How to stop organ trafficking? A Critique of the Transplantation of Human Organs Act in India

The organ trafficking is not new to the world and India is considered to be one of the biggest centres 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 article identifies such major issues which made the law futile and attempts to propose remedies to the problems in the law.

"There was approached by a stranger for a job. When I accepted, I was taken to a room with gunmen. They tested my blood, gave me an injection and I lost consciousness. When I woke up, I had pain in my lower abdomen and I was told that my kidney had been removed." 

The real significance of crime is in its being a breach of faith with the community of mankind. — Joseph Conrad

In the present day society, the system of acquiring human organs for their transplantation to the disease stricken individuals has become a matter of considerable importance. The law enacted on this subject some fifteen years ago is still in force, but it has miserably failed to control the corrupt practices of the unscrupulous elements who are running an illegal trade in the transplantation of human organs. The issues arising from the weakness of the law and the remedies that need to be adopted are the two themes on which this article is focused. A description is given herein first of the evolution of the system of organ transplantation and then an analysis is given of the provisions forming part of the famous legislation called the Organ Transplantation Act of 1994. A comparison is made to the provisions of its counterpart legislation in the UK and then the procedural defects are highlighted.

Concept of organ transplantation  The technique of transplanting the human organs had developed early in the twentieth century making it possible to transplant tissues from one person to another and thereby donating life to a person in need of it. Different countries adopted the system of organ donations in different ways. By and large two methods have become very common for obtaining the human organs: one is the method called ex vivo and the other is the method called ex morto. The ex vivo donor is described as a living donor who donates an organ to another person and the second type of donor is the ex morto, the cadaver who donates the organ after his death. Obviously, there is no physical or medical threat to the donor when removing an organ from a cadaver.

Evolution of law in India on organ transplantation  In India for a long time there was no specific legislation regulating organ transplantation due to which many number of kidney scams were reported leaving thousands of poor people exploited by the middlemen and the unscrupulous doctors in the country which led to initiation of the action to enact a law that could punish and curb this practice. A committee was appointed by the Central Government to draft legislation on the subject. As the main focus of the proposed legislation was kidney scams, the panel of doctors in the committee for framing the law were all kidney experts and thus, the Act has largely been framed keeping in view the kidney scams only. Finally the present Act dealing with regulation of organ transplantation called the Transplantation of Human Organs Act (THOA), 1994 has come into existence. The Act more or less resembles the Organ Transplantation Act of the UK. Due to inefficient and corrupt healthcare system, illegal trafficking of organs is really high in India. To stop illegal organ transplants, Indian Government has enacted the above legislation that criminalises organ sales. The Transplantation of Human Organs Act, 1994 has laid down the law that needs to be followed while conducting organ transplantation.

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." 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. 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 and Punjab. The story is more or less the same every time. The donor is lured by promise of a handsome monetary reward sometimes accompanied with an additional promise of a job. In most cases the entire illegal transaction remains undiscovered but for the infrequent occasions where the payment promised by the organ touts to the donor is unfulfilled, resulting in a public outcry by the donor who desperately seeks redressal. Hence, the trafficking in kidneys is primarily from a poverty-stricken donor to a rich or sometimes not so rich but desperate recipient. In the entire plot, the middleman is the biggest culprit but he usually escapes unscathed. The debate came to forefront again when the recent press reports brought to light kidneys being bought and sold in Tamil Nadu, Andhra Pradesh and many other parts of India including the State capital, Delhi. In this incident the kidney transplantation racket was operated on national and international basis by a quack doctor, Dr. Amit Kumar involving three hospitals, five diagnostic centres and ten laboratories, and more than fifty accomplices, including doctors and nurses, carried for years across Uttar Pradesh, Haryana and Delhi resulting in 500 illegal transplants has shocked the nation. These scandals only brought to general notice of many doctors and nearly all patients with kidney failure that one can buy a kidney in any State or, for that matter, in many parts of this sub-continent. While the kidney trade has been written about ad nauseum over the last 15 years, recent developments necessitate a review of the issue.

Secondly, the 1994 Act did nothing to ensure that hospitals would create protocols for retrieving the full range of retrievable organs that could be donated by the public and transplanted to save lives. The result was a market-driven lucrative focus on the only organ that could be donated by live donors viz. kidneys. The provisions of the Uniform Anatomical Gift Act of the USA which legislates in detail on the role of hospitals in organ retrieval from cadavers seems to have been completely overlooked by the lawmakers.

Detrimental effect on retrieval of organs The blatant illegal demands created by rich organ recipients, and profiteering doctors, hospitals, touts and illegal donors involved in the kidney racket has had one further serious consequence. The entire Government, the country’s judiciary and Law Ministry as well as the law enforcement mechanism, and the nation’s press has been single-mindedly involving themselves with curbing illegal practices in a single organ kidneys while ignoring the crying need for increasing supply of transplantable livers, hearts, corneas, heart valves, and the multitude of live saving human tissue and organs that can only be retrieved from cadavers. Even skin banks are a rarity in India where burns are a significant cause of hospital deaths.

