

# RELIGIOUS BELIEFS OF PARENTS: IMPLICATION FOR THE CHILD RIGHTS ACT, 2003 IN NIGERIA

Agnes Omotayo Adeyeye\*  
Joel Adelusi Adeyeye, Esq.\*\*

## Abstract

This article undertakes a critical study of the religious beliefs of parents as it affects the rights of the child. Every human being, be it an adult, male or female has rights that are domiciled in him/her as a creator of God. Children for being what they are cannot on their own enforce these rights. Right from the Universal Declaration of Human Rights (UDHR) and other international legal instruments, to the Regional legal instruments like the African Charter on Human and Peoples' Rights; the sub regional legal instrument like the Economic Community of West African States (ECOWAS), to the domestic law of each country; for example, the Constitution of the Federal Republic of Nigeria, 1999 (as amended); The child's Rights Act, 2003 and which various States of the Federation has domesticate these Law. This article therefore seeks to interrogate these laws as a result of the recent decision of the Supreme Court of Nigeria's decision in the case *Esabunorv Fayewa*[2019] 7 NWLR (pt 1671) 316. It is recommended that the government should review the aspect of age disparity in our Laws with a view to making a particular age workable for the purpose of implementing the Child Rights Act. In interrogating these Laws, judicial pronouncements from other jurisdictions other than Nigeria shall also be considered.

**Keywords:** Religion, Beliefs, Child Rights Act, Implications.

## 1. Introduction

The priority that accrues to life by humanity is so sacrosanct to the extent that any devise to take or affect the sustenance of this life is vehemently opposed.<sup>1</sup> From cradle to grave, man went through diverse intellectual exploration to improve the quality of life. In other words, man is intrinsically pro-life.<sup>2</sup> The sanctity of life is a treasure that no man is ordinarily willing to compromise.<sup>3</sup> It is the most cherished gift of humanity. It is also the most zealously guarded asset of mankind. Man may

\*B.ED, MA, Ph.D., Lecturer, Department of Religions, Faculty of Arts, University of Ilorin, Nigeria.

\*\*LL.B, LL.M, B.L, Solicitor & Advocate of the Supreme Court of Nigeria, Lecturer, Department of Jurisprudence & Public Law, College of Law, Kwara State University, Malete, Nigeria.

<sup>1</sup> S K Kigbu, J Barde and G Matthew 'Medical Euthanasia and the Right to Life Under Nigerians Laws' [2016] (3)(2) *Joseph Ayo Babalola University Law Journal* 15.

<sup>2</sup> *ibid.*

<sup>3</sup> *ibid.*

acquire lands, wealth of the nation, riches beyond the sea as well as the wizardly of science and technology; all this is to enhance the quality of human life.<sup>4</sup> The sanctity of life and the needs to safeguard it had been the preoccupation of mankind throughout all civilization.<sup>5</sup> To this extent, man can terminate other lives (both men and animals) to preserve his life. This struggle between man and other creations over the sustain ability of life is captured in the phrase 'survival of the fittest'.<sup>6</sup> Further, whenever man is in conflict with nature such as earthquake, flood, fire for example, he can forfeit his material possession and elect to stick with life. Even though gold is precious, diamond is gorgeous, money is luxurious and fame is glorious. All this are replaceable assets of humanity. In the scale of preference, none of these could take the place of life, because life is the navel of humanity.<sup>7</sup> However, when life appears to be irreconcilable with the realities of humanity what should be the next option? In the face of circumstances that made life hostile and unbearable to man, is life still relevant? In hurts, pains and agony is life still a reality or a gloomy fantasy? Is man competent biologically to give meaning to life when his health is elusive to healing and death appears to be imminent? Must he wait in pains and agony for death to come to him? Or should he resort to other means to meet death? And if he does so whose ox is goad? Is it a blow to law, morality, religion or a response to reality?<sup>8</sup> An attempt to answer the last question of the above paragraph posed a dilemma, on whether right to life is also a correlation of right to die. This now became a legal issue which ensue friction between abstaining from drugs and right to life.<sup>9</sup>

## **2. Conceptual Clarification**

According to Black's Law Dictionary, a child at common Law who had not attained the age of fourteen years though the meaning now varies in different statutes<sup>10</sup>. The Child's Right Act 2003, defines a child as person who has not attained the age of eighteen (18) years.<sup>11</sup> However, according to the Children and Young Person Law, enacted in various States of Nigeria, a 'child' means a person under the age of

<sup>4</sup> N Tobi *Fundamental Rights: Enforcement and Procedure Rules and Speedy Trials* 1991 Judicial Lectures: Continuing Education for the Judiciary (MIJ Professional Publishers Limited, 1991) 77-108.

<sup>5</sup> E A Taiwo 'Enforcement of Fundamental Rights and the Standing Rules Under the Nigerian Constitution: A need for more Liberal Provisions' <<http://www.scielo.org.za/pdf/ahrlj/v9n2/09.pdf>> accessed 27th June, 2020.

<sup>6</sup> *ibid.*

<sup>7</sup> *ibid.*

<sup>8</sup> Kigbu, Barde and Matthew (n 1)

<sup>9</sup> *ibid.*

<sup>10</sup> H C Black, *Black's Law Dictionary* (5<sup>th</sup> edn. West Publishing Co, 1979) 217

<sup>11</sup> S 277 of the Child Right Acts 2003.

fourteen years, while 'young person' means a person who has attained the age of fourteen years and is under the age of seventeen years.<sup>12</sup> Furthermore, the Immigration Act stipulates that any person under the age of eighteen years is a minor,<sup>13</sup> whereas the Matrimonial Causes Act 1970 puts the age of maturity at 21 years.<sup>14</sup> The latter Act becomes irrelevant in practice, since the individual states have their own age for marriage. As for penal responsibility, Penal Code (North) states:

No act is an offence which is done by a child under seven years of age; or by a child above seven years of age but under twelve years of age who has not attained sufficient maturity of understanding to judge the nature and consequence of such act.<sup>15</sup>

