

# MOTHERS WHO DONATE AND MOTHERS WHO SELL – FALSE DICHOTOMIES IN THE REGULATION OF LIVING ORGAN TRANSPLANTATION

—Jinal Dadiya\*

*Statistics suggest that a disproportionate number of all living organ donors in the world are women. Similarly, sociological accounts of the black market for human organs indicate that many more women sell their organs for money than men. An analysis of both these trends demonstrates that the reasons which persuade women to give away their bodily organs are similar, regardless of whether their organs are sold or donated. Indian law, however, categorizes these similar experiences into two distinct categories. In this respect, the law appears to be going against the natural grain of society. In this paper, I use a systems theory perspective to analyze this apparent incompatibility between law and society. I argue that the legal system communicates in a code that is not perfectly translatable to social codes; and highlight this as a possible reason for the law's failure to prevent commercial trade in human organs. Considering this, I argue in favour of legal interventions to correct the commodification of the female body in the larger social sphere, and for a need to reorient the Indian regulatory approach towards living organ transplantation.*

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\* Jinal holds a BCL from the University of Oxford and is a graduate of National Law School of India University.

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## I. INTRODUCTION

Indian organ transplantation regulation is oriented towards the achievement of two significant objectives - (a) ensuring a steady supply of human organs for therapeutic purposes, and (b) preventing commercial dealings in human organs.<sup>1</sup> The pursuit of each of these objectives exerts opposing pressures on the supply of organs in the healthcare system. While the pursuit of (a) requires regulators to, as a matter of public policy, encourage as many organ donations as possible; (b) requires regulators to be vigilant about the influence of commercial considerations in instances of transplantation. Therefore, a significant objective of Indian transplantation law is the maintenance of a balance between (a) and (b), as policy goals. However, it appears that in its attempt to strike this balance, Indian organ transplantation law has failed to achieve either objective satisfactorily. In this paper, I highlight the proliferation of commercial considerations among instances of living organ donation in India to show that the law has failed to curb commercial dealings in human organs, even as India continues to experience a dire shortage in organ availability. In this context, this paper uses systems regulatory theory to examine the causes of the organ transplantation law's failure in achieving its stated purposes.

Systems theory conceptualizes the social world as being constituted by several functionally differentiated subsystems (such as legal, political or economic systems) which interact with each other in specific ways. According to this approach, each subsystem is structured around a unique language and a binary code which determine the way in which it communicates with other social systems. For instance, the legal system communicates with other systems in the binary language of legality/illegality. Similarly, the economic system may be viewed as being structured around a binary code of efficiency/inefficiency. When any two subsystems understand each other perfectly, a state of structural coupling exists between them. While in this state, the two interacting systems are able to impact and influence each other successfully as the language of one is freely translatable into that of the other. On the other hand, in the absence of structural

<sup>1</sup> See generally, Preamble and the Statement of Objects and Reasons, Transplantation of Human Organs Act, No. 42 of 1994, INDIA CODE, <http://indiacode.nic.in/fullact1.asp?tfnm=199442>.

coupling, communication received from an external system remains undecipherable to the receiving system, and begins to resemble background noise.<sup>2</sup> A systems theoretical approach to the study of law in society indicates that the legal system produces regulatory effects by communicating with other subsystems in its own language of legality/illegality.<sup>3</sup> For instance, the law regulates the economic system by labeling some economic activities as illegal, thereby prohibiting or punishing them. According to Teubner, regulatory communication by the law can only achieve its intended objectives when a state of structural coupling exists between the interacting legal and social systems. For example, the inability of the law to regulate political practices such as vote-banking or gerrymandering may be on account of an incompatibility between political sensibilities and the language of the law.<sup>4</sup> However, in this regard, it may be noted that the empirical study of law-in-society indicates that legal and social systems are rarely in states of structural coupling with each other. Despite this, a study of the incongruity between legal and social systems in specific contexts may reveal the causes of regulatory failure in those contexts. Further, such an assessment may form the basis for exploring solutions to such failure.

The Indian law relating to living organ transplantation prohibits commercial dealings in human organs, permitting only those donations that are prompted by feelings of altruism or affection; thereby codifying all potential transplantations as legal/illegal. In this paper, I demonstrate that this categorization of all potential organ transplantations is incongruent with the psychic social systems (mental and emotional states of donors) underlying such donations, thereby causing regulatory failure. Empirical studies and sociological accounts indicate that a disproportionate number of all organ donors in the world are women. This gendered trend<sup>5</sup> in organ donation has been observed in both legal organ transplantations as well as in the illegal market for organs. I consider this gendered trend in organ donation to argue that the conscious reasons for organ donation or sale are shaped by several sociological factors which do not directly correlate with the legal categorization of organ transplantations as commercial/emotional. Since the separation of commercial dealings in organs from all other instances of transplantation is a primary policy objective of organ transplantation law, the law's current application appears to impede the realization of its stated goals. I highlight

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<sup>2</sup> For a general understanding of systems theory, see NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM*, trans. Klaus Ziegert (Fatima Castner and Richard Nobles eds., 2008); see also John Paterson, *Reflecting on Reflexive Law*, in LUHMANN ON POLITICS AND LAW: CRITICAL APPRAISALS AND APPLICATIONS (M. King and C. Thornhill eds., 2006).

