

ORGAN TRAFFICKING: PROFUSION OF POVERTY, LACK OF EDUCATION AND INGRESSION OF HUMAN RIGHTS

by

Sharmistha Bandyopadhyay

&

Debabrata Pyne

ABSTRACT

*Trafficking of human beings in any form is not only prohibited by law but also signify the ingression of basic human rights. Many-a-times, it is being seen that in the name of giving job or else to give some reward, people are becoming the subject of trafficking and are also being compelled to donate their organs and in few cases tissues as well. The heinous activity in the form of organ trafficking is getting increased day by day in economically backward countries like **India, Africa** etc. and in most of the cases the victims are none other than poor and uneducated people. It is true indeed that traffickers always tend to prey on poor and uneducated people as because it is easier for them to manipulate the will power of such persons without any hardship. Another important fact to be addressed hereinafter is that people lacking financial means are in need of money for their mere survival and also in some other cases; they are in need of money for meeting exigencies. Due to such economic hardship, they are always eager to do anything in terms of getting money and by some way or other become the subject of human trafficking. Apart from poverty, lack of education is also equally responsible for causing increase in organ trafficking as a form of human trafficking.*

This present work tries to focus on how people in the name of organ or tissue transplantation are becoming the subject of trafficking and also to suggest the best possible ways to curb this menace.

Keywords: Poverty, Transplantation, Education, Trafficking , India.

Introduction:

Human rights are not to be regarded as privilege conferred upon humans by government, rather to be regarded as entitlement of human being by virtue of his humanity. All the human beings are born free and are entitled to live their life with utmost dignity. Human trafficking is posing a threat to this main stream of life. Organ trafficking as one of the heinous forms of trafficking in humans not only gives birth to grave offence against humanity, but some way or other suggests the inference of human rights as well. The rate of organ trafficking as grave offence against humanity is reaching its peak due to gap between demand and supply of organs. Organ scarcity has paved the way to transplant commercialism and the number is more in countries lacking economic prosperity. Alike organ trafficking equally disturbing issue is commercialization of tissue, wherein the demand and supply problem has largely been overcome; in fact, globally there are certain types of tissues that are available in excess of demand. A flourishing organ and tissue commercialism relating to human body parts is intrinsically immoral, and the same needs to be tackled with effective mechanism both legally and humanely. While one needs to differentiate terms such as organ trafficking, commercialism and transplant tourism, the underlying basis of organ trading has always been exploitation of the needy.

Human trafficking in the form of organ or tissue transplantation is not confined only to **India**; it has rather extended its scope throughout the world. Such an illegal activity is becoming a hindrance for a nation to develop both **socially** and **economically**. In global context, almost majority of the countries have their own legislative framework to deal with immoral activities in the form of **organ trafficking**, so did **India** way back to the year **1994**. The legislative framework so adopted by our own nation in the form of **transplantation of human organs and tissues act, 1994** whether alone is sufficient enough or not to curb these illegalities still poses a question mark to the government or concerned authorities. Henceforth, it's always better to err on reality than to live in daydreaming.

Organ trafficking: General concept:

Organ trafficking in its literal sense denote removing one's organ for the purpose of buying or selling. It is more or less commercialisation of human of human organs only. The issue regarding organ trafficking and its commercialisation was raised for the first time in the **declaration of Istanbul (2008)**. In the said declaration it was adhered that organ trafficking includes within its ambit recruitment, transport, transfer, harbouring or receipt of living or deceased persons or their organs by any means, **i.e.** coercion, fraud, deception or abuse of power in order to gain unlawful advantages in terms of money from third parties.¹

Additionally, one can also have a close look into the explanation appended to **council of European convention against trafficking in human organs**. As per the said **convention**, the following particulars may be regarded as inclusive of organ trafficking activities²:

- Removal of human organs either from living or deceased being without obtaining a prior consent from the concerned person or else in violation of prevalent municipal laws wherein such trafficking taking place.
- Usage of such organs for the purpose of implantation.
- Inclusive of activities like storing, preserving, transferring, transporting, importing, exporting and receiving such organs.
- Abetting or attempt to commit such offence.
- Solicitation or recruitment of organ donors for commercial gains.
- Inducement of persons engaged in healthcare sectors to cause any removal or implantation of human organs by unlawful means.
- Receipt or demand of any undue advantages by such healthcare personnel to cause any of the above cited illegal activities.

