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QUESTION:

A 30 years old lawyer, Charity, is happily married and has a good income. She has just discovered that she is pregnant. She does want children at some point but has also been nominated for promotion at work. She knows she would not get the promotion if she told her boss she was pregnant. She decides that, at this time in her life, the promotion is more important to her than having a baby. She consults her general practitioner (GP) a few weeks later having finally decided that she would like to have an abortion. She asks the GP about whether she has the right to an abortion.

1. What are the grounds for lawful termination of pregnancy?
2. Does the potential father have any legal rights in this decision?

ABSTRACT

*Reproductive rights are accorded to individuals to decide whether or not to reproduce. However, most times, the reproductive rights of the woman stands far and above that of the man. Due to the creation of this right, a woman can now decide whether or not to start reproducing. Under this right, abortion is identified. This is the willful or spontaneous termination of a woman’s pregnancy. Some jurisdictions are open to the idea of abortion while others have frowned against it. Still, abortion seems to be carried out nevertheless. This paper therefore seeks to address the grounds for the lawful termination of pregnancy vis-a-vis the legal rights of the potential father if any in a woman’s decision to have an abortion.*

INTRODUCTION

Reproductive rights are legal rights and freedoms relating to reproduction and reproductive health that vary amongst countries around the world.[[1]](#footnote-1)

The World Health Organization defines reproductive rights as follows:

*“Reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence.”[[2]](#footnote-2)*

Reproductive rights can be brought conveniently under a person’s human right because it entails the right to life, right to personal liberty under which the right of autonomy can be deduced as well as the right to human dignity.

The question whether men have reproductive rights is a hotly debated topic in several jurisdictions. While reproductive rights have been legally recognized as a woman's right - especially in matters involving abortion, adoption, and procreation - men's reproductive rights have been less certain.[[3]](#footnote-3) From the above, it can therefore be inferred that when reproductive right springs up as a topic, it is mostly discussed in favor of the carrier of a child- the woman.

Reproductive rights however afford women the ability to decide the number, timing, and spacing of children, access to the information and resources needed to exercise voluntary choice, and the right to the highest attainable standard of health.[[4]](#footnote-4) "Reproductive rights" are the rights of individuals to decide whether to reproduce and have reproductive health. This may include an individual's right to plan a family, terminate a pregnancy, use contraceptives, learn about sex education in public schools, and gain access to reproductive health services.[[5]](#footnote-5)

This however brings us to the aspect of abortion.

WHAT IS ABORTION?

Before giving a working definition of the concept, it should be noted that abortion is an aspect of reproductive rights. In exercising one’s reproductive right, a person is entitled to determine whether or not to keep or terminate a pregnancy. The decision/process of terminating a pregnancy is known as abortion.

Etymologically speaking, the term abortion is derived from the Latin infinitive ‘aboriri’, which means ‘perish’, but literally translated as the loss of fetal life. Abortion is defined as the expulsion of a fetus from the uterus before it has reached the stage of viability (in human beings, usually about the 20th week of gestation).[[6]](#footnote-6) An abortion may occur spontaneously, in which case it is also called a miscarriage, or it may be brought on purposefully, in which case it is often called an induced abortion.[[7]](#footnote-7) Spontaneous abortions occur for many reasons, including disease, trauma, genetic defect, or biochemical incompatibility of mother and fetus. On the other hand, Induced abortions may be performed for reasons that fall into four general categories:[[8]](#footnote-8)

1. to preserve the life or physical or mental well-being of the mother;
2. to prevent the completion of a pregnancy that has resulted from rape or incest;
3. to prevent the birth of a child with serious deformity, mental deficiency, or genetic abnormality; or
4. to prevent a birth for social or economic reasons (such as the extreme youth of the pregnant female or the sorely strained resources of the family unit).

By some definitions, abortions that are performed to preserve the well-being of the female or in cases of rape or incest are therapeutic, or justifiable, abortions.[[9]](#footnote-9)

ABORTION IN NIGERIA

Nigeria’s abortion laws make it one of the most restrictive countries regarding abortion.[[10]](#footnote-10) Abortion in Nigeria is illegal and carries a heavy jail sentence--up to 14 years imprisonment--unless it is performed to save the life of the pregnant woman.[[11]](#footnote-11) Abortion is governed by the penal laws that operate in the country that is, the Criminal Code[[12]](#footnote-12) applicable in the south and the Penal Code[[13]](#footnote-13) applicable to the Northern part of the country. The relevant sections are 228, 229, 230 and 328 which provide for attempt to procure abortion, attempt to procure own miscarriage, supplying drugs or instruments to procure abortion and Killing Unborn Child respectively under the Criminal Code.[[14]](#footnote-14) However, section 297 states that

