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## LEGAL AND ETHICAL DEVELOPMENTS IN THE REGULATION OF ORGAN DONATION AND TRANSPLANTATION IN NIGERIA\*

### Abstract

*Organ transplantation is recognised as the criterion for end-stage organ failure, it has evolved over the years to become one of the innovative advancements in contemporary medicine; saving and prolonging lives, as well as enhancing many patients' quality of life. One of the problems outlined in the paper is that Nigeria currently lacks a national registry for organ donation or transplantation. The paper highlights the gains and limitations of our law as well as the legal and ethical issues that arise with respect to consent in organ donation and transplantation and generally evaluate the existing legal frame work regulating the practice of organ donation and transplantation in Nigeria. References were made to international protection on the subject of organ donation and transplantation as it is a medical interference that touches on the fundamental rights of the donor or the donee. A perusal of the provisions of the National Health Act 2014 on informed consent with regards to organ donation and transplantation in Nigeria shows there is a limitation in the law which borders on the unclear manner in which the principle of informed consent is couched and the impracticability of the law by the use of wills with respect to informed consent for cadaveric donation. The paper concludes with recommendations, chiefly that a national organ donation registry must be maintained to keep proper records, so as to easily evaluate success and plan on how to make improvement going forward. The paper also recommends that the law be amended to capture in clear and certain terms the essence of the principle of informed consent, being more detailed on the doctrine as it relates to children, and persons who lack the capacity to consent, the law also needs to ensure the feasibility of the wishes of the deceased to donate by providing other effective avenues such as health records or driver's licence for documenting the consent of willing donors.*

**Keywords:** Organ Donation, Transplantation, Legal Development, Nigeria

### 1. Introduction

Organ donation and transplantation represents one of the best clinical and the most cost-effective care when compared with alternative available treatments. Organ transplantation is expanding globally and has become a very important treatment for the increasing end-stage renal disease (ESRD) population in Nigeria.<sup>1</sup> Until the 20<sup>th</sup> century, the concept of organ donation and transplantation remained an unconceivable thought, an attempt of which bordered on foolhardiness.<sup>2</sup> Yet recently, it is indeed one of the major innovative achievements of modern

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<sup>1</sup> U Ifeoma, 'Organ Transplantation in Nigeria' *Transplantation* April 2016 vol 100 4 p 695 available online on [https://journals.lww.com/tranplantjournal/fulltext/2016/04000/organ\\_transplantation\\_in\\_nigeria.1.aspx](https://journals.lww.com/tranplantjournal/fulltext/2016/04000/organ_transplantation_in_nigeria.1.aspx) accessed 3 September 2019

<sup>2</sup> D Lamb, *Organ Transplants and Ethics* (Routledge 1990,p12).

medicine. This procedure is to a great extent one of the means of saving and enhancing the quality of people's lives but it can only be performed when free and informed consent is given.<sup>3</sup>

One of the key ethical consideration in organ donation and transplantation is the issue of consent. A writer posits that free and informed consent, is a principle founded on patient autonomy that reflects the patient's right to influence decisions about his or her body.<sup>4</sup> Organ donation and transplant though not a usual form of medical treatment in Nigeria, is swiftly gaining recognition and becoming a popular and most recommended form of life sustaining treatment.<sup>5</sup>

In Nigeria, the first successful organ transplant carried out was a kidney transplant performed at St. Nicholas Hospital, Lagos in 2001.<sup>6</sup> However, at the time, there was no legislation in place regulating such a procedure. Nigeria has come a long way in ensuring that it is not left behind in current socio-economic development, particularly with regards to healthcare issues, by enacting a National Health Act<sup>7</sup> to regulate issues emanating from organ donation and transplant. Although this procedure has been widely accepted in contemporary times all over the world as a safe medical procedure, it is fraught with major challenges in Nigeria, ranging from the ineffectiveness of existing frameworks in place to ethical, social and religious beliefs challenges.

The paper examines Nigerian current law and practice in place in this regard, with a view to determining if it is compatible and consistent with the international standard of ethics and human rights, the work also gives a general overview on the evolution of organ donation and transplantation, exploring the doctrine of informed consent as a fundamental requirement to the entrenchment of the right to adequate health care. The paper also makes references to the United Kingdom and United States of America as they are good examples of countries that have advanced in the science of organ donation and transplant and whose legislations have over time evolved in that respect.

The paper concludes with suggestions and recommendations that will improve the general practice of organ donation and transplantation in Nigeria as well as recommendations that will enable an amendment of the law to ensure the effectiveness of the doctrine of informed consent in organ donation and transplantation in Nigeria.

## **2. The Evolution of Organ Donation and Transplantation**

Over the years, as organ transplantation evolved, there were recorded accounts of the many attempts made at achieving a successful organ transplantation.<sup>8</sup> In 300 BC, there were accounts of some Christian Arabs saints, Cosmas and Damian who were said to have transplanted a leg to

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<sup>3</sup> M Stauch and K Wheat with J Tingle, *Text, Cases and Materials on Medical Law and Ethics* (4th edn, Routledge 2012) p502; Convention on Human Rights and Biomedicine (CHRB) 1997, art 5; Universal Declaration of Human Rights 1948, art 7; International Covenant on Civil and Political Rights 1966, art 5.

<sup>4</sup> I O Iyioha, *Pathologies, transplants and indigenous norms: An introduction to Nigerian Health law and Policy. Comparative Health Law and Policy: Critical Perspectives on Nigerian and Global Health Law* (Ashgate, UK 2015) 7.

<sup>5</sup> *Ibid* p 9

<sup>6</sup> Vintage Medical Centre, 'Kidney Transplant' (Education)

<http://www.vantagemedicalcentre.com/education/kidney-transplant> accessed 10 September 2019.

