

AN ANALYSIS OF SOME PROVISIONS OF THE 1999 NIGERIAN CONSTITUTION IN RELATIONSHIP WITH END OF LIFE CARE

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ABSTRACT

A number of people from one country to another are afflicted with life threatening illnesses that require that they must be cared for until they survive or die. This is referred to as end of life care in the literature. In some countries, the laws expressly make provisions for the end of life care. In Nigeria, though these provisions are not expressed, they are implied in the provisions of the 1999 Constitution, and can therefore, justify the need for end of life care. The important objective of this paper is to examine the provisions of Section 34(1) of the Constitution that deals with the dignity of a person and Section 38(1) that deals with the freedom of religion and thoughts in relation to end of life care. A review of the extant literature on the legal framework and end of life care was undertaken. The review indicates that every human being deserves to be treated with dignity irrespective of their health conditions as failure to do this will amount to human degradation. It further reveals that the concept of dignity along side equality are the most important elements of end of life care. Section 34(1) of the 1999 constitution provides that every individual is entitled to respect for the dignity of his person. Similarly, the paper shows that dying persons with strange religious convictions are legally entitled to hold on tenaciously to those beliefs and health workers are obliged to respect those beliefs in carrying out the end of life care. Section 38(1) of the 1999 Constitution provides that every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief. It is concluded that though the Nigerian laws do not expressly provide for the right of the dying persons, it can be deduced that the provisions of the laws allow a lee way for the end of life care of a dying person.

KEYWORDS: End of life care, Nigerian Constitution, dignity, religion and laws.

INTRODUCTION

The Constitution of the Federal Republic of Nigeria 1999 came into force on the 29th of May 1999 and like all modern constitutions it has entrenched in its provisions laws relating to fundamental human rights in sections 33 to 46 in chapter four. The concept of what we now refer to as human rights was called natural rights. These rights were regarded as superior to any positive law and embodied in the fundamental principles of justice which were apparent to reason².

In modern times, the concept of human rights is traced to the formation of the United

Nations Organization (now the United Nations) in 1945. In the preamble to the UN Charter, member states reaffirmed faith in fundamental human right, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small³. In 1948, the United Nations General Assembly declared that "All human beings are born free and equal in dignity and rights."

The Court of Appeal in Nigeria in the case of Chief Francis Igwe and Ors V. Mr Goddy Ezeanochie and Ors⁴ in a lead judgment delivered by Ariwoola J.C.A. succinctly gave the meaning of fundamental human rights and where same is derived from thus "A fundamental human

right is certainly a right which stands above the ordinary law of the land". The court went further to hold that in this country, the fundamental rights of a citizen though acquired naturally, are constitutionally guaranteed. Chapter IV of the Constitution of the Federal Republic of Nigeria 1999 clearly provides for fundamental rights⁵

It has been pontificated that more than ever before, there is a pressing necessity to adopt a national policy to cover the physical, emotional, practical and spiritual aspect of persons with life threatening or limiting diseases in Nigeria⁶. Further reports show that the need for end of life palliative care has never been greater and is increasing at a rapid rate due to the world's ageing population and increase in cancer and other communicable diseases⁷ It has also been acknowledged that there is a wide gulf in the development and the practice of end of life care between the developed and the developing countries of the world even though such care is needed more in the developing countries⁸.

It is not enough to formulate a national policy on end of life care, such a policy should be all embracing given the state of our health care system coupled with our religious and cultural beliefs.⁹ The thrust of this paper is therefore to advocate that it is imperative to incorporate into our national health policy an end of life care, the right of a person with life limiting disease to his/her dignity and his/her right to freedom of thought, conscience and religion. This is hinged on the provisions of Sections 34 and 38 of Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999. To this end, part two of this paper discusses the meaning and development of the concept of the end of life care, part three dwells on the link between end of life care and human rights, as entrenched in national Human Rights documents and the 1999 Constitution and part four concludes the paper.

2. Meaning and Development of the Concept of End of Life Care.

The Encarta Dictionary¹⁰ defines Hospice as a nursing home for the dying, a usually small residential institution for terminally ill patients where treatment focuses on the patient's wellbeing rather than a cure and includes drugs for pain management, sometimes periods at home and often spiritual counselling. It went further to define the word palliative as alleviating pains and symptoms without eliminating the cause. Hospice care has been described as an end of life care provided by health professionals and volunteers who give psychological and

spiritual support with the aim of helping people who are dying to have peace, comfort and dignity. Such health workers are expected to try and control pain and other symptoms to ensure that, the patient remains as alert and comfortable as possible.¹¹

The World Health Organization (WHO) in 2002¹² established a revised definition of palliative care for adults and children. The WHO regards palliative care as an approach which improves the quality of life of patients and their families facing problems associated with life threatening illness through the prevention and relief of suffering by means of early identification and impeccable assessment and treatment of pains and other problems, physical, psychological and spiritual.¹³ Palliative care as regards children is viewed by the WHO as the active total care of the child's body, mind and spirit. It also entails giving support or succor to members of the family. This process should commence upon the diagnosis of the illness and the situation must be evaluated in order to alleviate the child's physical, psychological and social distress.¹⁴

