“COMMERCIALIZATION OF TRANSPLANTATION OF HUMAN ORGANS” - A CRITICAL STUDY WITH SPECIAL REFERENCE TO KIDNEY RACKETING

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Abstract: The greatest creation of God is Human being. The changing lifestyle of today’s society has leaded the population easily prone to various diseases like obesity, cardiac failure, kidney failure, and hyper-tension and so on. Annually, thousands of perfectly healthy people die in road accidents, while a comparable number of patients die on hospital beds waiting for healthy organs from people to be transplanted onto them. The development of science and technology had led the growth of medical field beyond one’s imagination. One such development is organ transplantation. Organ transplantation is a boon to medical field as it helps in saving the lives of those who would otherwise die. There is a great need and demand for human organs for transplantation. Recent days, there are several incidents of commercial dealings of human organs. The amendment act of 2008 in the Transplantation of Human Organs Rules, 1995, wherein the hospital based in metro and big cities where the number of transplants exceeds 25 in a year can set up their own authorization committee, has loosened the process of approving the transplants which paves way for more commercial dealings of human organs. The lacunae provide the racketeers to do the illegal act of selling organs in legalized manner. Of all organ trading, kidney racketing seems to be more for the reason a person can survive even with one kidney after donating the other. People below poverty line are more targeted and victimized. Though there is a law for the regulation of organ transplantation and for the prevention of commercial dealing of organ, yet there are several instances of organ trading. Since these crimes are committed in an organized hidden manner only some instances comes to light. Henceforth, the paper on realizing the need of the study in the present scenario would like to undergo the study to find out the solution to the problem of commercialization of transplantation of human organs with special reference to Kidney racketing

Keywords: Human Organ, Transplantation, kidney racketing, Living Donor, Cadaver Donor.

Introduction:
The greatest creation of God is Human being. God has gifted the mankind with beautiful life and health. The changing lifestyle of today’s society has leaded the population easily prone to various diseases like obesity, cardiac failure, kidney failure, and hyper-tension and so on. Annually, thousands of perfectly healthy people die in road accidents, while a comparable number of...
patients die on hospital beds waiting for healthy organs from people to be transplanted onto them. The development of science and technology had led the growth of medical field beyond one’s imagination. One such development is organ transplantation. Organ transplantation is a boon to medical field as it helps in saving the lives of those who would otherwise die. When the organ of a person completely fails, the last option of treatment is organ transplantation. There is a great need and demand for human organs for transplantation. Transplantable organs are scarce. The need far exceeds the supply of transplantable organs. This disparity has led to the formulation of various legislations attempting to regulate the scarce resources and to allocate the organs where they can do the most good.

In India, the organ transplantation has developed only around 1970’s. During 1990’s there had been a persistent demand for legislation in parliament and from various national bodies, medical, legal and social experts, particularly when reports about the commercial dealing in human organs, especially kidneys have increased. In India, a series of scandals where kidneys were removed from gullible live unrelated donors for renal transplantation prompted the Indian government to enact the Transplantation of Human Organs Act in 1994. Hence the Transplantation of Human organs Act, 1994 (hereinafter to be called as TOHO Act) was enacted for regulating the removal, storage and transplantation of human organs and tissues for the therapeutic purposes and for the prevention of commercial dealing in human organs and tissues. The Transplantation of Human Organs Rules, 1995 was made in par to give effect to the TOHO ACT, 1994.[1-5]

Recent days, there are several incidents of commercial dealings of human organs. The amendment act of 2008 in the Transplantation of Human Organs Rules, 1995, wherein the hospital based in metro and big cities where the number of transplants exceeds 25 in a year can set up their own authorization committee, has loosened the process of approving the transplants which paves way for more commercial dealings of human organs. The lacunae provide the racketeers to do the illegal act of selling organs in legalized manner. Of all organ trading, kidney racketing seems to be more for the reason a person can survive even with one kidney after donating the other. People below poverty line are more targeted and victimized. The criminals make use of their poverty but many a times they threaten, coerce to donate their organs [6-8].

Aim and object of the study:
To study about the salient features of the transplantation of human organ and tissues act 1994.
To study the meaning and definition of organ transplantation.
To study about the commercial dealing of human organ in India.
To study various instances of illegal organ trading in India with special reference to kidney racketing.
To study on the lacunae that aids the commercial dealings of human organs.

