International Journal of Law and Legal Studies ISSN 2463-5634 Vol. 8 (2), pp. 001-009, February, 2020. Available online at www.internationalscholarsjournals.org © International Scholars Journals

Full Length Research Paper

An examination of the legal rights of surgical patients under the Nigerian laws

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Accepted 10 October, 2019

With the passing of the Universal Declaration of Human Rights, 1948 and signing of the International Covenants on Civil and Political Rights, 1966 and the Economic, Social and Cultural Rights, 1966, there has been a global emphasis on human rights. The issue of patients' rights has also been brought to prominence with the advent of modern technology and the availability (and use) of artificial measures to prolong life; the evolution of legal rights and duties of patients, an increased concern for the rights of the patients, the increase in number of people affected by HIV/Aids, and a growing population of elderly patients. However, apart from those international instruments setting out human rights, most national Constitutions have equally set out fundamental rights of individual. In this category is the Constitution of the Federal Republic of Nigeria, 1999 which sets out fundamental human rights enjoyable by everyone (any patient inclusive) within the territory of the country. Violation of these rights is enforceable in court and the violator may be liable to pay heavy damages and compensation. This article discusses those rights that centre on the relationship of a patient and his/her healthcare providers, specifically, the rights of a surgical patient in relation to his/her medical doctors, nurses, other health personnel and health institutions.

Key words: Surgical patients, human rights, legal rights, autonomy, self determination.

INTRODUCTION

The term "human rights" has become one of the most fashionable buzzwords of our contemporary world. The "era of human rights" is fast becoming the preferred term for describing the current times, and this makes any discussion on human rights so apt and relevant in this age. With the passing of the Universal Declaration of Human Rights, 1948 and signing of the International Covenants on Civil and Political Rights, 1966 and the Economic, Social and Cultural Rights, 1966, there has been a global emphasis on human rights.[1] The issue of patients' rights has also been brought to prominence with the advent of modern technology and the availability (and use) of artificial measures to prolong life; the evolution of legal rights and duties of patients, an increased concern for the rights of the patients, the increase in number of people affected by HIV/Aids, and a growing population of elderly patients.[2]

However, apart from those international instruments setting out human rights, most national Constitutions have equally set out fundamental rights of individual. In this category is the Constitution of the Federal Republic of Nigeria, 1999 which sets out fundamental human rights enjoyable by everyone (any patient inclusive) within the territory of the country.[3] The larger group of rights as provided for in the Constitution and the International Bill of Rights will not be discussed in this paper. The discussion in this article is, however limited to those rights that centre on the relationship of a patient and his/her health

[1] The Universal Declaration of Human Rights (UDHR) 1948, the International Covenants on Civil and Political Rights (ICCPR) 1966 and the International Covenants on Economic, Social and Cultural Rights (ICESCR) 1966, constitute the International Bill of Rights.

[2] See Slabbert and Van der Westhuizen when submitting in a similar respect on the issue of euthanasia. See Slabbert, M & Van der Westhuizen, C "Death with Dignity in lieu of Euthanasia" 2007 22(2) *SAPR/Public Law* 366; see also, Straus "The 'Right to die' or 'Passive euthanasia': two important decisions, one American and the other South African" 1993 (6) *SACJ* 196-208.

[3] See Chapter IV of the Constitution which provides for the various rights.

care providers, specifically, the rights of a surgical patient in relation to his/her medical doctors, nurses, other health personnel and health institutions. The relationship of a patient with her health care providers is contractual and is to some extent governed by the contract law, and in many more respects, also by the law of torts and criminal law. Bearing in mind the topic of this paper which bothers on legal rights; those other areas of law are therefore outside the scope of the paper but shall receive attention as they become relevant.

The point of departure in this article is the Constitution being the supreme law; everything and everybody is subject to the Constitution.[4] The Constitution is the source of the citizens' rights and sets out catalogue of rights. However, those rights relevant to this topic are: the right to life;[5] the right to human dignity;[6] the right to freedom from discrimination;[7] the right to personal liberty;[8] the right to freedom of thought, conscience and religion.[9] Apart from the Constitution, other sources of a patient's rights in Nigeria include the Common Law, International Convention and Professional Code of conduct, in particular medical profession code of conduct. In as much as the article does not pretend to lay claim to an exhaustive discussion on all legal issues and rights of a patient vis-à-vis his/her health care providers, this paper shall, however, endeavour to provide a catalogue of a patient's rights under the Nigerian laws. The article shall also attempt providing guidance to the health care providers in order not to run fowl of the law of the land or breach the fundamental rights of their patients.

