

Issues and Challenges of Organ Transplantation in India: A Scrutiny

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ABSTRACT:

As civilization progressed, man started fighting against various diseases both internal and external. Along with earlier herbal or natural medicines, man searched for inventing more preventive and curative medicines. Development in science and technology has brought in more and more advancements in the field of medicine and treatment. The transplantation of human organs can be considered as one of the wonders of medical science. Initially organs were transferred from deceased persons, but gradually it became possible to donate organs from living beings. There started issues of organ trade, organ selling, commercialization of organs etc. The issues of medical professionals being engaged in these practices, the unethical practices of hospitals etc. started getting public attention. The Government of India enacted Transplantation of Human Organs Act 1994 for regulating organ transplantations in India. The Act was amended in 2011 and the rules came into force in 2014. Most of the state governments also issued orders regulating various aspects of organs transplantations in accordance with the legislations. The Constitution of India guarantees right to life under Art. 21 and the Supreme Court and various High Courts have held in many cases that Art 21 also includes right to health. This article examines the various facets of organ transplantation in India, the reasons of organ trade, legislations for preventing organ selling etc.

Keywords: Transplantation, Trade, Constitution, Supreme Court, High Court

I. INTRODUCTION

Human rights are the rights which are possessed by every human being, irrespective of his or her nationality, race, religion, sex etc simply because he or she is a human being.¹ Human rights and fundamental freedoms allow us to fully develop and use our human qualities, our intelligence, our talents and our conscience and to satisfy our physical, spiritual and other needs.² Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Everyone is entitled to these rights, without discrimination.³ The secular belief in the sanctity of human life is particularly important in the context of the modern right to life. Contemporary human right law is based

¹ DR.SK KAPOOR, INTERNATIONAL LAW AND HUMAN RIGHTS 765 (14thedn 2002).

² JES FAWCETT, THE LAW OF NATIONS 151 (1968 edn).

³ *Human Rights*, UNITED NATIONS (Dec. 12, 2018), <http://www.un.org/en/sections/issues-depth/human-rights/>.

upon the concept that all human beings are equal and are entitled to protection of their life, dignity, liberty and freedoms.⁴ Both the world wars of 1919 and 1939 inspired the awakening to the values of human life.⁵ The principle of universality of human rights is the cornerstone of international human rights law. This principle, as first emphasized in the Universal Declaration on Human Rights in 1948, has been reiterated in numerous international human rights conventions, declarations, and resolutions.⁶ This article is an attempt to analyze the various issues in transplantation of human organs. Along with this, the author also makes an attempt to examine the legislations and the medical ethics involved in this.

II. ORGAN TRANSPLANTATION- HISTORY

Organ transplantation is a great achievement of the medical science. Ancient Indian and Chinese medical literature includes some description on organ transplantation, but the technical basis of modern organ transplantation was initiated by Alexis Carrel, a French Surgeon experimenting in animals in 1902. The human kidney was transplanted in 1946, Liver in 1963 and heart in 1967. This was followed in many other organs including lung, pancreas and intestines.⁷

III. ORGAN TRANSPLANTATION- MEANING

Transplantation means the grafting of tissues taken from one part of the body to another part or to another individual. It is the removal of a section of tissues or a complete organ from its original and natural site and transfer to a new positioning the same or separate individual.⁸ Transplantation also means to remove from one place or context and settle or introduce elsewhere.⁹ Transplantation in medical terms means the process of taking an organ or living tissue and implanting it in another part of the body or in another body.¹⁰ Transplantation is also defined as transfer of an organ or tissue from one person's body into another person's body to replace a diseased or failed organ or tissue.¹¹ Transplant candidate is an individual who has been identified as medically suited to benefit from an organ transplant and has been placed on the waiting list by the

⁴ ELIZABETH WICKS, *Positive And Negative Obligations Under The Right To Life In English Medical Law; Letting Patients Die*, in THE RIGHT TO LIFE AND THE VALUE OF LIFE (325 ed., JON YORKE 2010).

