THE NIGERIAN MEDICAL PRACTITIONER'S DUTY TO PRESERVE THE LIFE OF AN UNBORN CHILD *VIS-A-VIS* THE MOTHER'S RIGHT TO REJECT CERTAIN MEDICAL TREATMENTS IN LIFE THREATENING SITUATIONS*

Abstract
In Nigeria, a pregnant woman has the constitutional right to refuse certain medical treatment procedures if such treatment procedure in her opinion, contravenes her right to privacy and her right to practice the religion of her choice. The problem associated with this choice to refuse or accept the intended treatment procedure is that in most cases these women fail to put into consideration the interest of the in utero child. Furthermore, some of these women believe that their autonomous right to privacy gives them the unreserved right to decide what happens to their body. Thus, for these women, their interests and rights outweigh and supersede that of the unborn child. In the exercise of these rights by these pregnant women, some pertinent questions have been raised. Some of these questions which this work has made a bold attempt to proffer legal answers to are; Is the foetus entitled to a right to life? Is the foetus a distinct personality from the mother? At what point will the State intervene to uphold the right to life of an unborn child? Are these constitutional rights exercised by a pregnant woman in Nigeria absolute?

Keywords: Viable Foetus, Unborn Child, Blood Transfusion, Informed Consent, Abortion, Jehovah Witness

1. Introduction

A proper understanding of the ultimate essence of law is the intensification of conditions and circumstances favourable to life and human coexistence. Hence, any legal system that is properly inspired by the natural law is likely to oppose any conduct that will be inimical to the continued existence and living conditions of its citizens.[1] Situations may arise where a pregnant woman may decline certain medical procedures recommended by her physician on grounds of her religious belief or over concerns about the physical or emotional effects such procedures may have on her own well-being.[2] This decision to reject the medical procedure necessary for the survival of her unborn child creates a situation that may prompt the timely intervention of the state to override her decision. In a situation where the state decides to intervene, it is important to decipher the various circumstances where the state's interest or the interest of the foetus outweighs that of the mother.[3] In Nigeria, this right of refusal enjoyed by a pregnant woman finds root in the common law doctrine of informed consent and the constitutional provisions protecting and upholding a citizen's right to privacy[4] and right to freedom of thought, conscience and religion.[5] This right to privacy in most jurisdictions has been given a broad interpretation so as to give a woman autonomous right to decide what happens to her body. Thus, a pregnant citizen of Nigeria is entitled to reject certain medical treatment procedures where such procedures are at variance with her religious belief, where such treatment may invade her privacy or where such procedure in her opinion will be detrimental to her emotional and physical state. These medical procedures which has over the years taken the centre stage whenever the autonomous right of a pregnant woman is in contest includes; invasive procedures like caesarean section, abortion and less invasive procedures like blood transfusion. For instance, members of the Jehovah's Witnesses Society are widely known for their refusal of blood products, even when such a refusal may result in death.[6] Since the introduction of the blood ban in 1945, Jehovah's Witness parents have fought for their rights to refuse blood

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[1] M.O, Izunwa., S., Ifemeje., 'Right to Life and Abortion Debate in Nigeria: A Case for the Legislation of the Principle of Double-Effect'. *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*. (2011) 2 (1). p 111.

[2] J.E., Probst., 'The Conflict Between Child's Medical Needs and Parents' Religious Beliefs. *Am J Fam Law*. (1990) Summer, 4(2):175-92.

[3] J.A. Filkins, "A Pregnant Mother's Right to Refuse Treatment Beneficial to her Fetus: Refusing Blood Transfusion" *De paul Journal of Health Care Law* (1998) 2(2): 362.

[4] Section 37 of the 1999 Constitution provides that the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.

[5] Section 38 of the 1999 Constitution provides that every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

[6] See Genesis 9:4, Acts of the Apostles 15:29, the Holy Bible, International Standard Version, Zondervan Grand Rapids, Michigan 49530, USA.

on behalf of their children, based on religious beliefs and their right to raise children as they see fit. Adult members have also fought to protect their autonomy when making both contemporaneous and advance treatment refusal.[7] The pregnant members which form the crux of this academic survey are not left out, as most times blood transfusion are rejected by these pregnant members without considering the effect of such refusal to her physical wellbeing and that of the foetus as well. This refusal of blood transfusion raises ethical and legal dilemmas that are not easily answered. Can it be said that an individual's rights (namely bodily control, right to privacy, right to decide about life/death issues, right to religious freedom) outweigh society's rights (namely the preservation of life, the prevention of suicide, the protection of innocent third parties, and the maintenance of the ethical integrity of the medical profession)? Does the right to choose outweigh the value of human life? The dilemma faced by medical practitioners emerges when such practitioner is at an impasse as to which takes precedence; is it to respect patient autonomy or the duty to proceed with the rejected medical treatment procedure.[8]

