JUDICIAL BALACING OF PARENTAL OBJECTION TO MEDICAL TREATMENT ON THE BASIS OF RELIGIOUS BELEIFS AND CHILDREN RIGHT TO LIFE IN NIGERIA

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Abstract: Children being vulnerable, have special protection under the law through their parents or guardian who are responsible for them; and make decisions for them because they lack legal capacity. One of these decisions a parent/guardian makes is determining the religion of a child. Once the parent/guardian chooses the religion of the child, the child may become bound by its practices throughout childhood. While the right of parents to determine the religion of their children is recognised by domestic, regional and international laws, the way courts in Nigeria treat this recognition suggests that the right is not absolute. This paper adopts the doctrinal methodology in interrogating the extent to which Nigerian Courts permit the observation by a child of the religious practices of his/her parent in relation to submission to medical treatment in order to protect the child's right to life. This paper argues that law and morality are media of social control but have their convergence and divergence. It further argues that sanctity of human life which for many forbids suicide, requires that even adults should not be allowed to object to medical treatment which refusal may result in death which can be seen as "disguised suicide." These authors examined the Supreme Court decision in Medical Dental Practitioners Disciplinary Council v. Okonkwo and found that; Nigerian Courts recognise parent right to choose their children religion and practices however, any religious practice prejudicial to the child based on the "best interest" principle provided under the Child Right Act and its States equivalent will be jettisoned. It examines the practice in Britain and Canada and draw lessons for Nigeria. This paper recommends public enlightenment, prohibition of harmful religious beliefs such as objection to life-saving medical procedure by parents for minors as means of balancing parents/guardian right to choose their children religious beliefs and preservation of the children right to life.

Keywords: Child protection, right to religion, right to life, objection to medical treatment, law, Nigeria.

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1. Introduction

In Nigeria, freedom of religion and conscience is recognised and protected under domestic, regional and international law.[3] Ogbu (2013, p. 298) opined that every person, irrespective of creed, colour, sex or any other distinguishing feature, has the right to hold a religious belief and to propagate same while respecting the right of others to do so. This right is exercisable by every adult. For children, they are generally treated as minors who are incapable of personally exerting their rights. Thus, the parent or anyone *in loco parentis* is charged with the responsibility of exercising the rights of a child who is under their custody. Dada (2013, p. 223) has asserted that it is not unexpected that every child naturally subscribes to the religion and religious practices of his/her parent or guardian.

Emiri (2012, p.304) has pointed out that parents as care givers and protectors of the rights of their children, are expected to adopt measures that would ensure the health and safety of their children including subscription to medical treatment. However, some parents due to their religious beliefs and adherence may object to certain kind of medical treatment for themselves and their children. The Jehovah Witness (JW) sect believes and propagates the belief that medical treatment that has to do with blood transfusion and ancillary treatments, is against their religious beliefs as they cite biblical phrase. Based on the foregoing, Osuagwu (2010, p.1) has contended that even under life treating circumstance, where blood transfusion is necessary medical procedure to save their life, they object to it asserting their right to freedom of religion and conscience protected under domestic, regional and international law.

Nigerian courts recognises that everyone has the right to freedom of religion and conscience as enshrined in the 1999 Constitution. However, the question is, should the court allow the right of an adult to object to medical treatment on the basis of his/her religious belief to be extended to a child (under life-threatening situations) who is a minor and incapable of deciding for himself/herself bearing in mind that upon attainment of majority, may hold a contrary view to that of the parent/guardian? To what extent can a child be bound by the religious beliefs and practices of his/her parent/guardian with regards to medical treatment? Addressing these issues is the main concern of this paper.

This paper is divided into seven sections. Section one is the general introduction. Section two discusses the concept of child's right by highlighting the various rights of a child in Nigeria with emphasis on the right to life, religion and welfare. Section three examines the legal framework for the protection of child's right in Nigeria from domestic,

[3] See Section 39 of the 1999 Constitution of the Federal Republic of Nigeria Cap. C23 Laws of the Federation of Nigeria (LFN) 2004; Section 7(1) of the Lagos State of Nigeria Child's Right Law, 2007; Section 7(1) of Nigeria's Child's Right Act, 2003; Article 14 of the Universal Declaration of Human Rights, 1948; Article 8 of the African Charter on Human and Peoples Right, 1988, Article 9(1) of Africa Union Charter on the Rights and Welfare of the Child, Article 14 of the United Nation Convention on the Right of the Child.

regional and international perspectives. Section four juxtaposes judicial authority, of the Supreme Court on the right to object to medical treatment based on religious beliefs by adult and by parents/guardians for their children/wards. Section five examines the best interest of the child principle as the determinant of the position taken by the Supreme Court in the cases herein reviewed. Section six examine medical consent in other jurisdictions in relations to adult and children in comparison to Nigeria. Section seven contains the findings, conclusion and recommendations.

2. The Concept of Child's Right Under Nigerian Law

From the outset, while this paper concentrates on appraising the attitude of Nigerian courts in balancing the right of parents/guardians to object to medical treatment on behalf of their children/wards and the protection of the right to life of such children. Thus, for proper understanding; it is necessary to examine the concept of child rights although passively. The concept of child right takes its roots from the general concept of human right enshrined in various human rights legal instruments from the Magna Carter to particularly the United Nations Universal Declaration of Human Rights, 1948. Reynaer, Desmet. Lembrechts, and Vandenhole (2020) have opined that children rights are understood as fundamental claims for the realization of social justice and human dignity for children. Children's rights are fundamental: not all norms relating to or relevant for children can or should be characterised as children's rights. Just like human rights, more generally, children's rights originate from the quest for human dignity and social justice. However, the concrete meaning of these notions will be different for different people.

