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IX.

The Law for the Establishment of the Committee for Blood Transfusion and Other Incidental Matters in Lagos State: A Critique

Lateef Ogboye¹

Introductory Remark

GOVERNMENTS DEVELOP PRACTICE GUIDELINES in medical or paramedical fields in an attempt to reduce undesirable variations in care and to improve the quality of medical care. However, these guidelines have to be implemented and monitored by a body, hence the establishment of the committee for blood transfusion and other incidental matters in Lagos State. The law is highly desirable in order to guarantee quality assurance as part of health care. Although, these guidelines hold great promises, their ultimate value can only be determined based on the impacts that they have on patient's care, therefore the law is subjected to a review in this direction.

In recent times, the relationship between physicians, their patients and broader society has undergone significant changes. While a physician should always act according to his/her conscience and also in the best interest of the patient, equal effort must be made to guarantee patients' autonomy. We note that the latter is a missing gap in the law. This informs our contention that the law leans more towards paternalism at the expense of individual patients' autonomy and private dignity. While it is indisputable that blood transfusion is indispensable in some critical medical treatment and such transfusion must be undertaken by experts working within a particular legal and ethical frame-

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work, it is also desirable that the patient's dignity, right to privacy, culture, religious or personal values ought to be respected at all times in medical care. We therefore recommend that the law ought to be amended to accommodate the right of the patient to conscientious objection.

Importance of this Law

In 300 BC, Herophilus, the Greek anatomist and surgeon was credited with the saying:

To lose one's health renders science null, art inglorious, strength unavailing, wealth useless, and eloquence powerless.²

In 1787, reasoning along the same line, Thomas Jefferson advised thus:

With your talents and industry, with science, and that steadfast honesty which eternally pursues right, regardless of consequences, you may promise yourself everything but health, without which there is no happiness. An attention to health then should take place of every other object.³

The above sayings emphasize the importance of health in any person's life. As part of the responsibilities of governments worldwide to provide basic health to the public, the state of Lagos promulgated law for the purpose of achieving the aims of improving health, prolonging life, ensuring the quality of medical care, and to prevent diseases. The law is known as Lagos State Blood Transfusion Committee Law. It came into force in 2004.

Objectives of the Law

The objectives of the law are highlighted in various powers vested in the committee, which are specified in certain sections of the said law thus: Section 3 stipulates the functions and powers of the committee, viz:--

- to ensure quality control and assurance on all blood transfusion services and facilities in Lagos State;
- supervision and regulation of all the blood transfusion services throughout the state (public and private);
- registration, accreditation and regulation of blood transfusion services in the state;
- ensuring quality control of transfused blood;
- promotion of research and training needs and publication of information relating to blood transfusion in the state;
- supervision of all the blood transfusion in the state, among others.

Contents of the Law

The law contains 38 sections with a 6-paragraph schedule. It establishes a Committee for blood transfusion in Lagos and for other incidental matters. The committee, other-

² Herophilus, Fragment, 300 B.C.

³ Jefferson, T. Letter to Thomas Mann Randolph, Jr., July 6, 1787 referred to in Boyd, J. P., ed. The Papers of Thomas Jefferson. Princeton, New Jersey: Princeton University Press (1955), 555.

wise referred to as SBTS in law, is a corporate entity with power to sue, having perpetual succession and a common seal. The committee consists of a chairman and other members to be appointed by the Governor on the advice of Health Commissioner.⁴

Members include⁵:

- i. the Special Assistant to the Governor on AIDS/HIV matters and chief executive officer of Lagos AIDS Control Agency;
- ii. a representative of the state hospital governing board;
- iii. a representative of the Nigeria Medical Association;
- iv. the Association of Medical Laboratory Scientists of Nigeria⁶;
- v. a representative of NGOs with blood programs, and the Nigerian Red Cross Society.⁷
- vi. the Executive Secretary of the State Blood Transfusion Committee, and
- vii. a representative of the National Association of Nigerian Nurses and Midwives, Lagos State branch.

