Protecting and Balancing Rights of a Child and Adherence to Religious Beliefs of Parents in Nigeria

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ABSTRACT

In Nigeria, as in many other jurisdictions, parents or guardians may act on behalf of children and other persons deemed as lacking full legal competence to act on their own. This may include deciding on the religious belief to be practiced or followed by the child. The right of parents to do this is recognized in both domestic and international law. The paper discusses Nigerian cases in which the right of a parent to choose a religious belief or practice for a child was invoked in reference to submission to medical treatment considered by the parent as contrary his or her religious beliefs. The paper argues that law and religion, jurisprudentially, are media of social control and do have their divergence and convergence. It finds that while Nigerian courts recognize the right of parents to choose religion for their children, they will not permit any religious practice prejudicial to the child. Court decisions on this subject are largely predicated on the 'best interest' of the child principle encoded in Federal and State legislation on children's rights. The paper further makes recommendations on balancing the trajectories of law and religion, by advocating that sanctity of human life, in recognition of which suicide is outlawed, requires that even adults should not be allowed to object to medical treatment on religious grounds where refusal may result in death. This is 'disguised suicide.'

1. INTRODUCTION

Freedom of religion, also reflected as freedom of conscience, is one of the core fundamental human rights incorporated in many constitutional and international human rights instruments. Every person irrespective of creed, colour, sex or

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any other distinguishing feature, has the right to hold a religious belief and to propagate the same while respecting the right of others.[1] This right is exercisable by every adult. Children are generally regarded as minors, and incapable of personally exerting their rights. Thus, a parent or anyone *in loco parentis* is charged with the responsibility of exercising the rights of a child who is in their custody. It is therefore not unexpected that every child naturally subscribes to the religion and religious practices of his/her parent or guardian as they are bestowed with such right.[2] Jurisprudentially, religion just like law is a means of social control and they both have their convergence and divergence.[3]

Religious sanctity is germane in Nigeria, as the country is divided along religious lines. Parents, as care givers and protectors of the rights of their children, are expected to ensure the health and safety of their children, including subscription to medical treatment.[4] However, due to their religious beliefs, some parents may object to certain kinds of medical treatment for themselves and their children.[5] The Jehovah Witnesses (JW) sect, for example, believe that medical treatment involving blood transfusion is against their religion. They object to blood transfusion even where it is a prominent means of saving life, asserting their fundamental right to freedom of religion or conscience protected under domestic and international legal frameworks.[6]

The question is should the court allow the right of an adult to object to medical treatment on the basis of his/her religious belief to be extended to a child who is a minor and incapable of deciding for himself, who, upon attainment of majority, may hold a contrary view to that of the parent or guardian? To what extent can a child be bound by the religious beliefs and practices of a parent/ guardian as regards medical treatment? Addressing these issues is the main concern of this paper.

The paper is divided into seven parts. After this introduction, part two discusses the concept of rights of a child, highlighting the various rights of a child in Nigeria. Part three examines the legal framework for the protection of

1 ON Ogbu, *Human Rights Law and Practice in Nigeria*, (2nd ed, Snap Press Nigeria Ltd, Enugu 2013) 298
2 JA Dada, *Legal Aspects of Medical Practice in Nigeria,* (2nd ed, University of Calabar Press, Calabar, 2013) 223.
3 F Adaramola, *Jurisprudence,* (4th ed, LexisNexis, Durban, 2008) 87 – 88.
4 FO Emiri, Medical Law and Ethics in Nigeria, (Malthouse Press Limited, Lagos, 2012) 304.
5 Ogbu (n. 1) 1.
6 Malette v. Schulman (1990) 67, DLR (4th) 321.

rights of a child in Nigeria, from domestic and international perspectives. Part four reviews Nigerian judicial authorities, particularly the Supreme Court, on the right to object to medical treatment based on religious beliefs by adults, as parents or guardians for their children. Part five examines medical consent in other jurisdictions in comparison to Nigeria. Part six examines the best interest of the child principle as the influencer of Supreme Court decisions in the cases reviewed. Part seven collates findings, conclusions and recommendations.

2 THE CONCEPT OF RIGHTS OF A CHILD UNDER NIGERIAN LAW

The concept of rights of a child is derived from the general concept of human rights enshrined in various human rights legal instruments, from the Magna Carter to particularly the 1948 United Nations Universal Declaration of Human Rights. Children's rights are understood as fundamental claims for the realization of social justice and human dignity for children. Just like human rights more generally, children's rights originate from the quest for human dignity and social justice. However, the concrete meaning of these notions will be different for different people.[7]

Historians have argued that childhood is to a large extent a social construct. The concept of childhood emerged relatively recently, in the past 400 to 600 years. The notion of childhood apparently did not exist during the Middle Ages. Children dressed in the same manner as adults and they engaged in the same pastimes. Their education was carried out by means of apprenticeship during which they worked side by side with adults. It was not until the Renaissance and the Reformation that the concept of childhood developed. Children were perceived as innocent and weak during this period. They were regarded as needing proper and adequate discipline and assistance in order to develop into responsible adults.[8] From the 1500s, children were not considered to have independent wills and, consequently, were in total subjection to their

7 D Reynaert, E Desmet, 1S Lembrechts and W Vandenhole, *A Critical Approach To Children's Rights*, Available online at <http://www.hr4dev.be/documents/general--1-chapter-1-reynaert-et-al-introduction.pdf> last visited on 6 May 2019.

