

Law 1805 of 2016: Problems in the practice of organ transplants in Colombia

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Academic research to obtain the title of “Lawyer”

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Article 23:

“La Universidad no se hace responsable por los conceptos emitidos por los alumnos en sus trabajos de grado, solo velará porque no se publique nada contrario al dogma y la moral católicos y porque el trabajo no contenga ataques y polémicas puramente personales, antes bien, se vean en ella el anhelo de buscar la verdad y la justicia”¹.

Pontificia Universidad Javeriana

¹ “The University is not responsible for the opinions expressed by the students in their degree research. It will only ensure that nothing contrary to Catholic dogma and morals is published and that the work does not contain purely personal attacks and polemics, but rather the desire to seek truth and justice is seen in it”. Translated by the author.

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Abstract and Keywords

Abstract

Law 1805 of 2016 is the most recent regulation in Colombia on donation and transplantation of organs and anatomical components. It was promoted with the main objective of turning Colombia into a donor nation. In spite of this, it can be stated that the Law did not fulfill its goal. On the contrary, it generated a rupture between the legal and medical-practical aspects of organ donation and transplantation. This research aims to understand the impacts of this breach and to understand why the Law turns out to be inoperative in the practical world.

Keywords

Organ donation, donor nation, presumption, medical practice

Introduction

Recently, I graduated from Journalism at the Pontificia Universidad Javeriana in Bogotá, Colombia. To reach this milestone, I worked on my graduation paper regarding organ donation and how the media informed about its latest regulation in Colombia. Therefore, I decided I would like to continue inquiring about this subject as I bring my Law studies to a close. I am writing this paper because I want to propose an idea of what I believe would be an engrossing and productive research: how in legal and juridical terms, Law 1805 of 2016 does not necessarily fulfill its main goal, which is to make Colombia an organ donating country.

After finishing my graduation paper for Journalism and having presented it to my jury, I came to realize that this subject truly intrigues me. It not only takes into account many aspects of Medicine, a field of study that I have always found fascinating, but of Law and Sociology. I see organ donation as a fundamental part of society because it allows people to give and receive in order to make the world an easier place to live in. It really struck me when I realized that the latest piece of regulation in the matter is insufficient and, to some extent, useless. Not to mention the fact that the media made this situation worse when journalists did not fully comprehend its content and reported on it anyway, thereby spreading misinformation.

When I first approached this issue, I focused on how various media outlets informed and commented on Law 1805. This means that I centered my attention on the legal meaning of presumption and how it was being understood by the journalists of the time. After reading many news articles on the subject, I concluded that the lack of educational background in juridical and legal terms made these writers believe that presumption is a synonym of obligation. This is

because they do not know, to a full extent, that a presumption can be controverted when the opposite is proven. In other words, this meant that journalists (and the public) assumed that the legal presumption of being a donor literally obligated the citizen to be a donor once they died. This is certainly not the case, since the law allows people to say and show their dissent in case they do not want to be organ donors.

As was mentioned, the problem was that journalists were not the only ones that believed this. Most citizens, and even lawmakers, understood that this piece of legislation automatically turned all Colombians into organ donors. So, I asked myself if medical doctors, especially ones that practice in this field, thought the same. If this was the case, then it would be easy to determine that the new Law was not making any progress towards achieving its goal and, therefore, it was not being applied correctly. Fortunately, they did understand it, but faced the issue of nobody else acknowledging its true meaning and implications.

Even though it sounds as if this were strictly related to the medical practice, it turns out it has as much to do with the legal aspect of it. I think the answer is quite straightforward, although the research behind the topic might show many more details that make up the whole scenario. The relation between the two means that if the legal and juridical terms and conditions of the law do not make sense to the people who apply it on a daily basis, then they are either not following it to a full extent or they try to circumvent it in order to continue transplanting organs and to show people the upsides of donating them.

Therefore, one of my main ideas is to fully comprehend the rift that exists between the juridical and practical sides when it comes to organ donation in modern Colombia. Then, after

achieving this, I would like to propose a solution or alternative in which there is a clearer and easier correlation between the two. I think that with this last goal I would be able to apply what I have learned throughout my studies in a way that actually helps people and solves a social problem via a legal approach.

When I first read the Law 1805 of 2016 and combed minutely through all its details, I found it shocking that it keeps the family of the potential donor from declaring their stance on their loved one's organs being used for medicine or science. This struck me as surprisingly apathetic and indifferent towards the family's plight, since Colombia is a relatively conservative country and that it will, at least soon, protect the family institution at all costs. So, why take them out of the picture in this scenario?

I understand that Rodrigo Lara, the congressman who came up with this piece of legislation and lobbied it, wanted to find a solution to the problem of Colombians not donating enough organs. Nonetheless, I do not think that his reasoning was the right one. He insisted that it was because of the families' negativity that there were not many organ donation and transplant situations. I believe that congressman Lara was wrong to consider this because, if this were the case, the deceased person (whose organs could be donated) could've clearly stated their stance on the matter, even if it went against their family's wishes.

The problem is much bigger, however: there are so many myths and fake news revolving this subject and, at the same time, so little reliable information that people fear letting their organs be transplanted to other bodies upon their death. Some people don't see this as a life-saving procedure, but rather as a macabre or morbid practice. Thoughts like, "What if I receive

an organ donated by a pedophile? Wouldn't that make me a pedophile too?”, are very real and generalized. This is what the Law regarding this subject should be handling, not the families’ dissent. If these issues were addressed first, it probably wouldn’t have to forbid anybody from expressing their feelings, since more people could make an informed decision based on facts and trustworthy sources.

It’s also important to acknowledge the fact that most Colombians lack sufficient knowledge about organ donation in general, let alone about this particular topic. If someone with legal education, such as a Law student, can have a tough time comprehending the concept of presumption in organ donation, what are the odds your average citizen is going to understand it any better? When the Law was debated in Congress, lawmakers did not properly handle certain aspects of it, especially the ones regarding the importance of a legal presumption. Presumption in organ donation should easily offer the possibility of citizens opposing it, since it’s feasible that someone can die before they can properly voice their opinion on whether they’d like their organs to be donated or not upon death.

The preceding means that the presumption aims to narrow down the people that would like to oppose it. There should be a list that can be easily accessed so that hospitals know who doesn’t want their organs to be used for medical or scientific purposes. Nevertheless, this does not happen because even if people know about the presumption, they do not oppose it when they’re alive. People trust that the system is so weak and slow, that when they die their organs won’t be analyzed nor deemed useful.

The presumption is imperative not only to have a clearer view of who would like to donate, but because it serves as a warning. It basically tells Colombian citizens that if they do not wish to be part of an organ donation and transplant process, they need to state it clearly. Otherwise, the State is fully within its rights to make the decision for them once they're dead. This situation is thought-provoking, since it forces us to consider what exactly a corpse is in legal terms, under the understanding that a corpse is not a person, but rather an object or asset with special characteristics.

According to Colombian law, someone is no longer considered a person as soon as they die. Consequently, a corpse is not a person; a corpse is something that belongs to the family members that survive whoever died. Subsequently, the question of what happens to people that have no families or next of kin arises. Who would be the owner of those corpses and therefore have final say over what happens to the deceased's organs? Those corpses belong to the State, and that is why most of the organs that are transplanted come from corpses of people who suddenly died and had no family members to lay them to rest.

Besides the legal concept of a corpse, the presumption also implies some type of obligation. As mentioned before, many Colombians believe that Law 1805 of 2016 automatically made organ donation obligatory for all citizens. As we know, this is not the case and that is why, amongst other reasons, the presumption exists. Since the State cannot force its citizens to sign up as potential donors, it can apply a presumption that will stand until proven otherwise. This way, whoever doesn't want their organs to be transplanted to someone else after their death can make their wishes known before a Public Notary.

This all brings me to talk about the discrepancies that exist between the legal concepts of the Law and how they're applied within the health system. It's surprising that doctors who work on transplants know the content of the Law better than anyone. Since evidence shows that the law didn't increase the number of transplants, I gathered that this was because of a lack of understanding of the legal piece. After speaking to professionals in this field, I came to realize it is due to the difficulty that comes with the application of legal concepts and mandates, like the concept of presumption and barring families from making their dissent towards the organ donation of their loved ones known.

According to medical doctors (whose area of expertise is organ donation and transplantation) from the San Ignacio University Hospital (known as HUSI for its initials in Spanish) in Bogotá, the piece of legislation turned out to be useless. They know and believe that its intent was to make Colombia a donating country and that its social goal was to help those in need, but it ended up being another law that has no effect upon the field of practice. This is mainly due to the fact that Medicine is a career that takes into account human pain and suffering; it's a profession that cares for the wellbeing of people above all else.

