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# Legal Rights, Issues, and Challenges for Organ Donors in India

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## ABSTRACT

*In today's ultra-advanced age of medical knowledge, the average human life expectancy has been significantly increased. On the one hand, technology has introduced advanced means of invasive surgery, but it has also been exploited to exploit people. Human organ transplantation is one type of invasive surgery that can help an ailing patient live longer. Only specific organs in the human body can be transplanted, such as the heart, liver, kidney, and pancreas, and only in two scenarios can living people donate their organs for transplantation: the kidney and liver. In India organ transplantation is regulated by Transplantation of Human Organs and Tissues Act 1994 and Transplantation of Human Organs and Tissues Rules 2014. As a matter of fact Indian law criminalizes commercial dealings in human organs and makes any kind of payment punishable. In the given context this paper will analyze how far the rights of an organ donor is protected in India and whether they may be tagged as an offender in case they are receiving any payment in exchange of their organ? The paper also discusses how to move forward in order to create a workable solution that protects both the rights of a dying patient and the rights of organ donors.*

**Keywords:** *Living Donor, Right to Reimbursement, Organ Donation and Offence.*

## I. INTRODUCTION

The concept of human organ transplantation as we understand today has a history of evolution through several up and downs and criticism. The history of Medical endeavours to change damaged human tissue is very long. Sixth century BCE manuscripts found in India described in detail the procedure to conduct plastic surgery.<sup>2</sup>The most early and recognised treatment for replacing tissue was skin grafting, and from the beginning, this practice included the potential that another person may provide the skin graft for the patient. In the 1600s, surgeons began to seriously pursue donor-to-patient skin grafting. When medical advancements revealed that sickness may be caused by problems with a specific organ, clinicians began to have larger objectives for grafting injured organs.<sup>3</sup> In the 1800s, the availability of anaesthesia and

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<sup>2</sup> Vijay Pothula, "Sushruta and Indian Rhinoplasty" 30(1) *ENT and Audiology News*, 1 (2021).

<sup>3</sup> David Hamilton, *A History of Organ Transplantation*, 13-19 (University of Pittsburgh Press, 2012).

infection-prevention techniques made such surgical procedures even more appealing.

During early 1950s Physicians started seeing success in reaching an unreachable goal that is successfully transplanting human organ from the donor to the recipient surpassing the immunological inhibition.<sup>4</sup>The human organ transplantation was primarily unreachable due to the fact that human body immunity invariably reject any alien object in the body except in few cases.<sup>5</sup> This rejection of foreign body part or tissue is present in all level of living beings as such it was initially so difficult to surpass that no medical intervention could provide help. Many members of the medical community acknowledged and was very respectful towards the body's tenacious, pervasive ability to reject any foreign and alien object, to the extent that they believed that going beyond or attempting to surpass the rejection is futile as well as against the natural inhibitions.<sup>6</sup>

As such the pioneers of organ grafting faced not only a tremendous biological barrier, but also peer disapproval and, in some cases, hostile reactions.<sup>7</sup> Although early transplants in the 1950s and 1960s are now seen as praiseworthy, this view was not prevalent at the time. It took some time for early achievements to be appreciated, but that pioneering work is now regarded as one of surgery's most significant contributions.<sup>8</sup> Those surgeons who pioneered the field were constantly recognised internationally. By the end of the twentieth century, clinical success with human organ transplantation had almost been accomplished, and the practice had become common and uncontroversially accepted. The efforts to develop transplantation science continued and new targets evolved.<sup>9</sup>

Law and legal regulations around the transplantation of human organ and tissues played an active part from the very beginning. The early legal issues developed, mainly around who controlled a deceased person's corpse.<sup>10</sup> When corneal grafting grew more popular in the 1950s, legislators enacted regulations to speed up the acquisition of donated tissues.<sup>11</sup> By the 1960s, when renal organ donation became feasible, additional legislative changes were required. The changes in the legislations came through many controversies, legal, moral and social as the concept of brain death was to be incorporated in intensive care units before the organ

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<sup>4</sup> W. Watson Cheyne, "Skin Grafting after Removal of the Mamma" 138 (3540) *The Lancet*, 5-6 (1891).