8 S Scott, 'From Major to Minor: An Historical Overview of Children's Rights and Benefits' (1993) 9 *Journal of Law and Social Policy* 222 at 229.

parents.[9] It was only in the latter part of the twentieth century, and specifically the 1970s and early 1980s that the concept of children's rights emerged.[10] There was during this period 'recognition that children have interests, perhaps even rights that need to be considered distinctly and separately from those of adults, and particularly their parents.'[11] From this period up to 989, when the United Nations Convention on the Rights of the Child (UNCRC) was adopted, the concept of rights of a child became a truly universal phenomenon. Before the UNCRRC was adopted, the UN Declaration of the Rights of the Child (DRC) of 1959 marked the first major international consensus on the fundamental principles of the concept of rights of the child. These were in turn derived from the League of Nations Geneva Declaration of 1924, a document which for the first time recognized and affirmed the existence of rights specific to children, and the responsibility of adults towards children.[12]

In Nigeria, both governmental and non-governmental organizations are involved in the propagation of rights of the child. The Federal Government enacted the Child's Right Act of 2013 which many States have domesticated as comprehensive legislation on rights of the child. The main concern in Nigeria is not lack of legislation but observance of existing legislation. The law is mostly observed in breach rather than in compliance. Apart from lack of political will, other factors affecting enforcement of laws on rights of the child include cultural and religious barriers. Particularly in the Northern regions of Nigeria, where Islam in various shades and forms is the dominant religion, practices that might otherwise be regarded as child abuse or other violations of the law are regarded as religiously correct. For instance, marriages of under age children, who are made to consummate the marriage and procreate, are rampant. Religion is thus a major factor militating against the domestication of the Child's Right Act by most Northern States as some of its provisions appear to be collide with certain Islamic practices. Child betrothal is also practiced in some rural areas in the South and Eastern regions of Nigeria, notwithstanding its proscription under

9 J Begley, 'The Representation of Children in Custody and Access Proceedings' (1994) 10 *Solicitors' Journal* 1.

10 M Freeman, 'Whither Children: Protection, Participation, Autonomy?' (1994) 22-3 *Manitoba Law Journal* 307

11 C Bernard, R Ward and B Knoppers, 'Best Interests of the Child Exposed: A Portrait of Quebec Custody and Protection Law' (1992-93) 11 *Canadian Journal of Family Law* 57

12 See 'Origin of Declaration of Rights of the Child, 1959, at https://www.humanium.org/en/declaration-rights-child-2/

Federal Child's Rights Act (CRA).

In most cities in Nigeria, such as, Lagos, Port-Harcourt, Ibadan, Asaba, Onitsha, Calabar, Kano and Abuja, children litter the streets hawking various things under rain and sun to commuters during school hours.[13] Needless to argue, these children are exposed to various vices on the streets. Some become victims of sexual molestation, motor vehicle and other accidents, while others have become objects of ritual killings.[14] The importance of protecting rights of street or city children cannot be overemphasized.

3. THE LEGAL FRAMEWORK FOR PROTECTING RIGHTS OF A CHILD IN NIGERIA

This part of the discussion must necessarily start with a reference to the Constitution of the Federal Republic of Nigeria (CFRN), the supreme law of Nigeria. Chapter 4 is the fundamental rights chapter of the CFNR, which every individual is entitled to, irrespective of age and sex. Sections 33 and 34 cover fundamental rights particularly relevant to children. Section 33 covers the right to life, and section 34 the right to dignity.

Section 33 (1) provides that every person has a right to life, 'and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.' Section 7 of the Nigerian Criminal Code, however, declares that a child under the age of seven is incapable of committing an offence. The right to life for a child under the age of seven is, therefore, inviolable. It may not be taken away even in execution of a sentence of a court in respect of a criminal offence.

In section 34 of the 1999 CFRN, every individual, including a child, is entitled to respect for the dignity of his/ her person. This entails that no person shall be subject to torture or to inhuman or degrading treatment; no person shall be held in slavery or servitude; and no person shall be required to perform forced or compulsory labour. Children are particularly vulnerable to being held

13 M O Esiri and E Ejechi, 'Child Labour and Juvenile Delinquency in Nigeria' 1(1 & 2) 2006 *International Journal of Law and Contemporary Studies,* 203

14 A Folashade and S O Iroye, 'The Legal Overview of Child Labour and the Overriding Positive Impact of Education' (2015) 6 *Ekiti State University Law Journal* 485

in servitude and to being required to provide compulsory labour or service, even in homes where they should be nurtured.

Several provisions in the Child's Rights Act of 2003 can be regarded as linked or related to or adding substance to the fundamental rights in the 1999 CFRN. To begin with, section 1 of the Act states that 'the best interest of the child shall be the primary consideration' in every action concerning a child, whether taken by an individual, public or private body, institution or service, court of law or administrative or legislative authority. Section 2 gives the child the right to be given protection and care necessary for his/her well-being. Section 3 makes applicable the provisions of chapter 4 of the 1999 CFRN to all children. In addition to what is guaranteed in Chapter IV of the Constitution, every child is also entitled to the rights elaborated in Part II of the Act. These notably include a right to survival and development;[15] a right to a name;[16] a right to freedom of association and peaceful assembly in conformity with the law and in accordance with the necessary guidance and directions of parents or guardians;[17] and a right to freedom of thought. Conscience and religion, to be exercised with the guidance and direction of parents and legal guardians, having regard to evolving capacities and best interest of the child.[18]

Elaborating on the right to respect for the dignity of his/ her person in section 34 of the CFRN, section 11 of the Act states that 'accordingly, no child shall be subjected to,' among others, physical, mental or emotional injury, abuse, neglect or maltreatment, including sexual abuse; attacks upon his/ her honor or reputation; or held in slavery or servitude, while in the care of a parent, legal guardian or school authority or any other person or authority having the care of the child. Every child is also entitled to rest and leisure and to engage in play sports and recreational activities, and to participate fully in cultural and artistic activities;[19] and to parental care, protection and maintenance.[20]

