

ORGAN DONATION PROCEDURE IN NIGERIA: REVIEWING THE PROVISIONS OF NATIONAL HEALTH ACT 2014 AND ITS CHALLENGES*

Abstract

World health organization has provided a policy to regulate any commercial dealing in human organ. The policy provided for restriction for removal and retrieval of human organs and also regulations for hospitals involved to ensure transparency by all concerned. Laws and policies governing the use of organs for transplantation are evolving rapidly in response to sensitivity to ethical concerns and increasing shortages of transplantable organs. They are necessarily becoming increasingly detailed and complex. Professional practice will be enhanced by strict compliance with rules and regulation regarding its practice. Sequel to that, different countries come up with a legal framework in that respect. Nigeria as country has in 2014 passed the National Health Act into law. Although the Act recognized the need for consent before removal of any human organ from both the dead and the living, the need for such consent is not required in extreme emergency cases. This paper looked at the implication of the law on medical practice and the rights of the donor to consent. Where the donation is required from a living individual, his consent will be required, but for the non living, it is an issue that also requires consent from the family even though some jurisdiction recognize a presumed consent especially in extreme case of emergency.

Keyword: Human Organ, Transplantation of Human Organ and Consent.

1. Introduction

There is scarcity of human organs and this poses a serious threat all over the world, because the need far exceeds the supply of transplantable organs, demand is higher than the supply. Because of this, there is increasing practice of quest for organ transplant and without regulation there will be problem. Organ donation can arise from living, genetically-related individuals, from living, unrelated individuals in special circumstances where no unauthorized payment is made to the donor; or from cadavers. The first cardinal principle is that in no circumstances should doctors participate in nor should they encourage in any way, the trade in human organs. They must not advertise for donors nor make financial medical arrangements for people who wish to sell or buy organs. Doctors must also satisfy themselves that consent to a donation has been given without undue influence of any kind, including the offer of a financial or material benefit.¹ A doctor, or another appropriately qualified professional, independent of the transplantation team, must assess the motivation of each donor. Live donation of a single kidney was first done in 1954, but live donation of other parts of human organs is relatively a recent innovation in the nineties.² To date, the major source of organs and tissues in Europe and America has been from cadaveric donors. Living tissue deteriorates rapidly when its blood supplies, and organs need to be cooled and transported for implantation into the recipient within a limited number of hours. Short transfer time, entailing removal of organ from 'beating heart' donors, was made possible by the acceptance of 'brain stem death' as death.³ Worldwide, the demand for organs is growing, as the supply of organs and tissues for transplantation has not kept pace with demand. Approximately 122,403 individuals are waiting for lifesaving organ transplant in US each year as at 10th August 2015, and 12 people die each day while waiting for a lifesaving kidney transplant.⁴ This is another compelling factor to provide a legal framework to avoid the problem of removing human organ without consent.

After several failures in the history of organ transplantation in humans, history was made around the fifties by David Hume in Biston when he used a cadaver kidney in an attempt to save the life of one of his patients who had kidney problem. However, the attempt was unsuccessful which could be as result of poor technological equipment and complications. Thereafter, in 1954, there was a turn around on the transplantation of kidney when Joseph Murray bypassed the barrier of rejection by using the patient's identical twin as the donor of the human kidney transplant. This time, the kidney transplanted was harvested from a living donor, who was a twin brother of the recipient. The transplantation was successful although, the recipient died of a heart attack eight years after transplantation. This survival of the recipient for years brought hope and chance for an improvement and advancement in the area of organ transplantation in the medical field.

Despite the success recorded in the second transplantation, there were still some challenges especially where there are issues of rejection from the recipient due to compatibility test between the donor and the recipient. This is so because

By Anselm Uchechukwu ABONYI, PhD, Senior Lecturer, Department of Commercial and Property Law, Faculty of Law, Chukwuemeka Odumegwu Ojukwu University, Igbariam, Anambra State. Tel: 08033887683, Email: Barristeruchechukwu2002@gmail.com; and

Tochukwu Stanley EJEAGU, LLM Candidate, Faculty of Law, Chukwuemeka Odumegwu Ojukwu University, Igbariam Campus, Anambra State. Tel: 08033887683.

¹Section 53 National Health Act made it an offence for anybody who donates any organ to receive any financial reward, except for the reimbursement of reasonable cost incurred to provide such donation.

²Nadir N. Law and Medicine: An Analysis of the Organ Transplantation Law in India. Available at nupur.nadir@legalserviceindia.com last visited 10/9/2023

³ Ibid.