⁵ DR.VK ANAND, HUMAN RIGHTS (1st ed. 2001).

⁶ *What are human rights?*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (Dec. 12, 2018), <https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>.

⁷ Dr.LILY SRIVASTAVA, LAW AND MEDICINE 147 (2nd ed. 2013).

⁸ RP GWINN, THE NEW ENCYCLOPEDIA BRITANICA CHICAGO.

⁹ *Transplant*, MERRIAM WEBSTER, (Dec. 12, 2018), <https://www.merriam-webster.com/dictionary/transplant>.

¹⁰ *Transplantation*, ENGLISH OXFORD LIVING DICTIONARIES, (Dec. 13, 2018), <https://en.oxforddictionaries.com/definition/transplantation>.

¹¹ *Dictionary of Organ Donation and Transplantation Terms*, 1+1= LIFE METORSHIPNPROGRAM AMERICAN TRANSPLANT FOUNDATION, (Dec. 12, 2018), <http://www.americantransplantfoundation.org/wp-content/uploads/2014/04/Organ-Donation-Dictionary.pdf>.

transplant program.¹² Transplant recipient is a person who has received an organ transplant. Transplant surgeon is a physician who performs transplants and provides surgical care to transplant recipients.¹³

IV. ORGAN TRANSPLANTATION – PRESENT SCENARIO

Tissue transplantation from one human to another is a practice that has a long history and can be traced back to the medieval times. Blood transfusion and bone marrow transplants have been used to alleviate diseases. Organ transplants like that of kidneys, pancreas, liver, lungs and heart have now become routine. The organs are in short supply as the number of young donors has declined with increase in the average life expectancy. The organs from older people become less suitable for transplantation due to disease. Increasing cadaveric organs¹⁴ for transplantation are used as the preferred choice.¹⁵ The poor status of cadaver transplantation may be attributed to the moral, emotional and religious beliefs and taboos that inhibit the relatives of the deceased to come forward to donate organ(s) of a brain dead person.¹⁶ The evidences suggest that the practice of deceased organ transplantation in India is still on the back foot due to various factors such as the lack of awareness among general public as well as medical professionals, socio cultural and religious factors, organizational issues, and legal and ethical aspects.¹⁷

V. ROLE OF PHYSICIAN IN ORGAN TRANSPLANTATION

A medical care professional is involved in almost every step of organ donation beginning with his or her role in education of the general public regarding organ donation. Identification of the brain death and declaration of the same followed by counseling for organ donation are activities carried out by medical care professionals.¹⁸ Physicians have an important role in identifying potential donors while continuing to assure that the survivors' needs are met.¹⁹ A doctor's involvement in tissue and organ transplantation is crucial in all stages of tissue typing, consent for removal and consent for insertion of this human material into another person.²⁰ It is the doctor who could better convince the patient regarding the relevance and importance of accepting an organ

¹²*Id* at 2.

¹³*Id*.

¹⁴*Taking organs* (heart, lungs, kidneys, liver, pancreas) from brain dead people, as well as tissue donation, meaning taking tissues (skin, corneas, tendons, bone) from brain dead as well as heart dead people. (Dec. 13, 2018), <https://www.ncbi.nlm.nih.gov/pubmed/21443156>.

¹⁵ DR.ABUL MAJID SIRAJ, *LAW AND THE DOCTORS* 185 (2014 ed.).

¹⁶ CHANDA. H & SINGH P, *ORGAN TRANSPLANTATION: PRESENT SCENARIO AND FUTURE STRATEGIES FOR TRANSPLANT PROGRAMME (SPECIALLY CADAVERIC) IN INDIA: SOCIO-ADMINISTRATIVE RESPECTS*, J INDIAN MED ASSOC, JUL. 2001; 99(7):374-7.

¹⁷GS Adithyan & M Mariappan, Factors that determine deceased organ transplantation in India, INDIAN J. OF TRANSPLANTATION, 26-30 Vol II Issue II (2017).