Methodology applied:
The researcher adopts empirical method of study for the collection of the data. The data pertaining to the topic chosen was collected by the doctrinal method on perusal of the statute, the Transplantation of Human Organs Act, 1994, standard text books, law journals, articles from various journals, newspapers and net sources.

Meaning and definition of organ transplantation:
Transplantation is a surgical technique where the diseased or failure
organ of a person is removed and replaced with healthy organ. The healthy organ may be donated either by a Live or dead donor. The term “transplantation” has been clearly defined under Transplantation of Human Organs and Tissues Act, 1994 as the grafting of any human organ or tissue or both from any living person or deceased person to some other living person for therapeutic purposes. The organs that can be transplanted are as follows: heart, heart valves, liver, lungs, kidney, pancreas, eye tissue (cornea), bone, skin, tendons and ligaments and veins [9-14]

**Sources of organs for transplantation:**

Usually organs for transplantation are taken from living or dead (cadaveric) donors. Certain organs of living person when removed partially the bodily functions continue the same. For example, a lobe of liver and a kidney from the pair, when removed the function of these organs continues even then. The removal of the organs from the living person requires their free consent and the donor and the recipient are in need to prove before the authorization committee that there is no commercial sale of organ and out of love and affection only the organs are being donated. The Transplantation of Human Organs and Tissues Act defines “Donor” as any person, not less than eighteen years of age, who voluntarily authorizes the removal of his human organ, tissue or both for therapeutic purposes. In order to avail free consent only age limit has been prescribed under the Act. The Transplantation of Human Organs and Tissues Act, 1994 recognizes brain stem death and authorizes to remove the organs from brain stem death persons. On awareness of organ donation people are coming forward to donate their organs after their death. Everyone’s life is precious and everybody have right to life.

**International legal perspective on transplantation of human organs:**

Several scandals on organ trade all over the world lead the international bodies like UNO, WHO for the proposal of many conventions and protocols to prevent organ trading and commercialization of organ transplantation. The following conventions and Protocols prevent human trafficking for organ trade:

- The Universal Declaration of Human Rights, 1948
- The European Convention on Human Rights, 1950
- Convention on Human Rights and Biomedicine Concerning Transplantation of Organs and Tissues of Human Origin, 2002
- The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, 2000
- World Health Organization (WHO)

**Legal framework in India:**

- **Constitutional view on organ Transplantation:**
  
  Our Constitution provides for prohibition of trafficking in human beings in any form. Article 23 of our Constitution says, “Traffic in Human beings and beggar and other similar forms of forced labor are prohibited and any contraventions of this provision shall be an offence punishable in accordance with law.” Traffic in human beings means to deal in men and women like goods. Article 21 imposes an obligation on the state to safeguard the right to life of every person. Preservation of human life is thus of paramount importance.

- **The Transplantation of Human Organs and Tissues Act, 1994:**
  
  There is no penal provision for organ trafficking in Indian Penal Code. Until 1994, there was no legislation for the regulation of transplantation of human organs. On 5th May 1993, the
Transplantation of Human organs bill was submitted to the Rajya Shaba and then to the Lok Shaba and received president’s assent on 8th of July 1994. The transplantation of Human Organs and Tissues Act, 1994 has the following salient features:

The Act regulates the removal, storage, transplantation of human organs and tissues for therapeutic purposes.

It prevents the commercial dealing in human organs and tissues and provides penal measures for persons indulging in commercial dealing of organs.

The concept of Brain stem death has been recognized in India for the first time through this Act.

The Act clearly envisages regarding the qualifications of the Donor.

The Act provides with rules and regulations for the registration of hospitals conducting the removal, storage and transplantation of the organs.

The Act provides for the establishment of National Human Organs and Tissues removal and storage network and national registry.

To give information on the scientific and clinical status of human organs and tissues.

The Act provides for the constitution of appropriate authority, who are empowered to do the following functions:

To grant, suspend, or cancel registration for the hospitals [15-20]

To investigate any complaint of breach on any of the provisions of the Act.

To enforce standards as may be prescribed for hospitals engaged in the removal, storage or transplantation of organ and for tissues banks engaged in recovery, screening, testing, processing, storage and distribution of tissues.

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To inspect hospitals periodically for examination of the quality of transplantation.

