

Cultural-Religious Traditions and Practices and the Law Governing Cadaveric Organ Donations in Nigeria

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ABSTRACT

The paper discusses the legal framework for cadaveric organ donations in Nigeria. It is predominantly concerned with the co-existence of the law with centuries-old customary practices and traditions on corpse mystification and ancestral worship, under which cadaveric organ donations are an unfathomable taboo. It is noted that prevalent customary-religious traditions and practices are not conducive to cadaveric donations. At the same time, the legal framework reflected in the National Health Act of 2014 must be embraced and operationalized. It offers a historic opportunity for further gains in the near future.

1. INTRODUCTION

Nigerians like other members of the global community carry their body with delicateness, and guard its parts with extreme jealousy. This perception is rooted in the general doctrine of sanctity of the human body and a corresponding duty to protect the same from any type of invasion. No part of the body is regarded as dispensable by most Nigerians. Even where the body's metabolism and other life functions can still go on unhindered, the ordinary Nigerian would prefer keep his/her organs instead of donating them for benefit of a neighbour¹. The matter is made worse where the organ in question is that of a deceased person. In such instances, the matter transcends the realm of the donor and becomes a complex web in which relatives and family members begin to invoke cultural,

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1 This attitude can, for instance, be gleaned from simple altruistic acts like blood donation. It is not uncommon to find the average Nigerian expressing reservations about donating his/her blood on the ground that the remaining blood may not be enough for proper living, even where such claim may have no medical or evidentiary proof.

traditional, as well as religious norms, presenting the norms as a matter of life and death for all concerned. It is in this battle of wits that esoteric practices such as corpse mystification and ancestors worship come to the fore, with the result that more often than not, these cultural/religions prohibitions end up trumping existing legal norms, with the law consistently having to contend with age-long values that the people consider inalienable. This has been the Nigerian experience so far, such that matters regarding cadaveric donations have remained a pipe dream.

2. CADAVERIC ORGAN DONATIONS – A BRIEF OVERVIEW

Cadaveric donations involve the taking of organs such as the heart, lungs, kidneys, liver, and pancreas from brain-dead people. They also involve tissue donation - the taking of tissues such as skin, corneas, tendons, and bone from brain-dead as well as heart-dead persons.² Cadaveric donations are regarded as part of the choices an individual may make at the end of life, as to what happens to a body after death³. They can be for therapeutic purposes which, as mentioned above, would involve donating non-regenerative organs like the heart, kidney or liver, to benefit an individual in desperate need for transplantation. They can also be for educational purposes or clinical/ scientific research, where parts/ tissues are donated to medical schools or research laboratories⁴. Tissues are donated in collaboration with pathologists, who in most countries are responsible for the body after death. They can be harvested several hours after death, as they undergo slow degradation⁵.

The question of determination of death is an important factor in matters of cadaveric organ donation. General medical practice and sound legal doctrines provide that the donor be certified dead in line with acceptable medical standards before parts are removed. Currently the standard for determination of death is the brain stem death. Simply put, cadaveric organ donation requires

2 PJ Van Diest, NWJ Lopes Cardoso, and J Niesing, 'Cadaveric Tissue Donation: A Pathologist's Perspective', (2003), 29 (3), *Journal of Medical Ethics*, 135 – 136.

3 C Sharp and G Randhawa, 'Cultural Attitudes Towards Death Practices, the Body after Death, and Life after Death in Deceased Organ Donation - A UK Polish Migrant Perspective', (2016), 6 (3), *Journal of Palliative Care & Medicine*, 3-7.

4 PA Bhusari, DP Kathe, KB Khairnar, K Shukla and VB Chormunge, 'Whole Body Donation: An Attitude and Perception in North Maharashtra' (2012), 2 (2), *International Journal of Health Sciences*, 15-19.

5 PJ Van Diest *et al* (n 2).

that donors must have suffered an irreversible damage to the brain or brain-stem⁶. Some Scholars appear to suggest that the brain stem death as a standard for certifying biological or somatic death, may not really be appropriate as the supposedly dead person may just be incipiently dying⁷. This is accentuated by the argument that brain-dead individuals are simply in state of irreversible coma, and may be able to survive on some form of life support for years.⁸ Brain death should not therefore be equated with biological or somatic death⁹. These arguments notwithstanding, there is a multiplicity of procedures for definitively determining death in medical practice, which can all be applied, with the brain stem criteria at the tail end. This way, there would be no margin for error and death of the donor will be unequivocal and absolute.

Where it is required to ascertain the cause of death, organ/ tissue removal may be preceded by an autopsy¹⁰. After completion of the usual diagnostic procedures within the autopsy chain, there is usually a rather large volume of leftover material comprising of sections, paraffin blocks, and wet material i.e. organs and tissue samples kept in formalin.¹¹ It is common practice to keep paraffin blocks and sections for reasons of quality control, and for future diagnostic procedures requested by family members such as for hereditary diseases¹².

Where an autopsy is not required, and consent has been given for the removal of organs/ tissues, the procedure may commence. The procedure is rather intrusive to the cadaver, except perhaps for the removal of the cornea.

6 M Vokovic *et al*, 'Cadaveric Organ Transplantation and Religion', (2010) 63 (8), *Medicinski Pregled*, 575- 578.

7 The Idea of 'Incipiently dying' in medical practice refers to those who may not be deemed to be clearly dead, but who are regarded as destined to die as there is no way that they may return to life. For more critical review in this respect, *see generally*, R D Truog, 'Brain death – Too Flawed to Endure, Too Ingrained to Abandon', (2007) 35(2) *Journal of Law Medicine & Ethics*, 273-281; KG Karakatsanis, 'Brain Death: Should It Be Reconsidered?' (2008), 46(6), *Spinal Cord*, 396-401; AR Joffe, 'The Ethics of Donation and Transplantation: Are Definitions of Death Being Distorted for Organ Transplantation?' (2007) 2(1) *Philosophy, Ethics, and Humanities in Medicine*, 1 – 7; RM Veatch, 'Donating Hearts After Cardiac Death – Reversing the Irreversible' (2008), 359 (2), *The New England Journal of Medicine*, 672-673; and DA Shewmon 'Chronic Brain Death: Meta-Analysis and Conceptual Consequences, (1998) 51 (6), *Neurology*, 1538-1545.

8 N Zamperetti, R Bellomo, CA Defanti, *et al*. 'Irreversible Apnoeic Coma 35 Years Later' (2004) 30 (9) *Intensive Care Medicine*, 1715-1722.

9 AM Capron, 'Brain death – Well Settled Yet Still Unresolved' (2001) 344 (16) *The New England Journal of Medicine* 1244-1246.

10 PJ Van Diest *et al* (n 2).

11 *Ibid*.

12 *Ibid*.

It is therefore proper to have the consent of the donor given while still alive. This is also a major principle of biomedical ethics¹³. The issue of consent is usually the first point of contestation against cadaveric donations, given that it is principally entrenched in the long-established principle of bodily autonomy¹⁴. Where express consent is given, most often evidenced by a valid document like a Will or any other legal instrument, such is respected as part of the last wishes of the donor. Where there is no such document, consent may have to be sought from the next of kin or from the family where there is no next of kin.¹⁵ It is almost always a delicate and difficult matter for next of kin or family to consent to the harvesting of organs/ tissue of a deceased loved. It is a different situation where cadaveric tissue sampling or organ harvesting is routinely done (outside the framework of the regular autopsy) for scientific or educational purposes¹⁶. As what is involved may be highly intrusive, requiring cutting of the body into several pieces, it is always desirable that the deceased should have granted the permission, even where the sampling or harvesting is for scientific or educational purposes.¹⁷

Ambivalent perceptions towards the cadaveric donations, the world over, are shaped or influenced by concepts of death or mortality,¹⁸ which are in turn influenced by culture and religion.¹⁹ What does the family or community make of the need for a body after death? Is it for purposes of honouring the

13 The Principle of Consent which is foundational in all aspects of contract, is also a major pillar in the medical procedure value chain. In this context, absence of consent or fraudulently procured consent renders legally void or morally unacceptable any use of human bodily material.

