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Organ Trafficking as a Form of Organized Crime: Gaps in Law and Policy

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ABSTRACT

Organ trafficking violates human rights all across the world, just like any other major crime. The judiciary under article 21 of the constitution declares that everyone has a basic right to health. Highlighting the fact that the Constitution now recognizes a person's right to control their own body as a core fundamental right. Organ trafficking is reportedly an organized crime that has grown significantly in India. Human organ trafficking not only violates the victim's fundamental rights to life in dignity and freedom, but also has the potential to have detrimental effects on one's life and health. There is no doubt that India being the largest exporter of the human organs is involved in illegal organ trade. The global demand for human organs is rising, and crimes involving the trade of human organs are rising considerably especially among vulnerable and marginalized societal groups. Although there is a growing need for organs, there is not enough of a supply to satisfy this demand. This disparity has led to the commercialization of donations and the enormous growth of illegal organ markets. The perpetrators of organized crime take the advantage of increased demand of organs in India and abroad. They are involved in human trafficking for organ trade. Current legal regime to fight with this issue is inadequate and has become one of the fundamental causes of expanding commercial organ trading. This paper aims to critically examine the state of "organ trafficking" in India and the function of the current legal system in dealing with this menace.

Keyword: *Organ Trafficking, Human Trafficking, Organized Crime, Human rights, legal framework.*

I. MEANING AND NATURE OF ORGAN TRAFFICKING

The transfer, recruiting, harbouring, transport, or receiving of organs from either dead or living persons using pressure, force, deception, fraud, or any other criminal conduct in order to acquire financial advantage from third parties by mistreating potential donors is known as illicit organ trafficking.² The following characteristics of organ trafficking are described in the "Council of Europe Convention on Organ Trafficking":

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² J. Am. Soc Nephrol, 'The Declaration of Istanbul on Organ Trafficking and Transplant Tourism', 3(5) (2008), Olin., 1227, 1227-12231

1. Activities related to the preservation, storage, transfer, import, export, and reception of human organs
2. Activities related to the preservation, storage, transfer, import, export, and receipt of human organs
3. Implanting organs using them
4. The solicitation or recruitment of organ donors for the advantage of a third party or the person undertaking the solicitation or recruitment
5. The wilful commission of those offences or the facilitation of their commission
6. Requesting or receiving any disproportionate benefit from those working in healthcare facilities in order to carry out any of the aforementioned illegal activities.
7. Promising, offering, or providing any unwanted benefits to those working in healthcare facilities in order to implant or remove human organs in any manner that is against the law.
8. A financial transaction is illegal if it has anything to do with the illegal trafficking of human organs. The "indian legal framework" is the only requirement, and it must be satisfied for the transplant to be legal.

Organ trafficking, a profit making international criminal enterprise, is typically a less-publicized form of trafficking among anti-human trafficking organizations due to its intricate and frequently hidden nature. Leaders in public policy and efforts to increase awareness frequently relate human trafficking to sex and/or labour trafficking. But because there is such a strong demand for organs and there isn't enough law enforcement, organ trafficking plays a significant part in international organised crime groups.

People who appear respectable but are unquestionably powerful, such as doctors, nurses, politicians, and police, are involved in organ trafficking. Medical professionals have a moral obligation to uphold the special moral standards that apply to the field of medicine. The Hippocratic tradition is where many medical ethics principles first emerged. The dedication to nonjudgmental regard is one of them. Health practitioners have a professional obligation to treat patients without being influenced by any assessment of the patient's deservingness. A doctor has a responsibility of beneficence, which is a moral requirement to put the interests of their patients before their own. Fiduciary duty includes using expertise, authority, and privileges for the benefit of patients. This encapsulates medicine's fiduciary duty and dedication to beneficence.³ The involvement of medical practitioners makes prevention of these offences much more difficult. The regular trade in human organs and human trafficking for the purpose of organ trafficking are both horrible injustices that are, fortunately, widely condemned.

³ Rhodes R, Schiano T. 'Transplant tourism in China: a tale of two transplants' *Am J Bioeth.* (2010), 10:3–11

The only thing that is felt is the horrific medical legacy that organ traffickers, who profit in secret, have left behind. It puts vulnerable populations (donors) and first-world recipients at risk of grave exploitation and resilient health consequences. The financial industry, in particular, is susceptible to acting as an unwitting conduit for the facilitation of this kind of illegal behaviour. However, with the correct training, improved awareness etc. financial institutions might play a significant role in uncovering organ traffickers through the financial footprint they leave behind.

