

AN APPRAISAL OF THE LEGAL REGIME GOVERNING HUMAN ORGAN DONATION, TRANSPLANT AND ORGAN TRAFFICKING IN TANZANIA

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ABSTRACT

Nowadays organ trafficking is considered to be a serious international problem which requires a global concern. It is becoming a widespread and ubiquitous criminal phenomenon which in the first place, violates victims' fundamental rights and their human dignity. Nevertheless, it is still the most unknown and least addressed forms of trafficking.¹ Worldwide, currently, Organ donation and transplant is one of the greatest medical achievements of all time. It saves many lives in cases when there is no medical alternative of comparable effectiveness. However, due to inadequate knowledge on organ donation and transplant, as well as inadequate medical facilities and organs for donation and transplant, illegal trafficking of human organs crops in and is booming into becoming a serious problem. Although one of the underlying causes of organ trafficking is poverty, it becomes imperative to examine the responses given to Human organs trafficking by the international community and transplant societies, as to whether is it the rights of victim-donors to give organs without consent or his or her organs to be trafficked. International communities regard illegal human organs transplantation and donation as an organized crime while other communities encourage human organs trafficking as a factor saving lives of individuals due to the insufficient distribution of organs for transplants. Individuals should be protected from both types of organ trafficking and illegally removed of human body organ. Conversely, there are situation that a recipient can be fraudulently engaged in the illegal act as well as suffer from health deterioration due to poor quality of the

transplanted organ or conducted surgery that may put the patient in a vulnerable position. Despite the fact that Tanzania health services have made several improvements in terms of donation and transplant of organs, Currently, organ donation and transplant are not conducted under a specific law and appended regulations. The organ donation and transplant are currently conducted under issued guidelines to health facilities with capacities to perform such procedures. This paper hereby, makes an appraisal on the laws and practice on Human Organs Transplant and Donation and its link in promoting illegal Human Organ Trafficking.

INTRODUCTION

The spread of medical transplant technology across the globe has saved many lives, especially those in the final stages of diseases in which internal organs are completely failing. It has also led to a widespread of human rights abuses, especially with the development and success of organ transplantation since the mid-1950s that introduced an era in which donors and recipients no longer had to be relatives but could be biologically, socially and geographically distant. The most current scientific and technological advances are the ones that allowed the transplantation of organs and tissues of various types in a saving and safely way to patients with various types of illnesses.ⁱⁱ Eventually, Organ transplantation is a life-saving process for people who are suffering from organ failures and raises a new hope for a better longer life. In East Africa for instance there are enormous challenges in managing end-stage kidney failure. They include late diagnosis, as the condition is confirmed after worsening of kidney function, and when kidneys fail, kidney replacement through transplantation is the only option that allows patients to live normal lives,ⁱⁱⁱ and due to medical advancement in technology, this is made possible.

However, there is a great shortage of organs for transplantation due to the lack of legislation supported by the local community, lack of ethical and moral approval, scarcity of professional skill, lack of quality equipment, and institutions.^{iv} The unmet need for transplants has resulted in many systematic approaches to increase donor rates, but there have also been practices that have crossed the boundaries of legal and ethical acceptability. Recent years have seen intense interest from international political organizations, led by the World Health Organization, and professional bodies, led by The Transplantation Society. Their efforts have focused on the development of a series of legal and ethical frameworks, designed to encourage all countries

to eradicate unacceptable practices while introducing program that strive to achieve national or regional self-sufficiency in meeting the need for organ transplants^v

Although organ donation and transplantation can be a new hope to dying patients, the attitude and acceptability of organ donation and transplantation vary according to religious, cultural, and legal issues. These diversities in legal, cultural, religious, and traditional concepts regarding organ donation and transplantation restrain its acceptability and create a lack of willingness to organ transplant and donation,^{vi} eventually giving way to illegal human transplant, donation and prosperity of illegal human organs trafficking.