This article is divided into five parts. Following this introduction, the article consists of the following parts: Part two discusses the meanings of the major terms used in this article. Part three examines the legal rights of surgical patients in Nigeria. In this part, the right to life, the right to human dignity, the right to personal liberty, the right of a patient to give an informed consent to treatment and the rights to privacy and self-determination are discussed. In part four, the article discusses the vexed question of whether the rights of a surgical patient include the right to die while conclusion forms the fifth part.

MEANINGS OF THE MAJOR TERMS

In this article, the following words, "patient", "human right" and "legal rights" are dominant and their meanings therefore call for further examination at the onset. Simply put, a patient is a person who is ill and in the hospital to receive medical treatment.[10] In this work, however, "legal right" as a term is used synonymously as "human rights." The adjective "legal" is used advisedly to qualify the word "rights" as rights recognized by law while the other adjective "human" is generally used to qualify all those legal rights enjoyable as a human being.

However, the term "human right" is one of those legal concepts that defy a single acceptable definition from writers and scholars. The reason is that, the theoretical foundations of human rights vary over the years depending on the prevailing school of thought at a time.[11] Thus, the term "human rights" is a dynamic one, and is subject to change and expansion. While the term is widely and generally acknowledged, however, there is considerable confusion as to the basis of human rights law. Shaw posits that the question of what we mean by the term "right" is itself controversial and the subject of intense jurisprudential debate.[12] Baxi equally submits that the term "human rights" is deeply problematic; it straddles several universes of discourse.[13] At their foundation, human rights are a set of moral principles about how people should treat each other, particularly, how people should be treated by the state authorities.[14] Human rights are usually referred to by various names and phrases

[4] See section 1 of the 1999 Nigerian Constitution which proclaims the supremacy of the Constitution.
[5] Section 33.
[6] Section 34.
[7] Section 42.
[8] Section 35.
[9] Section 38.

[10] It means someone who is receiving medical treatment from a doctor. See *Longman Dictionary of Contemporary English* (2003) 1037; this includes in and out patients as well as a pregnant woman visiting hospital for ante-natal treatment.

[11] The natural law school for instance regards human rights as those conferred by God. This school of thoughts further argues that human or made-made laws must conform to it in order to be valid. But due to reformation and the decline of the role played by the Church in the state affairs, there came the positivists who secularized the notion of human rights; they thereby removed the issue from the realm of supernatural and metaphysics. However, human rights are defined as those which have become part of a positive legal system derived either from the will of a state or command of the sovereign ruler. See Barau "Towards Effective Promotion and Protection of Human Rights in Northern Nigeria" in Yemi Osinbajo, *et al* (eds) *Human Rights, Democracy & Development in Nigeria* (1995-1996) 313 at pp. 314-315.

[12] Shaw *International Law* 4th ed. (1997), p. 196.

[13] Moral philosophers signify by it a set of ethical imperatives that contribute to making the basic structure of society and state to be and remain overall "just." International lawyers regard the term as a set of norms and standard produced judicially (as having some sort of binding effect on the behaviour of states and regional and international organizations). Architects and administrators or regional governance (such as the African Union, European Union) regard "human rights" promotion and protection as symbolic of the syndrome of shared sovereignty. For national power-elites, "human rights" provides vocabularies of legitimating of governance. For those who regard practices and structures of governance as deeply unjust or morally flawed, "human rights" represents a rallying cry against oppression and sites for practices of "counter-power." See Baxi "Voices of Suffering, Fragmented Universality, and the Future of Human Rights" in McCorquodale (ed) *Human Rights* (2003), p. 159 at p. 162.

[14] See Galligan & Sandler "Implementing Human Rights" in Halliday & Schmidt (eds.) *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in National Context* (2004), p. 23.

such as "fundamental rights", "basic rights", "natural rights" and sometimes, "common rights."[15]

Raj described human rights as those minimal rights that individuals need to have against the state or other public authority by virtue of their being members of the human family.[16] The concept of human rights is founded on the ancient doctrine of natural rights based on natural law. Ever since the beginning of civilization, the shortcomings and tyranny of ruling powers have led people to seek higher laws. The concept of a higher law binding human authorities was evolved, and it came to be asserted that there were certain rights anterior to society. [17] These are superior to rights created by human authorities, universally applicable to people of all ages in all regions, and are believed to have existed prior to the development of political societies. These rights are considered as mere ideologies and there are no agreed catalogue of them and no machinery for their enforcement until they are codified into national constitutions as judicially enforceable bill of rights.[18]

According to Mubangizi, while the term "human rights" is relatively a contemporary one, the concept is not, theologians, philosophers and political theorists alike have been discussing these ideals for centuries.[19] It is generally believed that the concept of human rights has its origin in religion, humanitarian traditions and the increasing struggle for freedom and equality in all parts of the world.[20] It is safe to say that an interest in human rights is as old as civilization. It is observed that in the absence of human rights, human beings cannot fully develop and use their human qualities, their intelligence, their talents and their conscience in order to satisfy both their spiritual and physical needs. [21] It is submitted that human rights are a necessary component of any democratic society, thus, the protection of human rights is therefore necessary for democracy.[22]

