UNDERSTANDING THE MEDICO-LEGAL ASPECTS OF ORGAN DONATION AND TRANSPLANTATION IN NIGERIA

By

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ABSTRACT

It is the position of this paper that Organ donation and transplantation in Nigeria has legal implications which are as yet not fully considered nor properly understood. This Paper begins by examining generally the Medical aspects of organ donation and transplantation, highlighting the history, procedure and its necessity as a form of medical treatment. The paper then appraises the abiding legal regime, highlighting certain lapses in the law, and postulating that the law aught to be scrutinized from time to time, so as to consistently preserve the integrity of the process, prevent incidences of abuse and commercialization, and to minimize criminal activities that are bound to become an attraction. The Paper concludes by identifying the need for Nigeria as a country, to dedicate more attention to the law in this area, particularly leveraging on similar laws in other jurisdictions, to better fine-tune the process and achieve better medico-legal results.

1.1 Introduction

Organ donation and transplanting has come to be recognized as one of the most miraculous medical advances of modern times. Truly it is one of the miracles of modern medicine, saving the lives of many patients and improving the quality of life for many more[1]. Given the ever-increasing gap between the number of organs needed and the supply, clinicians have an ethical obligation to help ensure that the desires of people who want to donate organs are respected[2]. Organ donation has become rife, given the increasing demand for vital organs which unfortunately is consistently met with inadequacy in supply, both from living donors and cadaveric sources. The transplantation process is one that involves a wide-range of stakeholders, involving but not limited to the following - the donor, the donee, medical personnel, family/relatives, the society, government, ethic and religion. While the donee is the person critically in need of a replaceable organ, the donor is the one willing and generous enough to donate such an organ, and thus meet the need of the donee. There is also the third group made up of

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[1] Truog Robert.D., "Consent for Organ donation: Balancing conflicting ethical obligations", (2008) Vol.358, *New England Journal of Medicine*, pp.1209-1211.

[2] *Ibid.*

family members or relatives, whose role though limited, may become prominent where the consent of the donee becomes unavailable for different reasons[3].

These three stakeholders are largely concerned with one part of the arrangement, which is the *donation process*. There is also the society that is affected one way or the other by the effect of such transactions as to whether it engenders social harmony or results in more dislocations. This then leads to the other intermediaries that manage the other end of the procedure between the donor and the donee i.e. *the transplantation process*. Crucial to the success of organ donation is the attitude of healthcare workers[4]. These therefore include the hospital medical personnel and professionals trained in transplantation and transplant surgery, and in extension the post-transplantation process of managing the physiological and psychological end of the bargain. Lastly is the states that comes in as an overriding authority to regulate the activities of all of the above, to ensure conformity with relevant law, so as to fulfill the overall medical and legal aspiration of the nation. However, due to the heavily conservative nature of the Nigerian society and the huge deficit in medical technology, organ transplantation is rare and not much of a common practice as it is in most advanced societies. According to the Acting Chief Medical Director of the Lagos University Teaching Hospital (LUTH), Prof. Christopher Bode, most patients often rely on family members to come to their aid or travel to countries, such as Malaysia and India in search of donors, which he says is a serious concern to medical experts[5]. The Paediatric surgeon said such act would save lives and help restore hope to the hopeless[6]. The above notwithstanding, the practice is gradually gaining ground in the country and hence the need for a better understanding of the legal aspects and how it can be made to continuously evolve.

Admittedly, organ donation and transplantation given its very sensitive and delicate nature, throws up several fundamental legal questions, which usually includes the following – Who can donate organs and what types of organs and tissues are legally allowed for donation? What does the law say about both living and cadaveric donation and the regulation of the process? How does the law view consent in the donation process, particularly informed consent and the consent of those who ordinarily lack capacity? What is the role of monetary payment/compensation in the donation process? What are the currently available sanctions and how far-reaching are they? These and many more form the concerns of the Nigerian law in the organ donation/transplantation

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[3] For instance, such incapacitated donee, whether by reason of insanity, being a minor or where is in an unconscious state, the request for a replaceable organ will have to be made by proxy, or where on the other hand the individual is the donor and it's a cadaveric donation, the consent of the family/relatives may be the only needed consent. Controversies however abound on how to simply just assume consent of organ donation for dead people. What has been done in most countries to resolve this quagmire is to provide for legislations allowing for implied consent which allows people to opt out of organ donation rather than opt in and also allowing family the option of refusals.

[4] See Esezobor Christopher.I, Disu Elizabeth, and Oseni S.B.A., "Attitude to Organ Donation amongst Healthcare workers in Nigeria", (2012), Vol.26 (6), *Journal of Clinical and Translational Research*, available online at https://www.ncbi.nlm.nih.gov/pubmed/23072566, accessed 25/11/2016.

[5] See "Organ Donation are rare in Nigeria says LUTH Chief", *The Nation Newspaper* (Lagos: May 19, 2015), available online at http://thenationonlineng.net/organ-donation-rare-in-nigeria-says-luth-chief, accessed 25/11/2016.

[6] *Ibid.*

process. To this end, even though matter of organ donation and transplantation appear largely medical in nature, however given that it provides a platform for social interaction and exchange of valuable body parts, just like every other form of engagement and transactions in the society, it becomes the business of the states to ensure a proper regulation through the instrumentality of the law.