¹ The declaration of Istanbul on Organ Trafficking and Transplant Tourism, 3(5), olin.j.am.soc.nephrol,1227,1227-12231(2008)

² Council of Europe Convention on action against trafficking in human beings, cets no. 216, 2018

Organ trafficking & violation of human rights:

Trafficking of human beings in any form is some way or other paves the way for basic human rights violation. Keeping in mind that commercialisation of human body and any other commercialisation of human organs is absolutely unjust and unethical, and then the question arises as to whether it is natural for individual beings to sell or donate their organs for financial gain. The question is still stagnant whether an individual in the name of right to freedom can donate his or her organ to a third party or not. The main concern hereinafter is that whether in the name of organ donation or transplantation human rights are getting infringed or not. Notably, taking one's organ for the purpose of commercialisation is none other than an illegal activity and is bad in the eye of law. If an organ is being removed from the body of an individual whether alive or dead, the same depicts the picture of transgressing into one's right to health, which itself leads to violation of human rights. In the year **1948** in global context we have adopted **Universal Declaration of Human Rights (UDHR)** as a tool for protecting and recognising basic human rights. Getting inspired by the principles of **UDHR**, the concept of **human rights** has well had been incorporated in our **Indian Constitution** under **Part iii** in the form of **fundamental rights**. It is pertinent to note that trafficking of human beings in the form of removal of one's organ violate both **international** and **national legal** principles. In this connection, it would be worthwhile to discuss how **organ trafficking** violates basic human rights both **internationally** and **nationally**.

i. UDHR & human rights violation:

One of the basic tenets of human rights has been enshrined in **article 3** of **udhr** as '**right to life**'. In the wordings of **article 3** of **udhr**, every individual being is entitled to right to life and to live in freedom and safety. By way of interpreting the very expression, '**right to life**', it can easily be stated that living one's life with utmost dignity is possible only when there is no interference with one's life. But in the name of

commercialisation organ trafficking is getting its hype, which some way or other indicates the violation of **right to life** guaranteed under **article 3 of udhr**.³

ii. ICCPR and human rights violation:

One of the basic pillars of **UDHR** is **International Covenant on Civil and Political rights**. As per **Article 6 of ICCPR**, every human being possess the inherent right to life.⁴ Undoubtedly, entitlement of right to life is none other than a civil right of an individual being and if there is an unlawful interference with this very right, there shall be transgression of human rights. By the name of **right to life** whether an individual being can donate his or her organ or not is a matter of grave importance. If it is being done for noble cause, then there shall be no violation of human rights. What if the same is done with sole intent of commercialisation? Then the answer would no more be affirmative, it would rather be of gross violation of basic human right.

iii. Violation of article 21 of Indian constitution:

In the wordings of **article 21 of Indian constitution**, each and every individual is entitled to live his or her life in a healthy and dignified manner. Many-a-times **Indian judiciary** have regarded **right to health** as a concomitant part of right to life contained in **Article 21 of Indian Constitution**. Furthermore, right of a person over his or her own body is a **Fundamental Right** guaranteed under **Article 21**.⁵ It is thus very much evident that if an individual is subjected to trafficking in terms of organ removal, he or she can't lead a healthy life and which in turn lead to the violation of **Article 21 of Indian constitution**.

iv. Violation of article 23(1):

In a broader sense, **Article 23(1)** was included in our **Indian Constitution**, with intent to protect individual rights against any form of exploitation. Human trafficking is one of those exploitations if take place will lead to the violation of the protection guaranteed under **Article 23(1)** as follows:

³ Article 3, Universal Declaration of Human Rights, 1948

⁴ Article 6, International Covenant on Civil and Political Rights, 1966

⁵ Paramanand Katara v. Union of India (1989)

“Traffic in human beings.....are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.”⁶

