RIGHT OF A PATIENT TO REFUSE MEDICAL TREATMENT: JUSTIFICATION FOR JUDICIAL INTRUSION

Abstract

It is rather a paradox that while medical treatment is designed for the good health and well-being of the patient, the patient, especially an adult and competent one, reserves the right to refuse medical treatment even though that refusal may seem unwise, foolish or ridiculous or may lead to the death of the patient. This right is founded on the respect for the autonomy of the individual and the right to protect the integrity of his body. These rights are predicated on the fundamental rights of the individual as founded in the Constitution. Therein lies the paradox. This paper discusses the right of a patient to refuse medical treatment and juxtaposes this right with the necessity of judicial intrusion when the occasion presents itself. This is achieved by an expository review of relevant case law and scholarly literature on the subject. The conclusion that is made is that while the patient reserves the right to refuse medical treatment, judicial intervention is permitted in certain specified instances for the preservation of life, protection of innocent third parties or for the maintenance of the ethics and integrity of the medical profession. On the basis of this conclusion, the paper recommends that while judicial intervention is welcome in appropriate cases, it should not override a patient's right to refuse medical treatment in exercise of his constitutional right.

Key words: *Rights, Medical Treatment, Judicial Intrusion, State's Interest.*

1. Introduction

A patient's right to determine his or her treatment is fundamental and reflects the respect for the autonomy of the individual. Even though the principle is founded on constitutional safeguards[1], its historical origins can be traced to the philosophic treatises of the French and English Enlightenment.[2] In order to respect autonomy, self-determination, bodily integrity and freedom from battery, the right to refuse medical treatment which is a corollary to the doctrine of informed consent, must also be respected before any course of treatment can be undertaken. This allows patients to make treatment decisions based on the most available information possible.[3]

The need to obtain the consent of the patient before any medical treatment and the necessity to respect his right to refuse such medical treatment stems from the fact that in medical parlance, every touching of the patient is potentially a battery on that patient and makes the medical practitioner susceptible to some liability. The classic expression of this principle of autonomy is that of Cardozo J in *Schloendorff v Society of New York Hospital*[4] wherein the learned law lord stated thus:

> Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages[5]… This is true except in cases of emergency where the

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[1] *See sections 37 and 38 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)* which provide for the right to privacy of citizens as well as the right to freedom of thought, conscience and religion.

[2] ED Pellegrino and DC Thomasma: "*For the Patient's Good: The Restoration of Beneficence in Health Care",* (New York: Oxford University Press, 1988) P. 37. See also Irwin Kleinman, "The right to refuse treatment: ethical considerations for the competent patient", Can Med Assoc J 1991; Vol. 144 N0. 10, P. 1219 available at www.ncbi.nlm.nih.gov/pmc/articles/PMC1335174/pdf/cmaj00239-0029.pdf (accessed on 13/11/2014).

[3] Ibid.

[4] 105 N.E. 92, (N.Y. 1914)

[5] See also R.B. Standler, *"Legal Right to Refuse Medical Treatment in the USA"* available at http://www.rbs2.comIrrmt.pdf (accessed on 12/1/2014) and J.K. Mason and A McCall Smith, *Law and Medical Ethics,* (2nded; Butterworths, Edinburgh, 1987)) P. 141.

> patient is unconscious and where it is necessary to operate before consent can be obtained.[5]

The corollary of this is that unless the patient's right to refuse medical treatment is respected and honoured, the right to autonomy, privacy and self-determination will degenerate into paternalism: a right to agree with one's medical practitioner in the best interest of the patient.

There is a dearth of judicial decisions in this area of law in Nigeria but in other jurisdictions, courts have declared that both the common law and the Constitution protect an individual's right to refuse medical treatment.[6] On the other hand however, cases continue to occur in which individuals are treated despite their competent objections or withdrawal of consent where earlier given. This enforced medical treatment is usually founded on a court order which considers the necessity of preserving life or protecting innocent third parties. This paper discusses the right of a patient to refuse medical treatment, the rationale for respect of that right and the situations when that right will be curtailed especially on the promptings of a court order. As explained earlier, much reliance is placed on judicial decisions in other jurisdictions for the reason that decisions on such legal issues are virtually non-existent in Nigeria.

2.The Right to Refuse Medical Treatment

As has been noted before, the right to refuse medical treatment is the logical corollary of the doctrine of informed consent which in medical parlance, invests the patient generally with the right not to consent to medical treatment, that is, to refuse treatment. This right is available to the patient irrespective of the opinion of his or her physician and is founded on the recognition by law, of the patient's right to autonomy, self-determination and bodily integrity. It is the right to be free from unwanted bodily intrusions no matter how well-intentioned.[7]

Remarkably, neither the common law nor the Constitution explicitly recognizes a right to refuse medical treatment. And in the absence of an explicit right to refuse, the medical treatment cases have depended mainly on the constitutional rights to privacy, to freedom of thought, conscience and religion, and the common law right of bodily integrity, as legal basis for this right. As the Supreme Court of Nigeria put it in *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo*,[8]

> The Patient's constitutional right to object to medical treatment… is founded on fundamental rights protected by the 1979 Constitution as follows:
> (i) Right to Privacy: section 34;
> (ii) Right to freedom of thought, conscience and religion: section 35.
> All these are preserved in sections 37 and 38 of the 1999 Constitution respectively.

