



A Critical Appraisal of Organ Donation and Transplantation in Nigeria: Comparative Analysis with United Kingdom (UK)

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ABSTRACT

Over the years, organ donation and transplantation have saved many lives and provided respite to many families. Globally however, there has been acute shortage of organ to meet the heightened demand for transplantation. To address this disturbing concern many countries put in place legal and regulatory frameworks with the view to stimulate living and deceased donation to meet the demands of long list of patients on the waiting list for transplantation. It is on this basis that this paper comparatively examined the legal framework for organ donation and transplantation in Nigeria and UK. It was therefore recommended that the Human Tissue Authority framework in the UK be replicated in Nigeria in order to bolster this aspect in Nigeria. It is also recommended that the National Health Act in Nigeria be amended to accommodate deemed consent as applicable in advanced countries of the world. The authors adopted the comparative and analytical research methodology in achieving the aim of this paper wherein both primary and secondary materials were consulted.

INTRODUCTION

Organ donation is an altruistic act that allows an individual (donor) to donate his or her organs to a patient (recipient) suffering from renal failure¹ or organ malfunction.²This procedure represents the most clinical and cost-effective care when compared with the alternative treatment available.³Organs or tissues for transplantation are often source from either living or deceased persons. Transplantation on the other hand is the best method used to treat patient suffering from renal failure or organ malfunction. This procedure gives the recipient a second chance to life through the replacement of the dysfunctional organs.

Globally, the autonomy of the patient is cardinal for the legal consummation of organ donation. The National Health Act (NHA)⁴in Nigeria and the Human Tissue Act⁵in the UK endorsed the consent of the donor as the center piece of every organ donation and transplantation procedure. Hence, the commodification and commercialization of human organs are prohibited. The legal frameworks also creates regulatory frameworks and saddled these bodies with the task of regulating the sectors in terms of putting in place requirements for licensing, allocation, disposal and defining programs and policies that will encourage and stimulate organ donation to meet the heightened demand for organs.

It is however noted that, while the legal frameworks in Nigeria and UK recognize living donation as major source of organ for transplantation, Nigeria is yet to recognize the opt-out or opt-in system in terms of cadaver donation. It is also noted that in UK, organ donation is centralize and highly regulated by the government through the Human Tissue Authority (HTA), whereas in Nigeria, this sector is faced with myriad of challenges, ranging from absence

¹ Health Direct."Kidney Failure" <https://www.healthdirect.gov.au/kidney-failure#:~:text=Kidney%20failure%2C%20also%20called%20renal,function%20will%20recover%20over%20time.> Accessed 20th December, 2023. Kidney failure, also called renal failure, is when your kidneys no longer work properly.Kidney failure can be either acute or chronic.

²Cleveland Clinic,"Organ Donation and Transplantation" <<https://my.clevelandclinic.org/health/treatments/11750-organ-donation-and-transplantation>>Accessed 6th November, 2023.

³ Esther Hatsiwa Emmanuel and Ijeoma Francis Nabena,"Legal and Ethical Developments in the Regulation of Organ Donation and Transplantation in Nigeria"[2020]JAUJILJ.

⁴ National Health Act, 2014.

⁵ Human Tissue Act, 2005.

of a substantive regulator, religious, social-economic and cultural factors. There is also absence of centralize organ bank as obtainable in UK, thus aggravating acute shortage of organ for donation in the country.

It is in view of this obvious reality that this paper is focus on appraising the legal frameworks for organ donation and Transplantation in Nigeria and UK with the view to make recommendations on how best Nigeria can learn from the UK experience and how best it can strengthen it legal framework.

CONCEPTUAL CLARIFICATION

Organ Donation, Organ Transplant, deceased and living donation

Organ Donation

The concept of organ donation dates back to ancient times⁶and it represent one of the portent developments in modern sciences. Organ donation isa process whereby organ or tissue from the body of a healthy person either living or deceased is surgically removed with the consent of the person(the donor) and transplanted into the body of another personor used for research and educational purposes.⁷

The necessity of organ donation is provoked by the long list of patients on the waiting list. Globally, there are over 118,000 persons on the waiting list for organ transplantation⁸and out of which 17 persons die daily while waiting for transplantation. In the UK, in 2010 there were 8,012 patients on the waiting list. This number however witnessed a significant decreased from 2011 to 2022.⁹This shift was attributed to series of genuine effort by government of UK to address acute shortage of organ for transplantation in the country through robust and aggressive media campaign that simulate organ donation. Notably, this finding was corroborated in another report which revealed that in 2022 to 2023 out of the 6, 959 patients awaiting transplant in UK, 3, 822 persons were temporarily suspended by the end of March, 2022 out of which 439 died while waiting for transplant on the active list.¹⁰ It was also revealed that 732 patients were further removed from the list as a result deteriorating health and ineligibility for transplant.

In the United States of America, data from the Health Resources and administration showed that in 2023 there were 103, 327 patients on the waiting list. Furthermore, about 17 people die each day while waiting for organ whereas, every 10 minutes another person is added to the waiting list.¹¹In China there are about 1 to 1.5 Million people waiting for organ transplant every year and out of this number, only 10,000 get transplanted.¹²In India, it was revealed that in New Delhi, there are a total of 49, 745 people awaiting organ transplant as shown in the country Tissue Transplant Organization(NOTTO) which shows that there are nearly 50,000 people waiting for organ transplant in the country.¹³In Brazil there were 31000 people on the waiting list for organ transplantation in 2021¹⁴whereas in Spain, data from 2021 revealed that there were 6.9 thousand patients on the waiting List.

Though in Nigeria and most African countries there are no conclusive data to show the prevalence of this menace, it is not in doubt that there is pandemic ofrenal failure and organs malfunction. For instance Iwalaiye was of the view that in Nigeria, there are over 20 million people in need of organ donation and one in five of those persons is in serious need of transplantation.¹⁵ The author further attributed the high number of patients in need of transplantation to hypertension and renal failure.¹⁶ Ugwu on the other hand noted that, most organ donation in Nigeria are not free as organ donors are often forced or fraudulently induced into donating their organs.¹⁷ He considered illegal trading in human organs from black market as well as the lack of regulator in the sector as major hindrance to curtailing exploitation of vulnerable people from nefarious activities of organ traffickers and advocated for a policy change to address this concern.

Organ Transplantation

Organ transplantation on the other lane is a medical procedure that involves the transplantation of organ or tissue removed from the body of another person into the body of another person. Organ transplantation can be manifested in three categories namely:

⁶Abuad Law Review," Cadaveric Donors, Living Donors, Organ Transplantation, The National Health Act, 2014.

⁷National Institute on Aging,"Frequently Asked Questions About Organ Donation for Older Adults"<nia.nih.gov/health/frequently-asked-questions-aboutorgan-donation-older-adults#>Accessed 20th day of October, 2023.

⁸Kenneth P. Moritsugu," The Power of Organ Donation to Save Lives Through Transplantation"<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3675206/>>Accessed 20th October, 2023.

⁹ Ibid.

¹⁰ UK Parliament,"Organ Donation in England and the UK: Statistics and Law Changes'(House of Lords Library, 6 December, 2023).

¹¹ Health Resources and Services and Administration,"Organ Donation Statistics"<organonor.gov.>Accessed 20th November, 2023.

¹² Ni An and others,"Ogran Donation in China:the Major Progress and the Continuing Problem'[2016](30)(2)*The Journal of Biomedical Research*.81-82.

¹³ Kavita Bajeli-Datt,"Nearly 50,000 People Waiting for Organ Replacement in India, Says Centre"(The New Indian Express 29th March, 2023).

¹⁴ Statista,"Number of Patients on Transplant Waiting List in Brazil in 2021, by Organ"<www.statista.com>Accessed on the 20th November, 2023.

¹⁵ Temi Iwalaiye"The booming Business of Organ Harvesting and Trafficking in Nigeria(Business Insider Africa, 13th August, 2023).

¹⁶ Ibid.

¹⁷ Francis Ugwu"Concerns Mount over Unregulated Black Market in Ogran Trade in Nigeria"(DailyPost of 3rd November, 2023).

