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**New Delhi**

First Floor, 4598/12-B, 1st Floor,  
Padam Chand Marg, Daryaganj,  
New Delhi, Delhi 110002

Phone: +91 98 11 66 62 16 (M)

Phone: +91 70 11 60 56 18 (M)

**Bengaluru**

Jallahalli East

Bengaluru, Karnataka. India.

Phone: +91 98 11 66 62 16 (M)

Email: publisher.integrity@gmail.com

**USA**

New Jersey

14 Grandview Ave, Upper Saddle River,  
NJ-07458, USA

Phone: +14805226504 (M)

**London**

37 Degree Media

64, Hodder Drive, Perivale, London UB68LL.  
United Kingdom.

Phone: +44 7950 78 18 17 (M)

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## Organ Trafficking in India: A Critical Analysis of Judicial Responses and Enforcement Gaps

Author  
Niharika Singh



# Organ Trafficking in India: A Critical Analysis of Judicial Responses and Enforcement Gaps

Niharika Singh  
Amity University, Noida

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## Abstract

*Organ trafficking in India represents a grave violation of human rights, driven by the persistent gap between the demand for organ transplants and the limited availability of legally donated organs. Despite the existence of a comprehensive legal framework under the Transplantation of Human Organs and Tissues Act, 1994 (as amended), the illegal trade in human organs continues to flourish, exposing vulnerable populations to exploitation and coercion. This research paper undertakes a critical analysis of judicial responses to organ trafficking in India and examines the effectiveness of existing enforcement mechanisms.*

*Adopting a doctrinal approach, the study analyses key judicial pronouncements delivered by the Supreme Court and various High Courts to understand the evolving jurisprudence surrounding organ trafficking. It evaluates how courts have addressed issues such as commercial dealings in human organs, the role of intermediaries and medical professionals, and the regulatory oversight of authorization committees. The paper further explores the extent to which judicial interventions have contributed to deterrence, victim protection, and accountability.*

*The study identifies significant enforcement gaps that undermine the effectiveness of the legal regime, including weak monitoring mechanisms, procedural delays, lack of coordination among regulatory authorities, and corruption within enforcement agencies. It also highlights socio-economic factors, such as poverty and lack of awareness, which perpetuate the exploitation of marginalized communities. While the judiciary has increasingly adopted a strict stance against illegal organ trade, its interventions remain largely reactive, addressing violations after their occurrence rather than preventing them.*

*The paper concludes that a more robust and proactive approach is required to combat organ trafficking in India. It recommends strengthening institutional accountability, enhancing transparency in organ allocation systems, improving coordination among stakeholders, and promoting awareness to encourage ethical organ donation. Ultimately, the study underscores the need for a holistic framework that integrates effective enforcement with judicial vigilance to safeguard human dignity and public health.*

**Keywords:** *Organ Trafficking, Judicial Response, Enforcement Gaps, THOTA 1994, Human Rights, Illegal Organ Trade, India, Medical Law.*

## Overview of Organ Trafficking

Although organ trafficking is a lucrative global illicit enterprise, it is often a kind of human trafficking that is hardly recognised by anti-human trafficking advocates. Organ trafficking is intricate and often takes place clandestinely. Public policy leaders and awareness initiatives predominantly focus on human trafficking for labour or sexual exploitation. Organ trafficking holds a significant role among transnational organised criminal syndicates because to the substantial demand for organs and the relatively low enforcement of legislation.

The only thing that is felt is the terrible medical footprint that organ traffickers leave behind, while they have the ability to profit in the shadows. It leaves vulnerable populations, also known as "donors," and first world benefits, sometimes known as "recipients," subject to serious exploitation and the possibility

of experiencing health effects for the rest of their lives<sup>1</sup>. This type of illegal transaction also leaves the private sector, and the banking industry in particular, vulnerable to the possibility of being an ignorant conduit for the facilitation of this type of trade. Despite this, financial institutions have the potential to play a crucial role in uncovering organ traffickers by utilising the financial trail that they leave behind, provided that they receive the appropriate training and are made aware of the situation.

It is common for people to be confused about the manner in which organ trafficking can occur when they are defining this crime. According to estimates provided by Global Financial Integrity (GFI), ten percent of all organ transplants, including those involving the liver, heart, and lungs, are performed using organs that have been trafficked<sup>2</sup>. On the other hand, kidneys are the most prominent organs that are traded illegally. According to estimates provided by the World Health Organisation (WHO), about 10,000 kidneys are exchanged on the black market worldwide each year, which is equivalent to more than one kidney being transferred every hour<sup>3</sup>.