<sup>7</sup> National Health Act 2014

<sup>8</sup> B J A, Bailey and Love, *Short Practice of Surgery: Transplantation* (Vol 183, 24th edn, Arnold Publishers 2004) 206.

replace a diseased leg successfully.<sup>9</sup> The development of effective immunosuppressant in the early 1900s made the procedure of organ transplantation more achievable. This procedure requires certain degree of skillfulness and specialty as it requires the collaboration of several professionals like surgeons, immunologists, anesthetics and physicians.<sup>10</sup>

### 3. Conceptual Clarification

#### 3.1 Transplantation

Transplantation is the removal of living, effective cells, tissues, or organs from the body to be transferred either back into the same body or into a different body.<sup>11</sup> It is a surgical procedure in which organs are extracted from one body and transferred to another body or from one part of a body to another part of that same body. It can also be defined as a surgical procedure that requires the removal of an organ, body parts or tissue from a person (a donor) to another (the donee) in order to replace a frail or missing organ.<sup>12</sup> An author described transplantation as a unique way of affirming and sharing one's humanity.<sup>13</sup>

Transplantation has evolved over time to be the best choice of treatment available.<sup>14</sup> The evolution of transplantation was slow paced due to complications arising from the inability of the recipient's body to control the rejection of the organ which sets in after transplantation. But all this has now been put to rest with the development of effective immunosuppressant medications.<sup>15</sup> Thus, this brought about a breakthrough in organ rejection in transplantation thereby leading to the rapid expansion of cadaveric organ transplantation and making transplantation the best choice of treatment for survival.

There have been a lot of transplantations in the past, both between animals and between humans but the first ever success of this in humans could be traced to the first human kidney transplant carried out between identical twins in 1954 by Dr Joseph Murray in Boston.<sup>16</sup> Transplantation is not only limited to organs; tissues like bones, tendons, cornea, skin, heart valves, hairs and veins can also be transplanted because they also offer life prolonging and lifesaving surgical treatment.<sup>17</sup>

Globally, the kidneys are known to be the most commonly transplanted organs then subsequently, the liver and then the heart. Other various organs that could also be transplanted include the lungs, pancreas, intestine and thymus.<sup>18</sup> Due to the nature of the invasive procedure involved in transplantation, it is no doubt bound to raise ethical issues. Ethical issues concerning

<sup>9</sup> A A Bakari , E A Nwankwo , S J Yahaya , B M Mubi and B M Tahir , 'Initial Five Years of Arterio-Venous Fistula Creation for Haemodialysis Vascular Access in Maiduguri, Nigeria' *Internet Journal of Cardiovascular Research* 2007, Vol 4, No 2, p.21.

<sup>10</sup> H Kashi, 'Organ Transplantation' in M Micheal, N Henry, N Jeremy and Thompson (eds), *Clinical Surgery* (1st edn, W B Saundersan Imprint of Harcourt Publishers Ltd 2001) 193.

<sup>11</sup> M Hertl, P S. Russell, 'Overview of Transplantation' (Merck Manual, Consumer Version, 2016) <<http://www.merckmanuals.com/home/immune-disorders/transplantation/overview-of-transplantation>> accessed 4 September 2019.

<sup>12</sup> Transplant Association Nigeria, 'Transplant Information' (Transplant Association of Nigeria) <<http://transplant.org.ng/information.php#>> accessed 29 June 2019.

<sup>13</sup> D. Price, *Legal and Ethical Aspects of Organ Transplantation* (Cambridge University Press 2000) 1.

<sup>14</sup> *Ibid* n 10

<sup>15</sup> *Ibid* n 3

<sup>16</sup> *Ibid*

<sup>17</sup> *Ibid* n 12

<sup>18</sup> *Ibid*

the appropriate definition and determination of death, the quality of consent given for the transplantation of an organ, payment for transplant organs and organ commodification and trafficking.<sup>19</sup>

### **3.2 Organ Donation**

General body functions are conducted by organs as each organ has an identifiable and specific function which it performs. An organ, for instance like the heart, liver, lungs and stomach is made of several categories of tissue and hence several categories of cells too.<sup>20</sup> An organ is any part of the human body modified by its structure to perform any particular vital function. An organ also includes the eye and its accessories, but with the exclusion of the skin and appendages, flesh, bone, bone marrow, body fluid, blood or a gamete.<sup>21</sup>

Organ donation is the process of donating a vital organ to a donee (recipient) whose own organ has failed or is failing. In this regard, the first organ to be transplanted was the kidney in the 1950s; followed by the heart, liver and pancreas transplantation in the 1960s; and lung and small bowel transplantation in the 1980s. Organs donated can either be from a deceased/cadaveric donor or a living donor. Organ donors usually may either be living, or brain dead. For the donor 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.<sup>22</sup>

In the past, the notion of brain death was immaterial because as the brain dies, so does the rest of the body (that is, as the breathing stops similarly the heart beat stops). But with the advent of artificial means such as ventilators and medications, breathing and heart beats are now temporarily maintained even when all brain activity ceases. Brain death is the permanent loss of brain movement which results to a person's inability to breathe or maintain other important functions on their own and accordingly, all awareness and capacity for thought is lost permanently.

A person is considered legally dead once the diagnosis for brain death is confirmed. However, before such confirmation is made, all treatable conditions that could slow brain functions like low blood pressure, toxic drug usage, low body temperature and sedative overdose but to mention a few; are to be checked for so as not to mistakenly arrive at a wrong diagnosis of brain death. Since, brain death means that the brain stops working, there are some specific criteria which must be ensured to confirm brain death and they are mostly identified during the doctor's physical examination of the person. These criteria 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. Basically, the reason why tests are carried out is to confirm brain death thereby making organ donation a possibility. Again, for the viability of the organs intended for donation, tests such as electroencephalography (commonly known as EEG) and imaging tests are occasionally used especially after tragic head injury accidents. This is because no brain wave is shown in the former and no blood flow to the brain is detected in the latter when a person is brain dead. These criteria are usually rechecked 6 to 24 hours later and

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<sup>19</sup> *Ibid*

<sup>20</sup> A Villa-Forte, 'Tissues and Organs' (Merck Manual, Consumer Version, 2016) <<http://www.merckmanuals.com/home/fundamentals/the-human-body/tissues-and-organs>> accessed 5 September 2019.

