

ANALYSIS OF HUMAN ORGAN TRAFFICKING IN INDIA

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“Eventually, red markets have the nasty social side effect of moving flesh upward — never downward — through social classes. Even without a criminal element, unrestricted free markets act like vampires, sapping the health and strength from ghettos of poor donors and funneling their parts to the wealthy.”¹

There is a ubiquitous fact that one day each and every thing which has life, have to surrender itself to eternity but human being is keenly desirous to live an unending life or life as long as can be. To save life and reduce pain from human life medical science has reached to a revolution in the sphere of organ replacement. Organ transplantation is the moving of an organ from one body to another or from a donor site to another location on the person's own body, to replace the recipient's damaged or absent organ². Organs that can be transplanted are the heart, kidneys, lungs, pancreas, intestine, and thymus. There is a worldwide shortage of organs available for transplantation,³ yet commercial trade in human organs was at one point illegal in all countries except Iran⁴. Transplantation raises a number of bioethical issues, including the definition of death, when and how consent should be given for an organ to be transplanted, and payment for organs for transplantation. Other ethical issues include transplantation tourism and more broadly the socio-economic context in which organ procurement or transplantation may occur. A particular problem is organ trafficking.⁵

India, which seems to be at the middle of much of the red market trade, having the unique and unfortunate combination of huge population, massive poverty, widespread corruption,

¹ Scott Carney, *The Red Market: On the Trail of the World's Organ Brokers, Bone Thieves, Blood Farmers, and Child Traffickers*, pp. 69–70.

² http://en.wikipedia.org/wiki/Organ_transplantation last visited on 11/03/2015, time: 10:00 am (IST), Meerut (UP), India

³ <http://news.bbc.co.uk/2/hi/health/6240307.stm>, "Experts warn against organ trade" last visited on 11/03/2015, time: 10:07 am (IST), Meerut (UP), India

⁴ http://en.wikipedia.org/wiki/Organ_trade last visited on 11/03/2015, time: 10:20 am (IST), Meerut (UP), India

⁵ Organ trafficking and transplantation pose new challenges
<http://www.who.int/bulletin/volumes/82/9/feature0904/en/> last visited on 11/03/2015, time: 10:22 am (IST), Meerut (UP), India

ineffectual bureaucracies, enormous wealth discrepancy, and a post-colonial relationship with the west whose legacy is a set of trade routes and relationships for everything from articulated skeletons (dug up by grave-robbers who terrorize whole villages) to human hair⁶. Currently, the international community has also not responded adequately to the problem of organ trafficking. Legal provisions exist prohibiting this crime, but, where there are provisions, there are often weak enforcement policies and few prosecutions.⁷

Organ trafficking violates fundamental human rights, such as the rights to life, liberty, security in person, and freedom from cruel or inhumane treatment. As such, several international organizations have established standards on organ trafficking. These include the World Health Organization's Guiding Principles on Human Organ Transplantation (1991); the World Medical Authority, which has denounced the commercial use of organs since 1985; the Council of Europe's Convention on Human Rights and Biomedicine (1997) and its Optional Protocol Concerning Transplantation of Organs and Tissues of Human Origin (2002); and the Bellagio Task Force, a working group that Columbia University established to draft a document regarding the use of organs for transplants. In addition, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons includes "organ removal" and its subsequent sale as an end purpose of trafficking.⁸

Many nations have also passed domestic laws prohibiting organ trafficking, but the crime continues to thrive, often due to corruption. For example, despite adopting the Transplantation of Human Organs Act in 1994, the human organ trade is still widespread in India. The Act bans the sale of human organs and all transplants except in situations where a relative donates an organ. There is a large loophole in the Act, however, which stipulates that hospital authorization committees can allow non-related donors to donate organs for transplants if they are "emotionally close" to the patient, a term that has been very loosely defined. On numerous occasions, these committees have determined that people who are from different nations and speak different languages meet the "emotionally close" standard.

