



BLOOD TRANSFUSION IN NIGERIA: ANALYZING THE CONFLICT BETWEEN FREEDOM OF RELIGION AND FUNDAMENTAL HUMAN RIGHT TO LIFE¹

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Abstract: Blood transfusion is defined as the transfer of blood into the vein of a human or animal recipient. The blood is either taken directly from a donor or is obtained from a blood bank. Blood transfusions are a therapeutic measure used to restore blood or plasma volume, to increase the number and concentration of red blood cells in persons with anemia in order to improve the oxygen carrying capacity of their blood. As in any conflict over fundamental freedoms, the states have an obligation to protect both freedoms. This paper seeks to examine the provisions of the constitution that supports or does not support this sensitive global issue which has led to a cause of concern to several human rights organizations.

Keywords: Blood Transfusion, Blood, freedom of religion, Fundamental human right, right to life.

Introduction

This research analyses critically the conflict between two fundamental rights of particular importance; the right to life, without which no other right has any meaning, and the right to religious freedom which ensures that people can make the most essential choices in their lives. Blood transfusion is defined as the transfer of blood into the vein of a human or animal recipient. The blood is either taken directly from a donor or is obtained from a blood bank. Blood transfusions are a therapeutic measure used to restore blood or plasma volume, to increase the number and concentration of red blood cells in persons with anemia in order to improve the oxygen carrying capacity of their blood and to treat shock.²

This practice of blood transfusion is strongly rejected by the religious doctrine of Jehovah's witnesses, a recognized global Christian organization.

As in any conflict over fundamental freedoms, the states have an obligation to protect both freedoms. This work seeks to examine the provisions of the constitution that supports or does not support this sensitive global issue which has led to a cause of concern to several human

rights organization as by virtue of Section 33(1)(b) of the 1999 constitution of the Federal Republic of Nigeria (as amended) which states that every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence which he has been found guilty in Nigeria. Section 38(1) of the 1999 constitution of the Federal Republic of Nigeria every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.³

The constitution in section 33(1) (b) states a fundamental right to life, the right to freedom of religion is also stated in the constitution in section 38(1).⁴Evaluating the conflict between these rights; right to life and freedom of religion with regards to the issue of refusal of blood transfusion by a religious organization. This practice is being carried out by Jehovah's Witnesses (a religious organization protected

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² David, H.Y, Encyclopedia Britannica

J Martinez-Terror , (2007) <https://www.eprints.ucm.es>

³ Constitution of the Federal Republic of Nigeria (1999) (as amended)

⁴ Section 33(1)(b), 38 Constitution of Federal Republic of Nigeria 1999(as amended)



by the constitution) refusing blood transfusion in life threatening circumstances.

Jehovah's Witnesses also refusing this blood transfusion on behalf of their kids who are not of consenting age. Should practicing Jehovah's Witnesses be allowed to exercise this right when it questions the life of their children who require blood transfusion to live; does the parent's right to religion supercede the child's fundamental right to life. In the case of **Esanubor v Faweya**, the Nigerian court of appeal ruled that a Nigerian child cannot refuse a blood transfusion.⁵

This research seeks to analyze the impact this could have on a child knowing the present fact that most children who attain age of consent at adult age usually denounce their parents' religions. It also brings the question whether the process of allowing or not allowing blood transfusion a parental responsibility or the states responsibility?

A critique of the bible verse against blood transfusion, "(Genesis 9:4) its blood- you must not eat. (Deutonomy 12:23)" do not eat blood, because the blood is the life, and you must not eat the life with the flesh. A scriptural directive to not eat blood being construed to also not receiving blood transfusion to save life can be viewed as an irony. As "blood is life", hence why it should be freely given by others to those who need it to preserve their life in life threatening circumstances.

It brings the question, could this rule written centuries ago before the advancement of modern medical technologies on blood transfusion be binding and applicable to modern religious standards, being argued by modern scholars and human rights activists as inhumane and absurd.

Jehovah's Witnesses are permitted access to most forms of medical care, but must not receive blood transfusions under any circumstances. The renunciation of blood is viewed as an area that considers it the only true religion. Jehovah's Witnesses are not permitted to consume or transfuse blood or the four blood fractions (red blood cells, white blood cells, platelets and plasma), but are permitted to use blood fractions.⁶

The numerous changes the Jehovah's Witnesses has made regarding the use of blood for decades has resulted in a stance that it has biblical inaccuracies, most

Christian religions recognize that the bible does not forbid Christians from transfusing blood. The Jehovah's Witnesses also states that God's standard is not to store blood, but allows Jehovah's Witnesses to use blood fractions obtained from stored blood. Jehovah's witnesses also display double standards, they use blood-based medicines extensively, but donating blood is prohibited.

At one point, Jehovah's Witnesses instructed Christians not to allow vaccinations and organ transplants, but both were allowed in the 1980s. Jehovah's Witnesses have also made significant changes to its acceptable use of blood. Before deciding to refuse blood when lives are in danger, all Jehovah's Witnesses should understand what it means for the Jehovah's Witnesses society to make such changes to the doctrine of life and death.

Jehovah's Witnesses view the issue of blood transfusion as a religious issue rather than a medical one. Both the old and new testaments clearly command to abstain from blood according to the following scriptures (Genesis 9:4; Leviticus 17:10; Deutonomy 12:23, Acts 15:28,29) ⁷ Also, God sees blood as representing life so they avoid drawing blood not only out of submission to God, but out of respect for God as the one who gives life.

In the past, the medical community generally considered transfusion avoidance strategies, so called bloodless therapy, to be extreme and even suicidal, but in recent years the situation has changed. For example, in 2004 an article was published in the journal of medical education stated that "many of the techniques developed for use with Jehovah's Witness patients will become standard practice in the years to come." A 2010 Heart, lung and circulation article noted, "No blood transfusion surgery should be performed." Although limited to Jehovah's Witnesses, it should be an integral part of your daily surgical procedure."⁸ Today, thousands of doctors around the world use blood-saving techniques to perform complex surgeries without blood transfusions. Such transfusion alternatives are also used in developing

⁵ Esanubor v faweya. All FWLR(PT478) 380 (CA)

⁶ Paul Grundy (june 2005, updated march 2022)

<https://www.jwfacts.com/jehovah'switnessesandbloodtransfusions>

⁷ New world translation bible

⁸ The journal of thoracic and cardiovascular surgery, volume 134, no.2, pp. 287-288; Texas Heart Institute Journal, volume 38, no.5, p.563; Basics of Blood Management, p.2; and continuing Education in Anaesthesia, Critical Care & pain volume4, no.2, p.39



countries and are requested by many patients who are not Jehovah's Witnesses.⁹

In analyzing the conflict between the freedom of religion and fundamental right to life, this research is carried out to make relevant the position of the law with regards to these rights.

This research investigates the conflict between these two fundamental human rights with regards to the issue of ejection of blood transfusion in medical and life-threatening situations. This research will further examine how the state must engage in a balancing process to determine which of them must prevail in any particular case.

CONCEPTUAL FRAMEWORK

With regards to all the contextualizing and mediating elements, the conceptual framework in this research builds a bridge between the context, theory (both explicit and implicit), and the way the study is organized. When thought of holistically, a conceptual framework functions as the connective tissue of a research study in that it aids in integrating knowledge of the various influences on a particular research study to produce a more deliberate and methodical process of connecting the various parts of a study.¹⁰ Every Nigerian citizen has the right to freedom of religion and thought.¹¹ The free and unrestricted practice of one's faith in all its manifestations is covered by this provision. The freedom to practice, teach, and observe one's religion in public is thus guaranteed by the Constitution for every individual in Nigeria. Despite this, issues can still occur when a patient objects to a medical procedure, such as a blood transfusion, for ethical or physical reasons. Should the doctor in this case heed the patient's objection to medical care on moral or ethical grounds, even if doing so will result in the patient's death?

Definition of Terms

1. Blood

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<https://jw.org/whydontjehovahswitnessesacceptbloodtransfusions> (Accessed 2022)

¹⁰ R. H. Rogers, 'Using paired depth interviews to collect qualitative data'. The Qualitative Report, (2016) 21(9), 1708-1712. Available at <http://nsuworks.nova.edu/tqr/vol21/iss9/9> > accessed June 14, 2023

¹¹ Section 38 of the Federal Republic of Nigeria's 1999 Constitution (as amended).

¹² Sahib Mohammad Hussain, 'Physiology of Blood', (2021), available at:

'Blood' is a connective tissue in fluid form.¹² It is considered as the 'fluid of life' because it carries oxygen from lungs to all parts of the body and carbon dioxide from all parts of the body to the lungs. Due to the impact of an adverse environment on highly vulnerable cells, death will occur if blood flow is interrupted within minutes. The constancy of the composition of the blood is made possible by the circulation, which conveys blood through the organs that regulate the concentrations of its components.¹³

In the lungs, blood acquires oxygen and releases carbon dioxide transported from the tissues. The kidneys remove excess water and dissolved waste products. Nutrient substances derived from food reach the bloodstream after absorption by the gastrointestinal tract. Glands of the endocrine system release their secretions into the blood, which transports these hormones to the tissues in which they exert their effects. Many substances are recycled through the blood; for example, iron released during the destruction of old red cells is conveyed by the plasma to sites of new red cell production where it is reused. Each of the numerous components of the blood is kept within appropriate concentration limits by an effective regulatory mechanism. In many instances, feedback control systems are operative; thus, a declining level of blood sugar (glucose) leads to accelerated release of glucose into the blood so that a potentially hazardous depletion of glucose does not occur.¹⁴

A circulatory system is absent in unicellular creatures, early embryos of higher forms of life, and simple multicellular animals. These organisms can easily diffuse wastes into their surrounding media and can easily collect nutrients and oxygen due to their small size. Sponges and coelenterates (such as jellyfish and hydras) also lack a circulatory system; instead, water, either sea or fresh, is pushed through spaces inside the

<https://www.researchgate.net/publication/349519100> accessed June 14, 2023

¹³ C. Lockard Conley & Robert S. Schwartz 'Blood; biochemistry' available at <https://www.britannica.com/science/blood-biochemistry/Laboratory-examination-of-blood> > accessed June 14, 2023

¹⁴ Sahib Mohammad Hussain, 'Physiology of Blood', (2021), available at: <https://www.researchgate.net/publication/349519100> accessed June 14, 2023



organisms to supply nutrients and oxygen to all of the cells in these bigger multicellular animals. Larger and more complicated organisms need some form of blood circulation to deliver enough oxygen and other materials. In the majority of these species, the blood travels through a membrane for respiratory exchange, which may be found in the gills, lungs, or even the skin. The blood removes carbon dioxide and absorbs oxygen there.¹⁵

In the animal kingdom, blood cellular makeup differs from animal group to animal group. The majority of invertebrates have a variety of big blood cells that can move like amoebas. Some of them help move things around, while others can engulf and eat waste or foreign objects (phagocytosis). But invertebrate blood has comparatively fewer cells than those of vertebrates. There are numerous classes of amoeboid cells (white blood cells, or leukocytes), as well as cells that aid in clotting (platelets, or thrombocytes), in vertebrates.¹⁶

Blood composition and the design of the circulatory system have both been significantly influenced by oxygen requirements. Small worms and mollusks are examples of primitive creatures where the plasma simply dissolves the delivered oxygen. Pigments with a relatively high oxygen transport capacity are found in larger, more sophisticated animals, which have higher oxygen requirements.¹⁷ In all vertebrates as well as some invertebrates, the iron-containing red pigment hemoglobin is present. Hemoglobin is only found in red cells, also known as erythrocytes, in nearly all vertebrates, including humans. Mammalian red cells lack a nucleus, whereas the red cells of lesser vertebrates (such as birds) do. Mammals differ greatly in the size of their red blood cells; whereas goat red blood cells are considerably smaller than human red blood cells, the goat makes up for this by having many more red blood cells per unit of blood volume. Little difference exists between species in the amount of hemoglobin present in red blood cells. Some crustaceans have hemocyanin, a protein that contains copper but is chemically unrelated

to hemoglobin. When oxygen is present, hemocyanin is blue, and when oxygen is absent, it is colorless. Some annelids have the iron-containing green pigment chlorocruorin, others the iron-containing red pigment hemerythrin. In many invertebrates the respiratory pigments are carried in solution in the plasma, but in higher animals, including all vertebrates, the pigments are enclosed in cells; if the pigments were freely in solution, the pigment concentrations required would cause the blood to be so viscous as to impede circulation.¹⁸

The Importance of Blood

Blood assumes an essential part of controlling the body's frameworks and looking after homeostasis.¹⁹ It performs many capacities inside the body, including:

- a) Providing oxygen to tissues (bound to hemoglobin, which is conveyed in red cells)
- b) Providing supplements, for example, glucose, amino acids, and unsaturated fats either broken down in the blood or bound to plasma proteins (e.g., blood lipids)
- c) Evacuating waste, for example, carbon dioxide, urea, and lactic corrosive
- d) Immunological capacities, including dissemination of white platelets and identification of remote material by antibodies
- e) Coagulation, which is one a player in the body's self-repair component (blood thickening by the platelets after an open injury with a specific end goal to quit dying)
- f) Dispatcher capacities, including the vehicle of hormones and the motioning of tissue harm.
- g) Directing body pH
- h) Directing center body temperature
- i) Water powered capacities, including the control of the colloidal osmotic weight of blood

2. Blood Transfusion

A blood transfusion is a common medical procedure in which you receive donated blood through a small tube inserted into a vein in your arm. This potentially life-