II. RISING CASES OF ORGAN TRAFFICKING

One of the most terrible forms of exploitation that is still not taken seriously is organ trafficking. The loss of an organ may have health repercussions that last a lifetime for both the donor and the recipient. However, this is typically set aside because the financial rewards for individuals engaged are frequently given precedence over this. Organ trafficking is a crime that results from a lack of availability and a strong demand for organs, and it is frequently unclear how this crime might take place. Transplant tourism leads to fraud, oppression, and eviction.⁴ By permitting the selling of organs to continue, it encourages corruption since it could "dehumanise society by considering human beings and their parts as simple commodities."⁵ Allowing the sale of organs causes those who would have donated organs to sell them instead, lowering the number of donated organs, or it makes people decide not to donate at all, lowering the overall number of obtained organs.⁶ Poor sellers who have no other viable economic option are frequently coerced by organ brokers or recipients into selling their organs.

When talking about organ trafficking, there are frequently misunderstandings regarding how this crime may happen. As per the estimates from Global Financial Integrity, trafficked organs are used in 10% of heart, liver & lung transplants.⁷ As per World Health Organization (WHO) 10,000 kidneys, or more than one per hour, are traded on the black market globally each year, making them the most common organ that is sold illegally.⁸ According to a Human Rights

⁴ Cohen IG. 'Transplant tourism: the ethics and regulation of international markets for organs' . (2013) *J Law Med Ethics*; 41:269–285.

⁵ Cohen IG. 'The price of everything, the value of nothing: Reframing the commodification debate' In: Anderson E, editor, 'Value in ethics and economics' Cambridge: Harvard University Press; 1995. p. 144, 172

⁶ Danovitch GM, Leichtman AB 'Kidney vending: the "Trojan horse" of organ transplantation' *Clinical Journal of the American Society of Nephrology* (2006) 1:1133–1135

⁷ "Transnational Crime and the Developing World," Global Financial Integrity, March 2017, http://www.gfintegrity.org/wp-content/uploads/2017/03/Transnational_Crime-final.pdf (Accessed 30/3/2022)

⁸ Denis Campbell and Nicola Davison, 'Illegal kidney trade booms as new organ is sold 'every hour,' *The Guardian*, (May 27, 2012), <https://www.theguardian.com/world/2012/may/27/kidney-trade-illegal-operations-who>

Report, around 44,000 children are reported missing in India each year, with organ trafficking accounting for the majority of these cases.⁹

The first successful kidney transplant was done in Mumbai in the year 1967¹⁰, and India exports for more kidneys than any other country in the world.¹¹ The "Transplantation of Human Organ Act" was enacted in an effort to stop organ trafficking. Nonetheless, it was emphasised that this Act gave corruption and the illegal organ trafficking more freedom to grow. This Act created the "Authorization Committee," which was allegedly tasked with approving organ transplants in accordance with "Section 9(3)" on the basis of "Affidavit."¹² It was later determined that the organ donor and recipient had no romantic or other ties.

The contentious Amit Kumar case exposed the scope of organ trafficking in India by showing how many people were duped into receiving live donor treatment for Rs. 3 lakhs in exchange for false promises. Due to the kidney fraud, which Amit Kumar is suspected of running, 500 illegal organ transplants were performed, costing over \$50,000 per treatment.¹³

The community of fishermen in Chennai makes up a large portion of the trafficked victims; many of their homes were destroyed by the tsunami in 2004. Following the tsunami, traffickers started approaching hundreds of individuals with alluring "deals."