That the patient's consent or the right to refuse medical treatment is paramount has been determined in several cases in the United States of America where this area of law has received considerable judicial attention.[9] However, the paternalist might argue that there are many situations in medical practice in which treatment is justified in the teeth of the patient's objection. Arguing from such a position, that the patient may be unable to appreciate that a particular treatment is in his best interest, the decision of

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[6] G.J. Annas, es alia, "*The Right to Refuse Treatment: A Model Act*", 73 American Journal of Public Health, Vol. 73 N0. 8,1983, P. 918, available at www.ajph.aphapublications.org>doi>pdfplus (accessed on 12/1/2014) see also G.J. Annas and J.E. Densberger, "*Competence to Refuse Medical Treatment: Autonomy vs. Paternalism",* 15 Univ. Toledo Law Review, Winter 1984, P. 56.

[7] *In re Brown*, 478 So.2d 1033, 1040 (Miss. 1985). See also the case *of Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891) wherein the court held that No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

[8] [2001]7 NWLR (Pt. 711)206 at 244,

[9] Supra at 245.

the doctor to impose the treatment is seen as serving the patient's interest in spite of what may turn out to be short term objections. No matter that this is an invasion of the patient's right, a paternalist would hold that this cannot be wrong. For him, a patient will be happier treated than untreated because good health and physical comfort are preferable to ill health and physical discomfort.[10]

Paternalism, no matter how well-intentioned, cannot amount to a defence to the invasion of the patient's privacy and denial of the right to refuse medical treatment. This is so because in a long line of judicial decisions, the courts have refused to override the patient's decision on this point. In the American case of *Natanson v Kline*,[11] a medical malpractice case, the Kansas Supreme Court summarized the point thus:

> Anglo-American law starts with the premise of thorough-going self-determination. It follows that each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery, or other medical treatment. A doctor might well believe that an operation or form of treatment is desirable or necessary but the law does not permit him to substitute his own judgment for that of the patient by any form of artifice or deception.[12]

The principle of the above case is reflected in the opinions in *Sidaway v Board of Governors, Bethlehem Royal Hospital.*[13] At page 643 of the report, Lord Scarman said that "…the courts should not allow medical opinion of what is best for the patient to over-ride the patient's right to decide for himself whether he will submit to the treatment offered him". At page 666 of the same report, Lord Templeman expressed the view that:

> The patient is free to decide whether or not to submit to treatment recommended by the doctor
> …If the doctor making a balanced judgment advises the patient to submit to the operation, the patient is entitled to reject the advice for reasons which are rational or irrational or for no reason.

In *Bouvia v. Superior Court (Glenchur),*[14] which extended the concept of medical treatment to include nourishment, Elizabeth Bouvia was a 28-year-old quadriplegic woman who was suffering from severe cerebral palsy and degenerative arthritis. Except for the ability to move a few fingers of one hand and some slight head and facial movement, she was immobile and in continual excruciating pain. The feeding tube had been inserted against her will, and she wanted it removed. The court approved her decision, holding that a competent patient has the right to refuse any medical treatment including nourishment and hydration.

The following is a case that was debated by a panel of the Royal College of Physicians and Surgeons of Canada:[15]

> A 52-year-old woman had a heart attack and within 4 days showed signs of acute mitral regurgitation. After initially refusing she agreed to undergo cardiac catheterization. The findings led the treating physician to tell her that she would die within days without mitral valve replacement. She

[10] J K Mason & A Mc Call Smith (n.5) p 140
[11] 350 P. 2d 1093, 1104 (Kan 1960)
[12] See also R B Standler, "Legal Right to Refuse Medical Treatment in the USA", (2012) available at www.rbs2.com/rrmt.pdf (accessed on 17 December 2014)
[13][1985]1 All ER 637.
[14] 14 [1986]225 Cal Rptr 297 (App 2d Dist)
[15] A Chouinard; '*Bioethics in the Critical Care Unit: Damned if you do, damned if you don't* (1988)139 Can Med Assoc J 1180-1182. See also Irwin Kleinman (n.2) P 1220.

> refused the operation, and a psychiatrist was called in. He concluded that she had a personality disorder, and although frightened of dying she was probably more frightened of surgery. He felt that she could be declared incompetent, although both he and the treating physician thought she understood the consequences of her action. The patient survived surgery and agreed to a second operation when the replacement valve failed a few months later.

The panel concluded that the physician had acted inappropriately by operating on the patient. Among the arguments made by panel members was that one cannot overrule a competent patient's decision on the chance that the person might be grateful later. The right to refuse medical treatment is thus constant and does not lie within the competence of the medical practitioner to decide. Once the patient was competent while being presented with the decision and in making the decision which he did, the court should not interfere even though his decision might be considered unwise, foolish or ridiculous.[16] The right to refuse medical treatment is now so fundamental that it is not only incorporated in the laws of nations and Constitutions, but it is also encapsulated in international conventions.[17] The right is deeply rooted in history. As the English Philosopher, John Stuart Mill put it: "The only part of the conduct of anyone for which he is amenable to society is that which concerns others…. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign".[18]

Therefore, the consent of a competent adult patient must be obtained before any medical treatment is administered on him. This is so because the right of a competent adult patient to refuse medical treatment is so fundamental that it is given a pride of place by the courts except in emergency situations or on the few occasions when state interests may override the right of the patient to object to treatment.[19] Thus, as a general rule, medical treatment, even of a minor nature, should not proceed unless the doctor has first obtained the patient's consent. The principle of requiring consent applies in the overwhelming majority of cases, but there are certain circumstances in addition to that referred to above, in which a doctor may be entitled to proceed without the patient's consent. Such circumstances include when the patient's balance of mind is disturbed (when the patient is not with his full presence of mind), when the patient is incapable of giving consent by reason of unconsciousness and when the patient is a minor.[20]

3. Refusal of Medical Treatment on Religious Grounds

The principal focus of this section of this paper is the consideration of religious values in refusal of medical treatment. This discussion is on the premise of dealing with a common kind of refusal of medical treatment case: one involving a rational, normal and competent adult. Even though the central value cited in defence of honouring such a patient's refusal is autonomy, many cases do arise in which refusal of medical treatment is predicated on religious beliefs or value.