⁶ <http://boingboing.net/2011/05/31/the-red-market-book.html> last visited on 12/03/2015, time: 10:00 am (IST), Meerut (UP), India

⁷ Sheri R. Glaser, *Formula to Stop the Illegal Organ Trade: Presumed Consent Laws and Mandatory Reporting Requirements for Doctors*, *Transplant Proceedings*, vol.7, Issue 3, 2013, pp.45-67

⁸ <https://www.wcl.american.edu/hrbrief/12/2glaser.pdf> last visited on 14/03/2015, time: 11:00 am (IST), Meerut (UP), India

1. Organ Trafficking-

Human organ trafficking is a form of trafficking in human beings. The main terms connected to this crime are determined in the Declaration of Istanbul, an international document created at the Istanbul Summit on Organ Trafficking and Transplant Tourism in 2008. It clarifies the issues of transplant tourism, trafficking and commercialism and provides ethical guidelines for practice in organ donation and transplantation.

*Organ trafficking- is the recruitment, transport, transfer, harbouring or receipt of living or deceased persons or their organs by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving to, or the receiving by, a third party of payments or benefits to achieve the transfer of control over the potential donor, for the purpose of exploitation by the removal of organs for transplantation.*⁹

2. Patterns of Organ Trafficking-

Historically, certain patterns have been observed. In the 1990's most recipients of kidneys were residents of the Gulf States who traveled to India to purchase an organ or they were Asians who traveled to China or India. India remains a popular destination for both purchase and transplant, and buyers come from India's middle class and from around the world and include the United States, Canada, England and the countries in the Middle East.¹⁰ The market has expanded, but general patterns can be observed. The trade in kidneys from live donors generally flows from poor, underdeveloped countries to rich, developed ones. There are organ-donor and organ-recipient nations.¹¹ Common countries of origin for those selling kidneys are Bolivia, Brazil, China, Columbia, Egypt, India, Iran, Iraq, Israel, Moldova, Nigeria, Pakistan, Peru, the Philippines, Romania and Turkey. Countries of origin for those purchasing kidneys are

⁹ .Declaration of Istanbul.[http://www.hks.harvard.edu/cchrp/isht/study_group/2010/pdf/ Declaration Of Istanbul.pdf](http://www.hks.harvard.edu/cchrp/isht/study_group/2010/pdf/Declaration%20Of%20Istanbul.pdf) , last visited on 17/03/2015, time: 9:00 am (IST), Meerut (UP), India

¹⁰ Rothman, D. and Rothman, S., "*The Organ Market*", The New York Review of Books, Vol. 50, ed. 16, 23 October 2003, available online at <http://www.nybooks.com/articles/archives/2003/oct/23/theorgan-market/> last visited on 18/03/2015, time: 9:30 am (IST), Meerut (UP), India

¹¹ Scheper-Hughes, N., "*Parts unknown. Undercover ethnography of the organs-trafficking underworld*", Ethnography, vol. 5, ed. 2, 2004, 29—73.

Australia, Canada, Hong Kong, Israel, Italy, Japan, Malaysia, Oman, Saudi Arabia, South Korea, Taiwan and the United States.¹²

3. Causes of Trafficking in Human Beings for the Purpose of Organ Removal

There is given a general description of the many and complex reasons underlying THBOR. The three overarching causes are:

A. Organ scarcity –

The scarcity of organs is the single most common explanation given for the existence of organ trafficking. According to this explanation, the root cause for human organ trafficking is the existence of a demand for organs far outpacing the supply. Many articles refer to the desperation felt by organ failure patients faced with long waiting times and the uncertainty of whether or not they will receive an organ before it is too late. Such feelings of desperation, the literature suggests, lead patients to take desperate measures, that is, to buy an organ on the illegal market. However, this illegal market would not exist, several writers claim, were it not for the existence of persons willing to capitalize on the asymmetry between the demand and supply of organs. Utilizing this asymmetry, so called “organ brokers” emerge who facilitate and organize the transactions of money and body parts both, making extensive profits in the process.¹³

B. Global processes and asymmetries-

Next after the scarcity explanation, these are the most common causes indicated. Accounting for these in their entirety is however beyond the access. Consequently, there are mentioned two perspectives: cultural analytical and criminological.

a) Cultural analytical perspectives –

A majority of the writings that employ a cultural analytical perspective, first of all, supplement the scarcity explanation given above with one that addresses the inequalities that increasingly define our world. “The flow of organs follows the modern routes of capital,” anthropologist

¹² Bulletin of the World Health Organization, vol. 85, ed. 12, December 2007, 955-962, available online at <http://www.who.int/bulletin/volumes/85/12/06-039370.pdf>, last visited on 17/03/2015, time: 11:00 am (IST), Meerut (UP), India.

