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EXAMINATION OF THE LEGAL AND INSTITUTIONAL FRAMEWORKS OF MEDICAL LAW IN NIGERIA

Olabanjo Ayenakin
, Department of General and Liberal Studies, The Federal Polytechnic, Ado Ekiti.

Temidayo Akindejoye
Department of General and Liberal Studies, The Federal Polytechnic, Ado Ekiti.

Itunu Kolade-Faseyi
Department of Private and Business Law, College of Law, Achievers University, Owo.

ABSTRACT: *This paper examines the legal and institutional frameworks of medical law in Nigeria. The health sector has significant and considerable multiplier effect on virtually every facets of a country. The economic, industrial, technological and agricultural advancement of a country cannot be isolated from the state of the health of the citizens. Therefore, it is a truism that a healthy nation is a wealthy nation. Medical law being the legal regime that regulates the health sector, the prerogatives and responsibilities of medical professionals as well as the rights of patients; this head of law, is very significant. If the rights of patients, the duties of medical professionals and health institutions in Nigeria are to be protected, enhanced and developed, attention must be paid to Nigerian's medical law. Medical practice in Nigeria is bedevilled with a number of challenges, ranging from legislative imbroglio to institutional dysfunctions which consequently enmesh the health sector in sporadic cases of medical negligence, violation of patients' rights, breach of confidentiality, protracted discipline cases of medical practitioners and abuses. Existing research work by learned writers and jurists focus mainly on patients' rights and negligence. Most of the research works do not examine the legal regime of medical law as well as the institutional framework for the enforcement of patients' rights and discipline of medical practitioners. This academic work uses the doctrinal method of legal research to examine existing literature, articles, legislations and judicial authorities; to expose the legal and institutional dysfunction in medical law in Nigeria with a view to providing functional and holistic legal regime that will strengthen medical law in Nigeria. This work identified gaps in existing legislations in medical law in Nigeria; it exposes the non-justifiability of the constitutional provision on health in the Nigeria's constitution as well as weak institutional framework for enforcement of medical law. At the end of the work, it is recommended that the various medical or health law in Nigeria should be amended to incorporate contemporary trends in medical practice; massive education of the citizenry should be done to educate people about their health rights and strong institutions should be put in place for the enhancement of medical law in Nigeria.*

KEYWORDS: medical law, legal framework, institutional framework, legal regime.

INTRODUCTION

One of the most significant and pivotal segments of any vibrant, developed and organised society is the health sector. There is a casual and symbiotic relationship between national development, economic development, technological improvements and educational advancement of a country and the development of the health

sector. In other words, a robust and advanced health sector is not only critical to development; it is a catalyst for development.[1]

Consequently, the significance of a vibrant, articulate, developed as well as advanced legal, regulatory and institutional framework for medical law is very crucial. Medical law is so important to the development of any nation that nowhere in the world is the sector left to the whims and caprices of practitioners without appropriate regulations.[2] The reason for this is not farfetched; when the citizens of a country are sick, weak and diseased; every sector of the country will significantly be affected. The current pandemic nature of corona virus globally has brought to fore the place of medical practice not only in global economy but in global existence as humanity was grossly threatened by the pandemic.[3]

Medical law is the body of laws governing the rights and responsibilities of medical professionals and their patients. It focuses on issues like confidentiality, negligence, criminal law, ethical issues, cloning, surrogacy, and drug management, to mention only a few.[4] Many advanced countries of the world have not only made giant strides in their educational, economic and technological sectors, but they have made considerable progress in the medical sector; especially in the legal regime and institutional framework for the practice of medicine. The giant strides made in advanced countries largely explains the reason many of the citizenry are acquainted with patients' rights and demanding for compliance as well as legal enforcement where there are medical infractions unlike Nigeria where ignorance holds sway. Similarly, these advanced countries provide constitutional guarantee for the right to health and there are plethora of legislations regulating the health sector.

Health in Nigeria is protected in the Constitution under the Fundamental Objectives[5] which is meant to guide the government in the formulation of policies and there are a number of other legislations governing health and medical practice in Nigeria. Similarly, the various legislations in Nigeria establish a number of regulatory or institutional bodies for the regulations of medical practice or the health sector.

Notwithstanding the available legal regime and the institutional framework in Nigeria; the state of the health sector in the country is abysmal, deplorable and comatose. For example, in 2000, the World Health Organisation (WHO) assessed the performance of its 191 member states in terms of responsiveness, fairness, and overall attainment, level of health expenditure and overall performance; Nigeria was ranked 187 out of 191 states. There is no improvement in recent times as in 2011, the United Nation Development Programme (UNDP) ranked Nigeria's health sector 156 out of 187 countries assessed. In 2012 – 2013, the World Economic Forum (WEF) ranked Nigeria 142 out of 144 countries in terms of health performance. More

[1]Nwafor, G.C., and Nwafor, A.O., "The Healthcare Providers – Patients Relationship and State Obligations in Times of Public Health Emergency" (2016) 9 *African Journal of Legal Studies* 268 at 273

[2] Odia, J., and George R., (2008) Law and Ethics of Medical Practice in Nigeria, University of Port Harcourt Press Limited, 2nd Edition.

