
REGULATION OF ORGAN TRADING IN INDIA: AN ANALYSIS

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Abstract: *“Of all the things that it is possible to donate, to donate your own body is infinitely more worthwhile.”*
- The Manusmriti

Organ transplantation refers to a procedure that is performed on patients to replace a failed organ with a functioning and healthy organ. These organs are donated by other healthy individuals or by the family members of a deceased person. Organs such as kidney, partial liver, pancreas and intestines can be donated by a live donor whereas organs such as heart, lungs, the cornea has to be donated from a cadaver.

In India, the number of recipients exceeds the number of donors by a massive number. This causes a tremendous hike in the demand for organs as opposed to the supply. Commercial organ trading is a result of such scarce organ donor availability. The Transplantation of Human Organ Act, 1994 was enacted to establish strict guidelines of organ transplantation and to curb commercial organ trading. The problems of organ trading still remain irrespective of the legislation introduced.

This paper will enumerate the problems of organ transplantation in India with regard to human rights, both practically and ethically. It will further analyze the legislation and bodies regulating organ donation and provide suitable suggestions and recommendations in light of the challenges enumerated.

Keywords: Commercial Organ Trading, Human Rights, Organ Transplantation, The Transplantation Of Human Organ Act, 1994

Introduction: Organ donation is defined by the world health organization as a solution to end-stage organ failure; healthy organs are usually removed from deceased bodies or healthy living donors in order to replace the failed organ.ⁱ Organ transplantation is an astounding revelation in the field of science as it increases the lifespan of an individual whose organs have ceased to function. It further enumerates the utilitarian economic theory by providing an organ to the one who will make the most optimal use of it.

India has a mythological past with organ transplantation dating back to the xenograft transplantation performed on Lord Ganesh by Lord Shiva to retrieve his deceased son. Rig Veda also illustrates events of limbs and heart transplantation.ⁱⁱ The first instance of transplantation in India was of kidney transplantation which was performed in the 1950s on dogs by a team of doctors from King Edward VII Memorial Hospital. It was further performed on a human in 1965 in the same hospital by retrieving organs from a cadaver donor. The first successful organ transplantation was carried out in Christian Medical College (CMC) Hospital in 1971.ⁱⁱⁱ

The drawback of transplantation was that it required the donor to be a near blood relative to the recipient. In such instances, there arose the problem of scarcity. Hence, clinicians began to accept even unrelated parties as donors for the purpose of transplantation. This eventually led to organ trading in India. Numerous individuals from impoverished backgrounds signed up to be organ donors in order to earn monetary sums. Organ trading eventually took the form of exploitation.

This led the government to introduce the Transplantation of Human Organ Act, 1994 (THOA). Central institutions were lagging behind in the fields of transplantation as compared to private players before

AIIMS performed India's first regular cadaver kidney transplant program in 1994.^{iv} This was followed by numerous other transplantations including heart, bone marrow, liver, and pancreas transplantation carried out in numerous metropolitan cities of India.^v

Impact Of Organ Transplantation On The Society: Organ donation requires cadavers or “brain dead” patients as donors. Brain-stem death is firstly required to be identified and subsequently, a ventilator has to be affixed to the patient. Once the ventilator is attached, it allows the organs in a brain-dead patient to be alive as it pumps blood into these organs. These organs are further removed in order to replace damaged/ dead organs.^{vi}

The Transplantation of Human Organ Act, 1994 was enacted in order to curb commercialization of organ transplantation; regardless of the introduction, the implementation of the Act still remains to be insufficient as organ trading scandals have been on the upsurge. Organ transplantation is one such medical practice that summons multiple ethical and practical complexities.^{vii} The recipients for organ transplantation outnumber the donors by a massive number. The economic law of supply and demand is to be referred to study the reason behind the enormous market available for organ trade.

The law of supply and demand state that the supply of a commodity would fluctuate with the demand or desire for it matched with a paying capacity. Hence, commodities/services that are basic necessities for life have higher demand and if such commodities are extremely scarce in nature, their demand will hike. This demand causes the price for such a commodity to rise drastically.^{viii} Individuals from the backward strata of the society are often involved with such organ trade in order to gain the hyped price for the organ.

