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# TRANSPLANTATION OF HUMAN ORGANS AND TISSUES: AN INDIAN SCENARIO

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## ABSTRACT

Human trafficking for organs and tissues trading is a great threat to global health and security which has been facilitated by the globalization where the criminal organization easily manipulates the poverty-stricken people. Therefore, the aim and significance of the study is to access the research activity and trends on human trafficking and to analyze the legal framework and other anti-trafficking organizations which assist in eradicating illegal organ transplantation.

**Keywords:** Human Trafficking, Globalization, Poverty, Anti-trafficking, Illegal organ transplantation.

**Introduction: -**

Organ donation and transplantation is a government regulated activity in **India** and the same has been made possible with the enactment of **Transplantation of Human Organs and Tissues Act, 1994**. Till 1994, **India** was lagging behind in the race of transplantation of organs and tissues. The **Government of India** also found it suitable to have a legislation in this field. Subsequently, the **law of 1994** got enacted and gave it an impetus. The **Act** itself came into force on **February 4, 1995** in the states of **Goa, Himachal Pradesh** and **Maharashtra** and in all the **Union Territories**. Subsequently, it was adopted by all other states except **J&K** and **Andhra Pradesh** as because these **two states** have already had their own legislation. In this **chapter** the relevant legal provisions under the **Act** and their applicability in **India** are to be discussed.

**The Relevant Provisions and Rules under THOTA, 1994 governing Organ Donation and Transplantation in India: -**

The relevant **legal provisions** under **THOTA, 1994** are to be discussed under the following heads: -

**Purpose of the Act** – The **Act of 1994** was enacted with a view to provide for the regulation of **removal, storage and transplantation of human organs and tissues for therapeutic purposes** and also for the **prevention of commercial dealings in human organs and tissues** and for matters connected therewith or incidental thereto.

**Definitions of Relevant Legal Terminologies under the Act** – In order to know the effective implementation of the **Act**, the meaning of relevant legal terminologies are to be referred:

**a. Transplantation** – It means the grafting of any human organ from any living person or deceased person to some other living person for therapeutic purposes.<sup>1</sup>

**b. Human Organ** – This very expression means any part of a human body consisting of a structured arrangement of tissues, which, if wholly, removed, cannot be replicated by

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<sup>1</sup> S. 2(p), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

the body.<sup>2</sup>

**c. Tissue** – It means a group of cells, except blood, performing a particular function in the human body.<sup>3</sup>

**d. Therapeutic purposes** – This very expression denote systematic treatment of any disease or the measures to improve health according to any particular method or modality.<sup>4</sup>

**e. Deceased Person** – It 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.<sup>5</sup>

**f. Donor** – It means any person, not less than **18 years of age**, who voluntarily authorises the removal of any of his human organs for therapeutic purposes under **Sections 3 (1) or 3 (2)**.<sup>6</sup>

**g. Brain-stem death** – The stage at which all functions of the brain-stem have permanently and irreversibly is ceased and is so certified under **Section 6 (3)**.<sup>7</sup>

**h. Minor** – A person who has not completed his **18 years** of age.<sup>8</sup>

**i. Recipient** – A person into whom any human organ or tissue or both is, or is proposed to be, transplanted.<sup>9</sup>

**Kinds of donor and process of donation:** - As per the **provisions** appended to **Transplantation of Human Organs and Tissues Act, 1994**, a **donor** has been classified into two **parts**, i.e. **living donor & deceased donor**.

- A **living donor** can donate his **organ** only to the following category of persons-

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<sup>2</sup> S.2 (h), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

<sup>3</sup> S. 2 (oa), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

<sup>4</sup> S. 2 (o), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

<sup>5</sup> S. 2 (e), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

<sup>6</sup> S. 2 (f), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

<sup>7</sup> S. 2 (d), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

<sup>8</sup> S. 2 (hb), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

<sup>9</sup> S. 2 (m), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

- **near relatives**
- **related by affection or attachment**

**Near relative clause-** In terms of **section 9(1)**, a **living donor** can donate his organ only to his **near relatives**<sup>10</sup> and a **near relative** includes within its ambit **spouse, son, daughter, father, mother, brother, sister, grandfather, grandmother, grandson, granddaughter**.<sup>11</sup>

**Related by affection or attachment-** It is important to note that a **living donor** can also donate his or her organ to a person not being his **near relative**, but out of **love and affection**. It is also to be noted that for doing so prior approval from **Authorisation Committee** must be obtained.<sup>12</sup>

- A **deceased donor** in order to be eligible for registering himself for **organ donation** at any time before his **death** must have provided unequivocally consent in writing in the presence of **two or more witnesses**.<sup>13</sup>