2. Legal Personality and Right to Life of an Unborn Child in Nigeria

Although the Nigerian statutes offer some degree of protection to an unborn child, these statutes have failed to afford an unborn child a distinct legal personality. Thus, an unborn child is always viewed as an appendage of his mother thereby relegating some of the supposed statutory rights accorded to it subject to that of the mother. This suggests that where there are competing interests of a mother and an unborn child, the courts in most cases is likely to uphold the interest of the mother over that of the unborn child. In Nigeria, the uncertainty surrounding the distinct personality of an unborn child and its attendant right to life supposed to be protected under section 33 of the Nigerian constitution[9] is exacerbated by the descriptive term 'every person' which specifies the ambit of the protection afforded by section 33. Can 'every person' as used by section 33 be interpreted to mean an unborn child? or can it be said that the intendment of section 33 is to guarantee the right to life of an unborn child so as to enable a medical doctor employ every means available to him in preserving the life of the unborn child especially in situations where the decision of the mother may be averse to the assessment and recommendation of the medical doctor. Although it may sound incongruous to state that the intendment of the section 33 is to afford the right to life to an unborn child, however, it is the view of this paper that life of an unborn child ought to be protected under section 33. This stance taken by this paper is informed by the various recognition, protection and rights bequeathed to an unborn child by various Nigerian statutes. Albeit taking the stance that the unborn child is entitled to the protection offered by section 33, this paper however submits that that the unborn child being referred to is the viable foetus[10] and that the right to life of an unborn child should be made subject to that of the mother and this would only be permissible in situations where the continuous exercise of this right by the unborn child will lead to loss of life of the mother. This absence of a precise statement as it pertains to the enjoyment of the protection afforded by section 33 of the Nigerian Constitution to an unborn child is also a feature of some legislation. For instance, Article 24 of the Portuguese Constitution[11] states that human life is inviolable; however, according to the Portuguese Constitutional Court, this formula does not intend to grant the right to life to the unborn, although it provides objective protection to human life, either to the born and to the unborn, since all human life is considered having a constitutional value. 'Human life' as used by the Portuguese constitution can easily be construed to include the life of the born and unborn unlike the Nigerian constitution where the term 'every person' may seem odd to be interpreted to cover both the born and unborn. As earlier stated that due to the recognition of certain rights of and a distinct personality accorded to an unborn child in some Nigerian statutes, the provision of section 33 should be interpreted with a view to protecting the right to life of an unborn child. Some of these statutory recognition and protection afforded to an unborn child can be found in the Nigerian Criminal and Penal Code, where it is provided that abortion is unlawful and prohibited unless in situations where same is employed to save the life of the mother.[12] However, despite criminalizing abortion in Nigeria, a conviction for the crime of murder or homicide in respect of a foetus via abortion cannot stand and this may be attributed to the statutory description as to when a child can said to be capable

[7]S. Woolley, 'Jehovah's Witnesses in the Emergency Department: What are Their Rights?' *Emerg Med J*. (2005) 22(12), 869-71. R.T., Penson, P.C., Amrein. Faith and Freedom: 'Leukemia in Jehovah Witness Minors'. *Onkologie*. 2004, 27(2):126-8.
[8]Woolley (n.7).
[9]Section 33 of the Constitution of the Federal Republic of Nigeria 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.
[10]This is a foetus that has reached such a stage of development as to be capable of living, under normal conditions, outside the uterus.
[11] Constitution of the Portuguese Republic, Seventh Revision [2005].
[12] See section 297, 228 and 229 of the Criminal Code Act.

of being killed.[13] On this, *Ogbu*,[14] submitted that the Nigerian law has taken a middle course by not conferring the status of a person to a foetus but at the same time protecting the status by criminalizing abortion. Secondly, in the past, tort claims for prenatal injuries were generally not permissible. However, these days, some jurisdictions allow tort claims for compensation against third parties for the afflictions he or she has suffered as a result of any injury inflicted on the mother from conception to delivery.[15] Specifically, in Nigeria, section 17 (1) of the Child's Right Act[16] upholds this specie of right where it provided that a child may bring an action for damages against a person for harm or injury caused to the child willfully, recklessly, negligently or through neglect before, during or after the birth of that child. The unembellished interpretation to the foregoing section is that a person can institute an action for a harm he/she suffered as a foetus. In the English case of *Jones v. Taunton Somerset NHS Foundation Trust*, [17] Mr. Jones argued that his mother had been negligently prescribed with Nifedipine during her pregnancy causing him brain injury. This drug, according to him led to a fall in his mother's blood pressure and ultimately led to his suffering from periventricular leukomalacia (a brain injury affecting premature infants). Mr. Jones also contended that the drug of choice at the material time was Ritodrine, and that the Nifedipine was only administered as part of clinical trial and thus the Obstetrician in his opinion was negligent. Despite the recognition of this statutory right of an unborn child to institute an action for harm suffered during the gestation period, it has been argued that the intention in granting recovery in cases of prenatal injury is to compensate the postnatal child for the affliction it must bear.[18] Thus, recovery is not, therefore, a recognition that the prenatal child has legal rights and according to this line of reasoning, the rationale for the grant of recovery is consistent with the view that it did not recognize a foetus as an entity separate from the pregnant woman. The pertinent questions spurred by this ingenuous argument are:

i. At what point did the cause of action arise?
ii. Can the child still maintain the action in situations where the mother predeceases him during child birth?

In an attempt to proffer answers to the foregoing questions, it is the stance of this work that;

i. The said cause of action arose at the point the child was still a foetus and not when he was given birth to. Accordingly, the action being instituted by the child was as a result of an act or omission that resulted to a harm to him/her as an unborn child.
ii. The child can maintain the action because the action borders on prenatal injuries sustained by the child and the right to this action is immaterial whether the mother survived the child delivery process or not.