**Commercial dealing of human organ:**

Living donors had been the only source of organs for transplantation in India before 1994. The aim of the Act was to curb commerce in transplantation by promoting deceased donor transplantation, which was facilitated by accepting the concept of brain death and by laying down criteria for its diagnosis. The Act was stimulated by the innumerable scams involving removal of kidneys from poor people. The party that arranged the deal often got the best bargain in the transaction, be it a doctor, hospital staff or a person who donated a kidney earlier. Such scams involved almost all the regions of India. The Transplantation of Human Organs and Tissues Act, 1994 prohibits commercialized dealings of human organs and provides punishment for such dealings. The term commercialized dealing has not been expressly defined under the Act. But the provision on punishment for commercial dealings in human organs mentions on the prohibited act which comes under the purview of commercial dealings of human organs. The following are the acts that come under the purview of commercial dealings in human organs.

Making or receiving payment for the supply or for an offer to supply any human organ.

Seeking to find a person willing to supply for payment any human organ.

Offering to supply any human organ for payment.

Initiating or negotiating any arrangement involving the making of any payment for the supply or any offer to supply the human organ.

Taking part in the management or control of body of persons, whether a society, firm or company, whose activities consists of or include the initiation or negotiation of any
arrangement in making the payment for the supply or an offer to supply the organ. Publishing or distributing or causes to publish or distributes any advertisement in inviting or offering to supply any human organ for payment or indicating that the advertiser is willing to initiate or negotiate any arrangement to supply or making an offer to supply the human organ.

Abetting in the preparation or submission of false documents including giving false to establish that the donor is making the donation of the human organs, as a near relative or by reason of affection or attachment towards the recipient.[21-30].

Instances of commercial dealings on human organs:

Trafficking in organs is a crime that occurs in three broad categories: Firstly, there are cases where traffickers force or deceive the victims into giving up an organ. Secondly, there are cases where victims formally or informally agree to sell an organ and are cheated because they are not paid for the organ or are paid less than the promised price. Thirdly, vulnerable persons are treated for an ailment, which may or may not exist and thereupon organs are removed without the victim's knowledge. The vulnerable categories of persons include migrants, especially migrant workers, homeless persons, illiterate persons, etc. According to world health organization (WHO) 10% of all organ transplants involve travel to poor countries to buy organs. WHO also states that 15,000 kidneys are bought and sold in the organ market each year. Trafficking in organs is a serious problem in Asia, as patients from India and Japan frequently turn to organs from china, where the source of the organs is often executed prisoners. It is important to note that organ trade was permitted in Pakistan until 2007 and in China until July 2006. India was commonly known organ exporting country, where organs from local donors are regularly transplanted to foreigners. Although the number of foreign recipients seems to have decreased after the enactment of the Transplantation of Human organ and tissues Act the underground organ market is still existent and resurging in India. The Voluntary Health Association of India estimates that about 2000 Indians sell a kidney every year. India was, and even today, continues to be a cheap market for kidneys. A sizeable number of kidney transplant recipients in Bombay were Arabs and the city was also reported to have patients from Singapore and Thailand. Sri Lanka was alleged to import approximately 2000 kidneys annually from India. Most of the donors, if not all, happened to be poor and illiterate. It was reported that young people in Bombay belonging to the vulnerable sections of society, advertised in newspapers offering their kidneys for sale to the highest bidder. A similar practice prevailed in the other metropolitan city of Madras where the donors came from the district of Erode.

Though there is a law for the regulation of organ transplantation and for the prevention of commercial dealing of organ, yet there are several instances of organ trading. Some of the major instances are the Gurgaon kidney scam, kidney racket among the victims of tsunami in Ernavoor, Chennai. Recently from the month of January 2013 two incidents of kidney trading which was carried out for years were reported. The reported incidents occurred in Bangalore and in the district of Dharmapuri in the State of Tamil Nadu. On January 4th 2013, the Kumalgod police of Bangalore registered a complaint and had detained several persons who involved in the trade. The detentions were made based on information provided by a tout, Srikanth from Rammagar. Preliminary
investigations have revealed that the tout had been running this racket for the past five years.[32-34].