Medical Tourism another gateway to organ trade The medical faculty of India in collaboration with the tourism industry has worked together to provide cost-effective treatment to people across the globe. With the privatisation of medical care in India evolved the recent and popular trend of treatment along with the fun of a vacation, better known as medical tourism in India wherein the international kidney bazaar penetrated its tentacles and got highly evolved with extensive cross-border transactions and a hierarchy of preferences and prices. The victims are always desperately poor people who have lost everything, including hope. There is dire need to control the health tourism industry in the guise of which these scams are given an even more lucrative impetus.

Loopholes in the THOA Act, 1994 The Transplantation of Human Organs Act (THOA), 1994 was supposed to promote cadaveric organ transplantation in India: (i) a near absence of commitment on the part of Indian hospital managements and the Government to provide for brain death declaration and creation of reliable hospital infrastructure to counsel families of potential organ donors and retrieve offered organs in spite of proven successes of post-death counselling as a tool to motivate cadaver organ donation; (ii) the inclusion of loopholes either by design or default permitting the continued access (often illegally) to one of two human kidneys (viz. the proviso that a person not related to the patient could donate a kidney by reason of affection and the inclusion of the spouse as a near relative so that no one can marry for organ donation); (iii) the availability of enough poor people ready to sell a part of themselves; (iv) a medical social ethos which permits justification of the trade as good for both the seller and buyer; (v) a medical establishment willing to accept such commercial concepts and, perhaps most importantly, even ready to terminate successful cadaver organ retrieval programs in hospitals without assigning reasons for doing so.
THOA mandated an Authorisation Committee to ensure that non-related donors donated out of affection. These Authorisation Committees do not share the information with the public and no one knows as to how many permissions were actually given by them and how many applications were rejected? The absence of data suggests that there is need for some systematic research on volumes of (a) legal live related kidney donors, (b) legal live unrelated kidney donors, (c) illegal live unrelated donors and other categories to review the thirteen years of existence of the current THOA legislation. How often these committees meet in a given span of time is another big question. NGOs which are working for organ retrieval by giving counselling to the family members of the brain dead patient or the deceased are surviving on their own through sheer self-motivation with neither the Act nor the Government providing them any financial support. The present Act even does not recognise them as an entity relating to transplantation programme.

The present Act needs urgent amendment in a large number of clauses. In this respect two important events have happened in recent past. As a result of the Delhi High Court judgment dated 6-9-2004, a committee was constituted by the Ministry of Health, Government of India to review the provisions of the Transplantation of Human Organs Act, 1994 and Subsequent Rules. This article analyses and examines the loopholes in the Indian Organ Transplantation Act and attempts to suggest changes and emphasises on reforms to be brought about in the present law. Major controversies from the point of view of the application of the law are taken into consideration and discussed in detail.

Significant issues and solutions in the law relating to organ transplantation Ist Issue: What is the definition of "organ" for the purposes of this Act, does it need any extension?

The definition of organ as provided in the statute is not exhaustive and was a preliminary attempt to introduce the concept of organ transplantation. The present Act says that any part of the human body which is not replicated is called as "organ". It mainly considered internal organs like kidneys, liver, etc. as an extension of "brain death" definition and eyes (corneas)/ears as they were covered by earlier legislations.

Yet another hindrance to transplantation in the definition as per the original section is that there are organs which can partially rejuvenate, lost portions replicate in the course of time, such as skin, pancreas and liver but may not immediately. These organs too are very much useful to and save the lives of many people. For e.g. such as skin can be used for burn patients, and part of liver or pancreas that can be transplanted to the needy, are which is restricted by the definition. There is also the legal necessity of addressing the access and reuse of human tissue that are normally left over as "waste" and "residuals" after some types of routine surgical procedures. Hence, the scope of the definition of organ has to be widened and the aim of the proposed section is to list out as clearly as possible the tissues/organs for transplantation, though this is not an exhaustive list. The contents of the list are contingent on the kinds of transplants possible in India.

The modified section may be as follows:

\[ \text{à¢œ2. (h) à¢"human organ™ means any part of a human body consisting of a structured arrangement of tissues which include cornea, bone, artery, skin, tendon, ligament, heart valves, muscular, skeletal and amnion, kidneys, liver, pancreas, heart, lungs, intestines or any other portion of a human body.} \]

Now with the amended definition, all transplantable organs come under the purview of the revised THOA Act, 1994.