Section 2(2) (iv) and (vi) above appear anomalous in that the two paragraphs purport to make the Association of Medical Laboratory Scientists of Nigeria and the Nigerian Red Cross members of the committee. This appears contrary to the intention of the drafters of the law, which aims at making representatives of the two bodies members of the committee rather than the whole body. An amendment of the law may be necessary in this respect.

The law in section 4 establishes a monitoring state blood transfusion subcommittee comprising representatives from various medical and paramedical sectors in the state. This subcommittee is to be headed by the executive secretary of the blood transfusion committee. Its functions include, among others:

- monitoring and supervision of all blood transfusion activities in the state,
- encouraging the establishment of hospital-based blood transfusion advisory committees;
- disseminating clinical guidelines and training of staff who are in the field of blood transfusion in the state; and
- establishment of a state blood data bank.⁸

The monitoring committee shall be assisted by the enforcement unit created in section 10 of the law. The main functions of the enforcement unit are to monitor all blood banks and ensure compliance with the provisions of the law, to ensure that all blood is screened, to inspect the facilities, equipment and personnel of blood banks in the state. The tenure of the office of the State Blood Transfusion Committee shall be three years

4 S.1 of the law.

5 Ss.2 (2) i-vii of the law.

6 S.2 (2) (iv) is considered anomalous as explained in the body of the article.

7 S. 2 (2) (vi) is also considered anomalous on the same line of argument.

8 S.5 of the law.

but members may be re-appointed for another three-year term.⁹ However, a person appointed under the law may be removed at any time by the Governor:

- a. if the Governor is satisfied that such a person has been absent for three consecutive meetings without permission;
- b. in case of physical or mental illness leading to incapacitation to perform the functions of the office; or
- c. where a committee member is unfit to perform the function of the office in any other manner.¹⁰

The law is not specific about who grants permission to a member who is to be absent from the meeting. From the text of the law, the Executive Secretary heads the Committee, but the power of removal resides with the Governor, who may exercise such power of removal on an absentee member who did not obtain permission. It may, however, be inferred that the Governor may do this in reaction to a report to be submitted to him by the Executive Secretary who heads the Committee. A clarification as to who grants permission for absence from the meeting is therefore imperative to prevent ambiguity.

Section 11 establishes the primary and secondary blood transfusion blood centers. Their functions are provided for in sections 12 and 14 of the law.¹¹ Section 15 creates blood screening and certification centers and assigned functions to them in section 16.¹² By virtue of section 18, every blood bank in the state must be registered by the Committee as stipulated in the schedule to the law. By virtue of section 20, the Executive Secretary issues a certificate upon approval of the registration. A blood bank must operate with an operational permit, which must be renewed annually and be displayed in conspicuous places.¹³ The Committee reserves the power to cancel or suspend the activities of a blood bank that run afoul of the law.

Penalties in the Law

The following are penalties in the law:

- a. Non-registration of a blood bank leads to closure and prosecution.¹⁴
- b. Failure to display the certificate of registration leads to N10,000.00 fine only.¹⁵
- c. Failure to renew the license or permit within the first quarter of the year attracts N25,000.00 fine.¹⁶
- d. Obstruction of a duly authorized member of the monitoring and enforcement unit from performing their duties stipulated in the law attracts N50,000.00, in addition to the prosecution and closure of the

9 S.7.

10 S. 8.

11 Ss.12 and 14.

12 S.16.

13 S.21.

14 S.25.

15 S.27.

16 S.28.

blood bank.¹⁷

- e. Generally, contravention or failure to comply with any of the provisions of the law shall render the offender to be prosecuted and if found guilty he shall be liable to N100,000.00 fine and two years' imprisonment in the case of an individual and in the case of a company or a hospital, it shall be liable to a fine of N500,000.00.
- f. Section 34, however, provides for a right of appeal from any decision of the subcommittee to the Committee.

