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Withholding treatment from disabled newborns and its effect on the right to life in Nigeria

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The ultimate aim of medical treatment is to provide benefit for the patient and such treatment should not be prolonged if it cannot achieve this aim. Remarkable advances in neonatal care now make it possible to sustain the lives of many newborn infants who several years ago would have died in the first days or weeks after birth. Not all newborns fare well. Some infants with low birth weight or severe defects cannot survive for long, despite the most aggressive efforts to save them; others suffer severe impairments either as a component of their conditions or as a result of treatments. Consequently, medicine's increased ability to forestall death in seriously ill-newborns and this has magnified the already difficult task of physicians and parents who must attempt to assess which infants may or may not benefit from various medical interventions. This paper will examine the legal implications of withholding treatment in such instances. This will include the right of the child (with particular reference to the right to life) and whether this right is absolute. The paper will also discuss the grounds for state intervention in protecting the rights of a child. In doing this, the Baby Doe incidence which occurred in the United States of America will be used as a case study. An outcome of the Baby Doe case in the USA is the Baby Doe Law, and as such, this paper will also discuss the provisions of this law. It will also look at the provisions of the Nigerian Law in respect of withholding treatment for disabled newborns to determine whether or not the law on this issue is adequate.

Key words: Withholding treatment, withdrawing treatment, disabled/seriously ill newborn, right to life.

INTRODUCTION

The ultimate aim of medical treatment is to provide benefit for the patient and such treatment should not be prolonged if it cannot achieve this aim. Remarkable advances in neonatal care now make it possible to sustain the lives of many newborn infants who several years ago would have died in the first days or weeks after birth¹. However, not all newborns fare well. Some infants with low birth weight or severe defects cannot survive for long, despite the most aggressive efforts to save them; others suffer severe impairments either as a component of their conditions or as a result of treatments.

Consequently, medicine's increased ability to forestall death in seriously ill newborns has magnified the already difficult task of physicians and parents who must attempt to assess which infants will benefit from various medical interventions and which will not. As medical technologies

continue to provide treatment options to prolong life despite organ failure, there comes a marked blurring of the dividing line between life and death. An important distinction must therefore be made between withdrawal of treatment when it is futile and confers no benefit, and active intentional termination of life.

Decisions about whether life-sustaining treatment is warranted for newborns arise most frequently in two general categories: infants of low birth weight (those who weigh less than 1500 g) and infants with life-threatening congenital abnormalities. In this category are children with neural tube defects, such as anencephaly and spina bifida and permanent handicaps combined with surgical correctable, life-threatening lesion such as Down's syndrome.

This paper will examine the legal implications of withholding treatment in such instances. These will include the right of the child (with particular reference to the right to life) and whether this right is absolute. The paper will also discuss the grounds for state intervention in order to protect the rights of a child. In doing this the Baby Doe

¹ President's Commission, *Deciding to Forego Life-Sustaining Treatment: A Report on the Ethical, Medical, and Legal Issues in Treatment Decisions.*, 197-203 (March 1983), quoted in Patricia A King, et al, *Law, Medicine and Ethics.*, 2006, Foundation Press., New York, pp484-486.

incidence which occurred in the United States of America will be used as a case study². An outcome of the Baby Doe case is the Baby Doe Law, and as such, this paper will also discuss the provisions of this law. It will also look at the provisions of the Nigerian Law in respect of withholding treatment for disabled newborns.

WITHOLDING TREATMENT FROM A DISABLED NEWBORN: THE BABY DOE CASE

In April 1982, a baby was born in Bloomington, Indiana. He was diagnosed with Down's syndrome, a chromosomal abnormality that produces mental retardation and with esophageal atresia, the separation of the esophagus from the stomach, which rendered the newborn unable to absorb food. The obstetrician who delivered the baby told the parents that their child would have only a 50% chance to survive surgery for his atresia of the esophagus and that even if surgery was successful, their child would remain severely retarded and would face a lifetime of medical treatment, disability, and dependency. He advised the parents to withhold treatment and let their child die of his birth defect. The baby's parents decided that they did not want the baby treated (The C Everett Koop Papers, 2009)³.