IInd Issue: Live donation à¢” Related issues: Shall the Act allow à¢œlive donationà¢• of organs freely? Should the fiduciary relationship of à¢œlove and affectionà¢• be removed or retained, keeping in view the instances of its abuse in the recent past? What are the other measures which will help in curbing the menace of kidney bazaars or illegal kidney rackets? The Authorisation Committees are not working satisfactorily and most of the times they are obliging the rich. The parameters to justify the à¢œlove and affection clauseà¢• is the major ambiguity which makes the provision all the more exploitative whereby a poor person donates his organ to a rich man out of à¢œlove and affectionà¢•. Therefore in order to help the innocent, uneducated and poor people from being exploited and to remedy the problem it is proposed that the à¢œlove and affectionà¢• clause be removed and the scope of the definition of near relatives may be extended to à¢œcerebral blood three degree downwards and three degree upwards in the line of ascent and descentà¢•, and for relatives by marriage one degree up and one degree downwards and not only to those people who are defined as à¢œnear relativeà¢• in Section 2(i) of THOA, 1994. The whole purpose of restricting the donation of organs is to prevent illegal transplants and help the genuine cases. Proper care is taken while restricting it to relatives; all important relations are taken into consideration. The only genuine exception to this rule could be swapping of organs because currently, due to lack of focus on cadaver organs, most of the kidney transplants in India are live organ transplants. Hence the proposed section runs as follows:

Transplantation primarily was supposed to encourage cadaver donations and to restrict live donations to the maximum. Hence, the provision in the present Act is drafted keeping in mind this restricted view and the donations are restricted to only spouse, son, daughter, father, mother, brother or sister. But at the same time the door is kept widely open for all illegal transplantations by using à¢œlove and affectionà¢• clause, the consequence of which is that a donor can donate his organ to the donee even though he is not a relative of him, of course with a rider that the transplantation shall
IVth Issue: Whether the organ transplantation programme is in need of a centralised mechanism to regulate and
exempted from income tax under Section 80-G.

The fund is exempted under Section 10(23)(c) of the Income Tax Act and the contributions towards the ORF are
- (c) Such sums as the State Government or Central Government may from time to time contribute to the fund.            (2)
- (b) The interest which may from time to time accrue on the amount so donated under the clause.
- (a) Donations received from the public for the cause of organ retrieval.

The proposed definitions of the required transplant counsellor and fund may be as follows:

ثال2. (i) â€œdesignated relativeâ€™ means relative by blood through three degrees in the line of ascent and three degrees
the line of descent and relatives by marriage by one degree in the line of ascent and descent.â€•

IIIrd Issue: Whether the non-governmental organisations (NGOs) working for the cause of organ transplantation should
be recognised by the Act? Organ retrieval agencies (OROs) i.e. non-governmental organisations play a major role in
counselling the family members or relatives of the brain dead patient or cadavers. Since the awareness about the organ
transplantation is abysmal in India this role being played by the NGOs/organ retrieval organisations gains lot of
importance and their absence would virtually make the whole object of the Act futile. But now these NGOs do not find
any place in the statute so not formally recognised by the Government.

The second import significance of OROs is that they can keep surveillance on the working of ORBOs and if anything
goes wrong they can complain to the competent Magistrate or police officer and make them vigilant about the
commission of the offence or violation of the Act. OROs could be registered for speciality single organ or tissue retrieval
(eye bank, skin bank) or a group of organs like â€œsolidâ€• (internal) organs composed of kidneys, liver, lungs, etc. Eye banks,
skin banks, tissue banks are to be allowed to independently handle their own distribution systems as the procedures are
simpler and do not involve matching of donor to donee. Hence it is proposed that the NGOs working for the
transplantation of organs shall be recognised as organ retrieval organisations by the Act.

Organ retrieval organisation.â€“An organisation recognised and registered by the State authority for motivation, and
coordination of organ donation and retrieval and to work with any unit of ORBO that is appropriately registered under the
Act [with the provision that OROs for organs other than solid (internal) organs, like eye banks, skin banks, tissue banks,
etc. will also handle distribution].

IVth Issue: Whether non-governmental organisations (NGOs) working to counsel the relatives of the patients and
playing an important role in forwarding the cause of transplantation shall be recognised by the Act and also be provided
with financial assistance? According to the present Act the State does not have any network of its own for conducting
counselling of the families of brain dead patients or dead patients for cadaver donation. Due to various inhibitions,
religious or personal, relatives of the dead patient and brain dead patient show reluctance to donate the organs and the
entire transplantation or cadaver donation comes to a standstill. Then the entire transplantation system falls back on the
transplant counsellor. The transplant counsellor (usually a social worker) and the function performed by such a
counsellor are the basic fundamental key components in motivating donation of corneas, skin, heart valves, etc. from
donors in hospital wards. They serve to obtain timely consent for organ/tissue donation from donorsâ€™ relatives in a
sensitive manner, after occurrence of â€œnormal deathsâ€•.