These are only some examples of different ages enshrined in a multitude of legal texts and in customary law all over the country. These varieties in the minimum age limit pose a lot of problem in the process of interpretation. This can cause discrimination between children of same age in different parts of the country. Although the Child Right Act expressly prohibits the child betrothal and child marriage,<sup>16</sup> the practice is still widely rampant in Nigerian societies.<sup>17</sup> The recent row in the Nigerian Senate over child marriage is illustrative of this issue.<sup>18</sup> In 2009, the practice was reported in the city of Lagos where 2 young girls, 12 and 18 respectively, were married off and taken to their husbands' houses even without them knowing they were already brides.<sup>19</sup> In Nigeria, due to inconsistencies in legislation and the absence of any stipulation of a minimum age for marriage before the adoption of Child Right Act 2003, child marriages continue to take place in many cases as means to preserve chastity. The Marriage Act allows person under the age of 21 to get married,<sup>20</sup> provided that parental consent is given.<sup>21</sup> It should be

<sup>12</sup> S 23 of the Children and Young Person's Law of Cross River State, Cap C4, 2018, for example, <<https://laws.lawnigeria.com/2018/04/13/children-and-young-persons-law/>> accessed 18<sup>th</sup> June, 2020.

<sup>13</sup> S 116 of the Immigration Acts 2015 <[http://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=104155&p\\_count=3&p\\_classification=17](http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=104155&p_count=3&p_classification=17)> accessed 18<sup>th</sup> June, 2020.

<sup>14</sup> *ibid.*

<sup>15</sup> S 50 Penal Code Law, Cap 89 Laws of Northern Nigeria, 1963 <[https://www.scrip.org/\(S\(i43dyn45teexjx455qlt3d2q\)\)/reference/ReferencesPapers.aspx?ReferenceID=1774351](https://www.scrip.org/(S(i43dyn45teexjx455qlt3d2q))/reference/ReferencesPapers.aspx?ReferenceID=1774351)> accessed 18<sup>th</sup> June, 2020.

<sup>16</sup> S 22 (1) of Child's Rights Act 2003.

<sup>17</sup> T A Abdulraheem, M K Imam-Tamim & H A Folorunsho 'Child rights in Nigeria: Exploring the Contentions between the Child Rights Act 2003, Cultural Practices and Islamic Rites' 3-4. <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3328298](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3328298)> accessed 18<sup>th</sup> June, 2020.

<sup>18</sup> L Adedeji 'Cultural Practices Affecting Human Rights of Women in Nigeria', *The Lawyers' Chronicle* <<https://www.thelawyerschronicle.com/cultural-practices-affecting-human-rights-of-women-in-nigeria/>> accessed 18<sup>th</sup> June, 2020.

<sup>19</sup> J O Olubor, *Sunday Punch* 1<sup>st</sup> March, 2009, 3.

<sup>20</sup> S 18 of the Marriage Act <<http://lawsfnigeria.placng.org/laws/M6.pdf>> accessed 18<sup>th</sup> June, 2020.

noted that the age of marriage is a highly controversial issue and varies from place to place. Whereas in the North West and North Central Nigeria, 14 years is the age of marriage, in the North Central the age of marriage is between 16 to 18 years.<sup>22</sup> This inconsistency has been a source of ineffective implementation of the law against child marriage.<sup>23</sup>

On the other hand, religion is described as a set of beliefs concerning the cause, nature, and purpose of the universe, especially when considered as the creation of a superhuman agency or agencies, usually involving devotional and ritual observances, and often containing a moral code governing the conduct of human affairs.<sup>24</sup> Also religion is described as men to divinity, to reverence, worship, obedience, and submission to mandates and precepts of supernatural or superior beings. In its broadest sense includes all forms of belief in the existence of superior beings exercising power over human beings by volition, imposing rules of conduct, with future rewards and punishments. Bond uniting man to God, and a virtue whose purpose is to render God worship due him as source of all being and principle of all government of things.<sup>25</sup> Finally, belief means the feeling of being certain that something exists or is true.<sup>26</sup>

According to Wikipedia, A child is a person who is not yet an adult. Biologically, a child (plural: children) yet an adult. Biologically, a child (plural: children) is a human between the stages of birth and puberty.<sup>27</sup> The legal definition of child generally refers to a minor, otherwise known as a person younger than the age of maturity. Child may also describe a relationship with a parent (such as sons and daughters of any age) or, metaphorically, an authority figure, or signify group membership in a clan, tribe or religion. It can also signify being strongly affected by a specific time, place or circumstance, as in 'a child of nature' or 'a child of the sixties'.

The United Nations Convention on the Rights of the Child defines a child as 'a human being below the age of 18 years unless under the law applicable to the majority is attained earlier'. This is ratified by 192 out of 194 member countries. When the developmental stage of a child's social life is uninterrupted and that child undergoes the necessary education and training in the most suitable atmosphere, that child becomes in every ramification effective and relevant to his family, society and

<sup>21</sup> Order 1, Rule 4 of the Matrimonial Causes Rules defines a child as a person under the age of 21. <<http://edojudiciary.gov.ng/wp-content/uploads/2016/10/Matrimonial-Laws.pdf>> accessed 18th June, 2020.

<sup>22</sup> Second Periodic Report by Nigeria to the CRC, CRC/C/70/Add.24, 17/09/2004, & 46 <<https://www.ecoi.net/en/document/1317522.html>> accessed 18th June, 2020.

<sup>23</sup> *ibid.*

<sup>24</sup> Dictionary of Religion <<https://www.dictionary.com/browse/religion>> accessed 18th June, 2020.

<sup>25</sup> Black (n 1)

<sup>26</sup> Cambridge Dictionary <<https://dictionary.cambridge.org/dictionary/english/belief>> accessed 18th June, 2020.

<sup>27</sup> Meaning of Child <<https://en.wikipedia.org/wiki/Child>> accessed 29th June, 2020.

to humanity. Biologically, a child is generally anyone between birth and puberty or in the developmental stage of childhood, between infancy and adulthood. Whether from the one-celled zygote to an adult human being or from the well mixed dough to a delectable pizza, the developmental stage of anything is the most crucial point of its entire existence.

