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REGULATORY MECHANISM FOR ORGAN TRAFFICKING: A TRANSNATIONAL STUDY

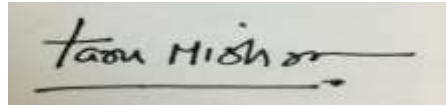
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Date: 21-04-24

Mr. Ayush Kumar Singh Bisen

List Of Abbreviations

THOTA	Transplantation Of Human Organ And Tissue Act
WHO	World Health Organization
UAGA	Uniform Anatomical Gift Act 1968
USA	United State Of America
SA	South Australia
IPC	Indian Penal Code
AIR	All India Reporter
NSW	New South Wales
QLD	Queensland
SCC	Supreme Court Cases
VIC	Victoria
WA	Western Australia
ONT	Organizacion Nacional De Transplantes
CETS	Council Of Europe Treaty Series
OPTN	Organ Procurement And Transplantation Network
WB	West Bengal
AC	Authorization Committee
NT	North Territory
WA	Western Africa
SA	Southern Africa
TAS	Tasmania
PO	Per Organ

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Chapter-1: Introduction

1.1 Introduction

As we know that the term organ trafficking referred as criminal activities or illegal activities done by selling the human organ with the help of the transplantation of illegal organ of living or dead individual.

Organ trafficking is considered as part of a market that includes¹ the sale of tissues, cells, kidney, liver, pancreas or other body parts in the market which is also known as red market.

Basically red market means the market of violence and theft which is not approved by the state.

Organ trafficking is a violation of human right in which every person gets involved directly or indirectly to earn profits.

it occurs in three broad categories-

1-Cases where traffickers force or deceive the victims into giving up an organ.

2- Cases where victims are defrauded after legally or informally agreeing to sell an organ

3-Vulnerable persons which may or may not exist and thereupon organ are removed without the victim's knowledge.

According to Dr Dominique Martin, senior lecturer in health ethics and professionalism at Deakin University 10% of solid organ transplant performed worldwide each year involve organ trafficking.

According to the estimate from GFI(global financial integrity) trafficked organs are used in 10% of liver, heart and lung transplants. However the organ traded the most are kidneys.

¹ The Transplantation of Human Organs and Tissues Act, No. 42 of 1994 [Hereinafter ‘THOTA’]



1.2 Scope Of Study

This research study mainly focuses on organ trafficking and on the Indian legislation deals with the issue related to the organ trafficking and preventing commercialisation of organs which is the Human Organ and Tissue Act 1994. The numerous goals of the act and the extent to which the goals have been met after more than two, its execution is examined. Analyzing the numerous aspects that contribute to the nation's booming organ market, an effort is made to suggest solutions. The legal situation in other nations, including the USA and Australia, is also analyzed to give a comparative perspective on the issue, even though the study primarily focuses on the Indian environment.

1.3 Research Questions

- 1) Has India's organ trade and commercialization been effectively curbed by the Transplantation Of Human Organs And Tissues Act Of 1994?
- 2) Does the 1994 Transplantation Of Human Organs And Tissues Act have any legislative shortcomings that encourage the country's organ trade?
- 3) Whether the actual act of THOTA 1994 needs to change to fit in 21st century?

1.4 Research Objectives

- 1) To determine and research the factors contributing to the rise in illegal organ trafficking smuggling in India.

- 2) To examine the transplantation of human organs and tissues act 1994 and to analyze the act's shortcomings or shortcomings.
- 3) Comparative analysis of the organ trade and regulations governing it similar across nations.

1.5 Hypothesis

The Transplantation Of Human Organs And Tissues Act, 1994 falls short in its efforts to encourage Cadaver Organ Donations and stop the trade in human organs in India and this law has to change to meet standard of internationally recognized law in USA and other country around the world.

1.6 Research Methodology

The research study has undertaken by going through the THOTA act of 1994 and international perspective of other nations.

1.7 Chapterisation

1.7.1 : Introduction

This chapter aims to provide a broad review of the state of the organ trade, cadaver organ donations, and the necessity of this research study in India.

The chapter introduces the elements that make the transplantation of human organs and

tissues act, 1994, ineffective. To help the readers comprehend the problem, need, and scope of this study, the problem and scope of the research study have been described, and the goals



and objectives of the research study, research questions, and hypothesis have been listed in this chapter. A summary of each chapter's content is also provided, along with a list of the chapter.

1.7.2 : Indian Laws Related To Organ Trade And The Transplantation Of Human Organ Act, 1994

The second chapter deals with the thota 1994 and Indian laws related to the organ trade. It also tells about the salient features of the thota 1994 and will also analyze about the amendment done in thota 1994 .

1.7.3 : Organ Traffickers In India And Factors Contributing To Organ Trade In India

The third chapter tells about why the organ trade is rising and what are the laws related to organ trade. It also analyze about the challenges of organ trafficking victims and it also deals with the some of cases related to the organ trade.

1.7.4 : International Perspective And Practices Of Organ Trading And Trafficking

The fourth chapter talks about the conventions and regulations that others countries like- Australia, Istanbul, Europe, USA and Iran and health organization like who had taken measures to tackle against the organ trade

1.7.5 : Suggestion And Findings

The fifth chapters talks about the suggestions and preventive measures that had been taken to deal with the issue.

1.7.6 : Conclusion

The sixth chapter which is the last chapter of this topic organ trade: a form of transnational crime deals with the conclusion and remedies to the trafficking victims.



Chapter 2

Indians Law Related To Organ Traffiking

The Transplantation Of Human Organs Act, 1994

On the recommendation of L.M. SINGHVI committee report, a bill was prepared and three states viz., Goa, Maharashtra, and Himachal Pradesh passed resolutions in its favour. On 5 may 1993, the transplantation of human organs bill was submitted in the Rajya sabha and received the house's unanimous approval.²

The president gives his assent on 8th july 1994. Rules under the act were notified in february 1995.

2.1.1 Salient Feature Of The Act

The act's main goals are to ban commercial dealings in human organs and to regulate the removal, preservation, and transplantation of human organs for medical treatment. The ear drums and ear bones (authority for use for therapeutic purposes) act of 1989 and the eyes (authority for use for therapeutic purposes) act of 1982 were both repealed by the act.³

²ARYAN JAWAHAR PRASAD MADHAVAN, Indian Organ Trade: The Public and Private Sphere,(nov 10, 2022)www.ijlmh.com,

³ WHO GUIDING PRINCIPLES ON HUMAN CELL, TISSUE AND ORGAN TRANSPLANTATION, WORLD HEALTH ORGANISATION



The following is a discussion of the act's main features:

Sections 2(d) and 2(e) of the act define "brain-stem death" and "dead person," respectively. Recognition of "brain-stem death" as "death" is outlined in sections 2(d) and 2(e) of the act, respectively.⁴

Brain stem death means when the person has lost the capacity to breathe and lost the potential of consciousness or where all the functions of brains stops working.

2.1.2 Authorization For Removal Of Human Organs:

Systematic management of any illness or improvement of health measures using any specific technique or modality. He/she has to do so in writing in the presence of two or more witnesses and at least one of them should be a near relative. In such a case, once the person dies, the person who is in lawful possession of the body, can grant to a registered medical practitioner all reasonable facilities for the removal of such human organ from the body of the donor for therapeutic purposes. However, the same must be done only if he has no reason to believe that the donor had subsequently revoked the authority. If no such authority has been granted but no objection was also expressed by deceased, the person who is in lawful possession of the dead body can authorize the removal of any organ of the deceased person for therapeutic purposes⁵. He can do so only when he has no reason to believe that any near relative of the deceased might have an objection. The removal of any organ can be done only by a registered medical practitioner and he has to satisfy himself that life is extinct in such body through a personal examination of the said body before the removal of the organ. In cases of brain-stem death⁶, removal of the human organ can be done only after the death has been certified as per the requirements of the act by a board of medical experts. If the brain-stem death occurs to a minor, his parents has the authority for the removal of any organ. The removal cannot be authorized or

no facilities can be granted in certain situations

⁴ www.ncbi.nlm.nih.gov

⁵ Health.tripura.gov.in

⁶ Yosuke Shimazono, *The state of the international organ trade: a provisional picture based on integration of available information*, BULLETIN OF THE WORLD HEALTH ORGANISATION [WHO] 85(12), (2007),

<https://www.who.int/bulletin/volumes/85/12/06-039370.pdf> [Hereinafter ‘The state of International organ trade’].



where the person empowered to grant authority has reason to believe that an inquest is required to be held in relation to such body as per any existing law. Authority should also not be taken from a person to whom the body has been entrusted solely for interment, cremation or other disposal.

If a dead body in a hospital or prison is not claimed by any near relative within 48 hours of the death, the authority for removal of human organ or organs can be granted by the person in charge of the management or an authorized employee of the hospital or prison⁷. Authorization cannot be given if the person empowered to give authority has reason to believe that though the body has not been claimed within the time specified, any near relative is likely to claim the body of the deceased.

In situations where the deceased has been sent for post-mortem examination for pathological or medical reason, the person competent can give authority if he believes that such human organ is not required for the purpose for which such body has been sent for post mortem examination, provided that he has satisfied himself that the deceased person had not expressed before his death, any objection to such removal or he had already given authority for removal of organs after his death and the same has not been revoked. Once any human organ is removed, the registered medical practitioner has to take necessary steps to preserve the organ so removed.

2.1.3 Restrictions On The Transplantation And Removal Of Human Organs:

A human organ removed from the body of a living person can only be transplanted to a near-relative of the donor and no one else. When a person gives authority for removal of his organs after his death or when any competent person as per the provisions of the act

⁷ Where any human organ is to be removed from the body of a person in the event of his brain-stem death, no such removal shall be undertaken unless such death is certified, in such

form and in such manner and on satisfaction of such conditions and requirements as may be prescribed, by a Board of medical experts consisting of the following namely, (i) the registered medical practitioner in charge of the hospital in which brain-stem death has occurred; (ii) an independent registered medical practitioner, being a specialist, to be nominated by the registered medical practitioner specified in clause (i), from the panel of names approved by the Appropriate authority; (iii) a neurologist or a neurosurgeon to be nominated by the registered medical practitioner specified in clause (i), from the panel of names approved by the Appropriate Authority; and (iv) the registered medical practitioner treating the person whose brain-stem death has occurred



gives authority, such organ can be transplanted to any person who is in need of such organ. If a donor authorizes removal of an organ before his death for transplantation into the body of a person who is not a near-relative, stating affection or attachment towards the

recipient or any other special reasons, such human organ should not be removed and transplanted without the prior approval of the authorization committee. If the donor and recipient make an application jointly, the authorization committee can grant approval for transplantation after conducting an investigation and determining that applicants have fulfilled all conditions set forth in the act and rules. However, if the authorization committee is satisfied that the applicants⁹ have not complied with the requirements after holding inquiry and hearing them, can reject such application after recording the reasons in writing. The law forbids the removal of any human organ for any reason other than medical treatment and before any organ removal or transplant medical professional is required who explain all possible effects, complications and hazards related to the removal and transplantation to the donor and the recipient.

2.1.4 Regulation Of Hospitals:

Every hospital has to be registered under the act to conduct, associate, or provide assistance with any human organ transplant, storage, or removal. No physician or other healthcare professional should conduct or help in conducting any activity relating to the removal, storage or transplantation of a human organ at a place other than a place registered. Removal, storage or transplantation of human organs should not be conducted for any purposes other than therapeutic purposes. However, eyes or ears including ear drums ear bones can be removed at any place from the dead body of donar by registered medical practitioner for therapeutic purposes¹⁰.

⁸ THOA, *supra* note 20, 2(o).

⁹ *Id.* 3(2).

¹⁰ *Id.* 3(2).



(a) In cases where the recipient is a spouse of the donor, the medical practitioner has to record the statements of them to the effect that they are so related and shall sign a certificate in form 4¹¹.

(b) Prior to the removal of human organs after the death of a person, he has to satisfy himself that the donor had authorized the same before his death as per the requirements of the act¹²; that the person lawfully in possession of the dead body has signed a certificate in the prescribed form.