**Penal Provisions under the Act:** -The **Transplantation of Human Organs and Tissues Act, 1994** under **Chapter VI** has specifically provided for various kinds of **offences** and the **punishments** to be imposed accordingly. The relevant provisions under the **Act** are as following: -

**a. Punishment for unauthorised removal of human organ or tissue** – If any person without having an authority remove any organ or body part thereof from the body of any person for whatsoever purpose specified under the **Act** shall be punishable with a **maximum imprisonment for 10 years** and also with a **maximum fine up to 20 lakh rupees**.<sup>14</sup> If the wrongdoer is a **registered medical practitioner**, his name from the register of **State Medical Council** may be removed for **3 years** provided that he is a first time offender and in case of subsequent offence, the same may be removed

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<sup>10</sup> S. 9(1), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

<sup>11</sup> S. 2(i), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

<sup>12</sup> S. 9(3), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

<sup>13</sup> S. 3(2), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

<sup>14</sup> S.3(1), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

permanently.<sup>15</sup>

In case of removal of tissue without authority, the wrongdoer shall be punishable with an imprisonment which may extend to **3 years** and with a **fine** which may extend to **5 lakh rupees**.<sup>16</sup>

**b. Punishment stipulated for commercial dealings in human organs** – If any person whosoever engages himself in any kind of commercial dealings in human organs in either of the following manner: -

- Making or receiving any payment for the supply of, or for an offer to supply, any human organ,
- Seeking to find a person ready to supply for payment any human organ
- Makes an offer to supply any human organ for payment
- 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 etc.

shall be punishable with a minimum imprisonment for **5 years**, but which may extend up to **10 years** and shall also be liable to minimum fine amounting to **Rupees 20 lakh**, but which may extend up to **Rupees 1 crore**.<sup>17</sup>

**c. Illegal dealings in human tissues and the punishment stipulated for** – If at any point of time it is found that a person is engaged in illegal dealings in human tissues, the person shall be punishable with minimum imprisonment of **1 year**, but which may extend to **3 year** and also with fine which shall not be less than **Rupees 5 lakh** but may extend up to **Rupees 25 lakh**.<sup>18</sup>

**d. Punishment except those mentioned under Sections 18, 19 & 19A** – In terms of **Section 20** of THOTA, 1994 if a person contravenes any of the provisions of the Act

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<sup>15</sup> S.3(2), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

<sup>16</sup> S.3(3), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

<sup>17</sup> S.19, THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

<sup>18</sup> S. 19 A, THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

and no specific punishment is stipulated thereunder shall be punishable with **imprisonment** extending up to **5 years** or with **fine** extending up to **Rupees 20 lakh**.<sup>19</sup>

**e. Cognizance of Offence** – If an offence takes place under **THOTA, 1994**, the cognizance thereunder shall be taken only on the basis of a **Complaint** filed either by an **appropriate authority** or an **authorised officer** or by a person who has already given a notice concerning the alleged offence of not less than **60 days** to the **appropriate authority** expressing his intention to lodge a complaint to the **Court**.<sup>20</sup>

It is also to be noted that any offence under this **Act** shall be tried either by a **Court of Metropolitan Magistrate** or by a **Court of Judicial Magistrate First class**.<sup>21</sup>

**Regulation of Transplantation Activities:** - For the purpose of regulating transplantation activities, the **Transplantation of Human Organs and Tissues Act, 1994** under **Chapter IV** specified for two regulatory bodies, i.e. **Appropriate Authority** and **Advisory Committees**.

**a. Appropriate Authority & their powers and functions-** The **Central Government**<sup>22</sup> or the **State Government**<sup>23</sup> may appoint one or more officers as **appropriate authority** in **Union Territories** or **States** respectively for effective implementation of the **Act**. This **body** is solely responsible for regulating **removal, storage** and **transplantation** of **human organs** and **tissues**.<sup>24</sup>

- The **Appropriate Authority** while exercising its power under the **Act** shall possess all the powers of a **Civil Court**. The **powers of Appropriate Authority** include the following<sup>25</sup>:-
- To issue **summons** to any person who has the knowledge concerning the violation of the provisions of this **Act** or any **rule** made thereunder.