⁴ [www.http//donatelife.net/statistics](http://donatelife.net/statistics) last visited 10/9/2023.

when an organ is transplanted, the body of the recipient sees it as a foreign object, and its complication can result in death. One of the people who contributed immensely to solve this problem was Peter Medawar, an immunologist who advocated tissue typing on both the donor and the recipient before a transplant as possible solution. The essence of doing this was to prevent the recipient's body from identifying the transplanted organ as 'foreign'. Further improvement on this challenge, was another breakthrough in 1983 when a Swiss pharmaceutical company produced cyclosporine which enabled the body of the recipient to suppress the rejection of foreign tissue selectively. This broke the barrier between the recipient and unrelated kidney donor from living persons to save patients in need of organs. In Nigeria, organ donation and transplantation has not gained much ground, although there is a lot of improvement recently compared to what was in operation decades ago. The first successful organ transplantation procedure in Nigeria was a kidney transplant at St Nicholas Hospital in Lagos in 2001. This success has opened the pathway to organ transplantation surgeries in Nigeria that has given rise to issues of organ donation and transplantation within the socio-cultural and legal ambit within this area of medical biotechnology operations. Generally, there are ways in which organs donated can be transplanted. These are through auto-grafts, homografts and xenografts⁵. This article examines the National Health Act on the regulation of donation of human organ and the requirement for consent of the donor, using some jurisdictions particularly where the principle of presumed consent applies as a comparison.

2. Conceptual Clarifications

The aim of this part is to define and clarify relevant key terms of the paper such as Human Organ, consent and transplantation of human organ.

- i. **Human Organ:** Human Organ is a relatively independent part of the body that carries out one or more functions. In other words, it is distinct part of an organism that performs one or more specialized functions, for example eyes, ears, hearts, lungs, liver and kidney.⁶ Human organ as provided by Section 301⁷ include fetal kidney, liver, heart, lungs, pancreas, bone marrow, cornea, eye, bone, skin and intestine including the esophagus, stomach, small or large intestine or any portion of the gastrointestinal tract.
- ii. **Transplantation of Human Organ:** This is often the only treatment for end state organ failure, such as liver and heart failure. It means the transfer of organ such as kidney from one body to another. It is also referred to as the procedure of replacing diseased organs, parts of organ, or tissues by healthy organ or tissues.⁸
- iii. **Consent:** Consent implies agreement or acquiescence. But according to clinical trial directives⁹ consent is referred to as a decision which must be in written, dated and signed and taken freely after being duly informed of the nature of the act, significance, implication and risk and appropriately documented, by any person capable of giving consent.¹⁰ A person has the right to be given all the necessary information about the proper procedure, pros and cons needed if the decision about the procedure is to be taken before a person shall give his consent.

3. Different Types Of Human Transplantation

Obviously, there are more recipients of human organ than there are donors. And this is what makes the donations a very difficult issue that attracts serious legal and ethical implications. All the laws dealing with the issue prohibit any commercial dealing in human organ, and in some countries, the donation is made through informed consent while in others, the consent is presumed to have been given before death. Yet in other countries, the family of the diseased are allowed to decide on the donation. The aim of this segment is to provide the reader with different types of organ donation and transplant. There are various types of human transplant:

- i. **Xenotransplantation:** This procedure involves transplantation, implantation into human recipient of either: live cells, tissue, or organ from non human animal source or human body fluids, cells, tissues or organs that have had ex vivo contact with live nonhuman animal cells¹¹.
- ii. **Living donor Homotransplantations:** This is a situation where a live donor of species x will allow his organ to be given to a recipient of species x. In this case, a person voluntarily donates his organ in order to relieve a patient.
- iii. **Post-Mortem Homotransplantations:** from a dead donor of species X into a recipient of species X, here the position of the law in UK now is that a person is presumed to have given consent before he died unless there is an express objection or if the family can prove that he has indicated his objection.

⁵ *Journal of Legal Studies and Research*, Volume 8 issue 4-ISSN 2455 2437, July –August, 2022, www.thelawbrigade.com. Accessed on 12/9/2023.

⁶ Available at www.medicinenet.com last visited 10/9/2023

⁷ United State National Organ Transplant Act. Available at Law.cornell.edu last visited 10/9/2023.

⁸ Steinberg A. Organ Transplantation and Definition of the Moment of death-jewish perspective. Available at www.medicethics.org.il last visted 10/9/2023

⁹ Article 2 (j0) of the Clinical Trials Directives 2001/20/EC.

¹⁰ Salihu S. Right to information in Clinical Research; A Case study of Pfizer Clinical Trial in Kano. *Abuja Journal of Private and Comparative Law* 2013 Vol 2 P. 91.

¹¹ Available at www.fda.gov/biologicsbloodvaccines/xenotransplantation/default.htm.

