



## TRANSPLANTATION AND DONATION – A NEW HOPE FOR A LIFE YET UNVOICED IN INDIA

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*Without the organ donor there is no story, no hope, no transplant. But when there is an organ donor, life springs from death, sorrow turns to hope and a terrible loss becomes a gift.*

• – “United Network for Organ Sharing”

### ABSTRACT

Life is an invaluable gift that cannot be returned in any way. Anyone who is going through the final stage of their life is given a chance at life by offering an essential part that might be a blessing. Protecting human rights is our responsibility. Giving a corpse as a gift through technological progress and placing a vital organ in order to give it the right to life is the beauty granted under the Human Organ and Tissue Transplant Act 1994. The right to life is guaranteed under Article 21 of the Indian Law. The Constitution and organ donation is an extension of it that adds meaning to this section, which makes it extremely important. The ability under this law to ameliorate individuals' predicament is still undervalued. The protection of human life is of paramount importance to give it the beneficial insight which is the right to well-being and the right to strength to enhance the beauty of this section for individuals

suffering from the final stage of organ failure which establishes a rule that has been greatly improved through the innovation of organ transplantation. But ever since the act of such importance has still failed to achieve its true essence due to both the reason for the establishment of such act been in vein.. India facing several social problems has reflected the shadow of same in such context too by various cases of poor people to sell their body organ as the way of getting money. The commendable goals of enhancing the gift of the corpse and overseeing commercial dealings in human organs were not able to realize its true potential, and the implementation of both laws could not achieve the desired elevation while incorporating such an act. The industry has now adopted the global rule for its implementation but still lacks the provisions necessary to achieve its single goal. Following legal and ethical rules can be a guideline for using science amicably and while judging a dispute in raising the flag by legal means.

**Keywords:** Transplantation, implementation, commercial, paramount, provisions

### INTRODUCTION

Giving importance to Right to life, Supreme Court regarded Right to Health as a benchmark to attain social order. Subsidized by Right to wellbeing adding subsequent relevance to the section. What's more, that safeguarding of human life is of central importance.<sup>1</sup>The Constitution of the World Health Organization characterizes health as, "... a condition of complete physical, mental

<sup>1</sup>[http://www.who.int/governance/eb/who\\_constitution\\_en.pdf](http://www.who.int/governance/eb/who_constitution_en.pdf) visited on May 7,2017. <sup>2</sup>“Human Right



and social prosperity and not simply the nonappearance of malady or illness."<sup>2</sup>The legislation so passed "The Transplantation Of Human Organ Act ( THO)" was passed in India in year 1994 so as to overview the activities related to this. It only accepted the Brain Death as the form of Death and so made sale of Organ as serious punishable offence prohibiting such provisions. Serious flaw in the implementation of such legislation has been observed as a matter of fact since the time immemorial wherein organ commerce and kidney scandals have left no spot in abusing the spiritual provision of the law. Rate of 0.05 to 0.08 per million population is the rate at which India is currently facing deceased donation. But same has been criticized by international bodies over a period of time due to unethical illegal unrelated donation seen in the nation. However with certain know-how the government is trying to take control of all illegal activities taking place under this name. The Transplantation of Human Organs and Tissues Act, 1994 then made was to manage training and methodology of such precious gift. This lead to a considerable increase in number of transplants so done in ethical manner. But despite of such act **neither has the commerce stopped nor have the number of deceased donors increased to take care of organ shortage.**<sup>3</sup> **The basic public opinion in this regard being** "where you can get one why give?" is the thinking people apprehends due to which decrease in

the rate of donation can be observed. Thereby, government seeing the Transplantation of Human Organ Act (THO) enactment that made irrelevant transplants illicit and perished gift a lawful choice with the acknowledgment of cerebrum death.<sup>4</sup> To overcome the lack of organs for replacement the illegal practices continued, so also with the implantation of the THO legislation neither trade stopped nor it could cure the shortage of organ faced. Hence the concept of brain death never came up publicly or was never publicized. Recent allegation put up by media and public related to illegal unrelated donations put a big question on implementation and constitutionality of THO legislations.<sup>5</sup> Along with such allegations put forth the very aligned problem of India facing several social problems is also reflected as a hindrance in the way of scientific advancement as poor people forced to sell their body organs for the source of income<sup>6</sup>, and so the following organ instead of serving as the gift to the receiver of the same now appears to be a curse since the poor would be in unhealthy terms and would be unfit so diminishing the beauty of the process specifically made of give a gift of life to a person of organ demise.