It is pertinent to restate at this point that all the arguments and position taken by this work in favour of the unborn child is in regards to the viable foetus. On the strength of the foregoing answers proffered, it can be argued that the foetus is a personality independent of the pregnant woman which would not have been so if the right to institute the action for prenatal injuries is extinguished upon the death of the mother during childbirth. In fact, a Michigan Court has held that a child could sue her mother for the discoloration of the child's teeth as a result of consumption of tetracycline during pregnancy,[19] while another court has suggested that a woman may be sued by her child for not preventing its birth if she had prior knowledge of the probability of its being born defective.[20] Similarly, the Supreme Court of South Carolina, in *Whitner v. South Carolina*,[21] held that a mother who was addicted to cocaine could be held responsible under South Carolina's Child Abuse and Endangerment Statute. The court opined that the legislature intended the word "child" to

[13]See section 307 of the Criminal Code Act where it is provided that a child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not and whether the navel-string is severed or not. See also section 328. Compare with Article 4 of the American Convention of Human Rights (ACHR) which explicitly declares that human life is protected from conception wherein it was stated that 'Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.' See also the US Unborn Victims of Violence Act, of 2004 which creates a separate offense for a person who causes the death or bodily injury of an *in utero* child.
[14] O.N. Ogbu., *Human Rights Law and Practice in Nigeria* (Enugu: Snaap Press Ltd., 2013) p.285.
[15]M. Hyman., 'Live Birth: A Condition Precedent to Recognition of Rights' *Hofstra Law Review*. (1976) p.825 Cited in S.S., Nehra, & A.S., Rajput, 'The Legal Personality of an Unborn Child: A Comparative Analysis of USA and India'. *Amity International Journal of Juridical Sciences*. (2019) 5 (1). p 100.
[16] Cap C50 Laws of Federation of Nigeria, 2010.
[17] (2019) Med. LR 384.
[18] Hyman (n.15).
[19] *Grodin v. Grodin* 102 Mich App 396 (1980).
[20] *Curlender v. Bioscience Larboratories* 106 Cal App 3d 811. 829 (1980).
[21] 492 SE.2d 777 (S.C 1997).

include a viable foetus. Thus, the court upheld the conviction of the mother for causing her child to be born with cocaine metabolites in its system. The court recognized that a viable foetus has certain rights and interests that the State may protect. Although the foregoing decisions of the court may be perceived as one that is inimical to the autonomous right of a pregnant woman, it can be applauded for identifying the right of an unborn child and at the same time delineating the separate personality of an unborn child. Thus, if the view of the courts in the foregoing decisions were tilted towards the fact that the mother and the unborn child form one entity, the outcome of the case obviously would have been different.

Still on the recognition and protection afforded to an unborn child in Nigeria, section 17 (2) and (3) of the Child's Right Act[22] recognises and protects inheritance rights of an unborn child. it is provided under these sub-sections that where the father of an unborn child dies intestate, the unborn child is entitled, if he was conceived during the lifetime of his father, to be considered in the distribution of the estate of the deceased father. Also, where the mother of an unborn child dies intestate before the child is delivered, the unborn child is entitled, if he survives his mother, to be considered in the distribution of the estate of the deceased mother. Finally, under the Administration of Criminal Justice Act, 2015,[23] the execution of death penalty on convicted pregnant women is forbidden, the sentence of death although passed on her is suspended until the child is delivered and weaned. It is without contention that this prohibition provides a consistent base to deduce some safeguard to the living being that women are carrying in their uterus, since this creature is, obviously, the subject of the referred protection.

3. The Dilemma of the Nigerian Doctor and the Patient's Constitutional Right to Reject Certain Medical Treatment Procedures on Grounds of Religious Belief:

Over the years, Nigerian medical doctors have been in the thick of taking critical decisions as it pertains the constitutional right of a pregnant woman to reject medical treatment on grounds of religious belief. Thus, the doctor finds himself in a crunch and ideally, in a bid to wriggle out of the situation, the doctor is expected to strike a balance between the competing rights and interest of the pregnant woman, the foetus and the state. The dearth of Nigerian judicial authorities on the right to refuse certain treatment procedure by a pregnant woman has made it difficult to ascertain the position of the Nigerian courts on this thorny issue, however, it is not likely that a Nigerian medical doctor will carry out a medical treatment like blood transfusion or caesarean section on a pregnant woman without first seeking and obtaining an informed consent. The Nigerian medical doctor is also not likely to transfuse a pregnant woman most especially where such transfusion has been rejected by the pregnant woman based on her religious belief. The Nigerian medical doctor is expected to devise and employ alternative methods and in a situation where such doctor is of the view that the patient cannot be managed properly in his facility, he is expected to transfer such patient to a more equipped facility.[24] This foregoing attitude presupposes that in the consideration of whether to transfuse a pregnant woman, most especially where the said transfusion may be beneficial to both mother and foetus, the view, rights and interest of the pregnant mother is paramount, final and it outweighs any supposed right or interest of the foetus. In *Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo*,[25] The Supreme Court in that case stated that a patient's constitutional right to object to medical treatment or to blood transfusion on religious ground is founded on fundamental rights protected by the right to privacy under S 37 of the 1999 Constitution. Upholding this right, the Supreme Court *Per Ayoola JSC* posed a rhetorical question:

> If a competent adult patient exercising his right to reject lifesaving 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 perhaps than to give the patient comfort?

Although the said case does not border on the right of a pregnant woman to reject blood transfusion, it bordered on the right of an adult patient to reject certain medical procedures intended to be applied by a Medical Practitioner to save her life. The facts of the case revolved around one Mrs. Martha Okorie (the patient) and her husband who are members of a religious group known as Jehovah's Witnesses and according to their religious belief, blood transfusion is contrary to God's injunction. The said Mrs. Okorie, a 29 -year

[22](n.16).

[23] See section 404.

[24]Rule 39(v) of Code of Medical Ethics in Nigeria 2004 provides for clinical management of religious adherents and it stipulates that the practitioner should decide if he is willing to accept the limitations in management and if so the practitioner should plan and offer optimal care if not the Practitioner should withdraw care and refer such patients for further opinion or to other Health Care Centre who might be willing to handle such case.