An action was brought to court⁴ to have him declared a neglected under Indiana Child in Need of Service Statute, and to have the court order medical treatment. Indiana courts ruled that there was no violation of the statute, and that the parents, confronted with contradictory medical opinions, had the right to decide the fate of their child. The Indiana Appeal Court let this decision stand. An appeal was made to the US Supreme Court. However, before the appeal could be heard, Baby Doe died of dehydration and pneumonia.

This culminated in the promulgation of the Baby Doe Law and the Baby Doe Amendment⁵. There have been 2 sets of Baby Doe rules. The first set of Baby Doe rules was based on section 504 of the US Rehabilitation Act of 1973. It mandated that states receiving federal money for child abuse programs develop procedures to report medical neglect, which the law defines as the withholding of treatment unless a baby is irreversibly comatose or the treatment is "virtually futile" in terms of the newborn's survival. By this law, opinions about the child's "quality of life" are not valid reasons for withholding medical care

² The author is not aware of any litigated or reported case of withholding or withdrawing treatment from a disabled newborn in Nigeria, hence the use of an American case as a case study.

³ The C Everett Koop Papers, "Congenital Birth Defects and the Medical Rights of Children, the Baby Doe Controversy", Retrieved from <http://profiles.nlm.nih.gov/qq/views/Exhibit/narrative/babydoe.htm>, on 16/4/09.

⁴ See *In Re Baby Boy Doe*, A Foetus 260 Ill. App.3d 392, 198 Ill.Dec. 267, 632 N.E.2d 326

⁵ U.S.C.A. TITLE 42. CHAPTER 67, Sec 15106a. [The current set of Federal Regulations in the US on how to treat extremely ill, premature, or terminally ill infants <1 year of age.]

(Kopelman et al., 1988)⁶.

Many neonatologists and other paediatricians reported that these rules immediately altered standards of care and limited clinicians' and parents' abilities to select individualised treatment plans and act in the best interests of infants (Kopelman et al., 1988)⁷.

The birth of another baby known as Baby Jane Doe in 1983 in New York tested the law. Baby Jane Doe had spina bifida, hydrocephalus, kidney damage, and microcephaly. The parents were told that the infant would be severely retarded and paralysed below the lesion and suffered frequent kidney and bladder infections. Doctors disagreed about whether aggressive treatment was appropriate and whether it was in the best interest of the child to have corrective surgery. The parents, deciding it was in their child's best interest to be provided palliative care, declined surgery⁸.

The US Supreme Court in *Bowen. v. American Hospital Association*⁹ rejected the government's interpretation of the civil rights law that generated the first set of Baby Doe rules. The court ruled these rules as unnecessary to protect the rights of disabled infants and parental rights to consent or refuse treatment base on what they deemed to be in their infant's best interest. The court noted, that these rules represented an unwarranted attempt to influence standard of care. Furthermore, the court upheld the 'best interest of the child' standard. This was because, allowing parents to have the primary responsibility would promote the best interests, welfare, and safety of children, given the various circumstances and options that shape complex medical-decision making. This led to the adoption of a new set of Baby Doe Rules as amendments to the child abuse and neglect to the funding requirements for states (Lauretta, 2005)¹⁰. The second set of Baby Doe rules is known as the Child Abuse Amendments of 1984, but unlike the first set, they have not been tested in the courts and are still in force (Lauretta, 2005).¹¹

CHILD ABUSE AMENDMENT OF 1984

In 1984, the Child Abuse Amendment Act was promulgated and it went into effect in 1985 (Lauretta, 2005)¹². This Act was also known as the Baby Doe Regulations (BDR). The key portion of the BDR provides thus: "The withholding of medically indicated treatment is the failure to respond to the infant's life-threatening conditions by

⁶ Kopelman L M, Kopelman A E, Irons T G, 'Neonatologists Judge the "Baby Doe" Regulations', *N.Engl.J.Med* 1988;318:677-683.

