



**A CRITICAL APPRAISAL OF THE LEGAL  
FRAMEWORK ON HUMAN ORGAN DONATION AND  
TRANSPLANTATION IN NIGERIA**

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**ABSTRACT**

*The advancement in medical sciences in recent times has brought succor to those suffering from the failure of vital organs. Organ transplantation has become a rapidly growing and imperative surgical specialty in the last four decades as transplantation of solid organs has become the preferred treatment for end-stage renal, hepatic, cardiac, and pulmonary disease. Although organ transplantation has been widely accepted in contemporary times all over the world as a safe medical procedure, it is fraught with some challenges in Nigeria, ranging from a lack of suitable structures and frameworks for snowballing the supply of needed organs to legal liability issues arising from the ruin or negligent misdirection of donated organs, commercialization of organs, organ trafficking as well as ethical, social and religious beliefs.*

*This paper examines the prevailing legal framework governing the practice of organ donation and transplantation in Nigeria highlighting the strength and weaknesses of the legislation. The work also gives a general overview of the concept of organ donation and transplantation and makes some recommendations.*

## 1.0 Introduction

The widespread medical transplant technology across the world has saved many lives, particularly those in the final stages of diseases in which internal organs are entirely failing. This procedure, in addition to prolonging lives, also “enables better quality of life and is considered to be cost-effective because it makes more resources available for other sectors of the economy”.<sup>1</sup>

Organ transplantation in the sense that it involves the use of human body parts as medicine is not a recent phenomenon as it enjoys historical antecedent in medicinal cannibalism or anthropophagy predominant in Europe in the Middle Ages, involving the use of body parts of young people that suffered violent deaths in therapeutic preparations known as *Mumia*.<sup>2</sup> However, organ transplantation as the contemporary standard form of medical care started in some parts of the Western world in the 1940s.<sup>3</sup> What can be termed the first successful organ transplantation took place on 23 December 1954, when Dr. Joseph Murray and his colleagues performed a living-related-donor kidney transplant between two brothers in Hollywood,

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<sup>1</sup> J. O. Fadare and B. L. Salako, ‘Ethical Issues in Kidney Transplantation: Reflections from Nigeria’ (2010) 2 *TRRM* 87.

<sup>2</sup> N.N. Remigius, ‘Organ Donation and Transplantation’ in Irehobhude O. Iyioha and N.N Remigius (eds), *Comparative Health Law and Policy* (1<sup>st</sup> ed, Routledge 2015).

<sup>3</sup> World Health Organisation, ‘WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation (2010) 11(4) *Cell Tissue Bank* 413.

Florida.<sup>4</sup> Because the brothers were identical twins, kidney graft rejection was not an issue and the brothers were discharged in good health several weeks later.<sup>5</sup> This kidney transplant was a proof that it was now possible to replace diseased organs with healthy ones. However, without immunosuppressant drugs, the possibility of transplantation for diseased organs was restricted to identical twins.<sup>6</sup> Further advancement in medical sciences in 1963 resulted in the development of Azathioprine, a drug that could alter the immune response to rejection, the possibility of transplantation for diseased organs was no longer limited to identical twins thus, permitting renal transplantation between non-identical living related donors.<sup>7</sup> The amalgamation of Prednisone and Azathioprine became a cornerstone of organ transplantation, expanding the procedure's availability to related non-identical donor populations.<sup>8</sup> The introduction of Cyclosporin A in 1983 had a massive impact on the availability of both cadaveric and living allograft transplantations.<sup>9</sup> Organ transplantation was now a very real possibility for a broad range of individuals suffering from organ failure. Current medical

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<sup>4</sup> Arnold G. Diethelm, 'Ethical Decisions in the History of Organ Transplantation' (1990) 211 *ANN. SURG.* 505.

<sup>5</sup> *Ibid.*

<sup>6</sup> R. Ainley, 'Organ Transplantation: A Model Law Approach to Combat Human Trafficking and Transplant Tourism' (2011) 13 *Oregon Review of International Law* 427.

<sup>7</sup> *Ibid.*

<sup>8</sup> Arnold G. Diethelm, 'Ethical Decisions in the History of Organ Transplantation' (1990) 211 *ANN. SURG.* 510.

<sup>9</sup> Cyclosporin A is a powerful immunosuppressant that drastically improves long-term graft survival.

technology and the acceptance of “brain death” have broadened transplantation procedures to include cadaveric and non-related living donors.

On 17 December 1986 there was a significant achievement in medicine in England when the first combined heart, lung, and kidney transplant was carried out.<sup>10</sup> Years after the development of Cyclosporin A, the success rate of organ transplantation, especially kidney transplant procedures has been excellent. Advances in organ preservation, immunosuppression, xenografting, and surgical technology continue to expand the frontiers of transplantation.