14 The rule regarding consent as a foundation of any interaction with the human body was long established following the landmark decision in *Schloendorff v. Society of New York Hospital*, 105 NE, 92, 93 (1914), where Justice Benjamin Cardozo opined: '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 his patient's consent commits an assault for which he is liable in damages. This is true except in cases of emergency where the patient is unconscious and where it is necessary to operate before consent can be obtained.' The Court in this case held that surgery to remove a tumour, which the patient, Mary Schloendorff, did not consent to, constitutes Medical battery. Some Scholars have disagreed with the rule, stating that the consent requirement, where necessary, can be displaced by compelling moral considerations. See TL Beauchamp and JF Childress, 'Respect for Autonomy', in *Principles of Biomedical Ethics*, (New York: Oxford University Press, 4th Edition, 1994), 126.

15 Elucidating on this point, Jonsen said: 'consent is ethically important because it manifests and protects the moral autonomy of persons and it is a barrier to exploitation and harm. These purposes are no longer relevant to the cadaver which has no autonomy and cannot be harmed.' See AR Jonsen, 'Transplantation of Fetal Tissue: An Ethicist's Viewpoint', (1988), 36, *Clinical Research*, 215-219.

16 Ibid.

17 Ibid.

18 L Ai-Ling, J Dermody CeRes and S Hanmer-Lloyd CeRes, 'Exploring Cadaveric Organ Donation: A Mortal Embodiment Perspective' (2007) 23 (5) *Journal of Marketing Management*, 559 – 585.

19 C. Sharp and G. Randhawa (n 3).

dead, observance of certain funeral rites and practices, or is there some notion of connectivity between the body and some form of existence after death? All these have a bearing on decisions on cadaveric donations.

3. THE CULTURAL LANDSCAPE OF NIGERIA AND CADAVERIC DONATIONS

Culture bound theories of the human body views the etiology of cadaveric organ donation as rooted in socio - cultural factors, historical values, norms, and the overall mystical perceptions of distinct social groups²⁰. In the anthropological understanding of the body, less attention has been given to the philosophical as well as cultural underpinnings of post-humous use of the body and its parts, as against the kind of focus yielded to matters like class and nationality²¹. A striking example is the idea of ‘physical capital’, which represents, in a way, the symbolic value of the body and how physical characteristics of the body can be improved to promote one’s social status and class²². It is also based on this understanding that Scholars have argued that even posthumously, the body is a thing of intrinsic value and must be accorded the appropriate treatment given the living²³.

The above notwithstanding, scholarly interest in the role of culture, tradition, and religion in relation to the body has been upped in recent times, such that today it is a medley of norms i.e. legal, socio-cultural, as well as ontological. Culture today is a major determinant particularly amongst the developing societies of sub-Sahara Africa in issues surrounding the post-humous use of the human body. In this area, the leading cultural societies that

20 KT Woo, ‘Social and Cultural Aspects of Organ Donation in Asia’, (1992) 21 (3) *Annals of the Academy of Medicine Singapore*, 421 – 427; P Bruzzzone, ‘Religious Aspects of Organ Transplantation’, (2008) 40 (4) *Transplantation Proceedings*, 1064 – 1067.

21 BS Turner, *The Body and Society: Explorations in Social Theory*, (Basil Blackwell, Oxford, 1984). It must be noted that the above scholarly work, published in 1984 is deemed the first contemporary book to focus entirely on the body as a theme of research. See further, BS. Turner, ‘The Body in Western Society: Social Theory and its Perspectives’, in Sarah Coakley (Ed.) *Religion and the Body*, (Cambridge University Press, 1997) 15-41.

22 P. Bourdieu, ‘Sport and Social Class’, (1978) 6 *Social science information*, 819-840.

23 In this regard, a South African Scholar argues that a cadaver possesses both intrinsic and instrumental values, and as such, the treatment of the living should influence our treatment of the dead. He further posits that the instrumental value of the cadaver invokes values when it is recognized as the source of the deceased’s memories and responses. See K S Satyapal, ‘The Treatment of Human Remains’ (2012) 5 (1), *South African Journal of Bioethics & Law*, 55-60.

make up modern Nigeria are of great interest. But first, how is culture viewed generally and in particular as it concerns Nigeria's legal literature?

Culture is generally referred to as the sum total of attitudes, beliefs, experience, knowledge, meanings, material objects, hierarchies, religion, spatial relations, and values of a group of people, that has come to be recognized as their common bond.²⁴ It is a collection of their existence, handed down from generation to generation. Black's Law Dictionary defines custom as, 'a usage or practice of the people which by common adoption and acquiescence and by long and unvarying habit, has become compulsory and has acquired the force of a law with respect to the place or subject matter to which it relates.'²⁵ In the Nigerian case of *Eshugbayi Eleko v. The Officer Administering the Government of Nigeria*,²⁶ the court in a bid to define culture referred to customary law as 'unwritten customs and traditions, which have been accepted as obligatory by members of a community.' Similarly, Karibi-Whyte JSC, (as he then was), defined customary law as, "a body of unwritten customs and traditions accepted as obligatory by members of the community for the regulation of the relations between its members.' In *Lewis v. Bankole*,²⁷ Osborne C J, in his observation on culture remarked:

'one of the most striking features of West African native custom is its flexibility, as it appears to have been always subject to motives of expediency, and shows unquestionable adaptability to altered circumstances without entirely losing its character...'²⁸

In Nigeria, culture enjoys pride of place amongst the more than 250 ethnic groups that are in the State, particularly among the three leading tribes, the Yorùbá of the South-West, Igbo of the South-East, and Hausa/ Fulani of the Northern region.²⁹ The Yorùbá People of South-West Nigeria for instance are

24 G. Hofstede, *Cultures and Organizations: Software of the Mind*, (McGraw Hill, New York, 1997).

25 Black's Law Dictionary, 2nd Edtn. See also the following English cases, *Adams v Insurance Co.*, 95 Pa. 355. 40 Am. Rep. 602; *Hursh v North*, 40 Pa. 241; *Lindsay v Cusiuiano*, (C. C.), 12 Fed. 504; *Strother v Lucas*, 12 Pet. 445, 9 L. Ed. 1137; *Panaud v Jones* Cal. 49S.

26 (1928) NILR 19, Customary Law.

27 (1908), 1 Nigerian Law Report 81, 100.

28 *Ibid.*

29 The Fulani or Fulbe, as a distinct ethnic group from the Hausas, are generally pastoral in nature. They constituting about 95% of the nomadic herders in Nigeria. They are today colloquially referred to as 'Fulani Herdsmen'. Significantly, the cultural identity and distinctiveness of the Fulani nation is that of cattle ownership/ rearing in a migratory pattern. History has it that the Fulani pastoralists emigrated to

well renowned for their rich cultural and traditional lifestyle.³⁰ Yorùbá culture is deeply rooted in the people's rich history that has for generations been the subject of deep scholarly inquisition.³¹ The beauty of Yorùbá culture has seen it spread as far as the lower River Niger into Nupe-land³² and other African countries such as Republic of Benin, Togo and Ghana, with its influences also felt as far as Brazil in South America.³³ Yorùbá culture is the way of life of the Yorùbá People, consisting of their language, ideas, beliefs, customs, taboos, rituals, ceremonies and symbols that have been handed down several generations through media such as arts, craft, festivals, folklores, myths, stories, songs, proverbs and wise sayings.³⁴ The Igbos or Ibo People occupy the South-East region of Nigeria, situated between the lower part of the Niger River, extending to parts of the Niger-Delta, largely in the Delta and River states, and moving all the way down to some parts of the coast in Cross River³⁵. The Hausa People occupy largely Nigeria's northern region close to the Sahel desert, and

Northern Nigeria, from the Senegambia in the western Sudan at the beginning of the 14th century, in a generational immigration that spanned several centuries moving in small units of compound families. They make a living from cattle herding based on unrestricted grazing and movement of their ruminant livestock searching for better conditions such as the availability of water, and grazing farmlands, while residing in tents as they migrate. As a result of their nomadic way of life, the Fulanis are today in about 31 out of the 36 states of Nigeria.

