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AN OVERVIEW OF ORGAN/TISSUE TRANSPLANTATION AND THE ROLE OF LAW IN NIGERIA

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ABSTRACT

The practice of organ/tissue transplantation as a medical sub-specialty has over the years gained worldwide popularity as the modern treatment option for End Stage Organ Failure. As a result, therefore, it has garnered a lot of attention from a wide spectrum of society on the important issues, challenges and considerations arising from the practice. The research has therefore attempted through doctrinal research, to present a general overview of the subject of organ/tissue transplantation and to put into perspective all the arrays of issues associated with the practice by tracing the historical development of organ/tissue transplantation, outlined and discussed some of the contemporary and controversial issues associated with the practice. The research also examined some of the ways in which the law has intervened to stabilize the practice through the provision of a workable, fair and equitable regulatory framework. The research also discussed the practice in Nigeria through a brief analysis of its development, impediments and the existence, legal framework put in place for the management of the practice. The research then proceeded to examine some novel trends, ideas, research and innovations in the transplantation sector that will potentially bear heavily on the future of organ transplantation as a sustainable treatment option. The research findings show that certain challenges exist in this practice even with the advent of the National Health Act 2014, the law does not adequately protect vulnerable citizens from organ commercialization and tourism. This research recommends that certain sections especially sections 48 and 51 of the National Health Act be repealed and there should be more emphasis on donor consent and Government should do more within its power to protect the vulnerable by upgrading hospitals to international standards and possibly include organ transplant in the National Health Insurance Scheme.

Keyword: Organ/Tissue Transplant, Legal Framework, National Health Act 2014, Healthcare

1.0 INTRODUCTION

The 20th and 21st centuries have recorded tremendous advancement in medical practice, bearing out novel innovations, ideas and techniques that have revolutionised global healthcare delivery and contributing immensely to the improvement of the quality of patient care thus saving numerous lives. One of such advancements is the advent of organ/tissue transplantation which today represents a milestone of modern medicine. Today, transplantation of solid organs has become the treatment of choice for End Stage Organ Failure which has brought respite to countless millions of ailing patients whose conditions would have otherwise been definitively ruled as fatal. It is also becoming more popular within the medical circle as a viable alternative to otherwise relatively more expensive and less effective treatment options.¹

The practice of organ/tissue transplantation has however not been without its drawbacks. Transplantation medicine is today one of the most complex and challenging areas of modern medicine. As a surgical sub specialty, it has in recent times witnessed an explosion in popularity as the preferred treatment option for End Stage Organ Failure, thus garnering attention and inviting an array of critical opinions and counter opinions from across various other disciplines. This is the case as the practice raises crucial issues including the attending problems, ethical considerations and reservations all of which will bear heavily on the future of organ/tissue transplantation.² This therefore accounts for the role of the law as the mechanism to balance respective interests and to answer those pertinent questions in the best way possible in order to safeguard the practice against abuse and at the same time ensure its progressive application and development so as to chart the course for its future as a sustainable treatment option.³

HISTORICAL BACKGROUND OF ORGAN TRANSPLANTATION IN NIGERIA

The idea of organ and tissue transplantation was first conceived in Nigeria in 1980 but due to the gradual deterioration in the public health care system, the concept was not actualized until the year 2000 when first renal transplant was done. But it was estimated that end stage renal disease

¹ Abubakar A. Bakari, Umar S. Abbo Jimeta, et al, *Organ Transplantation; Legal, Ethical and Islamic Perspective in Nigeria*. Nigeria Journal of Surgery, Volume 18 issue 2 July – December, 2012.

² George M. Abouna. *Medical Principles and Ethics; Ethical Issues in Organ Transplantation*.

³ Fred H. Gate. *The Role of Law in Human Organ Transplantation*; Articles by Maurer Faculty Scholarship, 1994.

(ESRD) is between 200 to 2000 per a million population. End Stage Renal Disease patients in Nigeria have been managed largely on hemodialysis which has not been a good quality of life to the patients and more so, very few patients who would afford to be on regular prescribed hemodialysis because of high cost of hemodialysis which is higher than that of kidney transplant.