¹³ Bagheri A, *Asia in the spotlight of the international organ trade: Time to take action*, Asian Journal of Wto & International Health Law and Policy, 2007; vol.2(1):pp11-23.

Nancy Scheper-Hughes writes, with which she means that the same global structures that allow first-world companies to capitalize on third-world natural assets and cheap labour also facilitate the trade in human organs. In the wake of the modern “neoliberal globalization” and its “global economy,” she writes, the bodies of the poor are increasingly turned into commodities possible to circulate on an international market.¹⁴

However, in the case of trafficking in human organs, market forces are not a sufficient explanation. In order for human organ trafficking to take place, the commercialization of body parts, fundamental to it, has to pair itself with the powers of contemporary biomedicine¹⁵. According to several scholars, in diagnosing, treating and successfully curing disease, biomedicine inevitably objectifies and fragments the human body. Organ transplantation is a perfect example of this, Sharp and Lock and Nguyen argue, since it fragments the human body into a number of replaceable organs defined by their function¹⁶. Here, the introduction on the market of the immunosuppressive drug cyclosporine, some writers suggest, has been instrumental in freeing the bodies of potential organ recipients and donors from their local dwellings, allowing the exchange of organs to become truly global.

Thus, it is only when contemporary market forces are paired with the objectifying and fragmenting healing powers of biomedicine that the organs of the poor become “bioavailable,” as anthropologist Cohen puts it¹⁷. According to the scholars presented in this paragraph, hence, the joint forces of the globalized market and contemporary biomedicine not only cause the realization of the phenomenon of trafficking in human beings for organ removal as such but also determine its nature. It is through this particular configuration that the flow of organs from poor people from the southern and eastern hemispheres to rich people from the northern and western hemispheres is facilitated.

¹⁴ Scheper-Hughes N. *The global traffic in human organs*. Current Anthropology. 2000;41(2):191-224.

¹⁵ Kierans C. Anthropology, organ transplantation and the immune system: Resituating commodity and gift exchange. Soc Sci Med. 2011;73(10):1469-76.

¹⁶ Lock M, Nguyen V-K. *An anthropology of biomedicine*: Wiley. com; 2011. , last visited on 21/03/2015, time: 10:00 am (IST), Meerut (UP), India _

¹⁷ Cohen L. Where it hurts: Indian material for an ethics of organ transplantation. Zygon. 2003;38(3):663-88.

b) Criminological Perspectives-

Criminological theories of the trade in human organs emphasize the influence of globalization processes. Beck and Camiller refer to globalization as “*the processes through which sovereign national states are criss-crossed and undermined by transnational actors with varying prospects of power, orientation, identities and networks*”¹⁸. Globalization has helped establish numerous licit (and illicit) global enterprises that flourish within a new global, capitalist economy. Market prices are determined by supply and demand. States are becoming increasingly dependent on the global market and on each other, as economic gains are realized through trade. The growth of the new global capitalist economy however has surpassed the development of a mediating global society equipped with necessary moderating and regulatory functions to safeguard human rights. The neoliberal paradigm, that is to say the ideology that endorses power of a competition-driven market model is dominant¹⁹.

The argument here is that the expansion of a global capital market does not involve the expansion of legal markets alone. As corporate and other actors become increasingly transnational, so do illegal enterprises. Passas maintains that different forms of cross-border crime produce asymmetries with complex criminological effects. In other words, criminal activities occur when criminogenic asymmetries are present. He defines these asymmetries as ‘structural disjunctions, mismatches and inequalities in the spheres of politics, culture, the economy and the law’. Firstly, asymmetries are criminogenic in that they cause or strengthen the demand for illegal goods or services. Secondly, they generate motives for particular actors to participate in illegal businesses. Thirdly, the asymmetries decrease the ability (or willingness) of authorities to control the illegal activities²⁰.