- a. Auto transplant: This has to do with transmission of organ or tissues from the part of one individual into another part of the same individual body.¹⁸
- b. Allotransplant: This is a medical procedure that involves the transplantation of an organ retrieved from one individual into the body of another person of the same species. It is the commonest type of transplantation is being practice across the globe. In achieving transplantation under this procedure, both the donor and the recipient are subject to a comprehensive procedure to determine suitability.¹⁹
- c. Xenotransplant: This procedure deal with transfer of organ or tissue across species barriers. It therefore involves the transplantation, implantation, or infusion into a human recipient of either(a) live cells, tissues, or organs from nonhuman animal sources, or(b) human body fluids, cells, tissues, or organs that have had ex vivo contact with live nonhuman animal cells, tissues or organ.²⁰

It must be noted that Donation after brain death (DBD) remains one of the major and primary sources for organ transplants. Once the death is legally confirmed, preparation for organ procurement will involves prognosis, a series of haematologic testing, and checking of the general pathophysiological changes of the deceased individual to determine the viability of potential donation before transplantation can take place.

Deceased Donation

Deceased organ donation is one of the pool through which organs are source for transplantation. This aspect is regulated by professional and legal regulations. Spain and United States of America are considered the two leading countries in the world in terms of deceased donation.²¹ In the UK, deceased donation is regulated by the Organ Donation (Deemed Consent) Act²². The Act adopted the opt-out system as against the opt-in system obtainable in jurisdictions like US and Spain. Under the opt-out system, consent of the deceased person is presumed upon death unless where it has been established that during the deceased life time a decision to opt-out has been registered with the organ donor registry. The opt-out system practice in England today was inspired by the success of the program in Wales wherein the practice has gained ground since 2015. Aside from UK, the opt-out system was also adopted by Scotland and Northern Ireland.

There is no gain saying that the introduction of the opt-out system in UK proved a game changer leading to significant shift in the rate of organ donation. It was further revealed that as a result of this development there has been an increase in the number of people opting in on the ODR, from 27.7 to 28.6 million at the end of March 2023 in UK. It is however observed that under the opt-out system, there are categories of persons that are exempted from being donors. These includes deceased person under the age of 18; persons that lack Mental capacity to consent to the procedure and deceased persons that have not been resident in England for a period of at least twelve months immediately before their death. The Act also provide general exception as regard presumed consent and this applies to persons in qualifying relationship who can show that immediately before the death of the deceased, he or she would not have consented to the organ donation and such information must be such that a reasonable person can believe it.²³ Section 27(4) of the Act list person in qualifying relationship with the deceased to include: Spouse or partner, parent or child, brother or sister, grandparent or grandchild, child of a person falling under paragraph (c) stepfather or stepmother, half-brother or half-sister and friend of longstanding.

The position is quite different in Nigeria where the NHA did not recognize either the opt-out or opt-in system; thus, deceased donation is not recognize except where the donation is made through a will in the presence of competent witnesses.²⁴ There is further restriction on the use of deceased donated organ as same can only be used for training of students in health sciences,²⁵ health research,²⁶ advancement of health sciences,²⁷ therapy including the use tissue in any living person; or²⁸ production of therapeutic, diagnostic or prophylactic substances.²⁹ This therefore suggests that the Act prohibit the use of organ retrieved from deceased person for transplantation in Nigeria. Adegboro while corroborating this assertion noted that Nigeria do not operate deceased donation system as the only obtainable practice is living donation. He further noted that organ donation and transplantation sector in Nigeria is largely unregulated, thus, the resort to international best practice.

It is obvious that the Act in Nigeria is muted about deceased donation. This has been attributed to cultural and religious practices in the country which is opposed to deceased donation. This notion was corroborated by Adegbite who noted that Nigerians carry their body with delicateness, and guard its part with extreme jealousy.³⁰ This belief is rooted in the doctrine of sanctity of the human body and a corresponding duty to protect the body from any form

¹⁸Ekhlorutomwen Gabriel Ekhaton "A Critical Appraisal of the Legal Framework on Human Organ Donation in Nigeria" [2022](2)(1) *Lawrit Journal of Law*;15.

¹⁹ A.A. Bakari, and Others, "Organ Transplantation: Legal Ethical and Islamic Perspective in Nigeria [2012](18) *Nigerian Journal of Surgery* 53.

²⁰ E.A. Okojie, *Medical and Forensic Law Companion* (Ambik Press 2020)212.

²¹ La Moncloa, "One in 4 EU donors comes from Spain" (2023) <[²² Organ Donation \(Deemed Consent\) Act, ODDCA, 2019.](https://www.lamoncloa.gob.es/lang/en/gob_ierno/news/Paginas/2023/20230830_eu-donors.aspx#:~:text=One%20in%20four%20deceased%20organ,States%20is%20ahead%20of%20Spain.>Accessed 6th November, 2023.</p>
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²³ Ibid s. 27(4).

²⁴ NHA(n4) s55.

²⁵ Ibid. s. 56(1)(a).

²⁶ Ibid. s 56(1)(b).

²⁷ Ibid. s. 56(1)(c).

²⁸ Ibid. s. 56(1)(d)

²⁹ Ibid. s. 56(1)(e).

³⁰ Olusola Babatunde Adegbite, "Cultural-Religioud Traditions and Practices and the Law Governing Cadeveric Organ Donations in Nigeria, [2019] *University of Botswana Law Journal*.

of invasion or encroachment.³¹ Akenroye and others confirmed this notion when the authors observed that in Sub-Saharan African countries; deceased organ donation is impeded by cultural practices. The authors demonstrated their view with South Africa where a survey showed that only 18% percent of families consented to deceased donation in 2017, which means, 82% of families in the country are against deceased organ donation.³²

It must be emphasis that while both the HTA and NHA recognized deceased donation, in practice however, it is not all deceased persons that are eligible for deceased organ donation, thus, deceased organ is retrievable from deceased persons that are legally confirmed brain death or circulatory death and under the right circumstances. Previously, only persons that are legally confirmed brain death are considered for deceased donation. This trajectory has however changed with advancement in transplantation technology which makes it possible to harvest organ from persons that die as a result of brain death or circulatory death.

Medically, there are established criteria that help in determining brain death and eligibility for donation. In terms of brain death, it must be confirm that there is 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.³³ More so, for the viability of organ sought to be harvested, test such as electroencephography (commonly known as EEG) and imaging tests are occasional used particularly as it relates to patients that died as a result of accident.³⁴ Notably, once a person is declared brain death, such a person can be considered for donation. In this regard the donors organ is kept viable by ventilators or other mechanical life supporting mechanism for transplantation after been declared brain death.

Living Donation

Living donation is said to be the reliable mainstay of organ donation over the years. It is the easiest, and safest in terms of donation. Living organ donation is strictly regulated due to the risk associated with the procedure. The HTA regulates living donation in England, Wales and Northern Ireland whereas in Scotland, living donation is regulated by the Human Tissue (Scotland) Act.³⁵ In Nigeria, living donation is regulated by NHA. In both jurisdictions, consent of the donor is integral for the consummation of living organ donation.

It then suggests that before living donation can be legally validated in Nigeria and UK, the donor must consent freely to the procedure. In UK, the consent must be “appropriate” whereas in Nigeria, the consent must be an “informed consent.” Correspondingly, for consent to be considered appropriate and informed it must not be influence by coercion, fraud or financial inducement. thus, the donors decision to donate his or her organ must be borne out of genuine altruistic act. This is significant because informed consent is a principle founded on patient autonomy that reflects the patient’s right to determine decisions about his or her body.³⁶ Therefore, it has been globally accepted that all human beings have a right to their autonomy and self-determination and any law that encourages forceful extraction of organs from the body of one person to another will be consider inhuman, unethical and inconsistent with human rights.³⁷ Bell opined in this regard that an informed and highly specific consent as a fundamental principle should be relied upon as respect for autonomy being one of the founding ethical principle of medical intervention.³⁸ It is on this basis that it has been noted that the doctrine of informed consent is an established precondition which must be present before any medical procedure that involves human body can be sanction.³⁹

Clearly, the requirement for consent as seen from the extant provisions of NHA and HTA are preconditions for living organ donation that cannot be jettisoned. This is in line with best global practice. This position was confirmed by the Court in the case of *Schloendorff v. Society of New York Hospital*⁴⁰ where Cardozo J held that “Every human being of adult years and sound mind has a right to determine what shall be done with his own body and a surgeon who performs an operation without the patient’s consent commits an assault.”⁴¹ In the same vein, the Court in the case of *Airedale NHS Trust v. Bland*⁴² further validated this principle per Lord Goff who held that:”

principle of self-determination requires that respect must be given to the wishes of the patients, so that if an adult of sound mind refuses, however unreasonable, to consent to treatment or care by which his life might be prolonged, the doctors responsible for his case must give effect to his wishes, even though they do not consider it be in his best interest to do so.⁴³

³¹ Ibid.