These doctors confirm that it's nearly impossible to try to reason with families that are going through tremendous loss and grief due to their loved one's death. This means that it's increasingly difficult, and perhaps insensitive, to convince them that they should allow for their dead relative's organs to be donated, especially when they may naturally be opposed to the procedure. It's all too possible to deepen a family's grief and to seem insensitive by bringing up subjects like organ donation when they're still grieving their recently deceased family members.

Telling mourners that the State is willing to disregard their thoughts and feelings in order to make use of their recently deceased loved one's organs for medical purposes is something that's difficult for medical doctors to follow through with. They also have difficulty understanding how lawmakers could believe that convincing families could possibly be done within such a short time frame. After someone dies, there are only a few hours during which their organs can be harvested from the corpse and be prepared for transplantation. Chances are that the shock of a relative passing away will prevent people from thinking clearly and considering the option of donating their organs.

Ultimately, even if Law 1805 of 2016 clearly states that there's a legal presumption that can only be opposed by the deceased while they were alive, hospitals and other medical facilities will relent and allow for family members to oppose it. According to medical experience, it's easier to follow through with one family's wishes of not donating their relative's organs and move onto another family that might be willing to reconsider. It's less emotionally taxing and less time consuming to acknowledge and respect grieving people's emotions and wishes than to hold a legal mandate over their heads in an attempt to win them over.

This shows why the Law should reconsider their approach and aim their efforts toward combating the myths revolving organ donation and transplants, educating the public instead of imposing a legal presumption and making it hard to oppose. If this law truly wanted to have a social impact, it'd try to educate Colombian citizens about the reality and benefits of these potentially life-saving medical procedures. Were this the approach that the State took towards the issue of not enough organs being donated, many people would be properly educated and

informed on the matter and would be less prone to dispute organ donation; they'd have the chance to make proper choice, based on facts and evidence.

From my point of view, this legal piece's heart is in the right place, but its execution is the main problem. The disconnection that exists between juridical and medical terms and practices make it all the more complicated for the Law to reach its goals. It also forgets the importance and legal nature of some concepts, such as those of corpses, presumptions, and good faith. Since lawmakers did not delve deeper into these aspects, there's much confusion as to how they work in real life and what can be done to apply them correctly and therefore, aspire for a better understanding from the community.

Considering the above, this research aims to determine what were the real and practical scopes of Law 1805 of 2016 and its intentions which were frustrated precisely because they were incompatible with medical practice. Therefore, the main objectives are (i) to understand the history that led to the enactment of Law 1805 of 2016, (ii) to understand organ donation from a legal and juridical aspect, (iii) to compare the concepts of organ donation and transplantation in the legal and medical worlds, (iv) to present a proposal on how to reduce the gap between the legal and scientific to put Colombia on the path to become a donor country.

1. Chapter 1: History of Law 1805 of 2016

The debate focused on organ donation in Colombia has caused a plethora of problems and complications for those in need of organ transplants and for medical professionals. The will of the deceased's family, the perceived ethics involved, and the lack of proper education for the masses on the matter are only a few of the reasons why organ donation in Colombia hasn't progressed as much as some have expected or wanted. Be that as it may, before we can continue looking forward, it's of utmost importance to look to the past, or more specifically, to the history of organ donation in Colombia and the laws that govern it.

It's important to note that Law 1805 of 2016 wasn't the first law to regulate organ donation in Colombia. The first legal norm that was enacted for this reason was the Health Code, or Sanitary Code, established within Law 09 of 1979. The Health Code and the subsequent Law 73 of 1988 that replaced it differ greatly from the current law for two major reasons. Firstly, the Code sought not only the potential donor's approval, but also that of their family (Law 09, 1979, art. 540). This law was considerate in that the family of the deceased also had a say in what happened to their loved one's body. Secondly, Law 73 of 1988 was the one that introduced the concept of donation presumption into Colombian law. The latter began a shift in organ donation within Colombia, since now the potential donor's explicit consent was not necessary; only their dissent was necessary to prevent the extraction and donation of their organs.

However, conflict inevitably arose when Law 73 of 1988 was established, mostly when confronted by religious groups and those opposed to organ donation. Lack of proper education on the contents of the new law meant many people did not know that the State now automatically

assumed they'd be fine with their organs being donated after their death, leading many to not state their opposition to this presumption while still living (Castañeda-Millán *et al*, 2014, p. 24). Religious groups also decried this law and its intentions; while their faith had no qualms with organ donation per se, many religious organizations frowned upon organ donation now being deemed mandatory. These communities strictly believe if organ donation were to take place, it should be completely optional and for the donor to decide, not a third party (CEC, 2017, par. 2).

Law 73 of 1988 introduced the concept of donation presumption in order to achieve its goal of increasing the number of active donors in Colombia. Lawmakers rationalized that if there were more donated organs available, waiting lists would become shorter and more lives would be saved, helping to develop medical programs specifically designed to facilitate organ donation (Rusique & Castro, 2018, p. 61). Nevertheless, perhaps automatically making all Colombians donors, while done with good intentions in mind, was the wrong approach to solving the organ donation crisis in the country. Not only did this spark conflict and bring about intense debates on the matter, but it created schisms even within those that supported organ donation in the first place (INS, 2009).

A culture of donation was nearly nonexistent in Colombia and for this reason, many patients in waiting lists kept dying. The main problem lied in the scarcity of organs and tissues. The scarcity in organs available for organ donation brought about the introduction of Law 73 of 1988, which was meant to increase the number of donors. Rusique and Castro (2018, p. 61) state that “el consentimiento presunto es un instrumento jurídico indispensable que contribuye en

el desarrollo de programas médicos de trasplante de órganos de manera efectiva para los pacientes en espera”².

The INS thought presumptive donation was going to be the answer to the scarcity of organs available for donation that Colombia was facing. Nevertheless, the number of human components that organ banks received did not change as expected, which brought another issue into the spotlight: the black market. Chaparro (2016) states that many patients that are on waiting lists and desperate for an organ transplant may eventually turn to the black market in order to satisfy their need. This problem brought about the enactment of Law 919 of 2004, wherein it’s established that the commercialization of human anatomical components for transplantation is prohibited and their trafficking is criminalized (Law 919, 2004).

It can also be said that organ donation prior to and after 1988 is a purely altruistic endeavor for the good of society and can be fitted within a modernist process. The law sought to make everyone equal when it comes to the possibility of receiving an organ transplant through organ donation. Thus, the concept of the presumed donor was introduced. As was mentioned earlier, despite all of the complications that it eventually caused, this law was enacted in order to satisfy the lack of anatomical components necessary for medical use. Since these laws were not enough to satisfy the scarcity of organs available for organ donation, people started to turn to the black market.

² “Presumed consent is an indispensable legal instrument that contributes to the development of medical organ transplant programs in an effective manner for waiting list patients”. Translated by the author.

This made people consider the idea that perhaps an economic incentive was necessary to further increase the number of donors, as was done in Iran (Chaparro, 2016). This, however, would be impossible to implement since the commercialization of bodily components is illegal in the country. This turn of events made it imperative to find another solution to the problem of organ scarcity in Colombia.

Thus, Rodrigo Lara Restrepo, a congressman for the Cambio Radical party proposes what would eventually become Law 1805 of 2016. Law 1805 alters Law 73 of 1988 by doing the following: “la voluntad de donación expresada en vida por una persona solo puede ser revocada por ella misma y no podrá ser sustituida por sus deudos y/o familiares”³ (Law 1805, 2016, art. 3). Law 1805 adds not only presumptive donation, but also removes the deceased’s relatives’ right to oppose the removal of their family member’s organs and be used for donation. The family’s dissent when organ donation is brought up tends to be the main obstacle when trying to make use of organs sorely needed for transplants; allowing the deceased’s family members to express their disapproval when discussing organ donation reduces organ donations by about 39% (Ramírez, 2016, p. 127).

It's important to note that the political party that came up with the Law, named Cambio Radical (Radical Change), has been at the forefront of healthcare throughout the last few presidencies. One of the party’s main objectives has been cited to be increasing healthcare coverage (Cambio Radical, 2018). They’ve pushed forward a variety of laws in this area, specifically some regarding the regulation of organ donation, fining healthcare services that have

³ “The will to donate expressed by a person during their lifetime can only be revoked by them and cannot be substituted by their family members”. Translated by the author.

not offered good services to their users, as well as regulating prior consultations (Prensa Cambio Radical, 2018) and creating the Ministry of Family, whose foundations are based upon health and mental and physical wellbeing (Redacción Política, 2018).