<sup>21</sup> National Health Act 2014, Part VII, s 64

<sup>22</sup> *Ibid* n 11

after it is confirmed twice that the brain is not functioning, then a diagnosis of brain death can be made.<sup>23</sup>

A person once declared brain dead can be considered for organ donation. Although some organs such as the kidney, lung and segment of liver, can be donated during life. Most organ and tissue donations worldwide come from people who have expressed an altruistic desire during their lifetime to donate upon their death. This they often do formally by registering their wish to donate on the Organ Donor Register or by discussing the subject with their relatives and loved ones.<sup>24</sup> The success rate of organ transplantation has given rise to the demand for more organs following which two categories of donors have emerged.

### 3.3 Categories of Donors

Organs can be donated either by living persons or deceased/dead persons. Therefore the types of organ donors are generally classified into two; the living organ donors and the cadaveric/deceased organ donors.<sup>25</sup>

### 3.4 Living Organ Donors

In this type of donation, ‘only an organ, or part of an organ which its remaining organ can regenerate or take on the workload of the rest of the organ’ is donated as the donor still remains living after the donation. This type of donation may be in form of a single kidney donation, partial donation of liver or small bowel.<sup>26</sup> Worldwide, this is the most common type of organ donation as transplants from living donors reduces the chances of organ rejection and subsequently boosts more success rates.<sup>27</sup>

### 3.5 Cadaveric/ Deceased Organ Donors

Organs from cadaveric donors mostly come from people who previously agreed to donate their organs by indicating their willingness to donate either in a written document or by making their wishes known to their close relatives. It may also be obtained by approval from the deceased’s closest relative when the deceased’s wishes are unknown. The donors could be healthy persons who have been involved in a major (fatal) accident or persons as who died as a result of a medical disorder.<sup>28</sup> Deceased/cadaveric donors are donors whose organs are kept viable by ventilators or other mechanical life supporting mechanisms for transplantation after been declared brain dead. In view of the growing demand for organs, the cadaveric/deceased donor program is essential to supplement the donor pool as the living donor program alone is not adequate to meet this need. Setting up a deceased donor program in Nigeria will surely be fraught with many challenges which may arise from cultural, social and religious beliefs, public acceptance of deceased organs and organ allocation problems to mention a few.<sup>29</sup>

<sup>23</sup> K Maiese, ‘Brain Death’ (Merck Manual , Consumer version, 2016)

<<http://www.merckmanuals.com/home/brain,-spinal-cord,-and-nerve-disorders/coma-and-impaired-consciousness/brain-death>> accessed 6 September 2019

<sup>24</sup> *Ibid*

<sup>25</sup> A A Bakari, U A Jimeta, A A Mohammed , S U Alhassan, and E A Nwankwo, ‘Organ Transplantation: Legal, Ethical and Islamic Perspective in Nigeria’ 18 (2) *Niger J Surg*, (2012) , p. 53.

<sup>26</sup> *Ibid* n 11

<sup>27</sup> *Ibid* n 2 p 504

<sup>28</sup> *Ibid* n 10

<sup>29</sup> *Ibid* n 11

Cadaveric organ transplantation only takes place with proper pre-mortem consent from the deceased, organs are extracted from the deceased's body for transplantation after death. Prior to their death, individuals could choose to either opt-in or opt-out of donating their organs for transplantation after death. An opt-in refers to where proper pre-mortem consent is given by a deceased or the relatives allowing the extraction of his or her organs for transplantation after death. An opt-out on the other hand, occurs when there is an objection to extraction prior to death by the deceased or post mortem by the relatives.

However, in some jurisdictions like Spain, Belgium and Austria, if no objection is raised pre or post-mortem, there will still be removal of organs because consent will be presumed for the deceased and it will be implied that the deceased has presumably consented to donation by not objecting.<sup>30</sup> This system of presumed consent as it is often 'fair labelled'<sup>31</sup> by legislators, is understood to be an unstated or implied wish to organ donation by a person where there is no record of an objection. Under critical examination, presumed consent could be likened to an opt-in system because they both have defining features in common. Under both systems, organs can be extracted once there is no objection, this infers that the silence of the deceased is an implied consent to extract. A presumed consent system is more or less one and the same with an opt-out system.

Presumed consent is a form of consent to cadaveric organ donation which is in practice in some countries. Some countries like France passed this form of consent into law to boost the advancement of transplantation and also enhance the procurement and donation rates of organs to cater for the greater demand in organs which is not at par with the rate of supply.<sup>32</sup> Many countries now rely on cadaveric organs to meet the demands of organ shortage. For instance, Spain have met most of the demand for kidneys in their country relying on cadaveric organs.<sup>33</sup> Cadaveric organ donation is rapidly gaining wide recognition probably because it minimizes dangers of injury and also enables extraction of all organs in the body at once. This is possible primarily due to the fact that the organs extracted are from the deceased, not a living donor. Likewise, this form of organ donation has presently been used in achieving around two-thirds of the kidney transplants done in the United Kingdom.<sup>34</sup>

## **4 Legal Framework for Organ Donation and Transplant**

### **4.1 International Legal Framework**

In the United Kingdom, the position of the law in relation to living or cadaveric organ donation is that, a donor must always consent to the removal of an organ free from coercion or undue influence.<sup>35</sup> The United Kingdom Human Tissue Act 2004 was enacted 'to provide a consistent legislative framework for issues relating to whole body donation and the taking, storage and use

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<sup>30</sup> A. Rithalia, et al. , 'Impact of Presumed Consent for Organ Donation on Donation Rates: A Systematic Review' (2009) 340 *BMJ* p. 3162

<sup>31</sup> Austen Garwood-Gowers, 'Time to Address the Problem of Post-Mortem Procurement of Organs for Transplantation Occurring without Proper Pre-mortem Consent' (2013) 20 (4) *European Journal of Health Law* 383, 386

<sup>32</sup> G. Nowenstein, 'Nemo Censetur Ignorare Legem? Presumed Consent to Organ Donation in France, from Parliament to Hospitals' In Austen Garwood-Gowers, John Tingle and Kay Wheat (eds), *Contemporary Issues in Healthcare Law and Ethics* (Elsevier, 2005) p.173.