¹⁸Vaishaly Bharambe, *Organ donation in India: Crucial role of medical care professionals*, 353-354, MED J DY PATIL VIDYAPEETH, Vol X Issue IV (2017).

¹⁹SUSAN W. TOLLE et al., *Responsibilities of Primary Physicians in Organ Donation, diagnosis and treatment*, ANNALS OF INTERNAL MEDICINE, (May 1, 1987), <http://annals.org/aim/article-abstract/701848/responsibilities-primary-physicians-organ-donation>.

²⁰ DR.ABUL MAJID SIRAJ, *Supra* note 15.

as far the recipient is concerned. With regard to the relatives of dead donor, again the doctor has a duty to convince them about the gracious element involved in organ donation and the necessity of this. The concept of brainstem death is as important to neurosurgeons, as it is to the transplant surgeons as the neurosurgeons can allow the hopeless patients to die in peace and the relatives can accept the fact of death in a ventilated body.²¹

VI. LEGISLATIVE FRAMEWORK FOR ORGAN TRANSPLANTATION IN INDIA

The legislation called the Transplantation of Human Organ Act (THOA) was passed in India in 1994 to streamline organ donation and transplantation activities.²² This legislation consists of VII Chapters divided into 25 sections. The Act provides for the regulation of removal, storage and transplantation of human organs for therapeutic purposes and for the prevention of commercial dealings in human organs and for matters connected therewith or incidental thereto. The Act contains detailed provisions relating to the authority for removal of human organs,²³ preservation of human organs, regulation of hospitals conducting the removal, storage or transplantation of human organs,²⁴ functions of appropriate authority,²⁵ registration of hospitals²⁶ and punishment/penalties²⁷ for offences relating to aforesaid matters. The Government of India enacted the Transplantation of Human Organs (Amendment) Act, 2011 and the title was revised as Transplantation of Human Organs and Tissues Act, 1994.²⁸ This allows swapping of organs and widens the donor pool by including grandparents and grandchildren in the list.²⁹ The rules were notified in 2014.

the Act recognizes cadaver transplantation, brain stem death, prohibits unrelated donors, allows preservation of harvested organs for the purposes of transplantation, permits live donors when are spouse, son, daughter, father, mother, brother, sister, grandfather, grandmother, grandson or granddaughter of the recipient.³⁰ The Act allows unrelated live donors by reason of affection or attachment towards recipient or for any other special reason with the approval of Authorization Committee.³¹ The Act regulates the hospitals where removal, storage or transplantation human organs are performed by constituting the Appropriate Authority assisted by an Advisory Committee.³² The Act mandates the appointment of a transplant coordinator³³ in every registered

²¹ JK MASON, RA MC CALL SMITH, GT LAURIE, LAW AND MEDICAL ETHICS 22 (6thed. 2003).

²² Sunil Shroff, *Legal And Ethical Aspects Of Organ Donation And Transplantation*, 348-355, INDIAN J UROL., Jul.-Sep. 2009; at 25(3).

²³ Sections 3-6, Transplantation of Human Organs Act, 1994, No. 42, Acts of Parliament, 1994 (India).

²⁴ See Section 10 *Id.*

²⁵ See Section 13 *Id.*

²⁶ See Section 14 *Id.*

²⁷ See Section 19 *Id.*

²⁸ *Acts related to human organ transplantation*, VIKASPEDIA, (Dec. 12, 2018), <http://vikaspedia.in/health/organ-donation/transplantation-of-human-organs-act-1994>.

²⁹ See Section 5 (b) (i), Transplantation of Human Organs (Amendment) Act, 2011, No. 42, Acts of Parliament, 2011 (India).