[25](2001) LPELR-1856 (SC); (2001) 7 NWLR (Pt.711) 206.

old woman, having had a delivery at a maternity on 29th July, 1991 was admitted as a patient at Kenayo Specialist Hospital for a period of 9 days from 8th August, to 17th 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 stating her refusal for the blood transfusion leading to her subsequent discharge. Upon her discharge from Kanayo Hospital she was taken to JENO hospital by her husband on 17th August, 1991 where the respondent proceeded to treat the patient without transfusing blood. However, the patient died on 22nd August, 1991. Evidence revealed that the deceased who was informed of the consequence of refusing blood transfusion opted for treatment without blood transfusion on grounds of religious belief (Jehovah's Witness). She even signed a *"no blood"* medical document which was countersigned by her husband and the first doctor who later terminated the contract to treat the deceased. There was also evidence from one Esther Ugwu who said she was a friend of the deceased and according to her, when she visited the deceased in the hospital, the deceased pleaded with her not to leave but to wake her up in case there was an attempt to infuse her with blood. However, the contentions of the Appellant were that Dr. Okonkwo (The Respondent) who received the deceased after she was discharged by the first doctor at Kanayo Hospital, acted negligently by accepting the deceased who was severely anemic as shown on the referral letter without making any plans to transfuse blood to the patient until her death. The Appellant also contended that at the point the Respondent failed to collect consent he ought to have transferred the deceased to a bigger centre. The appeal was dismissed in the light of the uncontroverted evidence by the husband of the deceased that at the point they got to the Respondent's hospital, the Respondent informed the deceased of the consequences of carrying on the treatment without blood transfusion but the deceased remained adamant. In fact, a Release from Liability Form was signed and given to the Respondent before he proceeded with what best he felt could save the deceased. The facts of this case clearly show that the right to reject treatment based on religious grounds by an adult patient outweighs the duty to preserve life of such patient by the Nigerian medical doctor. Conceding that an adult patient has the constitutional right to reject certain treatments based on his/her religious belief, can the exercise of such right be extended to a parent's decision to reject certain medical treatment procedures on behalf of her born or unborn child. The Nigerian Supreme Court has proffered an answer in case of an already existing child leaving the fate of the unborn child unresolved and ambivalent. In *Esabunor & Anor v. Faweya & Ors*[26] which also bordered on the right of a patient to reject certain treatment procedures like blood transfusion based on grounds of religious belief. This time, the Supreme Court discarded the view taken in the foregoing *Okonkwo*'s case based on the fact that the patient in question was a child. On an appeal to the Supreme Court relying on S 45(1)(b) of the 1999 Constitution, the Nigerian apex court penned thus:

> All adults have the inalienable right to make any choice they may decide to make and to assume the consequence, when it involves a child different considerations apply and this is so because a child is incapable of making decisions for himself and the law is duty bound to protect such a person from abuse of his rights as he may grow up and disregard those religious beliefs. It makes no difference if the decision to deny him blood transfusion is made by the parents. See MDPDT v. Okonkwo (2001) 7 NWLR (Pt. 711) 206. When a competent parent or one in Loco parentis refuses blood transfusion or medical treatment for her child on religious grounds, the Court should step in, consider the baby's welfare, i.e. saving the life and the best interest of the child, before a decision is taken. These considerations outweigh religious beliefs of the Jehovah Witness Sect. The decision should be to allow the administration of blood transfusion especially in life threatening situations.[27]

The facts are that the 1st Appellant, a one-month old child was rushed to the Chevron Clinic, Lekki Peninsula in Lagos by his mother; the 2nd Appellant. The 1st Respondent (Dr. Faweya) examined and found out that the child was suffering from severe infection and anemia (low number of red blood cells). Antibiotics were administered on the child but in the morning of the next day, the 1st Respondent observed that the child was in a very bad shape as he was convulsing and had poor breathing. The 1st Respondent intimated the 2nd Appellant of the urgent need for blood transfusion but being a member of Jehovah Witness Sect, this idea was bluntly and out rightly rejected by her on grounds of her religious belief. The next day Counsel for the Commissioner of Police, Lagos State moved an Originating Motion Ex-parte before the Chief Magistrate (5th Respondent) which was granted and an order was made that the 1st Respondent be permitted to do all things necessary for the protection of the life and health of the 1st Appellant. Acting on the order, the 1st

[26] (2019) LPELR-46961 (SC).
[27] *Ibid* at p. 26-29, paras. F-A, *Per Rhodes-Vivour JSC.*

Appellant was transfused and consequently he got well and was taken home. The Appellants thereafter approached the High Court for an order for *Certiorari* and damages which was refused by the High Court and was also refused on appeal to the Court of Appeal. On a further appeal to the Supreme Court, the court, *Per Okoro, JSC* in his concurring judgment had this to say:

> It is instructive to note that the law exists primarily to protect life and preserve the fundamental right 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 decisions for himself… I hold the view that 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 of the religious conviction of his parent. He probably would not be alive today. I agree with my learned brother that in a life threatening situation, such as the 1st Appellant was in as a child, the consideration to save his life by application of blood transfusion greatly outweighs whatever religious beliefs one may hold, especially where the patient is a child.[28]

