

# Transplantation of Human Organs: An Indian Legal Analysis

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## Abstract

This article is an attempt made by the author to discuss the various aspects of transplantation of human organ and its legal features. Human organ and tissue transplantation was started in India in 1962. Earlier, the human organ transplant was unfettered, and human organ trafficking was rampant in the society. The parliament of India first drafted The Transplantation of Human Organ Act governing the transplantation which was passed in 1994. This act has been subsequently amended in 2011, and new rules came into force in 2014. This research paper discusses the significant mechanism of the act and spotlights on what all medical practitioners involved in transplant should know about the legal aspects of transplantation.

**Keywords:** *human organ, body, transplantation, medical*

## Introduction

Transplantation of human organ is a great achievement in the medical history like the invention of antibiotics and anesthesia. The ancient Indian text and some of the Chinese literature narrated about the transplantation of organs. But first it was invented by a French surgeon named Alexis Carrel who experimented in animals in the year 1902. The first human kidney was transplanted in the year 1946 and the liver in 1963 and the heart in 1967. After this many organs were transplanted like lung, pancreases, intestines etc. The WHO has now accepted transplantation of human organ as a well and standard recognized treatment. With the passage of time people have come forward for the donation of their respective human organs as a mark of true spirit of humanity and to save the precious lives. The Organ transplantation means “a medical procedure in which an organ is removed from one body and placed in the body of a recipient, to replace a damaged or missing organ. The donor and recipient may be at the same location, or organs may be transported from a donor site to another location.” There are two parameters to get

the consent for removal of organs from dead individuals firstly “the presumed consent in the absence of objection from the deceased when he was alive or from family members of the deceased, secondly informed consent based on the express consent of the deceased or the family members.” The law relating to transplantation of human organs have been passed in Denmark, France, Sweden, Italy and Israel. Moreover “the permission of the relatives of the deceased unless the deceased has forbidden in his lifetime is assumed.” For the first time in India, the Transplantation of Human Organ Bill was introduced in the parliament on 20th August 1992 and subsequently became the Transplantation of Human Organ Act in 1994.

## Death and Transplantation in India:

According to the section 46 of the Indian Penal Code, 1860 it provides that, death denotes “death of a human being unless the contrary appears from the context.” The definition of life in the context of death means the span of animate existence and the period between birth and death. Under the Part III of the Indian Constitution Article 21 broadly enumerates the meaning of life and guaranteed as a fundamental right of every citizen. Right to life includes right of the individual of his body in its completeness and without any dismemberment. The prohibition of any parts of the body or injury of the body/organ life cannot be enjoyed and is a violation of basic fundamental right.

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Organ Transplantation has raised many ethical, moral, religious and legal issues. Science has advanced and biotechnology has also made a great contribution in the field of medicine. This organ transplantation is also very expensive procedure in India. Besides the cost of surgery the therapeutic care cost is added to the expensiveness.

### **Transplantation of Human Organ Act**

This is an act “to provide for the regulation of removal, storage and transplantation of human organs for therapeutic purposes and for the prevention of commercial dealings in human organs and for matters connected therewith or incidental thereto.” This act also “to provide for the regulation of removal, storage and transplantation of human organs for therapeutic purposes and for the prevention of commercial dealings in human organs”

The provision mandated that the donor must not be less than eighteen years of age and must voluntarily give his/her consent which is as understood from the Indian Contract Act, 1872. Section 12 of the Act also provides the consent of the donor must be informed consent. Section 3(4) of the act prohibits other than the medical practitioners no one can remove any organ from the donor. The most important of the guideline which prescribes that “no human organ removed from the body of a donor before his death shall be transplanted into a recipient unless the donor is a near relative of the recipient.” The near relative means may be son, daughter, brother, sister, father, mother & spouse.

Section 6 of the act prescribes for Authority for removal of human organs from bodies sent for post mortem examination for medico-legal or pathological purposes that “where the body of a person has been sent for post-mortem examination- (a) for medico-legal purposes by reason of the death of such person having been caused by accident or any other unnatural cause; (b) for pathological purposes, the person competent under this Act to give authority for the removal of any human organ from such dead body may, if he has reason to believe that such human organ will not be required for the purpose for which such body has been sent for post-mortem examination, authorize the removal, for therapeutic purposes, of that human organ of the deceased person provided that he is satisfied that the deceased person had not expressed, before his death, any objection to any of his human organs being used,

for therapeutic purposes after his death or, where he had granted an authority for the use of any of his human organs for therapeutic purposes after his death, such authority had not been revoked by him before his death.”

Section 7 of the Act Provides for Preservation of human organs that, “after the removal of any human organ from the body of any person, the registered medical practitioner shall take such steps for the preservation of the human organ so removed as may be prescribed.”