[3] Corona virus otherwise known as COVID – 19 which is also called acute respiratory syndrome is a novel severe acute respiratory problem. It was first isolated from three people with pneumonia connected to the cluster of acute respiratory illness cases in Wuhan, China. The disease broke out in February, 2020 and it became pandemic globally with millions of death recorded all over the world.

[4] Kennedy & Grubb, Medical Law, Third Edition, (2000), London Butterworth, P. 3. Medical law is primarily concerned with the relationship between health care professionals (particularly doctors and to a lesser extent hospitals or health care institutions) and patients. Also, respect for a person's body, respect for dignity, negligence, abortion, surrogacy, product liability, donation and transplant of human tissues and fluids, rights to life and right to dies, care of dying patients, death and death bodies are issues that do arise in medical law.

[5] Chapter II, 1999 Constitution of the Federal Republic of Nigeria (as Amended).

worrisome is the fact that Human Development Report and available data put life expectancy in Nigeria at 53.3 years.[6]

Undoubtedly, Nigeria's health sector is one of the worst hit by underdevelopment as infant and maternal mortality are still high, HIV/AIDS is still ravaging, deaths resulting from medical negligence are still high, malaria is still a scourge and recently COVID-19 is biting; to mention only a few.[7] The deplorable condition of the health sector in Nigeria calls for urgent statutory and regulatory interventions. The present legal regime and institutional framework for medical practice in Nigeria seems not to be up to date with emerging trends in the sector. The advanced countries of the world have strong institutions for the maintenance and enforcement of medical infractions. Many advanced countries have broken new grounds and have provided legislative basis for emerging practice areas like fertility, cloning, euthanasia and genetic materials.[8]

This paper seeks to lucidly examine how the available legal regime and institutional framework for medical practice in Nigeria has been able to keep with contemporary trends in the sector; how the sector can be stimulated and enhanced through the instrumentally of law and strong institutions.

Legal Framework for Medical Law in Nigeria

In Nigeria, medical practice is regulated by a number of statutes; among which are: the Medical and Dental Practitioners Act;[9] the Nursing and Midwifery (Registration etc.) Act;[10] the National Health Act[11] 2014; the Code of Medical Ethics in Nigeria;[12] the Constitution of the Federal Republic of Nigeria 1999 (as amended); the Medical Oath; the Compulsory Treatment and Care for Victims of Gunshot Act;[13] the Patients' Bill of Rights;[14] the Pharmacy Act[15] and the Criminal Code Act.[16] 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 open season of malpractice suits is one of the major factors that compelled the National Assembly of Nigeria to pass the National Health Bill which was assented by the President into an Act of the Federal Republic of Nigeria as the National Health Act 2014 on the 8th of December 2014. The objectives of the National Health Act 2014 include: encompass public and private providers of health services; promote a spirit of cooperation and shared responsibility among all providers of health services in the Federation and any part thereof; provide for persons living in Nigeria the best possible health services within the limits of available resources; set out the rights and obligations of health care providers, health workers, health establishments and users; and protect, promote and fulfil the rights of the people of Nigeria to have access to health care services.

These statutes are very critical to medical practice in Nigeria as they provide for the rights of patients and the healthcare providers. The statutes set the basic minimum standard of care and professional conduct expected from healthcare providers. The Medical and Dental Practitioners Act establishes the Medical and Dental

[6] Dada (2000), Legal Aspects of Medical Practice in Nigeria, Calabar, Nigeria, P. 28.
[7]
[8] Michael, D (1998), Textbook on Law, (2nd Edition), Hants, P. 29.
[9] Laws of the Federation of Nigeria, 2004, CAP M8.
[10] No. 89, 1979.
[11] No. 208, vol. 101, 2014.
[12] Made pursuant to section 1(2)(2), CAP MS.
[13] No. 105, 2017
[14]Patients' Bill of Right Act 2018
[15]Pharmacy Act of Nigeria 1992 No. 91 P17 – 2
[16]Criminal Code Act 1965 CAP C38

Council of Nigeria[17] 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.

Moreover, one of the major roles of the Medical and Dental Council of Nigeria is that it has the power to discipline erring medical practitioners and dental surgeons. The Medical and Dental Practitioners Act lucidly make provisions for the body charged with disciplinary role in medical practice, instances in which the disciplinary power can be invoked and the mechanisms for discipline.Similarly, the Nursing and Midwifery Registration Act and Pharmacy Act have statutory regulations for the practice of nursing, midwifery and pharmacy in Nigeria as well as make provisions for discipline of nurses, midwives and pharmacists.