At present these counsellors are being maintained and paid by some NGOs out of their own funds and not properly
remunerated. They are in need of financial assistance from the Indian Government. Therefore if these counsellors are
recognised by the statute that will motivate them and would give a good boost-up to the cadaver donation programme.
Further, the increased useful employment opportunities for good social workers as â€œcounsellorsâ€• in hospitals will help
reverse the trend of a significant percentage of trained social workers migrating to less socially relevant jobs within a few
years of leaving college.

The proposed definitions of the required transplant counsellor and fund may be as follows:

ثالTransplant counsellor.â€“means a qualified social worker or specially trained person deployed by organ retrieval
organisations in hospital wards to motivate organ donation after death.â€•

Establishment of organ retrieval fund (ORF).â€“The Central Government with the coordination of State Governments by
notification shall establish in and for the country a fund called â€œorgan retrieval fundâ€•.

(1) The Central Government may, by notification, make a scheme specifying the authority in which the relief fund
shall vest, the manner in which the relief fund shall be administered, the form and the manner in which money shall be
drawn from the relief fund and for all other matters connected with or incidental to the administration of the relief fund and
the payment of relief therefrom. This consists of:

- (a) Donations received from the public for the cause of organ retrieval.
- (b) The interest which may from time to time accrue on the amount so donated under the clause.
- (c) Such sums as the State Government or Central Government may from time to time contribute to the fund.            (2)
The fund is exempted under Section 10(23)(c) of the Income Tax Act and the contributions towards the ORF are
exempted from income tax under Section 80-G.

Vth Issue: Whether the organ transplantation programme is in need of a centralised mechanism to regulate and
supervise the activities of organ retrieval all over the country? If yes, what shall be its structure and functioning? (It is high time that India should think of establishing a centralised system which takes care of organ retrieval and organ distribution which shall be impartial and transparent in its execution. Presently, there is no such system in place giving rise to a number of problems like lack of coordination between the organisations of different States. For example if a patient who is in need of liver transplantation in one State, he cannot get from another State, the waiting list of organ-seeking patients is not maintained properly by the transplant organisations. The whole system also lacks transparency. Since such a planned system does not exist currently, every new organ scandal which is reported in the press raises fresh doubts in the mind of the public about the ethics and controls being followed in organ retrieval, distribution and transplantation. This affects the efforts of the Government and NGOs to increase cadaver organ donations. This prime responsibility should be shouldered by the Government of India to ensure transparent and fair organ transplantation in the country.

(The Ministry of Health and Family Welfare, Government of India mooted the idea of setting up of ORBO (Organ Retrieval and Banking Organisation) at the central level with sub-units all over the country, so that controlling and coordination of organ transplantation process becomes easier. These sub-units need to be established first in all States under a common government framework. A central unit should eventually be evolved with capability and resources to coordinate with all State sub-units for ultimately merging into a nation-wide (internal) organ sharing facility on the lines of UNOS in the USA. However, it is important that these sub-units need to be established and made operational first.

(The following section describes the establishment and functions of the centralised transplant coordinating body.

(Organ Retrieval and Banking Organisation (ORBO). A facility licensed, accredited or approved by the Central Government under this Act in each State, for coordinating retrieval of (internal) human organs by organ retrieval organisations, the equitable and fair distribution of such organs, and spreading awareness on organ donation (with the proviso that for other organs/tissue—like corneas, skin, heart valves, etc. the distribution will be handled by organ retrieval organisations themselves). It will also function as the appropriate authority's approved agency for data collection from registered hospitals, for monitoring their performance and for submitting recommendations in cases of non-compliance under the Act and its Rules.

(ÓA. Establishment and administration of Organ Retrieval and Banking Organisation (ORBO). There shall be a central unit set up by Government of India to facilitate the retrieval and processing of all types of transplantable human organs and tissue, and for their fair and equitable distribution for optimum utilisation.

(The Government shall, further create five regional centres/units of ORBO in northern, southern, eastern, western and central regions of the country which would work under the supervision of the central unit. Such regional units shall in turn have one State unit covering each unit falling within the jurisdiction of the regional unit.

(The policy decision and the functioning guidelines of all the regional units and State units shall be governed by the central unit in relation to human organ transplantation.

Vlh Issue: Which preventive measures could be taken to prevent unauthorised and illegal transplantations? (This issue is by far the most important one wherein the law failed in a drastic manner in preventing and punishing the menace of illegal organ trade. It is well known that most exploitation of poor people for illegal organ donation is done by faking donor-donee relationship that does not fall within the purview of the Authorisation Committees under the Act. Past experience with lucrative organ scams suggest that it is difficult for any committee to verify donor-donee relations from documents presented by organised criminals when even fake passports that can pass stricter scrutiny, are possible. Organ criminals thrive on secrecy in their operations and this veil of secrecy can be partly lifted by well-designed mandatory public disclosures. Organ transplants are unique and distinctly different from other therapeutic procedures because it necessarily involves a separate lay person—a human organ donor—and the donor themselves family.