- 30 E D Babatunde, *Culture, Religion and the Self: A Critical Study of Bini and Yorùbá Value Systems in Change*, (Edwin Mellen Press, New York, 1992). Though the Yorùbás dwell mostly in South-West of Nigeria, comprising of the States of Ekiti, Ogun, Ondo, Osun, Oyo, and Lagos, they are also found in small parts in Delta, Edo, Kwara, and Kogi States.
- 31 For a comprehensive read on the history of the Yorùbá People, see: JA Atanda, *A Comprehensive History of the Yorùbá People up to 1800*, (GO Oguntomisin Ed.) (John Archers, Ibadan, 2007); I A Akinjogbin, and E A Ayandele, 'Yorùbáland up to 1800', in O. Ikime (Ed.), *Groundwork of Nigerian History*, (Ibadan: Historical Society of Nigeria, 2000), 121-143; B. Davidson, *The Growth of African Civilization: A History of West Africa 1000-1800*, (Longman, London, 1965); CO Osasona and ADC Hyland, *Colonial Architecture in Ile-Ife, Nigeria*, (Book-builders Editions Africa, Ibadan, 2006); E. Isichei, *History of West Africa since 1800*, (Macmillan Publishers, London, 1999); KH Basso, *Wisdom Sits in Places: Landscape and Language Among the Western Apache*, (University of New Mexico Press, Albuquerque, 1996); OI Obateru, *The Yorùbá City in History: 11th Century to the Present*, (Penthouse Publishers, Ibadan, 2006); S. Biobaku, *Origins of the Yorùbá*, (Federal Information Service, Lagos, 1995); S. Johnson, *The History of the Yorùbás: From the Earliest Times to the Beginning of the British Protectorate*, (Cambridge University Press, 2010); W. Bascom, *The Yorùbá of Southwestern Nigeria*, (Holt, Rinehart & Winston, New York, 1969); W. Fagg and J. Pemberton, *Yorùbá: Sculpture of West Africa*, (Collins, London, 1982).
- 32 NA Fadipe, *The Sociology of the Yorùbá*, (Ibadan University Press, 1970).
- 33 JS Eades, *The Yorùbá Today*, (Cambridge University Press, 1980). Outside Nigeria, Yorùbá people are also scattered in places like Jamaica and the Caribbean Islands generally.
- 34 JO Awolalu and PA Dopamu, *West African Traditional Religion*, (Macmillan Nigeria Publishers Ltd., 2005).
- 35 The Ibo language has several dialects, as the Ibos traditionally live in autonomous villages, and self-contained towns, organizing themselves into patri-lineages i.e. lineage groups along lines of descent and ascendancy. Each lineage has a head, who is regarded as a representative of the departed ancestors. Thus, although their customs and values were closely related, each still considered itself a distinct society usually made up of few villages.

some parts of the North-central around the upper Niger River. The religion of Islam is central to Hausa/ Fulani culture and tradition, codified in a body of law known as Sharia law, though as a People, they are also well known for their great attachment to culture and tradition and great history³⁶.

A significant part of the culture of all the ethnic groups relates to issues of cadaveric donation, erecting automatic barriers on the way of accessing non-regenerative organs.³⁷ Amongst the three, there is a variety of taboos surrounding contact with dead bodies, a belief that is accentuated by the multi-layered differences in funeral rituals and superstitions about what happens after an individual dies. In most cultures, respect for the human body being intact upon the death of the owner, is based on the presumption that the body belongs to the almighty maker of all – God, and that failing to secure the body in one piece, will not only jeopardize the entry of the departed into the new world but would also cause unimaginable calamities and misfortunes to befall the community.³⁸ The belief therefore is that cutting open a dead body to harvest an organ, or burying the same without some parts, is a bad omen that offends custom and diminishes the value to be accorded the deceased and his/ her family.³⁹ For example, in order to gain post-mortem value, families in some part of Africa decorate the body of the deceased in order to conceal certain bodily distortions that should not be carried into the next world, which they believe may affect the deceased's place as an ancestor.⁴⁰ There is a cultural belief system that the interest of the deceased, including interest in his body and its constituents, are not attenuated upon death. Scholars have also argued that by post-humous organ/ tissue removal, the deceased suffers harm, the harm in question being that of assault on the bodily interest that he/ she would have wanted preserved.⁴¹

36 Records have it that an Arab geographer in the 9th century was the first to refer to Hausa kingdoms, while the first Hausa/ Fulani states are known to developed in the Sahel region around 500-700 AD, with seven principal city-states emerging notably, Biram, Daura, Gobir, Katsina, Kano, Rano, and Zaria, largely for the purpose of trade and commerce. At this time, the initial seat of government for these seven city-states was Biram, while Gobir provided the Military force protecting the group from rival empires. In the same vein, Katsina and Daura provided access to trans-Saharan trade routes bringing goods into the city-states. In terms of culture, the Hausa/Fulani were known for their beautiful indigo dye, used for art and textiles materials.

37 AK Eziyi, et al, 'Determinants of Acceptance of Organ Donation among Medical Students Nigeria' (2014) 1 (8), *International Journal of Medicine and Medical Sciences*, 116-121.

38 J. S. Mbiti, *African Religions and Philosophy*, (Heinemann Educational Books Ltd, Oxford, 1990) 83.

39 Ibid.

40 R Lee, 'Death on the Move: Funerals, Entrepreneurs, and the Rural Urban Nexus in South Africa,' (2011) 81, *The Journal of the International African Institute*, 226-247.

41 W. Glannon, 'Do the Sick have a Right to Cadaveric Organs?' (2003) 29, *Journal of Medical Ethics*,

4. CULTURAL/ RELIGIOUS ATTITUDES TOWARDS CADAVERIC DONATIONS IN NIGERIA

Culturally, there is the view that when an individual dies his/her existence is not automatically extinguished.⁴² Among most of the ethnic groups in the Nigeria, therefore, there is likely to be serious objection to cadaveric donation. Some may also regard such donations simply as a denigration of the dead.⁴³ This is more likely among the Yorùbá and Ibo ethnic groups. The Hausa/ Fulani are likely to be guided by prescripts of Sharia law, which generally regulate their way of life. Sharia law enjoins the faithful to be benevolent, and one of the ways of expressing such benevolence may be through sustaining the life of another through organ donation.⁴⁴ Thus, if not explicitly prohibited under Sharia law, cadaveric donations are culturally likely to be more acceptable among the Hausa/ Fulani than they are among the Yorùbás and the Ibos.

The strict cultural prohibition of cadaveric donations amongst the Yorùbás and the Ibos is rooted in what is known as ‘Ancestor Worship,’ a belief system based on the jurisprudence that life’s course is cyclical and not linear, such that those who are dead, though not physically seen are alive in a different

153-156; CL Hamer and M.M. Rivlin, ‘A Stronger policy of Organ Retrieval from Cadaveric Donors: Some Ethical Considerations,’ (2003) 29, *Journal of Medical Ethics*, 196-200. On this point, Harris however disagrees with the argument that the deceased suffers harm by reason of such removal. He said: ‘rights or interests would have to be extremely powerful to warrant upholding such rights or interests at the cost of the lives of others...the interests involved after death, be there any, are simply nowhere near strong enough to maintain the consent requirement for cadaveric organ recovery while potential recipients continue to die.’ For a deeper exposition see generally J. Harris, ‘Organ procurement: Dead Interests, Living Needs’ (2003) 29, *Journal of Medical Ethics*, 130-134.

42 S. McGuinness and M. Brazier, ‘Respecting the Living Means Respecting the Dead Too’ (2008) 28, *Oxford Journal of Legal Studies*, 297-316; M. Brazier, ‘Retained Organs: Ethics and Humanity’ (2002) 22, *Legal Studies*, 550-569.

43 Death in some Nigerian cultures is seen as a natural transition from the visible world to the invisible spiritual ontology. It is often accompanied by a series of rituals, which help to connect the living with the dead. Culture also dictates what is right and what is wrong when it comes to dealing with or disposal of the remains of the dead. See, for example, Harris (n 41); I.I. Ulasi and CK Ijoma, ‘The Enormity of Chronic Kidney Disease in Nigeria: The Situation in a Teaching Hospital in South-East Nigeria,’ 6 (2010) *Journal of Tropical Medicine*, 1 – 6; and O. Daramola, A. Ojo, and S. Joel, ‘Environmental Sanitation Perception and Practices of the Disposal of the Dead in Ile-Ife City, Nigeria,’ (2016) 3 (1), *International Journal of Academic Research in Environment and Geography*, 15-23.