<sup>3</sup> NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM*, trans. Klaus Ziegert (Fatima Castner and Richard Nobles eds., 2008).

<sup>4</sup> Gunther Teubner, *After Legal Instrumentalism? Strategic Models of Post - Regulatory Law*, in *DILEMMAS OF LAW IN THE WELFARE STATE* (1986).

<sup>5</sup> This paper refers to gender in binary terms. This is due to limitations of data availability on donation statistics and social perceptions relating to organ donation and transplantation. However, since gender cannot adequately be expressed in binary terms, there is a need to undertake a more nuanced study of the concepts and trends discussed in this paper.

this lack of structural coupling between legal and psychic systems as a possible reason for the law's failure to achieve its intended objectives, despite the active and vigilant regulatory efforts of its enforcers.<sup>6</sup> While this paper does not provide concrete solutions to this incompatibility, it provides a conceptual framework on the basis of which such solutions may be explored.

## II. CODING OF LIVING ORGAN TRANSPLANTATION UNDER THE TRANSPLANTATION OF HUMAN ORGANS ACT, 1994

The Transplantation of Human Organs Act, 1994 and the rules made thereunder (the regulatory framework is collectively referred to as the 'THO' in this paper) form the primary framework governing the transplantation and donation of human organs in India. It criminalizes some kinds of commercial dealings in human organs by making it an offence to solicit, offer, supply, negotiate for, receive or pay for human organs. In this regard, it may be noted that the activities which have been criminalized under the THO only form a small category of all commercial dealings in human organs i.e., the THO only criminalizes certain visible, transactional kinds of commercial dealings in organ transplantation, while, at the same time failing to recognize the commercial underpinnings of other kinds of organ transplantation.

The THO also provides a regulatory framework for the approval of transplantation arrangements between certain categories of living donors and recipients. Authorization Committees, Appropriate Authorities, and Competent Authorities ("authorizing committees") set up under the THO are empowered to permit certain kinds of organ transplantations, as long as they satisfy prescribed regulatory requirements and do not appear to be commercial deals between the applying donors and recipients. In this regard, authorizing committees are empowered to approve of two specific kinds of living organ donation under the THO:

- i) Near-Relative Donation: One of the two ways in which the THO permits living organ donation is by allowing it to take place between 'near-relatives'. The THO defines the 'near-relatives' of a person restrictively to include only their spouses, children, parents, siblings, grandparents, and grandchildren. The authorizing committees are responsible for ensuring that the near-relative donor possesses 'biological capacity, mental condition, awareness ... and ability to give free consent' at the time of providing its approval for transplantation. To this end, Authorisation Committees and Competent Authorities have been given wide probative powers to assess a prospective donor's levels of awareness and his/her ability to

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<sup>6</sup> Sunil S. Shroff, *Legal and Ethical Aspects of Organ Donation and Transplantation*, 25(3) *INDIAN J. UROLOGY* 348 (2009). The author highlights that the Transplantation of Human Organs Act has failed to curb commercial trade in human organs.

freely consent to the donation. Nevertheless, it has been observed, in practice, that the fact of a near-relative donor's submission of the requisite forms and paperwork prescribed by the THO raises a presumption of consent on the part of the donor among most Authorisation Committees and Competent Authorities. It is only in particular cases of overt vitiation of consent that approval for near-relative donations is withheld.<sup>7</sup>

- ii) Altruistic Donation: The other category of living organ donation permitted under the THO includes those donations which are prompted by love, affection and altruism.<sup>8</sup> Accordingly, all cases of donation between individuals who do not fall within the THO's definition of near-relatives are subject to the scrutiny of the authorizing authorities. They must ensure that the prospective act of donation is prompted by feelings of love, affection and altruism between the donor and the recipient of the organ, before providing their approval. Any evidence of an underlying commercial arrangement for the proposed transplantation can result in a rejection of application. This mechanism appears to balance the need to prohibit commercial dealings in human organs and a rising demand for organs by needy recipients. However, it must be noted that an illegal market for human organs for transplantation has arisen right within its auspices; and there have been recorded instances of commercial arrangements of transplantation being accorded with the approval of authorizing committees.<sup>9</sup> Accounts of the illegal organ market in a Tamil village that is now popularly known as Kidneyvakkam reveal that exploitative kidney sales take place 'with the seal of approval from the Authorization Committee... The law, which was meant to prohibit commercial dealings in human organs, now provides protection for those very commercial dealings'.<sup>10</sup>

Thus, the THO creates a distinction between near-relative and affectionate donations. However, considering the THO's stated goal of prohibiting commercial dealings in organs, this distinction appears to be merely procedural; and does not indicate a higher policy-level tolerance towards the operation of commercial pressures in near-relative donation. The lower levels of scrutiny afforded to near-relative donation seems to be a procedural reflection of the presumptions that - (i) commercial considerations do not operate as freely between members of a family as they do between persons who are not closely related to each other, and (ii) persons are more likely to donate their organs to their relatives for filial reasons. To prevent an abuse of such presumptions, the THO has attempted to include adequate procedural safeguards to prohibit near-relative donations prompted by

<sup>7</sup> Observation of Proceedings of Competent Committee for Hospital X in Bangalore, Karnataka (Apr. 25<sup>th</sup>, 2015).