Organ transplantation entices numerous ethical dilemmas varying from differed perspectives of individuals involved in the process. These ethical dilemmas are:

1. **Doctor's dilemma:** A doctor's role in identifying the right donor is key to any organ transplantation. The task of identification is merely the beginning of the duties that are imposed on a doctor. A surgeon is expected to unveil smallest of the details of the transplantation procedure to the live donor, elucidate the possible complications that arise during the process and inform that the generous donation could go in vain if the recipient is not able to sustain the operation.^{ix} Apart from these conditions, a doctor is also to inform the donor regarding the probable psychological and physical trauma that would be caused to the human body on losing an organ. A doctor's goal in his/her professional practice, under the oath, is to act in the best interest of human life; hence to suggest an organ donation to any individual is a challenge to the professional morality as the quality of life is bound to reduce after a major organ transplantation.^x The cadaveric donation also invites a certain set of ethical dilemmas. A surgeon is required to identify a brain stem dead individual in order to perform the transplantation. The ethical quandary posed involves a doctor's Hippocratic Oath; he/she has to take a call regarding whether treatment for the brain stem dead patient should continue or the patient should be deemed fit for transplantation.^{xi}

2. **Valuation of life:** Majority of the countries in the world apply the “brain-stem death” criteria as a prerequisite for cadaveric organ transplantation. The jurisprudential argument against this criteria is that only death can be considered as the end of human life and not a medical state of a person. It is key to not to declare a breathing individual as “deceased” as the actual death has not occurred.

The other issue with organ transplantation is that it provides for compensation for those who have taken part in live organ donation. This process of compensation is not efficient measure as the effects of organ donation last throughout life^{xii} and manifests through various versions of health complications.

In India, one can sign up to pledge his/her organs for donation in case of death. On death of such a person or on any such organ donation, a doctor would refer to the recipient list that is maintained according to the chronological order of patients to determine the recipient of the organ donated. There arises an economic conflict due to this list as it does not consider the utility of such an organ to each of the recipients on the list. It is immoral to determine which recipient deserves the organ more, but it is an economic waste if the resource does not flow towards its most optimal use.

3. Commercialization of organ transplantation: Commercial organ transplantation refers to the trade of organ for monetary sums. This process is banned in the majority of states except in Iran.^{xiii} Commercial organ trade raises several jurisprudential questions regarding the persons with whom the ownership of organs lie and further the possible valuation of the same. Organ trade is the result of the limited number of donors in contrast to the excessive number of recipients. The poorer strata of the society are often the prey for such an organ trade or even organ trafficking^{xiv} as monetary gains are desperately required by these individuals.

The most significant moral and ethical catch is when the two sides of the organ transplantation are pitted against each other; i.e., having the need for a vital organ to survive and being economically exploited due to one's status in the society. Commercial organ trading has both pros and cons if made legal.

4. Moral and practical validity of practice of xenotransplantation: Xenotransplantation refers to the process of replacing tissue or organs of one species with the organ or tissue of another species.^{xv} The practice of xenograft is an anthropocentric approach to organ transplantation. Human life is to take priority over the life of other species for the purpose of this kind of transplantation;^{xvi} hence it raises numerous uncertainties regarding whether human beings are in the position to make choices of life and death for other species and to what measure is it justified.

The practical issue of such transplantation is caused due to the tentative and limited knowledge on the various xenogenic materials present in the bodies of other species and their possible reaction on introduction into human body.^{xvii}

5. Theological differences: Indian population is highly diverse and religiously active having been the birthplace of Hinduism and the land of both British colonization and Mughal invasion. The concept of death, the process of burial and the belief regarding after life differs from religion to religion.^{xviii} In religions where reincarnation and rebirth is identified, the family members are often against the idea of organ donation as they believe the body would be of future use; whereas religions that purport the concepts of direct heaven or hell have no negative implications regarding physical harm done to the body.

Critical Analysis of The Transplantation of Human Organs Act, 1994: The Act aims to regulate, remove, store and transplant human organs for the therapeutic purposes. It also seeks to accept brain death to make it possible for use these patients as potential organ donors, but mainly it prevents commercial dealings of organs. There have been amendments to the Act in 2009 and 2013. The amendments have expanded the list of near relative in order to accommodate an increased number of members who can donate in order to facilitate transplantation. The procedure for unknown live donors for being able to donate requires an authorization committee to accept the affidavit made by the donor. The Act allows only for donations made out of love and affection and hence does not directly allow altruistic donations from strangers, but it can be allowed at the discretion of the authorisation committee.^{xix} The amendment further provided stricter punishment for commercial organ trading.

The Transplantation of the Human Organ Act, 1994 places the responsibility on the doctor in charge to approach the family of a brain dead patient for seeking permission to donate the organs; further, in cases of live organ donation, he/she is to gauge the true intention behind the donation and ensure that it originates from a place of love and affection.