¹⁵ Sahib Mohammad Hussain, 'Physiology of Blood', (2021), available at:

<https://www.researchgate.net/publication/349519100> accessed June 14, 2023

¹⁶ C. Lockard Conley & Robert S. Schwartz 'Blood; biochemistry' available at

<https://www.britannica.com/science/blood-biochemistry/Laboratory-examination-of-blood> > accessed June 14, 2023

¹⁷ Ibid

¹⁸ C. Lockard Conley & Robert S. Schwartz 'Blood; biochemistry' available at

<https://www.britannica.com/science/blood-biochemistry/Laboratory-examination-of-blood> > accessed June 14, 2023

¹⁹ 'What is the importance of blood in human body?', available at <https://www.tutorialspoint.com/what-is-the-importance-of-blood-in-human-body> > accessed June 17, 2023



saving operation can assist in replacing blood lost during surgery or from an injury. If a disease prevents your body from producing blood or some of the components of blood properly, a blood transfusion may also be helpful. Blood transfusions typically go smoothly. When issues do arise, they are frequently minor.²⁰ Across many cultures, humans have regarded blood as a substance with important regenerative properties since long before blood transfusions became feasible as a form of medical therapy. The idea of transferring new blood to a sick person to restore his or her health is quite old, but until the modern era it was only possible in the realm of myth. In the *Odyssey*, for example, Odysseus is able to temporarily revitalize shades in the underworld—allowing them to communicate with him—by giving them the blood of a sacrificed animal.²¹

The two scientific breakthroughs that made blood transfusion conceivable as a medical treatment were William Harvey's pioneering description of the circulation of blood through the body, published in 1628, and Christopher Wren's invention of a syringe for injecting substances intravenously around 1659.²² Soon physicians in England and France began experimenting with transfusions between animals. In 1666 the English physician Richard Lower performed the first successful transfusion between animals.²³

On June 15, 1667, the first direct blood transfusion to a human was performed by the physician Jean-Baptiste Denis, when he gave a feverish young man approximately 12 ounces of blood taken from a lamb. The young man recovered quickly. Shortly afterward, Denis performed another transfusion that also appeared to be successful. The third and fourth transfusion patients fared badly, though. The third died shortly after having a transfusion, and the fourth died while a transfusion was in progress. The fourth patient's wife accused Denis of murder. He was brought before a court and cleared of wrongdoing, but the court also ruled to ban blood transfusions. The French parliament, the Catholic Church, and the Royal Society soon passed their own bans on blood transfusions, and the procedure ceased to

be used in mainstream medicine until the mid-19th century.²⁴

We now know that there was no way to perform a blood transfusion safely prior to Karl Landsteiner's discovery of blood types in 1900–01. Mixing blood from two non-compatible blood types causes an immune response that can be fatal. It's possible that this caused the death of one or both of Denis's patients, although we can't be certain.

Importance of Blood Transfusion

A unit of blood does so much for patients in need. The gift of life is donated, tested, processed and sent to hospitals' transfusion service departments where more important work is done to ensure it is compatible with the recipient.²⁵ Once the unit is ready to go, it has a number of advantages to offer. These are some of the benefits your donated blood can provide for patients in need:

1. Increase low hemoglobin levels: low hemoglobin can cause damage to body organs and tissues due to low oxygen levels.
2. Help stop bleeding: bleeding may not be controlled if platelets and/or clotting factors are low.
3. Keeps the heart pumping: low blood volume can lead to low pressure and the heart may not be able maintain the circulation of blood.
4. Help with serious blood infections when other methods fail. Granulocyte transfusions, for example.
5. Provide red cells and platelets when the bone marrow is compromised: as with blood cancers, bone marrow transplants, chemotherapy.
6. Provide red cells and platelets for patients with blood disorders: such as sickle cell, thalassemia, myelodysplasia, aplastic anemia.
7. Save a person's life.

The Concept of Right To Life

The right to life is one of the essential rights in existence in Nigeria. Indeed, the importance of this right is more highlighted when the State takes away the right for one to choose death. This simply means that a person who has the right to live cannot choose the right to die. The issue of euthanasia and suicide in Nigeria are

²⁰ 'Blood Transfusion' available at <https://www.mayoclinic.org/tests-procedures/blood-transfusion/about/pac-20385168> > accessed May 18, 2023

²¹ The Strange, Grisly History of the First Blood Transfusion , available at <https://www.britannica.com/story/the-strange-grisly-history-of-the-first-blood-transfusion> accessed May 17, 2023

²² Ibid

²³ The Strange, Grisly History of the First Blood Transfusion , available at <https://www.britannica.com/story/the-strange-grisly-history-of-the-first-blood-transfusion> accessed May 17, 2023

²⁴ Ibid

²⁵ Billie Rubin, 'Benefits of Blood Transfusions', available <https://stanfordbloodcenter.org/benefits_of_blo/ > accessed June 17, 2023



criminalized on the basis that the State so values the individual's life. The constitution of Nigeria elevates this right to a fundamental right and the right to life assumes the first position. It is common for State governments to reemphasize on their inalienable duty to protect lives and properties of citizens at any slightest opportunity.

In order to have a proper grasp of the concept, we will attempt to break the concept down into "life" and "Right"

(a) What is life?

Tom Baraski²⁶ saw life as 'the aspect of existence that processes, acts, reacts, evaluates, and evolves through growth (reproduction and metabolism). The crucial difference between life and non-life (or non-living things) is that life uses energy for physical and conscious development. Life is anything that grows and eventually dies, i.e., ceases to proliferate and be cognizant'. Merriam Webster Online dictionary defined life in varied forms as, 'the quality that distinguishes a vital and functional being from a dead body; a principle or force that is considered to underlie the distinctive quality of animate beings; an organismic state characterized by capacity for metabolism, growth, reaction to stimuli, and reproduction'.²⁷ Now, one can safely define life as the state of being alive; the state of living of any organism particularly man. Working with this definition therefore one will hold that every human is deemed to be alive once such human has safely proceeded from the mother's womb as described by Section 307 of the Criminal Code.²⁸

The next concept here is the concept of rights.

b) What is right?

'Rights' are entitlements (not) to perform certain actions, or (not) to be in certain states; or entitlements that others (not) perform certain actions or (not) be in certain states.²⁹ It is further defined as 'a noun meaning an entitlement to something, whether to concepts like justice and due process, or to ownership of property or some interest in property, real or personal. These rights include various freedoms, protection against interference with enjoyment of life and property, civil rights enjoyed by citizens such as voting and access to the courts, natural rights accepted by civilized societies, human

rights to protect people throughout the world from terror, torture, barbaric practices and deprivation of civil rights and profit from their labor, and such American constitutional guarantees as the right to freedoms of speech, press, religion, assembly and petition and as an adjective it is defined as just, fair, correct.'³⁰ Suffice it to say that right is an entitlement and may depend on whether it is a legal entitlement or social or even moral entitlement.

On the understanding that we now know right as entitlement to life, it behooves on us to clearly seek the meaning of the concept right to life. Section 33 of the 1999 Constitution embodied the right to life in Nigeria. It provides as follows;

(1) Every person has a right to life, and no one shall be 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 in Nigeria.

(2) A person shall not be regarded as having been deprived of his life in contravention of this section; if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary-

(a) For the defense of any person from unlawful violence or for the defense of property;

(b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or

(c) For the purpose of suppressing a riot, insurrection or mutiny.'

Right to life is one of the fundamental rights provided for by the Nigerian Constitution. Chapter IV of the 1999 Constitution of Nigeria made several provisions which it termed fundamental rights. 'The phrase 'fundamental rights' is defined by learned authors of Black's Law Dictionary³¹ at page 744 as:

1. A right derived from natural or fundamental law. 2. Constitutional law. It is a significant component of liberty, encroachment of which are rigorously tested by Courts to ascertain the soundness of purported governmental justification. A fundamental right triggers strict scrutiny to determine whether the law violates the Due Process Clause or Equal Protection Clause of the 14th Amendment. As enunciated by the Supreme Court,

²⁶ Philosophy Now, Issue 101 available online at https://philosophynow.org/issues/101/What_Is_Life accessed on

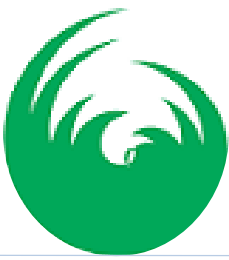
²⁷ <https://www.merriam-webster.com/dictionary/life>> accessed May 18, 2023

²⁸ Cap C38 LFN 2004

²⁹ Wenar, Leif, "Rights", The Stanford Encyclopedia of Philosophy (Spring 2021 Edition), Edward N. Zalta (ed.), URL=

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fundamental rights include voting, interstate travel, and various aspects of privacy (such as marriage and contraception rights)....³²

In *Ukaobasi v Ezimora & Ors*,³³ Yakubu JCA defined Fundamental Rights as, ‘The organic law that establishes the governing principles of a nation or State, esp., constitutional law - Also termed organic law; ground - law.’ Tur JCA opined that, ‘Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999 describes rights set out from Section 33-45 as ‘fundamental rights.’

‘The Nigerian Constitution seeks to protect and safeguard the basic or fundamental rights of all citizens. By its nature, fundamental right is a right that stands out and above the ordinary laws of the land which is in fact antecedent to any political society. It is a right with international flavor as can be seen in the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act. Fundamental rights are guaranteed to all citizens and any person who alleges that any of the provision has been or likely to be breached can approach the Court for a redress. Section 46 (1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides that: - 46(1) Any person who alleges that the provision of this Charter has being, is being, or is likely to be contravened in any state in relation to him may apply to the High Court for redress.’³⁴

Ogunwimiju JCA(as she then was) supported this when she held that;

*‘The importance of Fundamental Rights to the citizenry cannot be over-emphasized. They are rights that are not only basic to humans; they form the bedrock for a free society devoid of forces of unbridled aggression, oppression, repression, authoritarianism. They have been entrenched in Chapter IV of the 1999 Constitution of Federal Republic of Nigeria (as amended) due to their sacrosanct nature and importance. When applicants approach the Courts for the enforcement of these rights, the Court must within reasonable limits do all that is necessary to ensure that these rights are protected.’*³⁵

In *Ajoku v EFCC & anor*, Yakubu JCA went the extra mile to analyse the nature of fundamental rights when he held as follows:

³² Ibrahim v Nigerian Army, (2015) LPELR-24596(CA)

³³ (2016) LPELR-40174(CA)

³⁴ Per Lamido JCA in Ihua-Maduenyi V. Robinson & Ors (2019) LPELR-47252(CA)

³⁵ Okafor & Ors v. Ntoka & Ors (2017) LPELR-42794(CA)

³⁶ (1985) LPELR - 2940 (SC) @ pages 333-34

The entrenchment of fundamental rights and the mode of enforcement of their breaches in the Nigerian Constitutions over the years, undoubtedly underscores its importance and the need to zealously protect the sanctity of human life and the liberty of every Nigerian citizen, as guaranteed under Section 35 of the Constitution of the Federal Republic of Nigeria, 1999, as amended. Therefore, the Courts do not shirk their responsibilities in ensuring that the human rights of the citizens are not compromised and on no account should such rights be swept under the carpet or capriciously tampered with by any person, government or any governmental agency under any guise, without a lawful justification.’

The Supreme Court, in espousing the ideals and quite essence of fundamental rights in *Ransome - Kuti & Ors v. Attorney General of the Federation & Ors*³⁶, per his Lordship, Eso, JSC., succinctly stated thus:

*‘What is the nature of a fundamental right? It is a right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to a civilized existence and what has been done by our Constitution, since independence, starting with the Independence Constitution, that is, the Nigeria (Constitution) Order in Council 1960 up to the present Constitution, that is, the Constitution of the Federal Republic of Nigeria, 1979 (the latter does not in fact apply to this case: it is the 1963 Constitution that applies) is to have these rights enshrined in the Constitution so that the rights could be ‘immutable’ to the extent of the ‘non-immutability’ of the Constitution itself. It is not in all countries that the Fundamental Rights guaranteed to the citizen are written into the Constitution.’*³⁷

The Concept of Religion

Black’s Law Dictionary defines ‘religion’ as, ‘a system of faith and worship usually involving belief in a supreme being and usually containing a moral or ethical code... Such a system recognized and practiced by a particular church, sect, or denomination.’³⁸ Religion refers to the attribute of the human being to go beyond himself into relationship with the divine or the Supreme Being. Tylor sees religion as ‘belief in spiritual beings’.³⁹

³⁷ 1(2018) LPELR-46692(CA)

³⁸ Garner, B. A. (2014). Black’s Law Dictionary. 10th ed. St Paul, MN: Thomson Reuters.

³⁹ E B Tylor, ‘Animism’ in WA Lessa & EZ Vogt (eds), Reader in Comparative Religion: An Anthropological Approach (2nd Ed, New York: Harper & Row Publishers, 1965) p.10



Durkheim added more flesh to this rudimentary understanding of religion by saying that it is “a unified system of belief and practices (rite) relative to sacred things, that is to say, things set apart and surrounded by prohibitions –beliefs and practices that unite its adherents in a single moral ecommunity called a Church”.⁴⁰ Goetz observed that finding a definition of religion that covers the distinctive features of the religions in the world is the first difficulty in discussing religion.⁴¹ The difficulty, according to him, comes primarily from what he considered as a fundamental and radical divide in the understanding of religion. There is the Western conception on one hand; and on the other, there is the conception of religion found amongst societies termed primitive society by religion scholars.