Law 1805 of 2016 establishes that all citizens, who were already considered presumed donors, are presumed donors. Only the deceased's explicit disapproval of this presumed donor status is taken into account, making the family's dissent completely irrelevant in the matter. Thus, it can be said that the latter have lost a right, under the pretext of doing so for the greater good. This was previously considered as such by the Constitutional Court (C-933, 2007).

The Constitutional Court continues to play an important role in the matter, however; in their most recent rulings, they've shown to be leaning in favor of the family's right to express their disapproval or dissent. The constitutional basis for granting the relatives of a deceased person the right to oppose the removal of organs from the corpse of the deceased is based on the principle of liberty and the rights of freedom of conscience (Constitutional Court, C-933, 2007). However, despite the Court and the Law disagreeing on the matter, the former does see the value and importance of presumed and informed donation. It is important to keep this in mind in order to be able to evaluate and understand the pieces of jurisprudence subsequent to the enactment of the law in question.

Families losing their right to decide over their deceased relatives' bodily components means that it comes down to every individual to express their dissent over their status as a donor. This affects Colombians in different ways, depending on their stance when it comes to organ donation. Presumed donors that are against their being a donor find themselves at odds with the

Law, since they cannot turn to their families as a last resort. However, presumed donors that are in favor of their status as a donor find this works to their advantage, since they no longer have to express their consent to organ donation in life and even then, their families cannot oppose their will after they've passed away. This also affects those who find themselves in waiting lists, since they now have a higher chance of receiving the life-saving bodily components that they need.

Religious institutions have been going along with the Constitutional Court's argument, as they did when Law 73 of 1988 was enacted. They argue that while saving lives is a selfless act that is ultimately done for the good of society (HRSA, n.d., par. 11), no one should be forced to do so. As such, these religious institutions believe that people's families should be able to oppose their deceased relative's organs being used for medicinal ends. Nonetheless, and as mentioned before, they have never stated that they disagree nor that their beliefs stand against organ donation.

Law 1805 of 2016 is not only responsible for the deceased's family's right to oppose the organ donation of their loved one, but it also concerns itself with the matter of foreigners on Colombian soil being recipients of anatomical components. Foreigners who don't reside in Colombia but rather may find themselves in the country at a time when they may need an organ donation also see themselves at a disadvantage thanks to the law. Law 1805 of 2016 states that "se prohíbe la prestación de servicios de trasplante de órganos y tejidos a extranjeros no

residentes en el territorio nacional”⁴ (Law 1805, 2016, art. 10), unless they meet certain requirements that shall be further examined later on.

⁴ “The provision of organ and tissue transplant services to foreigners not residing in the national territory is prohibited”. Translated by the author.

2. Chapter 2: Organ Donation from a Legal Perspective

2.1. The Meaning and Possibility of Organ Donation

It's paramount for the concept of donation within the Colombian legal regime to be absolutely clear before proceeding. According to the Colombian Civil Code (Art. 1443, 2022), donation amongst the living is an act through which a person transfers, freely and irreversibly, a part of their assets to another person who accepts. On top of this, it's also important to mention that the legislation affirms that the donation of anatomical components; organs, tissues, and bodily fluids must always be done for humanitarian reasons. Any form of compensation or payment for anatomical components is prohibited (Law 919, 2004, Art. 1).

In previous definitions, there are inconsistencies when discussing the asset's economic worth. While the first one establishes that a donation must be done upon an asset, what it means to say is that said object must have monetary value, since it will become part of the recipient's estate. The second definition details that no payment of any kind for the organ can be done since its donation is for the wellbeing of society. Furthermore, according to Sofía Tribín (2017), one of the requirements necessary for a donation to take place is the asset's commercial value, albeit the commercialization of body parts is forbidden by law (Law 919, 2004).

Keeping in mind what has been previously mentioned, it's necessary to note that the question of whether organs from the human body can be considered assets before and after the death of the person arises. Gustavo García (2011) thinks that the human body is not an asset and that, as a result, its parts cannot be a part of someone's estate. The current legal regime in Colombia is in accordance with this line of thinking: a person is that which has rights over their

body and their life (Valencia, A. and Ortiz, A., 2006). Hence, it cannot be said that the human body or its anatomical components are assets, since they don't have monetary value, nor are they subject to appropriation. The human body in life is inherent to the human being and cannot be considered a thing.

It can be concluded that organ donation is not a donation contract in the strict sense of the term since, in accordance with current legislation, it's clear that the thing upon which the deal is made must have commercial value and its ownership must be transferable (Linares, J.A., 2008). Human being's organs can't be removed from the original owner's estate since, as has been observed, not even the person to whom they belong has rights over them, so they are non-property assets.

In consequence, organ donation is the obligation that arises when a living person states that they want to donate their organs and fluids free of charge for medicinal use or when they don't object to the legal presumption of donation (Law 1805, 2016). The donation contract is concluded when the recipient accepts the anatomical component and becomes part of their body, but not of their estate. This donation consists of non-patrimonial and irrevocable legal acts (Albano, C.A., 2015) because it's an abnormal agreement of wills where, in general terms, the donor doesn't know the recipient (nor vice versa) and the object of the obligation is a purely humanitarian and social obligation.

2.2.The Meaning of Presumption

The presumption of consent to organ donation is based upon the following fact: every Colombian citizen and resident is a donor by law. This means that the country's legal system

assumes that a person that meets the requirements of being over the age of 18 and of being in a healthy condition is a donor of organs, tissues, and anatomical components. This implies that it is not necessary to explicitly state the desire to become a donor, as the Law takes this as a given.

Law 1805 of 2016 treats the subject of assumption as one of the motives for there being organ donation in Colombia. This means that it is surmised that all Colombians are donors unless they state otherwise before death. Thus, it is a presumption of fact, as it allows evidence to prove the contrary. It's important to note that the second article of Law 1805 of 2016 is a modification of the first article of Law 73 of 1988, which implies that presumption is applied to the donation of organs and anatomical components since said year and not since 2016. The original text said: “solo se podrá proceder a la utilización de los órganos, componentes anatómicos y líquidos orgánicos a que se refiere este artículo, cuando exista consentimiento del donante, del receptor, de los deudos, abandono del cadáver o presunción legal de donación”⁵ (Law 73, 1988, art. 1).

On the other hand, it is essential to emphasize that the same norm treats the subject of presumption in its objective. It reads as follows: “tiene por objeto ampliar la presunción legal de donación de componentes anatómicos para fines de trasplantes u otros usos terapéuticos”⁶ (Law 1805, 2016, art. 1). When talking about a broadening, it means that the concept existed previously, as the goal is to change it to better serve society. Law is not an exact science as it fluctuates with the intent of adapting to the era which it is serving, so there is always the

⁵ “The organs, anatomical components and organic fluids referred to in this article may only be used when there is consent from the donor, the recipient, the next of kin, abandonment of the corpse or legal presumption of donation”. Translated by the author.

⁶ “Aims to extend the legal presumption of donation of anatomical components for transplantation or other therapeutic uses”. Translated by the author.

possibility of broadenings, changes, modifications, and repeals. For this reason, the Law may also revoke all previous legislations that may oppose it.

In its fourth article, the process those opposed to the presumption must follow is explained. The Law is clear in that the presumption may be subverted, but only in life by the same person. This means that family members cannot oppose the use of anatomical components of the deceased since if the latter did not do so in life in a Public Notary or through their health provider⁷, the consent to donation is assumed. Therefore, the Law also defines who is presumed to be a donor: “cuando una persona durante su vida se ha abstenido de ejercer el derecho que tiene a oponerse a que de su cuerpo se extraigan órganos, tejidos o componentes anatómicos después de su fallecimiento”⁸ (Law 1805, 2016, art. 3). Thereafter, it confirms that the will to donate expressed by a person during his/her lifetime can only be revoked by him/her and cannot be substituted by his/her relatives and/or family members (Law 1805, 2016, art. 3, par. 1).

The concept of presumption is linked to the *socialization of the corpse*. According to Varsi (2016), the socialization of the corpse refers to the moment in which the State can freely make use of the corpses of its citizens in order to save lives. Hence, keeping in mind that donation presumption applies in Colombia, the State has the authority to use the corpse and its organs for medical and scientific purposes it may deem appropriate. By using donation

⁷ The use of health provider in this case refers to EPS in Colombia, which translates into Entidad Promotora de Salud.