Concept of Human Organs Transplant Donation and Trafficking

There have been numerous responses from different organizations, bodies, and institutions at both international and regional level, suggesting ways to address the concept of human organ transplant, donation and trafficking.

In biology, an organ (from the Latin "organum" meaning an instrument or tool) is a collection of tissues that structurally form a functional unit specialized to perform a particular function.^{vii} Organ is also the name we give to functional elements in the body and quite often they are also physically distinct and they are all defined by a shape and a location in your body and they are also defined by a function.

The five vital organs in the human body are the brain, heart, lungs, kidneys, and liver. Other organs include the gallbladder, pancreas, and stomach. Organ systems, such as the nervous system, support these organs.^{viii}

Whereas, Organ Transplant means the therapeutic replacement of an organ or other bodily tissue which have irreversibly failed to function properly with that of a healthy organ or body tissue which is functioning in a proper manner. Such transplantation can occur where an organ is removed from a cadaveric human or animal donor to the organ recipient or from a living human or animal donor to the organ recipient.^{ix} And Organ donation and transplantation is removing an organ from one person (the donor) and surgically placing it in another (the recipient) whose organ has failed.^x Organ donation is a process when one organ is surgically removed from one person into another. Technically therefore, in order to transplant an organ,

there should be a donor (one who gives the organ) and a recipient (one who receives the organ). Almost everyone is a potential organ or tissue donor.

Organ trafficking is the recruitment, transport, transfer, harboring, or receipt of living or deceased persons or their organs by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving to, or the receiving by, a third party of payments or benefits to achieve the transfer of control over the potential donor, for the purpose of exploitation by the removal of organs for transplantation.^{xi}

Human Trafficking and Organ Removal

The modern era of organ transplantation began with the first successful kidney transplant performed in Boston, Massachusetts in 1954.^{xii} This was followed by the transplantation of the liver, pancreas and heart in the 1960s, and living-related lung and liver in the 1980s.^{xiii} The success of tissue typing to match biological characteristics between the donor graft and the recipient, and the use of an immunosuppressant drug such as cyclosporine opened up an era that allowed donors not related to recipients of organs to be able to donate their organs to such recipients. Donors and recipients could therefore be biologically, socially and geographically distant and still donate and receive organs respectively. Organ transplantation has been regarded as one of the most remarkable inventions of the twentieth century.

This medical and technological development of organ transplantation would normally not be a problem, except that the demand for organs now exceeds the supply, and the shortage of organs is acute. Between 1990 and 2003, kidney donations in the United States of America increased by 33 per cent, but the number of those awaiting a kidney transplant increased by 236 per cent.^{xiv} In March 2007, WHO estimated that illicit kidney removals for transplantation accounts for five to 10 per cent (between 3,400 and 6,800 commercial donors in 2007)^{xv} of the approximated 65,000 kidney transplants performed annually throughout the world. The shortage of organs is a universal problem. Organs have been mainly sourced from deceased persons or brain-dead people (who have sustained some sort of fatal injury that makes it impossible for them to survive without being attached to a machine.)^{xvi} Deceased donation still remains the main source of some organ transplants, such as those involving hearts and lungs. Some countries have developed a deceased organ donation program in order to address the shortage, but studies have shown that such programs have been hampered by sociocultural,

legal and other factors.^{xvii} Some of these factors include cultural and religious beliefs based on the fact that the body should be buried intact. Countries in the Middle East for instance, uphold religious teachings that discourage and, in some cases, even prohibit cadaveric organ donation. The shortage of deceased donor organs; and medical advancement have resulted in the use of organs from living persons. This has become a suitable and currently the most important alternative to addressing the problem of organ scarcity.^{xviii} However, it has not solved the problem of shortage of organs. Reasons for the continued shortage in organs can be attributed to ageing of populations, general growth in heart and vascular diseases leading to increased incidences of organ failure, donor compatibility issues, as well as the ever-increasing faith of recipients in the medical advancement of organ transplantation linked to the rising success and greater improvement in post-transplant outcome.^{xix} These reasons and many others that abound explains why it takes years before patients on ‘organ waiting lists’ get an opportunity for a transplant.