Sections 21 to 23 of the Act cover prohibition of child marriages and child betrothal. A person who marries a child or to whom a child is betrothed, or who promotes a marriage or betrothal of a child, commits an offence and, upon

15 Nigerian Child's Rights Act, 26 of 2002, s. 4
16 Section 5
17 Section 6
18 Section 7
19 Section 12
20 Section 14

conviction, may be liable to hefty fine, a term of imprisonment, or both.[21]

Child labor is covered in sections 28 and 29 of the Act. Section 28 generally prohibits employment of a child in forced or exploitative forms of labor. But this prohibition does not apply to employment of a child by a member of his/ her family on light work of an agricultural, horticultural or domestic character. Also not proscribed is employment of a child as a domestic help in his/ her own home or environment. Section 29 states that provisions relating to young persons in sections 58, 59, 60, 61, 62 and 63 of the Labour Act shall apply to children under the Act. These provisions notably proscribe child labour and night work.

According to section 30, no person 'shall buy, sell, hire, lei on hire, dispose of or obtain, possession of or otherwise deal in a child.' It also prohibits use of a child for the purpose of hawking of goods or services; begging for alms; guiding beggars; prostitution, domestic or sexual labour or for any unlawful or immoral purpose; or use of a child as a slave or for any practices similar to slavery; or for any purpose that deprives the child of the opportunity to attend and remain in school. Any person contravening this provision is liable on conviction to imprisonment for a term of ten years. Another notable piece of legislation, similar in import to section 30, is the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act.[22] Section 17 of the Act prohibits the procurement, recruitment, use or offer for use of any person under the age of 18 years for the production of pornography or for pornographic performances. Anyone who does this is liable to imprisonment for a term of not less than seven years and a fine of not less than ₦ 1, 000,000. A person who promotes or facilitate the foreign travel of any person less than 18years for prostitution or such activities, upon conviction, is liable to imprisonment for not less than seven years, and a fine of not less than ₦ 1, 000,000.[23] It also prohibits trafficking for the purposes of forced or compulsory recruitment for use in armed conflict.[24]

Under section 59 of the Labour Act of 1974, alluded to above, young persons, (and children by virtue of section 30 of the Child's Rights Act), are

21 Section 23 refers to a fine of N 500,000. 00 and a term of imprisonment of five years.
22 Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2015.
23 Section 18
24 Section 19

protected from any work or arrangement requiring them to carry or move anything so heavy as to likely harm their physical development, and they cannot be employed or required to work in an industrial undertaking, except for educational purposes.[25] As alluded to above, night work is also prohibited, except where the nature of the employment requires it, there is strict supervision.[26] The Act requires every employer to keep a register of all young persons in his employ with particulars of their age, date of employment and the condition and nature of their employment.[27] Also, the Compulsory, Free Universal Basic Education Act, 2004 provides every child with the right to compulsory, free basic education and places a responsibility on all parents to ensure that their children attend and complete primary education and junior secondary school.[28]

At the international plane, the preamble to the 1948 Universal Declaration of Human Rights makes provisions of the Declaration applicable to all humans, including children. Articles 18 and 26 respectively guarantee the right to freedom of religion of all persons including children, and the right to education, which should be free at least at the elementary stage. The African Charter on Human and People's Rights (ACHPR)[29] is another international legal instrument that deals with human rights of children as far as Nigeria is concerned. Article 17(1) provides for the right of education of everyone. Article 18(3) enjoins State members to the Charter to ensure the elimination of every form of discrimination against women and ensure protection of the rights of women and children as stipulated in international declarations and conventions. Another instrument is the African Union Charter on the Right and Welfare of the Child[30] (AUCRWF). Article 1(3) enjoins member States to abolish any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations created under the charter to the extent of its consistency with the charter. Articles 3 and 4 guarantee the right of the child to non-discrimination irrespective of any factor such as race, colour, tribe, religion, age, sex, language, fortune, circumstance of birth, political opinion, etc., and in every action concerning a child undertaken by anybody (private

25 Labour Act1974, s. 59 (1) and (2)
26 Section 60
27 Section 62.
28 Compulsory, Free Universal Basic Education Act, Ss. 2 and 3.
29 African Charter on Human and People's Rights 1981.
30 African Union Charter on the Right and Welfare of the Child, 1991.

or public), the best interest of the child shall be the paramount consideration at all times. The Charter also protects a child's right to life, which is inherent, and State parties are required to ensure, to the maximum extent possible, the survival, protection and development of the child, and that the death sentence shall not be pronounced for crimes committed by children.[31]

Every child has the right from his/her birth to have a name and to be registered immediately after birth.[32] No child shall be subjected to arbitrary or unlawful interference with his/her privacy, family, home or correspondence, or to be attacked upon his/her honour or reputation subject to his/her parents/ guardian right of reasonable supervision over their conduct.[33] Every child who is capable of communicating his/her thoughts, subject to lawful restriction has the right to disseminate his/her views; also, a child has the right to associate freely and peacefully.[34] Every child has the right to education, rest, leisure, participation in cultural and artistic activities for is/her proper development.[35] Article 15 prohibits all forms of child labour which are hazardous to the child's wellbeing. Articles 16 and 19 guarantee a child's right of freedom from child abuse and torture and entitlement to parental care and protection to the extent that no child shall be separated from his/her parent except pursuant to an order of a competent court. Articles 27 and 28 enjoin all member States to protect children against sexual exploitation and drug abuse.