³² Temidayo Akenroye and others, “Human Organs for Transplant: 5 Steps Africa must take to Improve the Supply Chain” The Conversation, published June, 2023.

³³ Esther Hatsiwa Emmanuel and Ijeoma Francis Nsbena “Legal and Ethical Developments in the Regulation of Organ Donation and Transplantation in Nigeria [2020] (11) (1) *NAUJILJ*.

³⁴ Ibid

³⁵ Human Tissue (Scotland) Act, 2006.

³⁶ I.O Iyioha, “Pathological, Transplants and Indigeneous 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.

³⁷ Convention on Human Rights and Biomedicine (CHRB) (1997) Art. 10; European Convention on Human Rights (1950) Art. 8; *Schloendorff v Society of New York Hospital* (1914) 105 NE 92 (Cardozo J).

³⁸ MD Bell, “The UK Human Tissue Act and Consent: Surrendering A Fundamental Principle to Transplantation Needs?” [2006] (35) (2) *J. Med. Ethics*; 283.

³⁹ CHRB (n35).

⁴⁰ 105 NE, 92 (NY, 1914).

⁴¹ G.T. Laurie and others, “Law and Medical Ethics P. 65, Eleventh Ed (Oxford University Press, 2018).

⁴² (1993) 1 ALL ER 821.

⁴³ Ibid.

So also in the English case of *Chester v Afshar*⁴⁴, the House of Lords restated the fundamental requirement of consent in medical treatment when it held that “the right to self-autonomy with respect to choosing treatment is part of modern medicine. It therefore suffice that for consent to be informed and appropriate, there are certain elements that must be present, i.e, the consent must be free, voluntary, without coercion or fraud and the person giving the consent must be informed of the probable risk involved in the procedure.

Generally, before living donation can be sanctioned, the donor will undergo a series of medical and surgical tests to confirm whether indeed the prospective donor is suitable for the donation. More so in UK, there is also in place a specialist team that will attend to the donors to determine his or her preparedness of the procedure. The responsibility of the team is numerous. Aside from carrying out questioning sessions to determine the voluntariness of the process, the team is also saddled with the duty to notify the prospective donor of the risk and possible dangers involved in the process to enable the person make up his or her mind on whether to proceed or abort the process. In Nigeria, the donor will also be screened and assessed by an independent team as well as asked to swear to an affidavit from the court to show that the consent is free and devoid of any inducement. Therefore, once these requirements are met, the retrieval process will commence in terms of living donation.

THE PREVALENCE OF ORGAN DONATION AND TRANSPLANTATION IN NIGERIA AND UK

Over the world today there is an alarming number of people on the waiting list for organ transplantation. The list is endless and cuts across the globe. In the UK, data from the National Health Service (NHS) showed that there are over 7000 people on the waiting list for organ transplantation whereas in 2022, the data revealed that over 430 patients on the waiting list died while waiting for organ transplantation.⁴⁵ The situation in Canada is not different as data retrieved from the Canadian Organ Replacement Register (CORR)⁴⁶ summary statistics revealed that⁴⁷ as of December 31, 2022, there are over 3,777 Canadians on the waiting-lists.⁴⁸ The report further revealed that in 2022, a total of 701 Canadians were removed from the organ transplant wait-lists; of those that were removed, 39% had died while waiting.⁴⁹ Similarly, in the United States of America, a report from the United Network for Organ Sharing (UNOS)⁵⁰, as of January 2023, showed that there were more than 107,000 people in the U.S. waiting for an organ transplant on the national transplant waiting list.⁵¹ It was further revealed that in the US, in every 9 minutes, another person is added to the National Transplant list, while 17 persons die each day on the waiting list.⁵²

Sterri, Regmi and Harris summed up this statistic when the authors noted that globally, 1.2 million people die each year from kidney failure.⁵³ Furthermore, that in the US, over 100,000 people are on the waiting list to receive an organ. It was the authors' further findings that almost 10,000 people either die or are considered too sick to receive a kidney transplant each year while waiting. The authors also revealed that in Europe, over 150,000 people are on the waiting list to receive an organ and 21 patients die each day waiting for a transplant whereas in low- and middle-income countries like Nigeria, South Africa and other African countries, the problems are much worse. In India, more than 150,000 patients need dialysis each year and only 1 percent

⁴⁴ [2004](UKHL, 4.

⁴⁵NHS Organs and Blood Transplant, "Organ donation and transplantation Give the gift of life after your death" <[⁴⁶The Canadian Organ Replacement Register \(CORR\) is a pan-Canadian information system managed by CIHI. CORR collects data from hospital dialysis programs, transplant programs, organ donation organizations \(ODOs\) and independent health facilities to track patients from their first treatment for end-stage organ failure \(dialysis or transplantation\) to their death. The CORR is a national database that provides statistics to track long-term trends for Dialysis activity, Organ transplantation, Organ donation and Wait list statistics.](https://www.nhs.uk/what-we-do/transplantation-services/organ-donation-and-transplantation/#:~:text=Thanks%20to%20our%20amazing%20donors,the%20UK%20Transplant%20Waiting%20List.> Accessed 10th October, 2023. donation and transplantation Give the gift of life after your death.</p>
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⁴⁷ Canadian Institute for Health Information, "Summary statistics on organ transplants, wait-lists and donors" <[⁴⁸ Ibid.](https://www.cihi.ca/en/summary-statistics-on-organ-transplants-wait-lists-and-donors#:~:text=As%20of%20December%2031%2C%202022,39%25%20had%20died%20while%20waiting.> Accessed on the 7th day of October, 2023.</p>
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⁴⁹ Ibid.

⁵⁰ The United Network for Organ Sharing (UNOS) is a non-profit scientific and educational organization that administers the only Organ Procurement and Transplantation Network (OPTN) in the United States, established (42 U.S.C. § 274) by the U.S. Congress in 1984 by Gene A. Pierce, founder of United Network for Organ Sharing. Located in Richmond, Virginia, the organization's headquarters are situated near the intersection of Interstate 95 and Interstate 64 in the Virginia BioTechnology Research Park.

⁵¹ Health and Wellness, (2023) "Organ Donation Facts and Statistics" <[⁵² Donate Life America, "Organ, Eye and Tissue Donation Statistics" <\[⁵³ Aksel Braanen Sterri \\[Opens in a new window\\], Sadie Regmi and John Harris, "Ethical Solutions to the Problem of Organ Shortage" \\(2022\\) <<https://www.cambridge.org/core/journals/cambridge-quarterly-of-healthcare-ethics/article/ethical-solutions-to-the-problem-of-organ-shortage/5DEEF791F4436A0F5326EDE76034EAB8>> Accessed 10th October, 2023.\]\(https://donatelife.net/donation/statistics/#:~:text=17,waiting%20for%20an%20organ%20transplant.> Accessed 10th October, 2023.</p>
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ever receives treatment and that 160,000 patients are waiting for transplants but only 12,000 organs are available.⁵⁴ The statistic further showed that in 2021 in the US, over 6000 people died while on the waiting list.⁵⁵

The above data showed authoritatively that there is high prevalence of organ failure globally and there have been sustained effort to address these challenges both globally and nationally through regulatory frameworks and programs as enjoined by the World Assembly and WHO. Obani, Okunrobo⁵⁶ noted in this regard that globally, over 125,000 people undergo organ transplantation annually, and that this figure is relatively small when compared to the number of persons on waiting lists for organ transplants.⁵⁷ Therefore, they opined that this contributes to the prevalence of illegal practices such as trafficking in human organs (TIHO) and human trafficking for organ removal (HTOR).⁵⁸ Therefore while the available data show the prevalence of shortage of organ to meet the demand of patients on the waiting list in advanced countries as seen above, in low income countries however, there is none availability of data to evidence this prevalence and this is attributed to the backwardness of the healthcare system in most of these countries. Therefore, to determine the prevalence of organ donation in low income countries, resort must be made to work of authors that carried out an in-depth survey through the use of various sampling technique to determine this prevalence.