Many cases that have arisen, and in which courts have been asked to order medical treatment have involved patients who refused to give consent based upon religious beliefs. Some of the most common cases involve those whose religious beliefs forbid blood transfusions or any blood products or by-products.[21] The religious group that immediately comes to mind is the Jehovah's Witnesses whose

[16] *In re Yetter*, 62 Pa. D. & C. 2d 619, 623-624 (com. Pl. June 1973). See also F O Emiri, *Medical Law and Ethics in Nigeria* (Lagos: Malthouse Press Ltd, 2012) P. 300 and j A Dada, *Legal Aspects of Medical Practice in Nigeria* (2nd Ed, Calabar: University of Calabar Press, 2013) P. 213-214.

[17] See for example, *Article 7 of the International covenant on Civil and Political Rights* (ICCPR) which provides that:No one shall be subjected to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent, to medical or scientific experimentation.

[18] Mill, 'On Liberty' in R Hutchins (ed), *Great Books of the Western World*, Vol. 43 (New York: Encyclopedia Britannica, 1952) P. 271.

[19] *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo,* supra at P. 244

[20] J K Masons & A McCall Smith (n.5) P 142

[21] John Kasprak, 'Refusal of Medical Treatment on Religious Grounds', OLR Research Report, February 3, 1999, available at http://www.cga.ct.gov/PS99/rpt/olr/htm/99-R-0180.htm (accessed on 13 November 2014). See also

refusal of blood transfusion, based on scriptural doctrine, is one of the bedrock of their beliefs. But apart from Jehovah's Witnesses, there are other religious groups whose beliefs are in the extreme and even more fundamental than that of the Jehovah's Witnesses. Such religious groups include the Faith Tabernacle Congregation which believes that diseases are caused by the devil and would not accept any form of medical treatment, the Church of Christ, Scientist (a.k.a. Christian Science) who refuse most medical treatments. This denomination promotes healing of physical and mental illness through prayers. They do not generally go to hospitals or seek medical attention rather; they rely on the healing prayers of Christian Scientist Practitioners.[22]

The issue that arises for determination here is: should the medical practitioner honour the patient's objection to medical treatment on religious grounds? The answer is not as simple as it seems. Those who refuse treatment on this ground argue that they have a right to practice their religious beliefs. In Nigeria, this right is protected by the Constitution.[23] And it is not for nothing. It has been argued that a patient's objection to medical treatment on religious grounds has to be respected and honoured because religious beliefs and values are special. The reason religious beliefs and values are special has to do with the pervasive, supremely important integrating and reconciling function that they have in a person's life. In an important sense, religious beliefs fill out the person, and are integral to his personal identity and sense of himself. Not to respect an autonomous adult person's refusal of treatment when that refusal is on religious grounds, is not to respect him as a person at the deepest level, the level at which he has tried to reconcile himself to the limitations of his own human existence, and the level at which he has made the attempt to find out who he is, what his place in the world is, and what the nature of this sorry scheme of things entire is. Not to honour a person's refusal to medical treatment on religious grounds would be a personal insult of a very deep and cutting nature.[24]

The Supreme Court of Nigeria reiterated the specialness of religious beliefs and values when in the case of *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo,*[25]it held that:

> The right to privacy implies a right to protect one's thought, conscience or religious belief and practice from coercive and unjustified intrusion; and, one's body from unauthorized invasion; the right to freedom of thought, conscience or religion implies a right not to be prevented, without lawful justification, from choosing the course of one's life, fashioned on what one believes in, and a right not to be coerced into acting contrary to one's religious belief.

Fay A Rozovsky, *Consent to Treatment: A Practical Guide,* (4th Ed, New York: Aspen Publishers, 2007) P 336 wherein the author discusses the legal validity of respect for religious beliefs but argues, on the strength of the US Supreme Court decision in Reynolds v. US (1879) that the state still reserves the right to impose restrictions on religious practice, and Frank Cranmer, 'Jehovah's Witnesses and Objections to Blood Transfusion', (2014) available at www.lawandrelionuk.com/2014/03/10/jehovas-witnesses-and-objections-to-blood-transfusion/ (accessed on 24 January 2014)

[22] J G Anderson, 'Refusal of Medical Treatment on Religious Grounds, available at www.web.ics.purdue.educ/.../ SOC%205739020-% 20Refusal%20of%20Medical (accessed on 17 February 2016). See also 'Two Large Christian Groups that Oppose Medical Care' available at www.religioustolerance.org/medical2.htm (accessed on 17 February 2014) and 'Small Generally Fundamentalist Christian Groups that Promote Faith Healing. Part 1' available at www.religioustolerance.org/medicals.htm (accessed on 17 February 2016).

[23]*Section 38 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)* 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.

