

## Transplant tourism of organ transplantation: A reason for commercialisation of organ donation in India

Raghuvinder Singh<sup>1</sup>, Neelma Devi<sup>2</sup>

<sup>1</sup> Faculty law, University Shimla, Himachal Pradesh India,

<sup>2</sup> Research scholar, University Shimla, Himachal Pradesh India

### Abstract

Transplantation of human organs is a dream of past a reality of present and a deep rooted challenge for the times to come in future. In today's world of medical and technological advancement human organs transplantation has improved to a large extent and given rise to the phenomenon of Transplant Tourism which has originated from the term Medical Tourism. The medical tourism depends upon various factors such as national circumstances, place of the country in the economy, access to health care facilities and most importantly availability of organ in the market. For the countries where the economy is not divided into four classes i.e a) below poverty line b) poor/ lower class c) middle class and d) upper-class along with strong enforcement of law mechanism it may seem like a boom or a blessing. But in our country India where exploitation due to lack of financial resources takes place easily the question remains whether can we continue Medical Tourism or we need to have a closer look at the prevalent law mechanism and exploitative tendencies of parties involved in this commercial setup. The researcher aims to critically analyze the present situation of such commercialization.

**Keywords:** medical tourism, human organ transplantation, transplant tourism

### Introduction

Transplant Tourism derived from 'medical tourism' has been defined by The Declaration of Istanbul as "Travel for transplantation that involves organ trafficking and/or transplant commercialism or if the resources (organs, professionals and transplant centers) devoted to providing transplants to patients from outside a country undermine the country's ability to provide transplant services for its own population."

Transplant Tourism is a phenomenon where a potential recipient travels abroad to purchase organ for transplantation from a donor. This cross border travel for seeking organ could be due to a number of reasons mainly expensive transplantation cost in one's own country, non-availability of organs or due to a strict stance of law enforcement mechanism upon commercialization of organ trade. It is not a new concept where cross border travel is witnessed to reap and enjoy benefits of health care services at a cheaper rate in a developing country. The cost of surgical procedure is less than 10 percent lower as compared to U.S.A and half the amount of Europe which makes India a hotspot for healthcare services also a medical visa grant for India is easy too. According to the data India is a hub of medical tourism with taking nearly 18 percent of the global market wherein 6-8 percent patients come from Europe and 19 percent patients come from Nepal, Pakistan and Afghanistan <sup>[1]</sup>.

The World Health Organization while emphasizing on the problem of organ trade has identified four leading hotspots mainly for sale and purchase of organs. India has found its place among one of the four hotspots along with Colombia, Pakistan and Philippines. There could be a number of factors behind this grey zone / black market of organ that has been created and flourished in India

While discussing the factors responsible for witnessing a scary jump in cases of commercialization of organ trade it is of prime importance to keep the economic condition of our country India in the backdrop. India is a developing country with about 25.7 percent people below poverty line in rural India and about 13.7 percent under urban area <sup>[2]</sup> The basic requirement of sustenance is food, cloth and shelter for people who are below poverty line or slightly above it. These people due to their adverse financial circumstances and because of shortage of basic needs fall in prey of such commercial activities.

The poor and aggrieved see this as a prospect to better financial aid wherein in most of the circumstances they are not even provided with a fair monetary exchange and proper rehabilitation in terms of medical care post operation. In majority cases the donor due to neglect does not survive post organ donation due to lack of ethical standards of the health care service providers. Due to lack in social and ethical aspects victims are just seen as a prospective organ

<sup>1</sup> Data published in Federation of Indian Chambers of Commerce and Industry available at <http://ficci.in/ficci-in-news-page.asp?nid=17703>

<sup>2</sup> Data captured by National Sample Survey Office under Ministry of Statics and Programme Implementation and further calculated by NITI AAYOG's task force for the purpose of poverty estimation in 2019.

donor not a living human being and his organ is just accounted as a thing with label of MRP for purpose sale and purchase. No matter how dark but these are the sad affairs of transplant tourism in India!

The other factors are unemployment, poor status of immigrants and no value of human existence over monetary considerations which force the financially compromised population to opt for transplant tourism irrespective to the fact and with the knowledge that it can be life threatening for them.

