercion:*** Similar unevenness of relations may also lead to coercion, even within a family.

***Crowding Out:*** If organs are bought and sold, richer clients will simply tap into the market instead of having an incentive to donate altruistically. Indeed [26], it has been shown that an ease in restriction of LURDS (organs exchanged in return for money) does not increase the

number of transplants, but only shifts the curve from altruistic donations to financially acquired organs.

The expansion of kinship in 2018 was expected to curb the organ black market.

The recent high court decision wishes to extend this further to any known person with a proper mechanism in place so some of these above-mentioned problems may be avoided. However, while it is possible to discern a completely altruistic donation in very emotionally challenged cases, a permission based on procedures may be difficult to implement and manage when the number of donations is large. Given that Bangladesh already has a black market for organs [27], it may not be easy to ensure the genuineness of many of the criteria, even if the two are known to one another and are from financially compatible groups [28]. Also, restricting the right to donate for emotional reasons only to the financially solvent may seem discriminatory. The poor might also have feelings for connected fellows to whom they might wish to donate organs. A law requiring equal treatment for equal cases again introduces a larger possibility of abuse, though it is surely possible to abuse the criteria to coerce a person who comes from a solvent family. The strength to resist is not always connected with one's finances, especially when family and peer pressures are involved.

In Iran, donation of kidneys is possible by unknown persons and this is also followed by payment by various parties [29]. However, such systems may be able to avert the possible pitfalls and objections only when the regulatory system and the oversight infrastructure are very strong. In Bangladesh, this is unlikely to be possible.

Further, in the case of acquisition of organs from cadavers in controlled situations, a conflict of interest exists between the wellbeing of the patient and the need of the organ recipient. The two-tier system involves committees in hospitals and also a national committee that would oversee such transplants. The involvement of disparate people makes the likelihood of corruption low. To be involved in organ transplant without prior authorization is now illegal.

A controlled market maybe an option where all donors are compensated under a regulated government sector. Given the high demand of organs, and the low percentage of GDP used in the health sector [30] it is unclear if the government would like to take over the entire sector.

## **BANGLADESH LAW AND RELATED ASPECTS**

It is difficult for relatives of a patient to accept death. In countries like Spain, a consent for donation is presumed. This may be hard or soft. A softer form of consent is vitiated by objections from relatives. A comparison between the UK and Spain shows that in the UK, where relatives' consents are needed, organ donations are low [39]. This might be explained by the psychological obstacle against being directly responsible for the decision, and hence the difference between act and omission.

However, in countries like Bangladesh, where the level of consent is very low such a measure of presumed consent may create an initial backlash. In the USA, as well as in India, hospitals are required to reach out to the organ agencies and also to the relatives when transplantation possibilities arise. In the context of Bangladesh, it is possible to implement a system where patient's relatives are counselled about the possibilities of organ donation in case of an unfortunate event when the patient is alive and is admitted, as it might be emotionally challenging to reach such a decision on the wake of the news of death. The hospital may also discuss the possibility of patients who are capable of consenting. To protect the interest in patient, this procedure should be undertaken by a team different from the attending doctors and the attending doctors should have no ties with such institutes. Further, any organ should be given to patients on a waitlist maintained by separately and secretly.

In the USA and in many other countries, people may voluntarily agree to become organ donors [40], and may carry organ donation cards. In Bangladesh too, the government may reach out to the public, asking them to sign up as possible donors. Such a drive may increase the number of people who voluntarily leave the gift of life. This would also acknowledge each patient's own point of view about end-of-life donations.

## **OTHER SOUTH ASIAN APPROACHES**

The rate of organ transplant is low in India as well [20]. The Transplantation of Human Organs and Tissue Rules, 1984, India [21] does not allow for a living donor unless the donor is a close relative (s9). However, medical professionals can extract organs from unclaimed bodies and also from bodies that have undergone post mortems in cases of accidents (ss5,6). Similarly, in s3(3) an authority in possession of a dead body is allowed to remove body parts for therapeutic



purposes if no objection was made by him even if he did not consent in writing as required by s3(2). In all three cases, the right to remove the body part is overruled if it is believed that a near relative has objections.