Brokers even offered such organ "donors" temporary accommodation after surgery. The bodies of children without organs were discovered by an NGO called "Bachpan Bachao Andolan," but these cases are typically reported as kidnapping because the police find it more convenient to book those cases as kidnapping and murder on unidentified people than to conduct an investigation into organ rackets.¹⁴

III. LEGAL FRAMEWORK IN INDIA TO FIGHT ORGAN TRAFFICKING

In a number of circumstances, "human trafficking" is frequently associated to organ trafficking. The Indian Constitution also recognises the "Right against Exploitation" as a Basic Right. This

⁹ Illegal Human Organ Trade in India: A Study of the International Socio-legal perspective, Lloyd Law College (Jun 13, 2020, 01:12 AM) <https://www.lloydlawcollege.edu.in/research-publication/research-project/viewmore2.html>

¹⁰ Parul Chopra, Doctor NDTV Cadaver Organ Donation in India, NDTV (Jun11, 2020, 03:17 AM) http://doctor.ndtv.com/storypage/ndtv/id3774/type/feature/Cadevar_organ_donation_in_india.html.

¹¹ Jayant Prakash Patel, Organ Transplantation and the Legal Prospects, LSI (Jun 11, 2020, 03:12 AM) <https://www.legalserviceindia.com/articles/1279/Organ-Transplantation.html>.

¹² Sandhya Srinivasan, Will the law against organ trade remain a moral victory?, InfoChangeIndia.Org (Jun 11, 2020, 03:43 AM) <http://infochangeindia.org/health/analysis/will-the-law-against-organ-sale-remain-a-moral-victory.html>.

¹³ Neha Pant, The Fall, rise and fall of kidney racket Kingpin Dr Amit Kumar, HindustanTimes (Jun 12, 2020, 02:20 AM) <https://m.hindustantimes.com/india-news/the-fall-rise-and-fall-of-kidney-racket-kingpin-dr-kumar/storyhgMheixL8H9I6k1KTNeNCN.html>.

¹⁴ Ashwaq Masoodi, Why organ trafficking thrives in India?, Livemint (Jun 12, 2020, 01:27 AM) <https://www.livemint.com/Politics/pxj4YasmivrvAhanv600CJ/Why-organ-trafficking-thrives-in-india.html>.

law prohibits any Indian person from becoming a victim of unlawful trafficking. The "right to health" and "ownership over one's own body" have also been recognised as essential elements of Article 21¹⁵, which ensures that every Indian citizen can live a decent life. The "Section 360" of the IPC¹⁶ covers offences including kidnapping. As per the provision of Section 12¹⁷ individuals who exploit kids for the aim of harvesting their organs are equally punished. The Transplantation of Human Organs Act of 1994 created a legal framework that, in principle, ought to allow those in need of organs to be able to get them. The Legislation intends to encourage and regulate the voluntary donation of organs among immediate family members. If the potential donor has no reservations and has never voiced any objections before, organs may be donated by agreement in circumstances of deceased donors and the kin of the deceased. The "Transplantation of Human Organ Act, 1994" was passed to regulate organ transplantation and minimise organ failure-related mortality in people. This regulation, which restricted organ donation to only immediate family members out of affection and love, was passed to encourage organ donation. For corpse donors, the Act only authorises consented donation. The family of the deceased individual has the right to donate their loved one's organs if they did not object to any organ donations during the deceased person's lifetime. In the event that the family of the deceased person did not approve of the donations, such permission would be deemed null and ineffective.

Organ transplants is permitted between close relatives with the Authorizing Committee's approval in cases when it has been decided that a patient won't be qualified for an organ transplant since they don't have a close family.¹⁸ Similar to that, this Act has a variety of limitations that do not deal with the increasing need for organ donations, which fuels organ trafficking.¹⁹ Notwithstanding the THO act, India has not increased the number of deceased donors or stopped the trade in order to meet the country's organ shortage.²⁰

To fix the problems with the Act of 1994, an Act with the amendments was passed in the year 2011. The provisions of the Act were extended to West Bengal. The amended Act permits organ donation from even living individuals. Doctors are now compelled to discuss the potential of organ donation with their patients and to ask them whether they would like to donate or not. They risk penalties under this Act if they don't.²¹

¹⁵ The Constitution of India, 1950.

¹⁶ The Indian Penal Code, 1860(Act no. 45) of 1860.

¹⁷ The Transplantation of Human Organs and Tissues Act, 1994.

¹⁸ Section 9 THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

¹⁹ Dr. Anju Vali Tikoo, Transplantation of Human Organs: The Indian Scenario, 1, *ILI. L. Review*, 147, 147-174 (2017).

²⁰ *Karnataka's unabating kidney trade*, *Frontline*. 2002;19:07.