4. The Requirement of Consent in the Donation of Human Organ

The law presumes that consent must be obtained freely without deceit, fraud, duress or coercion; otherwise, the consent will not be valid in law¹². The court¹³ defined consent as an act of giving approval or acceptance to something done or proposed to be done, and is an exact conduct flowing from the person giving the consent. However, this consent may vary from other consent, like ordinary consent and informed consent. The National Health Act does not prescribe the process of obtaining and recording consent for cell, tissue and organ donation in the light of international ethical standards. No enough sampling is made from the manner in which organ procurement is organized in some other jurisdiction. Consent may be expressly referred to as 'opting in' requesting an individual to exercise his autonomy or it may be presumed as in the case of UK presently, also known as 'opting out'. Whether consent for donation from deceased persons is 'explicit' or 'presumed' depends upon each country's framework including the manner in which families are involved in decision-making about health care generally. Under both systems any valid indication of deceased person's opposition to posthumous removal of their cells, tissues or organs will prevent such removal. Although expressed consent is not required in an opting-out system before removal of the cells, tissues or organs of a deceased person who had not objected while still alive, clinician may be reluctant to proceed if the relatives personally oppose the donation; likewise, in opting-in system, health personal typing seek permission from the family even when the deceased gave pre-mortem consent. They are not able to rely on the deceased's explicit or presumed consent, without seeking further permission from family members when the public understanding and acceptance of the process of donating cells, tissues and organs is not deep-seated and unambiguous.¹⁴ Even when permission is not sought from relatives, donor programmes need to review the deceased's medical and behavioral history with family members who knew him or her well, since accurate information about donors helps to increase the safety of transplantation.¹⁵ For tissue donation, which entails slightly less challenging time constraints, it is recommended always to seek the approval of the next of kin. An important point to be addresses is the manner in which the appearance of the deceased's body will be restored after the tissues are removed. The essence of this illustration is that people shall know the implication of the two terms opting-out. The argument against opting-out which is presumed consent is that one is compelled to express his will or his organs may be used for either donation to another person or research.

5. Brief Legal Regime For Informed Consent In Nigeria

The legal regime regulating consent in any medical treatment including human organ in Nigeria starts with common law. It provides that, consent of a living person to medical treatment or to the removal of any of his bodily part is absolutely mandatory. In fact, the person can maintain an action in tort or civil wrong for damages for trespass against his person against a medical practitioner or a hospital for removing his tissue, organ, blood or blood product or any of his bodily part without his consent.¹⁶ Even when consent has been obtained, it is the duty of the medical practitioner, to explain to the person beforehand what he intends to do and its medical implication as any responsible doctor in similar circumstances would do. And if the medical doctor claims that he did it under a medical emergency, the onus of proving the need for an emergency is upon him, and this might be difficult to discharge. Section 252 of the criminal code¹⁷ relates to the issues of informed consent, as it relates to doctor/patient relationship. From the provisions of the Criminal code, it shows that if a person does not give consent after proper information, any act carried out on him or her, which causes injury or personal discomfort can amount to assault as envisaged by the law. Here, prohibition to any treatment without informed consent as a common law principle is captured in the statute dealing with crime. This makes the framework richer and added flavor to common law principle. The question to be asked is to what extent does the National Health Act comply with this stand of the law?

6. Highlights of The Provisions of National Health Act, 2014 and Its Challenges

The National Health Act is the major legislation for health services in Nigeria. However, the law is criticized by both lawyers and medical practitioners. The challenge is about the removal of human organs without the need for compliance with informed consent in case of emergency. The issue relates to the provisions of Section 48, 51 and 52 of the Act. Particularly Section 48 provides:

¹² Rafindadi A. A. *Hand Book of forensic Medicine*, Zaria Amana Publishers LTD 2004.

¹³ In *Okekearu v Tanko* (1985) 5 NWLR (Pt 10) P. 2011.

¹⁴Sani I. Salihu, Transplantation of Human Organ: The need for right to consent and the Nigerian National Health Act, 2014. <https://www.researchgate.net/profile/sani-...-Donors-Consent>. Gotten from a paper written by Abadie A. The Impact of presumed Consent on Cadaveric Organ Donation: A Cross Country Study. Available t ww.hks.harvard.edu. last visited 10/9/2023.

¹⁵ Ibid note 1 pg. 133

¹⁶ *Wells v Surrey* A. H. A. E. (1978).

¹⁷Section 252 'A person who strikes, touches or moves or otherwise applies any kind of force to the person of another, either directly or indirectly, without his consent, or with his consent is obtained by fraud, or who by any bodily act or gesture, attempts, or threatens to apply force of any kind to the person of another without his consent, in such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect his purpose, is said to assault that other person and the act is called an assault. The term 'applies force' includes the case of applying heat, light, electrical force, gas odour, or any other substance or thing whatever, if applied in such a degree as to cause injury or personal discomfort.

(1) subject to the provision of section 53,¹⁸ 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.¹⁹

In accordance with to the above provision of the law, the need for consent may be waived in cases of emergency, investigation and treatment of disease. The implication here is that once any available personnel is satisfied that there is a case of emergency or any related issue; he can act for the purposes provided by the law. Consent to medical treatment is a human right issue. It relates to right to privacy, personal liberty and right to religion. It is beyond ethical issue.

