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## The commercialisation of the Human Body and Bodily Materials

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*The human body is very complex to understand and all organs are interrelated. Organ Transplantation is a pioneer in the modern world of invention. Modern Medicine practice has been evolved by the new method of surgery. Now even a cadaver has some purpose to someone in need before it was buried or burned as religious sentiment. The human body and body material consist of lots of different organs and tissues. Legislation is made for the regulation of this transplantation. Indian laws are yet in process of coping with the demand of area of organ transplants. The future of organ transplant is expanding but the supply is less and demand are more. Government has to make awareness for donations and make legislation for same.*

**Keywords:** *organ plantation, cadaver, human body, legislation.*

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### INTRODUCTION

"It is infinitely better to transplant a heart than to bury it to be devoured by worms," said Christiaan Neethling Barnard who was a South African cardiac surgeon who performed the world's first human-to-human heart transplant operation.<sup>1</sup> The human body and bodily materials are the physical substance of human organisms, formed by living cells and

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<sup>1</sup> 'Christiaan Neethling Barnard: South African Surgeon' (*Britannica*, 4 November 2021)  
<<https://www.britannica.com/biography/Christiaan-Barnard>> accessed 20 January 2022

extracellular materials and transform into the tissue, organs, and systems.<sup>2</sup> According to eminent scholars like Salmond, the law has given significant emphasis on a person's body and he states "there are three things in respect of which the anxieties of living men extend beyond the period of their deaths in such manner that the law will take notice of them. They are a man's body, his reputation, and his estate."<sup>3</sup> Organ transplantation is a process (surgical procedure) through which new organs are transplanted by replacing the old mangled or deteriorating organ. Organ transplantation is a marvelous innovation in the medical field which has saved thousands of lives and many more to come. It gives hope to people in need to live a new life. The commercialization of the human body is easy when the organ in question is a kidney or a liver which a living person can donate, but when the requirement is for a lung or a heart, a living person cannot do the same. It is only possible after the death of the donor. The organ shortage led to organ trafficking resulting in the exploitation of the poor by richer sections of society to sell their organs, particularly the liver, heart, and kidney. The Government of India regulates organ donation and transplantation by the Transplantation of Human Organ Act of 1994.<sup>4</sup>

## **DISTINCTION OF HUMAN BODY AS PROPERTY**

Two schools of thought have emerged on the topic of property rights of the human body; natural rights theory and social constructivist theory. As per the natural rights theory, the owner and the owner's object have a property relation. On the other hand, the social constructive school of thought is a distinct view from the natural theory.<sup>5</sup> In the present scenario, the ambit of Property in its definition has widened due to advancements in medical technology. The body of a deceased person had been considered worthless, but after the

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<sup>2</sup> 'Human Body' (*Britannica*, 22 October 2021)

<<https://www.britannica.com/science/human-body>> accessed 20 January 2022

<sup>3</sup> P.J. Fitzgerald, *Salmond On Jurisprudence* (12<sup>th</sup> Edn., Sweet & Maxwell 1966) 301

<sup>4</sup> Transplantation of Human Organ Act, 1994

<sup>5</sup> B Björkman & S.O. Hansson, 'Bodily rights and property rights' (*NCBI*, April 2006)

<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2565785/>> accessed 20 January 2022

revolution in medical science, there was a change in perspective. In the current scenario, buying and selling a human organ is a huge billion-dollar industry around the globe.<sup>6</sup>

The landmark case of *Moore v Regents of the University of California*<sup>7</sup> ruled that patients do not have a right to share in profits earned from their body parts. *Hecht v Superior Court (Kane)* (1993)<sup>8</sup>, in this case, the Australian court has taken a different approach and the court advanced property rights on gamete materials by validating a donor's will. In India, the landmark judgment in *Parmanand Katara v Union of India*<sup>9</sup> the supreme court has ruled that just as there is the dignity of a living person same prevails for him after he is deceased. Article 21<sup>10</sup> protects the rights of both living beings as well as cadavers.