The Nigerian case of *Milam v. Medical & Dental Practitioners Investigation Panel & Anor*,[29] created a good opportunity for the Nigerian Court of Appeal to make a judicial statement that would have created a reference point for the Nigerian medical practitioner who has a duty to preserve the life of a viable foetus, a duty that is constrained by the pregnant mother's right to refuse blood transfusion based on religious belief. However, it appeared that the decision of the appellate court emerged from the line of argument adopted by the appellant. Thus, if the appellants had anchored their reason to go ahead with the procedure on the basis that the adopted procedure would be beneficial to both the mother and the foetus, the court would have been afforded an opportunity to make a judicial statement that will aid a doctor to take a decision whenever he is in a situation where the right to life of a viable foetus is being threatened by its mother's constitutional right to reject blood transfusion based on religious belief. The facts of the case are that one Mrs. Florence Abatan (deceased) was delivered of a baby girl through a caesarean section and bilateral tubal ligation (BTL) conducted by the appellant and one Doctor Fom-dom at the Maitama General Hospital on 14th February, 2004 and after the procedure, she began to lose blood. According to the appellant, there was a pre-arrangement with the husband of the deceased (Mr. Gabriel Abatan) to provide blood for transfusion which was not done based on the fact that it was against his faith as a Jehovah Witness. A further request by the Consultant Obstetrician Gynecologist and Head of Department (Dr. Adebayo) to provide blood for transfusion was also allegedly rejected by the husband of the deceased. The woman eventually passed on and the appellant was arraigned before the Tribunal, following investigation by the disciplinary panel wherein he was found guilty. The Court of Appeal affirming the judgment held *inter alia* that improper assessment made the Appellant conduct two major operations on the deceased which were compounded by failure of the appellant to ensure the availability of blood for transfusion before embarking on those two major operations (Cesarean section and BTL). The Court stated emphatically that it was not enough for the appellant to argue that the complainant and the deceased were counselled and thereafter consented to the procedure, thus, a necessity for the procedure must be shown to be justified by the Appellant.[30] The judgment cannot be faulted because the judgment was delivered based on the issues formulated and the argument canvassed by the appellants. It is submitted that if the appellant had raised a jurisprudential issue to the effect that one of the reasons to go ahead with the procedure without ascertaining the availability of blood was because of the imminent threat to the life of the viable foetus, the propriety of the appellant's action would have been put on an imaginary scale by the appellate court. This is owing to the fact that there is a likelihood that from the assessment of the appellants, the child could only be delivered via a cesarean section and in which case blood transfusion is a probable consequence of such procedure which also suggests that the only option that may not require blood transfusion was a vaginal delivery and this may be detrimental to both mother and foetus.

4. Rejection of Certain Medical Treatment Procedures on Basis of Right to Privacy

In the same manner a patient rejects blood transfusion, the same patient can also reject an invasive treatment procedure like a cesarean section on the basis that it is an invasion of her constitutional right to privacy.[31] A patient who abhors blood transfusion may refuse to undergo a caesarean section because blood transfusion is a probable consequence of a cesarean section. Furthermore, a woman in the exercise of her reproductive rights may opt to terminate the life of a foetus on the basis that she has an autonomous right to decide what

[28] *Ibid* at p. 36-37, paras G-D.
[29] (2018) LPELR-45539 (CA).
[30] *Ibid* at p. 42, para. E, *Per Abubakar, JCA*.
[31] See section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (As amended).

happens to her body. Most times these decisions reached by these pregnant mothers are arrived at without putting into consideration the effect of such choice on the foetus which may be viable at the point the decision was reached. In India, although the autonomy to reproductive rights as a fundamental right of a woman is provided for under Article 21 of the Indian Constitution, the interests of a foetus (unborn child) have also been recognized via the Medical Termination of Pregnancy Act, 1971 and Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act of 1994.[32] In the United States the turning point in the debate of the autonomous right of a woman to decide what happens to her body as it relates to abortion was the case of *Roe v. Wade*, which presented the theory of the trimesters:

(i) During the first trimester abortion is declared free and only depends on the mother's will.
(ii) Before the third trimester, the State may restrict abortion having in mind the safeguard of the mother's health.
(iii) Finally, in the third trimester, and because at this point we are facing a viable unborn, abortion can only be allowed for reasons related with the mother's well-being.

In this decision the Supreme Court refused to take a stance at the personhood of the unborn, and based the entire reasoning on the reproductive right of the woman, whose existence was found in the penumbra of the 14th Amendment and its privacy rights.[33]

5. A Comparative Analysis

In some jurisdictions, mainly in situations where medical treatment is not necessary for survival, the decisions of the court have been depicted with fluctuating outcomes; however, these decisions are dependent on the prevailing facts of each case. These courts have adopted different rationales for their judgments. Strikingly, a good number of these decisions have been hinged on the intensity of the risk inherent in the treatment procedure, thus where the medical treatment will pose a greater risk to the mother the decision of the court may tilt towards protecting the decision of the mother to refuse such treatment procedure. However, where the mother decides to hide under the cloak of statute to refuse the said treatment procedure on the basis of religious belief, the state is more likely to intervene in favour of the unborn child, thereby striking a balance between the right of the mother to refuse the said treatment procedure on religious grounds and the right of the unborn child to live. Thus, it appears that the most important considerations are the reason adduced by the mother and the degree of harm the child will suffer if the medical treatment is declined by the mother. The greater the harm, the more likely the court will intervene to allow the medical treatment. *In Jefferson v. Griffin Spalding County Hospital Authority*,[34] the Georgia Supreme Court ordered a pregnant woman, who suffered from placenta previa,[35] to undergo a caesarean section. The court was of the view that the invasion into the woman's life was outweighed by the court's duty to protect the unborn child from a premature death. The court in furtherance to its resolution to protect the unborn child denied the parent's motion for a stay of the superior court's order authorising that a caesarean section be performed in the event the mother presented herself for delivery of her child. The examining physician discovered that the placenta was between the baby and the birth canal and that it would have been virtually impossible for the condition to correct itself prior to delivery. The physician's recommendation was that there was a ninety-nine percent certainty that the child would not be able to survive natural childbirth and only a fifty percent possibility that the mother would survive vaginal delivery. Part of the recommendation was that if a caesarean section were performed before the onset of labor, the mother and child would have an almost one hundred percent chance of survival. Despite the advice of the physician, the mother declined consenting to caesarean section and its resultant blood transfusion on religious grounds. To salvage the situation, the court granted temporary custody of the unborn child to the Department of Family and Children Services, giving it full authority to make all decisions including consenting to a surgical delivery. The court rested its decision on the basis that the unborn child was a viable human being entitled to the protection of the Juvenile Court Code of Georgia. Similarly, *In Re Madyun Fetus*,[36] the court ordered a non-consenting female to submit to a caesarean section. The court held that the foetus was at much greater risk of dying from infection than its mother was of dying