The Western notion is theistic in nature and is influenced greatly by the Western speculative, intellectualist and scientific approach to knowledge. This Western approach is equally a product of the dominant Western religious pattern which has been characterized by Judaism, Christianity and Islam. Theism as a pattern of religious belief involves belief in a transcendent deity that is distinct from all else, thereby involving the notion of two worlds – the world of the deity and the world of humans.⁴² On the other hand, in the so-called primitive societies, the Western concept of religion cannot fit in as there are no such two worlds. These societies do not consider the deity to be anywhere outside the world. The deity is immanent in the world. The conclusion from this is that regardless of the problem of finding an all-embracing definition of religion, the phenomenon of religion is found in all cultures and societies.

Similarly, Arinze described religion as the transcendent dimension of culture.⁴³ Religion, therefore, involves a relationship with a spiritual being whether in the theistic sense or in the immanent sense. This lends credence to the description of man as a homo religiosus, meaning that religion is part and parcel of human nature. Consequently, allowing him to practice religion, as freedom of religion connotes, is allowing him to be truly human. Man is not fully alive if he is not allowed the

freedom to reach out of himself into relationship with the divine. In doing this, the human person defines himself in a most spectacular way as the only creature capable of reaching out of himself to establish a relationship with the divine. Political communities, to cater well for their citizens and individuals within their territories, have therefore to juridically allow them freedom of religion.

Freedom of Religion Under the 1999 Nigerian Constitution(as Amended)

The Nigeria constitution guarantees the right to freedom of religion as one of the fundamental rights in Section 38 of the 1999 Constitution (as amended) provides:

(1) *Every person shall be entitled to freedom of thought, conscience, and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.*

(2) *No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction, ceremony or observance relates to a religion other than his own, or a religion not approved by his parent or guardian.*

(3) *No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination.*

(4) *Nothing in this section shall entitle any person to form, take part in the activity or be a member of a secret society.”*

It is not only the Nigerian Constitution that understands religion as an inherent attribute of the human person. Many international legal instruments do. They include the Universal Declaration of Human Rights (UDHR),⁴⁴ the International Covenant on Civil and Political Rights (ICCPR), the African (Banjul) Charter on Human and Peoples’ Rights,⁴⁵ the European Convention on Human

⁴⁰ E Durkheim, *The Elementary Forms of Religious life*, (New York: Oxford University Press, 2001) p.46.

⁴¹ J. Goetz., “Religion” in B L Marthaler (ed), *New Catholic Encyclopedia*, (2nd Ed, Michigan: Thomson Gale, vol. 12, 2002) p.56.

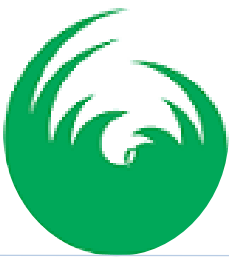
⁴² J O Ezeanokwasa, *The Legal Inequality of Muslim and Christian Marriage in Nigeria: Constitutionally Established*

Judicial Discrimination, (New York: Edwin Mellen Press, 2011) p.14.

⁴³ F. Cardinal Arinze, *Religions for Peace: A call for Solidarity to the religions of the World*, (New York: Doubleday, 2002) p.41.

⁴⁴ The Universal Declaration of Human Rights 1948, art. 18.

⁴⁵ The African (Banjul) Charter on Human and Peoples’ Rights 1981 (Entry into force in 1986), art. 8.



Rights (ECHR),⁴⁶ the Arab Charter on Human rights (ACHR) 2004,⁴⁷ and the American Convention on Human Rights.⁴⁸ The only difference amongst them is in the words used to convey the idea. Rather than use the words every person most of these legal instruments use the word everyone. For instance, the ICCPR provides in article 18(1): “Everyone shall have the right to freedom of thought, conscience and religion....” The African (Banjul) Charter on Human and Peoples’ Rights uses neither ‘every person’ nor ‘everyone’. It simply makes an impersonal guarantee of the freedom thus: “freedom of conscience, the profession and free practice of religion shall be guaranteed.”⁴⁹ All the same everyone can be read into it from the other provision of the article 8 relative to the derogation of freedom of religion where it uses everyone in the negative sense: “No one may, subject to law and order, be subjected to measures restricting the exercise of these freedoms.”

The freedom of religion is guaranteed by the 1999 constitution is not a solitary right to hold a religion but rather is a compound right embracing other freedoms that define religion as involving rational process, and a social reality, which thrives in interpersonal dynamics and concrete civil presence. It is guaranteed alongside freedom of thought and conscience. This is not an anomaly because religion ordinarily involves thought and conscience even though thought and conscience can exist without necessarily leading up to having a religious belief. By ringing these three concepts together, the Constitution recognizes this internal bond which Oraegbunam refers to as the “conceptual koinonia among the three concepts of thought, conscience and religion.”⁵⁰ The Oxford Advanced Learner’s Dictionary defines ‘thought’ as;

“Something that you think of or remember; a person’s mind and all the ideas that they have in it when they are thinking; the power or process of thinking; the act of thinking seriously and carefully about something, power

or process of thinking; a feeling of care or worry; an intention or a hope of doing something”.

Adults are in relationship with God because they are deemed to have analyzed and considered the relationship to be beneficial to them. Infants and children who have not acquired mature analytical faculties relate with the object of religion on the authority of their parents or guardians. Thus, Chidili, believes that religion without conscience is nothing but a misnomer, and religion without thinking is outright fanaticism.⁵¹ This however, does not mean that everything about religion is thought because there are always some non-rational aspects of religion.⁵² At the same time, a religion that is majorly irrational would not be worth the name⁵³ since that would be contrary to the nature of the religious object, understood as the “author and epitome of rationality”, and whom the religious individual worships in conscience as the Wholly Other.⁵⁴ In spite of religion embracing thought and conscience, they have independent existence outside of religion. This explains why the Constitution, like other legal instruments, lists them separately. By so doing the Constitution guarantees their being enjoyed outside of religion. This is the basis of the right to not have a religion. To give fuller effects to the right to freedom of religion, the Constitution guarantees ancillary rights. These are: freedom to change religion or belief, freedom to manifest religion, freedom to propagate religion, and freedom to not have a religion. Given that the Constitution introduces these ancillary freedoms with ‘include’, it means that the list is not exhaustive. Court can, on case by case basis, determine other freedoms that can be added to the list. These freedoms are as follows;

(a) Freedom of Thought and Conscience

Freedom of thought and conscience protects an individual from every coercion or restriction in holding a thought. It could be religious, atheistic or merely philosophical. The right protects the most fundamental aspect of the human person, which has to do with his

⁴⁶ The European Convention on Human Rights 2010, art. 9(1).

⁴⁷ The Arab Charter on Human rights 2004 (Entry into force in 2008), art. 30(1)

⁴⁸ The American Convention on Human Rights 1969 (Entry into force in 1978), art. 12(1).

⁴⁹ The African (Banjul) Charter on Human and Peoples’ Rights, art. 8.

⁵⁰ I K E Oraegbunam, ‘Islamic Law, Religious Freedom and Human Rights in Nigeria’ (2012) *African Journal of Law and Criminology*, vol 2. No. 1

⁵¹ B Chidili, “Religious Fanaticism” (1998) *West Africa Journal of Ecclesial Studies (Wajes)*, Vol. 4, 82

⁵² I K E Oraegbunam, Op. cit.

⁵³ F R Tenant, *Philosophical Theology*, (London: Cambridge University press, Vol. 1, 1927) pp. 306-332.

⁵⁴ R Otto, *The Idea of the Holy*, (London: Oxford University Press, 1972) pp. 25-30. C



rational faculty--man's crowning attribute. Any inhibition or force to his mental processes and belief would gravely undermine his dignity. After doubting the existence of everything, the only thing, the French Philosopher, Rene Descartes, could not doubt be that he was doubting. He concluded that he was alive because he was thinking and a fortiori doubting; hence his conclusion: *cogito ergo sum* –

*I think, therefore, I am. Freedom of thought and conscience also embraces the right to conscientious objection. Article 10(2) of the Charter of Fundamental Rights of the European Union 2000 expressly incorporates it into the concept of freedom of thought, conscience, and religion. Section 34(2)(c) of the 1999 Constitution recognizes conscientious objection by providing for alternative labour to be given to those who have conscientious objection in serving in the armed forces of the Federation. Thus it can be comfortably read into section 38 of the 1999 Constitution.*⁵⁵

(b) Freedom of religion embraces freedom of belief.

The second and third mentions of 'religion' in section 38(1) come with 'belief' connected to it with 'or' signifying alternation. Thus 'belief' can be similarly joined to the first mention of 'religion' in section 38(1) and in all the sections. Freedom of religion issues have bothered man from the earliest of human history traversing the Old Testament times of the people of Israel and their neighbours through the Greek and Roman civilizations to our times under the international order being moderated by the United Nation. Article 18 of the ICCPR is similar to section 38(1) of the 1999 Constitution. On the interpretation of 'religion' and 'belief' in article 18 of the ICCPR, the Human Right Committee of the UN directs that the terms 'belief' and 'religion' are to be broadly construed to embrace theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.⁵⁶ Accordingly, in *Campbell and Cosans v. UK* the court held that "a belief... denotes views that attain a certain level of cogency, seriousness, cohesion and importance".⁵⁷ The

onus of proving these characteristics lie on the applicant. However, the burden of proof is not very high.⁵⁸ This liberal attitude to the proof of religion or belief has led the court to restrain from trying to attempt an objective definition of religion because it is principally subjective. In *Watson v. Jones* the U.S. Supreme Court stated that "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect".⁵⁹ The same mindset is seen in the Nigerian judiciary. In *Medical and Dental Practitioners Disciplinary tribunal v. Okonkwo, Ayoola* JSC stated:

*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 be coerced into acting contrary to one's religious belief. The limits of these freedoms, as in all cases, are when they impinge on the rights of others or where they put the welfare of society or public health in jeopardy.*⁶⁰

In other words, the state cannot prescribe any religion or proscribe any.⁶¹

Limitations to Right to Freedom of Religion

In spite of religion being an inherent feature of the human person, right to freedom of religion is not a license for one's religion to be manifested however, wherever and whenever a person desires. It's manifestation in the society has to be balanced out with other social values and interests. In this way the legal right to freedom of religion is interfaced with the legal duty to respect other key social interests. This fact is incorporated in section 45(1) of the 1999 Constitution which provides:

Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonable justifiable in democratic society –

(a) in the interest of defense, public safety, public order, public morality or public health; or

(b) for the purpose of protecting the rights and freedom of other persons.

Apart from the freedom of thought, conscience and religion contained in section 38(1), section 45(1) limits

⁵⁵ Australian Human Rights Commission, > <https://www.humanrights.gov.au/freedom-thought-conscience-andreligion-or-belief> > accessed May 18, 2023

⁵⁶ Australian Human Rights Commission, > <https://www.humanrights.gov.au/freedom-thought-conscience-andreligion-or-belief> >

⁵⁷ *Campbell and Cosans v. UK*, Ser. A, no. 48 (1982), para.

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⁵⁸ M D Evans, *Religious Liberty and International Law in Europe*, (Cambridge-U.K.: Cambridge University Press,1997) p. 291.

⁵⁹ (1872) 80 U.S. (13 Wall) 679, at p. 728 [20 Law. Ed. 666, at p. 676].

⁶⁰ (2001) 10 WRN 1 SC at 41.

⁶¹ See 1999 Constitution of Nigeria, s. 10



the exercise of the rights in sections 37, 39, 40 and 41 of the Constitution. By including section 38 amongst the sections of the Constitution to be limited under section 45(1), it means that every right granted under section 38 is liable for restriction including freedom of thought and conscience. But most international legal instruments restrict only the manifestation of religion or belief in social actions without including thought and conscience. Such instruments include the UDHR,⁶² ICCPR,⁶³ UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief,⁶⁴ the African (Banjul) Charter on Human and Peoples' Rights,⁶⁵ and the European Convention on Human Rights, 2010.⁶⁶ Others are the American Convention on Human Rights⁶⁷ and the Arab Charter on Human Rights 2004.⁶⁸ The couching of the provision differs but the same idea runs through them. The UDHR for instance provides in article 29(2):

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The ICCPR in article 18(3) states that "freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others". Notwithstanding the foregoing, article 15(1) of the European Convention on Human Rights appears to authorize during war a sweeping limitation of freedom of religion similar to the provision of section 45(1) of the Nigerian Constitution. It provides in article 15(1): "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law". This is a general legal authority for government to do whatever is possible for defending the

country during war or in an emergency situation, which does not particularly mean restricting people's right to think, have a conscience, religion or a belief simpliciter.

The Concept Of Informed Consent

Informed consent is a process where a person is given all the information, they need to make a decision about something, such as medical procedures. The Black's Law Dictionary defines 'informed' consent as, 'a person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives. For the legal profession, informed consent is defined in Model Rule of Professional Conduct.' A patient's knowing choice about a medical treatment or procedure, made after a physician or other healthcare provider discloses whatever information a reasonably prudent provider in the medical community would give to a patient regarding the risks involved in the proposed treatment or procedure.⁶⁹ 'Informed consent' is a critical principle in medicine and research. It ensures that people are not coerced into making decisions and that they are fully aware of the potential risks and benefits of a procedure. Informed consent is usually obtained through a process of discussion, where the person is given all the information they need to make a decision. The person should be given enough time to consider their options and ask questions before making a decision. The process of informed consent is designed to protect the rights and welfare of individuals who are participating in medical procedures.

