

COMMERCIALISATION IN ALTRUISTIC DONATION: CHALLENGES AND CONCERNS

**Harvinder Kaur, Research Scholar,
Panjab university, Chandigarh.**

Abstract

Illegal Human organ trading has acquired draconian dimensions. The altruistic donations have been outnumbered by black marketing in the human organs. Due to advances in medicine and surgery, organ and tissue transplantation has been transformed over the last 30 years from an experimental procedure performed only in highly developed countries to being a therapeutic intervention carried out in hospitals and clinics around the world. The shortage of available organs has created a thriving global organ market in which kidneys are the most traded commodity. A combination of poverty, a significant level of inequality, and an all pervading corruption makes India a fertile ground for this trade¹.

Keywords: organ trade, living donation, medical tourism.

Introduction

The word 'donation' generates good feeling in our mind. It means to do some noble act for others. But when donation is of human organs it means to give new ray of life to those who are dying because of organ failure. Today the whole world is suffering from organ shortage and it is heart breaking for those who are suffering of organ failure. non availability of organs for transplantation has diminish the hope of patients to play new inning of life. This shortage has developed a new type of commercialisation in human organs. Taking the benefit of this shortage a race to purchase the organs has been started. At one end, there is an abundance of desperately poor people who see the sale of a kidney as a possibility to raise cash, and at the other end, there are rich patients in need of a kidney and some of the world's best medical facilities to perform the actual operations.² While technical and medical progress makes possible a high level of health care for the entire population, capitalism is forcing millions of people around the world to sell parts of their own bodies.

Gangs of organ traffickers conduct a million-dollar business in this illegal trade. The illegal traffickers exploit the social plight of the donors, who urgently need money but often receive only a fraction of the total. Many are cheated out of any money. Since the global financial crash in 2008, the worldwide illegal organ trade has increased dramatically. According to the World Health Organization (WHO), in 2010 there were approximately 107,000 donated organs worldwide— both legal and illegal. Kidneys made up about two thirds of all transplanted organs.³

International Legal Framework on organ Trafficking

Human organ trafficking is always associated with serious crimes, such as stealing organs, purchasing organs from executed prisoners, killing for organs, and kidnapping people for organs. Thus, human organ trafficking is becoming a very serious social problem. In most of the world, laws specifically ban the sale of organs. U.S. law, for

example, prohibits any "valuable consideration" resulting from an organ donation. Human trafficking for organ removal (HTOR) occurs across the globe and constitutes egregious human rights abuses. There are some international legal frameworks to combat human trafficking:

a) United Nation Trafficking Protocol⁴

Article 3 (a) of the UN Trafficking Protocol that defines trafficking in persons, clearly includes trafficking for the purpose of removal of organs. States that ratify the Protocol are under an obligation to introduce comprehensive criminal measures against organ trafficking and should consider providing measures for the physical, psychological and social recovery of victims, including (in co-operation with NGOs) counselling and information (especially regarding their legal rights); medical, psychological and material assistance. States should also ensure victims have the possibility of obtaining compensation for damages suffered.

b) World Health Organisation (WHO)⁵

The WHO's Guiding Principles on human organ transplantation (1991) state that the commercialization of human organs is 'a violation of human rights and human dignity'. The Guiding Principles stated several key principles relevant to organ trafficking:

- Informed consent of the donor is required for voluntary organ transplantation to take place;
- Transplants can take place between related donors with a proven genetic relationship and where there is a good match (tissue and blood) between donors;
- Living donations shall be considered secondary to cadaver donations;
- Non-commercialization of transplantation i.e. not to condone organ sales in any circumstances.

c) World Medical Authority (WMA)⁶

World Health Assembly passed many resolutions from time to time to fix standards for human organ transplantation, for safety and health of human beings, and to prevent the illegal trade which is going on in human organs. Furthermore, access to needed medical treatment based on ability to pay is inconsistent with the principles of justice. Organs suspected to have been obtained through commercial transaction must not be accepted for transplantation. In addition, the advertisement of organs in exchange for money should be prohibited. However, reasonable reimbursement of expenses such as those incurred in procurement, transport, processing, preservation, and implantation is permissible.⁷ It calls on all countries to take effective steps to prevent the commercial use of organs.

(d) Declaration of Istanbul

Considering the need to prevent organ trafficking in 2004, the World Health Organisation called on member States to take actions to protect the poorest and vulnerable groups from transplant tourism and the sale of tissues and organs, including attention to the wider problem of international trafficking in human organs and tissues. Growing crimes relating to human organs all over the world forced the World Health Organisation to take suitable actions to stop this illegal activity and to recommend

procedure and measures for the transplantation so that exceeding demand of organs could be adequately meted out. On the direction of the WHO a summit meeting of more than 150 representatives of scientific and medical bodies from around the world, governmental officials, social scientists and ethicists, was held in Istanbul from 30 April to 2 May 2008. Draft of this declaration was revised and finalised in this meeting. Definition of organ trafficking as given by as given by United Nations⁸ has been accepted and quoted in this declaration. The medical tourism has also encouraged the illegal trafficking in human organs. The concept of transplant tourism has also been defined and analysed. Transplant tourism becomes organ trafficking when organs of one country supplied to another countries to fulfil that country's patient's needs. Sometime with the donors professionals also travel to that country and sometimes patients were travelled to find out suitable donors, when their country cannot fulfil their needs.⁹

