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Need of Organ Donation-A Jurisprudential Study in Today's Context

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1. Introduction:

The Vaishali Chodnekar, Managing Director of the YMC Organ Donation and Transplant Foundation¹ once said that, there is no story, no hope, no transplant without an organ donor. However, when there is an organ donor, Life emerges from Death, Sorrow transforms into Hope, and a terrible loss becomes a gift.

The very less number of Organ Donation rate in India is a very serious issue now a days specially during the Covid Pandemic. As per the recent survey made by the Government of India 1,06,560 number of men, women, and children are on the national transplant waiting list, 17 people die each day waiting for an organ transplant, at every 9 minutes another person is added to the transplant waiting list.² With advancements in surgical techniques, organ preservation, and pharmaco-immunologic therapies, organ transplantation has become a critical pathway in the management of severe organ failure worldwide. The majority of organs are obtained from deceased donors following brain death; however, a significant number of organs are obtained from live donations, and a significant number can also be obtained from non-heart-beating donors.

The Organs are the vital part of the Human Body. No ordinary man can imagine his life with any physical abnormality.³ Many tries to keep them very fit and fine to live healthy life. In this Article the researcher wants to connect the Importance of Human Organ with some jurisprudential theories by highlighting the various views of various philosophers in various Schools of Jurisprudence. Moreover, researcher by this article wants to spread an awareness

¹ Vaishali Chodnekar, YMC Organ donation & Transplant foundation Audiologist and Speech language pathologist, <https://yateenfoundation.com/pdf/about-vaishali.pdf> last seen on 03/04/2022.

² HRCAs, <https://www.organdonor.gov/learn/organ-donation-statistics>, last seen on 17/01/2022.

³ Thinkstock, A Point of View: Happiness and disability, BBC, dated 01/06/2014, <https://www.bbc.com/news/magazine-27554754>, last seen on 15/07/2022.

amongst people to donate the Human organs to help the needy one.

2. Views Of Different Schools Of Jurisprudence:

2.1 Natural Law School:

The entire human right philosophy is an outcome of the principle of Natural Law School. Various philosophers give their opinion regarding the Importance of the Human Organs.

- According to the **Aristotle**, Man is a part of the nature. Natural Law school is based on 'reason'. On his part, Aristotle (384-322 BC) saw nature as a potential on creation found in specific objects and striving at a specific goal.⁴
- The **Stoics**, who studied the cultivation of self-control and fortitude as a way to resolve negative feelings, connected existence with rationality. Aristotle claimed that rationality rules all aspects of the world and that human beings are similarly ruled by rationality. We then claimed that individuals work 'naturally' as we conduct their lives in line with reason. Cicero agreed with the contributions of these thinkers as he claimed that design provides the laws that human culture will abide by and that such laws should be found through intention.⁵
- **Cicero** said that, 'The law is right reason'. Cicero agreed with the submissions of these philosophers when he argued that nature provides for rules that human society should live by and that these rules could be discovered by reason.⁶
- **St. Thomas Aquinas** believe that supremacy of law attains common good, concept of justice carries with respect for the rights and other, it is complete virtue that produces good of individual as well as the society. According to Thomas Aquina preservation of life has highest value.⁷

⁴ Man as a social animal, The Hindu, dated 12/03/2022, <https://www.thehindu.com/features/education/research/man-as-a-social-animal/article2988145.ece>, last seen on 15/07/2022.

⁵ Natural Law, New World Encyclopedia, https://www.newworldencyclopedia.org/entry/Natural_law#:~:text=Stoic%20Natural%20Law,-The%20development%20of&text=to%20its%20source.-.The%20Stoics%20asserted%20that%20the%20universe%20existed%20according%20to%20a,actions%20that%20accorded%20with%20virtue., last seen on 14/07/2022.

⁶ Stanford Encyclopedia of Philosophy, Cicero, <https://plato.stanford.edu/entries/aquinas/>, last seen on 16/07/2022.

⁷ Stanford Encyclopedia of Philosophy, Saint Thomas Aquinas, <https://plato.stanford.edu/entries/aquinas/>, last seen on 15/07/2022.