1.2 Organ donation and transplantation: A brief historical background

From contemporary history, surgical transplants from living and deceased donors became an established medical procedure after the Second World War, while kidney transplants documented since the 1950s and heart transplants performed since the late 1960s, have given a new lease of life to thousands[7], with further technological advancements witnessing increased success rate[8]. On December 23, 1954, two twin brother Richard and Ronald Herrick both 23years old became an integral part of surgical history, when Ronald agreed to donate a kidney to his brother and the transplant procedure which took five and a half hours later kept Richard alive for eight more years and ultimately led to thousands of kidney transplants and eventual transplants of other organs[9]. Dr.Joseph Murray, the lead surgeon in the transplant at Peter Bent Brigham Hospital in Boston, United States later won the Nobel Prize in 1990 after he discovered that identical twins were ideal candidates for surgery because the transplant ultimately lacked immune problems[10]. This medical feat by Dr.Murray was to later open the door for many other medical breakthroughs in this area, including the following. In 1963, Dr. James Hardy of the University of Mississippi Medical Center in Jackson, performed the first successful lung transplant, which was followed by the successful transplantation of pancreas/kidney by Drs. Richard Lillehei and William Kelly of the University of Minnesota in Minneapolis in 1966 and the first successful liver and heart transplant by Dr. Thomas Starzl of the University of Colorado in Denver and Dr. Christian Barnard of Groote Schuur Hospital in Cape Town, South Africa respectively in 1967. The first successful heart transplant in the United States by Dr. Norman Shumway of Stanford University Hospital in 1968 while in the later part of the century, the first successful hand transplant was carried out by the duo of Dr. Earl Owen (An Australian) and Dr. Jean-Michel Dubernard (A French) in a 13-hour long operation in Lyon, France in 1998. The new milliniuem also witnessed a couple of such transplant miracles, with the first successful partial face transplant by Dr. Bernard Devauchelle and Dr. Jean-Michel Dubernard in Amiens, France in 2005, and the ground-breaking feat of the world's first full face transplant taking place in Spain in 2010.

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[7] *Ibid*, pg. 10.

[8] Arthurs Sean, "No More Circumventing the Dead: The Least-Cost Model Congress Should Adopt to Address the Abject Failure of Our National Organ Donation Regime", (2005), Vol.73 *University of Cincinnati Law Review*, pp.1101-1111.

[9] See Shelley Jeana Lyn , "History of Organ Transplantation", Des Moines University, available online at https://www.dmu.edu/wp-content/uploads/Shelley-History-of-Organ-Transplantation.pdf, accessed 25/11/2016.

[10] *Ibid.*

1.3 Medical Aspects of Organ donation and transplantation

Organ transplantation is the removal of tissues from the human body, from a living or dead person, for the purpose of transplantation as a treatment[11]. It is also referred to as the gifting of biological tissue or an organ of the human body, from a living or dead person to a living recipient in need of a transplantation. Transplantation is the replacement of diseased and damaged organs as a form of established treatment for end stage organ failure .According to Yosuke Shimazono of the Oxford University, organ transplantation is an effective therapy for end-stage organ failure and is widely practiced around the world[12]. The access of patients to organ transplantation, however varies according to their national situations, and is partly determined by the cost of health care, the level of technical capacity and, most importantly, the availability of organs[13]. The surgical procedure involves the removal of an organ e.g. a kidney or liver from a living donor referred to as 'living donation', or in some other instances the harvesting of such organ from a corpse referred to as 'cadaveric donation', and the transplantation of such into the body of the recipient[14]. The issue of organ transplantation is reported as one of the most lauded and respected areas of medical science and it commands universal approval for so dramatically saving lives and giving near-death patients a second chance at living[15].

Majorly, there are three biological hurdles to be overcome in successful transplantation therapy and these are

i. Neutralizing the 'tissue immunity' reaction,

ii. Ensuring that the donated organ is healthy, and

iii. Preserving the viability of those organs in the period between their becoming available and their reception[16].

A tissue immunity reaction results from the recognition by the body of anti-genetically foreign material which it will then reject with a degree of determination which depends, to a large extent, on how different is the donated tissue from that of the recipient[17]. At the time of definitive brain death, the body is medically maintained to assure viability of transplanted organs until organs can be explanted in an operating room[18]. Hence, viability

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[11] Budiani-Saberi.D.A.,and Delmonico.F.L., "Ethics Corner: Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities", (2008), Vol.8 (5), *American Journal of Transplantation*, pp.925-929.

[12] Shimazono.Y., "The State of the International Organ Trade: A Provisional picture based on integration of available information", (2007), 85(12), *Bulletin of the World Health Organisation* , pp. 955–962, available online at www.who.int/bulletin/volumes/85/12/06-039370.pdf , accessed 31/05/2016.

[13] *Ibid.*

[14] Such transplantable organs and tissues are removed in a surgical procedure following a determination, based on the donor's medical and social history, of which are suitable for transplantation.

[15] *See* Ranee Khooshie Lal Panjabi, "The Sum of a Human's parts: Global Organ Trafficking in the 21st Century", (2010), Vol. 28(1), *Pace Environmental Law Review*, available online at http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1654&context=pelr, accessed 25/11/2016.