44 Z Iliyasu, I S Abubakar and U M Lawan *et al*, ‘Predictors of Public Attitude Toward Living Organ Donation in Kano, Northern Nigeria,’ (2014) 25 *Saudi Journal of Kidney Disease and Transplantation*, 196-205.

world and can reincarnate,⁴⁵ in a circular pattern of multiple deaths and rebirths.⁴⁶ Thus, in a sort of immortal continuum, an individual is deemed as sent into this world by natural birth, and at the completion of his/ her task, returns through death to continue as a being in the other realm.⁴⁷ Adherents of this cultural belief boldly claim that to be in this other world, i.e. the world of the dead, is to have supernatural powers over those in the world of the living. Such powers including the ability to bless or curse. When death occurs, reasons behind the death may be sought from ancestors through divination, and the cause may be attributed to spiritual forces more than medical factors⁴⁸.

For instance, in Yorùbá traditional belief, the concept of the visible world of the living and the spiritual enclave of the ancestors and spirits represent two distinct but acceptable realms.⁴⁹ The Yorùbá belief in the body as a vehicle for reincarnation is symbolized most eloquently in the ‘Egúngún’ masquerade, a most rambunctious fellow and notable social figure, believed to be adorned with rare supernatural powers, sometimes manifested in extreme acrobatic displays and commemorated most lavishly with high celebrations.⁵⁰ Further to this, given

45 F Eyetsemitan, ‘Cultural Interpretation of Dying and Death in a Non-Western Society: The Case of Nigeria,’ (2002) 3 (2) *Online Readings in Psychology and Culture*, 1-10.

46 J. Gire, ‘How Death Imitates Life: Cultural Influences on Conceptions of Death and Dying,’ (2014) 6 (2) *Online Readings in Psychology and Culture*, 1-22.

47 RK Barrett and KS Heller, ‘Death and Dying in the Black Experience,’ (2002) 5, *Journal of Palliative Medicine*, 793-799.

48 Ibid. For instance, while interpreting life empirically may result in preparing for death based on a Medical Doctor’s report and other medical evidence, for those who see death from a cultural perspective consideration will be given to other factors as being responsible for death, which in this context may be linked to things like enemies deploying the use spiritual powers to cause misfortune and activities of other dark forces at work. In most cultural groups in Nigeria, the idea of acceptability of death revolves round the logic of utility and liability. Thus, while utility value makes the society categorize certain individuals as useful, the liability perspective sees others as of little important. Within this context, it is not surprising for the society to see a young successful person as viable and useful to the community, as against an old man who is likely to be regarded as having used up his time or overstaying his welcome. Given the belief that a child having being nurtured from birth is expected, after attaining a particular age, to contribute to the economic wellbeing of the family and society, and consequently live up to old age, if such a child eventually dies without fulfilling this expectation by the family members and other relations, it is seen as a great loss, both to the family and the community. In such instances, the bereavement is more of a communal thing and evokes so much pain and anguish. To this end, an instructive rule posits that when it comes to matters of death, only elders are permitted to procure this commodity, as they are assumed to have finished their assignment on earth and due to go home to their ancestors. Where it involves a younger person, it is deemed as the handiwork of evil doers. An interesting Yorùbá adage says: ‘*Omo ta bi leni, to ku lola, o kanju ku ni*,’ meaning, ‘*The child that was born today, only to die tomorrow, has only died in a hurry*’. This is based on the fact that such will still die, except that as a Child, the time is not ripe.

49 JH Drewel, ‘The Yorùbá World’, in Simon Gikandi (Ed), *Death and the Kings Horseman: Authoritative Text, Background, Contexts, and Criticism*, (W.W. Norton & Company, New York, 2003), 69.

50 In Yorùbá land the ‘Egúngún’, meaning ‘*a masked ancestral spirit*’, is a notable social figure. The Yorùbá Egúngún as purveyor of reincarnated disembodied soul, represents the spirit of a deceased ancestor

the claim that harmony among the living is sustained by a relationship between the ancestors dynamically engaging in connectedness with the living as well as those who have passed, the dead body in most instances is highly venerated.⁵¹ In African thought generally, the ancestors are believed to have a beneficent relationship with the living members of their erstwhile communities.⁵² In this epistemological paradigm, the dead are posthumously regarded as now having taken up residence with spirits in a world of collective immortality.⁵³

An interesting demonstration of this is what happens during a typical Tiv burial ceremony in Nigeria, where the rites of passage begin with a message to the great ancestor (Takuruku), intimating him of the death and requesting his presence to come and wait and receive the person into the ancestral world.⁵⁴ On the day of the burial, elderly women wash the deceased in order to enable him/ her to enter the spirit world neatly and well dressed in the traditional attire all within twenty-four hours.⁵⁵ This tradition of exaggerated ceremonies which is common in most cultures is also a phenomenon that has attracted

returning from the After-life (Èhin-Ìwà) i.e. another realm, to visit his people and in the course of the visit transfer certain things to them, such as a message, admonition, or fortune. For some cultures, the Egúngún is elevated to the status of a periodic festival in which the return of the so-called ancestor is heralded by heavy wining and dining, which is followed by a diviner's summon, and upon the appearance of the spirit, sacrifices are offered as parts of the rites of his passage from the other realm to this realm and back. While the Egúngún job appears to be largely one of traditional religion, in some climes it is also called upon to perform quasi-judicial functions, by adjudicating over disputes and may in some instance deliver severe punishments.

- 51 Ibid. Also see LM King, 'In Discourse Towards a Pan-African Psychology: Drum Rolls for a Psychology of Emancipation,' (2013) 39, *Journal of Black Psychology*, 223 - 231.
- 52 C Agulanna, 'Community and Human Wellbeing in an African Culture' (2010) 14 (3), *Trames*, 282-298. It has been noted that a major importance of such belief is that it helps serve as motivation for people to live socially responsible lives, so that they can die a 'good death' at the end of their life. For instance, in Yorùbá land, where an elder attains old age and has very successful children, his funeral is only attended by a brief period of mourning, which later climaxes into loud partying and merry-making. Such is deemed as a socially acceptable way of celebrating 'a life well spent'. Further, the belief in an after-life has both social as well as moral functions. For one, the expectation of an 'other life' in which people will be rewarded for virtuous living is an encouragement for good conduct and social responsibility among those who make up the community. For another, the hope of attaining the enviable status of an ancestor could inspire people with the spirit of hard work, industry, and integrity. In other words, apart from whatever spiritual values it may have, the belief in an after-life has its social significance as well. It is equally a socially remunerative system, in the sense that anyone who is deemed to have died a good death, as established above, is buried in a class of his/ her own, which is usually inside the house where his/ her kith and kin still reside. For an in-depth understanding of the deconstruction of the dead in Yorùbá Culture see A. Ojo, *Yorùbá Culture: A Geographical Analysis*, (University Press, Ile Ife, 1966), 192.
- 53 JS Mbiti, *African Religions and Philosophies*, (Heinemann Educational, Oxford, 1990); WW Nobles, *Seeking the Sakhú: Foundational Writings for an African Psychology*, (Third World Press, Chicago, 2006).
- 54 OF Agbo, 'Tiv Traditional Conception of the Human Person' (2016) 7 (6), *Arts and Social Science Journal*, 235.
- 55 Ibid.

scholarly interest⁵⁶. Sharing similar understanding with the Tiv system is the Igbo traditional belief that a single person may reincarnate, contemporaneously showing up in two or more physical bodies.⁵⁷ There is additionally the Igbo belief that a part of a deceased person may thereafter continue to exist in the discarnate realm, following which such is elevated to the status of an ancestor by those who are still living⁵⁸. The cultural interpretation to this is that though life and death are physically viewed as two distinct phenomena, in cosmic ontological unity both represent one interdependent unit, existing as the two forces shaping the life and after-life of the human being.⁵⁹

Another dimension to this cyclical spiritual cosmic system is to be seen in the *Abiku phenomenon*. The Abiku conception is a major cultural signpost amongst the Yorùbá and the Ibo nations, both of Southern Nigeria⁶⁰. The Abiku in Yorùbá culture represents a recalcitrant Child seen as having come from the spirit world, belonging to a group of discarnate, who are destined to eventually return to the same world after a short sojourn here on earth, unless certain rituals take place.⁶¹ It is seen as a problem of the spirit world which must be addressed,

56 Such scholarly inquisition can be found in the extensive works of renowned body Scholar, Arnold Van Gennep. In his analysis Van Gennep captured the theme thus: 'The life of an individual in any society is a series of passages from one age to another and from one occupation to another. Transitions from group to group and from one social situation to the next are looked on as implicit in the very fact of existence, so that a man's life comes to be made up of a succession of stages with similar ends and beginnings: birth, social puberty, marriage, fatherhood, advancement to the higher class, occupational specialization and death. For every one of these events there are ceremonies whose essential purpose is to enable the individual to pass from one defined position to another which is equally well de-fined. Thus, we encounter a wide degree of general similarity among ceremonies of birth, childhood, social puberty, betrothal, marriage, pregnancy, fatherhood, initiation into religious societies and funerals. In this respect, man's life resembles nature, from which neither the individual nor the society stands independent.' See generally A Van Gennep, *The Rites of Passage*, (University of Chicago Press, 1960), 3.