<sup>5</sup> Joseph E. Murray, J.P. Merrill, J. Hartwell Harrison, Richard E. Wilson, and Gustave J. Dammin, "Prolonged Survival of Human-Kidney Homografts by Immunosuppressive Drug Therapy" 268(24) *New England Journal of Medicine*, 1315-1323, 1318 (1963).

<sup>6</sup> David Hamilton, *A History of Organ Transplantation*, Op. Cit.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

retrieval.<sup>12</sup> But the problem with legislations concerning the organ and tissue transplantation is that they often lagged behind the rapid medical advancements.<sup>13</sup>

Keeping this history of evolution of the medical procedure of organ transplantation behind, we can now look into the modern legislation governing the procedure with reference to India. Indian adopted the Transplantation of Human Organ and Tissues Act in 1994 after various stakeholder raised concern over exploitation the poor vulnerable population who are being lured to being organ donors in exchanges of meagre sum of money and without any knowledge of the possible outcome of such organ harvesting.<sup>14</sup> The problem of illegal organ harvesting was not unique to only in our country as such it is prevalent all over the world. The law defines the terms such as “Donors” and “Transplantation”. It has made commercial dealings illegal and provided penal provisions as well. Although the law has been criticised for being hasty and ill-drafted, it has provided some sort of regulation towards the organ commerce, which we will discuss in the latter parts.

## II. THE TRANSPLANTATION OF HUMAN ORGAN AND TISSUES ACT

The Parliament enacted the “Transplantation of Human Organ and Tissues Act (THOTA) under the Clause (1) of Article 252 of the constitution of India as resolutions were passed by all the Houses of the Legislatures of the States of Goa, Himachal Pradesh and Maharashtra.<sup>15</sup> The primary object of the legislation is to have a comprehensive legislation for regulating the removal of organs from the cadavers and living persons and prohibiting commercial dealings in human organ. Despite having the law in force there were numerous reports in the print and electronic media that human organ trade is blooming, leading to consequential exploitation of the economically weaker sections of the society. As such the Hon’ble High Court of Delhi constituted a committee to examine the lacunae in the implementation of the said Act which resulted in the amendment of 2011.<sup>16</sup>

The THOTA as it stands today provides wide range of definitions, including the terms like, “brain-stem death” which has been incorporated for the first time through this law.<sup>17</sup> Chapter

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Before the passing of the Transplantation of Human Organs Act of 1994, no comprehensive legislation were there to regulate the removal of organs from living as well as deceased person and transplantation of such organs. Union Territory of Delhi had two enactments, namely, 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. These were piecemeal legislations, and therefore there was need for a comprehensive law as such a report was prepared by the L. M. Singhvi Committee after which the legislation was adopted.

<sup>15</sup> Constitution of India 1950, Articles 249, 250, and 252.

<sup>16</sup> In *Balbir Singh v. Authorisation Committee*, AIR 2004 Del 413, the Delhi High Court constituted a committee to look into the loopholes in the implementation of the Act of 1994.

<sup>17</sup> Section 2 of the Transplantation of Human Organs and Tissues Act 1994 provides the definitions of various

two of the Act deals with how to authorize organ retrieval.<sup>18</sup> It specifies who can authorize, under what circumstances the authorization will be legal and what are the restrictions on the removal.<sup>19</sup> The third chapter is concerned with regulations of the hospitals.<sup>20</sup> While the fourth and fifth chapter is concerned with power and structure of the Appropriate Authority<sup>21</sup> and criterion for registration, suspension and cancellation registration of the hospitals and tissue banks.<sup>22</sup> The sixth chapter provides penalties for contraventions of the laws and makes the commercial dealings in human organ and illegal dealing in human tissues punishable offence.<sup>23</sup>

The Act is further supplemented by the Transplantation of Human Organ and Tissue Rules 2014.<sup>24</sup> The rules provides duties of the medical professionals in relation with the organ donation. It also provides the structure of the Authorisation Committee and its role in allowing or disallowing the transplantation.<sup>25</sup> The Rules also provides the procedure for obtaining approvals from the Authorisation Committee in cases of transplantation between near relatives as well as non-related donor and patients.<sup>26</sup>