Another important international legal instrument on rights of a child in Nigeria is the United Nations Convention on the Rights of the Child (UNCRC). Article 6 recognizes a child's inherent right to life and the duty of member States, to the maximum extent possible, to ensure the survival and development of every child. The Convention recognizes children's right of freedom of expression and freedom of thought.[36] Article 31 provides for the child's right to leisure and rest while Article 28 provides for the child's right to education, with primary education being compulsory. Article 37 prohibits all forms of torture or cruel treatment against a child and enjoins member States to make laws in prohibition of this. Article 26 makes State parties duty bound to recognize the

31 Article 5 (1), (2) and (3).
32 Article 6 (1), (2) and (3).
33 Article 10.
34 Articles 7 and 8.
35 Articles 11 and 12.
36 Articles 12 (1) and 13(1) United Nations Convention on the Rights of the Child

right of the child to benefit from social security. Article 38(1) enjoins member States to ensure that international humanitarian laws applicable to children in armed conflict are respected and abide by. Article 23 enjoins member States to recognize that mentally or physically disabled children are entitled to enjoy full and decent life, in conditions which ensure dignity, self-reliance, and ensures the child's active participation in communal life.

From the above, it is abundantly clear that both domestic and international legal instruments recognize and protect various rights of children in Nigeria. However, recognition of these rights is one thing and their actual protection and realization is another. There is rampant disregard of some of the rights of children in Nigeria, especially in reference to child labour and education or literacy.

4. JUDICIAL STANCE ON THE RIGHT TO OBJECT TO MEDICAL TREATMENT BY ADULTS AND PARENTS FOR THEIR CHILDREN IN NIGERIA

To be examined in this part are two decisions in which the Supreme Court of Nigeria pronounced on the right of an adult to object to medical treatment based on religious belief, and the extent of the right of a parent or guardian to object to medical treatment for his/her child. The first decision is that of *Medical and Dental Practitioners Tribunal v Okonkwo.*[37] Mrs. Martha Okorie, 'the patient', and her husband, Loveday Okorie, were members of the Jehovah's Witnesses religious group, which regarded blood transfusion as amounting to the 'eating of blood' and, therefore, contrary to one of their teachings and religious beliefs. Mrs. Okorie, aged 29, had a delivery at a maternity facility on the 29 July 1991. After complaining of difficulty in walking and severe pain in the pubic area, she was admitted at Kenayo Specialist Hospital for a period of nine days. The doctor recommended blood transfusion as part of the treatment for her diagnosed severe ailment. She and her husband vehemently objected to the blood transfusion. After failing to persuade them to accept blood transfusion as a life saving measure, the doctor was constrained to discharge her. He gave them a note confirming that they had refused blood transfusion 'despite

37 [2001] 7 NWLR (Pt. 711) 206; (2002) AHRLR 159; previously reported at [2001] WRN 1

appeals, explanations and even threats that she may die.' It also stated that the 'the husband rather asked for his wife to be discharged, and he took her away on 17/ 8/ 91.' Mrs. Okorie was on the same day taken to JENO Hospital by her husband. At the hospital, the husband produced to Dr. Okonkwo a card signed by the patient titled 'Medical Directive/Release', on which she directed that no blood transfusions should be administered even though physicians may deem such vital to her health or life. She would accept non-blood expanders such as Dextran, saline of Ringer's solution or hetastarch. The card indicated her age and suggested that it had been executed on her own initiative. It alleged that this was in accord with her rights as a patient, and her religious beliefs as a Jehovah's Witness. The card further indicated that she accepted any added risk her refusal of blood transfusion may cause, and released doctors and all personnel from any responsibility for any untoward result caused by her refusal. She further directed witnesses to her decision, (her husband and uncle), to ensure that her decision is respected in the event that she lost consciousness. Her husband in another document signed by him reiterated the position of his wife and further directed that the patient's decision not to accept transfusion or any similar treatment is final, and should not be changed in the event that he became unconscious. He also released the personnel of JENO hospital from any untoward consequences arising from their refusal to accept blood transfusion and the medical advice in respect thereof.

Based on these documents, the Respondent proceeded to treat the patient without administering blood transfusion. The patient unfortunately died on the 22 August 1991. As a result, the Respondent was charged before the Medical and Dental Practitioner Disciplinary Tribunal on two counts. Count one was for attending to the patient in a negligent manner and thereby conducting himself infamously in a professional respect contrary to Medical Ethics, punishable under section 16 of the Medical and Dental Practitioners Act. The second count was for acting contrary to his oath as a medical practitioner and thereby conducting himself infamously in a professional respect, contrary to the provision of the same law referred to above. Testifying for the prosecution was an officer of the Medical and Dental Council, and the mother and uncle of the deceased, who had reported the death to the Council. The respondent, testifying in his own defence, stated that he was guided by the patient and her husband's refusal to

give consent to blood transfusion, even after he had made them to understand the gravity of the situation, and not by his own religious beliefs, which appeared to be similar to the patient's. He testified that he would have arranged for blood transfusion had there been consent. The husband of the deceased testified in support of the respondent, confirming that they had objected to blood transfusion even after being informed that it was necessary to save the life of the deceased. He also testified that the respondent was willing to transfer the patient to another hospital, but had to respect their objection to a transfer too. The Tribunal found the respondent guilty, not for being guided by his own or the patient's religious beliefs, but for holding onto the patient knowing that she could have been given the required treatment at another medical facility where the inhibition placed by the patient and her husband could have been dislodged, particularly when he was aware that the appropriate treatment could not be given by him due to his failure to obtain the requisite consent. The respondent, who had pleaded not guilty to the charges, was suspended for six months on each count of the charges, the suspension to run concurrently.