A person sacrifices his life by donating organ is influence of natural law philosophy. The Doctrine of 'Live and Let Live' is basic of this organ donation law; and also basic philosophy of natural law, because right to life, respect the dignity of human beings and secured the universal human right is a part of natural law philosophy. Thomas Aquinas categorizes the rule into the rule of divine, universal justice, moral law, and human justice.⁸ The question of what is just or unjust law, and how we are supposed to react to unjust law, is viewed through the lenses of philosophers who have been confronted with these issues in generations past. In addition, we would look at the sum of natural law by symbolic definitions – social contract, power-separation, liberty and basic human rights. And finally, we may find some of the arguments that contradict the theory of natural justice.

- **Grotius** firmly believes that man by nature is peace loving and desired to live according to the dictates of reason.⁹
- According to **John Locke**, purpose of law is to protect the natural right of man, right to life, liberty and property is necessary for well-being of the individual.¹⁰
- According to **Rousseau**, the state and the law made subject to the general, law should confirm with "general will" of the people.
- **Kant** believe that, law is the best result of human wisdom acting upon human experiences for the benefit of the public.
- According to **Stammler**, Just law was the highest expression of man's social life and aims at reservation of freedom of individuals.¹¹
- According to **John Rawl**, everyone respect for rights of others which is the primary goal of justice. Rawl's Idea considered equality of opportunity into account the initial social and cultural disabilities of an individual.¹²

⁸ Ibid.

⁹ Jim Powell, Natural Law And Peace: A Biography of Hugo Grotius, Libertarianism, dated 04/07/2000, <https://www.libertarianism.org/publications/essays/natural-law-peace-biography-hugo-grotius#:~:text=Grotius%20defended%20natural%20law%20without,changed%20even%20by%20God%20himself,> last seen on 15/07/2022.

¹⁰ Dale Mineshema-Lowe, Natural Law, The First Amendment Encyclopedia, <https://www.mtsu.edu/first-amendment/article/788/natural-law#:~:text=Locke%20believed%20if%20a%20ruler,in%20overthrowing%20the%20existing%20state,> last seen on 10/07/2022.

¹¹ Natural Law, New World Encyclopedia, https://www.newworldencyclopedia.org/entry/Natural_law#:~:text=Stoic%20Natural%20Law,-The%20development%20of&text=to%20its%20source,-The%20Stoics%20asserted%20that%20the%20universe%20existed%20according%20to%20a,actions%20that%20accorded%20with%20virtue, last seen on 14/07/2022.

¹² Christopher Wolfe, John Rawls, Contemporary Liberalism, and Natural Law, dated
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- **Kohler**, give an important to the "inner impulse" for reasonable form of life.
- **Fuller**, given importance to the internal morality of law and believe law and morality are necessarily co-related like the thinking of H.L.A. Hart.¹³

Natural Law school is based on principles of human rights which are universally applicable. Justice and morality are two pillars of natural law. natural law given importance to the fundamental rights such as justice, equality, Liberty, paternity, brotherhood etc.

Organ donation law recognize the consent of organ donor without coercion, these human body organs may be used to save the lives of people or improve quality of life of human society which provides "Right to life" including Right to health.

The person has legal right to object on organ donation before his death.

- According to **Kant**- "Person heads off free will and he can decide what should be done in specific circumstances, he is responsible for his own action."¹⁴

"Every man born free", so every person can justify himself with his own mind.

- According to **Marshall** (1996) - A view of "live and let live" include someone allow to remove once organ for financial reward for money or someone saving life. both are considered as valuable in human society.

'Right reason's shows the path of sacrifice for others, justice is nothing but respect for other's rights.

- **St. Augustine (354-430)**: St. Augustine concluded that our human life was irredeemably polluted by original sin.¹⁵ He rendered a difference between the City of God and the City of Man. Although the City of God relates to the performing of the will of Christ, the City of Man symbolizes the continuation of sin. This divided the rule into three groups: *lex temporalis*, *lexnaturalis* and *lexaeterna*. On his part, Aquinas classified the rule into four groups: divine law, eternal law, natural law, and human law. Next to him, the rule would be only for the greater good. Nevertheless, if such a statute

26/08/2021,

<https://www.thepublicdiscourse.com/2021/08/77496/#:~:text=For%20example%2C%20Rawls's%20theory%20includes,sense%20of%20one's%20own%20worth.%E2%80%9D>, last seen on 14/07/2022.