The combined reading of both the Act and the rules we get to know that when organ is donated by a person who comes under the definition of the near relative of the recipient the competent authority<sup>27</sup> can also evaluate the status of their relationship unless one of them is foreigner in such case the matter has to be evaluated by the Authorisation Committee. In case of donation between married couple the fact and duration of the marriage has to be evaluated. When the donation is between non-related persons, Authorisation Committee must in all cases inquire into the fact that no commercial transaction has taken place. Under Rule 20 donation of organ by an Indian national to a foreigner who is not a near-relative of the donor is absolutely

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terms such as, “brain-stem death” means the stage at which all functions of the brain-stem have permanently and irreversibly ceased and is so certified under sub-section (6) of section 3”; “deceased person” means a person in whom permanent disappearance of all evidence of life occurs, by reason of brain-stem death or in a cardio-pulmonary sense, at any time after live birth has taken place; “human organ” means any part of a human body consisting of a structured arrangement of tissues which, if wholly, removed, cannot be replicated by the body; “near relative” means spouse, son, daughter, father, mother, brother, sister, grandfather, grandmother, grandson or granddaughter; “transplantation” means the grafting of any human organ from any living person or deceased person to some other living person for therapeutic purposes, etc.

<sup>18</sup> Transplantation of Human organs and Tissues Act 1994, Sections 3-5.

<sup>19</sup> *Ibid.*, Sections 6-9.

<sup>20</sup> *Id.*, Sections 10-12.

<sup>21</sup> *Id.*, Sections 13-13D.

<sup>22</sup> *Id.*, Sections 14-17.

<sup>23</sup> *Id.*, Sections 18-22.

<sup>24</sup> The Transplantation of Human Organ and Tissues Rule 2014 has been implemented by supersession of the Transplantation of Human Organs Rules 1995 after the amendment of the Act of 1994 in the year 2011.

<sup>25</sup> Transplantation of Human Organs and Tissues Rules 2014, Rules 5, 7, 11, 12 and 13.

<sup>26</sup> *Ibid.*, Rules 18, 19, and 20.

<sup>27</sup> *Id.*, Rules 2(c), “Competent authority means the Head of the institution or hospital carrying out transplantation or committee constituted by the head of the institution or hospital for the purpose.”

prohibited from taking into consideration by the Authorisation Committee.<sup>28</sup>

Both the Rule and the Act aim at preventing commercial dealing as the legislative presumption has been that it is always the economically and socially disadvantageous organ donors who are exploited at hands of the rich organ recipients. So it will now be pertinent to discuss who the donors are under present law in order to depict how the rights varies with different types of donors.

### III. DEFINING ORGAN DONORS

In order to understand the level of protection has been given to the organ donors we must understand who these special set of population are. As a matter of fact there are various kinds of transplant process, such as autografts, allografts, xenografts, and domino transplant.<sup>29</sup> These types of transplant is possible from mainly two types of donors, namely, either living or deceased. In case of deceased donors, it is either those who have been declared as brain-dead or cadaveric donation from patients after cardio vascular death.<sup>30</sup> Living donors can also be further classified into living related donors and living non-related donors.<sup>31</sup>

Now THOTA defines “donor” as “any person, not less than eighteen years of age, who voluntarily authorize the removal of any of his human organs or tissues or both for the therapeutic purposes under sub-section (1) or sub-section (2) of Section 3.”<sup>32</sup> In essence it encompasses both living and deceased donors provided in case of the deceased donors the necessary authorisation can be given by the donor himself before his death or it can be obtained from the family members of the deceased.<sup>33</sup> But it must also be noted that even if a deceased person has himself given consent any time before death for the purpose of removal of his organs

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<sup>28</sup> *Id.*, Rules 20 (b), “Provided that the Indian living donors wanting to donate to a foreigner other than near relative shall not be considered.”

<sup>29</sup> Tissue is transplanted into the same person in an autograft. This can occasionally be done using spare tissue, tissue that is regenerable, or tissue that is more urgently required somewhere else (skin grafts, vein extraction for CABG, etc. are examples). An organ or tissue transplant between two genetically distinct individuals of the same species is known as an allograft (for instance, human kidney or heart transplantation). Transplanting tissue or organs from one species to another is known as a xenograft. A transplanted porcine heart valve is one example. An organ is taken out of one transplant candidate and instantly transplanted into another patient in a process known as a "domino transplant," in which the first patient receives a fresh organ from a cadaveric donor.