[32] Nehra & Rajput (n.15) p.104.
[33] Raposo., V.l., 'Human Rights in Today's Ethics: Human Rights of the Unborn (Embryo and Foetus)'. *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol, Univerity of Coimbra, Portugal* (2011). p 104.
[34] 249 Ga.86, 274 SE.2d 457 (1981).
[35] Placenta previa is the attachment of the placenta to the wall of the uterus in a location that completely or partially covers the uterine wall (opening of the cervix). Although the treatment of placenta previa involves bed rest and limitation of activity, tocolytic medications, intravenous fluids, and blood transfusions may be required depending upon the severity of the condition.
[36] No 189-86 (DC Super. Ct July 26, 1986).

from a caesarean section. In *Crouse-Irving Memorial Hospital v. Paddock*[37] and *In Re Jamaica Hospital*[38], the New York Supreme Court permitted the necessary blood transfusions. In *Crouse-Irving*[39] the petitioner required a caesarian section delivery because of various complications with her pregnancy. Ms. Paddock consented to the caesarian section and all other medical procedures, except blood transfusions, necessary to ensure a safe delivery. Her attending physician, Dr. Robert Neulander, testified that Ms. Paddock would probably lose a life-threatening amount of blood because of the caesarian section and the need to incise her placenta. Aware of these risks, Ms. Paddock and her husband affirmed their opposition to any blood transfusions on the basis of their religious beliefs. The court ordered the hospital to administer blood transfusions to Ms. Paddock as medically necessary. Additionally, the court held that a patient could not place her physicians or a hospital in the untenable position of allowing them to undertake aggressive medical treatment on her behalf, while simultaneously denying them the authority to correct life-threatening problems arising from that treatment. The court stated that the state's interest, as *parens patriae*,[40] in protecting the health and welfare of the unborn child must take precedence over the parent's decision to decline necessary treatment based on constitutional grounds. Although, the court did recognise that it may not determine the most effective treatment when the parents have chosen among reasonable alternatives, however, the court asserted its authority to deny a parent the right to refuse a treatment procedure which is beneficial to the unborn child or permit a treatment procedure that is detrimental to the life of the unborn child.

Also, *In Re Jamaica Hospital*,[41] the court indicated that the life of the unborn child must be considered, although it recognized that the patient has an important and protected interest in the exercise of her religious beliefs. Applying its *parens patriae* power, the court held that it was under an obligation to protect the foetus. In that case the New York court regarded the foetus as a human being even though the foetus was not yet viable. The facts are that a hospital obtained a court order which forced a patient who was eighteen weeks pregnant and in critical condition to submit to blood transfusions. The patient had refused the transfusions for religious reasons. The Court held that the transfusions were necessary to stabilize the woman's condition and to save the unborn child's life. Albeit, the foetus was not yet viable, the court concluded that the woman's religious beliefs could not override the state's significant interest in protecting the life of a midterm foetus. Once again, the pregnant woman's objections were ignored because the state's interest in protecting the foetus was greater than the woman's right to exercise her religious beliefs.[42] *In Re Fetus Brown*[43] Darlene Brown, 34 and 3/7-weeks pregnant, was admitted to the hospital by her physician because of urinary tract discomfort. Following a cystoscopy that revealed a urethral mass, her physician, Robert Walsh, ordered surgery to remove the mass. During the surgery, Brown lost almost 1500 cubic centimeters of blood, and her hemoglobin fell to less than one-third of the value normal for women at her stage of pregnancy. During the operation, when her blood loss had reached about 700 cubic centimeters, the physician called for two units of blood for transfusion. Brown, who was conscious during the procedure, refused the transfusion, declaring that she was a Jehovah's Witness (an information she had not previously disclosed). Walsh completed the surgery without administering any blood, but, subsequently, when Brown's hemoglobin continued to decline, he asked the hospital to seek court approval for transfusions to save the life of Brown and her fetus. Walsh explained that transfusing Mrs. Brown was the only way to get oxygen through the placenta to the fetus. Without transfusion, he estimated that Mrs. Brown and her fetus had a 5 percent likelihood of survival. A hearing was held immediately in an Illinois circuit court, during which the state asked that a temporary custodian be appointed for Fetus Brown with the right to consent to one or more transfusions for Darlene Brown when the necessity arose. With the appointment of the hospital administrator as temporary custodian, Darlene was restrained and sedated for the transfusions to take place. Three days later Darlene Brown delivered a healthy baby and was subsequently discharged from the hospital. One week after the baby's birth, the court vacated the temporary custody order and dismissed the case. In an appeal filed by Darlene, the appellate court held that the circuit court