The respondent, being dissatisfied with the Tribunal's decision, lodged an appeal to the Court of Appeal. The Court upheld the appeal and set aside the Tribunal's decision. The appellant then filed an appeal at the Supreme Court against the decision of the Court of Appeal setting aside the trial tribunal's decision. The Supreme Court did not entirely agree with the reasons advanced by the Court of Appeal in setting aside the decision of the Tribunal, but it agreed with Court's conclusion that the respondent was not guilty of professional misconduct as charged. The Supreme Court held that the charge of infamous professional conduct had not been substantiated. Infamous conduct must relate to a serious infraction of acceptable standards of behavior or ethics of the profession. It connotes conduct so disreputable and morally reprehensible as to bring the profession into disrepute if condoned. By respecting the patient's religious beliefs and refusal to consent to blood transfusion, the respondent was not acting in such a reprehensible manner. There was nothing infamous in the conduct of the respondent. He was in fact acting in a manner permitted under the law.

Because of its importance, the Supreme Court's decision on the right of an adult patient to object to medical treatment is reproduced *verbatim ad*

literatim below:

> 'The patient's constitutional right to object to medical treatment or, particularly, as in this case, to blood transfusion on religious grounds is founded on fundamental rights protected by the 1979 Constitution as follows: (i) right to privacy: section 34; (ii) right to freedom of thought, conscience and religion: section 35. All these are preserved in section 37 and 38 of the 1999 Constitution respectively. 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 unauthorised invasion. 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. The limits of these freedoms, as in all cases, are where they impinge on the rights of others or where they put the welfare of society or public health in jeopardy. 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. The law's role is to ensure the fullness or 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. It will be asking too much of a medical practitioner to expect him to assume this awesome responsibility in the privacy of his clinic or surgery, unaided by materials that are available to the courts

> or, even, by his training. This is why, if a decision to override the decision of an adult competent patient not to submit to blood transfusion or medical treatment on religious grounds is to be taken on the grounds of public interest or recognised interest of others, such as dependent minor children, it is to be taken by the courts.
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> It is to the credit of the tribunal in this case that it acknowledged the right of the individual to hold his religious belief and that it also accepted that a practitioner should respect the religious beliefs of others. Its decision in the case, however, progressed into error when it deviated from the correct path into ignoring the concomitants of the right of the patient to reject medical treatment or blood transfusion on religious grounds, and concluded that the respondent was guilty of infamous conduct for holding onto the patient knowing fully well that the correct treatment cannot be given in the face of failure to obtain consent.

Since the patient's relationship with the practitioner is based on consensus, it follows that the choice of an adult patient with a sound mind to refuse informed consent to medical treatment, barring state intervention through judicial process, leaves the practitioner helpless to impose a treatment on the patient. That helplessness presents him with choices. He could terminate the contract, and, I would say, callously, force the patient out of his clinic or hospital; he could continue to give him refuge in his hospital and withdraw any form to treatment; he could do the best he could to postpone or ameliorate the consequences of the patient's choice. To a large extent the practitioner should be the judge of the choice that may be better in the circumstances. The choices become a question of personal attitude rather than one of professional ethics. Indeed, in one case it has been said that the prevailing medical ethical practice does not, without exception, demand that all efforts towards life prolongation be made in all circumstances, but seems to recognise that the dying are more often in need of comfort than of treatment. (See Superintendent of Belckerton State School v Sackewicz noted in 93 ALR 3d 75.) That the patient's consent

is paramount has been determined in several cases in the United State of America where this area of law has received considerable judicial attention. If a competent adult patient exercising his right to reject life-saving treatment on religious grounds thereby chooses a path that may ultimately lead to his death, in the absence of judicial intervention overriding the patient's decision, what meaningful option is the practitioner left with, other, perhaps, than to give the patient comfort?'38 The above decision is to the effect that under normal circumstances, no medical doctor can forcibly proceed to apply treatment to a patient of full and sane faculty without the patient's consent, first sought and obtained, particularly if that treatment is of a radical nature such as surgery or blood transfusion.[39] So, the doctor must ensure that there is a valid consent and that he does nothing that will amount to a trespass to the patient.[40] While adhering to this, the medical practitioner must exercise a duty of care to advise and inform the patient of the risks involved in the contemplated treatment and the consequences of his refusal to give consent.[41] Patient consent is fundamental and it is of great antiquity.[42] The decision above is *in tandem* with the English Court decision in *S v. McC*[43] where Lord Reid held:

> 'English law goes to great length to protect a person of full age and capacity from interference with his personal liberty. We have too often seen freedom disappear in other countries not only by *coup d'état* but by gradual erosion and often it is the first step that counts. So, it would be unwise to make even minor concessions… it is a legal wrong to use constraint to an adult beyond what is authorized by state or ancient common law powers connected with crime and the

38 Per Ayoola JSC [2001] WRN 1, 73 -75

39 *In Re Yetter* (1973) 62 Pa D & C2d 619.

40 Dada JA [2001] 7NWLR 206, 213. He posits that 'the consent of the patient is what confers on the doctor the requisite authority to commence and carry out his professional duties towards the patient.'

41 *Sideway v.Board of Governors of Bethlehem Royal Hospital* (1985) 1 AC 871.

42 FO Emiri, *Medical Law and Ethics in Nigeria,* 299. He stated that 'the common law has long recognized the principle that every person has the right to have his bodily integrity protected against invasion by others. The seriousness with which the law views any invasion of physical integrity finds its justification in the fact that everyone has the right of self-determination with regards to his body. Every touching of the patient is potentially battery. It is the patient's consent, either implied or express, which makes the touching legally innocuous. At law, no treatment is to be administered to a patient without his consent merely because others reason that it is for his benefit. Anyone who does would be treated as a busybody that would expose himself to actionable trespass.

43 (1972) AC 24 at 43.

like.'