²¹ The Transplantation of Human Organs (Amendment) Act, 2011, Act No. 18 of 2011, Acts of Parliament (India).

IV. VICTIMS OF ORGAN TRAFFICKING IN INDIA

Many surgeons in big cities like Chennai, Bangalore, Delhi, and Mumbai claim that there isn't a lot of information on people who have had organs removed and how it affects them in the long run. The sites of the transplant surgeries showed that it was challenging to collect the data and nearly impossible to identify the kidney seller after the process.²² The truth is that most of those kidney sellers originate from urban shantytowns and other low-income areas. This led to the following discovery:

1. A greater proportion of women are selling their kidneys.
2. Many in India sell their organs to pay off debt.
3. The proceeds from the sale of kidneys are divided in half and used to pay off debt, cover wedding costs, and fund future children's education.
4. Frequently, the husband uses the funds for alcohol.

In order to force people into purchasing an organ, organised criminal groups make money off the suffering of the unemployed, migrants, asylum seekers, and refugees. Those who have been victims of sexual or labor-related human trafficking are also more vulnerable. The techniques employed in other types of human trafficking, such as making deceptive promises about jobs abroad and using violence and threats, are used to entice victims and keep them under control. Most of the time, victim-donors receive a smaller pay-out than what was originally discussed with the recruiter or broker, and on rare occasions, they may not receive any of the promised funds at all. Several victim-donors have struggled with their health and recovery after surgery.²³

V. INTERNATIONAL LEGAL FRAMEWORK

Human trafficking for the purpose of harvesting the organs is prohibited, according to the United Nation Convention to Prevent, Suppress, and Punish Trafficking in People, Particularly Women and Children (Trafficking in Persons Protocol). The Protocol against Traffic in Persons explains that "organ removal" is one of the specified types of abuse that must be made illegal by national law.²⁴

The most important standard-setting mechanism for preventing and combating the trafficking of human organs is the adoption of the (Council of Europe, COE'S) Convention against Trafficking in Human Organs. This was made possible by ensuring that related offences are made illegal, defending the rights of victims, and encouraging both domestic and international

²² <https://www.who.int/bulletin/volumes/85/12/06-039370.pdf>

²³ North and West Africa: INTERPOL Report highlights human trafficking for organ removal, 30th Sept, 2021.

²⁴ Article 3, United Nation Convention to Prevent, Suppress, and Punish Trafficking in People, Particularly Women and Children (Trafficking in Persons Protocol)

cooperation on the subject. Another regional legal framework that prohibits the sale of organs is the CoE Convention for the Protection of Human Rights & Dignity of Human Beings with Respect to the Application of Biology & Medicine, which states that "the human body parts should not be utilized to promote financial benefit."²⁵ The Additional Protocol to the Convention on Human Rights and Biomedicine concerning the Transplantation of Organs and Tissues of Human Origin, adopted in 2001, broadened the scope of the provisions of the Convention to cover a variety of issues relating to organ and tissue transplantation, including the practise of organ trafficking. According to that procedure, the activity breaches human rights, takes advantage of vulnerable people, and erodes public confidence in the transplant system.²⁶ A crucial set of guidelines for organ trafficking is provided by the 2018 Declaration of Istanbul on Organ Trafficking and Transplant Tourism.²⁷ In order to offer ethical direction to decision-makers and industry professionals, the Declaration employs the same definition of organ trafficking as the CoE Convention. The definition of organ trafficking under the Trafficking in People Protocol and the Declaration of the Crime of Trafficking in Persons for the Removal of Organs are exactly the same.

VI. SUGGESTIONS AND CONCLUSION

Even though there are only 0.6% donors per 1 million people in India, the market for organs is nevertheless growing rapidly. Around 200,000 kidney donors are needed, yet only 3500 donors can be accommodated. As a result, India needs a standard law to reduce the number of organ trafficking cases there in the near future. It can be challenging to obtain the family of the deceased's agreement due to prevalent superstition and religious views. As a result, since the Act of 1994's enactment, the rate of organ donation has considerably fallen. Even if the deceased had consented to having their internal organs removed while they were still alive, their family does not consent to the removal of organs. It is crucial that the law prioritise the deceased's permission because they have the legal right to decide whether to donate their organs after death

²⁵ See Article 21. For a comprehensive interpretation of "financial gain" in the context of organ trafficking, see also CoE, Committee on Bioethics (DH-BIO), and CoE Committee on organ transplantation (CD-P-TO), Guide on prohibition of financial gain (2018): <https://www.coe.int/en/web/bioethics/guide-financialgain>.