The fuzzy line between legal and illegal corporations is referred to as *black markets*. A black market is an underground economy of both *legal and illegal* goods and services that exists

¹⁸ Beck U, Camiller P. What is globalization?: Polity Press Cambridge; 2000.

¹⁹ Farmer P. Pathologies of power: health, human rights, and the new war on the poor: with a new preface by the author: University of California Pr; 2005.

²⁰ Passas N. Cross-border crime and the interface between legal and illegal actors. Upperworld and underworld in cross-border crime. 2002:11-41.

parallel to legal markets. In these economies income is not reported and consequently taxation and detection is evaded, either through money laundering, payments in cash or other means. In black markets goods (contraband) and services are obtained illegally (i.e. stolen), which are then moved and sold to resellers or end users²¹. Another essential element of black markets is that licit and illicit exchanges overlap. In this regard Passas argues: *“If the goods or services happen to be outlawed, then illegal enterprises will emerge to meet the demand. In this respect, there is no difference between conventional and criminal enterprises. Very often, all that changes when the business is illegal are some adjustments in modus operandi, technology and the social network involved. In some cases we have a mere re-description of practices to make them appear outside legal prohibitive provisions”*.²²

Black markets do not merely flourish because goods or services are or have become outlawed. They also exist because there may be a *scarcity* of legal goods. This happens when the demand for a good exceeds the supply, such as with human organs for transplantations. Black markets thrive because there is a remaining demand for what they offer. For this reason Taylor has argued that, *“if we are concerned about reducing the abuses of the black market for human kidneys, we should favour the legalisation of kidney markets, not their continued prohibition.”*²³. Ambagtsheer and Weimar emphasize the resilience of demand-driven crime to prohibition. They claim that prohibition of organ trade may drive up prices, provides illegal income, displaces crime to other regions and may go underground, resulting in higher crime rates and victimization²⁴. In black markets conventional crime often meets and becomes friendly with legal actors. Criminal groups both teach and learn criminal activities from their legitimate counterparts rather than the other way around.

²¹ Bruinsma G, Bernasco W. Criminal groups and transnational illegal markets. *Crime, Law and Social Change*. 2004;41(1):79-94.

²² Paoli L. *The paradoxes of organized crime*. *Crime, law and social change*. 2002;37(1):51-97.

²³ Taylor JS. *Black markets, transplant kidneys and interpersonal coercion*. *Journal of Medical Ethics*. 2006;32(12):698-701.

²⁴ Ambagtsheer F, Weimar W. A criminological perspective: *Why prohibition of organ trade is not effective and how the declaration of Istanbul can move forward*. *Am J Transplant*. 2012;12(3):571-5.

C. Local causes-

Attending to global processes does not suffice if one wants to understand the causes for trafficking in human beings for the removal of organs. One also has to take into account local conditions and contexts. Therefore three such conditions presented that causes the existence of human organ trafficking in particular national or regional settings. The first of these is corruption. For example, the existence of human organ trafficking in India can to a large extent be assigned to corrupt law-enforcement officials and other authorities turning a blind eye to the illegal activities of brokers and hospitals. The second local condition that frequently emerges is the absence of laws regulating organ transplantation in general and organ trade in particular. Several countries that have been deeply involved in the illegal trade in organs have only recently passed such laws, for example, Pakistan, the Philippines and Israel. Since these laws have been passed there are indications that the incidence of human organ trafficking has decreased, at least in Israel and the Philippines. In Pakistan the situation seems to be worse. The last local condition is the relative mundaneness and routineness that has come to characterize the act of selling an organ in some local settings. There are several examples of regions or parts of major cities where a significant proportion of the, almost always gravely poor, population has sold a kidney. These places are not infrequently referred to in terms of “kidney-villes,” “villages of half men,” “kidney towns/villages or no-kidney islets,” places where, according to the literature, kidney sale has become an established way of attempting to make ends meet²⁵. Thus, without nearly exhausting the subject, it is clear that local conditions are, together with global processes, seen as instrumental to the existence of Trafficking in human beings for the purpose of organ removal.