⁸ “When a person, during their lifetime, has abstained from exercising his right to object to the removal of organs, tissues or anatomical components from their body after death”. Translated by the author.

presumption, it's understood that any person that has not opposed donation beforehand is granting the State permission to make use of their body.

Keeping in line with what was stated in the previous paragraph, it's possible to confirm that for there to be 'socialization of the corpse,' it implies that presumption is taking place. In the case of someone being opposed to donation in life, the State cannot make use of the corpse or of its organs. It can be concluded that in Colombia, as in Spain, the Law assumes that we're all potential donors if we haven't stated otherwise in life; and it has even been pointed out that the corpse has been *socialized* (Ministerio de Sanidad y Consumo, 1986).

2.3. Is Organ Donation Compulsory?

Taking into account that there is, in fact, a legal presumption, one could assume that organ donation in Colombia is compulsory. Nevertheless, since it is a rebuttable presumption, it cannot be understood that organ donation is mandatory. The fact that one can prove the contrary of what the presumption assumes means that there is a possibility for the fact to change. Hence, organ donation in Colombia is not, by any means, compulsory.

The public tends to use presumption and obligation as synonyms, but in juridical terms they are not the same. A presumption is stated by the law and, depending on its nature, can be rebutted or not. An obligation, on the other hand, needs to be complied with and can be born in a private contract or in the law. While an obligation is mandatory, a presumption cannot be. Taking this into account, since being an organ donator in Colombia is juridically stated as a rebuttable presumption, there will always be a way of manifesting one does not wish to donate their organs.

Making organ donation compulsory certainly could have its benefits. The main and first one being that organ donations and transplants would highly increase, which would make it easier for medical doctors in the field to go ahead with these procedures and save lives. Also, the process could be much quicker due to the fact that there would be a bigger pool of donors and there would not be a need to check for express consent or the application of a presumption. Moreover, the commission of the crime of organ trafficking, as stated as such by the Law 919 of 2004, would decrease since it would be easier and faster for people in the organ donation waiting list to get a transplant. Lastly, there could be a chance of some of the organs to be used for scientific purposes, helping researchers find the cure for certain diseases.

Nevertheless, it can also be counterproductive and represent a setback in fundamental rights. First, when people do not have the possibility of deciding what to do with their bodies, there is a limitation to the right of freedom. According to Sanguino Madariaga (1987), “la decisión de donar debe ser completamente espontánea, sin presiones ni condicionamientos ajenos a la libre voluntad”⁹. On top of that, it could represent a clash with other liberties, such as religious ones. These two reasons do not allow legislators to make organ donation a compulsory issue in Colombia, especially when taking into account that it is a conservative country.

Organ donation in Colombia, under the Law 1805 of 2016, is not mandatory, but presumable. The piece of legislation allows Colombians and residents to express their dissent of donating their organs via a notarized declaration or when affiliating to a health provider. Even though this subject will be analyzed in the next subtitle, the fact that family members of the

⁹ “The decision to donate must be completely spontaneous, with no pressure or conditions other than free will”. Translated by the author.

diseased cannot express their negativity towards the use of the organs of their loved one does not imply that organ donation is compulsory. It would only be considered compulsory if, during life, one could not dissent and counterprove the legal presumption.

2.4.The Family's Dissent

Family members' opposition to the donation and use of the organs of their loved ones is a controversial topic in that there exist two stances in this issue. The first and most accepted one, states that bereaved relatives opposing organ donation is only but a setback in the steps taken towards a more fair and just society. On the other hand, others believe that family members' wishes do not impact the donation rate.

One of the purposes of Law 1805 of 2016 was to disregard families' dissent with the goal of increasing the donor rate, as it was believed that this was the largest obstacle for organ donation in the country. However, the increase in donations after the norm came into effect is not in consequence of this. According to Johnattan García Ruiz¹⁰ (personal communication, October 16th, 2020), the growth that followed the norm becoming law is due to the natural and standard yearly increase. Thus, it's possible to confirm that denying relatives' right to oppose the donation is neither the main reason for which there is no donor culture in Colombia nor the reason for which statistics have shifted.

Moreover, this measure is, to a certain extent, both counterproductive and useless. In addition to the fact that family dissent is not the root of the problem, applying this norm in

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practice is complex. At the time of Law 1805 of 2016 being enacted, congresspeople and interested parties did not consider the pain and sadness that are inevitably linked to organ donation. While it's true that this is a benevolent act that seeks the wellbeing of society, it comes from a moment of deep pain: death.

According to María Alejandra Saavedra Martínez and Alejandra María Pérez Pachón¹¹ (personal communication, November 11th, 2021), this law is completely disconnected from reality. In medical practice, death is a recurring event, which makes it impossible to detach the pain, the mourning, and trauma caused by it. This makes it difficult and exhausting to explain to a surviving relative that this law assumes the recently deceased donor's will and that the donor's organs will be used for medical purposes, even if the family does not agree with it.

Keeping in mind what was previously mentioned, the institutions that offer transplant services and their professionals opt for not using the organs of people whose families are opposed. According to the surgeons, it's impossible to separate reason from emotions in situations such as this, especially for people who are in mourning. Furthermore, it's essential to consider that donation must be done quickly to keep the organs healthy and useful. Hence, trying to convince people whose thoughts and beliefs are being clouded by shock and grief about a matter as significant as organ donation is counterproductive.

Mainly due to the situation described in the previous paragraph is that many professionals that specialize in organ donation consider that there is much progress to be done in the field of

¹¹ María Alejandra Saavedra Martínez and Alejandra María Pérez Pachón are medical surgeons that work in the Donation and Transplant Coordination as well in the Intensive Care Unit of the San Ignacio University Hospital of Bogotá D.C.

public opinion, by developing sanitary education campaigns on the matter. It's important to let relatives know what their opposition means (Ministerio de Sanidad y Consumo, 1986), but from a friendly and educational perspective in moments of calmness and normalcy.

If the problem were to be related to the deceased's family's opposition, providing them with truthful information in an educational manner during times of emotional stability might encourage organ donation. In this scenario, more people would understand that it's solely a social and charitable act. While it's true that there's a socialization of the corpse precisely because of donor presumption applies, it's different in practice.

As in countries such as Spain and Argentina, in Colombia, the family's approval still holds weight, regardless of what the law establishes. When the relatives of the potential donor are present, it becomes difficult to not acknowledge their stance on the matter. According to Saavedra Martínez and Pérez Pachón (personal communication, November 11th, 2021), to ignore or disregard what the surviving family feels, says, and thinks represents a lack of ethics and is nigh impossible. Hence, despite Law 1805 of 2016 being clear in its mandate, most of the time it remains on the backburner.

For there to be a successful transplant from a corpse to a living individual, it must be done within a small time frame after the donor's death. It is for this reason, aside from what has been previously stated, that it's complicated to deal with a family that opposes the donation. Explaining to people who are in a state of shock, grief, and/or sadness that an organ extraction must be done by order of the law, according to these medical experts, takes a lot of time and wears out both the surgeons and the deceased's family.

This becomes increasingly complex in cases where relatives are not aware of the deceased's wishes or stance on the matter. This happens because surviving family members often assume that their relative would be against organ donation and resist the extraction of said organs for a future transplant. While it's true that in medical centers and healthcare institutions (also known as IPS in Colombia) where these services are provided there are professionals specialized in psychology that try to engage in conversations with relatives about the positives of organ donation, successful cases are rare and few between (Saavedra Martínez and Pérez Pachón, (personal communication, November 11th, 2021).

This is how the last resort mechanism is reached: Inform family members that extraction of the organs could be carried out under the law, but it would certainly be a more supportive attitude on their part to grant permission as well (Ministerio de Sanidad y Consumo, 1986). Nevertheless, health professionals try to avoid this situation and respect the relatives' wishes. Therefore, for the myriad of reasons previously stated, it can be confirmed that Law 1805 of 2016 does not work: the donation rate has not been positively impacted by prohibiting the family's dissent.

2.5.The Legal Status of a Corpse

For many, the law only concerns and applies to the living; law concerning the dead tends to not be considered by the public at large, as it may not concern them at that precise moment in their life (and if they're able to even consider, it certainly does not currently apply to them as they're still living). Determining the legal nature of the corpse, however, is essential for establishing certain aspects of cadaveric organ donation in legal and juridical terms. Therefore,

the following is an analysis of some positions of what is legally understood as a corpse and what rights it is entitled to.