(e) Council of Europe Convention against Trafficking in Human Organs (2014)

The Committee of Ministers on 16th November 2010 in their report underlines that "trafficking in human organs, tissues and cells is a problem of global proportions that violates basic human rights and fundamental freedoms and constitutes a direct threat to individual and public health". These committees further pointed out that despite the existence of International legal binding instruments there are certain loopholes, that are not sufficiently addressed by these instruments and they continue to exist in the international legal framework. With this view the Committee of Ministers established the ad-hoc Committee of experts on Trafficking in Human Organs, tissues and cells and tasked it with the elaboration of a draft criminal law convention against trafficking in human organs, and if appropriate, draft additional protocol to the aforesaid draft criminal law convention against trafficking in human tissues and cells. The draft text of this convention was finalised by the European Committee on Crime Problems which approved it at its plenary meeting in 2012 and in July 2014 the Committee of Ministers of the Council of Europe has adopted an international Convention to prevent the trafficking in human organs and consider it as a criminal offence and to protect the victims, to facilitate co-operation at national and international levels on action against the trafficking in human organs. This convention prescribes the illegal removal of human organs from living and deceased persons without their consent, where in exchange for the removal of organs a third party or living donor has been offered or has received a financial gain.¹⁰ It also prohibits the transplant tourism and export of human organs outside the country.¹¹

National Legal Framework on Organ Trafficking In India

In India the Transplantation of Human Organs Act came into force on 8th July 1994. This is primarily meant to provide for the regulation of removal, storage, and transplantation of human organs for therapeutic purposes and for the prevention of commercial dealings in human organs. To make the act more effective further in 1995 certain rules has been framed and in 2008 amendment has been took place. Again in 2011 Government introduced a bill in the Rajya Sabha to amend the Transplantation of Human Organ Act, 1994 and it was passed by the lok Sabha on 12 August, 2012. Various sections has been amended to make the provisions of this act more applicable. The provisions of this legislation laid down certain limitations to prevent the misuse of Act.

Donor has been divided into three categories: (1) Live near relative donor which includes spouse, son, daughter, father, brother, or sister, [grandfather, grandmother, grandson,

and granddaughter].¹² (2) Live unrelated donor which permits an unrelated donor to donate his or her organs if he/she could established before the authorization committee an affection or attachment towards the recipients, (3) Cadaver/ deceased donor: according to this the organs of deceased person, who consent to removal of organs after death, can also be transplanted to the recipients. Section 9 puts restrictions on removal and transplantation of human organs and thus prevents the illegal sale of human organs. A living donor can donate their organs only to near relatives.¹³ If the donor wants to donate his organ to a person who is not a near relative but by reason of affection and attachment towards the recipients than both the parties must produce before the authorization committee and after the approval of authorization committee an organ could be donate.¹⁴ Further section 9 (1A)¹⁵ says that where the donor or the recipient being near relative is a foreign national, prior approval of the Authorisation Committee shall be required before removing or transplanting human organ or tissue or both. No human organ or tissue shall be removed from the body of a minor¹⁶ or mentally challenged¹⁷ person before his death for the purpose of organ transplantation. Organ of a minor can be used after his death according to a manner prescribed by law.

Commercialisation in Altruistic Donation and Challenges

Altruistic donor is a person who decides to donate an organ to a complete stranger with no expectation of compensation and reward. Altruism and gift giving have been an integral part of organ transplantation from the outset: the gift of science to humanity. Donor should not intend to benefit from the donation and should not expect to any kind of reward. Although organs from living donors can be transplanted safely, concern about the protection and wellbeing of such donors has prompted the transplantation community to develop a consensus statement emphasizing that a living donor should be competent, willing to donate an organ, and free of coercion.¹⁸ In addition, the new reliance on organs from living donors has increased the risk of donation for financial reasons, particularly in the case of a genetically unrelated donor. Cultural values embodied in the National Organ Transplant Act make it illegal for "any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation."¹⁹ The shortage of cadaver organs has led to a worldwide black market for organs from living donors, and patients with sufficient means can travel to distant locations in order to purchase kidneys for transplantation.²⁰ Despite religious belief that opposed violation of the human body, the sale of kidneys occurs on a regular basis.²¹ There are only 650 dialysis machines in India, which has 80,000 individuals diagnosed with end stage renal failure.²² For many, the any chance for life is to purchase a kidney and approximately two thousand individuals each year sell a

kidney. The donor receive around 1000 dollar and the broker receives six to ten times the amount.²³ Sometimes due to some poverty reasons a poor person prefer to sell their organ for some financial gains. But, the amount given to a donor is much less than the amount on which organs are actually sold. All this is happened due to shortage in supply of organs. With transplants as the preferred therapy for renal failure, demand for kidneys will continue to outpace supplies. Until nations can build transparent, reliable systems of organ donation through altruistic donations from healthy individuals and deceased donors, poor and vulnerable individuals are at risk for being targeted to supply organs to privileged patients. The majority of transplanted organs come from live, often unrelated, donors. Even in the United States, the number of renal or kidney transplants from live donors exceeded those from deceased donors for the first time in 2001.²⁴ Critics feel that the selling of human organs to possible organ recipients and organ procurement agencies has the potential to exploit the poor and disadvantaged in a community.