⁷ Kopelman L M et al., *ibid*

⁸ "Killing the Handicapped: Is It Discrimination?"; Published by [Ohiolife.org](http://ohiolife.org), Retrieved from www.pregnantpause.org on 16/4/09

⁹ 106 S Ct 2101

¹⁰ Lauretta Kopelman, 'Are the 21 Year Old Baby Doe Rules Misunderstood or Mistaken?', "PEDIATRICS", Vol 115, No.3, March 2005, pp 797-802.

¹¹ *ibid*

¹² Lauretta Kopelman, *ibid*

providing treatment (including) appropriate nutrition, hydration and medication) which, in the treating physician's (or physicians') reasonable medical judgement will be most likely to be effective in ameliorating or correcting all such conditions, except that the term does not include the failure to provide treatment (other than appropriate nutrition, hydration or medication) to an infant when, in the treating physician's (or physicians') reasonable medical judgement any of the following circumstances apply:

- 1.) The infant is chronically and irreversibly comatose.
- 2.) The provision of such treatment would merely prolong dying, not be effective in ameliorating or correcting all of the infant's life threatening conditions, or otherwise be futile in terms of the survival of the infant; OR
- 3.) The provision of such treatment would be virtually futile in terms of the survival of the infant and the treatment itself under such circumstances would be inhumane (US Dept of Health and Human Services, 1985)¹³.

The aim of the regulations is to prevent "medical neglect" of handicapped newborns by "withholding medically indicated treatment from disabled infants with life-threatening conditions". For the purposes of the amendment, "medically indicated treatment" is treatment likely to correct life threatening conditions.

The BDR requires that medical treatment be based on the infant's survivability and not the quality of life. Consequently, treatment need not be provided if the infant is chronically and irreversibly comatose. Pursuant to this regulation, State Child Protective Agencies are empowered to enforce the regulations. Guidelines accompanying the regulations require that child protective services take action when parents refuse consent for treatment recommended as an overall plan, even when such treatment would not itself improve all life-threatening conditions.

An effect of the BDR is that it limits clinician's discretion and parents' ability to act in the best interest of the infants in deciding whether they should receive comfort care or aggressive life-saving treatments. Traditionally, the law authorised parents to make medical decisions for their children. It is assumed that parents will act with the best interests of their children in mind. Parental authority is however not limited, as it can be overridden by the state if children are abused or neglected.

Focused on the infant's right to life, the spirit of the regulation, believes that where there is the slightest hope that a baby will beat the odds and live, that chance must be taken. However, the pertinent issue is: Should those who will live with the burden of a disabled child not have the right to decide, more so, when burden can weaken or destroy families?

By virtue of their unique role, physicians regularly participate in decisions that demand quality of life

¹³ US Dept of Health and Human Services, 1985: 1340.15(B)2. P.14887-14888

assessments. The medical profession has endowed its members with the knowledge and skills required to treat disease and deformity. Physicians have been charged with the onerous responsibility of determining when intervention is appropriate. Underlying this responsibility is a foundation of core principles, including beneficence, non-maleficence, and compassion. However, conscious use of these principles is not often helpful when the best interests of the patients are varied and apply to many relevant but competing parties. The physician, by virtue of the Hippocratic Oath has an obligation to treat all and do all they can for survivability. The medical treatment of infants should be based on what is in their best interest. However, because the infants' best interest is not always clear, parents and health care givers are often faced with difficult treatment decisions when faced with situations of a severely ill, extremely premature, or terminally ill infant (American Academy of Paediatrics Committee on Bioethics- Guidelines on Foregoing Life-Sustaining Medical Treatment, 1995)¹⁴.