The American Medical Association defines informed consent as "a process of communication between a patient and physician that results in the patient's authorization or agreement to undergo a specific medical intervention"⁷⁰. Similarly, the World Medical Association defines informed consent as "a process by which a patient is informed about and consents to a specific medical intervention, after being provided with information about the intervention, including the risks

⁶² Art. 29(2).

⁶³ Art. 18(3).

⁶⁴ Art. 1(2 & 3)

⁶⁵ Art. 8.

⁶⁶ Art 9(2).

⁶⁷ Art. 12(3).

⁶⁸ Art. 30(2).

⁶⁹ Bryan A. Garner.(2014)Black's Law Dictionary, 11th ed. St. Paul,MN: Thomson Reuters

⁷⁰ American Medical Association, "informed consent",(2016), retrieved from <https://www.ama-assn.org/delivery-care/ethics/informed-consent> (accessed june 19,2023).



and benefits, alternatives, and the consequences of not having the intervention”⁷¹

Legal Framework For Informed Consent

The fundamental right of a patient to choose his or her own course of treatment demonstrates respect for that person’s autonomy. The principle’s historical roots can be found in the philosophic treatises of the French and English Enlightenment, despite the fact that it is based on constitutional protections. Before beginning any course of treatment, the right to refuse medical treatment, which is a corollary to the notion of informed consent, must also be recognized in order to uphold autonomy, self-determination, bodily integrity, and freedom from battery. This enables patients to choose their treatments based on the most information that is readily available. This chapter seeks to examine the concept the practice and principle of informed consent.

The Practice and Principle of Informed Consent

A comprehensive disclosure of key information about a medical procedure, its advantages, any dangers or potential consequences, and any available alternative treatments is required for informed consent.⁷² Before performing a surgery on a patient or client, a doctor is required by law to seek informed consent. In the event that a patient is harmed as a result of the treatment or procedure, failure to get such permission may give rise to a medical malpractice lawsuit.⁷³ Furthermore, when a patient is not provided with adequate and crucial information regarding the medical procedure, as is most frequently done in Nigerian health care services, it creates a number of difficulties because the patient lacks sufficient knowledge of the condition and is unable to decide whether or not to proceed with the proposed treatment.⁷⁴

A fundamental tenet of medicine is that each person has the right to decide what happens to his or her body, and that the government must uphold those rights. One could argue that since a patient has little or no knowledge of medicine, the doctor should be allowed to act in the

patient's best interests. The right to self-determination or autonomy is, however, violated by this proposition. We shall examine the fundamentals of informed consent in regard to the crimes of assault and battery and, to a lesser extent, the tort of negligence as we examine the legal implications of a lack or inadequacy of informed consent in Nigeria's health care delivery.⁷⁵

The essentials of a valid informed consent include disclosure, understanding voluntariness, competence and consent.⁷⁶ Where these elements are vitiated, then consent is said to be invalid and the physician may be liable for an offence of battery and or murder depending on the circumstance of the case. Informed consent protects both the client and his patient as both parties are aware of their scope of duty, The importance of informed consent was elucidated in the case of *Medical and Dental Practitioner Disciplinary Tribunal (MDPDT) v Okonkwo*.⁷⁷ It is pertinent to briefly explain the facts of the case, one Martha Okorie, a pregnant Jehovah Witness came to the hospital in a critical condition which requires blood transfusion. She declined the offer based on religious ground. She was discharged against medical advice from this hospital, She was later admitted in hospital of Dr Okonkwo, a Jehovah witness, he treated her without blood transfusion and she later died. Her relatives made a formal complaint of medical negligence to the MDPDT. Okonkwo was found guilty of breach of the ethics of his profession and was suspended from practice for 6 months. His appeal went from the Court of Appeal to the Supreme Court.

The Supreme Court overruled the tribunal as it held as follows:

The patient was free to decide whether or not to submit to a treatment By a doctor... if the doctor making a balanced judgement advises the the patient to submit to the operation, the patient is entitled to reject the advice for reasons which are rational or irrational or for no reason...⁷⁸

⁷¹ World Medical Association, “ethical principles for medical research involving human subjects”,(2013), retrieved from <https://www.wma.net/policies-post/wma-declaration-of-helsinki-ethical-principles-for-medical-research-involving-human-subjects/> (accessed june 19,2023).

⁷² Rule 19 of the Code of Medical Ethics and The National Health Act, Act No. 8, FRN Gazette, 2014.

⁷³ D. Goguen “what is’ Informed Consent’ in a Medical Malpractice Claim” www.medical-

malpractice.lawyer.com/proffessional-duty/care/lack-of-informedconsent.htm > accessed June 13, 2023

⁷⁴ Ibid

⁷⁵ F.O Emiri ‘ Medical Law and Ethics in Nigeria’(Malt house Press Ltd. Lagos 2012)325

⁷⁶ J. Cutan, ‘Informed Consent: An Ethical Obligation or Legal Compulsion’ (2008) 1 (1) *Journal of Cutaneous and Aesthetic Surgery* 33 at 35.

⁷⁷ (2001) 7 NWLR (Part 711) 206

⁷⁸ Ibid



This establishes the principle of self-determinism, the right of a patient to determine what happens to his or her body. The apex court also stated that it is only the court which can override the decision of a patient not to give informed consent. It can be argued that the court will take such decision based on overriding public interest and the right to protect and preserve the life of its citizen. Similarly, in the case of *Schloedorff v New York Hospital*⁷⁹, a woman allowed her physician to administer anesthesia on her to determine if a diagnosed fibroid tumor was malignant. The physician went ahead to remove the tumor whilst the patient was under the influence of the anesthetic drug without her consent. She sued. The court held as per Cardozo J as follows:

*Every human being of adult years and sound mind has the right to determine What shall be done with his own body: a surgeon who performs an operation Without his patient consent commits an assault and is liable to damages.*⁸⁰

It is submitted however that where a physician performs a procedure on a patient without consent, he will be liable for an offence of assault and monetary compensation will be awarded in favour of the patient.

A physician may be exempted from such liability in emergency cases where a patient is unconscious and there is urgency to preserve life, consent may be expended with. Conversely, the right to self-determinism may be dispensed with in cases of overriding public interest. In *Esabunor v Faweya*⁸¹ the appellant withhold consent to transfuse her child with blood based on her religion (Jehovah Witness). The Commissioner of Police got an order from the Magistrate court to transfuse the child with blood. The court held that the child being an infant would prefer to live rather than to die and that the Appellant has no right to determine the fate of the child. A cursory look at the judgement: would it not amount to a violation of the right of the Appellant as a guardian to the minor as well as violation of the right of the appellant to freedom of religion and association?⁸² It is my humble submission that whichever way it is explored, the interest of the child remains paramount (the right to life) and the law must protect and preserve it.

Furthermore, every competent adult has the right to decide what happens to his/ her body even when such

claim may seem irrational or senseless or she is unable to give her consent at that time, but has a document in her possession which determines what her decision may be as shown in the case of *Malette v Shulman*⁸³. In this case, a doctor administered blood transfusion on a Jehovah Witness patient with a card in her purse indicating that she will not consent to blood transfusion in any circumstances. The patient sued the doctor on recovery for disregarding her wish. The doctor argued that the patient was in a critical condition and could not give consent and moreover, he had a duty to save life. He went further to say that the interest of the society is the preservation of life and that this reason overrides the patient's decision not to receive blood transfusion. The court held in favour of the plaintiff, she had the right to make decision that affects her life though rational or irrational. The plaintiff was awarded damages of \$20,000. The doctor was found guilty of the offence of trespass. It is pertinent to quote a portion of the decision of the court, it states thus:

A competent adult is generally entitled to reject a specific treatment or all treatment or select an alternative form of treatment, even if the decision may entail risk as serious as death and may appear mistaken in the eyes of the medical profession or of the community...it is the patient who has the final say on whether to undergo a treatment.⁸⁴

Sometimes in emergency situation, a surgeon may take a decision during an operation which the patient had not consented to but was discovered during the surgical operation. Can the doctor be held liable in tort for carrying out such procedure without the consent of the patient? This point is elucidated in the decision of the court in *Marshall V Curry*⁸⁵, a surgeon obtained consent from a patient to cure a hernia. During the surgery, the surgeon found a deceased testicle which is dangerous to the health of the patient and removed it. The patient sued the doctor for removing his testicle without his consent. The court held that in emergency situations where it is impossible to obtain consent, the doctor can intervene to save the life of the patient. The doctor was not held liable.

In *Murray v. McMurchy*⁸⁶, where the surgeon was found responsible, the court took a different stance than that in

⁷⁹ (1944) 105 NE 92 at 93

⁸⁰ *Ibid*

⁸¹ (2008) 12 NWLR (Part 1102) 794 at 810- 811 Para. E-B

⁸² Section 45, The Constitution of the Federal Republic of Nigeria 1999(as amended)

⁸³ (1990) 47 DLR. 18

⁸⁴ (1999) 47 DLR.18.

⁸⁵ (1933) 3 DLR 260 (NS.SC) 8

⁸⁶ (1949) 2 DLR 442 (BC. SC)



*Marshall v. Curry*⁸⁷, which was decided. A pregnant woman in the present instance gave permission to have a Caesarean section performed on her. The surgeon discovered an abdominal tumor during the procedure, and since a subsequent pregnancy may be risky, he tied up the fallopian tubes. She filed a lawsuit. The court ruled that there was no emergency and that the patient should decide whether or not she wants her tubes tied. Without her permission, the doctor had no legal right to tie up her fallopian tubes. The physician was made accountable.

Furthermore, it goes without saying that every competent adult has the right to make their own decisions. However, in the case of *Fosmire v. Nicoleau*⁸⁸, where the plaintiff, a Jehovah's Witness who had a caesarian delivery due to complications that caused a profuse loss of blood that caused the hemoglobin level to drop to 4gm/dl, the choice of an individual could be overruled by the overriding interest of the state. The plaintiff declined a blood transfusion on religious reasons with her husband's approval. The hospital asked the New York Supreme Court to issue a directive directing the patient to receive blood transfusions. The request was approved. The patient filed a lawsuit against the hospital alleging that it had violated her autonomy and fundamental rights to decide what should happen to her body. Although the patient had a right to make decisions for themselves, the court found that this right had an adverse effect on an innocent third party and the state, which has a paramount interest in preserving the lives of its inhabitants. The judge ruled in the state's favour.

In *Re S (Adult Refusal of Medical Treatment)*,⁸⁹ the same thing happened. The preservation of people's lives is the state's main priority, regardless of their religious convictions or teachings. A pregnant Nigerian woman who was living in England was admitted in labour; due to the baby's anomalous position, labour made little progress, and a caesarian section was the only way to save both the mother and the baby. Despite claiming to be "Born Again Christians," the defendant and her

husband refused to sign the document. A request for permission to perform a caesarian section on the patient was made by the hospital to the president of the Family Court Division, and the court granted their request. Decisions made by the defendant and her spouse are superseded by those of the unborn child and the general public.

However, because of the concept of self-determination and basic human rights, the state does not have unrestricted authority to override a person's choice. In *Application of the President and Director of George Town College*⁶, the defendant, a Jehovah witness, was taken to the hospital when an ulcer ruptured and she lost a lot of blood⁹⁰; however, she refused a blood transfusion because it went against her religious convictions. The hospital applied to the federal court for authorization to give the patient a blood transfusion when death became near as a result of the patient's denial of the transfusion. The court decided that it could only grant the motion if the patient's competence had been damaged by the disease. However, in this particular case, the court believes that the woman is now eager to receive the transfusion because she initially went to the hospital in need of medical care. The ruling allowing the hospital to give the patient a blood transfusion was thus approved by the court. Insofar as it does not directly interfere with the rights of others, it is argued that consent gives the doctor the permission to perform an operation on a patient; in the event that consent is withdrawn, the patient has the right of self-determination to control what happens to his body.⁹¹

Legal Frameworks on Informed Consent In Nigeria's Health Care Delivery Services

As stated above, the ability of the patient to refuse any medical treatment recommended by medical staff is fundamental to the medical community worldwide. This agreement is required by the idea that every person has the right to select how his or her health will be managed. According to Mills, a person who is an adult and of sound mind has unquestionable control over either his or her mind and body.⁹² Only the National Health Act⁹³ and

⁸⁷ Supra

⁸⁸ 1 551 NY.S. 2d 876 N.Y 1990(Court of Appeal of New York)

⁸⁹ 331 F2d 1000 (D.C.Cr 1964)

⁹⁰ Patricia Imade Gbobo & Mercy Oke-Chinda, 'An Analysis of the Doctrine of Informed Consent in Nigeria's Health Care Services', (2018) (69) *Journal of Law, Policy and Globalization*, 24

⁹¹ Patricia Imade Gbobo & Mercy Oke-Chinda, 'An Analysis of the Doctrine of Informed Consent in Nigeria's Health Care Services', (2018) (69) *Journal of Law, Policy and Globalization*, 17

⁹² J. S. Mills 'On Liberty' (Ontario Barouche Books Limited, 2001) 13

⁹³ The National Health Act, Act No. 8, FRN Gazette, 2014.