<sup>8</sup> S. CARNEY, *THE RED MARKET* (2011).

<sup>9</sup> LAWRENCE COHEN, *WHERE IT HURTS: INDIAN MATERIAL FOR AN ETHICS OF ORGAN TRANSPLANTATION* (1999).

<sup>10</sup> M.K. Mani, *The Nephrotoxicity of the Tsunami*, 20(3), *NAT'L MED. J. INDIA*, (May/June, 2007), [http://www.nmji.in/archives/Volume\\_20\\_3\\_May\\_June/Letters/Letter\\_from\\_Chennai.htm](http://www.nmji.in/archives/Volume_20_3_May_June/Letters/Letter_from_Chennai.htm).

commercial considerations. Therefore, it is clear that near-relative donations and altruistic donations only differ in terms of the legal procedure to be followed to ensure the absence of underlying commercial pressures.

Based on the description above, the regulatory framework of the THO appears to be codifying all potential organ donations into the following two categories:

- **Illegal Organ Donation:** This includes all kinds of donations which involve visible commercial transactions, as criminalized by the THO i.e., ‘visibly commercial transactions’.
- **Legal Organ Donation:** This includes both near-relative and altruistic donations. For ease of reference, this paper collectively refers to these as ‘purely affectionate donations’. Such affectionate donations could be a consequence of affectionate, altruistic, as well as filial considerations.

In this regard, it must be noted that the THO divides all transplantations into fixed, watertight and unambiguous categories, leaving no scope for cases to belong to both categories at the same time. Theoretically, there may exist some cases which ostensibly belong to neither category. These instances, which include cases of criminal transmission of infection through transplantation, are extremely rare and outside of the purview of this paper. Set out below is a diagrammatic representation of the legal categorization of all potential organ donations.

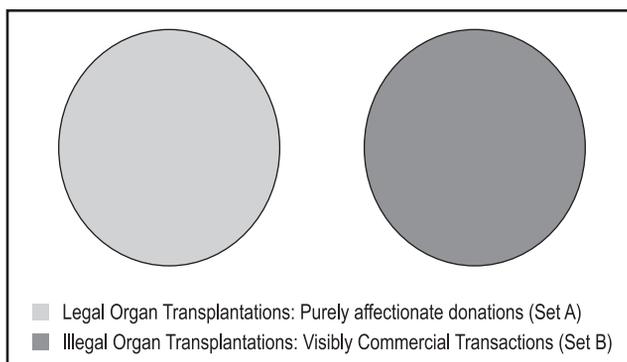


Fig. 1 – Codification of organ transplantations into mutually exclusive legal categories of legal and illegal. Set A includes all purely affectionate donations as legal organ transplantations, and Set B includes all visibly commercial transactions as legal organ transplantations.

### III. WOMEN AS NATURAL DONORS WITHIN FAMILIES

Empirical accounts from within and outside India indicate that women are more likely to be living donors than men.<sup>11</sup> Data released recently by the Directorate of Medical Research, Maharashtra indicates that sixty three percent of all living organs transplanted in Maharashtra in the year 2016 were sourced from female donors.<sup>12</sup> Information obtained from leading hospitals that carry out organ transplantation in India reveals similar statistics.<sup>13</sup> Similarly, anthropological studies show that the commercial organ market is also dominated by organs sourced from female bodies; and accounts from Kidneyvakkam indicate that almost all women in the village have sold their kidneys on the black-market.<sup>14</sup>

In the absence of a demonstrated medical preference for female organs for transplantation, we may seek to explain this gendered trend using sociological insights. Dominant accounts attribute this trend to natural feminine altruism, filial affection, and spirit of self-sacrifice.<sup>15</sup> Nevertheless, a closer look at the reasons which persuade women to donate their organs indicates a strong influence of subtle, but compelling, socio-economic pressures operating within familial settings. Simultaneously, the stories of women who sell their organs for money show that they were acting out of deep altruism and care while sacrificing their organs for the welfare of their families.

Set out below is a description of the conscious reasons which persuade women to give away their organs. These reasons indicate that the legally differentiated categories of purely affectionate donations and visibly commercial transactions are not, in fact, mutually exclusive; and that conscious considerations for organ donation overlap among female donors belonging to both categories.

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<sup>11</sup> See e.g., Sarah Rasmussen et al., Gender Bias and Organ Transplantation in Nepal, 36(2) HIMALAYA (Dec., 2016); Megan Crowley-Matoka and Sherine F. Hamdy, Gendering the Gift of Life: Family Politics and Kidney Donation in Egypt and Mexico, 35(1), MED. ANTHROPOL., 31 (June, 2015); See e.g., Reeta Dar and Sunil Kumar Dar, Legal Framework, Issues and Challenges of Living Organ Donation in India, 4(8) IOSR J. DENTAL & MED. SCI. 59 (Aug., 2015).