<sup>30</sup> There are basically two types of organ donors namely, living donors and deceased donors. In case of deceased donors also the death might have caused either due to cardio-pulmonary failure or by declaration of brain death. Most deceased donors are those who have been pronounced brain dead. Brain dead means the cessation of brain function. Organ donation is also possible after cardiac death in some situations.

<sup>31</sup> Living donation is possible during the lifetime of a donor as in case of blood, skin etc. or in some cases living donor can donate an organ or part of an organ where the organ can regenerate from the remaining part for instance in case of partial liver donation or small bowel donation, or as in case of kidney donation other kidney can take up the work of missing organ.

<sup>32</sup> Transplantation of Human Organs and Tissues Act 1994, Section 2(f).

<sup>33</sup> *Ibid.*, Section 3 (1), 3 (2) and 3 (3).

or tissues or both in the event of his death, family members can nullify such authorisation.<sup>34</sup> The definition of donor excludes minors that is persons under the age of eighteen years, in such cases the necessary authorisation can be given by any of the parents of the deceased person. But it is important to note that a person below the age of eighteen cannot be living donor nor organs or tissues can be removed from such a patient who has suffered cardio-pulmonary death even with the consent of the parents.<sup>35</sup>

There is another category of donors in pediatric organ transplantation that is anencephalic babies. Congenital absence of the forebrain, skull, and scalp is a characteristic of anencephaly, a disorder of the central nervous system. Some primitive forebrain tissue may exist, and a functional brainstem is often present. Without life-saving measures, the majority of anencephalic new-borns die within a few days or weeks.<sup>36</sup>

Following the successful new-born heart transplant at Loma Linda Medical Centre in the late 1980s, which used a Canadian anencephalic new-born as the organ donor, the use of anencephalic infant organs for transplantation attracted international attention. Twelve anencephalic new-borns were studied in 1989 at Loma Linda and given intensive medical support for a week in order to facilitate the announcement of brain death. Not one of the infants was able to donate an organ successfully. Without legislative and medical modifications to control brain death and organ donation, the authors of the study came to the conclusion that anencephalic new-borns could not be employed as organ donors.<sup>37</sup> The organs of an anencephalic neonate has to be obtained during their short life span and such removal ultimately results in their immediate death. This creates a contradiction as the law does not allow removal of organs from a living minor. On the other hand anencephalic neonates are lacks a major part of their brain as such they will inevitably die within weeks if not within hours.<sup>38</sup>

#### IV. RIGHTS OF ORGAN DONORS UNDER INDIAN LAW

Many Indian laws, in particular the THOTA, provide some protection for the rights of organ donors, whether they are living or deceased. Article 21 of the Indian Constitution protects the right to live with dignity, while Article 23 ensures freedom from exploitation.<sup>39</sup> Additionally, it

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<sup>34</sup> *Id.*, Section 3(2) and 3 (3).

<sup>35</sup> *Id.*, Section 3(7) reads: “Notwithstanding anything contained in sub-section (3), where brain-stem death of any person, less than eighteen years of age, occurs and is certified under sub-section (6), any of the parents of the deceased person may give authority, in such form and in such manner as may be prescribed, for the removal of any human organ or tissue or both from the body of the deceased person.”

<sup>36</sup> Dale L. Moore, “Anencephalic Infants as Sources of Transplantable Organs” 30(2) *Jurimetrics*, 189-221 (1990).

<sup>37</sup> Paul Byrne and Edmonton, Alberta, “Use of anencephalic new-borns as organ donors” 10(6) *Paediatr Child Health*, 335-337 (2005).

<sup>38</sup> Dale L. Moore, “Anencephalic Infants as Sources of Transplantable Organs” 30(2) *Jurimetrics*, 189-221 (1990).

<sup>39</sup> Constitution of India 1950, Articles 21 and 23.