Contrary to the notion of reasoned decision arrived at together by parents and physicians following informed parental consent, the BDR has made aggressive treatment compulsory except where such treatment will be futile or when the baby is chronically or irreversibly comatose.

LEGAL ASPECTS OF WITHHOLDING TREATMENT FROM THE DISABLED INFANT

The controversy over the non-treatment of handicapped newborns arises in a context of criminal and civil laws. These are discussed below:

STATE INTEREST ON ITS CITIZENS' LIFE

The individual's right to refuse medical treatment is sometimes balanced against the state's significant interest in preserving life (Constitution of the Federal Republic of Nigeria, section 33 of the 1999 and section 11 of the Child's Right Act, 2004)¹⁵, which includes suicide prevention and the protection of third parties, such as unborn viable foetus. The state interest in preserving life rarely takes into consideration the infant's quality of life. The state's interest often assumes that all treatment will be beneficial unless the infant is not likely to survive.

It is submitted that the state has legitimate interest in preservation of life. State interest in preserving life is both fundamental and compelling. It constitutes the basic purpose for which governments are formed (Patricia et al., 1995).¹⁶ It is observed however that the state's interest

¹⁴ "American Academy of Paediatrics Committee on Bioethics- Guidelines on Foregoing Life-Sustaining Medical Treatment"., Paediatrics. 1995; 96: 362

¹⁵ See section 33 of the 1999 Constitution of the Federal Republic of Nigeria and section 11 of the Child's Right Act, 2004.

¹⁶ See Patricia A. King, Judith Areen & Lawrence O. Gostin, *Law, Medicine and Ethics* op cit, 413.

in the preservation of life is not absolute.¹⁷ Also important is the state's interest in preserving the integrity of the medical profession. The state has an unquestionable duty to see that the integrity of the medical profession is preserved and that it is never allowed to become an instrument for the selective destruction of lives.¹⁸ It is a crime for a doctor to actively and intentionally hasten a patient's death however compassionate the motive and whatever the age and medical condition of the patient.¹⁹

HUMAN RIGHTS IMPLICATIONS

It has been argued that disabled newborns have essentially the same right as every other individual including the right to protection of their lives²⁰. There may of course be circumstances for sick infants, as with other individuals, in which it is morally and medically in their best interest to allow them to die. Such circumstances may include irreversible unconsciousness, imminent death, dependence on unusual life-support systems, or the prospect of prolonged agony. Considerations such as the expense of care are morally irrelevant to such life and death decisions but are conditions requiring the sharing of the family's burden by society.

Be that as it may, decisions to withhold treatment from a disabled newborn may encroach on the fundamental rights of the child. These include the right to life (s.33 1999 Constitution of the Federal Republic of Nigeria)²¹ (however, withholding artificial nutrition does not amount to an intentional deprivation of life); the right to be free from human and degrading treatment (s.34, 1999 Constitution of the Federal Republic of Nigeria)²² (where treatment given offers no benefit to the patient or he/she will never have awareness or the reality to interact and is therefore unable to experience benefit, the duty to protect life must be balanced against the right to subject the patient to inhuman or degrading treatment); right to respect for privacy and family life (s.37, 1999 Constitution of the Federal Republic of Nigeria)²³; freedom of expression (s.39, 1999 Constitution of the Federal Republic of Nigeria)²⁴, which includes the right to hold opinions and to receive information; right to be free from discriminatory practices in respect of these rights (s.42, 1999 Constitution of the Federal Republic of Nigeria)²⁵.

Art VI (1) of the United Nation Convention on the

Rights of the Child provides that every child has the inherent right to life. Art VI (2) compel that state parties to ensure to the maximum extent possible the survival and development of the child.