## THE HUMAN BODY AND BODILY MATERIAL

Materials that are procured from the human body are generally classified as 'human bodily materials' or 'human biological materials'. The human body consists of chemical elements, cells, blood, tissue, gametes, organ, and other things. Organ and tissue which can be transplanted are liver, kidney, pancreas, heart, lung, intestine, corneas, middle ear, skin, bone, bone marrow, heart valves, connective tissue, and vascularized composite allografts.<sup>11</sup> The donor can be alive or a cadaver. If we look into the law relating to living humans there is a lot of legislation that protects the right of human beings against battery, assault, murder, or other harm to the body. Slavery and human trafficking were also considered grave crimes as it involves having possession of a person's body. Now, the question arises whether there should be the commercialisation of human body parts for transplantation. The law concerning human body parts and their transplantation is evolving.

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<sup>6</sup>Elizabeth KJ, 'Marketing Human Body and Human Material- Property Rights over Human Law' (*Know Law*, 29 August 2021) <<https://knowlaw.in/index.php/2021/08/29/marketing-human-body-and-bodily-materials/>> accessed 21 January 2022

<sup>7</sup> *Moore v Regents of the University of California* [1990] 51Cal. 3d 120

<sup>8</sup> *Hecht v Superior Court (Kane)* [1993]

<sup>9</sup> *Parmanand Katara v Union of India* [1989], AIR 2003, SCR (3) 997

<sup>10</sup> Constitution of India, 1949, art. 21

<sup>11</sup> Access to human tissues for research and product development, *EMBO Reports* <<https://biblio.ugent.be/publication/5971208/file/5971209.pdf>> accessed 21 January 2022

Human bodily material includes any biological body material, including human tissues and cells, gametes, embryos, and fetuses, as well as substances extracted therefrom, whatever the degree to which they have been processed,<sup>12</sup> but are not limited to, blood, urine, saliva, or other bodily fluids; tissues; hair or nails; sperm, oocytes, and products of conception such as placenta or umbilical cord; excess pathological tissue; and waste surgical leftover. A cadaver or a corpse has been given the same dignity and respect as a living being as per the supreme court. "Emotional attachment to the dead exists in most cultures, as is demonstrated by burial rituals".<sup>13</sup> But as fairly pointed out by the quote by Christiaan Neethling Barnard, it's always great to help one in need rather than giving it to warm.

## RIGHT OF HEALTH

The safety of human lives and security are important factors on which all legal systems are framed by countries. Ensuring the security of health and prosperity to grow are factors around which legislation revolves. 'Right to health' is the basic and most crucial element of the development of society. As said by Honourable former Chief Justice of India, K.G. Balakrishnan: "There is an obvious intersection between healthcare at the individual as well as the societal level and the provision of nutrition, clothing, and shelter". In the Constitution of India, Seventh Schedule, Entry 6 of List II (state list) discusses matters regarding 'health'. A similar provision is given in the 'The Union List - List I' and 'The concurrent List - List III'. In *Consumer Education and Research Centre v Union of India*<sup>14</sup>, the Supreme Court held that the right to health and medical aid for the protection of the worker, whether they are in service or retired, is a fundamental right under Article 21.

Having a proper system that governs all areas relating to organ and tissue transplant are due and there is a definite need for legislation to control the black market and give people the'

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<sup>12</sup> 'Organ Donation and transplantation' (*Cleveland Clinic*)  
<<https://my.clevelandclinic.org/health/articles/11750-organ-donation-and-transplantation>> accessed 21 January 2022

<sup>13</sup> Cordelia Mary Thomas, 'A Framework for the Collection, Retention and Use of Human Body Parts' (*Victoria University of Wellington*, 2006)  
<[https://openaccess.wgtn.ac.nz/articles/thesis/A\\_Framework\\_for\\_the\\_Collection\\_Retention\\_and\\_Use\\_of\\_Human\\_Body\\_Parts/16926553/files/31319416.pdf](https://openaccess.wgtn.ac.nz/articles/thesis/A_Framework_for_the_Collection_Retention_and_Use_of_Human_Body_Parts/16926553/files/31319416.pdf)> accessed 21 January 2022

<sup>14</sup> *Consumer Education and Research Centre v Union of India* [1995], AIR 992 SCC (3) 42

Right to Health'. Subsequently, the Government of India formulated the Transplantation of Human Organs Act (THOA) 1994, to regulate organ transplantation.