All this in anchored on the autonomy of the patient. From a human rights perspective, autonomy can be equated to liberty, dignity, integrity, individuality, independence, responsibility and self-knowledge, self-assertion, critical reflection, freedom from obligation, absence of external coercion, and knowledge of one's own interest.[44] The World Medical Association Declaration guarantees the patient's right of autonomy with regards to medical treatment.[45] It is apposite to note that where the issue of lack of consent or objection to a medical treatment by an adult is not made known to a medical practitioner administering the same, a case of violation of the right to privacy and religion would be difficult to establish. The person who does not subscribe to a particular medical treatment must disclose this to the medical practitioner, otherwise *volenti no fit injuria* could come into play.[46] Also, where an adult patient is brought to a medical facility unconscious and treatment that the person does not approve is administered, upon gaining consciousness, it is doubtful whether a claim for violation of his right based on religious beliefs and practices can be successfully maintained as lack of knowledge on the part of the medical practitioner would exculpate him from any liability.[47]

The right of a patient to consent or object to medical treatment may not be unfettered in all situations. Situations may arise requiring a medical practitioner to disregard an adult patient's right to refuse a particular medical treatment.[48] For instance, where an armed robber, shot and badly wounded, is rushed to the hospital and diagnosis shows that he requires blood transfusion to save his life, a medical practitioner would be entitled to ignore his objections to the treatment notwithstanding the rights guaranteed by sections 37 and 38 of the 1999 Constitution. FRN, the medical practitioner would be right to ignore the objection. Public policy may require that he should be kept alive so as to face the consequences of his heinous conduct.

In the second case, *Esabunor & Anor. v. Faweya & Ors*,[49] the Supreme

44 G Dworkin, *The Theory and Practice of Autonomy* (Cambridge Press, London, 1988) 6.

45 Principle 3 (a) of the World Medical Association Declaration of Lisbon on the Right of the Patient 1948.

46 E Malemi, *Law of Torts,* (Princeton Publishing Co. 3rd Edn., 2008) 65

47 *In Re Osborne* (1972) Dist Col App.

48 FE Iyasere and S Ienlanye, 'Human Rights and Non-Consensual Medical Procedure and Research in Africa' 83 (2018) *University of Port-Harcourt Journal of Private Law* 2

49 (2019) LPELR-46961 (SC).

Court examined the extent of the right of parents or guardian to object to medical treatment for their children or wards based on their religious beliefs and practices pursuant to sections 37 and 38 of the 1999 Constitution. The second appellant is the mother of the first appellant. She gave birth to him on 19 April 1997 at the Chevron Clinic, Lekki Peninsula, Lagos, Nigeria. One month after birth, he became seriously ill and he was taken back to the clinic where he was born for urgent treatment. The first respondent attended to the child. From the diagnosis, he established that the first appellant required blood transfusion as a life saving measure. The second appellant and her husband sternly protested and objected to the blood transfusion, claiming that there are several medical hazards associated with it such as HIV and Hepatitis. Further, as members of Jehovah's Witnesses sect, their religious beliefs did not permit blood transfusion. The first respondent refused to entertain the protest and sternly warned the second appellant and her husband. He contacted the Police. An originating e*x-parte* motion was filed on behalf of the Commissioner of Police, Lagos State, before the fifth respondent, pursuant to sections 27 (1) and 30 of the Children and Young Persons Law, Cap. 25, Laws of Lagos State, Nigeria. It sought an order 'that the medical authorities of the Clinic of Chevron Nigeria Limited, Lekki Peninsula, Lagos be allowed and are hereby permitted to do all and anything necessary for the protection of the life and health of the child TEGA ESABUNOR and such further order or orders as the court deem fit in the circumstances.' After hearing counsel for the applicant, the Chief Magistrate granted the application under its inherent jurisdiction. Pursuant to this order, the first respondent administered blood transfusion on the first appellant same day against the objection of the second appellant and her husband. The first appellant got well and was discharged.

The second appellant subsequently filed an application on notice before the Chief Magistrate, seeking to set aside the order of the Chief Magistrate authorizing the doing of anything by Chevron Clinic to protect the life and health of the first appellant, which was dismissed. Dissatisfied with this, the appellants approached the High Court for an order of certiorari and and for 10 million Naira damages. The High Court refused the prayer and the claim for damages. Being dissatisfied with the decision of the High Court, the appellants appealed to the Court of Appeal. The Court of Appeal in turn affirmed the decision of the

High Court dismissing their application for certiorari and payment of damages. They further appealed to the Supreme Court. Several issues were raised for the determination of the Supreme Court, but issue 4 is what we are concerned with. This was whether the Court of appeal was correct in holding that the second appellant's refusal to give consent to blood transfusion amounted to an attempt to commit a crime or to allow the first appellant to die. In addressing the issue, the Supreme Court reiterated the legal position established in *Medical and Dental Practitioners Tribunal v. Okonkwo*[50] that an adult who is conscious and in full control of his mental capacity has the right either to accept or refuse medical treatment, (blood transfusion). The hospital or medical practitioner has no choice but to respect their patient's wishes even where there may be untoward outcome consequences, which must be explained and indicated to the patient for an informed decision to be made. However, different considerations apply when the patient is a child, who is deemed incapable of making his or her own decision on the matter. A parent or guardian does not have an unfettered discretion to object to the medical treatment on religious grounds. It must be countenanced that the child may later on adopt a religion different from that of the parent or guardian. A parent may therefore not be allowed to refuse medical treatment for a child regardless of any untoward consequences to the child's health or life, on the basis of the constitutional rights of the parent enshrined in sections 37 and 38 of the 1999 Constitution. It was therefore proper in this case to jettison religious beliefs of the parents on blood transfusion in favour of the overriding interest of saving the life of the child. When affirming the decision of the Court of Appeal, Okoro JSC held:

> 'It is instructive to note that the law exists primarily to protect and preserve the fundamental rights of its citizens inclusive of infants. The law would not override the decision of a competent mature adult who refuses medical treatment that may prolong his life but would readily intervene in the case of a child who lacks the competence to make decision himself… It could have amounted to a great injustice to the child if the Court had stood by and watched the child being denied of basic treatment to save his life on the basis

50 See (n. 37) above

> of religious conviction of his parent. He probably would not be alive today … The consideration to save his life by application of blood transfusion greatly outweighs whatever beliefs one may hold, especially where the patient is a child.'[51]

This is a welcome development in the law on protection of rights of a child under Nigerian law. Where parents or persons in *loco parentis* have an unrestrained right to choose a religion for their children or wards, the need to protect and preserve the right of a child through medical treatment must always outweigh the need to adhere to religious beliefs and practices prescribed by parents or guardians. It is only by doing so that the child can be afforded the opportunity to attain majority and personally exercise its right of freedom of thought, conscience and religion, which may comport with or be different from what parents or guardians subscribed to. This right must not be traded for anything, and the Courts, medical care givers and government agencies should be reluctant to intervene in deserving situations. It should also be permissible under the law for a minor to be treated, in cases of emergency or other situations, without the consent of the parent or guardian.[52]

5. MEDICAL CONSENT IN THE UNITED KINGDOM AND CANADA

To compliment the foregoing discussion of Supreme Court decisions in Nigeria on the right of patients to refuse forms of medical treatment on religious grounds, reference must also be made to some decisions on medical consent from the United Kingdom and Canada, two comparable common law jurisdictions.

In the United Kingdom, a medical practitioner may not examine or treat an adult without first seeking and obtaining his or her consent. In *Sidaway v. Bethlehem Royal Hospital*[53] the House of Lords held that a doctor operating without consent, save in emergency or a case of mental incapacity, commits trespass and criminal assault. An adult also reserves the right to object to a particular form of medical treatment. This was reaffirmed by Lord Denning

51 (2019) LPELR-46961 36-38.
52 See, for example, *Banks v. Medical University of South Caroline* (1994) 444 2d 519.
53 [1985] AC 871 at 87, 904.

in *Re T*[54] It was in fact held in *Airedale NHS Trust v. Bland*[55] that an adult can appoint a proxy in the event of incapacitation to assert his right to reject a particular medical treatment.

In Canada, as in the United Kingdom, the law gives an adult the right to object to medical treatment on grounds of his/ her religious beliefs. In *Malette v. Shulman*[56] a doctor operated on a Jehovah's Witness and administered blood transfusion, although he was informed that a card in her purse instructed that on no condition should she be given blood transfusion. She sued the doctor for disregarding her wishes. The doctor's defence that the blood transfusion was necessary since she was an accident patient and her life needed to be saved, and that society had an interest in the preservation of her life, was discounted. The Ontario Court of Appeal, confirming the award of damages for battery by the trial judge, *inter alia* observed:

> '… A competent adult is generally entitled to reject a specific treatment or all treatment or to select an alternative treatment, even if the decision may entail risk as serious as death and may appear mistaken in the eyes of the medical profession or of the community. Regardless of the doctors, opinion, it is the patient who has the final say on whether to undergo the treatment …'[57]

In the United States, in *Banks v. Medical University of South Carolina*,[58] the plaintiff, a Jehovah's Witness, brought action against the defendant hospital for wrongful death and battery for non-consensual administration of blood on her 8 year-old daughter. She was admitted at the hospital suffering from respiratory distress and intense hip pain. Doctors performed exploratory surgery, removed her appendix, administered cardiac resuscitation and, against the instructions of the mother, blood transfusions. Tragically, final resuscitative efforts were unsuccessful and the girl died. The cause of death was 'pulmonary emboli', blood clotting in the lungs caused by a protein C blood disorder. In a suit filed against the doctors and the Medical University, alleging wrongful death and

54 (1992) 9 BMLR 46.
55 (1993) 12 BMLR 64.
56 (1990) 47 DLR 18.
57 Per Robins JA, at p. 11 of the pdf transcript of the case found at http://globalhealthrights.org>
58 (1994) 444 S. E. 2d 519.

survival actions, as well as actions for battery, deprivation of liberty interests, breach of duty, and breach of contract, summary judgment was granted on the causes of action for battery, deprivation of liberty interests, and breach of contract. On appeal, the Supreme Court of South Carolina held that summary judgment should not have been granted to the respondents on the appellant's cause of action for battery. The court observed that 'as a general proposition, except in the event of an emergency, a surgeon will be liable for an assault where he operates on a child without the consent of the latter's parents.' Consent is not required if in the opinion of the consulting and treating physicians it is necessary to save life the life of a child. Banks conceded that she had no authority to withhold necessary medical treatment from her child even if this was contrary to her religious. But whether the child was in a life-threatening situation, which would have justified the administration of the transfusions without parental consent, was a relevant material issue of fact to be litigated upon. Summary judgement, therefore, should have been granted on this cause of action

6. PROTECTION OF RIGHTS OF A CHILD AND THE BEST INTEREST PRINCIPLE IN NIGERIA

In Nigeria, as in the other jurisdictions alluded to above where the issue has come up for consideration, whether a parent can object to a particular form of medical treatment for a child on the basis of conflict with the parent's religious beliefs, is invariably considered in reference to what is in the 'best interest' or welfare of the child. As alluded to earlier, the 'best interest' principle is encoded thus in section 1 of the Nigerian Child's Rights Act and legislation of various States of the Federation that have domesticated the Act:

> 'In every action concerning a child, whether undertaken by an individual, public or private body, institutions or service, court of law, or administrative or legislative authority, the best interest of the child shall be the primary consideration.'