Rationale for Medical Law

The major challenges faced by medical practice in Nigeria that has dented the image of the profession and caused it to record abysmal performance among its contemporaries can be attributed to weak, inadequate and insufficient legislations as well as weak and poor institutional basis for the enforcement of patients' rights and the discipline of healthcare providers.The standard of medical practice; discipline in the medical profession; respect for patients' rights and dignity cannot be enhanced if there are no solid legislative framework for medical practice with strict mechanisms for discipline of erring medical practitioners. The policy consideration underpinning the conduct of professional disciplinary proceedings in medical practice is aptly captured in the dictum of **Tijani Abubaka, JCA[18]** his lordship held inter alia:

'*The conduct of professional disciplinary proceedings is underpinned by two major policy considerations; the first being to internally regulate its affairs as a profession; and the second being that the purpose of the disciplinary proceedings is not about punishment or retribution, but protection. See Newsouth Wales Bar Association v. Evatt (1968) HCA 20; 117 CLR 177, where the High Court of Autralia remarked that the power of the tribunal is entirely protective, and notwithstanding that its exercise may involve a great deprivation to the person disciplined, there is no punishment involved'.*

The rationale for medical law is to protect the rights of patients and persons seeking medical attention in Nigeria. The law also regulates the practice of medicine and dentistry prescribing the minimum standard of requirements for persons seeking to practice medicine and dentistry in Nigeria. It equally sets out what constitute professional infractions among practitioners.

INSTITUTIONAL FRAMEWORKS FOR MEDICAL LAW IN NIGERIA

Medical and Dental Council of Nigeria

The Medical and Dental Practitioners Act establishes Medical and Dental Council of Nigeria. The Act empowers the Medical and Dental Council of Nigeria to determine the standards of knowledge and skills to be attained by persons seeking to become members of the medical or dental profession and also to review these standards from time to time.[19]

[17]Medical and Dental Practitioner Act. 1988 No. 23 CAP. M8
[18]Dr Milam v. Medical and Dental Practitioners Investigation Panel & Anor.
[19] S. 1(2)(9), 9 and 10 of the Medical and Dental Council Act, 1988.

The Council is empowered to maintain registers of the names, addresses, qualifications and such other particulars of persons who are entitle to practice medicine and dental.[20] One of the roles of the Medical and Dental Council of Nigeria is the power to discipline erring medical practitioner or dental surgeon. These are three broad instances in which the Council can invoke its disciplinary power; to wit:

(a) Where a registered practitioner is adjudged by the disciplinary tribunal to be guilty of infamous conduct in a professional respect;[21]

(b) Where a registered person is convicted by a court of law or tribunal in Nigeria or elsewhere;

(c) Where a person has been fraudulently registered.[22]

Establishment and Functions of the Medical and Dental Council of Nigeria

The Medical and Dental Council of Nigeria (otherwise called "the Council") is a body corporate with perpetual succession and a common seal which may sue or be sued in its corporate name. The Council shall have responsibility for-[23]

(a) determining the standards of knowledge and skill to be attained by persons seeking to become members of the medical or dental profession and reviewing those standards from time to time as circumstances may permit;

(b) securing in accordance with the provisions of the Act, the establishment and maintenance of registers of persons entitled to practise as members of the medical or dental profession and the publication from time to time of lists of those persons;

(c) reviewing and preparing from time to time, a statement as to the code of conduct which the Council considers desirable for the practice of the professions in Nigeria;

(d) supervising and controlling the practice of homeopathy and other forms of alternative medicine; (1992 No. 78.)

(e) making regulations for the operation of clinical laboratory practical in the field of Pathology which includes Histopathology, Forensic Pathology, Autopsy and Cytology, Clinical Cytogenetics, Haematology, Medical Micro-biology and Medical Parasitology, Chemical Pathology, Clinical Chemistry, Immunology and Medical Virology; (1992 No. 78.) and

(f) performing the other functions conferred on the Council by the Act.

Composition of the Council

1) The Council consist of a chairman to be appointed by the President, and: two representatives of the Federal Ministry of Health both of whom shall be fully registered medical practitioners or dental surgeons; the Chief Medical Officer (or however called) of the Ministry of Health of each State of the Federation; one representative of the Armed Forces Medical Services; some representative of the National Post-Graduate Medical College; three representatives of Colleges or Faculties of Medicine of universities in the country to be appointed by the Minister in rotation from among the provosts or deans of such Colleges or Faculties, however so that no two of such persons shall be from the same university; two representatives of the medical and dental professions to be appointed by the Minister; eleven members of which nine shall be from the Nigerian Medical Association and two shall be from the Nigerian Dental Association; one representative of

[20] S. 6(2) of the Medical and Dental Council Act, 1988.

[21] In Allison v. General Council of Medical Education and Registration (1894) 1 QB 750; the Court of Appeal held inter alia that if it is shown that a medical man, in the pursuit of his profession has done something which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competence, then it is open to the General Medical Council to say he is guilty of "infamous conduct in a professional respect."

[22] S. 16 of the Medical and Dental Council Act.