The Tamil Nadu Government probed in an enquiry wherein it was found out that 25-33 percent of lung transplant and heart transplant is routinely done in favour of foreign national [3]. The other very important question that arises after analyzing this data is that should organs from Indian donors first go to foreign nationals when thousands of potential recipient are dying from end- stage organ failure? The only requirement for an organ donation is a letter from embassy certifying the relationship between donor-recipients of foreign nationality which is then further processed by the authorization committee without keeping in account for the background of donor making a mockery out of the whole protocol for establishing genetic relationships or relationship occurring out of love and affection.

**International Response to this Global Crime**

The major ambiguity while defining ‘transplant tourism’ or organ tourism’ is that it has not been explicitly defined under any national or international legislation. No obligation and duties for physician involved in terms of legal implication has been addressed. On International level the problem of transplant tourism is poorly addressed and defined for namesake. The only organization that addresses with is -

- World Health Organization (WHO)
- The Transplant Society (TTS)
- The International Society of Nephrology (ISN)

They seek protection of victims that fall in prey of transplant tourism but do not specifically prohibit purchase of organs by people living in abroad. But mere guidelines or commentaries for protection of vulnerable groups is the only evil aspect of transplant tourism? Does it not need a stringent legal mechanism? Is the life of a financially compromised donor not worthy enough? Unfortunately, no international legislation seems to understand the severity of this problem. The Declaration of Istanbul on Organ Trafficking and Transplant Tourism established in 2008 condemns transplant tourism and raises a concern of diminishing ethical practices of the healthcare professional involved but the fact of major conflict still remains that it is not a legally binding document and can only be perceived to influence transplant process by implementation of its principle. The Declaration further differentiated between

transplant tourism and travel for transplantation. While classifying the latter as legitimate the former was categorized as illegal as it allows commercialization and illegitimate procurement of organ which belongs to the own nationals of the country [4] It

laid down importance for understanding the model of organ, professional and transplant centers better to curb this problem through developing an ethical understanding of it by providing these services within own's country first so that first the national registry maintained can be sequentially followed and second the national legal enforcement mechanism could keep a check on any practice of illegal trafficking. Transplant Tourism totally defeats the order of systematic maintenance of national organ registry protocol through by passing the whole process.

As per the data of WHO Global Observatory on Donation and Transplantation (GODT) [5] on human organ transplantation 130,000 solid organ transplantations are performed around the world which is about 10 percent less than the overall global need carving out a way for unethical pathways due to this huge discrepancy in availability of organs [6] The three most important guiding principles of GODT are availability, safety and quality of the transplant procedure. It also aims at developing a national accountability system by building a mechanism for self-sufficiency and development of transplant system in order to eliminate the possibilities of illegal organ trade and transplant tourism.

**National Response to this crime**

In India the legislation which is followed to streamline activities of Human Organ Transplantation is The Transplantation of Human Organs and Tissues Act, 1994 which was amended in 2011 to ensure strict implementation by adding strict provisions to govern the whole idea of voluntary and un-paid donation. Some of salient features of this amended act as follows.

Living donations [7] may include related, non- related and spousal donors. A form required to be filled includes Form 1 to obtain the consent of the donor.

**Table 1:** Types of living donation

Genetically related	
1st degree relative	Parent, sibling, offspring
2nd degree relative	Grandparent, grandchild, aunt, uncle, niece, nephew
Other	Cousin
Emotionally related	Spouse, in-laws, adopted, friend
Unrelated (not genetically or emotionally related)	Directed (possibility of donor-recipient financial arrangement)
	Non directed (altruistic)
	Paired exchange
	Living-deceased exchange

<sup>4</sup> Retrieved from <https://www.declarationofistanbul.org/> last visited on 2<sup>nd</sup> June 2020

<sup>5</sup> It is a global database on donation and transplantation. Website for further information can be accessed on <http://www.transplant-observatory.org/>

<sup>6</sup> Retrieved from <https://www.who.int/transplantation/donation/taskforce-transplantation/en/> last visited on 2<sup>nd</sup> June 2020

<sup>7</sup> Section 3 of The Transplantation of Human Organ and Tissues Act, 1994

<sup>3</sup> Retrieved from <https://thewire.in/health/underbelly-organ-transplantation-india> last visited on 1st June 2020

**Table 2:** <sup>[8]</sup> Form 4 in lieu to ascertain the fitness of the donor. A detailed table containing all particulars has been listed below:-