Screening of Blood

Section 30 no doubt is the most important and the basic reason behind the promulgation of the law. It emphasizes the need to have blood screened at the time of collection and before administering same to the patient. It categorically states that every owner of a hospital, a medical laboratory or a medical clinic having a blood bank within the state shall not obtain blood from a blood donor unless such donor has been screened and found to be negative at the time of collection. The screening must show negative result to HIV 1 and 2, hepatitis B and C, syphilis and any other transmittable diseases found to be necessary by SBTC.¹⁸

The law lays too much emphasis on screening of blood before transfusion to the deserving people without considering other aspects that are incidental and relevant to the subject matter. It is suggested that the law should briefly mention the category of people who are qualified to screen the blood. The emphasis should extend beyond the screening of blood to include the professionals who are skillful in such screening.

Critique of the Law

First and foremost, the law recognizes the societal demand for the highest standard of medical care, together with the protection of the patient against undue risk in medical treatment. This is adequately portrayed to be the role of the Committee established by the law without more. It is contended that the role and functions of the Committee should aim at balancing society's needs for the advancement of medical science against the rights of human subjects—patients and volunteers donors. In other words, while the law should primarily guarantee the protection of persons against avoidable medical risk, it should also guarantee the need to protect the patient's fundamental right to dignity and privacy as well as preventing abuse. Thus, the significant missing gap in the law is the right of the patient to conscientious objection. Our arguments are stated as follows:

Consent versus Paternalism: Definition of Terms

It is our contention that the law is too paternalistic at the expense of the patient's consent. Thus, it would be paternalistic to give a blood transfusion to an unwilling or non-

¹⁷ S.29.

¹⁸ This law makes the screening of blood mandatory in order to ensure that safe blood is administered to patients who may be in need of blood. This includes blood grouping, ensuring compatibility of the donor and the recipient, as well as testing for transfusion-transmitted agents. The blood must therefore be screened thoroughly to ensure safe blood supply. Most importantly, the transmission of infection through transfusion of infected blood and blood products can be easily prevented through screening of blood.

consenting patient, against his or her decision to reject a transfusion. Consent is defined in a number of ways and is distinguishable from paternalism. Paternalism has been defined to imply the power and authority one person or institution exercises over another in order to confer benefits on, or prevent harm to, that person, regardless of the person's informed consent.¹⁹ Similarly, Beauchamp uses the term to refer to "practices that restrict the liberty of individuals, without their consent, where the justification for such actions is either the prevention of some harm they will do to themselves or the production of some benefit for them that they would not otherwise secure."²⁰ This is the main focus of the law as against the need to recognize the consent of the patient before blood is given to him or his right of refusal to blood transfusion.

According to Polani, consent means compliance or approval, especially of what is done or proposed by another. It signifies capable, deliberate agreement to, or concurrence in, some act or purpose, and implies physical and mental power.²¹ The *New Oxford Dictionary* defines consent as "permission for something to happen or agreement to do something."²² Consent has become a dominant concept in medical ethics, and its strength has been enhanced by its incorporation in the declarations of Helsinki²³ and in the World Medical Association's declaration on the rights of the patient (Declaration of Lisbon).²⁴ The law therefore should reflect the fact that such a transfusion should be done only with the consent of the patients. It is necessary to note that consent may be declined to blood transfusion on various grounds as discussed hereunder.

Refusal of Blood Transfusion on Religious Grounds

Refusing blood transfusion is common among Jehovah's Witnesses. Their basis for refusal of transfusion is credited to the biblical injunction forbidding blood transfusion of any kind. The relevant provisions are in Leviticus 17: 10–11, where God said:

And I will turn my face against anyone, whether an Israelite or a foreigner living among you, who eats blood in any form. I will excommunicate him from his people. For the life of the flesh is in the blood, and I have given you the blood to sprinkle upon the altar as an atonement for your souls; it is the blood that makes atonement because it is the life.