[24] Michael J Wreen, 'Autonomy, Religious Values, and Refusal of Lifesaving Medical Treatment ' (1991)17 *Journal of Medical Ethics,* 124-130, available at www.ncbi.nlm.nih,gov/pmc/articles/PMC1376028/ pdf/jmedth00278-0014.pdf (accessed on 23 January 2014). See also Dan C English, 'Addressing a Patient's Refusal of Care Based on Religious Beliefs' (2007)76(9) Am Fam Physician, 1393-1394, available at www.aafp.org/afp/2007/1101/P1393.html (accessed on 23 January 2014)

[25] Supra at p. 244

In line with this well-established principle of law, the courts have upheld the rights of patients who object to medical treatment on religious grounds. In the Canadian case of *Malette v Shulman*,[26] a Jehovah's Witness patient had been brought into hospital; unconscious following a car injury. The medical practitioner administered blood to her in the course of the treatment notwithstanding that he had been informed that a Medical Alert Card found in her purse stated that she was a Jehovah's Witness and would not consent to blood transfusion under any circumstance. When she recovered, she sued the medical practitioner for disregarding her religious wish. The doctor argued that the clinical procedure was undertaken in the emergency situation which required an urgent lifesaving blood transfusion. In rejecting this argument as being untenable, the court awarded damages against him in the sum of $20,000.00 (Canadian) and held that:

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

Similarly, in the American case of *Stamford Hospital v Vega*,[27] the plaintiff hospital sought an injunction to authorize the administration of a blood transfusion to the patient, a Jehovah's Witness who had withheld consent. The defendant bled heavily following the birth of a healthy baby. The attending physician and other hospital physicians were of the opinion that blood transfusion was essential for her to survive and take care of the baby. The trial court, relying on the state's interests in preserving life and protecting innocent third parties such as the baby, granted the injunction. The defendant's appeal to the Court of Appeal was dismissed prompting her to further appeal to the Connecticut Supreme Court. In allowing the appeal, the court held that:

> The issuance of an injunction authorizing the hospital to administer a blood transfusion to the defendant violated her common law right of bodily self-determination; the hospital's interest in protecting its patients did not extend to the defendant's baby whose health was not in danger, and, as compelling as the hospital's interest in preserving life and upholding the ethical integrity of the medical profession might be, those interests were not sufficient to take priority over the defendant's common law right to bodily integrity as long as she was sufficiently informed of the consequences of her decision, was competent to make such decision, and freely chose to refuse the blood transfusion.[28]

The right of a patient to refuse blood transfusion on religious grounds was also recognized and formed the bedrock of the facts culminating in the Nigerian case of *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo*[29] in which case the court recognized that a consideration of a religious objection to medical treatment involves a balancing of several interests, namely; the constitutionally protected right of the individual not to be coerced into acting contrary to one's religious beliefs and values; the state's interest in public health, safety and welfare of the society; and the maintenance of the ethical integrity and reputation of the medical profession.

Thus, if the refusal of required medical treatment is due to religious belief, to ignore it might violate the free exercise of religion guaranteed in section 38 of the Nigerian Constitution.[30] Yet, reliance on the constitutional guarantee in Nigeria, as on the first amendment in the United State, raises rather than answers the question because that provision has not been held to give absolute freedom to religious

[26] [1990]47 DLR 18
[27] (236 Conn 646 (1996)
[28] See also John Kasprak (n.21)
[29] (n.8)
[30] This is similar to the First Amendment to the United States' Constitution.

practice.[31] In the old case of *Reynolds v United States,*[32] George Reynolds was a member of The Church of Jesus Christ of Latter-day Saints members of who believed that their religious duty required them to marry multiple women. They also believed that the penalty for refusing to practice polygamy was eternal damnation in hell. Reynolds was still married to Mary Ann Tuddenham when he married Amelia Jane Schofield. He was charged with bigamy under *section 5352 of the Morrill Anti-Bigamy Act*[33] which provided as follows:

> Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for a term of not more than five years.

At his trial, Reynolds did not dispute the fact that he had clearly broken the law but argued that his religion required him to marry multiple women. As part of his legal defence, he contended that the law was unconstitutional in that it violated his First Amendment right to free exercise of religion. He was convicted and upon his eventual appeal to the US Supreme Court, the court, in dismissing his appeal, made a distinction between religious belief and religious practice. It held that while religious belief is immune from state regulation, conduct in pursuit of religious belief may be curtailed. Thus, the basic legal premise for compelling medical treatment under this head rests on this distinction between religious beliefs and practices. The decision set a precedent that, while guaranteeing the free exercise of religious beliefs, permits the state in certain circumstances to limit religious practices. Generally therefore, when the state can demonstrate a compelling interest in the preservation or promotion of health, life, safety or the public well-being, religious practices may be curtailed.[34]

4.Non-Consensual Treatment in Children

The first issue to clarify here is: who is a child? In Nigeria, section 277 of the Child's Rights Act[35] provides that a "child" means a person under the age of eighteen years. This means that any person under the age of eighteen years is a child. Is a child capable of giving or withdrawing consent to medical treatment under Nigerian law? There is no clear judicial authority in this area of law yet in Nigeria but it does appear that although the age of majority is 18 years, that is not the age of legal capacity to give consent to medical treatment. In other words, consent to medical examination and treatment is not predicated on the attainment of the age of 18 years. In the case of *Okekearu v Tanko,*[36] the Supreme Court of Nigeria faulted the amputation of the finger of a 14 year old boy without his consent and thereby, debunking the traditional position that parents or guardians make necessary medical decisions on behalf of their children or wards who have not attained the age of majority. Thus, where the minor is mature and sufficiently understands the nature and consequences of the proposed clinical procedure, he is competent to make his medical decisions. This is akin to the position in England under the *Family Law Reform Act of 1969* which provides that a person over 16 years old, though not an adult, may