Historians have argued that childhood, to a large extent, is a social construct.[4] Kosher, Ben-Arieh and Hendelsman (2016, pp.9-15) argued that the concept of childhood emerged relatively recently, in the past 400 to 600 years. Roche (1988, 5) is of the opinion that in the Middle Ages, the notion of childhood did not exist. Children dressed in the same manner as adults and they engaged in the same pastimes. Scott (1993, 229) states that their education was carried out by means of apprenticeship during which they worked side by side with adults. It was not until the Renaissance and the Reformation that the concept of childhood developed Roche (1988, 5). During this period, children were perceived as innocent and weak. Scott (1993, p. 229) opined that they (i.e. children) were regarded as needing proper and adequate discipline and assistance in order to develop into responsible adults. Begley (1994, pp. 12) state that from the 1500s, children were not considered to have independent wills and, consequently, young persons were in total subjection to their parents. In the Africa, childhood is a concept that is of paramount interest and the recognition of the place of a child as part of the family and larger society is of antiquity. Onwauchi, (1972, pp. 241-247) contends that while the child is recognised as a person, he is dependant and his legal rights and obligations are traced to and exercised by his parents/guardian. According to Agya, (2010, pp. 104-115) the

[4] UKEssays. (November 2018). The Concept of Child/Childhood. Retrieved from https://www.ukessays.com/essays/young-people/the-concept-of-child-childhood.php?vref=1(Accessed 16 February 2022)

foregoing position does not mean that the rights of a child are neither recognised nor protected in the African traditional society, because children are generally considered as a vulnerable group and are given special protection and attention above other members of the society. The United Nations Convention on the Rights of the Child (UNCRC) 1959 builds upon rights that had been set forth in a League of Nations Declaration of 1924. It is apposite to note that the League of Nations was the predecessor organisation to the United Nations. The Preamble to the League of Nations Declaration (LND) provides that children need "special safeguards and care, including appropriate legal protection, before as well as after birth." This reiterates the 1924 Declaration's pledge that "mankind owes to the child the best it has to give."[5]

According to Freeman (1994, p. 320) it was only in the latter part of the twentieth century, and specifically the 1970s and early 1980s that the concept of children's rights emerged. Bernard, Ward and Knoppers (1992-1993, pp.122-123) assert that during this period, there was recognition that children have interests, perhaps even rights that need to be considered distinctly and separately from those of adults, and particularly their parents. Since this period up to the 1989 when the United Nations Child's Right Convention was adopted, the issue of child's right has become a universal phenomenon.

In Nigeria, both governmental and non-governmental organizations are involved in the propagation of child's rights. In 2003, the Federal Government of Nigeria (FGN) enacted the Child's Right Act which many States have domesticated as a comprehensive legislation on child's rights promotion and protection. Despite the enactment of this law and the domestication of same buy most States in Nigeria and Nigeria's obligation under various international human rights treaties dealing with child's rights, the challenge of violation of children's rights subsists. Uncontrovertibly, the issue is not with the laws but their implementation. They are mainly observed in breach than in compliance. Kabo (2018, pp.35-56) argued that other factors aside lack of political will to enforce these laws are the quagmires of tradition and religious barriers. Particularly in the Northern regions of Nigeria where Islam in various shades and forms is being practiced, practices regarded as child abuse and violations are customarily and religiously encouraged as captured by Ladan (2007, p.1). For instance, marriage of underage children who are made to consummate the marriage and even procreate is rampant, it it so notwithstanding the fact that this practice is considered a form of child abuse as observed by Mohammed (2015, p.108). Religion has been the main factor militating against the domestication of the Child's Right Act (CRA) by most Northern States as most of the provisions are at loggerhead with certain Islamic practices. Nwonu and Oyakhiromen (2014, pp. 120-126) have argued to the effect that in some rural areas in the South and Eastern regions of Nigeria, child betrothal is still being practiced despite its prohibition by the CRA. The justification is that it is a long standing practice or the *volgiest* of the people despite its obvious incompatibility with existing law and its repugnancy to natural justice, equity and good conscience as argued by Akpan (2003, pp.70-76). As to who is regarded as a child,

[5] Available online at https://www.loc.gov/law/help/child-rights/international-law.php [accessed 6 May, 2020].

section 277 of the Child's Rights Act and 262 of the Child's Right Law of Lagos State, 2007 provides that a child is a person under the age of eighteen years.

Esiri and Ejechi (2006, 203) argued that in most cities in Nigeria, such as, Lagos, Port-Harcourt, Ibadan, Asaba, Onitsha, Calabar, Kano and Abuja, several children loiter the streets hawking various items under rain and sun to commuters during school hours. Folashade and Iroye (2015, p.485) opined that it is needless to argue that these children are exposed to various vices while on the streets, some have become victims of sexual molestation, accident victims while others have become objects of ritual killings. The importance of protecting the rights of children cannot be overemphasized. Therefore, nothing irrespective of its eminence can constitute a justifiable barrier especially in this 21st century when human rights takes centre stage in all human endeavours.

3. The Legal Framework for Protecting Child's Right to Life, Religion and Welfare In Nigeria

This section examines both domestic, regional and international legal instruments protecting child rights in Nigeria with emphasis on right to life and religion. While this section focuses on examining laws relating to the protection of the right to life, religion and welfare of a child, it is important to note that, it is inescapable not to make mention and interrogate (even if passively) other child's rights that are intrinsic to the aforementioned ones bearing in mind the indivisibility of human rights (children's right too). This is done without taking the focus off the rights (i.e. right to life, religion and welfare) which are the primary object of discussion herein. Chapter 4 of the 1999 Constitution of the Federal Republic of Nigeria (herein simply referred to as 19999 CFRN) contains a bundle of rights applicable to all persons irrespective of age and sex. By virtue of section 33 and 34 of the 1999 CFRN, a child has right to life and respect to the dignity of his/her human person. As a result, no one can intentionally deprive a child of his/her life and the law insulate children depending on their age from criminal liability all in a bid to buttress their right to life. For instance, the Criminal Code[6] per section 30 thereof, makes a child under the age of seven incapable of committing an offence under Nigeria's criminal jurisprudence and renders a male child below the age of 12years incapable of having carnal knowledge. Taiwo (2011, p.35) have affirmed the foregoing presumption. These provision of the Criminal Code is an irrefutable presumption of law hence, in a criminal proceedings where a child below 7yrs is being tried, the Court must come to the conclusion that no evidence can be admitted to the contrary same thing applies where a child is being tried for the offence of carnal knowledge. This protection is absolute and untrammelled once it is established that the child in question falls within the prescribed age. The Child's Right Act contains several rights pertaining to a child in Nigeria but we will limit out discussions to the rights being examined (i.e. right to life, religion and welfare) while merely making mention of others.[7] Before further adumbration, a preliminary point must be noted that, section 3 of the CRA provides the paramount consideration to be taken by anyone in relation to a child. This section is to the effect that in every or any