<sup>12</sup> Sumitra Debroy, More Women Donated to Aid Live Organ Transplantation in Maharashtra, TIMES OF INDIA, Mar. 8, 2017.

<sup>13</sup> See Reeta Dar and Sunil Kumar Dar, Legal Framework, Issues and Challenges of Living Organ Donation in India, 4(8) IOSR J. DENTAL AND MED. SCIENCES 59 (Aug. 2015); See also Sumitra Debroy, More Women Donated to Aid Live Organ Transplantation in Maharashtra, TIMES OF INDIA, Mar. 8, 2017.

<sup>14</sup> S. CARNEY, *supra* note 8.

<sup>15</sup> INEKE KLINGE, SEX AND GENDER IN BIOMEDICINE: THEORIES METHODOLOGIES RESULTS, 49 (2010).

## A. Commercial Considerations in Near-Relative/Affectionate Organ Donation

Both theorists and practitioners warn against the airbrushing of female donors as naturally altruistic, loyal, and sacrificial.<sup>16</sup> They reject tropes such as that of the “self-sacrificing mother”,<sup>17</sup> and describe such stereotypes as internalized social constructs.<sup>18</sup> On one hand, feminine altruism and affection may be consequences of gendered patterns moral development wherein women are systematically trained to occupy caring and sacrificial roles within social spheres. At the same time, individual narratives highlight the conspicuous roles played by less internalized factors in persuading women into donating their organs to family members and friends.<sup>19</sup> Broadly, women are more likely to donate their organs on account of factors such as socio-cultural norms, sociological positioning, socio-economic insecurities, commodification of female body organs, and undervaluation of women’s domestic work. Each of these factors persuades women to exchange their organs for various socio-economic and emotional reimbursements.

When questions of donation arise within familial contexts, it is usually presumed that one of the women of the family will volunteer to donate her organs to her relatives and friends.<sup>20</sup> This social presumption is linked to perceptions of women’s roles within families, and to the values that their organs bear to their families’ economic sensibilities. As primary care-givers and nurturers, women are burdened with an expectation to make their organs available to family members in times of need. Thus, for several women, the decision to donate a kidney is not a conscious decision, but rather one imposed upon them before they have a chance to consider their options.<sup>21</sup> In an interview conducted a few years ago, Mrs. Sadhna Pandya (name changed), who donated her kidney to her son, stated that her decision to donate had only emerged after a series of relatives telephoned her to ask “*tum toh apni kidney de hi rahi ho na? (You are giving your kidney, aren’t you?)*”. It was only then that the prospect of donating her kidney occurred to her at all. Her family had then used religious notions of karma and motherhood to influence her decision to donate. Her kidney was described as a religious debt that she owed the disabled baby who had emerged from her womb, without which she would never be free from a cycle of pain. While she does not regret her decision to donate her kidney to her son, she often wonders why her father-

<sup>16</sup> See e.g., INEKE KLINGE, *SEX AND GENDER IN BIOMEDICINE: THEORIES METHODOLOGIES RESULTS*, 49 (2010); Sarah Rasmussen et al., *Gender Bias and Organ Transplantation in Nepal*, 36(2) *HIMALAYA* (Dec. 2016); Sunil S. Shroff, *supra* note 6.

<sup>17</sup> Megan Crowley-Matoka and Sherine F. Hamdy, *Gendering the Gift of Life: Family Politics and Kidney Donation in Egypt and Mexico*, 35(1) *MED. ANTHROPOLOGY* 31 (Jun. 2015).

<sup>18</sup> INEKE KLINGE, *supra* note 15.

<sup>19</sup> LAWRENCE COHEN, *supra* note 9. This position also reflects the understanding obtained by the author from interviews conducted with Mrs. S. Pandya, aged 60 years, Kolkata (Jan. 29, 2015).

<sup>20</sup> Interview with Mrs. S. Pandya, aged 60 years, Kolkata (Jan. 29, 2015); Mrs. A. Kejriwal, aged 35 years, Kolkata (Jan. 29, 2015).

<sup>21</sup> INEKE KLINGE, *supra* note 15.

in-law (who, much to her indignation, still claims to love the boy a lot more than she does) didn't offer to donate his. The question of her husband donating his kidney appears never to have risen. Similarly, her friend, Mrs. Aparajita Kejriwal (name changed) who donated her kidney to her husband only two years into her marriage maintains that she did not volunteer to make this choice, and says that "*mere saas-sasur ne mujhe suli pe chadha diya* (My in-laws put me on the noose)".<sup>22</sup>

Like Mrs. Pandya's husband and father in law, male relatives of patients rarely volunteer to donate their organs in times of need. Women then respond to this male reticence with the rhetoric of "If not me, then who?" - a plea repeated by several aged mothers and young wives before authorizing committees in order to convince them of their own suitability as donors.<sup>23</sup> One simplistic explanation for the high number of female organ donors is linked to the prioritization of men's health in society and policy. Since more men are likely to be able to afford and undergo transplantation surgeries, there are likely to be more wives who donate organs to their husbands than husbands who donate organs to their wives.<sup>24</sup> Similarly, some men are excused from donating their organs because of their past histories of alcoholism or tobacco abuse; both of these are habits which women don't pick up on account of their different socialization.<sup>25</sup> However, these accounts only provide a limited explanation for gendered trends in organ donation, and do not discount subtler socio-economic pressures that make it more likely for women to donate their organs.