<sup>33</sup> A G Gowers, *Living Donor Organ Transplantation: Key Legal and Ethical Issues* (Ashgate and Dartmouth 1999) p.22.

<sup>34</sup> *Ibid* n 3 p 519.

<sup>35</sup> Human Tissue Act 2004, s 1

of human organs and tissue'.<sup>36</sup> The Human Tissue Act 2004 repeals and replaces the Human Tissue Act 1961, the Anatomy Act 1984, and the Human Organ Transplants Act 1989. The Act came into existence as a result of some scandalous happenings which were against public policy. These scandals includes, the retention of organs scandals at Bristol Royal Infirmary<sup>37</sup> and the Royal Liverpool Childrens' Hospital.<sup>38</sup> The Alder Hey scandal (which was the subject of the Redfern Report of the Royal Liverpool children's inquiry) involved the extraction, examination and retention of body parts and organs of dead children without the consent of their parents. The parents and guardians who actually remembered consenting to the storage had no idea about what they were consenting to as the doctors did not disclose or give them proper information on the reason for their consent thus, the consent obtained was not an informed one and therefore invalid.<sup>39</sup> The outcome of the scandal was a report which recommended for an introduction of the fundamental principle of informed consent for the lawful extraction and retention of body parts and organs.<sup>40</sup>

The underlying principle behind the 'lawful storage and use of human bodies, body parts, organs and tissue and the removal of material from the bodies of deceased persons is **consent**.'<sup>41</sup> This principle which is deeply rooted in the law of most western societies stems from a deep rooted fact that all human beings have a right to their autonomy and self-determination and a law that encourages the forceful extraction of organs for the benefit of others will be inhumane, thus, unethical and inconsistent with human rights.<sup>42</sup> The failure of a doctor under British law to carry out any medical intervention without an 'appropriate consent' is unlawful<sup>43</sup> and makes him liable for battery<sup>44</sup> and assault<sup>45</sup> both in civil and criminal law respectively.<sup>46</sup> Bell also agrees as highlighted by the Human Tissue Act 2004 that an 'informed and highly specific consent' as a fundamental principle should be relied upon as respect for autonomy is one of the founding ethical principles of medical intervention.<sup>47</sup> The doctrine of informed consent is an established

<sup>36</sup> *Ibid* n 34,

<sup>37</sup> United Kingdom Central office of Information, 'The report of the Bristol Royal Infirmary Inquiry' (Central Office of Information, London, 2001).

<sup>38</sup> Redfern M, 'The Royal Liverpool children's inquiry Report (Redfern Report)' (Department of Health, the Stationary Office, 2001) <<http://www.rlcinquiry.org.uk/>> accessed 14 September 2019

<sup>39</sup> *AB v Leeds Teaching Hospital NHS Trust* [2004] EWHC 644

<sup>40</sup> Rodgers, M E, 'Human bodies, inhuman uses: Public reactions and legislative responses to the scandals of bodysnatching' in Austen Garwood-Gowers, John Tingle and Kay Wheat (eds), *Contemporary issues in healthcare law and ethics* (Elsevier 2005) 151; Hall D, 2001. 'Reflecting on Redfern: What can we learn from the Alder Hey Story?' (2001) 84 (6) *Archives of Disease in Childhood* 455 <<http://adc.bmj.com/content/84/6/455.full>> accessed 12 September 2019.

<sup>41</sup> *Airedale NHS Trust v Bland* [1993] AC 789 (Goff LJ); Explanatory note 4 to the Human Tissue Act 2004.

<sup>42</sup> Convention on Human Rights and Biomedicine [1997], art 10; European Convention on Human Rights [1950]; art 8; *Schleondorff v Society of New York Hospital* (1914) 105 NE 92 (Cardozo J).

<sup>43</sup> *Ibid* n 34 s 1, 2, 3, 6.

<sup>44</sup> *Wilson v Pringle* [1986] 2 ALL ER 440; *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1.

<sup>45</sup> Offences against the Person Act 1861, s 18, 20.

<sup>46</sup> T Elliott, 'Body Dysmorphic Disorder, Radical Surgery and the Limits of Consent' (2009) 17 *Med L Rev* 149; PDG Skegg, *Law, Ethics and Medicine* (Clarendon Press 1984), *Airedale NHS Trust v Bland* [1993] AC 789 (Mustill LJ); Human Tissue Act 2004, s 5.

<sup>47</sup> M D Bell, 'The UK Human Tissue Act and Consent: Surrendering A Fundamental Principle to Transplantation Needs?' 32 (5) *J Med Ethics* 2006, p.283.

precondition which must be present before the occurrence of any medical interference with the body.<sup>48</sup>

The American Uniform Anatomical Gift Act 1968, amended in 1987 and further amended in 2006<sup>49</sup> regulates organ donation and transplant in America and provides for all ethical requirement that must be complied with as well as the fundamental principle of informed consent, which importance cannot be overemphasized.<sup>50</sup> This was exemplified in the American case of *McFall v Shimp*.<sup>51</sup> In the above case, a patient requiring a bone marrow donation sought an injunction to compel his cousin who though a suitable donor, declined to donate his bone marrow to make the transplantation. The patient's cousin who had volunteered for a compatibility test declined undergoing further tests after being found to be a suitable donor. The court held that the decision to undergo such a medical procedure rests with the individual whose body part is to be removed. Thus, compelling such an individual to submit to bodily intrusion will defeat the sanctity of life of that individual and also impose a rule which will have no limits.<sup>52</sup>