Public disclosure—A remedy. (As far as live donations are concerned there are legal precedents that allow public disclosure to allow involvement of wider open society for reducing chances of possible injustices that may slip past normal regulatory stipulations. Registration of marriages is one such example wherein the parties to the marriage would make a public disclosure about the proposed marriage. From the donee's point of view it may therefore be debatable whether such public disclosure comes under the one-to-one privileged communication between a doctor and patient or whether it violates medical ethics as applied to socially sensitive issues like venereal diseases or AIDS. Public disclosure puts the donee in the public eye. In every organ scandal, it is the paying rich donee that is the true culprit in instigating the crime. But so far not a single law-breaking donee has been even identified in the media. The following provision is coined keeping in view all the above problems. The first section makes it mandatory to disclose about the details of the organ transplantation such as the name of the donee and donor, the organ to be donated, etc. of the live organ donation and the second provision focuses on the procedure to be adopted by a person whoever has any objection to the proposed transplantation. In the same way this kind of a provision of public disclosure could increase chances of dependants learning about the secret illegal sale of an organ by a sole breadwinner.
(The corresponding proposed section is as follows:

(Public declaration of live donation. Whenever a live donor is intending to donate his organ, it should be notified in a local newspaper along with all details such as the name of donor and donee, the organ to be donated and the relationship they share. Any person having any objection to the notified transplantation can file a complaint with, ORBO within one week’s time.

(Procedure on receipt of objection. If an objection is made under the section to an intended donation of the organ, ORBO shall not proceed with transplantation until it has inquired into the matter of the objection and is satisfied that it ought not to prevent the transplantation or the objection is withdrawn by the person making it, but ORBO shall not take more than one week from the date of objection for the purpose of inquiring into the matter of the objection and arriving at a decision.

VIIIth Issue: Whether there is a need to provide more teeth and empower the enforcement agency (police) as far as the Act is concerned? (The THOA Act recognises the offences relating to illegal organ transplantation as non-cognizable which has made the Act almost redundant because police cannot arrest the accused without warrant. If the offence is made cognizable a police officer can arrest the accused without warrant and the accused cannot manage to go scot-free. It is also felt that genuine doctors who are into transplantation process should be protected from the clutches of malicious prosecutions from the public and to protect against unwarranted harassment. Therefore as far as doctors are concerned the law would permit their arrest by police only with a warrant.

(Illegal organ transactions are hatched in secrecy and would involve a number of people such as fake doctors, kingpins, donors and donees, which makes the case all the more difficult to resolve as a result of which the number of incidents of misuse are much more than the actual number of cases which are registered. It shows that more teeth are to be given to the law enforcement authorities such as the District Magistrate or District Collector and also to judges by conferring them with the power to interfere with illegal transplantations suo motu or power to issue injunction orders to the District Magistrate so that there will be an efficient enforcement of the Act. It is practically not possible for the police alone to guard against all ill happenings hence it is also proposed that if some preventive powers are given to other functionaries like Judicial and Executive Magistrates that will make the Act more effective because if any information is given to them through any source they can issue an order, subject to their satisfaction, and stop the illegal transplantation. Therefore on these lines the following sections are proposed:

(22. Cognizance of offences. (1) Offences to be cognizable and non-bailable. Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence punishable under this Act shall be cognizable and non-bailable, provided that for a registered medical practitioner the offence shall be non-cognizable and that no police officer shall arrest a registered medical practitioner without warrant.

(2) Power to the Judicial Magistrate to take cognizance of the offence suo motu. The Court of the Judicial Magistrate of the First Class or the Metropolitan Magistrate may take suo motu cognizance on the basis of any reliable report or information.

(3) Preventive powers to District Magistrate. The District Magistrate shall have additional powers to stop organ transplantation, if the transplantation is not being carried out according to the Act.

X. What are the punishments that have to be imposed on the key role players that flout the law and is there any need to enhance the punishments? (Deterrence can be used as a sharp weapon to cut the prevention of socially undesirable behaviour by fear of punishment. The basic phenomenon which keeps a person in awe is the fear of punishment. When an offender has been punished he knows what it is like to be prosecuted and punished, and this may strengthen his fear of law. Strict and severe punishments may serve both the purposes, general and specific deterrence. The law envisages punishing everybody who are involved as middlemen, touts and most important, the organ recipient who makes monetary payment and actually instigates the crime and thus supports and perpetuates the organ transplantation trade. They are the people who influence the mind of the innocent people or people in dire need of money and make them part of the rigmarole. They exploit the vulnerability of the people. They definitely need harsher punishment than provided in the earlier Act because of two reasons: (a) the amount of fine they pay are a meagre amount compared to the profits they earn, and (b) more importantly they have converted the value of human life into a mere business possibility for them.