[16] See more comprehensive analysis on the very technical aspects of transplantation as a type of medical procedure in Mason J.K., McCall Smith R.A, and Laurie G.T., *Law and Medical Ethics*, 5th Edition,(London: Butterworth, 1999), pg.338.

[17] *Ibid.*

[18] Robey.T.E. and Marcolini.E.G., " Organ Donation after acute brain death: Addressing limitations of time and resources in the emergency department", (2013), Vol. 86 (3), *Yale Journal of Biology and Medicine*, pp.333-342, available online at

of organs and warm/cold anoxic time are essential considerations in the transplantation process. After removal, the process of deterioration of an organ can be reduced significantly by chilling the organ, such that its viability going forward then depends on the warm anoxic time i.e. the period or interval between the removal of the organ and the chilling of same[19]. For example, in a transplantation procedure a kidney becomes useless after more than one hour warm anoxia[20]. Also, the cold anoxic time i.e. the length of time of chilling of the organ is also important. Practically, the heart and the lungs can be used up to four hours after harvesting, while for the liver its about 8 – 12 hours and for the Kidney, it can be so maintained for more than 24 hours[21].

From this point of view, we can therefore distinguish three principal forms of transplantation procedures:

1. Auto-transplantation: This is the transplantation of portions of the same body, usually involving procedures like skin or bone grafting. This is known to usually possess little difficulties.
2. Homo-transplantation: This involves the transplantation of an organ or tissue from one human being to another.
3. Hetero-transplantation or Xeno-transplantation: This is the transplantation of an organ or viable tissue from a member of one specie to another.

Under standard medical procedure, before any organ can be harvested the "*dead donor rule*" must be strictly complied with. This rule requires patients to be declared dead before the removal of life-sustaining organs for transplantation, so as to assure that no one is intentionally killed in order to harvest his/her organs[22]. However, much of the medical and philosophical literature reveals inherent difficulties in definitions of death and the appropriate time to begin organ procurement[23], as such scholars have argued that donors of vital organs, including those diagnosed as "brain dead", and those declared dead according to cardiopulmonary criteria, are not in fact dead at the time that vital organs are being procured[24]. The very complex nature of organ transplantation accounts for why some of the most qualified physicians who perform organ transplants command global respect and admiration for their dedication and their skill. The ambit of scientific

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http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3767218, accessed 09/07/2016.

[19] Mason J.K., McCall Smith R.A, and Laurie G.T, *supra*, n.16.

[20] Ibid

[21] Ibid

[22] Truog R.D. and Robinson W.M, "Role of Brain Death and the Dead Donor Rule in the Ethics of Organ Transplantation", (2003), Vol. 31(9), *Critical Care Medicine*, 2391-6, available online at http://www.ncbi.nlm.nih.gov/pubmed/14501972, accessed 09/07/2016.; See further Truog.R.D. and Miller.F.G., "The Dead Donor Rule and Organ Transplantation", (2008), *The New England Journal of Medicine*, 359:pp.674-675. At the dawn of organ transplantation, the dead donor rule was accepted as an ethical premise that did not require reflection or justification, presumably because it appeared to be necessary as a safeguard against the unethical removal of vital organs from vulnerable patients.

[23] For the difficulties that currently confronts the Dead-Donor Rule, see more extensive literature in Mead Matthew Phillip, "Informed Consent in Organ donation and the Abandonment of the Dead-Donor Rule", (2015), Vol. 3(2), *Journal of Cognition and Neuroethics*, pp. 47 – 56.

[24] Franklin G.Miller, Robert D.Troug, and Dan Brock, "The Dead Donor Rule: Can it withstand critical scrutiny?", (2010), Vol.35 (3), *Journal of Medicine and Philosophy*, pp.299 - 312.

research on this subject continues to expand and this results in various organs being amenable to transplantation including kidneys, hearts, liver, corneas, as well as human bone, ligaments, cartilage, skin and tissues and bone marrow[25].

1.4 Legal Aspects of Organ donation and transplantation in Nigeria

Developments in human tissue transplantation over the past 15 years have generated much controversy about the ownership of the body, the relationship of the individual to the state, the role of governments and markets, and the legal definition of death[26]. The success of human tissue transplantation has thrust what was previously considered as the realm of science into the 'here and now', bringing with it the potential for macabre commercial exploitation of uninformed poorer citizens in the Third World[27]. Until recently, Nigeria had no specific legislation governing organ donation and transplantation; however with the passing into law of the National Health Act, 2014 Nigeria's human transplant regime entered a new phase. The Act deals comprehensively with healthcare delivery and regulation, dedicating some specific portions to certain important Medico-legal matters, one of which is organ donation and transplantation. Specifically, in Part VI, Sections 47 – 58, the Acts extensively covers different areas dealing with the control of the use of blood, blood products, tissue, and gametes in humans[28]. The main provisions of the Act as captured under the above-mentioned sections are analysed below.