There is no doubt that there is knowledge and awareness of organ donation and transplantation in most low income countries. For instance in a study conducted by Okafor in Nigeria, it was found that some of the problems that bedeviled organ donation in the country leading to delay in organ donation and transplantation include lack of finance.⁵⁹ Oluyombo and others in their study made the same findings.⁶⁰ The authors found that organ transplantation is still being significantly dwarfed by non-availability of donors in Nigeria.⁶¹ Randhawa on the other hand carried out a cross-sectional study to determine the level of awareness of Nigerians to organ donation and transplantation and the result indicated that⁶² many Nigerians have mixed attitude toward organ donation that is not commensurate to the level of knowledge possesses. This revelation showed a significant problem amongst Nigerians as it relate to their perception about organ donation. In another related study by Odusanya and others which was focused on Lagos state, the author used a multistage sampling technique to determine the awareness of people in Lagos State which is the most progressive and populated State in Nigeria⁶³ and the findings was also significant as it showed that many Nigerians are aware of organ donation and many of the respondents indicated willing to donate their organs. Similarly,

In another survey conducted by Esezobor, Disu and Oseni amongst healthcare workers to determine the level of willingness to donate their organs to patients suffering from organ damage, the result was positive as 59,3% of the Respondents which cut across healthcare practitioners ranging from nurses, doctors and health workers from tertiary hospitals confirmed their willingness to donate their organs.⁶⁴ In a related study by Oluyombo and others, the authors noted that it has been an uncontested fact that health workers are indispensable to a successful transplantation program,⁶⁵ but, it was their contention that over the years, studies have shown that there is obvious lack of awareness and commitment, misconception and superstitions belief not only among the general law public but among health workers who are customarily to be harbinger and change agents of organ donation.⁶⁶ The authors further noted the danger of unmotivated and uninformed health workers in the campaign against organ donation and transplantation and opined that such workers may fail to pass adequate information that would convert an unwilling or undecided living donor or relations to the program, therefore this uncommitted attitude from uninformed or unmotivated program may endanger the program as seen playing out in many Sub-Saharan countries with no tangible effort on ground to address this concern.

Nwabueze on the other land contended that organ transplantation is not yet a standard procedure in Nigeria and that transplantation capacity is still embryonic.⁶⁷ He attributed lack of development in this area to the attitude of Nigerians whom he claimed do not trust the health care system and will prefer traveling abroad to have renal procedure. The author further contended that this problem is not only associated with Nigeria but other Sub-Saharan countries and while quoting from Woods to justified this contention, he observed that the countries of Sub-Saharan African represent what is undoubtedly

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Pedi Obani, and Hadiza O. Okunrobo, "Critical Reflections on Combating Trafficking in Human Organs in Nigeria"[2020]Nigerian Current Law Review https://www.zbw.eu/econis-archiv/bitstream/11159/532568/1/EBP089869478_0.pdf Accessed 10th October, 2023.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ R. Oluyombo and Others, "Knowledge Regarding Organ Donation and Willingness to Donate Among Health Workers in South-West Nigeria[2016](7)(1)"National Library of Medicine.

⁶¹ Ibid.

⁶² M. Ibrahim, G. Randhawa, "Knowledge, Attitudes, and Behavior of Nigerian Students Toward Organ Donation"[2017](49)(8)Transplantation Proceedings.

⁶³ Olumuyiwa O. Odusanya and other, "Organ Donation: Knowledge, Attitudes, and Practice in Lagos, Nigeria"(2006) National Library of Medicine <pubmed.ncbi.nlm.nih.gov/16911317/> Accessed 6th day of October, 2023.

⁶⁴ Christopher Esezobor, Eliza O. Disu and Saheed Oseni, "Attitude to Organ Donation Among Healthcare Workers in Nigeria"[2012](26)(6) Clinical Transplantation.

⁶⁵ Rotimi Oluyombo, "Organ Donation Among Tiers of Health Workers: Expanding Resources to Optimize Organ Availability in a Developing Country"[2016]Transplantation Direct.

⁶⁶ Ibid.

⁶⁷ Nwabueze(n).

the worst case and active ESRD treatment program which scratch the surface of the problem and is limited to South Africa and Zimbabwe.⁶⁸ It was further contended that the intervening years did not change this position as only four African countries; Nigeria, South Africa, Kenya and Mauritius showed sign of positive development in this regard. This finding was corroborated by the work of Ifeoma Ulasi and others who maintained that organ donation and transplantation activity lags behind in Sub-Saharan African countries and this is attributed to high cost of treatment, low GDP, inadequate infrastructure and institutional support, absence of subsidy, poor knowledge of the disease condition, poor accessibility to health-care facilities, religious and tradocultural practices.⁶⁹

Notably, while there are absence of data to show with certainty the prevalence of organ donation and transplantation in Nigeria as this effort have been significantly dented by cultural practices and other Sub-saharan countries which impeded organ donation in the countries, there is however considerable progress in this area in Nigeria which has been in motion even before the international response in this regard. For instance, it has been observed that in 1980 the Lagos University Teaching Hospital (LUTH) established a Dialysis Center.⁷⁰ The center however did not engage in renal or any other type of organ transplantation. Few years thereafter, the center upgraded its transplantation capacity which enable it in 2011 to perform its first kidney transplant.⁷¹ It was also noted that in 1990 the Nigerian government established the first center for hemodialysis and kidney transplantation at the University of Maiduguri Teaching Hospital(UMTH) and the center was well-funded and equipped to carry out transplantation and hemodialysis, the center could not however achieved its desire objectives due to the absence of professional capacity to perform organ transplantation.⁷² The center only performed its first kidney transplant in 2010 many years after its establishment.⁷³

It was also recorded that as part of the effort to address this concern, the Lagos state government in 2004 announced plans to acquired kidney transplant equipment for use at the Lagos State University Teaching Hospital (LASUTH).⁷⁴ It was however doubtful if the center operate to capacity as projected.⁷⁵ It was also noted that another significant success story were recorded in the Obafemi Awolowo University Teaching Hospital, Ile-Ife, the University College Hospital, Ibadan; and Bayero University Teaching Hospital, Kano.⁷⁶ It was however observed that due to power outage and lack of funding, the mandates of these centers were grossly undermined. Oyekunle corroborated this assertion when he opined that "the incessant power outages and the sub-optimal medical infrastructures at public hospitals in Nigeria indicate that transplantation activities are likely to be taken over by the private sector and thus be profit driven, and consequently would be beyond the reach of the average Nigerian Patient."⁷⁷ Nwuabuze therefore observed that this prediction has come to past as today most transplantation procedure are been performed by private centers as evidence in Lagos-based St. Nicholas Hospital which established the center in 1998 and the hospital remained the leading hospital in Nigeria that engages actively in kidney transplanting in the country. It has been recorded that aside from been credited with performing the first-ever kidney transplant in Nigeria in 2000, the hospital has further performed successfully a total of about 96 kidney transplant in the country.⁷⁸ In the same vein, St Nicholas Hospital had a breakthrough and credited to the performance of first pediatric kidney transplant in West African sub-region in 2009.