is evident that courts are stepping beyond THOTA's formalities to guarantee that organ recipients and donors receive appropriate care in a timely manner. In the cases of *Ajay Mittal v. Union of India*,<sup>40</sup> the Punjab High Court approved the transplant petitions amongst non-proximate relatives. The Delhi High Court rendered a comprehensive ruling in *Amar Singh Bhatia v. Sir Ganga Ram Hospital*,<sup>41</sup> establishing deadlines for application processing, document verification and completion, and interview scheduling for organ and tissue transplants within six to eight weeks. In *Neha Devi v. Government of the National Capital Territory of Delhi*,<sup>42</sup> the Delhi High Court examined the proper interpretation of Rules 18 and 22 of the Transplantation of the Human Organs and Tissues Rules, 2014 and ruled that spousal consent was not contemplated nor required by the rules. The sole prerequisite is the autonomous permission of the donor, verified by someone apart from the recipient. The ruling ruled that the Court could not interpret the Act if it did not contain a legislative obligation requiring the spouse's agreement for organ donation, meaning that the respondents' position was erroneous. The Court cited *Common Cause v. Union of India*<sup>43</sup> to emphasise how crucial it is to protect people's rights to privacy, physical autonomy, and life. Being a personal right, the ability to donate one's organs cannot be acknowledged as requiring the spouse's approval. A spouse has no supervening power to dictate the donor's personal choices. The donor must, however, provide free consent and make an informed decision; this is the sole restriction.

In addition to this constitutional safeguard and court action in preserving the rights of organ donors in India, the primary legislative goal of the THOTA has been to prevent exploitation of the economically disadvantaged segments of society.<sup>44</sup> Upon careful examination, the Act safeguards a person's right to freely choose whether or not to donate their organs.<sup>45</sup> They have a right to be informed about the entire process as well as possible outcome.<sup>46</sup> In an act of compassion and love, it has also permitted organ donation between live, unrelated donors.<sup>47</sup> A number of procedural safeguards have been put in place to prevent any type of commercial

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<sup>40</sup> CWP No.26361 of 2022.

<sup>41</sup> W.P(C) 3590/2020 and CM APPL. 12775/2020.

<sup>42</sup> W.P (C) 8671/2022, decided on 30 -5-2022.

<sup>43</sup> (2018) 5 SCC 1.

<sup>44</sup> Statement of Object and Reasons of the Transplantation of Human Organs Act 1994.

<sup>45</sup> *Ibid.*, Section 3 (After Amendment in 2011).

<sup>46</sup> *Id.*, Section 12 reads: "Explaining effects, etc., to donor and recipient.— No registered medical practitioner shall undertake the removal or transplantation of any human organ or tissue or both unless he has explained, in such manner as may be prescribed, all possible effects, complications and hazards connected with the removal and transplantation to the donor and the recipient respectively."

<sup>47</sup> *Id.*, Section 9(3), "If any donor authorises the removal of any of his human organs or tissues or both before his death under sub-section (1) of section 3 for transplantation into the body of such recipient, not being a near relative, as is specified by the donor by reason of affection or attachment towards the recipient or for any other special reasons, such human organ or tissue or both shall not be removed and transplanted without the prior approval of the Authorisation Committee."



transaction.<sup>48</sup> The Act expressly forbids Indian donors from donating their organs to overseas recipients unless the recipients are close relatives.<sup>49</sup> It appears that the donations are shielded from being taken advantage of by the touts. Every kind of commercial dealing has been declared illegal and has been made punishable offence.<sup>50</sup> Even the perpetrators of the crime are to be fined heavily. The Act has provided a nuanced process for the registration of hospitals.<sup>51</sup> It makes provision for having a national network and a registry for organ and tissue donation as well.<sup>52</sup>

Nevertheless as the process of human organ transplantation from the very beginning has been susceptible to abuse due to severe scarcity of transplantable organs and a skyrocketing demand, illegal trafficking of organs, medical tourism for organ transplantation and international human trafficking for the purpose of harvesting organs are therefore consequential outcome of the disparity. As such the Indian Penal Code 1860 incorporates punishment for trafficking in person for the purpose of the forced removal of the organs under Section 370.<sup>53</sup>

## V. RIGHTS OF ORGAN DONORS UNDER INTERNATIONAL LAW

In the international sphere World Health Organisation (WHO) has endorsed the Guiding Principles on Human Cell, Tissue and Organ Transplantation<sup>54</sup> (WHO Guiding Principle) which governs the medical and ethical process of organ and tissue transplantation. These principles are applied in India. Because the objects and reasons of the Indian Transplantation of Human Organs and Tissues Amendment Act 2011 clearly mentioned that the guiding principles of the World Health Organisation are consulted during the time of amendment in 2011.<sup>55</sup>

A comprehensive examination of the instrument reveals that few rights are acknowledged for the protection of the donors, such as the need that informed consent be obtained from the donor, which is crucial because consent is the moral basis for all medical procedures.<sup>56</sup> In order to avoid any type of conflict of interest, the doctor who assisted in caring for the deceased donor or who determined the death of a possible donor must not be engaged in the transplantation procedure.<sup>57</sup>

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<sup>48</sup> *Id.*, Section 9 and Rule 19.