## TRUTH OF ORGAN TRANSPLANTATION IN INDIA

Due to the high rate of poverty and advanced medical facilities in India, it is a hub for the sale of organs. While the Constitution talks about protection and preservation of health, on other hand there stay a lack of initiative to formulate broad legislation which covers all areas of transplantation. Ethics should be maintained by the doctors and other authorities who are responsible. The commercial sale of organs is banned by legislation and hospitals are banned from receiving any donors. But there are backdoors opened by players like hospitals, different authorities, doctors, and their brokers.<sup>15</sup>

Organ transplantation is now an industry that has been built on the pavement of exploitation of poor sections of society and this should be stopped for the betterment of society. Poor youth donate their kidneys under any influence or necessity of money, unaware that it will affect them in the long run. Scandals are happening on a large scale; the Gurgaon kidney scandal<sup>16</sup> of 2008 is one of the most horrifying incidents when it comes to people's lives. Organ transplantation is a boon for a person who is getting an organ. His life is saved by the operation. It's always better to save a person's life when there is a slight chance the most important requirement is not getting a matching donor but to take proper consent for the same. Consent should be given without any duress; the donor should have the legal capacity and proper knowledge of the act. The donor should know the diagnosis and the future of the nature of treatment and recovery. Consent should be honest and reasonable and both morally and legally constructive. It can be written or verbal but writing is preferable in the professional world as its acts as evidence.<sup>17</sup>

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<sup>15</sup> Elizabeth KJ (n 6)

<sup>16</sup> Dipak Kumar Dash, 'Gurgaon Kidney racket: Gang has smooth run, bribed its way out' (*Times of India*, 25 March 2013) <<https://timesofindia.indiatimes.com/city/delhi/gurgaon-kidney-racket-gang-had-smooth-run-bribed-its-way-out/articleshow/19177391.cms>> accessed 20 January 2022

<sup>17</sup> Veena Raushan Jose, 'Commercialisation of Human Body and Bodily Material' (*National University of Advanced Legal Studies*, 25 October 2018)

## INDIA: HUMAN BODY MARKET

If we look into the literacy rate in the rural areas of India, it stands at 26.5%<sup>18</sup> of people illiterate. That is where the weaker and poor sections of society become a huge market for organ selling. In India, there is a lack of legislation to regulate this market, e.g. Surrogacy. Surrogacy is when one person agrees to become pregnant and carries a child till the birth to be handed over after delivery to another person. It should be a legal agreement and there should be a law but we see that<sup>19</sup>Dr. Harsh Vardhan on behalf of the Ministry of Health and Family Affairs introduced "The Surrogacy (Regulation) Bill, 2019" in Lok Sabha, which is yet a bill.

As there is a tremendous advancement in technology, biotechnology has grown at a rapid rate. Now almost all parts of the human body can be utilized to help others in need. Eye donation and kidney, liver, and heart transplantation are major areas in which India is becoming a hub. Although due to the pandemic this industry has taken a huge hit just like other industries. There was a dramatic drop in the rate of transplantation after the pandemic. Due to less supply, there is a chance that organ trafficking to human trafficking has increased to meet the demand.<sup>20</sup>

Indian legal system is coping with changes, diversification, and the new era of advancement in the medical field. Some of the legislation which regulates this transplantation and human trafficking which involves organ selling is Indian Penal Code 1860, Immoral Trafficking (Prevention) Act 1956, The Constitution of India 1950, The trafficking of Persons (Prevention Protection and Rehabilitation) Bill 2018, The Surrogacy (Regulation) Bill, 2019 and the most