Many believe that a room has been created for people's right to be violated. Even though the current trend shifts towards presumed consent making donation the default position, from which everybody would retain the right to opt out during their life time.²⁰ However, in Nigeria, is only in an emergency situation that organ may be removed without the requirement of obtaining consent according to the Act. Njemanze, who is a specialist in Neurocybematics pointed out that Section 48 (b), waives the right to consent in an emergency situation. He argues that, it is forbidden in medical practice to waive the right of consent under whatever circumstances for living or even dead persons. He further asserted that even when a living patient is unconscious or unable to make decisions, that right of consent is temporarily transferred to his next-of-kin, guardian or parents in the case of a child, but is never waived. Consent must be obtained from both living and non living donor.

One may be tempted to ask question here, which is whether the argument of the learned professor is correct and there are similar provisions in other jurisdictions? In UK for example, there is Human Tissue Act²¹ which regulate the donation of human organ. Although the issue of consent is outside the scope of the Act, it is covered by the common law and the Mental Capacity Act²² where requirement of consent for living donor are set out in Section 33 and 34 of Human Tissue Act and 9-14 of the Regulation.²³ It is therein made to be an offence to remove or use any organ or part of the body of a living person for transplantation unless the requirement of consent is satisfied and an independent assessor must conduct an interview with the donor, and if somebody gives the consent on behalf of the donor, it must be checked.²⁴ This position reiterates the argument that consent is an uncompromised requirement for donation of human organ. And we do not think this is the intention of the National Health Act.

Another important issue worth noting is that, if organ can be taken without consent in an emergency situation, what is the meaning of emergency within the context of the law? In the Act, 'emergency situation: was not defined, which means that it's only the doctor, who could decide whether there is an emergency and thereby authorize the removal of anybody's organ, without consent. The Chairman, Global Profile Alliance (GPA), Prof Philip Njemanze, condemned this section of the Act, describing it as a way to kill Nigerians. He stated that Nigerian population would be reduced through secret trading on human organs by international financial giants to save lives of their citizens, while warning that human organs, such as the heart, liver, kidney, lens, ovarian eggs, and sperms and so on, would be secretly transplanted in designated hospitals. The fear for Nigerians is that some certain medical practitioners at the designated hospital had been empowered by the law to remove these vital organs of sick Nigerians who are on admission. This is so because; the law made provision for the right of consent for patients, one hand and took it away with the other land from the patients, in times of some certain medical emergency conditions.²⁵

In his view, the learned silk Femi Falana (SAN) reason that the National Assembly erred passing the law. He said, 'we wish to point out that the National Assembly has violated the fundamental rights of Nigerians to life, human dignity, privacy and freedom of thought, conscience and religion by authorizing medical doctors to remove organ of a living

¹⁸ Section 53 (1) it is an offence for a person: - who has donated tissue, blood or a blood product to receive any form of financial or other reward for such donation, except for the reimbursement of reasonable cost incurred by him or her to provide such donation.

¹⁹ National Health Act, 2014.

²⁰ Cartwright-shamoon M., Human Rights and presumed consent for organ donation in the UK. *Ulster Med. Journal* 206. Available at www.ncbi.nlm.nih.gov last visited 10/9/2023.

²¹ Human Tissue Act 2004.

²² Mental Capacity Act (MC Act) 2005.

²³ The Human Tissue Act (Quality and safety for Human Application) Regulation 2007

²⁴ Code of Practice 2 Donation of solid organ for transplantation. Available at www.hta.gov.uk. Last visited 10/9/2023

²⁵ Section 33 of the constitution of the federal republic of Nigeria 1999 (as amended) cap C23 LFN 2004 therefore, section 51 is inconsistent with the Right to life of the fundamental rights under the 1999 Constitution of the federal republic of Nigeria.

persons in Nigeria without their informed consent.²⁶ The learned practitioner made reference to Section 48 and 51 of the Act.

Section 51 of the National Health Act, 2014 *supra* provides;

1. A person shall not remove tissue from a living person for transplantation in another living person or carry out the transplantation of such tissue except:
 - a. In a hospital authorized for the purposes; and
 - b. On the written authority of;
 - i. The medical practitioner in charge of clinical services in the hospital or any medical practitioner authorized by him or her; or
 - ii. In the case where there is no medical practitioner in charge of the clinical services at that hospital, a medical practitioner authorized thereto by the person in charge of the hospital.
2. The medical practitioner stated in subsection (1) (b) shall not be the lead participant in a transplant for which he has granted authorization under that subsection.
3. 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.

Under Section 51, therefore, there can be no question of any ‘me too’ hospital carrying out a transplantation procedure. Nor can such (me too) hospital justify a transplantation procedure merely on the basis of consent given by both donor and donee. It is a common knowledge that without Section 51 of the NHA, 2014, the common law permits every hospital and qualified doctor to offer transplantation services, subject to the consent 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 organ. In contrast, the issue of donor’s consent to organ donation is dealt with in section 48 of the National Health Act, 2014 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 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 protocol 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 of fails to comply therewith is guilty of an offence and liable on conviction as follows:

- (a) in the case of tissue, a fine of ₦1,000,000 or imprisonment of not less than two years or both fine and imprisonment; and
- (b) in the case of blood product, a fine of ₦100,000 or imprisonment for a term not exceeding one year or both fine and imprisonment.