[31]Kenny F Hegland, 'Unauthorized Rendition of Lifesaving Medical Treatment', (1965)53(3) Cal L Rev, 860 available at http://scholarship.law.berkeley.edu/calfornialawreview/vol53/iss3/4 (accessed on 15 February 2014). See also Sonya Meyers Davis, 'The Refusal of Life-Saving Medical Treatment vs. The State's Interest in the Preservation of Life: A Clarification of the Interests at Stake' (1980)58(1) Wash U L Rev, 85 at 96-97 wherein the author argues that although the first amendment to the United States Constitution protects a competent patient's right to refuse lifesaving medical treatment, the states may yet restrict the patient's fundamental right to freedom of religion to effectuate a "compelling" state interest. This article is also available at: http://opensholarship.wustl.edu/law_lawreview/vol58/iss1/7 (accessed on 15 February 2014)

[32] 98 U S (8 Otto)145 (1878)

[33] Of the Territory of Uttah

[34] Robert E Riggs, 'Reynolds v. United States' in D H Ludlow (ed.), *The Encyclopedia of Mormonism*, (New York: Macmillan Press, 1992) 1229. See also Sonya Meyers Davis (n.31) P 85, Kenney F Hegland (n.31) P 860 and Fay A. Rozovsky (n. 21) PP 440-441.

[35] Cap. C50, Laws of the Federation of Nigeria, 2004.

[36] [2002]15 NWLR (Pt. 791)

validly consent to medical treatment without reference to the parent or guardian.[37] In this regard, the House of Lords in *Gillick v. West Norfolk and Wisbech Area Health Authority*,[38] held that a 16 year old girl is competent to consent to, and receive contraceptive advice and treatment notwithstanding parental objections.

The corollary of the foregoing is that such a child also has the capacity to refuse medical treatment. In that case, the ethical issue that arose is: is it ethical to respect a child patient's decision to refuse treatment if it will be against their best interest? The answer seems to be in the negative. This is so because if a particular act is detrimental to a person, even with that person's consent, then that act cannot be judged to be a good act. Teleological ethics as a parameter in philosophy considers the outcome of an act as the determinant, of whether or not it is good or ethical. In that perspective, an act is considered good or ethical by teleological ethicists if it results in "the greatest good for the greatest number" or in preventing "the greatest amount of suffering for the greatest number."[39] From this perspective, honouring a child patient's decision to refuse medical treatment is thought of as not preventing suffering for the important stakeholders in the situation including the child patient. Thus, teleological ethics seems to advise that a child patient's refusal of medical treatment should be overruled in the best interest of the child.

The issue becomes complex and somewhat perplexing when the child involved is of tender years and incapable of making any decision himself. In such a case, proxy consent will be necessary. It is important to note however that proxy consents are only of true value when the patient has given express authority to another person to give or withhold consent on his behalf, or when the law invests a person with such power as in the relationship between a parent and a child. When such proxy consent is the case, the person vested with the power must use it reasonably otherwise, it may be sufficient justification for a third party to ignore such withholding of consent.

Many cases do arise in which parents refuse to give consent to the medical treatment of their children on religious grounds. Some of the most common involve those whose religious beliefs forbid transfusions of any blood products or by-product. When faced with such a situation, doctors and hospitals have always turned to the courts to try and overcome a parent's refusal to consent to a transfusion, and in most such cases, the courts have almost always acceded to this request on the basis of "the best interest principle."[40] This is so because it has been stated that there has been a redefinition of the role of the parents in respect of control of their children and that it is no longer possible to regard parents as having an almost absolute power over their children. As Lord Fraser put it in *Gillick v West Norfolk and Wisbech Area Hospital Authority*,[41] "parental rights to control a child exist not for the benefit of the parent but for the child" and in *Hewer v Bryant*,[42] Lord Denning MR succinctly made the point when he held that "parental rights start with the right of control and end with little more than advice". Thus, a child may be treated in the circumstances discussed above on the grounds of necessity or on the grounds that the parental power had been exercised unreasonably.

[37] Mason & McCall Smith (no 5) P. 142.
[38] [1986]AC 112.
[39] J S Mill, 'Utilitarianism': Project Gutenberg online edition, available at http://www.gutenberg.org/files/11224/11224-h/11224-h.htm#CHAPTER// (accessed on 15 February 2014). See also C Wolf (ed), *The Repugnant Conclusion: Essays on Population Ethics* (Dordrecht, Holland: Kluwer Academic Publishers, 2004) P 61-80 and T L Bwauchamp, *Philosophical Ethics: An Introduction to Moral Philosophy* (2nd Ed., New York: McGraw Hill, 1991) P. 171.
[40] John Kasprak (no 21). See also S Wooley, 'Children of Jehovah's Witnesses and Adolescent Jehovah's Witnesses: What are their Rights?" (2005) available at http://www.doi:10.1136/adc.2004.067843 (accessed on 15 February 2014) in which the writer cites Jehovah's Witnesses parents who refuse blood products for their children and argues that when their decisions threaten the life of their child unreasonably, parents are no longer considered to be acting in their best interests.
[41] (no 38) at 121
[42][1970]1 QB 357 at 359.

When a child's life is in danger and parental consent is withheld, the medical practitioner is entitled to rely on clinical judgment or seek the order of a court to proceed with the procedure. This scenario played out in the Nigerian case of *Esabunor v Faweya*.[43] In that case, Tega Esabunor was born on 19th April 1997 at the Chevron Clinic Lagos. On 11th May 1997, he fell sick and was taken to the hospital where he was born. After thorough medical examination, baby Tega was found to be suffering from severe infection which led to severe shortage of blood. He was therefore placed on antibiotics but by the morning of 12th May 1997, it was clear that the antibiotics were not working. After being placed on oxygen therapy, the medical personnel at the hospital believed that without blood transfusion, baby Tega would die. His mother was informed of the position but she refused to consent to the transfusion of blood on the ground that she was a Jehovah's Witness and blood transfusion was forbidden by her religion.