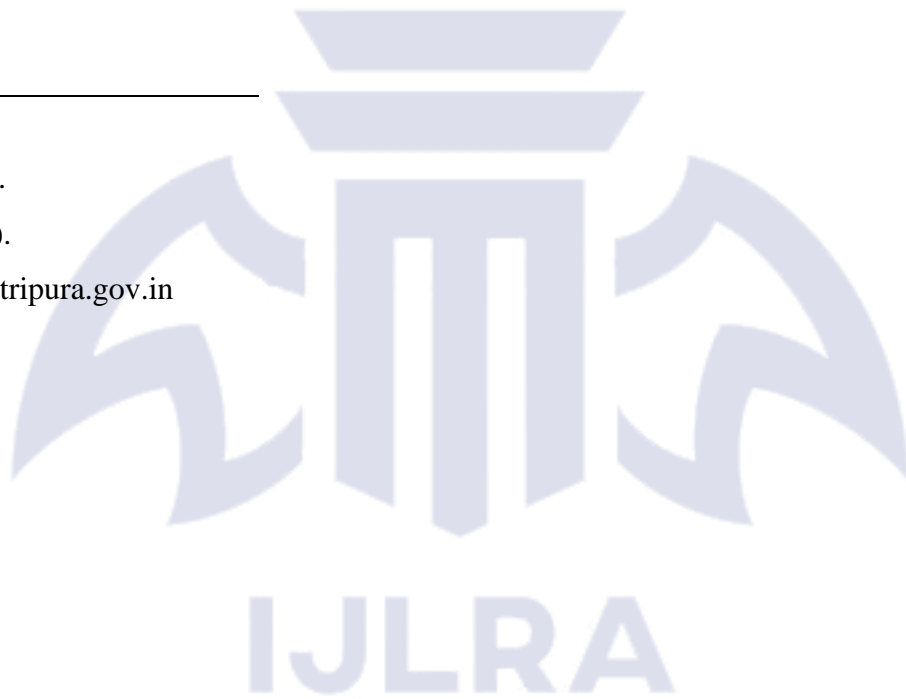
(c) In the event of brain stem death, he has to ensure before removing any organ from the body of the such person that a certificate has been signed by all the members of the board of medical experts according to the act. If the person is a minor, the medical practitioner has to ensure that an authority signed by the parent of such person has been obtained in addition to the certificate of board of medical experts¹³.

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¹¹ *Id.* 3(2).

¹² *Id.* 3(2).

¹³ Health.tripura.gov.in



Provision	Offence	Punishment
S. 18	Renders his services, conducts or helps in the removal of any human organ without authority.	Will be held imprisonment upto 5 years and fine upto rs. 10,000. (if the person convicted is registered medical practitioner, the same shall be reported to the respective state medical council by the appropriate authority and necessary action must be taken including the removal of his name from the council's register for a period of 2 years in case of first offence and permanently for the subsequent offence.)
S. 19	(a) Makes/Receives any payment for the supply or an offer to supply any human organ; (b) Seeks to find person willing to supply any human organ for cash; (c) Makes a financial offer to donate any human organ.	Imprisonment of 2 To 7 years And fine of Rs. 10,000 To 20,000.

	<p>(d)Initiates or negotiates any of the arrangement involving the making of any payment for the supply of, or for an offer to supply, any human organ;</p> <p>(e)Takes part in the managementof body of persons, whose activities consist of or include the initiation ornegotiation of any arrangement as mentioned above;</p> <p>(f)Publishes/distributes/causes to be published any advertisement: invitingpersons supply or offering to supply any human organ for h, or indicating that the advertiser is willing to iate or negotiate any arrangement.</p>	
<p>S. 20</p>	<p>Violating any clause in a act, the regulations, or the term of registration that is issued, for which there is no special penalty.</p>	<p>Imprisonment upto 3 years or fine upto rs. 5000.</p>

2.2 Amendments In THOAT

2.2.1 The Transplantation Of Human Organs(Amendment) Rules, 2008¹⁴

According to the amendment of 2008¹⁵, it is added that if the live donor is not a near relative, the medical practitioner has to satisfy himself that he has signed the appropriate form and submitted a joint application with the recipient and the permission from the authorization committee has been obtained. He should also ensure that, before the removal of any organ from the body of a person after his death, the donor had clearly approved before his death, in front of two or more witnesses, atleast one of whom was a close family, the removal of organ from his corpse after his death for medical purpose. There should also not be any reason to believe that the donor had revoked such authority subsequently and the person who is lawfully in possession of the dead body has signed a certificate in the appropriate form.

The amendment adds a new rule 4a¹⁶ containing provisions concerning Authorization Committees. It is stated that a medical practitioner who is a part of organ transplantation shall not be a member of the committee. When the organ transplantation is carried out between a married couple¹⁷, the registered medical practitioner who is in charge of the transplant centre must evaluate the factum and duration of the said marriage, ensure that all relevant documents, information regarding number and age of children, family photograph illustrating entire immediate family, birth certificate of children, etc. Authorization committee should also consider requests in circumstances where the donor or recipient or both are not Indian nationals whether near relatives or not¹⁸.

¹⁴ THOA, *supra* note 20, 3(6).

¹⁵ The Transplantation of Human Organs (Amendment) Rules, GSR No. 571(E), Jul. 31, 2008[Hereinafter 'Rules, 2008'].

¹⁶ The Transplantation of Human Organs (Amendment) Rules, GSR No. 571(E), Jul. 31, 2008[Hereinafter 'Rules, 2008' Amended

¹⁷ *Id.* 3(2)

¹⁸ Rules, 2008, *supra* note 37, Rule 6F (a)(iv).



Authorization committee should make certain evaluations when the proposed donor and recipient are not near relatives as defined under the act. The committee should ensure that there have been no commercial transactions or payment of money or in kind or promises of such kind to the donor or any other person. The committee has to specifically analyze certain factors like explanation of the link between the donor and recipient and the situations which led to the offer being made, reasons why the donor wishes to donate his organs, documentary evidence of the link between them, (for instance, proof that they lived together if that is the connecting link between them) and both donor and recipient should have a photograph together. The committee should also ensure that there is no intermediary or broker involved in this process and ensuring the donor does not have a history of drug abuse or criminal activity. The financial position of the donor and recipient should also be assessed and any gross disparity between the status of the two should be evaluated in the backdrop of preventing commercial dealings of organs. The next of kin of the proposed donor who is not a near relative should be interviewed with respect to matters concerning awareness about his intention to donate the organ, authenticity of the link between donor and recipient and reasons for such donation. Disagreement, objection or any strong views of such person should be recorded and taken note of.

With respect to the application to grant the approval for removal and transplantation of organs, the committee should take a decision in accordance with the guidance as provided in rule 6-a¹⁹ which was inserted through this amendment and deals with composition of authorization committees. It states that there must be one state level authorization committee and additional authorization committees can be set up at various levels according to the norms given under the rules which are: a member of the transplant team of the institution should not be a member of the authorization committee and all foreign nationals, related and unrelated are supposed to go to authorization committee as more precautions have to be taken in such case, In big cities and metro areas, committee must be hospital based if the number of transplant performed at those facilities surpasses 25 year and in smaller towns committee at district level exist if the number of transplant performed in those district less than 25.

The rules provide for the composition of hospital based as well as state or district level authorization committees.

¹⁹ *Id.* 3(3)



Rule 6b states that the state level committees have to be formed for providing approval or no objection certificate to the donor and recipient in order to establish the legal and residential status as a domicile state. It makes the approval or no objection certificate from the respective domicile state government necessary, if donor, recipient and place of transplantation are from different states. The quorum of the committee must be minimum four, as stated under rule 6c. However, quorum cannot be regarded as complete without the chairman and secretary (health) or nominee and director of health services or nominee is also mandatory. While the committee examines the applications, if any document or information is found to be inadequate or doubtful, explanation has to be sought from the applicant. If the committee considers necessary to verify any fact or information to confirm its veracity or correctness, the same must be ascertained through the concerned officers of the state or union territory government.

Rule 6f of the rules lays down provisions requiring the authorization committee to focus on certain matters.

Clause(A)-

Deals with transplantation between genetically related persons like mother father, brother, sister, son or daughter above the age of 18 years and that the competent authority has to evaluate certain matters like results of tissue typing and other basic tests, documentary evidence of relationship, documentary evidence of identity and residence of the donor and family photograph of both the donor and recipient along with near relative. If the relationship is not conclusively established from such evidence in its opinion, it can direct certain medical tests as provided in the rules and if such tests do not prove a genetic relationship between the donor or the recipient, the same tests have to be performed on both or at least one parent. If the parents are not available, the tests have to be performed on the available and willing relatives of donor and recipient, failing which, genetic relationship between will be deemed to have not been established.

Clause (C)-

Deals with transplantation between married couples and the competent authority or authorization committee has to ensure factors as under rule 4-a.

Clause D-

“The Transplantation of Organs between people who are not "Close Relatives" is covered under Rule 6fl. in such circumstances, the Authorization Committee should evaluate various aspects as mentioned above.

Clause (E)

Deals with the situation when both donor and recipient are foreigners. In such circumstances, a senior embassy official of a country of origin has to certify the relationship between the donor and the recipient. Authorization committee is supposed to exercise greater caution while examining cases of Indian donors consenting to donate organs to a foreign national, who is a near relative, including a foreign national of India origin and such cases should be considered rarely on case-to-case basis.

While determining the eligibility of an applicant to donate, he should be personally interviewed by the authorization committee and minutes of that interview should be recorded and video graphed. Greater precautions have to be taken when the donor is a woman. The identity of such woman and independent consent must be confirmed by a person other than the recipient. In order to confirm that the documents are for the same individual, who is the potential donor, the documentary proof of residence or domicile and details of parentage must be correlated with the applicant's photo identity. The committee might seek any further information or evidence that may be necessary and desirable given the specific circumstances of case if there is any insufficient or questionable information regarding the same. The

committee should state in writing its reason for rejecting or approving the application of the donor. Any approval by the committee should be subject to certain conditions viz., the approved donor to be subjected to all medical tests that are required at different stages to determine his biological capacity and compatibility to donate the organ, the psychiatrist clearance to certify his mental status, awareness, absence of any



overt or latent psychiatric disease, his ability to give free consent, filled up forms by the concerned persons involved and all interviews to be video recorded. Where the patient requires immediate transplantation, the committee should speedup its decision making process and its judgement in a sensible and practical manner.

The rules contain provisions requiring every authorized transplantation centre to have its own website. The committee should take its final decision within 24 hours of holding the meeting for grant of permission or rejection for transplant. The decision must be displayed on the notice board of the hospital or institution immediately and on the website within 24 hours of the decision. In addition to this, the website has to be updated regularly with respect to the total number of transplantations carried out in the hospital along with relevant details and such data must be accessible for compilation, analysis and further use by the respective state governments and central government. The amended rules also contain various forms that have to be filled by the related donor, spousal donor, un-related donor, the concerned medical practitioner, and application for approval of removal and transplantation in case of live donor which has to be filled by both donor and recipient.

2.2.2 The Transplantation Of Human Organs(Amendment) Act, 2011²⁰

Despite the implementation of the act in 1994, there were numerous reports of illegal transplantations and commercial dealing²¹s of organs in the market which led to a widespread perception that the act was not successful in curbing the commercial dealings of organs, may have even hindered genuine transplantations due to the lengthy and complicated procedures for approval and there was no significant increase in the deceased donor transplantations. Some major incidents of commercial dealings were reported in Bangalore in 1995 and 2002, Amritsar in 1995, New Okhla industrial development area,

²⁰ The Transplantation of Human Organs(Amendment)Act, No.16 of 2011 [Hereinafter ‘THOA2011’].

²¹ Agarwal et al., Evolution of the Transplantation of Human Organ Act and Law in India, 94(2),TRANSPLANTATION, 110-113



Noida in 1998, Delhi in 2000, New Delhi in 2004²², Calcutta in 2006, and Gurgaon in 2008.

