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AN APPRAISAL OF SOME FUNDAMENTAL RIGHTS OF MENTALLY-ILL PERSONS IN NIGERIA

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Abstract

Mental health issues are usually demographic free and not subject to any geographical boundaries. From East to West as well as North and South, both in developed and developing nations, cases of mental and behavioural disorders abound. There is need to analyse some fundamental rights of the mentally ill in Nigeria. The paper highlighted some of these rights to include, employment, leading to mental health services, equality, and standard treatment, privacy and dignity, confidentiality, legal representative, right to refuse or accept treatment, consent to treatment, among others. Against this background, the author argued the inherent rights contained in both the 1999 Constitution (as amended) and the extant National Mental Act, 2023, actually providing for and could be utilised and applied to accommodate the perceived rights of the mentally-ill. The author therefore maintained on the need for consent to treatment. The paper therefore concluded that an aspect of these rights that has not gained adequate attention in Nigeria is rehabilitation of the mentally-ill after treatment. The paper therefore recommends that government at all levels in Nigeria should make adequate arrangements for rehabilitation after treatment as it obtains in developed societies the world over.

Keywords: Medical consent, Fundamental Rights, Mentally-ill, incompetent person, battery

1. Introduction

International instruments supporting even the most basic rights of persons with mental disorders have been very long in coming.[1] On 17th December 1991, the United Nations General Assembly adopted 25 Principles for the protection of persons with mental illness and the improvement of mental health care through Resolution 46/119.[2] This was the culmination of fourteen years of work that began in 1970 when the Human Rights Commission of the United Nations requested the sub-committees on Prevention of Discrimination and Prevention of Minorities to study the question of the protection of those detained on the basis of mental illness.[3] The draft resolution was finalized after more than a decade of debates and discussion of the Economic and Social Council.[4]

Chamberlin is quoted to have succinctly put the issue this way:

> Perhaps, someday, it will be recognized that person who are diagnosed as mentally ill should have exactly the same rights as other citizens of their countries, most fundamentally the rights to live their lives as they choose and make their own decisions. Any special help or protection they may need as a result of disability should in no way alter their fundamental citizenship rights.[5]

On its part, the World Health Organization[6] also provided some guidelines for the protection of human rights of persons with mental disorders-to be applied without discrimination on any ground such as disability, race, sex, language, religion, political, or other opinion, national, ethnic, or racial origin, legal or social status, age, property or birth.[7]

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[1]. "Guidelines for the Protection of Human Rights of Persons with Mental Disorder: A Division of Mental Health and Prevention of Substance Abuse, World Health Organization, Geneva, 1996 available at www.who.int/mental-health/policy/legislation/guidelines-promotion-pdf accessed on 4/4/2024, p.10.
[2]. Ibid, p.11
[3]. Ibid
[4] ."Guidelines for the Protection of Human Rights of Persons with Mental Disorder," supra, at p.11
[5]. Ibid, p.13
[6] [Hereafter, The World Health Organisation}
[7]. Ibid, 17

Significantly, Nigeria is not left out with respect to the regime of mental health. There exist statutory provisions provided by the 1999 Constitution (as amended) and the extant National Mental Health Act, 2023 for the protection of the rights of the mentally ill.

2. Nature and Scope of Legal Rights of the Mentally-Ill in Nigeria

The United Nations Convention on the Rights of Persons with Disabilities[8] was negotiated during the eight sessions of the Ad-Hoc Committee of the General Assembly from 2002 to 2006 and adopted on December 13, 2006.[9] There were 140 signatories to the CPRD (with 49 ratifications) and 83 signatories to the Optional Protocol (with 37 ratifications). Nigeria was among the eighty original signatories to the convention. At the signing ceremony, the then Minister of Foreign Affairs announced that a Bill that would outlaw all forms of discrimination against persons with disabilities was pending before the legislature. Such a law, would among other things, take into account the principle of the fundamental human rights of mentally-ill persons, and also, the humanitarian and self-preservatory rules.[10] The United Nations convention on the Rights of Persons with Disabilities also set out a framework for a rights-based approach to disability and in doing so, "calls for changes that go beyond quality of care to include both legal and service reforms" and demands that we "develop policies and take actions to end discrimination in the overall society that has a direct effect on the health and well-being of the mentally disabled.[11] The CPRD outlined a number of guiding principles to include:

a. Respect for inherent dignity; individual autonomy including the freedom to make their own choices and independence of persons.
b. Non-discrimination.
c. Full and effective participation and inclusion in society
d. Respect for difference and acceptance of person with disabilities as part of human diversity and humanity.
e. Equality of opportunity.