²⁶ Article 22, For a comprehensive interpretation of "financial gain" in the context of organ trafficking, see also CoE, Committee on Bioethics (DH-BIO), and CoE Committee on organ transplantation (CD-P-TO), Guide on prohibition of financial gain (2018): <https://www.coe.int/en/web/bioethics/guide-financialgain>

²⁷ The Istanbul Declaration is a non-legally binding instrument which was first adopted in 2008 and later updated in 2018. The Declaration was endorsed by a significant number of professional societies associated with transplantation medicine across the world and has therefore acquired prominence as an instrument for guidance in the field of transplantation. The 2008 edition, developed at an international summit convened by The Transplantation Society, contained a definition of "transplant commercialism", which has later been updated to be included under the definition of "organ trafficking". In addition, the earlier edition did not feature a definition of trafficking in persons for the purpose of organ removal. For more information see: [https://www.kidneyinternational.org/article/S0085-2538\(19\)30033-X/fulltext](https://www.kidneyinternational.org/article/S0085-2538(19)30033-X/fulltext).

and what happens to their own body. To satisfy the growing demand for organs to save lives, it is crucial to raise awareness about organ donation in India. In order to eliminate unethical behaviour and corruption, the "Authorizing Committee" operations require clearer law. To break the connection between the medical industry and organ trafficking, specific methods are required to increase transparency. Human trafficking and organ harvesting continue to increase at an alarming rate despite the fact that there are 0.6% of officially registered donors for every 1 million inhabitants. Only 3,500 people may currently have their needs met through formal means, despite the fact that there is a need for 150,000–200,000 kidney donors. As a result, organ trafficking in India is anticipated to grow more in the upcoming years. Many of the underprivileged individuals in India who have end-stage kidney disease (ESRD) do not have means for their treatment. Diagnosis & treatment of diabetes and hypertension are more cost-effective ways to prevent kidney failure in a nation like India. Even more so than the kidney buyer, the brokers, doctors, transplant centres, and pharmaceutical corporations are the primary gainers from the kidney trade.

Most organ trafficking occurs at "five star" medical facilities that provide transplant tourism services. There are several flaws in the legislation like having a system which let people deal in the kidney market. The market is governed on the basis of demand and supply even though the the Act is enacted by the government itself. Also, it has opened up opportunities for the illegal trade in organs in India, which calls for the passage of a national law that the Parliament can carry out by using Articles 249 and 252 of the Constitution.²⁸

Also, in cases of cadaver donation, the idea of family consent has been established, together with the approval of the person in control of the dead body, rendering the consent of the deceased irrelevant. Obtaining the family's consent in India will be difficult due to prevailing religious and superstitious beliefs, despite the fact that a deceased person's will may provide a provision for organ donation. The incidence of organ donation has fallen after the Act of 1994's passing because the family typically does not allow the removal of organs from a deceased family member, even if the deceased had consented to it.

Since it is the deceased's right to determine the disposition of their body, the law should place more emphasis on their consent because it would be against their rights if they elected to donate their organs after death just to win their family's moral support. Success in this area must continue if the law is to be properly implemented and the number of organ donors is to rise. Through coordinated campaigns, the general public as well as healthcare professionals should be made aware of organ donation. We also need to involve the media, religious leaders, and

²⁸ The Constitution of India, 1950.

educational institutions, along with the Indian Society of Nephrology, which would be a beneficial partner in this effort. Apart from all these our government is required to reinforce its anti-human trafficking units (AHTU). Being transnational in nature, the elimination of the organ trade calls for international cooperation. Wealthy nations must inform their populations, particularly medical professionals, about the significance of adhering to regulations banning the sale and trafficking of organs and promoting selfless live and deceased donation.

Increasing awareness of organ donation is crucial to addressing India's rising demand for transplants. The law must clarify the Authorising Committee's role in order to reduce corruption. Transparency in all medical procedures is also essential for identifying the network behind organ trafficking.

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