CONCEPTUAL CLARIFICATION

ORGAN

Organ is defined by the oxford advanced dictionary as part of a body that has a particular purpose such as the heart or brain.⁴ Organ is also defined as any part of the human body consisting of a structured arrangement of tissue which if wholly removed cannot be replaced by the body.⁵ It is worthy to note that hair, nail, blood marrow do not fall within this definition of organ as such can regenerate.⁶

TISSUE

Tissue is also defined as the collection of cells that form the different parts of human.⁷ Tissue may be recovered from donors who are cardiac dead. That is, their breathing and heartbeat has ceased. They are referred to as cadaveric donors. In general, tissues may be recovered from donors up to 24 hours after the cessation of heartbeat. In contrast to organs, most tissues can be preserved and stored for up to 5years, meaning they can be banked.

ORGAN TRANSPLANTATION

An organ transplantation is a surgical operation in which a failure or damaged organ in the human body is removed and replaced with a functioning one.⁸ It is worthy to note that organ or tissue that is transplanted within the same person's body is called autographs while transplant that are recently performed between two subjects of the same species are called allograft. Allograft can either be from a living or cadaveric source.

DONOR: This is referred to the person mat gives out his organ of tissue to be transplanted on another.

⁴ Advanced Learners Dictionary 8th Edition

⁵ Section 7 (2) Human Organ Transplant Act, 1989

⁶ Festus O. Emiri: Medical Law and Ethics in Nigeria (Malthouse Press Limited, 2012)

⁷ Ibid

⁸ www.ahc.umn.edu/ing/assets accessed 5/1/2018

DONEE· This is the recipient of the organ or tissue.

WHO CAN BE A DONOR OF ORGAN AND TISSUE

The parties involved in organ transplants are referred to the donor and donee. The donor is the person that donates his or her organ while the donee is the recipient of the organ. It is worthy to note that the Act provides that donation is only lawful where the donor and donee are genetically related.

Organ donor may be living or may have died of brain death or circulatory death. Most deceased donor is those who have been pronounced brain dead. Brain death indicate a situation where the cessation of the brain function typically after receiving an injury to the brain or otherwise cutting of blood circulation to the brain. Organ donation is possible after cardiac death in some situation primarily when the person is severely brain injured and not expected to survive without artificial breathing and mechanical support. Independent of any decision to donate a person's next of kin may decide to end artificial support if the person is expected to expire within a short period of time after support is withdrawn.

LIVING DONOR

These are a donor that remains alive and donates a renewable tissue, cell or fluid or donate an organ or part of an organ in which the remaining organ can regenerate or take on the workload of the rest of the organ.

DECEASED DONOR

Deceased Donor are people who have been declared brain - dead and whose organs are kept viable by ventilator or other mechanical mechanism until the can be exhume for transplantation.

It is also worthy to note that a successful organ transplant involves scaling through several medical hurdles before achieving the process.

The processes involves:-

- a. Ensuring that donee body does not reject the donated organ.
- b. Ensuring that the donor's organ to be used is safe and healthy, it is in this respect that younger donor is most likely used as it is presumed that the organ is in a healthy stage.
- c. Acceptance of brain death definition carried with it many of the advantage derivable from a living donor.

CONSENT IN ORGAN/TISSUE TRANSPLANT: In all cases where an organ is transplanted the

Jaw requires that the principle of informed consent should be observed even where the donor is a child.

Consent where the donor is a minor - where a donor is a minor, the consent of the minor is required. Doctors in this regard are advised in cases of transplant of organs, where the donor is a minor is to seek the consent of the minor, his parent and the court before proceeding.

It is not also in doubt that the ultimate judge of what can be done to a patient or person's body is the patient himself⁹, having considered the gravity of transplant. It is also important that consent inform only is insufficient where the consent is from someone else then the consent is said to be non-factual. Consent should be free, voluntary without any form of inducement. Where such consent is gotten from a proxy it becomes void. **MCFALL V. SHIMP**¹⁰, This case makes an important point about the limits of an average person's obligations to help another, and reminds us of the difference between what we believe to be moral obligations and actual legal obligations.