(The Act presently prescribes moderate punishments ranging from two years’ punishment to seven years and Rs 10,000 fine. The doctors and touts are the ones who have been swindling the people. These offences fall in the category of white collar crimes hence these people should be punished severely. In fact the kingpins and other role players who indulge in illegal transplantation activities mint money in lakhs and crores. The present situation is that neither the term of imprisonment nor the amount of fine is deterring the potential accused. Thus, the quantum of fines should be increased exemplarily and the punishment of imprisonment should also be increased as these offences also include breach of fiduciary relationship i.e. the relationship between a doctor and patient. The proviso to the earlier section needs to be removed because it leaves too much discretion on the hands of the judge. This provision might have a tendency for misuse. Also, seeing the nature of the crime, it is essential that we provide for a minimum mandatory...
sentence.

(The proposed section runs as follows:

(18. Punishment for removal of human organ without authority. (1) Any person who renders his services to or any hospital and who, for purposes of transplantation, conducts, associates with, or helps in any manner in, the removal of any human organ without authority, shall be punishable with either description of the term which shall not be less than three years but which may extend to seven years and with fine which may extend to one lakh of rupees.

(f) Publishes or distributes or causes to be published or distributed any advertisement, “
(i) Inviting persons to supply any human organ for payment;
(ii) Offering to supply any human organ for payment; or
(iii) Indicating that the advertiser is willing to initiate or negotiate any arrangement referred to in clause (d),

(Shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to ten years and shall be liable to fine which shall not be less than fifty thousand rupees but may extend to one lakh rupees.

(emphasis supplied)

XI. Should the brain death cases be notified to some agency which will help in counselling the family members and motivate the organ donation? (All over the world including the courts in England and Wales have unequivocally declared that a brainstem-dead person is dead for all medical and legal purposes. In Mail Newspapers v. Express Newspapers23 and A (A Minor), In re24 the High Court held that the brainstem-dead patients concerned were dead despite the fact that the patients were on ventilatory support. In Northern Ireland, this state was also established as constituting death in T.C. (A Minor), In re25. However, in Airedale NHS Trust v. Bland26 it was decided that Tony Bland was not brain dead, despite his permanent vegetative state. His brainstem was still functioning and he was not ventilator dependent. It was remarked obiter dictum that a person is not clinically dead in the eyes of the medical world and of the law so long as the brainstem retains its function. Brainstem death refers to the death of that part of the brain without which the body cannot function at all without assistance27.

(When a patient is declared as brain dead by a qualified doctor, or a team of neurosurgeons, the information shall be immediately passed on to the Organ Retrieval Organisation (ORO) so that they can send their post-death counsellor to the relatives of the patient for counselling and the retrieval of the organ. At present the information is not given to anyone and many brain dead patients who are interested in donating their organs also cannot help this cause. This is the proven way of promoting cadaver donation of organs. However, to make this procedure work, it is necessary that conditions for 

(xi) Indicating that the advertiser is willing to initiate or negotiate any arrangement referred to in clause (d),

XII. Should the teaching hospitals be made a part of organ retrieval mandatorily? If yes, on what lines? (It is an established fact that Government operates a significant number of large hospitals in every State, many of which are also teaching colleges. The Central Government also separately runs some large leading-edge teaching hospitals and medical research centres like All India Institute of Medical Sciences (AIIMS), Delhi; Post Graduate Institute of Medical Education and Research (PGIMER); PGI Chandigarh; Sree Chitra Tirunal Institute of Medical Sciences and Technology (SCTIMST), Thiruvananthapuram; National Institute of Mental Health & Neurosciences (NIMHANS), Bangalore and Sanjay Gandhi Postgraduate Institute of Medical Sciences (SGPGIMS), Lucknow. Government hospitals also function as important centres for post-mortem examinations of which a good fraction are accident victims and potential brain death cases. The Government should recognise that India cannot be considered a leader among developing nations in advanced health care if medical students are denied exposure to the modern life-saving procedures of organ retrieval and transplants. The current ongoing interaction to amend our Organ Transplantation Act therefore needs to be produce a clear indication of the Government’s time-bound seriousness to make organ retrieval an integral part of hospital functions.

(7-A. Obligation of teaching hospitals. (a) All teaching hospitals should create protocols for organ retrieval within the hospital wards and shall apply for registration under this Act within a period not exceeding two years.
(b) All teaching hospitals operating super speciality departments as stipulated in clause 9 of the attendant rules of this Act, shall create protocols for organ retrieval within the hospital wards through declaration of brain deaths, and to
Conduct organ transplants, and shall apply for registration under this Act within a period not exceeding three years.