These issues were addressed by the Delhi High Court in the case of Balbir Singh V. The Authorization Committee²³ and the court ordered for setting up of a review committee to review the functioning of the act²⁴. The review committee recommended various amendments to the acts and rules like setting up of a National Organ Transplant Program with particular focus on promoting Cadaver Donations, mandating the hospital staffs to request for brain donation to the relatives of brain dead patients, Next of kin to be given family welfare which preference in the waiting list, providing benefits through comprehensive health schemes to live donors, etc. some of these recommendations were taken into consideration and the government introduced the transplantation of humanorgans (amendment) bill,2009 in the parliament with several significant changes in the act. later, in 2011 the human organs (amendment) act, 2011 was passed on 27th September 2011 after the bill was referred to the standing committee on health and submitted its 44th report on the transplantation of human organs (amendment) bill, 2009 to the Rajya Sabha and Lok Sabha on 4 august 2010. However, the act did not come into force till January 2014 and the rules of the amended act was notified only in march 2014. this act has been adopted by all states and union territories except Andhra Pradesh and Jammu and Kashmir⁴⁵ which have their own legislations based on the act.

The significant development which came into force through the 2011 amendment was the inclusion of human tissues under the ambit of the act and more stringent punishment and penalties for violation of the provisions of the act. The act was hence renamed as transplantation of human organs and tissues act. The amendment defines human organ retrieval centre to be a hospital having adequate facilities for treating seriously ill patients

²² The Transplantation of Human Organs (Amendment) Act, No. 16 of 2011 [Hereinafter 'THOA2011'].

²³ Balbir Singh v. The Authorization Committee, 2004 SCC OnLine Del 709

²⁴ THOA 2011, *supra* note 40, § 2(ha).



who can be potential donors of organs in the event of death and which is registered under the provisions of the act.

The definition of near relative ‘under **section 2(i)**²⁵ of the act was revised to include grandfather, grandmother, grandson and granddaughter. **Section 2(oa)**²⁶ defines tissue as a group of cells performing a particular function in the human body, except blood.

Section 3 (1a) was inserted under the provisions of authority for removal of human organs and tissues. It imposes certain duties upon the registered medical practitioner who in consultation with transplant co-ordinator, if available has to ascertain whether the proposed donor had authorized before his death the removal of any human organ or tissue, from the person admitted to the ICU or from his near relative. The hospital must then proceed to document such authorization in the manner which is prescribed under the act. If such authorization has not been made, the medical practitioner has to make aware that person or near relative about the option to authorize or refuse donation of his organs or tissues. The hospital is then required to inform in writing to the human organ retrieval centre for removal, storage of transplantation of human organ. These duties of the medical practitioner also apply to those working in an ICU in a hospital which is not registered under the act.

Under the provisions related to restrictions on removal and transplantation of organs and tissues or both, section 9(1a) has been inserted. It is stated that where the transplant is between near relatives and the donor or recipient is a foreign national, prior approval of the authorization committee is required before removing or transplanting such organ or tissue. The critical aspect to note here is that the proviso prohibits any such approval by the committee when the recipient is a foreign national and the donor is an Indian national, and they are not near relatives. Section 9(3a) deals with swap donations and mandates the prior approval of the authorization committee for the same.

²⁵ *Id.* 9(1B), § 9(1C).

²⁶ THOTA 2011



A human organ or tissue cannot be removed from a minor’s body before his death for transplantation except in the manner prescribed and no such removal can be carried out in the case of a mentally challenged person before his death. The amendment also provides for the establishment of advisory committees to advise the appropriate authority in discharging its functions. It also provides for the establishment of national human organs and tissues removal and storage network and the central government is required to maintain a national registry of the donors and recipients of human organs and tissues, containing prescribed information to an ongoing evaluation of the scientific and clinical status of human organs and tissues. There were also significant changes in the punishments of offences and those changes are listed below:

Provision	Offence	Punishment (Before Amend- ment)	After Amend- ment
S. 18(1)	Renders services, conducts or helps	Imprisonment	Imprisonment

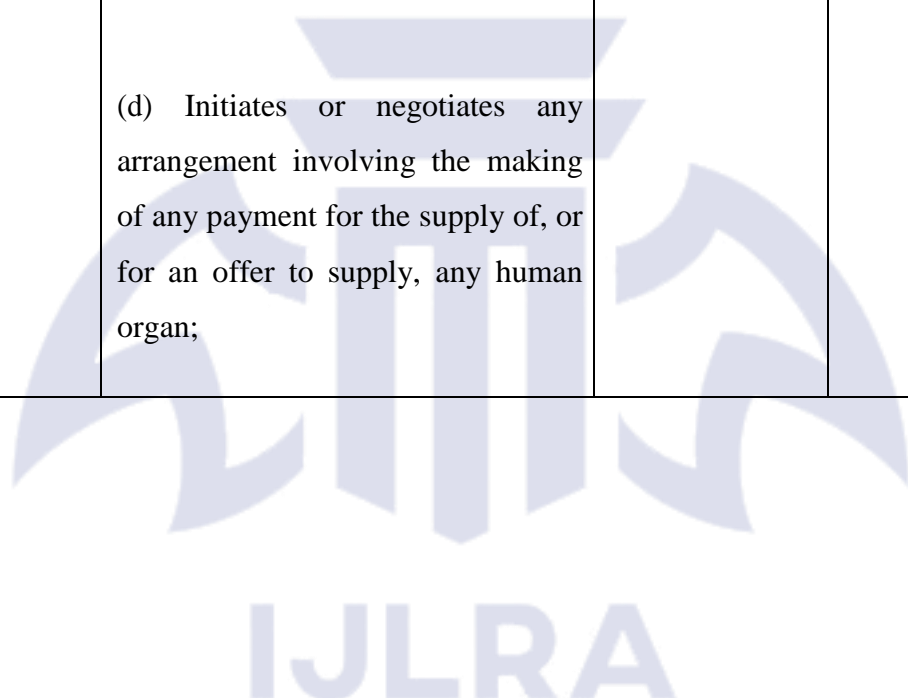
And 18(2) ²⁷	In the removal of any human organ without authority.	Will be imprisoned for 5 years and fine upto Rs. 10,000.(in case of a registered medical and practitioner, removal of his name from the council's register for a period of 2 years for the first offence permanently for the subsequent offence.)	Upto 10 years and fine upto Rs. 25,000. (removal of name of a RMP from the register for a period of 3 years for the first Offence ,permanently for subsequent offence)
S. 18(3) ²⁸ (New Provision)	Renders, services, conducts, associates or helps in the removal of human tissues without authority.		Imprisonment Upto three years and fine upto Rs. 5 lakhs

²⁷ *Id.* 9(1B), 9(1d).

²⁸ *Id.* 9(1B), 9(1d).

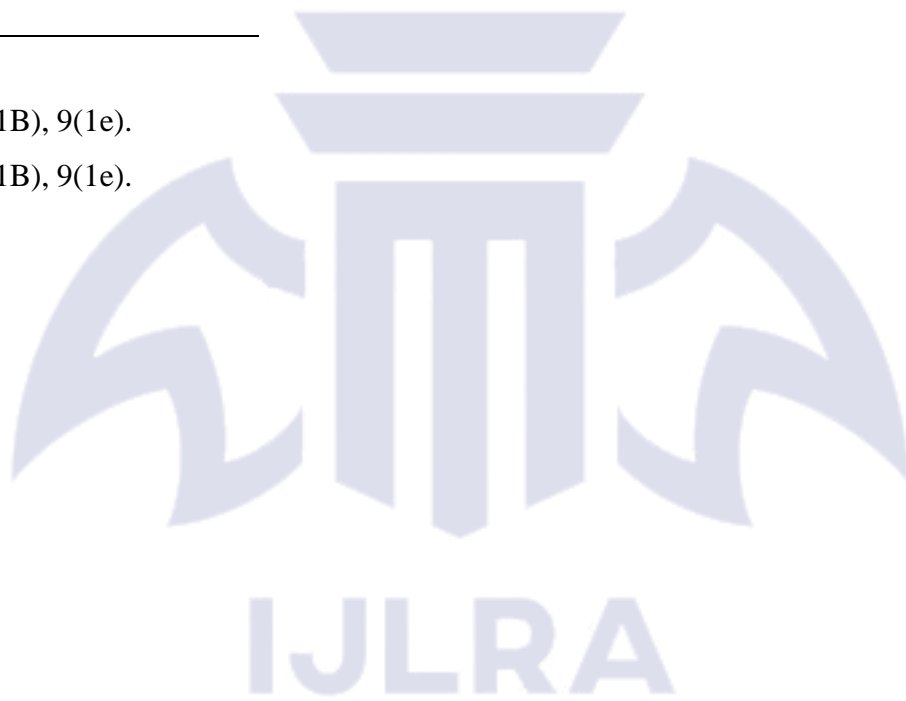


<p>S. 19 (A)²⁹ To (F)</p>	<p>(a) Makes/receives any payment for the supply or an offer to supply any human organ;</p> <p>(b) Seeks to find person willing to supply any human organ for cash;</p> <p>(c) provides any human organ in exchange for cash³⁰;</p> <p>(d) Initiates or negotiates any arrangement involving the making of any payment for the supply of, or for an offer to supply, any human organ;</p>	<p>Imprisonment of 2 to 7 years and fine Rs. 10,000 to 20,000.</p>	<p>Imprisonment of 5 to 10 years and fine of Rs. 20 Lakhs to 1 crore.</p>
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²⁹ *Id.* § 9(1B), 9(1e).

³⁰ *Id.* § 9(1B), 9(1e).



S.19(G)(New Provision)	<p>(e) takes part in the management of a body of persons, whose activities consist of or include the initiation or negotiation of any arrangements mentioned above;</p> <p>(f) publishes/distributes/cause to be any advertisement: inviting persons to supply or offering to supply any human organ for cash, or indicating that the advertiser is willing to initiate or negotiate any arrangement.</p> <p>(g) Abets in the preparation or submission of false documents to establish that the donation is between near relatives or by reason of affection or attachment.</p>	
S.19a (New Provision) ³¹	<p>(a) accepts or makes any payment for the provision of, or an offer to provide, any human tissue</p> <p>(b) looks for someone ready to supply human tissue in exchange for cash.</p> <p>(c) promises to provide any human tissue in exchange for money.</p> <p>(d) starts or negotiates any agreement that</p>	<p>Imprisonment Upto 3 Years And Fine Of 5 Lakhs To 25 Lakhs.</p>

	calls for paying money in exchange for providing or offering to provide human tissue.	
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³¹ *Id.* 13(A)(1).



	<p>(e) participates in the management of a group of people whose tasks include or entail initiating or negotiating any of the aforementioned arrangements.</p> <p>(f) publishes/distributes/causes to be published/distribute any advertisement: inviting persons to supply or offering to supply any human tissue for cash, or indicating that the advertiser is willing to initiate or negotiate any arrangement.</p> <p>(g) Abets in the preparation or submission of false documents to establish that the donation of human tissues is between near relatives or by reason of attachment and affection.</p>		
S. 20 ³²	Acting in contravention to any provision of the act or rules ³³ , or any condition of the registration granted, for which no punishment is separately provided.	Imprisonment upto 3 years or fine upto Rs. 5000.	Imprisonment upto 5 years and fine upto 25 lakhs.

³² *Id.* 13(b)(1).

³³ *Id.* 13(A)(1).