Cicely Sanders has been credited with the development of Hospice Services and palliative care. She is regarded as the founder of modern hospice movement. She opened the St. Christopher's Hospice in London in 1967¹⁵. A Canadian Doctor, Balfour Mount has been credited to have coined the word "palliative care"¹⁶ In Nigeria, the development of Hospice has been traced to Dr. Anne Merriman, now a Professor from the St. Christopher's Hospice, the author of *Audacity of Love*¹⁷ in conjunction with Mrs. Kokumo Fatumbi who established Hospice Nigeria in 1993 as a non-governmental organization to provide home based care to the terminally ill¹⁸

It has been contended that while end of life care has been expanding in developed countries, same cannot be said of developing countries especially in the continent of African where such care is needed.¹⁹ Unlike other countries, where concerted efforts have been made to develop comprehensive policies towards end of life care, in Nigeria palliative care has been driven by non-governmental organizations. These NGOs include the palliative care initiative of Nigeria now Centre for Palliative Care Nigeria (CPCN) which brought palliative into the public consciousness in 2003²⁰, Hospice Nigeria that was registered in 1993 and missionary institutions.

There is a general belief in Nigeria that if patients are **let in to** the extent of their health situations they will suffer more²¹ and in major parts the mention of death to a patient with life limiting disease is considered an abomination, life is celebrated while death is despised.²²

3. End of Life Care as Human Right

In recent times, end of life care has been viewed as a human right issue. This link is founded on the provision of Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 which advocates for right to healthcare, a right of every one to the enjoyment of the highest attainable standard of physical and mental health.

This link is further reinforced by the report of the U.N Committee on Economic, Social and Cultural Rights, General Comment 14 para 25 which was adopted in 2000. It states that, it is imperative to provide “attention and care for critically and terminally ill persons, sparing them avoidable pain and enabling them to die with dignity”. The report went further to provide that “states are under obligation to respect the right to health by refraining from denying or limiting equal access for all persons to preventive, curative and palliative health services.²⁵ Another plank upon which this link is placed is the report submitted in February 2013, by the UN Special Reporter on Torture, Juan E. Mendez that denying access to pain relief can amount to inhuman and degrading treatment²⁵.

It is of note that Nigeria ratified the ICECR in 1993. She is a member of the Organization Of African Unity, the African Union and adopted the African Charter on Human and People’s Rights in 1983 by virtue of the African charter on Human and People’s Rights (Ratification and Enforcement) Act 1983 (then Cap 10 of the Laws of the Federation of Nigeria 1990). Article 5 of African Charter on Human Right provides that “every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited. In *Abacha V Fawehinmi*²⁶, the Court of Appeal in Nigeria held that where a treaty is enacted into law by the National Assembly as was in the case with the African Charter which is incorporated into our domestic law, it becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the Court.

Section 34(1) of the Nigeria Constitution also provides that “every Nigerian individual is entitled to respect for the dignity of his person and accordingly (a) No person shall be subjected to torture or to inhuman or degrading treatment”. Going by the combined effects of Article 12(1) of ICESCR 1966, Article 5 of the African Charter on Human and Peoples Right 1983, the decision in *Abacha V Fawehinmi* and Section 34(1) of the 1999 constitution, a patient who has a life threatening and/or limiting illness deserves to be treated with dignity.

From the foregoing, it is obvious that the laws in Nigeria particularly the constitutional provision of section 34(1) of the 1999 constitution lays the foundation for patients undergoing end of life care to be treated with dignity and should form one of the cornerstones of our policy. End of life care involves holistic approach which should encompass providing relief from pains, helping people who are dying have peace, comfort and dignity and ensuring they are not subjected to inhuman or degrading treatment.

3.1 Right to Freedom of Thought, Conscience and Religion

Another concern raised in end of life care is the issue of spiritual need of the patients. The scope of the required care for these patients going by the WHO covers Spiritual care which is an essential part of health care systems especially the world over in end of life care where a holistic approach is required.²⁷ It is also essential that health workers take into consideration the religious and cultural beliefs of dying persons. In Nigeria, there are two major religious beliefs, Christianity and Islam, though there are some other people who are traditionalists. Each group holds tenaciously to its religious beliefs. It is not uncommon in Nigeria to deny death, some people consider it forbidden to discuss death. In some cases illnesses are attributed to spiritual attacks²⁸.

The Nigeria Constitution in Section 38(1) provides “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”. In South-West Nigeria, where the authors come from patients with life threatening illness sometimes demand that they be taken home to seek traditional/spiritual help, at times oracles are consulted to find out the course of the illness. It is

also not out of place to offer sacrifices to appease the gods or take spiritual baths which are undertaken at night either at the groove or at intersections.

Majority of members of various churches are also of the belief that healing without medicine is biblical. To them sickness is caused by the fall of man, the force behind sickness is Satan. They support this assertion with several verses from the Bible.²⁹ It is also their belief that healing can be obtained by individual prayer, prayer by two or more groups of persons who have agreed to pray by faith, laying of hands on the head of the sick and by the ministry of Elders anointing the sick with prayer of faith.³⁰ The white garment churches embark on the sanctification of water for the sick to drink, perform special washing for the sick in a flowing river, light up candles of different colors around the sick person. Muslims also consult their personal Alfa or Imam for prayers, Qoranic verses are read into water for the sick to drink, and koranic inscriptions are made on a small board and washed with water for the sick to drink.