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 the learned silk Femi Falana, SAN acknowledges this, he asserts that the exception for ‘medical investigations and treatment in emergency cases’ under Section 48 (1) (b) witless the potency of the protection provided under Section 48(1)(a). the researcher does not think that this construction of the effect of Section 48 is justifiable. A bit of introduction of the doctrine of informed consent is necessary. Informed consent is an ethical and legal doctrine that requires health care professionals to obtain the consent of their patients before treatment is administered or surgery performed. The principle of patient autonomy is foundational to the doctrine of informed consent. Patient autonomy recognizes the right of every patient to decide what is to be done with his or her body as well as every patient’s right to bodily integrity.

Informed consent, which applies in both medical research and treatment, arose because of the Nuremberg trials in 1946 and the horrific inhuman experimentation carried out by medical physicians. Principle 1 of the Nuremberg Code

²⁶ Femi Falana points to danger in new National Health Law Nigeria News stand 30 December, 2014. Available at <http://nigerianewsstand.com/falana-points-to-danger-in-new-national-health-law/> last visited 10/9/2023.

established after the Nuremberg trials stipulates the requirements of voluntary consent as essential to the grant of consent for research purposes, accompanied by the individual's knowledge and understanding of the nature of the subject matter involved. The National Health Act (NHA), 2014 incorporates the informed consent doctrine in Section 23, which provides for the right of every patient in Nigeria to informed consent in matters of diagnosis and treatment and the right of every patient to refuse health services.

The National Health Act, 2014 did not define what constitutes 'medical investigations and treatment in emergency cases' under Section 48 (1)(b) of the Act and that is where the lacuna lies. However, under the code of ethics of the medical and dental professions in Nigeria, there are exceptions to the informed consent principle, of which the circumstances of emergency are one. Also, it is relevant to state that informed consent functions within certain constitutive elements or conditions, including whether the individual from whom consent is sought has the necessary competence to do so. To be competent to provide consent, the patient must have the mental capacity to consent and must have attained the age of majority, which is 18 in Nigeria, or if younger than 18, is able to appreciate the nature and consequences of the proposed treatment; the patient must also be conscious and mentally capable to provide consent. Indeed, the code of Medical Ethics of the Medical and Dental Professions in Nigeria outlines this clearly. According to the code, a competent patient in Nigeria is one who has attained the age of 18 and is not mentally impaired or unconscious. Where a patient is incompetent by virtue of age, mental impairment or being unconscious, a next-of-kin must provide the necessary informed consent for a procedure to be carried out. Where there is no next-of-kin, the highest-ranking physician in a hospital is given the power to give appropriate directives to preserve the life of the patient, and where necessary, a court order may be required to enable a life-saving procedure to be carried out by the physician. Of course, and as clearly stated in the code, these safeguards are in place to protect the fundamental rights of every patient.

From the discussion above, therefore, we argue that based on the Code of Medical Ethics, 'Emergency' under the National Health Act, 2014 involves a situation where a patient is in urgent need of life sustaining medical attention and is either unconscious or unable to provide the necessary consent either explicitly or implicitly, nor is the patient's next of kin, legal guardian or representative available to give proxy or substituted consent. This is consistent with common law's approach to emergency treatment without the consent of the patient's next-of-kin or legal representative due, of course, to an inability to reach the latter promptly before the performance of a time-sensitive life saving medical procedure.

However, instead of the simple characterization of the topic as 'emergency treatment' as is often the case in the medical literature, the Act uses the term 'medical investigation and treatment in emergency cases'. But this adds nothing to the standard adaptation and understanding of the medical emergency exception to the doctrine of consent. The 'medical investigation' part of the phrase simply means 'medical diagnosis', so that if the entire phrase is read together, it means medical diagnosis and treatment provided in a period of emergency. This means that, at least, the removal of tissues, blood and blood product for non-therapeutic research involving human subject or other purpose such as transplantation is not contemplated by section 48(1)(b). The emphasis is 'treatment' in the course of an emergency.

More to the point, arguments have been made that the exception for medical emergency means that, during such period, a doctor could harvest organ from the victim of an emergency for the purpose of transplantation into another person. We are of the view that even if it is possible that organ can be harvested during the emergency, the emergency exception under Section 48(1)(b) deals squarely and solely with 'treatment' (that is, therapy) given to the victim of an emergency, including the medical diagnosis (of the victim of emergency) done pursuant to such treatment, such as necessary blood test or, where the victim is scheduled to receive a transplant, histo-compatibility tests. Extracting an organ from a victim of medical emergency for the purpose of transplantation into another person or for any other non-diagnostic or non-therapeutic purpose, does not qualify as the 'treatment' of the victim under Section 48(1)(b), but it is possible that medical professionals and health care officers can compromise the procedure and harvest organ in the situation of such emergency.