The devaluation of women's domestic work within family economics is yet another reason for women's organs being considered more donatable than those of men.<sup>26</sup> The social dismissal of the physical exertion involved in the performance of domestic work results in women's bodies being perceived as disposable. Therefore, in times of need, it is rational for the family economy to transfer organs from the bodies of female members to the bodies of male members.<sup>27</sup> However, these decisions are rarely made by donor women alone, but are hugely influenced by dominant voices in their families.<sup>28</sup>

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<sup>22</sup> Interview with Mrs. A. Kejriwal, aged 35 years, Kolkata (Jan. 29, 2015).

<sup>23</sup> Interview with Mrs. S. Pandya, aged 60 years, Kolkata (Jan. 29, 2015); LAWRENCE COHEN, *supra* note 9: The author also notes that the rhetoric of "if not me, then who" is used by women to convince themselves of the need to sell their organs in the black market.

<sup>24</sup> Sarah Rasmussen et al., Gender Bias and Organ Transplantation in Nepal, 36(2) HIMALAYA (Dec., 2016).

<sup>25</sup> See generally, Sharon C. Wilsnack, The Genacis Project, (3 Supp. 1) SUBSTANCE ABUSE REHAB (2012).

<sup>26</sup> On the commodification of the female body and the economics surrounding it, see generally DONNA DICKENSON, PROPERTY IN THE BODY: FEMINIST PERSPECTIVES (2007).

<sup>27</sup> *Id.*

<sup>28</sup> INEKE KLINGE, *supra* note 15, at 46.

The need to protect themselves from widowhood and its implications of poverty is another common reason for women to consider kidney donation.<sup>29</sup> Similarly, older women often donate their organs in order to legitimize their claims to being maintained by younger, more-productive generations.<sup>30</sup> Even in situations where economic pressures are not visibly linked to a woman's claim to upkeep, the fear of emotional desertion and abandonment may push women into sacrificing parts of their body to other members of their familial and social circles.<sup>31</sup>

When women act upon socio-economic pressures to donate parts of their body, their organs begin to take on the qualities of tradable/exchangeable objects which may be exchanged or bartered for economic efficiency, financial security, social acceptability and cultural conformity. This trade-off, which is often invisible as it coincides with acceptable social trends of filial duty and affection, takes on undertones of a commercial exchange. This demonstrates a commercialized and collateralized treatment of women's organs.<sup>32</sup> It must be noted that the prohibition of such invisible commercialization is an important aspect of the THO's stated policy goals. Therefore, the proliferation of commercial considerations prompting near-relative and altruistic transplantations is an instance of the THO's failure to achieve its stated purposes.

## **B. Altruistic Concerns in Commercial Organ Transactions**

The illegal market for organs is comprised of a disproportionately large number of women who sell their organs to tide their families over in times of poverty and need. Women's decisions to sell their organs for the welfare of their families are usually influenced by both commercial and altruistic factors operating simultaneously.

In situations when the proceeds of an organ sale are necessary for a family's survival, women within the family feel the pressure to step up. In addition to the general burden of poverty, women feel further pressured to sell their organs by similar factors such as socio-cultural norms, commodification of the female body, undervaluation of women's domestic work, and the socio-economic insecurities that impact female donors in intra-family donations.<sup>33</sup> In Kidneyvakkam, there is an implicit understanding that men should not sell their kidneys, stemming from the belief that the male profession of fishing requires both kidneys to be intact within the body. It is erroneously presumed that the traditional female lifestyle

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<sup>29</sup> Sarah Rasmussen, *supra* note 24.

<sup>30</sup> Sarah Rasmussen, *supra* note 24.

<sup>31</sup> Interview with Dr. A Chatterjee, aged 60 years, Kolkata (Feb. 2, 2017).

<sup>32</sup> Gunther Teubner, *supra* note 4.

<sup>33</sup> See LAWRENCE COHEN, *supra* note 9: here the author notes that the rhetoric of "if not me, then who" is used by women who sell their organs as well as those who donate their organs highlight their suitability as organ donors.

(which involves selling fish in the market, cooking, managing the household, preparing fishing nets and making boats) does not require similar levels of exertion, thereby leaving women's kidneys free to be sold.<sup>34</sup> It must be noted here that women rarely sell their organs purely for personal economic gain. The proceeds of a woman's sale of her organs are usually used to feed, clothe, and benefit her family, with very little left over for herself.<sup>35</sup> Such organ sales, therefore, are acts of heightened altruism and affection in times of abject poverty, and cannot be dismissed as merely commercial transactions.