[6] Criminal Code Act Cap. C38 Laws of the Federation of Nigeria, 2004.
[7] Child's Right Act, CAP. C50 Laws of the Federation of Nigeria 2004.

action concerning a child, whether taken by an individual, public or private body, institution , court of law or administrative or legislative authority, the best interest of the child shall be the primary consideration.[8] Under the CRA, a child has the right to necessary protection and care for his/her well-being.[9] This implies that the parent/guardian of the child as well as the society as a whole, has a duty to provide the child with things that will support the well fare and or wellbeing of the child, these things will basically include shelter, food, clothing, education and safety. All these needs affects the right to life of a child whether directly or indirectly beside, indivisibility of human rights is a golden thread that is gaining prominence in agitation for the protection of human rights including children's rights The CRA makes applicable the provisions of chapter 4 of the 1999 CFRN to all children.[10] To this end, rights such as privacy, dignity of human person, religion and conscience, freedom from discrimination, etc. contained under Chapter 4 of the 1999 CFRN all inure to a child.[11] Going by the foregoing chapter of the 1999 CFRN, every child has the right to freedom of thought, conscience and religion; parents (and where applicable, legal guardians) are to provide guidance and direction in the exercise of these rights having due regard to the evolving capacities and best interest of the child.[12] Section 9 of the CRA provides that every child is entitled to respect for the dignity of his person, and accordingly, no child shall be, subjected to physical, mental or emotional injury, abuse, neglect or maltreatment, including sexual abuse.[13] The child also has right to leisure, recreation and cultural activities as well as right to parental care, protection and maintenance.[14] Kabo (2021, pp. 131-138) pointed out that section 29 of the CRA makes the prohibitive provisions of sections 68, 59, 60, 61, 62 and 63 of the labour Act[15] which prohibits child labour, night work by children applicable *muntatis mutandi* as these prohibited activities exposes a child to avoidable danger which threatens the child's life and welfare. The CRA further prohibits buying, selling, hiring or otherwise dealing in children for the purpose of hawking or begging for alms or prostitution, and a person who contravenes this provision is liable on conviction to ten year imprisonment term.[16] With regard to health, every child is entitled to enjoy the best attainable state of physical, mental and spiritual health hence, any action that is inimical to the health of a child predicated on any factor, including parents or guardians religious belief, will be considered not to be in the best interest of a child.[17] The Trafficking in Persons (Prohibition) Law Enforcement and Administration Act[18] prohibits the procurement, recruitment, use or offer for use of any person under the age of 18 years for the production of pornography or for pornographic performances.[19] Anyone who does this is liable to imprisonment of not less

[8] *Ibid*. S. 1.
[9] *Ibid*. S. 2.
[10] *Ibid*. S. 3.
[11] *Ibid*. Ss. 9, 10, 11.
[12] Child's Right Act, 2003.S. 7.
[13] *Ibid* S. 9.
[14] *Ibid*. 12 and 14.
[15] Labour Act Cap. L1 Laws of the Federation of Nigeria 2004.
[16] Child's Right Act, 2003.S. 30.
[17] S. 13 Child's Right Act, 2003.
[18] Trafficking in Persons (Prohibition) Law Enforcement and Administration Act Cap. T23 Laws of the Federation of Nigeria 2004.
[19] *Ibid*. S. 17.

than seven years and a fine of not less than N 1, 000,000 (One Million Naira). A person who promotes or facilitate the foreign travel of any person less than 18years for prostitution or such activities, upon conviction, is liable to imprisonment of not less than seven years and a fine of not less than N 1, 000,000[20] (One Million Naira). These prohibitions is to guarantee the welfare of a child as well as safeguard their right to life from infringement. Also, the Compulsory, Free Universal Basic Education Act[21] provides every child with the right to compulsory, free basic education and places a responsibility on all parents to ensure that their children attend and complete primary education and junior secondary school.[22] the rights examined under the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act and Compulsory, Free Universal Basic Education Act are intrinsic to a child's right to life or how does one explain that a child who is exposed to any of the menaces under these law has his or her right to life protected? To argue that where a child's right to life is being recognised and protected while the child is exposed to any of these menaces is to reduce or equate right to live to merely being alive irrespective of the mental, psychological, emotional and physical wellbeing of the child which are the actual determinants.

At the international plane, the preamble to the Universal Declaration of Human Rights makes the provisions of the Declaration applicable to all humans, children inclusive. [23] Thus, the various rights guaranteed there are applicable to children. Articles 18 and 26 guarantee right to freedom of religion of all persons including children as well as right to education which should be free at least at the elementary stage. The United Nations Convention on the Rights of the Child[24] which Nigeria ratified in 1991stipulates that; any action taken by the court, administrative or legislative body or an individual, the best interest of the child shall be the paramount consideration. A child has the right to enjoy the highest attainable standard of health and to facilities for treatment of illness and rehabilitation of health.[25] The Convention also recognises the inherent right to life of every child and enjoins all States to guarantee same by ensuring the survival and development of children.[26] Under the Convention, State parties recognises the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.[27] It enjoins all State parties to take appropriate measures to protect children from all forms of exploitation prejudicial to any aspects of the child's welfare. The Convention accords to every child the right to freedom of thoughts, conscience and religion which exercise is to be supervised by the parent or legal guardian of the children having regard to the evolving capacities of the child.[28] The African Charter on Human and People's Rights (ACHPR)[29]

[20] *Ibid*. S 18.
[21] Compulsory, Free Universal Basic Education Act, Cap. C52 Laws of the Federation of Nigeria 2004.
[22] *Ibid.* s .2 and 3.
[23] Universal Declaration of Human Rights, 1948.
[24] United Nations Convention on the Rights of the Child.
[25] *Ibid*. Art. 14
[26] *Ibid*. Art. 7.
[27] *Ibid*. Art. 15.
[28] *Ibid*. Ar. 9.
[29] African Charter on Human and People's Rights 1981.