According to the Constitutional Court (1994), a corpse is not a person, and therefore is not entitled to any rights whatsoever. However, it is not an object that is subject to appropriation either. With this in mind, it's safe to say that it's impossible for the State to take possession of a deceased person's body (Sentence T-162/94). For this reason, it's imperative to either determine the donor's will or allow for presumption to take place.

On the other hand, Article 1 of Decree 1546 of 1998 defines a corpse as a body in which (i) encephalic death has occurred or (ii) irreversible cessation of cardiorespiratory functions has occurred. This means that the Colombian legal system understands that death can take place in both scenarios. Therefore, the body will be considered a corpse even if procedures are performed to maintain and sustain it in order to use its anatomical components for transplantation in case of encephalic death (Decree 2493 of 2004, art. 13).

In accordance with what was stated in the previous paragraph, Ortega-Ruiz and Ducuara (2019) confirm that a corpse has rights and obligations to certain people with whom situations of liability arise. Thus, we now find ourselves with a legal system where corpses not only have rights, but also obligations. The latter always must be expressly undertaken in life, as is having had expressed their position on being a donor or allowing presumption to act by itself.

The fact that there's a specific nature for corpses and that there exists a judicial status for them shows that, despite no longer being considered people, corpses have certain rights. This implies that donation presumption exists. Otherwise, only those people who had expressly

manifested their desire to be donors during their lifetime would be considered as such. Therefore, the fact that it can be tacitly affirmed that there is an intention to be a donor allows the State to dispose of the corpse. In this sense, the State is empowered to perform transplants with the aim of achieving social wellbeing and improving the quality of life of citizens.

3. Chapter 3: Organ Donation and Medical Practice

As has been mentioned in previous chapters, the issue of talking with the donor's families is one of the most important aspects in the donation and organ transplant process. Two scenarios are emphasized: (i) the conversation between the donor and their family while they're alive, where the former informs the latter of their intent to become an organ donor at the moment of their death, and (ii) the conversations that medics and health professionals must have with families that've lost a loved one and that were unfamiliar with or opposed the deceased's intent on becoming a donor.

Moreover, it's necessary to keep in mind the impact that the existence of myths and other fears have upon the organ donation process. The medical sector, especially that which specializes in the transplantation of organs and tissues, depends in large part on how society views these treatments and procedures. Thus, if the country is wary of organ donations, we could see ourselves facing a serious public health crisis.

Due to the previous reason, in the paragraphs going forward the concept of donor nation will be analyzed, along with the negative consequences that mythical beliefs and taboos surrounding a practice which is legal, legitimate, and altruistic have brought about. In that sense, prohibitions and technicalities imposed by Law 1805 of 2016 to try and stop and slow down the impact of the aforementioned factors will also be touched upon.

3.1.The Conversation Between the Donor and their Family During their Lifetime

3.1.1. When the Family Agrees

This scenario turns out to be the simplest one and the most convenient for *postmortem* donation since there are no limitations of any kind. In a case such as this one, the potential donor expresses their interest in donating their organs and tissues at the moment of their death to their family and the family is not opposed to their relative's wishes. Additionally, this potential donation shall be done within the bounds of the law, which means that said bodily components shall only be used with medical purposes if they meet the necessary criteria in order to be used in transplants.

In this case, the most advisable and practical solution is for the person to express their intent on becoming a donor in life so that their information can be introduced into the INS database so these procedures can be done. Regardless of there being a presumption, the State finds having these records useful since, as will be explained later, it's easier to obtain and make use of organs and tissues from people that made their intent of becoming donors known than those upon who presumption was applied.

3.1.2. When the Family Disagrees

When the family of the eventual donor is not in agreement with this person's organs and tissues being subject to *postmortem* organ donation, tension between the family members starts to arise. Theoretically, it's in this very situation where Law 1805 of 2016 acts: by eliminating the family's right to object to the donation of a relative's organs, the barrier and limitations posed by this dissent disappears.

Before the law was enacted, even if a person had told their family their intent on becoming an organ donor and even if they had a donor card, little did those things matter since their family had the final say. Hence, it can be concluded that those truly take the decision and ruled over the topic were indeed people's families. The donor only had control over the situation when the discussion took place with a family that, despite not agreeing, would seek to respect their deceased relative's wishes.

Nevertheless, here we face a complex situation since Law 1805 of 2016 generates a schism between what is theoretically legal and what is done in medical practice: while the law states that families cannot show any opposition to the medical and surgical use of their loved ones' organs and tissues, medical professionals (especially those involved in organ transplants) cannot simply set aside the wishes of this critical party.

According to Saavedra Martínez and Pérez Pachón, (personal communication, November 11th, 2021), in healthcare institutions where transplants are performed, it's quite complicated to change a grieving family's opinion on organ donation. According to the medics, medicine is a human science that cannot limit itself to merely physical pain, but rather must also understand and sympathize with the mental and emotional pain that so many of those involved must go through and is not only limited directly to their patients. Ignoring a family's feelings and thoughts, especially in a moment of distress, can ultimately be detrimental to society itself.

For this reason, it's easy to establish a conversation with families that were familiar with their loved one's wishes to become a donor and have accepted it or those families who were not informed but are in agreement with their deceased relative's wishes regardless. In a scenario

such as this, medics have no major social obstacles to face. Thus, proceeding with treatments and procedures is much easier, efficient, and quicker.

On the other hand, when a family was not aware of their relative's intent on becoming an organ donor and refuse to let their loved one's organs and tissues be used for medical purposes, for medical professionals it's almost impossible to complete the donation process. According to what the experts said, in a case such as this one, it's impossible to move away from other people's pain, motive for which it would not be neither prudent nor necessary to make families feel more sorrow in an already stressful and painful situation.

The medics at the San Ignacio University Hospital point out that in a first approach with families who are vehemently opposed to donation, they try to debunk any erroneous beliefs they may have on the subject and demonstrate how organ donation actually works for society's benefit. After this talk takes place, the deceased's family is usually given a few minutes to think it over. Nevertheless, their answer and stance on the matter seldom changes to a positive one.

In addition, time is of the essence: postmortem donations must be done as soon as possible since extracted organs must remain oxygenated and in good condition (HRSA, 2021). Hence, families that are not in agreement or are unsure of going forward with organ donation don't have much time to think and make a decision. According to the medics, despite being correctly informed and having all necessary data readily available, changing people's mindset in a moment of profound grief and sadness is difficult and unlikely.

3.2. What People Know About Organ Donation

The question of what Colombians think or believe about organ donation is fundamental to understanding that this is a topic that transcends its own legal aspects. While it's true that we're facing a figure whose origin is social in nature and its definition is strictly judicial, there exist aspects that the law simply cannot touch upon or regulate. Myths, fears, and misinformation are factors that the law has tried to involve itself in, but has not made any notable progress in this endeavor.

According to Colombiana de Trasplantes (2020) and Mayo Clinic (2019), some of the more common myths that impede the advancement and development of organ donation in the country are the beliefs that (i) organs may be sold on the black market, (ii) that religions are against organ donation, (iii) that the donor's feelings and behaviors transfer over to the recipient when an organ is transplanted, and (iv) that famous and/or rich people have priority when it comes to waiting lists.

To illustrate this, it's worth mentioning the impact made by the Colombian Netflix show *The Marked Heart*. Thanks to the show's debut, whose central themes center on organ trafficking and disrespecting waiting lists, the practice of donation and transplants gained ill will from Colombian society and was thrust into a more negative light. According to Sergio Salcedo Herrera, an internist, nephrologist and president of Colombiana de Trasplantes (2022), there was a drastic reduction in organ donation in the days and months following the series' debut on Netflix. The expert states that donor families expressed their dissent regarding donation citing

practices done in the show, such as inducing of encephalic death in otherwise healthy people in order to obtain their organs and traffic them in the black market.

In addition to this, the series reinforced the notion that the feelings, thoughts, and personality of the donor would carry over to the patient when an organ is transplanted, especially one like the heart. The president of Colombiana de Trasplantes (2022) clarifies that this is impossible, since organs aside from the brain don't store neither someone's emotions nor their intelligence and as such, they're only made to comply with their designated anatomical functions. Hence, since organ donations are being reduced by misconstrued fears of the aforementioned situations occurring, people that need transplants are losing their lives precisely because the number of donors is falling while waiting lists get longer and longer.

Law 1805 of 2016 tries to stop the impact these beliefs have since it was created with the purpose of increasing the amount of organ donations in Colombia and, consequently, turning the country into a donor nation. The concept of donor nation is based upon different analyses and the study of figures and numbers related to the donation and transplantation of organs and tissues that demonstrate that Colombia is still far off from becoming a country with a donor culture in place (Altamar Badel, 2019).