The concept of organ transplantation was first conceived in Nigeria in 1980 but due to plodding deterioration in the public health care system, the concept did not actualise until 2000 when the first renal transplant was performed at St. Nicholas Hospital, Lagos.<sup>11</sup> Since then other medical centers began to emerge in the country. However, at that time, there was no legislation in place regulating such a procedure. This situation was remedied with the enactment of the National Health Act 2014 to regulate issues emanating from organ donation and transplant.

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<sup>10</sup> E. A. Okojie, *Medical and Forensic Law Companion* (Ambik Press 2020) 197.

<sup>11</sup> E. H. Emmanuel and I. F. Nabena, ‘Legal and Ethical Developments in the Regulation of Organ Donation and Transplantation in Nigeria’ (2020) 11 (1) *NAUJILJ* 122.

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## **2.0 Conceptual Clarification**

### **2.1 Organ Transplantation**

Organ transplantation is a medical procedure in which organs are removed from one body and implanted in another body or from one part of a body to another part of that same body.<sup>12</sup>

Organ transplantation can be broadly classified into three based on the resemblance between the site of transplantation and also between the donor and the recipient:<sup>13</sup>

- i. Autotransplant: it is the transmission of tissues or organs from one part of an individual to another part of the same individual.
- ii. Allotransplant: it involves transfer from one individual to a different individual of the same species, which is the most common form of solid organ transplants performed today. In allotransplant,

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<sup>12</sup> Ibid.

<sup>13</sup> A. A. Bakari, U. S Abbo Jimeta, M. A. Abubakar, S. U Alhassan, E. A Nwankwo, 'Organ transplantation: Legal, Ethical and Islamic Perspective in Nigeria' (2012) 18 *Nigerian Journal of Surgery* 53.

both the donor and the recipient are subjected to screening to establish compatibility between them.<sup>14</sup>

- iii. **Xenotransplant:** it involves transfer across species barriers. It involves the transplantation, implantation, or infusion into a human recipient of either (a) live cells, tissues, or organs from nonhuman animal sources, or (b) human body fluids, cells, tissues, or organs that have had *ex vivo* contact with live nonhuman animal cells, tissues or organs.<sup>15</sup>

Globally, kidneys are known to be the most commonly transplanted organ. Other organs that could also be transplanted include the liver, heart lungs, pancreas, intestine, and thymus.<sup>16</sup>

## **2.2 Organ Donation**

Organ donation is the act of donating a healthy organ to a recipient whose own organ has failed or is failing. It is the process of surgically removing an organ or tissue from one person (the organ donor) and implanting it in another person (the recipient).<sup>17</sup> Organs donated can either be from a deceased/cadaveric donor or a living donor. In the case of a deceased/cadaveric donor, the donor has to be brain dead, for

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<sup>14</sup> Ibid.

<sup>15</sup> E. A. Okojie, *Medical and Forensic Law Companion* (Ambik Press 2020) 212.

<sup>16</sup> E. H. Emmanuel and I. F. Nabena, 'Legal and Ethical Developments in the Regulation of Organ Donation and Transplantation in Nigeria' (2020) 11 (1) *NAUJILJ* 122.

<sup>17</sup> E. A. Okojie, *Medical and Forensic Law Companion* (Ambik Press 2020) 199.

him to be brain dead he must have received either a traumatic or pathological injury to the part of the brain in control of his heartbeat and breathing. Since brain death means that the brain stops working, some specific signs must be identified to confirm brain death and they are mostly identified during the doctor's physical examination of the person. These signs include lack of movement and specific responses or reactions to tests being carried out on certain reflexes, lack of reaction to light by the eyes, and lack of an attempt to breathe. The tests that are carried out are to confirm brain death thereby making organ donation a possibility.<sup>18</sup>

In whatever form of donation, the donor must have given informed consent before the organ can be removed from the donor's body. In the case of deceased/cadaveric donors, before their death, the donors could choose to either opt-in or opt-out of donating their organs for transplantation after death.<sup>19</sup>

### **3.0 Legal Framework for Organ Donation and Transplant in Nigeria**

In Nigeria, matters concerning human organ donation and transplantation are regulated by the National Health Act 2014.<sup>20</sup> The Act has many laudable provisions. Generally, the Act

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<sup>18</sup> Ibid.

<sup>19</sup> B. Venter, 'A Selection of Constitutional Perspectives on Human Kidney Sales' (2013) (16) (1) *PER* 352.