¹³ Dale Mineshema-Lowe, Natural Law, The First Amendment Encyclopedia, <https://www.mtsu.edu/first-amendment/article/788/natural-law#:~:text=Locke%20believed%20if%20a%20ruler,in%20overthrowing%20the%20existing%20state.>, last seen on 10/07/2022.

¹⁴ Ibid.

¹⁵ Anton-Hermann Chrous, The Philosophy of Law of St. Augustine, Vol. 53, No. 2, jstor, pp. 195-202 dated 24/03/1994, <https://www.jstor.org/stable/2182025>, last seen on 29/06/2022.

became unfair, it became worthless to be considered a rule. Therefore, the term *lex iniusta non est lex*¹⁶ (unjust legislation is not rule) is used to refer such unfair statute.

Natural law recognizes equality, and 'inner impulse' which is part and parcel of donation of human organ laws. Right to life's concept was used in Natural law theory which also includes the organ donation to the needy one. It is needed to establish the equitable legal system of human body donation in India with philosophy of natural law.

2.2. Historical School:

- According to **Burke** law is an expression of common belief, fits and practices of the community. The role of custom and traditions are important in growth of law.
- According to **Pollock** Law based on traditions and customs.
- According to **Savigny** customs, traditions, culture and sentiments of people is the principal of law. In his "**Volksgeist**" theory he expresses view that law is product of people spirit or general conscience of people. Law grows with the growth of society; law grows with nation.¹⁷
- According to **Hugo** law is the outcome of habits and traditions of the people.¹⁸
- According to **Vinogradoff** law is an expression of the general will of the people.¹⁹

Organ donation law faces challenges in the aspects of moral, cultural, religion, death ceremonies as a part of religious aspect.

The problem of shortage in supply of human organ is closely related with religious, traditional and cultural aspects.

Gift of organs of human body is related to wheel or common conscience of the people like as "Volksgeist" philosophy of Savigny.

There are huge customary and traditional obstacles in donation of human organs.

2.3 Religious Aspects:

Many religious beliefs ought to be taken into consideration, because faith plays a very significant role in people's actions and therefore influences how they speak about organ donation and how they respond to organ donation. Only few of the general views of religious groups on donation will be highlighted in order to indicate their importance in the present

¹⁶ David Knowles, THE LIMITS OF LAW: 'Lex iniusta non est Lex', Vol. 37, No. 439, *jsor*, pp. 402-412, <https://www.jstor.org/stable/43815263>, last seen on 29/06/2022.

¹⁷ Naresh Kumar, Savigny's theory of Volksgeist, *Law Notes for You*, dated 21/04/2021, <https://www.lawnotes4u.in/savignys-theory-of-volksgeist-historical-school/>, last seen on 16/07/2022.

¹⁸ **Subodh Asthana**, Custom as a Source of Law, *ipleaders*, dated 12/06/2019, <https://blog.ipleaders.in/customs-source-law/>, last seen on 14/07/2022.

¹⁹ *Ibid.*

context. They should assume that there would be no clear viewpoints on rewarding a donor, although it might be necessary to derive a viewpoint from the general patterns in thought.

The Japanese religion of **Shinto** has a religious doctrine directly against organ donating, harvesting and transplantation.²⁰ Such actions are considered to be spiritually dirty, and therefore organ donations and transplantations are almost non-existent in Japan. Throughout 2000, only eight sets of kidneys were collected from deceased donors with the permission of the families. The downside to this strategy is that Japanese patients are "organ tourists;" they go abroad to purchase kidneys.²¹

A short overview about few faiths reveals how diverse theological beliefs on organ donation are and how the adherents of each faith perceive donation. As suggested, people's opinions on certain facets of organ transplantation are decided, or at least affected, by religious beliefs.