(c) All hospitals with ICUs/trauma wards shall create protocols for organ retrieval and shall apply for registration under this Act within a period not exceeding two years.

(d) All Government-controlled non-teaching hospitals shall create protocols for organ retrieval and shall apply for registration under this Act within a period not exceeding two years.

(The current ongoing interaction to amend our Organ Transplantation Act therefore needs to be produce a clear indication of the Government’s time-bound seriousness to make organ retrieval an integral part of hospital functions.

(To sum up, the THOA Act, 1994 needs to be improved upon and adjusted to the current scenario. The need for an overhaul of the Act is felt because when the legislators came up with this Act, they had envisaged something else in their minds. The main benefit of the Act was its focus on definition of “brain death” to allow legal retrieval of internal organs (kidney, liver, heart, etc.) and punitive steps to control illegal organ dealing. But this was nullified by lack of corresponding legal measures to make it obligatory for hospitals to declare “brain death” and create protocols with our vibrant social work community to retrieve organs as mandated in the US legislation. The Act also did not facilitate the post-death retrieval of various other types of transplantable tissues (cornea, bone, artery, skin, tendon, ligaments, heart valves, etc.) that are not limited to “brain death” donors. We, thus, keeping this in mind have to go ahead and make the Act more amenable to the present situation.

(It is a known fact that the implementation of the Act has suffered serious jolts because of its inability to foresee the pressures for illegal organ transactions being generated in society. The need of the hour is to protect those who want to legally and legitimately transplant organs; the donors, the donees and the doctors. The very first step here is to ensure that the law be such which can provide us with a structured approach towards encouraging ethical retrieval and transplantation so that there is no scope for the so-called “touts” to come in.

(In conclusion it may be stated that the system of organ transplantation has yet to gain momentum. It is a very good mechanism indeed in relation to the needy patients, but the corrupt practices which have been witnessed among the various units of medical profession compel us to think twice before embarking on the technique of organ transplantation. The problems highlighted above need to be addressed very urgently. There is need at the same time for the Government to come with an iron hand on the unscrupulous traders trying to make the technique of organ transplantation a money-making racket. In many countries like Spain, Singapore, US the transplantation programme is entirely backed by the State. The time has come when the Government should take the initiative of dealing with the loopholes in the law, by amending the Act wherever necessary and by modifying its procedural mechanism for the proper implementation of this important legislation.

- Labourers, many who gathered every day in parts of Gurgaon (Delhi) to look for any kind of job, were offered around Rs 50,000, for their kidneys. They were sold to wealthy clients for 10 times as much. An incident reported in Delhi, the capital city of India. Many victims complained they were taken to the house with promises of a job, and then duped or forced at gunpoint to sell their kidneys: Reuters (28-1-2008) “Kidney racket scandal in Gurgaon shocks India”, retrieved on 20-2-2008 from the website.
- “Kidney anaesthetist surrenders” (12-2-2008), Express news service, retrieved on 12-2-2008 from the website.
- Ibid.
- “Kidney scandal Indian doctor Amit Kumar came to Nepal: Media Kathmandu”, (7-2-2008), retrieved on 14-1-2009 from the website.
- (h) “human organ” means any part of a human body consisting of a structured arrangement of tissues which, if wholly removed, cannot be replicated by the body;
- (i) “relative” means spouse, son, daughter, father, mother, brother or sister;
- 9. Restrictions on removal and transplantation of human organs. (1) Save as otherwise provided in sub-section (3), no human organ 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.
- (2) Where any donor authorises the removal of any of his human organs after his death under sub-section (2) of Section 3 or any person competent or empowered to give authority for the removal of any human organ from the body of any deceased person authorises such removal, the human organ may be removed and transplanted into the body of any recipient who may be in need of such human organ.
- (3) If any donor authorises the removal of any of his human organs before his death under sub-section (1) of Section 3 of transplantation into the body of such recipient not 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 shall not be removed and transplanted without the prior approval of the Authorisation Committee.
- (4) (a) The Central Government shall constitute, by notification, one or more Authorisation Committee consisting of such
members as may be nominated by the Central Government on such terms and conditions as may be specified in the notification for each of the Union territories for the purposes of this section.

(b) The State Government shall constitute, by notification, one or more Authorisation Committees consisting of such members as may be nominated by the State Government on such terms and conditions as may be specified in the notification for the purposes of this section.

(5) On an application jointly made in such form and in such manner as may be prescribed, by the donor and the recipient, the Authorisation Committee shall, after holding an inquiry and after satisfying itself that the applicants have complied with all the requirements of this Act and the rules made thereunder, grant to the applicants approval for the removal and transplantation of the human organ.

(6) If, after the inquiry and after giving an opportunity to the applicants of being heard, the Authorisation Committee is satisfied that the applicants have not complied with all the requirements of this Act and the rules made thereunder, it shall, for reasons to be recorded in writing, reject the application for approval.