### C. Female Psychic Systems Underlying Organ Donation/Sale

Through an array of narratives, I have highlighted conditions which indicate that women's decisions to donate their organs to members of their families do not differ, in substance, from their decisions to sell their organs for the welfare of their families. Most instances of affectionate donation, as well as of commercial sale, of organs are prompted by economic and altruistic factors acting simultaneously. The two experiences then only appear to differ in their physical manifestations of surgical method and regulatory process. It may be noted that the legalization of 'organ swapping' in 2011 has made human organs fungible and restrictively tradable,<sup>36</sup> thereby reducing the sociological and biological significance of organs flowing from the bodies of affectionate donors to the subjects of their affection in a legal donation.

Set out below is a diagrammatic description of the influences which persuade women to give away their organs, demonstrating an overlap between decisions prompted by commercial considerations, and those prompted by affectionate, altruistic, or filial considerations.

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<sup>34</sup> S. CARNEY, *supra* note 8.

<sup>35</sup> See LAWRENCE COHEN, *supra* note 9; See also S. CARNEY, *supra* note 8.

<sup>36</sup> In 2011, the Transplantation of Human Organs Act was amended to allow for 'organ swap' donations. This involved two living donors whose organs were biologically incompatible with those of their intended recipients, to donate their organs to each other's intended recipients, if each donor was compatible with the other donor's intended recipient. Consequently, organs of donors can now be inserted with the bodies of unrelated recipients and vice-versa, indicating that the flow of organs from a donor to the subject of her affection is no longer a principled priority of the law.

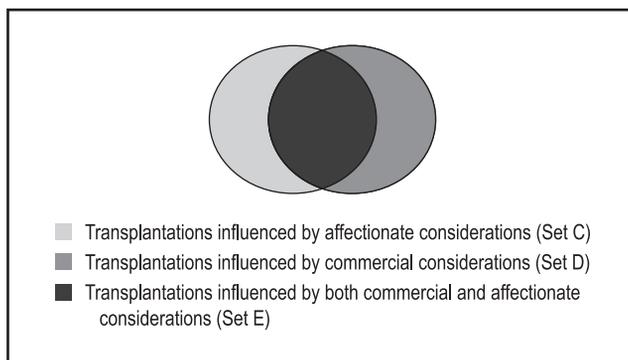


Fig. 2. Overlap between transplantsations influenced by commercial considerations and transplantsations influenced by affectionate considerations; Set C includes those transplantsations that are influenced by affectionate considerations alone, and Set D includes those transplantsations that are influenced by commercial considerations alone. Set E is the intersection set of Sets C and D.

The overlapping Set E depicts those transplantsations which are influenced by both commercial and affectionate considerations. The experiences of women who give away their organs, as described in this paper, suggest that a large proportion of all living organ donations fall within Set E. While each woman's specific experiences are mediated by particularized socio-economic factors, they parallel each other's underlying realities of bodily perception, socio-economic pressure, patterns of ownership, and bonds of affection within their families. The gender-specific experiences described herein constitute the psychic systems underlying organ donation/sale.<sup>37</sup> The next part of this paper will consider the extent of compatibility between legal and psychic systems, insofar as they influence organ donation.

#### IV. INCOMPATIBILITY BETWEEN LEGAL AND PSYCHIC SYSTEMS AFFECTING ORGAN DONATION

The THO prohibits commercial dealings in human organs, and permits only those donations which are prompted by feelings of altruism or affection; thereby codifying all potential transplantsations as legal/illegal. Since the THO addresses the feelings and considerations which persuade people to donate their organs, it is essential for it to be compatible with psychic systems underlying their decisions. Since female donors form a predominant part of all living organ donations, this

<sup>37</sup> Systems theoretical approaches conceptualise systems of consciousness within persons as psychic systems which influence the way they exercise their agency to make decisions. *See* Bettina Lange, *Understanding Regulatory Law: Empirical v. Systems-Theoretical Approaches?*, 18 OXFORD J. LEGAL STUD. 449 (1998).

paper considers the extent to which the THO is compatible with female psychic systems.<sup>38</sup>

The experiences of women set out in Section 3 indicate that commercial transactions and affectionate donations do not form mutually exclusive categories, but instead, overlap with each other. On the other hand, by treating commercial sales and affectionate donations as completely distinct categories (as depicted in Fig. 1 herein), the THO turns a blind eye to commercial considerations which subtly persuade women to donate their organs. The THO presumes all near-relative donations to be purely affectionate in nature, unless this presumption is reversed by strong evidence of an express commercial arrangement underlying the donation.<sup>39</sup> Consequently, the law only prohibits overt commercial arrangements of organ transplantations; and is tolerant and permissive of the subtler pressures described in Section 3. Set out below is a diagrammatic depiction of decisions which are influenced by subtle economic pressures within the larger categorization depicted in Fig. 2 above.