Organ trafficking in India: responsible factors

Alike any other country, **india** is also largely affected by the heinous activities named **organ trafficking**. Trafficking of human beings in the form of removing one’s organ traces its root to transplantation of organs and tissues. The traffickers find it easier to take out the organs and tissues in the name of transplantation and in this way, they are commercialising the same. One can’t depict the real scenario unless he or she is the victim of such illegality. Mere witnessing the illegality in the name of organ transplantation as well sharing one’s own opinion in social media platform does not confer upon us the status of being human in its entirety. Sitting idle and doing nothing is none other than equivalent to causing injustice to own as well to the society. Organ trafficking is such an illegality confined not only to the nation but has expanded its root to the entire world also. On serious note, the same needs to be prevented conjointly. In this regard, it is noteworthy to discuss about various factors responsible for causing organ trafficking in India.

➤ **Poverty as a driving factor to cause illegal trading in organs-**

It is undoubtedly acceptable that **India** is still lagging behind from economical perspective. **India** is not even in such a position as to reach the status quo as already achieved by western countries. In countries like **India**, people are ready to do anything in terms of getting money. Many-a-times, the researchers have come up with this burning issue wherein it has been found that due to lack of money, people are distressed to sell their **kidneys** as well other organs.

⁶ India const. art. 23, cl.1

A team comprising of **Dr. Madhab Goyal** and **Dr. Rabindra Mehta** from **Geisinger Health System** in **Pennsylvania** along with the colleagues from the **case Western Reserve University** in **Ohio** and the **University of California School of Medicine** at **San Diego** had undergone a cross sectional survey of people in **India** who actually had sold their kidneys to the traffickers. The ulterior motive behind conducting such survey work was to find out many-a-factors, **i.e.** motivation for organ selling, the money they have got after selling their kidneys, the way they have spent the money so earned from thereunder, health status of the donor soon after the sale, advice to others whether to sell their kidneys or not etc. the survey was mainly conducted in **Chennai (Tamil nadu)**. Approximately, **305** persons were interviewed throughout the survey. Out of which **96%** of the participants asserted that in order to pay off their debts they did not find any other better option than to sell their renal organ, **3%** among them sold it due to meet dowry demands and marriage expenses for their daughters and the rest of the participants were in urgent need of money so that they could set up their own business platform. In most of the cases (**approx. 70%**), the kidneys were sold through intermediaries and the rest were done directly to clinic or else to an individual. As a consequence, the donors were paid **\$1070**, which is **third** lower than the average amount promised.⁷

One of the biggest scandal in the form of organ trafficking was discovered by **Punjab police**, wherein they could arrest the mastermind of the scandal, **dr. parveen kumar sareen**, the then associated doctor of **kakkar hospital**. Along with him the **Punjab police** also took into custody **dr. o p**

⁷ *Selling a kidney fails to rescue Indians from poverty; Deborah josefson, bmj 2002 oct 12, 325(7368):795, <https://pmc.ncbi.nlm.nih.gov/articles/PMC1124324>*

mahajan, principal of **government medical college** and **chairman** of the **authorisation committee**. It was discovered throughout investigation that approximately **1.5 billion rupees** got changed hands between the **doctors**, **middlemen** and the **donors** from **1997** to **2002**. It was stated by the then inspector general of police in **Jalandhar**, **Satish Kumar Sharma** that the racketeers made exploitation of the provision of **THOTA, 1994**, which allowed donation of organs between unrelated donors if it arises out of love and affection for the patient. It was also stated by him that between half a million and a million rupees was charged for each transplantation. Out of such huge transaction, the **doctors** and **middlemen** concerned took major share of the money, the donors mainly poor migrant labourers from the state of **Uttar Pradesh** and **Bihar** were given only **rupees 25000** to **50000**.⁸