We submit that the human organs (the kidney, liver, heart, lung, pancreas and intestine) are scarce many people who would benefit from receiving a transplant do not get one, which is enough reason to come off with a good legal framework where the necessary need of the recipient will not lead to the harm of the donor. The most fundamental of all is the consent of the donor whether living or deceased. However, the argument that the need for consent has been taken away by the Act is worth considering. Failure to obtain consent can have a serious and different consequences (criminal, civil or both and each of these have its consequences). Touching patient without consent will be negligence which is an actionable tort under the civil law and negligence will be easier proved than assault and crime which require proof beyond reasonable doubt.²⁷ The position here is that touching or removing organ from anybody without his consent will be actionable in tort.²⁸

²⁷ S. 138 Evidence Act Cap E14 Laws of the Federation of Nigeria 2004, *AG Kaduna V. Hassan* (1985) 2 NLWR (Pt 8) 483.

²⁸ *Ibid* Note 1 Pg 180

On the question of human right, the case of *Denloye V. Medical & Dental practitioners Disciplinary Tribunal* is illustrative here. The Apex Court of Nigeria held²⁹ that failure to seek and obtain a patient's informed consent before administering a blood transfusion on him constituted a violation of his fundamental human rights to privacy³⁰ and right to freedom of religion and conscience.³¹ The Supreme Court held that the patient's constitutional right to object to medical treatment or, particularly, as in this case, to his tissue, blood or blood products or his organ being taken away from his body is founded on fundamental rights protected in the above mentioned provision of the law and right to freedom of thought, conscience and religion under section 38.³² The court further held that the right to privacy 'implies a right to protect one's thought, conscience or religious belief and practice from coercive and unjustified intrusion; and, one's body from unauthorized invasion. The right to freedom of thought, conscience or religion implies a right not to be prevented, without lawful justification, from choosing the course of one's life, fashioned on what one believes in, and a right not to be coerced into acting contrary to religious belief. The limits of these freedoms, as in all cases, are where they impinge on the rights of others or where they put the welfare of society or public health in jeopardy. The implication of the highest court's decision is that rights to privacy, freedom of thought, conscience or religion mean that an individual should be allowed to choose a course for his life, unless there is a law democratically justifiable to infringe on such right.³³ If Section 48 of National Health Act means removing one's organ in case of emergency without consent, the Act is in flagrant violation of the above provision of the law.

The contention in this Act (NHA) is regarding Sections 48 and 51. Section 51 permits the removal of a tissue or an organ of living person for transplantation. The section did not contemplate written consent of the patient. The only thing it says is that the removal should be carried out 'at a hospital authorized for that purpose' or with 'the written authority of a medical practitioner in charge of the clinical services.....' many legal scholars have interpreted this section of the law to have meant that once a hospital is authorized to do transplant, the hospital can remove an organ in emergency situation without hesitation.

7. Socio-Cultural and Legal Issues Associated with Organ Donation and Transplantation in Nigeria

Sale of organ:

Generally, under Nigeria law, donation of organ for transplantation should be altruistically done without any flavour of compensation on the part of the donor. This position has cleared all doubt irrespective of any cultural and religious arguments on commercialization of organs for donation. However, the reality is that many people are unwilling to donate their organ for donation. However, the reality is that many people are unwilling to donate their organs without some form of compensation which in actual fact leads to selling of organs in a clandestine manner. Where the deceased-donor has not expressed the wish to donate either in his Will and testamentary documents, it becomes an issue to know who has the legal right to give consent on the donation between the medical personal and the relatives. At times, it could lead to disagreement among the relatives to determine the appropriate person to give consent. This is so because most of the deceased family members care more about the financial gains from the donation.

Despite the prohibition of commercialization of organ, it has been argued that there is a need to reward donors either financially or through other forms of compensation by government to encourage people to come forward as potential organ donors, thereby reducing the scarcity of organs for transplantation. In addition, some recipients often believe they have a duty to compensate their donors because they consider the donation as a special gift which necessitates a reciprocal appreciation. Failure to appreciate the donor may cause psychological and moral burden to repay their donors in some way, which is an entrenched cultural value to show appreciation. As much as this argument is reasonable, it has some negative implications. One issue that could arise from compensation if allowed is the difficulty to determine the reasonable compensation to be given to avoid selling of the organs to the highest bidder. The NHA is silent on quantum and what manner of compensation should be deemed adequate for a donor. This lacuna, has affected the equitable health care amongst Nigerians. However, it will not be out of place to reimburse the donor for the cost incurred during the time of providing the donation including short and long term medical care, loss of income, travel, accommodation to cater for them where reasonable which is applicable in other countries. Indeed, people are willing to donate for money and both the doctors and professionals work hand in hand like the case of the organ harvesting saga in Gwagwalada Abuja aimed in most National Television where donors allegedly accept ₦1,000,000(One Million Naira) and ₦800,000(Eight Hundred Thousand Naira) for one kidney.