57 MEN Njaka, *Igbo Political Culture*, (Northwestern University Press, Evanston, 1974), 39; CK Meek, *Law and Authority in a Nigerian Tribe*, (Barnes & Noble, New York, 1970), 54; NW Thomas, *Anthropological Report on the Ibo-Speaking People of Nigeria, Part 1 – Law & Custom of the Ibo of the Awka Neighbourhood, S. Nigeria* (Negro Universities Press, New York, 1969), 31; For example, most cultures believe that the old identities of the bereaved do not die with the deceased, but are resurrected with every commemorative service of the loved one. See M. Kagawa-Singer, 'The Cultural Context of Death Rituals and Mourning Practices' (1998) 25 (1), *Oncology Nursing Forum*, 1752-1756.

58 FA Arinze, *Sacrifice in Ibo Religion*, (Ibadan University Press, 1970), 17-18.

59 B Bujo, *The Ethical Dimension of Community: The African Model and the Dialogue between North and South*, (Pauline Publications Africa, Nairobi, 1998); MB Ramose, *African Philosophy through Ubuntu*, (Mond Books Publishers, Harare, 2002).

60 W. Bascom, *The Yorùbá of Southwestern Nigeria*, (Holt, Rinehart, and Winston, New York, 1969); EG Parrinder, *West African Psychology*, (Lutterworth Press, London, 1951); W. Soyinka, *Ake: The Years of Childhood*, (Rex Collings, London, 1981).

61 B Okri, 'Spirit-Child: Abiku Migration and Post-modernity', (1995) 26 (1), *Research in Africa Literature*, 20-29; CO Ogunyemi, *African Woman Palava: The Nigerian Novel by Women*, (University of Chicago Press, 1996).

lest the same child surfaces again.⁶² In Igbo Jurisprudence, the Abiku also referred to as ‘*Ogbanje*’, is regarded quite disapprovingly as a mischievous brat frequenting between the world of the living and the dead without any identifiable purpose.⁶³ Literally, the term in Igbo language means, ‘to make several trips, to and from a place.’⁶⁴ By way of characterization, such naughty children are given special names at birth, apparently to conjure the idea surrounding the frustration of their parents, and also depicting their attempt at labeling the child in terms of the circumstances of his/ her cyclical journey.⁶⁵ Examples of such names among the Yorùbá people include Kokumo (he will not die again) or Malomo (don’t die again).⁶⁶ All these names are so crafted to appeal to the child’s emotion, persuading it to abandon the traumatic back and forth and stay put.⁶⁷

Where this fails and the child succeeds in entering another cycle of death, the dead body is handed over to a traditional health practitioner, who mutilates it believing that kindred spirits would reject it due to the scarification and ugliness that would result from the mutilation, and by this rejection, the child is then forced to stay in the physical world, when it is reborn.⁶⁸ A Yorùbá Scholar, Oluwole, trying to capture the child in this ontological framework, posits that Yorùbá cultural belief in reincarnation is strengthened by three justifications. These are family resemblance, by which newly born children are said to look like their dead forebears; the ability of some children to tell true stories of their

62 OS Okechi, ‘Culture, Perception/Belief about Death and their Implication to the Awareness and Control of the Socio-Economic, Environmental and Health Factors Surrounding Lower Life Expectancy in Nigeria’ (2017) 3 (5), *Acta Psychopathol*, 56. Notably, some religious and cultural traditions such as Hinduism also subscribe to a circular pattern of life and death where a person is thought to die and is reborn with a new identity, with this exit and reentry into life capable of occurring multiple times.

63 See C Achebe, *Things Fall Apart*, (Heinemann Books, London, 1958); C. Achebe, *The World of the Ogbanje*, (Enugu: Fourth Dimension, 1986); A. Quayson, *Strategic Transformations in Nigeria Writing: Orality and History in the Work of Rev. Samuel Johnson, Amos Tutuola, Wole Soyinka, and Ben Okri*, (Indiana University Press, Bloomington, 1997).

64 K Williamson, *Igbo-English Dictionary*, (Ethiopia Publishing Corporation, Benin City, 1972), 404.

65 YD Ogunyemi, *Introduction to Yorùbá Philosophy, Religion and Literature*, (Athelia Henrietta Press, New York, 1998).

66 Some other similar names given in Yorùbá-land to such Abikus include Banjoko, (sit with me); Durotimi or Rotimi, (stay with me); Durojaiye, (stay and enjoy life); Kashimawo, (let’s wait and see); Kosoko, (there is no hoe anymore); Orukotan, (all names have been exhausted); and Yemiitan, (stop deceiving me). Amongst Igbo people, a name like Onwubiko, (death, I implore you) is common. Among the Urhobo people, Akpoyoma, (*the world is good*) is also a familiar name.

67 AE Asakitikpi, ‘Born to Die: The Ogbanje Phenomenon and its Implication on Childhood Mortality in Southern Nigeria’ (2008) 10 (1) *Anthropologist*, 59 – 63.

68 Ibid; MO Okonji, ‘Ogbanje: An African Conception of Predestination,’ (1970) 1 (4), *The African Scholar*, 1-2; and MM Khaing, *Burmese Family*, (Indiana University Press, Bloomington, 1972).

dead ancestors, almost in a form of telepathy; and the abiku phenomenon earlier discussed, when some of the incisions made on the dead child, are seen when another is born.⁶⁹ Though this practice which is rife among the different cultural groups in southern Nigeria may be analyzed as myth, it is nonetheless rooted in the peoples' way of life and ultimately shapes their cosmology and cultural attitudes.⁷⁰ It is within this discourse that cadaveric organ donation and death in Nigeria's cultural landscape are intrinsically viewed as two sides of the same coin, heavily shadowed by a coterie of existential cultural, religious, and social beliefs, alongside traditional medical practices.⁷¹

Thus, when it comes to cadaveric organ donation, the reasoning is that the owner of the body, the deceased, is not yet dead. He has only transited to another realm. As such, it becomes a taboo to seek to dismember any part of such a being, as such scarification not only reduces the wholeness of the being, but constitutes theft of what belongs to the deceased. In another light, to seek to harvest an organ/ tissue of the deceased is regarded as dishonour. To what extent are such conservative cultural attitudes and perceptions reflected or accommodated under the modern legal framework for cadaveric organ donations in Nigeria? This is the question broached in the next segment of the paper.

5. THE LAW GOVERNING CADAVERIC DONATIONS IN NIGERIA

Prior to the enactment of the National Health Act of 2014,⁷² the law regulating cadaveric donations in Nigeria was located in at least two separate criminal law codes; the Criminal Code Act,⁷³ operating in 17 predominantly Christian States in the Southern part of the country, and the Penal Code Act holding sway in the Northern region.

69 SB Oluwole, 'Reincarnation: An Issue in African Philosophy', in S. B. Oluwole (ed.), *Witchcraft, Reincarnation and the God-Head*, (Excel Publishers, Lagos, 1996).

70 Ibid.

71 II Ulasi and CK Ijoma (n 43)

72 Act No. 8 of 2014.

73 Criminal Code Act, Cap C 38, LFN 2004.

5.1 Prohibition and Subsequent Legalization of Cadaveric Donations in Southern Nigeria

The Criminal Code Act did not specifically address organ donation. Section 242, covering ‘misconduct with regards to corpses,’ was closest provision in the Act on this subject. It provided:

‘Any person who -

- (1) without lawful justification or excuse, the proof of which lies on him,
 - (a) neglects to perform any duty imposed upon him by law, or undertaken by him, whether for reward or otherwise, touching the burial or other disposition of human body or human remains; or
 - (b) improperly or indecently interferes with, or offers any indignity to, any dead human body or human remains, whether buried or not;
- (2) eats or receives for the purpose of eating any part of a dead human body; is guilty of a misdemeanour, and is liable to imprisonment for two years.’