S.No	Number	Purpose of Form	To Be filled By	Name of Rule
1	Form 1	For organ Donation From Living near related Donor	Living related donor	Rule 3 and Rule 5 (3) (a)
2	Form 2	For organ donation from living spousal donor	Living spousal Donor	Rule 3& Rule 5(3) (d)
3	Form 3	For organ donation from "other than near relative" donor	Living known" other than near relative" donor.	Rule 3 & Rule 5(3) (a), 5(3) (e)
4	Form 4	For the Certificate of Medical fitness of living donor	Registered Medical practitioner	Rule 5(3) (b)
5	Form 5	For certificate of genetic relationship of living donor with recipient.	Head of pathology certifying relationship.	Rule 5 (3) (c) and Rule 18 (3)
6	Form 6	For Spousal living donor	"Competent authority" in case of Indian nationals and by "Authorization Committee" in case of foreigners after verifying the marriage through documentary evidence.	Rule 18 (2)
7	Form 7	Organ and Tissues Pledging form.	To be filled by the Individuals of the age of 18 or above	Rule 5 (4) (a)
8	Form 8	Derclarations cum Consent	To be filled by the near relative or lawful possessor of the brain –stem dead person.	Rule 5 (4) (b) and 5 (4) (d)
9	Form 9	For unclaimed Body in the Hospital or Prison.	To be filled by the person in lawful possession of the dead body	Rule 5 (1) (b)
10	Form 10	Certifications of the brain death	To be filled by the registered medical expert certifying the brain-stem death.	Rule 5 (4) (c) & Rule 5 (4) (d)
11	Form 11	Applications for the approval of the Transplantation from living Person.	To be filled by the proposed donor and proposed recipient.	Rule 5 (3) (d) and Rule 5 (3) (e)

The 'other than near-related donors'- This remains a controversial subject- matter of human organ transplantation as the vulnerable and poor segment of society is the most affected by the same because this category includes donor except those defined under near-related donors .The permission under this category can only be obtained after validation of authorization committee. The committee has to keep in view a number of factors and pre-requisites before giving any approval. Some of the main points for examination are:-

- Ascertaining the relationship between the donor-recipient
- Establishing and verifying traces of any transaction which might be commercial in nature.
- Evaluation of financial status of the donor is of prime importance and evidence of his income/ occupation of last three financial years have to be stated out so that the poor do not fall in prey of commercialization of organs.
- Also the reason for donation by the donor has to be ascertained to overrule any type of undue influence, use

of force, coercion etc.

### Foreign Donations

These donations are strictly scrutinized by the authorization committee. If incase an Indian Living Donor wants to give his organ to a foreign national such act can only be permitted to person which are defined in the category of 'near relative'. If the foreign national is travelling to India for the purpose of transplantation i.e. when both the recipient and donor are not nationals of India and are travelling for availing medical facilities for transplantation the foreign embassy of the country of there origin will grant such permission only after determining and enquiring about their relationship. Form 21 has to be supported with after obtaining it from the embassy of the particular country.

### The Role of Notto

The National Organ and Tissue Transplant Organization is a national level organization under Directorate General of Health Services, Ministry of Health and Family Welfare of India <sup>[9]</sup> it is an apex center for coordination and networking for procurement and distribution of Organs and Tissues. They collect data and develop it in national registry with the primary objective of notification of available organs and the tentative waiting list in sequential order for receiving organ. NOTTO has two divisions a- National Biomaterial Centre b- National Human Organ and Tissue Removal and Storage Network. Notto publishes same data on regional as well as state level and further created awareness and promotion of organ donation and transplant activities.

Many NGO are working to solve the issue of commercialization of organ trade out of which MOHAN Foundation <sup>[10]</sup> has remarkably brought in reforms for better implementation of legislative framework under The Transplantation of Human Organs and Tissues Act 1994. This non – profit organization works with the objective of creating public awareness and also has undertaken to train health care professionals dealing with such cases efficiently. This organization also thrives to raise resources to promote organ donations. The only key to prevent exploitation in the name of transplant tourism is by creating awareness amongst the cross section of society.

The challenges often faced in the Indian set up while regulating this issue is:-

- Uneven supply of organs availability
- Reluctance to make deceased donations due to various cultural, ethnic and social barriers
- Lack of awareness and poor sensitization of committees scrutinizing the organ donation forms.
- Poor or no information about organ donation on national registration portal

To address the above concerns The National Organ Transplant Programme <sup>[11]</sup> has tried to devise a system for distribution of organ as its main objective. The NOTP promotes deceased organ donation and thrives to build a better understanding about deceased organ donation by spreading awareness.