Organ Trafficking in the context of Human Rights

It is indisputable that any form of trafficking in persons entails serious human rights violations. The Palermo Protocol and the CoE Convention, in addition to criminal law provisions, contain substantive human rights dimensions regarding the protection and assistance of victims. Thus, organ donors can be considered not only as ‘victims of trafficking’, but also ‘victims of human rights violations.’^{xx} It is unreasonable to expect that the organ trafficking frameworks will encompass the protection for all the violated rights of victims, since the purpose of these specialized tools is to provide the immediate protection necessary after the trafficking incident. Moreover, despite the fact that those anti-trafficking instruments addressing organ removal focus on victim protection and assistance, it cannot be said that all provisions related to victim protection therein can be regarded as victim’s human rights.^{xxi} In order for victims to enforce their rights, violations must be attributed to the breach of state obligations arising from binding human rights instruments. Therefore, the additional protection can be sought from the relevant international law mechanisms and international human rights law acts as a supplementary tool for the existing anti-trafficking efforts. It plays a crucial role in providing the protection for the victims, despite the fact that the existing international human rights instruments do not directly addresses organ trafficking. Nevertheless, it is generally accepted that trafficking is in itself a violation of human rights under international law.^{xxii}

Trafficking in human beings has much in common with trafficking in human organs when it comes to the breached rights of victims as a consequence of the organ removal. While different rights will be relevant at different stages of trafficking in persons for the purpose of organ removal, similar rights of victims whose organs are trafficked can also be infringed, even though the latter form of trafficking occurs in relation to the activities of transportation, storage and transfer of the human organs. The prohibition of organ trafficking can be traced back to non-binding, but authoritative human rights instrument, namely the UDHR which emphasized in its preamble that “inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”^{xxiii}

The difference between the victims of trafficking in persons for the purpose of organ removal and trafficking in human organs at this point is that in the latter form of organ trafficking the decision to sell an organ due to the poverty can hardly be attributed to the state conduct, whereas the same conduct under the trafficking in persons for the purpose of organ removal which comprises coercive or deceptive ways into donating an organ may entail the breach of state obligations.^{xxiv} Moreover, the ban on the sale of organs is not stringently enforced by many states. As to the organs that are trafficked without the valid consent from the victims of trafficking in human organs, the conditions in which the victims are kept against their will and the degree of suffering inflicted by the removal of organs are the prerequisites to constitute the violation of the right to life or the prohibition of torture or other forms of ill-treatment. As torture can have an end goal, the evident example of the violation of the prohibition of torture is constituted in the illegal harvesting of organs from executed prisoners who are convicted to the death penalty in China.^{xxv} The Tribunal into Forced Organ Harvesting from Prisoners of Conscience in China confirmed that there are objectives (e.g. the intent of destroying the members of certain groups as a whole or in part) other than the purely commercial purpose of harvesting and selling organs. The issue of premature withdrawal of life support or treatment is also worth noting in the context of trafficking in human organs. Commercial transaction may be the reason behind the termination of the life of donors in order to save someone else’s life. In this case, the whole range of human rights is violated including the right to freedom of expression, right to respect for personal and family life. In addition, the ICCPR includes a provision which prohibits any medical or scientific experimentation without the free consent.^{xxvi} As it can be seen, organ trafficking can violate both of the absolute rights and other

fundamental human rights and freedoms of victims. A distinctive feature of the right to life and prohibition of torture and other forms of ill-treatment is that they do not allow any limitations in normal circumstances, and states are not allowed to derogate from the obligations owned by these rights even in situations which threaten the life of the nation.^{xxvii} The establishment of a violation of the prohibition of torture and other forms of ill-treatment in the case of organ trafficking would lead to the determination of specific non-derogable obligations under international law, as well as the application of certain principles that are directly related to the protection of victims of organ trafficking, namely the principle of non-refoulement.³³⁶ This principle plays a significant role in the protection of victims, as it directly affects the outcome of all other provided human rights protections.