On his part, Dlamini defines human rights as "the rights which all human beings have or should have equally by virtue of being human irrespective of race, gender, age, noble or ignoble descent, social class, national origin or ethnic or tribal affiliation; and regardless of wealth or poverty, occupation, talent, merit, religion, Ideology or other personal idiosyncrasy."[23] These rights are inalienable and can not be transferred, forfeited or lost by having been usurped or by failure to exercise or assert them, for whatever length of time. They are referred to as fundamental because they are important and life, dignity and other high human values all depend on them.[24] Mubangizi further asserts that fundamental or basic rights are those rights which must not be taken away by any legislation or act of the State and which are often set out in the fundamental law of the country, for example in the bill of rights in a constitution. [25] It is in the above context that the term "right" is used in this article.

THE LEGAL RIGHTS OF SURGICAL PATIENTS IN NIGERIA

As mentioned earlier in this paper that the Constitution sets out some rights which are to be enjoyed by everyone by virtue of being human being. The rights relevant to this topic are: the right to life; the right to human dignity/ the right to freedom from discrimination; the right to personal liberty. Another right which is important but not specifically mentioned in the Nigerian Constitution but derived from established medical practices, professional code and recognized at the Common Law is the right of a patient to give an informed consent to treatment.[26] This right encompasses legal and ethical issues in the health care provider-patient relationship, including the right to privacy, the right to quality medical care without prejudice, the right to be informed about the condition, treatment options and possible results and side effects of treatment, the right to make informed decisions (based on adequate information) about care and treatment option and the right to refuse treatment. Each of these rights will now be examined.

The right to life

Section 33 of the 1999 Nigerian Constitution provides for the right to life and states further that no one shall be

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[15] Mubangizi, however, submits that while these phrases do not mean one and the same thing, nevertheless, they are usually used interchangeably and sometimes rather confusingly. See Mubangizi *The protection of Human Rights in South Africa (A legal and Practical Guide)* (2004), p. 2.

[16] Raj 'Awakening of Human Rights' in Nirmal (ed) *Human Rights in India* (2000), p. 1.

[17] See Raj in Nirmal (ed) *Human Rights in India*, op. cit, p. 1.

[18] See Basu *Human Rights in Constitutional Law* (1994), pp. 5-6.

[19] See Mubangizi, *The protection of Human Rights in South Africa,* op. cit, p. 4.

[20] Ibid.

[21] United Nations *Human Rights: Questions and Answers* (1987), p. 4.

[22] Mubangizi *The Protection of Human Rights in South Africa*, op. cit, p. 7; See also, United Nations *Human Rights: Questions and Answers* (1987), p. 4.

[23] Dlamini, C.R.M, *Human Rights in Africa: Which Way South Africa?* (1995), p. 3.

[24] Ibid, at pp. 3-4.

[25] The learned author asserts: "These are rights which all men and women should share. This perhaps explains why human rights were initially referred to as 'the rights of man'- until the 1940s when Mrs. Eleanor Roosevelt promoted the use of the expression 'human rights' after discovering, through her work in the United Nations (UN), that the rights of men were not understood in some parts of the world to include the rights of women. Earlier, the term 'rights of man' had in fact replaced the original term 'natural rights', which had arisen as a result of its connections with natural law." See Mubangizi *The Protection of Human Rights in South Africa*, pp. 2-3.

[26] This has foundation on the constitutional right to freedom of thought, conscience and religion.

deprived intentionally of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty. The effect of this provision is that everyone including a patient has a right to life and the section imposes a duty on everyone, including the health care provider to take reasonable/absolute care when treating the patient and must ensure that death does not result as a consequence of such treatment. In this wise, a patient must not be subjected to medical experiment with the resultant effect of causing death of the patient. Since a patient has a right to life, this imposes a corresponding duty on his health care personnel not to act in such a way that will deprive such a person his right to life. If in the course of treatment, medical personnel act negligently in such a way that causes the death of a patient, such a medical officer may be prosecuted either for the offence of murder or manslaughter depending on the facts and circumstances of the case.

The right to human dignity

Section 34 of the Nigerian Constitution provides that every individual is entitled to respect of the dignity of his person and accordingly, no person shall be subjected to torture or to inhuman or degrading treatment.[27] The importance of the right to human dignity and its central place in the Constitution must be emphasized. Like the right to life, the right to dignity is equally important. The right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right is therefore the foundation of many of the other constitutional rights.[28] The right to dignity also imposes a duty on the health care officer to respect the worth and person of his patient; his person must be respected and must not be treated in a cruel, inhuman or degrading manner. The effect of this right is that a patient has a right to be respected and treated in a dignify manner no matter the state of his health. He must not be treated in a brutal or dehumanizing way and his medical attendants must respect this right at all times, otherwise the patient may bring an action for the breach of his right to human dignity in the course of receiving medical care.