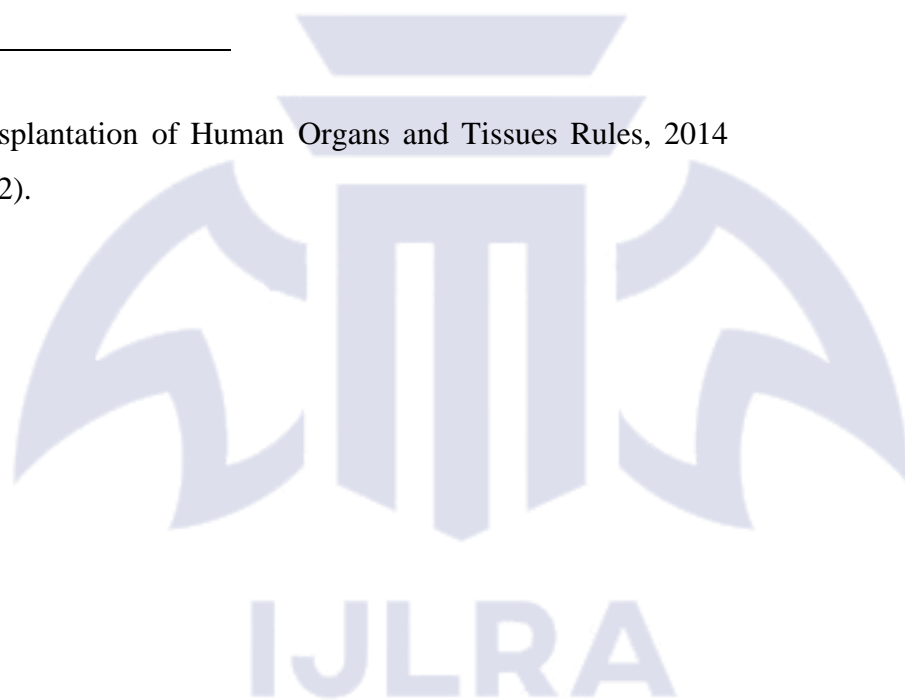


2.2.3 The Transplantation Of Human Organs And Human Tissues Rules, 2014³⁴

The transplantation of organs and tissues rules, 2014³⁵ operationalize the new entities and institutions which were set up by the 2011 amendment act and provide procedural and technical guidance for the procedure of organ transplantation and people carrying out the process under the act. It introduced 21 forms that have to be filled by the concerned persons during the course of transplantation. Though most of the provisions remain to be the same with minor changes, there have been changes in the numbering of the clauses and the provisions have been reorganised. Some of the major changes include the introduction of provisions on the priority of organ allocation, provisions on the working and scope of organ registry at the national and regional levels, swap donations to be approved by the authorization committee and to be permissible only from near relatives of the swap recipients, the cost for maintenance of cadaver or retrieval or transportation or preservation of organs or tissues to be borne by the recipient's family and not the donor's, etc.

³⁴ The Transplantation of Human Organs and Tissues Rules, 2014

³⁵ *Id.* 13(b)(2).



Chapter-3

Organ Trafficker In India And Factors Contributing To Organ Trade In India

3.1 Introduction

Organ transplantations are considered as one of the most outstanding achievements of the medical industry by saving and extending the lives of thousands of patients with organ failures. Numerous instances of generosity by organ donors and their families and several significant scientific and clinical advances achieved by dedicated medical professionals have made transplantation not only a life-saving therapy but a symbol of human solidarity³⁶. However, such a process has been tarnished by the several instances of trafficking in human organs and trade in human organs, which involves patients who are ready to spend any amount to save their own lives and the poor and vulnerable who are ready to sell their organs for cash. In 2007, it was estimated that up to 10% of organ transplantations across the world involved such illegal practices³⁷.

India is a commonly known organ exporting country, where organs are regularly transplanted from local donors to foreigners for money. Though the enactment of the transplantation of human organs and tissues act, 1994³⁸ seems to have contributed to reductions in the number of foreign recipients, the underground organ market is still existent and resurging in India. The voluntary health association of India estimates that about 2000 Indians sell a kidney every year, and this figure does not include all donations and transplantations taking place under the proper procedures³⁹. This chapter deals with the reality of organ trade and organ trafficking,

³⁶ The Preamble, *The Declaration of Istanbul on Organ Trafficking and Transplant Tourism*, 2018 ed.[Hereinafter ‘Declaration of Istanbul’].

³⁷ The state of International organ trade, *supra* note 4.

³⁸ *Id*

³⁹ Chris Hogg, *Why not allow organ trading?*, BBC NEWS, (Aug. 30, 2002), <http://news.bbc.co.uk/2/hi/health/2224554.stm>.



especially in India, various instances of illegal organ transplantations in the country, and most importantly, examines the multiple factors facilitating organ trade in India which includes the wide gap between demand and supply of organs, involvement of medical professionals in such practices, low rate of cadaver organ donations and high rate of live donations, cultural/religious and emotional constraints, lack of awareness about organ donations, etc.

3.1.1 Organ Trade And Trafficking

Organ trade is the commercial dealing in human organs where one person purchases and sells the organs which usually occurs outside legal transplantation systems. It involves diverse actors and consists of various practices, i.e., organ trafficking, transplant tourism, organ sales and organ harvesting⁴⁰. Organ trade can be traced back to the late 1980s which was conducted by transplant physicians in the gulf states, who were confronted with high mortality amongst patients who had purchased a kidney in India and returned home for follow-up treatment. It was revealed by the physicians that 130 patients from the United Arab Emirates and Oman travelled to Bombay to buy kidneys from a living unrelated Indian donor between June 1984 and May 1988, however, such practices were not criminalised in India till 1994⁴¹. India has been a hub for organ transplantations due to the low costs of treatment and willingness of people ready to sell their organs due to poverty, and the same is carried out even today despite a legislation in force criminalising such practices. as per the declaration of Istanbul on organ trafficking and transplant tourism⁴²,

⁴⁰ Seán Columb, *Beneath the organ trade: a critical analysis of the organ trafficking discourse*, 63, CRIME LAW SOC. CHANGE, 21-47 (2015).

⁴¹ Declaration of Istanbul, *supra* note 51, at 2

⁴² Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings*, May 16, 2005, CETS 197



“organ trafficking consists of (a) removing organs from living or deceased donors without legal authorization or consent or in exchange for money or another benefit to the donor and/or a third party; (b) transporting, handling, transplanting, or otherwise using such organs; or (c) providing any unjustifiable benefit to, or requesting the same by, a healthcare professional, public official, or employee of a private sector entity to facilitate or carry out the illegal activity.”

This definition was derived from the council of Europe convention on trafficking in human organs, 2015⁴³ by the drafters of the declaration. while organ trade includes organ trafficking, it can also be carried out between persons with valid consent withor without knowledge of the illegality of such practices. On the other hand, organ trafficking involves coercion, force, or undue advantage or removing the organs eitherwithout obtaining valid consent from the donor or without his knowledge.

There are instances where organs are removed from persons on the pretext of unrelated surgeries or medical treatments without their knowledge. While some do not realise their bodies have been functioning without one kidney or any part of other organs in their lifetime, some realise the same at a later point in time while undergoing random medical check-ups or diagnosis of any related ailments. There are even cases where the demand for dowry eventually led to the removal of a kidney and selling it for cash by the husband and in-laws⁴⁴.

⁴³ DR. RAMESH KUMAR, KIDNEY TRANSPLANTS AND SCAMS: INDIA’S TROUBLESOME LEGACY (Sage Publications Pvt. Ltd) (2020)

[Hereinafter ‘Kidney transplants and scams’]; As stated in ‘Kidney transplants and scams’, a woman in Kolkata who got married in 2005 was under constant pressure from her husband and his family for dowry. In 2016, while she was admitted to a hospital for appendectomy, the ultrasound revealed that her kidney had been removed illegally. The police arrested her husband and in-laws who confessed that the woman’s kidney was sold to a businessman in Chhattisgarh

⁴⁴ *Kidney scam kingpin gets 7 yrs in jail for threatening witnesses*, THE

TRIBUNE, (Feb. 29, 2020),

<https://www.tribuneIndia.com/news/chandigarh/kidney-scam-kingpin-gets-7-yrs-in-jail-for-threatening-witnesses-49165>



There have been various reports and arrests of rackets involved in organ scandals especially involving kidney, in various parts of the country even after the transplantation of human organs and tissues act, 1994 had come into force. The Gurugram kidney scandal, which was a multi-billion-rupee racket, has been well known for its implications on a national and international scale, led by an untrained non-medical and self-proclaimed surgeon who carried out 600 illegal kidney transplants between 1996 to 2008.

This person was arrested a number of times but eventually managed to obtain bail or flee from police custody, relocate to different places, and continue carrying out such illegal practices. In 2013, a special CBI court awarded seven years imprisonment with a fine of Rs. 60 lakhs to him and his brother, who was involved in the scandal. However, he managed to escape from the police custody and was finally arrested in late 2017 and in February 2020, the convict was again sentenced to 7 years imprisonment and a fine of Rs. 20,000 for threatening the witness in the scam.

During the period between September 2010 to May 2012, a non-profit international health and human rights organisation called coalition for organ failure solutions India identified approximately 1000 victims of human trafficking for organ removal.

In India and conducted semi-structured in-depth qualitative interviews with 153 of them from four areas of the country viz., Erode, Chennai, villages of West Bengal and small towns around Karnataka. Out of these victims who were interviewed, one of their kidneys was removed between 1981 and 2012, of which 34 cases, i.e., 22 % of these removals occurred from 2009 to summer 2012, which makes it amply clear that the illegal transplantations and commercial dealings on human organs are being carried out even after the implementation of the transplantation of human organs and tissues act, 1994. Victims described their experiences and stated that their health has been deteriorating in addition to the negative social, economic, and psychological consequences of the removal of their organs. Each of these cases involved the commercial removal of a kidney

which was confirmed by the doctors through medical follow-up examinations.



In the state of Kerala, there have been reports in 2002 stating the Tribals were the targets of organ rackets. The Tribals were made to donate their organs and were paid money in exchange. The tribal people from the Ulladas, Oralis, Aaryas communities and the Dalits were not hesitant to admit that they survive by selling their kidneys. This made the unscrupulous racketeers tighten their grip on these tribes as they clearly knew that the tribes were ready to sell their kidneys. The Tribals came forward to sell kidneys for Rs 1.5 lakh each without any persuasion. Hence, a village called Poomala began to be known as the ‘kidney village’ among middlemen. The tribal kidney scam in the state involved money power, muscle strength, political influence, as well as elements of dishonesty and duping potential recipients and swindling lakhs of rupees on the false promise of locating a compatible kidney donor. In 2014, the city police in Kochi arrested the kingpin behind the scam. The relatives of the victims claimed that they met the accused through a newspaper advertisement for kidney donors that they themselves had put out in 2011, when the transplantation of human organs and tissues act, 1994 was in force prohibiting any activities involving soliciting kidney donors through print or visual media. There were also other reports of paid organ transplantations and illegal dealings in organs in the state. Another kidney racket involving transactions worth Rs.150 crores was arrested in the city of Amritsar in Punjab in 2012. The police arrested one of the top kidney transplant surgeons in the city, other doctors, lawyers and middlemen.

3.2 Why Cases Of Organ Trafficking Rising?

According to the survey there are 3 major factors that cause organ trafficking-

3.2.1 Poverty – In Chennai, India, 305 people were the subjects of a research in 2002⁴⁵ that found 96% of them sold their kidneys to pay off debts, but only 22% of them really managed to do so.

Being offered anywhere between \$1,000 and \$3,000 for a kidney (notice the actual worth of >\$62,000) is like

⁴⁵ Kidney transplants and scams, *supra* note 59.



winning the lottery for many people in India, when the typical yearly median income is about \$616. 81% of those offered money in return for their organs, mostly their kidneys, never receive any money at all.

3.2.2 Demand

While the supply of organs is barely growing, the demand for them is soaring in wealthy nations. Transplant tourism—the practise of individuals travelling across borders to receive an organ transplant—is a result of this. When everything else fails, folks on waiting lists who feel they have no choice but to do this or those who don't want to risk endangering the life of a loved one by asking for a donation will frequently resort to this.

Most organ recipients come from nations where there is a long waiting list for organs or where transplants are prohibited.

3.2.3 Lack Of Education⁴⁶

Anthropologist **Monir Moniruzzaman** asserts that practically all of the persons who are forced into selling their kidneys have no idea what they are doing. More precisely, it was discovered through interviews with several donors and an examination of newspaper advertisements in Bangladesh that the doctors had blatantly misrepresented to their intended audiences which helps the traffickers to take advantage of illiterate person.

3.3 Trafficking And Criminal Law

Organ trafficking referred as criminal activities or illegal activities done by selling the human organ with the help of the transplantation of illegal organ of living or dead individual

⁴⁶ Kidney transplants and scams, *supra* note 59



“Trafficking” means the act of buying and selling of something which is illegal.

While organ trafficking is illegal and is happening everywhere in the world so to stop it there are several provision given related to organ trafficking which will help us to not let it happen.