It has been pointed out³¹ that personal preference or wish of the dying person should be considered and respected in the end of life care process and this may impact greatly on the entire system.

It is of almost importance that providers of end of life care come to terms with personal beliefs of their patients especially as the freedom of religion and belief is constitutionally guaranteed in Nigeria.

3.2 Fundamental Human Rights and Fundamental Objectives and Directive Principles on State Policy.

The entrenchment of provisions relating to political, civil, economic and social rights in Nigeria constitutions started with the 1960 constitution²² and that has continued even in the 1999 Constitution. However the trend has been to make civil and political rights fundamental rights and justiciable, while social and economic rights are not. This trend is evident under the 1999 constitution. Chapter IV of the said constitution accommodates political and civil rights as fundamental human rights³³, which social and economic rights are accommodated in Chapter II as fundamental objectives and directives principles of state policy.³⁴ In *Archbishop Anthony Olubunmi Okogie (Trustee of Roman Catholic School & Others V Attorney-General of Lagos State*³⁵, it was held that the directive principles of state policy in chapter II of

the constitution have to conform to and run subsidiary to the fundamental rights and that chapter II is subject to legislative powers conferred on the state. It was emphasized in the court that the provisions of Chapter II run subsidiary to the provisions of chapter IV. Osita Eze opined that the position is so because African countries are underdeveloped as such, it will be futile to spice litigations based on the infringement of socio-economic rights.³⁶

Section 17 of the 1999 Constitution contains the social objectives of the country. According to sub-section 1 of the Section, the social order is founded on ideals of Freedom, Equality and Justice. Section 17(2) provides that in furtherance of the social order:

- Every citizen shall have equality of rights, obligations and opportunities before the law.
- The sanctity of the human person shall be recognized and human dignity shall be maintained and enhanced.
- Section 17 (3) (d) further provides that there are adequate medical and health facilities for all persons.

It can be said here that, the provisions of Section 17(2) (b) is similar to the provision 34(1) in Chapter IV of the constitution. Sub-Section 3(d) of Section 17 is not granted the status of a fundamental human right. It is obvious that if the provision of adequate medical and health facilities for all is fundamental and made justifiable will go a long way in providing proper care for people with life limiting diseases.

CONCLUSION AND RECOMMENDATIONS

This paper attempts to look at the end of life care with emphasis on fundamental human rights and not from the perspective of a healthcare practitioner. The paper notes that unlike in developed countries where there are comprehensive polities on end of life care, it is either non-existence or just developing in Nigeria. The paper advocates that in the preparation of a comprehensive national policy on end of life care, consideration must be given to the protection of the patients' right to die with dignity and should be accorded the right to freedom of religion and conscience. This will be in line with the provisions of International Human Right Documents, which emphasize rights of human beings including people with life limiting diseases. This becomes imperative on the grounds that first, the decision of the court in *Abacha V Fawehimi*³⁷ provides the platform on which our courts are obliged to apply the provisions of the international and regional

treaties and covenants aimed at guaranteeing human rights to Nigerians and all other persons within the territory of Nigeria. Second, Nigeria has a constitution that guarantees fundamental human rights in Chapter IV of which includes right to human dignity and right to freedom of religion.

It is recommended that section 17(3) (d) that relates to the provision of adequate medical and health facilities to all persons which is in chapter II be made a fundamental human right and inserted in Chapter IV of the document. This recommendation is made based on the provision of section 9(1)-(4) of the Constitution that relates to the alteration of the constitution.

Section 9(3) provides that An Act of the National Assembly for the purpose of altering the provisions of this section, Section 8 or Chapter IV of this constitution shall not be passed by either House of the National Assembly unless the proposal is approved by the votes of not less than four-fifths majority of all members of each House and also approved by resolution of the Houses of not less than two-thirds of all the states.

The importance of section 9(3) is that the attention of the provisions of chapter IV is included among the few provisions of the Constitution that require votes of not less than four-fifths majority of all members of each House of the National Assembly. This underscores the importance of the chapter IV. While the alterations of most provisions of the constitution require the vote of two-thirds majority of all members of each House, the alteration of chapter IV requires votes of not less than four-fifths of members of both Houses. If there is a provision under chapter IV which entrenches the right to the provision and enjoyment of medical and health facilities, Nigerians who require end of life care will be exposed to better treatment.

In drawing up such comprehensive policy, efforts should be made to incorporate into it the rights of persons with life threatening diseases to have their dignity intact through reduction of pains and the freedom to hold onto the rents of their religion and their beliefs. It will not also be out of place to include in that national policy what can be termed complementary and alternative medicine (CAM) treatments, prayer or faith to obtain healing from terminal diseases. Unlike in developed countries where there are comprehensive policies on end of life care, it is either non existence or just developing in Nigeria.

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