An important aspect of this right is the prevailing prejudice against HIV-positive patient in the hospital. It is submitted that any patient no matter the state of his health or the nature of his sickness has the right to his/her personal dignity. His/her person must be respected and must not be discriminated against. It is not unusual to give less attention to HIV/Aids patients or to directly or indirectly alienate them from priority of attention in the discharge of medical responsibilities. It is therefore contended that this attitude amount to a kind of stigmatization and assault on the patient's dignity. The South African Constitutional Court for instance, in the case of Hoffmann v South African Airways,[29] criticized such an act. In that case, the court dealt with an airline policy of not employing HIV-positive persons as cabin attendants. The court noting the prevailing prejudice against HIV- positive people held that any further discrimination against them was a fresh instance of stigmatization and assault on their dignity.[30] The court held further that such discrimination could not be justified as fair because it was based on ill-informed prejudice against people with HIV. The fact that some people with HIV would not be healthy enough to work as cabin attendants did not justify a blanket policy of refusing employment to anyone with HIV.[31]

The right to personal liberty

Section 35 of the 1999 Nigerian Constitution provides everyone with the right to personal liberty. It provides *inter alia* that every person shall be entitled to his personal liberty and no one shall be deprived of such liberty save in some cases and in accordance with a procedure permitted by law. Personal liberty guarantees in this section is the right not to be subjected to imprisonment, arrest and any other physical coercion in any manner that does not admit of legal justification.[32] The Constitution by the above provision vests in an individual, the right to his personal liberty, and he must not be deprived of this right whether within or outside of the confine of a hospital except where the deprivation of liberty is justified. Confining a patient to a hospital bed or premises for the purpose of giving him medical attention does not breach this right.

By way of exception, a person may be deprived of his liberty in the case of persons suffering from infectious or contagious disease, person of unsound mind, person addicted to drugs or alcohol or vagrants, for the purpose of their care and treatment or protection of the community.[33] Apart from those conditions or other necessary provisos for the treatment of a patient, a patient must not be arbitrarily detained in hospital for example, to enforce the payment of hospital bill. By way of extension, this right imposes an obligation on the hospital management to discharge a patient once he/she is medically certified fit. Refusal to let go a patient who is well may amount to false imprisonment since deprivation

[27] Section 34(1)(a) of the 199 Nigerian Constitution.
[28] See *S v Makwanyane* 1995 (3) SA 391 (CC) para 144.
[29] 2000 (11) BCLR 1235.
[30] Para 28.
[31] Para 37.
[32] See Dicey, *Constitutional Law* (9th ed.), pp. 207-208.
[33] See section 35(1) (e) of the Constitution.

of personal liberty for the enforcement of hospital bill is not recognized as an exception to the right to personal liberty recognized under the Constitution. Health care providers will be acting against the law of the land if it resorts to detention or deprivation of the patient's personal liberty to enforce payment of hospital bill.[34]

The right of a patient to give an informed consent to treatment/the rights to privacy and self-determination

Under the common law, no right is held more sacred, or is more carefully guarded than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.[35] In this context, it is submitted that a person has a right to do what he or she pleases with his/her body.[36] Thus, in Schloendorff vs. Society of the New York Hospitals,[37] Cardozo, CJ stated as follows: "every human being of adult years and sound mind has a right to determine what shall be done with his own body." The long-standing common-law principle recognizes and protects human autonomy and self-determination. This principle forms the basis of the common law doctrine of informed consent which is regularly applied to support cases that individual has right to decide the medical treatment he/she wishes to receive.

In some jurisdictions such as Canada and South Africa, this right is otherwise known as the right to security of person. [38] This includes protection of personal autonomy, at least in respect of medical treatment and decision concerning reproduction.[39] The right to freedom and security of person is a right to be left alone. The South African Constitutional provision is a bit elaborate on this right compared to Nigerian Constitution. Section 12 (2) of the 1996 South African Constitution provides that everyone has the right to bodily and psychological integrity which include the right-

(a) To make decisions concerning reproduction;
(b) To security in and control over their body; and
(c) Not to be subjected to medical or scientific experiments without their informed consent.

Although this right is not constitutionally guaranteed in Nigeria, the Common law position on the right to give informed consent in medical treatment or medical experimentation applies in the country. It goes to say that a patient has autonomy over his body and he can refuse the best medical advice or course of treatment and may not be subjected to compulsory medical treatment unless he gives his consent.[40] The Nigerian Supreme Court decision in the case of the Medical and Dental Practitioners Disciplinary Tribunal vs. Dr. John E. N. Okonkwo[41] recognizes the right of a patient to self determination in the context of the freedom of thought, conscience and religion. The case also confirmed the common law position that there is some degree of constitutionally protected liberty interest in avoiding unwanted medical treatment, including life-sustaining medical treatment such as artificial nutrition and hydration and blood transfusion.