[23] Sec 1(2) (a) 1988 MDCN (Medical and Dental Council of Nigeria)

alternative medicine practitioners; two pathologists to be appointed by the National Post-Graduate Medical College to represent the health zonal distributors, teaching and specialists hospitals in Nigeria.[24]

Medical and Dental Practitioners Disciplinary Tribunal

The Medical and Dental Practitioners Disciplinary Tribunal is a similitude of a court of law created under the Medical and Dental Practitioners Act[25] and it is the body charged with responsibility of disciplining any erring medical and dental practitioners. The body otherwise known as "The Disciplinary Tribunal" is charged with the duty of considering and determining any case referred to it by the Panel established under subsection (3) of the Medical and Dental Practitioners Act and any other case of which the Disciplinary Tribunal has cognisance of under the Act.

The Disciplinary Tribunal consist of the Chairman of the Council and ten other members of the Council appointed by the Council who shall include not less than two persons who are fully registered dental surgeons.

The Disciplinary Tribunal has the status of a High Court of the Federal Republic of Nigeria and practitioners who appear before it, whether as complainants, defendants, or witnesses, whether or not they are also represented by a lawyer, must conduct themselves as they would before a high court. Legal practitioners who appear before the tribunal are to accord the court the decorum given to a High Court.[26]

Moreover, the Tribunal has the statutory power to award penalties against medical and dental practitioners where: a registered person is adjudged by the Disciplinary Tribunal to be guilty of infamous conduct in any professional respect; a registered person is convicted by any court of law or Tribunal in Nigeria or elsewhere having power to impose imprisonment for an offence which in the opinion of the Tribunal is incompatible with the status of a medical practitioner or dental surgeon and if the name of any person has been fraudulently registered.

Where a practitioner has been brought before the Tribunal; the Tribunal may give any of the following awards: order the Registrar to strike out the name of the erring person off the relevant register; suspend the person from practice or admonish the person.[27]

Appeal against the decision of the Tribunal shall lie to the Court of Appeal. The person appealing may do so within 28days from the date of service on him. The notice of the Tribunal is decision and the Tribunal shall be a respondent to the appeal.[28]

A person whose name is removed from a register in pursuance of a direction of the Disciplinary Tribunal shall not be entitled to be registered in that register again except in pursuance of a direction in that behalf given by the Tribunal on the application of the person.

[24]Sec 2 (i) (a – i) (2) of Medical and Dental Practitioners Act 1988 CAP M8 – 3
[25]Establishment of Disciplinary Tribunal Investigation Panel. Section 15(3) of the Medical and Dental Practitioners Act 1988. CAP M8 – 11
[26]
[27]Section 18(7) of Pharmacists Councils of Nigeria Act 1992.
[28] In Okekearu v. Tanko (2002) 15 NWLR Pt. 791, 657; consent was defined as the act of giving approval or acceptance to something done or proposed to be done, and it is an exact conduct flowing from the person giving the consent.

An Overview of Patients' Rights in Nigeria Medical Law

Where a patient submits himself or herself to a doctor for treatment; there exist a contractual relationship between the doctor and the patient. The terms of a contract between a doctor and a patient may contain express and implied terms. A Consent Form is an example of an agreement containing express terms.[29] Although there is a limit to what parties can agree on; parties cannot agree on anything that is contrary to public policy, for example, selling of organs. In every contract between a professional man and his client, there is always an implied term that the professional will use reasonable care and skill in discharging his obligations to his patient. Although the law does not imply a warranty that the doctor will achieve the desired result or a guarantee that the treatment will be successful; but reasonable care and skill must be deployed. In some jurisdictions like Canada; a doctor who makes express commitment is bound by it.

Confidentiality and access to medical information is another head of right a patient has in Nigeria. Patients have the right to expect that information about them will be held in confidence by their doctors. The practical necessity of maintaining a medical confidence is further reinforced by ethical imperative placed on the medical professional by the Hippocratic Oath. Therefore, a doctor is under a duty not to disclose voluntarily without the consent of his patient information which he, as a doctor has gained in his professional capacity save in some exceptional circumstances. The legal duty of confidentiality owed by a doctor to his patient is not absolute. It is subject to certain exceptions: disclosure under compulsion of law (to employees, insurance companies etc), disclosure in the interest of the public, and consent of the patient. Where a doctor feels a patient is incapable of giving consent by virtue of immaturity, illness or mental capacity; the doctor may disclose the information to an appropriate person or an authority. It must be noted that the duty of confidentiality survives the patient's death. A patient has the right to inspect and obtain copies of his or her medical records. However, if a patient will not be able to handle certain information; an individual other than the patient may be identified.

The medical practitioner owes the patient a legal duty of care and it is the right of the patient to be attended to promptly and competently. Where a doctor holds himself out as possessing special skills and knowledge; and he is consulted; he owes the patient a duty of diligence, care, knowledge, skill and caution in administering treatment. In the case of *Mahon v. Osborne*,[30] a swab used during surgery was left in the abdomen of a patient. Although there was evidence before the court that a nurse assured the surgeon towards the end of the surgery that all swabs were retrieved, the court still opined that it was the responsibility of the surgeon to confirm that information.