### HISTORICAL BACKGROUND

Turning the pages of the history we get to know the first attempt to use a corpse kidney was undertaken in 1965 in Mumbai.

<sup>2</sup>Parmanand Katarav. Union of India, AIR 1989 SC 2039

<sup>3</sup>Karnataka's unabating kidney trade, Frontline. 2002;19:07. [[Google Scholar](#)]

<sup>4</sup>Government of India. Transplantation of Human Organs Act, 1994. 1994. Central Act 42 of [cited 2007 Mar 9]

<sup>5</sup>Gazette - Transplantation of Human Organs Rules. 1995. (GSR NO. 51(E), dr 4-2-1995) [As amended

vide GSR 571(E), dt31-7-2008] [cited 2008 Jul] Available from: [http://www.medindianet/indian\\_health\\_act/The-Transplantation-of-Human-Organ-Rules-1995-Definitions.htm](http://www.medindianet/indian_health_act/The-Transplantation-of-Human-Organ-Rules-1995-Definitions.htm).

<sup>6</sup>Jafarey A, Thomas g, Ahmad A, Srinivasan S. Asia's organ farms. Indian J Med Ethics. 2007 Apr-Jun;4(2):52-3.



Although India is seen having short history in this context as compared from other nations. India's scientific contribution is very limited as to matters pertaining to transplantation. In the early 20<sup>th</sup> century the same was restricted to live donor kidney transplant that too in selected urban areas. Thereby with the increase in medical centers and trained staff introduction was kidney transplant was encouraged. But such blessing is still not available to a large population. Many people still rely on long term dialysis leading a low quality of life. Survey showed of more than 90% of people of South Asia dying within a month of diagnosis due to expensive treatment on unaffordable terms. So estimated that only 2.5% of the people of the end stage of their diagnosis actually end up getting transplant.<sup>7</sup> For liver such statistics is even more worse. And just a slow improvement seen in the case of heart and lungs.

### **THE LAW AND RULES GOVERNING ORGAN DONATION AND TRANSPLANTATION**

Some of the important and the recent provisions contented in THO Act and presented in gazette are as follows –

1. For Live Donation - Distinguish who can give without legal charters. Family members permitted to grant mother, father, siblings, child, daughter and companion. More recently, the grandparents were remembered in the New Gazette with a group of early family members. Key family members are required to provide confirmation of their relationship by genetic testing or possibly reliable reports. In the absence of the first

<sup>7</sup>Abraham g, John g T, Shroff S, Fernando EM , Reddy Y. Evolution of renal transplantation in India

family members, the recipient and the recipient must seek exceptional approval from the Board of Trustees of Approval authorized by the Legislature and attend a meeting before the committee to prove that the process of thinking about the gift has completely ended the charity or friendship of the beneficiary.

2. The demise of the mind and its manifestation - traversing the brain is characterized by the accompanying measures: there are stresses required 6 hours separate from the specialists and two of them must be specialists selected by the appropriate authority of management with one of them being a specialist in the field of neurosciences.

3. Handbook of transplantation exercises by framing a commissioning committee (AC) and appropriate authority (AA.) In each state or union territory. Each hectare has a distinct function as follows:

1. Authorization Action Committee (AC) - The motivation behind this body is to direct approval procedures to confirm or reject transplants between a recipient and recipients other than the first family member. The primary obligation of the board of directors is to ensure that the recipient does not misuse the financial thought of giving to its members.

The joint application submitted by the recipient and the donor is investigated and a one-on-one meeting is fundamental to achieving the true rationale for the gift to the AC and to ensuring the contributor understands the potential risks of the medical procedure. The confirmation or dismissal information is sent via mail to the respective

over the last four decades. Clinical Kidney Journal. 2010;3:203-7.



clinics. The option to recognize or reject the donor is represented in subparagraph (3), Clause 9 of Chapter Two of the THO Offer.

