

Organ Transplantation and the Law

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ABSTRACT

Organ transplantation dates back to the ancient times and since then it has become one of the important developments in modern medicine; saving the lives, as well as improving the quality of life of many patients. As the demand for organ transplantation far exceeds the organ availability, the transplant program is often saddled with complex legal and ethical issues. This article highlights the history of organ transplantation and how it came about in Nigeria, the laws regulating organ transplantation in Nigeria and the challenges posed by this new modern form of medicinal treatment in a society like Nigeria. This writer has employed the doctrinal method of research in writing this article; by observing articles, online journals, reputable and trusted textbooks to arrive at a conclusion and some feasible recommendations on the subject matter.

Keywords: Organ transplantation, Living donors, Cadaveric donors, the National Health Act 2014,

Introduction

All human beings have innate survival instinct. We strive to survive when we are faced with adversity until there is no more fight in us then we give up. This instinct has led to scientific advancement in the field of medicine that has made organ donation and transplantation possible. Before the invention of modern clinical techniques, patients with end stage organ failure (a condition whereby an organ reaches its peak of damage and is no longer able to support life) live with a very slim chance of seeing the next day.^[1] However, with the advent of organ transplantation, patients with critical organ problems get a better chance of having a longer life. Organ transplantation has been identified as the best form of treatment for a person suffering from organ dysfunction.^[2]

In healthcare jurisdictions where organ transplantation has become a routine form of medical treatment, some of the relevant debates have ranged from appropriate structures and frameworks for increasing the supply of needed organs to legal liability issues arising from the destruction or negligent misdirection of donated organs.^[3] In Nigeria and other sub-Saharan African countries, however, organ transplantation is far from being a routine form of medical treatment.^[4]

A History of Organ Transplantation in Nigeria

Human organ transplantation started in the twentieth century, however surgical transplantation of human organs from the deceased, as well as living donors to sick and dying patients began after the Second world war.^[5] Organ transplantation is a routine and standard form of medical care in most parts of the Western world, at least since the 1940s. However, in the sense that it involves the use of human body parts as medicine, organ transplantation is not a recent phenomenon as it enjoys historical precedent in medical cannibalism or anthropophagy prevalent 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*.^[6] Thus, Noble argued that medicinal cannibalism in the sixteenth century has some kindred relationship with the modern global trade in human organs and that both occupy a spectrum of multi-temporality: Belief in the capacity of the human body to heal is the driving force of Western corpse pharmacology and the medical trade in human bodies and bodily matter; this is just as true of today's medical market as it was in the sixteenth and seventeenth-century England.^[7]

The concept of organ transplantation was first conceived in Nigeria in 1980 but due to gradual deterioration in the public health care system, the concept did not actualize until in 2000 when first renal transplant was done.^[8] Since then other centres begun to emerge in the country. In Nigeria, though no documented study was done, but it was estimated that end stage renal disease to be about 200-300 per million populations. In Nigeria, patients who suffer from End Stage Renal Disease (ESRD) are usually put on prescribed regular haemodialysis. This is not only expensive, but it reduces the quality of life of the patients. Only very few Nigerian citizens are able to afford such treatment which unfortunately costs more than an actual kidney transplant.^[9] In 2008, there were four centres and more than 100 patients had successful renal transplant to date. Recently, University of Maiduguri Teaching Hospital in collaboration with other sister centres in the country for the first time successfully transplanted a kidney. Various collaborations with international transplant centres, especially in renal transplantation were made to train and improve the skills of the indigenous transplant team for sustainability of organ transplantation in Nigeria.^[10]

Organ Transplantation in Nigeria

Nigeria has legislated pre-emptively on the issue of organ shortage by making provisions for organ donation and regulating the provisions of organ transplant services. For instance, section 51 of the National Health Act 2014 prohibits the provision of organ transplant services except in a duly authorized hospital and with the written permission of the medical practitioner in charge of clinical services at the hospital. For that purpose,^[11] 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. Similarly, only duly qualified and registered medical and dental practitioners are authorized to render transplantation services.^[12] Furthermore, the National Health Act by section 53 prohibits any form of commercialization of human organs. Thus, it is an offence punishable with imprisonment or fine (or both) for a person "who has donated tissue" to receive any form of financial or other reward for such donation or "to sell or trade in tissue".^[13] However, the Act exempts reimbursements for reasonable costs incurred by a donor in

connection with organ donation.[14] More significantly, the Act establishes two sources of organs for transplant; living and cadaveric donors. [15]