In that case, one Mrs. Martha Okorie (the patient), her husband and Dr. John Emewulu Nicholas Okonkwo all belong to the Jehovah's Witness, a religious sect that believes that blood transfusion is contrary to God's injunction. The patient, a 29 years old woman having had a delivery at a maternity home on 29/7/91 and was admitted at the Kenayo Specialist Hospital for a period of nine days from 8/8/91, because she had difficulty in walking and severe pain in her public area. A diagnosis was carried out and it was discovered that she had a serious ailment for which blood transfusion was recommended, but she refused to give consent to the treatment. On that ground, the Doctor at the Kenayo Hospital discharged her with a note that she refused blood transfusion despite appeals and threat that she might die.

She was taken to Jeno Hospital by her husband on 17/8/91 and gave Dr. Okonkwo (the respondent) a card signed by the patient and witnessed by her husband and uncle titled: "Medical Directive/Release." In that card, she directed that no blood transfusions be given to her even though the physicians deemed such vital to her health or life. She stated that the directive was in accordance with her rights as a patient and her beliefs as one of the Jehovah's witnesses. She accepted any added risk the refusal may bring and released doctors, anesthesiologists, hospital and their personnel from responsibility. The husband further signed another document on 17/8/91 wherein he instructed that blood should not be transfused on his wife and therein released Jeno Hospital and its personnel from any liability on the issue.

The respondent proceeded to treat the patient in accordance with her directive that is without blood transfusion but she died on 22/8/91. The respondent was charged before the Medical and Dental Practitioner Disciplinary

[34] It is submitted that the option left for health care providers where a patient defaults in the payment of his hospital bill is to bring an action in court for the recovery of payment of such debt.
[35] See *Cruzan v Director, Missouri Department of Health*, 497 U.S. 261 (1990); *Union Pacific R. Co. v Botsford*, 141 U.S. 250, 251 (1891).
[36] See Thomasma, D.C & Graber, G.C, *Euthanasia: Toward An Ethical Social Policy* (Continuum, New York, 1990) 192.
[37] 211 NY 125, 105 N.E. 29, 1914.
[38] See section 12 of the 1996 South African Constitution.
[39] See *R v Morgentaler (No.2)* [1988] 1 SCR 30; 44DLR (4th) 384; see also, Peter Hogg, *Constitutional Law of Canada* 3rd ed. (1992), p. 103, para 44.8.
[40] If he/she is still a minor or incapable of giving consent, the consent of his guardian or parents must be sought and obtained.
[41] (2001) 2 MJSC 67.

Tribunal on two counts of negligent and acting contrary to his oath as a medical practitioner and thereby conducted himself infamously in a professional respect contrary to the Medical and Dental Practitioner Disciplinary Act. The Tribunal found the respondent guilty of the two counts and suspended him from the profession for a period of six months. The respondent appealed to the Court of Appeal which allowed the appeal. The Medical and Dental Practitioner Disciplinary Tribunal thereafter appealed to the Supreme Court.

Unanimously dismissing the appeal, the Supreme Court, per Ayoola, JSC held *inter alia*:

"The patient's constitutional right to object to medical treatment or, particularly, as in this case, to blood transfusion on religious grounds is founded on fundamental rights protected by the 1979 Constitution as follows: (i) right to privacy: section 34; (ii) right to freedom of thought, conscience and religious: section 35. All these are preserved in section 37 and 38 of the 1999 Constitution respectively. The right to privacy implies a right to protect one's thought conscience or religious belief and practice from coercive and unjustified intrusion; and, one's body from unauthorized invasion. The right to freedom of thought, conscience and religion implies a right not to be prevented, without lawful justification, from choosing the course of one's life, fashioned on what one believes in, and a right not to be coerced into acting contrary to one's life, religious belief. The limits of these freedoms, as in all cases, are where they impinge on the rights of others or where they put the welfare of the society or public health in jeopardy. The sum total of the rights of privacy and of freedom of thought, conscience or religion which an individual has, put in a nutshell, is that an individual should be left alone to choose a course for his life, unless a clear and compelling overriding state interest justifies the contrary…"[42]

On his part, per Uwaifo, JSC added:

"I am completely satisfied that under normal circumstances no medical doctor can forcibly proceed to apply treatment to a patient of full age and sane faculty without the patient's consent, particularly if that treatment is of a radical nature such as surgery or blood transfusion. So, the doctor must ensure that there is a valid consent and that he does nothing that will amount to a trespass to the patient. Secondly, he must exercise a duty of care to advise and inform the patient of the risks involved in the contemplated treatment and the consequences of his refusal to give consent."[43]

[42] Per Ayoola, JSC at pp 103-104.