4. Transplant activities under the threat of curtailed organ trafficking-

Human organ trafficking is the dark consequence of transplantation of human organs. Organ transplants in India are regulated by Transplantation of Human Organs and Tissues Act 1994 and Rules made there under. By the amendment in this legislation in 2011 various improvisation has been introduced these includes permission for organ swapping, which as in practice involve various questions open to threat of organ trafficking and organ sale. There are another problems remain unsolved due to two other legalized practices under this statute one

²⁵ Shimazono Y. *The state of the international organ trade: A provisional picture based on integration of available information*. Bull WHO. 2007;vol.85(12):pp955-62.

of them is live organ donation by non relatives and second is transplant tourism, however both are directly prohibited but under the umbrella of section-9 (3) which includes the words “by reason of affection or attachment towards the recipient or for any other special reasons” these are permitted.

A. Organ Swapping-

India has opened the purview of its legislation to adopt organ swap in Transplantation of Human Organs and Tissues Act 2011. Organ swap transaction as it means is clear with the example that addresses the situation in which a patient in need of an organ may have a relative or friend willing to donate that organ (as a living donor), but ABO incompatibility prevents that person from donating.²⁶The researchers propose to pair two sets of people in which ABO-incompatibility prevents donation, but where each of the prospective donors is compatible with the unrelated donor, and allow a "swap." Thus, Donor A and her relative Recipient A would be ABO incompatible, while a similar situation would exist between Donor B and Recipient B. After verifying that Donor A is compatible with Recipient B, and Donor B is compatible with Recipient A, all four people would be put in operating rooms in a single hospital for a kidney swap transaction. Kidneys would be simultaneously removed from the two donors and immediately transplanted into the unrelated donors. The operations take place simultaneously in order to prevent the possible problems, legal and otherwise, that might occur if one of the donations took place while the other did not.

B. Live Organ Donation by Non Relatives-

Living organ donation has developed as an important alternative to cadaveric organ procurement. These efforts are stimulated by the fact that cadaveric organs cannot meet the demand, particularly in countries whose legislation does not use the ‘presumed consent’ or ‘opting out’ model. Indifference, doubts about the brain death concept, religious reservations about post mortem organ donation, and fear of possible abuses by irresponsible physicians are likely further factors contributing to the shortage of organs.²⁷

²⁶ Lainie Friedman Ross, David T. Rubin, Mark Siegler et al., "*Ethics of a Paired-Kidney-Exchange Program*," *NEJM* 336 (1997): pp.1732-55.

²⁷ Singer PA, Siegler M, Whittington PF, Lantos JD, Emond JC, Thistlethwaite JR and Broelsch CE. *Ethics of liver transplantation with living donors*. *N Engl J Med* 1989;vol. 321(9):pp. 620–622

In its Transplantation of Human Organs Act of 1994, India requires that living donors have to be related to recipients – exceptions have to be authorized by a special committee at the level of the states. The living donor has to be an adult of sound mind who voluntarily authorizes the donation in the form of a written consent (Art. 2). Both donor and recipient have to be informed of the risks and side effects by a medical practitioner. Commercial dealing in human organs is prohibited.²⁸

Only the federal laws of Germany and India require a particular relationship between donor and recipient and the legal majority of the living donor. In the U.S., anonymous donation is possible, and the use of children as living organ donors has been debated in a series of legal cases. The three legislations concur, however, on the prohibition of organ trading, therefore rejecting financial incentives as a motivation for donation. They also concur on the legal requirement of informed consent for organ removal from a living donor. Not only medical law, but medical ethics as well generally considers free and informed consent – and therefore a donor's autonomous and voluntary decision – a necessary prerequisite for allowing a physician to hurt one person in order to help another.²⁹ At the same time it is beyond doubt that the concept of informed consent is an ideal that is rarely if ever reached in practice.