<sup>20</sup> National Health Act No. 145, 2014.

provides a framework for regulating the removal and use of human organs donated for transplantation.<sup>21</sup> The Act recognised the two sources of organs transplantation i.e the living and cadaveric donors<sup>22</sup>

Part VI of the Act regulates the use of blood, blood products, tissue, and gametes in humans. The tissue under the Act refers to “human tissue, and includes flesh, bone, a gland, an organ, skin, bone marrow or body fluid, but excludes blood or a gamete”.<sup>23</sup> Just as applicable under the common law, consent is the superintending principle for living donation under the Act. However, consent may be waived for medical procedures such as investigations and treatment in emergency cases following prescribed protocols by the appropriate authority.<sup>24</sup> A consent so given can be revoked before the removal of the organ in the same manner it was given and in the case of a consent given by a Will through the revocation of that will.<sup>25</sup>

Though the National Health Act provides for consent as a precondition before the use and storage of tissues and organs, it did not prescribe or offer an interpretation as to what constitutes an “appropriate consent” for organ and tissue storage and usage.

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<sup>21</sup> Ibid, Sections 47 – 57.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid, Section 64.

<sup>24</sup> Ibid, Section 48.

<sup>25</sup> Ibid, Section 57.

This is alarming as the doctrine of informed consent is one that is expected to be addressed and given an in-depth discourse as it is not only a prerequisite for organ donation and transplant<sup>26</sup> but the substratum upon which any medical interference with the body is anchored on.<sup>27</sup> Although informed consent is to some extent discussed in section 23 of the Act<sup>28</sup>, the part discussed merely covers ensuring that a “user” in the language he understands, receives full knowledge of the medical services to be carried out and his rights to refuse such. How the heading of section 23 is worded does not make for clarity and certainty. Subsequently, what it seeks to clarify is the presence of informed consent before any medical interference is lost. It is essential that a statutory definition of consent be contained in the Act to ensure clarity. Furthermore, in defining the scope of free and informed consent, the Act should state the factors that need to be considered concerning adults, children, and persons who cannot consent as it is under the United Kingdom Human Tissue Act 2004 to arrive at proper consent under the law because an undefined scope of informed consent could lead to the illegal procurement of organs.

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<sup>26</sup> Convention on Human Rights and Biomedicine (CHRB) 1997, Article 19.

<sup>27</sup> Ibid, Articles 5, 6 and 7.

<sup>28</sup> National Health Act 2014.

Still on consent, in accordance with section 55 of the National Health Act 2014 a deceased donor may give consent through a will, in any document signed by him/her and witnessed by two competent witnesses, or in a written statement made before two competent witnesses.<sup>29</sup> There appears to be a problem in ensuring the practicality of this provision given the Nigerian societal values and the laws that govern probate in Nigeria.<sup>30</sup> It is common knowledge that most Nigerians dislike the idea of making their wills.<sup>31</sup> This stems from the notion that making such a testamentary statement is a signal that one is about to die. Again, even if a valid will exists, the bottlenecks and delays in the process of the deceased's lawyers trying to sort out all the formalities involved in getting a grant of probate to reveal the contents of the will, the proper time to harvest the organs would have lapsed, as organs deteriorate quickly once death occurs.<sup>32</sup> Besides, organs are not harvested from persons who are dead but from persons who are clinically dead or brain dead. This is because at a person's death the organs immediately shut down due to lack of oxygen and thus, be of no transplantable use unless

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<sup>29</sup> Ibid, Section 55, (a) (i) (ii) & (iii)

<sup>30</sup> Lagos State High Court Civil Procedure Rules, Order 55, Wills Law of Lagos state Cap W2 2004, Wills Act 1837

<sup>31</sup> R Choji, 'Why 'Wills are hardly effective in Nigeria'(Leadership newspaper, 30 March 2014) <<http://leadership.ng/features/360889/wills-hardly-effective-nigeria>> Accessed 6 April 2022.

<sup>32</sup> H. Kashi, 'Organ Transplantation' in M. Micheal, *et al* (eds), *Clinical Surgery* (1st edn, W B Saundersan Imprint of Harcourt Publishers Ltd 2001) 193.

kept alive by ventilators or other life support mechanisms.<sup>33</sup> As a barrier to deceased organ donation, most societies in Nigeria and Africa are largely impacted by cultural, social, and religious beliefs and practices, in most of these cultures, the dead body is venerated as such any deceased organ donation procurement procedure may be viewed as a vilification of the dead.<sup>34</sup>

The Act also protects children from organ donation exploitations. Section 48(2) of the Act provides that “a person shall not remove tissue that is not replaceable by natural processes from a person younger than eighteen years”. Furthermore, the section provides for the punishment in the case of contravention of the provisions in this section. “In the case of tissue, a fine of ₦1,000,000 or imprisonment of not less than two years or both fine and imprisonment” is imposed. This section aims to protect children from exploitation by adults.