- a) Force a developing butterfly or a caterpillar out of its cocoon for any for any reason and it will never fly.
- b) Interrupt the download of a file on your device and you would have to start all over again.

All these are simple illustrations to impress it upon us the importance of the developmental stage of anything and to teach us that if by any means, no matter how marginal or inconsequential it may appear, a segment in the developmental stage of an entity is interfered with, there is a high risk of permanent loss or damage of this entity.

We spend millions everyday around the world trying to fix the damages mankind has wrought upon his own abode, the earth. We are constantly researching on how to deal with the fumes and carbon monoxide poisoning the atmosphere, the manufacturing of nuclear warheads and anything that threatens mankind. A society that sacrifices its children on the altar of religious faith is a damned, cursed society, sitting at the edge of a volcano.

Courts have consistently recognized that the relationship between a parent and a child is constitutionally protected.<sup>28</sup> All parents have the right to the custody and care of their children, and the right to raise their children according to the dictates of their own conscience.<sup>29</sup> The right to direct the religious upbringing of children is inherent in the fundamental right of child-rearing.<sup>30</sup> This fundamental right also includes the right to make medical decisions for their children. Parental rights, however, are not absolute.<sup>31</sup> These rights, even when linked to a claim based on the free exercise of religion, are subject to limitation in certain circumstances.<sup>32</sup> If a child's well-being is at issue, the Court's first and paramount duty is to consider the welfare of the child, not the rights of the parents. State intervention is appropriate if parental conduct threatens a child's safety or health.<sup>33</sup> To decide what circumstances mandate state intervention on a child's behalf, Courts have identified three competing interests that must be balanced: the parents' fundamental rights, the interests of the child, and the

<sup>28</sup> M J Marcus 'State Intervention When Parental Decision based on Religious Beliefs' [1991] (25) *Suffolk University Law Review* 814

<sup>29</sup> Prince v. Massachusetts, [1944] 321 U.S. 158, the United States Supreme Court stated that a primary function and basic freedom of parents is preparing their children for obligations the state can neither supply nor hinder. *Id.* at 166.

<sup>30</sup> *ibid.*

<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*

<sup>33</sup> [1984] 'Custody of a Minor' <<https://law.justia.com/cases/massachusetts/supreme-court/volumes/392/392mass728.html>> accessed 29th June, 2020.

interests of the state. Parents have the fundamental right to raise children according to their own beliefs, including religious beliefs. The court considers the best interest of the child by substituting its judgment for the child's judgment.<sup>34</sup> Finally, the state interests are on the free exercise of religion. The preservation of life, the protection of the welfare of its citizens, and the maintenance of the ethical integrity in the medical profession. In *Custody of a Minor*,<sup>35</sup> the Supreme Judicial Court of Massachusetts considered the competing interests and ordered state intervention because parents refused urgent medical care for their child on nonreligious grounds. Other jurisdictions have decided consistently that state intervention is appropriate if parents refuse life-saving medical treatment for their child on religious grounds.

### **3. Legal Framework of the Right to Life of a Child**

#### **3.1 The United Nations Convention on the Rights of the Child**

The UN Convention on the right of a child provides that States Parties recognize that every child has the inherent right to life, and also States Parties shall ensure to the maximum extent possible the survival and development of the child.<sup>36</sup> It also provides that States Parties shall respect the right of the child to freedom of thought, conscience and religion and freedom to manifest one's religion or beliefs may subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.<sup>37</sup>

#### **3.2 The African Charter on People and Human Rights**

This is a regional legal instrument applicable to all African states that are members of African Union(AU) and are signatories and ratifies it. Nigeria by virtue of the provisions of the 1999 Constitution (as amended) ratified this provision.<sup>38</sup> Consequently this law is applicable and enforceable in Nigeria. The charter provides for the rights to life of every citizen.<sup>39</sup> It also provides for the inviolability of personal liberty and self-determination. This Charter does not permit taking of human life except where there are justifications or excuses for doing that. Even under the Organization of African Unity(OAU) the predecessor of AU provides that in all actions concerning the child undertaken by any person or authority, the best

---

<sup>34</sup> *ibid.*

<sup>35</sup> *ibid.*

<sup>36</sup> art vi (1) (2) The United Nations Convention on the Rights of the Child  
<<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>> accessed 27th June, 2020.

<sup>37</sup> *Ibid* art xiv (1) (2).

<sup>38</sup> S 12 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).  
<[https://www.constituteproject.org/constitution/Nigeria\\_1999.pdf](https://www.constituteproject.org/constitution/Nigeria_1999.pdf)> accessed 27th June, 2020

<sup>39</sup> *ibid* art iv.

interest of the Child shall be the primary consideration.<sup>40</sup> It also provides that every child has an inherent right to life. This right shall be protected by Law. States parties to the present charter shall ensure, to the maximum extent possible, the survival, protection and development of the child.<sup>41</sup> Furthermore, every child has the right to freedom of thought, conscience and religion. Parents and where applicable, legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the avoiding capacities, and best interests of the child. States parties shall respect the duty of parents and where applicable, legal guardians to provide guidance and direction in the enjoyment of these rights subject to the national Laws and policies.<sup>42</sup>

### 3.3 Declaration on the Decade of the Culture of the Rights of the Child in West Africa (2001-2010)

ECOWAS countries, in their declaration on the Decade of the Culture of the Rights of the Child in West Africa, stated the inalienable attachment to the principles embodied in the African Charter on the Rights and Welfare of the Child and to the United Nations Convention on the Rights of the Child. This is a restatement of what is contained in the international and regional legal instrument of UN and AU.

