

# Organ donation legal yet stigmatized law international essay

Law



## **Introduction**

One of the growing practices in societies is the practice of organ donation, defined as the removal of viable and healthy organs or tissues from a living or dead person and transplantation of the parts to a recipient, which is also used for profitable scientific research. Emanating since the 1950's, it became imperative in medical practice being a matter of saving human life and such importance attached to it makes it an integral part of international and national law. It coincides with social welfare and religious views and is thus considered a charitable act. However, the excess of global demand over the supply of organs has turned the act into a malpractice whereby it is taken undue advantage of and has become popular in the practice of organ trade, for various reasons. Countries have witnessed horrific human rights violations perpetrated on their citizens on this ground. This creates a paradox around the concept of Organ ' Donation', which suggests it is a courteous and acceptable deed, legal in every perspective; yet, in these unfortunate times of desperate needs and corruption, it attaches a stigma to it. Where it caters to human rights as the well being of a person is being entertained; on the contrary it abuses human rights by infringing the fundamental right to life. This ambivalent position of organ donation will be addressed to in this essay. As a result, some countries have tried to take strict measures to protect their citizens and maintain human integrity due to national and international pressure. This includes incorporating opt-in or opt-out laws into their national legislation[1] which are two main methods for voluntary consent, namely ' explicit' or ' presumed' consent, respectively – which either mandates or allows an individual who is a potential donor, or his

relatives/next of kin, to provide their consent for organ donation. This is also done to encourage organ donation and to remove societal preconceptions which create reluctance, in light of the view that it can save thousands of lives.

## **Legal**

Organ Donation is an effective therapy for a vulnerable human life. With improved technology and medicine, it has gained widespread attention through public awareness and campaigns to encourage organ donation as a national cause due to shortage of organs. According to the World Health Organization (WHO), every year there are tens of thousands of transplants that are carried out legally[2]. Looking at it from a human rights perspective, it is socially encouraged as it helps cater to the welfare of human beings and saving lives. The general view remains that Organ Donation and its related law is utterly legal and compatible with human rights, serving both social and ethical aspects of a society. Most religions support the exercise as a benevolent act for the greater benefit of the society, such as Islam, Christianity and Judaism; however there are strict exceptions to the same[3]. Deceased organ donation is an efficient and legitimate way of donating organs. One of its forms is 'brain death' which is a medical condition defined by irreversible damage to the brain, after which the person is kept on machine support and is declared brain dead. Donation occurs upon explicit or presumed consent, as mentioned above. Though the death criteria under this condition has initiated debates on religious and ethical grounds[4], doctors emphasize upon changing the patterned mindset of a family member attaching to this form of donation, and be ready to contribute for a noble

cause. As stated in an interview with Professor Dr. Adeeb Rizvi, the director of SIUT which provides free and ethical kidney transplantation in Pakistan, ‘ One deceased/brain-dead person can save 17 lives. So, people should feel encouraged to come forward and pledge their organs and save many precious lives.’[5]However, like everything has its pros and cons, arguments have been articulated against organ donation. Firstly, it has been condemned on grounds of personal autonomy and dignity, which is based on the argument that one does not simply owe an obligation, in his personal capacity, to another to give away his organs on his death. The individual has an exclusive control over his body, and has the perfect liberty to exercise or not to exercise the right over his parts that he possesses, and this right is not subjected to any external factors. Secondly, it is criticized where this practice has been turned into increased misdemeanors of organ trafficking and commercial organ trade, making it an abominable activity. Therefore in some countries the development of programmes for organ donation is hampered due to socio-cultural factors which have blemished the act of ‘ donating’ organs, initially expounded with an altruistic intent and a long term impact of saving lives. The human rights motive behind it has been rendered useless due to the illegal means and exploitative measures adopted, which we will look in detail below.

## **Stigma**

The international organ trade has been considered an important policy issue due to commercial transactions of organs and organ trafficking, that are on the increase worldwide. A form of black market has arisen in this area, due to demand superseding supply. Hence, in a wide way there are two forms of

exploitation taking place under organ donation, namely ‘ physical exploitation’ where operations are taking place in third-world hospitals with poor and risky methods leading to severe repercussions, and ‘ financial exploitation’, where the donors are paid much less than their promised pay for donation or where an innocent recipient is asked to pay unaffordable costs. We will focus on Asian countries of Pakistan and India, where such unacceptable and illegal practices are occurring, as a result of which they have turned into famous organ ‘ bazaars’ (markets), where potential recipients travel from abroad to obtain organs cheaply, sometimes through coercion and pressure. On the contrary, developed countries like the United Kingdom, have curbed and abolished these practices by regulating them according to law; but because organ trade is banned in the UK, people go on to take desperate measures[6]. Such absurdity is the reason why there is general reluctance to legitimizing free trade for the donation of organs, and the idea of an organ market seems grotesque to many. Therefore countries face a dilemma as to how organ supply can be increased to meet the demand, when the manner is plagued by corruption and violation of human rights. Nancy Scheper-Hughes coined a phrase called ‘ New Cannibalism’, arguing that the actual exploitation is an ethical failing, a human exploitation; a perception of the poor as organ sources which may be used to extend the lives of the wealthy[7]. This can be seen as a violation of Article 12 of the UDHR which provide Right to Privacy and Family Life that is breached when a person’s life is risked by reprehensible organ trade. This can be understood in the case of organ donation occurring without consent, when the donor is deprived of his organ from his body, his health is

consequently affected, which hinders him from enjoying a healthy family life. Moreover, his personal autonomy and his privacy are invaded when the body that is owned by him, is in a way ‘harmed’. According to WHO January 2007 Bulletin (Volume 85), about 10% of the 63000 kidney transplantations carried out annually worldwide, involve payment of non-related donors of different nationalities. It mentions how innocent people are financially exploited and paid meager amounts of money for donating kidneys. This happens at the hands of poverty-stricken people in needs of desperate measures to survive their families. A common feature of this practice is that the donors are put at risk with no post-operation care provided, due to which they witness serious bodily repercussions, explaining physical exploitation. India was a commonly known country for the largest organ market where foreign recipients could gain easy access to organs from locals, but after enactment of the law banning organ trade and tourism in the country[8], attention was diverted to Pakistan.