The OAU Charter on the Rights and Welfare of the Child also recognises that every child has an inherent right to life (Art V (1) OAU Charter on the Rights and Welfare of the Child 1979)²⁶. It the duty of state parties to ensure to the maximum extent possible, the survival, protection and development of the child (Art V (2) OAU Charter on the Rights and Welfare of the Child 1979)²⁷.

In addition, Art 7 (1) of the United Nations Declaration on the Rights of Disabled Persons (UNDRDP), 1975, provides that 'state parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children'.

Furthermore, Art 7 (2) UNDRDP states that in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration. State parties reaffirmed that every human being has the inherent right to life and they would take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others (Art 10 UN Declarations on the Rights of Disabled Persons 1975)²⁸.

THE RIGHT TO LIFE AND WITHHOLDING TREATMENT FROM DISABLED NEWBORN UNDER NIGERIAN LAW

The right to life is fundamental because it is on this right that other rights are dependent. Its importance accounts for its wide recognition in a number of important national, regional and international instruments (article 3 of the Universal Declaration of Human Rights (UDHR), 1948).²⁹ Article 3 of the Universal Declaration of Human Rights (UDHR) 1948 constitutes the watershed for all other instruments on the right to life. The article provides: "Everyone has the right to life, liberty and security of person." Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) 1966 is more elaborate in its provisions, it states: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." The right to life is equally guaranteed by article 4 of the African Charter of Human and Peoples' Rights (ACHPR) 1981 which provides: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived or this

¹⁷ For example, state-sponsored executions may constitute an exemption to the duty to preserve life for a complex of reasons ranging from an emphasis on the value of the lives of innocent victims to the necessity of maintaining an orderly society. King, P.A, Areen, J & Gostin, L.O *Law, Medicine and Ethics* at 413.

¹⁸ See generally, King, P.A, Areen, J & Gostin, L.O *Law, Medicine and Ethics* at 413-418.

¹⁹ Keown, J, *Euthanasia, Ethics and Public Policy* 58-59.

²⁰ Dan Devlin and Phyllis R Magrab, "Bioethical Considerations in the Care of Handicapped Newborns", *Journal of Paediatric Psychology* 6(2), pp 111-119.,

²¹ See s.33 1999 Constitution of the Federal Republic of Nigeria.

²² See s.34, 1999 Constitution of the Federal Republic of Nigeria.

²³ See s.37, 1999 Constitution of the Federal Republic of Nigeria.

²⁴ See s.39, 1999 Constitution of the Federal Republic of Nigeria.

²⁵ See s.42, 1999 Constitution of the Federal Republic of Nigeria.

²⁶ Art V (1) OAU Charter on the Rights and Welfare of the Child 1979

²⁷ Art V (2) OAU Charter on the Rights and Welfare of the Child 1979.

²⁸ Art 10 UN Declarations on the Rights of Disabled Persons 1975.

²⁹ See article 3 of the Universal Declaration of Human Rights (UDHR) 1948; article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) 1966; article 4 of the African Charter of Human and Peoples' Rights (ACHPR) 1981; section 33(1) of the Constitution of the Federal Republic of Nigeria 1999; section 306 of the Nigerian Criminal Code among others.

right.”

At the national level, Nigerian Constitution holds the sanctity of human life as so important and guarantees the right to life. Section 33(1) of the Constitution of the Federal Republic of Nigeria 1999 provides: “Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.” This provision requires that even if a person has been convicted of murder, he is entitled to explore all the avenues for appeal before his life can be terminated. The right to life is inalienable and indivisible and cannot be derogated on except in accordance with the strict observance of laid down provisions (*Bello v Attorney-General of Oyo State* (1985)).³⁰

Sanctity of life is held in very high esteem under the Nigerian law. Section 306 of the Criminal Code provides: “It is unlawful to kill any person unless such killing is authorized or justified or excused by law.”³¹

There is no specific provision with regards to withholding treatment from disabled newborn in Nigeria. However, guidance can be taken from relevant laws such as the Criminal Code, the 1999 Nigerian Constitution and the Child Right Act, 2003.