Rule 19 of the Code of Medical Ethics in Nigeria created provisions for “informed consent” in Nigeria, which refers to giving the patient enough information to enable informed consent. *The principal objective of the medical or dental practitioner shall be the promotion of the health of the patient. In doing so, the practitioner shall also be concerned for the common good while at the same time according full respect to the human dignity of the individual.*⁹⁴ Similarly, the physician oath which the medical practitioners are obliged to pledge also provides that “I will respect the autonomy and dignity of my patient.” As a result, the laws governing “consent” in the Nigerian health industry are insufficient. However, medical practice in Nigeria is regulated by a number of statutes; among which are: the Medical and Dental Practitioners Act;⁹⁵ the Nursing and Midwifery (Registration etc.) Act;⁹⁶ the National Health Act 2014; the Code of Medical Ethics in Nigeria;⁹⁷ the Constitution of the Federal Republic of Nigeria 1999 (as amended); the Medical Oath; the Compulsory Treatment and Care for Victims of Gunshot Act;⁹⁸ the Patients’ Bill of Rights;⁹⁹ the Pharmacy Act¹⁰⁰ and the Criminal Code Act.¹⁰¹

The right to dignity of the human person is provided for in the 1999 Constitution of Nigeria. Also, the right to freedom from discrimination is protected by the Nigerian Constitution. The Medical and Dental Practitioners Act establishes the Medical and Dental Council of Nigeria¹⁰² and vest it with the power to determine the standards of knowledge and skills to be attained by persons seeking to become members of the medical or dental profession and it also has the power to review the standards from time to time. The Council is empowered to maintain registers of the names, addresses, qualifications and such other particulars of persons entitled to practice medicine and dentistry in Nigeria.

Following the National Health Bill’s eventual enactment on October 31, 2014, it took close to ten years for Nigeria to draught and enacts a legal framework for health. The National Health Bill was first presented in 2004. The

National Health Act of 2014 (NHA), which provides a legal framework for the regulation, development, and management of a National Health System and sets standards for providing health services in Nigeria and for related matters, has been passed into law after more than 50 years as an independent nation in Nigeria.¹⁰³

The NHA is divided into seven components and many sections. Each section comprises essential elements that, if properly and efficiently implemented, will have a significant impact on patient care, health outcomes, health care costs, and the quality and standards of healthcare. They also address issues like as universal health coverage and health care access. The seven components of the NHA are: Responsibility for Health, Eligibility for Health Services, Development of National Health System, Health Establishments and Technologies, Rights and Obligations of Patients and Healthcare Workers, National Health Research and Information System, Human Resources for Health, Control of Use of Blood, Blood Products, Tissue, and Gametes in Humans, Regulations and Other Provisions.¹⁰⁴

Section 20 (1) and (2) of the National Health Act provides that “(1) A health care provider, health worker or health establishment shall not refuse a person emergency medical treatment for any reason. (2) A person who contravenes this section commits an offence and is liable on conviction to a fine of N100, 000.00 or to imprisonment for a period not exceeding six months or to both.”¹⁰⁵

Health professionals have a vital role in the smooth, efficient, effective, and high-quality delivery of healthcare services. They are a significant part of health care systems. It is impossible to overstate the importance of health professionals in achieving the NHA’s aim, which is to regulate, develop, manage, and improve Nigeria’s National Health System. The degree to which the Act is implemented successfully and the extent to which its ultimate benefits of better health coverage, quality, and health outcomes are realised will therefore

⁹⁴ Rule 19 of the Code of Medical Ethics, Cap.221 Laws of the Federal Republic of Nigeria 1990

⁹⁵ Laws of the Federation of Nigeria, 2004, CAP M8

⁹⁶ No. 89, 1979.

⁹⁷ Made pursuant to section 1(2)(2), CAP MS.

⁹⁸ No. 105, 2017

⁹⁹ Patients’ Bill of Right Act 2018

¹⁰⁰ Pharmacy Act of Nigeria 1992 No. 91 P17 – 2

¹⁰¹ Criminal Code Act 1965 CAP C38

¹⁰² Medical and Dental Practitioner Act. 1988 No. 23 CAP. M8

¹⁰³ Enabulele, O., & Enabulele, J. E. (2016). Nigeria's National Health Act: An assessment of health professionals' knowledge and perception. *Nigerian medical Journal: journal of the Nigeria Medical Association*, 57(5), 260–265. <https://doi.org/10.4103/0300-1652.190594>

¹⁰⁴ *Ibid*

¹⁰⁵ Section 20 (1) and (2) of the National Health Act



probably depend on their understanding of, familiarity with, and perception of the NHA.

Capacity To Give Consent In Nigeria

A valid consent or a refusal to give consent requires a capability to make such decisions after adequate information has been given about the type of treatment or procedure, benefits, risks involved, alternative treatment if any and possible complication.¹⁰⁶ A competent adult with sound mind and body has the capacity to give consent to treatment or procedure to be carried out on him or her. However, where the examination or procedure involves marital issues such as sterilization, termination of pregnancy or removal of sex organs (breast or uterus) both couples must give their consent. It should be noted that this is also not a legal requirement but it is a desired practice. But an unconscious person, a minor or patient in an unstable state of mind may not be able to refuse treatment.¹⁰⁷

(i) Unconscious Patients

An unconscious patient is unable to give consent, but it is assumed that if they had the ability, they would do so in order to save their own lives. The Doctrine of Necessity will be applicable in this case. The idea of necessity in criminal and civil law gives legitimacy to an otherwise illegal act, but the intention to save or save a human life is of utmost importance. Therefore, a doctor should not be held criminally liable for performing an operation or treating an unconscious patient in order to save that patient's life; hence, necessity is a defense for nonconsensual treatment, especially in an unconscious patient. In particular, a doctor shouldn't use a patient's unconsciousness to do an operation that is beyond what is immediately necessary to preserve their life.

This stance was established in two well-known Canadian decisions where a distinction was drawn between treatments that were justified by necessity and those that were done out of pure convenience. In *Marshall v Curry*,¹⁰⁸ the plaintiff sought for damage for battery against a surgeon who removed a testicle in an operation of hernia. The surgeon claimed that the testicle was diseased and would affect the life of the patient if not

removed immediately. The court held that the action of the surgeon was necessary at the point

However, in the case of *Murray v Mc Murdy*,¹⁰⁹ the action of battery succeeded where the surgeon sterilized a female patient by removing her uterus without her consent during a caesarian section operation. The court held that the procedure of sterilization is not detrimental to the life of the patient and could be decided later. Therefore, a physician in the course of duty must obtain a valid consent before invasive procedures or treatments are carried out on a patient to avert criminal liability.

(ii) Consent of a Child/ Minor

The ability to give consent is not limited to the statutory age of majority. A competent minor who is under the legal age of majority can offer a valid permission for a medical examination or treatment as long as they are fully informed and comprehend the implications of the process. Parents are thought to be capable of making judgments that will effect their children's life accurately and wisely. This may be predicated on the notion that parents are responsible for the long-term effects or repercussions of the treatment decisions they make on behalf of their children.¹¹⁰

Although parents have the legal authority to make decisions for incapable minors, this authority does not extend to some medical procedures, such as sterilization, the removal of a child's vital organs for donation, and the decision to let the minor die as a martyr.¹¹¹ It implies that parental rights to make decisions on their children's behalf are not inalienable. However, a mature minor who is capable of comprehending the treatment option and its implications can provide legal consent to care just like an adult would. The highest court ruled on this idea of a mature minor in the case of *Re Ernestine Gregory*¹¹².

Ernestine, a 17-year-old Jehovah's Witness, was being treated for leukaemia at the time. The legal maturity age in Illinois was 18 years old. He declined the blood transfusion since it went against his religious beliefs; his mother supported him in this. The Child Welfare Officials in Chicago sued his mother for medical malpractice since he was a juvenile. In spite of the patient's shown maturity to make such a decision, the

¹⁰⁶ S D Pattinson, *Medical Law and Ethics* (Sweet & Maxwell Ltd. London 2006) 129.

¹⁰⁷ Patricia Imade Gbobo & Mercy Oke-Chinda, 'An Analysis of the Doctrine of Informed Consent in Nigeria's Health Care Services', (2018) (69) *Journal of Law, Policy and Globalization*, 17

¹⁰⁸ {1933} 3 DLR 260

¹⁰⁹ (1949) 2 DLR 442.

¹¹⁰ Patricia Imade Gbobo & Mercy Oke-Chinda, 'An Analysis of the Doctrine of Informed Consent in Nigeria's Health Care Services', (2018) (69) *Journal of Law, Policy and Globalization*, 17

¹¹¹ Re T (1992) WLR 782, 4 ALL ER 649

¹¹² Re Ernestine Gregory 133 IU 2d 98549 NE 2d 322(1989)



trial court ordered a blood transfusion. This judgment was challenged by the patient. The Court of Appeal affirmed the decision of the mature minor. The Supreme Court also re-affirmed the position of the appellate court overruled the decision of the trial court on the ground that the patient has shown enough competence to make such decision and hence cannot be forced to submit to blood transfusion, his right of self-determination must be respected.

In addition, it is established under Common Law that parents in the absence of neglect or incapacity make all the necessary choices as it pertains to the wellbeing of their children.⁹ Furthermore, there are essentials that must be taken into consideration in implementing the best interest principle, they include:

- a) Is the decision likely to improve the condition of the child?
- b) Can the treatment prevent further deterioration of the child's condition?
- c) If the benefit involved in the treatment outweighs the risks on the child?
- d) Whether there is an option of a less invasive treatment?¹¹³

(iii) Mentally Incapacitated Persons

In general, a person who is in good physical and mental health can offer informed permission. Patients with mental illnesses or impairments, however, could be unable to give consent for treatment or medical operations. Dementia brought on by aging-related degenerative processes in the brain could also be the cause of mental impairment.¹¹⁴

According to Davis there are three categories of lack of competence: transitory (as in patients who are asleep) or permanent (as in some patients with mental disabilities, unless they are in the lucid stage where they are able to absorb what is being told to them). Determining when a patient is competent to offer informed consent to treatment or surgery is the key problem.¹¹⁵

3.4 FACTORS PREVENTING EFFECTIVE INFORMED CONSENT PRACTISE IN NIGERIA'S HEALTHCARE SYSTEM

Nigeria is a multi-ethnic nation where socio-cultural and religious beliefs have an impact on the population. The

view of the general public concerning the use of informed consent in Nigeria's health care delivery system is greatly influenced by a number of factors, including poverty, low educational attainment, trust, the myth of diseases, religious beliefs, and familiar influences. These concerns will be addressed in order.

a) Low Educational Background / Illiteracy as a factor

According to reports, almost 50% of people in Nigeria lack a high school diploma. The ability of patients to comprehend and make knowledgeable decisions about their health in the nation's health care delivery system is also impacted by the high prevalence of illiteracy.¹¹⁶ The influence of social and cultural norms that affect decisions about health-related issues can be lessened with education. When treating educated patients against fewer or uneducated individuals, it has been found that doctors are more cautious with the former. It makes sense why; an informed patient would have done considerable study about their ailment and be prepared to ask their doctor a tonne of questions. The patients' understanding of the causes, advantages of a certain treatment, drawbacks, and potential alternatives thanks to earlier study will help them make an educated decision and give their consent for any surgeries or treatments. The uneducated patient, on the other hand, has no comprehension of his or her medical condition and relies entirely on the doctor to decide what is best for him or her. The doctor may misuse this privilege by acting beyond what is reasonable at the time.

The quality of a patient's decision, once thorough information about health issues has been provided, may depend on their level of knowledge, it is suggested. It has been noted that the uneducated patient has the intellectual capacity to understand the information provided by the doctor and is therefore unable to make an informed choice regarding their health.

b) The Absence of Laws on Consent in Nigeria

In Nigeria, the laws controlling the health industry are insufficient. As a result, medical professionals are not required by law to obtain the patient's agreement, and in cases where they do not, the patient has few legal options. There are various regulations on the subject of

¹¹³ J.A Dada Legal Aspect of Medical Practice in Nigeria (University of Calabar Press 2013) 257-218

¹¹⁴ Patricia Imade Gbobo & Mercy Oke-Chinda, 'An Analysis of the Doctrine of Informed Consent in Nigeria's Health Care Services', (2018) (69) *Journal of Law, Policy and Globalization*, 17

¹¹⁵ M. Davies Textbook on Medical law (1998 Blackstone Press Ltd. London) 131-139.

¹¹⁶ K.A Agu, E.I Obi, B.I Eze and O.O Okonwa 'Attitude Towards Informed Consent Practice in a Developing Country: A Community based Assessment of the Role of Educational Status' (BMC Medical Ethics 2014 Vol. 15(77))



consent in both the United Kingdom and the United States, where the laws governing the health sector are constantly evolving.

c) Religious Beliefs

In Nigeria, there is a strong belief in a supreme being which controls both the living and the dead. This belief constitutes a challenge to the effective practice of informed consent in the health care service delivery in Nigeria. It is believed that deities, predestination affect the life of the people; all these are hinged on customs and tradition. According to Aniaka¹¹⁷ ‘the absolute dependence on supernatural beings makes it easy to hinge failure, illness and woes on abstract entities’ This belief vitiates the purpose of informed consent as the essence of informed consent is to enable patients to take control of their situation by being involved in decisions relating to their lives rather than submitting their fate to a supreme being. Where a person believes that his illness is caused by a supreme being, he is unlikely to seek orthodox care.

d) Trust

The relationship between a doctor and patient is fundamentally based on trust. Any type of medical treatment depends on the patient having faith in his doctor for it to be effective and successful. It is thought that the problem of physician trust abuse led to the problem of autonomy in the provision of healthcare services. The level of faith that patients have in their doctors, according to some, hasn't decreased despite their abuse of that trust; rather, it has remained strong. Trust is having complete faith in a doctor to act in the patient's best interests. It may also be described as a feeling of security.