[37] 485 N.Y.S 2d 443 (N.Y App.Div.1985).
[38] 491 N.Y.S 2d 898 (N.Y.App Div 1985)
[39] (n.37).
[40] Latin meaning of parent of the country.
[41] (n.38).
[42]In *Mercy Hospital v. Jackson,* 489 A2d 1130 (Md. Ct. App 1985) the constitutional right of a woman to refuse blood transfusion was upheld on the basis that failure to transfuse the woman was not detrimental to her unborn child. The patient entered Mercy Hospital in premature labor in the twenty-fifth or twenty-sixth week of pregnancy. Ms. Jackson's physicians urged a Caesarian section delivery because of problems with the position of the fetus and her previous abdominal surgery. Ms. Jackson consented to the Caesarian section, but warned she would refuse any blood transfusions because of her religious beliefs. Her physicians explained the risks of blood loss from the Caesarian section and the likelihood of her death, but Ms. Jackson persisted in her refusal. Mercy Hospital, believing the risk to Ms. Jackson to be unacceptable, petitioned the circuit court for Baltimore to appoint a guardian for Ms. Jackson with authority to order a blood transfusion. The judge convened a hearing at Ms. Jackson's hospital bed, but both Ms. Jackson and her husband reaffirmed their opposition to a blood transfusion. The judge denied the petition for guardianship. Mercy Hospital appealed, but the appellate court upheld the dismissal. The court held that a competent, pregnant adult had the right to refuse a blood transfusion for religious reasons, when her decision posed no risk to her unborn child.
[43] 689 N.E 2d 397,399 (ILL App.Ct. 1997).

erred in ordering a transfusion for Darlene Brown. It appears that in an attempt to override an individual's right to refuse life-sustaining treatment, the state traditionally invokes four interests:
(1) The preservation of life.[44]
(2) The prevention of suicide.
(3) The protection of third parties.
(4) The ethical integrity of the medical profession.[45]

In the initial hearing brought by the hospital, the circuit court based its decision on interests no 1 & 3. It decided that the transfusion was necessary to preserve the lives of Darlene Brown and her foetus. On interest no. 3, the circuit court claimed an interest in preventing harm to Darlene Brown's eight and ten years old daughters who would be left motherless should Darlene die. However, the appellate court disagreed and consequently it raised the state's fundamental interest in protecting the liberty and autonomy of its citizens. According to the appellate court, the state's interest in protecting Darlene Brown's autonomy outweighed its interest in protecting her life.[46] In holding that a blood transfusion is an invasive procedure that interrupts a competent adult's bodily integrity, the court scaled the balance in favor of a pregnant woman's right to refuse medical treatment.[47]

Extending the Rationale of *Esabunor v. Faweya* [48]

Decision making capacity is one of the most important components of informed consent. A valid consent can only be obtained from a rational and stable patient. In situations where the state of the patient precludes such patient from giving a valid consent, consent is sought and obtained from the closest relative. However, at all times, the decision to refuse or grant consent must be in the best interest of the patient. This line of reasoning informed the decision of the Nigerian Supreme Court in the *Esabunor's*[49] case and according to the court, 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 of the religious conviction of his parent. It is submitted by this work that there is an imperative need for the extension of the rationale of the decision reached in *Esabunor's* to cases where the right of an unborn child to life is being subsumed and threatened by its parent's religious conviction. Just like in some jurisdiction, whenever this case comes up in Nigeria, it is the stance of this work that the doctor involved should as a matter of urgency inform a state counsel who would in turn approach the nearest family court at the Magistrates' Court within jurisdiction with an application which shall be considered based on the prevailing facts.[50] It is also submitted that the decision to either grant or refuse the application by the court should be influenced by the following facts:

1. What effect would the refusal or grant of the application have on the mother or foetus?
2. Are there viable alternatives to the treatment procedure in contest?
3. What are the reasons adduced by the pregnant mother for refusing the treatment procedure?
4. What is the developmental stage of the foetus (whether the foetus is viable)?
5. Even where the treatment procedure will be beneficial to the foetus, is the treatment procedure inimical to the continued existence of the mother.

In *Raleigh Fitkin-Paul Memorial Hospital v. Anderson,*[51] a pregnant woman refused blood transfusion on religious grounds. The pregnant woman (Willimina Anderson) entered Fitkin Memorial Hospital in the thirty-second week

[44]See the English case of case of *In re S.* [1993] Fam.123, a woman objected to the delivery of her foetus by cesarean section for religious reasons. The woman was thirty-years old, an African immigrant on her third pregnancy. The physicians informed the woman that she and her foetus were in serious danger due to the position of the foetus. The woman understood that she and her fetus would die without the treatment; however, she remained obstinate. The hospital applied to the court for a declaration that would authorize the surgery which was granted after a brief hearing conducted in the judge's chamber. Although, the judge could not find any binding English law, however, he turned to the American case of *In re A.C.*, 573 A.2d 1235 (D.C Cir. 1990) and, ultimately he granted the application.

[45]F. Lagah, "When a Parents Belief Endangers Her Unborn Child" *American Medical Association Journal of Ethics* (2005) 7(5): 375-378. M.L., Moore, 'Their Life is in the Blood: Jehovah's Witnesses, Blood Transfusions and the Courts. *North KY Law Rev*. 1983; 10(2):281-304. L.M., Plastine., "In God we trust": When Parents Refuse Medical Treatment for their Children Based upon their Sincere Religious Beliefs. *Const Law J*. 1993 Spring, 3(1):123-60.

[46]*Ibid.* See also J.K., Levy, Jehovah's Witnesses, Pregnancy, and Blood Transfusions: A Paradigm for the Autonomy Rights of all Pregnant Women. *J Law Med Ethics*. (1999) Summer, 27(2):171-89.

[47]Filkins (n.3)381. See also *In re Baby Boy Doe*, 260 Ill.App.3d 392,623 n.E.2d 326 (1994), where the court refused to grant the hospital's petition to compel the woman to consent to the cesarean section and in effect the court stated that the woman should be allowed to make her own treatment decisions. In *Stallman v. Youngquist*, 125 Ill.2d 267 (1988) the Illinois Supreme Court refused to recognize a tort action against a mother for unintentional infliction of prenatal injuries. The court was of the view that allowing the action would subject a woman's every act to state scrutiny during her pregnancy, which would intrude upon both her right to privacy and her right to control her own life.