³⁰ *Id.*

³¹ See Section 9(b)(c) *Id.*

³² See Section 13 A(1) *Id.*

³³ See Section 5 e(pa) *Id.*

hospital. The Act also directs for the setting up of a National Network for coordination of several registered hospitals³⁴ and maintenance of a data bank of donors and prospective recipients³⁵ and the Act also provides for punishment for any violation of the Act.³⁶

VII. CONSTITUTION OF INDIA AND RIGHT TO HEALTH

The Constitution incorporates provisions guaranteeing everyone's right to the highest attainable standard of physical and mental health. Article 21 of the Constitution guarantees protection of life and personal liberty to all persons. The Supreme Court has held that the right to live with human dignity, enshrined in Article 21, derives from the directive principles of state policy and therefore includes protection of health.³⁷ India is a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The Supreme Court held that Article 21 of the Constitution of India in relation to human rights has to be interpreted in conformity with international law.³⁸ In *Paramanand Katara v. Union of India*³⁹, the Supreme Court observed that Article 21 of the constitution casts an obligation on the State to preserve life. The patient whether he be an innocent or be a criminal liable to punishment under the laws of the society, it is the responsibility of those who are in charge of the health of the community to preserve life so that the innocent may be protected and the guilty may be punished. Article 21 is couched in a negative phraseology. But by its creative interpretation of Art 21 in various cases, the Supreme Court has come to impose positive obligation upon the state to take steps for ensuring to the individual abettor enjoyment of his life and dignity.⁴⁰

VIII. ISSUES IN ORGAN TRANSPLANTATION

There are many legal, ethical and human rights issues involved in organ transplantation. Organ transplantation has progressed tremendously with improvements in surgical methods, organ preservation, and pharmac-immunologic therapies and has become a critical pathway in the management of severe organ failure worldwide.⁴¹ Organ donation carries with it significant moral and ethical obligations. In most developed countries, organ donation is an entirely altruistic act irrespective of whether the donor is alive or dead.⁴² But as far as developing countries are concerned, there comes into play the factors like organ trade, organ trafficking, organ sale etc.

³⁴ See Section 13 *Id* at 33.

³⁵ See Section 13 *D Id*.

³⁶ See Sections 16-19 *Id* .

³⁷ *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 SC 802 (India).

³⁸ *People's Union for Civil Liberties v Union of India*, (1997) 1 S.C.C. 301(India).

³⁹ *Paramanand Katara v. Union of India*, A.I.R. 1989 SC 2426 (India).

⁴⁰ MP JAIN, *INDIAN CONSTITUTIONAL LAW* 1158 (7THed. 2016).

⁴¹ Rafealbeyarm.D., D.Sc., M.P.H *challenges In Organ Transplantation*, Rambam Maimonides Med J., Apr. 2011 ; 2(2): E0049.

⁴² PJ Simson, *What Are The Issues In Organ Donation In 2012?* BRIT J ANAESTH, Volume 108, Issue Suppl_1, (Jan. 1 2012), Pages I3–I6, <https://doi.org/10.1093/Bja/Aer352>.

In spite of the enactments to curtail the commercial dealing in human organs, more number of scandals involving medical practitioners and others in kidney trade has come to light periodically from every State of India.⁴³The increasing demand for organs pushed profiteers to exploit poverty stricken parts of India to offer cash for organs. India is ripe with vulnerable communities who are desperate to pay with their organs for dowry for their daughters waiting to get married to sustain a living. Increasing demand resulted in underground mafia style culture of selling body parts. Kidnapping and forcible removal of organs also became a modus operandi for the organ trade.⁴⁴ Kidneys are the most in demand not only from other parts of India but also from abroad.⁴⁵

IX. MEDICAL PROFESSION AND SOCIETY

Medical profession is regarded with respect by the public. This is one of the most esteemed professions in the social fabric. The medical profession is noble but the brightness is sometimes shadowed. Trust reposed on doctors is sometimes betrayed by unnecessary surgical operations and clinical tests.⁴⁶ As in other technological endeavors, absence of accountability and a regulating system have virtually reduced the human body to lucrative, commercial enterprise.⁴⁷ In olden days, law, medicine and divinity were looked upon as three professions and the lawyer, the doctor and the parson were supposed to frame their view of life and conduct by rules that were somewhat different to those which regulated the dealings of others engaged in making a living by trade.⁴⁸