Voluntariness is therefore a major requirement for a valid consent. The essential elements of a valid consent include, firstly, the patient must have the mental competence to make the decision.<sup>53</sup> Basically, a person is presumed to have the capacity to consent or refuse medical treatment. However, a person will be seen to be unable to make a decision if such a person in his decision making process cannot understand, retain<sup>54</sup> and use<sup>55</sup> the information given and also cannot communicate his decision whether by talking or gesticulating.<sup>56</sup> In addition, it is suggested that in assessing capacity, the values and beliefs of the person being assessed be considered as some values and beliefs though respected by the person assessed may be seen or thought to be meaningless by the assessor.<sup>57</sup>

Secondly, the patient must consent to or refuse the treatment in question freely without duress or undue influence. This means that the consent must be given voluntarily as voluntariness requires the absence of any coercion.<sup>58</sup>

Thirdly, the patient must have been given sufficient information about the intended treatment.<sup>59</sup> The information given needs to explicitly and essentially state what is to be done and why it

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<sup>48</sup> Convention on Human Rights and Biomedicine [1997], art 5; Universal Declaration of Human Rights 1948, art 7; International Covenant on Civil and Political Rights [1966], art 5.

<sup>49</sup> Uniform Anatomical Gift Act 2006

<<http://uniformlaws.org/Act.aspx?title=Anatomical%20Gift%20Act%20%282006%29>>accessed 15 September 2019

<sup>50</sup> A Maclean, *Autonomy, Informed Consent and Medical Law – A Relational Challenge* (CUP 2009).

<sup>51</sup> (1978) 10 Pa D &C (3d) [90].

<sup>52</sup> *McFall v Shimp* [1978] 10 Pa D & C (3d) [90] (Flaherty J).

<sup>53</sup> *Re MB (Medical Treatment)* [1997] 2 FLR 426 (CA) (Butler-Sloss LJ).

<sup>54</sup> *An NHS Trust v T (Adult: Refusal of Medical Treatment)* [2004] EWHC 1279 (Fam); *Local Authority X v MM* [2007] EWHC 2003 (Fam) (Munby J).

<sup>55</sup> *R v Collins and Ashworth Hospital Authority ex p Brady* [2000] Lloyd's Rep Med 355 (Maurice Kay J); *B v Croydon Health Authority* [1994] 2 WLR 294.

<sup>56</sup> Mental Capacity Act 2005, s 2, 3.

<sup>57</sup> M Gunn, 'The Meaning of Incapacity' [1994] 2 *Med L Rev* p 8.

<sup>58</sup> *The Centre for Reproductive Medicine v U* [2002] EWCA Civ 565.

<sup>59</sup> *Sideway v Board of Governors of the Bethlehem Royal Hospital and the Maudsley Hospital and Others* [1985] AC 871.



needs to be done and this is mostly deciphered from what the nature and purpose of a medical procedure entails.<sup>60</sup>

Furthermore, the English Mental Capacity Act (MCA) principles<sup>61</sup> provides that a person is assumed to have capacity unless it is established that he lacks capacity and that a person shall not be treated as unable to make a decision unless all practicable steps to help such a person to do so have been taken without success and that making an unwise decision does not make a person incapable.<sup>62</sup> In addition, any act or decision made on behalf of such a person must be made in his best interest and in a way that is less restrictive of the person's rights and freedom of action. With the advent of the MCA, guidelines on ways to determine capacity in relation to incapable adults were provided for and provisions were made for donees of a 'lasting powers of attorney' to take care of their personal care<sup>63</sup> and treatment and advanced decisions to refuse treatment made when they had capacity.<sup>64</sup> The MCA also provides for the powers of the court to make declarations as to the capacity or incapacity of a person<sup>65</sup> and the appointment of deputies to consent to treatment on behalf of the incapable patient.<sup>66</sup>

On the capacity of children to consent or refuse treatment, this could be quite tricky as it tends to be a bit complex. In accessing capacity with regards to children, the English age of majority is 18 years but for the purposes of giving a valid consent to medical treatment, minors who have attained the age of 16 years could consent.<sup>67</sup> Children under the age of 16 could consent to medical treatment if they are *Gillick Competent*. It was decided by Lord Fraser in *Gillick v Norfolk and Wisbech AHA*<sup>68</sup> that younger children below the age of 16 may be able to consent to medical treatment depending on their level of understanding.

Thus, *Gillick Competence* follows that if a minor below 16 years is capable of understanding what is proposed and of expressing his or her wishes, any consent given by such a minor will be effective and valid. However, this is only in relation to consent and not refusal. A minor's refusal of treatment could still be overridden by the parents or persons in *loco parentis*.<sup>69</sup> Like the case of a 16 year old girl suffering from anorexia nervosa and refusing treatment, the Court of Appeal held that section 8 of the Family Law Reform Act<sup>70</sup> did not confer an absolute right and could be overridden by the court exercising its inherent jurisdiction.<sup>71</sup> It is essential to note that in relation to children, the court usually adopts a paternalistic approach when it relates to refusal of treatment which has grave implications for continuity of life or health.<sup>72</sup> Where a doctor is not convinced of the capacity of a minor to refuse or consent to treatment, such a matter should be brought before the courts for a declaration.

<sup>60</sup> A Grubb, *Principles of Medical Law* (2<sup>nd</sup> edn, OUP 2004).