The above therefore showed considerable success made so far in Nigeria in this regard since the 1980 and this success is gradually redefining the system of organ transplanting in Nigeria. The concern however is the fact that, while there are considerable effort in addressing the problem of organ transplant, there are no recorded effort in the aspect of organ donation. For instance, like the blood bank, there is no organ bank in Nigeria. There is also no legislative framework that dictates how organs donated can be receive and distributed equitably in line with the WHO Guidelines. Oluymbo and others noted in this regard that Nigerian being a multi-sociocultural society with different religious and ethical principle, operate an isolated transplantation program through the effort of tertiary health institutions with good outcome, but the success of the program has been grossly affected by less supply of organ.⁷⁹ The authors further reiterated the provisions of the NHA wherein the program is limited to living donors, and that there is no appreciable effort from government to expand organ donation and transplantation in the country. Arogundade and others also noted this concern when they observed that over the past decades in Nigeria, there is reported exponential increase in renal failure which is comparable to developed countries, but the lack of donors support this program which is obvious concern to the country and need urgent reform.⁸⁰

Therefore while the above findings show willingness by Nigerian to donate their organs, there is no regulator that is saddle with the responsibility to ensure that these donors indeed donate and they are well taking care of as obtainable in UK, where the data of the donor is collected and carefully followed up to address post procedure complications that may arise as a result of the procedure.

⁶⁸ Ibid.

⁶⁹ Ifeoma Ulasi and Others,"Organ Donation and Transplantation in Sub-Saharan Africa:Opportunities and Challenges[2020]Chapter Metrics Review.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Oluymbo and Others(n)

⁸⁰ Arogundade FA and Others,"The Pattern, Clinical Characteristics and Outcome of ESRD in Ile-Ife, Nigeria: Is there a Change in the Trend?[2011](11)Afri Health Sci;592-601.

LEGAL FRAMEWORK FOR ORGAN DONATION AND TRANSPLANTATION IN NIGERIA

The National Health Act (NHA) is the principal legislation that regulates organ removal, donation and transplantation in Nigeria. The Act creates the National Tertiary Health Institution Standard Committee (NTHISC)⁸¹ as the sole regulator and empowers the body to determine the criteria for the approval of transplant facility⁸² and procedural measures to be applied for such approval.⁸³ The Act further regulates organ donation related issues that pertain to prohibition and limitation that surround organ procurement and transplantation in the country.

The Act made the informed consent of the donor the cornerstone for the legal consummation of living donation. Furthermore, the process of donation and transplantation must be carried out in a licensed center or hospital duly authorized by the regulator and the procedure must be authorized by the written permission of the medical practitioner in charge of clinical services of the facility. In the absence of the medical practitioner in charge of the facility, any person authorized by him can permit the procedure. Similarly, a medical practitioner that authorized the procedure is prohibited from leading the transplantation process. As a further requirement, only registered medical and dental practitioners are authorized to render transplantation services.

In terms of deceased organ donation, there is no express requirement for consent of the donor or their relatives before same can be harvested. There is however restriction on the use of organ retrieved from deceased persons. Thus, organ or tissue retrieved from deceased persons can only be used for training of students in health sciences,⁸⁴ health research,⁸⁵ advancement of health sciences,⁸⁶ therapy including the use of tissue in any living person; or⁸⁷ production of therapeutic, diagnostic and prophylactic substances.⁸⁸ As regard organ retrieved from children below the age of 18, the Act barred the retrieval of organ unless organ or tissue that can be replaced through natural process. In effect, organs or tissues that can be replaced through natural process can be legally harvested in children. With respect to persons suffering from mental incapacity, the Act unlike its counterpart in UK, the HTA and the MCA make no reference to this category of persons.

Certainly, the silence of the Act on deceased donation as it relates to requirement for consent before harvested cannot be construed to mean approving the process. It has been established elsewhere in this work that NHA was basically designed to regulate living and not deceased donation. Nigeria is yet to come to terms with certain cultural and religious practices that are against deceased donation. Perhaps, the drafters of the Act were not oblivious of this reality, which informed the silence of the Act in this regard. Thus, failing to address this important issue by the Act is rather validating the cultural values that have permeated many cultural practices in the country and continue to serve as impediment to deceased organ donation. It is however hopeful that in the future, government will push for cultural change through policies as did in many countries to stimulate deceased donation which has been considered as one of the major sources of organ for transplantation.

Therefore, it is incumbent on all hospitals licensed for donation and transplantation activities to put in place measures through designed protocol that will ensure the informed consent of the donor is obtained voluntarily without any fraud or monetary inducement before authorizing the process. In effect, the authorizing clinician's express permission will be conditional upon the fulfillment of this requirement; otherwise, the process will be illegal, thereby exposing the center to the risk of losing its license. Licensed centers must therefore incorporate the requirement for proper investigation of consent in their protocol or set a team of independent assessors to verify the consent of the donor.

In another interesting development, the Act enabled the requirement of consent to be waived by the licensed center on the basis of medical investigation, treatment in emergency cases or in accordance with prescribed protocol by the appropriate authority.⁸⁹ The Act however did not define the parameters of medical investigation, emergency or established protocol under which consent can be waived as obtainable under the HTA in UK. Obidimma, Onuigbo and Neka were of the view that the exception to consent as permitted by the Act is porous and sabotaging in nature and could be abused.⁹⁰ Njemanze, the Chairman Global Alliance (GPA) was also in consonance with this assertion and noted that this exception could portend a great risk to the generality of Nigerians; hence, ought to be amended, otherwise, it will encourage organ trafficking and illicit organ harvesting.⁹¹ Titilayo and Adebayo also agreed with this contention. The author posited that as much as the provision appears helpful, it can be grossly abused on the basis that it raises the question of right and ownership of human tissue and consent to use it which could lead to human rights abuse.⁹²

⁸¹NHA(n4) s. 54(3).

⁸² Ibid. s 54(3)(a)

⁸³ Ibid. s. 54(3)(b).

⁸⁴ Ibid. s. 56(1)(a).

⁸⁵ Ibid. s 56(1)(b).

⁸⁶ Ibid. s. 56(1)(c).

⁸⁷ Ibid. s. 56(1)(d)

⁸⁸ Ibid. s. 56(1)(e).

⁸⁹ Ibid. s48(1)(b).

⁹⁰ E.O.C Obidimma, and Onuigbo and Christiana Nneka, "Assessing the Legal Framework for Consent in Human Organ Donation and Transplantation in England(UK) Lesson for Nigeria. *NnamdiAzikwe University Awka Journal of Commercial and Property Law*.

⁹¹ Sahara Reporters, Nigerian Law Permits Harvesting of Organs without Owners, Medical Expert Tells National Assembly(SaharaReporters, 12th August, 2022).

⁹² Titilayo O. Aderibigbe and Adesoji K. Adebayo." Contemporary Issues on Organ Donation and Transplantation in Nigeria: A Discussion[2022](8)(4)*Journal of Legal Studies and Research*;71-96.

To our client, the contention of Titilayo and other authors in this regard as regard instances where the requirement for consent can be waived appears a fair criticism. We take refuge under the practice as obtainable in UK under the HTA which places the power to waive consent of the donor in the regulator and stated clearly the circumstances under which the approval for the waiver can be based, considered and approved. Therefore, to allow every licensed hospital to determine the condition under which consent can be waived will lead to greater risk on the part of unsuspecting patients who will be certainly exploited as evidence in recent rampant gross abuses of patients privacy in most hospital in Nigeria through illegal organ harvesting by unscrupulous medical practitioners and health care centers.

It is not in doubt that over the years we have seen unabated cases of illicit organ removal from unconscionable medical practitioners to unsuspecting patients without their consent. A classic example is the case the so-called Dr. Noah Kekere, the owner of the Murna Clinic and Maternity; a medical doctor, Philip Bwede Dachung and staff of the clinic, Yusuf Abdullahi whom were arraigned on allegation of illegal organ harvesting. The facts of the case revealed that the suspect connived to harvest the kidney of their victim during operation without their consent.⁹³ This development was confirmed by the National Agency for the Prohibition of Trafficking in Persons (NAPTIP) which pledged to ensure justice for the victims.⁹⁴ In another awkward development in Lagos State, two girls' alleged that their ovaries were illegally removed without their consent. The allegation is that one of the church members of the victim allegedly took the girls for surgical Egg Retrieval in River Hood Hospital, Abeokuta and PF Hospital Surulere, Lagos without their authorization.⁹⁵ One of the victim narrated how they were promised N80,000 compensation if they provide their menstruation to the hospital and that they were advised not to disclose the information to anybody otherwise, they will be killed.