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<sup>19</sup> S. 20, THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

<sup>20</sup> S.22(1), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

<sup>21</sup> S. 22(3), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

<sup>22</sup> S. 13(1), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

<sup>23</sup> S. 13(2), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

<sup>24</sup> Sunil Shroff, Legal and ethical aspects of organ donation and transplantation, Indian. J Urol, 2009, 25(3), 348-355, Legal and ethical aspects of organ donation and transplantation-PMC.pdf

<sup>25</sup> S. 13B, THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

- To discover and produce any document or material object.
- To issue **search warrant** for any place suspected to be involved in unauthorised removal, procurement or transplantation of human organs or tissues or both.
- The **functions**<sup>26</sup> of the **Appropriate Authority** are as following:
  - To grant registration to **hospitals** and also to renew the registration.
  - To suspend or cancel the registration under **Section 16** of the **Act**.
  - To set standards for **hospitals** as well for **tissue banks** engaged in **transplantation of human organs** and **tissues** respectively.
  - To investigate into any complaint of breach of any of the provisions or rules under the **Act**.
  - To inspect **tissue banks** periodically.
  - To inspect **hospitals** periodically for examination of the quality of transplantation and the follow-up medical care to person who have undergone transplantation and also to persons from whom organs are removed.

**b. Advisory Committee & its role** – For the sake of advising the **Appropriate Authority**, the **Central Government** shall constitute an **Advisory Committee** for a period of **2 years**.<sup>27</sup>

The **Advisory Committee** shall consist of the following **members**<sup>28</sup>:

- One administrative expert not below the rank of **Secretary to the State Government**.
- Two medical experts.
- One officer not below the rank of a Joint Director to represent the Ministry or Department

<sup>26</sup> S. 13(3), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

<sup>27</sup> S.13A(1), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

<sup>28</sup> S. 13A (2), THE TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

of Health and Family Welfare.

- One Legal Expert.
- One person to represent the non-governmental organisations or associations.
- One person specialist in the field of Human Organ transplantation.

### **Conclusion:-**

Living one's life at the cost of transplanted organ or tissue from another person is a noble concept. Organ and Tissue transplantation is no more an isolated concept, rather it is now a globally recognized concept. Alike the advanced countries (U.S.A., U.K. etc.), India has also adopted the same view. Since a longer period of time transplantation of organs and tissues are taking place in India and desirably it is regulated by the law named **Transplantation of Human organs and tissues Act, 1994**. From time and again changes have been brought in the existing law of 1994. One of the significant changes took place in the year 2014. By virtue of which **Transplantation of Human Organs and Tissues Rules, 2014** came into effect and in consequence the implementation of **THOTA, 1994** has been made possible more effectively. Having said that, it is equally important to note this very act was enacted with a chief objective of regulating illegal organ trafficking in Indian context. Mere enactment of law is not fruitful unless it can achieve the desired goal. Whether the illegal trafficking on human organs and tissues have completely been banned or not is a matter of concern. Another aspect to be taken care of is that how far the existing law has had been successful in curbing the menace of organ trafficking. Donation of one's organ or tissue for the purpose of transplanting it in the body of needed one is indeed a noble cause. But if it is done for the purpose of commercialization, the same shall be prevented with immediate effect under the guidance of stringent rules and regulations. Many-a-times, a person suffering from renal failure, liver damage and so on seek for a donor who can donate his organ to save the person's life. And this is the root cause wherein the possibility of commercialization of organ and tissue may occur. This in turn led the brokers or else other organ peddlers to intervene as well to pave the way for commercialization. Almost two-decades have been passed since the enactment of **THOTA, 1994**, and despite all the possible efforts, the act has failed to achieve its goals to a large extent. One of the major objectives behind the enactment of this act was to deal

with organ shortage in India by regulating procedures concerning transplantation as well promoting cadaver donations. Even though India had witnessed a certain amount of increase in cadaver donations in past few years, yet there is a huge gap between the demand and supply of organs. Desirably, demands being always far ahead of the supply. In India, a poor rate of deceased donations is a key concern. India having high rates of fatal road accidents each year, has the potentiality of reaching impressive rates of cadaver donations, but unfortunately, due to lack of quick and responsive infrastructures there is a failure to achieve the same. Among other objectives, the more significant one was to prevent and control the commercialization of human organs and tissues. Even though the act had to some extent been successful in curbing the same, the complete prevention of the same is yet far to reach. It is hard to detect the offences relating organ trades and trafficking and the act itself is silent about the same. Furthermore, the act doesn't provide for the definitions of organ trade and trafficking, which it purports to prevent and control. Moreover, the act is more inclined towards punishing the criminal and deterring the crime rather than to protect the interests of the victims. Hence the act lacks a humanitarian and holistic approach. It is also noticeable that the act is failed to put any check and balance upon the functioning of the Authorization Committees to deal with any abuse of power or to identify any possibilities corruption involved.