If we see in India then-

As there is no provision given under Ipc and Crpc related to organ trafficking so there is separate act given to deal with this issue which is known as THOTA(transplantation of human organs and tissue act 1994) .

3.3.1 Under THOTA-

According To Sec 18-

- (a) Anyone who performs services for or at hospital and who without authorization conduct, assist or contributes to the removal of any human organ is punishable up to 10 years in prison and a fine up to 20 lakh rupee.
- (b) The appropriate authority shall report the name of any person found guilty under subsection(1) who is registered as a medical practioner to the appropriate state medical council so that council

can take appropriate action such as removing the person's name from the council's register for 2-3 years for the first offence and permanently for any subsequent offence.

(c) Any who provide their services to or at a hospital and conducts, associates with or assist in any way the removal of human tissue without authorization is penalized up to 3 years in prison and a fine of up to five lakh rupees.



3.4 Challengess Of Organ Traffiking Victim

Many people including medical professionals regard buying and selling of human organs as a win-win situation where both the donor and the recipient are benefitted due to the transaction. However, the reality is not the same and there is a huge issue of exploitation of the poor by rich and middlemen. In addition to such exploitation, there are serious issues revolving around organ trade and it cannot be a win-win situation as it is widely propagated. Some of the major arguments against the commercial dealings in human organs are as follows:

3.4.1 Consequences Of Commercial Living Donors

There are various consequences with respect to commercial living donors after organ removal. Studies have shown that the impacts include negative health, economic, social and psychological consequences. It has been reported that there is a general deterioration in their health status, which is 86% in India. It has also been revealed that selling organs for getting rid of debts and poverty has also not solved such issues. Despite payments received from the recipients of organs, the economic status of commercial living donors tends to decline as a majority of them lose their ability to return to labour intensive work, compromising their good health and capacity to generate income through such jobs. In India, such commercial living donors 'average family income declined by one-third after the nephrectomy and 75% of them remained in debt even after selling their organs. A financially motivated organ donation also causes social and emotional harm to the living donors. The data makes it clear that despite resorting to organ trade to resolve their economic crisis, the same does not help but in fact it adversely affects their health status leading to the inability to work in the future. Hence, commercial dealings in human organs, though it may appear that it would help the poor to solve their economic issues, it just

adds to their misery.



3.4.2 Benefits To The Rich And Exploitation Of The Poor

The poor have been widely exploited through the practice of buying and selling organs and the people who are desperate enough to sell their organs to lead a normal life are exploited by the rich and the middlemen. Their financial burdens force them to sell their kidneys to meet their very basic needs. Many of them later claim that the promised amount is not paid to them. Proper follow-up of their health status is not carried out leaving them unattended once the organs have been procured, leading to serious health issues affecting their physical and mental health.

There is also a concern that once a market in human organs is permitted, it would be the wealthy who will be able to purchase the organs and the poor will not be able to afford the same. Organ distribution will be on the basis of wealth and not need. This can seriously affect the very idea of accessibility of organs and resolving organ shortage through an organ market. Hence, it can be stated that there cannot be a market of organs where the poor are not exploited and the rich will always be in a better position to afford and access the organs.

3.4.3 Harm To Altruism

Organ trade would undermine the voluntary organ donations and if there is a market in organs, fewer people will donate and people will instead sell their organs. Since the current system of organ donation encourages and celebrates altruism and it is a virtue that needs to be upheld, commercial market in human organs could lead to lesser or no altruistic donations, leaving no way for people who cannot afford to buy an organ to survive. Such a market in human organs would eventually deprecate and destroy the present willingness of members of the people to

donate their organs out of altruism. Although sometimes promoted as a means of providing a solution to the shortage of organs, repeated experience has shown that



commercial donation comes at the expense of altruistic donation and not in addition to it. Hence, commercialisation of human organs could stand in the way of altruistic donations and can in turn affect people who cannot afford to buy an organ.

3.4.3.1 Commercialisation Of The Human Body And Issue Of Free Consent

The commercial dealings in human organs treat the organs to be mere commodities that can be bought and sold for payment just like any other commodity. This raises several ethical issues and the dignity of the human body will be compromised if they are treated as objects. This leads to a devaluation of the human body and it would be seen as simply a collection of parts, which can be disposed of at will. Ethically and morally, it will not be a good solution to commercialise and make the human organs mere commodities in order to address the organ shortage⁴⁷.

Another concern is that a person's consent for organ donation⁴⁸ would not be genuinely autonomous because of the coercive, manipulative impact of the prospect of receiving money for the organ. Those who sell their organs are often driven by poverty or threats from debt collectors. Any person wanting to sell his organs must be driven by such desperation that such person's consent must be regarded as invalid. There can be no genuine and free consent to the sale of organs and the three major arguments supporting the same are that the consent is not genuine as there is incompetence through ignorance, coercion by poverty and coercion by unrefusable offers. Hence, the consent cannot be regarded as free will and can be coerced due to the various socio-economic conditions of the donor.

⁴⁷ Lok Sabha Parliamentary Q & A on Organ Donation & Transplantation, Unstarred Question No. 1563, (Mar. 4, 2016), available at <https://www.mohanfoundation.org/loksabha/loksabhaQA.asp>.

48 Unravelling of a kidney racket, *supra* note 8.



3.4.4 Increase In Transplantation Costs

Organ transplantation being a complex procedure, the complexity has always been reflected in its cost too. Commercial market in human organs can result in a huge increase in the cost of organ transplantations. Payments for human organs could mean that additional costs would be transferred to the recipients making the already expensive procedure much more costly. This would mean that many people will not be in a position to afford the procedure and can result in millions losing their lives. As a country where there is a large disparity in the distribution of healthcare facilities

Where the rural poor are unable to afford and access the healthcare system, this would have a devastating effect on them who might have to succumb to death due to the reason of high costs of organ transplantations.

3.5 Important Case Laws

3.5.1 B.L. Nagaraj And Others Vs. Kantha And Others⁴⁹, the intended recipient filed a writ appeal with the high court of Karnataka challenging the ac's decision to deny the recipient's sister-in-request law's for organ donation on the grounds that close relatives were not eligible donors. When granting the writ petition, the high court stated: "there is no provision in the act which forbids a person from donating his kidney simply because the 'close relative' has not been regarded as a donor by the family for kidney transplantation. While denying the petitioners permission, the committee has gone in the wrong direction. The committee would inquire of the second petitioner to determine whether she would be giving the kidney as a result of her "attachment and

compassion." relationships between the donors and recipients, length of acquaintance and level of contact, reciprocity of feelings, thankfulness, and other human ties may be some of the elements that support "affection and attachment" between two people. The

⁴⁹ **B.L. Nagaraj And Others Vs. Kantha And Others-2010**



committee is responsible for making sure that the human organ does not turn into a commodity. The primary goal of the law is to prohibit the sale of human organs for profit.

Additionally, the act does not provide recourse for those whose families may choose not to donate an organ.

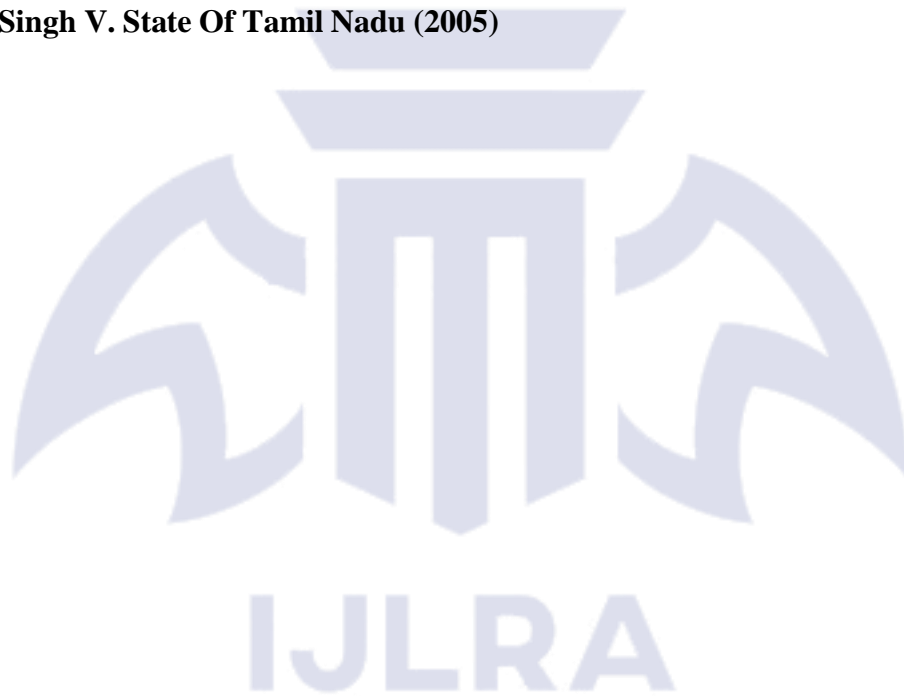
Because of this, the THOTA act has neither helped to stop the illicit trade or offered workable solutions to close the gap between the number of transplants performed and the supply of organs.

3.5.2 Kuldeep Singh V. State Of Tamil Nadu (2005)⁵⁰

In that case, the proposed transplant site was in the state of Tamil Nadu, although both the potential donor and receiver were from the state of Punjab.

Which state's authorization committee approval was to be sought, that was the question. The supreme court ruled that because the act's goal is to stop the sale of human organs, the authorization committee must determine the true reason the donor gave for approving the removal of his organ. It came to the conclusion that the authorization committee of the state that the donor and donee are a part of would be better suited to determine this reason. However the rules were amended with effect from 04.08.2008 and rule 6b (supra) was inserted. The said rule 6b makes mandatory either approval or NOC from the state of domicile but makes only the approval mandatory from the place of intended transplant.

⁵⁰ **Kuldeep Singh V. State Of Tamil Nadu (2005)**



3.5.3 Rajindra Kumar Vs State Of Punjab 2005⁵¹

The petitioner has argued that he has full-blown kidney failure. He was advised to have the aforementioned organ transplanted. The petitioner's wife had previously given one of her kidneys. However, the aforementioned organ transplantation was unsuccessful; as a result, the petitioner was given medical advice to undergo a new kidney transplant. Jeewan Sharma, a willing donor, was located by the petitioner. When a human organ donor and receiver are unrelated, the transplantation of human organs act, 1994(hereafter referred to as the "act") stipulates that the authorization committee established by the act must approve the transplant. Jeewan Sharma wasn't related to the previously mentioned prospective donor since consequently, the petitioner and the donor asked the authorization committee for the required authorization. Both the donor and the petitioner submitted their separate affidavits for the aforementioned reason. Additionally, a number of petitioner's medical test results were documented, along with certificates provided by the surgeon who would perform surgery on the petitioner. Shrimati Rita Sharma, the intended donor's wife, also submitted an affidavit. On September 27, 2004, the authorising committee convened. The authorization committee discovered that the prospective donor and his wife had no familial ties to petitioner and were only employed as housekeepers. This led to the conclusion that since the donor and his wife were employed as servants by the recipient's family and there was a significant economic gap between them, "the money involvement cannot be ruled out." as a result, the authorization committee(ar) declined the petitioner's request for authorization.

⁵¹ **Rajindra Kumar Vs State Of Punjab 2005**



Chapter-4

International Perspective And Practices Of Organ Trafficking And Its Policies

4.1 Council Of Europe Convention Against Trafficking In Human Organs⁵²

The convention which was adopted in 2005 by the council of Europe seeks to prevent and fight the trafficking in human organs by providing for the criminalisation of certain acts⁵³, to protect the rights of victims of the offences as per the convention and to facilitate cooperation at domestic and international levels on action against the trafficking in human organs⁵⁴. The convention calls upon each party to take necessary measures, legislative and others to establish the intentional removal of organs from living or deceased donors as a criminal offence under its domestic law, where the removal of the organ is carried out without the free and informed consent of living or deceased donor or unauthorized removal⁵⁵ as under its domestic law in case of the deceased donor; where the living donor or a third party has been offered or has received any monetary benefit or comparable advantage in exchange for the removal of organs including removal of organs from a deceased donor.