[43] See also, Sideway v Board of Governors of Bethlehem Royal Hospital (1985) 11 A.C 871; See also the South African case of *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T) where it was held that a person of sound mind may refuse medical treatment irrespective of whether it would lead to his death or not.

Other rights

Other rights that a patient enjoys in terms of his relationship with his health care providers include the right to choose own medical doctor and other health care providers; the right to a full information and disclosure of all materials facts concerning his health condition; the right to confidentiality and to the best standard of care available, and the right to an emergency treatment. Professional code of ethics recommends that physicians should provide patients with information that will have a bearing on medical care decision-making and communicate that information in a way that is comprehensible to patients. The right to tell the patient the truth and timely disclosure of medical error committed in the course of treatment. A medical error is a commission or an omission with potentially negative consequences for the patient that would have been judged wrong by skilled and knowledgeable peers at the time it occurred, independent of whether there were any negative consequences.[44]

When mistakes are not acknowledged in a timely manner, there may be a perception of a cover up and patients and public confidence in physicians and the health system may be undermined. The physician-patient relationship is of fiduciary character that is based on trust. This relationship obliges the physician to tell the truth and make disclosure of any error to his/her patient in accordance with the ethical principles of nonmaleficence, beneficence, respect for persons and justice. Timely disclosure will enable the patient to obtain timely and appropriate treatment to correct problems that may result from the mistake. Disclosure can thus prevent the patient from further harm and may prevent the patient from worrying needlessly about the cause of an ensuing medical problem. Failure to disclose will, however, expose the health care providers to legal liability and aggravated damages may be awarded. In short, a medical personnel owes his patient, duty of care and utmost good faith.

DOES THE RIGHT OF A SURGICAL PATIENT INCLUDE THE RIGHT TO DIE?

Another important issue emanating from the rights of a surgical patient is the current debate whether such rights include a "right to die." The "right to die" or "how to die" has become a crucial matter of concern for both terminally-ill patients and health professionals in recent times due to development in medical technology and perceptions of death. These perceptions vary within and between cultures, religions, philosophy, medicine and the law. The pertinent question therefore is this: Does a

[44] Examples include transfusion of HIV infected blood; foreign bodies like sponge or instrument left in surgical wounds; extravasations of drugs into subcutaneous tissue resulting in skin necrosis; forgetting a tourniquet in the upper arm resulting in arm gangrene and amputation; mistaking 5mls of medazolam for 5mg thereby delivering 25mg, and many trivial ones.

terminally ill individual have the "right" to decide how and when to end his/her life? This question introduces the issue of euthanasia in our contemporary societies.

According to Manson and McCall Smith, euthanasia is a quiet, painless death and intentional putting to death by artificial means of persons with incurable or painful disease.[45] Euthanasia is a complex and controversial issue which has assumed increasing prominence globally in recent times. It has attracted heated debate within medical, legal, religious and social circle with many arguing that there is nothing wrong legalizing it if it is voluntarily requested by a patient. Conversely, many more argue that it is morally wrong and therefore should not be legalized in any legal system. There are many arguments around this complex issue which is fuelled by a number of social, medical and legal factors or developments.[46]

Despite major advances in medicine and palliative care in the modern days, many patients still die in pain and distress. In this critical condition, some often entreat their doctors to put an end to their suffering by terminating their lives or by helping them to kill themselves.[47] While some people may think that there is nothing wrong or unlawful for a doctor to end a suffering patient's life on request, others oppose the idea on the ground that human life is sacrosanct and also because of the attendant gross abuses which might follow if euthanasia is legalized. This debate always attracts divergent and contradictory views.[48] It is against this background asserted that the issue of euthanasia has invested modern legal systems with numerous unresolved problems.[49]

The issue of euthanasia or the right to die is so divergent that demands a separate paper on its own. It is however necessary to mention that in some country such as the Netherlands and the State of Oregon in the United States, a patient has such a "right to die." Euthanasia is allowed in the American State of Oregon by virtue of the Death with Dignity Act 1994. [50] The Act allows terminally ill Oregon resident to obtain and use prescriptions from their physicians for self-administration, lethal medications. Termination of one's life in accordance with this Act does not constitute suicide. Under the Act, a person who is seeking physician-assisted suicide would have to meet certain criteria.[51]

Similarly, the Netherlands law permits voluntary active euthanasia (VAE).[52] The term euthanasia when used in the Netherlands refers to voluntary active euthanasia and other classifications of euthanasia are rarely meant. A Dutch Government bill which has given statutory force to the guidelines permitting VAE was passed by the Dutch lower parliament in November 2000 and by the upper house in April 2001. The Act provides *inter alia*: (1) VAE must be performed in accordance with "careful medical practice." Requests must be voluntary, well considered, persistent, and emanating from patients who are experiencing unbearable suffering without hope of improvement, and the doctor and the patient must agree that VAE is the only reasonable option. At least, one

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[45] Manson, J.K & McCall Smith, R.A, *Law and Medical Ethics* (Butterworths, London, 1991) 319; see also, Thomasma, D.C & Graber, G.C *Euthanasia: Toward An Ethical Social Policy* (Continuum, New York, 1990) 2, where euthanasia is defined as an art of painlessly putting to death persons suffering from painful and incurable diseases.