THE NATURE AND LEGAL STATUS OF HUMAN ORGANS TRANSPLANT DONATION AND TRAFFICKING IN TANZANIA

There has been significant improvement of nephrology services in Tanzania with establishment of local nephrology training programs and kidney transplantation services. This is attributed to political will, government support, commitment of health care providers for training and increase in the awareness about the burden of kidney diseases, as well as active clinical research.^{xxviii} Despite this milestone achievement in terms of medical practises in Tanzanian health service still there is no clear law nor regulation guiding donation and transplant of human organs in Tanzania. This eventually promotes illegal human organ trafficking, since the perpetrators use the loophole of the nonexistence of a strong legal regime to illegally traffic humans in order to harvest their organs.

The Public Health Act^{xxix} only provides for public health to ensure comprehensive public health services to the general public. The act even carters for vaccinations, institutional health generally, sanitation, housing and hygiene. This Act is only responsible for hygiene in public areas. But it doesn't touch on the issue of organ transplant, donation nor trafficking for the better safety of the public.

The Penal Code^{xxx} is the law for penal offenses and punishment in the state. Under **S. 5**, The Act defines "*grievous harm*" to mean any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which

extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense, whereas the punishment to causing grievous harm is seven years.^{xxxvi} The Act further defines “*maim*” means the destruction or permanent disabling of any external or internal organ, member or sense, but that us as far as it goes, it doesn’t touch on the offence of illegal organ transplant, donation nor organ trafficking.

The Anti-Trafficking in Persons Act^{xxxvii} put in place a comprehensive legislation to address all aspects of trafficking in persons in the country. The Act acknowledges removal of organs through exploitation,^{xxxviii} and makes it an offense to remove organs for trafficking^{xxxix}, whereas, on conviction, the offender shall be liable to a fine of not less than five million shillings but not more than one hundred million shillings or to imprisonment for a term of not less than two years and not more than ten years or to both.^{xl} However, that is as far as the Act stipulates, it doesn’t write any further on trafficking of organs for transplant nor donation. This leaves a loophole for perpetrators to perform illegal transplant and donation.

The Need for Regulation of Human Organs Transplant, Donation and Trafficking in Tanzania

The governing legal regime does not ensure sufficiency legal coverage to facilitate effective implementation of the human organ’s transplantations and donation and this gap promotes human organ trafficking in Tanzania. This position hinders the interest of the community since the community have the right to benefit from the best and acceptable practices in the human organ’s transplantations and donation organ. Subsequently, there needs to have a strong legal framework adhering to human transplant, since there isn’t any existing law that governs organ transplant process and its fatal for both the patients, (recipients), and donors, since medical issues arising out of transplant may occur and there would be no law to handle the situation.

Unlike other countries, there is no regulatory authority in the country to oversee organ transplant and donation, nether is there a database to keep record on the same. As such, there is not a database for records on human organ trafficking, eventually prompting the illegal practice to flourish.

For blood transfusion and donation in the country, the NBTS^{xli} is responsible to regulate and oversee donation and transfusion of blood in the country as well as blood banks. This is not the

situation when it comes to organ transplant, provided that currently in Tanzania, Muhimbili National Hospital (Dar es salaam) and Benjamin Mkapa Hospital (Dodoma) have already begun organ (kidney) transplant. Without any regulatory framework and authority, there is a definitely an increase in illegal transplant, donation and trafficking of human organs.

Factors leading to the Occurrence of Human Organs Trafficking in Tanzania

There are existing groups of people who are unaware of the concept of organ transplant, donation and the illegality of commercial dealings and trafficking in human organs. There are also myths and misconceptions about organ transplant, donation and trafficking that are prevalent in the society preventing the general public from donating organs and hence boost commercial dealings in human organs.