Another survey conducted during **November, 2013** to **February 2014** had depicted the same picture in addition to the above mentioned one. The said survey work was conducted with due assistance of **153 participants** across the villages of **erode, Chennai** and some part of **west Bengal**. It was found throughout the survey that around **87%** of the victims were **female** whereas the numbers stood at 56% in erode. The victims of **Chennai** were mostly belonging to **fishing community** who had lost their home because of **tsunami** took place in the year **2004**. The traffickers targeted them by offering rewards in terms of money, whereas the brokers started offering them to provide house to stay. These were the multiple factors responsible for organ removal at that point of time. It was also noticeable throughout the survey that around **87.7%** of the interviewees had opted for selling kidneys in order to

⁸ *Police uncover large scale organ trafficking in Punjab*; Sanjay Kumar; BMJ. 2003, Jan 25;326(7382):180,<https://pmc.ncbi.nlm.nih.gov/articles/pmc1125055/>

pay off their debts and also with the hope of transcending poverty.⁹

The leading case of **Amit Kumar** may also be cited in this regard. This case depicted the picture of illegal organ trafficking in **India**, wherein it was found that poor labourers got forced to be live donors in lieu of fake promise to get **rupees 3 lakh**. However, it was discovered later on that **amit kumar** used to charge approximately **\$50000** per operation and had conducted near about **500** illegal transplantation.¹⁰

Organ trafficking as a punishable offence both in national and international domain:

Human trafficking in its any form is a punishable offence. It covers within its ambit **organ trafficking** as well. There are in Toto **two** comprehensive legislative framework in **India** covering the aspect of **organ trafficking** and its complete ban, **i.e. Indian Penal Code, 1860** (currently **Bharatiya Nyaya Sanhita, 2023**) and **Transplantation of Human Organs and Tissues Act, 1994**.

i. Penal provision under Indian Penal Code, 1860 (Bharatiya Nyaya Sanhita, 2023):

If one closely look into the provisions contained both in **indian penal code, 1860** or else in **bharatiya nyaya sanhita, 2023**, it can easily be stated that the very expression **organ trafficking** has nowhere been explicitly mentioned or in other words the same has impliedly been incorporated within the context of the offence prescribed in **section 370 of Indian penal code, 1860** or **section 143 of bharatiya nyaya sanhita, 2023**. The trace of **organ trafficking** may well be found under **explanation 1** appended to **section 370(1) of Indian penal code, 1860** or **section 143(1) of bharatiya nyaya sanhita,2023**. In the

⁹ Shroff s, Navin s, *Study on Organ Trafficking in India*, ITN, Nov. 2013-Feb 2014

¹⁰ Neha pant, *the fall, rise and fail of kidney racket kingpin dr. Amit Kumar*, *Hindustan times* (Jun 12, 2020, 2:20 am), <https://m.hindustantimes.com/india-news/the-fall-rise-and-fall-of-kidney-racket-kingpin-dr-kumar/story-hgmheixl.8h9i6k1ktnencn.html>

wordings of **explanation 1**, if there is any forcible removal of human organ, the same shall constitute **trafficking**.¹¹

If any person is associated with such kind of heinous activities, he or she will be subjected to **rigorous imprisonment** of not less than **10 years**, which may extend up to **imprisonment for life** and shall also be liable to **fine**.¹²

ii. Organ trafficking and THOTA, 1994:

One can go back to early **1970s** when for the first time organ transplantation took place. But unfortunately, there was no existing **legislation** to regulate transplantation of **human organs** or **tissues**. It is thus much desirable to state that in absence of any suitable legislative framework, there was huge scope for the racketeers to deal with **human organs** or **tissues** illegally. This was for the first time in the year **1994**, an urgency to have a comprehensive legislation to regulate transplantation of human organs or tissues was felt and accordingly, **parliament** came up with a suitable legislation as **Transplantation of Human Organs and Tissues Act, 1994**. The said **act** was mainly enacted with intent to regulate **transplantation** of **human organs** or **tissues** and also to put a ban on any kind of **commercial dealings** in **human organs** or **tissues**. If we closely look into the provisions of the said **act**, it will give us an inference that transplantation of human organ or tissue is permissible only if the **donor** and **donee** are in a **family relationship** and in this regard it is noteworthy to mention that every process needs to be conducted under due supervision of authority. If there is a failure to comply with the same, penal provisions stipulated under the **act** will get attracted. The relevant **penal provisions** are as follows:

- If there is removal of human organ without any authority, the wrongdoer shall be subjected to **imprisonment** extending up to **10 years** and shall also be liable to **fine** extending up to **rupees 20 lakh**.¹³

¹¹ Indian Penal Code, 1860, S.370(1); Bharatiya Nyaya Sanhita, 2023, S.143 (1)

¹² Indian penal code, 1860, s.370 (2); Bharatiya Nyaya Sanhita, 2023, s.143 (2)

¹³ Transplantation of Human Organs and Tissues Act, 1994, s. 18(1)

- Commercialisation of any human organ will attract the penal provision contained in **section 19 of Transplantation of Human Organs and Tissues Act, 1994**. In the wordings of **section 19**, if an individual engages himself or herself in any kind of **commercial dealings of human organs**, he or she will have to face the penal consequences of minimum **5 years of imprisonment** extending up to **10 years** and shall also be liable to minimum **fine of rupees 20 lakh** extending up to **Rupees 1 crore**.

❖ The role of **Indian judiciary** in prohibiting illegal organ trading is phenomenal. From time and again, the **Indian judiciary** have played a pivotal role in deciding the matter concerning **organ trafficking**. Some of these instances are as follows:

*Amar Singh Bhatia & anr. v/s Sir Ganga Ram Hospital & Ors*¹⁴, In the instant case it was observed that **thota,1994** had been enacted with sole objective to regulate transplantation of human organs and tissues and also to prohibit any kind of illegal dealings in human organs.

*Sajith Shyam v/s State of Kerala*¹⁵,

Thee **Apex Court** observed that “**organ trafficking an organised crime, this was perhaps just tip of the iceberg.**”

▪ **International legal instruments in combating organ trafficking:**

Organ trafficking is no more a national issue; it has rather been extended to entire world. Having **national legislation** is absolutely worthy, but what if the same takes place as cross border crime. So, in order to combat the same, many a **legal instrument** have been adopted internationally as well, **i.e. united nations protocol against trafficking in persons (Palermo protocol); council of Europe convention against trafficking in human beings; and council of Europe convention against trafficking in human organs.**

i. **Palermo protocol:**

This said **protocol** was adopted by **general assembly** through **resolution 55/25** on **November 15, 2000** with intent to urge the **state parties** to take effective action so that trafficking in

¹⁴ Decided on May 20, 2024

¹⁵ (2024) SCC Online Ker. 3857 (India)

persons can be prevented and also to adopt punitive measures to provide protection to human rights. While dealing with **trafficking in persons** adherence to be given to the usage of the word, **exploitation** which shall include within its purview the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the **removal of organs**.¹⁶

Stressing upon the very expression '**removal of organs**', it can easily be stated that this said **protocol** had also taken into consideration the burning issue of **organ trafficking** as one of its main tenets.

ii. Council of Europe convention on action against trafficking in human beings:

This said **convention** mainly designed to protect the rights of human beings and also suggested for providing assistance to the victims of **human trafficking**. In due consideration of **organ trafficking** one may resort to the definition of the word **exploitation** appended to **article 4 (a)**, wherein it can be said that removal of one's organ without his or her consent or else with consent for satisfying the purpose of commercialisation is nothing but trafficking of human beings only. It has thus been suggested under **article 18** of the said **convention** that each **state party** shall adopt such legislative measures through which such kind of illegal activities may be prevented.¹⁷

iii. Council of Europe convention against trafficking in human organs, 2005:

This **convention** more popularly known as **Santiago de compostela convention**. It is also to mention that the said **convention** is binding in nature aimed for combating the illegal removal and trafficking of human organs. It criminalizes illegal

¹⁶ Article 3(a), Protocol to Prevent, Suppress and Punish Trafficking in persons especially women and children, supplementing the United Nations Convention against Transnational Organized Crime, General Assembly Resolution 55/25, November 15, 2000

¹⁷ Council of Europe Convention on Action against Trafficking in Human Beings, CETS no. 197

removal of organs inclusive of **living** or **deceased donors** without free, informed consent or even without authorisation under **municipal law**. The **convention** also includes within its purview the provisions for protecting victims and preventing trafficking.

iv. Guiding principle 5 of who guiding principles on human cells, tissue and organ transplantation:

In the light of quoted principle, **cells, tissues** and **organs** should only be donated freely any without any monetary payment or some other reward of monetary value. It has also been mentioned in the said **principle** that if there is any commercialisation of **human organs, cells** or **tissues** the same shall be banned or restricted with immediate effect from the end of nation states.