The Hippocratic Oath⁴⁹ remains almost certainly, the most famous medical ethics document, even in the 21st century. No comprehensive book on medical ethics is complete without it, and there have been many written about it in its own right.⁵⁰ The purpose of ethics is to try and find principles for living good lives.⁵¹ On every illness, the focus of doctor-patient relationship has undergone tremendous change. In every interaction between the two, the doctor suspects a potential litigant in a patient and the patient in turn firmly thinks that a second or even a third opinion from a different doctor is something which he or she cannot avoid.⁵²

Compliance of legal and ethical regulations is a not a matter of individual choice, there is a greater need for sensitization on the part of medical practitioners. Continuing medico legal education programmes exclusively focusing on pertinent legal and ethical inputs catering to the informational needs of medical professionals is the

⁴³ MODI, A TEXTBOOK OF MEDICAL JURISPRUDENCE AND TOXICOLOGY 197(25th ed. 2016).

⁴⁴ *Supra* note 15 at 186.

⁴⁵ *Id* at 188.

⁴⁶ DR NANDITA ADHIKARI, LAW AND MEDICINE 3 (3rded. 2014).

⁴⁷ *Supra* note 7 at 148.

⁴⁸ *Supra* note 43 at 55.

⁴⁹ *The Hippocratic Oath*, GREEK MEDICINE, (Dec. 13, 2018), https://www.nlm.nih.gov/hmd/greek/greek_oath.html.

⁵⁰ JOSE MIOLA, MEDICAL ETHICS AND MEDICAL LAW- A SYMBIOTIC RELATIONSHIP 21 (2007).

⁵¹ MARC STAUCH & KAY WHEAT WITH JOHN JINGLE-SOURCE BOOK ON MEDICAL LAW 3 (1999).

⁵² DR.SV JOGA RAO, MEDICAL ETHICS 10 (2004).

need of the hour.⁵³ The actions and inactions of health providers whether consistent with or in conflict with or unregulated by state laws and policies that result in the intentional, unjustifiable infliction of severe physical or mental pain must be recognized, condemned and curbed.⁵⁴ In India, the general control of the medical profession is vested with the Medical Councils created under the Indian Medical Council Act 1956.⁵⁵

X. CONCLUSION

It is a fact that organ sale or organ trading is going on in one form or other in most parts of the country. There may be some instances of sincere altruism, but in almost all other cases of unrelated live donors, the main factor maybe poverty and debt. What is happening is that after selling the organ, the amount paid will be spent for paying off the debts and the health of the donor will start declining gradually. The poverty stricken family will gradually turn again into debts and the same situation. In other cases, even if the family members are willing to donate organs, there comes the shortage of funds for the expenses for operation. In our country, we still have the social issues like child labor, dowry system, child marriage etc. Even though we have many legislations for curbing or prohibiting all these, the issues are existing in one way or other. Likewise, Government is bringing more and more amendments and rules for stricter implementation of the provisions of laws regulating organ transplantation, still the issues of organ trade or organ selling are there. The government is bringing into effect more rules for ensuring accountability on the part of the hospitals as well as physicians. Anyway, what is the need of the hour is to have more awareness among the people for donation of organs. There is increasing demand for organs, and at the same time there are large numbers of accident deaths occurring every day. If these organs could be transplanted, the shortage of organs can be solved to some extent. If the public are educated about the necessity of organ donation, the selling or commercialization of organs can be restricted.

⁵³ *Id* at 12.

⁵⁴ DR ISHITA CHATTERJEE, LAW OF FORENSIC SCIENCE 45 (1st ed. 2015).

⁵⁵ PARIKH'S TEXTBOOK OF MEDICAL JURISPRUDENCE, FORENSIC MEDICINE AND TOXICOLOGY 1.23 (6th ed. 2011).