In the words of Castañeda-Millán *et al.* (2014, p. 24), there are many misguided popular myths and beliefs surrounding the donation of anatomical components. Consequently, many people fear this situation and for this very reason, the law forbid family members from deciding in their deceased relative's stead. The goal is for the rate of donors and donation to rise and therefore avoid problems and public health crises.

Despite this, the main objective of Law 1805 of 2016 (increasing the number of donations and transplants, as well as creating a donor culture) was cut short due to misinformation generated by the media the moment the law was enacted, among other factors. In broad terms, Colombian media made a huge mistake by confirming in people's minds that with the enactment of the Law, donation presumption was born, and that Colombians were all going to become mandatory donors. Additionally, almost no media outlet reported on the real changes brought about by the law which the old one did not include: not allowing a deceased person's family from opposing the presumed donation.

From this comes the fact people that have no proper education in law or medicine or aren't informed on organ donation have erroneously comprehended that a presumption necessarily implies an obligation. As was touched upon in previous chapters, organ donation in Colombia is not mandatory since there are two ways of rebutting the presumption: (i) saying as much at the time of affiliation to an EPS, or (ii) by means of a document signed by personal presentation before a Public Notary (art. 4, Ley 1805, 2016).

3.2.1. Survey About Organ Donation

As to further ground what was detailed in the previous section, the results obtained from a survey in which 52 people between the ages of 18 and 50 participated will be analyzed. The survey was related to their knowledge of organ donation in Colombia. The main objective of said survey was to see if the participants were familiar with the changes Law 1805 of 2016 introduced in the rules and regulations on organ donation and transplantation.

The survey consisted of the following questions:

Question	Possible Answer	Right Answer
Does donation presumption exist in Colombia?	Yes	
	No	
Is organ donation in Colombia mandatory?	Yes	
	No	
How may a citizen oppose being an organ donor (in life)?	By means of a written document with personal presentation before a Public Notary	
	At the moment of affiliating to an EPS	
	Both of the above	
	One cannot oppose to being an organ donor	
Can a donor's family currently oppose the donation?	Yes	
	No	
Do you know which is the Law 1805 of 2016?	Yes	DNA
	No	DNA
Would you like to be an organ donor?	Yes	DNA
	No	DNA
	Maybe	DNA
	I'd rather not answer	DNA
If you know of any myth surrounding organ donation, please write it here.	Open question	DNA

Color	Right
code	Wrong

As can be seen in the table above, the survey had four single-answer questions made to determine if the participants truly knew or were at least familiar with the most important aspects of Law 1805 of 2016. Therefore, the questions asked if whether the presumption existed in Colombia and other topics such as the obligation to donate, how to oppose donation, and the role people's families could play in organ donation.

Questions with multiple answers were also included in the survey. The objective of these particular questions was to know if the participants had obtained their knowledge on organ donation in Colombia by reading about the law and understanding their opinion on being donors. Additionally, the participants were given the option to write about the myths they'd heard of surrounding the donation and transplantation of organs and tissues.

The survey results can be found below as Annex 1. Regarding the first question, 90.4% of respondents answered correctly. This demonstrated that the participant pool is informed on the existence of the presumption of being a donor of organs and tissues in Colombia. Only the remaining 9.6% did not know that this applies in our legal system. This data is favorable, since it shows that a vast majority of respondents understand that presumption is a factor of importance in organ donation, despite them not necessarily completely understanding what this seeks or implies.

Regarding the second question, 75% of respondents answered correctly. This means that 25% of them believe that organ donation in Colombia is mandatory. This is worrisome since even though it's less than half of all participants, it's still a relatively high number compared to that of the previous question. In this case it can be concluded that despite people know that a presumption exists, they see it as something that implies mandatory organ donation. As was mentioned in previous sections: the term obligation is not the same as *presumption*, since the former implies that all Colombians must donate their organs and tissues for medical means, while the latter establishes that all those who don't show opposition to their status as a donor could therefore be considered as such.

The third question's answers show that Colombians know that there exists a way to oppose being a donor during their lives. Only 5.8% of respondents selected the option that established that "you cannot oppose being a donor". In fact, 94.2% of participants knew that opposition to being an organ and tissue donor can be done in life. Regardless, not everyone knew that there are two ways to do so. 38.5% thinks that opposition to being a donor can only be done by means of a written document signed before a Public Notary and 3.8% think that it can only be done when an EPS is joined.

The answers to the fourth question show that people are completely unfamiliar with the contents of Law 1805 of 2016: 44.2% of respondents think that families can still oppose their loved one being subject to organ donation. While it's true that most people, represented by the 55.8% of survey participants that knew that families no longer have this right, the difference between the two is rather small. Hence, it can be said that nearly half of respondents aren't informed of the large changes brought about by the enactment of the law and in that sense, believe that their relatives could disagree with their organs and tissues being donated, should the situation ever arise.

From the above, it is clear that people are aware of the fact that there is a presumption of donation but believe that Law 1805 of 2016 introduced this or that organ donation itself is mandatory. Few of them are aware of the latest laws on the matter, so much so that the Ministry of Health, in its February 16th of 2017 press release, reestablished that Law 1805 of 2016 makes all Colombians organ and tissue donors, unless they state otherwise during their lifetime. Thus, it is understandable that citizens aren't aware of the regulation. If the Ministry in charge of these practices is unfamiliar with current laws, it cannot be expected for citizens to be.

The lack of knowledge of the law can be seen in the percentages of responses to the question that sought to know whether or not respondents were aware of Law 1805 of 2016. 90.4% of participants answered that they didn't know about said law and as such, didn't know what the object of its regulation is or what changes it has introduced to the system. Based on this, it's not unusual for these people to not know that families technically cannot oppose the donation of their relatives' organs. Moreover, the fact that their position is still taken into account and considered in medical interviews makes the standard completely unknown and unenforceable.

Regarding the myths, the respondents mention that the beliefs they know about regarding organ donation are the following: (i) aborted fetuses are sold in the black market, (ii) donation promotes organ and tissue trafficking, (iii) the thoughts, personality, and behavior of the donor are passed on to the recipient, and (iv) that religions promote organ donation as a taboo. This proves that myths surrounding this practice have influence on those who could become potential donors and on possible patients.

This is related to the fact that only 69.2% of the respondents are completely sure that they would like to be donors. While it is certainly a majority, 17.3% aren't sure if they'd be fine with their organs being used for medical purposes and only 5.8% are definitely not interested in taking part in this practice. As can be seen, Colombia is not a donor nation. There's still much to be done to finally debunk all the erroneous beliefs and taboos that surround organ donation. This is how it can be confirmed that Law 1805 of 2016, no matter how many modifications it made to the practice and the presumption of donation, did not really meet the objective of increasing the rate of donors and transplants.

4. Conclusions

4.1. General Conclusions

Having analyzed the contents of Law 1805 of 2016 and its main goal in light of medical practices and the myths and beliefs that surround the topic of organ donation and transplantation, it can be said that the law does not fulfill the purpose for which it was created. The law was meant to be for the good of society as it was meant to increase the number of donations and transplants, thus reducing the number of deaths of patients in waiting lists. However, it can be said that the way the Law approached the problem was not the correct one and as such, did not attack the root of the problem.

While it is true that the process and procedure of organ donation must be regulated, it's not possible to leave it only in the hands of laws. As was mentioned in the first chapter of this written text, there are many regulations and jurisprudential pronouncements in this regard. It is also true that there have been important advancements in this endeavor and in the concept of presumption. Even so, overregulation of the matter does not address the central issue: misinformation and lack of knowledge surrounding organ donation.

It is true that by means of regulations, a State has been reached that considers that organ donation, being an altruistic and beneficial work, should be carried out by all citizens who have this possibility. Therefore, the legal system understands that the presumption must apply to all Colombians over 18 years of age in order for it to be a universal duty. In the same sense, it is possible to conclude that the State does not make donor status mandatory, but rather leaves it as a

de facto presumption that can be rebutted so that citizens have free will as to what to do with their body upon death.

Law 1805 of 2016, in an attempt of going against the conservatism that exists in Colombia, limited the rights of the deceased's relatives to the point of prohibiting them from objecting on their behalf to the use of their organs for medical purposes. If the regulation had been focused on solving the larger problem, there wouldn't have been a need to restrict people's rights, as people would be taking informed decisions.