- **Buddhism-**

Buddhists believe that the death is not disaster, but merely changed consciousness. It means Buddhism allows donation of human organs. Buddhism views life as a continuum: once the cognitive cycle of mind-brain has passed into death, the divine phase begins.²² Death is not treated as a tragedy, but rather a shift of conscience. Thus, harvesting the organs of a donor and using enormous resources to insert these organs into another body to sustain existence looks to a Buddhist as an act of self-delusion, which might suggest denial of one's divine nature.²³ Clarity of mind is important in the cycle of death because it decides the consistency of one's next life. Cutting the body of the donor can be unsettling throughout the evisceration process. Buddhists, therefore, do not condemn organ donation, but neither do they support it.

- **Hinduism –**

Hindu religion is also not prohibited from donating human organs because they believe that it is the final order of God.

Hindus are not forbidden from sacrificing organs under their religious rules. It's an independent choice. There is little about the Hindu faith that suggests that sections of people, deceased or alive, should not be used to ease the misery of others. The rituals performed upon death include the destruction of the preserved corpse in the presence of the kin. Some Indians, however, do not remove organs from the corpses. Yet social practices are not the sole explanation why

²⁰ Michael Oliver, Organ donation, transplantation and religion, Vol no. 26, Oxford Academic, dated 04/02/2011, Pages 437–444, <https://doi.org/10.1093/ndt/gfq628>, last seen on 14/07/2022.

²¹ Ibid.

²² Michael Oliver, Organ donation, transplantation and religion, Vol no. 26, Oxford Academic, dated 04/02/2011, Pages 437–444, <https://doi.org/10.1093/ndt/gfq628>, last seen on 14/07/2022.

²³ Ibid.

Indians do not donate organs.²⁴

Donation i.e. *Dan's* are considered to be very pious thing amongst Hindus. During the Monarchical periods like Ramayana's and Mahabharata's era the Donations were considered to be the essence of once's life. The Vedas are also of the view that the one should divide his money into three categories. The first one for the present expenses, the second one for the future and medical expenses and the last one for the donation purposes. Karna is considered to be the best donor amongst all. Donating the organ would definitely be the great pious donation which saves the life of many ones.

- **Christianian –**

There is little conclusive evidence about the role of Christianity in organ donation. Europe and the United States, which are predominantly Christianian states, tend to have well-established transplantation systems, higher rates of donation, and populations with favourable attitudes toward donation. Evidence suggests that the Christian faith does not play a significant role in willingness to donate, and that it is more of an individual matter.²⁵

In terms of what is known about the role of the Christian faith, research suggests that rather than religious teachings, it may be the strength of religious belief or perhaps conservativeness of belief that acts as a barrier to donation. According to research, interpreting one's relationship with God is more likely to be cited as a barrier to donation than interpreting religious teachings.

These barriers may be more significant for Black Africans and Black Caribbeans than for Whites, with bodily integrity being a particularly significant barrier that transcends religious beliefs.²⁶

The question as to whether Christians can accept rewards for any organ donation has not yet been fully answered. In the absence of a guiding view, individual Christians are left without an authoritative teaching on how to approach the subject of receiving organ donation rewards.

- **Islam –**

Islam means peace, surrender or submission to Allah's will - Allah is the one "giving life and ending it". The Quran is not for or against organ donation. Islam as a religion originated in

²⁴ Michael Oliver, Organ donation, transplantation and religion, Vol no. 26, Oxford Academic, dated 04/02/2011, Pages 437–444, <https://doi.org/10.1093/ndt/gfq628>, last seen on 14/07/2022.

²⁵ Religious beliefs and attitudes to organ donation, Llywodraeth Cymru Welsh Government, <https://gov.wales/sites/default/files/statistics-and-research/2019-07/150730-religious-beliefs-attitudes-organ-donation-summary-en.pdf> last seen at 15/07/2022.

²⁶ Ibid.

seventh-century Arabia. Since then, religion has become a faith with approximately 1,000 million followers spread throughout the world. In South Africa, Islam is a minority, but seen in the context of Africa, it enjoys some 40 % of the total population of the continent. Muhammad is the recipient of the Holy Scripture of Islam called the Holy Quran.