<sup>49</sup> *Id.*, Section 9 and Rule 20, “Provided that the Authorisation Committee shall not approve such removal or transplantation if the recipient is a foreign national and the donor is an Indian national unless they are near relatives.”

<sup>50</sup> *Id.*, Section 18- 20.

<sup>51</sup> *Id.*, Section 14.

<sup>52</sup> *Id.*, Section 13C, and 13D.

<sup>53</sup> Indian Penal Code 1860, Section 370.

<sup>54</sup> As endorsed by the sixty-third World Health Assembly in May 2010, in Resolution WHA 63.22.

<sup>55</sup> Object and Reasons of Amendment Act No. 16 of 2011.

<sup>56</sup> WHO Guiding Principle 1.

<sup>57</sup> WHO Guiding Principle 2.

Before beginning the transplant procedure in the event of a living donation, a legally competent individual must provide their informed and voluntary permission. Living donation is only allowed when appropriate professional care and monitoring are provided; moreover, they have to be clearly and concisely informed about any possible dangers and hazards. It is illegal to remove organs or tissue from any legally incapable person unless prior consent has been acquired in the case of a minors.<sup>58</sup>

Except for reimbursement for donation-related costs, such as medical bills and loss of wages for living donors, other forms of remuneration are forbidden in order to prevent them from acting as a deterrent to donation. As long as the human body and its components are not used as a means of generating profit, it is also acceptable to pay for the reasonable expenses associated with obtaining human cell and tissue products and organs for transplantation. Concerns are raised when donors get incentives for necessities that they otherwise could not afford, such health insurance or medical treatment. Access to the best possible degree of health is a fundamental right that cannot be acquired in return for body parts. Living donors may rightfully get free periodic medical screenings connected to the donation, as well as insurance for death or issues that emerge from the donation.<sup>59</sup>

Transplant programmes should be monitored by national health authorities to make sure recipients and donors receive the right treatment, including information on the transplantation team that will be handling their care. Accurately balancing the interests of donors and recipients requires evaluation of information about long-term hazards and benefits as part of the consent procedure. The advantages of donation and transplantation must exceed the hazards for both parties.<sup>60</sup>

Finally, the instrument promotes transparency, which entails keeping the public's access to regularly updated, extensive data on procedures, specifically allocation, transplant activities, and consequences for both recipients and living donors, in addition to organisation, funding, and budgetary information. In order to minimise harm to donors or receivers, the system's goal should be to identify dangers and allow their remedy in addition to maximising the availability of data for academic research and governmental monitoring.<sup>61</sup>

## **VI. ARE THESE RIGHTS SUFFICIENT?**

Organ donors in theory are protected from economic exploitation and they have a fundamental

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<sup>58</sup> WHO Guiding Principle 4.

<sup>59</sup> WHO Guiding Principle 5.

<sup>60</sup> WHO Guiding Principle 10.

<sup>61</sup> WHO Guiding Principle 11.

right of protection against trafficking. But the dilemma lies not in the intention but in its application. In practice it very difficult avoid the probability of emotional coercion in case of donation between near relatives. When they are genetically related they are burdened with an obligation to donate, and such consent cannot be said to be free or voluntary as required by the World Health Organisation Guiding Principles. Reports also indicates towards greater gender disparity as such in case of living donations more than eighty percent donors are female, mostly wives or mothers and eighty percent recipients are males.<sup>62</sup> The reason behind this huge gender disparity according to experts is due to economic and financial responsibilities, societal pressures, and ingrained preferences. While more men are cadaver donors, more women are living donors. The primary reasons for more women donors are the socio-economic pressure on them to be caretakers and givers in the family, and the hesitation of men, who are often the breadwinners, to undergo surgery.<sup>63</sup> In such complex socio-cultural scenario how the requirement of free and voluntary consent can be fulfilled?