However, a large number of people in Bangladesh are practicing Muslims who identify with the religion formally, and surveys of Muslims elsewhere have shown an increased sensitivity towards the burial of the integral dead body [31]. The constitution of Bangladesh assures freedom of religion. Hence laws should ideally not go against held religious practices. If a dead person was a practising religious individual, his or her organ should not be taken out to benefit others by showing respect for his own possible belief and the quasi property right attributed to dead bodies that allow kins to provide the body with a proper burial. When kins are not present, it is natural to assume that the right should extend to community members who might wish to see the body treated in a manner consistent with the person's most probable living wish. A backlash is possible if discarded bodies are used en masse to collect organs for others without any a priori consent from either the dead or the dead person's kins.

While there is no law promising a dignified burial for the dead in Bangladesh, as was mentioned before, this right is almost taken for granted with the exception for post mortems. During the COVID period, acts of discarding bodies in fear of infection were highly criticized [45]. Also, voluntary organizations work hard to ensure proper burial of unwanted corpses or of people who died of infection [46]. As per Hart, law and morality are separate [8]. However, in many cases, laws are shaped by policies. Policies are shaped not only by needs of the society, fundamental rights and goals but also by public sentiments, as the laws are in the end created by elected public representatives.

In Ireland, for example, laws prohibit abortion. This is in congruity with the moral sentiment of the catholic majority population. It is illegal to kill a foetus in Bangladesh as well (**Penal Code 1860 s 316**). In such a situation, tampering with unclaimed dead bodies pose a threat of stirring public sentiments, and hence possibly better alternatives to organ donation in the context of the local culture should be sought.

On the other hand, Islamic scholars, issued a fatwa allowing organ transplants in the UK in 1996 [32]. This allows for personal freedom to donate organs even in a country where most people identify themselves with the religion. In this light, one can make his or her own decision

based on the importance of religion in his or her life and also on the interpretation of abstract religious tenets one wishes to choose.

Religious tenets have not stopped that practise of dissecting bodies for post mortem or for medical lessons in Bangladesh. However, the first is conducted for the sake of justice and for the sake of the dead himself. An organ donation benefits another party in distress. The latter is a result of a public benefit the modern society cannot live without. Healthcare is a fundamental right and it is virtually impossible to train skilled doctors without dissecting bodies. Hence, though religious dogmas are not strictly followed in Bangladesh, exceptions are made for extenuating situations that benefit the dead him or herself or the greater social needs.

## **UNCLAIMED BODIES AND SOCIAL COHESION**

As the dead body is not a legal property of the former legal person, the laws of property, trust or wills do not apply. It is the society's sentiment towards the dead that has value. Sometimes, a good law balances various interests and also looks into social sentiments in policy making when possible while offering forms of freedom. This takes into account both the individual's rights and the cohesive factors of the society. The law considers the specific society's fabric and understands the consequences on the various adhesive factors. While Lord Devlin and Hart [35] [36] disagree on the degree of moral sentiments a law should take into account, deterioration of values, leading to corruption eventually, which is the consequential corruption of allowing a certain procedure [37] is of importance if these consequences can be properly identified. At times, the law refuses to tread into territories where final results are unknown and so the society may descend into a slippery slope (**R v Conway**).

In Bangladesh, where a large number of people are not under any scheme of social welfare, and where homeless and drifting people abound, allowing for acquisition of organs from unclaimed bodies might be analogous to taxing the dead for a life led with little social support, placing undue burden on the already neglected part, and possibly creating further social alienation or corruption of values regarding social cohesion. While acquiring organs from unclaimed bodies may decrease pressure from the black market, the act might also further the notion of disposability of certain people. In the opinion of the author, though harvesting organs

from unclaimed bodies may increase the number of transplants, perhaps it is a more appropriate choice in the socio-economic context of Bangladesh to try to increase the number of consenting donors first.

## CONCLUSION

In summary, Bangladesh has a statutory framework for organ donation that is in line with that of many other countries. Considerations are taken regarding personal autonomy and rights of individuals as well as public and family sentiments. The social demand is balanced against personal and family expectations. However, the rate of organ donation remains very low. Fine-tuning some of the criteria and adding programs to recruit consenting volunteers might help improve the statistics.

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