From living persons

The use of living donors has become unique and important in the field of transplantation today. Living transplantation is unique in the sense that surgeons operate on a healthy individual who has no medical disorders. Most living-donor renal transplants are between genetically related individuals. Living-donor transplantation between genetically unrelated individuals give better results than well matched cadaveric allografts. In all cases of living “ organ donation, it is essential to ensure that the prospective donor is fully informed and is free from coercion to donate and has no risk to the donor.[16]

It has been estimated that 85 to 100 per cent of all organ donations in developing countries came from live donors. This trend can be traced to socio-cultural factors, technological challenges and inefficient and poorly developed cadaveric transplantation programmes in many developing countries.[17] Even in developed countries, there has been a policy shift in favour of living donation, no doubt in response to the inability of cadaveric organs to fill the ever increasing demand for organs, prompting Price to observe that “not only do some nations rely either entirely or heavily upon living organ donors, but in the face of stagnant or declining deceased donation rates living donation is rapidly on the increase today in many parts of Europe including the UK and in other parts of the world, e.g Australia.[18] In Africa, the extended family system and the general communal orientation of most societies in developing countries have helped to engender a wider pool of living donors. Thus, Bakari and colleagues observed that in “Nigeria, there are abundant of willing living donors in an extended family setup without coercion” [19].

However, there are significant disadvantages and limitations associated with living person donation. To start with, living person donation entails some potentially significant risks for the donors, exacerbated by poverty, poor access to healthcare and the inadequate healthcare facilities under which such donations take place in most developing countries. Another disadvantage is that of surgical complications. Surgical complications can include pain, infection, blood loss, blood clots, allergic reactions to anaesthesia, pneumonia, injury to surrounding tissue or other organs and even death. As transplant surgeries are becoming more common and surgical techniques are advancing, risks involved with living donation continue to decrease. [20] Another significant limitation of live donation is that re-transplants are often difficult to achieve, especially in the context of intra-familial donation. For instance, where a familial donation is made and the graft is subsequently lost due to one disease or other causes, it would be extremely difficult to get another organ from the family re-transplantation either because the family considers the second donation as unnecessary sacrifice that would meet the fate of the earlier one, or no more suitable match or donor could be found in the family. [21]

The law regulating organ transplant in Nigeria

Living donors for the procedure of organ transplantation in Nigeria is one which is very much recognized. It is so important that it was noted in Obafemi Awolowo University Teaching Hospital Ile-Ife (one of the only four transplant centres in Nigeria) that the transplant programme which was proposed for the Renal Unit was intended to be reliant on live donation. Unsurprisingly, the Nigerian Health Act of 2011 recognizes the importance of living donation. As with the common law, consent is the guiding principle for living donation under the Act. By the provisions of Section 48 “a person shall not remove tissue” from the body of another living person for any purpose unless it is done”;

With the informed consent of the person from whom the tissue” is removed granted in the prescribed manner.

The consent given under the Act can be revoked at any time before the removal of the donated organ. Since the consent must be informed, the proposed live donor, as in all surgical operations must be informed of the nature of the transplant procedure and the risks involved. Consent of the proposed recipient of the organ must also be obtained, after he or she has been informed of the benefit and risks of the transplantation procedure. In practice, the donee”s consent would pose no special problems since he or she is intended to benefit therapeutically from the procedure. In contrast, the donor faces significant risks, rather than benefits from the transplant procedure. Consequently, it is important that the donor”s consent is genuine and voluntary.

A prominent lawyer Mr. Femi Falana had led the attack on certain provisions of the law to the effect that it derogates from the right to personal autonomy of the person from whom an organ is being transplanted.[22] However, there has also been a viewpoint disagreeing with his argument.[23] Most trenchantly, Mr Falana accuses the Act and its facilitators of violating the Nigerian Constitution and infringing various fundamental rights of the Nigerian citizens in that Section 51 of the Act which provides for the transplantation of an organ or tissue from one living person to another; according to Mr. Falana permits non-consensual organ extraction from a live donor. Mr Falana equally contends that Section 51 makes possible the trafficking in bodies of Nigerian citizens. Although he should be applauded for the very fact of provoking this interesting public debate, it is however imperative to observe that the interpretation of the section 51 does not capture the legislative intent that underlies the section. According to Section 51 “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;

1. *In a hospital authorized for that purpose; and*
2. *On the written authority of;*
3. *The medical practitioner in charge of clinical services in that hospital or any other medical practitioner authorized by him or her; or*
4. *In the case where there is no medical practitioner in charge of the clinical services at the hospital a medical practitioner authorized thereto by the person in charge of the hospital.[24]*