Case background:

The plaintiff, ROBERT MCFALL was diagnosed with a plastic anemia, a rare type of bone marrow with a low chance of survival without an immediate bone marrow transplant from a compatible donor.

The defendants, DAVID SHIMP, the plaintiff's first cousin, was found to be compatible donor, and if he agreed to donate, MCFALL would have a **50-60%** chance of survival.

Shimp refused to donate without providing any kind of reason for his refusal.

McFall brought a lawsuit against Shimp to attempt to force him to donate.

What issues are being debated?

Are people legally and/or morally obligated to help others?

Must person submit to a non-therapeutic procedure to save of another?

Can a person refused to undergo a procedure knowing that it Will cause another person to die?

What power does a court have to legally enforce standards of morality?

How was the law interpreted and applied?

⁹ This right of self-determination is firm fixed in common law, See Cardozo j in *Schleondorff v society of New York Hospital* (1914)67 DLR 4th 321.

¹⁰ (1978) Pa D & C 3d 90

Judge John P. Flaherty Jnr. Found Shimp's position morally indefensible, but simultaneously denied the plaintiff's request.

The court cannot force a person to submit to a non-therapeutic procedure, as it violates the sanctity of individual's body.

The judge feared that this would set a dangerous legal precedence for bodily autonomy.

AFTERMATH OF THE CASE

On August 10, 1978, the Michigan Daily reported that MCFALL died of a massive hemorrhage, a complication of his condition. While it is possible that Mcfall would have died regardless of transplant, it would have died regardless of the transplant it would have greatly increased his chances of survival.

When asked why he refused to donate, Shimp said that he was not sure whether or not his body could endure the operation, explaining that his position was common sense.

Now, the question is **does a bone marrow transplant entails risk?**

Yes, all medical procedures involve some level of risk. Around 2.4 % of patients experience complications due to anesthesia or damage to bone, nerve or muscle in the hip region.

Many of society's laws are created as a way of enforcing generally agreed upon ideas of ethics, such as laws against stealing and murdering. However, this is one area where the legal system finds itself forced to betray its ethical stance in this situation because of the larger legal and moral implications of violating a person's bodily autonomy

LEGAL, ETHICAL AND RELIGIOUS PERSPECTIVE IN NIGERIA

Organ/tissue transplant is considered as a medical intervention that touches on the fundamental rights of the donor or the recipient where there is an unlawful infringement of the right of such person which in any way may be regarded as against **Section 34¹¹** dealing with the right of dignity of human person. Researchers and Government bodies have agreed to informed consent for organ/tissue donation and for recipient should be obtained without coercion before embarking on such medical treatment.

A legally and ethical valid informed consent process should consist of a balance discussion of the available option and counseling to help patient or their families reach the choice that is for them,

¹¹ Constitution Federal Republic of Nigeria 1999 (as amended)

the issue of consent has drawn many controversy and debates.

HARVESTING ORGAN FROM PATIENT WITHOUT CONSENT

The National Bill Expert argue over harvesting organ from patient without consent, the debate triggered by **Mr. Femi Falana (SAN)** on the legality of organ donation and transplantation in Nigeria which has arisen in the wake of both the promulgation of **National Health Bill 2014** into law by former President Goodluck Jonathan. In this debate, while some of the views canvassed simply trench on the novelty of medical law in Nigeria, it is not all together surprising that the first statutory and comprehensive legislation in the country to regulate and legitimate a medical procedure that is absolutely extraordinary should elicit mixed reaction from Nigerian. Developed countries like the United Kingdom and the USA where organ donation and transplantation have become of routine, has passed through a similar phase about 60 years ago when organ donation and transplantation were still rudimentary in those countries, and their lawyers equally struggled to account for the legality of the procedures under the prevailing legal systems.

At the time, it was strongly believed in some respectable legal circles that the extraction of the organ from a living donor for transplantation into the recipient would amount to a criminal offence since the extracted organ could not be said to be for the treatment of the donor.