[46] These factors include the advent of modern technology and the availability (and use) of artificial measures to prolong life; the evolution of legal rights and duties of patients, and increased concern for the rights of the dying. It is submitted that increase in number of people affected by HIV/Aids, a growing population of elderly people and the declining influence of organized religion contribute to the prominence of euthanasia debate lately. See Slabbert, M & Van der Westhuizen, C. op cit, at 366; see also, Straus, S.A. "The 'Right to die' or 'Passive euthanasia': two important decisions, one American and the other South African" 1993 (6) *SACJ* 196-208; Ranchod "Another Legal View of Euthanasia" in Oosthuizen, GC, Shapiro, HA & Strauss, SA (eds) *Euthanasia* (Oxford University Press, 1978), p. 133.

[47] See Keown, J, *Euthanasia, Ethics and Public Policy* (Cambridge University Press, 2002), p. 1.

[48] See de Villiers, E "Euthanasia and Assisted Suicide: A Christian Ethical Perspective" 2002 (3) *Acta Theological Supplementum* 35 at 36-41.

[49] See Lupton, M.L. "Clarke v Hurst NO, Brain NO & Attorney-General Natal (unreported 1992 (N) - A Living will, Brain Death and the Best interests of a Patient" 1992 (3) *South African Journal of Criminal Justice* 342-348, 345. *Clarke case* has been reported in 1992 (4) SA 630 (D).

[50] Implementation of this Act was delayed by a court injunction which was eventually lifted on 27 October 1997. In November 1997, a measure asking for Oregon voters to repeal the Act was placed on the general election ballot. Voters rejected this measure by a majority of 60 to 40 per cent thereby retaining the Death with Dignity Act. See Measure 51, authorized by the Oregon House Bill 2954; See also, Oregon Revised Statute 127.800-127.995 available at http://egov.oregon.gov/DHS/ph/pas/docs/year7.pdf.

[51] The condition are as follows: the patient must be resident in Oregon and must be aged over 18 years; the person must make 2 oral and 1 written requests for assistance in dying to his or her physician; there must be at least 15 days interval between the first and the last request; the person must convince two physicians that he or she is sincere and not acting on a whim, and that the decision is voluntary; the person must not have been influenced by depression; the person must be informed of "reasonable alternatives", including but not limited to comfort care, hospice care, and pain control; the prescribing physician must request, but may not require, the patient to notify his or her next-of-kin of the prescription request; the patient must be terminally ill with a life expectance of less than 6 months; this prognosis must be confirmed by a second consultant physician; both doctors must confirm that the patient is capable of making this decision and confirm that the patient does not have medical condition that impairs his judgement, and the patient must self-administer the lethal medication. Under the Act, a person who complies with these requirements would receive a prescription for a barbiturate that would be sufficient to cause death. However, physicians are prohibited from inducing death by injection or carbon monoxide. Further, to comply with the law, physicians must report all prescriptions for lethal medications to the Department of Human Services (DHS). In 1999, additional requirement was included, that pharmacists must be informed of the intended use of the prescribed medications. Physicians and patients who adhere to the foregoing requirements of the Act are protected from criminal prosecution. See generally, Eight Annual Report 2006. Oregon Administrative Rules 333-009-000 to 333-009-0030 available at http://egov.oregon.gov/DHS/ph/pas/oars.shtml

[52] See *Schooheim case* Netherlands Jurisprudence (NJ) (1985) No. 106, 451; the case is named after the defendant doctor. It is also often referred to as the *Alkmaar case* (after the town where the case was first heard).

independent physician must be consulted, who must see the patient and give written opinion on the case.[53]

Euthanasia is not yet legalized in Nigeria, apart from the Constitution of the Federal Republic of Nigeria which guarantees the individual's right to life, both the Criminal Code and the Penal Code prohibit killing of human being. Thus, killing or hastening the death of another person in Nigeria no matter the intent is always treated as a murder case. It is long settled that neither the defense of necessity or duress can avail the accused. [54] Therefore, the position in Nigeria is that a patient does not have the "right to die" and any person, who assists a person to die, is liable to prosecution.