Section 9 (1) of the THOA 1994 imposes restriction on live organ donation in this way-
Save as otherwise provided in sub-section (3), no human organ and tissue or both 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. only near relatives can donate their organs before death and who will be counted as near relative provided in section 2(i)-
"near relative" means spouse, son, daughter, father, mother, brother, sister, grandfather, grandmother, grandson or granddaughter."

Further section 9 (3) of Transplantation of Human Organs Act, 1994 said,

"If any donor authorizes the removal of any of his human organs and tissues or both before his death under subsection (1) of section 3 for transplantation into the body of such recipient, not

²⁸ Jacobs C, Johnson E, Anderson K, Gillingham K and Matas A. *Kidney transplants from living donors: How donation affects family dynamics*. *Adv Ren Replace Ther* 1998;vol. 5(5):pp. 89–97.

²⁹ Cf. for example the Nuremberg Code or Declaration of Helsinki of the World Medical Association

being a near relative, as is specified by the donor by reason of affection or attachment towards the recipient or for any other special reasons, such human organ and tissue or both shall not be removed and transplanted without the prior approval of the Authorisation Committee."³⁰

It provides exception to sub section 1 of section 9 of the same Act. There are enough evidences where commercial organ donors donate their organs to those to whom they never know of any reason but only for affection or attachment which arises suddenly and fuel is provided by the network of human organ traffickers.

C. Transplant Tourism-

Under the General Agreement of Trade in Service (GATS), governments may choose to trade health services to achieve their national health objectives. Health service exports, through the treatment of foreign patients entering their territory (classified as “mode 2” or “consumption abroad”), are used by some countries as an instrument of economic development. The trade in transplant-related health services across borders, however, may result in the inequitable allocation of deceased donor organs and has also raised ethical concerns, especially when this occurs in a country where the regulatory frameworks to protect live organ donors from coercion, exploitation and physical harm are not well developed or implemented.

Transplant Tourism has become a connotation for organ trafficking. The United Network for Organ Sharing (UNOS), recently defined transplant tourism as ‘the purchase of a transplant organ abroad that includes access to an organ while bypassing laws, rules, or processes of any or all countries involved’³¹. However, not all medical tourism that entails the travel of transplant recipients or donors across national borders is organ trafficking. Transplant tourism may be legal and appropriate. Examples include, when travel of a related donor and recipient pair is from countries without transplant services to countries where organ transplantation is performed or if an individual travels across borders to donate or receive a transplant via a relative. Any official regulated bilateral or multi-lateral organ sharing program is not

³⁰ Section-9(3), Transplantation Of Human Organs And Tissues Act, 1994

³¹ UNOS board further addresses transplant tourism. June 26, 2007. Available at: <http://www.unos.org/news/newsDetail.asp?>, last visited on 27/03/2015, time: 11:0 pm (IST), Meerut (UP), India.

considered transplant tourism if it is based on a reciprocated organ sharing programs among jurisdictions.³²

5. Legislative Measures Regarding Human Organ Trafficking

The organ trafficking is not new to the world and India is considered to be one of the biggest centre for this market. Illegal organ transplants are on the rise in spite of having a special legislation in place to deal with the menace. The law for various reasons failed in its objective and implementation giving scope to make the ground fertile for organ scandals. It is also creating hurdles for various philanthropic agencies which are working to further the cause of transplantation and sometimes unwittingly helping the kingpins and touts to easily circumvent the law. This chapter identifies such major issues which made the law futile and attempts to propose remedies to the problems in the law.

There are two crimes-human organs trafficking and trafficking for the purpose of organ removal. Former is criminalized by The Transplantation of Human Organs and Tissues Act 1994 and later is dealt by newly substituted section-370 in the Indian Penal Code 1860.

Salient Features of The Transplantation Of Human Organs Act, 1994-

- The Act allows doctors to certify brain death, thus enabling the starting of cadaver transplantation.
- The provision refers to donors who are not near relatives of the recipient. The expression near relatives is defined in Section 2(i) to mean spouse, son, daughter, father, mother, brother or sister and now with the latest amendment in 2011 it also includes grandparents and grandchildrens, Chapter II deals with Authority for the removal of human Organs." Sub-section (2) of Section 3 deals with removal of the organs after death for therapeutic purposes.
- Sub-section (1) however deals with authorisation by any donor for removal of any human organ before his death for therapeutic purposes.