This suggests that there was no contemplation or accommodation of the possibility of cadaveric donations under the Criminal Code Act. Such matters were shrouded in secrecy and conducted, if at all, in an underground black-market system. The Health Act of 2014 brought matters into the open and, for the first time, legalized cadaveric donations. Section 54 of the Act provides:

- (1) Human organs obtained from deceased persons for the purpose of transplantation or treatment, or medical or dental training or research, shall only be used in the prescribed manner.
- (2) Human organs obtained under subsection (1) shall

be allocated as prescribed.

- (3) The National Tertiary Health Institutions Standards Committee shall prescribe: -
- (a) criteria for the approval of organ transplant facilities; and
 - (b) procedural measures to be applied for such approval.
- (4) A person who contravenes a provision of this section or fails to comply therewith or who charges a fee for a human organ is guilty of an offence and shall be liable to imprisonment for a minimum of five years without option of fine.’

Section 55 of the Act further provides:

- ‘(a) A person who is competent to make a will may –
- (i) in the will,
 - (ii) in a document signed by him and at least two witnesses, or
 - (iii) in a written statement made in the presence of at least two competent witnesses, donate his or her body or any specified tissue thereof to be used after his or her death, or give consent to the post mortem examination of his or her body, for any purpose provided for in this Act.
- (b) A person who makes a donation as stated in paragraph (a) of this section may nominate an institution or a person as done.’

Section 56 of the National Health Act 2014 also provides:

- ‘(1) A donation under Section 55 of this Act may only be made for the purposes of –
- (a) training of students in health sciences;
 - (b) Health research;
 - (c) Advancement of health sciences;
 - (d) therapy, including the use of tissue in any living person; or

- (e) production of a therapeutic, diagnostic, or prophylactic substance.
- (2) This Act does not apply to the preparation of the body of a deceased person for the purposes of embalming it, whether or not such preparation involves–
 - (a) making of incisions in the body for the withdrawal of blood and the replacement by a preservative; or
 - (b) restoration of any disfigurement or mutilation of the body before its burial.’

The Act, lastly, also provides the ‘procedure for revocation of any donation’ made in terms of the above provisions. Section 57 states:

‘A donor may, prior to the removal for transplantation of the relevant organ into the donee, revoke a donation in the same way in which it was made or, in the case of a donation by way of will or other document, also by the intentional revocation of that will or codicil or document.’

The upshot of these provisions is that it is now permissible under Nigerian law, while one is still alive, to make cadaveric donations; to specify the donee and the uses to which donated organs or tissue may be put; and to revoke any donations. This must be done under written, signed and attested instruments. If this is properly done by a competent person in the eyes of the law, the decision made may not be overridden by relatives after his/ her death.⁷⁴ Under Nigerian law, however, a person under the age of eighteen may not have legal capacity to make such donations. Scope therefore remains for family members to resist cadaveric donations young persons and others lacking full legal capacity.

⁷⁴ AA Bakari, UA Jimeta, MA Abubakar, SU Alhassan, and EA Nwankwo, ‘Organ Transplantation: Legal, Ethical and Islamic Perspective in Nigeria’ (2012) 18 (2) *National Journal of Surgery*, 53-60.

5.2 Cadaveric Donations in Northern Nigeria and the Nexus Between Law and Religion

The Penal Code Act, the principal criminal law statute in Northern Nigeria, served the same function as the Criminal Code Act in the south of the country. But the Penal Code Act did not contain any provision comparable to section 242 of the Criminal Code Act, proscribing certain dealings with human corpses. The reason is that dealings with human corpses and issues related to cadaveric donations were largely governed by Shari'ah law, which can be regarded as the customary law of the Muslim majority in Northern Nigeria.

The operation of the Sharia'h law amongst Northern Nigeria Muslims is not different from its well-established norms and principles amongst other Muslims globally. It is a complete code of life prescribing both the secular and spiritual standards for all Muslims⁷⁵. All religious and cultural norms stipulating these standards come from the Quran and the Sunnah, and both remain the source of guidance on any matter related to the lives of Muslims, and cadaveric organ donation related matters are not an exception. The world over, the Shari'ah law as a body of religious codes, is applied to deep and complex bioethical issues regarding medico-legal issues.⁷⁶ It is however necessary to note that matters related to cadaveric organ donations are also controversial among Islamic scholars. Largely, opposition to cadaveric donation amongst Muslim scholars is predicated on the controversy surrounding the determination of death. For some scholars, cadaveric donation is un-Islamic because it violates fundamental Islamic principles requiring that death should be determined in reference to cessation of heartbeat and breathing function, ultimately resulting in coldness of the body.⁷⁷ Scholars supporting cadaveric donations, on the other hand, do so on the ground that the currently accepted standard of death, i.e. the brain stem death, is valid, as it lends credence to the fact that death can only be deemed to have occurred when all of the body's biological units that are interconnected

75 YIM EL-Shahat, 'Islamic Viewpoint of Organ Transplantation' (1999) 31 (8) *Transplantation Proceedings*, 3271.

76 H Hathout, 'Islamic Basis for Biomedical Ethics', in ED Pellegrino, P Mazarella, and P Corsi (Eds), *Transcultural Dimensions in Medical Ethics*, (University Publishing, Maryland, 1992), 57-72.

77 M. Al-Mousawi, T. Hamed, and H. Al-Matouk, 'Views of Muslim Scholars on Organ Donation and Brain Death' (1997) 29 (8), *Transplantation Proceedings*, 3217.

have indeed ceased to function.⁷⁸

The divergence of views among Muslim Scholars on whether or not Islam prohibits cadaveric organ donation also appears to be a sectarian matter. While scholars from the Indian subcontinent, comprising largely Pakistan, Bangladesh, and the Muslim population of India, hold that Islam forbids the removal of organs from dead individuals, their counterparts from the Middle East, made up of mostly Arab Scholars, hold otherwise, opining that Islam permits such organ removal as long as it is a voluntary act of charity.⁷⁹ Those who argue against cadaveric donation hinge their position on the sacredness of the human body and the fact that the body belongs to God⁸⁰. Thus, while autopsies are seen as acceptable in Islam, there remains reservations regarding matters like the postponement of burials, transferring the body from place to place before burial, and any violations of the sanctity of the human body.⁸¹ It is for this reason that Muslims are instructed to conduct funeral rites immediately death occurs⁸². They assert that God alone can give direction on the use of the body.⁸³ However, a majority of Muslim scholars, both Sunni and Shia, advocate the importance of saving human life based on injunctions of the Shari'ah.⁸⁴ Based on these injunctions, there is the general view that the Shari'ah does not entirely frown at organ donation.

Where both the Quran and Sunnah offer no clear-cut position on the controversy in question, Islamic Scholars are known to delve into what is known as *Ijtihad*, which is basically the academic exercise of giving their opinion from the stand-point of Islamic Jurisprudence known in the Muslim faith as *usulal-fiqh*.⁸⁵ Islamic Scholars argue that the Quran does not explicitly speak on matters of cadaveric organ donation.⁸⁶ This however appears as taking a narrow

78 AM Hassaballah, 'Definition of Death, Organ Donation and Interruption of Treatment in Islam' (1996) 11 (6) *Nephrology Dialysis Transplantation*, 964-965.

79 RH Kuddus, 'Islamic Founding Principles on Organ Transplantation and the Evolution of Islamic Scholarly Opinions on the Subject' (2014) 46 (6) *Transplantation Proceedings*, 2033-2045.

80 J Syed, 'Islamic View on Organ Donation,' 1998 8 (3) *Journal of Transplant Coordination*, 157-160

81 V. Rispler-Chaim, 'The Ethics of Post-mortem Examinations in Contemporary Islam,' (1993) 19 (3), *Journal of Medical Ethics*, 164-168.

82 Ibid.

83 Ibid.

84 Ibid.

85 AR Gatrad and A Sheikh, 'Medical Ethics and Islam: Principles and Practice, (2001) 84 (1) *Archives of Disease in Childhood*, 72-75.