- The Supreme Court of India in Kuldeep Singh v. State of T.N., (2005) 11 SCC 122, categorically said that it is only the Authorisation Committee which can look into the issue of permitting organ transplantation under the love and affection clause, while answering a petition filed by a kidney donor (not a near relative but out of love and affection without any consideration) complaining that the authorisation process is wastage of time and would be fatal to the patient.


- Remedial Measures suggested by NHRC to all the States/UTs to check illegal trade in human organs:
  (a) The State Medical Councils should screen the records of hospitals performing organ transplants (especially kidney transplants) and estimate the proportion of transplants which have been made through a &eacute;compassionate donor&acirc; mechanism. In case of kidney transplants, wherever the proportion has exceeded 5% of the cases performed in any of the past 5 years, the State Medical Council should initiate a full-fledged enquiry into the background of the donors and the recipients, as well as a careful documentation of the follow-up health status of the donor and the nature of after care provided by the hospital concerned. Wherever police enquiries are needed for such background checks, the help of the State Human Rights Commission may be sought for providing appropriate directions to the State agencies: A.S. Anand, Chairperson of National Human Rights Commission, &eacute;Illegal Trade in Human Organs&acirc; (29-1-2004) retrieved on 28-11-2008 from the website.

- Corresponding change from &eacute;near relative&acirc; to &eacute;designated relative&acirc; has to be made in Chapter II, clause 9, para (1) and (3). Further, the &eacute;near relative&acirc; definition needs to continue unchanged in its Chapter II application as Authority for Removal of Human Organs. Widening its definition will be counter-productive in counselling after death to motivate donation of organs/tissue like corneas, skin, etc. as it will increase the people who could refuse consent for donation.

- For example now NDTN&acirc;ths (National Deceased Transplantation Network) curren examples set up with involvement of the State Governments are: Zonal Transplant Coordinating Centre (ZTCC) in Mumbai, ZCCK Bangalore, NNOS in Chennai, MOTHER Bhubaneswar, Ganadarp in Kolkata and the non-Government MOHAN Foundation&acirc;TMs group in Hyderabad.

- Additions to Chapter II of the THOA Act, 1994.
- The Special Marriage Act, 1954, Section 5
  5. Notice of intended marriage. &acirc;When a marriage is intended to be solemnised under this Act, the parties of the marriage shall give notice thereof in writing in the form specified in the Second Schedule to the Marriage Officer of the district in which at least one of the parties to the marriage has resided for a period of not less than thirty days immediately preceding the date on which such notice is given. The Special Marriage Act, 1954, Section 7
  7. Objection to marriage. &acirc;(1) Any person may, before the expiration of thirty days from the date on which any such notice has been published under sub-section (2) of Section 6, object to the marriage on the ground that it would contravene one or more of the conditions specified in Section 4.

(2) After the expiration of thirty days from the date on which notice of an intended marriage has been published under sub-section (2) of Section 6, the marriage may be solemnised, unless it has been previously objected to under sub-section (1).

(3) The nature of the objection shall be recorded in writing by the Marriage Officer in the Marriage Notice Book, be read over and explained if necessary, to the person making the objection and shall be signed by him or on his behalf.

- (l) &eacute;non-cognizable offence&acirc; means an offence for which, and &eacute;non-cognizable case&acirc; means a case in which, a police officer has no authority to arrest without warrant. [Section 2(l) of Criminal Procedure Code, 1973.]
- (c) &eacute;cognizable offence&acirc; means an offence for which, and &eacute;cognizable case&acirc; means a case in which, a police officer has authority to arrest without warrant in accordance with the First Schedule or under and other law for the time being in force, arrest without warrant. [Section 2(c) of Criminal Procedure Code, 1973.]
- i.e., arrest with the permission of the Magistrate or the court and the police officer himself can arrest the Doctor.
- Similar provisions are found in the Prohibition of Child Marriage Act, 2006.
- 18. Punishment for removal of human organ without authority. &acirc;(1) Any person who renders his services to or at any hospital and who, for purposes of transplantation, conducts, associates with, or helps in any manner in, the removal of any human organ without authority, shall be punishable with imprisonment for a term which may extend to five years and with fine which may extend to ten thousand rupees.

(2) Where any person convicted under sub-section (1) is a registered medical practitioner, his name shall be reported by the appropriate authority to the respective State Medical Council for taking necessary action including the removal of
his name from the register of the Council for a period of two years for the first offence and permanently for the subsequent offence.

- Section 19(f)
  Provided that the court may, for any adequate and special reason to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than two years and a fine less than ten thousand rupees.

- 987 FSR 90, as referred to by Price (n 1) 56.
- Regulation of Hospitals, Chapter III, Clause 10; Add new para between (a) and (b) of the THOA Act.