- b. Proper Authority Function (AA): The motivation behind this body is to manage the evacuation, storage and transplantation of human organs. The medical clinic is allowed to perform such exercises once permission is obtained from the authority. The expulsion of eyes from the corpse of a shareholder is not administered by this authority and must be possible in various places and does not require any method of permitting. AA powers include reviewing and permitting recruitment into clinics for a transplant medical procedure, allowing necessary guidance for emergency clinics, directing the customary examinations of emergency clinics to look into the nature of the transplantation, following up the clinical considerations of the contributors and beneficiaries, suspending or dropping the registration or failure of emergency clinics, and conducting examinations related to objections to breaching any arrangements from the law. AA grants an emergency clinic permit for a period of 5 years one after the other and the permit can be re-issued after that period. Each member requires a different permit

Although the main reference of committee was on term “ brain death” it also recommended sale of human body organs as a punishable offense and so in 1994 Transplantation of Human Organs Act (THOA) was introduced.<sup>8</sup> It tried to stop commercial trade of human organs which can

<sup>8</sup>Ministry of Law, Justice and Company Affairs. The Transplantation of Human Organs Act, 1994. New Delhi: MoLJCA; 1994[cited 2014 Jun 10]. Available from: <http://health.bih.nic.in/Rules/THOA-1994.pdf>

now only be done by sanction of an authorization committee on necessary terms. Studies have shown even after such restrictive nature of the act so imposed the scandals related to unrelated donors were still observed as high rate and those who were not able to come under such umbrella went either underground or to certain other countries with several liberal laws such as Singapore to get treatment done.<sup>9</sup>

### PROBLEMATIC INTERPRETATION OF LAW

Significantly, the interpretation of THO presentation by AC and designated clinical experts was flawed. This has been largely taken care of in the current scenario. Whatever the case, this journal must be passed by state governments before it becomes obligatory for emergency clinics to follow the decision. The arrangements to be reached are stipulated in Sub-Clause (3), Clause 9 of Chapter Two of the THO Statement states - "If any giver approves the expulsion of any of his human organs before his demise under sub-area (1) of Section 3 for transplantation into the collection of such beneficiary, not being a close to relative as is determined by the benefactor, by reason of love or connection towards the beneficiary or for some other uncommon reasons, such human organ will not be evacuated and so stopping the Transplantation process which can now take place by the consent of Authorization Committee" the following provision have largely been flawed.

<sup>9</sup>Pal S. It's easy to fly to Singapore, fix kidney. dnaindia.com[Internet]. 2011 Jun 7[cited 2014 Jun 10]. Available from: <http://www.dnaindia.com/mumbai/report-it-s-easy-fly-to-singapore-fix-kidney-1552446>



As per the legal provisions only the hospitals performing transplantation are the recognized ones which can only declare a brain death, the presence of which were very less. Thus, a large number of institutions were not able to declare brain death due to which transplantation of same was struck leading to a conflict situation wherein the cadaver being shifted to another hospital for the sake of organ retrieval.

A recent amendment to the law in 2011, and rules in 2014, led to the creation of a class of institutions called "non-transplanted organ retrieval centers" where organs can be recovered after approval and then transferred to an institution where the recipient's procedure is performed. However, a large number of institutions are still not recognized and potential donors are often transferred to recognized hospitals for transplantation. This is an obvious conflict of interest scenario wherein the hospital can then use the organs as they have priority as an "internal" donor. Therefore, there is the possibility of inducing the transfer of potentially brain dead individuals with "soft" incentives such as fee exemption.<sup>10</sup>

As of 2014, around 2,500 cadaver transplants have been performed in India, especially in the last five years in the states of Tamil Nadu, Andhra Pradesh, Maharashtra, Kerala and Gujarat. Tamil Nadu, and the city of Chennai in particular, have seen great success in cadaver donation with about 1,400 cadaver transplants so far<sup>11</sup>. The relative success of Tamil Nadu has been showing significant

results due to multiple reasons, including frequent interaction between government and stakeholders, and the provision of necessary legal and administrative support through regular government orders that facilitate the process. Also it tried to maintain absolute transparency since its inception. Mumbai has seen an increase in body donations in the past few years<sup>12</sup> and has already seen 15 donations in the first six months of 2014.