Not having any other option, the hospital management informed the police who applied for and obtained an order from the Magistrate's Court authorizing the hospital to do all that was necessary for the protection of the life and health of the baby. The blood transfusion was done and the baby's condition improved so considerably that he was discharged a few days later. The baby's mother brought an application to set aside the order authorizing the blood transfusion and when that application failed, she brought an application at the High Court to quash the order of the Magistrate Court and damages in the total sum of N15 Million for denial of parental right. The application was dismissed and she appealed to the Court of Appeal. In dismissing the appeal, the court held that although a person has a right to choose a course for his or her life, that right is not available to determine whether her son should live or die on account of her religious belief. Citing the case of *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo*,[44] the court further held that the sum total of the right of privacy and of freedom of thought, conscience or religion which an individual has, is that an individual should be left alone to choose a course for his life, unless a clear and compelling overriding state interest justifies the contrary.[45]

What the court in the above case did not mention was the baby's best interest. Now, *section 1 of the Child Rights Act*[46] 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 legislative authority, the best interest of the child shall be primary consideration". It is submitted that had the court adverted its mind to this provision, it would not have had any difficulty in coming to the same decision it did. After all, it would be in the child's best interest to live a healthy life. This principle has been applied in other jurisdictions. In England, in the recent case of *Birmingham Children's NHS Trust v B & C*,[47] A was born on 7 February 2014 with complex cardiac defects including a hole in the heart. A successful interim procedure was performed to improve his oxygen levels while he waited for an operation scheduled for 14 February 2014. A's parents, who are Jehovah's Witnesses consented to their child undergoing the recommended surgery but because of their religious beliefs, could not consent to him receiving blood during or subsequent to the surgery. The medical opinion of the medical staff of the hospital was that if the procedure was not carried out, A was unlikely to survive beyond babyhood, that though the risks of the proposed surgery were relatively low, it could not be done without blood transfusion. In considering the application, the court, on the basis of A's welfare best interest, gave permission for A to undergo blood transfusions during the surgery notwithstanding his parent's objections on religious grounds.

[43][2008]12 NWLR (Pt. 1102)794.
[44] (no. 8)
[45]At page 810 of the report.
[46] (n. 35)
[47] [2014] EWHC 531 (Fam); cited in Frank Cranmer, 'Jehovah's Witnesses and objections to blood transfusion" (2014) available at www.lawandreligionuk.com/2014/03/10/jehovas-witnesses-and-objections-to-blood-transfusion/ (accessed on 16 March 2014). See also Barbra Dozier, 'Child Refusing Treatment: Module on Management, Ethics and Law' (2012) available at http://barbradozier.wordpress.com/2012/04/13/chil-refusing-treatment-module-on-management-ethics-and-law/ (accessed on 16 March 2014).

Similarly, in *A C v. Manitoba (Director of Child and Family Services)*[48] A C, a child of 14 years was apprehended under the *Manitoba Child and Family Services Act* (which provides that the wishes of the child over 16 years should be recognized but under that age, the courts would act in the child's best interests in imposing treatment deemed necessary) and forced to receive a medically necessary blood transfusion against her wishes pursuant to an order of the court. AC and her parents, all devout Jehovah's Witnesses, appealed the court order but the appeal was dismissed. They further appealed to the Supreme Court of Canada which in dismissing the appeal, held that compelling/forcing a 14 year old to undergo necessary medical treatment in the circumstances of this case, was not a violation of her rights under the *Canadian Charter of Rights and Freedom*.[49]

From the foregoing discussion, it is crystal clear that in virtually all cases involving children, where parental consent is withheld especially on religious grounds, medical practitioners have always relied on clinical judgment to embark on the procedure required. The courts have also acceded to requests to grant an order to proceed with the medically necessary procedure in the child's welfare best interest.

5.Justification for Judicial Intrusion

As has been shown in this article, an integral part of human autonomy, self-determination and bodily integrity is the right to make choices pertaining to one's health, including the right to refuse lifesaving medical treatment. As has also been shown, this right of refusal extends to all medical choices and the weight of authority on this point is that a competent adult has the right to make choices to refuse medical treatment, however irrational or foolish that refusal may be. This notion is predicated on the common law right of self-determination, by which competent adults are generally permitted to refuse medical treatment even at the risk of death. And since nonconsensual medical treatment may make medical practitioners and hospitals liable for assault and battery (except in emergency cases in which the patient is unconscious), the issue of an individual's refusal to consent to lifesaving medical treatment is invariably taken to the courts for resolution. The Court of Appeal of Nigeria stated as much when in *Esabunor v Faweya*,*[50]* citing the Supreme Court of Nigeria decision in *Medical and Dental Practitioners Disciplinary Tribuna v Okonkwo*,[51] it held that:

> If a decision to override the decision of a competent adult patient not to submit to blood transfusion or medical treatment on religious grounds is to be taken on the grounds of public interest or recognized interest of others, such as dependent minor children, it is to be taken by the courts.

The corollary of this is that the right to refuse medical treatment has never been absolute. Courts have performed a balancing of several interests including the constitutionally protected right of the individual, the state's interest in public health, safety and welfare of society; and the interest of the state in maintaining the ethical integrity of the medical profession.[52] The state interests discussed in this paper as constituting the justification for judicial intrusion into the right of a patient to refuse medical treatment include preservation of life, protection of third party interests and maintaining the ethical integrity of the medical profession. As will be shown, courts engage in different value assessments of

[48][2009] SCC 30. Decided on 26 June 2009. See also 'The Canadian Bioethics Companion' (an online textbook for Canadian ethicist and health care workers) Chapter 2: Caring for Patients, available at www.Canadianbioethicscompanion.ca/the-canadian-bioethics-companion/chapter-2-the-doctor-patient-relationship/ (accessed on 24 January 2016).