which was ratified by Nigeria in 1983 is a regional human rights legal instrument that deals with the protection of the right to life, religion, and welfare of children as far as Nigeria is concerned.[30] Articles 4, 5 and 6 of the ACHPRs guarantees the right to freedom of conscience, the profession and free practice of religion by a child as well as right to life and respect for the integrity of the person of every child.[31] Also, the African Union Charter on the Right and Welfare of the Child adopted in 1990 but ratified in 1999 by Nigeria (AUCRWF) is another regional human rights instrument that recognises the right to life, religion and welfare of a child in Nigeria.[32] It enjoins member States to abolish any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations created under the charter to the extent of its consistency with the charter.[33] It guarantees the child's right to non-discrimination irrespective of any factor such as race, colour, tribe, religion, age, sex, language, fortune, circumstance of birth, political opinion, etc. An overriding principle under the AUCRWF) is that of "the best interest of the child rule. The principle which requires that in every action concerning a child undertaken by anybody (private or public), the best interest of the child shall be the paramount consideration at all times.[34] The Charter also protects a child's right to life which is inherent and State parties shall ensure to the maximum extent possible, the survival, protection and development of the child and dead sentence shall not be pronounced for crimes committed by children.[35] The Charter enjoin all member States to protect children against sexual exploitation and drug abuse which is inimical to their welfare.[36]

4. Judicial Stance on Right to Object to Medical Treatment by Adults and Parents/Guardians for Their Children in Nigeria

This section of the paper critically examines two decisions of the Supreme Court of Nigeria where the Court has pronounced on the right of an adult to object to medical treatment based on religious belief, and the extent of the right of a parent or guardian to object to medical treatment for his/her child. Thus, it examines judicial authorities dealing with both adults and children. It must be noted at this juncture that; there is a dearth of judicial authority on parent/guardian's objection to medical treatment for their children/wards in Nigeria unlike adult objection to medical treatment on account of religious belief. The first decision is that of *Medical and Dental Practitioner Disciplinary Committee v. Dr. Nicholas Okonkwo*.[37] The brief facts of the case are as follows: Mrs. Martha Okorie "the patient" and her husband Loveday Okorie, a members of the Jehovah

[30] Nigeria domesticated the African Charter on Human and People's Rights pursuant to Section 12 of the 1999 Constitution of the Federal Republic of Nigeria Cap. C23 Laws of the Federation of Nigeria, 2004 by enacting the African Charter on Human and People's Rights (Ratification and Enforcement) Act Cap. A10 Laws of the Federation of Nigeria 2004.
[31] *Ibid*. Art. 4, 5 and 8.
[32] African Union Charter on the Right and Welfare of the Child, 1991.
[33] *Ibid*. Art. 1(3) African Union Charter on the Right and Welfare of the Child, 1991.
[34] *Ibid*. Art. 4.
[35] *Ibid*. Art 5 (1) (2) (3).
[36] *Ibid*. Art. 27 and 28 respectively.
[37] [2001] 7 NWLR (Pt. 711) 206.

Witness religious group who believe that blood transfusion as a form of medical treatment is contrary to their beliefs and practices as it amounts to "eating" or "consuming" of blood. Mrs. Okorie who was 29 years old, had a delivery at a maternity facility on the 29th day of July, 1991, was admitted as a patient at Kenayo Specialist Hospital for a period of nine days. She complained of difficulty in walking and severe pains at the public area. At Kenayo Hospital, tests were run and the diagnosis showed a severe ailment which led the doctor to recommend blood transfusion. The patient and her husband vehement refused the option of blood transfusion. The Doctor, after failed attempts of persuasion, discharged them and gave them a note disclosing that they have refused blood transfusion despite explanation and appeals that it was a life saving measure for the patient based on her diagnosis. Her husband demanded that she be discharged and the physician was constrained and did so.

Having been discharged against medical advice, the patient was taken to JENO Hospital by her husband on the 17th August, 1991. The husband at Jeno Hospital, produced to Dr. Nicholas Okonkwo a card signed by the patient titled "Medical Directive/Release." The signed card prohibited anyone treating the patient from administering blood transfusion on her but could use non-blood expanders to treat her as to do otherwise, would be contrary to her religious belief as a Jehovah Witness (JW). According to her, the Bible in Acts Chapter 15:28-29, command them (JW) to withstand from blood. She accepted any added risk her refusal of blood transfusion may cause and releases the doctors and all personnel from any responsibility who abide by her directive from any untoward result caused by her refusal, despite their competent care. She further directed the witnesses to her decision (her husband and uncle) in the event that she loses consciousness to ensure that the decision is respected. Her husband in another document signed by him reiterated the position of his wife and further directs that the patient's decision not to accept transfusion or any similar treatment is final and in the event that he becomes unconscious, same must not be changed howsoever. He also released the personnel of Jeno hospital from any untoward outcome based on their refusal despite their best efforts.

Based on these documents, the Respondent proceeded to treat the patient without administering blood transfusion. However, the patient died on the 22nd day of August, 1991. As a result, the Respondent was charged before the Medical and Dental Practitioner Disciplinary Tribunal on two counts. Count one was for attending to the patient in a negligent manner and thereby conducting himself infamously in a professional respect contrary to the Medical Ethics punishable under section 16 of the Medical and Dental Practitioners Act. The second count was for acting contrary to his oath as a medical practitioner and thereby conducted himself infamously in a professional respect contrary to the same provision of the same law stated above. The prosecution opened it cases and the officer of the Medical and Dental Council testified against the Respondent with two other (the deceased mother and Uncle) who had reported the death to the MDPDT; they tendered evidence in support of their testimonies. The Respondent and the deceased husband testified for him to the effect that the deceased and her husband objected to blood transfusion and persisted in their objection even after the Respondent had informed them of the untoward outcome of their refusal as it was necessary to save the deceased life. In maintaining their insistence against the Respondent's advice, the husband signed the

document that stated their objection to the medical procedure as well as absolving the Respondent and his hospital from liability due to their insistence. He gave evidence to the fact that had the patient consented to blood transfusion, he would have arranged for it. He stated that the medical ethics and oath as opposed to his religious belief and practice as a Jehovah witness, guided his treatment of the patient. The patient husband testified that the Respondent was willing to transfer her to another hospital but had to respect their objection to a transfer, too. The Tribunal found the Respondent guilty not for his own religious belief nor respecting that of the patient but for holding unto the patient knowing that she could have been given the required treatment in another medical facility where the inhibition placed by the patient and her husband could have been dislodged particularly when he was aware that the appropriate treatment could not be given by him due to his failure to obtain the requisite consent.