Since the 1970s, organ transplants have been performed in India. In 1994, following a number of incidents in which organs were sold for commercial purposes, India passed a law called the Transplantation of Human Organs and Tissues Act. By this law, the sale of organs was prohibited, and the only circumstances in which organs could be donated were between members of the same immediate family or for charitable purposes, without any monetary exchange taking place. A number of locations in India have emerged as important centres for life-saving transplant surgery of a variety of organs, including the kidneys, heart, liver, lungs, and pancreas, during the course of the past decade or so. The deceased donor program, which involves the collection of organs from donors who have passed away due to brain death, has also gained traction in certain regions of the country. A little more than 13,300 living transplants and approximately 2,700 transplants from deceased donors were carried out in India as of the year 2022<sup>4</sup>. Despite this, there are over three lakh patients in the country who are on the waiting list for organs, and twenty individuals lose their lives every single day due to a lack of an organ. What is the operation of the laws governing transplants, and are there any gaps in the legislation that need to be filled? Is there a specific set of laws that pertain to foreigners? How can donor rights be maintained in a more stringent manner in order to protect them from being exploited? Is it possible to expand the transplant program so that it can better satisfy the requirements of the nation?

Despite the existence of regulatory frameworks like as THOTA, the problem of organ trafficking in India continues to be a significant socio-legal burden. Illegal transplant operations are still being supported by the growing demand for organs, which, when combined with poverty and a lack of understanding, continues to fuel the situation. Although there have been certain judicial decisions and government actions that have contributed to the reduction of organ trading, there are still gaps in the implementation and regulation of these laws.

### **Evolution of Organ Trade in India**

The term "organ trade" refers to the commercial exchange of human organs, with the primary goal of implementing transplantation procedures. Due to the glaring disparity between the great demand for healthy organs and the limited availability of organs that are donated voluntarily, this practice has emerged as a serious concern in the field of bioethics. Kidneys, hearts, and livers are among the most important organs that are traded in this industry<sup>5</sup>. As a result of the possibility of living donations, kidneys are the organ that is transferred the most frequently. The illegal trade in organs frequently targets vulnerable groups, particularly in poor nations, and may entail the use of coercion or exploitation of donors.

Even though there have been breakthroughs in medical technology that have made transplantation safer and more prevalent, the demand for organs continues to outpace the supply, which has led to significant ethical questions. Whether or not individuals have the legal right to sell organs and the ramifications of compensating donors are also topics that raise questions. Even though certain nations, such as Iran, have

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<sup>1</sup> Cams, K. M. "Organ Trafficking: The unseen form of Human Trafficking" *ACAMS Today*, (2018, July 31).

<sup>2</sup> "Transnational Crime and the Developing World," *Global Financial Integrity*, (March 2017)

<sup>3</sup> Denis Campbell and Nicola Davison, "Illegal kidney trade booms as new organ is sold 'every hour,'" *The Guardian*, (May 27, 2012)

<sup>4</sup> Hamid, Z. "What drives the illegal organ trade in India?," *In Focus podcast. The Hindu*, (2024, March 4).

<sup>5</sup> <https://www.ebsco.com/research-starters/anatomy-and-physiology/organ-trade>

made efforts to regulate kidney sales in order to solve this problem, illegal organ trafficking continues to be a global concern. This is especially true in locations such as North and West Africa as well as certain parts of Asia, where it is known that organised crime networks are engaged in their activities. When taken as a whole, the organ trade involves significant ethical, legal, and societal problems concerning health rights, exploitation, and the integrity of medical processes.

In the year 1954, the kidney was the first human organ to be successfully transplanted into another individual. Transplants of the liver, heart, and pancreas were successfully performed by the late 1960s, while transplant procedures for the lungs and the digestive tract did not begin until the 1980s. Beginning in the middle of the 1950s and continuing until the early 1970s, organ procurement organizations and specific transplant hospitals were responsible for managing all elements of organ recovery and transplantation<sup>6</sup>. If a donor's organ could not be used at hospitals in the donor's immediate vicinity, there was no mechanism in place to locate suitable candidates in other locations. The inability of transplant teams to find a suitable recipient in a timely manner resulted in the inability to use a significant number of organs.

During the 1960s, the notion of brain death was introduced, which involved the utilisation of organs from brain-dead patients (cadavers) who were maintained on ventilators and whose hearts continued to act normally<sup>7</sup>. This helps to prevent irreparable ischaemia of the organs, which can be prevented by maintaining blood circulation. The acceptance of the notion of brain death brought about an increase in the availability of organs and made it possible to do transplants that would not have been conceivable with living people (such as transplants of the heart, lungs, intestines, and so on). In spite of this, many families found it challenging to come to terms with the fact that their loved one had passed away due to brain death. Therefore, the significant disparity between the demand for organs and the supply of organs continued to exist.