- ❖ Few instances of **organ trafficking** at **international level** may be referred as follows:

State v. Netcare Kwa-Zulu Limited; UNODC Human Trafficking case

In the present case, there was an advertisement in a newspaper concerning **kidney donations**. Consent of the victims was mainly obtained fraudulently. The victims were deceived by the **defendants** as they didn't disclose anything about such **kidney donation** to the victims. The **defendants** rather made a fake promise to give \$7000 each. But at the end of the day it was being found that the **defendants** didn't fulfil their promise, rather they even took back the money from **victims** as a payment of **expenses** or **debts**. Another allegation against the **defendants** was that the victims were not provided with post-surgery medical care and they were rather threatened by the **defendants**. In a prosecution against the **defendants**, the **court** held them guilty of trafficking in persons for organ removal.

J. A. v. State of Israel

the **defendant** in this present case compelled the **victims** to sell his kidney in terms of money and sent him to a person in another country who would make the necessary arrangements for him. On discovery

of the **facts**, the brother of the **victim** demanded for the said money against the **defendant** and on denial filed a complaint forthwith. As a consequence, the **defendant** was convicted of involvement in selling or giving up an organ in exchange of money which itself is prohibited in **national domain**. Initially, the **court** sentenced the **defendant** to face **8 months** of **imprisonment**; but due to his **young age** and out of sympathy for his family, the same got reduced to **one month**.

Conclusion & suggestive measures:

Donation of one's organ or tissue for the purpose of **transplantation** is indeed a noble cause. But if it is done for the purpose of commercialisation, the same shall be prevented with immediate effect under the authority of stringent rules and regulations. Many-a-times, a person suffering from **renal failure, liver damage** and so on seek for the help of a donor who can assist him to get rid of the same. And this is the root cause wherein the possibility of commercialisation of organ and tissue may occur. This in turn lead the brokers or else other organ peddlers to intervene as well to pave the way for commercialisation.

In the light of the discussion done so far and also taking into consideration all other prevalent scenarios across the country, it is noteworthy to mention that despite of having **transplantation of human organs and tissues act, 1994**, there are still some remote areas wherein organ trafficking is taking place even in daylight. **Poverty** is one of the prominent factors which drives the **traffickers** as well the **brokers** to strike upon. It can also be said that lack of knowledge regarding organ trafficking, poor and uneducated people are getting subjected to trafficking. Undoubtedly, government have come up with a number of **legislative mechanisms, national policies** etc. so that **trafficking of human beings** can be prevented. But the present scenario portrays some other picture. As a consequence of which, the dream of establishing a trafficking free society is yet far to reach.

It is also to mention that the issue of **organ crisis** is one of the leading factors due to which there is an increase of **offences** like **organ** trafficking. Henceforth, the same should be addressed and dealt with as a matter of prior

concern. Furthermore, endeavours should be taken in order to increase the pool of potential donors by encouraging **cadaver** donations. Norms should be fixed with great adherence to facilitate a quick, responsive and efficient organ donation program to retrieve organs and tissues from deceased person.

It cannot be undermined that in modern times, transplantation of organs and tissues has gained much recognition and in a country like **India**, people are coming forward to give it an impetus. This is true indeed a great achievement. Despite of having all these positive attributes, there are still some lacunae as well gaping which are to be solved with best possible solutions.

Even though we are not completely free from the taboo of **trafficking**, the following measures may be adopted to curb the menace of **trafficking**;

- i. Setting up of human trafficking awareness cell especially in remote areas.
- ii. Development of infrastructural facilities.
- iii. Creating more job opportunities.
- iv. Spreading the message: **today it is me, tomorrow it may be you.**