In other part of the third world, where similar dangerous legislation exist, organ removed from living or death persons are sold and transported to western countries where they are in high demands.

Mr. Falana's opposition to the Nigeria Health Act captured the need and timelessness of a comprehensive analysis of the legal and ethical aspect of medical practice in Nigeria, including the legal history of organ donation and transplantation and the statutory transplantation frame work that has been established under the act. Here, Mr. Falana accuses the Act and its facilitator of violating the Nigerian constitution and infringing various fundamental rights of the Nigerian citizens, in that **section 51 of the National Health Act 2014**.¹² He further contended that section 51 makes possible the trafficking in bodies of Nigerian citizen but we give short shrift to this latter contention because of the unambiguous criminalization of commercialization of human organs by **section 48 (3) and 53**.¹³ Based on the provision of Section 51, Mr. Falana argued that since the

¹² Section 51 National Health Bill, 2014

¹³ Section 4(5) and 53 National Health Act 2014.

medical doctors have been empowered to decide when to remove organs from living persons, Section 51 of the Act constitute and infringement on the rights of citizens.¹⁴

Another heated argument was also canvassed by Mr. Falana over the apparent legalization of human part; sale by the National Health Bill signed into law by President Goodluck Jonathan as the National Health Act 2014. Mr. Falana raised an alarm while addressing a press conference in Lagos on the dangers of the new National Health Act. He noted that portion of the Act infringe on the fundamental right of Nigerians to health as guaranteed by Article 16.¹⁵ He stated that the National Assembly has violated the Fundamental Rights of Nigerians to life, human dignity, privacy and freedom of thought, Conscience and Religion by authorizing medical doctors to remove organs of living persons in Nigeria without their informed consent. He stated that there can be no justification for reducing the body of a Nigeria citizen to spare parts of vehicles which can be removed and sold in the market the National Assembly has, by such obnoxious provision of the National Health Act, 2014. The National Assembly has abused its legislative powers.

Section 48 and 51 of the National Health Act provides thus:

Section 48 (1)¹⁶ Subject to the provision of section 53, a person shall not remove tissue, 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 case: and
- (c) In accordance with prescribed protocols by the appropriate authority.
- (2) A person shall not remove tissue which is not replaceable by natural processes from a person younger than 18 years of age
- (3) A tissue, blood or a blood product shall not be removed from the body of another living persons for the purpose of merchandise, sale or commercial purposes.
- (4) 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 **₦1,000,000** or imprisonment of not less than two

¹⁴ <https://sunnewsonline.com//national-health-billtypeequationhere...> Accessed on 12/2/2017

¹⁵ Article 16 of the African Charter on Human and Peoples Right Act Cap A9, Law of Federation of Nigeria 2004.

¹⁶ National Health Act 2014.

years or both: and

- (b) in the case of blood or blood products, a fine of **₦1,000,000** or imprisonment for a term not exceeding one year or both.

Section 51 (1)¹⁷ 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 service 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 service at that hospital medical practitioner authorized thereto by the person in charge of the hospital.

(1)(b) shall not be the lead participant in a transplant for which he has granted authorization under that subsection.

- (2) The medical practitioner stated in subsection.
- (3) For the purpose of transplantation, there shall be an independent Tissue Transplant Committee (TIC) within any health establishment that engages in the act and practice of transplantation as prescribed.

According, to Falana, since all hospitals and other medical establishments have been have licensed medical personnel to engage in unauthorized surgical operations for the purpose of removing vital organs of living persons. By denying patients the right to give consent or authorized the removal of vital organs from their bodies the National Assembly has empowered Doctors to subject Nigerians to degrading and inhuman treatment. In other words, Section 51 of the Act constitutes an egregious assault on the humanity of Nigerians. As such, the National Assembly should expunge it from the law without any delay. Even though there are stringent penalty for commercializing any organs removed from any living person, why should the consent of the donor be dispensed with?

In other parts of the Third World where similar dangerous legislations exist organs removed from living or dead persons are sold and transported to western countries where they are high demand.