1.4.1 Who can donate an organ and the removal of tissue from a living person

Generally, organ donation is not a well developed form of medical treatment in Nigeria. Due to age-long traditional norms, cultural sensitivities and religious standpoints, many Nigerians are known to be averse to donating any of their body parts. As a matter of fact, studies conducted among the general public in parts of Nigeria regarding awareness and attitude toward organ donation, revealed that their responses were influenced by educational, religious, cultural and ethical factors[29]. For instance, a study conducted in Lagos found that 60% of the respondents were aware of organ donation, but that only 30% were willing to donate[30]. Largely, those willing to donate were seen to have been significantly influenced only by age, but not by gender or educational status[31]. This notwithstanding,

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[25] Ranee Khooshie Lal Panjabi *supra* , n.15.

[26] Boronia Halstead and Paul Wilson, "'Body Crime': Human Organ Procurement and Alternatives to the International Black Market", (1991), No.30, *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, available online at http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi030.pdf, accessed 02/11/2016.

[27] *Ibid.*

[28] The term "tissue" is used consistently in the Act, it must however be noted that the term is used interchangeably with organ in contemporary health law discourse. In providing the needed clarification, it is in this light that the English Human Organ Transplants Act, 1989 defines an organ as, *"any part of the human body consisting of a structured arrangement of tissues, which if wholly removed cannot be replicated by the body"* (The italics mine).

[29] See Iliyasu Z, Abubakar I.S, Lawan U.M, Abubakar. M, Adamu. B., "Predictors of public attitude toward living organ donation in Kano, Northern Nigeria", (2014), Vol. 25(1), *Saudi Journal of Kidney Diseases and Transplantation*, pp.196 – 205.

[30] *Ibid.*

[31] *Ibid.*

for living donation the Act defines who can donate without legal limitations and who cannot. According to the Act:

> A person shall not remove tissue which is not replaceable by natural processes from a person younger than eighteen years; a person who contravenes the provisions of this section or fails to comply therewith is guilty of an offence and liable on conviction as follows:
>
> (a) in the case of tissue, a fine of N1,000,000 or imprisonment of not less than two years or both fine and imprisonment; and
>
> (b) in the case of blood or blood products, a fine of N100, 000 or imprisonment for a term not exceeding one year or both fine and imprisonment.[32]

In the first instance the language of this provision clearly states that the removal of the said tissue/organs is to be from living persons i.e. living donations. To start with, the law dealing with living donations is rooted in both Common law and Nigerian statute. In context, this provision is couched as a rule stating that no one is permitted to consent to his/her own death[33], by donating an organ that cannot be replaced naturally by the body. The legality of living donations is to prohibit any procedure that is likely to cause grave harm to the donor[34]. Thus the donation of a non-regenerative organ e.g. the heart is totally prohibited[35]. To further protect the strict rule on living donation, the Act provides additionally that:

> A person shall not remove tissue from a living person for transplantation in another living person or carry out the transplantation of such tissue except:
>
> (a) in a hospital authorised for that purpose; and
>
> (b) on the written authority of;
>
> (i) the medical practitioner in charge of clinical services in that hospital or any other medical practitioner authorised by him or her; or
>
> (ii) in the case where there is no medical practitioner in charge of the clinical services at that hospital a medical practitioner authorised thereto by the person in charge of the hospital.

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[32] Section 48 (2) & (3), National Health Act, 2014.

[33] See Section 326, Criminal Code Act, 2004, CAP C39; See also Section 311 & 313, Criminal Code Act, 2004, CAP C39.

[34] The procedure therefore must be seen as strictly therapeutic, and where it is not, such that some form of harm would be inflicted on the person so involved, it must have been provided for under another legislation so enacted; See also *Bravery v. Bravery* (1954) 1 WLR, 1169 at 1180, *per* Denning L J.

[35] Before now, the liver was also one of the organs classified as non-regenerative , however due to medical advancements over time that has established that the liver regenerates both anatomically and functionally, segments of the liver is now put to use in Paedatric transplantation procedures.

(2) The medical practitioner stated in subsection (1) (b) shall not be the lead participant in a transplant for which he has granted authorisation under that subsection.

(3) For the purpose of transplantation, there shall be an independent tissue transplantation Committee within any health establishment that engages in the act and practice of transplantation as prescribed[36].

Furthermore, this same provision of the Act stipulates that only persons who are of the majority age of 18 years and above can donate an organ, or have an organ removed from their body. This provision is apt, given that it highlights the importance of capacity and an ability to understand the decision being taken in the donation process. This is because, the presumption in law is that anyone of the specified age is deemed sufficiently matured to understand the risks, consequences, and benefits of the medical procedure in question. This position however conflicts with legal development in other jurisdictions. Following the decision in the Court in *Gillick v. West Norfolk and Wisbech Area Health Authority*[37], the determination of legal capacity to give consent in a medical procedure has been expanded to accommodate any sufficient demonstration of understanding by a minor, to the extent that where such a minor can show proper understanding of the risk, benefit and severity of the proposed therapy or procedure, the issue of age would becomes immaterial and can be dispensed with. The *Gillicks case* has since been applied with approval in a number of cases in other jurisdictions[38]. With this advancement in the law, it becomes needful to advise that at some point in the near future, the Nigerian National Assembly would have to take a second look at this provision, with a view to inserting an exception clause providing for what referred to in medico-legal scholarship as the "*a matured minor's understanding rule*", which would properly put the Nigerian law at per with current global standards.