The Respondent pleaded not guilty to the charges. He was therefore suspended for six months on each of the count of charges to run concurrently. The Respondent being dissatisfied with the Tribunal's decision lodged an appeal to the Court of Appeal. The Court of Appeal upheld the appeal and upturned the tribunal's decision by setting it aside. The Appellant being dissatisfied with the decision of the Court of Appeal, filed an appeal to the Supreme Court against the decision of the Court of Appeal setting aside the trial tribunal's decision.

As to the alleged infamous misconduct in a professional respect, the Supreme Court held that the Medical and Dental Disciplinary Tribunal had no jurisdiction to entertain and adjudicate upon the charges as framed because they disclose an element of crime which it is not competent to adjudicate. Its function under section 15 of the Medical and Dental Practitioners Act is to consider any case referred to it pursuant to section 15(3) thereof and not crimes at large. On an adult patient's right to object to medical treatment, due to its germane nature, the court's decision is hereby produced *verbatim ad literatim* as follows[38] (Reference needed here to actual court decision name):

> … 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. The limits of these freedoms, as in all cases, are where they impinge on the rights of others or where they put the welfare of society or public health in jeopardy. The sum total of the rights of privacy and freedom of thought, conscience or religion which an individual has, pit in a nutshell, is that an individual should be left alone to choose a course for his life, unless a clear and compelling overriding state interest justifies the contrary. Law's role is to ensure the fullness of liberty when there is no danger to public interest. Ensuring liberty of conscience and freedom of religion is an important component of that fullness. The

[38] *Medical and Dental Practitioner Disciplinary Committee v. Dr. Nicholas Okonkwo* [2001] 7 NWLR (Pt. 711) 206 at 244-245, Paras. F-E.

> courts are the institution society has agreed to invest with the responsibility of balancing conflicting interests in a way as to ensure the fullness of liberty without destroying the existence and stability of society itself. It will be asking too much of a medical practitioner to expect him to assume this awesome responsibility in the privacy of his clinic or surgery, unaided by materials that is available to the courts or, even, by his training. This is why, if a decision to override the decision of an adult competent patient not to submit to blood transfusion or medical treatment on religious grounds, is to be taken on the grounds of public interest or recognized interest of others, such as dependent minor children, it is to be taken by the courts. It is to the credit of the Tribunal in this case that it acknowledged the right of the individual to hold his religious belief and that it also accepted that a practitioner should respect the religious beliefs of others. Its decision in the case, however, progressed into error when it deviated from the correct path into ignoring the concomitants of the right of the patient to reject medical treatment or blood transfusion on religious grounds, and concluded that the respondent was guilty of infamous conduct 'for holding onto the patient knowing fully well that the correct treatment cannot be given in the face of failure to obtain consent.' Since the patient's relationship with the practitioner is based on consensus, it follows that the choice of an adult patient with a sound mind to refuse informed consent to medical treatment, barring state intervention through judicial process, leaves the practitioner helpless to impose a treatment on the patient. That helplessness presents him with choices. He could terminate the contract, and, I would say, callously, force the patient out of his clinic or hospital, he could continue to give him refuge in his hospital and withdraw any form of treatment; he could do the best he could to postpone or ameliorate the consequences of the patient's choice. To a large extent, the practitioner should be the judge of the choice that may be better in the circumstances. The choice becomes one of personal attitude rather than professional ethics.[39]

The above decision is to the effect that under normal circumstances, no medical doctor can forcibly proceed to apply treatment to a patient of full age and sane faculty without the patient's consent, first sought and obtained, particularly if that treatment is of a radical nature such as surgery or blood transfusion.[40] Dada (2013, p.123) has opined that the doctor must ensure that there is a valid consent and that he does nothing that will amount to a trespass to the patient. While adhering to this, the medical practitioner must exercise a duty of care to advise and inform the patient of the risks involved in the contemplated treatment and the consequences of his refusal to give consent and the fact that he reserve the right to withhold consent.[41] Patient consent is fundamental and it is of

[39] *Medical and Dental Practitioner Disciplinary Committee v. Dr. Nicholas Okonkwo* [2001] 7 NWLR (Pt. 711) 206 Per Ayoola JSC (As he then was) at 245, Para. G.
[40] *In Re Yetter* (1973) 62 Pa D & C2d 619.
[41] *Sideway v. Board of Governors of Bethlehem Royal Hospital* (1985) 1 AC 871.

great antiquity. Emiri (2012, p.299) has argued that the common law has long recognized the principle that every person has the right to have his bodily integrity protected against invasion by others. The seriousness with which the law views any invasion of physical integrity finds its justification in the fact that everyone has the right of self-determination with regards to his body. Every touching of the patient is potentially battery. It is the patient's consent, either implied or express, which makes the touching legally innocuous. At law, no treatment is to be administered to a patient without his consent merely because others reason that it is for his benefit. Anyone who does would be treated as a busybody that would expose himself to actionable trespass. The decision above is *in tandem* with the English Court decision in *S v. McC*[42] where Lord Reid held that:

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

All this is anchored on the autonomy of the patient. According to Dworkin (1988, p.6), from human rights perspective, autonomy can be equated to liberty, dignity, integrity, individuality, independence, responsibility and self-knowledge, self-assertion, critical reflection, freedom from obligation, absence of external coercion, and knowledge of one's own interest. The World Medical Association Declaration[43] guarantees the patient's right of autonomy with regards to medical treatment. It is apposite to note that where the issue of lack of consent or objection to a medical treatment by an adult is not made known to a medical practitioner who administered same, there cannot be successfully established a case of violation of the right to privacy and religion. The person who does not subscribe to a particular medical treatment must disclose this to the medical practitioner else *volenti no fit injuria*[44] will come to play opined Malemi (2008, p.65). Also, where an adult patient is brought to a medical facility unconscious and treatment that the person does not approve is administered, upon gaining consciousness, it is doubtful whether a claim for violation of his right based on religious beliefs and practices can be successfully maintained as lack of knowledge on the part of the medical practitioner would exculpate him from any liability.[45] This is anchored on the constitutional guaranteed rights of privacy and right to freedom of thoughts, conscience and religion contained in Sections 37 and 38 of the