For duty of care to arise, no contractual relation is necessary nor is it necessary that the treatment be for reward. Therefore, negligence is a failure to reach the standard expected. This could be: failure to give prompt attention; leaving an item in patient's abdomen after surgery; incompetent assessment of patient; improper administration of injection; improper diagnosis; mistake in treatment and failure of communication. Broadly, a doctor's professional functions can be divided into three: diagnosis; advice and treatment. The test is the standard of an ordinary skilled man. Lord Denning in his book: The Discipline of Law (1979), Butterworth Publisher, page 237 to 243 stated thus:

"In an hospital, when a person who is ill goes in for treatment, there is always some risk, no matter what care is used. Every surgical operation involves risks. It would be wrong and indeed bad law, to say that simply because a misadventure or mishap occurred, the hospital and the doctors are liable…"

[29]Part A Section 19 of the Code of Medical Ethics in Nigeria; issued by the Mental and Dental Council of Nigeria in consonance with the provision of the Mental and Dental Act, CAP 221 Laws of the Federal Republic of Nigeria 1990, on 1st January, 2004.
[30] (1939) 2 KB 14

The authority that runs the hospital has a number of duties to patients; the duty of competent staff and vicarious liability.[31] In the realm of diagnosis and treatment, there is ample room for genuine difference of opinions. One man is not negligent merely because his opinion or conclusion differs from that of other nor because he displayed less skill or knowledge than others would have shown. The true test for negligence in diagnosis or treatment is whether a doctor of ordinary skill could make that mistake. The manufactures of drugs as well as the doctors prescribing drugs owe the ultimate consumer the duty to take reasonable care. A doctor must advice patients of possible side-effects of drugs. Products in the content of medical services include drugs and medical devices. In *Grant V. Australian Knitting Mills Ltd,*[32] an hospital was held liable for transfusing a patient with an HIV infected blood. A manufacturer could be held liable for selling a defective product used in screening blood.

Judicial Interventions in Medical Law in Nigeria.

There is a steadily growing medical cases in the legal environment in Nigeria, with a total of 190 judgments of professional negligence against doctors between year 2000 and 2007 and this represents a two hundred percent increase from the previous records of only 92 petitions from 1963- 1999[33]. It is imperative to consider some of the cases briefly:

The case of **Akintade V. Chairman, Medical & Dental Practitioners Disciplinary Tribunal.[34]** This case critically X-ray the concept of infamous conduct in a professional respect. One Chief (Mrs) Florence Olusola Abe (now deceased) was admitted at the Christian Health Centre, Ilesha on 27th October, 1997 for appendesectomy. The operation was carried out by Dr. R.O Akintade. After the surgery, complications set in and the patient's conditions deteriorated. She was later referred to OAUTH where she later died. Secondary cause of death was septicaemia. It was found out that proper investigation was not carried out to ascertain that the deceased was diabetic. The doctor was charged for the following: (a) failure to attend to the patient promptly; (b)incompetence in the assessment of the doctor by failing to diagnose her as a diabetic and failure to realize that the patient had post operations complications of faucal peritonitis (c) deficient treatment and poor post-operative management. He was found guilty and sentenced to suspension from practice for three months.

In determining the true nature of serious professional misconduct, the courts during the years had laid down a two stage test; to wit:did the doctor's conduct fall short by an act or omission of the standard of conduct expected among doctors? And was this failing serious?

Tanko V. Okekearu[35]

Danjuma Tanko is a 14 years old boy. He damaged his centre finger. Dr. Okekearu while treating him amputated his finger. Tanko sued through his next friend that he did not consent to the amputation. Dr. Okekearu claimed to have sought and obtained the consent of Tanko's aunt. The court held that the consent of the aunt was invalid and damages was awarded. Every person of sound mind has the right to accept or refuse treatment whether such is rational or irrational.

[31] (1936) AC 85
[32]Development of Health Law in Nigeria (The Open Season of Malpractice Suits (4/24/2015) Olaolu A. Osanyin LCM https://aclm.memberolicks.net
[33] (2005) 9 NWLR Pt. 930, 338, 5.
[34] (2002) JELR 51968.
[35]*Surgeon Captain C. T. Olowu v. The Nigerian Navy* (Friday, 9th day of December, 2011)

THE CASE OF NAVY CAPT/DR. OLOWU[36]: who failed to personally examine the patient having complications in pregnancy for 15 hours. He merely wrote a letter of referral when the situation had already become bad as she was already bleeding profusely from the vagina. She was later operated upon in another facility where it was discovered that the baby died about 24 hours with several complications and inability to further conceive. The Federal High Court, Lagos, awarded N100 million damages against the Nigerian Navy and Captain C.T Olowu, for negligence. The Court Martial consequently demoted him from the rank of captain to commander, a four-year reduction in seniority.

THE CASE OF DR. SAMUEL WOKOMA[37]: who neglected to see and monitor the management of a patient who was in a severely ill condition. It was alleged that he conducted himself infamously in a professional respect contrary to Rules 29 and 43 of the Code of Medical Ethics in Nigeria 2008. He was subsequently suspended from practice for a period of three (3) months.