Acts 5: 29 equally provides: "that ye abstain from meats offered to idols, and from blood, and from things strangled, and from sexual immorality." Leviticus 3:17²⁵ also states:

19. Bedau, H. A., "Paternalism," in Honderich T., ed., *The Oxford Companion to Philosophy*. Oxford, New York: Oxford University Press, 1995, 647; Beauchamp T. L., "Paternalism," in Reich W. T., ed., *Encyclopedia of Bioethics*. New York: Free Press, 1978, 1194–1200.

20. Beauchamp, 1194–1200.

21. Polani, P. E., "The Development of the Concepts and Practice of Patient's Consent," in Dunstan, G. R., Seller, M. J., eds. *Consent in Medicine*. London: King's Fund Publishing Office, 1983, 57–84.

22. *The New Oxford Dictionary of English*. Oxford University Press, 1998.

23. Adopted by the 18th World Medical Assembly, Helsinki, Finland, June 1964. Amended by the 29th World Medical Assembly, Tokyo, Japan, October 1975; 35th World Medical Assembly, Venice, Italy, October 1983; and the 41st World Medical Assembly, Hong Kong, September 1989.

24. Adopted by the 34th World Medical Assembly Lisbon, Portugal, September/October 1981, and amended by the 47th WMA General Assembly Bali, Indonesia, September 1995, and editorially revised at the 171st Council Session, Santiago, Chile, October 2005.

25. See further (Acts 15:29; Gen. 9:3, 4; Lev. 7:26, 27; 17:1, 2, 10–12; and Deut. 12:23–25.)

"This shall be a perpetual statute throughout your generations in all your dwellings: you shall eat neither fat nor blood."

As a result of the interpretation of the above passages, Jehovah's Witness doctrine does not support eating blood or receiving its transfusion. The latter is considered to be the same as eating blood. It therefore follows that a patient who subscribes to this belief must be respected and cannot be given blood by a medical practitioner, even if it is to save his life, unless he consents otherwise.

Right to Conscientious Objection

Apart from the freedom of religion, the right to conscientious objection must be understood in light of the right to freedom of conscience which has a universal appeal. Freedom of conscience is recognized as a fundamental right, and is well ensconced in various international human rights instruments. For example, the Universal Declaration of Human Rights²⁶ contains a guarantee on freedom of conscience, as does the International Covenant on Civil and Political Rights.²⁷ Regional instruments such as the European Convention on Human Rights²⁸ and the African Charter on Human and Peoples' Rights²⁹ similarly contain freedom of conscience clauses. As pointed out by Charles Ngwenya, the right to freedom of conscience is an affirmation of moral and ethical diversity. It is an acknowledgement that people do not always share the same outlook to life. They may differ in thought, belief and opinion for religious, political, philosophical and other reasons. Individual autonomy must thus be respected.³⁰ The right to conscientious objection is about protecting the practice associated with such thought, belief and opinion which is held by individuals.

Freedom of conscience encompasses and also accommodates freedom of religion. Article 18(1) of the International Covenant on Civil and Political Rights provides that this right shall include the freedom "to manifest his religion or belief in worship, observance, practice and teaching." Freedom of conscience is not confined only to religious beliefs; rather, it is all-embracing in the sense that it also protects the political, ethical or moral beliefs and practices that are genuinely held regardless of whether they are outside conventional religious doctrines or practices.³¹ In its General Comment on the said article 18 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee stated:

Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right

²⁶ Universal Declaration of Human Rights (UDHR) GA/Res/217A (111) of December 10, 1948; International Covenant on Civil and Political Rights (ICCPR) General Assembly Resolution 2200 A (XXI) of December 16, 1966.

²⁷ International Covenant on Civil and Political Rights (ICCPR) General Assembly Resolution 2200 A (XXI) of 16 December 1966.

²⁸ The European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms) is an international treaty to protect human rights and fundamental freedom in Europe. It was drafted in 1950 by the then newly formed Council of Europe. The Convention entered into force September 3, 1953.

²⁹ The African Charter on Human and People's Rights (ACHPR), OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

³⁰ Ngwenya, C., "Conscientious Objection and Legal Abortion in South Africa," *Journal for Juridical Science* (2003) 28(1).