Section 307 of the Criminal Code provides that a child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not and whether it has an independent circulation or not and whether the navel-string is severed or not. No doubt, a disabled newborn comes within this category and is capable of being killed.

In terms of the provisions of section 308 Criminal Code, a person is deemed to have killed another when he causes the death of that other, directly or indirectly, by any means whatsoever. It is therefore submitted, that going by this provision, any person authorising the withholding of treatment which eventually leads to death, is deemed to have killed that other.

Furthermore, a person who does any act or makes any omission which hastens the death of another person who, when the act is done or the omission is made, is labouring under some disorder or disease arising from another cause, is deemed to have killed that other person.³² The implication of this provision is that, the existence of any abnormality does not exonerate the person withholding the treatment.

Under section 315 of the Criminal Code, any person who unlawfully kills another is guilty of an offence of murder or manslaughter, as the case may be.

Any person who unlawfully abandons or exposes

child under the age of 7 years, in such a manner that any grievous harm is likely to be caused to it, is guilty of a felony and is liable to imprisonment for 5 years³³.

It is the contention of this writer that the above provisions of the Criminal Code reveal that withholding or withdrawing treatment from a disabled newborn amount to infanticide which is punishable under the Nigerian Laws. Be that as it may, is the disabled newborn’s right to life absolute? Can there be circumstances when it will be acceptable to withhold or withdraw treatment?

The Child Right Act (CRA) 2003 is another legislation which protects the right of the child in Nigeria. Section 1 of the CRA, recognises that decisions/actions may be taken on behalf of a child. These decisions/actions must, however, be in the best interest of that child. The section provides:

“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”.

The ‘best interest’ standard is a moral and legal standard for guiding decisions for persons lacking decision-making capacity and who have not left advance directives; it should be used by guardians, judges, clinicians, or other responsible persons for making decisions for the incompetent person assessing the net benefits and burdens and selecting the best available options, for the incompetent person (Kopelman, 1997)³⁴.

Section 2 provides that a child must be given protection and care necessary for his well-being. In the same vein, section 13 provides that, every child has a right to health and health services.

While sections 2 and 13 can be interpreted to mean that the withholding treatment from a disabled newborn is against the law, it is submitted however that, where withholding treatment will be in the best interest of the child, it will be permissible³⁵.

With regards to the right of a child, section 3 CRA provides for the application of chapter IV of the 1999 Constitution of the Federal Republic of Nigeria. Chapter IV makes provisions for the fundamental rights of all citizens. These include the right to life³⁶ and right to dignity³⁷. These provisions also exist in the CRA.³⁸

The CRA and the 1999 Constitution while creating state interest in the life of citizens, recognise the right of parents in decision making in respect of their children. This right can only be overridden where there is conflict between their decision and that of the medical practitioners

³⁰ In *Bello v Attorney-General of Oyo State* [1985] 5 NWLR (pt 45) 825, the Nigerian Supreme Court held that though it is legal to execute a person under the sentence of capital punishment, it however, severely castigated the Oyo State Government for executing the convict while his appeal was still pending. It held that this act clearly constitutes a breach of the right to life.

³¹ See also, section 220 of the Penal Code.

³² Section 311 Criminal Code

³³ See s.341 Criminal Code

³⁴ Kopelman L M, ‘The best-interest Standard as threshold, ideal and standard of reasonableness’, J. Med Philos. 1997; 22:271

³⁵ See s.1 Child’s Right Act 2004.

³⁶ Section 33 1999 Constitution

³⁷ Section 34 1999 Constitution; see also section 11 of the CRA, 2004

³⁸ See section 11 CRA 2004

or where their decision is not in the best interest of the child.

Consequently, the state has the power to override the wishes of parents, if it considers the medical treatment or the withdrawal or withholding of treatment to be in the best interest of the child.