## **Pakistan**

Organ tourism has been on the rise since the 2000s when Pakistan turned into the cheapest organ bazaar and became an important center for commercial organ trade and transplant tourism. Shortage of cadaver donors in Pakistan due to absence of a deceased program has lead to unrelated commercial transplant from kidney vendors, exploited by the middleman in the rampant trade who further siphons off the money, leaving the donor with insufficient compensation. With 45% of the population living under the poverty line, rural habitants comprise of the donors for the lucrative business, who are desperately in need of money[9]. According to WHO

statistics, the country hosts up till 15000 transplants annually[10], with patients coming in from USA, UK, and Middle East paying \$200, 000 to \$30, 000. These foreigners, frustrated by long waiting lists at home and desperate to get rid of the deadly circumstance, get their arrangement in days that too at a fraction of the cost in their native country[11]. The National Assembly tried to curb the practice by passing ' The Transplantation of Human Organs and Tissues Act, 2010'[12]under a Supreme Court order. This was done following campaigns by the Sindh Institute of Urology and Transplant (SIUT) which highlighted the despicable black marketing of organ trade and manipulation of the impoverished. The effect of the Act is to ban illegal organ exchange prevalent in major parts of the country, with certain measures being imposed such as a restriction on the age limit for donors and evaluation of voluntary donation by medical experts. The Act was passed on in accordance with the Universal Declaration of Human Rights (UDHR), to which Pakistan is a signatory. Through the enactment of the said Act, fulfillment of Article 3 of the UDHR, which asserts the Right to Life, Liberty and Security of a Person, and more specifically Article 25, which ensures the Right to a Standard of Living Adequate for the Health and Well-being of a Person[13]was attained, which were clearly breached at the expense of basic personal liberty being heavily infringed upon. The idea behind live organ donation is that the rich gets the kidney, the poor gets the money, and the medical procedure satisfies both. But due to the abominable business adopted out of it, the practice has failed to alleviate poverty and leaves the donors worse off, medically vulnerable after substandard care. Despite the legislative action taken to curtail the business, organ trafficking and its

resurgence since 2011 remain unaddressed, partly due to corruption within the institutions and law enforcement offices.[14]

## **India**

Another center for kidney trade is India where the same situation as Pakistan, is prevalent, and it again remains controversial whether organ donation improves the economic status of the donor. It is known for its black market in organ trade which is backed by the presence of a growing middle class, lack of a national health insurance scheme, growing disparity between the rich and poor, to some extent the presence of technology in the country, and most importantly support from corrupted government officials. Organ trafficking in India has made the process of commoditization of organs a simple, short and a tantalizing form of business for some and a solution for others. A cross-sectional survey conducted in the region of Chennai, showed 305 individuals who sold their kidneys, primarily to pay off debts instead of with the motive of helping a needy recipient. Participants reported an altogether decline in their financial status, as the financially-distressed and illiterate people are misled by being promised for substantial financial gains that can meet their immediate social needs and requirements[15]. This shows how human rights are rampantly violated on such a large scale to an extent that it comprises a whole market, with the human body and its parts being put on sale, something which would sound completely ridiculous and absurd on human rights grounds. Although legislative act in 1994 dramatically curtailed the practice, there is an underground market that is unfortunately flourishing.



## Conclusion

Organ donation itself is a purely legal and ethical practice which was aimed for the sole purpose of therapeutic intervention, supported by legislation for the purpose of medical practice. However due to the shortage of supply over demand, it has led to the commercialization of human organs which has expanded to an international level in the forms of organ tourism and organ trafficking, at the risk of taking advantage of extremely needy people.

Nations, by failing to regulate this malfeasance, are in effect acquiescing to this abhorrent business and giving way to an exploitative measure of harming their own people economically, socially and even morally. Therefore organ donation is a practice that can be said to be legal, yet, due to the abuse of this practice it has become a serious human rights concern and a significant health issue in the international community; it has been gravely stigmatized. In my opinion, giving in to market forces is not an alternative to overcoming the problem of organ shortage. It has brought us to a point where this cruel practice worldwide has become so common that an almost acceptance of disregarding the intrinsic human dignity attached to an individual, can be assumed. However, considering the medical benefits it attaches, we cannot completely propose to prohibit the practice of organ donation altogether. Where organ trafficking has violated rights of human, organ donation can comply with them, if the practice is confined on grounds of medicine only; to save human lives. Therefore enactment of opt-out laws by countries seems an appropriate solution, with pressure from the international community as well. This can be backed by the World Health Organization that has been active in taking some action against the global

trafficking in human organs, clearly stating that it violates the UDHR as well as its own constitution[16]. Accordingly the World Health Assembly passed a resolution in 2004 for Member States to take measures accordingly[17].

However as pointed out earlier, the major problem of enforcement mechanisms and implementation measures prevails, which the individual countries fail to take, as seen from our study on the Asiatic states.