This is profound. The 'best interest' of the child is to guide the court in making any decision pertaining to a child. Unfortunately, what the 'best

interest' of the child entails is not described or indicated in the Act.[59] From a medical caregiver's position, Beauchamp posits that 'the best interest' standard is one requiring a surrogate decision maker to determine the highest net benefit among the available options, assigning different weights to interests which the patient has under in each option and discounting or subtracting inherent risk or cost.'[60] Okunrobo argues that it could simply be regarded as 'the decision of the court to weigh the options open to the child and take a decision in the child's best interest,'[61] as the child would have done, if it had sufficient understanding to decide on the matter. In all cases, the welfare or interest of the child must the uppermost in the assessment.

In *Esabunor & Anor. v. Faweya & Ors* [62] clearly there was conflict between respecting the parent's religious inclination and protection the health of the child. Applying section 1 of the Child's Rights Act, the health or life of the child was the paramount consideration. There was a contest between freedom of religion and preservation of the life of a child, both constitutionally guaranteed rights. Priority or superiority was accorded to the right to life or health. This cannot be not overemphasized. Only a person who is alive can assert the right to freedom of religion and most other constitutionally guaranteed rights.

In section 3 (2) of the Childs' Rights Act, as earlier indicated, it is provided that in addition to the Fundamental Rights guaranteed in Chapter IV of the Constitution of the Federal Republic of Nigeria, every child is entitled to the rights enumerated in part II of the Act. These include 'a right to survival and development,'[63] and a right 'to enjoy the best attainable state of physical, mental and spiritual health.'[64] The child's right to survival and development entails that he or she must have access to reasonable health care services. A child as an 'incompetent person' cannot access these rights, except through a proxy, i.e. the parent or anyone *in loco parentis*. When the proxy refuses, fails and or neglect to aid the child access these rights, a court may intervene to avail

59 HA Okunrobo, 'Judicial Overriding of Parental Rights to Refuse Life Saving Treatment on a Child: Review of *Esanubonor v. Faweya*" 2014 (15) 1, *University of Benin Law Journal,* 114.
60 TI Beauchamp & JF Chidress, *Principles of Biomedical Ethics,* 5th ed. (New York, Oxford Press, 2001) 102.
61 Okunrobo, (n 59) 114.
62 (2019) LPELR-46961 (SC).
63 Nigeria, Child's Rights Act, 26 of 2005, s. 4.
64 Section 13 (1)

them to the child. Thus, in addition to the best interest principle in section 1 of the Child's Rights Act, had it so wished, the Supreme Court could have invoked several other provisions of the Child's Rights Act to come to the conclusion that a parent would not be allowed to assert the right of freedom of religion to withhold consent to blood transfusion where this is a necessary treatment for a child.

The 'best interest' principle is also part of English law.[65] It has been applied by the courts to prolong the lives of children whose parents took positions inimical to their lives in furtherance of their religious beliefs. In *RE B*[66] a child was born with down syndrome and a blocked intestine which if not operated upon would have had fatal consequences. The parent preferred that she died a few weeks after birth as a natural consequence of the condition of her birth. The local authority applied to the court to have the child as its ward. The application was granted. She was moved to another hospital for an operation. The Court of Appeal applied the best interest of the child principle to decide that if the operation was carried out successfully, it could afford the child the opportunity to live a normal life. In *Re R,*[67] the court applying the best interest principle, overrode the objection of a parent to have a child subjected to blood transfusion by a doctor treating her for leukemia.

7. CONCLUSION AND RECOMMENDATIONS

Under Nigerian law, a child enjoys several rights in various spheres of life. These include rights to basic education; freedom from forced or injurious labour, such as night or underground work; healthy life and unimpaired growth; and to basic necessities of life such as food, shelter and clothing. A child is also entitled to the fundamental rights of every person described in the relevant chapter of the 1999 Constitution of the Federal Republic of Nigeria. Parents or persons in *loco parentis* have the responsibility of ensuring that all rights of a child are protected and realized, since a child lacks the requisite legal capacity to personally enforce these rights. Parents or guardians must make the necessary choices towards the realization of these rights. In doing so, the law recognizes

65 Section 8 English Child Right Act, 1989.
66 [1990] 3 All E.R. 927.
67 [1993] 2 FLR 757.

that parents or guardians may determine the religion of the child, and a child is bound by beliefs and practices of such a religion.

Where an adult of a sound mind, in furtherance of his or her religious beliefs guaranteed by law, objects to medical treatment, even where the objection may have untoward consequences, the medical practitioner under Nigerian law, has a duty to obey the objection. A medical practitioner must respect the objection even where the result may be loss of life. The sanctity of human life does not stand in the way of exercise of the right to freedom of religion, thought or conscience or right to privacy. However, when it comes to a child patient, these rights may only be insisted upon where rights of a child or ward to life and adequate medical treatment are not threatened. Where adherence to the parent's religion would expose the child to avoidable hazard, the law would step in to ensure that the interest of the child, which of paramount consideration is protected. After all, a child may grow up to exercise his or her right to freedom of thought, conscience and religion in a manner contrary to what parents or guardian would have chosen. The law has a duty to ensure that a child's right to make his own choice upon attainment of majority is not jeopardized by his/ her parent's religious beliefs.

Based on the above findings and the sanctity of life, just as the law has prohibited suicide, which is the willing taking away of one's life, the position of the law that an adult of sound mind can legally object to medical treatment (blood transfusion) even where such refusal can result in death should perhaps be revisited. Sanctity of life requires that since no human can create life, no human is permitted under whatever circumstance to endanger or terminate his or her life, especially where the effects of such termination are multidimensional. It is in recognition of the sanctity of life that suicide is legally prohibited and no exception should be allowed.