### 3.4 Child's Right Act

The Child's Right Act provides that in every action concerning a child, whether undertaken by an individual, public or private body, institutions or service, court of law, or administrative or legislature authority, the best interest of the child shall be primary consideration.<sup>43</sup> Also, every child is entitled to enjoy the best attainable state of physical, mental and spiritual health.<sup>44</sup> Every Government, parent, guardian, institution, service, agency, organisation, or body responsible for the care of a child shall endeavour to provide for the child the best attainable health.<sup>45</sup> Every Government in Nigeria shall endeavour to reduce infant and child mortality rate,<sup>46</sup> endure the provision of necessary medical assistance and health care services to all children with emphasis on the development of primary health care,<sup>47</sup> ensure the provision of adequate nutrition and safe drinking water,<sup>48</sup> ensure the provision of

<sup>40</sup> Art iv of the OAU Charter on the Rights and Welfare of the Child.  
<[https://www.un.org/en/africa/osaa/pdf/au/afr\\_charter\\_rights\\_welfare\\_child\\_africa\\_1990.pdf](https://www.un.org/en/africa/osaa/pdf/au/afr_charter_rights_welfare_child_africa_1990.pdf)>  
accessed 27th June, 2020.

<sup>41</sup> *ibid* art v (1) (2).

<sup>42</sup> *ibid* art ix (1) (2).

<sup>43</sup> S 1 of the Child's Right Act, 2003 <<https://www.refworld.org/pdfid/5568201f4.pdf>> accessed 27<sup>th</sup> June, 2020.

<sup>44</sup> S 13 *ibid* (1).

<sup>45</sup> *ibid* (2).

<sup>46</sup> *ibid* (3) (a).

<sup>47</sup> *ibid* (3) (b).

<sup>48</sup> *ibid* (3) (c).

good hygiene and environment sanitation,<sup>49</sup> combat disease and malnutrition within the framework of primary health care through the application of appropriate technology,<sup>50</sup> ensure appropriate health care for expectant and nursing mother, and support, through technical and financial means, the mobilization of national and local community resources in the development of primary health care for children.<sup>52</sup> Every parent, guardian or person having the care and custody of a child under the age of two years shall ensure that the child is provided with full immunization.<sup>53</sup>

### **3.5 Nursing and Midwifery Act**

Distaste for infant mortality is reflected in the Midwives Regulations under the Nursing and Midwifery (Registration etc) Act. This law expressly provides that where a child is apparently born dead, the midwife shall carry out the methods of resuscitation which she has been taught.<sup>54</sup> This clearly express that there is a duty to preserve the life of a new-born baby, even where dead is apparent. The same law enjoined the midwives to report to a doctor (obstetrician) or the parents of the child: where the health of the child is in danger of death. This law that deals with maternal health, envisaged the likelihood of neonaticide, hence it obliged Midwives to exhibit due to a new born baby from dying. This is a clear negation of neonaticide in Nigeria.<sup>55</sup>

### **3.6 The Code of Medical Ethics in Nigeria 2008**

This is a Code of ethics for medical practitioner in Nigeria. It is akin to Rule of Professional Conduct (RPC) for lawyers. It consolidates on the ethics garnered from the Oath of Hippocrates which urged doctors to safeguard the sanctity of life. The Rules of the Hippocrates Oath prohibits a doctor never to harm anyone, even for that person's interest.<sup>56</sup> It also prohibits the doctor from violating the morality of his Community.<sup>57</sup>

<sup>49</sup>ibid (3) (d).

<sup>50</sup>ibid (3) (e).

<sup>51</sup>ibid (3) (f).

<sup>52</sup>ibid (3) (g).

<sup>53</sup>S 13 ibid (4).

<sup>54</sup>S 36 Nursing and Midwifery Act (Regulations) <<http://lawsofnigeria.placng.org/laws/N143.pdf>> accessed 29th June, 2020.

<sup>55</sup>ibid S 37.

<sup>56</sup>Rule 3 of the Hippocrates Oath of the Medical Practitioners

<<https://www.pbs.org/wgbh/nova/article/hippocratic-oath-today/>> accessed 29<sup>th</sup> June, 2020.

<sup>57</sup>ibid Rule 4.

#### 4. Refusal of Medication due to Religious Beliefs

In the case of *Esabunor v Faweya*,<sup>58</sup> the 2<sup>nd</sup> appellant is the mother of the 1<sup>st</sup> appellant. She gave birth to him on 19<sup>th</sup> April 1997 at the Chevron Clinic, Lekki Peninsula, Lagos State. On 11<sup>th</sup> May 1997, within a month of his birth, the 1<sup>st</sup> appellant fell gravely ill. His mother took him back to Chevron Clinic that day for urgent treatment. The 1<sup>st</sup> respondent examined the 1<sup>st</sup> appellant and found that he was suffering from severe infection and anaemia (lack of blood). The 1<sup>st</sup> respondent began treatment. He administered antibiotics on the 1<sup>st</sup> appellant. In the morning of 12<sup>th</sup> May 1997, the 1<sup>st</sup> respondent observed that the 1<sup>st</sup> appellant's health had not improved. The 1<sup>st</sup> appellant had poor colour, was convulsing, and was not breathing well. From his observations, the 1<sup>st</sup> respondent concluded that the 1<sup>st</sup> appellant urgently needed blood transfusion to stay alive.<sup>59</sup> But the 2<sup>nd</sup> respondent and her husband clearly told the 1<sup>st</sup> respondent that on no account should the 1<sup>st</sup> appellant (their child) be given blood transfusion. Their reasons were that: (a) blood transfusion would expose the 1<sup>st</sup> appellant to several health hazards such as Aids, hepatitis, etc.; and (b) as members of the Jehovah's Witnesses Christian sect, their religious belief required them to abstain from blood transfusion.<sup>60</sup>

The 1<sup>st</sup> respondent did not agree with the 2<sup>nd</sup> appellant and her husband on their objection to blood transfusion for the 1<sup>st</sup> appellant. He reported the matter to the 4<sup>th</sup> respondent who filed an originating motion *ex parte* before the 5<sup>th</sup> respondent on 12<sup>th</sup> May 1997. The motion was filed under sections 27(1) and 30 of the Children and Young Persons Law, Cap.25, Laws of Lagos State, 1994. The 2<sup>nd</sup> appellant was the defendant to the action. The relief sought was that the medical authorities of the clinic of Chevron Nigeria Limited, Lekki Peninsula, Lagos State be allowed and permitted to do all and anything necessary for the protection of the life and health of the 1<sup>st</sup> appellant.