### **International Organ Trafficking**

Similar to the illegal markets for guns, people, and drugs, the trafficking of organs is a burgeoning and lucrative business that is continuously expanding. Since the 1980s, both exaggerated kidnapping experiences and credible reports of underground organ markets have been reported by the media, which has contributed to the sensationalization of myths involving organ trafficking. Organ trafficking is recognised as a human rights and public health concern by the international community, despite the fact that the precise magnitude of the problem continues to be cloaked in doubt. The clandestine organ trade accounts for ten percent of all organ transplants performed throughout the world and generates between six hundred million and one and a half billion dollars in illegal cash annually.

Although the sites of organ trafficking centres are always changing, a few of countries have become notorious for being hotbeds of the activity. There is a thriving underground market in Pakistan that is supplied by people who are living in poverty. Pakistan is home to one of the greatest "kidney bazaars" in the world. Because there were no national rules or mechanisms in place to manage organ donation at the time, commercial kidney transactions quickly became common. This led to the expansion of kidney transplants in the late 1980s, which was a time when there was a legal vacuum. These days, brokers collaborate with hospitals to find donors from low-income families, who are responsible for donating around two thousand kidneys annually.

As a result of the fact that more than eighty percent of kidney transplants in Egypt involve commercial donors, Egypt is also a centre for organ trafficking. Because there are no regulations or transplant processes in place in Egypt, over the counter (OTC) trafficking has become the primary means of organ procurement, much as it is in Pakistan. Egypt's organ seller pool, on the other hand, is made up of both destitute Egyptian nationals and immigrants from sub-Saharan Africa. This is in contrast to Pakistan, where the majority of donors are Pakistani citizens.

An increasing number of organ trafficking organisations involve individuals who are simultaneously operating in a number of different countries in order to recruit donors and receivers. In addition to the Philippines, nations such as India, China, Egypt, Iraq, Turkey, and Pakistan are also considered to be organ supply countries. In order to obtain organs on the black market, patients from wealthy countries

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<sup>6</sup> <https://unos.org/transplant/history/>

<sup>7</sup> [https://journals.lww.com/ijjt/fulltext/2018/12030/legal\\_aspects\\_of\\_transplantation\\_in\\_india.4.aspx](https://journals.lww.com/ijjt/fulltext/2018/12030/legal_aspects_of_transplantation_in_india.4.aspx)

such as the United States of America, the United Kingdom, Canada, and other countries travel to countries that are sources of organ supply.<sup>8</sup> As a result of the fact that contributors do not often go outside of their native nation, these kinds of transactions constitute illegal trafficking. In 2008, for instance, the authorities in India disbanded a network of medical professionals, including doctors, nurses, paramedics, and hospitals, which had carried out five hundred illegal transplants on foreigners, with the majority of the donors coming from destitute Indian families.

### **Concept Of Trafficking of Persons for the Purpose of Organ Removal**

Trafficking in humans for the purpose of organ removal is a type of trafficking in which a person is exploited for their organ. This can include coercion, deception, and abuse of a position of vulnerability. Although the act is commonly mistaken for organ trafficking, organ trafficking is a broader term that refers to the illegal buying and selling of organs for money or other material benefits. In organ trafficking, the attention is on the organ itself; conversely, in trafficking in persons for the purpose of organ removal, the focus is on the individual. The Palermo Protocol, which is the most important worldwide anti-trafficking instrument, defines exploitation as include at least "the removal of organs," as well as sexual exploitation, forced labour, and slavery or practices that are similar to slavery<sup>9</sup>.

The Palermo Protocol defines organ trafficking as the exploitation of organs for the purpose of removing them, but it does not include tissues or cells. However, while kidneys are the most commonly trafficked organs, other organs and tissues, such as livers, corneas, and skin, are also sought after. Victims may not receive any remuneration at all, or they may receive some payment. It is crucial to note that an individual might still be a victim of trafficking in persons or other human rights abuses even if they got some type of payment.

According to Article 5 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (also known as the Trafficking in Persons Protocol), which is an addition to the United Nations Convention against Transnational Organised Crime (also known as the Organised Crime Convention), states that are parties to the protocol are required to make trafficking in persons for the purpose of organ removal a crime, as defined in Article 3.<sup>10</sup> The Trafficking in individuals Protocol is the first international legal document to define trafficking in individuals for the purpose of organ removal.