Section 51(2) continues by stating that the medical practitioner stated in subsection (1)(b) shall not be the lead participant in a transplant for which he has granted authorization under the subsection. Subsection 3 of 51 prescribes that for the purpose of transplantation, there shall be an independent tissue transplantation committee within any health establishment that engages in the act and practice of transplantation as prescribed. Mr Falana argues that since medical doctors have been empowered to decide when to remove organs from living persons, Section 51 of the National Health Act 2014 which states “*a person shall not remove tissue from a living person for transplantation in another living person or carry out the transplantation of such tissue*” constitutes and infringement of the rights of the citizens. It is contended by Iyioha *et al.* that Mr Falana’s view is not correct. Section 51 does not deal with consent to organ donation as contended by Mr Falana. Rather, a live donor’s consent is regulated by section 48 of the Act; although he seemed to have recognized that fact, he quickly dismissed the impact of Section 48.

In contrast to Mr Falana’s rendition of Section 51 of the Act, Iyioha *et al* argue that Section 51 clearly deals only with the issue of licensing for the practice of transplantation.^[25] In other words, no hospital in Nigeria can undertake transplantation procedure unless it is duly authorized or licensed pursuant to regulations or criteria prescribed by the National Tertiary Health Institutions Standards Committee under Section 54 of the Act.^[26]

Thus, section 51 of the Act ensures that only authorized and specifically licensed hospitals can provide transplantation services, and even in such hospitals no transplantation procedure can take place without further internal controls, such as consent of the appropriate officer of the hospital (usually the doctor in charge of clinical services) and the permission of an “independent tissue transplantation committee” of the hospital (section 51(3)).^[27]

Under section 51, therefore, there can be no question of any copy-cat hospital carrying out a transplantation procedure. Nor can such copy-cat hospital justify a transplantation procedure merely on the basis of consent given by both donor and donee. Recall that without section 51, the common law permits every hospital and qualified doctor to offer transplantation services, subject to the consents of the donor and recipient of an organ, as well as the use of medical negligence theory to ground the transplant surgeon’s liability. In essence, section 51 is wisely intended to obviate the application of common law which would have rendered the provision of transplantation procedures a free-for-all medical practice. As section 51 is basically a licensure provision, it does not have the effect attributed to it by Mr. Falana “non-consensual extraction of live donor organs.”^[28] In contrast, the issue of donor’s consent to organ donation is dealt with in section 48 to which we turn.

The section provides:

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

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

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

(c) *In accordance with prescribed protocols by the appropriate authority.*

(2) *A person shall not remove tissue which is not replaceable by natural processes from a person younger than eighteen years.*

(3) *a person who contravenes the provisions of this section or fails to comply therewith is guilty of an offence and liable on conviction as follows:*

(a) *in the case of tissue, a fine of N1,000,000 or imprisonment of not less than two years or both fine and imprisonment; and*

(b) *in the case of blood or blood products, a fine of N100,000 or imprisonment for a term not exceeding one year or both fine and imprisonment.*^[29]

Clearly, section 48(1)(a) above provides the architecture of live organ donation in Nigeria and uses informed consent of a donor as the applicable regulatory model. Although Mr. Falana acknowledges this, he asserts that the exception for “medical investigations and treatment in emergency cases” under section 48(1)(b) vaporizes the potency of the protection provided under section 48(1)(a). Flowing from the words of Iyioha *et al*, this researcher does not think that this construction of the effect of Section 48 is justifiable. ^[30]

From Deceased Donor

Most transplanted organs are taken from “brain dead” individuals. Brain death occurs when severe brain injury causes irreversible loss of the capacity for consciousness combined with the irreversible loss of the capacity for breathing.^[31]

In most countries, it is accepted that the condition of brain death equates in Medical, Legal and Religious terms with death of the patient. The patient must have suffered major brain damage of known aetiology, be deeply unconscious and require artificial ventilation. Hypothermia, which is a potentially dangerous condition, occurs when the body core temperature drops below the normal rate which is 35 degrees Celsius. Therefore, hypothermia, profound hypotension and metabolic or hormonal conditions that may contribute to Central Nervous System deterioration and mistake the diagnosis of brain death must also be excluded. Clinical testing for brainstem death includes absence of cranial reflexes, motor response and spontaneous respiration.^[32]