Hidden activities of human traffickers were highlighted by Coalition for Organ-Failure Solution in its report on “Sudanese Victims of Organ Trafficking in Egypt. Through its on-the-ground investigation, COFS has uncovered compelling evidence that traffickers have exploited and are continuing to exploit Sudanese refugees and asylum-seekers for their organs in Egypt. These abuses include removing kidneys either by inducing consent, coercion, or outright theft. The victims include men, women and children.²⁵ In spite of various national and international documents in preventing organ trade, the global community at large can be divided into organ importing and organ exporting countries.²⁶ The live donors have been brought from Moldova, Nepal, India, and Pakistan to US, UK, Canada and other wealthy nations regarded as organ importing countries.²⁷ Asia is still regarded as the hub of organ trade. In 2001 and 2002 in South Africa, the investigating officer found out that there has been international organ trafficking where most recipients came from Israel and donors came from East European countries.²⁸ The Sindhu Institute of Urology in Pakistan held that 2000 renal transplants were performed in 2005 where 2/3rd performed on foreigners.²⁹ According to the World Health Organization (WHO), in 2010 there were approximately 107,000 donated organs worldwide— both legal and illegal.³⁰ Even in India: Punjab, Karnataka, and Gurgaon kidney scandal are examples of this trade. Kidneys from most of the victims, who were the poor hailing from the nearby western Uttar Pradesh, were transplanted into clients from United States, United Kingdom, Canada, Saudi Arabia and Greece.³¹ According to Dr. H. Sudarshan, the Chairman of the Karnataka Task Force on health and family welfare, “underlying the trade is the attitude that the poor can be bought by the rich”. He told to frontline investigation team that the large sum of money are shared by doctors and hospitals that perform such transplant. According to him it is the authorization

committee that has a special responsibility to prevent this and he puts a more blame on them for not implementing the act effectively.³² The Authorization committee established under the act has been entrusted with granting power for organ transplantation, approved thousands of paid donor transplant after getting affidavits from donors coming under purview of Section 9(3) and to everyone's surprise it had been found in reality that there was no affection and love between donor and recipient and they have never met each other to be able to donate the organs and the member of the committee were

Organ trafficking is occurring because of a lack of a transplantable organs available to patient. To survive they need of such organs and they try to purchase it from criminal groups who are actively working in this field. On the other side trafficking in human organs is increasing day by day just because of black markets in organs. On the one hand there is a huge gap between demand and supply of organs in all over the world, while on the other hand there are regular reports in the media about a flourishing human organ trade and the consequential exploitation of vulnerable sections of the society. In India there is a need of approximately 1,75,000 kidneys, 50,000 livers, and 50,000 hearts for transplants every year, around 3000 patients die every year due to lack of timely organ transplant surgeries; 95% kidneys and liver transplants are from living donors; only 1% of all donations are cadaver.³³ Though various systems have been proposed to increase the supply of organs to solve this shortage yet all systems implemented thus far have a common element: they have all failed.

Suggestions

Though Transplantation of Human Organs Act, 1994 has been recently amended by amendment of 2011 to make it more effective yet there are some more suggestions which should be included in it to make its working effective. These include:

- Transplantation of human organs act should be applicable to all the states equally. According to 2011 amendment it shall be applies at the first instance to Goa, Himachal Pradesh, and West Bengal. Other states adopt it by passing a resolution, which is a drawback falling in this Act because no state bother about it and are always busy in their routine.
- The term 'Organ Trafficking' should be included and defined in the Organ Transplantation Act.
- A Committee should be constituted which shall keep a watch on 'Authorisation Committee.'
- Punishment for receiver should be harsh than the donor because donor is a victim who suffers from both the sides.
- Awareness-raising and information campaigns on organ, tissue, and cell donation should be promoted at the regional and national level. .

Conclusion

Concept of organ donation by living being is a good concept by which we can meet the demand of human organs but there is a need to regulate donation policy. After researching on the topic it has been found that some influential group in a society tries to exploit the vulnerable section of society and exceeds the crime of organ trafficking. A market system in organ donation infringes on the inalienable values of life and liberty

and against the moral and legal ethics. After analyzing the laws and actual position in the existence of laws we concluded that we have enough laws to combat trafficking in Human Organs both on national and international level. The problem lies not in the laws but it lies in the proper implementation of these laws. Trafficking and sale of organs is flourishing because of corrupt medical staff, police, and governmental official. Poverty is another main contributing factor in organ trafficking and it needs to be addressed through sustainable and empowering poverty- alleviation programs targeted at the potential donor- seller communities. To ensure the proper implementation of the transplant act it is extremely important to ensure that the law has no loopholes that can be taken advantage of.

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Article 4 of Convention

Article 5

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Section 9(3).

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