*“a person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.”*

Under both the Criminal Code (Section 297) and the Penal Code (Section 232), abortion is legal and allowed if ‘performed in good faith and for the purpose of preserving the life of the mother’.[[15]](#footnote-15) In the case of *R v Bourne*,[[16]](#footnote-16) an indictment was preferred against Alex Bourne, an obstetric surgeon on the grounds that he used an instrument with an intent to procure the miscarriage of a 15-years old girl contrary to section 58 of Offences against the Person Act 1861. This English Case of *R v Bourne* states that; no abortion is unlawful when performed in order to save the pregnant woman’s life.[[17]](#footnote-17) Also, in *R v Edgal*,[[18]](#footnote-18) the appellants were convicted of supplying drugs to procure abortion contrary to section 230 of the Criminal Code. On appeal, it was held by the West African Court of Appeal in deciding the question of when it is lawful to procure a miscarriage that it is only lawful for the purpose of preserving the life of the mother. In all other cases, it is unlawful.

QUESTION 1

What are the grounds for lawful termination of pregnancy?

This refers to the exceptional circumstances under which abortion which is illegal becomes legal and can be carried out without imposing liability on any person. They include:

1. Where the continued pregnancy would endanger the life of the woman (section 297 of the criminal code)
2. Where the child when born will be seriously handicapped
3. Where the pregnancy is as a result of rape or incest.

A person will however not be guilty of an offence under the law relating to abortion-

1. When a pregnancy is terminated by a registered medical practitioner
2. When two registered medical practitioners are of the opinion and have formed in good faith that

* The pregnancy has not exceeded the 20th week and continuing of the pregnancy would involve greater risk than if the pregnancy were terminated.
* That the termination of the pregnancy is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman
* That the continuance of the pregnancy would involve risk to the life of the woman greater than if the pregnancy were terminated.
* That there is a substantial risk that if the child were born, it would suffer from physical or mental abnormalities as to be seriously handicapped.

These are the grounds for a lawful termination of pregnancy.

QUESTION 2

Does the potential father have any legal rights in this decision?

When discussing abortion, the topic often revolves around the rights of the woman and the unborn child. With that being said, it is important to also note that during family planning decisions that involve abortion, the father’s rights need to be considered as well. It should be noted that it is not uncommon for the father’s rights to be considered secondary to the rights of the mother and the child.[[19]](#footnote-19)

Whether a male has a legal right to advance his personal interest, whether it be toward abortion, fatherhood, or adoption, over that of the female, differs by region.

In answering this second question, two aspects will be addressed. First is the moral and courteous aspect to abortion. Courtesy demands that legally married spouses should take decisions together as regards their reproductive rights after all, it takes the both of them to procreate. Those who support a man's right to intervene in a woman's reproductive decisions, argue that it is unreasonable that, after fertilization has occurred, women are often given more options with regard to pregnancy and parenthood than men.[[20]](#footnote-20) Also, if both individuals are recognized as having equal rights, therefore, the father has as much legal right as the mother to that unborn child.

However, the legal position in virtually all jurisdictions is that the expected father has no right whatsoever in the determination of whether or not a pregnant woman should have an abortion.[[21]](#footnote-21) A husband sought injunctive relief to restrain the defendants from terminating his estranged wife’s pregnancy in *Paton v Trustees of the British Pregnancy Advisory Service*.[[22]](#footnote-22) Sir George Baker P in that case said:

*“The Abortion Act gives no right to a father to be consulted in respect of a termination of a pregnancy.”*

He went onto say:

*“The husband… has no legal right enforceable in law or in equity to stop his wife having this abortion or to stop the doctors from carrying out the abortion…The law of England gives him no such right; the Abortion Act 1967 contains no such provision.”*

Unsatisfied Mr. Paton sought to secure the injunction by arguing that his standing to protect his unborn child’s right to life was secured under the right to respect for his private and family life in *Paton v United Kingdom*.[[23]](#footnote-23) Unsurprisingly the European Commission described his claim as ‘manifestly ill-founded’ and dismissed his claim, finding that his estranged wife’s right to respect for her private and family life prevailed. The concept of autonomy cannot be over emphasized in this situation. The woman is at liberty to determine whether or not to have a child and the father has no legal right whatsoever to restrain her from exercising her right to autonomy.