Compromise Nature of the Medical Personnel:

²⁹ *Medical and Dental Practitioners Disciplinary Tribunal v Dr. John Emewulu Nicholas Okonkwo* (2002) AHRLR 159

³⁰ Section 37 Constitution of the Federal Republic of Nigeria 1999 as amended Cap C23 LFN 2004.

³¹ *Ibid* Section 38

³² Effiong, O. National Health Bill: Experts argue over Harvesting Organs from patients without consent. Available at <http://trends.ng/national-health-bill-experts-argue-over-harvesting-organs-from-patients-without-consent/>. Last visited 10/9/2023.

³³ *Ibid* note 46

Nigerian medical personnel are often the first point of contact when a patient is in need of organ transplantation, therefore they play a vital role in the process of donation, harvesting and transplantation of vital organs. Since there is no clearly stipulated procedure under the NHA, patients are often scared to trust the medical team that will procure the harvesting of the organs for donation. There have been instances of violation of the ethical code by some medical personnel who have been held guilty of medical misconduct in this regard and as result, pass wrong signal and messages to the potential donors who might want to donate to save lives. Mistrust and apprehension has further compounded donor apathy as it relates to organ donation in Nigeria.

Cultural and Religious Influence:

Culture and religion play determinant role on how people perceive organ donation in Nigeria. Generally, most religion may not forbid organ donation since it is a way of saving lives; however donors must do it altruistically. In all the over 240 different cultures in Nigeria, there is the belief that human body is sacred and should not be tampered with unless in cases of dire need and for altruistic reasons. As such, the beliefs of donors will determine the possibility of harvesting organs even after death.

Scarcity of organ:

Scarcity of organ for donation is one of the major issues surrounding donation and transplantation of human organs in Nigeria. The scarcity is attributed to high rate of demand for organ than its availability. The shortage of transplantation organs may not necessarily be linked with the methods of procuring organs but the availability of donors for procurement. Statistics on organ transplantation and donation is not readily available in Nigeria. The scarcity of organs for donation cuts across the globe and is not limited to Nigeria. For instance, in the year 2004, 86,173 people were on the nation's organ transplant waiting list in the USA, 115 patients were added daily to the waiting list, while 17 patients died every day waiting for an organ. In Nigeria, End-Stage Renal Diseases (ESRD) is a growing burden and it constitutes a high percent of hospital admission. Record showed that in Nigeria, from 2004-2014, patients with ESRD and on dialysis was estimated to have increased from 780-1500. In Nigeria, many factors contribute to the scarcity of human organs for donation. Many Nigerians find it difficult to donate because of fear of the outcome, illiteracy, religious inhibitions, cultural biases and limited information and awareness on organ donation. Many Nigerians do not know that they can still survive with one of the paired organs in their body system. Another contributing factor to the scarcity of organ donation in Nigeria is the absence of organ banks. Organ banks in Nigeria are isolated in nature because there is no legislation or legal framework creating organ banks in Nigeria.

Poor Advanced Equipment and Inadequate/Medical Personnel:

The Nigerian Health Sector is one of the sectors that should be well financed by the government but unfortunately, the reverse is the case. The public hospitals at the federal, state and local government levels are not well equipped with facilities needed to aid adequate delivery of health care services. It is a challenge that some of private hospitals have more equipment than the public government owned hospitals. The implication of this is that the affluent members of the public can get better case in private hospitals. The implication of this is that the affluent members of the public can get better care in private hospitals at higher cost whereas the larger percentages of Nigerians are living below economic standard. Economically advantaged people might prefer to travel outside Nigeria for organ procedures because of fear of disappointment and complication resulting from poor equipment and management in Nigeria. Hence affordability of good health care in terms of donation and transplantation of human organ is cumbersome and beyond the reach of average Nigerians. Poor transportation of fatal accident victims to the hospital and inadequate Intensive Care Unit (ICU) bed space, the cardiac arrest of patients can also lead to premature death of patients suffering from organ diseases. It has been reported that some of the factors contributing to high death rate of ESRD patients are; inadequate and inequality of dialysis centers, few active transplant centers, high cost of care, poor funding and inadequate personnel.