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<<http://14.139.185.167:8080/jspui/bitstream/123456789/118/1/Commercialisation%20of%20Human%20Body%20and%20Bodily%20Materials.pdf>> accessed 19 January 2022

<sup>18</sup> 'NSO survey highlights urban-rural education divide in India' (*Deccan Herald*, 13 August 2020)  
<<https://www.deccanherald.com/national/nso-survey-highlights-urban-rural-education-divide-in-india-872880.html#:~:text=As%20per%20the%202018%20report,rate%20at%2070.3%20per%20cent.>> accessed 19 January 2022

<sup>19</sup> Shreya Kumari, 'Surrogacy provisions in india' (*Reader Blog: Times of India*, 20 July 2021)  
<<https://timesofindia.indiatimes.com/readersblog/legal-writing/surrogacy-provisions-in-india-35429/>> accessed 19 January 2022

<sup>20</sup> 'Organ Donation Day 2021: How organ donation has changed in the pandemic' (*Indian Express*, 13 August 2021)  
<<https://indianexpress.com/article/lifestyle/health/organ-donation-day-how-organic-donation-has-changed-amid-pandemic-coronavirus-7451886/>> accessed 19 January 2022

crucial legislation is Transplantation of Human Organs Act (THOA) 1994 with the latest amendment of 2011 and 2014.

### **TRANSPLANTATION OF HUMAN ORGANS (LEGISLATION)<sup>21</sup>**

Organ transplantation is the pinnacle of medical science. Law and human activity go hand in hand; so to regulate any medical treatment we need a regulatory body to regulate it. The first legislation received the assent of the President on 8th July 1994 as "TRANSPLANTATION OF HUMAN ORGANS ACT, 1994". The whole Act was divided into 7 chapters and consisted of 25 sections. The preamble of the Act states that the act is constituted for regulation of the matter related to removal, storage, and transplantation of human organs for therapeutic purposes and it aims to prevent commercial dealing.

#### **Features of the Act:**

- It provides the regulation related to the removal, storage, and transportation of human organs for therapeutic purposes and prevention of commercial dealing.
- It illegalizes the buying and selling of human organs and making cash out of them, which is known as "organ trafficking".
- Institution structures should be established which are authorized and registered under this act to regulate the human organ transplant and regular checking in hospitals that are authorized to do so.
- This act recognizes the concept of Brain stem death and makes a program for kidney transplants by cadaver.
- Penalisation of any act which is done beyond any provision.

#### **Authority for removal of human organs:**

- If any donor is permitting that his organ can be removed before his death, then he can only do that for therapeutic purposes.

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<sup>21</sup> Transplantation of Human Organ, 1994

- If any donor is giving his consent in front of two witnesses that before or after his death the organ can be transplanted, then one of the two witnesses should be his near relative.
- If any dead person near relative has no objection that authorised authority's person can remove organs from the dead person for therapeutic purpose, then organ can be removed.
- The authority is only given to Registered Medical Practitioner to remove the organ, no other person can do so.
- In case of Brain stem death, the Registered Medical Practitioner will self-examine the patient and he will submit a report on whether organ transplantation will take place or not.
- Authority for organ removal can only be given in case of death is certified by medical experts. Medical experts consist of neurologists or neurosurgeons or Registered Medical Practitioners In-charge.
- Any parents may give consent to the Authority for removal of an organ for therapeutic purpose in case of brain stem dead when personage less than 18 years.

**Removal of Human Organs not be authorised in Certain Cases:**

- The unclaimed body, no person knows whose such cadavers near relatives are and has no database to relate the same. Then authority can't be given immediately.
- If any unclaimed body is lying in hospital/prison for more than 48 hrs, then the authority is being transferred to the person in charge of management or control of that particular hospital or prison.
- No authority can give to the management when any person claims that he is a near relative of an unclaimed body.