Similar to this, the goal of informed consent is to safeguard the patient's autonomy or right to self-determination and to eliminate any information disparity between a patient and a doctor. Because of their lack of information, many patients in Nigeria place a great deal of trust in their doctor to act in their best interests without inquiry.¹¹⁸ The effectiveness of informed consent in

Nigeria's healthcare delivery system is constrained by the extent of patient dependence on their doctor.

e) Poor Economic Status

Patients' financial difficulties in Nigeria's healthcare system make informed consent difficult. According to studies, people in low socioeconomic position are more prone to accept and follow instructions blindly.¹¹⁹ Can someone who now lives in Nigeria during a time of economic recession and is unable to provide for basic needs file a lawsuit for violation of their fundamental right to informed consent? However, when a patient's right to informed consent is violated, the obstacles of being unable to seek recourse in court will be less challenging.

f) Autonomy or Self Determination

The right an individual has to decide what happens to his or her body, life as the case may be is called autonomy or self-determination. There are several factors which can influence the right to autonomy; these include socialization, culture and religious practices. The concept of autonomy is limited in the sense that a person who has been gender socialized may find it difficult to appreciate the will to make decisions even when it is crucial to her survival. The challenge faced by such person is the resolution for others to make decisions on their behalf even when they are neither minor nor incapacitated in mind or in an unconscious state. This scenario is common in paternalism where the influence of father, brothers and males generally are domineering. This concept affects the quality and effectiveness of informed consent not only in Nigeria but in other male dominated customs. In cases of minors, unconscious and mentally ill patients, the degree of autonomy is also reduced, but the best interest of the patient must be of utmost priority.¹²⁰

g) Family Influence

In Nigeria, the family system is closely knitted and custom plays a very important role. The family is communal in nature unlike in the western world where the family unit is individualistic. The family is involved in making decisions that affect the health and lives of

¹¹⁷ O. Aniaka ‘Patients Right and Socio- Cultural Challenges to Informed Consent in Nigeria’ [www.languageconnections.com/descargas/clinical trials in South Africa.pdf](http://www.languageconnections.com/descargas/clinical%20trials%20in%20South%20Africa.pdf)> accessed June 13, 2023

¹¹⁸ R. Emmanuel & A.P Marshall ‘ Informed Consent Practice in Nigeria’ (2009) 9(3) *Developing World Bioethics* 133-148.

¹¹⁹ O. Aniaka ‘Patients Right and Socio- Cultural Challenges to Informed Consent in Nigeria’ [www.languageconnections.com/descargas/clinical trials in South Africa.pdf](http://www.languageconnections.com/descargas/clinical%20trials%20in%20South%20Africa.pdf)> accessed June 13, 2023

¹²⁰ Patricia Imade Gbobo & Mercy Oke-Chinda, ‘An Analysis of the Doctrine of Informed Consent in Nigeria’s Health Care Services’, (2018) (69) *Journal of Law, Policy and Globalization*, 24



each and every member of the family. Where a family member is ill, relatives contribute to decisions affecting the life of that member since they are all involved in the care. Arguably, a patient is the one who bears the complication or consequences of the procedure or treatment should be allowed to voluntarily to give consent to treatment without external influence of members of the family.

The Right To Refuse Medical Treatment Under The Laws

The right of a patient to refuse treatment cannot be overridden, despite the fact that some courts may have demonstrated some interest in defending the interests of the medical community. It is the law that the right to privacy, autonomy and self-determination includes the right of a competent adult patient to refuse any form of medical treatment even though that refusal may seem unwise, foolish or ridiculous.¹²¹ Although the state may have a legitimate interest in shielding doctors from civil or criminal liability by allowing them full control over the treatment and care of their patients, this has never been a good enough reason to justify judicial interference with the patient's constitutional right to self-determination and bodily integrity to refuse medical treatment.¹²² This chapter seeks to examine the right to refuse medical treatment under the relevant laws and ethics in the medical profession.

The Right to Refuse Medical Treatment

The right to refuse medical treatment, as previously mentioned, follows logically from the idea of informed consent, which, in terms of medicine, gives patients typically the right to refuse medical treatment.¹²³ This right, which is supported by the legal acknowledgment of the patient's rights to autonomy, self-determination, and physical integrity, is available to the patient regardless of the opinion of his or her doctor. No matter how well-intentioned, everyone has the right to be free from unwelcome physical interference.¹²⁴

Surprisingly, the right to refuse medical care is not expressly recognized by either common law or the constitution. And as there is no specific right to refuse

medical treatment, the legal basis for this right has mostly relied on the constitutional rights to privacy, freedom of thought, conscience, and religion, as well as the common law right to bodily integrity. However, the patient's constitutional right to object to medical treatment has been premised on the provisions of the constitution on fundamental rights,¹²⁵ as emphasized by the Supreme Court of Nigeria in *Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo*.¹²⁶ The right of patient to object to medical treatment or intervention has been determined in several cases in the United States of America where this area of law has received considerable judicial attention.

The paternalist opposed the notion for the right to refuse medical treatment arguing that there are numerous instances in medical practice where medical intervention or treatment is acceptable despite the patient's protest. The doctor's decision to impose the therapy is considered as serving the patient's interest, despite what may ultimately prove to be short-term concerns, according to the argument that the patient may not be able to understand why a certain treatment is in his best interest. A paternalist might argue that this cannot be wrong, despite the fact that it is an infringement on the patient's rights. According to him, receiving treatment makes a patient happier than not receiving it since good health and physical comfort are preferable to poor health and misery.¹²⁷

It should be noted however that paternalism is not a defense for invading a patient's privacy or taking away their ability to refuse medical treatment, no matter how well-intentioned the action may be. This is the case since the patient's decision has been respected by the courts in various legal decisions. In the *Natanson v. Kline*¹²⁸ case, a medical malpractice lawsuit from the United States, the Kansas Supreme Court summarized the problem as follows.:

Anglo-American law starts with the premise of thorough-going self-determination. It follows that each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance

¹²¹ O. C. Emmanuel & B. A. OBIDIMMA, 'Right of a Patient to Refuse Medical Treatment: Justification for Judicial Intrusion', (2014) *NAUJILJ*

¹²² *Ibid*

¹²³ *Ibid*

¹²⁴ *In re Brown*, 478 So.2d 1033, 1040 (Miss. 1985).

¹²⁵ Sections 34 and 35 of the Constitution address the rights to freedom of thought, conscience, and religion, respectively. Sections 37 and 38 of maintain all of them.

¹²⁶ [2001]7 NWLR (Pt. 711)206 at 244

¹²⁷ G.J. Annas and J.E. Densberger, "Competence to Refuse Medical Treatment: Autonomy vs. Paternalism", 15 *Univ. Toledo Law Review*, Winter 1984, P. 56

¹²⁸ 350 P. 2d 1093, 1104 (Kan 1960)



of life-saving surgery, or other medical treatment. A doctor might well believe that an operation or form of treatment is desirable or necessary but the law does not permit him to substitute his own judgment for that of the patient by any form of artifice or deception.¹²⁹

Competence, Consent and Refusal of Treatment

Competence suggests that a person has enough cognitive reasoning to decide on a certain matter. Cognitive capacity to make reasonable decisions, which can range from simple to complicated, is constrained. Status and capability are the two factors that establish a person's competence to provide informed consent. As seen in the case of *Re C*, when a 68-year-old medical practitioner with schizophrenia (a mental condition) refused to provide consent for a surgery to remove a gangrenous foot, a patient may be physically competent but intellectually unable to understand the issues at play. He requested and was granted a court order prohibiting the hospital from amputating his leg without his express permission. In this instance, the court ruled that a patient has the freedom to reject any kind of medical intervention, including one that could save their life. A patient has the right to autonomy, often known as self-determination, and can decide whether to accept or reject therapy.¹³⁰

It is however noted that, in spite of the individual's right to autonomy and self-determination, the state also recognizes the strong public interest to protect and preserve life. However, the notion that an individual has unfettered right to determine what happens to his/ her life can be rebutted.¹³¹ Where a patient lacks capacity or incompetent to make an informed decision, the physician has a duty to act in the best interest of the patient. In Britain, the Mental Health Act Code sets out the criteria for assessing capacity, regrettably, the Mental Health Act is not applicable in Nigeria and there is no law on the issue in Nigeria.

It is also argued that a patient has a right to determine the type of treatment desired and offer informed consent, this right super cede the physician's duty to preserve life. This position was affirmed in the case of *Randolph v City of New York*¹³² where the court held that a patient has the

right to determine medical treatment including refusal of blood transfusion based on religious beliefs. The court went on to add that a physician could not be held liable for adhering to the patient's order, though he later administered the blood transfusion after receiving permission to do so by the hospital administrators. Consequently, it is the choice of the patient that is important, it is irrelevant if such decision or choice is illogical, irrational or dangerous and the choice of the patient overrides the interest of the medical profession.

Refusal of Treatment by Adults

All competent adults have the right to determine what happens to his or her body. This brings us to the concept of autonomy and self-determination. A person can refuse any form of treatment, even a lifesaving treatment. This position was established in *A.G of British Columbia v Astaforuff*¹³³ where a prisoner refused feeding and was force-fed by the prison warden to prevent suicide. The court held that the prison authority had no moral or legal justification to force feed a prisoner to eat against his wish.

The right to self-determination or autonomy, when pitted against society's need to preserve the sanctity of life, also creates tension when making decisions that have a significant impact on a person's life. According to one argument, the self-determination principle governs the preservation of life. The ability to refuse any sort of treatment is also essential because it is a part of the legal right to privacy. As a result, when a doctor performs an operation on a patient without getting that patient's express agreement, it is considered a battery offence and is punishable by law.

In the same vein, refusal of treatment cannot be viewed as suicide but merely a choice about how one intends to live, suicide or refusal of treatment is distinguishable. Suicide means ending one's life while refusal of treatment is merely a choice of how one chooses to live.¹³⁴ In *Airedale NHS Trust v Bland*¹³⁵ the court took this illuminating position as regards the right of a patient to refuse a treatment even when it is lifesaving:

'If the patient is capable of making a decision on whether to permit treatment and decide not to permit it, his choice

¹²⁹ *Ibid*

¹³⁰ O. C. Emmanuel & B. A. OBIDIMMA, 'Right of a Patient to Refuse Medical Treatment: Justification for Judicial Intrusion', (2014) *NAUJIL*

¹³¹ The Mental Capacity Act 2005 is a legislation which governs capacity

¹³² 50 NTS. 2d Series 837(App. Division 1986); See also *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo* (2001) 7 NWLR(Part 711) 206

¹³³ (1983) 6 WWR 322, On Appeal [1984] 4WWR 385.

¹³⁴ *Bovia v Supreme Court*(1986) 225 Cal.Rptar 297(Cal. CA)per Beach J

¹³⁵ (1993) 1 All ER 821



must be obeyed, even if on any objective view it is contrary to his best interest... Thus it is that the patient who is undergoing life maintaining treatment and decides that it will be preferable to die must be allowed to die, provided that all necessary steps have been taken to be sure that it is what he or she really desires'

Thus, it is said, a patient has the total right to make any choice that could have an impact on his or her quality of life, regardless of whether that choice seems illogical, risky, or otherwise. In order to protect the sanctity of life, his choice must be recognised over state interests. However, a legal refusal of treatment requires the doctor and patient to fill out a Refusal of Treatment Form, which is often kept with the hospital's records. It must be made clear that doctors must respect patients' autonomy when it comes to making life-or-death decisions based on their religious or cultural views.

Non-Consensual Treatment in Children

In Nigeria, section 277 of the Child's Rights Act¹³⁶ provides that a "child" means a person under the age of eighteen years. This means that any person under the age of eighteen years is a child. Is a child capable of giving or withdrawing consent to medical treatment under Nigerian law? There is no clear judicial authority in this area of law yet in Nigeria but it does appear that although the age of majority is 18 years that is not the age of legal capacity to give consent to medical treatment. In other words, consent to medical examination and treatment is not predicated on the attainment of the age of 18 years. In the case of *Okekearu v. Tanko*¹³⁷, the Supreme Court of Nigeria invalidated the conventional wisdom that parents or guardians make important medical decisions on behalf of their children or wards who have not reached the age of majority by criticising the amputation of a 14-year-old boy's finger without his consent. The kid is competent to make his own medical decisions if he is mature and fully comprehends the nature and implications of the planned clinical procedure. This is comparable to the situation in England under the Family Law Reform Act of 1969, which states that a person over 16 who is not an adult may give a legal consent to medical treatment without consulting their parent or guardian.¹³⁸ In this regard, the House of Lords determined in the case of *Gillick v. West Norfolk and*

*Wisbech Area Health Authority*¹³⁹ that a 16-year-old girl is competent to get contraceptive counsel and treatment and to consent to do so, despite parental disapproval.