³² http://www.cofs.org/COFS-Publications/Budiani_and_Delmonico-AJT_April_2008.pdf, last visited on 27/03/2015, time: 11:0 pm (IST), Meerut (UP), India.

- Sub-section (4) of Section 9 deals with constitution of Authorisation Committee consisting of such members as may be notified by the Central Government or the State Government, as the case may be.
- Under sub-section (5) of Section 9 application is required to be jointly made by the donor and the recipient in the prescribed manner.
- According to the Act, the unrelated donor has to file an affidavit in the Court of a Magistrate stating that the organ is being donated out of affection, after which the donor has to undergo a number of tests before the actual transplant takes place.
- The Authorisation Committee set up for the purpose ensures that all the documents required under the Act have been supplied. It banned organ sales, therefore, no foreigner can get a local donor. The Committee is required to hold an enquiry and if after such an enquiry it is certified that the applicants have complied with the requirements of the Act and the Rules, it can grant the applicants approval for the removal and transplantation of the human organs concerned. If on the contrary, after enquiry and after giving an opportunity to the applicants of being heard, the Authorisation Committee is of the view that the applicants have not complied with the requirements of the Act and the Rules, the application for approval may be rejected for reasons to be recorded in writing.
- Section 11 prohibits removal or transplantation of human organs for any purpose other than therapeutic purposes.
- Chapter VI deals with Offences and penalties. Section 18 provides for punishment for removal of human organs without authority. Section 19 provides for punishment for commercial dealings in human organs.
- The shocking exploitation of abject poverty of many donors for even small sums of money, appears to have provided the foundation for enacting the Act. The Authorisation Committee has to be satisfied that the authorisation for removal is not for commercial consideration. Since some amount of urgency has to be exhibited because of the need for transplantation, expeditious disposal of the application would be appropriate. But the matter should not be dealt with in a casual manner as otherwise the intent and purpose of the Act shall be frustrated. The penalty incurred for organ trade is also very high. This law does not allow exchange of money between the donor and the recipient.

Failure of the Transplantation of Human Organs Act, 1994 –

The law failed miserably in achieving the goal on two counts. Firstly, it did not register much success which is evident mainly from the kidney scams reported in the years 2002, 2003 and 2004 through the fortuitous fact of it being the only lucrative human organ accessible illegally from live donors. Numerous instances of kidney trade were highlighted by the media from the States of Kerala, Karnataka, Tamil Nadu, Punjab and recently from Uttarakhand.

Section-370 Of Indian Penal Code 1860-

The provisions under the Indian Penal Code, 1860 which can be read in relation to the crime of trafficking are scarcely used and have so far lacked teeth. While trafficking in itself is often not seen as a crime, the efforts of the law enforcement agencies have also remained half hearted. It can therefore be seen that the menace of trafficking still manifests the society with full vigour. The much talked about and credible Justice Verma Committee Report deals with trafficking in detail and gave some comprehensive solutions. The expert debate, demands of the common man and the executive will, led to the passing of the Criminal Law (Amendment) Act, 2013.

Section-370. Criminal Procedure code, 1973 (1) Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by—

First.— using threats, or

Secondly.— using force, or any other form of coercion, or

Thirdly.— by abduction, or

Fourthly.— by practising fraud, or deception, or

Fifthly.— by abuse of power, or

Sixthly.— by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.

Explanation 1.— *The expression “exploitation” shall include prostitution or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the forced removal of organs.*

Explanation 2.— *The consent of the victim is immaterial in a determination of the offence of trafficking.*

(2) *Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine.*

(3) *Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.*

(4) *Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life.*

(5) *Where the offence involves the trafficking of more than one minor at the same time, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years but which may extend to imprisonment for life.*

(6) *When a public servant including police officer is involved in the trafficking of a minor then such public servant shall be punished with imprisonment for life, which shall mean the remainder of that person’s natural life.*

(7) *If a person is convicted of the offence of trafficking of minors, on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life.*³³

This section is quite similar to the definition of human trafficking included in the U.N. Protocol on human trafficking. The trafficking of organs alone, separate from the donor, is not addressed by the section, given that the removal of organs does not always entail coercive elements; to constitute the crime of trafficking in persons for the purposes of organ removal, the actual person has to be transported for the purpose of removing their organs. Now the question arises— How can a clear distinction be made between trafficking in persons for the purpose of organ

³³ See, section -370 Indian Penal code 1860.

removal and trafficking in organs, when a person is trafficked for the purpose of organ removal and their organ continues to be trafficked independently of the person?