As was mentioned in the previous chapter, several Colombians hide behind their religious beliefs as to not be organ donors. There are myths that establish that religions are vehemently opposed to organ donation, especially when it's done *postmortem*. This comes as a consequence of Colombia being considered a country made up mostly of people of faith (Observatorio de la Democracia, 2017). Hence, it can be said that many families that seek to oppose their deceased relative's organ donation by means of religiousness and erroneous convictions, rather than actually being against organ donation itself.

Since this practice has many taboos and misinformation surrounding it, the regulation tried to reduce the negative impact that this brings by limiting said rights. This, however, had the opposite effect: it set aside the humanity that is inherent to organ donation and transplantation. By not respecting the thoughts and beliefs of some families, as well as assuming that if there was no disagreement with the donation presumption in life then people want to become donors, it completely destroys the idea of organ donation being a purely altruistic act that occurs because donors actually want to donate their organs upon death. Thus, while there are ways to rebut the

presumption during life, not allowing a third party to rebut it after death undermines the whole purpose of a charitable work.

After a year of Law 1805 of 2016 coming into effect, organ transplants had increased only by 21% (Salud, El Tiempo, 2018). However, experts on the matter have stated that this is merely a natural increase in the procedure and doesn't necessarily mean that the law itself was the cause of this trend (García Ruiz, personal communication, October 16th, 2020). The increase in donations and transplants is due to the fact that we live in an ever-changing society that is becoming more understanding and accepting of this practice. However, as medic Sergio Salcedo Herrera (2022) notes, news or entertainment content that misinform people on the subject only help to drastically reduce the numbers once more. This has all happened after the law was put into effect, so it can certainly be said that Law 1805 of 2016 definitely did not fulfill its objective.

In addition to the foregoing and as has been demonstrated throughout this written text, there is a great schism between the legal and medical aspects when discussing organ donation and transplantation. It's clear that the law is not humane in any shape or form as it does not take into account the pain and sense of uncertainty that is usually linked to this procedure. Furthermore, it does not contemplate the political, religious, and socio-cultural environment of Colombia from any point of the spectrum, motive for which it reaches absurd prohibitions such as not allowing families to oppose the use of organs for medical purposes. Therefore, in this order of ideas, physicians specializing in these areas fall short in applying and complying with the regulations.

As was explored in previous chapters and mentioned throughout this dissertation, conversations with families that aren't in agreement with organ donation tend to be difficult, time-consuming, and complex. Changing someone's mind on such a delicate subject when they're going through moments of grief and sadness can have disastrous consequences, such as people become distrustful of the healthcare system. Medics and health professionals usually opt for not using the organs of people whose families are against the donation despite the law stating the contrary since there is no mechanism in place that allows them to enforce said prohibition. As indicated by the medical surgeons Saavedra Martínez and Pérez Pachón, (personal communication, November 11th, 2021), the Law stays on paper and in theory.

Moreover, the medical system has no way of fighting against the misinformation and myths that tend to surround organ donation. Although health care institutions specializing in transplantation have identified the most common myths, combating them is a complex task. So, when they find themselves talking to the family of a potential donor, or even with a patient in a waiting list that doesn't condone the practice, it's nigh impossible to debunk these beliefs. Thus, consequently, potential donors' organs are lost, waiting lists get longer, and there are more deaths due to not receiving the necessary transplant in time (Salcedo Herrera, 2022). As a result, Law 1805 of 2016 remains on the backburner because physicians and these institutions do not fully abide by it.

4.2.Proposal

Keeping in mind all the information that was collected in the previous section, this written text has the goal of making a proposal to fulfill Law 1805 of 2016's objective and,

consequently, setting Colombia on the path to becoming a donor nation. The overregulation of the matter is only going to generate more dissatisfaction and misinformation in the populace due to the low number of people that know the normative contents and because media outlets don't comply with their responsibility of informing people correctly.

As was seen in the results of the survey, few people know and understand that a donation presumption exists and what this implies. Furthermore, fewer are aware of which law is Law 1805 of 2016 and the changes it brought into the organ donation practice. Those who vehemently oppose the practice usually do so based on erroneous and scientifically unproven beliefs. Due to this, better education plans and networks on the topic are invaluable.

If the legislator, as well as the Ministry of Health, are really interested in promoting a donor culture, they should join efforts to attack the underlying problem. This can be done by promoting education plans and brigades that inform the entire country about the altruistic and selfless act of donating organs through the easiest means of communication. These sessions should be aimed at people of all ages, including minors, as well as people from different socioeconomic and religious backgrounds.

Health insurance companies and healthcare institutions can also participate in these sessions. Finally, Colombia should become a donor nation by conviction, not because the law told them to do so. Hence, by being involved with these entities, both Congress and the Health Ministry can understand what is truly the root of the problem. In this manner, the problem itself is attacked, instead of overregulating by means of limiting people's rights and implementing concepts and technicalities that common citizens are not familiar with, nor can they understand.

In these brigades, as well as in the different statements that these entities put out regarding the subject, the following aspects must be included, mainly: (i) the clear definition and way in which donation presumption is implemented, (ii) the invalidity of the family's refusal, its implications, and how to combat it, and (iii) the debunking of myths and erroneous beliefs regarding organ donation and transplantation.

Regarding the first point, it's necessary to clarify that donation presumption in Colombia is not a recent development and has existed since the 1980s. In this sense, Law 1805 of 2016 can be *undemonized*, since some people seem to think that this law makes organ donation mandatory upon the time of death. Likewise, explaining the two available mechanisms to oppose presumption is of great importance: Show clear dissent towards becoming an organ donor in life (i) by means of a document before a Public Notary, or (ii) when affiliating to an EPS (or healthcare provider).

With the enactment of Law 1805 of 2016, whose objective it was to increase the number of donations and transplants, comes a setback in the advances that were being made in donor culture (García Ruiz, personal communication, October 16th, 2020). Consequently, said educational networks and brigades must not only educate and inform on topics that set back the practice of organ donation, but they must also include topics related to families' inability to oppose organ donation in place of their deceased relative, according to the law's third article.

Although in practice this legal point is not observed or taken into consideration, it is worthwhile to include it in the training as to properly inform people on the legal mandate and on the fact that they can only refuse to take part in organ donation while they're alive. In this sense,

if at any moment it becomes more complicated for health professionals to not abide by the contents of this law, then people will understand that it's a law that must be followed.

Additionally, keeping the latter in mind, a situation could arise where families don't even try to challenge the presumption, since they'll already know how it is applied and what effects opposing it could have.

Finally, when discussing the third point that must become part of the educational agenda, it's absolutely necessary to somehow prioritize the myths and inaccurate beliefs. This means that by means of surveys, the responsible entities can learn which are the most common and the most impactful on the practice, with the main goal of debunking them first. Thus, the negative perception attributed organ donation and transplantation due to supposed religious dissent and the commercialization of organs on the black market, among others, are two beliefs that must be shown to the contrary.

For example, the aid of different religious authorities would be necessary to combat the idea of religious dissent towards organ donation, so these leaders can speak to their communities and clear up religion's true stance on organ donation. In this way, even more people would possibly consider becoming organ donors. On the other hand, to debunk the sale of organs on black markets, people must be educated on the contents of Law 919 of 2004, which prohibits the commercialization of human anatomical components. Moreover, the public must be demonstrated the system's transparency, with the goal of showing them where the organs come from, to whom and how they are transplanted, and the rigorousness regarding waiting lists.

Thus, to summarize and conclude, the analyses obtained during this investigation allow us to conclude that the purpose of Law 1805 of 2016 was not reached because it did not correctly address the fact that Colombia is not a donor nation. On the contrary, it tried to quell the problem by limiting people's rights that it had no right to restrict. By reducing their rights, the law created a schism between the legal aspect and what is done in practice, which only served to weaken the donor culture in the country. If the regulation had been aimed towards creating an education system centered around perceiving organ donation as an altruistic and selfless act, instead of overregulating it, it surely would've been more profitable and applicable to the law.