The law tends to define brain death only in cases of organ transplantation in simple terms whereas on the other hand the medical communities widely working on the interpretation that if brain death is diagnosed thereby the authorities are so deprived to the right of transplantation if the family of the donor refuses and there being no legal sanction to remove the life support such as ventilator. And so after declaration of death of an individual the body without any transplantation is handed over to the relatives, if they demand no donation.

### CONSENT – A FLAWED INTERPRETATION

The pre-consented topic of taking organs for donation of corpse requires initial consented behavior can be done in three understated procedures mainly being 'opt-in', 'opt-out' and 'commanded choice' type. India basically follows 'opt-in' type of consent which requires 'authorization' from the side of individual regarding giving of his priceless organ. The simple idea behind doctrine to be regarded as to person need to decide within

<sup>10</sup>Pandya SK: 'Brain death' and our transplant law. Issues Med Ethics. 2001;9:51-2.

<sup>11</sup> Department of Health and Family Welfare, government of Tamil Nadu. Cadaver Transplant Program, government of Tamil Nadu. Chennai:

DHoFW;2008 Sep 15. Available from: <http://www.dmrhs.org/tnos/>

<sup>12</sup>government of Maharashtra. Zonal Transplant Co-ordination Centre website. Mumbai: goM; date unknown[cited 2014 Jun 10]. Available from: <http://www.ztccmumbai.org/>



his lifetime as to what is to be done with his body once he dies. Being so given the privilege to talk of his afterlife desires. Subsiding it with the inspirational mentality this way of choice simply disregards the very idea of “assumed consent”. The mere concept of authorization so reflect the basic idea of standard consent reflected by Transplantation of Human Organs and Tissues Act, 1994. Section 3(1) of the act permits any person after having been complied to certain condition can suggest any strategy for evacuation of a particular organ before his demise just for the sake of restoration purposes.<sup>13</sup> Consent for donation of such organs can also be given by the family members as per directions laid down by sec 3(3) of the act. Such consent is so recorded by two observers presented there of whom one should be a close relative to the deceased. At a specific stage other than the family members who own the corpse, even the individual, other than family members such as of a person who owns the body, may allow every reasonable office to register in the clinic that specializes in expelling the human organ of the expired individual for therapeutic purposes. Given that this evacuation can be done fairly and fairly by a registered clinical specialist. Only here the prohibition of being a family member or an individual who owns a body must be certain.

### **OTHER FORMS OF CONSENT**

Over a large period of time countries are trying to expand their pool of organ donation by adopting various different strategies mainly focusing on the area of consent obtainment. Some of these being maintaining of “donor cards” by the citizens throughout

their lifetime declaring their consent to donate after their demise. The other being “required request” in which the doctor is required to ask the relative of the brain dead patient related to organ donation. Also some countries are found to be working on very basic function of “presumed consent” marking of doctor presuming the consent and so being eligible to evacuate the body parts of individual which can be taken into use in absence of any objection laid down by the family member of the deceased

With the dynamic changes the current modification in THOA Act has seem to bring the concept of “required request” in Indian scenario which has now made it necessary for the doctors in ICU identifying the brain death and so asking the relatives of the deceased regarding organ donation. Such strategy still to be found debatable in public domain wherein unprepared and unstructured health care centers facing difficulty in instantly shifting themselves to such premise. The factual data of the policy is so given consideration but still has not been adequately adopted in the public scenario.

Theory of “presumed consent” has also been implied in the modern scenario in various countries such as in some European countries, such as Austria, Belgium, Denmark, Finland and France. This gives liberty to doctors to take down usable set of organs as per their need in absence of any objection from deceased in his/her lifetime or by his family after his death. This so solves the problem of limitation with regard to organs at time of transplantation. This practice was so adopted after long debates in the history. This requires the prior consent of the deceased or any of family member in order to not to escape from such provisions.