Management of the donor is aimed at preserving the functional integrity of the organs to be procured. The length of time for which an organ can be stored before transplantation varies with the type of organ.[\[33\]](#)

Challenges of Organ Transplantation in Nigeria

Life is sacred and as such, all human beings crave to utilize all available means to sustain living. This is one desire that is pitched against the reality of human life, which is attached to the health conditions of human organs. Organ transplantation therefore, is a potential solution to achieve replacement of damaged human organs. However, this opportunity is not fully available in Nigeria due to the several constraints and challenges involved in such transplants.[\[34\]](#)

Organ/Tissues transplantation requires huge investment in terms of hospital setup and equipment, staff training and continuing financial support. The recipient organ transplant would require immunosuppressive treatment and control of post-transplant infections and malignancies which also require funds. There is need for government-community partnership fund and sustain such programme. In Nigeria, there are abundant willing living donors in an extended family setup without coercion. However, because of poor socio-economic status of the populace, the rich may use the poor as their source of organ for their transplantation and the poor may not have access to such treatment. Recently, a doctor in a private clinic removed both kidneys of patient who came for a treatment typhoid fever.[\[35\]](#) Hence, organ trafficking and tourism may become a problem in Nigeria. Organ donation from a deceased has a lot of cultural and religious implication in Nigeria. Many families do not allow autopsy what more of organ removal of deceased beloved ones because they believe in preserving the sanctity of the loved one's body. Moreover, due to under developed economy and lack of adequate intensive care and organ support facilities for deceased donor, deceased organ donation may not be feasible. The government should endeavour to include Organ transplantation funding in the National Health Insurance Scheme (NHIS) and enact a law/legislation on transplantation and endeavour to encourage research in the field of transplantation in conformity with Helsinki declaration of 1964.[\[36\]](#)

The government should take measures to protect the poor and vulnerable groups from transplantation tourism and the sale of tissues and organs including attention to wider problem of international trafficking in human tissues and organs. The government should also setup ethics commission to ensure the ethics of cells, tissues and organ transplantation. National Transplant registry should be established in order to monitor and regulate the programme in the country.[\[37\]](#)

How to Legally Donate Organs to Save Life

Organ donation has proved to be a life-saving practice in Nigeria. Some health organizations in Nigeria have encouraged Nigerian citizens on the practice of organ donation.[\[38\]](#) According to medical practitioners, certain organs like the kidney and lungs are best transplanted than managed with drugs. To legally donate an organ, all that is required is to register an organ in a recognized organ donation centre. This automatically gives your consent for organ donation when the need arises and even after death.[\[39\]](#)

Recommendation

Studies have shown that a good percentage of Nigerians are aware of the need of organ donation and the impact it has on life, but only a few of them are willing to donate due to one superstitious belief or the other.[\[40\]](#) The work in this aspect cannot be left alone for the Government to tackle though it is their responsibility. Both non-governmental, governmental and even private bodies should take up the responsibility of creating awareness to the rural and urban areas of the importance of organ donation and how the transplantation of a human organ can save a person's life.

Also, apart from educating the populace on the importance of organ transplantation, people should be made aware of the criminality of donating organs on illegal black market in consideration of money. This is not only illegal but most times may have adverse effects on the health of the donor in which the money he/she has received in return of the organ may not be able to fix. This issue should be addressed more to the poor and vulnerable groups who are at risk of international trafficking of their organs and tissue.

The government should also setup ethics commission to ensure the ethics of cells, tissues and organ transplantation being monitored and given to the right persons who have a chance of survival. A National Transplant registry should be established in order to monitor and regulate the programme of organ donation and transplantation in the country. Through the registry, those in need of an organ can be placed on a list in the order of priority in the event of there being an available organ in the nearest future.

Conclusion

In conclusion, this researcher has been able to establish that the practice of organ transplantation is one of the measures of saving human life when the organs of one's body are damaged or failing. The Nigerian Legislature by virtue of the National Health Act has been able to promulgate laws for the regulation of organ donation among living donors. Although, with the rate of increase in this practice, it is still sad to note that under developing countries most especially Nigeria, is faced with some tremendous challenges of which the government has to take steps to modify by becoming more involved in the processes transplantation and avoid tourism of Nigerians to other countries to sell their organs.

Although, there are some religious and ethical principles involved in the process of organ transplantation, this article was more concerned in establishing the legality of organ transplantation in Nigeria of which close perusal of the aforementioned has been explained coupled with some innovative recommendations on what can be done on the issue of organ transplantation in Nigeria.

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