**Regulation of hospitals:**

- When the hospital is not registered under this act those hospitals have no authority for removal, storage, or transplant of organ or tissue.

- Other than the place which is registered under the Transplantation of Human Organ Act, no other place or medical practitioner can use that place for transplantation of organ or tissue.
- Any tissue bank which is to be formed has to register under this act, without registration can't carry out any activities relating to recovery, screening, testing, processing, storage, and distribution of tissue.
- Under certain circumstances, the eye and ear can be collected for therapeutic purposes by Registered Medical Practitioner from the place where the dead body is kept. The ear may include both eardrums and ear bones.
- There is a prohibition on removal or transplant or organ, for any purpose other than therapeutic. If anyone is caught doing so will be considered illegal.
- The main point is to understand that the transplantation can't take place until and unless Required Medical Practitioner has to explain all critical possibility scenarios connected to the removal and transplantation of organ. The donor and the recipient should have comprehensive knowledge about what the outcome is.

The matter related to what organs can be transplanted, principle matter, preservation of human organs and tissue after removal, restriction on removal and transplantation of human organ, appropriate authority, and the formation of the advisory committee all this are covered under this act.<sup>22</sup>

### **IMPORTANT AMENDMENT OF 2011**

New provisions for Retrieval centers and swap donations are being included. The definition of 'near relative' now also includes grandchildren and grandparents. The word tissue has also been explained and added. All hospitals which are added or which are registered under this act have to make a mandatory provision for 'Transplant Coordinator'. The penalty section has been expanded to keep a check on the exploitation of the poor section relating to organs trafficking. National Human Organs and Tissues Removal and Storage Network and National Registry for Transplant is to be established. Provisions are also made for mandatory inquiry

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<sup>22</sup> Transplantation of Human Organs and Tissues Act, 1994

from the attendants of the potential donor who are being admitted in ICU and informing them about the donation option, if consent is given from their side then they can inform the retrieval center. If Neuro physician or Neurosurgeon is not available to constitute a Brain Death Certificate member then they can be replaced by an anesthetist or intensivist as a member. A great area of focus was on minor and foreign national, cases regarding transplantation.<sup>23</sup>

## FUTURE OF ORGAN TRANSPLANTATION

Organ transplant is not a simple procedure, it is not as ordinary as transplanting an organ from one person to another. There are lots of complications; first, the immune system of the body will treat that organ as a foreign substance and rejects it; secondly, there are lots of chances of getting infections or cancer, thirdly many a times the operation is successful but after a year or two that organ will start degrading, and lastly the demand is more and supply is less. After 60-70 years, modern medicine has developed beyond our imagination, and day by day it is touching new heights. Now, a new revolution has happened where organs' of different species' are transplanted to humans. A team of surgeons from the University of Maryland School of Medicine has recently transplanted a genetically modified pig heart into a human which was successful.<sup>24</sup> Now medicine is at a stage of evolving and in the future, we will see the harvesting of small organs from the stem cells of people. The scientists believe that due to its vast scope, it has possibilities to take mankind to the next stage.<sup>25</sup>

## CONCLUSION

Now we are entering an era that has changed the trend of people selling animal parts to now their part. Organ transplantation is a boon of new medical science but its ethics and legality are in question. In our Indian Mythology, we have read that Lord Shiva has implanted an elephant neck to save the life of Lord Ganesh. Saving a life is the sole objective of Doctors that's why there are even considered as God. Modern medicine has tremendous potential to

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<sup>23</sup> *Ibid*

<sup>24</sup> Corrie Pelc, 'First Successful pig-to-human heart transplant may offer new options for patients' (*Medical News Today*, 18 January 2022) <<https://www.medicalnewstoday.com/articles/first-successful-pig-to-human-heart-transplant-may-offer-new-options-for-patients>> accessed 21 January 2022

<sup>25</sup> *Ibid*

evolve and a new door will be open in near future. Government should take active participation by making awareness among the people for organ donation so that the demand and supply will be met.