In 2008, Black market organ scandal in Gurgaon, a business centre close to Delhi made the whole nation to look into the issue. The doctor’s involved in the scandal have illegally transplanted as many as 500 kidneys. The police officials who investigated the case have mentioned that as little as $1000 for the kidney was paid to the victim and then sold them for as much as $37,500. The victim’s were from as many as eight Indian states. Dr. Amit and his accomplices illegally transplanted about 600 kidneys. Charges were framed against the accused on March 2012 under various sections of IPC, including attempt to murder, Section 18, 19,19A, 20 of the Transplantation of Human Organs Act, 1994.A special CBI court on March 22, 2013, convicted and sentenced five people. The Judge awarded seven year rigorous imprisonment to the kingpin of the scam, Dr. Amit Kumar and Dr.Upendra Kumar for their involvement in the illegal transplantation of kidneys of poor people. The court also imposed a fine of Rs.60 lakh of them.

On June 11th 2013, 5 persons were arrested on alleged kidney trade racket in Dharmapuri. Based on the preliminary investigation, said that it was a clear case of exploitation of poverty and unemployment through commercialized organ trade. From seized documents, including agreements between the tout and ‘donors’, officials found that a gang had been operating for over eight years and 60-80 kidney sellers were lured into the racket.

In 2007, serial killings in Noida were discovered by the CBI. Several bundles, containing parts from the torsos of bodies, were found in the home and drain of the two main accused. Moninder Singh Pandher and Surinder Koli, the main accused in the serial killings at Nithari in Noida, had links to illegal organ trade. The missing torsos of the victims have confounded investigators and led to the organ trade theory. The case was identified under rarest of rarest case and capital punishment was awarded in 2012.

India’s slums are a gold mine for organ traders, full of poor people desperate enough to sell their organs. Villivakkam, a slum in the north of Chennai, is known as “Kidneyvakkam” or “kidney town” among the locals. Surveys conducted for the health ministry show almost every family includes someone who has sold their kidney. Here, “the healthy kidney can be bought for between 20,000 and 40,000 rupees” one former middleman reveals. The news was also reported in some leading newspapers. But the state or judiciary has no response. V.K.Subburaj, deputy secretary of health and family welfare, admitted in an inaugural address that “The kidney rackets have been operating in this community for a long time. Ninety percent of the donors we know about come from below the poverty line, and 90 percent of those donate for money”.

Since these crimes are committed in an organized hidden manner only some instances comes to light. Another important issue to be dealt is whether the organs donated from the cadaveric donors are properly distributed to the needy people is a million dollar question. There is no transparency in the distribution system. Only the wealthiest sectors of our community are benefitted.

**Punishment for commercial dealing of human organs:**

The Transplantation of Human Organs and Tissues Act, 1994 provides with different penal measures for persons whoever dealing with human organs and tissues commercially. Section 18, 19,19A
and 20 of the Transplantation of the Human Organs and Tissues Act provides the punishments for the commercial dealings in human organs.

Section 18 provides the punishment which may extend to ten years and fine which may extend to twenty lakh for removal or rendering service for the removal of human organ without authority. If the person convicted is a registered medical practitioner on the report of the appropriate authority his name shall be removed from the register of the Council for a period of three years for the first offence and permanently for the second offence. Section 19 provide the punishment of imprisonment for a term which shall not be less than five years but may extend to ten years with fine which shall not be less than twenty lakh but may extend to one crore for the commercial dealing in human organs. On analyzing the Sections 18 and 19, it puts on the doubt whether the removal of organ without authority would not comes under the purview of the commercialization of organ. The punishment provided under the section 18 for the doctors is comparatively less than to others who indulge in the commercial dealing of human organs. Section 19A provides for punishment for illegal dealing in human tissues where it shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and shall be liable to fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees.

In addition the Transplantation of Human Organs (amendment) Act, 2011 provides for the establishment of the national registry which shall maintain the clinical details of the donor and the recipient. The objective behind the establishment of the national registry is to show the transparency in the system and also to prohibit the commercialized dealings in organs. But the national registry had not been established yet.

The Act has also provided with punishment for removal of human organs or tissues without authority. 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 for removal of any human organ without authority, shall be punished with imprisonment which may extend to ten years and with fine which may extend to twenty lakh rupees. Where the convicted 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 three years for the first offence and permanently for the subsequent offence. In case of removal of human tissue without authority the person shall be punished with imprisonment for a term which may extend to three years and with fine which may extend to five lakh rupees.

Conclusion and Suggestions

On the study made, the researcher concludes that there is commercialization in the transplantation of human organs. The researcher limited the scope of the study with pertaining to live kidney transplantation. The study revealed that in live organ donation, rate of kidney donation is high when compared to other organ donation. The source of the transplantable kidney comes from the live or cadaveric donor. Commercialization of kidney transplantation occurs in case of live donor only. The live donor may either be related or unrelated to the recipient. The reason for commercialized dealing in transplantation of human organs is the scarcity of the organ required for transplantation and the selfishness attitude of the recipient and his family to save the
life of the recipient at the cost of exploitation of the poor people.