The 5<sup>th</sup> respondent heard and delivered his ruling on the motion that same 12<sup>th</sup> May, 1997. The 5<sup>th</sup> respondent held that he had had the inherent jurisdiction to prevent the commission of offences. He reasoned that if the 2<sup>nd</sup> appellant was allowed to prevent the 1<sup>st</sup> appellant from being transfused with blood, an offence would have been committed under section 339 of the Criminal Code, and that if the 1<sup>st</sup> appellant died. The offence of murder under section 316 would have been committed as a result. So, the 5<sup>th</sup> respondent granted the relief sought. He authorized the medical authorities of the Chevron Clinic to do all and anything necessary for the protection of the life and health of the 1<sup>st</sup> appellant.

<sup>58</sup>[2019] 7 NWLR (pt 1671) 316 <<https://judgements.lawnigeria.com/2019/04/24/tega-esabunor-and-anor-v-faweya-and-others/>> accessed 29<sup>th</sup> June, 2020.

<sup>59</sup> *ibid.*

<sup>60</sup> *ibid.*

On receipt of the 5<sup>th</sup> respondent's order, the 1<sup>st</sup> respondent administered blood transfusion on the 1<sup>st</sup> appellant who got well, was discharged, and was taken home by the 2<sup>nd</sup> appellant. Later, on 15<sup>th</sup> May 1997, the 2<sup>nd</sup> appellant filed an application on notice at the magistrate Court. She sought setting aside of the order by which the blood transfusion was done. The 5<sup>th</sup> respondent heard and dismissed the application. The appellants were dissatisfied with the proceedings before the 5<sup>th</sup> respondent. They filed an action at the High Court for:

- a) An order of *certiorari* removing into the High Court the entire proceedings for the purpose of being quashed.
- b) N10,000,000 (Ten million naira) as damages against the respondent jointly and severally for unlawfully injecting or transfusing blood into the body of the 1<sup>st</sup> appellant without the consent of himself and of the 2<sup>nd</sup> appellant.
- c) N5,000,000 (Five million naira) damages against the 1<sup>st</sup> and 2<sup>nd</sup> respondents for unlawfully preventing the 2<sup>nd</sup> appellant from having access to her son (the 1<sup>st</sup> appellant) from 12<sup>th</sup> May 1997 to 15<sup>th</sup> May 1997, and also for preventing the 2<sup>nd</sup> appellant from exercising her parental rights of care over the 1<sup>st</sup> appellant.

The parties filed their respective affidavit and counter-affidavit. After hearing the parties, the High Court delivered a considered ruling. The High Court held that an order of *certiorari* could not be made because the blood transfusion had taken place. Therefore, the High Court dismissed the appellants' application. The appellants appealed to the Court of Appeal, which found that there was no basis upon which the High Court could have granted the relief of *certiorari* sought by the appellants. Consequently, the Court of Appeal affirmed the ruling of the High Court and dismissed the appeal. The appeal to the Supreme Court was also dismissed.

Also in *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo*,<sup>61</sup> the facts which led to this question are largely undisputed and can be briefly stated. Mrs Martha Okorie ('the patient') and her husband belonged to a religious sect known as Jehovah's Witnesses who believe that blood transfusion is contrary to God's injunction. They take their stand from the scriptures. In Leviticus 17:10-11 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.<sup>62</sup>

<sup>61</sup>[2001] LPELR-SC 213 <<https://nigerialii.org/ng/judgment/supreme-court/2001/10-0>> accessed 29th June, 2020.

<sup>62</sup> *ibid.*

They believe that the prohibition was passed to the 'Gentiles', that is, non-Jews in Acts 15:29 where it is stated that 'ye abstain from meats offered to idols, and from blood, and from things strangled, and from sexual immorality'. They believe that blood transfusion is 'eating' of blood.

Mrs Okorie, a 29-year old woman, having had a delivery at a maternity on 29 July, 1991 was admitted as a patient at Kenayo Specialist Hospital for a period of 9 days from 8 August to 17 August, 1991. She had complained of difficulty in walking and severe pain in the pubic area. At Kenayo Hospital the diagnosis disclosed a severe ailment and a day after her admission, blood transfusion was recommended. The patient and her husband refused to give their consent to blood transfusion. Dr Okafor of the hospital consequently discharged the patient, giving her a document in the following terms:

To whom it may concern: Re: Martha Okoriethe patient and her husband strongly refused blood transfusion despite appeals, explanations and even threats that she may die. The husband rather asked for his wife to be discharged and he took her away on 17 August 1991.<sup>63</sup>

Upon her discharge from Kenayo Hospital she was taken to JENO hospital by her husband on 17 August, 1991. There he produced to Dr Okonkwo ('the respondent') a card signed by the patient titled 'Medical Directive/Release' which reads as follows:

I, Martha K. Okorie, direct that no blood transfusions be given me, even though physicians deem such vital to my health or my life. I accept non-blood expanders, such as Dextran, saline or Ringer's solution, hetastarch. I am 29 years old and execute this document of my own initiative. It accords with my rights as a patient and my beliefs as one of Jehovah's witnesses. The bible commands: 'Keep abstaining from blood.' (Acts 15:28, 29). This is, and has been, my religious stand for 6 years. I direct that I be given no blood transfusions. I accept any added risk this brings. I release doctors, anesthesiologists, hospitals and their personnel from responsibility for any untoward results caused by my refusal, despite their competent care. In the event that I lose consciousness, I authorize either witness below to see that my decision is held.<sup>64</sup>

In another document signed by the patient's husband dated 17 August, 1991 and titled 'Release from liability' the patient's husband stated as follows:

To Jeno Hospital, and the medical and nursing personnel who having anything to do with the case of Mrs Martha Okorie (My Wife); You are hereby notified and instructed that I do not wish any transfusion