<sup>9</sup> Website for further information can be accessed on <https://notto.gov.in/about-us.htm>

<sup>10</sup> Website for further information can be accessed on <https://www.mohanfoundation.org/who.asp>

<sup>11</sup> A government initiative programme to promote organ transplantation as per the current legal mechanism.

<sup>8</sup> Retrieved from <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3812925/table/T1/> last visited on 3<sup>rd</sup> June 2020

**Addressing the final question**

The most important question after reviewing national and international policies should transplant tourism/ medical tourism be completely prohibited? The legislation does not answer the root cause and leaves ambiguity hanging over the matter of transplant tourism. The second challenge is that it is very difficult to find the exact number of organs transplanted from the national reserve in the name of transplant tourism. There is no concrete data available for self-evaluation which leaves an unclear picture of true and disturbing reality of this problem. This problem is not only limited to organ trade but is a grave threat to the public health policy of our country. In a country like India where the major problem is poverty, hunger and unemployment if we let a practice like this flourish the life of public at large will stand endangered. Many vulnerable class of society will succumb to such lucrative offers on the prospects of leading a life with better standard of living. The majority of donors from low social economic class will opt for this and will end up being exploited by authorities because of no accountability and deterrent set as a precedent by law governing the protection of illegal organ trafficking . It is also a threat to transparency in the economy as it is an outcome of malpractices like corruption and bribery.

**Human Right Conflict**

The WTO under its constitution (1946) has embedded that to attain high standard of health is a fundamental right of a human being <sup>[12]</sup> and state is under obligation to maintain standards for health, promote safe and sound healthcare policies etc. The right to health focuses more on the disadvantaged population. WTO classifies violation of right to health by denial of public health services or providing poor quality care or health service to the vulnerable targeted group in a particular society. The Committee on Economic, Social and Cultural rights defined right to health under Article 12 to consist of four major components :- Availability, Accessibility, Acceptability and Quality. Article 25 of the Universal Declaration of Human Rights (1948) also reserves right to health. The question for consideration is that whether transplant tourism is in conflict with human rights? Is it consistent with the phenomenon of transplant tourism? The answer is a roadmap to building a better legislation which covers aspects of human right based approach while working with the issue of transplant tourism or organ tourism.

The Constitution of India also various has provisions regarding protection of the right to health. The obligation of the State is to ensure that there is creation and continued sustenance of necessary conditions which are congenial to good health and is a part of Directive Principles of State policies contained within the Articles 38, 39 (e) (f), 42, 47 and 48 A in Part IV of the Constitution of India. The question before court in various cases has been weather the right to health is a fundamental right? To what extent is state responsible if there is a breach of right to health?

Consumer Education and Resource Centre v. Union of India <sup>[13]</sup> the Supreme Court has held that “the right to health and Medical care is a fundamental right under Article 21 of the constitution as it is essential for making the life of the

workman meaningful and purposeful with dignity of person. “Right to life” in Article 21 includes protection of the health and strength of the worker. The expression ‘life’ in Article 21 does not connote mere animal existence. It has a much wider meaning which includes right to livelihood, better standard of life, hygienic conditions on workplace and leisure.”

In the case of Common Cause v. Union of India and others <sup>[14]</sup> it was held that State shall be responsible for providing health care facilities through establishing proper centers and has to further ensure efficient working of those health care centers and units.

**Issue of Consent :-** The issue of consent is to be minutely discussed as consent can be obtained through various ways leading to exploitation of the victim as it could be obtained by rendering payment in exchange of organ removal which is a great incentive for a poverty driven individual. The reason behind the ‘service’ of organ donation is not voluntary but obtained through scuffling in the pathways of driven by extreme poverty. Article 3(a) of the protocol refers with the issue of consent. What comes under the purview of consent obtained through unfair means are as under the highlighted portion is subject matter of the research paper

**Table 3**

Reason for the act	Means and Methods Adopted	Purpose of the act	Consequences
Recruitment Transport	Threat Use of Force Coercion	Exploitation – Sexual/ Slavery etc	
Transfer	Abduction Fraud Deception	Human Organ Trafficking/ Removal	Trafficking
Harbouring Receipt	Abuse of power or vulnerability Giving payment	Forced Labour/ Slavery	

