



# *Kathmandu School of Law Review*

ISSN 2091-2110

Volume 4; Issue -1; 2014



**“QUALITY AND DIVERSITY”**

# Addressing the Issue of Disparity in Organ Transplantation: *Pooja Khatri et al. v Government of Nepal*

-Pooja Khatri<sup>2</sup> &  
Bikash Thapa<sup>3</sup>

*This case comment discusses upon the pronouncement of Supreme Court of Nepal on the issue of kidney trafficking, its significant impact and analysis of the case in relation to organized crime. Similarly, it also deals with the disparity in terms of organ donation, which the Court has positively delved into, by recognizing mother's clan as close relative, thereby expanding the scope of prospective donors for organ transplantation.*

## Background to the Discussion

Organ transplantation is one of the major concerns of the society today and refers to the 'transplantation of an organ of one human body into another human body for the purpose of treating a disease in a managed manner in accordance with the modern medical system.'<sup>4</sup> The advancement in the field of science has been a boon for many patients, who would otherwise have died due to organ failure. On the other hand, a narrow scope for receiving transplantation imposed by law has increased the risk of organ trafficking.

Nepal's National Kidney Center estimates that there are over 2.7 million Nepalese suffering from kidney failure.<sup>5</sup> World Health Organization (WHO) estimates

---

<sup>1</sup> *Pooja Khatri et al. v Government of Nepal*, Supreme Court of Nepal, WN 0059, 2012, order of 14 May 2014.

<sup>2</sup> Section Officer, Supreme Court, Nepal.

<sup>3</sup> Student, Kathmandu School of Law, LLM (ongoing).

<sup>4</sup> *Human Body Organ Transplantation (Regulation and Prohibition) Act*, 1998 (2055), Nepal, s. 2(c).

<sup>5</sup> Wendy Zeldin, 'Nepal: Draft Amendment to Human Organ Transplant Act Broadens Scope of Donors', 2009, *Library of Congress*, para. 3 available at [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205401220\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205401220_text), accessed on 15 October 2014.

kidney transplants are performed in nearly 100 countries.<sup>6</sup> The case being commented upon concerns the expansion of the scope of the prospective donor, thereby balancing the gender viewpoint. Few years back, due to lack of transplantation facilities, many Nepalese travelled to different country at a high financial expense. Nowadays, despite the availability of such facilities in Nepal itself, people have not stopped traveling abroad for organ transplantation as the Nepalese law only allows a father's clan to be the prospective donors.<sup>7</sup> This provision is discriminatory and is not supported by any scientific evidence, since anyone within genetic relation is a suitable donor, if he/she is substantiated and matched by medical science. The case being commented upon penetrates into the gender disparity present in the Nepalese law related with organ trafficking.

The case *Pooja Khatri et al. v Government of Nepal* is a recent pronouncement of the Supreme Court of Nepal and involved Justice Kalyan Shrestha, Justice Girish Chandra Lal and Justice Sushila Karki. The reason why this case is landmark is that the within the purview of organ trafficking, the court has expanded the scope of the term 'close relative'<sup>8</sup> mentioned in the *Human Body Organ Transplantation (Regulation and Prohibition) Act, 1998* and has issued an order of mandamus to the concerned authority to make necessary arrangement for including the women's clan in the definition of 'close relative'.

There are two basic domestic laws governing the area of trafficking of human organs in Nepal, which are – the *Human Trafficking and Transportation (Control) Act, 2007* and *Human Body Organ Transplantation (Regulation and Prohibition) Act, 1998*. Extraction of organ other than otherwise prescribed by law is also regarded as trafficking.<sup>9</sup> Extraction of human organ beyond the close group without the consent of people is illegal. *Human Body Organ Transplantation (Regulation and Prohibition) Act, 1998* and the *Kidney Transplantation (Regular & Prohibitory) Rules, 2001* govern the area of organ transplantation in Nepal by regulating the activities pertaining to the extraction of an organ from the human body for the purpose of treating a disease in a systematic manner in accordance with the modern medical treatment.

---

<sup>6</sup> Yosuke Shimazono, 'The state of the international organ trade: a provisional picture based on integration of available information', *Bulletin of the World Health Organization*, 2007 available at <http://www.who.int/bulletin/volumes/85/12/06-039370/en/>

<sup>7</sup> Prospective donor means that donor who can provide his/her organ to the recipient.

<sup>8</sup> *Human Body Organ Transplantation (Regulation and Prohibition) Act* (n 4), s. 2(l).

<sup>9</sup> *Human Trafficking and Transportation (Control) Act, 2007*(2064), Nepal, s. 4(c).