[42] (1972) AC 24 at 43.
[43] Principle 3 (a) World Medical Association Declaration of Lisbon on the Right of the Patient 1948.
[44] This Latin maxim means "to a willing person, it is not a wrong." It connotes a situation where a person knowingly and voluntary consent to an act or omission, he/she cannot subsequently complain of any harm suffered from the act/omission. See also Omole C, "The Nigerian Senate and Volenti non fit Injuria – A Legal Analysis of Sen. Ndume Suspension" <https://charlesomole.org/the-nigerian-senate-and-volenti-non-fit-injuria-a-legal-analysis-of-sen-ndume-suspension/> accessed 25 February 2022.
[45] *In Re Osborne* (1972) Dist Col App.

1999 CFRN which in the circumstance are absolute, sacrosanct and untrammelled. This unfettered right of an adult to object to medical treatment is not an unruly horse. According to Iyasere and Ienlanye (2018, p. 83) situations may arise necessitating the medical practitioner to discountenance the refusal of an adult patient's right to refuse a particular medical treatment. The point must be noted that the right to refuse medical treatment by an adult and the corresponding obligation on the part of medical practitioners to respect that decision is not dependent on whether or not the patient is an upstanding member of society. Obidimma and Obidimma (2014, pp.150-162), Annas (1983, p.918), Gbobo and Oke-Chinda (2018, pp.15-25), Lokulo-Sodipe (2009, pp. 079-087) have opined that the law is simply that an adult cannot be compelled against his wish to accept lifesaving treatment, even if he is a criminal, except where to do so may be in the interest of the public policy, interest or safety. Of course, individual rights (including an adult right to object to medical treatment guaranteed by Sections 34 and 37) are subject to public policy, interest and safety as was held by the Supreme Court of Nigeria in *Dokubo-Asari v FRN*.[46] For instance, where an armed robber was shot and was badly wounded, he was rushed to the hospital and diagnosis shows that it will require blood transfusion to save his life, if he objects to same pursuant to sections 37 and 38 of the 1999 CFRN, the medical practitioner would be right to ignore the objection. The reason is, as a suspect particularly of such a heinous crime, public policy and safety requires that he be kept alive to face trial. The law cannot come to his/her aid in order for him/her to avoid answering to the alleged armed robbery offence. To do so, would amount to using the law against public interest under the most questionable circumstance which is not permitted by the law.

In *Esabunor & Anor. v. Faweya & Ors*.[47] the Supreme Court examined the extent of the right of parents or guardian to object to medical treatment for their children or wards based on their religious beliefs and practices pursuant to section 37 and 38 of the 1999 CFRN. The brief facts of the case are as follows. The second appellant is the mother of the 1st appellant. She gave birth to a boy on April 19, 1997 at the Chevron Clinic, Lekki Peninsula, Lagos, Nigeria. One month after birth, he became seriously ill and he was taken back to the clinic where he was born for urgent treatment on the 11th day of May, 1997. The 1st Respondent was the one who treated the 1st appellant, from the diagnosis; he found out that the 1st respondent needed blood transfusion as a life saving measure. The 2nd respondent and her husband sternly protested and objected that on no account should the 1st appellant be subjected to blood transfusion as there are several medical hazards such as Human Immunodeficiency Virus (HIV) contraction, Hepatitis, etc. and as members of Jehovah Witness sect, blood transfusion and the likes, is forbidden by their religion. The 1st respondent remained unyielding to the protest and stern warning of the 2nd appellant and her husband.

He therefore contacted the police authority and the learned Counsel to the Commissioner of Police, Lagos State filed an Originating Motion *Ex-parte* before the 5th respondent. The Motion was brought pursuant to Section 27(1) and 30 of the Children and

[46] [2006] 11 NWLR (Pt. 991) 324.
[47] (2019) LPELR-46961 (SC).

Young Persons Law, Cap. 25, Laws of Lagos State, Nigeria. It sought for an order "that the medical authorities of the Clinic of Chevron Nigeria Limited Lekki Peninsula Lagos be allowed and are hereby permitted to do all and anything necessary for the protection of the life and health of the child TEGA ESABUNOR and such further order or orders as the court deem fit in the circumstances." After hearing counsel for the applicant, the Chief Magistrate granted the application under its inherent jurisdiction. Pursuant to this order, the 1st respondent administered blood transfusion on the 1st appellant same day against the objection of the 1st appellant and her husband. The 2nd appellant (i.e. the 1st Appellant's child) got well and was discharged.

Subsequently, the 2nd appellant filed an application on notice before the Chief Magistrate Court seeking to set aside the order of the Chief Magistrate authorizing the doing or anything by Chevron Clinic to protect the life and health of the 1st appellant but it was dismissed. Being dissatisfied with the dismissal order, the appellants approached the High Court for an order of Certiorari and damages of 10 million Naira (Ten Million Naira) only. In a well-considered ruling, the learned trial judge, refused the prayer and the claim for damages. Being dissatisfied with the decision of the High Court, the appellants appealed to the Court of Appeal. The Court of Appeal heard the appeal and affirmed the decision of the High Court dismissing their application for certiorari and payment of damages. They further appealed to the Supreme Court against the judgment of the Court of Appeal. Several issues were raised for the determination of the Supreme Court but issue 4 is what we are concerned with. The said issue four was whether the Court of appeal was correct in holding that the 2nd appellant's refusal to give consent to blood transfusion amounted to an attempt to commit a crime or to allow the 1st appellant to die.