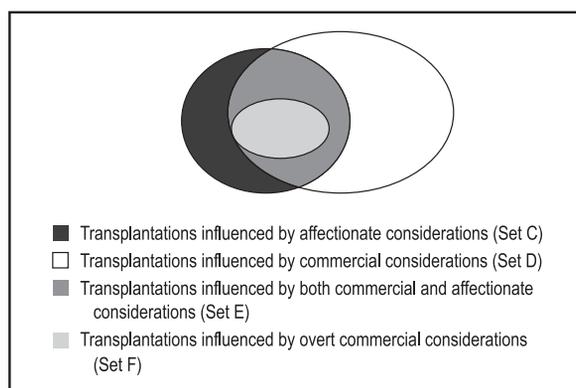


Fig. 3. Transplantations influenced on the basis of overt commercial considerations as a subset of all transactions that are influenced by both commercial and affectionate considerations. Set F is a subset of Set E.

The scheme of the THO prohibits transplantations that fall within Sets D and F (i.e. it prohibits cases falling within  $D \cup F$ ) in Fig. 3 but permits those which fall within Set E but not in Set F (i.e. it permits transactions falling within  $E \cap F$ ). According to the scheme depicted in Fig. 1, the composite Set  $(D \cup F)$  now coincides with Set A, and the intersection Set  $(E \cap F)$  now coincides with Set B. However, while Sets A and B are disjoint sets, Set F is a subset of Set E.

<sup>38</sup> A more general analysis of the relationship between the Transplantation of Human Organs Act and all psychic systems of all organ donors is likely to yield similar, but perhaps, slightly diluted results.

<sup>39</sup> Gunther Teubner, *supra* note 4.

Therefore, we see that the psychic scheme depicted in Fig. 3 cannot be correctly mapped onto the scheme depicted in Fig. 1. The THO's selective prohibition of only visibly commercial transplantations is similarly incompatible with the sensibilities of psychic systems underlying such decisions. Therefore, the THO and psychic systems underlying organ transplantation appear to be talking past each other.

### **A. Incongruity between Law and Society, and the Over-legalization of Society**

Teubner uses systems theoretical approaches to explain that regulatory failure occurs in situations of incompatibility between legal, political and social systems i.e., when the systems are not in a state of perfect structural coupling.<sup>40</sup> In such states, the law is unable to communicate with social systems, becoming an external irritant instead. This could result in a regulatory trilemma involving one of the following three situations:

- i) Incongruence of law, politics and society: When the law is incompatible with social interactions, it becomes irrelevant to society, and 'speaks past it'. In such situations, the law retains only symbolic value, and is unable to produce its desired regulatory effects.
- ii) Over-legalization of society: Incompatibility between legal and social systems can result in situations where the law destroys the structure of social systems entirely, and imposes its own logic on society. This is generally undesirable as it may result in destruction of the social fabric.
- iii) Over-socialization of the law: Incompatibility between legal and social systems can also result in situations where the law succumbs to social influences, and transforms itself to match social structures. This could result in the law being reduced to an instrument of social policy.

In each of these three situations, the law fails to achieve its stated regulatory goals.

In the first instance, the incompatibility between legal and psychic systems appears to closely resemble a situation of incongruence between law, politics, and society, as described in (i) above. By adopting a vocabulary that does not accurately reflect sensibilities of the psychic system, the THO appears to be talking past it. However, a social analysis of the impact of the THO reveals that psychic and other social systems might be engaged in a struggle against its over-legalizing influence as described in (ii) above. The THO's selective prohibition of organ donations (as depicted in Fig. 3) modifies social perceptions of organ

<sup>40</sup> See generally, Gunther Teubner, *supra* note 4; See generally John Paterson, *Reflecting on Reflexive Law*, in LUHMANN ON POLITICS AND LAW: CRITICAL APPRAISALS AND APPLICATIONS (M. King and C. Thornhill eds., 2006).

transplantation by attaching shame to commercial organ sales, while celebrating sales that are a result of subtler commercial pressures. As a result, cases depicted in Set E and Set F in Fig. 3 begin to be perceived as entirely dissimilar from each other, even though Set F is a subset of Set E. It is only upon very close scrutiny that the gender-specific similarities between Set F and the rest of Set E become visible to an observer. Consequently, the THO creates a false social distinction between the experiences of female donors based on the visibility of the socio-economic pressures that they are subject to. Lawrence Cohen notes that acceptability of kidney sales has risen considerably in previous years, especially in more impoverished communities.<sup>41</sup> However, this rising acceptability does not, in any manner, liken the experiences of women who donate organs and those who sell them.

In general, by permitting donations which are influenced by subtle, but compelling, socio-economic pressures, the THO allows the commodification of human organs; thereby failing to achieve its stated objectives.<sup>42</sup>

## **V. CONCLUSION - RETHINKING THE INDIAN REGULATORY APPROACH TOWARDS LIVING ORGAN DONATION**

In this paper, I have considered gender-specific trends in living organ transplantation to highlight a significant incompatibility between legal and psychic social systems. This incompatibility can be traced to the law's creation of an artificial dichotomy between organ donations and organ sales. By presuming that all organ donations are purely affectionate in nature, the law denies the influence of commercial factors which pressurize women to donate their organs to their relatives. At the same time, the law dismisses all organ sales as economic transactions, thereby denying the altruistic and affectionate emotions underlying such sales. As a result, the law fails to achieve its stated policy goals of preventing the commodification of human organs. Simultaneously, the law creates an artificial distinction between the experiences of women across class distinctions, who are often persuaded to give away their organs due to similar reasons. Therefore, a study of the incongruity between the THO and its regulated systems reveals the causes of the THO's failure to achieve its stated policy objectives. In addition to providing clarity on the causes of such regulatory failure, it also throws light upon the way in which such failure may be corrected.