IS THE DISABLED INFANT'S RIGHT TO LIFE ABSOLUTE?

According to the various provisions of law discussed above, all children an inherent right to life which must be protected by law. The state has a duty to ensure to the maximum extent possible, their survival, protection and development. Consequently, no parent, doctor or court has the power to determine that the life of any child, however disabled, will be deliberately taken.

However some infants with severe congenital abnormalities and or very low birth weights are treated at great cost despite poor chances for survival. If they do survive, it is often with severe handicaps and a seriously impaired quality of life. The great costs to the infant, the family, the care providers and society have led some to conclude that the withholding or withdrawal of intensive treatment is at times ethically acceptable³⁹.

It has been argued, that for disabled newborns, the right to life is not absolute and there may be strong proportionate reasons for overriding the presumption that life should be maintained. The high price of keeping them alive with invasive medical treatments as well as the consequences for parents should be taken into consideration⁴⁰.

The BDR provides that, treatment need not be provided if the infant is chronically and irreversibly comatose. Peter Singer in his essay titled, "Justifying Infanticide"⁴¹, argues that withholding treatment from the disabled infant does not amount to infanticide. In his opinion, it is the parents' desire for the infant to live that matters. He noted that withdrawal or withholding treatment against the wishes of the parent is a wrong against the parent and not the infant.

He supports his argument by stating that, there would be no loss to the newborn, since the baby is not a person whose life has begun. Consequently, it lacks self awareness and rationality and is not able to see itself as existing over time.

While it is this writer's opinion that it may in certain circumstances be justifiable to withhold or withdraw

treatment from a disabled newborn, I failed to agree that a newborn is not a person whose life has begun, based on the fact that it lacks self awareness and rationality. If this is the basis of determining for determining personhood, then, the average mentally retarded person will not qualify as a person.

In my opinion, non treatment would be legally permitted and palliative care offered when treatment could not be reasonably said to be in the interest of the patient involved. To continue treatment in this circumstance would amount to inhumane and degrading treatment and violation of the right to respect for privacy and family life.

The proper test to apply when dealing with disabled newborns and young children is not whether their life is worth living, but whether reasonable treatment can be applied which will allow the child to live. The withdrawal of burdensome or useless treatment cannot be equated with a deliberate decision to terminate life because that life may not be worthwhile.

Be that as it may, there are no absolute answers to the dilemma posed by this issue – only choices. These choices on their part involve consequences. And only now, as results emerge from a mass of new research on the long-term outcome of neonatal intensive care, are these consequences becoming clear.

CONCLUSION

With regards to withholding or withdrawing treatment from disabled newborns, two schools of thought are in conflict. The first is focused on the right of the infant to life, and argues that if there is the slightest hope that a baby will beat the odds and live, that chance must be taken. The other argues that only those who must live with the burden of a disabled child – a burden that can weaken or destroy families- should have the right to demand the maximum aggressive care to ensure the child's survival. This stances takes into account the family's and the infant's future quality of life.

Going from the provision of the various laws, we can safely conclude that, withholding treatment from a disabled newborn prima facie is a denial of the right to life of the infant. The Baby Doe Law has placed the enforcement of this right as paramount. The choice between the Baby Doe Law and the best interest standard is important. In situations, where given the prognosis and suffering intrinsic to his illness and treatment, it would be in the child's best interest to have comfort care and to forgo aggressive life-sustaining treatments, the Baby Doe Law compels the health care providers to provide aggressive life-sustaining treatment.

It has been said that since its promulgation, the number of disabled children have increased putting a serious burden on their families who are bearing the cost of caring for them. The only exception is when it will be futile to treat the child or when the child is irreversibly

³⁹ "American Academy of Paediatrics Committee on Bioethics - Guidelines on Foregoing Life-Sustaining Medical Treatment", Paediatrics. 1995; 96:362

⁴⁰ "Church of England Says Right to Life for Newborns Is Not Absolute – Russian Orthodox Church Speaks Against Active Euthanasia of Seriously Disabled Newborn Babies", in "Orthodoxy and the World". Retrieved from www.pravmis.com on 29/9/09.