The Supreme Court in resolving this issue, reiterated the position of the law established in *Medical and Dental Practitioner Disciplinary Committee v. Dr. Nicholas Okonkwo*[48] that an adult who is conscious and in full control of his mental capacity, and of sound mind has the right to either accept or refuse medical treatment (blood transfusion). The hospital or medical practitioner has no choice but to respect their patient's wishes even when it may create untoward outcome which they are duty bound to explain to the patient and allow him/her to take or leave it. However, when it is a child, the unfettered discretion granted an adult patient to object to medical treatment is not applicable as different considerations apply because a child is incapable of making decisions for him/herself. The law is therefore duty bound to protect a child from potential abuse of his/her right because the child upon attainment of the age of majority, may decide to adopt a different religion from that which his/her parent have chosen for him. This will imply that all the restrictions festered on such a child by his/her parent/guardian including restriction/prohibition to certain medical treatments, are thereby jettisoned by the child. It is inconsequential that the decision to refuse a particular medical treatment (i.e. blood transfusion) was made by his parent/guardian who is legally authorised to make decisions for and on behalf of the child. Thus, where a parent refuses blood transfusion for their

[48] [2001] 7 NWLR (Pt. 711) 206.

child on religious grounds pursuant to their Constitutional right enshrined in Sections 37 and 38 of the 1999 CFRN, the Court must step in, regarding the child's welfare as the paramount consideration and not the parent's transferred religious belief or dogma. By the foregoing, the court is invited into the situation which can be described as a contest between adherence to the parent/guardian religious beliefs and dogma, and the need to save the life and preserved the best interest of the child. The Court is therefore invited to consider these contending interest and create a balance. Applying the foregoing test, the Court ruled that the religious belief of the 2nd appellant and her husband must be jettison for the overriding interest of saving the life of the child and affirmed the decision of the Court of Appeal. Okoro JSC held that:

> It is instructive to note that the law exists primarily to protect 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 decision himself… It could have amounted to a great injustice to the child if the Court had stood by and watched the child being denied of basic treatment to save his life on the basis of religious conviction of his parent. He probably would not be alive today… in a life-threatening situation, such as the 1st appellant was a child. The consideration to save his life by application of blood transfusion greatly outweighs whatever beliefs one may hold, especially where the patient is a child.[49]

Aderibigbe and Okonkoh (2021, pp.449-461) have asserted that this decision is a welcomed development in the area of protection of the child's rights under Nigerian law. If parents or persons in *loco parentis*[50] are given an unrestrained right to choose their children and wards religion and for them to be bound *in toto*, untoward consequences may arise especially where such beliefs seeks to deny the child medical treatment that may be a life saving measure. The need to protect and preserve the right of a child through medical treatment must always outweigh the need to adhere to its parent prescribed religious beliefs and practices. It is only by doing so that the child can be afforded the opportunity to attain majority and personally exercise his right of freedom of thoughts, conscience and religion which may be in compliance to that which his/her parent had chosen or totally different. This right must not be trader for anything and the Courts, medical care givers and government agencies must not be reluctant in intervening in deserving situations.

However, it is apposite to note that in cases of emergency, a minor can be treated without the consent of his/her parent/guardian.[51]

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[49] (2019) LPELR-46961 (SC) at Pp. 36-38.

[50] This Latin maxim means that a person (s) who are placed in or are in the position of a parent in relation to a child.

[51] *Banks v. Medical University of South Caroline* (1994) 444 2d 519.

5. The "Best Interest" Principle as a Catalyst for Child Right Protection in Nigeria

This part of the paper discusses the "best interest" principle by arguing that it is a catalyst for the protection of the right of children in Nigeria and it influenced the decision of the Supreme Court in the cases discussed in the preceding sections. This principle is provided for in section 1 of the Childs Right Act and in the Child's Right Laws of the various states that have domesticated same. It 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 the primary consideration.

The profoundness of the above provision to the protection of the rights of children in Nigeria by all and sundry is obvious. It categorically prescribed the procedure to be followed in any matter concerning a child. The blueprint laid down here is that the "best interest" of the child is to guide the court in making any decision pertaining to a child. Unfortunately, despite the plausibility of this principle, the Act whether by sheer legislative inadvertence, or lack of foresight, does not define what best interest of the child entails. This notwithstanding, Beauchamp and Childress (2001, p.102) interpolating this principle from a medical caregiver position, posits that "the best interest standard is one in which a surrogate decision maker must determine the highest net benefit among the available options, assigning different weights to interests the patient has in each option and discounting or subtracting inherent risk or cost." Okunrobo (2014, p.114) argued that it could be simply regarded as "the decision of the court to weigh the options open to the child and take a decision in the child's best interest, for which the child would have done, if he had the sufficient understanding to do so." This principle enjoins the court as well as everyone concerned when dealing with any matter pertaining to a child, to make the well fare or interest of the child the paramount consideration of any decision that will be made.

It is crystal clear that the case of *Esabunor & Anor. v. Faweya & Ors*.[52] is a conflict between obedience to a child's parent religious inclination and preservation of the life of the child. Noteworthy is the fact that freedom of religion and right to life are both constitutional guaranteed rights in Nigeria, nevertheless, the superiority of the right to life over religion cannot be overemphasized. Only a person who is alive can assert his/her right to religion and any other right for that matter.

The Childs' Right Act per section 3 thereof, provides every child with the right to life, survival and development. Section 12 thereof, provides that every child is entitled to enjoy the best attainable state of physical, mental and spiritual health. The child's right to survival and development entails, he must have access to health care services for his/her survival and development for the attainment of the best state of physical, mental and spiritual health. A child as an "incompetent person" cannot access these rights, except

[52] (2019) LPELR-46961 (SC).

through a proxy, i.e. the parent or anyone *in loco parentis*. When the proxy refuses, fails and or neglect to aid the child access these rights, the court can and must intervene to avail them to the child. This is so as the Act enjoins the State to prevent infant mortality,[53] which invariably means preservation of the child's right to survival and development. The corollary of this is that the court by so doing, honours the child's right to dignity of his human person as the child is not subjected to avoidable medical deprivation leading to the termination of the life of the child.