Furthermore, a major shortcoming of this provision of the Act is that it does not specify exactly who can be donated to and the permissible bracket. For instance, under the Indian Transplantation of Human Organ Act, the relatives who are allowed to donate include mother, father, brothers, sisters, son, daughter, and spouse, and just recently, in the new Gazette grandparents have been included in the list of first relatives[39]. The first relatives are required to provide proof of their relationship by genetic testing and/or by legal documents, and in the event of there being no first relatives, the recipient and donor are required to seek special permission from the government appointed authorization

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[36] Section 51 (1) (2) & (3), National Health Act, 2014.

[37] (1986) AC 112, (1985) 3 All ER 402; In the case which had to do with the provision of contraceptives, the dominant position was that the right of the parents to give consent as to whether the minor child of 16years old could access contraceptives, immediately terminates the moment the child in question achieves a significant understanding to enable her make an informed decision on what is being proposed.

[38] ***Hewer v. Bryant*** (1970) 1QB 357; *Re R (a minor) (wardship: medical treatment)* (1992) 3 Med LR 342 at 347.

[39] For a discussion on framework and the rules governing organ donation in India, *see in particular* Shroff Sunil, "Legal and Ethical Aspects of Organ donation and Transplantation", (2009), Vol.25 (3), *Indian Journal of Urology*, pp. 348 – 355.

committee and appear for an interview in front of the committee to prove that the motive of donation is purely out of altruism or affection for the recipient[40]. This is not the case under Nigerian law, as does not provide for any prohibited degree in terms of donation, but simply makes it an open-ended affair. Also unlike the Indian Act, the Act in Nigeria does not address the requirement of medical fitness, nor define the state of health under which donation will be permitted[41]. This Author is therefore of the view that in any future review of the Act, this is one area that must be considered and developments in other countries such as the example of Indian would be useful.

1.4.2 Cadaveric donation

Nigerian law respects the use of organs after death for transplantation provided that the death was established by two or more physicians who are not concerned or immediately concerned with the organ transplantation. The physicians establishing death must state in a dated and signed report the method used to establish death. Thus, as a corollary to living donation, the Act provides for individuals, upon their death, to donate their organs or the entire body where it states that:

> A person who is competent to make a will may:
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> (i) in the will; or
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> (ii) in a document signed by him and at least two competent witnesses; or
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> (iii) in a written statement made in the presence of at least two competent witnesses, donate his or her body or any specified tissue thereof to be used after his or her death, or give consent to the post mortem examination of his or her body, for any purpose provided for in this Act.

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[40] *Ibid;* The Indian State regulates transplant activities by forming an Authorization Committee (AC) and Appropriate Authority (AA.) in each State or Union Territory, with the function of regulating the process of authorization to approve or reject transplants between the recipient and donors other than a first relative. The primary duty of the committee is to ensure that the donor is not being exploited for monetary consideration to donate their organ. The joint application made by the recipient and donor is scrutinized and a personal interview is essential to satisfy to the AC the genuine motive of donation and to ensure that the donor understands the potential risks of the surgery. Information about approval or rejection is then sent by mail to the concerned hospitals. The decision to accept or reject a donor is governed by Clause 9 (3) of Chapter II of the Transplantation of Human Organ Act.

[41] For instance under the Indian Act, Any donor may authorize the removal, before his death, of any human organ of his body for therapeutic purposes as specified in forms that have been made more comprehensive and are to be submitted alongside means of identification and address, marriage registration certificate, family photographs, etc. with attestation by a Notary Public. The gazette states that before removing a human organ from the body of a donor before his death, a medical practitioner should satisfy himself that the donor has given authorization in Form 1(A) if the relative is a close relative i.e., a mother, father, brother, sister, son, or daughter, Form 1(B) if such is the spouse, and Form 1(C), is it is for other relatives. The Act also require the Medical practitioner to confirm that the donor is in a proper state of health and is fit to donate the organ, by signing the certificate as specified in Form 2, and that the donor has submitted an application in Form 10 jointly with the recipient and the proposed donation has been approved by the concerned competent authority. The relationship between the donor and recipient must also have been examined to the satisfaction of the Registered Medical Practitioner in charge of the transplant center.

(b) A person who makes a donation as stated in paragraph (a) above may nominate an institution or a person as donee[42].

The Act equally defines the various uses to which such cadaveric donation can be put, where it provides that:

> A donation under section 55 may only be made for the purposes of:
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> (a) training of students in health sciences;
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> (b) health research;
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> (c) advancement of health sciences;
>
> (d) therapy including the use of tissue in any living person; or
>
> (e) production of a therapeutic, diagnostic or prophylactic substance[43].

The current position of the Act is laudable, but still a far cry from recent developments in other countries. For instance, in some countries of continental Europe, cadaveric organ procurement is based on the principle of presumed consent[44]. Under presumed consent legislation, a deceased individual is classified as a potential donor in absence of explicit opposition to donation before death[45]. Also, in the United Kingdom, an explicit or informed consent system operates which requires that individuals authorise organ removal after death by carrying a donor card or joining a national registry[46]. This is referred to as the '*Organ Donor Registry*'. This position has also been supported by Fentiman who argues that it is time to consider an alternative approach to organ procurement and allocation, particularly one that relies on presumed consent to organ donation, combined with incentives which recognize the communal basis of the obligation to donate one's organs after death[47]. Going further Fentiman concludes that such a system must provide numerous opportunities for opting out of donation in order to promote individual autonomy and use economic and eleemosynary incentives for persons to contribute their organs after death[48]. In the same vein, Kolber in his work on organ donation has proposed that people should be encouraged to register to donate organs upon death by offering them some priority to receive an organ should they need one during life[49]. It is therefore suggested that the above systems of a National Registry of

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[42] Section 55, National Health Act, 2014.