The corollary of the foregoing is that such a child also has the capacity to refuse medical treatment. In that case, the ethical issue that arose is: is it ethical to respect a child patient's decision to refuse treatment if it will be against their best interest? The answer seems to be in the negative. This is so because if a particular act is detrimental to a person, even with that person's consent, then that act cannot be judged to be a good act. Teleological ethics as a parameter in philosophy considers the outcome of an act as the determinant, of whether or not it is good or ethical. In that perspective, an act is considered good or ethical by teleological ethicists if it results in "the greatest good for the greatest number" or in preventing "the greatest amount of suffering for the greatest number."¹⁴⁰ From this perspective, honouring a child patient's decision to refuse medical treatment is thought of as not preventing suffering for the important stakeholders in the situation including the child patient. Thus, teleological ethics seems to advise that a child patient's refusal of medical treatment should be overruled in the best interest of the child.

The issue becomes complex and somewhat perplexing when the child involved is of tender years and incapable of making any decision himself. In such a case, proxy consent will be necessary. It is important to note however that proxy consents are only of true value when the patient has given express authority to another person to give or withhold consent on his behalf, or when the law invests a person with such power as in the relationship between a parent and a child. When such proxy consent is the case, the person vested with the power must use it reasonably otherwise, it may be sufficient justification for a third party to ignore such withholding of consent.

There are several instances where parents object to their children receiving medical care for religious reasons. Some of the most frequent cases involve people whose religious convictions restrict the transfusion of any byproducts or products derived from blood. A parent's refusal to consent to a transfusion has never prevented doctors or hospitals from trying to overcome it. In these

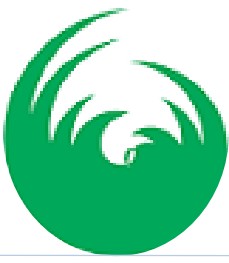
¹³⁶ Cap. C50, Laws of the Federation of Nigeria, 2004.

¹³⁷ [2002]15 NWLR (Pt. 791)

¹³⁸ O. C. Emmanuel & B. A. OBIDIMMA, 'Right of a Patient to Refuse Medical Treatment: Justification for Judicial Intrusion', (2014) *NAUJILJ*

¹³⁹ [1986]AC 112.

¹⁴⁰ O. C. Emmanuel & B. A. Obidimma, 'Right of a Patient to Refuse Medical Treatment: Justification for Judicial Intrusion', (2014) *NAUJILJ*



situations, the courts have virtually invariably granted these requests on the basis of ‘the best interest principle.’¹⁴¹ This is so because it has been stated that there has been a redefinition of the role of the parents in respect of control of their children and that it is no longer possible to regard parents as having an almost absolute power over their children. As Lord Fraser put it in *Gillick v West Norfolk and Wisbech Area Hospital Authority*,¹⁴² “parental rights to control a child exist not for the benefit of the parent but for the child” and in *Hewer v Bryant*,¹⁴³ “Parental rights start with the right of control and end with little more than advice,” Lord Denning MR stated plainly. Therefore, a child may be treated in the situations described above on the basis of need or on the grounds that the parental power had been used inappropriately.

When a child's life is in danger and parental consent is not given, a doctor is permitted to use clinical judgement or ask a court for permission to perform the surgery. In the Nigerian case of *Esabunor v. Faweya*, this scenario occurred.¹⁴⁴ Tega Esabunor was therefore born on April 19, 1997, at the Chevron Clinic in Lagos. He became ill on May 11th, 1997, and was sent to the birthing facility. Baby Tega was determined to be suffering from a serious infection that had caused a severe blood shortage after a thorough medical checkup. He was consequently given antibiotics, but by the morning of May 12, 1997, it was obvious that they were ineffective. Baby Tega was put on oxygen therapy because hospital staff members thought that he would die without blood transfusion. Despite being apprised of the situation, his mother refused to allow the transfusion of blood on the grounds that she was a Jehovah's Witness and that doing so was against the law in her faith.

Not having any other option, the hospital management informed the police who applied for and obtained an order from the Magistrate's Court authorizing the hospital to do all that was necessary for the protection of the life and health of the baby. The blood transfusion was done and the baby's condition improved so considerably that he was discharged a few days later. The baby's mother brought an application to set aside the order

authorizing the blood transfusion and when that application failed, she brought an application at the High Court to quash the order of the Magistrate Court and damages in the total sum of N15 Million for denial of parental right. The application was dismissed and she appealed to the Court of Appeal. The court ruled in dismissing the appeal that while everyone has the right to select their own path in life, this right does not extend to deciding whether a mother's son should live or die based solely on her religious convictions. The court further held, citing the case of *Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo*,¹⁴⁵ that the totality of an individual's right to privacy and freedom of thought, conscience, or religion is that they should be left alone to make life decisions, unless there is a clear and compelling overriding state interest that justifies the opposite.¹⁴⁶

What the court in the above case did not mention was the baby's best interest. Now, section 1 of the Child Rights Act provides that “in every action concerning a child, whether undertaken by an individual, public or private body, institutions or service, court of law, or administrative or legislative authority, the best interest of the child shall be primary consideration”.¹⁴⁷ It is submitted that had the court adverted its mind to this provision, it would not have had any difficulty in coming to the same decision it did. After all, it would be in the child's best interest to live a healthy life. This principle has been applied in other jurisdictions. In England, in the recent case of *Birmingham Children's NHS Trust v. B & C*,¹⁴⁸ A was born on 7 February 2014 with complex cardiac defects including a hole in the heart. A successful interim procedure was performed to improve his oxygen levels while he waited for an operation scheduled for 14 February 2014. A's parents, who are Jehovah's Witnesses consented to their child undergoing the recommended surgery but because of their religious beliefs, could not consent to him receiving blood during or subsequent to the surgery. The medical opinion of the medical staff of the hospital was that if the procedure was not carried out, A was unlikely to survive beyond babyhood, that though the risks of the proposed surgery

¹⁴¹ John Kasprak, ‘Refusal of Medical Treatment on Religious Grounds’, OLR Research Report, February 3, 1999, available at <http://www.cga.ct.gov/PS99/rpt/olr/htm/99-R-0180.htm>> accessed June 13, 2023

¹⁴² [1986]AC 121

¹⁴³ [1970]1 QB 357 at 359

¹⁴⁴ [2008]12 NWLR (Pt. 1102)794

¹⁴⁵ [2001]7 NWLR (Pt. 711)206 at 244

¹⁴⁶ O. C. Emmanuel & B. A. Obidimma, ‘Right of a Patient to Refuse Medical Treatment: Justification for Judicial Intrusion’, (2014) *NAUJIL*

¹⁴⁷ Section 1, Child Rights Act, 2004.

¹⁴⁸ [2014] EWHC 531 (Fam)



were relatively low, it could not be done without blood transfusion. In considering the application, the court, on the basis of A's welfare best interest, gave permission for A to undergo blood transfusions during the surgery notwithstanding his parent's objections on religious grounds.

In a case similar to this, *A C v. Manitoba (Director of Child and Family Services)*¹⁴⁹ A C, a 14-year-old girl was taken into custody under the Manitoba Child and Family Services Act (which stipulates that while under the age of 16, the courts must act in the child's best interests when imposing treatment deemed necessary) and made to consent against her will to a medically necessary blood transfusion in accordance with a court order. Devout Jehovah's Witnesses AC and her parents attempted to appeal the ruling, but they were unsuccessful. They further appealed to the Supreme Court of Canada which in dismissing the appeal, held that compelling/forcing a 14 year old to undergo necessary medical treatment in the circumstances of this case, was not a violation of her rights under the Canadian Charter of Rights and Freedom.¹⁵⁰

From the explanation above, it is abundantly evident that medical professionals have traditionally relied on clinical judgment to initiate the necessary procedure in practically all cases involving minors where parental consent is refused, especially on grounds of religion. The courts have also granted orders to carry out medically essential procedures when doing so is in the best interests of the child's wellbeing.

Argument in Support of Judicial Intervention

The right to refuse medical intervention or treatment is not absolute and the courts have over time made efforts to struck a balance between a number of interests, including the constitutionally guaranteed right of the person, the state's interest in preserving the moral standards of the medical profession, and the state's interest in the public health, safety, and welfare of society. The issue of a person's refusal to consent to life-saving medical treatment is invariably brought before the courts for resolution because nonconsensual medical treatment may make medical professionals and hospitals liable for assault and battery (aside from emergencies

where the patient is unconscious). In *Esabunor v. Faweya*, the Court of Appeal of Nigeria made clear this, citing the ruling of the Supreme Court of Nigeria in *Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo*,¹⁵¹ which found that:

If a decision to override the decision of a competent adult patient not to submit to blood transfusion or medical treatment on religious grounds is to be taken on the grounds of public interest or recognized interest of others, such as dependent minor children, it is to be taken by the courts.

a) Preservation of Life.

In most jurisdictions of the world, the preservation of human life is the primary purpose of government. This means that the state has a clear interest in preserving the lives of those who desire to live.¹⁵² In line with this governmental obligation, apart from the assurance of the right to life in section 33, section 14(2)(b) of the Constitution of the Federal Republic of Nigeria¹⁵³ provides that the security and welfare of the people shall be the primary purpose of government. This means that the state's interest in preserving the lives of its citizens is commonly considered most significant. In this regard, while fully recognizing the right of a competent adult to refuse medical treatment, the court may, should the need arise, as in where the health and safety of society is under threat, make an order overriding the patient's autonomy to decide what happens to his body.¹⁵⁴

The basis of this judicial intrusion is in pursuance of the interest of the state in the preservation of the lives of its citizens. But the basis of the intrusion must be balanced against the constitutional and inalienable right of the patient to self-determination and bodily integrity so that except there is an overwhelming reason to override the basic right of the patient, this intrusion cannot be justified. In this regard, the California Supreme Court in the case of *Thor v Superior Court*¹⁵⁵ held that:

The state's paramount concern is the preservation of life, which embraces two separate but related aspects: an interest in preserving the life of the particular patient and an interest in preserving the sanctity of all life. In this context, however, these considerations can only assert themselves at the expense of self-determination and

¹⁴⁹ 8[2009] SCC 30

¹⁵⁰ E B Giblin & C M Scarpa, 'When Patients Refuse Treatment' (2012) available at www.aaos.org/AAosNow/2012/Apr/managing/managing6/?ssoPc=1 June 13, 2023

¹⁵¹ *Supra*

¹⁵² O. C. Emmanuel & B. A. OBIDIMMA, 'Right of a Patient to Refuse Medical Treatment: Justification for Judicial Intrusion', (2014) *NAUJIL*

¹⁵³ CFRN, 1999 (as amended)

¹⁵⁴

¹⁵⁵ 6855 P. 2d 375, 383 (Cal. 1993)



bodily integrity... when disease or physical disability renders normal health and vitality impossible.¹⁵⁶

Therefore, while courts are generally vigilant to protect the right of competent adult patients to refuse medical treatment, they frequently intervene at the request of attending physicians and hospitals in deserving cases, based on evidence of a compelling state interest in preserving life, to curtail this right to self-determination and bodily integrity.

b) Protection of Innocent Third Parties

The state's interest in protecting innocent third parties, particularly where minor children are involved, is another significant interest that justifies judicial interference. Numerous cases, particularly in American law, have demonstrated tremendous regard for the state's interest in securing parental support of dependent children and minors. The welfare of minor children and dependents who might endure emotional distress and financial loss as a result of a competent adult's decision to forego life-saving or life-prolonging therapy is of particular concern to the state. In *Holmes v Silver Cross Hosp of Joliet, III.*,¹⁵⁷ the court held that while the state's interest in preserving an individual's life was not sufficient, by itself, to outweigh the individual's interest in the exercise of free choice, the possible impact on minor children would be a factor which might have a critical effect on the outcome of the balancing process.

In 1987, the New Jersey Supreme Court summarized the law succinctly thus:

When courts refuse to allow a competent patient to decline life-sustaining treatment, it is almost always because of the state's interest in protecting innocent third parties who would be harmed by the patient's decision. For example, courts have required competent adults to undergo medical procedures against their will if necessary to protect the public health,... or to prevent the emotional and financial abandonment of the patient's minor children.¹⁵⁸

Such is the justification for this judicial intrusion that even when the refusal to undergo a medical procedure is on religious grounds especially with regard to minor children, the courts have not hesitated one bit to declare in favour of the patient's dependents or innocent third

parties. In *Prince v. Massachusetts*,¹⁵⁹ the U.S. Supreme Court in this regard, made the point when it stated that: Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice themselves.¹⁶⁰

The Court of Appeal of Nigeria echoed the same sentiment in *Esabunor v Faweya*¹⁶¹ when it stated that although a person has a right to choose a course for his or her life, that right is not available to determine whether her son should live or die on account of her religious belief. The net effect of the foregoing postulation is that the courts would, for the purpose of protecting innocent third parties, make an order permitting the administration of medical procedure against the will of a competent adult patient.

c) Upholding the Medical Profession's Ethical Integrity

The preservation of the ethical integrity of the medical profession is another area of state interest on the basis of which judicial interference may be justified. The right of a patient to refuse treatment cannot be superseded, notwithstanding the fact that some courts may have expressed some interest in safeguarding the interests of the medical community. There has never been a good reason to justify judicial interference with a patient's constitutional right to self-determination and bodily integrity, which includes the right to refuse medical treatment. The state may have a legitimate interest in protecting doctors from civil or criminal liability by giving them free rein in the treatment and care of their patients.¹⁶²

Without a question, the state has a stake in preserving the moral standing of the medical community and giving hospitals the full chance and latent flexibility to provide treatment for the patients they are in charge of. This interest was cited as a restriction on the ability of a competent patient to refuse medical care. It is argued that allowing competent individuals to forgo life-sustaining medical care does not pose a serious threat to this state interest. Therefore, it would not be a legal intrusion to override a patient's ability to make an informed decision about what treatment to accept. After all, medical ethics

¹⁵⁶ *Ibid*

¹⁵⁷ 340 F. Supp. 125 (D.III. 1972).