Though it is not argued that awareness is the only factor prompting illegal organ donations, transplant and trafficking, it plays a significant role in increasing the number of illegal dealings in the same. If people are not aware or have misconceptions about the basic concepts of organ donation, it would adversely affect the organ donation rate. Increase in the level of awareness about organ donation and transplant among the public will eventually curb illegal organ trafficking. Though there has been a change in the level of awareness over the years, the level has still not made it to a level to curb the illegal dealings in organs.

With lack of a strong legal framework in Tanzania there is no doubt that there will be a boom in illegal human organ trafficking, since there are no strong laws to oversee human organ donation and transplant, perpetrators use the loophole to conduct illegal human organ trafficking.

The absence of strong regulatory authority that clearly regulates human organ transplant and donation, illegal human transplant, donation and trafficking shall not demise. Wrongdoers will always find a clear opportunity to forego with their wrongdoing since there is no regulatory authority that puts them out to light.

Poverty, especially extreme poverty, is one of the most significant drivers of human trafficking. Extreme poverty leads many people migrate in order to find better work, , which makes them more vulnerable to traffickers. People also sell their own family members – including their children – to survive or in the hopes their loved ones might get a chance at a better life. Other

causes of human trafficking, like a lack of education and legitimate work, are closely tied to poverty.^{xxxvii} While in other countries for hopes and promises of better living, organs of the poor are then exposed to forceful trafficking.

Many legal frameworks and activists for human rights forbid human trafficking like debt bondage, child sexual exploitation, forced marriage, and forced prostitution. Trafficking is a clear violation of human rights, but if anti-trafficking activities don't use a rights approach, attempts to end trafficking can cause more harm. The LHRC^{xxxviii} for instance, is Tanzania's human rights advocacy organization, with the purpose of working to empower and conscientize the people of Tanzania on legal and human rights. However, it doesn't draw attention towards illegal trafficking of human nor illegal trafficking of human organs, since it only centres itself on safeguarding, and promoting the rights of the Marginalized groups in both rural and urban areas^{xxxix}, thus, attempts to end illegal trafficking are null.

CONCLUSION

Each country has a different take on organ donations and organ transplantations and is governed using federal or state laws as most suitable for administrative purposes. Most of the countries across the world stand against organ trade and trafficking and have their own legislations criminalizing commercial dealings in human organs. Though there is no data available as to the effectiveness of these legislations in various jurisdictions in curbing the illegal practices associated to organ donations and transplantations, it can be seen that the consent policy and the implementation of legislations have played a significant role in improving the cadaver organ donations in various countries as stated in the table above. Implementation of the legislations are equally important and it has to be ensured by the authorities that it does not just remain on paper and is put into effect in an efficient manner thereby preventing any illegal practices with respect to organ donation and transplantation and exploitation of the poor by the rich. Taking into consideration the international instruments on organ trafficking while drafting or implementing legislations on the matter would also aid in reducing organ trafficking globally. Council of Europe Convention against trafficking in human organs, World Health Organization's Guiding Principles on Human cell, tissue and organ transplantation and Declaration of Istanbul are some of the major international

instruments prohibiting commercial dealings and organ trafficking. Hence, it can be stated that the domestic laws of the country are dependent upon various factors including its administrative structure and socio-economic factors. However, each country should try to tackle the global issues of organ shortage and illegal practices in relation to the same with the available resources.

Many states have criminalised commercial dealings in organs, and there is direct state involvement and support as well as legislations on medical practitioners and authorities that promotes legal organ transplant and donation, where's these intend to curb and put an end to illegal organ transplant, donation and trafficking, whereas they impose heavy penalties when found guilty.

Suggestions to improve the situation in Tanzania on organ transplant, donations, and reduce organ trade and trafficking in the country, strict measures should be adopted for the effective implementation.