Article 3(a) of the Trafficking in Persons Protocol states the following:

*"Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitat At a minimum, exploitation will encompass the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices comparable to slavery, servitude, or the removal of organs".*<sup>11</sup>

### **Evolution of Legal Framework**

Prior to the passage of "The Transplantation of Human Organs and Tissues Act, 1994," there was no complete regulation that regulated the removal of organs from live as well as deceased individuals and the transplantation of such organs. This legislation was passed in 1994. The Eyes (Authority for use for Therapeutic Purposes) Act, 1982 and the Ear Drums and Ear Bones (Authority for Use for Therapeutic Purposes) Act, 1982 were the two laws that were in effect in the Union territory of Delhi. These laws regulate the removal and transplantation of cornea, ear drum, and ear bones. Both of these laws were passed in 1982. There is a need to ensure that human organ trafficking does not occur by taking advantage of the poverty, illiteracy, and ignorance of a significant portion of Indian population. This is one of the principles of public interest. Because transplantation has the potential to save lives, it is

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<sup>8</sup> <https://bclawreview.bc.edu/articles/727/files/63b293afbb013.pdf>

<sup>9</sup> [https://www.state.gov/wp-content/uploads/2024/08/24-02934-TIP\\_Factsheet-Forced-Organ-Removal\\_Accessible-8.22.2024.pdf?utm\\_source=chatgpt.com](https://www.state.gov/wp-content/uploads/2024/08/24-02934-TIP_Factsheet-Forced-Organ-Removal_Accessible-8.22.2024.pdf?utm_source=chatgpt.com)

<sup>10</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 3 & 5

<sup>11</sup> Trafficking in Persons Protocol, Article 3(a)

essential that it be permitted. There is a considerable correlation between the protection of the public's health and the practice of transplantation.

Both the Bombay Corneal Grafting Act of 1957 and the Maharashtra Kidney Transplantation Act of 1982 are pieces of legislation that govern the transplantation of kidneys and corneas, respectively, in the state of Maharashtra. Therefore, there was a requirement for a complete regulation that would prohibit commercial deals in human organs and regulate the removal of organs from living individuals as well as cadavers or other living individuals.

### **The Report of the L.M. Singhvi Committee**

In addition, a report was compiled by a committee consisting of medical and legal professionals, which was led by Dr. L.M. Singhvi. In order to provide clarity on the following issues, the L.M. Singhvi Committee was established. These issues include the following: the concept and definition of brain death; the necessity of separate legislation to recognise brain death and the legal, medical, and social implications of such legislation; the safeguards that must be adopted in order to prevent the misuse of the concept of brain death; and the manner in which the concept of brain death must be applied in order to promote the availability of human organs for transplantation.

### **The Transplantation of Human Organ and Tissues Act, 1994**

The Transplantation of Human Organs Act, which was passed in 1994, is the primary piece of legislation in India that pertains to organ donation and transplantation. Its purpose was to regulate the removal, storage, and transplantation of human organs for therapeutic purposes, as well as to prevent commercial dealings in human organs. In India, each state is responsible for regulating issues that are associated with health. After being begun at the request of Maharashtra, Himachal Pradesh, and Goa (which therefore adopted it by default), the act was later adopted by all states with the exception of Andhra Pradesh and Jammu & Kashmir. The media reported on instances of commercial dealings involving human organs, despite the fact that there was a regulated system in place. An amendment to the act was proposed by the states of Goa, Himachal Pradesh, and West Bengal in 2009. The purpose of the amendment was to remedy deficiencies in the act's effectiveness, relevance, and impact. 2011 was the year that the amended act was approved by the parliament, while 2014 was the year that the rules were made public. The same is adopted by the states and union territories that proposed it by default, and it is possible for other states to adopt it by passing a resolution. Several distinctions can be made between the statute of 1995 and the later regulations that were enacted in 2014.

### **The Transplantation of Human Organ's Act, 1994**

Following the report that was submitted by the L.M. Singhvi Committee, a Bill was draughted, and three states, namely Goa, Maharashtra, and Himachal Pradesh, issued resolutions that were in favour of the legislative proposal. The bill pertaining to the transplantation of human organs was presented to the Rajya Sabha on May 5, 1993, and it was adopted by the House of Representatives without any opposition. The Lok Sabha, on the other hand, made the decision in December 1993 to send the Bill to a Select Committee for additional scrutiny or investigation. Both the inclusion of in-laws as near relatives and the payment of live donors were subject to some minor adjustments that were proposed by the Committee. Due to the fact that these were not supported by the Union Cabinet, the Bill was ultimately approved by the Lok Sabha on June 15, 1994. On July 8, 1994, it was bestowed with the approval of the President. Regulations pertaining to the Act were published in February of 1995.

"An Act to provide for the regulation of the removal, storage, and transplantation of human organs and tissues for therapeutic purposes and for the prevention of commercial dealings in human organs and tissues] and for matters connected therewith or incidental thereto," the language of the proposed legislation reads.