Section 49 of the Act prohibits the use of “tissue removed or blood or a blood product withdrawn from a living person”<sup>35</sup> for another purpose for which they were not removed. Similarly, “human organs obtained from deceased persons for transplantation or treatment, or medical or dental training or

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<sup>33</sup> M. Hertl and P.S. Russell, *Overview of Transplantation* (Merck Manual, Consumer Version, 2016) < <http://www.merckmanuals.com/home/immune-disorders/transplantation/overview-of-transplantation>> Accessed 6 April 2022.

<sup>34</sup> E. H. Emmanuel and I. F. Nabena, ‘Legal and Ethical Developments in the Regulation of Organ Donation and Transplantation in Nigeria’ (2020) 11 (1) *NAUJILJ* 122.

<sup>35</sup> Section 49.

research, shall only be used in the prescribed manner”.<sup>36</sup> For that purpose, the National Tertiary Health Institutions Standards Committee<sup>37</sup> is authorized to develop guidelines for the approval of organ transplant facilities, as well as the procedure for obtaining such approval.<sup>38</sup> “A person who contravenes a provision of this section or fails to comply therewith or who charges a fee for a human organ is guilty of an offense and shall be liable to imprisonment for a minimum of five years without the option of a fine”.<sup>39</sup>

According to section 51 of the Act, “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 in a hospital authorised for that purpose; and on the written authority of the medical practitioner in charge of clinical services in that hospital or any other medical practitioner authorized by him or her; or in the case where there is no medical practitioner in charge of the clinical services at that hospital a medical practitioner authorized thereto by the person in charge of the hospital”. However, “the medical practitioner stated in this section shall not be the lead participant in a transplant for which he has granted authorisation under this

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<sup>36</sup> National Health Act 2014, Section 54(1).

<sup>37</sup> Ibid, Section 9.

<sup>38</sup> Ibid, Section 54(3).

<sup>39</sup> Ibid, Section 54(4).

section”.<sup>40</sup> This Section has helped in upholding ethics as it excludes the medical practitioner who has approved a transplant from taking part in the process and this ensures that there is absence of conflict of interest.

The Act further provides that only duly “registered medical practitioners or dentists may remove any tissue from a living person, use tissue so removed for any of the purposes stated in this Act, or transplant tissue so removed into another living person”.<sup>41</sup>

The Act prohibits any form of commercialisation of human organs, thus it is an offence punishable with a fine, imprisonment or both for a person who has donated tissue or organ to receive any form of financial reward, except reimbursement for the reasonable cost incurred by the donor in connection with the organ donation. Any person found guilty of commercialisation is liable on conviction to a fine of ₦100,000(one hundred thousand naira) or imprisonment for a period not exceeding one year or to both fine and imprisonment. While the Act does not prohibit organ trafficking which is one of the fastest growing international organised crimes, this loophole was however remedied by Section 20 of the Trafficking in Persons (Prohibition), Enforcement and Administration Act,

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<sup>40</sup> Ibid, Section 51.

<sup>41</sup> Ibid, Section 52(1).

2014 which prohibits the procurement or recruitment of a person for organ harvesting with “imprisonment for a term of not less than 7 years and to a fine of not less than ₦5,000,000.00”.<sup>42</sup>

It must be noted that the prohibition of financial gain with respect to donation aims to ensure respect for the dignity of living donors and recipients and their human rights; the indivisibility of the body of the deceased donor. It also contributes to the promotion of altruistic donation and the safety and quality of donated human body parts, thereby maintaining a donation system that people can trust. However, the prohibition of financial gain does not prevent the compensation of living donors for loss of earnings and settlement of any other justifiable expenses caused by the removal of organs, tissues, or cells, or by the related medical examinations; compensation in case of undue damage resulting from the removal of organs, tissues or cells.<sup>43</sup>

#### **4.0 Conclusion and Recommendations.**

Globally, organ transplantation is now the best medical treatment for patients with end-stage organ failure. The procedure is now accepted in Nigeria and a law has been enacted

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<sup>42</sup> Trafficking in Persons (Prohibition), Enforcement and Administration Act, 2014, Section 20.

<sup>43</sup> National Health Act 2014, Section 53(1)(a).

to regulate the process but there are still rooms for improvement.

It is recommended that an amendment should be made to the National Health Act 2014 to clear grey areas that will reflect a detailed provision on informed consent. The definition of “consent” and “the elements that constitute a free and informed consent” should be included in the Act to offer a further safeguard statutorily.

Also, section 55 of the Act which provides for the donation of organs by deceased persons should be amended to include a more practical and effective means of organ donation for deceased persons who wish to donate their organs after death.

Lastly, the fine for violation of the provisions of the Act with regards to the commercialization of organs should be increased.