On the question of whether there are reasons behind human organ trafficking, there is still lack of a strong legal framework and regulatory authorities that regulate the process of human organ transplant and donation as the sole cause behind unending business of organ trafficking. The increase in the rate of crime has exposed various flaws and drawbacks of the legal regime in Tanzania.

There are hospitals that perform organ transplant, but there are no laws that protect and oversee the whole procedure and the recipients as well as donors. This loophole is therefore used by ill doers and perpetrators to flourish the illegal organ trafficking. There is little awareness about the legislation and the illegality of the commercialisation of organs which results in the general public contributing to a substantial rate of organ trade without knowing that it is illegal. They tend to follow the instructions of hospitals and medical practitioners which might or might not disclose that such commercial dealings are illegal.

Nonetheless, the various ethical, religious, and emotional constraints that discourage individuals from going for organ donation as well promote illegal organ transplant, donation and trafficking. The concept of brain death and cadaver organ donations are also still unknown to a large population and the same has not been actively promoted or publicized widely in the

country, hence leading to a shortage of organs that if harvested could have been a cure to illegal organ transplant, donation and trafficking.

Illegal organ transplant, donation and trafficking is now widely prevalent in Tanzania and is increasing at an alarming rate, even though under high secrecy. Strict legal regime and heavy punishment should be imposed to the law breakers who commercialize the dealings in human organs.

It is hereby conclusive that there is little awareness on the whole notion of organ transplant, donation and trafficking, to both the society and the legislators, and in addition, this gives boom to the increase in illegal transplant, donation and trafficking of organs, which results in the general public contributing to a substantial rate of organ trade without knowing that it is illegal.

Furthermore, it is conclusive that the law in Tanzania that oversee organ trafficking are ineffective, and surprisingly the legal regime on the human organ's transplantation, donation and organ trafficking is next to nonexistence, as there are no known laws nor bills on the same, nor are there regulatory to oversee the same.

RECOMMENDATIONS

After having made observation on the factors that promote illegal transplant, donation and trafficking of human organs, and having concluded that , there is still lack of a strong legal framework and regulatory authorities that regulate the process of human organ transplant and donation as the sole cause behind unending business of organ trafficking, and that illegal organ transplant, donation and trafficking is indeed a booming problem in the country, recommendations are hereby made as follows:

- **To the Legislature**

Establish laws governing the human organ's transplantations and donation and widen the scope of the laws on human organ trafficking in Tanzania. There is a need to create strong laws and broaden the spectrum of the whole notion of transplant, donation and trafficking, covering all loopholes that may necessitate illegal transplant, donation and trafficking. The laws and policies created should be specifically legislated in order to ensure that there is a competent

legal coverage towards effective implementation of laws and policy on which the human organ's transplant, donation and trafficking in Tanzania shall be combated.

- **To the Government**

To establish a regulatory institution that shall regulate implementation of the human organ's transplantations and donation but also have a database on human organ trafficking cases Tanzania. The government is supposed to establish a regulatory institution which will regulate human organ trafficking.

To expand knowledge to individuals on which the human organ's transplantations and donation as well as human organ trafficking is implemented in Tanzania.

- **To the Community**

To expand knowledge concerning the human organ's transplantations and donation organ as well as human organ trafficking implemented in Tanzania and get rid of poor beliefs about transplant on human organs as well as organ donation.

- **To the National Security Forces**

The national security forces including the police and the secret services should widen their workforce to identify the perpetrators and ill doers who conduct illegal transplant, donation and trafficking of human organs, and bring them out to light as well as taking them to the courts of law so that they may be properly punished.

- **To the Judiciary**

The judiciary should implement strong penalties towards the wrongdoers and offenders found guilty of committing the crimes of illegal transplant, donation and trafficking, to set an example and show the public on the seriousness of the matter of committing the crime of illegal transplant, donation and trafficking of human organs.

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