[8]. [Hereafter, The CPRD]
[9]. J. K. Burns, "The Mental Health Gap in South Africa – A Human Rights Issue" (2011) 6, *The Equal Rights Review***,** Vol. six, p.99
[10]. Ibid
[11]. Burns, "The Mental Health Gap in South Africa" op cit p.107

f. Accessibility.
g. Equality between men and women, and respect for the right of children with disabilities and preserve their identities.[12]

I. Fundamental Freedom and Basic Rights

Every person with a mental illness shall have the right to exercise all civil, political, economic, social and cultural rights as recognized in the Universal Declaration of Human Rights, the International Convention on Civil and Political rights, and in other relevant instruments such as the Declaration on the Rights of Disabled Persons and the Body of Principles for the protection of all persons under any form of detention or imprisonments.[13] This principle stressed the need for persons with mental disorder to be able to exercise civil, political, economic and cultural rights such as:

(a) The right to marry
(b) The right to own property
(c) The right to freedom of though
(d) The right to vote
(e) The right to freedom of expression and opinion
(f) The right to work, to free choices of employment to just and favourable conditions of work and to protection against unemployment
(g) The right to education
(h) The right to have children and to maintain parental rights
(i) The right to freedom of movement and choice of residence (assuming the individual has not involuntarily committed)
(j) The right to qualified legal assistance to protect their rights, and to have their condition taken fully into account in any legal proceeding
(k) Right to give or refuse consent
(l) Confidentiality
(m) Boundaries violations[14]

[12]. Ibid
[13]. "Guidelines for the Protection of Human Rights of Persons with Mental Disorder: A Division of Mental Health and Prevention of Substance Abuse, World Health Organization, Geneva, 1996 available at www.who.int/mental-health/policy/legislation/guidelines-promotion-pdf accessed on 4/4/2024, p.10.
[14]. See Principle II of the United Nations Declaration on the Rights of Disabled Persons, 1975.

However, there exist International treaties which recognize the right to health and Nigeria is a party to most of them. They include the International Covenant on Economic, Social and Cultural Rights.[15] This recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[16] The general language in this covenant does not provide for States much guidance on how to ensure this right for their citizens, but the principles of any new law in Nigeria should at least comply with the broad rights guaranteed by the Covenant. Others include Convention on the Elimination of all Forms of Discrimination; the Convention on the Elimination of all Forms of Discrimination against Women; and the Convention on the Rights of the Child.[17] Nigeria is also a party to two health related treaties on civil and political rights namely, the International Covenant on Civil and Political Rights and the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment. In addition, Nigeria is also a party to several conventions of the International Labour Organization-some of which contain provisions on the health of workers.[18] Nigeria is also a party to the General Conventions and Additional Protocols that prescribe rules for conduct of warfare, including health-related obligations.

Furthermore, Nigeria adheres to several non-binding instruments that address health issues. They include the 1993 Vienna Declaration and Programme of Affairs, the Programme of Action of the 1993 United Nations International Conference on Population and Development, and the 1995 Beijing Declaration and Platform for Action, and the United Nations Fourth World Conference on Women. At the regional level, Nigeria is a party to the African Charter on Human and Peoples' Rights (African Charter); the African Charter on the Rights and Welfare of the Child, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.[19] As regards the applicability of these treaties within domestic framework, it is worth noting that with the exception of the African charter which has been domesticated into Nigeria's legal, no

[15] [Hereafter, The ICESCR]
[16]. A. H. Westbrook, "Mental Health Legislation and Involuntary Commitment in Nigeria: A Call for Reform", in *Washington Global Studies Review*, Vol. 10, 397, p. 411
[17]. O. Nnamuchi, "The Right to Health in Nigeria-The Right to Health in the Middle East,' Supra, p. 2
[18]. Ibid
[19]. Ibid

other treaty relating to the right to health has direct application in Nigeria.[20] This is because Nigeria, like most common law countries, adopts a dualist approach in receiving international law. This means that notwithstanding ratification, treaties require legal force only upon enactment by the National Assembly.