The purpose of organ removal is not important for constituting an offence under the convention. Some other offences as provided under the convention for the parties to establish as criminal offences address all the parties involved in the human organ

Trafficking including those who solicit or recruit donors, those who move or transport

⁵² Council of Europe, *Council of Europe Convention against Trafficking in Human Organs*, Mar. 25, 2015, CETS 216, <https://rm.coe.int/16806dca3a>

⁵³ World Health Assembly Resolution 57.18, *Human organ and tissue transplantation*, http://www.who.int/gb/ebwha/pdf_files/WHA57/A57_R18-en.pdf.

⁵⁴ UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*

⁵⁵ *Id.* art 4.



organs⁵⁶, those who use illicitly removed organs and medical professionals or others who perform illicit transplant surgeries. The convention hence tries to criminalise⁵⁷ the use of illegally removed organs, illegal solicitation and recruitment of organ donors and recipients for any financial gain, acts committed following the illicit removal of organs and aiding, abetting and abetting all the offences as mentioned above.

4.2 Declaration Of Istanbul⁵⁸

Globally, there has also been a serious shortage of organs. It was the need of the hour to address the urgent and growing issues in relation to sale of human organs, transplant tourism and trafficking in organ donors with respect to the global shortage of organs. Hence, in 2008, a summit meeting of more than 150 representatives of scientific and medical bodies from across the world, government officials, social scientists, and ethicists, was held in Istanbul. Preparatory work for the meeting was carried out by a steering committee convened by the transplantation society and the international society of nephrology in Dubai in December 2007⁵⁹. Draft declaration by the said committee was circulated widely and then revised considering the comments received and later at the summit, the revised draft was reviewed by working groups and finalized in plenary deliberations. It was subsequently endorsed by more than 135 national and international medical societies and governmental bodies involved in organ transplantation. The declaration of Istanbul was the first concerted effort to mobilize the professional transplant community so as to develop practical and ethically acceptable solutions to the problem of international trafficking of human organs⁶⁰.

The declaration seeks to prohibit transplant commercialism, transplant tourism and organ

⁵⁶ *Id.* art 4.

⁵⁷ *Id.* art 5.

⁵⁸ *Id.* art 6.

⁵⁹ *Id.* art 7.

⁶⁰ Gabriel M. Danovitch & Mustafa Al-Mousawi, *The Declaration of Istanbul-early impact and future potential*, 8, NAT. REV. NEPHROL, 358-361 (2012).



trafficking. It also tries to provide safe, effective, and accountable practices addressing the issues and needs of the organ recipients as well as protects the rights of living organ donors. One of the major objectives of the declaration is to maximise the benefits of organ transplantations and share them equitably with the people in need and at the same time, no reliance to be placed on unethical and practices especially against the poor and weak people across the world. As per the principles of the declaration, trafficking in human organs and trafficking in persons for organ removal should be prohibited and criminalized. It also states that organ donation should be a financially neutral act. It also put forward various proposals to increase the donor pool, prevent organ trafficking, commercialisation of transplants, transplant tourism and to encourage legitimate, lifesaving transplantation programs. They include proposals to respond to the need to increase deceased donation so as to make sure that the protection and safety of living donors and appropriate recognition for the same.

4.3 World Health Organisation Guiding Principles On Human Cell, Tissue And Organ Transplantation⁶¹

Who guiding principles was endorsed in may 2010 by the 63rd world health assembly resolution and updated considering the changes in practices and perspectives with respect to organ and tissue transplantation. It intends to provide an orderly, ethical and acceptable framework for the procurement and transplantation of human cells, tissues and organs for therapeutic purposes. The member countries can determine the means through which these guiding principles are implemented. The essential points of the 1991 version have been preserved while new provisions were incorporated as a response to the current trends in organ and tissue transplantation, especially provisions for protecting the living donors and the increasing use of human cells and tissues. These principles emphasise on the significance and necessity of ensuring proper documentation and enhancing transparency, both for quality management purposes as well as to justify the confidence of patients, medical professionals,

⁶¹ World Health Assembly Resolution 63.22



and the general public in donation and transplantation services. Cells, tissues and organs may be removed from deceased and living persons for transplantation only as per the guiding principles.

Any cells, tissues or organs may be removed from the body of a deceased if any consent is obtained as per the law and there is no reason to believe that deceased had any objection to such removal. It is also important that the physician who determines the death of a potential donor should not be directly involved in the removal of organ or subsequent procedures so as to avoid any conflict of interest, and they will also not be responsible for the care of the intended recipient of the organ so removed. Cadaver donations have to be improved to their maximum therapeutic potential, however, living donations may be permitted as per domestic regulations and generally, living donors should be related to the recipients genetically, legally or emotionally. Such donations are acceptable when there is informed and voluntary consent, when necessary follow-up and professional care is ensured and the selection criteria should be scrupulously applied and monitored. There should not be removal of any cells, tissues or organs from the body of a living minor or a legally incompetent person except as per the narrow exceptions under national law.

The most important provision in the context of commercial dealings in human organs is guiding principle 5 which states that:

"Only voluntary donations of organs, cells, and tissues should be made; none should be in exchange for payment or another type of incentive with a monetary value. It should be illegal to buy, offer to buy, or sell living people or the next of kin of the deceased any cells, tissues, or organs for transplantation.

The inability to sell or buy human cells, tissues, or organs does not

prohibit paying for the costs associated with obtaining, processing,



preserving, and supplying human cells, tissues, or organs for transplantation as well as paying for reasonable and verifiable expenses incurred by donors, such as lost income.”

The provision makes it clear that it prohibits any commercial dealings in human organs, cells or tissues and the expenses incurred by the donor for the process should however be reimbursed. The commentary to the principle states that this provision intends to avoid payments for organs as it is likely to take unfair advantage of the poorest and vulnerable sections of the society, undermines altruistic donation, and leads to profiteering and human trafficking. Also, such commercial dealings can convey the idea that such persons lack dignity and are used as mere objects by others. The principles provide the freedom to the countries to decide the details and method of the prohibitions it will use, including punishments that may encompass joint action with other countries in the region. Such a prohibition on commercial dealings of organs, cells and tissues should apply to all individuals including the transplant recipients who try to evade law or domestic regulations by travelling to areas where prohibitions on commercialization are not enforced.

There are also provisions including prohibiting advertisements for inviting donors with an aim to involve commercial dealings, restraining physicians and other parties from involving in transplantations and other procedures where there is exploitation or payments made to the donor or next of kin in case of cadaver donations and prohibiting healthcare facilities and professionals from receiving any payment exceeding the justifiable fee for the services provided. It is also stated that the allocation of organs must be as per clinical criteria and ethical norms and not financial or other considerations.

4.4 Position In The United States Of America

There have been around 26 legislations passed in the US aiming at regulating organ transplantations and donations and these regulations range from what constitutes being dead, to what constitutes consent for organ donation, to national honours for organ donation.



However, the main legislation associated with commercial dealings in human organs is the national organ transplant act (NOTA) passed by the USA congress in 1984 and the uniform anatomical gifts act, 1968.

4.4.1 The National Transplant Act 1984

The national transplant act was enacted to provide for the establishment of task force on organ transplantation and the organ procurement and transplantation network with the main aim to authorize financial assistance for organ procurement organizations, and for other related purposes. It is the cornerstone of federal system for organ donation and transplantation

Section 101(b).

Discusses the obligation of task force which includes conducting comprehensive examinations of the medical, ethical, economic, legal, and social issues presented by human organ procurement and transplantation, making assessment of immunosuppressive medications used to prevent organ rejection in transplant patients, prepare reports on various matters like recommendations to ensure the equitable allocation of donated organs among transplant centres and among patients medically qualified for an organ transplant, etc. Title iii of the act deals with prohibition of organ purchases wherein it is stated under section 301 that-

- (A) If the transfer has an impact on interstate commerce, it is illegal for anyone to knowingly obtain, receive, or otherwise transfer any human organ for use in human transplantation.**

(B) Anyone who violates subsection (a) faces a maximum fine of \$50,000 or a maximum sentence of five years in prison, whichever is greater.



The act clearly prohibits any commercial dealings in human organs and any violations will result in imprisonment extending to five years and or fine. The valuable consideration as mentioned above does not include the reasonable payments with respect to the organ removal, transportation, implantation, processing, preservation, quality control, and storage or the expenses of travel, housing, and lost wages incurred by the donor with respect to the donation. Nota called for an organ procurement and transplantation network (optn) to be created and run by a private non-profit organisation under federal contract. In 1986, optn was created with an aim to increase and ensure the effectiveness, efficiency and equity of organ sharing in the national system, and increase the supply of donated organs available for transplantation. The federal contract was given to the united network for organ sharing, a non- profit organization that coordinated more than 4,60,000 transplants from deceased organdonors within the next three decades.

4.4.2 The Uniform Anatomical Gifts Act, 1968

Prior to nota, the legislative activity with respect to organ transplantation has been primarily driven by the uniform anatomical gifts act, which was passed by the national conference of commissioners on uniform state laws in 1968 and adopted by the district of Columbia and all fifty states, with slight variations by 1973. It is another significant law in the context of organ transplantation and has been revised in 1987 and in 2006. The uniform commissioners isa body of law and policy experts who are appointed by the governors of each state for identifying areas that would benefit from uniformity nationwide but which cannot be federally regulated as they fall under the reserved powers of the state. Organ donation being one of those areas and since

there existed a need for a uniform law on the policy of deceased organ donation, UAGA has been enacted in every state in the US, thereby providing national consistency through the state law. The act establishes a regulatory framework for the donation of tissues, organs, and various other human body parts in the country. It tried to increase the



number of available organs by streamlining the process for individuals to pledge as organ donors. The organ donor card which was mandated to be recognised as a legal document empowered any person who has attained the age of 18 years to legally pledge to donate his organs upon death. The act regards donation of an organ as an anatomical gift and lack of any monetary consideration is vital in this context as the federal law prohibits any buying and selling of organs. Under the act, an adult can make a gift before his death, which is done usually through a donor registry. Donor registries have been very successful with annual growth for 10 years since 2018 and over 142 million registered donors as of January 2018, representing over 54% of the adult population. Next of kin of deceased can also authorize a gift at the time of the donor's death. The law also bars anyone including the family from revoking the consent of the deceased, if he has made an anatomical gift before his death. The recipients of a gift are restricted to hospitals, doctors, medical and dental schools, universities, tissue banks, and a specified individual in need of treatment. The purposes of such gift are transplantation, therapy, research, education, and the advancement of medical or dental science. Section 10 of the act deals with the prohibition on the sale or purchase of parts. It reads as follows:

(a) It is illegal to intentionally buy or sell a body part for transplantation or therapy if the removal of the part is planned to take place after the decedent's passing.

The act requires every hospital to ask every patient on or before admission to a hospital whether the person has pledged a donation of organ or tissue. Once this law came into force in USA, there was a significant increase in the level of awareness about organ donation and the number of organ donors⁶².

Organ donation breakthrough collaborative was an initiative started in the country in 2003⁶³

⁶² TOHOA, *supra* note 113

⁶³ Institute for Healthcare Improvement, *Improvement Stories-Organ Donation*

BreakthroughCollabo-rative,

<http://www.ihl.org/resources/Pages/ImprovementStories/OrganDonationBreakthroughCollaborati>

ve.as px.



To save thousands of lives a year by spreading awareness and known best practices to the nation's largest hospitals to achieve organ donation rates of 75 percent or higher in these hospitals. As of 2008⁶⁴, the organ donation breakthrough collaborative has achieved a 30 percent increase in the rate of deceased organ donation in the past five years, compared to a 1-2 percent increase over the past decade.

4.5 Position In Australia

The supply of organs in Australia largely depends upon the voluntary altruistic donation of deceased organs. There is a ban on commercialisation of human organs and no financial inducements can be offered to the donors except to cover the expenses incurred as a result of the organ donation. Cadaver organ donations are encouraged through community education campaigns in the country. Number of organ transplants has increased considerably due to major changes in the procurement of deceased organs which occurred after the introduction of the national organ and tissue authority in 2009, with a record 1480 organs donated in 2015⁶⁵. There have been various efforts by the country to improve donation rates to both living and deceased donor organ pools and the same has resulted in significant.