[43] Section 56 (1), National Health Act, 2014.

[44] See Abadie Alberto and Gay Sebastien, "The Impact of presumed consent legislation on Cadaveric organ donation: A Cross-country study", (2006), Vol.25 (6), *Journal of Health Economics*, pp.599 – 620.

[45] *Ibid.*

[46] Rithalia Amber, McDaid Catriona, Suekarran Sara, Myers Lindsey, and Snowden Amanda, "Impact of presumed consent on Organ donation rates: A systematic review", (2009) *British Medical Journal*, 338.

[47] Fentiman Linda.C., "Organ donation as National Service: A proposed Federal Organ donation law", (2009) Vol. 27, *Suffolk University Law Review*, pg.1593.

[48] *Ibid.*

[49] Kolber J.Adam,, "A Matter of Priority: Transplanting Organs Preferentially to Registered Donors", (2003), Vol. 53, *Rutgers Law Review*, pg. 671.

Cadaver Donations is one that can be considered in any future reform of the Nigerian Act.

1.4.3 Consent, informed consent and the Nigerian organ donation process

It is a Common law principle that in the course of any medical procedure, the consent of the patient or any would-be participant must first have been sought and had. In the celebrated case of ***Schloendorff v. Society of New York Hospital***[50], this rule was firmly applied per Cardozo J., where the Court opined that:

> Every human being of adult years and sound mind has the right to determine what shall be done with his own body; and a surgeon who performs an operation without the patient's consent commits an assault[51].

This same rule extends to the organ donation process, particularly the consent of the donor and the donee[52]. Probably the most analysed element of the consent process is the obligation to ensure that consent is appropriately informed[53]. Informed consent is one of the cornerstones of medical practice, and in ethics, informed consent is important because of the belief that individuals should be able to make choices about their life, free from interference unless other individuals are harmed[54]. Informed consent generally, is considered to have four components[55]. In the case of living donation, the donor should have the necessary decision making capacity to reflect on the benefits and burdens that reasonably can be expected from the procedure and to make this decision in the context of his or her own value system[56]. This decision should be voluntary, free from pressure or coercion[57]. No component of informed consent is more important than having adequate information on which to base a decision, and in organ donation it is critical that a donor understand the risks associated with the surgical procedure, possible long-term problems that may result based on careful follow-up studies of previous donors and how

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[50] 105 NE 92 (NY, 1914).

[51] For more extensive discussions and extrapolation on the doctrinal issues surrounding consent, *see generally* ***R v. Brown*** (1996) 1 All ER 545; ***Smart v. HM Advocate*** (1975) SLT 65; However in certain instances, the consent may be waived whether in a life-threatening situation or where the patient is in an unconscious state. See the divergent views held by the Courts in ***Marshall v. Curry*** (1933) 3 DLR 260 and ***Murray v.McMurchy*** (1949) 2 DLR 442.

[52] For a complete discussion of both the legal and ethical background to the doctrine of consent, *see generally*, Price, D P.T., "Legal framework governing deceased organ donation in the UK", (2012), Vol.108, *British Journal of Anaesthesia*, pp.68 – 72; See also Farsides,B., "Respecting wishes and avoiding conflict: Understanding the Ethical basis for organ donation and retrieval", (2012), Vol.108, *British Journal of Anaethesia*, pp. 73- 79.

[53] For a more wide-ranging critical review, *see* Caulfield Timothy, "Living Organ donation: Consent Challenges", A Paper prepared for the Canadian Council for Organ donation and transplantation,

[54] Hensley Samuel. D., "Informed consent in Living organ donors", (2005) *Clinical and Medical Ethics*, Center for Bioethics and Human Dignity, available online at

[55] *Ibid.*

[56] *Ibid.*

[57] *Ibid*; Especially when a relative's life is at stake, family members or involved physicians may exert tremendous pressure or take advantage of the pressure the donor is already experiencing to get quick consent without adequate discussion of whether the patient is choosing freely to take these risks. It must be recognized that, in the emotion of the moment, a living donor may fail to consider how other family members would be affected by their own death or chronic medical complications.

volunteering for organ donation may affect future medical insurability[58]. The doctrine imposes a legal duty on physicians to provide their patients with "material information" concerning the proposed treatment, so as to enable the patient makes an informed choice[59]. Also, physicians have a clear responsibility to ensure that the donor understands the information that has been given[60].

In this regard, scholars have noted that the doctrine of informed consent is so crafted, to protect the right to bodily integrity of the patient. The doctrine elementarily protects the autonomy of persons seeking to receive medical treatment, so as to ensure proper communication and understanding between the physician and the patient. According to Bernard Dickens, the patient "maintains the ultimate control of decisions that affect them, and determine the goals of their medical care even when they yield to health professionals the choice of technical means for pursuing those goals"[61].