[49] See E B Giblin& C M Scarpa, 'When Patients Refuse Treatment' (2012) available at www.aaos.org/AAosNow/2012 /Apr/managing/managing6/?ssoPc=1 (accessed on 16 March 2014)

[50] (no. 43) P. 810-811

[51] (no. 8))

[52] (no. 8) P 244. See also John Alan Cohan, "Judicial Enforcement of Lifesaving Treatment for Unwilling Patients', (2005) available at Http://dspace.creighton.educ/xmlui/bitstream/handle/10504/40568/28_39 (reightonLRev849 (2005-2006).pdf?sequence+1 (accessed on 23 March 2014) in which the author enumerated four state interests which the courts balance against the patient's right of bodily autonomy to include: (1) Preservation of life (2) Prevention of suicide, (3) Protection of third party interests, and (4) maintaining the ethical integrity of the medical profession.

these state interests, with some courts holding that the right of autonomy is almost absolute, so that it will be rare for the court to authorize medical treatment against a patient's will. At the other end of the spectrum are cases that emphasize the state's interest in preserving life and protecting the interests of third parties to justify overriding the patient's refusal to consent, particularly if the treatment is relatively noninvasive, such as a blood transfusion.

5.1Preservation of Life.

In most jurisdictions of the world, the preservation of human life is the primary purpose of government. This means that the state has a clear interest in preserving the lives of those who desire to live.[53] In line with this governmental obligation, apart from the assurance of the right to life in section 33, section 14(2)(b) of the Constitution of the Federal Republic of Nigeria[54] provides that the security and welfare of the people shall be the primary purpose of government. This means that the state's interest in preserving the lives of its citizens is commonly considered most significant. In this regard, while fully recognizing the right of a competent adult to refuse medical treatment, the court may, should the need arise, as in where the health and safety of society is under threat, make an order overriding the patient's autonomy to decide what happens to his body.[55]

The basis of this judicial intrusion is in pursuance of the interest of the state in the preservation of the lives of its citizens. But the basis of the intrusion must be balanced against the constitutional and inalignable right of the patient to self-determination and bodily integrity so that except there is an overwhelming reason to override the basic right of the patient, this intrusion cannot be justified. In this regard, the California Supreme Court in the case of *Thor v Superior Court*[56] held that:

> The state's paramount concern is the preservation of life, which embraces two separate but related aspects: an interest in preserving the life of the particular patient and an interest in preserving the sanctity of all life. In this context, however, these considerations can only assert themselves at the expense of self-determination and bodily integrity… when disease or physical disability renders normal health and vitality impossible.[57]

Thus, while courts are usually vigilant to protect the right of competent adult patients to refuse medical treatment, they often enough, in deserving cases, intervene at the request of attending physicians and hospitals, based on evidence of a compelling state interest in the preservation of life, to curtail this right to self-determination and bodily integrity. This is sufficient justification for judicial intrusion in the context of this paper.[58]

5.2Protection of Innocent Third Parties

A second interest of considerable magnitude which provides justification for judicial intrusion is the state interest in the protection of innocent third parties particularly when minor children are involved. Many cases, especially in the American jurisdiction, have shown great respect for the state's interest in

[53] Sonya Meyers Davis (no. 31) P. 103 wherein the author states that the Declaration of Independence (in America) reflects the view that protecting life is a primary purpose of government, and protecting life remains a major state function.

[54] 1999 (as amended)

[55] *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo* (no. 8) P. 241.

[56] 855 P. 2d 375, 383 (Cal. 1993).

[57] See also *Superintendent of Belchertown State School v Saikewicz*, 370 N.E. 2d 417, 426 (Mass. 1977) where the Massachusetts Supreme Court explained that the recognition of such state interests does not necessarily override the patient's right to self-determination except where there is convincing circumstances to hold that view.

[58] Fay A Rozovsky (no. 21) P. 338. See also J A Valenti, 'Circumstances when Medical Treatment may be Forcibly Imposed Despite a Patient's Explicit Refusal: A Comprehensive Analysis of Pennsylvania Law', (2012) Widener Law Review, Vol. 18 No. 27, PP 27-52, available at : widenerlawreview.org/files/2012/06/02-VALENTI-FINAL-PP.27-52pdf (accessed on 16 March 2016) in which the author discusses situations justifying judicial intrusion on the right of an adult patient to refuse medical treatment on the basis of state interest to preserve life in the state of Pennsylvania.

ensuring parental support of minor children and dependents. The state is interested in the welfare of minor children and dependents who would suffer from the emotional and financial damage which may occur as a result of the decision of a competent adult to refuse lifesaving or life-prolonging treatment. In *Holmes v Silver Cross Hosp of Joliet, III*.,[59] the court held that while the state's interest in preserving an individual's life was not sufficient, by itself, to outweigh the individual's interest in the exercise of free choice, the possible impact on minor children would be a factor which might have a critical effect on the outcome of the balancing process.