[20]. Ibid, at p.2

II. Some Basic Rights

There exists a plethora of rights for the mentally-ill persons in Nigeria. Part II of the extant National Mental Health Act, 2023 provides for the Rights of persons with Mental Health conditions. These include "rights of persons in need of mental health conditions services.[21] Employment Right,[22] Housing Rights,[23] Right to mental health services,[24] Right to quality and standard treatment;[25] Right to appoint legal representatives,[26] Rights to participate in treatment planning;[27] Rights to privacy and dignity;[28] Right of access to information;[29] Right to confidentiality;[30] Right to legal representation;[31] and protection of persons with mental health conditions,[32] among others. Of special note is Part III of the Act, titled "Facility-Based Treatment or Care" is "Informed Consent"[33] which takes prominence in this discourse.

3. Determination of Pre-Treatment Requirement of Consent

The requirement that a patient must give a valid consent to medical treatment and its corollary, that is, the patient's prerogative to refuse treatment even that which will save his life, are issues at the heart of medical law.[34] In Anglo-American Law, it is a fundamental principle that the consent of the patient, or of someone authorized to act for a legally incompetent patient must be obtained before any medical or surgical treatment is undertaken, unless on emergency, justifies treatment without consent. The reason for this is that any unpermitted, intentional touching of the patient's body constitutes the tort

[21]. Section 12, National Mental Health Act, 2023
[22]. Section 13, National Mental Health Act, 2023
[23]. Section 14, National Mental Health Act, 2023
[24]. Section 15, National Mental Health Act, 2023
[25]. Section 16, National Mental Health Act, 2023
[26]. Section 17, National Mental Health Act, 2023
[27]. Section 18, National Mental Health Act, 2023
[28]. Section 19, National Mental Health Act, 2023
[29]. Section 20, National Mental Health Act, 2023
[30]. Section 21, National Mental Health Act, 2023
[31]. Section 22, National Mental Health Act, 2023
[32]. Section 23, National Mental Health Act, 2023
[33]. Section 26, National Mental Health Act, 2023
[34]. Maurch Stauch & Ors. Sourcebook in Medical Law (2nd ed.), Cavendish Publishing Ltd, London 2002, p. 103

of assault and battery.[35] Similarly, the common law has long recognized the principle that every person has the right to have his "bodily integrity protected against invasion by others" and this finds justification in the fact that everyone has the "right of self-determination in regards to his body."[36] This classic judicial statement supporting the foregoing general principle of law was made by Justice Cardozo in Schloendorff v Society of New York Hospital.[37]

> Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages. This is true except in cases of emergency, where the patient is unconscious and where it is necessary to operate before consent can be obtained.

At law, no treatment is to be administered to a person without his consent merely because others reason that it is for his benefit. Any doctor who disregards a patient's right to "self-determination" and embarks on a treatment for which consent is not given by the patient exposes himself to the civil wrong of trespass to the person and may also face criminal charge for assault.[38]

Types of Consent

At common law, consent to medical treatment may be **express** or **implied**.[39] The difference between an express and implied consent is in the method by which the patient, or the one authorized to consent manifests it consent.

Express consent is manifested by words, oral or written, while **implied consent** is manifested by acts on the part of the patient and by all the circumstances surrounding the rendering of medical or surgical treatment.[40] To illustrate, a routine physical examination

[35]. A. F. Southwick, The Law of Hospital and Health Care Administration (2nd ed.), Michigan Health Administration Press, Ann Arbor, 1988, p.350
[36]. F. O. Emiri, *Medical Law and Ethics in Nigeria***,** Malthouse Press Ltd, Lagos, 2012, p. 299
[37]. (1914) 105, N. E. 92, 93, N.Y, 125, 129, 105
[38]. Emiri, Supra, at p. 299
[39]. Tijani Nasiru, "Physicians, Patients and Blood: Informed Consent to Medical Treatment and Fundamental Rights" in E. Chianu (ed.) Legal Principles and Policies-*Essays in Honour of Justice Chukwuweike Idigbe, District Universal Ltd,* Benin City, 2006, p. 360
[40].Southwick, Supra, at p.350

of a mentally competent adult patient in a physician's office, or of a minor accompanied by a parent need not be fortified by an express, oral or written consent. On the other hand, a patient in labour presenting herself at a maternity department of a hospital has impliedly consented. This is often referred to as voluntary submission.[41] Effective consent may be based upon either of two conditions. First, the patient or the patient's surrogated may have been willing to undergo the medical procedure in question. Second, irrespective of his actual willingness or unwillingness, the patient may through his conduct has sufficiently manifested consent.[42] However, consent in whatever form must be informed. Professor Emiri asserts that informed consent to treatment is said to have six basic elements that underlie it, especially in the context of medical experiment. They include:

(a) A fair explanation of the procedure to be followed, and its purposes including identification of any procedures which are experimental;
(b) A description of any attendant discomfort and risk reasonably to be expected;
(c) A description of any benefits reasonably to be expected;
(d) A disclosure of any appropriate alternative procedures that might be advantageous for the subject;
(e) An offer to answer any inquiries concerning the procedures;
(f) An instruction that the person is free to withdraw his consent and to discontinue participation in the project or activity at any time without prejudice to the subject.[43]

The adumbrated provisions of the Nigerian Constitution serve as safeguards to the right of a patient to reject a form of medical treatment based on religious beliefs.[44] This issue arose in the Canadian case of Malette v Shulman.[45] In this case, a doctor transfused blood on a Jehovah witness patient, though he had been informed of a medical alert card in the patient's purse stating that she will not consent to blood transfusion under any circumstance. When she recovered from unconsciousness, she sued the doctor for battery for disregarding her wish. The doctor argued that it was an emergency resulting from her serious car injury which necessitated urgent life-saving blood transfusion that ought to

[41]. Ibid
[42]. J. H. King (Jnr.), *The Law of Medical Malpractice* (2nd ed.) West Publishing Co; Minnesota, 1986, p.131
[43]. Emiri, Supra, at p. 299
[44]. Nasiru, Supra, at p. 366
[45] (1990) 47 DLR 18

override her medical alert instruction. The doctor further argued that society has an interest in the preservation of life and that the particular emergency justified his disregard of the card and that he had a medical duty to save life. He further reasoned that since he, in such emergency could not communicate the serious life threatening nature of the situation to the patient, the patient could not make an informed refusal to the treatment deemed necessary. The Ontario Court of Appeal dismissed his arguments and asked him to pay damages of $20,000 Canadian Dollars for trespass. The Court said:

> A competent adult is generally entitled to reject a specific treatment or to 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. Regardless of the doctor's opinion, it is the patient who has the final say on whether to undergo the treatment.

The decision in this case was approved and accepted by the Nigerian Supreme Court in Medical and Dental Practitioner Disciplinary Tribunal v. Okonkwo.[46] In this case, an anaemic patient of the Jehovah's Witness Christian group rejected blood transfusion. She was managed according to her wishes. No transfusion was administered. It happened that the physician who managed her up till the time of her death was also a Jehovah's Witness. The deceased's mother caused the physician to be tried by the Medical and Dental Practitioners Disciplinary Tribunal (MDPDT) for not seeking consent to transfer her to another hospital where blood would have been transfused. The physician was found guilty of infamous conduct in a professional respect and was handed a six-month suspension. The Tribunal held that Dr. Okonkwo, the proprietor of the private hospital where the deceased died should have transferred the patient to a "bigger centre" where she would have been transfused. On Dr. Okonkwo's appeal, the Court of appeal quashed the suspension on the ground, **inter alia,** that a physician is not criminally or civilly liable where he treats his patients in accord with the patient's wishes. The MDPDT's appeal to

[46]. (2001) 7 NWLR (Pt. 711) 206. The Jehovah's Witnesses staunch rejection of blood transfusion stands on two grounds- belief that God's law on blood as expressed in such scriptures as Genesis 9:34, Leviticus 17:10-14, Deuteronomy 12:23, Acts 15:20, 20-29 in the Holy Bible should be applied literally, also on unflinching conviction that if they die loyal, they would be resurrected to a better life under Christ's Kingdom Rule which they believe is at hand. John 6:40. They are not fatalists as they accept non-blood volume expanders and other non-blood management of ailments.

the Supreme Court was unsuccessful. The Court of Appeal's reasoning was upheld. Uwaifo, JSC said:

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

Also, in another Nigerian case of Okekearu v Tanko,[47] the plaintiff had an injury following the crushing of the middle finger. The bone was broken and only a strip of the skin held the finger to the hand. He was taken to the defendant's clinic who then amputated the left centre finger of the 14year old plaintiff. The doctor's defence was that he obtained the plaintiff's consent from the plaintiff's auntie who gave him the go ahead with whatever treatment he deemed necessary. No effort was made by the defendant to obtain the consent of the plaintiff before amputating the finger. The trial judge gave judgement for the plaintiff and awarded him the sum of N100,000 (One hundred thousand naira) only as general damages for permanent incapacitation, negligence and battery resulting from the amputation of his finger. The defendant's appeal to the Court of Appeal failed, but only the general damages was reduced from N100,000:00 to N50,000:00. The defendant further appealed to the Supreme Court which dismissed the appeal.