### **Prevention of Commercial Dealings in India**

Commercialization of Organs in India is increasingly common. Many of the cases and instances have been reported relating to transplantation of human organ. This is seen almost in Rich & Poor Context. The poor who cannot feed his/her hungry stomach are easily ready for selling their one kidney by approaching the needy rich people. However Section 19 of the Act provides Punishment for commercial dealings in human organs that “whoever – (a) makes or received any payment for the supply of, or for an offer to supply, any human organ; (b) seeks to find person willing to supply for payment any human organ; (c) offers to supply any human organ for payment; (d) initiates or negotiates any arrangement involving the making of any payment for the supply of, or for an offer to supply, any human organ; (e) takes part in the management or control of a body of persons, whether a society, firm or company, whose activities consist of or include the initiation or negotiation of any arrangement referred to in clause (d); or (f) publishes or distributes or causes to be published or distributed any advertisement- (a) inviting persons to supply for payment of any human organ; (b) offering to supply any human organ for payment; or (c) indicating that the advertiser is willing to initiate or negotiate any arrangement referred to in clause (d), shall be punishable with imprisonment for a term which shall not be less than two years but which may extend to seven years and shall be liable to fine which shall not be less than ten thousand rupees but may extend to twenty thousand rupees: Provided that the court may, for any adequate and special reason to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than two years and a fine less than ten thousand rupees.”

### **Role of Judiciary on Transplantation of Human Organ**

There are many cases discussed by the judiciary to tackle with the challenging issues of the transplantation

of human organs. In the case of *Auckland Health Board v. Attorney General*,<sup>1</sup> the court held that, “the values of human dignity and personal privacy belonged to everyone whether dead or alive. There are essentially two parameters to draw consent for removal of organs from a deceased person, (1) presumed consent, in the absence of objection from the deceased when he was alive or from family members, (2) informed consent, based on the express consent of the deceased or the family members.” Generally the strict requirement of the consent is superseded by empowering the family to consent on behalf of the deceased. Medical hospitals that need an organ ask the permission of very close relatives of the deceased patient as normal procedure.

In another case *Arup Kumar Das v. State of Orissa*,<sup>2</sup> the court observed that, “it is essential to point out various objectives of the Transplantation of Human Organ Act, 1994 and the intention of the legislature in enacting the present legislation appears to have not been properly understood by the statutory authorities who have been vested with the responsibilities of enforcing the said act. What have been prohibited under the statute is commercial dealings in authorization must be prevented and the commercialization dealings in human organs is prohibited, yet bona fide applicants may not be viewed in a suspicious manner since the act itself permits not only the donors from within the family but also permits non relative donors.”

In another case of *Jeewan Kumar Raut v. Central Bureau of Investigation*<sup>3</sup>, the court observed that, “TOHO is a special Act. It deals with the subjects mentioned therein, viz., offences relating to removal of human organs, etc. Having regard to the importance of the subject only, enactment of the said regulatory statute was imperative. TOHO provides for appointment of an appropriate authority to deal with the matters specified in Sub-section (3) of Section 13 thereof. By reason of the aforementioned provision, an appropriate authority has specifically been authorized inter alia to investigate any complaint of the breach of any of the provisions of TOHO or any of the rules made there under and take appropriate action.”

In another case *Mukesh Gandhi v. Deputy Secretary (Health) Medical Education and Research*,<sup>4</sup> the court held that, “as such there cannot be compulsion on the part of the recipient to have the liver transplanted in the very hospital, where it has been harvested. As observed earlier, situation of preservation of human organ through

scientific mode is conceived under the Act. Therefore, there could be a transplantation of such human organ in different hospital than the hospital at which organ is removed. But of course with the requirement to be followed for ensuring that the preservation is under accepted scientific method and the viability for the purpose of transplantation is not lost. It is also required to be ensured that the transplantation takes place in the body of the recipient only, so that the purpose of donor for therapeutic use is fulfilled. What measures may be required to be undertaken are generally left to the authorization committee to decide and in any case, it would be required for the authorization committee also to ensure that, as and when such permission is granted, well accepted scientific methods are complied for preservation of such human organ, and the same is transplanted in the body of the recipient through recognized hospital having expertized for such purpose, and there is no misuse by any party during the course of transplantation.”

## Conclusion

Donation of human organ by a person who is dead or alive is considered to be the highest sacrifice. This sacrifice is for a giving life to other person. The transplantation act has evolved over last few decades and it is still in force. All the stakeholders who are part of this process, may it be Doctor, Doner, Donee & the relatives should aware of these rules & regulations so that misuse of human organs can be checked in the society.

**Ethical Clearance:** Not required, as the research article is based on Transplantation of human organ and its legal provisions. The research is doctrinally undertaken.

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## References

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