The answer is that above Section counted the modes of exploitation when these are matched to the act done than we find it –

What is done (act)- Recruitment ,Transport,Transfer ,Harbouring,Receipt +

How it is done (means)-By Threat or use of force, Coercion , Abduction, Fraud ,Deception, Abuse of power or vulnerability, Giving payment or benefits+

Purpose- Exploitation including, Prostitution, Sexual exploitation, Forced labour, Slavery or similar practices, Removal of organs, Other types of exploitation=

Trafficking in human beings for organ removal under Section-370 Indian Penal Code if the purpose is removal of organs.

To sum up the discussion, there is one thing that could be stated, Indian legal situation on the problem of organ trafficking is about vacuum. There is lack of consolidated law on the issue. The existing legal framework is so scattered and confusing that it is not enough to deter the cannibal offenders who has developed a habit of surviving on the flesh of their own fellow men's. The actual victims got punishment and offenders including doctors got protection from various dimensions. The doctors who have acted negligently towards their patients, liable only under the consumer protection laws for lack in the service but not obliged by the provisions of criminal law if they cause incurable harm to innocent sufferers. The result of the present Section 370 of IPC is still awaited, but what one could do if responsible authorities closes their eyes as commercial organ dealing is an open secret.

6. Conclusion-

The problem is a complex one which needs to be addressed from legal, medical and ethical perspectives. Given its often transnational nature, the ease and affordability of international travel and the possibility that the internet can easily be used to recruit new donors, both legal and extra-legal measures must be taken to reign in this illicit and exploitive trade. From a legal perspective, it is likely that the establishment of an international binding legal instrument which, instead of adopting a criminal law framework, is more victim-focused and emphasizes removing the causes of organ trafficking would be more effective in eradicating the crime. In order to tackle the causes, the factors underlying the organ trafficking market must be examined and targeted. Inherent to the market for trafficked organs is the demand for organs. As such,

measures must be taken to meet the demand for organs in other ways. Instead of taking an approach which is predominantly criminal law-focused, and thus post-hoc, in nature, States can and should take all actors involved in the process of organ trafficking into account in order to reduce the demand for trafficked organs. In addition to government officials, offenders and victims, the facilitators in the process must also be taken into account: members of the medical and health care community, health insurers, tour operators and community leaders can all be seen as important actors within the issue of human trafficking for the purpose of organ removal. For instance, it has been noted that health insurance companies preferentially support illegal practices in some countries.

A survey of the legal and policy environment surrounding trafficking in persons for the removal of organs confirms that a lack of clarity around some key questions is hampering progress in efforts to combat this particularly egregious human rights violation. Most significantly, the researcher has concluded that the distinction between trafficking in persons for removal of organs and trafficking in organs is generally unhelpful. Certainly, there is an urgent need to ensure that laws on trafficking in persons for the removal of organs are supplemented by the effective criminalization of all related offences that may be implicated in such cases but that may not readily or easily fall within the three-element umbrella definition of trafficking in persons. To that extent, the draft Council of Europe convention against trafficking in human organs represents a potentially important contribution to fleshing out the legal framework around trafficking in persons for the removal of organs and ensuring that all persons complicit in such offences do not escape liability. Case-based experience confirms, however, that the trade in organs is inextricably linked to actions against individuals aimed at their exploitation. There lies great danger in removing the individual victim from this picture by separating out the concept of trafficking in organs from the concept of trafficking in persons for the removal of organs.

Compensatory measures for victims of organ trafficking should be mandated in the Transplantation of Human Organs Act 1994.