<sup>13</sup>THOTA 1994, available at: <http://lawmin.nic.in/ld/PACT/1994/The%20Transpla>

ntation%20of%20Human%20Organs%20and%20Tissues%20Act,%201994.pdf



In India we frequently come across debatable situation in this regard so facing difficulty in attaining such practice due to certain delusions or peoples belief so vested in religious practices related to cremation process to be followed.<sup>14</sup> As per the argument originally enrooted from Anglo-Saxon Western Culture requires an in depth discussion before mandating provision in our culture , since our culture primarily seen working on the premise of the argument that individuals after their death should serve “the greater common good” brings up many questions<sup>15</sup>so depending upon ones need to be considered while such practice for our country.

### RIGHT TO HEALTH AND THE INDIAN CONSTITUTION

Right to health though not being a fundamental right under Part- III of the Indian Constitution still finds a valuable place for itself in Part IV of the Constitution stating directive policies. And so further health being a matter of concern falls under passage -6 of list two ( state list ) stated in the seventh schedule of the constitution where the meaning of the facet records to be "General Health and Sanitation, Hospitals and Dispensaries". Article 252 read with article 249 of the Constitution are extraordinary arrangements which give power on the Parliament to enact for at least two states by assent or by reception of such enactment by some other state. Further as per

<sup>14</sup>nagral S. Will presumed consent make transplantaion accessible, ethical and affordable in India? Indian J Med Ethics. 2009 Jul-Sep;6(3):155-6

<sup>15</sup>nagral S. Will presumed consent make transplantaion accessible, ethical and affordable in India? Indian J Med Ethics. 2009 Jul-Sep;6(3):155-6

<sup>16</sup>4 AIR 1978 SC 597. The judges in Maneka Gandhi repented the decision of A.D.M. Jabalpur v. S.S.

the instances seen in *Maneka Gandhi v. Union of India*<sup>16</sup> Article 21 was contended to be specific in nature. Thereby court making a move from rigid and restrictive provision to purposive methodology to “right to life” whereby this article extending further the apprehension of the article through the judgment to extension of the comprehension of the 'assurance of life and freedom' under article 21, taking purview of Part IV while understanding such phenomenon. The Incomparable Court of India further proceeded to receive a methodology of harmonization between major rights and order standards in Indian Constitution in a few cases<sup>17</sup>

### Legal activism and right to health

Decisions Sent in *Parmanand Katara v. Union Of India*, *Indian Medical Association v. V P. Shantha*<sup>18</sup> and *Paschim Bengal, Khet Mazdoor Samiti v. Province Of West Bengal*<sup>19</sup> Province are not many among the many Supreme Court options that have strengthened recognition of the "right to health". The Court's activity saw through various options that the refusal of rapid clinical reflection in relation to the patient in need adds to the violation of the "right of life, furthermore, the freedom" guaranteed under Article 21. Likewise, this arrangement is made for clinical management. As an end result of financial thought adding to "management" for reasons related to the

Shukla, AIR 1976 SC 1207 as it had endorsed the violation of the fundamental rights of a large number of people during the dark period of emergency and even in the years to follow

<sup>17</sup>Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789

<sup>18</sup>AIR 1996 SC 550

<sup>19</sup>AIR 1996 SC 2426



Consumer Protection Act of 1986, it went too far in securing patient interests.

### **ETHICS OF ORGAN SALE**

As per the societal norms so set up, lack of medical awareness in the society, disparity between rich and poor enhances the gap between the two classes. Visualizing the condition of medical ethics largely seen the process of donation as well as transplantation can be treatment for one, blessing been given to start a new life altogether while it can be simple, fancy and eye-catchy way of business for other, hereby trading in such organs he may earn a reasonable amount of money. Middle or the upper class families have often found to be of a view that "why donate and take any risks when you can buy a kidney?" So advertising concept of Transplantation in evil ways tending to increase spirited process of encouraging life as of many of pre-existing poverty stricken crime like child labor and prostitution, already in existence.