Now let us consider the problem relating to offences and penalties under the THOTA. It is to be noted that in the said Act both the person who provides money or any other thing of money's worth in exchange of an organ and the person who receives it, are offender. The treating the patients or organ recipients as offenders violates principle of justice altogether. Moreover in case of living donor, they are not in a position to claim any assistance if they suffer from any ailment in future since our Indian law outright prohibits commercial transaction and if they do so they may be termed as an offender. The Act, even though makes provision for punishments and fines but the provisions are rather ineffective because cognizance of the offences has been made subject to an application by the Appropriate Authority.<sup>64</sup> The law it also fails to incorporate one of the core component envisaged in the WHO Guiding Principles that is the proper mechanism for follow-ups and infrastructure for treatments of the living donors.

The position of living donors in India are such that they have rendered ineligible for medical health coverage after their donation since they have an organ or part of an organ missing. The

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<sup>62</sup> Steffy Thevar, "Generally 4 of 5 Living Organ Donors in India are Women, and 4 of 5 Recipients Men: Study," (Times of India, 13 November 2023).

<sup>63</sup> Ibid.

<sup>64</sup> Transplantation of Human Organs and Tissues Act 1994, Section 22 reads: "Cognizance of offences.—(1) No court shall take cognizance of an offence under this Act except on a complaint made by— (a) the Appropriate Authority concerned, or any officer authorised in this behalf by the Central Government or the State Government or, as the case may be, the Appropriate Authority; or; (b) a person who has given notice of not less than sixty days, in such manner as may be prescribed, to the Appropriate Authority concerned, of the alleged offence and of his intention to make a complaint to the court. (2) No court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act. (3) Where a complaint has been made under clause (b) of sub-section (1), the court may, on demand by such person, direct the Appropriate Authority to make available copies of the relevant records in its possession to such person."

situation is worrisome since already India has a very low number of transplants and if the prospective donors are not given health coverage then it might adversely affect the entire process.<sup>65</sup>

For one basic reason, the majority of health insurance policies do not pay organ donor expenses: giving an organ to someone else will not benefit the donor (policyholder) in any way. Quite the reverse—donating an organ puts a healthy person at risk for extensive surgery. In addition, he might experience specific medical difficulties like allergic reactions, blood clots, and harm to surrounding tissues and organs. Occasionally, donors experience psychological problems in addition to difficulties with the residual organ's functionality. Anxiety and depression are two mental health conditions that organ donors frequently experience. All these could raise their medical costs, putting further strain on the insurance provider. When someone donates out of love, they give up not just a necessary portion of their body but also, if they haven't already, their entitlement to a suitable health insurance policy. India is in need of donors, and many of them go on to have healthy, regular lives in the wake of their selfless deed. Rejection should not be based only on the donor's organ donation.<sup>66</sup>

## VII. CONCLUSION

In the ultimate analysis of the legal position of organ donors in India through various parameters we can say that although legislative intent is very noble, that is to safeguard them from being exploited, the means to achieve the aim is lacking. If we take the example of the working of the authorisation committees, then there are cases which show that they have disallowed application for organ donation between non-related donor and recipient in the context of unfortunate economic background of the donor leading to a suspicion of possible commercial transaction but when appeal was filed against such order in the High Court, the court ruled that such presumptions are antithetical to the promotion of the welfare of the people. Now the position remains very complex, in case of living donors, whether they are related or not, if they are donating they are not allowed claim any protection from the government nor can they legally claim any support from the recipient. The position of related donors are to some extent better in the sense that at they have emotional investments in the recipient. The position of the family of a deceased donor is also clad with ethical and moral dilemma. The family has just lost their near and dear member and they now have to be convinced to allow harvesting of the organs from the body of the deceased member. It is also very unfortunate that the legislative

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<sup>65</sup> Priyanka Vora, "Health Insurance Firms are Denying us Coverage, Some Organ Donors Allege," (The Scroll, 27 January, 2018).

<sup>66</sup> Steffy Thevar, "Health Cover Can Boost Organ Donation Numbers in Country" (Times of India, 28 August 2023).

presumption is that every transaction involving money has to be termed as illegal and punishable offence. As a matter of fact it leads to insecurity in the minds of the donors that they might be treated as offender. They are doomed to live in fear. The only way forward in this case can be adopting and resorting to such policies which will primarily ensure protection of the donors from any health hazards and then to securing and maximizing the standard of their living.

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