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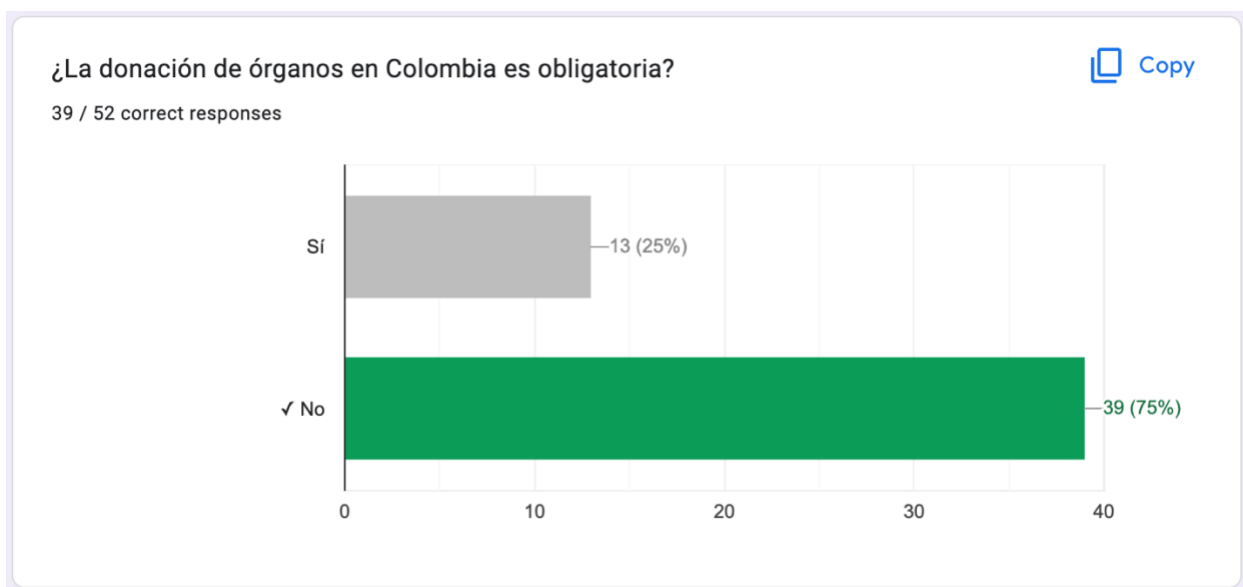
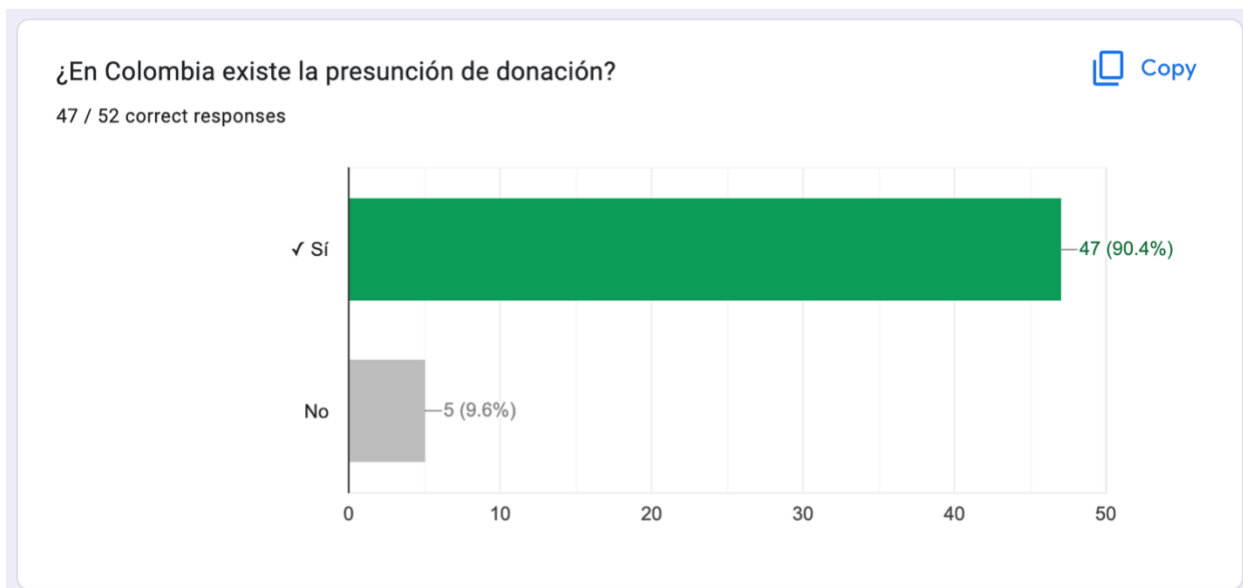
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Annexes

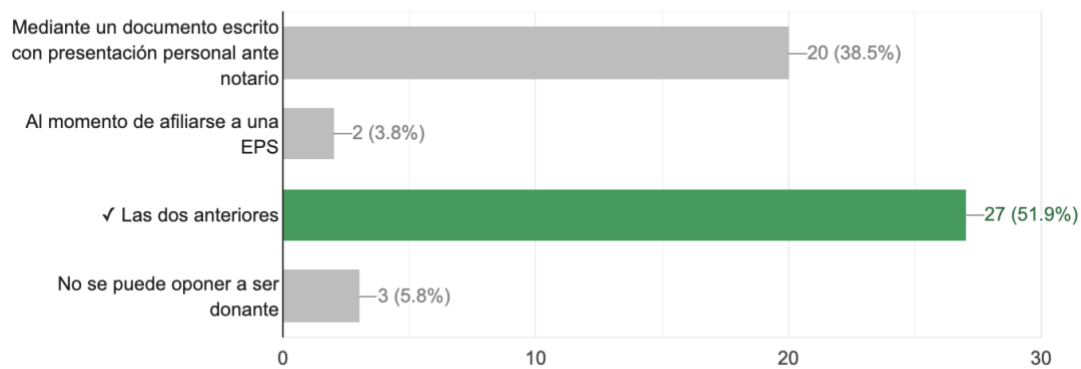
Annex 1. Survey – Questions and Results



¿Cómo puede un ciudadano oponerse a ser donante (en vida)?



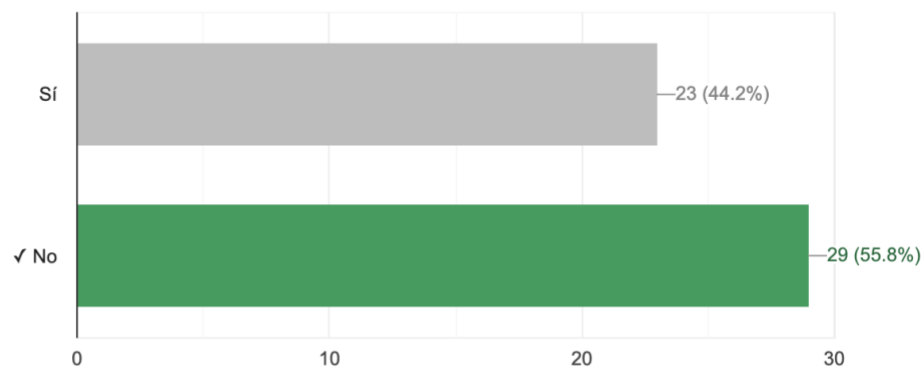
27 / 52 correct responses



¿Actualmente la familia del donante puede oponerse a la donación?



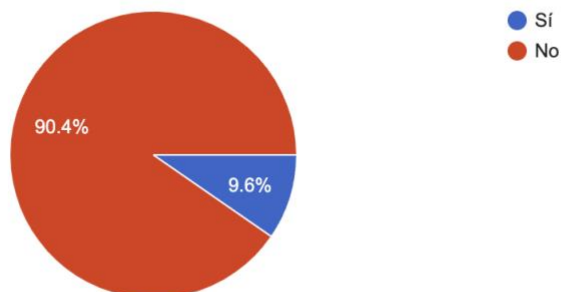
29 / 52 correct responses



¿Sabes cuál es la Ley 1805 de 2016?

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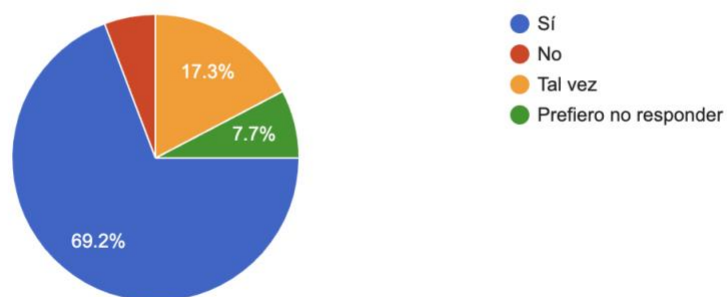
52 responses



¿Te gustaría ser donante?

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52 responses



Si conoces algún mito sobre la donación de órganos, escríbelo aquí.

7 responses

Si me trasplantan un órgano de algún criminal, me voy a volver como ese criminal

Que los fetos abordados los venden o algo así

Ninguno.

La verdad no sé mucho, por no decir nada del tema.

Que eso ayuda al tráfico de organos

No

Mas que todo creencias religiosas que ponen tabues en ese tema