³¹ *Ibid.*

not to profess any religion or belief. The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional beliefs.³²

It is therefore conventional that a patient's right of refusal of blood transfusion or any medical procedure whatsoever is protected irrespective of the basis on which such patient is exercising the refusal. Any law that regulates such a procedure must recognize this exception in its coverage.

Conflict of Right to Freedom of Religion, Right to Liberty, Right to Privacy and the Dignity of Human Person

It is pertinent to note that the constitutionally guaranteed rights to religion, liberty, privacy and dignity of the human person generally conflate when the issue of blood transfusion comes up. Except and unless an express consent of the patient is obtained, giving a patient blood transfusion will negate these constitutional rights of the patient. The need to consider and balance the interest of the patient with the societal need to preserve health is vividly captured by Supreme Court when it considered and upheld the right of a patient to conscientious objection in the case of *Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo*.³³ The court declared that the patient's constitutional right to object to medical treatment or, particularly, to blood transfusion on religious grounds is founded on fundamental rights protected by the (i) right to privacy in section 37; (ii) right to freedom of thought, conscience and religion in section 38 of the 1999 Constitution, respectively. The Court stated that the right to privacy implies a right to protect one's thought conscience or religious belief and practice from coercive and unjustified intrusion; and one's body from unauthorized invasion. The court stressed the fact that the right to freedom of thought, conscience or religion implies a right not to be prevented, without lawful justification, from choosing the course of one's life, fashioned on what one believes in, and a right not to be coerced into acting contrary to religious belief. Therefore, the sum total of the rights of privacy and of freedom of thought, conscience or religion which an individual has, put in a nutshell, is that an individual should be left alone to choose a course for his life, unless a clear and compelling overriding state interest justifies the contrary. Delivering the majority opinion, Ayoola, JSC, stated:

The law's role is to ensure the fullness of liberty when there is no danger to public interest. Ensuring liberty of conscience and freedom of religion is an important component of that fullness. The courts are the institution society has agreed to invest with the responsibility of balancing conflicting interests in a way as to ensure the fullness of liberty without destroying the existence and stability of society itself...³⁴

³² Human Rights Committee, General Comment 22, UN Doc. HR I/GEN/1/Rev.2; Detrick 1999, 244.

³³ *Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo* (2002) AHRLR 159 (Ng SC 2001).

³⁴ Paragraph 23 of the report.

The point being made here is that the above enumerated rights have not been considered by the LSBT law and the law focuses only on the safety of the procedure for blood transfusion.

The [LSBT] Law vis-a-vis Internationally Recognized Medical Practice

The fundamental and basic mission and duty of a medical practitioner in relation to his patient is to safeguard the health of such patient. It is not contestable that a medical practitioner must dedicate his medical knowledge, expertise and personal conscience towards the fulfillment of this basic duty and mission. In this regard, the Declaration of Geneva of the World Medical Association binds the doctor with the words "The health of my patient will be my first consideration."³⁵

Similarly, principle 1 of the Declaration of Lisbon emphatically protects the patient's right to medical care of good quality. It provides, *inter alia*, thus:

- a. The patient shall always be treated in accordance with his/her best interests. The treatment applied shall be in accordance with generally approved medical principles.
- b. Quality assurance should always be a part of health care. Physicians, in particular, should accept responsibility for being guardians of the quality of medical services.

It is submitted that this duty as internationally acknowledged has been well covered by the LSBT. The law is therefore, in our humble opinion, very adequate in this respect. On the other hand, the law is silent on the need to balance the medical practitioner's duty to protect life with the residual fundamental right of a patient to refuse treatment in certain situations like blood transfusion. The latter is equally paramount and it has international recognition and adherence. This is highly pronounced in the International Code of Medical Ethics which declares that "Any act or advice which could weaken physical or mental resistance of a human being may be used only in his interest."³⁶ In the same vein, the need to recognize and act according to the wishes of the patient is greatly underscored in the preamble to the Declaration of Lisbon, which states *inter alia* as follows:

The following Declaration represents some of the principal rights of the patient that the medical profession endorses and promotes. Physicians and other persons or bodies involved in the provision of healthcare have a joint responsibility to recognize and uphold these rights. Whenever legislation, government action or any other administration or institution denies patients these rights, physicians should pursue appropriate means to assure or to restore them.³⁷

In principle 4 of the Declaration of Lisbon (*supra*), the patient's right to self-determination is also well grounded. It provides that:

³⁵ Adopted by the General Assembly of the World Medical Association, Geneva, Switzerland, September 1948 and amended by the 22nd World Medical Assembly, Sydney, Australia, August 1968.