To further confirm this bleak reality, Ogundipe⁹⁶ noted that the perilous world of organ harvesting in Nigeria is dark and foreboding.⁹⁷ It was his further contention that this reality has tangible impact on individuals, families and the society as large.⁹⁸ This assertion was further corroborated by Ugwu who noted that many Nigerians are disturbed about the impact of illegal organ harvesting and trafficking. It was the authors further finding that incidences of illegal organ removal is on the increase in Nigeria and that most organ donation in the country are done under terrible conditions, i.e, compulsion, forced, abduction for forceful removal or vital organs and fraud.

The above findings, justify our contention that, while it will be unrealistic to absolute barred instances where consent could be waived, it is our position that, as obtainable in advance countries of UK, US, Israel and Spain, the power to waive consent should be determine by the regulator under appropriate and approved condition and not the licensed hospital, otherwise, it will be abused.

Furthermore and in line with established protocol, the NHA precludes organ donors from receiving financial reward for donating organ. Donors are however entitled to recover by way of reimbursement reasonable costs or expenses properly incurred as a result of organ donation. The Act is silent on how the reimbursement could be recovered and the components that this claim can be based. Though this position is in line with best global practices as well as WHO guidelines, it must be emphasis that in reality, most especially in most African countries shattered by poverty and lack, it is difficult to find people willing to donate their vital organs freely. This position was echoed by Anenga, the Chairman of the Nigerian Medical Association (NMA) Benue state who noted that most people in Nigeria sale their organs to earn a living and that this sector is thriving due to lack of regulatory framework to checkmate the activities of these evil merchants. Iwalaiye also corroborated this assertion when he noted that indeed organ donation in Nigeria is neither free nor voluntary giving that many people sale their vital organs to earn a living.

The above position therefore suggests that, placing restriction on donors' ability to be adequately compensated for donation may grossly affect the capacity of many potential donors from donating vital organs. Giving that poverty level in Nigeria is high and the price of human organ is tempting is a potential avenue that could stimulate organ commercialization. For instance, recently, a case was reported where a security guard was lured into donating his kidney for lucrative offer. As a matter of fact, kidney could cost as much as Twenty-million naira or more in Nigeria. The case of Ike Ikweremadu is also another example of organ sale where a young person was lured into travelling to UK for the purpose of donating his organ to salvage the Senators daughter's failing kidney in Nigeria under the right offer.⁹⁹ It was after the arrangement failed that the public got to know what played out behind the scene. This is not all as many Nigerian have lost their kidneys under the same guise over the years through instances such as forceful kidnap of victim for organ harvesting, organ harvesting in the guise of ritual killing and many more.

It is also important to underscore the fact that in advanced countries like, UK, Israel, Chile, Singapore and US, there are policies that encourage adequate compensation for organ donors. For instance, the NHS in England reimburses people who donate organs (living donors) in order to ensure that the financial impact on the living donor is cost neutral.¹⁰⁰ The principle of reimbursement is anchored on the notion that there should be no financial incentive

⁹³ Channels, "Three Arraigned for Alleged Organ Theft in Plateau State" <Channelstv.com> Accessed 20th November, 2023.

⁹⁴ TheGuardian, "Illegal Human Organ Harvesting: NAPTIP Promised Justice for Victim in Plateau State" (TheGuardian of 26th September, 2023).

⁹⁵ Wale Odunsi, "Lagos Orders Probe of Alleged Organ Harvesting Involving Teenagers" (Daily Post of 15th June, 2023)

⁹⁶ Shola Ogundipe, "Organ Trafficking: Nigerian's Silent Crisis" (Vanguard, 23rd September, 2023).

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Simba Den "UK Court Jails Nigerian Senator Ekweremadu, Wife Over Organ-Harvesting Plot" <https://saharareporters.com/2023/05/05/breaking-uk-court-jails-nigerian-senator-ekweremadu-wife-over-organ-harvesting-plot> Accessed 20th December, 2023.

¹⁰⁰ NHS England, "Payment for living kidney donation Purposes for processing" <https://www.england.nhs.uk/contact-us/privacy-notice/how-we-use-your-information/our-services/payment-for-living-kidney-donation/#:~:text=NHS%20England%20reimburses%20people%20who,in%20becoming%20a%20living%20donor.> Accessed 20th December, 2023.

or disincentive in becoming a living donor.¹⁰¹ Thus, Living donors would usually submit a claim for financial reimbursement to NHS England in accordance with the NHS England published policy.¹⁰² The data submitted and processed allows for consideration of any claims and payment of expenses.¹⁰³ Similarly, in 2008 Israel became the first country in the world to have enacted a legislation that provides for priority based incentive to donors.¹⁰⁴

The Israeli incentive based allocation offers priority to persons that register as organ donors in the event they succumb to medical condition that need urgent medical attention.¹⁰⁵ The system is based on relative priority. Thus, if two patients on the transplant waiting list have equal medical need for an organ, priority will be accorded to (a) individuals whose first-degree relative has donated organs after death; (b) non-directed and directed living donors; (c) individuals who expressed their consent to donate organs after death by signing a donor card; (d) individuals whose first-degree relative has signed a donor card. It is further noted that these four categories are weighed differently, i.e Categories (a) and (b) are granted top priority, as they involve an actual organ donation that occurred in the past, whereas, category (c) receives second priority, and category (d) third priority.¹⁰⁶ It is further noted that where an individual fall into more than one category, only the highest priority is relevant, as priorities cannot be cumulated. Individuals under the age of 18 and those incapable of giving consent receive relative priority status.¹⁰⁷

In US, different approaches are also used to stimulate organ donation. For instance, in 2004 the authorities of the National Organ Transplant Act provided reimbursement of travel and subsistence expenses for living organ donors and administered various states with grants.¹⁰⁸ In addition to OPOs and UNOs, the internet is also used as a source for organ donation. For instance, “since 2004, MatchingDonors.com has facilitated over 600 transplants and currently has over 15,000 registered altruistic living donors, with waitlist times significantly less than the US government waitlist¹⁰⁹

The above demonstrate that, while organ commercialization should be prohibited, in reality, for government to change the narrative in other to boost organ denotation, effort must be put in place to genuinely stimulate cultural and attitudinal perception about organ donation in the country which is steadily low and not in any way encouraging. The government must act to its responsibility of stewardship and sponsor policies that will be geared toward addressing this concern. For instance, the government can through legislative and regulatory policies as did in UK, US and Israel imposed policies that will compel cultural changes to align with the dictate of the state in the public interest. The government must also champion certain incentives that will boost organ donation through aggressive media campaign and put in place transplantation coordinators in some ICU that will market this idea as well as encourage financial and non-financial reward for donors.

It also noted that the Act recognizes the right of a person to donate his or her organ or tissue in a testamentary deposition (a will) with the condition that the will must be made in the presence of at least two competent witnesses. The person making the will is also empowered to appoint or nominate any person or institution to act as a donee of any of his specified part of the body for the said purpose.¹¹⁰ This donation can be made for the purpose of training of students in health science, health research, advancement of health sciences, therapy, including the use of tissue in any living person, or production of therapeutic, diagnostic or prophylactic substances.¹¹¹ Furthermore, a donor under this category reserves the right to revoke the consent prior to the removal of the organ.¹¹²

As seen from the above discussion, the legal framework in Nigeria is far from being perfect when compare to other notable jurisdictions like the UK, Spain, US and Israel. The NHA contained many obvious gaps that need to be address to boost organ donation and transplantation sector in Nigeria. The regulator must also equip to embrace it mandate, otherwise, Nigerians will continue to be exploited. The government must also own this as mark of it public stewardship to its citizenry which to our mind will improve in great measure health of Nigerians.

LEGAL FRAMEWORK FOR ORGAN DONATION AND TRANSPLANTATION IN UNITED KINGDOM

Basically, there are two legislations that regulate deceased and living organ donation in the UK; the Human Tissue Act and the Organ Donation (Deemed Consent) Act (ODDCA). While the HTA regulate donation of organ from living persons, the ODDCA regulate deceased organ donation. The provisions of the two laws are implemented by the Human Tissue Authority. Aside from the aforementioned laws; the Quality and Safety of Organs Intended for Transplantation Regulations (QSOITR) (as amended)¹¹³ made specific regulations regarding licensing, organ allocation and consequences of failure to comply with statutory regulation for organ donation and transplantation.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Melanre Levy, “State Incentives to Promote Organ Donation: Increasing the Principles of Reciprocity and Solidarity interest in the Gift Relationship” [2018](5)(2) Journal of Law and Biosciences.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Amy Lewis and Others, “Organ donation in the US and Europe: The supply vs demand imbalance” <<https://www.sciencedirect.com/science/article/pii/S0955470X20300586>> Accessed 20th December, 2023.