8. Conclusion and Recommendation

It is found in this discussion that many Nigerians do not understand the intention of the National Assembly for including Section 48 and 51 of the Act. The Act do not contemplate organ shopping or harvesting of human organ. The Act tries to restrict organ transplant only to a qualified and registered hospital in Section 51. While Act by Section 48, only blood and tissue removal in emergency cases regarding treatment of disease are covered. It is also never contemplated to allow removal of human organ without consent of any patient. There is need for further clarification regarding what emergency situation is and the procedure of obtaining the said consent. The Act raised a lot of doubt in the mind of some legal and medical practitioners about the respect of the right of the victims regarding consent. In addition to common law requirement for consent in any medical treatment, other regulations need to be put in place. Some countries passed laws and regulations in this respect. At the international level, The World Health Organization has provided a guiding principle for that purpose. One of the cardinal principles captured by most of the regulations is that the right to give consent for any organ removal is paramount. The National Health Act did not give serious consideration about the implication of leaving the fate of patients in the hands of medical practitioners in the name of emergency with adequate regulations. We are of the view that the Act should be amended to include the definition of emergency situation and to emphasize on the need for consent even in emergency cases. We seriously contend that through the Act by Section 48 (1) (a) makes it mandatory for consent to be obtained before medical

treatment or procedure is carried out on a patient, subsection (1) (b) of the Section waived the right to consent by the exceptions provided namely medical investigations and medical emergency. In any of the two exceptions, there is possibility for organ or organs or tissue etc to be removed without the patient knowing or even given the opportunity to consent because owing to the emergency he may at such time be adjudged incapable of taking any decision.

Part VI of the National Health Act (NHA) discussed the control of use of blood products, tissue and others in human. The NHA, being the major legislation on organ donation in Nigeria has some limitations which need urgent attention. The NHA interpreted death to mean brain-death but clarity was not made as to the meaning of brain-death under the interpretation section. This uncertainty can cause such issues as to when cadaveric organs can be harvested from someone acclaimed to be brain-dead. In addition to this, the Act did not expressly address the term ‘organ’ as it categorized organ under tissue. Whereas, by biological explanation, organ is a structure made up of a group of tissues working together to perform specific function. In this case, tissue should have been placed under organ and this would have clarified many issues related to organ under the Act. Section 55 of the Act provided for donation of human bodies and tissues of deceased persons either through a Will or written documents. However, this section did not make provision for those who are willing to donate their organ but died intestate and their family members could not be reached. Section 48 of the Act provides for the conditions to remove tissue, blood or blood product from living persons. However, the Act if compared with other jurisdictions did not expressly provide for donation of tissues or blood product by a person under the age of 18 and this could pose a challenge where the issue of donation involves a minor. Furthermore, the lacuna in the Act also reflects in the area of documentation of organs for donation. There are inadequate provisions for registration, transplantation, procurement and details of the donors (especially the cadaveric donors), such as the address, nationality, gender and other information needed for proper documentation particularly where the deceased donor’s family cannot be traced. In 2013, the World Health Organization (WHO) estimated death from road accident in Nigeria to be 20.5/100,000 which was about 35,000 deaths in a population of about 175 million at the time and Nigeria was rated 9th position in road accident worldwide. It is estimated that, the figures and percentage would have increased since then due to the increase in Nigeria’s population estimated to be above 200m in 2022.

In all, it is recommended that the National Health Act 2014 should immediately be amended so as to address the issues and concerns raised by Nigerians particularly the contention that the Act violated the fundamental rights of citizens through its provisions under Sections 48(1) (b) and 51 which permits the removal of organs without the consent of the person, ‘on grounds of medical investigation and emergency’ the patient or citizen so called in view of the provisions of the 1999 constitution as it relates to right to life as contended by Femi Falana (SAN) as well as the views expressed by renowned medical expert Prof Njemanze of the Global Pro-life Alliance (GPA). The sections permitted the removal of organs or tissues or blood or blood products or any human part on grounds of medical emergency at designated hospitals and with approval or consent of officer in charge of clinical services or another medical personnel authorized by him or personnel authorized by whoever is in charge of such hospital. Thus, the provisions in the sections are a kind of ‘license’ to remove organs and by this the Somatic Cell Nucleus Transfer ‘SCNT’ programme of the big financial group overseas is adopted in the ‘IVF’ project and ovarian eggs are taken from the Nigerian women seeking to get their own children, how many eggs are taken, and how many is used for each ‘IVF’ procedure is still a question. The ones taken but are not used are not accounted for. If the Act is not tinkered by amendment, our view is that as citizens, our organs can be removed without our consent and such removal is covered by law under the exception of ‘medical investigation and medical emergency’. A look at the legislations in Nigeria shows serious lapses. Some road accident where people lost lives are not recorded; even when victims died because of the severity and irreversibility of their injuries, the fatal accident victims could have been potential donors and provide vital organs to help those on organ transplant list but there is no effective legislation to cover this space. Furthermore, the Nigeria legislation is also lacking in the area of organ banking in case of emergency or for storage purpose, hence the few private technologically advanced hospitals with organ banking are not regulated. The legal framework within a jurisdiction has meaningful impact on the operation and recognition of certain acts allowed by law. The paucity and lacuna in the legislations coupled with poor implementation of existing regulations in Nigeria will continually give rise to negative implication on the citizens with regards to organ donation and transplantation.