In light of the fact that it is expedient to provide for the regulation of the removal, storage, and transplantation of [human organs or tissues or both] for therapeutic purposes, as well as for the prevention of commercial dealings in [human organs or tissues or both], And whereas the Houses of the Legislatures of the States of Goa, Himachal Pradesh, and Maharashtra have all passed resolutions in accordance with clause (1) of Article 252 of the Constitution, stating that the matters aforesaid should be regulated in those states by Parliament by law; and whereas the Houses of the Legislatures of the

States of Goa, Himachal Pradesh, and Maharashtra have all passed resolutions to the effect that the aforementioned matters should be regulated in those states by Parliament by law<sup>12</sup>;

### **Regulation of Cadaveric Donation**

Sections 3 to 8 of the Act govern cadaver donation.<sup>13</sup> According to Section 3 of the Act, an individual may, at any point prior to their death, provide written authorisation in the presence of two or more witnesses for the removal of any organ from their body post-mortem. Form 7 of the Transplantation of Human Organs and Tissues Rules, 2014, delineates the prescribed format for such authorisation. Authorisation can now also be included in a driving licence. If the individual did not provide authorisation prior to death, the person legally in possession of the deceased's body may permit the removal of any organ, unless there is reason to believe that a close relative of the deceased objects. The Act does not establish presumed consent for organ donation from a deceased individual, as is the case in Spain, but mandates informed consent from the donor or the one legally in possession of the corpse.

According to Section 3(6) of the Act, organ donation from cadaver donors necessitates certification of brain-stem death by a panel of medical professionals, which includes: (i) the registered medical practitioner overseeing the hospital where brain-stem death has been established; (ii) an independent registered medical practitioner from a list sanctioned by the Appropriate Authority; (iii) a neurologist or neurosurgeon; and (iv) the registered medical practitioner responsible for the care of the individual whose brain-stem death has been confirmed.

### **Regulation of Living Donation**

Section 9 of the Act governs living donation<sup>14</sup>. The Act delineates distinct procedures for living donations from near relatives and those from unrelated donors. Section 2(i) defines a "near relative" as a spouse, son, daughter, father, mother, brother, sister, grandfather, grandmother, grandson, or granddaughter.

### **U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children**

The U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the U.N. Convention against Transnational Organized Crime (U.N. TIP Protocol, also known as the Palermo Protocol), entered into force on September 29, 2003.

The protocol includes "the removal of organs" as a type of exploitation in its definition of trafficking in persons. In providing advice and consent to the U.N. TIP Protocol in 2005, the U.S. Senate included a reservation stating that U.S. federal criminal law was "broadly effective" for addressing activities listed in the protocol and a declaration that U.S. law satisfied the obligations of the protocol and that the United States did not intend to enact new legislation to fulfill protocol obligations. In 2010, then-TIP Ambassador CdeBaca explained the U.S. interpretation of the organ-related provisions: "The United States has interpreted the organ trafficking portion of the Palermo Protocol to criminalize those who would traffic a person in order to harvest their organ. Some countries are looking at it more expansively and looking at the trafficking in the organ itself."

### **3.4.2 World Health Organization (WHO) Guiding Principles on Human Cell, Tissue, and Organ Transplantation**

First endorsed by the WHO's decision-making body, the World Health Assembly (WHA), in 1991, and updated in 2010, the WHO Guiding Principles on Human Cell, Tissue, and Organ Transplantation (WHO Guiding Principles) "are intended to provide an orderly, ethical and acceptable framework for the acquisition and transplantation of human cells, tissues and organs for therapeutic purposes." The preamble references the growth of "commercial traffic in human organs" and "the related traffic in

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<sup>12</sup> The Constitution of India, Article 252

<sup>13</sup> The Transplantation of Human Organ's Act 1994, sec 3-8

<sup>14</sup> The Transplantation of Human Organ's Act 1994, sec 9

human beings.” Several guiding principles relate to organ trafficking, including provisions stating that<sup>15</sup>-

- live donations should occur with the donor’s informed and voluntary consent and that donors should be provided professional medical care (Guiding Principle 3),
- cells, tissues, and organs should be donated, not sold, and that sales should be prohibited, though compensation for donations is permitted (Guiding Principle 5), and
- health professionals should not engage in, or provide insurance coverage for, transplantations that involved “exploitation or coercion of, or payment to, the donor or the next of kin of a deceased donor” (Guiding Principle 7).

Furthermore, a 2004 WHA resolution urges member states to “take measures to protect the poorest and vulnerable groups from ‘transplant tourism’ and the sale of tissues and organs.

### **3.4.3 The Declaration of Istanbul on Organ Trafficking and Transplant Tourism**

The Declaration of Istanbul on Organ Trafficking and Transplant Tourism (Istanbul Declaration) arose from the International Summit on Transplant Tourism and Organ Trafficking convened by the Transplantation Society and International Society of Nephrology from April 30 to May 2, 2008. The summit sought to address “the urgent and growing problems of organ sales, transplant tourism and trafficking in organ donors,” and the resulting Istanbul Declaration included principles and proposals relating to strengthening legal and ethical organ transplants and preventing organ trafficking, transplant commercialism, and transplant tourism. Provisions included calls for countries to maximize the number of organs available for transplantation and prohibit advertising for organ trafficking. The declaration was updated in 2018.