STATE V OZEGBE[38]: A nursing orderly who paraded himself as a doctor and proceeded to surgically excise a lump. The court convicted him for manslaughter

THE CASE OF DR. VITAL ESEIHIEN UHOMOIBHI: who in the process of attending to a female patient related indecently with the said patient in the consulting room and on several occasions in the Teaching Hospital had related indecently with other female patients. He was also reported to have conducted vaginal examination on several female patients in the same Teaching Hospital with un-gloved fingers. He was found guilty of professional misconduct and his name struck-off the register of Medical and Dental Practitioners in Nigeria.

CASE OF DR. AFAM EZENDIUGWU: who did a caesarean section on a patient without the necessary consent form. He was suspended from practice for six months

New Frontiers in Medical Law

Medicine has made extraordinary advancement in many areas of health. Considerable advancement has been made in response to the desire of women and their partners to have children. These advances are in consonance with the European Convention on Human Rights which provides that people of marriageable age have the right to marry and have children.[39]

In many jurisdictions, infertility treatments are being carried out in accordance with the provisions of appropriate law. The government in the United Kingdom has Human Fertilization and Embryology Act 1990. This covers fertility treatment that use donated genetic materials like sperm, eggs or embryos. The Act regulates the storage of all reproductive materials amongst so many other things. However, in Nigeria, no statutory mechanism or legal framework is available to control or regulate that aspect of medical practice.

36

37(1957) WNLR 152

38

39 See Article 12, European Convention on Human Rights, 1950 and Article 9 European Charter of Fundamental Rights

39 Article 12 European Convention on Human Rights 1950 and Article 9 European Charter of Fundamental Rights

What is generally obtainable in the country is 'self regulation.'[40] The problem with non uniformity of fertility procedures is that it could lead to unethical practice and create inroads for quacks to hijack the procedure.

The practice of surrogacy is a pragmatic and innovative concept in human reproduction in the 21st century. Surrogacy is the practice whereby one woman carries a child in her womb with the intention that the child should be handed over after birth.[41] Surrogacy can take a number of forms. The commissioning mother may be the genetic mother in that she provides the egg or she makes no contribution to the establishment of the pregnancy. There are many legal, medical and ethical issues involved in surrogacy such as: the genetic constitution of the child; where the best interest of the child lies; storage of genetic materials; issues of consent and whether the arrangement is altruistic or commercially motivated.[42] Given the controversial nature of the issues involved in surrogate contracts, countries around the world have adopted different laws in regulation of surrogacy agreements.[43]

Another issue which raises serious ethical and statutory concern and where modern advancements have been is abortion. Abortion is the spontaneous or artificially induced expulsion of an embryo or foetus.[44] In legal context, it is usually referred to as induced abortion. Issues bothering on when abortion is legal or illegal and issues of consent or otherwise of the husband of a pregnant woman during abortion where legal are of serious international concern.

Sterilization whether of a woman or a man is another new frontier in medicine. A man or woman may decide to indulge in sterilization operation so as to prevent the chances of further procreation.[45] Can an individual give a valid consent to a surgical operation for sterilization[46]; are there circumstances in law in which the law requires not only the consent of the person to be sterilized, but also of some other person, such as spouse?[47] The question of sterilizing a patient who is mentally incompetent to give consent is complex and troublesome.[48] Under the English Jurisdiction, the law is that an operation to sterilize a woman who is incapable of giving consent on grounds of either age or mental capacity is unlawful if performed without the consent of the High Court.[49] Could it ever be in the interest of an incompetent male patient that he be sterilized bearing in mind that he would not bear the burden of pregnancy, labour and child rearing? These are strong, legal and ethical issues which are copiously addressed in advanced jurisdiction.

[40] See Kolade-Faseyi, I., and Deji-Jayeoba, O., 'Statutory Control of Assisted Reproductive Technologies in Nigeria: To Be or Not to Be?' (2020) (6)(2) *Journal of International Law and Jurisprudence*, 237. See also Adewumi, A.A. 'The need for Assisted Reproductive Technology Law in Nigeria' (2012) (2) (1) *University of Ibadan Law Journal*,22.
[41] Prof. Osato F. Giwa – Osagie, "It is now possible for a child to have multiple parents". Daily Sun, 15 October, p. 37.
[42] Human Fertilisation and Embryology Act's Code of Practice (4th edition, 1998) para 3.20.
[43] See Poe v. Wade (1973) 410 U. S. 113, 93 S. C. 705 and Webster v. Reproductive Health Services, 109 S. C. 3040, 106 L. Ed. 2d 410.
[44] Mason and MaCall Smith, (1994) Law and Medical Ethics, (4th ed.) London, Butterworths, P. 83.
[45]S. 51 (1)(b) of the UK NHS Act 1977 permits an individual to consent to a surgical operation for sterilisation and it is not against public policy since sterilisation is a similitude of contraceptive. See bravery v. Bravery (1954) 1 WLR 1169.
[46]In Murray v. Vandevander (1974) 522 2nd ed., 302; it was held that a married lady can give a valid consent to a surgical operation for sterilisation without the consent of her husband.
[47]See Re: F (Mental Patient: Sterilisation) (1990) 2 AC 1. See also Secretary, Department of Health v. JWB & SMB (1992) 66. ALJR 300.
[48]The UK Official Solicitor Practice Note (Sterilisation: Minor and Mental Health Patients) (1993) 3 All ER 222 (1970) 1
[49]G. Dworkin, The Law Relating to Organ Transplantation in England, 33 MLR 533.