³⁶ Adopted by the Third General Assembly of the World Medical Association at London in October 1949 (World Medical Association Bulletin, 1/3, October 1949, 109, 111).

³⁷ See generally Declaration of Lisbon, note 24 above.

- a. The patient has the right to self-determination, to make free decisions regarding himself or herself. The physician will inform the patient of the consequences of his/her decisions.
- b. A mentally competent adult patient has the right to give or withhold consent to any diagnostic procedure or therapy. The patient has the right to the information necessary to make his/her decisions. The patient should understand clearly what the purpose of any test or treatment is, what the results would imply, and what would be the implications of withholding consent.

Where the patient is unconscious, his consent may be given through a proxy.³⁸ Where a patient is a minor or otherwise legally incompetent, the consent of a legally entitled representative is required in some jurisdictions. Nevertheless, the patient must be involved in the decision-making to the fullest extent allowed by his/her capacity.³⁹ Subjecting the LSBT to the above guidelines from the Lisbon Declaration would therefore translate to mean that the law misses out some salient clauses relating to the consent of the patient prior to blood transfusion.

Suggestions

It is therefore our humble suggestion that the law be amended by adding a paragraph to read as follows: Subject to the provision hereunder in subsection 2 and 3 of this section, transfusion of blood or blood components shall be carried out while respecting the rights of the patient and after obtaining a written informed consent from him/her, for which the patient shall be provided in easily understandable language, information regarding:

- i. the reasons for transfusion of blood or blood components;
- ii. the goal of the transfusion and the expected result;
- iii. the possible adverse reactions and the potential risks associated with transfusion of blood or blood components;
- iv. the existing alternatives and the risks resulting from them.

In case the patient is incapacitated, the informed consent shall be given by his/her legal representative or guardian. Transfusion of blood or blood components without obtaining informed consent may however be carried out when the life of the patient is endangered:

³⁸ This is explained further that: a. If the patient is unconscious or otherwise unable to express his/her will, informed consent must be obtained whenever possible, from a legally entitled representative; b. If a legally entitled representative is not available, but a medical intervention is urgently needed, consent of the patient may be presumed, unless it is obvious and beyond any doubt on the basis of the patient's previous firm expression or conviction that he/she would refuse consent to the intervention in that situation; c. However, physicians should always try to save the life of a patient unconscious due to suicide attempt.

³⁹ d. If the legally incompetent patient can make rational decisions, his/her decisions must be respected, and he/she has the right to forbid the disclosure of information to his/her legally entitled representative; e. If the patient's legally entitled representative, or a person authorized by the patient, forbids treatment which is, in the opinion of the physician, in the patient's best interest, the physician should challenge this decision in the relevant legal or other institution. In case of emergency, the physician will act in the patient's best interest.

- a. his/her physical or mental condition does not allow for obtaining an informed consent,
- b. the patient is incapacitated and the timely obtaining of consent from his/her legal representative or guardian is impossible.

With an amendment reflecting the above, the interest of the government to protect and preserve life may be balanced with the interest of the individual patient to have his constitutional rights protected. According to the lead judgment of Ayoola, JSC, in *Okonkwo's case* (*supra*), any rule of ethics or professional conduct that ignores the need to balance these interests or that gives undue weight to any of them (as in the case of LSBT law under review) without regard to individual circumstances, will be out of touch with reality and may lead to unjust consequences.⁴⁰

⁴⁰ See para 72 of the Report.