The Nepalese law has a very clear provision regarding donation of an organ from living and deceased person, for which the law has prescribed a certain procedure. One of such procedures is the necessity of 'voluntary consent' from the donor before the extraction of an organ. Regarding the donation of a living person, the legal provision is very clear and grants the right to transfer an organ within the close relative<sup>10</sup>. However, an overview of the definition of close relative reveals its discriminatory nature.<sup>11</sup>

### Arguments Raised in the Supreme Court of Nepal

The petitioner in the case raised concerned from the gender perspective that the provision gives space to the father's clan to be included within the close relative, making them capable of donating their kidney, but completely excludes the mother's clan. The petitioner also forwarded the argument that while the provision is discriminatory and violates the fundamental right to equality<sup>12</sup> and right of women<sup>13</sup> guaranteed by the Nepalese Constitution, it also limits the scope of donation itself by excluding other possible donor from donating their organs, which ultimately has a long term effect on meeting the demand of organ in the market.

The Government of Nepal, as the defendant, argued that the language of section 2(L) of *Human Body Organ Transplantation (Regulation and Prohibition) Act* is gender friendly and does not discriminate on the basis of gender. It submitted that the matter of the language of an Act falls within the province of legislative, making it irrational for the court to enter into its discussion. The Government also argued that the section 2(L) imposed no restriction in the enjoyment of fundamental rights of women. For these reasons, the defendant asserted that the writ should be quashed.

---

<sup>10</sup> *Human Body Organ Transplantation (Regulation And Prohibition) Act* (n 4), s. 15.

<sup>11</sup> 'Close relative' in respect of any person, means that person's son, daughter, mother, father, brother, sister, uncle, nephew, niece, grandfather, grandmother from the father's side, grandson, grand-daughter from the son's side, grandson, granddaughter from the daughter's side, and includes husband, wife, adopted son, adopted daughter, step mother, step father, father in- law, mother- in law, which whom relationship has constantly existed since two years ago. *Ibid*, s. s(1).

<sup>12</sup> *Interim Constitution of Nepal*, 2007 (2063), art. 13.

<sup>13</sup> *Ibid*, art. 20.

## The Decision of the Supreme Court of Nepal

After a careful analysis, the Supreme Court of Nepal first reflected on the purpose of the *Human Body Organ Transplantation (Regulation And Prohibition) Act*, which is ‘regulating the activities pertaining to the extraction of an organ from the human body for the purpose of treating a disease in a systematic manner in accordance with the modern medical treatment and extraction of an organ from the body of a human being and transplantation of that organ into the body of another human being and preventing activities relating to the purchase and sale of human body organ and use of the same in other purposes’.<sup>14</sup> In simple words, the Act seeks to regulate organ transplantation process and prevent its illegal trafficking. The court further explained that the inclusion of only the father’s clan in section 2(L) of the Act limits the interest and benefit of the victim in need of an organ, who could potentially receive it from the mother’s clan. It further observed that there is no scientific evidence ruling out the compatibility of an organ received from the mother’s clan. It also noted that the only objective of the organ transplantation law of Nepal is to control illegal trafficking, and for this end, there is no particular evidence supporting the rejection of an organ from the mother’s clan,

The Court also reflected on the larger context of organ transplantation. It expressed that organ donation is a voluntary act with no expectation of a benefit. Conversely, organ donation adds to further health complications. Nepalese society is inadequately aware about health and social aspects of organ donation. Moreover, a person fit for donation also may hesitate to proceed ahead due to anxiety. This requires the state to expand the scope of prospective donors. The Court found that the state has main responsibility to timely review the Act and be strict in observance and monitoring of organ transplantation laws, thereby controlling illegal organ trade and facilitating rational organ transplantation.

In the spirit of these reasoning, the Court declared that the provision allowing organ transplantation only among the close groups of father’s clan is one-sided and narrow. It issued an order of mandamus to the Government of Nepal to review the definition of section 2(l) of the *Human Body Organ Transplantation (Regulation And Prohibition) Act* for increasing its scope.

---

<sup>14</sup> *Human Body Organ Transplantation (Regulation And Prohibition) Act* (n 4), preamble.

### Comments on the Case

The organized crime regarding organ trafficking is an institutional crime and a bitter fact. Institutions such as the Central District Office, Police department and hospitals are being used as tools for organ trafficking. In this regard, the major issue to be discussed is: whether, by extending the meaning of ‘close relative’<sup>15</sup>, through an inclusion of the mother’s clan in the purview of prospective donor, can the issue of institutional crime be actually addressed and mitigated? In this sense, could the order issued by the Supreme Court of Nepal be effective enough to make any difference in the activities of concerned institutions for controlling the organized crime of organ trafficking?