86 AA Al-Khader, FA Shaheen and MS Al-Jondeby, 'Important Social Factors that affect Organ Transplantation in Islamic Countries' (2003) 1 (2) *Experimental and Clinical Transplantation*, 96-101.

and restricted view of Quranic injunctions. Why is this so? By way of inference, it appears plausible to say that the Quran deals with matters of cadaveric organ donation through some of its injunctions. What then does the Quran say in this regard?

The position of the Shari'ah as regards cadaveric donation is better viewed from how Muslim faith upholds the sanctity of human life. Under the Sharia'h it is provided that '*if anyone killed a person – not in retaliation of murder; or (and) to spread mischief in the land – it would be as if he killed all mankind, and if anyone saved a life, it would be as if he saved the life of all mankind.*'⁸⁷ Additionally, it is provided that, 'And kill not anyone whom God has forbidden, except for a just cause (according to Islamic law). This he has commanded you that you may understand.'⁸⁸ It is thus clear that the Sharia'h cherishes human life. Flowing from this, notwithstanding the general prohibition of organ donation in Islam, there exists an exception to the rule, and that is that Islamic codes recognizes as permissible, and even worthy of reward, where one person willingly goes all out to save the life of another.⁸⁹ This position was clarified by one of the highest-ranking organizations in the Islamic faith, the Islamic Council of Saudi Arabia, which stated that Islam does not forbid cadaveric organ donation where it is specifically to save life.⁹⁰ The same position is said to have been the consensus of several leading Muslim Scholars who approved the resolution of the Pan-Islamic Council Jurisprudence on Resuscitation Apparatus in the Jordanian capital, Amman. Therefore, in Islam, any transplantation that would sustain human life and all attached to it is permitted.⁹¹

Most of what is today agreed as the Shari'ah's position on organ donation came out of the works of Islamic scholars trying to put forward the context in which Quranic codes deal with the subject⁹². Generally, the Shari'ah permits the transplant of organs from one person, whether dead or living to another, but subject to certain conditions,⁹³ including the following:

87 (5:32) (Quran).

88 (6:151) (Quran).

89 YIM El-Shahat (n 75)

90 Ibid.

91 Ibid.

92 E Uskin and M Ozturk, 'Attitudes of Islamic Religious Officials towards Organ Transplant and Donation' (2013) 27 (1), *The Journal of Clinical and Translational*, 37-41.

93 AA Bakari *et al* (n 74)

1. The donation must be the only possible medical means of treating or saving the life of the donee.⁹⁴ The closest to this is the Shari'ah injunction on the use of carcasses.⁹⁵ The idea is that though the Shari'ah clearly forbids the eating, consumption or receiving of dead meat, blood, and the flesh of swine, but where it is necessary as a matter of life and death such as where a sick person needs an organ transplantation because his life/ her is under the threat of death, such a person will be deemed as guiltless.⁹⁶ The further understanding is that in allowing organ donation there is the seeking of ease for human beings, pity for the sick and sharing of pain, which is all in line with sound Shari'ah doctrines.⁹⁷ This position is backed up by several portions of the Shari'ah such as those which say: 'the more harmful detriment is removable by the less harmful one'; 'when facing two evils, choose the less harmful one'; and 'when comparing between two ill deeds, consider which is the greater in harm and do the other.'⁹⁸
2. Such donation is also allowed where it is towards providing welfare.⁹⁹ It must be considered as solely a humanitarian act and one of mercy.¹⁰⁰ This position is based on the fact that since human nature is what the Shari'ah regulates, whenever welfare of a man is in issue, it becomes legal and permissible in Islamic law.¹⁰¹ It is held that Islamic law is established particularly for welfare of humanity and thus, any action which brings about human welfare is permissible in Shari'ah.¹⁰²
3. Organ removal should not endanger the donor's life.¹⁰³ This is predicated on the fact that Shari'ah provides that a disease should not be cured through means that will cause a similar or worse harm than the disease itself.¹⁰⁴ If the donation is done at the end of life, the shari'ah prescribes that painful

94 Ibid; and health24 'Blood and Organ Donation: What Does Islamic Law say?' available online at <https://www.health24.com/Lifestyle/Your-Blood/Blood-and-organ-donation-What-does-Islamic-law-say-20150120>, accessed 5 March 2018.

95 Ibid.

96 Ibid.

97 Ibid.

98 Ibid and AA Sirajudeen, *Organ Transplant in Islamic Perspectives*, (Lamber Academic Publishing, Germany, 2011), 26.

99 Ibid.

100 S. Athar, 'A Gift of Life: An Islamic Perspective in Organ Donation and Transplantation' (2015) 5 (1) *Journal of Transplantation Technologies & Research*, 1-4.

101 AA Bakari *et al* (n 74)

102 Ibid.

103 Ibid.

104 Ibid, and YIM El-Shahat (n 75)

procedures are avoided.¹⁰⁵ For instance, where the organ donation is likely to procure or hasten the death of the deceased, it would be clearly forbidden. This is so because the Quran forbids a Muslim taking his/ her life.¹⁰⁶ In this regard, it is provided: ‘And whoever kills a believer intentionally, his recompense is hell to abide therein, and the wrath and the curse of God are upon him, and a great punishment is prepared for him.’¹⁰⁷

4. The donor must willingly consent to the procedure and it must not be by duress.¹⁰⁸ Consent is generally a basis for cadaveric donation in Islam, and not just consent but one predicated on full disclosure leading to a validly made decision by the deceased.¹⁰⁹ This is because any consent procured without adequate information coming to either the donor or the family acting as proxy violates elementary Islamic principles on truth-telling and honesty.¹¹⁰ It has however been argued that the consent rule regarding cadaveric donation should be extended to presumed consent, to the end that there would be an implied agreement and understanding to remove organs from a deceased person unless such he/ she explicitly indicated otherwise.¹¹¹ Others have however objected to this position as one prone to abuse and one which may lead to other unethical behaviours such as commercialization of removed organs.¹¹²

5. Principles of human dignity and self-worth must also be adhered to as provided for under Shari’h injunctions.¹¹³ As a matter of fact, Islam prescribes that when a Muslim is suffering from a terminal disease and death is a certainty, such should be allowed to die in peace and not subjected to further torture.¹¹⁴ This is given Islam’s recognition of the right to dignity of a Muslim. In the same vein, cadaveric organ donation must not be such that it will violate the donor’s

105 RD Truog, ‘End-of-life Decision-Making in the United States, (2008) 25 *European Journal of Anaesthesiology Supplement*, 43-50.

106 The Quran forbids all forms of Euthanasia, whether voluntary, involuntary, or non-voluntary. See generally, A. Sachedina, ‘End-of-life: The Islamic View’ (2005) 366 (9487) *The Lancet*, 774-779.

107 (4:93) (Quran).

108 Ibid.

109 S. Aksoy, ‘A Critical Approach to the Current Understanding of Islamic Scholars on using Cadaver Organs without Prior Permission’ (2001) 15 *Bioethics*, 461-472.

110 Ibid, and V. Choo, ‘UK Shari’ah Council Approves Organ Transplants’ (1995) *The Lancet* 303.

111 D. Hamm and J. Tizzard, ‘Presumed Consent for Organ Donation’ (2008) 336 (7638), *British Medical Journal*, 230.

112 FS AIKhwari, GV Stimson and AN Warrens, ‘Attitudes Toward Transplantation in U.K: Muslim Indo-Asians in West London, (2005) 5 (6) *American Journal of Transplantation*, 1326-1331.

113 Ibid.

114 N Sarhill, et al ‘The Terminally ill Muslim: Death and Dying from the Muslim Perspective,’ (2001) 18 (4) *The American Journal of Hospice & Palliative Care*, 251-255.

dignity.

6. It is lastly required that the proposed recipient must be a Muslim, particularly where the donor is a Muslim.¹¹⁵ However one challenge for cadaveric donations among Muslims is that they are enjoined by the Shari'ah to bury their dead immediately, particularly if the death occurs before 4.00 pm. The transplantation procedure may therefore conflict with the funeral rites, except where organs can be removed almost immediately after death.¹¹⁶

These conditions appear to be widely accepted positions in Islamic Jurisprudence.¹¹⁷ It appears settled, therefore, that Islam generally permits cadaveric donations. Given that Muslims in Northern Nigeria are deeply religious, they were likely to be guided by what is permissible under their religion. The only issue to be resolved and reconciled with cadaveric donations among Muslims concerned the belief that the body must be presented intact at death, for the hereafter life. Cadaveric donations under this belief could be regarded as involving desecration of the body. The enactment of the National Health act of 2014 has rendered it unnecessary to consider this issue, and shunted aside the need to apply Islamic law on cadaveric donations in Northern Nigeria. Muslim physicians, scholars and others must now decide on these matters on the basis of what is in the Act.