Organ donation and transplant of human tissues are also contemporary development in medicine. Issues bothering on consent, age, mental capacity, genetic relations, theft of organs and negligence are issues that are emerging in organ donations and transplant[50].

Neonaticide which is known as the killing of a new-born child who is born handicapped is also trending. The concept raises one fundamental question: should a handicapped new-born child be allowed to live or be left to die?[51] Passive euthanasia of defective new-borns through selective non-treatment is widely practised in UK and the USA. Many persons defend the practice as morally and socially justifiable way to prevent suffering[52].

Until recently there was no doubt what life was and what death was. Previously, a man was dead if he stopped breathing and his heart stopped beating. There was no artificial means of sustaining life more than a short while. However, recent developments in medical science have fundamentally affected these certainties. In medicine, the cessation of breathing or of heartbeat is no longer death. By the use of a ventilator, lungs which is the unaided course of nature would have stopped breathing can now be made to breathe, thereby sustaining the heartbeat. Thus, a patient who would previously have died through inability to swallow food can be kept alive by artificial feeding. Apparently, death has been redefined with advancements in medicine and several other ethical and legal issues have resurfaced due to these developments.

Statutory and Institutional Challenges to Medical Law in Nigeria

Having discussed discipline in the medical practice, it is crucial to observe that most discipline cases are borne out of breaches of the contractual relationship between a healthcare provider and a patient, confidentiality, medical negligence, defective drugs and medical products, consent issues, wrongful birth and conception, abortion and surrogacy, among others.

Notwithstanding, the available legislations and the institutional frameworks for discipline in medical practice in Nigeria; a comparative analysis of medical practice in Nigeria shows that patients' rights are still grossly abused, incompetence is phenomenally high, cases of medical negligence are not only monumentally rampant, but they are done with impunity. Patients are not attended to promptly, instances of wrong diagnosis and poor prescriptions and treatments still abound. Quackery incidences are high, Hippocratic Oaths are violently violated, knowledge of patients' rights among the citizenry is low, enforcement of discipline among practitioners is poor and a host of other challenges.

At this juncture, it ;is pertinent to dwell on these challenges with a view to proffering lasting solutions to them. One of the major challenges to medical law in Nigeria is inadequate legislation. There are emerging and evolving areas of medical practice such as euthanasia, abortion, fertility, human cloning, surrogacy, organ transplant, dead bodies, and a host of others that have no legislative basis or backing or inadequate legislations in Nigeria unlike other jurisdictions. Some of these emerging areas and their peculiar challenges will be discussed below.

Euthanasia: A critical examination of the Nigerian 1999 Constitution (as amended) reveals that there is a right to life[53] but there is no corresponding right to die. As a matter of fact, the statutes do not make provisions for the making or determination of end-of-life-decisions where the holder of such life is terminally ill or in

[50]WHO Document, Promotion of the Rights of Patients in Europe (Kluwer, 1995).
[51]J. Robertson, (1978), Substantive Criteria and Procedures in Withholding Care for Defective Newborns in Spicker et al. (eds), P. 217.
[52]
[53] Section 33 (1) Constitution of the Federal Republic of Nigeria (as amended)

excruciating pains. Provisions of the Criminal Code[54] expressly prohibit all forms of euthanasia or assistance-in-dying. Being terminally ill or consenting to the euthanizing act is not a justification and does not affect the criminal liability of persons by whom such death is caused.[55] The law as it is in Nigeria today is to the effect that killing a person or hastening the death of a person is criminal and can amount to either murder or manslaughter.

'Life' and 'death' has been redefined in several jurisdictions of the world[56] with the choice between the two not left to the State. Although there is no legal framework in Nigeria to assist persons requesting help in dying, it is an open secret that euthanasia is practiced outside the safe boundaries of the law- withdrawing life sustaining support or life prolonging treatment like fluid, drugs or food from ill patients, putting off life support machines, patient's refusal of medical treatments even where such decisions hasten their deaths, not delivering cardio-pulmonary resuscitation and allowing a patient whose heart has stopped to die are instances where it is tacitly carried out. When this is done, officials who signs death certificate only state the terminal disease the deceased person was battling with as cause of death. This is the grim reality we are faced with. The need to specifically legislate to either prohibit or allow euthanasia in Nigeria is no doubt imminent.