Teubner prescribes reflexive law as a solution to avoid regulatory failure. He describes reflexive law as a self-restrained, procedural law which acts as a social

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<sup>41</sup> LAWRENCE COHEN, *supra* note 9.

<sup>42</sup> Sunil S. Shroff, *supra* note 6: The author has argued that the Transplantation of Human Organs Act has failed to curb the commercialization of human organs.

coordinator.<sup>43</sup> Unlike in substantive law, reflexive law does not intervene in the arrangements of social systems to produce specific substantive outcomes. Instead, it plays a supportive role in the maintenance and adaptation of natural social orders.<sup>44</sup> In this regard, systems theory provides a conceptual framework on the basis of which specific regulatory solutions may be explored. Braithwaite also thinks that it is imperative for the law to work in congruence with the natural grain of society, and suggests responsive regulation as a solution to situations of incongruence. According to this approach, law should be responsive to the needs of the society that it seeks to govern. A responsive approach to regulation differs from a reflexive approach by being more flexible in form, and generally allowing the law to provide customized solutions to regulatory problems.<sup>45</sup>

The incompatibility of systems described in this paper could be addressed by exploring both reflexive and responsive approaches. Some of the approaches which could thus be explored include:

#### **A. Decreased tolerance towards commercial influences operating within affectionate contexts:**

To satisfactorily prohibit the commercialization of human organs, the law must become more sensitive to subtle pressures operating within affectionate contexts, and prohibit all affectionate donations which are the necessary outcome of such pressures. Specific regulatory reform in this regard could include reversal of the presumption of free consent in near-relative donations, and an intensification of the evidentiary requirements for obtaining approval from authorizing committees. However, such an approach would lead to a drastic decrease in organ availability, which would contravene THO's stated goal of ensuring an adequate supply of human organs for therapeutic purposes. At the same time, it would prohibit a significant category of living organ donations from taking place, producing undesirable consequences. Therefore, it is essential for the law to only prohibit those transplantations where commercial considerations do not merely influence, but also act as decisive factors in prompting decisions to donate. Further, the law's broader focus must lie in the reduction of commercial pressures acting within near-relative and affectionate contexts, to prevent them from impacting decisions to donate.

I have previously highlighted the highly entrenched and internalized nature of the commercial pressures which operate within affectionate contexts. Since the

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<sup>43</sup> See generally, Gunther Teubner, *supra* note 4; See generally John Paterson, *Reflecting on Reflexive Law*, in LUHMANN ON POLITICS AND LAW: CRITICAL APPRAISALS AND APPLICATIONS (M. King and C. Thornhill eds., 2006).

<sup>44</sup> John Paterson, *Reflecting on Reflexive Law*, in LUHMANN ON POLITICS AND LAW: CRITICAL APPRAISALS AND APPLICATIONS (M. King and C. Thornhill eds., 2006).

<sup>45</sup> John Braithwaite, *Responsive Regulation and Developing Economies*, 34(5) *WORLD DEV.* 884 (2006).

THO only regulates organ transplantation at a specific, advanced stage of regulatory scrutiny, it is inadequately equipped to address such socially entrenched and internalized considerations. Such internalized pressures, therefore, should be addressed by legal frameworks which regulate gender and family relationships, and impact perceptions of ownership of the female body. For this, the wider legal frameworks of family law, constitutional law, criminal law, tax law, and health-care law may be modified to secure women's positions within their families, and within the economy. Tax and healthcare policy frameworks may be additionally reoriented to decommmodify the female body in other medical contexts (such as that of reproduction). The legal encouragement of the activities of civil society organizations which work towards bringing out similar outcomes, may also help ameliorate some of the commercial considerations influencing organ transplantations.

### **B. Decriminalization of all commercial transactions in organs and regulation of organ sale**

Currently, the law only prohibits certain categories of commercially prompted living organ donation. Prohibited organ donations are typically those which involve visible monetary transactions, and are endemic to specific classes of donors. At the same time, the law is blind to commercial transactions underlying near-relative and altruistic transactions. In the interest of principled integrity, and to prevent a class-based distinction between organ donors, policy-makers should consider the decriminalization of visibly commercial transactions in organs. This would involve a reinterpretation and clarification of the phrase commercial dealings, as it appears in the preamble to the THO, and in its definition as a criminal offence. *Prima facie*, this approach appears to contradict the goals of social and public policy. Therefore, such a proposal should be subject to intense legislative consideration while rethinking the entire regulatory approach towards living organ transplantation.

These approaches are only illustrative and are not concrete solutions to the regulatory problem at hand. However, they indicate a need to rethink the law's approach to living organ donation by suggesting possible approaches.