---

<sup>63</sup> *ibid.*

<sup>64</sup> *ibid.*

of whole blood, blood plasma, packed cells, blood fractions or blood derivatives to be used in the treatment of this patient. I regard the transfusion of blood and blood products as unnecessarily dangerous treatment producing too many bad effects to justify the risk. It is also contrary to my faith as one of Jehovah's Witnesses. I recognize and understand that the attendant physicians have advised that they are of opinion that blood transfusion is necessary perhaps save the life of the patient. I do not share their opinion and adhere to the instructions given in this notice. This restriction leaves open the use by transfusion or otherwise of Ringer's lactate solution, glucose or other volume expanders not derived from blood. This matter has been carefully considered by me and my instructions are not going to change because I or the above-named patient is unconscious. The hospital, the medical and nursing personnel caring for the above patient are hereby released from responsibility and liability for any and all untoward effects which flow from the decision not to accept the treatment prohibited in the release. Dated this 17<sup>th</sup> day of August, 1991.<sup>65</sup>

##### **5. Duty and Obligation of State to Protect Life**

A consideration of foreign decisions, particularly those of the European Court of Human Rights, will reveal that the state is under obligation to take active steps in ensuring compliance with protection of right to life. Although Article 2 of the European Convention on Human Rights is similar to section 33(1) of the Nigerian constitution, that Article contains the following extra phrase 'Everyone's right to life shall be protected by law.' This distinction has not created a gulf; and the provisions of Article 2 remain of great importance in the interpretation of section 33.

The European Court of Human Rights (ECHR) has consistently, using the provisions of Article 2, imposed a duty on the state to take active steps in protection of human life. Some of the decisions include the following, namely:

- a) A proper interpretation of Article 2 is that not only is the state prohibited from intentionally taking one's life, it must also do all things and take all steps that are necessary and lawful to safeguard life.<sup>66</sup> Thus, failure to protect a prisoner who is still in the custody of the state amounts to a breach of this Article.<sup>67</sup> However, government will not be held to have breached this right if a vulnerable witness is not protected and gets killed by a third party to the

<sup>65</sup> *ibid.*

<sup>66</sup> *Kilic vs. Turkey* (2000) ECHR 22492/93, para. See, also, *Osman vs. UK* (1998) 29 EHRR 245, para. 115.

<sup>67</sup> *Edwards vs. UK* (2002) 35 EHRR 19.

- proceedings; because it cannot be reasonably said that government ought to have anticipated immediate and real risk to his life.<sup>68</sup>
- b) The right to life as guaranteed under Article 2 is one of the most important fundamental rights; hence derogation against it in any form will not be tolerated.<sup>69</sup> Accordingly, the courts must always construe strictly the provisions of Articles 2, especially those permitting the taking of life.<sup>70</sup>
- c) Protection of right to life also requires that the state must properly and effectively investigate its armed agencies which are alleged to have taken life through the use of force.<sup>71</sup> Accordingly, ineffective or inadequate investigation by the state of such wrong extinction of life will amount to a procedural breach of this Article.<sup>72</sup>

However, the question as to whether this duty extends to taking extraordinary steps when a person arrested has committed or is in the process of committing a crime arose in *AL Hassan-Daniel v Revenue and Custom Commission*.<sup>73</sup> In this case, the deceased was arrested at the Heathrow Airport when traces of cocaine were found on him. Indeed he was found to have swallowed 116 sealed packages containing 1kg of raw cocaine. Upon being detained, he refused food and drinks for almost one week, but later ate and drank little. He was warned of the danger of cocaine in his stomach. He died shortly after taking the food and water, from damage caused by the cocaine. His widow and father brought an action alleging, inter alia, breach of Article 2, which protection life. They contended that with a better policy in place and better handling of the situation, the deceased would have lived. The defence moved the court at the threshold to dismiss the claim, basing their application on the criminal action of the deceased, of swallowing cocaine. They contended that the action was not justifiable, because of the doctrine of *ex turpicausa non oritur actio*, which means no claim arises from a dishonourable cause of action. The trial court upheld this application and dismissed the action. In allowing the appeal and ordering a rehearing, however, the court Appeal held that in at least two decisions,<sup>74</sup> even though the victims had committed crimes before being shot by the police, the courts held the consequent claims justifiable. But where the actions of the state are clearly reckless, resulting to the death of an innocent person, breach of the guarantee of right to life will be held to have been occasioned. Thus, the European Court held in *Andronicus vs. Cyprus*<sup>75</sup> that the

<sup>68</sup> *Van Colle vs. Chief Constable of Hertfordshire* (2008) 3 All ER 977 H.L.

<sup>69</sup> *Velikova vs. Bulgaria* (2002) ECHR 41488/98, para. 68

<sup>70</sup> *Salman vs. Turkey* (2000) ECHR 21986/97, para. 97.

<sup>71</sup> *Kaya v Turkey* (1999) 28 EHRR 1; *Gulec v Turkey* (1999) 28 EHRR 121; *McCann v UK* (1995) 21 EHRR 97; *Akdeniz v Turkey* (2001) ECHR 23954/94, para.89 and *Hugh Jordan v UK* (2001) ECHR 24746/94, para. 105. The English Court of Appeal also reached the same decision in *AL Hassan-Daniel vs. RCC* (2011) 2 All ER 31 at 35, per Sedley, L.J.

<sup>72</sup> *Ayhan v Turkey* (APPLICATION No. 41964/98) (2006) ECHR 41964/98, para. 99.

<sup>73</sup> (2011) 2 All ER 31 C.A.

<sup>74</sup> *Makaratzis v Greece* (2005) 41 EHRR 49 and *Jalloh v Germany* (2006) 20 BHRC 575.