¹⁰⁹ Ibid.

¹¹⁰ Ibid. s. 55(a) and (b).

¹¹¹ Ibid. s. 56(a) to (e).

¹¹² Ibid. s.57.

¹¹³ QSOITR, 2022.

It has been established from the onset that the HTA regulate living donation in England, Wales and Northern Ireland with the exception of Scotland whereas the Organ Donation(Deemed Consent) Act regulate deceased donation in England. Furthermore, Wales, Scotland and Northern Ireland have different legislations within their jurisdictions that regulate deceased donation.

In terms of living donation therefore,the HTA made strict requirements for appropriate consent as a precondition for the organ retrieval, storage and transplantation. Consent therefore under the HTA is threefold, children below the age of 18, adult and persons with mental impairment.

The Act defined appropriate consent as it relate to a child as the consent of the “child¹¹⁴ and this applies where the child is alive. Consent can also be giving on behalf of the child where the child is incapable of giving consent.¹¹⁵ Similarly, where the organ retrieve from the child is to be used for public display or where the subject-matter of the activity is not excepted material, anatomical examination, for such process of donation to be valid, it must be in writing, signed by the child concern and in the presence of at least one witness who must attest his signature, otherwise, the process will be invalid.¹¹⁶It is also noted that where the consent is on the direction of the child, for it to be valid, it must also be witness by at least one witness who must also attest his or her signature.¹¹⁷

It is further noted that aside from the HTA, the Family Law Reform Act¹¹⁸also recognized the right of a child below 18 years to consent to organ donation. Similarly, a child under the age of 16 or 17 can give valid consent for treatment and this consent will be synonymous to consent giving by an adult person. It therefore means that a child in UK under the right circumstances can validly consent to the retrieval of his or her organ for the process of transplantation without any restriction as obtainable in Nigeria under the NHA wherein only organs that can be replace through natural process are legally allowed to be harvested in children for purposes of transplantation.

In practice however, organs are not generally retrieve from children unless there is express consent from the guardian in UK. This position was validated by the Court in the case of *Gillick v West Norfolk & Wisbeck Area Health Authority*¹¹⁹ where the court developed the doctrine of Gillick competence. This doctrine presupposes that, for a child to be competent for organ donation, it must be shown that the child is mature to understanding the nature and implication of the decision, comprehend the outcomes of not pursuing the decision, retain the information for a long time so as to arrive at a conclusion on whether to proceed with the procedure or not; weight up the information and arrive at a decision and communicate his or her choice or decision.¹²⁰ There are instances where the court may authorize the decision of a child to donate his or her organ for transplantation where public interest demands. This was demonstrated in the case of *Strunk v. Strunk*¹²¹where this position was validated.

As it relates to organ retrieval, storage and transplantation from adult living persons, appropriate consent must be obtained from the person before the procedure can commence. Licensed holders have the obligation under their license to properly investigate whether consent is valid and voluntary before giving effect to the donors’ decision to donate his or her organ to be transplanted into the body of another person. The donor will also be duly inform of the probable risk of the procedure before test could be conducted to determine the donors suitability for the donation process.

With regard to persons suffering from mental impairment, the HTA allowed organ to be harvested from such person.¹²²This is in line with section 3(1) of the Mental Capacity Act.¹²³This provision therefore enabled a mentally unstable person to make decision to donate his or her organ prior to the mental incapacity¹²⁴through donating the power to act in that regard to any person to act on his or her behalf.¹²⁵An application in this regard can also be made to the court to validate this donation under section 1(5) of the MCA.¹²⁶This provision provide to the effect that an act done or a decision made, under the act for or on behalf of a person who lacks mental capacity must be done, or made in his best interest. This principle was followed in the case of *RE Y (Adult patient) Transplant: Bone Marrow*¹²⁷ where the court confirmed this position and authorized a declaration for the donation of Y’s bone marrow for transplant, even though Y lacked the mental capacity to have given an informed consent for the procedure.

The Act strictly prohibits and criminalizes organ donation and transplantation that is sanction without appropriate consent being obtained from the donor. This act is punishable with term of imprison or fine or in some cases both fine and imprisonment.¹²⁸ This also extends to persons that fraudulently obtained donors consent by misrepresentation or other illicit means. Consent therefore must be free and voluntary, and this must be properly investigated by the HTA before authorizing any organ donation and transplantation.

¹¹⁴ HTA(n5) s. 2(2)

¹¹⁵ Ibid. s. 2(3)(c).

¹¹⁶ Ibid. s 2(6)(a).

¹¹⁷ Ibid. s 2(6)(b).

¹¹⁸Family Law Reform Act, 1969.

¹¹⁹ (1985) ALL ER 402 or(1986) AC 112 HL.

¹²⁰ Ibid.

¹²¹ 445 SW 2d 145(Ky, 19690).

¹²²Ibid. s 6.

¹²³ Mental Capacity Act., 2005.

¹²⁴ Ibid. s 24

¹²⁵Ibid. s. 9.

¹²⁶Ibid. s. 1(5).

¹²⁷ (1997) Fam 110.

¹²⁸Ibid. s. 5(1).

With regard to deceased donation however, the Organ Donation (Deemed Consent) Act entrenched the opt-out system whereby a donor is allowed to register a decision during their life time with the organ donor register on whether to donate or not after death. Where a person failed to register a decision during his or her life time, consent to donate will be deemed or the default consent will be presumed without the necessity of consulting the donors' next of kin or family members. Though generally in practice, upon the death of a registered donor, the HTA often establish contact with the deceased family to discover whether there has been change of decision prior to the death of the deceased donor.

Having seen the legal framework in terms of living and deceased donation, it is pertinent to consider briefly the criteria for licensing of transplantation centers and the process of donation. This section is regulated by the Quality and Safety of Organs Intended for Transplantation Regulations (QSOITR) (as amended) which made provisions for these requirements.

Licensing

Under the QSOITR, license is a condition precedent for a person or establishment to be allowed to carry out the business of organ procurement or transplantation. License is therefore a mandatory requirement that empowers a person or hospital to legitimately engage in the activities of organ procurement or transplantation, absence of which the action of the person or hospital will be sanctioned. Basically, there are two types of activities that a license holder can carry out under the Regulation;

- i. Procurement; and
- ii. Transplantation¹²⁹

Each of these activities involves several activities. For instance, Application for procurement includes one or more of the following activities; donor characterization, organ characterization, preservation of an organ, making arrangements to transport an organ; and retrieval of organ¹³⁰ whereas activities for transplantation on the other hand includes one or more of the following; organ characterization, preservation of an organ; making arrangement to transport an organ; and implantation of an organ.¹³¹

An applicant therefore must specify the activities that the license intends to cover. It is however noted that a single license can cover both activities in terms of procurement and transplantation¹³² and unlike Nigeria, once the application for license is granted, it operates on the individual and hospital or center rather than the premises. This is irrespective of geographical location where the facility is situated. Employees of the employer for whom an application is granted can safely operate under the license. This implies that if Mr. A applied for license and was granted, Mr. B who is an employee of Mr. A can operate under the license and his or her power to act under the license will not be impeded by the fact that he or she performs the operation in a different facility. This is however different from the position in Nigeria, where license is not granted to individuals but rather a facility. Therefore only individuals working under the facility and authorized by the person in charge of the facility can operate under the license.