<sup>61</sup> Mental Capacity Act 2005, s 1

<sup>62</sup> *Ms B v An NHS Hospital Trust* [2002] EWHC Fam. 429

<sup>63</sup> *Ibid* n 60 s 9

<sup>64</sup> *Ibid* n 60 s 24, 25, 26

<sup>65</sup> *Ibid* n 60 s 15

<sup>66</sup> *Ibid* s 16

<sup>67</sup> Family Law Reform Act 1969

<sup>68</sup> [1986] 1 AC 112

<sup>69</sup> *Re R (A Minor) (Wardship: Consent to Treatment)* [1992] Fam. 11, CA

<sup>70</sup> *Ibid*

<sup>71</sup> *Re W (A Minor) (Medical Treatment)* [1993] Fam. 64, CA

<sup>72</sup> *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386

The importance of free and informed consent as a requirement covers both living donor and cadaveric organ donor.<sup>73</sup> It is worthy of note that failure to ensure the enforcement and implementation of a free and informed consent could lead to an increase in organ commodification and trafficking. The success rate of transplantation has increased the demand for more organs to be made available and with this arose the evil of organ trafficking. There are cases where people have sold their organs for financial gain and benefits. Making offers and selling to the highest bidder and vulnerable patients buying at excessive costs just to survive. An example is the story of the 17 year old Chinese boy who contacted an illegal agency online to sell one of his kidneys so as to purchase mobile phones.<sup>74</sup> There has also been a recent case of two Chinese men who tried to sell their kidneys in order to purchase iphone 6s cell phones but could not as the agent who brokered the deal failed to show up at the appointed hospital.<sup>75</sup> Such actions are unethical and inconsistent with international laws and treaties which seeks to protect both donor and donee.<sup>76</sup>

In most jurisdictions, the position of the law in relation to organ commodification and trafficking is very strict. For instance in the United Kingdom, commercial dealings in human organs or material for transplantation is prohibited and anyone who engages in such is guilty of an offence.<sup>77</sup>

#### **4.2 An Appraisal of the Gains and Limitations Under Our Domestic Legislation**

In Nigeria and other sub-Saharan African countries, organ donation and transplantation is far from being a routine form of medical treatment, organ donation networks and infrastructures are not yet well-developed in Nigeria. The sub-optimal transplantation capacity in Nigeria is not able to trigger a high demand for organs that will raise concerns in relation to supply. This immunity is only limited to the problems of organ shortage, but not from the problems of transplant tourism. In healthcare jurisdictions where organ transplantation has become a routine form of medical treatment, some of the debates have ranged from appropriate structures and frameworks for increasing the supply of needed organs, to liability issues arising from the destruction or misdirection of donated organs.<sup>78</sup>

In Nigeria, matters concerning human organ donation and transplantation are regulated by the National Health Act.<sup>79</sup> The Act has many laudable initiatives such as the prohibition of the provision of organ transplant services except in a duly authorized hospital and with the written

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<sup>73</sup> *Freeman v Home Office (NO 2)* [1984] 1 ALL ER 1036.

<sup>74</sup> Foreign Staff, 'Chinese student sells kidney for ipad' (Telegraph, 10 August 2012) <<http://www.telegraph.co.uk/news/worldnews/asia/china/9466585/Chinese-student-sells-kidney-for-iPad.html>> accessed 17 September 2019; Meredith Bennett-Smith, 'W Shangkun, Chinese teen who sold kidney to buy ipad, too weak to face alleged harvesters in trial' (Huffington Post, The World Post, 12 August 2012) <[http://www.huffingtonpost.com/2012/08/10/wang-shangkun-kidney-ipad\\_n\\_1764335.html](http://www.huffingtonpost.com/2012/08/10/wang-shangkun-kidney-ipad_n_1764335.html)> accessed 17 September 2019.

<sup>75</sup> NDTV Correspondent, 'Two men reportedly try to sell kidney for iphone 6s' (Gadgets 360, 16 September 2015) <<http://gadgets.ndtv.com/mobiles/news/two-men-reportedly-try-to-sell-kidney-for-iphone-6s-740488>> accessed 19 September 2019.

<sup>76</sup> The Declaration of Istanbul on Organ Trafficking and Transplant Tourism 2008; Convention on Human rights and Biomedicine [1997], art 21; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, art 3 a.

<sup>77</sup> *Ibid*

<sup>78</sup> R N. Nwabueze, 'Organ Donation and Transplantation' *Law Explore Administrative Law* 2016 available online at <https://lawexplores.com/organ-donation-and-transplantation/> accessed 4 December 2019

<sup>79</sup> *Ibid* n 21

permission of the medical practitioner in charge of clinical services at that hospital. For that purpose, the National Tertiary Hospital Commission is empowered to develop criteria for the approval of organ transplant facilities, as well as the procedure for securing such approval. The Act further provides that only duly qualified and registered medical practitioners are authorized to render transplantation services.

Furthermore, the Act prohibits any form of commercialization of human organs, thus it is an offence punishable with fine, or imprisonment or both for a person who has donated a tissue or organ to receive any form of financial reward, except reimbursement for reasonable cost incurred by the donor in connection with the organ donation. The Act also establishing the two sources of organs for transplantation i.e the living and cadaveric donors discussed above. Generally, the Act provides a framework for the regulation of the removal and use of human organs donated for transplantation.<sup>80</sup>Part VI of the Act provides for the control of the use of blood, blood products, tissue and Gametes in humans. A 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>81</sup>

Just as applicable under the common law, consent is the guiding principle for living donation under the Act. The fact that informed consent is only mentioned in relation to tissues, blood and blood products without the inclusion of organs under the Act<sup>82</sup> is worrisome and it is probably as a result of the interpretation of a tissue under the Act to include organs.<sup>83</sup> This interpretation ends up distorting the clarity and certainty of the information which the Act seeks to convey with a resultant effect of a non-inclusion of the word *organs* in the heading in part VI and in section 48 (1) (a) of the Act. Although the Act also defined an organ, it is still inappropriate that a tissue is interpreted to include organs. Under proper analysis, it should be the other way round as scientifically, organs are made up of tissues and besides, tissues are regenerative in nature while organs are not.<sup>84</sup>

The Act also provides for the removal of tissue, blood or blood products from a living donor but only after appropriate consent is given by the donor.<sup>85</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 the purposes of organ and tissue storage and use. This is alarming as the doctrine of informed consent is one that is expected to be addressed and given a thorough discourse as it is not only an essential prerequisite for organ donation and transplant<sup>86</sup> but the bedrock upon which any medical interference with the body is anchored on.<sup>87</sup> Although informed consent to some extent in section 23 of the Act<sup>88</sup> is discussed, 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. The manner in which the heading of section 23 is worded does not make for clarity and certainty. Subsequently, what it seeks to clarify which is the presence of an

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<sup>80</sup> *Ibid* Part VI, s 47 - 57

<sup>81</sup> *Ibid* Part VII, s 64

<sup>82</sup> *ibid* s 48 (1) (a)

<sup>83</sup> *ibid* s 64

<sup>84</sup> *Ibid* n 19

<sup>85</sup> *Ibid* n 20 Part VI, s 48 (1)(a)

<sup>86</sup> Convention on Human Rights and Biomedicine (CHRB) 1997, art 19.