Improvement in the access to organ transplantation for the citizens, as it was indicated by a 55% increase in the number of organ transplantation carried out from 843 in 2009 to 1303 in 2015.

Organ trafficking is an offence under division 271 of criminal code⁶⁶ which deals with offences of trafficking in human beings including trafficking for the purpose of removal of organs. It covers trafficking into and out of Australia, as well as between states and territories

⁶⁴ Alexander et al., *Organ Transplantation in Australia*, 101(5), TRANSPLANTATION, 891-892 (2017)

⁶⁵ ORGAN AND TISSUE AUTHORITY, AUSTRALIAN GOVERNMENT, AUSTRALIAN DONATION AND TRANSPLANTATION

⁶⁶ *The Criminal Code Act 1995 (Cth) div 271 (Austl).*



in Australia, i.e., domestic organ trafficking. It would constitute an offence to involve in the entry or intended entry into the country, reception, exit or intended exit or movement around Australia of a victim by a person who is reckless as to whether it will result in the removal of a victim's organ. It is considered as an aggravated offence if the case involves a child, or if it involves cruel, inhuman or degrading treatment, or conduct that might lead to death or serious harm to the victim or another person. The punishment for such offences is imprisonment extending to 12 years and 20 years for the aggravated offences. There has been only one case of organ trafficking in Australia under the provisions of criminal code and prosecution did not proceed with the case due to the death of one of the alleged offenders⁶⁷.

Apart from the criminal code which punishes the trafficking in human beings including trafficking for the purpose of organ removal, each state and territory in Australia has specific legislations dealing with organ transplantations and regulating the removal of human organs and tissues. They are human tissue act 1983 (nsw); human tissue act 1982 (vic); transplantation and anatomy act 1979 (qld); human tissue and transplant act 1982 (wa); transplantation and anatomy act 1983 (sa); human tissue act 1985 (tas); transplantation and anatomy act 1978 (act); and the transplantation and anatomy act (nt).

The legislations have substantially similar provisions and definition of tissue makes it clear that it includes an organ. Each of these legislations makes provisions with respect to offences related to transplant tourism and organ removal. For example, part viii of the human tissue act 1982 in the state of victoria deals with prohibition of trading in tissues including organs. While section 38 of the act states that a person shall not sell, or agree to sell, tissue (including his own tissue) or the right to take tissue from his body, section 39 deals with prohibition on buying of the tissue and states that a person must not buy, agree to buy, offer to buy, hold himself out as being willing to buy, or inquire whether a person is willing to sell to the person or another person, tissue or the right to take tissue from the body of another person. If the

⁶⁷ Natalie O'Brien, *Organ trafficker's death closes case*, The Sydney Morning Herald, (Mar. 25, 2012), <https://www.smh.com.au/national/organ-traffickers-death-closes-case-20120324-1vqvn.html>; Anti-slavery Australia, *Parliamentary Inquiry into Human Organ Trafficking and Organ Transplant Tourism*, Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade.



minister where he considers it desirable by reason of special circumstances, can grant permit subject to any conditions to buy tissue (other than or the right to take tie from the body of another person. Covering reasonable expenses incurred as a result of organ removal will not constitute buying and selling of tissues.

The punishment for unauthorized selling of an organ will be 50 penalty units and unauthorized buying of an organ will lead to 100 penalty units or six months imprisonment or both. Section 40 deals with restrictions on advertisements and prohibits advertisements for buying and selling of organs unless the proposed advertisement has been approved by the minister and contains a statement to that effect. Any violation would attract 50 penalty units or imprisonment for three months, or both.

4.6 Presumed Consent System In Spain

Presumed consent means that someone is believed to have given permission for the removal of the organ and transplant it to a potential recipient. Spain follows the system of presumed consent and a person has to specifically opt-out if he does not intend to donate his organs. Presumed consent plays a vital role in the organ transplantation system and has considerably contributed to the cadaver donation rate in Spain. As per the international registry in organ donation and transplantation, the organ donation rate of Spain stands at 37.9 per million⁶⁸. Spanish system permits more government involvement in individual healthcare, and also enables the government to easily collect data and build a donor registry which is managed by the Organizacion Nacional de Transplantes (ont).

All Spanish citizens are assumed to have consented to organ donation on their death and the organs can be transplanted to a recipient unless the families explicitly refuse the same. Spain is

considered best in terms of its rate of deceased organ donation as the organ transplantation system in the country capitalises on brain deaths due to road accidents. The establishment of

⁶⁸ International Registry, *supra* note 66



national transplant organization to coordinate cadaver donations at the national level and trained transplant donor coordinators have also increased the rate of organ donations significantly. Presumed consent is a great way to tackle organ shortage and the countries with presumed consent system has shown positive results in the organ donation rates. Apart from Spain, some other countries that follow presumed consent policies for organ donation are Austria, France, Columbia, Norway, Italy, and Singapore.

4.7 Legal Sale Of Organs In Iran

Iran is the only country in the world that offers a legal way to its citizens to sell their organs⁶⁹. Buyers and sellers are registered through a government foundation that matches them up and sets a fixed price of \$4,600 per organ. More than 30,000 kidney transplants have been performed in Iran this way since 1993⁷⁰. However, there are various ethical issues surrounding the same like people not operating through the government foundation, exploitation of the poor, people traveling from other countries with forged ids to buy organs from Iran citizens⁷¹. In the Iranian model, a patient in need of a kidney who does not have a living related donor is referred to the dialysis and transplant patients association to locate a suitable living unrelated donor.

Though the major intention behind legalising sale of organs was to bridge the gap between demand and supply of human organs and thereby tackle organ shortage, the legal sale of organs has not cleared its waiting list and that trading between socioeconomic classes is a substantial problem. Legalisation of sale and purchase of organs focuses more on donations

⁶⁹ Organ India, *supra* note 88; C Rudge, *International Practices of Organ Donation*, 108 Suppl

(1), BRJ ANAESTH, 148, 151

⁷⁰ TOHOA, *supra* note 113, at 8.

⁷¹ Sheldon Zink et al., *Presumed vs Expressed Consent in the US and Internationally*, 7(9), VIRTUAL MENTOR, 610-614 (2005).



from living donors which discourages cadaver organ donations which is a much effective way of dealing with organ shortage.

4.8 Organ Trafficking Recent Trend

In a recent report, Interpol evaluated the issue of human trafficking for organ harvesting, which is primarily caused by the lack of available organs for morally acceptable transplants worldwide. Although organ trafficking occurs throughout the world, it is especially concerning in North and West Africa since there are more vulnerable populations and impoverished communities there.

The strategic assessment report, created as part of project enact, offers understanding and analysis into the problems to help law enforcement organisations in North and West Africa come up with the best solutions.

In order to force individuals into purchasing an organ, organised criminal groups take advantage of the plight of the unemployed, migrants, asylum seekers, and refugees. Those who have been the victims of human trafficking for sexual or labour purposes are likewise at greater risk.

The methods used to lure victims and keep them under control are the same as those employed in other forms of human trafficking, such as making false promises about employment abroad and using violence and threats.

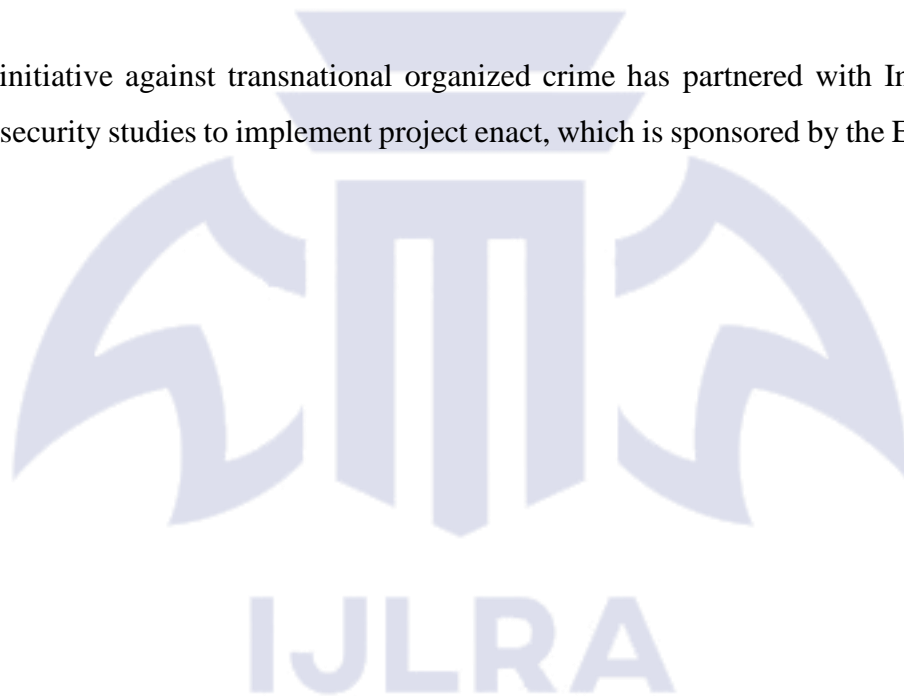
The majority of the time, victim-donors get less of the money than was originally agreed upon with the recruiter or broker, and occasionally they might not obtain any of the promised payment at all. Many victim-donors have experienced health problems and post-operative difficulties

So to tackle it project was launched –

4.8.1 Project Enact-

Enhancing Africa's response to transnational organized crime (project enact) aims to support African police in implementing proactive tactics to counter threats from organised crime, enable information exchange, and improve investigative abilities.

The global initiative against transnational organized crime has partnered with Interpol and the institute for security studies to implement project enact, which is sponsored by the European union



Chapter-5

Suggestions And Findings

5.1 Introduction

Looking at the legal regime and the practice that is prevalent in other countries, one can safely conclude that the Indian law, howsoever well-intentioned it might be, lacks an implementation that would reconcile the apparently conflicting ends of meeting the ever-burgeoning organ deficiency and curbing the evil menaces of illegal organ trade. Some recommendations to tackle organ trade in the country and to ensure effective implementation of the transplantation of human organs and tissues act, 1994 are as follows:

5.2 Promoting Cadaver Organ Donations

Though the transplantation of human organs and tissues act, 1994 tries to promote cadaver organ donations in the country, the same has not picked up even after more than two decades of implementation of the act. The issue of shortage in human organs and the wide gap between demand and supply of human organs can be alleviated through increasing the deceased organ donations in India. In India, there is a huge potential for deceased organ donations as the number of fatal road traffic accidents is high and this pool is yet to be tapped. As of 2006, India had 6%

of the world's road accidents and the total number of road accidents is approximately 90,000 per annum. In 2005, one of the states, Tamil Nadu alone reported 13,000 fatal deaths due to road accidents. Tamil Nadu is the leading state in brain stem death organ donation in the country and has witnessed 136 donations in 2015.



The cause of death in around 40 to 50% of all fatal road accidents across the world is head injury leaving potential cadaver organ donors in the country from road accidents alone. Brain tumours and other causes of death from subarachnoids could potentially increase the number of cases. Even if 5 to 10% of these deceased persons became organ donors, there would be no requirement for any live organ donations. Hence, educating and convincing the relatives about the potential of saving lives from a brain-dead person as a result of road accidents can make a huge difference. Concentrating on increasing cadaver organ donations is expected to bring a fall in the illegal organ donations from living persons for financial reasons.

5.2.1 Increasing The Level Of Awareness On Organ Donations

There exist groups of people who are unaware of the concept of organ donation and the illegality of commercial dealings in human organs. There are also myths and misconceptions about organ donation prevalent in the society preventing the general public from donating organs and, involving in commercial dealings in human organs. People need to be aware about the concept of organ donation on their death and that such an initiative can save many lives. While some people are aware of this, they do not know about the procedure or how it can be done. Availability of donor registration forms in hospitals, schools, universities, public officers, leaflets describing the procedure to register oneself for cadaveric donation which can be put up on notice boards at such institutions at a conspicuous place can improve the level of awareness in people.