### **Landmark cases and judicial interpretation**

**Sajith shyam v. State of kerala**<sup>16</sup>, decided on 10-07-2024

In a petition filed under Section 439 of the Code of Criminal Procedure, 1973 (‘CrPC’) by the petitioner, who is the third accused in the original complaint regarding human organ trafficking, punishable under Section 370 in conjunction with Section 34 of the Penal Code, 1860 (‘IPC’) and Section 19(a)(b)(c) & (d) of the Transplantation of Human Organs and Tissues Act, 1994, C.S. Dias, J., dismissed the petition, denying bail. The judge noted that courts must consider the gravity and nature of the offence and whether the release of the accused would adversely affect society.

### **Decision-Making and Analysis**

After reviewing the parties' arguments and the evidence presented, the Court saw that funds were sent to the petitioner's account, which were subsequently retransferred to Stemma Club, and the call records indicated communications with multiple individuals. The Court stated that the Transplantation of Human Organs and Tissues Act, 1994, was enacted by Parliament after reviewing multiple reports regarding the burgeoning human organ trade in India and the resultant exploitation of economically disadvantaged groups through organ removal and illicit transplants. Nevertheless, the Court observed a disparity between the Act's aim and its execution. The Court stated that the allegations against the petitioner represented a grave transnational crime necessitating investigation by the NIA, particularly due to the involvement of national security and the trafficking of innocent individuals to a foreign nation for organ harvesting.

The Court noted that the determination of whether the petitioner gained from the transaction will be subject to scrutiny during the trial. The Court cited the ruling in *Ash Mohammad v. Shiv Raj Singh*<sup>17</sup>, which established that the broader public interest of the State must be taken into account when evaluating a bail application. The Court stated that in a bail application under Section 439 CrPC, it must assess the nature and severity of the offence, evaluate the likelihood of the accused fleeing, and determine if granting bail would adversely impact society. The Court denied the petitioner's bail request,

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<sup>15</sup> file:///D:/Your%20Data%20Don't%20Delete/Downloads/R46996.pdf

<sup>16</sup> 2024 SCC OnLine Ker 3857

<sup>17</sup> (2012) 9 SCC 446

dismissing it on the grounds that the preliminary evidence indicated the petitioner engaged in financial transactions and frequent cellphone communications with the absconding accused 1.

### **Narmada kidney foundations vs. High Court of Bombay<sup>18</sup>**

The Narmada Kidney Foundation, which is a non-governmental organisation based in Mumbai, submitted a Public Interest Litigation (PIL) to the Bombay High Court in the year 2016. PIL requested directives for the efficient implementation of the program under Section 9(3-A) of the Transplantation of Human Organs and Tissues Act, 1994, notably concerning swap kidney transplants. The PIL was filed in the United States District Court for the Northern District of California. In addition to this, the petitioners asked for the establishment of separate regulations that would govern transplants of this kind.

The case was presided over by a division bench that included Chief Justice Manjula Chellur and Justice M.S. Sonak of the Supreme Court of India. Despite the fact that the court questioned the NGO's position in the matter and emphasised the importance of striking a balance between allowing swap transplants and prohibiting the commercialisation and trafficking of human organs, the court decided not to consider the public interest litigation (PIL). The court emphasised the significance of authorisation committees in contributing to the preservation of this equilibrium.

By making this decision, the judiciary demonstrated its cautious approach to the modification of organ transplant legislation. This approach ensures that any changes do not accidentally promote unethical practices for organ transplantation.

### **Challenges and future trends**

#### **1. Problems with the System**

- In spite of the fact that the Organ Transplant Act has been subject to frequent revisions in the recent past, there has not been a substantial shift or growth in the general donation numbers or in the establishment of a donation system within the country (with the exception of a few states, which will be mentioned later).
- In the event of living organ donations, which are organs that are transferred from a living donor to a recipient, the transplant must be approved by a committee at the state level or a hospital committee, consisting of government officials, if the donor is not related to the recipient. It is only natural that these regulations may cause delays throughout the entire procedure.
- When it comes to organ donations from deceased individuals, there are not many hospitals that proclaim brain deaths, and there are not enough representatives available to consult families, both of which contribute to a low conversion rate. The concept of brain death as a type of death is not adequately understood or acknowledged by the general public. Additionally, there is reluctance on the side of the medical community to declare that a person has died from brain death. If there is a need to raise the number of organs that are donated, then this must be altered.

#### **2. Problems both with the infrastructure and with the competent personnel**

Only a few number of facilities possess the necessary staff and equipment to successfully carry out a transplant. These include competent medical professionals and transplant coordinators who have received further training.