⁴¹ Excerpted from Practical Ethics, 2nd edn, Cambridge Press., 1993., pp175-217. Retrieved from "Taking Life: Humans", www.utilitarian.net/singer/by on 30/9/09

comatose. These exceptions are difficult to determine and consequently, most of these children will be given a chance to live and most do. This law is unfair in the sense that it does not take into consideration the best interest of the child. It neither considers the quality of life which the child will have nor the burden on the family. Notwithstanding the issue of sanctity of life, however, rather than allowing a child to pass through a less than dignified life, it is better for nature to take its course. By not giving parents the right of choice, the Baby Doe Law constitutes a violation of their right to self-determination and privacy.

The Nigerian law though not specific on withholding treatment from a disabled newborn, has some provisions that can be interpreted to cover this issue. Thus by implication, withholding and withdrawing treatment are offences. However, given the conditions and circumstances of the health care delivery system the present economic situation in Nigeria the parents concerned are left with choices rather than options. The burden of bringing up such children would more often than not be unbearable for the parents concerned. In such instances, the best interest of the child should be given paramount consideration and the parents who bear the burden or hardship should be given opportunity to decide what is in the best interest of their children. This is in view of the fact that, coupled with the financial and other implications on the parents and family of the disabled newborn, the infrastructure available for caring for the disabled infant is limited, expensive and not readily available.

Be that as it may, it is the opinion of the writer that the power of the government to override the rights of parents should be enforced so as to ensure the right to life to infants born with defect and disabilities.

The Nigerian government on her part should honour her commitment to all human rights conventions such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Universal Declaration of Human Rights (1948), by providing the necessary infrastructure for the survival of these infants, thereby giving parents options rather than choices.

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- See section 33 of the 1999 Constitution of the Federal Republic of Nigeria and section 11 of the Child's Right Act, 2004.
- See Patricia A. King, Judith Areen & Lawrence O. Gostin, *Law, Medicine and Ethics* op cit, 413.
- For example, state-sponsored executions may constitute an exemption to the duty to preserve life for a complex of reasons ranging from an emphasis on the value of the lives of innocent victims to the necessity of maintaining an orderly society. King, P.A, Areen, J & Gostin, L.O *Law, Medicine and Ethics* at 413.
- See generally, King, P.A, Areen, J & Gostin, L.O *Law, Medicine and Ethics* at 413-418.
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- See s.33 1999 Constitution of the Federal Republic of Nigeria.
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- See s.37, 1999 Constitution of the Federal Republic of Nigeria.
- See s.39, 1999 Constitution of the Federal Republic of Nigeria
- See s.42, 1999 Constitution of the Federal Republic of Nigeria.
- Art V (1) OAU Charter on the Rights and Welfare of the Child 1979
- Art V (2) OAU Charter on the Rights and Welfare of the Child 1979.
- Art 10 UN Declaration on the Rights of Disabled Persons 1975.
- See article 3 of the Universal Declaration of Human Rights (UDHR) 1948; article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) 1966; article 4 of the African Charter of Human and Peoples' Rights (ACHPR) 1981; section 33(1) of the Constitution of the Federal Republic of Nigeria 1999; section 306 of the Nigerian Criminal Code among others.
- In *Bello v Attorney-General of Oyo State* [1985] 5 NWLR (pt 45) 825, the Nigerian Supreme Court held that though it is legal to execute a person under the sentence of capital punishment, it however, severely castigated the Oyo State Government for executing the convict while his appeal was still pending. It held that this act clearly constitutes a breach of the right to life.
- See also, section 220 of the Penal Code.
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- Section s.341 Criminal Code
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- Section 34 1999 Constitution; see also section 11 of the CRA, 2004
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