Perhaps, the most frequently cited case in the American jurisdiction in which a court ordered a competent adult to submit to a medical procedure on grounds of the state's interest in the protection of innocent third parties, is the case of *Application of President & Directors of Georgetown College*.[60] In that case, the patient, aged twenty-five and the mother of a seven-month-old-child, was taken to the hospital for emergency care after having lost two thirds of her body blood from a ruptured ulcer, she and her husband were Jehovah's Witnesses and they refused to consent to the needed blood transfusion. When death without a transfusion became imminent, the hospital applied to the district court for permission to administer blood but this was denied. The hospital then appealed to the Circuit Court judge who gave permission for the transfusion because of a mother's "responsibility to the community to care for her infant." In coming to this decision, the court stated that:

> The state, as *parens patriae*, will not allow a parent to abandon a child, and so it should not allow this most ultimate of voluntary abandonments. The patient had a responsibility to the community to care for her infant. Thus, the people had an interest in preserving the life of this mother.[61]

In 1987, the New Jersey Supreme Court summarized the law succinctly thus:

> When courts refuse to allow a competent patient to decline life-sustaining treatment, it is almost always because of the state's interest in protecting innocent third parties who would be harmed by the patient's decision. For example, courts have required competent adults to undergo medical procedures against their will if necessary to protect the public health,… or to prevent the emotional and financial abandonment of the patient's minor children.[62]

Such is the justification for this judicial intrusion that even when the refusal to undergo a medical procedure is on religious grounds especially with regard to minor children, the courts have not hesitated one bit to declare in favour of the patient's dependents or innocent third parties. In *Prince v. Massachusetts*,[63] the U.S. Supreme Court in this regard, made the point when it stated that:

> Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice themselves.[64]

The Court of Appeal of Nigeria echoed the same sentiment in *Esabunor v Faweya*[65] when it stated that although a person has a right to choose a course for his or her life, that right is not available to determine whether her son should live or die on account of her religious belief. The net effect of the foregoing

[59]340 F. Supp. 125 (D.III. 1972).
[60] 331 F. 2d 1000, 1008 (D.C.Cir), cert. denied, 377 U.S. 978, 84 S.Ct. 1883, 12 L.Ed. 2d 746 (1964).
[61]At Page 1007.
[62]*Matter of Farrel*, 529 A. 2d 404, 412 (N.J. 1987). See also *Holmes v. Silver Cross Hospital* (no. 59) at P. 130 where the court noted that a father can similarly be compelled to undergo a blood transfusion if his refusal would devastate his dependents, and *John F. Kennedy Memorial Hosp. v Heston*, 58 N.J. 576, 279 A. 2d 670 (1971) where the court permitted blood transfusion for a pregnant woman in the interest of her child.
[63] 321 U.S. 158 (1944)
[64]At Page 166, 170 of the report.
[65] (no 43) P. 810

postulation is that the courts would, for the purpose of protecting innocent third parties, make an order permitting the administration of medical procedure against the will of a competent adult patient.

5.3. Maintaining the Ethical Integrity of the Medical Profession

Another point of the state's interest on the basis of which judicial intrusion may be justified is the maintenance of the ethical integrity of the medical profession. Although some courts may have shown some concern for protecting the interest of the medical profession, this cannot override a patient's right to refuse treatment. The state may have a valid interest in protecting doctors from civil or criminal liability by giving them free hands in the treatment and care of their patients, this has never been a valid ground to justify judicial intrusion of the constitutional right to self-determination and bodily integrity of the patient to refuse medical treatment.[66]

No doubt, the state has interest in the maintenance of the ethical integrity of the medical profession as well as allowing hospitals the full opportunity and latent freedom to care for patients under their control. This interest was asserted as a limitation on a competent patient's right to refuse medical treatment. It is submitted that this state interest is not particularly threatened by permitting competent patients to refuse life-sustaining medical treatment. As such, it would not constitute a valid intrusion to override the right of a competent adult patient to decide what treatment to refuse. After all, medical ethics do not require medical intervention in disease at all costs. It is therefore not necessary to deny a right of self-determination to a patient in order to recognize the interests of doctors, hospitals and medical personnel in attendance on the patient. This is so because the recognition of the right to refuse necessary medical treatment in appropriate circumstances is consistent with existing medical mores, and such a doctrine does not threaten the integrity of the medical profession. This is why most courts have jettisoned this proposition. Indeed, it has been held that if the patient's right to informed consent is to have any meaning at all, it must be accorded respect even when it conflicts with the advice of the doctor or the values of the medical profession as a whole.[67]

6.Conclusion

Undoubtedly, from available literature including case law and statute, it is the law that the right to privacy, autonomy and self-determination includes the right of a competent adult patient to refuse any form of medical treatment even though that refusal may seem unwise, foolish or ridiculous. As was shown, in several cases, in line with the principle of autonomy and bodily integrity, the courts have refused to override the competent adult patient's decision to refuse medical treatment. In others, they have found ways, (for example, for the reasons of preservation of life, or for the protection of innocent third parties, or for the maintenance of the ethical integrity of the medical profession), round the problem of the paramountcy of the patient's consent. What is important is that in no case has the decision to override the patient's decision been left with the medical practitioner or the hospital. The resolution of that issue has always been referred to the courts for adjudication.

This is the conclusion that is made in this paper: while the competent adult patient retains the right to refuse medical treatment for any reason or no reason at all, judicial intervention is permitted on the few occasions when valid state interests conflict with the patient's autonomy. In view of the foregoing, it is recommended that while judicial intrusion is necessary and welcome in appropriate cases, it should not override a patient's right to refuse medical treatment in exercise of his or her constitutional right. It is further recommended for purposes of clarity, that there is need to make available, legal remedies to make objecting competent adult patients, in appropriate cases, submit to life-saving medical treatment. The availability of these remedies would settle the responsibility of deciding whether or not the decision of the patient should be overridden. This decision would, in the circumstances, shift to the courts which are the proper forum for such decisions. The legislature is therefore required to fill that gap.

[66] Sonya Meyers Davis (no 31) P. 102.

[67] *Matter of Conroy*, 486. A. 2d 1209, 1224-1225 (N.J. 1985). See also Ronald B Standler, (no 5) P. 30.