- Ventilators that are appropriate for the care of brain-dead individuals are not readily available everywhere. The situation is made worse by the limited facilities that are available for transporting donated organs. Very few private hospitals that specialise in organ transplantation can brag of having standard infrastructure that allows for a smooth process of organ donation and transplantation. The circumstance becomes much more dire in the

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<sup>18</sup> Narmada Kidney Foundations Vs. High Court Of Bombay 2016

case of public hospitals, which are responsible for observing the majority of cases of this kind<sup>19</sup>.

- According to a number of physicians who participated in our research, another limitation is that there is a lack of training for people working in intensive care units when it comes to maintaining brain dead patients.
- According to the information provided by a respondent, a significant number of medical professionals are not familiar with the concept of brain death throughout the entire process because it is not included in their formal education curriculum.

### **3. Due to a lack of awareness, religious and other difficulties**

There is still a significant lack of awareness, which is one of the primary reasons for the extremely low organ donation rates in India. Currently, there are no organised or targeted awareness campaigns or initiatives that are aimed at assisting individuals in comprehending the what, why, or how of organ donation. Despite the fact that there are certain non-governmental organisations (NGOs) that are making efforts, these efforts are, at best, like droplets in the ocean. It is a common belief that individuals in India do not sign up for organ donation; yet, in actuality, there are very few platforms that are available for people to "sign up." In their whole lives, the vast majority of people have never been presented with this option. There are a lot of people that are conscious and willing to travel, but they don't know where to go. Families may not consent to the donation of organs from deceased individuals for a variety of reasons, including religious views.

### **Conclusion**

The field of organ donation is still relatively unexplored in India, and it has not yet gained significant popularity. This is made abundantly clear by the fact that the rate of organ donation in India is barely 0.26 per million, but in industrialised countries it is somewhere between 30 and 40 per million. If we look at the opposite side of the coin, we see that the demand for organs is consistently growing, but the supply is not sufficient to meet this demand. Donations have become commercialised as a result of this imbalance, and unlawful markets have been experiencing great growth with this imbalance. The increasing prevalence of commercial organ selling can be attributed to the socio-economic realities of the country as well as the legal framework that is now in place.

Despite the fact that there are only 0.6% donors in India who are over one million people, the organ trade is nevertheless continuing to experience substantial growth. Over two hundred thousand kidney donors are needed, yet there are only three thousand five hundred donors that can be managed. For this reason, India requires a unified legal framework in order to curb the growing number of instances of organ trafficking in the not-too-distant future. Obtaining the agreement of the deceased person's family can be a challenging endeavour due to the prevalence of superstition and traditional religious beliefs. Consequently, this cause leads to a drastic reduction in organ donation rates from the time when the Act of 1994 came into effect. Even though the deceased individual may have given his or her consent for the harvesting of internal organs while alive, the relatives of the deceased individual do not give permission to harvest the internal organs of the deceased individual.

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<sup>19</sup> Prateek Gupta- TRANSPLANTATION OF HUMAN ORGANS: A CRITICAL ANALYSIS, INTERNATIONAL JOURNAL OF LEGAL DEVELOPMENTS AND ALLIED ISSUES VOLUME 6 ISSUE 4 – ISSN 2454-1273 JULY 2020

### **Cost-effectiveness**

1. Ayushman Bharat Scheme Under the PMJAY: The procedure includes the transplanting of bone marrow and kidneys. In addition to increasing the quantity, there is a requirement to broaden its scope so that it encompasses the heart, lungs, liver, pancreas, and other organs.
2. Drugs such as immunosuppressants, preservative solutions for organ transportation, and other consumables that are necessary for organ transplantation ought to be exempt from taxation.
3. Investing in Research and Development: The use of abandoned or underutilised organs from deceased donors should be permitted for the purpose of conducting research on organ preservation and organ resuscitation utilising contemporary technologies.
4. Despite the fact that organ donation pledges have greatly grown across the nation, there is still a need to raise awareness and make it easier for people to donate organs. There need to be a provision for the pledge of organs included in each and every driver's license.
5. Approach based on collaboration: Encourage collaboration among various stakeholders in order to build ethical principles and policies that will govern emerging technologies in the field of transplantation, such as xenotransplantation and gene editing.

### **Suggestions**

Although new rules under NOTTO and anti-trafficking campaigns indicate intent, the lack of explicit attention on organ trafficking as a unique crime restricts the impact of these policies. This is revealed by a critical analysis of the situation. Through the implementation of THOTA in conjunction with the high fines imposed by the BNS, the use of digital tools in accordance with the DPDP Act, and the expansion of NOTTO's oversight, India is able to enhance its fight against this illegal trade. These initiatives, when combined with public awareness, victim rehabilitation, and international cooperation, have the potential to bridge the organ demand-supply gap in an ethical manner. This will ensure that recent legal improvements translate into concrete justice and protection for those who are vulnerable. The only way for India to eradicate organ trafficking and protect the sanctity of human life is through the utilisation of such synergy.