Liver donation was so influenced as by kidney donation alongside the unrelated living donations were also related to be reported in the beginning.<sup>20</sup> But in a recent field study on the economic and health consequences of selling a kidney in India, it was found that 96% of participants (over 300) sold their kidneys to pay off debts. The average amount received was \$ 1,070. Most of the money received was spent on debt, food and clothing. Average household income decreased by a third after kidney removal and the number of participants living below the poverty line increased. A total of

three quarters of the respondents were still in debt at the time of the survey. A serious illness could be largely seen in about 86% of people after the course of nephrectomy. And so plenty of people about 79% not advising kidney sold by other persons, proving to be a hurdle to pool of assets related to transplantation. The article concludes that among the paid donors in India, the sale of a kidney does not lead to long-term economic benefit and may be associated with poor health. Goyal et al. We conclude: "In a country like India protection to be given to the donors against the evils of exploitation. By several ways like some being educating them about the potential consequences of selling a kidney."<sup>21</sup>

In the past few years, a group of doctors and policymakers in India wanted to consider the possibility of making the sale of a kidney a legal transaction by putting in place a mechanism to protect them from middlemen or middlemen as it is happening in countries like Iran. These policymakers should remember that the value of using short-term donor financial gains to increase the supply of organs for transplantation is not a cure to poverty. With the existence of corrupted people in the society who can exploit poor with the help of money and resources, there will be continued existence of social evils and so legalizing the same process adding another pillar to this evil and further weaken the social norms.

### **CONCLUSION**

*We have taken a cue from very spiritual*

<sup>20</sup>Kakodkar R, Soin A, Nundy S. Liver transplantation in India: Its evolution, problems and the way forward. Nat Med J India. 2007;20:53-6. [[PubMed](#)]

<sup>21</sup>Goyal M, Mehta RL, Schneiderman LJ, Sehgal AR. Economic and Health Consequences of selling a Kidney in India. JAMA. 2002;288:1589-93. [[PubMed](#)]



*Hindu mythology, so the episode moves where Lord Ganesha was executed in provocation to a sudden and dangerous danger, leaving Goddess Parvati howling and cring in the name of Ganesha “ Oh! Son, what is this done to you ”. Atmosphere of misery spread in whole Kailash , it was then when Lord Shivatransplanted the elephant head on the body of Ganesha transformed granting him a new life into the form of grace. Converting Ganesha into the religion of learning and spreading wisdom everywhere.*

The idea of transplanting and giving as a blessing has its roots in the past, giving us the most widespread moral learning from time immemorial, giving hopes of life, Changing situation from Demise to a tide of happiness, by just applying some science and giving a new life altogether. The legal and ethical rules that we follow everywhere with organ gifting and transplantation are also important for the future as they can be used to define our specific claims with emerging sciences, for example, cloning and building tissues and immature microorganisms. Therefore, the guidelines arising from the THO Act were drawn up to overcome the problem of organ shortage and reduce the problem of members' commercial trade. But it did not control the organ trade and did not help develop an expired gift program to deal with the organ shortage. THOTA presented, 1994 to cover a paper on such problems. But it lacks effective explanation of all provisions due to some misunderstood guidelines. It can also be said that if a certain brain death was announced in time and taken into account in a swift manner, then there would be no need for relatives to donate their organs. India has great potential for pooling sources of organ donation due to the high population and lots

of accidents that are observed on a daily basis. In total, about 160,000 people have been seen passing through certain road accidents giving India a bundle of deathly gifts if used effectively. But the law did not have the option to fill the gap between the demand and the agility of the members. India has great potential for pooling sources of organ donation due to the high population and lots of accidents that are observed on a daily basis. In total, about 160,000 people have been seen passing through certain road accidents giving India a bundle of deathly gifts if used effectively. But the law did not have the option to fill the gap between the demand and the agility of the members. The dynamic law to enhance the gift of members has been welcomed in the rule book but in reality and for viable reasons it has not produced the desired results. It is recommended that we turn to either presumed consent or withdraw from the consent arrangement and take advantage of the body's organ group from spontaneous collisions, the mind of the patients who died along with creating a vigil among the masses about organ donation.

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