Sanctity of life is held in very high esteem under the Nigerian law. Section 306 of the Criminal Code provides: "It is unlawful to kill any person unless such killing is authorized or justified or excused by law."[55] Similarly, sections 311 and 326 of the Criminal Code prohibit euthanasia in whatever forms (either through counseling, procuring or aiding it). Section 311 provides: "A person who does any act or makes any omission which hastens the death of another person who, when the act is done or the omission is made, is labouring under the some disorder or disease arising from another cause, is deemed to have killed that other person."[56] Equally, section 326 says: "Any person who;

(1) Procures another to kill himself; or
(2) Counsels another to kill himself and thereby induces him to do so; or
(3) Aids another in killing himself; is guilty of a felony, and is liable to imprisonment for life."[57]

The combine effect of the above provisions is that euthanasia illegal in Nigeria and nobody has the right to terminate his/her life or be assisted to kill himself. Anyone who engages in it, apart from receiving professional disgrace, is liable to criminal prosecution which may attract lengthy term of imprisonment or death sentence.

Conclusion

As mentioned earlier in this article, everyone has a right which is constitutionally guaranteed and which the State is obliged to protect. These rights exist whether within or outside the hospital precinct and may not be derogated from on the ground that the subject of these rights is in the hospital as a patient. Violation of fundamental rights is enforceable in court and the violator may be liable to pay heavy damages and compensation. No matter the motive and genuine intention of the health care providers at saving the life of a patient, He/she must at all time realize that a patient has some rights which must be respected and that such a patient has the final say on any issue concerning his/her her health. Operating a patient or performing a slight experiment on the body of a patient without his/her express consent may amount to trespass to his/her person which is actionable.

However, in the case of emergency where the consent can not be obtained without undue delay or where delay may be dangerous to the health or life of the patient, it is submitted that the medical personnel has the right/duty to treat the patient to safe his life and he may conveniently rely on necessity or exigency as a good defense. If the patient is a minor, the consent of his parents or guardian may be obtained. As the patient has some rights against the health care provider, similarly, the patient has corresponding duties to his medical personnel. He has the duties to follow the treatment plan, provide complete and accurate health information, communicate comprehension

[53] The following conditions were put in place to forestall possible abuses: (i) all case must be reported to and evaluated by regional committee consisting of a lawyer, a doctor, and ethicist or another professional who is accustomed to dealing with ethical issues; (ii) VAE will not be punishable if performed by a doctor who has complied with the requirements listed in (1) above and has reported the case to local medical examiner; (iii) The local examiner shall send his or her report as well as the physician's report to the regional review committee. The medical examiner shall send a form to the prosecutor informing the prosecutor about the case and seeking permission for burial or cremation. In the event of any serious infringement, the prosecutor will withhold permission for burial or cremation until a further investigation has been conducted. The reports to the regional committee must demonstrate that all the requirements have been met; (iv) A doctor may agree to a request for VAE by a child between 12 and 16 years but only with the parents' consent. Requests by children aged 16 to 17 years do not require parental consent, though parents should be involved in the decision making process; (v) Doctor may terminate the life of an incompetent patient who has made his or her request for VAE by way of a signed advance directive. See http://www.minijust.nl:8080/a-beleid/fact/suicide.html (accessed on 2008/09/26); see also, Religion and Ethics – Ethical Issues: http://www.bbc.co.uk/ethics/euthanasia/infavour/infavour_1.shtml (accessed on 2009/04/20). See also art 293(2) of the Netherlands Criminal Code.

[54] See *Dudley v Stephens* (1884-5) 14 QBD 273, one of the English cases that constituted precedent in Nigerian Courts before Independence and which still remain of persuasive value to the Nigerian judiciary. In that case, Lord Chief Justice Coleridge, rejecting necessity as a defence to murder said at p. 287: "It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what?" It is not a defence for a doctor to claim the defence of duress that her or she felt compelled to terminate a patient's life by threat of death or serious injury made by the patient or relatives. Thus in *Howe* [1987] AC 417 at 456, Lord Mackay held: "It seems to me plain that the reason that it was for so long stated by writers of the authority that the defence of duress was not available in a charge of murder was because of the supreme importance that the law afforded to the protection of life and that it seemed repugnant that the law should recognize in any individual in any circumstances, however extreme, the right to choose that one innocent person should be killed rather than another."

[55] See also, section 220 of the Penal Code.

[56] See also, section 227 of the Penal Code; thus, with these provisions, under the Nigeria criminal law, any distinction between "act" and "failure to act" (omission) when both have the same consequence (effect) is nothing but an illusion. Criminal responsibility attached to such act or omission is the same.

[57] See also, section 228 of the Penal Code.

of medical instructions on procedure of treatment, and among others, the duty to provide assurance and ensure that financial obligations of the health care are met.