It is important to emphasize that, the Authority is empowered to vary, modify or revoke a license from license holder.¹³³ This indicates that, a license holder that failed to comply with the express stipulations of the Act or Regulation will stand the risk of losing his or her license. In this regard, the Authority is saddled with the responsibility to regularly audit the activities of license holders with the view to determine whether indeed they are complying with the provisions of the Regulation and requirements of the law as well as directions by the HTA. In achieving this, the Authority can carry out a self-assessment or visit the license holder for inspection or combine both activities.¹³⁴

It is noted that HTA has the power to collaborate with any health agency in UK for the purposes of effective and efficient regulation of the sector. In this regard, the HTA often collaborates with NHSBT as provided by regulation 21 and pursuant to this, the HTA have agreement with the NHSBT to assist the Authority in functions which includes the following: supervise the exchange of organ between UK and other countries, keep records and make reports concerning procurement organizations and transplantation centers, keep data that will ensure traceability at all stages of the chain from donation to transplantation or disposal, keep records of all activities of procurement and activities, publish annual report on the activities of procurement organization and transplantation centers, keep register of living donors for purposes of ensuring follow-up of living donors and manage reporting system for donors with serious adverse reactions (SAEARs).¹³⁵ Therefore, there is a statutory requirement for all procurement and transplantation centers to comply with the aforementioned requirements and the NHSBT is mandated to ensure that there is adequate compliance in this aspect.

It is also noted that there is National Operating Procedure (NPO)¹³⁶ which requires a license holder to put in place a number of procedures which are developed by NHSBT that cover the following areas, management of a serious adverse event or reaction, reporting serious adverse events and reactions and the management measures taken, ensuring the data required to ensure traceability of organs is kept for 30 years from the date of retrieval, storing information on organ characterization for a period specified by the HTA, management of procurement materials, verification of consent, transfer of information

¹²⁹Ibid. QSOITDA (n77) para. 2.

¹³⁰ Ibid. 2(a)(i-v).

¹³¹ Ibid. 2(b)(i-iv).

¹³² Ibid. para. 3.

¹³³ Ibid. para. 4.

¹³⁴ Ibid. para. 7.

¹³⁵ Ibid. para. 14(a-d).

¹³⁶ Ibid. para. 21.

on donor and organ characterization, ensuring the integrity of the process and many more.¹³⁷ The license holder is also required to collect relevant information from the organ donor for the purposes of followed-up referred to as donor characterization to ensure that the condition of the donor is monitored to avoid any adverse reaction that may be detrimental to the donor.¹³⁸

It is also incumbent on the license holder to ensure that test for donors and organ characterization is done in a licensed laboratory that is accredited with the United Kingdom Accreditation Service (UKAS) to avoid any mistake that could mar the process.¹³⁹ Similarly, in terms of organ retrieval, whether procurement or transplantation, the license holder must ensure that the statutory requirement for consent is strictly complied with. International and operating standards, organizational policies and procedures must also be follow-up.¹⁴⁰ Where the retrieval pertains to living donor, there is the further requirements of follow-up after the donation to ensure safety and to address adverse effect that may arise thereafter the procedure.¹⁴¹

In terms of implantation into a recipient, the regulation set requirements that must be adhered to ensure effective and efficient implantation. The license holder is therefore required to verify the following before implanting an organ into the recipient; identification of the donor, the collection of information specified in Annex A and where appropriate Annex B and compliance with the statutory requirements as enshrined in the regulation.¹⁴² Added to this the license holder is further required to have in place operating procedure that will determine verification of donor, consent and organ donor characterization of both deceased and living person for the purpose of the transplantation.¹⁴³

It is important to note that the regulations also cover disposal of organs wherein it was provided that organs that cannot be used for transplantation can be used with the appropriate consent for research, public display, training and education,¹⁴⁴ re-implantation into the living or return to the donor's family and in appropriate circumstances destroy the organs by incineration/cremation or burial.¹⁴⁵ The license holder must also keep records of the disposal organ.¹⁴⁶

NIGERIAN AND UK FRAMEWORK COMPARED

From the above position, it is glaring that there is significant difference from what is obtainable in UK and Nigeria. Some of the major differences are in the area of deemed consent as it relates to deceased donation which is obviously lacking under the Nigerian legal framework. It is observed that putting in place a regulatory framework that will address this aspect will prove pivotal to addressing shortage of organs. Though it will be difficult to achieve deceased organ donation in Nigeria due to cultural, social and religious practices, a legislative codification may however alter the perception. It is also noted that, there is clear distinction in terms of licensing procedure, as under the UK framework, a person can apply for procurement or implantation. The NHA is silent in this area. It is also noted that license in UK is granted to individuals and institution whereas in Nigeria license is only giving to facilities operating clinical services and only register and qualified clinicians can sanction an operation and must be done in writing.

It is also noted that in terms of follow up process, there is clear provisions to ensure that donors are well taking care of and this is not done by individuals recipients but the NBHST, however in Nigeria, individual recipients are allow to bear the cost of the reimbursement for reasonable cost incurred. This to our mind is one of the reasons why many Nigerians are unwilling to donate their organs. There is also willingness by the health workers in the UK to address the issue of organ shortage and transplantation that was enhance by incentivizing effort by the government which is obviously lacking in Nigeria. Many health workers are not motivated to give their best in critical cases of this nature, thus affecting their ability to market the idea of organ donation as done in most advanced countries where this idea is incorporated in the programs of government, i.e if one wants to register a license, he or she may be asked as reflected on the form whether the person may desire to be organ donor at some point. These programs are obviously lacking in Nigeria and this attitude could be attributed to the responses of government to the plight of health workers.

It is further observed that in Nigeria, there is no organ bank for organs and to our knowledge there is also not in existence a specialized procedure of equal and fair allocation of donated organs. As a matter of fact, most donors are family members of the recipient or relatives or acquaintances. Therefore while in principle, there is recognition of organ donation, in reality, there are no genuine efforts on the part of government through policies and programs to enhance organ donation and transplantation. There is also not in place defined programs that cater for organ donors and this explain why there is general unwillingness in Nigerians to donate their organs. This is critical given the fact that most Nigerians are poor and therefore could not afford the cost of medical treatment in the event of adverse reaction that could be capital intensive.

¹³⁷Ibid. para 23(a,j).

¹³⁸Ibid. para. 25.

¹³⁹Ibid. para. 35.

¹⁴⁰Ibid. para.45 and 46.

¹⁴¹Ibid. para. 48.

¹⁴²Ibid. para. 79.

¹⁴³Ibid.

¹⁴⁴Ibid. para. 83

¹⁴⁵Ibid. para.84(a-e).

¹⁴⁶Ibid.

CONCLUSION

Organ donation as rightly noted above has come a long way towards saving the lives of many patients suffering from end stage renal or organ failure. While there have been genuine efforts from many countries to address this concern; in Nigeria, the legal framework is still evolving and it is advisable therefore that the NHA be amended to address this concern for effective and efficient administration of the sector. Recently, we know of a media personality that died as a result of kidney malfunction. The case was pathetic because, a friend was willing to donate, but due to the lack of resources, he could not be taking out of the country to undergo the procedure. His friends struggled to raise fund to address this challenge, he died in the waiting process. This is the fate of many Nigerians who cannot afford to travel abroad for these procedures; as private hospitals within the country attempting the procedure are either ill-equipped or very expensive for the ordinary person. This is however not the case with UK and other advanced countries where the government actively participates in programs that change people perception towards organ donation and transplantation which have proved effective in decongesting the waiting list and waiting periods, thereby giving many families respite.

RECOMMENDATIONS

1. It is recommended that the Spain and UK model as well as Wales be adopted to allow for deemed consent as it relates to deceased person donation.
2. It is also recommended that the Regulatory authority be empower to make regulations that will enhance organ donation and transplantation in the country.
3. It is further recommended that a donor's bank be established as the Blood bank to make it easy for people to donate their organs for storage in order to facilitate transplantation.
4. It is also recommended that a policy should be put in place that will ensure just and equitable distribution of donated organs.
5. It is our further recommendation that the licensing procedure be change from facility based to individual and institutionally based as obtainable in the UK.
6. It is also recommended that license should be classify as done in the UK through procurement and transplantation and should be open in such a way that a person can process two on a single license.
7. It is also recommended that the WHO guidelines and recommendations be followed.
8. It is also recommended that organ donation register be establish to take stock of organ donors in the country.
9. We also recommend that programs and policies should be put in place in all health care facilities as well as other sectors to encourage a robust organ donation system in the country.

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