¹⁷ National Health Act 2014

Indeed, He have confirmed that the offending sections 48 and 51 of the Act were introduce to the Bill which became an Act was due to pressures from an influential foundation based in the United State.

In conclusion, **Mr. Falana** declared Section **48 and 51** of the National Health 2014 Act as **immoral and illegal** calling on the national Assembly to repeal the sections without any delay. He demanded that the status quo before the enactment of the law whereby a donor of an organ have to give his/her informed consent should be restored.

RELIGIOUS PERSPECTIVE ON ORGAN/TISSUE TRANSPLANT

Under the religious aspect our focus will be limited to the Islamic perspective on organ/tissue transplantation. Organ transplant is one of those current medical issues that are new to the Muslim life. Muslim scholars and researchers strived to conduct researchers on the issue in other to arrive at a legal position in the light of sharia, either at the individual or at the institutional levels. This was done through applications of sound Islamic objectives that guarantee; and maintain the interest of the individual, as well as the community. Due to the fact, that organ transplant is subjected to *ijtihad* (exertion of mental energy in the search of legal opinion). This made it an issue of difference in opinion among Muslim scholars and researchers who, in turn here divided into two groups of opinion: those who legal support as to its permissibility while the other group sees it as illegal.

FIRST OPINION: LEGALITY

A committee of Muslim league organization held a conference in Malaysia in 1969¹⁸ where they upheld the legality of organ and tissue transplant with religious justification and juristic evidences among others. In the **Holy Quran Chapter 2 verse 173** state that:-

‘he had only forbidden you from death meat, and blood, and flesh of swine, and that of which any other name had hath been invoked beside that of Allah. But if one is forced by necessity without willful disobedience, nor transgressing due limit, then he is guiltless. For Allah is forgiving and most merciful’¹⁹

so a sick person who is a need of a transfer of any organ of his body will belike the person in need

¹⁸ Al Natsha M. Ali Mas’ aii al Tibbiyya, London, Majallat al Hikma, 2001 pg 93.

¹⁹ Holy Qur’an Chapter 2 verses 173

because his life is under the threat of death just as in the case of kidney failure.

SECOND OPINION: PROHIBITION

Minority scholars and researchers base the prohibition on a number of evidences from the glorious Quran noble hadith and logical evidences such as in **Holy Quran Chapter 3 verse 119**. Where Allah reports the saying of Satan that:-

‘I will mislead them, I will create in the false desires, I will order them to slit the ears of cattle and to deface the nature created by Allah’²⁰

This verse proved that defacing the fair nature created by Allah is prohibited and kidney transplant is a form of this. It is therefore, not permissible

CONCLUSION

Worldwide transplantation has become the best medical treatment for patient with end stage organ failure. A number of legal, ethical, social and religious perspectives concerning organ and tissue transplant worldwide and Nigeria in particular have been discussed, with abuses and controversies pointed out. We concluded that there is a law/legislation backing organ/tissue transplantation in Nigeria as can be seen in the National Health Bill which was pass in to law in 2014 by the then President Goodluck Jonathan.

RECOMMENDATIONS

1. The Government should take measure to protect the poor and vulnerable groups from transplantation tourism and the sale of tissue and organs.
2. National transplant registry should be established in order to monitor and regulate the programme in the country.
3. Section 48 and 51 of the National Health Act should be repealed by the National Assembly to give or allow consent of the donor to be taken into cognizance.
4. Section 46 of the National Health Act which barred public officials from travelling abroad for medical check-up, investigation and treatment at public expense should compel the Federal Government of Nigeria to fix and upgrade our hospitals to international standards.
5. To ensure the provision of basic health care services to Nigeria, the National Health Act stipulated that not less than 1% of the consolidated revenue of the Federal Government

²⁰ Holy Qur'an Chapter 3 verses 199

shall be allocated to the National Provision Fund on an annual basis. We vehemently object to this provision, considering the enormous cost of medical services the 1% allocation is like a drop in the ocean. It is however hoped that the National Health Insurance Scheme will be reorganized to partner with the National Health Counsel (created under the Act) to ensure the provision of efficient and affordable healthcare delivery system throughout the country.