Without doubt, organ transplantation is fully dependent upon scientific and medical basis and the rationality behind defining ‘close relative’ is paramount. Certain jurisdictions have placed a restriction that there should be a relationship between the donor and the recipient. For reference, Indian law has set a definition for ‘near relatives’<sup>16</sup> and the UK has set some limitation on transplantation between genetically related people.<sup>17</sup> There are different approaches of law in relation to genetic relationship. Indian Law has used the term ‘genetically related’, also loosely used with the term near relative. German Law states that only close relatives of patient or spouse may donate kidneys as live donors. In Belgian law, close relative stands for a first degree relative or the spouse residing with the donor.

In the discussed case, the expansion of the scope of close relative by the inclusion of mother’s clan is noteworthy. In *Pooja Khatri et al. v Government*

---

<sup>15</sup> *Ibid*, s. 15.

<sup>16</sup> ‘Near relative’ means spouse, son, daughter, father, mother, brother or sister. *Transplantation of Human Organs Act*, 1994, India, s. 2(i).

<sup>17</sup> Subject to subsection (3) below, a person is guilty of an offence if in Great Britain he between persons, not genetically (a) removes from a living person an organ intended to be related, transplanted into another person; or (b) transplants an organ removed from a living person into another person, unless the person into whom the organ is to be or, as the case may be, is transplanted is genetically related to the person from whom the organ is removed. (2) For the purposes of this section a person is genetically related to (a) his natural parents and children; (b) his brothers and sisters of the whole or half blood; (c) the brothers and sisters of the whole or half blood of either of his natural parents; and (d) the natural children of his brothers and sisters of the whole or half blood or of the brothers and sisters of the whole or half blood of either of his natural parents; but persons shall not in any particular case be treated as related in any of those ways unless the fact of the relationship has been established by such means as are specified by regulations made by the Secretary of State. *Human Organ Transplants Act*, 1989, the United Kingdom, s. 1.

of Nepal, the Supreme Court of Nepal highlighted on the women's rights perspectives of the issue of organ transplantation. The commentators concur with the Court's observation that the restriction to the mother's clan is not justified looking at practices of other jurisdictions and is also not justified on the basis of scientific evidence as WHO itself has proven the maternal genetic relationship.

However, the Court did not clarify about the lawful measures in absence of a qualifying close relatives. If no close relative within the ambit of the *Human Body Organ Transplantation (Regulation And Prohibition) Act* qualifies to donate an organ, is it permissible for a person not falling within the definition of 'close relative' to donate his/her organ to the person in need? The Supreme Court, in the discussed case, did not address this issue

Also, the Court did not shed light into the crime control perspective of the issue, since the legal limitation on organ transplantation could essentially dissuade traffickers and discourage persons helping in trafficking of organs. Article 3 of the *UN Trafficking Protocol*, that defines trafficking in persons, clearly includes trafficking for the purpose of removal of organs where States are under an obligation to introduce comprehensive criminal measures against organ trafficking. *WHO Guiding Principles on human organ transplantation, 1991* states that the commercialization of human organs is a violation of human rights and human dignity. In case of voluntary transplantation, the informed consent of the donor is required and it has further stated that transplants can take place with a proven genetic relationship and when there is a good match (tissue and blood).

The transplantation law of Nepal clearly speaks about the prevention of commercialization of human organs. However, it should be noted that there is widespread poverty in developing countries like Nepal that compels people to transplant their organs for money, even during the existence of a prohibitive legislation. Furthermore, there is a lack of legal guideline to monitor and regulate the process of organ transplantation due to which unjust practices are prevailing in living organ transplantation, especially in the form of commercialization of human organs. The expansion of the scope of the prospective donor by the Supreme Court in the discussed case can aid in curbing illegal trafficking.

To conclude, the Supreme Court of Nepal seems to be positive in the issue of gender justice by reviewing the discriminatory provision which allowed only the father's clan to donate the organ to incorporate mother's clan under the

definition of close relative qualifying as prospective donors in organ transplantation. However, the gender-centric analysis in the case seems inadequate to address the problems related with organ transplantation in Nepal, such as potential genetic mismatch between recipient and close relative, absence of close relative and the issue of organ trafficking. Personally, the commentators believe that the expansion of the scope of prospective donors can, to some extent, fill the demand-supply gap in organ transplantation market, which could further aid in lessening illegal trafficking of organs.