For example in the United States, it is specified for hospitals that life donor candidates undergo an extensive process of informed consent beginning at referral and ending at consent for surgery[62]. The Advisory Committee on Organ Transplantation (ACOT) of the US Department of Health and Human Services also established standards for informed consent for living donors, which stipulates that living donors be competent, medically and psychologically suitable to donate, free of coercion, and informed about the risks, benefits and alternatives to the donor and to the recipient[63]. Sometimes, it is parental/family consent that is required in organ donation, particularly as it concerns cadaveric donation. The family's refusal to consent to organ donation has been cited as one of the key factors in the shortage of organs, with lack of understanding about brain death and organ donation identified as major reason for such refusal[64].

The Nigerian National Health Act makes mandatory, the requirement of consent in the organ donation process. In this regard, it states that:

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[58] *Ibid.*

[59] Caulfield Timothy, *supra*, n.53.

[60] *Ibid*; Understanding is the fourth prerequisite for truly informed consent. Without understanding and reflection, the other components are moot. In advising living organ donors, two areas are of immediate concern. The first involves providing adequate information about long-term outcomes. It is not an exaggeration to suggest that no one knows the number of complications resulting from living donor transplants because there has been no systematic follow-up of living donors. This lack of information renders the required information component of informed consent impossible. A second area of concern regards the scarcity of organs for transplant and the desperate medical needs of potential organ recipients. It is often literally a matter of life or death. These circumstances place the transplant surgeon in an extremely difficult situation with conflicting goals. He or she desires greatly to perform life saving surgery but must guard against coercing a donor or taking advantage of an emotionally volatile family dynamic. The critical need of the intended organ recipient cannot be allowed to deflect the surgeon's concern and responsibility from the living donor.

[61] Bernard M.Dickens, *Informed Consent*, in Jocelyn G.Downie (ed.), Canadian Health Law and Policy, 2002, 130.

[62] Gordon,E.J., "Informed Consent for living donation: A review of key empirical studies, ethical challenges and future research", (2012), Vol.12 (9), *American Journal of Transplantation*, available online at http://onlinelibrary.wiley.com/doi/10.1111/j.1600-6143.2012.04102.x/full, accessed 21/11/2016.

[63] *Ibid.*

[64] Beaulieu Danielle, "Organ Donation: The Family's right to make informed choice" (1999), Vol.31 (1), *Journal of Neuroscience Nursing*, available online at http://journals.lww.com/jnnonline/Abstract/1999/02000/Organ_Donation__The_Family_s_Right_to_Make_an.5.aspx, accessed 21/11/2016.

Subject to the provision of section 53, a person shall not remove tissue, blood or blood product from the body of another living person for any purpose except;

(a) with the informed consent of the person from whom the tissue, blood or blood product is removed granted in prescribed manner;

(b) that the consent clause may be waived for medical investigations and treatment in emergency cases ;and

(c) in accordance with prescribed protocols by the appropriate authority[65].

The Act further reinforces the requirement of consent, particularly full and informed consent, thereby reaffirming the current position in most health law jurisdictions. In this area, it provides that:

Every health care provider shall give a user, relevant information pertaining to his state of health and necessary treatment relating thereto including:

(a) the user's health status except in circumstances where there is substantial evidence that the disclosure of the users health status would be contrary to the best interests of the user;

(b) the range of diagnostic procedures and treatment options generally available to the user;

(c) the benefits, risks, costs and consequences generally associated with each option; and

(d) the user's right to refuse health services and explain the implications, risks, obligations of such refusal.

(2) The health care provider concerned shall, where possible, inform the user in a language that the user understands and in a manner which takes into account the user's level of literacy[66].

1.5 The Prohibition of Monetary Payment and Compensation in the Donation Process

In 1984, an offensive proposal for kidney sales by a US physician led to the enactment of the United States National Organ Transplant Act, and thereafter many other countries followed suit to pass similar legislations[67]. Consequent on this legal standard, an ethical consensus developed around the world that there should be no monetary compensation for transplantable organs, either from living or deceased persons[68]. Also, the World

[65] Section 48 (1) (a), (b) & (c), National Health Act, 2014.
[66] Section 23 (1) & (2), National Health Act, 2014.
[67] See Ghods,A.J., "Governed financial incentives as an alternative to altruistic Organ donation", (2004), Vol. 2(2), *Experimental and Clinical Transplantation*, pp. 221-228.
[68] *Ibid.*

Health Organization (WHO) in its statement on the sale of organs clearly states that it violates the Universal Declaration of Human Rights, as well as its own constitution[69]. Therefore it states that, "The human body and its parts cannot be the subject of commercial transactions. Accordingly, giving or receiving payment for organs should be prohibited"[70]. The world body accordingly advices physicians not to transplant organs if they have reason to believe that the organs concerned have been the subject of commercial transactions[71].