The doctrine of informed consent has also gained statutory backing in the Nigerian legal jurisprudence. **Section 26(1) & (2)** of the National Mental Health Act 2023 adequately provides for the concept. Tagged "Informed Consent,"[48] S**ection 26(1)** of the Act provides unequivocally that:

> No treatment shall be administered without the prior written consent of the person with mental health condition voluntarily given after the attending

[47]. (2002) 15 NWLR (Part 191) 657
[48]. **Section 26 (1) & (2)** National Mental Health Act, 2023

health care worker has provided the person with relevant information pertaining to his state of health and necessary treatment…

On its part, **subsection 2** provides that:

> The health professional shall ensure that the information provided to the person under subsection (1) is given in the language the person understands and in a manner which takes into account the literary level of the person ….

This provision operates to obviate the defence of lack of understanding of communication on account of language barrier.

4. The Law and Quality of Consent for the Treatment of Incompetent Persons

It is widely recognized in both criminal and civil law that there are circumstances in which acting out of necessity legitimates an otherwise wrongful act.[49] A doctor who treats a patient without a valid consent may still not be liable in an action in battery if he can raise the defence of necessity and has treated the patient in the patient's best interests. Although the defence of necessity must be equated with acting in the best interests of the patient, the concept is frequently used to refer to emergency treatment carried out on unconscious patients or when dealing with patients who are permanently lacking in capacity, whether emergency case or not.[50] An incompetent adult is a person who suffers from a disease of the mind or natural mental infirmity (which is the core of this discourse) which impairs in reasoning powers or ability to decide whether to take a form of medical treatment or not. A patient may be unable to grant an effective consent for medical or surgical treatment by reasons of mental incompetence of other disability. It is generally accepted that every human being of adult years and sound mind has a right to determine what shall be done to his own body. This means that practitioners are obligated to seek and obtain the consent of mature adults and those that are mentally sound. The traditional or conventional position of law is that patients who are minors or those with mental illness lack the capacity or competence to give a valid consent to medical treatment. Consequently, consent to treat them will therefore be given by proxy either by their parents, guardian, legal best friend, next of kin or as the court may decide.

[49] Maurch Staunch and ors., supra, at p.169
[50]. Ibid

a. Consent in Medical Emergencies

In a medical emergency, no consent at all is required. The law in effect presumes that consent has been given, and the lack of an express or implied consent will not justify an action based upon assault and battery or negligence against a physician or hospital. This rule, which is sometimes called "*consent implied by law*" applies to all patients regardless of age.[51] However, to justify medical treatment without consent, the defendant must show, first, that it was not possible at the time treatment was undertaken to obtain the consent of the patient or that of the person authorized to act in place of the patient. Secondly, the traditional legal concept of a medical emergency demands that a situation where there is an immediate threat to life or a threat of permanent impairment of health. If delaying treatment while consent is obtained would not increase the hazard to the patient, "the emergency" is not sufficient to justify treatment without consent.[52]

5. Conclusion and Recommendation

The author has demonstrated the nature and scope of the relationship between mentally ill and the subsisting legal framework both in International and Nigeria laws. Furthermore, the author analysed the need for primary issue of obtaining consent as well as the quality of consent, most especially as it affects mentally ill. The author demonstrated his investigation with chains of statutory provisions and case laws applicable in Nigeria. Drawing attention from the provisions of both the 1999 Constitution (as amended) and the extant National Mental Health Act 2023, the paper concluded that there are provisions for the protection of rights of the mentally-ill. The paper maintained that such rights included right to marry, own property, education, to give or refuse consent, employment rights, freedom of movement, privacy and dignity, housing and right to mental health services, right to participate in treatment planning, privacy and dignity, among others. An aspect of these provisions that is missing is rehabilitation after treatment. The paper

[51]. Southwick,, supra, at p.350.
[52]. *Zoski v Gaines*, 271 Mich.1. 260, Nov. 99 (1995), where a surgeon was held liable for the removal of a minor's tonsils without parental consent. See generally, *Luka v Lowrie*, 171 Mich. 122, 123 N.W. 1106 (1912), *Moses v Rishworth*, 222, S.N (Tex. Comm'n of App. (1920) – a 9 year old and 11 year old's consent were held insufficient.

therefore recommends that the relevant government agencies should ensure that mentally-ill persons who have been treated should be adequately rehabilitated either into their communities or with their families, in order to confer dignify and self-worth.

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