Though it is not argued that awareness is the only factor guiding organ donations, it plays a crucial part in raising the nation's organ donation rate. If people are not aware or have misconceptions about the basic concepts of organ donation, it would adversely affect the organ donation rate. Increase in the level of awareness about organ donation among the public has

resulted in a significant increase in the organ donation rate in the country. Hence, increasing the level of awareness among the public about organ donations, especially cadaver organ donations, can contribute to a significant increase in organ donations in India and thereby lead



to a substantial reduction in the commercial dealings of organs. Though there has been a change in the level of awareness over the years, the level has still not made it to a level to curb the illegal dealings in organs. Increasing the level of awareness and eliminating the misconceptions in the minds of the people can help in reducing the rate of organ trade in the country to a great extent.

5.2.2 Incentives To Organ Donar

Commentary to the who guiding principle 5 states that the principle aims to affirm the special merit of donating human materials to save and enhance life. However, it permits situations where it is customary to provide organ donors with tokens of gratitude which cannot be measured in the form of money. The principle allows compensation for the costs of making donations, including medical expenses and lost earnings for living donors, lest they operate as a disincentive to donation. The need to cover legitimate costs of procurement and of ensuring the safety, quality and efficacy of human organs for transplantation is also accepted as long as the human body and its parts as such are not a source of financial gain.

Though access to healthcare is a basic right that needs to be provided to everyone and not just something that has to be provided in exchange for human organs, free periodic medical assessments related to organ donation and insurance for death or complications that arise from the donation may legitimately be provided to living donors. Providing people with incentives in forms other than monetary benefits for organ donation can be an appreciation as well as an encouragement for more people to come forward to donate their organs after death. Measures can be adopted where the individuals who donate their organs are given facilities of free medical check-up and health insurance till their death, thereby acknowledging their generosity to the society. Such recognition and felicitation have the potential to attract more people into the generous act of donating the organs on their death.

5.2.3 Personal Autonomy Over Will Of Relatives

One of the major issues with the implementation of the transplantation of human organs and tissues act, 1994 is that the wishes of the relative override the will of the deceased and the organ removal is not carried out if the relatives object to the same after the death of the person who had consented to organ donation during lifetime.

Section 3(2) and 3(4) of the act are not implemented effectively and the respect for personal autonomy and free will of the deceased is totally neglected when the family of the deceased objects to the donation of his organs. The will of the relatives of the deceased supersedes over the will of the deceased in cadaver organ donation. Despite having pledged his organ or making his relatives aware of such wish to donate, the wishes of the deceased are entirely ignored and priority is given to the wishes of his family.

Since the act tries to promote cadaver organ donations, it is a paradox that even the decision of a person who is willing to donate his organs after death is neglected when his relatives wish otherwise. The issue here is that as per the law, the autonomy of the deceased is respected only when he had objected to organ donation and not when he had agreed to the same. This is a serious breach of the personal autonomy of the deceased and disrespects his wishes to donate his organs. There should be effective measures adopted to ensure that when the person had already consented to donate his organs on his death, the procedure has to be carried out irrespective of the wishes of his family. If such practice is put into effect without any relaxations, it would mean that there is lesser time between death of such person and determination of the consent which would guarantee that the organ is as fresh as possible, thereby increasing the success rate of such transplantation. As mentioned above, a hard opt-in system should be strictly adopted and gradually, the country should strive for an opt-out system.

5.2.4 Effective Working Of Authorization Committees

Authorization committees play a vital role in preventing commercial dealings in human organs and if they work efficiently, organ trade in India can be resolved to a great extent. As discussed in the previous chapters, as authorization committees mainly comprise of medical authorities or medical professionals, it would be difficult to analyze whether there are any financial motives and commercial dealings involved in the organ donations. While the medical practitioners look into the medical aspects of the organ removal and transplantation, it is inevitable to ensure that the donation does not involve any commercial arrangements. Hence, it is essential to have persons with the necessary skills and expertise in the area especially while dealing with donations made out of affection or attachment or any other special reasons. This can help in preventing organ trade in the country and thereby ensure effective working of authorization committees. Proper training of authorization committee members to examine whether the cases coming before them for approval have any financial motives involved can also help in improving the efficiency of the committees.

5.2.5 Increasing The Public Health Expenditure And Improving The Medical Infrastructure

Organ transplantations being a complex procedure, need proper health infrastructure and adequate investment to carry out the same efficiently. Medical infrastructure is necessary to ensure that the objectives of the transplantation of human organs and tissues act are achieved in the best possible manner. Increasing the donor pool without adequate facilities does not serve its purpose. This issue has to be addressed with special focus on the remote areas where even the basic amenities of healthcare are not always available. The low rate of organ transplantations

from cadavers in the country can be attributed to the facilities in the Indian health system like lack of facility for the resuscitation of the victim at the accident spot, lackof well-equipped medical institutions, shortage of trained personnel in the intensive care units,



lack of quick communication and proper transport facilities, etc.

Hence, in practice, the cadaveric donation technology is almost missing considering the large number of brain-stem death patients in India.

India is one of the countries that invest the lowest in health sector as compared to other countries. India's public expenditure on healthcare stands at a mere 1.26% of GDP as of 2021 which is substantially low considering the large population and other socio-economic factors of the country. The public health infrastructure and public health investment need to be improved substantially to improve the rate of organ transplantations in the country. Improving public health investment is not just needed to improve the status of organ transplantations in the country, but also as a solution to many serious issues faced by the health sector in the country.

5.3 Key Recommendations

5.3.1 Clarity On “Affection” Or “Attachment”:

Section 9(3) has been often referred to as a loophole supporting commercial dealings in human organs since there is no clarity on what constitutes affection or ‘attachment’. The provision has to be tightened in order to prevent any commercial dealings in the pretext of affection or ‘attachment’. There needs to be clarity on what constitutes affection ‘or attachment’ and what can be the special reasons sufficient enough to permit an unrelated donor to donate his organ to a patient and ensure that the same does not involve any commercial arrangements.

5.3.2 Prohibition On Advertising:

Section 19(f) does not expressly prohibits advertisements seeking or offering organs if the same is not a commercial arrangement. This has led to problematic interpretations where the courts have been allowing advertisements stating that it does not establish any commercial motives and are purely altruistic organ donations. Since there is no way to regulate such advertisements and ensure that there is no financial motive involved once such advertisement is made, the provision has to be made clear on this aspect and any advertisements for human organs have to be prohibited. Alternatively, state or national organ donation systems or regulatory authorities like national organ and tissue transplantation organisation can be used to address the demand and supply of organs purely on altruistic motives without any direct contact between the donor and recipient.

5.3.3 Reducing The Waiting Period For Unclaimed Dead Bodies:

Section 5 of the act allows removal of any human organ from the unclaimed dead body in hospital or prison, if the authorities are unable to locate near relatives of the deceased within 48 hours of the death on a reasonable enquiry. Since a dead body would be decomposed in 48 hours under normal circumstances and the organs from the body cannot be utilised even if the body is not claimed after 48 hours, the waiting time needs to be reduced to 24 hours as the organs can be removed in a healthy state soon after death and ensure that potential organs do not go waste .

5.3.4 Clarity On Definition Of „Death“:

Section 9(3) has been often referred to as a loophole supporting commercial dealings in human organs since there is no clarity on what constitutes affection or ‘attachment’. The provision has to be tightened in order to prevent any commercial dealings in the pretext of affection or ‘attachment’. There needs to be clarity on what constitutes affection or ‘attachment’ and what can be the special reasons sufficient enough to permit an unrelated donor to donate his organ to a patient and ensure that the same does not involve any commercial arrangements.

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Since there are multiple definitions of death under other statutes like Indian penal code, 1860 and registration of births and deaths act, 1969, there is a need to ensure that there are no ambiguities regarding the declaration of brain death or the time of declaration of death. Hence, it is important that the definition under the transplantation of human organs and tissues act, 1994 is made applicable for the purposes of the act irrespective of the different definitions under the other two statutes and the same be stated expressly under the act.

5.3.4 Simple Procedure To File A Complaint:

Section 22 of the act provides for a cumbersome procedure to file a complaint and the provision needs to be modified in such a way that the public can access the court directly and avoid any unnecessary delay. The procedure to file a complaint under the act needs to be simplified and hence the requirement for filing a complaint through an appropriate authority has to be removed in order to permit people to approach the courts directly.

5.3.5 Need For Emergency Provisions:

Though the very nature of organ transplantations demands expeditious decision making with respect to approval of organ removal and transplantation, the act fails to lay down any specific time limit for deciding the matters before the various authorities constituted under the act. Rule 23(2) under the act states that the authorization committee has to take decisions expeditiously where a patient requires the transplantation on an urgent basis, but still does not provide any specific time limit for making decision on matters related to organ donations. Hence, the act should provide for a specific time period for granting or refusing approval to transplantations to ensure that the patients who are critically ill do not lose their lives waiting for the decision of

the authorization committees and are not forced to rely on illegal practices due to the delay.



Chapter 6 Conclusion

INTRODUCTION

According to the surveys, acts, and all the informations that we get about the organ trafficking it is clear that even having an separate act the case of organ trafficking doesn't stopped either it is in India or in other countries. As a citizen of India i think that the transplantation of human organs and tissues act, 1994 has failed badly to prevent commercial dealings in human organs or promote cadaver organ donations in the country. The act has several ambiguous provisions making it easier to evade the law and carry out illegal practices in human organs. This needs to be changed through appropriate amendments incorporating clear and more stringent provisions. This can be done through bringing clarity on what constitutes affection or attachment, or what the special reasons are, eliminating ambiguity on the definition of death, simplifying the procedure to file a complaint under the act, incorporating new provisions laying down specific time limit for deciding matters before the authorities, reducing the wait period for removal of organs from unclaimed dead bodies, etc.

There can also be various measures adopted to ensure the effective implementation of the act as explained above. Promotion of cadaver organ donations, ensuring effective working of authorization committees, increasing the level of awareness on organ donations, giving primacy to personal autonomy of the deceased over the will of the family, etc are some measures that can be adopted to tackle the rampant organ trade in the country. India has to gradually adopt the presumed consent system by first adopting a hard opt-in system which could make the shift easier. Since poverty and unemployment are some of the major contributing factors to organ trade in the

country, fighting poverty and ameliorating the health conditions of every citizen can eventually aid in eradicating the country's organ trade threat. It is the need of the hour that India takes efficient measures to improve the healthcare system in the country through improving the medical infrastructure, increasing public health expenditure



significantly and ensuring effective implementation of the health-related legislations in the country.

6.1 Preventive Measure Towards Organ Trafficking

- 1- The amount of information about organ trafficking are insufficient among the people so there should be more data collection and research about this issue.
- 2- Identification of both trafficking victims and traffickers is primarily the responsibility of law enforcement. Training that enables police officers, customs agents, and border guards to spot organ traffickers and those who engage in trafficking for the purpose of removing organs should be made available to them.
- 3- Victim protection and aid are crucial components of any strategy used to combat human trafficking. In order to best serve victims of trafficking, support services for organ transplant survivors should collaborate with one another

6.2 Remedies For Trafficking Victims

For long periods of time and no compensation, trafficking victims are frequently exploited. They might have sustained wounds or gotten infections that need medical attention. Due to their involvement in human trafficking, they might have accrued debt. Despite the fact that there are still very few effective anti-trafficking measures, there is a clear movement in this direction. For instance, several nations have explicitly given victims of trafficking the opportunity to take private legal action against their traffickers and have mandated restitution to those who have been trafficked as part of the criminal punishment of 26 traffickers.

Other nations allow victims, regardless of their citizenship or immigration status, to file civil lawsuits against their traffickers.



The state is responsible for the violation of an international legal obligation (such as the obligation to criminalise trafficking, and the obligation to protect and support victims of trafficking), or if the state was not directly involved but failed to fulfill its obligation to prevent the harm, the state is still obligated to provide remedies and the right to access remedies (for example, failure to investigate and prosecute trafficking; failure to take measures to prevent trafficking).



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ORGAN AND TISSUE AUTHORITY, AUSTRALIAN GOVERNMENT, AUSTRALIAN DONATION AND TRANS-PLANTATION