The best interest test under Nigeria's Childs Right Act is applicable in Britain under its Child Right Act.[54] It has been applied by the UK court to prolong the lives of children whose parent took positions inimical to their live pursuant to their religious beliefs. In *RE B*[55] the child was born with Down Syndrome (DS) and a blocked intestine which if not operated upon, will be fatal. Her parents preferred that she die just a few weeks after birth as a natural consequence of the condition of her birth. The local authority applied to the court to have the child as it ward, the application was granted. She was kept from pain and suffering through sedation and moved to another hospital for the operation, but the surgeons in the hospital she was moved to had a contrary opinion. The Court of Appeal applied the best interest of the child to decide that if the operation is carried out successfully, it could afford the child the opportunity to live a normal life. In *Re R*[56] the court apply the best interest of the child principle, overrode the objection of the parent to have the child subjected to blood transfusion by the doctor in treating her of leukaemia.

6. Medical Consent in Britain and Canada

This section of the paper examines the practice of medical consent in some other jurisdictions in comparison to Nigeria. Britain and Canada are selected for at least two main reasons, Nigeria was colonised by Britain as a result, the laws and legal philosophy of Britain was imported to Nigeria and the decision of her courts shaped and influenced Nigeria's. Both Britain and Canada are commonwealth jurisdictions and have advanced practice on the issue from which Nigeria can draw lessons.

6.1 Britain

The position of the law from judicial authorities is that for an adult to be examined or treated by a medical practitioner, the consent of the adult must be sought and obtained. Such an adult reserves the right to object to medical treatment. In *Sidaway v. Bethlehem Royal Hospital*[57] the House of Lords held that a doctor operating without consent, save in emergency or a case of mental incapacity, commits

[53] S 12 (a) Childs Right Act, 2003.
[54] S 8 English Child Right Act, 1989.
[55] (1990) 3 All E.R. 927.
[56] (1993) 2 FLR 757.
[57] [1985] AC 871 at 87, 904.

trespass and criminal assault. An adult patient's right to reject medical treatment was reaffirmed by Lord Denning in *Re T*[58] In fact; an adult can appoint proxy in the event of incapacitation to assert his right to reject a particular medical treatment as was held in *Airedale NHS Trust v. Bland*.[59]

6.2 Canada

Like in the UK, the judicial position in Canada gives an adult the right to object to medical treatment on grounds of his/her religious beliefs. In *Malette v. Shulman*[60] a doctor operated on a Jehovah Witness although he was informed that a card in her purse has her instruction that on no condition should she be given blood transfusion. She sued the doctor for disregarding her wishes. The doctor's defence that the blood transfusion was necessary since she was an accident patient and her life needed to be saved as society had an interest in the preservation of her life was discountenanced. The Ontario Court of Appeal in awarding damages in favour of the patient held that:

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

In *Banks v. Medical University of South Caroline*[61] the plaintiff was a Jehovah Witness, brought an action against the Defendant hospital for wrongful death and battery for non-consensual administration of blood on her eight year daughter. She was admitted due to respiratory distress and hip pain. They Respondent performed surgery on her and against the Plaintiff's instructions, administered blood plasma on her but she did not survive. The court held that although the plaintiff had no authority to withhold necessary medical treatment for her daughter even if same was contrary to her religious beliefs, notwithstanding, the transfusion amounted to battery in that it was not consented to by the parent when no emergency arose.[62]

7. Conclusion and Recommendations

Under Nigerian law, a child enjoys several rights in various spheres of life. These rights include right to basic education, freedom from forced or injurious labour such as night work or underground work, right to healthy life and unimpaired growth, right to basic necessities of life such as food, shelter and clothing. These rights include

[58] (1992) 9 BMLR 46.
[59] (1993) 12 BMLR 64.
[60] (1990) 47 DLR 18.
[61] (1994) 444 2d 519.
[62] *State of Washington v. King Country Hospital* (1967) 278F. Supp. 488.

the general rights available to all persons under chapter two of the 1999 CFRN. The parent or persons in *loco parentis* has the responsibility of ensuring that the rights of the child are protected and realized because a child lacks the requisite legal capacity to enforce his/her rights personally. As a result, his/her parent make necessary choices towards the realization of these rights because the law recognises parents/guardian right to do so. In doing so, the parents/guardians determine the religion of the child, and the child is bound by the beliefs and practices of such a religion chosen by the parent/guardian.

Where an adult of a sound mind, in furtherance to his or her religious beliefs guaranteed by law, objects to medical treatment, even where the objection may have untoward consequences, the medical practitioner under Nigerian law, has a duty to obey the objection. This duty to obey the objection, nevertheless, is an affront on the sanctity of human life which cannot be created by any human and no human should be allowed to do anything that may lead to its destruction. However, when it comes to a child patient, the parents are allowed to decide his/her religion but adherence to its beliefs and practices is only sacrosanct to the extent that the child's right to life and adequate medical treatment to preserve his/her life is not threatened. Where adherence to the parents/guardian's religious beliefs would expose the child to avoidable hazard, the law would step in to ensure that the interest of the child (which is the paramount consideration in any action or decision pertaining to a child) is protected. This is because the child may grow up and exercise his right to freedom of thoughts, conscience and religion in a manner contrary to that which his/her parents/guardian have chosen for him/her as a child. The law has a duty to ensure that a child's right to make his own choice upon attainment of the age of majority is not jeopardized by his/her parent/guardian religious beliefs which the parent/guardian chose and bestowed on the child.

While religious beliefs and dogmas are controversial issues in Nigeria which is multi-religious with extreme religious consciousness, the sacredness of life cannot be overemphasised hence, the imperativeness of preserving same. Prohibition of religious beliefs such as refusal of blood transfusion may not be an effective means of curbing the "harmful religious belief" when it is considered against the background that even the 1999 CFRN which is the supreme law, grants Nigerians the right to have such beliefs. Thus, it is recommended that enlightenment campaigns be deployed to sensitise the general public (especially adherents to such harmful religious beliefs) on the danger of harmful religious beliefs. In doing this, the position laid down by the Supreme Court as regard objection to medical treatment by parents/guardians for their children/wards should be discussed this is capable of dissuading adherents from continuing in such beliefs.

Also, the Medical and Dental Practitioners Council and other organisations within the medical field, should sensitise their members on the position of the law as laid down in the case. This will foreclose the possibility of a medical practitioner ignorantly restraining him/herself from carrying out lifesaving procedure on a child because of failure of the parent/guardian to give consent.

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