<sup>87</sup> *Ibid* art 5, 6, 7

<sup>88</sup> *Ibid* 20

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 a free and informed consent, the Act should state the factors that need to be considered in relation to adults, children and persons who lack capacity to consent<sup>89</sup> to arrive at proper consent under the law.

As seen under the English law, the term ‘appropriate consent’ is defined in section one of the Human Tissue Act 2004 thereby clarifying the meaning and scope of an appropriate consent as it relates to children<sup>90</sup>, adults<sup>91</sup> and adults who lack capacity to consent.<sup>92</sup> An undefined scope of informed consent could lead to the illegal procurement of organs. This will subsequently encourage a rise in organ commodification which is prohibited<sup>93</sup> as any organ procured without the requisite appropriate consent will be unlawful and as such can no longer be termed a donation.

Subsequently, when the necessary preconditions required to be fulfilled before organ donation is not satisfied, it becomes very easy to procure these organs under the false pretence of donation which is unethical and inconsistent with international standards.<sup>94</sup> In protecting the rights of individuals to bodily interference, it is important that donors be given the opportunity to understand what their status as donors entail and how to effectively exercise their rights as donors by consenting to the procedure of donation, through it all, it is paramount that the donors consent is genuine and voluntary. At the international level, there are already measures on trafficking in human beings for the purposes of organ removal such as the Council of Europe Convention on Action against Trafficking in Human Beings and the U N Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.<sup>95</sup> Nigeria is not a signatory to these Conventions.

For intra-familial donation, the reality of consent is debatable, because of factors such as pressure to help a family member, societal, cultural and religious expectations, role expectations, such as the belief in some Asian countries that a wife must do everything to help out a husband in need might undermine the voluntariness of consent.<sup>96</sup> Section 55 also provides for the capacity to consent to donation before death by deceased donors. A ‘competent’ deceased donor may show consent through a will, or in a document signed by him/her and witnessed by two competent witnesses, or in a written statement made before two competent witnesses.<sup>97</sup> In the provisions of the Act as it relates to consent in the donation of organs by deceased persons, there appears to be a problem in ensuring the practicality of that provision in view of the Nigerian societal values and the laws that govern probate in Nigeria.<sup>98</sup> It is common knowledge that most

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<sup>89</sup> Convention on Human Rights and Biomedicine 1997, art 19 and 20

<sup>90</sup> *Ibid* n 34 s 2

<sup>91</sup> *Ibid* n 34 s 3, 4; Human Tissue Act 2004, Code of Practice 2- Donation of organs, paras 96-103

<sup>92</sup> *Ibid* n 34 s 6

<sup>93</sup> *Ibid* n 20 s 53; *ibid* n 75 art 21

<sup>94</sup> *Ibid* n 64

<sup>95</sup> Warsaw, 2005, Council of Europe Treaty Series No. 197 available online at

<http://www.coe.int/t/dghl/monitoring/trafficking/docs/convntn/CETS197en.asp#topofpage> and Palermo, Italy, 2000, U N Crime and Justice Information Network available at

<http://www.uncjin.org/documents/conventions/dcatoc/finaldocuments2/convention%20traffeng.pdf> accessed 2 March 2020

<sup>96</sup> *Ibid* n78

<sup>97</sup> *Ibid* 20 s 55, (a) (i) (ii) & (iii)

<sup>98</sup> Lagos State High Court Civil Procedure Rules, Order 55, Wills Law of Lagos state Cap W2 2004, Wills Act 1837

Nigerians dislike the idea of making their wills.<sup>99</sup> This stems from the notion that making such testamentary statement is a signal that one is about to die.

Again, even if a valid will exists, the bottlenecks and delay in the process of the deceased's lawyers trying to sort out all the formalities involved in getting a grant of probate so as to reveal the contents of the will, the proper time to harvest the organs will have lapsed, as organs deteriorate quickly once death occurs.<sup>100</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 kept alive by ventilators or other life support mechanisms.<sup>101</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 process may be viewed as a denigration of the dead. At present, no transplant facility in Nigeria undertakes a deceased donor program.

As a limitation also, the National Health Insurance Scheme does not cover services for transplantation, which makes it largely not affordable for the masses due to the huge cost of the procedure. Lastly the proposed world first anti-organ trafficking treaty is very commendable, the treaty bans making money off transplants. The treaty is open to all countries and takes effect when at least five countries ratify it.<sup>102</sup>

### 4.3 Conclusion and Recommendations

The point has been made that organ donation and transplantation is a medical procedure that involves bodily interference, the procedure is not entirely new in Nigeria and some protective laws are already in place to protect willing donors which is an issue that cannot be overlooked, but there is a lot of room for improvement.

The paper concludes with recommendations, firstly that an Ethics Committee and a National Organ Donation and Transplant Registry must be set up and maintained to keep proper records as well as monitor and regulate the procedure in Nigeria, the data base can also be used to easily evaluate success and plan on how to make improvement going forward.

It is important for the government to take steps to reduce transplantation tourism and the problem of national and international trafficking in human tissue and organs, especially considering the poverty and illiteracy index in the country, which may force the downtrodden to commercialize their organs or tissue without proper knowledge of what the procedure entails.

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. A law which will give better clarity and certainty and also aid better understanding of the principle of informed consent with regards to organ donation and transplantation.