Allah said: "Breaking a dead person's bone is equal to breaking it while that person is alive". Because of this writing, some Muslims are questioning the opening up of a person's body to remove organs. However, the Shariah, the principal source of Islamic rule, allows such acts though they are beyond theological interpretations if it is in the interests of an individual. For example an incision can be rendered on a pregnant woman in order to save the infant. Therefore, if any organ may profit from the exclusion, it is permissible, except in specific criteria. It must be the best option to cure the disease; the efficacy of the transplantation must be strongly probable but the patient or the relatives must have consented to it.²⁷

Most Muslims even comply with the living sacrifice of a kidney from one Person to another, as the Quran stipulates: "Aid one another in righteousness and piety."

Tradition and custom is recognised by Article 13 (3) as law. In India generally custom, tradition of religion is favour with organ donation. But unfortunately, we are not able to bring awareness in the people and inspire them to donate the human organs. So, it is the situation due to lack of awareness that shortage of donation of organs. While it is important to ascertain the opinions of various faiths on organ transplantation, it is not as straightforward to decide their stance on the donor's payout. Within the previous pages, a few deviations were rendered from Christian and Islamic values. Aside from the moral considerations of a civil rights-based community, though, personal liberty will always be valued. In other words, after informed consent has been given, the individual must be allowed to donate or receive a reward for a donated organ, justified solely on the basis of his or her autonomy and personal belief system. Autonomy is doing what's right, not because others think it's right. Because you can justify this by means of your personal and freely chosen and justified view of life, it exercises control over your own actions in terms of your norms. The risk that the donor will take is his or her own, not the physician or the ethicist. When one wishes to donate an organ on an independent basis, i.e. voluntarily, rationally and respectfully, the choice will be honored. The choice to take funds for organ donation will be assessed and viewed in the same way.

²⁷ Michael Oliver, Organ donation, transplantation and religion, Vol no. 26, Oxford Academic, dated 04/02/2011, Pages 437–444, <https://doi.org/10.1093/ndt/gfq628>, last seen on 14/07/2022.

Marshall²⁸ et al. promote a "live and let live" approach. Whether someone wants to require the organ to be withdrawn for financial re-entry, let them; if someone requires funds and sells an organ, it supports him or her and becomes life-saving to the receiver. Gill and Sade remind all anti-donor critics that there is another side to organ transplantation: people are waiting for organs, especially kidneys, people who will live if they get the organ, if they don't, will die, or at least suffer needlessly. Those would then find the whole image and not only the condition of the donor. Always hold in mind that until now, it has not been altruistic to inspire donors to contribute.

2.4. Sociological School:

Law is an instrument of social progress and serving the needs of the society.

- According to **Ehrlich** Purpose of law was attainment of social justice.²⁹
- According to **Friedman** Law is based on social convention.
- As per Doctrine of social Solidarity of **Duguit** 'Each Individual cannot fulfill his own needs'. The ultimate end of all human activities is to ensure the interdependence of men.³⁰
- **Duguit** pointed out that "Law is a rule which men obey not by virtue of any higher principle but because they have to live as members of society",³¹ it is most important that brings mutual Co-operation and mutual interdependence between individuals' group and societies.
- According to the **Roscoe Pound** Law made secure private public and social interests.³²

Donation of organ is the need of individual as well as society and part and parcel of social welfare. The organ donation law made with challenging needs of society; the law secures the Interest of public at large. Law is one of the parts of the social progress. organ donation is based on secure social interest. It is needed that Doctrine of the "gift of life" concern with society at large. Various Non-government organizations and governmental departments take efforts to spread awareness in public about donating of human organ. But these efforts by the government are not sufficient and more efforts are required to be made regarding this.

²⁸ Magda Slabbert, Law, religion and organ transplants, dated 04/06/2011, https://www.researchgate.net/publication/274658228_Law_religion_and_organ_transplants, last seen on 14/07/2022.

²⁹ Eugen Ehrlich, Austrian legal scholar, <https://www.britannica.com/biography/Eugen-Ehrlich>, last seen on 14/07/2022.

³⁰ Léon Duguit, French jurist, <https://www.britannica.com/biography/Eugen-Ehrlich>, last seen on 14/07/2022.

³¹ Ibid.

³² Roscoe Pound, American jurist, botanist, and educator, <https://www.britannica.com/biography/Eugen-Ehrlich>, last seen on 14/07/2022.