Abortion:
Provisions on Abortion in Nigeria are scattered in Statutes.[57] Abortion is only permitted if the act is directed towards the preservation of the life of the pregnant woman. However, in practice provisions of the Criminal Code and Penal Code are flagrantly ignored as abortion is carried out even for economic reasons.[58] The way abortion is routinely carried out with impunity in Nigeria explains why one can hardly find case laws on the subject. There is no means to monitor or control health centers or practitioners who carry out abortions.
Surrogacy: There is no legal framework for surrogacy in Nigeria. Although the concept of surrogacy is relatively new in Nigeria, the surrogacy 'business' is booming. The absence or at best inadequacy of laws to determine the legality or otherwise of surrogacy in Nigeria has brought to the fore front issues of exploitation, 'baby factories,' child trafficking among others. Whether surrogacy is for altruistic reasons or on pure commercial considerations, it is important that surrogacy contracts be drawn up and all parties involved (the commissioning parents, surrogate (agencies) mother, or the child) taken care of. It does appear that there are gaps in Nigeria medical law and the current legislations cannot match the pace of advancements in medical practice. The implication of these legislative inadequacy is gargantuan. Apart from the fact that it portends serious challenge during enforcement proceeding; it leaves the rights of affected patients and their hopes to be hanging.

The Medical and Dental Practitioners Tribunal which is vested with considerable power for medical practitioners' discipline seems to be ill equipped to enforce discipline in the profession. The composition and membership of the tribunal are largely from the medical profession. A review of some of the cases handled by the Tribunal shows that members of the tribunal are not versed in the nitty gritty of fair hearing principles and administrative compliance. The resultant effect of these shortcomings is that many of the findings of the

[54] See sections 300, 308, 311, 326, 343 (1) (e)(f) Criminal Code
[55] Kolade-Faseyi, I 'The Right to Die: The Place of Religion, Ethics and the Law' (2017) (8)(1) Nnamdi Azikwe University Journal of International Law and Jurisprudence, 105.
[56]See Oregon Death with Dignity Act, Termination of Life on Request and Assisted Suicide (Review Procedure) Act 2002
[57] See sections228, 229,230, 297 Criminal Code, and section 232 Penal Code
[58] Izunwa, M.O., and Ifemeje, S., 'Right to Life and Abortion Debate in Nigeria: A Case for the Legislation of Principle of Double-Effect' in Izunwa, M.O and Izunwa, D.R. (eds), *Law and Ethics of Healthcare* (4) (2016) Nnewi Diocesan Archival Series, 394.

Tribunal are subsequently set aside by the Court of Appeal. The tribunal is also an ad-hoc one and not a regular Tribunal with the attendant implication of delay.

Recommendations

If the health of Nigerians is to be guaranteed and the future of medical and dental practices in Nigeria is to be sustainable, developed and enhanced; there is urgent need for a number of innovations and improvements.

i. The Nigerian medical law has to be overhauled. Rights of Nigerians relating to health must be removed from the Fundamental Objectives and Directive Principle of State Policy under the Nigerian constitution. This is because, the head of rights under this chapter are not enforceable or justiciable in any court of law. Health rights should be made justiciable and by so doing, the Nigerian government can be held responsible for breaches of patients' rights resulting from government neglects and faults.

ii. In advanced jurisdictions like Canada, UK, and the US, there are specific and elaborate legislations on human cloning, reproductive health, surrogacy, use of human parts or bodies as specimen for training, euthanasia and other evolving areas of medical practice. Undoubtedly, existing legislations in Nigeria contain serious legislative gaps that do not meet contemporary trends in medical practice. Extensive, comprehensive and up – to – date legislations that can close existing gaps in medical advancements should be promulgated to cover the gaps.

iii. The Medical and Dental Practitioners Tribunal's composition, operations and methodology requires statutory and institutional over haul. It is apparent that reported cases of lack of fair hearing and instances of members who did not participate in all sittings of the Tribunal are leading to situations where decisions of the Tribunal are set aside on appeal. The Medical and Dental Practitioner's Act merely requires that two out of the ten members of the Tribunal should be medical and dental practitioners; it does not make provision for a member who is knowledgeable in law or qualified to practice law in Nigeria. The operation of the Tribunal will be more effective and effectual if at least one of the members is a legal practitioner who is qualified under the Legal Practitioner's Act. The Tribunal's operation should be given wide publicity to ensure transparency and deterrent to erring medical practitioners.

iv. It is also evident that judges are poorly equipped to regulate healthcare practice and are increasingly blind to their weaknesses. The only reason to encourage judicial intervention is because the alternatives are less satisfactory. Therefore, the capacity of the judges of the High Court, Magistrate and justices of the Court of Appeal should be enhanced through on the job trainings, seminars and synopsis on the evolving trends in medical practice.The curriculum of law students should be expanded to make medical law compulsory, bearing in mind the significance of health to human existence.

v. One of the major banes of prosecution of erring medical practitioners is ignorance of patients' rights among Nigerian citizens. Also, in this clime, when death occurs; notwithstanding the cause of death, people tend to attribute it to Act of God even if the medical practitioner was negligent. Citizens of Nigeria must be educated about their health rights. Existing legislations which guarantee patients' rights must be given adequate publicity. Similarly, citizens should be educated about the existing institutions and mechanisms that are available for the ventilation of their grievances.