Nigeria is no exception in this regard. The National Health Act with a clear intention of distinguishing between altruism and commercialism strictly prohibits the donation of organs for financial gains and makes it punishable. The only exception is however in the area of payment for the cost incurred to perform the transplant surgery and to perhaps complete the post-transplantation treatment of the donor. Besides that the Act frowns at other forms of monetary consideration, nothing even a compensation for the donor. Specifically, the Act says:

> It is an offence for a person:
>
> (a) who has donated tissue, blood or a blood product to receive any form of financial or other reward for such donation, except for the reimbursement of reasonable costs incurred by him or her to provide such donation; and
>
> (b) to sell or trade in tissue, blood, blood products except for reasonable payments made in appropriate health establishment for the procurement of tissues, blood or blood products
>
> (2) Any person found guilty of an offence under subsection (1) is liable on conviction to a fine of N100, 000 (One hundred thousand naira) or to imprisonment for a period not exceeding one year or to both fine and imprisonment[72].

Though the Nigerian law is ***impari materia*** with some leading legislations on organ donation[73], an apparently developing phenomenon is that in several countries also, the hitherto vehement rejection on ethical grounds of anything but uncompensated donation, is slowly been replaced by an open debate of plans that offer financial rewards to persons willing to have their organs, or the organs of deceased kin, taken for transplantation[74]. Thus, in recent times, there has been renewed argument trying to overthrow this strict

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[69] Shroff Sunil, *supra*, n.39.

[70] "Dilemma over Live-donor transplantation", *Bulletin of the World Health Organization*, available online at http://www.who.int/bulletin/volumes/85/1/07-020107/en, accessed 25/11/2016.

[71] Shroff Sunil, *supra*, n.39.

[72] Section 53 (1) & (2), National Health Act, 2014.

[73] For instance the provisions of Section 1(1) of the English Human Organ Transplants Act, 1989 which prohibits the exchange of money for organ donation, and also further prohibits any advertisement for that purpose in Section 1(2) of the Act.

[74] See comprehensive discussions in Joralemon Donald, "Shifting Ethics: Debating the Incentive question in Organ transplantation", (2001), Vol.27 (1), *Journal of Medical Ethics*, pp.30 – 35.

legal position by calling for some form of compensation for organ donors. In this regard, Bagheri argues against a prohibition of payment and compensation to organ donors, saying that denying them legitimate compensation because of the understandable fear of an organ trade is not morally justifiable[75]. He further avers that a look at the Iranian model of compensated kidney donation offers substantial insights and highlights some benefits that overcome these concerns[76]. However, anti-commodificationist have countered this position saying that those whose organs and tissues are taken for a financial reward are not to be classified as donors, but as sources within the context of organ commodification[77]. This positions helps shed more light on the distinction between donating an organ for altruistic purposes and simply selling of an organ. This author considers the Nigerian legal position as one that should be retained and further strengthened; as there is always the tendency of abuse in any attempt to create exceptions.

1.6 Conclusion

Giving in to market forces and making organs a commodity is fraught with dangers and erodes social, moral, and ethical values and is not an alternative that can be acceptable to overcome the problem of organ shortage in a civilized society[78]. This position has also been amplified by Nancy Scheper-Hughes, who states that by their very nature markets are indiscriminate, promiscuous, and inclined to reduce everything, including human beings, their labor and even their reproductive capacity to the status of commodities, to things that can be bought, sold, traded, and sometimes even stolen[79]. It is on this basis that one must salute the efforts that produce the National Health Act and its position on the commodification of organs in the donation and transplantation process.

Experience has shown that the mere enactment of laws has not always helped to address many national challenges, not even that of the Health sector. For instance, the Indian Transplantation of Human Organs Act, 1994 despite having been passed 15 years ago, it has not succeeded in curbing the commodification of organs, nor has it helped the promotion of the deceased donation program to take care of the organ shortage, such that the resulting transplant tourism boom has caused an outcry from many international bodies[80]. This goes to show that in addition to the suggestion already recommended, when a future reform of the National Health Act is considered, there is equally the need to back such reform with a strong enforcement framework to prosecute offenders found culpable of manipulating the organ donation process. Ensuring such a potent enforcement framework is needful, particularly when one considers the novel challenges of medical advancements that continue to crop up everyday via emerging trends in cutting edge

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[75] See Bagheri Alireza, "Compensated Kidney donation: An Ethical Review of the Iranian model", (2006), Vol. 16 (3), *Kennedy Institute of Ethics Journal*, pp.269 – 282.
[76] *Ibid.*
[77] Kolber, Adam.J., *supra*, n.49.
[78] Shroff Sunil, *supra*, n.39.
[79] See Scheper-Hughes, N., "The End of the Body: The Global Traffic in Organs for Transplant Surgery",
[80] Shroff Sunil, *supra*, n.39.

regenerative medicine such as sperm cells transplants, sperm banking, gamete engineering and cryogenics[81]. The National Health Act must therefore justify its entrance as the flagship of Nigerian health law by being not just a dog that can bark, but also one that can bite and in its biting, inflict massive pain on those caught on the wrong end of the law. For an Act dealing with the sanctity of the human body, no lesser standard can be demanded of it than this.

[81] The recent judicial development in the United Kingdom on this aspect of Health Law has further helped to throw up new and more complex issues. *See generally* Bowcott Owen and Hill Amelia, "14 year-old girl who died of Cancer, wins right to be cryogenically frozen", *The UK Guardian Newspaper*, (London: November 18, 2016), available online at https://www.theguardian.com/science/2016/nov/18/teenage-girls-wish-for-preservation-after-death-agreed-to-by-court, accessed 25/11/2016.