The Transplantation of Human Organs and Tissues Act, 1994 prohibit the commercialization of transplantation of human organs. The TOHO Act provides for the composition of the authorization committee and appropriate committee to carry out the functions which mentioned under the Act. The authorization committee authorizes the removal and transplantation of human organs. The authorization committee is composed at state and district level. Rule 6A of the Transplantation of Human Organs Rules, 1995 provides for the hospital based authorization committee. If the number of transplantation exceeds 25 in a year the hospital can form its own authorization committee. Though the hospital based authorization committee includes the secretary of health or his nominee, yet it loosens the regulatory regime. In spite of various regulatory systems to control commercial racketing of kidney the problem still exist in this contemporary world.

On analysis made with the problem of commercial dealing of kidney, the researcher gives the following suggestions to decrease the rate of commercial dealing of live kidney donation.

The Rule 6A of the Transplantation of Human Organs Rules, 1995 providing for the composition of hospital based authorization committee where the transplantation rate exceeds 25 might be repealed of as it loosens the regulatory regime.

As provided under Section 12 of the TOHO Act, if the risks and consequences are well explained at the time of interview before the authorization committee, the unrelated donor will not consent for donation if he has not truly volunteered to donate out of love and affection.

The term “commercialization of human organs” must be explicitly defined. The term may be defined as a buying or selling of human organ for money and includes all the activities in making arrangement for doing so. Removing of organ without authority must also be brought under the meaning of commercialization. The punishment provided under Section 18 for removal of organs without authority must be amended with minimum mandatory punishment of ten years and maximum term of imprisonment may be life imprisonment. If the medical practitioners indulge in such act along with the imprisonment, fine shall be imposed which shall not be less than twenty lakh and which may extend to one crore and also their name shall be removed from the register of medical council permanently for the first offence itself. The fine imposed may be awarded as compensation to the victims. As there is scarcity of the kidney required for the transplantation than the need is the reason for the commercial dealing rate of cadaveric donation must be increased. Cadaveric donation rate can be increased on creating awareness among the people to donate their organs after death. Organs of the persons who died on road accidents may be made as national resource and organs can be removed. The national registry as provided under Section 13 D of the Act must be established with the details of the donor and the recipient. This shall reduce the commercialized dealing on organs. The organ allocation will be transparent as allocation will be based on the waiting period and not on the economic status of the recipient. Prevention is better than cure. Hence the people should take steps in preventing the lifestyle diseases like obesity, diabetes, blood pressure which are responsible for kidney failure. The main source of nutrition in our country is carbohydrate. The food with high fiber
content may be good to reduce the sugar level in blood. Alcoholism is also one of the causes of the kidney failure. This may also be avoided. As long as economic inequality and the scarcity of deceased donor organs persist in India, it is uncertain that commerce in transplantation will continue to flourish. If Cadaveric Organ donation rate is increased, it will reduce the rate of commercial dealings on organs. From the consideration made on the sale of our own organs, poverty will not be eradicated. Only the problem of the instance will be solved. Hence live organ donation must be made only to save the loved One’s or others on humanitarian basis, it must not be commercialized.

References
6 Dr. Mathiharan, Prof. Dr. Amrit K Patnaik, (eds), “ Medical Jurisprudence and toxicology“, 249, Lexis Nexis, New Delhi, 2007
7 The Transplantation of Human organs and tissues act, 1994, Act No.42 of 1994, Preamble clauses
8 Section 24 of the Transplantation of Human Organs Act, 1994.
9 Bangalore Bureau, “Kidney racket thrives in Bangalore, thanks to loopholes in law”, An article published in Hindu newspaper dated Jan 4th 2014.
11 Section 2(p) of TOHO Act,1994.
12 “What organs can be transplanted”- An article on BC Transplant website, an agency of the provincial health services authority , Available at http://www.transplant.bc.ca/what_organ can.htm Accessed on 90214.
13 Section 2(f) of TOHO Act,1994.
14 Section 2(f) of TOHO Act,1994.
23 Section 19 of TOHO Act, 1994.
34 Section 18 of TOHO Act, 1994.