<sup>75</sup> (1996) 22 EHRR CD 18.

firing by the police of several bullets in a bid to rescue a hostage, resulting in the death of the hostage, was a violation of the right to life, because the sheer number of bullets fired reflected reckless disregard for potential harm to the innocent. In India, it has been held that the right to livelihood is an important facet of the right to life; hence a deprivation of someone's mean of livelihood amounts to amount to an infraction on that person's right life.<sup>76</sup>

### **5.1 Refusal of Deceased to Take Appropriate Medication**

Refusal of a person to take appropriate medication or to abide by medical advice, including his election to die gracefully is all matters that eliminate the element of "intention" on the part of person taking care of him, medically or otherwise. These considerations arose in the case of *Medical and Dental Practitioner's Disciplinary Tribunal v Emewulu*.<sup>77</sup> in this case, the deceased, a 29-year-old lady and her husband belonged to the Jehovah Witnesses' sect. The 1<sup>st</sup> respondent, a medical doctor, also belonged to the sect. from the evidence at the trail of the 1<sup>st</sup> respondent before the appellant, the deceased needed blood transfusion to sustain her life. She and her husband had rejected this medical advice from the first clinic where she was admitted and had indeed signed a paper discharging the first doctor from liability. When they took her to the 1<sup>st</sup> respondents' clinic, he also duly warned them on the risk of refusing blood transfusion. Yet the duo was still intransigent and even signed yet another paper (exhibit "G") discharging the 1<sup>st</sup> respondent from liability. The 1<sup>st</sup> respondent, therefore, commenced treatment of the deceased via other modes of medication. The deceased died shortly therefore. The 1<sup>st</sup> respondent was, however charged before the appellant for; inter alia, refusing to transfuse blood to save life, because of his religious beliefs. He was also accused of refusing or failing to transfer the deceased to another hospital or clinic where blood transfusion would have been carried out on her. The appellants found the 1<sup>st</sup> respondent guilty and suspended him from practice for six months. The 1<sup>st</sup> respondent appealed to the Court of Appeal, which allowed his appeal and set aside findings of the appellants. On appeal by the appellant to the Supreme Court, the Supreme Court held that the deceased, an adult, having elected to allow her life just slip away like that on religious grounds, the 1<sup>st</sup> respondent ought not to have been held responsible.

### **5.2**

#### **Right to Life**

Right to life is one of the most important fundamental rights of mankind, principally because life is everything and stands at the very root of human existence.<sup>78</sup> Right to

<sup>76</sup> See *Tellis vs. Bombay Municipal Corporation* (1987) LRC (Const) 351.  
<sup>77</sup> (2001) 3 SCNJ 106.

<sup>78</sup> S T Hon, S T Hon's *'Constitutional and Migration Law in Nigeria* (Pearl Publishers International Limited), 2016 <<https://www.worldcat.org/title/st-hons-constitutional-and-migration-law-in-nigeria/oclc/968687082>> accessed 29th June, 2020.

life is, therefore, the first guaranteed right under the Nigerian constitution.<sup>79</sup> Comprehensive provisions guaranteeing this right have been made under section 33 of the Constitution of principle and exceptions to the section, by dividing the provisions thereof into segments. Section 33 of the Constitution of the Federal Republic of Nigeria, 1999(as amended), which has guaranteed this right, is to the following effect:

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. A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force is reasonably necessary-For the defence of any person from unlawful violence or for the defence of property; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or for the purpose of suppressing a riot, insurrection or mutiny.<sup>80</sup>

By way of prefatory remarks, it must be emphasized that the constitutional right to life is the most important fundamental right, because without it, none of the other rights will be available for accentuation and enjoyment by the holder thereof. It is the primary fundamental right, indeed the *fonsetorigo* or the source of all other fundamental rights. That was why the Supreme court of Uganda described as "the most fundamental of all the right" Also, the Tanzanian Court of Appeal held, quite unassailably, in case of *Mbushu v Republic*<sup>81</sup> as follows: "As human right only attach to living human beings, one might expect the right to life itself to be in some sense primary, since none of the other right would have any value or utility without it."<sup>82</sup>

### 5.3 Right to Medical Treatment

Right of the human being to live or his right to have life necessarily includes his right to have medical treatment when he needs one; hence anybody that deprives him of such right will be held to be in breach of section 33. In *Barnett vs. Chelsea and Kensington Hospital Management Committee*,<sup>83</sup> some night security guards had

<sup>79</sup> *ibid.*

<sup>80</sup> S 33 (1)-(2) of the 1999 Constitution of Nigeria

<sup>81</sup> Criminal Appeal No.142 of 1994 <<https://thrdc.or.tz/wp-content/uploads/2019/09/MBUSHUU-alias-DOMINIC-MNYAROJE-ANOTHER-vs-REPUBLIC-CONSTITUTIONAL-CASE.pdf>> accessed 29<sup>th</sup> June, 2020, See also *Attorney General v Kigula* (2009) UGSC 6 <<https://www.globalhealthrights.org/africa/attorney-general-v-susan-kigula-and-417-ors/#gsc.tab=0>> accessed 29<sup>th</sup> June, 2020.

<sup>82</sup> *ibid.*

<sup>83</sup> (1995) 1 LRC 232

taken ill after drinking poisonous tea and were rushed to the respondents' hospital for treatment. Although they went to the emergency casualty department of the hospital, no doctor attended to them and they left in that state and later died. In finding the hospital management liable, Nield, J., held that since the patients had entered the hospital without hindrance, the management owed the patients a duty of care as a body that ran a casualty department, to have them treated, which may have prevented them untimely death. He concluded, however, that if the hospital had closed its doors and said that no patients would be received or entertained, it would not have been liable if the patients had forced themselves in but were denied treatment. In such case, the hospital could not have been held to owe the patients any duty of care, his lordship concluded.

Similarly, once a patient is received or admitted for treatment in a hospital or clinic, whether for a fee or for free, the hospital or clinic, acting through its personnel, owes such patient a duty of care to give its best; and if it fails in this regard and death occurs, the hospital and the staff will both be liable for such death. Thus, Denning, L.J., held in *Cassidy vs Ministry of Health (Fahni, Third Party)*, as follows:

In my opinion, authorities who run a hospital be they local authorities, government boards, or any other corporation, are in law under the selfsame duty as the humblest doctor. Whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. The hospital authorities cannot, of course, do it by themselves. They have no ears to listen through the stethoscope, and no hands to hold the knife. They must do it by the staff which they employ, and, if their staff is negligent in giving the treatment, they are just as liable for that negligence as in anyone else who employs others to do his duties for him. Is there any possible difference in Law, I ask, can there be, between hospital authorities who accept a patient for treatment and railway or shipping authorities who accept a passenger for carriage? None whatever. Once they undertake the task, they come under a duty to use care in the doing of it, and it is so whether they do it for reward or not.<sup>84</sup>

In the same way, Stuart-Smith, L.J., held in *capital and countries vs. Hants country council*,<sup>85</sup> relying on Barnett and Cassidy's case, thus:

There is no doubt that once the relationship of doctor and patient or hospital authority and admitted patient exist, the doctor or the hospital owe a duty to take reasonable care to effect a cure, not

<sup>84</sup>(1951) 1 All ER 574 at 558, (1951) 2 KB 343 at 360.