¹⁵⁸ Matter of Farrel, 529 A. 2d 404, 412 (N.J. 1987).

¹⁵⁹ 3 321 U.S. 158 (1944)

¹⁶⁰ *Ibid*

¹⁶¹ *Supra*,

¹⁶² O. C. Emmanuel & B. A. OBIDIMMA, 'Right of a Patient to Refuse Medical Treatment: Justification for Judicial Intrusion', (2014) *NAUJILJ*



do not mandate constant medical treatment for sickness. Therefore, it is not necessary to restrict a patient's right to self-determination in order to acknowledge the interests of physicians, hospitals, and other healthcare professionals caring for the patient. This is true because acknowledging the choice to refuse necessary medical care in the correct situations is consistent with prevailing medical mores and does not pose a danger to the medical profession's legitimacy. Because of this, the majority of courts have rejected this claim. In fact, it has been ruled that in order for the patient's right to informed consent to have any significance at all, it must be respected even when it goes against the doctor's recommendations or the principles of the medical community as a whole.¹⁶³

Legal Prescriptions and Regulations on Informed Consent in Nigeria

No distinctive feature of the local culture or social context appears to have an impact on Nigeria's laws governing informed consent. Given the colonial history of the nation and the heterogeneous makeup of Nigerian society, this is not unexpected. The Nigerian Code of Medical Ethics, which addresses informed consent in Rule 19 of Part A, serves as a guidance for medical professionals.¹⁶⁴ Its requirements and the notion of autonomy and human rights it espouses are similar to those of any advanced Western nation. It acknowledges that, depending on the circumstance, consent may be requested from the patient, his or her family, or the appropriate governmental authority. While the Nigerian patient has the primary right to information and any treatment decisions, minors and people without ability can also give consent with the permission of a next of kin. In the absence of a relative, the institution's senior physician can make the proper decision to sustain life. In particular situations, a court injunction might be required. Consent negotiations and paperwork ought to be seen. According to the code, a proper informed consent must have the following elements:

- (1) information on the advantages and hazards of a procedure;
- (2) suitable professional advice on available options;
- (3) the patient's selection of their chosen option; and

(4) permission for the doctor to start treatment by signing the form.

The code recognizes the inherent right of a patient to his/her body and life. While acknowledging different types of consent (including voluntary self-offer for treatment), the code insists that certain interactions deserve expressly defined and documented consent. It provides a standard consent form (see appendix) and does not recognize any other form used by individual physicians.¹⁶⁵

The Nigerian legal system is based on British law and most procedural cases are derived from that legal system. Medical practice in Nigeria is relatively free of malpractice litigation compared to developed countries. Accusations of medical negligence, incompetence and unethical or unprofessional conducts are common, but most of these cases are adjudicated by the disciplinary committee of the Medical and Dental Council of Nigeria: the body that regulates professional medical practice in Nigeria. The decision of the disciplinary committee can be appealed in the regular Appeal Courts, but such cases are the exception.

The general reticence to use litigation in settling medical disputes is said to be embedded in the Nigerian sociocultural milieu.¹⁶⁶ There are ingrained traditional ways of settling disputes through the use of elders, religious ministers and family members. Nigerians will prefer to 'leave the judgment to God' rather than take steps to seek redress in courts.¹⁶⁷ It is, however, debatable to what degree this reticence to use legal recourse is attributable to cultural issues as opposed to social, educational and economic factors. The literacy level is low, especially in rural areas and the northern parts of the country. Even educated citizens are often not sufficiently aware of their legal rights. Also, the cost of litigation is very high and, in the face of poverty, aggrieved individuals will rather channel scarce resources to immediate needs and other worthy endeavors. Legal factors also make litigation unattractive. The wheel of justice is very slow and the bar and the bench are not immune to the corruption that exists in the whole system. In addition, medical practitioners in Nigeria are among the privileged group

¹⁶³ Matter of Conroy, 486. A. 2d 1209, 1224-1225 (N.J. 1985).

¹⁶⁴ Medical and Dental Council of Nigeria. 2004. Codes of Medical Ethics in Nigeria. Surulere: Petruvanni Co. Ltd: 26–31

¹⁶⁵ Emmanuel R. Ezeome & Patricia A. Marshall, 'Informed Consent Practices in Nigeria', *Developing World Bioethics* ISSN 1471-8731 (print); 1471-8847 (online)

¹⁶⁶ J.A. Yakubu, ed. 2004. *Medical Law in Nigeria*. Ibadan: Demyx Press.

¹⁶⁷ Ibid



in the country; the average person may not have the resources to seek redress. Besides, many patients present very late in their disease progression and are in bad shape by the time a doctor attend to them. Whatever the outcome then, it is more difficult to apportion blame to the doctor. With the increasing level of literacy, decline in poverty, and the introduction of a health insurance scheme, the absence of medical malpractice cases in Nigeria may not continue much longer.

In a clear case of departure from the norm of paucity of legal suits in medical practice, the supreme court of Nigeria in 2001 adjudicated its most celebrated case on informed consent.¹⁶⁸ In *Medical and Dental Disciplinary Tribunal vs. Okonkwo*, the appellant, Dr Okonkwo, was found guilty of professional misconduct. He had honored the verbal and written wishes of a Jehovah's Witness patient who refused blood transfusion and consequently died during treatment. The Nigerian appellate court upheld Dr Okonkwo's appeal and the Supreme Court concurred.¹⁶⁹ The apex court ruled that an adult Nigerian has a right to refuse life prolonging medical treatment, including blood transfusion. The court located that right in the constitutional right to privacy and freedom of thought, conscience and religion. The court, in defining the limits of treatment in that judgment, stated:

*The patient's consent is paramount... (Accordingly) the patient's relationship (with the Doctor) is based on consensus. It follows that the choice of an adult patient with a sound mind to refuse informed consent to medical treatment, barring state intervention through judicial process leaves the practitioner helpless to impose a treatment on the patient.*¹⁷⁰

Beyond the Okonkwo case, Nigerian courts have not established the parameters of the doctor's duty of consent, hence in real practice, not much information is supplied to the patients. Although Nigerian local culture and social pressures might affect the actual practice of informed consent, the aforementioned legislative decision and the rules addressed informed consent in a way that any Western system would. Legal experts have compared Nigerian medical laws to those in the US and UK and used them as precedents in their analyses of Nigerian medical laws.¹⁷¹ What is not easily discernable, however, is the limits the courts will impose on medical

practitioners in actual adversarial proceedings. While the Okonkwo case made news within the Nigerian medical community because it was the first of its kind, its full impact on informed consent among physicians was not realized as it was highlighted in the mass media as a case of the right of Jehovah's Witnesses to refuse blood transfusion. This ruling, however, threw more light on the expectations in the patient-physician relationship in Nigeria and points to the likely course legal rulings will take if and when litigations become a major part of the significant forces shaping consent practices in Nigeria.

Conclusion

This study critically analyzed the conflict between the freedom of religion and the fundamental right to life, especially in the cases of blood transfusion. Blood is an essence component in the human system. It is considered as the 'fluid of life' because it carries oxygen from lungs to all parts of the body and carbon dioxide from all parts of the body to the lungs. In any circumstance where there is no or insufficient amount/level of blood in a person such an individual will in no time die. Blood transfusion is a medical intervention developed to help transfer blood through a small tube inserted into the vein of a human or animal recipient. The blood is either taken directly from a donor or is obtained from a blood bank. Blood transfusions are a therapeutic measure used to restore blood or plasma volume, to increase the number and concentration of red blood cells in persons with anemia in order to improve the oxygen carrying capacity of their blood. There are several reasons for blood transfusion. However, it is essentially done to preserve the life of person who is in need of blood.

Freedom of religion can be an obstacle in the adoption of this potential lifesaving medication intervention and thereby conflicting with the right to life of such individual. Blood transfusion is strongly rejected by some religious doctrine especially the Jehovah's witnesses - a recognized global Christian organization. The clash over the free exercise of religion and medical treatment has not been restricted to Jehovah's Witnesses. Flowing from the objective of this work; the study examined the right to privacy and right to freedom of thought, conscience and religion, the limitation to the right to privacy and right to freedom of thought,

¹⁶⁸ C.C. Nweze. Medical Negligence: Comparative Contemporary Legal Perspectives. Consumer Journal 2005; 1: 35–67.

¹⁶⁹ Medical and Dental Disciplinary Tribunal V Okonkwo (2001) 4 SCN 78. NLWR 2001; Part 711: 205–255

¹⁷⁰ *Ibid*

¹⁷¹ A.J. Dada. 2002. Consent to Medical Treatment. In Legal Aspects of Medical Practice in Nigeria. A.J. Dada, ed. Calabar: University of Calabar Press: 157–171.



conscience and religion, and the right to refuse medical treatment on religious grounds.

The right of a patient to refuse treatment cannot be overridden, despite the fact that some courts may have demonstrated some interest in defending the interests of the medical community. It is the law that the right to privacy, autonomy and self-determination includes the right of a competent adult patient to refuse any form of medical treatment even though that refusal may seem unwise, foolish or ridiculous.¹⁷² Although the state may have a legitimate interest in shielding doctors from civil or criminal liability by allowing them full control over the treatment and care of their patients, this has never been a good enough reason to justify judicial interference with the patient's constitutional right to self-determination and bodily integrity to refuse medical treatment.

The exercise of the right to freedom of thought, conscience and religion guaranteed by the Constitution cannot be divorced from the right to refuse medical treatment on religious grounds. This is so because that is the very aspect of the exercise of the right guaranteed under section 38 of the Constitution. However, the right guaranteed under that section may not be honoured where the health and safety of the society is under serious threat and where the state's interest in preserving life or protection of innocent third parties is called to question. The fundamental right of a patient to choose his or her own course of treatment demonstrates respect for that person's autonomy. The patient's right to consent to any medical treatment proposed by medical personnel is now internationally recognized. The principle of the right of the inviolable right of the individual to choose and to decide the circumstances of his health necessitates this consent. The consent must be free, prior and informed. The patient must be able to access and comprehend the disclosure, which must include information on the nature, extent, length, potential hazards, and anticipated effects of the medical operation, among other things. Full disclosure of information on the procedure's benefits, risks, complications, and side effects is required. The physician provides all the necessary information regarding a procedure or treatment to be carried out on the patient. In Nigeria, the issue of free, prior, informed

consent in medical practice is poorly implemented. Several factors are responsible for this. Firstly, there is the problem of low level of literacy in Nigeria. Illiterate patients tend to rely completely on the judgment of the physician. The second factor is the fact that the right to informed consent is poorly enforced. There is limited remedy available in Nigerian law to patients whose rights to informed consent have been breached. Furthermore, the mechanisms for enforcing the right to informed consent are hampered by bureaucracy.

The Constitution of Nigeria did not define influential terms in the provision such as the phrase "reasonably justifiable", "democratic society" and the criteria for determining such a law. The Constitution did not also define what comes within the purview of phrases such as defense, public health, public morality etc. or even the right of others that it seeks to protect. The lack of definitions allows the government to determine the meaning of those terms in derogating from the rights. In addition, the meanings of words like manifestation, worship, teaching, practice and observance in the provision are not provided for. Nobody knows whether they can apply to a wider range of beliefs or not. Second, the religion-state pattern of the country indicates in contrast to what many believe, that there is a difference between theory and practice in the pattern.

Both the right to life¹⁷³ and the fundamental right to freedom of thought, conscience and religion¹⁷⁴ are fundamental rights recognized by the constitution. Okonkwo's case seems to have settled the question of whether a person of full capacity can reject medical treatment on religious grounds. But with regard to a situation where the patient is still a child or where a parent rejects medical treatment on behalf of his or her child, even though the same principle ought to apply as in Okonkwo's case from the discussion made above, the Nigerian courts have rather prevaricated. The conclusion that is made is that the exercise of the right to freedom of thought, conscience and religion guaranteed by the Constitution cannot be divorced from the right to refuse medical treatment on religious grounds. This is so because the right to refuse medical treatment on religious grounds is an aspect of the exercise of that right. It is conceded however that the right to refuse medical

¹⁷² O. C. Emmanuel & B. A. OBIDIMMA, 'Right of a Patient to Refuse Medical Treatment: Justification for Judicial Intrusion', (2014) *NAUJILJ*

¹⁷³ Section 33(1) of the Constitution of the Federal Republic of Nigeria (CFRN), 1999, as amended, provides that "every

person has a right to life, and no one shall be 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 in Nigeria"

¹⁷⁴ *Ibid*, Section 38



treatment may not be honoured where the state's interest in preserving life or the protection of innocent third parties is called to question.

Recommendations

In view of the foregoing, it is recommended that while judicial intrusion is necessary and welcome in appropriate cases, it should not override a patient's right to refuse medical treatment in exercise of his or her constitutional right. It is further recommended for purposes of clarity, that there is need to make available, legal remedies to make objecting competent adult patients, in appropriate cases, submit to life-saving medical treatment. The availability of these remedies would settle the responsibility of deciding whether or not the decision of the patient should be overridden. This decision would, in the circumstances, shift to the courts which are the proper forum for such decisions. The legislature is therefore required to fill that gap.

Furthermore, there should be definitions of all-important phrases used in the language of freedom of religion. The legislature and the judiciary should provide a more clear and specific criteria for determining exactly what to do in each specific situation.

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