6. CONFLICT BETWEEN CULTURAL/ RELIGIOUS NORMS AND THE LAW ON CADAVERIC DONATION

It would appear that the enactment of the National Health Act of 2014 has not had its desired effect. There has been no increase in cadaveric donations to hospitals, national tertiary health institutions or medical research facilities. Potential donors are still constrained by cultural/ religious taboos prohibiting the same among the different ethnic groups in Nigeria. This raises questions about the appropriateness of the legal framework ushered by the National Health Act of 2014. Some contend that the law is foreign in outlook, and completely fails to acknowledge or accommodate age-long cultural practices of the people it

115 Ibid.

116 K Hedayat, 'When the Spirit Leaves: Childhood Death, Grieving, and Bereavement in Islam,' (2006) 9 (6) *Journal of Palliative Medicine*, 1282-1291.

117 Ibid.

seeks to govern. An Act blending extant common law principles and aspects of customary law would perhaps have enjoyed wider acceptability on the ground. This paper does not agree with this trend of thought or line of reasoning.

To begin with, it was neither feasible nor practicable to design a law accommodating intricacies in the cultural practices of the three leading ethnic groups, the Yoruba, Igbo and Hausa/ Fulani. How would such a law deal with cultural conflicts, where they exist? Even among the Yoruba and Igbo, who both believe in ancestor worship, the specifics are not the same. Accommodating all cultural practices in a law might therefore entail accommodating conflicting positions as well. Further, if the law accommodated only the acceptable cultural practices of the Yoruba, it would not be workable or readily acceptable among the Igbo or Hausa/ Fulani, and vice versa. Such a law would only fan the flames of existing ethnic and regional divisions in Nigeria.

Cultural practices to be accommodated in the design of suitable legislation on cadaveric donations would also have to pass the ‘Repugnancy and Incompatibility Test.’ Under this test customary practices would be recognized and deemed fit for application in Nigerian Courts if they were not ‘repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any law for the time being in force.’¹¹⁸. The law specifically provides:

‘The High Court shall observe, and enforce the observance of every, native law and custom which is not repugnant to natural justice, equity, and good conscience nor incompatible either directly or by implication with any law for the time being in force, and nothing in this law shall deprive any

118 For an extensive review of the applicability of the Repugnancy Test and the evolution of Customary Law particularly in sub-Sahara Africa, see generally: ME Kiye, ‘The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon,’ (2015) 15 (2) *Africa Studies Quarterly*, 85-106; WC Ekow Daniels, ‘The Interaction of English Law with Customary Law in West Africa’ (1964) 13 (2) *The International and Comparative Law Quarterly*, 574-616; WC Ekow Daniels, ‘The Influence of Equity in West Africa’ (1962) 11 (1), *The International and Comparative Law Quarterly*, 31-58; OW Igwe and MD Ogolo, ‘Repugnancy Test and Customary Criminal Law in Nigeria: A Time for Re-assessing Content and Relevance’ (2017) 3 (3), *Donnish Journal of Law and Conflict Resolution*, 35-39; and HA Amankwah, ‘Ghanaian Law: Its Evolution and Interaction with English Law,’ (1970) 4 (1) *Cornell International Law Journal*, 37-57. See also *Abi Zacharia Ajong v Nji Micheal Ajong*, Suit No. BCA/4CC/2000: reported in CCLR 2002, Part 9, pp. 67- 72, where the Court held that a particular custom that excluded girl-children from the administration of their father’s estate was not repugnant to natural justice. In the opinion of the Court, the custom in question does not permit women to engage in the business of the running of the Estate, thereby upholding a highly discriminatory custom.

person of the benefit of any such native law or custom.¹¹⁹

Thus, for years the application of matters of custom and tradition has always met a brick wall in the regular courts, particularly where it comes to establishing guilt or innocence, or rights and liabilities, based on the accepted standards of rules of evidence. Where such custom is deemed 'repugnant to natural justice, equity, and good conscience', or ruled to be in conflict with an existing law, it loses validity and no claim can be made pursuant to it. This is also made worse by the fact that such customs are not subject to the rules of evidence, so proving a claim or right becomes impossible. For example, if a cadaveric donation matter was to go to Court and the some provisions of the Act is in issue, how does a next of kin or relative prove that the deceased had given, or not given consent for his/ her organ to be harvested where there is no document to back such claim up, except to say that it is simply a part of their tradition that once an individual dies a certain kind of death, his body part should not be donated. It was probably with this in mind that the National Health Act of 2014 was drafted and enacted without reference or allusion to Nigeria's complicated system of culture and tradition. Unfortunately, given the heavy cultural attitudes that pervade the land, many still consider most of the rules of their custom as abiding authority, in disregard to what the law says. It is however submitted that the Act, as it currently is, is a good law and full of promise on matters of cadaveric donations. It should be vigorously marketed and promoted.

7. CONCLUSION

Cadaveric donations as a medical procedure help to make the most of body parts that would otherwise have been wasted, to prolong the life of others and generally make for a happier human society.¹²⁰ It is said that life is sacred. This is a reality that compels a craving in all humans to utilize every available means

119 Section 34 (1), of the High Court Law of Northern Nigeria, 1963. See also section 2 of the Elese of Irese (Confirmation of Declaration) Edict, 1987 of Kwara State.

120 Commenting quite illuminatingly on the legitimacy of this approach, Harris opined as follows: 'If we can save or prolong the lives of living people and can only do so at the expense of the sensibilities of others, it seems clear to me that we should. For the alternative involves the equivalent of sacrificing people's lives so that others will simply *feel* better or not feel so bad, and this seems nothing short of outrageous.' See J. Harris, 'Human Resources', in *Wonderwoman and Superman: The Ethics of Human Biotechnology*, (Oxford University Press, 1992) 100-103.

to sustain life.¹²¹ Thus, generally, the problem of access to cadaveric organs in Nigeria is not one of ignorance. There is a gulf in Nigerian society between knowledge about the need for cadaveric organs and the willingness to donate accordingly. Donations are hamstrung by an environment heavily shaped by culture and tradition.

It has been suggested in this Paper that many in Nigeria are unwilling to countenance cadaveric donations because of deeply rooted cultural/ religious beliefs that a human body should not be desecrated after death. It is thus evident that a culturally inspired posthumous interest in the body is a pervasive Nigerian phenomenon, reinforced by the existential philosophy of ancestor worship. To encourage more cadaveric organ donations, there is need for more robust and comprehensive education, particularly one that can demystify this current regime of cultural apprehension and controversies.¹²² In Northern Nigeria, where the philosophy governing cadaveric donation is a derivative of religion, which also serves as the customary law of the region, it might be necessary to involve religious leaders, (Muslim Clerics), more in campaigns for more cadaveric organ donations, as Shari'ah law does not appear to greatly frown upon such. Muslim clerics seemingly exert greater influence on those that they lead in worship.¹²³

It has also been submitted that it was probably better for Nigeria that little or no attempt was made to accommodate cultural practices and beliefs in the crating of Nigeria's modern law for cadaveric organ donations. The law may thus be a catalyst for evolution, modernization or abandonment of some of the darker, outmoded practices.¹²⁴ The current law on cadaveric organ donations in Nigeria must be properly marketed and embraced.

121 OO Olusegun, 'Challenges of Organ Transplantation in Nigeria,' (2017) 8 (3) *International Journal of Private Law*, 205 – 218.

122 R Oluyombo *et al*, 'Knowledge regarding Organ Donation and Willingness to Donate Amongst Health Workers in South West Nigeria' (2016) 7 (1) *International Journal of Organ Transplantation Medicine*, 19-26.

123 *Ibid*.

124 M Eseyin and SE Udoh, 'Cultural Re-Engineering: The Way-out of Human Rights Subversion in Sub-Saharan Africa, Nigeria a Case-Study,' (2015) 3 (4), *Global Journal of Politics and Law Research*, 71-84.