<sup>99</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 28 January 2019

<sup>100</sup> *Ibid* n10

<sup>101</sup> *Ibid* n 22

<sup>102</sup> <https://www.mohanfoundation.org/news/world-first-anti-organ-trafficking-treaty-will-be-signed-by-nations-today-887.htm> accessed 2 March 2020

It is recommended that the definition of 'consent' and 'the elements that constitutes a free and informed consent' should be included in the Act to offer a further safeguard statutorily. This will ensure the provision of a more detailed and robust interpretation of consent statutorily which will be achieved by addressing what constitutes a valid consent as it relates to capable adults, incapable adults and children. The particular section of law concerned with informed consent should be titled in accordance to what it seeks to clarify. It could be termed 'informed consent' or 'appropriate consent'.

Again, the concerned section should be given a broader or wider scope of definition to encompass all the elements and salient points mentioned above. The section should also go further to clarify the fact that unless these elements are met, a valid consent will not have been properly acquired and any person who performs any health services with such a consent will be seen to have committed an offence under the law.

It is recommended that the definition of a 'tissue' be amended to exclude organs so as to erase any misunderstanding or uncertainty that could arise in the interpretation of the definition of 'an organ' especially with regards to the principle of informed consent. It is further recommended that the Act also be modified to reflect the word 'organs' in both section 48 (1) (a) and in the heading in part VI of the Act.

The paper also recommended that section 55 of the National Health Act which provides for the donation of organs by deceased persons be amended to include a more practical and effective means of organ donation for deceased persons who wish to donate their organs after death. An effective means could be achieved either through the use of advance directives or Physician Orders for Life-Sustaining Treatment (POLST) documents. Advance directives are legal written agreements which may include a person's wishes or preferences for medical care or a secure power of attorney in which an ill person authorises another person to make medical care decisions on his or her behalf. A physician orders for life-sustaining treatment (POLST) documents are written doctor's orders that reflects a person's preferences for health care. These documents are usually kept in the person's medical records to be used in determining the person's health care preferences and instructing health personnel in an emergency.<sup>103</sup> In some jurisdictions, people indicate their interest to donate on their driver's licence. While in some other countries it is mandated by law that citizens who wish to acquire a driver's licence state their wishes to donate or not before they get one.<sup>104</sup>

Some countries have actually gone far in deliberations on whether to enact laws ensuring the provision of such information as one of the preconditions of citizens' international passports

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<sup>103</sup> E L Cobbs, K Blackstone, J Lynn, 'Legal and Ethical Concerns at the End of Life' (Merck Manual, Consumer version, 2016) <<http://www.merckmanuals.com/home/fundamentals/death-and-dying/legal-and-ethical-concerns-at-the-end-of-life>> accessed 20 September 2019

<sup>104</sup> P Walker, 'Driving Licence Applicants Asked to Join Organ Donor Register' (The Guardian, 31 July 2011) <<https://www.theguardian.com/society/2011/jul/31/driving-licence-organ-donor-register>> accessed 20 September 2019

renewal.<sup>105</sup> These means mentioned above are some practical means of encouraging cadaveric organ donation which are functioning effectively in some jurisdictions and Nigeria could also consider these ideas with a view to modifying them to suit our local circumstances.

In the alternative, the paper also recommends that Nigeria embraces the presumed consent form of cadaveric organ donation as it is one of the means of ensuring an increase in the supply of organs. Many countries like Chile, Israel and Singapore, to mention a few have taken the initiative to modify their laws to provide for the system of presumed consent as a form of consent for cadaveric organ donation.<sup>106</sup> Even though our progress in organ transplantation as a country is not record high, and we may feel that going into the presumed consent regime may be way above us, the problem of shortage will most likely arise to create problems in the future. Progressively, this is why laws are enacted not only for the pressing challenges of the moment but for most of the likely future challenges that may arise later. There is no doubt that Nigeria just like other jurisdictions will get to a stage in the future where her demands for organs will not be satisfied by the supply available. Hence, it will be good practice to ensure when that time comes, there will be a robust provision enacted to ensure more supply.

Lastly, the paper has observed that the issue of organ donation has generated lots of religious and cultural sentiments. This is because various cultural and religious groups see harvesting deceased organs for donation as a violation of the dead body and negates the sacredness and respect supposedly accorded to a dead body. This is also at variance with the precepts and teachings of some religions. This brings up the need for better awareness on the importance of such procedure by the National Orientation Agency and other non-governmental organizations working in this area, people should be made to understand the essence of this procedure which is principally life prolonging and lifesaving. For the protection of adherents of any religious group that forbids cadaveric organ donation, a law could be put in place for their protection borrowing a leaf from Singapore where the law is couched in such a way as to protect the rights of the Singaporean Muslims who have registered their intention to donate.<sup>107</sup>

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<sup>105</sup> Daily Mail, 'No Driving Licence until you say if you will Donate Organs' (Daily Mail Online, 30 July 2011) <<http://www.dailymail.co.uk/news/article-2020613/No-driving-licence-say-donate-organs.html>> accessed 20 September 2019.

<sup>106</sup> A Zuniga-Fajuri, 'Increasing Organ Donation by Presumed Consent and Allocation Priority: Chile' (2015) 93 (199-201) Bulletin of the World Health Organization <<http://www.who.int/bulletin/volumes/93/3/14-139535/en/>> accessed 21 September 2019; C A J, 'Points Mean Prizes: Priority Points, Preferential Status and Directed Organ Donation in Israel' (2014) 3 (1) *Isr J Health Policy Res* 8

<sup>107</sup> Department of Health, 'The Potential Impact of An Opt Out System for Organ Donation in the UK, An Independent Report from the Organ Donation Taskforce' (Department of Health, UK, 2008) <<http://www.nhsbt.nhs.uk/to2020/resources/ThepotentialimpactofanoptoutsystemfororgandonationintheUK.pdf>> accessed 2 October 2019.