<sup>85</sup>(1997) 2 All ER 865 at 883 C.A.

merely to prevent further harm. The undertaking is to use special skill which the doctor and hospital authorized have to treat the patient.<sup>86</sup>

His lordship then alluded to the situation to the distinction drawn in *Barneet's* case, *supra*, between a casualty department in a hospital that closes its door to patients and the fact in that case, where three watchmen who had taken poison had entered the hospital but were given wrong advice. In the first scenario, Stuart-Smith, L.J., held no duty of care arose, while in the second one, he said it arose. He then reasoned thus:

Likewise, a doctor who happened to witness a road accident will very likely go to the assistance of anyone injured, but he is not under any legal obligation to do so (save in certain limited circumstances which are not relevant) and the relationship of doctor and patient does not arise. If he volunteers his assistance, his only duty as a matter of law is not to make the victim's condition worse.<sup>87</sup>

He concluded, therefore, that the mere existence of close proximity between a medical doctor and person with a medical problem will not give rise to any duty of care.

Similarly, it has been held that a medical doctor retained by an organization to advise such organization on the health conditions of an applicant who want to be employed by an organization does not owe a duty of care to such applicant; as its duty is just to fulfil its retainers; for the doctor "does not, by examining the applicant, come under any general duty of medical care to the applicant," but he is "under a duty not to damage the applicant in the course of the examination".<sup>88</sup>

In Nigerian case bordering on damages for negligence resulting to death, even though the court of Appeal reasoned that the medical records kept by the hospital which was treating him were poor, hence resulted in a breach or negligence, it concluded that from the clinic folder kept by the said hospital and the evidence tendered in court, the medical staff had done its very professional best to keep the deceased alive, hence the hospital was not guilty of negligence.<sup>89</sup>

From the above cases of *Esubanor v Faweya*<sup>90</sup> and *Medical and Dental Practitioners' Disciplinary Tribunal v Okonkwo*,<sup>91</sup> it is quite clear, that the age disparity in the two

<sup>86</sup>Placing reliance on the dictum of Denning, L.J., in *Cassidy v Ministry of Health* (Fahrmi, third party), *supra*.

<sup>87</sup> 883

<sup>88</sup>Per Lord Browne-Wilkinson, in *X & Ors. (Minors) v Bedfordshire CCM, etc* (1995) 3 All ER 353; 383, (1995) 2 AC 633 at 752 H.L. <<https://www.lawteacher.net/cases/x-minors-v-bedfordshire-cc.php>> accessed 29th June, 2020.

<sup>89</sup>See *University of Ilorin Teaching Hospital v Abegunde* (2015) 3 NWLR (pt. 1447) 421 C.A. <<https://nigerialii.org/ng/judgment/supreme-court/2012/4>> accessed 29th June, 2020.

<sup>90</sup>[2019] 7 NWLR (pt 1671) 316.

<sup>91</sup>(2001) FWLR (pt. 44) 542. See, also, *Re Yetter* (1937) 62 pa D & C2d 619 <<https://www.leagle.com/decision/197368162padampc2d6191572>> accessed 29th June, 2020.

cases led to the decision of the Supreme Court. The former was a minor, whereas the latter was already an adult. That was why the Supreme Court held that once an adult patient opts not to accede to medical treatment on religious ground, the doctor or medical centre treating such a patient becomes helpless; and that if the patient dies, the doctor or hospital will not be held responsible. It does not matter that the doctor himself, for similar religious reasons, does not believe in such a treatment.

## **6. Recommendations**

It is important for the government to review this aspect of age disparity in our Laws with a view to making a particular age workable for the purpose of implementing the Child Rights Act. The protection of the right of the children is also hindered by lack of adequate awareness among the citizens as well as the lack of political will to enforce the provisions of the CRA 2003. It is, however, believed that these challenges could be addressed by taking practical measures like government embarking on increased and intensive advocacy efforts to further enlighten the citizens especially the rural dwellers about the existence and values contained in the CRA 2003; recognizing the socioeconomic rights of the citizens; retraining the judges to imbibe proactive judicial practices; restatement of customary and codification of Nigerian Law.

## **7. Conclusion**

It is erroneous to view the balance of competing interests as favouring state intervention in all cases where the child's life is threatened. If a parental decision to refuse medical treatment for their child threatens the child's life, the state and parental interests will invariably collide, each negating the other's effect. Accordingly, the most influential factor in the balance will be the interests of the child, an inherently fact-specific determination. The ultimate decision of whether intervention is appropriate will therefore rest on the fact-finder's determination of the best interests of the child.

The *Esubanor v Faweya*<sup>92</sup> and *Medical and Dental Practitioners' Disciplinary Tribunal v Okonkwo*<sup>93</sup> decision to reinforce the modern trend towards state intervention in certain circumstances where parental decisions affect the health and well-being of children. The Nigeria Supreme Court emphasizes that Courts will carefully scrutinize parents' medical decisions concerning their dangerously ill children, even when those decisions are based upon religious beliefs. It is comforting to realize that the focus of Courts' decisions on State intervention in this area will continue to be the determination of the best interests of the child.

---

and *Sidaway v Board of Governors* (1985) 1 All ER 643 at 666.

<<https://www.globalhealthrights.org/health-topics/medicines/sidaway-v-bethlem-royal-hospital-governors-and-ors/>> accessed 29<sup>th</sup> June, 2020.

<sup>92</sup> (n 58).

<sup>93</sup> (n 61).