**Suggestions and Recommendations**

Transplant Tourism happen due to three main reasons- a developed country with long waiting list, secondly due to presence of an underdeveloped country with no legal enforcement or no deterrent legal precedent giving way to stringent legal implications and lastly wherever there is a presence of a financially vulnerable segment or class of society who are ready to make money by selling their organ. The influence of social and cultural factors also plays a very important role in such commercial transaction. To regulate the commercialization of organ trade the regulatory mechanism has to be deterrent and the government through spreading awareness should increase participation of public in organ donation. Each country especially India should effectively focus more on deceased organ donation in the cases of brain death etc. so as to create availability of organs in the chain leaving no grey area for commercialization. The ethical responsibility should be practiced by the medical practitioners and registered transplant center while dealing with cases of human organ transplant and shall personally undertake counseling on donor if suspected for commercialization of organ. The license of the health care workers and hospital should be revoked immediately if found acting in default of the provisions of THOA, 1994.

<sup>12</sup> Retrieved from <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> last visited on 3rd June 2020

<sup>13</sup> AIR (1995) 3 SSC, 42

<sup>14</sup> AIR (1996) SC 929

Education and awareness of voluntary donation programme is the key element that can lessen the hazards of organ transplantation through unfair means. Transparency as per the accountability of health authorities should be fixed. Self-sufficiency of organ supply within one's country should be insured only by voluntary means completely free of any monetary transaction. The recipient of the organ should bear the medical expense of the donor for his post-operation care until he fully recovers from the surgical process. Monetary compensation for the donor must only be fixed in circumstances of his death during surgical medical organ transplantation so as to cover expenses of his family. Health insurance policies of countries should not cover the object and scope of travel for transplantation etc. The principles of social justice have to keep in mind strictly while dealing with this issue. The International Transplant Committee also needs to give a loud and clear message that commercialization of organs cannot be supported as it infringes the human rights of vulnerable or financially compromised class by exploitation both in terms of social justice and health care facilities. The medical practitioners involved with transplant tourism should come together to provide effective solutions to mend governmental policies of dealing with the problem of commercialization of organs.

### Conclusion

Hence the researcher concludes it paper by the above recommendations and suggestions. To conclude Transplant Tourism is a global problem and it cannot be solved by participation of one single country. The whole International community of countries have to come together and look into this disturbing issue altogether. The global/ worldwide ban on this issue is not the only solution wherein a black market for organ trade will further be created. This issue has to be dealt with extreme patience and an approach parallel to protection of human rights. The Customary International Law which protects human rights should work in the direction of inculcating treaties which discusses the vices of transplant tourism and timely puts an effective ban on the same. The three main ethical drawback of transplant tourism is commodification of organ for the purpose of sale and purchase; it attacks dignity of a vulnerable group and third decline of health, income after such practice due to poor post-op services. Transplant Tourism cannot be denied to have contributed in the overall economic growth of our country as India is one of the most desired locations when it comes to Medical Tourism but social justice should prevail in the end bringing rest to whole debate of legalization of transplant tourism. There is a need to work on all three levels i.e. international, regional and national if we want to introduce effective solutions.

### References

1. Data published in Federation of Indian Chambers of Commerce and Industry available at <http://ficci.in/ficci-in-news-page.asp?nid=17703>
2. Data captured by National Sample Survey Office under Ministry of Statics and Programme Implementation and further calculated by NITI AAYOG's task force for the purpose of poverty estimation in, 2019.
3. Retrieved from <https://thewire.in/health/underbelly-organ-transplantation-india> last visited on 1st June 2020
4. Retrieved from <https://www.declarationofistanbul.org/> last visited on 2<sup>nd</sup>, 2020.
5. It is a global database on donation and transplantation. Website for further information can be accessed on <http://www.transplant-observatory.org/>
6. Retrieved from <https://www.who.int/transplantation/donation/taskforce-transplantation/en/> last visited on 2<sup>nd</sup> June 2020
7. Section 3 of The Transplantation of Human Organ and Tissues Act, 1994
8. Retrieved from <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3812925/table/T1/> last visited on 3<sup>rd</sup> June 2020
9. Website for further information can be accessed on <https://notto.gov.in/about-us.htm>
10. Website for further information can be accessed on <https://www.mohanfoundation.org/who.asp>
11. A government initiative programme to promote organ transplantation as per the current legal mechanism.
12. Retrieved from <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> last visited on 3<sup>rd</sup> June 2020
13. AIR (1995) 3 SSC, 42
14. <sup>1</sup> AIR (1996) SC 929