1. The records pertaining to hospitals that carry out the process of organ transplant should be examined by the State Medical Council to ascertain the ratio of organ transplants done through what can be termed as "compassionate donors." If the percentage has crossed 5 percent of all organ transplants carried out in any year of the last five years, then the State Medical Council must conduct an investigation of the background of the donor and recipient in the case of kidney transplant procedures. In addition, the State Medical Council must document the condition of the donor after the procedure along with the type of aftercare provided at the hospital. Wherever there is a need for police involvement to get the background information of the donors and recipients, then the help of State Human Rights Commission can be availed.
2. In order to lessen the need for "live donors," it is recommended that cadaver transplant programs be developed and implemented.
3. In order to give alternatives to kidney transplantation, hospitals should expand the number of facilities that are required for chronic renal dialysis and upgrade those facilities.

4. It is imperative that improved facilities be made available in order to facilitate transparent and efficient counselling of potential contributors.

#### **5. The Amendments to the THOTA Act (Post-1994 Updates) Being Tightened**

Some of the most recent changes to THOTA have been geared towards broadening the donor pool by, for example, incorporating donations from close relatives and swaps. On the other hand, the law ought to implement more clarifications and penalties for "commercial intent" by establishing monetary thresholds or specific criteria to differentiate between lawful reimbursements and trafficking payments. This would close gaps that brokers take use of.

In order to improve openness and traceability, it should be mandatory to conduct real-time digital reporting of all transplant surgeries. This would leverage the recent digitisation initiatives that have been undertaken in accordance with the Act.

#### **6. Utilising the Digital Personal Data Protection Act (DPDP Act)**

Implement to protect the data of both donors and recipients, while also providing authorities with the ability to monitor unlawful online organ trade networks. In cases of human trafficking, strong penalties should be enforced for the exploitation of personal data through activities such as identity theft and forging permission.

In accordance with India's recent push for digital governance, the database of the National Organ Transplant Organisation (NOTTO) should be integrated with cybercrime units in order to monitor advertising for organ sales on the dark web or social media platforms (such as Telegram groups).

#### **7. Strengthening the Enforcement of the Bharatiya Nyaya Sanhita (BNS)**

Section 111 of the BNS, which took the place of the Indian Penal Code in 2023, contains rules that pertain to organised crime situations. For the purpose of this section, organ trafficking should be clearly classified as an organised crime. This would ensure that trafficking syndicates are subject to more severe sanctions, including life imprisonment or the death sentence in extreme situations.

Train law enforcement and the judicial system to prioritise organ trafficking cases in accordance with the new criminal laws. This will coincide with the victim-centric approach taken by the BNS, which includes providing expedited trials and protection for donors who have been exploited.

#### **8. By Expanding the Role of the NOTTO in Light of Recent Guidelines**

Recent guidelines from the NOTTO place an emphasis on programs for deceased donors. Accelerate its execution by allocating funding from the Union Budget for 2024-25 to modernise intensive care units in government hospitals. This would increase the number of organs that are recovered, thereby lowering the organization's reliance on living donors who are susceptible to being trafficked.

In the event that it is suspected that trafficking is taking place, NOTRO should be given the authority to carry out unexpected audits of private transplant centres and the authority to cancel licenses under the Clinical Establishments Act of 2010.

Incorporating Anti-Trafficking Provisions from the 2021 Bill Build on the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2021 (which is currently pending or assumed to be adopted by 2025), in order to include organ trafficking expressly as a type of human trafficking. The National Organisation for Trafficking in Persons (NOTTO) should be linked with district-level anti-trafficking teams in order to rescue victims and prosecute perpetrators.

As a result of the penalties collected under this law, rehabilitation packages consisting of counselling, skill training, and financial assistance.

### **9. In the context of recent PM initiatives, the promotion of public-private partnerships**

Encourage private hospitals to participate in legal organ donation programs by providing them with financial incentives, such as subsidies or tax breaks, as part of current healthcare initiatives such as Ayushman Bharat. This will help reduce the demand that drives illegal markets.

A framework should be utilised to pay the price of transplants for economically disadvantaged groups. This will discourage these parts from selling organs out of desperation.

### **10. A Harmonisation of International Relations with Recent Commitments**

THOTA should be aligned with India's obligations under the 2023 G20 New Delhi Declaration, which placed an emphasis on combating transnational terrorist organisations. Utilising India's recent leadership in international forums, work together with Interpol and the countries of South Asia to destroy networks that are involved in the trafficking of organs across international borders.

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Ex. Dean & Head,  
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*DR. KALPESHKUMAR L GUPTA*

Founder ProBono India, Legal Start-ups,  
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