It is the responsibility of the doctor to determine whether a donation has been done for commercial exchange.^{xx} It also mandates the doctor to disclose all necessary details regarding the transplantation to the live donor, but the specifications regarding what has to be disclosed is not mentioned; further there is no punishment or penalty provided for not disclosing such information either.

The Act provides immense power to both doctors and the authorizing committee for the purpose of allowing a donation, but regardless of the powers and duties imposed, neither the doctors nor the support staff are explicitly trained to handle situations of organ donation in accordance with the Act. As a result of this, numerous patients who are brain dead are not identified for organ donation.

The rejected applicants for live organ donation approach the courts to present their case and the recipient gets disadvantaged. The Act remains silent as to the mechanism available for those organ donors whose applications have been rejected by the Authorising Committee.

Suggestions:

1. **Time limitations for judicial procedures:** The element of time is of utmost important for those who are in dire need of organs, and hence it is necessary for the Act to specify a time limit within which cases regarding organ donation have to be judged where the recipient is still in need of an organ.^{xxi} The authorization committee is also to be bound by certain restraints as the current provisions under the Transportation of Human Organ Act 1994, provides for substantial power but limited accountability.
2. **Composition of the Authorizing Committee:** The authorising committee mentioned under the Act comprises of various senior medical officers and common citizens who hold great respect in the society. The duties of the board is to gauge whether an unrelated organ donation is done out of commercial benefit or out of pure affection. The duty imposed is of the same nature as an enquiry. The Act should be amended to mandate the presence of minimum one police officer who holds a position higher than that of a Sub-Inspector. A police officer would be more efficient and effective for the task assigned to the Authorization Committee.
3. **Training of medical officers and doctors:** The Transportation of Human Organ Act, 1994 imposes numerous duties on the doctor involved in the organ transplantation but it does not provide for any pre-training or preparation for the doctors.^{xxii} It is suggested that all surgeons are to be trained and educated about their duties in cases of possible organ transplantation. Doctors hold the key role in effective implementation of the Act, hence it is of great importance to involve them in the legal process as well. Training can also be provided in medical school as part of their legal paper.
4. **Government Incentives:** India has an immense need for organ donors. This need has been satisfied through black markets for organs. It is a beneficial action by the state if governmental incentives could be provided to those who seek to donate.^{xxiii} Governmental incentives need not necessarily mean monetary sums. It could be in form of free health care for those who have donated their organs, in cases of live organ donation. In the case of cadaveric donation, the government in association with the hospital could provide subsidy on the bill payable by the family of the deceased. These measures tackle the problem shortage of organ donation by not entering the arena of commercial organ trade.
5. **Allowing unregistered hospitals to perform cadaveric organ transplantation:** The Act, allows only registered hospitals under the Act to perform organ transplantation, this causes majority of the hospitals to be barred from organ transplantation activities.^{xxiv} The number of transplantations could be increased by allowing unregistered hospitals to retrieve organs from a brain dead individual as emergencies and accidents require on spot medical attention.^{xxv} In order to avoid exploitation, these hospitals could seek permission from the State Authorizing Board's chairperson. This particular measure already exists in numerous western countries.
6. **Mandate organ transplantation permission seeking:** In order to increase the number of cadaveric organ donations, the Act should mandate all doctors to seek permission from the family members when the patient is brain dead. The doctor is the right individual to seek such permission as he/she has the necessary information to provide appropriate knowledge as to the condition of the patient and the impact of organ donation.

Conclusion: Organ transplantation is a path-breaking discovery in the field of medical sciences. It provides individuals a chance at a healthy life. The importance of organ transplantation cannot be measured by monetary sums. It is therefore important to closely guard such a practice. The Transplantation of Human Organs Act, 1994 along with the regulation rules sought out to achieve the end of commercial organ trading and exploitation. In its way of doing so, the Act has imposed complex procedures that ultimately effect the amount of organs donated.

This paper seeks to address such drawbacks of the Act in light of ethical and practical challenges that organ transplantation naturally inherits. The jurisprudential accept of organ trading still remains a

concept that is not highly ventured upon. It is only key to consider the psyche and intention behind organ donation and the entitlement of human beings in terms of xenotransplantation.

There is no right reaction to the ethical challenges that arise due to organ transplantation, the only solution is to make an apt choice with economic reasoning in consideration of prevailing circumstances.

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