[48] (n.26).

[49] (n.26).

[50] Section 150 of the Child's Right Act, 2003 provides for the family court at the Magisterial level.

[51] 42 N.J 421 (N.J 1964).

of her pregnancy. Her physicians told her she would likely hemorrhage during her pregnancy and would therefore require blood transfusion. She was also informed that without the transfusion, she and the unborn child will die. Ms. Anderson responded and informed the hospital that she would not be transfused for the reason that the transfusion will be contrary to her religious conviction as a Jehovah Witness. Fitkin Memorial Hospital then petitioned the Chancery Division of the Superior Court of New Jersey for authority to give blood transfusion to Ms. Anderson, should a transfusion become necessary to save her life or that of her unborn child. The trial court held that the judiciary could not intervene in the case of an adult or in respect to an unborn child. However, the Supreme Court of New Jersey directed an immediate appeal of the hospital's petition because of the potential emergency but the pregnant woman absconded before the appeal could be heard. The parties, nevertheless, prayed the court to decide the issue because of the likelihood of similar situations that may spring up. The Supreme Court of New Jersey held that the law's protection extended to an unborn child and, therefore, a court could validly order a hospital to administer a blood transfusion to a pregnant woman to save her life or the life of her unborn child. In furtherance to its position, the New Jersey Supreme Court relied on *State v. Perricone*,[52] where the New Jersey Court ordered blood transfusion for an infant despite the religious objections of his parent and *Smith v. Brennan*,[53] where permission was granted to a child to sue for injuries negligently inflicted upon him/her prior to birth. It is worthy to clarify that the call for the extension of the rationale in *Esabunor*'s case by this paper does not extend to a non-consenting pregnant woman who after a successful delivery develops complications which requires a blood transfusion. Such non-consenting adult should be allowed to exercise her constitutional right.[54] Thus, the call for extension of the protection provided in the *Esabunor's* case is for an unborn child whose continued existence is tied to the mother's decision to either refuse or accept a particular treatment procedure.

6. Conclusion

This work which embarked on a foray of the attitude of courts from different jurisdictions in striking a balance between the competing rights and interest of a pregnant mother, the foetus and the state also appraised the supposed rights of a foetus to life and the dilemma faced by the Nigerian medical doctors in these situations. Concluding, it is the stance of this work that any attempt to impose any restriction on a woman's guaranteed freedom of privacy and liberty through the creation of foetal rights which obviously may appear potentially hostile to her should at least meet the test of compelling state interest. It must also, be narrowly tailored and the state must prove a high threshold of justification that the law is drafted with precision to achieve its legitimate aim and objectives by the adoption of least drastic means.[55] Although this work concedes that the right of autonomy of a pregnant woman does not diminish simply because she gets pregnant, however the stance taken by this paper is premised on the fact that a viable foetus is also entitled to live and that the pregnant mother owes such foetus an obligation to ensure and permit any medical treatment (invasive and non-invasive) which is geared towards preserving the life of the foetus most especially when such treatment procedure will not be detrimental to the mother. This work further submits that the intervention of the courts/state to order for the application of certain medical procedure in situations where the said procedure is intended to save the life of both the viable foetus and mother should not be discretionary rather absolute most especially where the surviving children of the pregnant woman may be denied of parental support in a situation the woman dies.[56]

[52] 37 N.J 463 (1962).

[53] 31 N.J. 353 (1960).

[54] Can blood transfusion be ordered after a successful delivery to save the life of a mother who had developed post-delivery complications on the grounds that the new born baby will be denied of parental support, love and care if the mother is allowed to die as a result of the failure to transfuse her? An attempt to answer this question was made *In Fosmire v. Nicoleau,* 551 NE 2d 77 (N.Y. 1990). The patient in this case entered Brookhaven Memorial Hospital in Suffolk County, New York in premature labor and her physicians performed a caesarian section and delivered a healthy baby boy. Following the delivery, Ms. Nicoleau began to bleed from the uterus, thus making another surgery necessary. Over the course of her second surgery, Ms. Nicoleau lost a substantial amount of blood requiring replacement by transfusions. Ms. Nicoleau refused any blood transfusion, although her physicians advised her she would die without one. The hospital sought a court order authorsing it to order transfusions on Ms. Nicoleau's behalf, if medically necessary. The superior court issued an order granting the hospital the authority to administer blood transfusions on Ms. Nicolea's behalf. Later that day, Ms. Nicoleau received the first of two transfusions. The patient and her husband appealed to the appellate division to vacate the order. Ms. Nicoleau argued her fears about the medical dangers of blood transfusions, as well as her religious beliefs motivated her refusal to consent to a blood transfusion. She argued that compelling her to submit to a blood transfusion, violated not only her right to religious freedom, but also her right to make her own medical decisions. The court held the State's interest in preventing the loss of parental support was not compelling because the father and extended family agreed to take care of their minor child should Ms. Nicoleau die. See also *In re Matter of Patricia Dubreuil*, 629 So.2d 819 (Fla 1993). J.l., Bamonte, C.,Bierman., 'In re Dubreuil: is an Individual's Right to Refuse a Blood Transfusion Contingent on Parental Status?' *Nova Law Rev*. 1992, 17(1):517-47.

[55]McQuoid-Mason DJ. 'Parents Refusing Blood Transfusions for their Children Solely on Religious Grounds: Who Must Apply for the Court Order?' *S Afr Med J*. 2020, 110(2):100-101.

[56]This stance of the paper is recommended when the chances of survival without the application of the medical procedure in dispute is below 5%.