If a man's pregnant partner seeks to have an abortion, the father's consent isn't legally required; a woman may choose to terminate a pregnancy against the father's objections. The legal reasoning for this is twofold, based on a woman's right to privacy in her medical decisions, and the fact that the mother is more directly affected by pregnancy.[[24]](#footnote-24) The Supreme Court has found laws requiring a spouse's consent for an abortion to be unconstitutional. In *Planned Parenthood v. Danforth*,[[25]](#footnote-25) the Court reasoned that a husband's refusal to consent would in effect veto a woman's choice to terminate a pregnancy. While both prospective fathers and pregnant women have an interest in the decision, when the two disagree, only one partner's position can prevail. According to the Court, since the woman actually carries the pregnancy, "the balance weighs in her favor," preventing the husband from vetoing her choice.

The ‘no-father right’ principle has been stretched to include the proposition that he cannot in any way act on behalf of the unborn to enforce his rights.[[26]](#footnote-26) In C v S,[[27]](#footnote-27) Robert Carver sought injunctive relief to restrain his former girlfriend from terminating the pregnancy on the ground that the fetus was a ‘child capable of being born alive’ within the meaning of s1 (1) of the Infant Life (Preservation Act) 1929. The claim was eventually rejected.

These examples demonstrate that the courts have been reluctant to recognize any paternal right to be involved in the pregnancy termination decision making process.

CONCLUSION

It has been stated that generally, abortion is a subsection of reproductive rights and it entails the termination of pregnancy which may either be induced or spontaneous. It is not a widely accepted concept as some jurisdictions frown at the idea while others have embraced it. In Nigeria, it is not legal going by our penal laws. However, there are exceptions to the rules that have been listed out in the course of the work. On the legal right or otherwise of the potential father to the decision of abortion, it has been established that the autonomy of the woman supersedes all rights whatsoever and he has no right to restrain the woman who is most likely to be adversely affected by the pregnancy, from terminating it.

1. R. J. Cook & M.F. Fathalla, ‘Advancing Reproductive Rights Beyond Cairo and Beijing’ (1996) 22(3) *International Family Planning Perspectives*, p. 115–121. [↑](#footnote-ref-1)
2. World Health Organization, ‘Gender and Reproductive rights’ available at

   <https://web.archive.org/web/20090726150133/http://www.who.int//reproductive-health/gender/index.html> accessed 19 April 2020. [↑](#footnote-ref-2)
3. FindLaw, ‘What are Reproductive Rights?’ available at < https://family.findlaw.com/reproductive-rights/what-are-reproductive-rights-.html> accessed 18 April 2020 [↑](#footnote-ref-3)
4. M.E. Wallace et al, ‘The Status of Women's Reproductive Rights and Adverse Birth Outcomes’ (2017) 27 (2) *Jacobs Institute of Women’s Health* p. 121. [↑](#footnote-ref-4)
5. FindLaw (note 3 above). [↑](#footnote-ref-5)
6. Encyclopedia Britannica, ‘Abortion’ available at < https://www.britannica.com/science/abortion-pregnancy> accessed 18 April 2020. [↑](#footnote-ref-6)
7. Ibid. [↑](#footnote-ref-7)
8. Ibid. [↑](#footnote-ref-8)
9. Ibid. [↑](#footnote-ref-9)
10. I.O Iyioha, *Comparative health law and policy: critical perspectives on Nigerian and global health law* (Taylor and Francis 2015). [↑](#footnote-ref-10)
11. I. Okagbue, ‘Pregnancy termination and the law in Nigeria’ (1990) 21(4) *Studies in Family Planning*, p. 197. [↑](#footnote-ref-11)
12. Criminal Code Act C38 L.F.N. 2004. [↑](#footnote-ref-12)
13. Penal Code (Northern States) Federal Provisions Act Cap.P3 L.F.N. 2004. [↑](#footnote-ref-13)
14. Under the penal code, the relevant sections for abortion include sections 232, 233 and 234. [↑](#footnote-ref-14)
15. I. Okagbue (note 11 above). [↑](#footnote-ref-15)
16. (1939) 1 K.B 687. [↑](#footnote-ref-16)
17. Ibid. [↑](#footnote-ref-17)
18. [1938] 4 WACA 133. [↑](#footnote-ref-18)
19. Nicholas Baker, ‘What You Should Know about Abortion and Fathers’ Rights’ available at

    <https://www.familylawrights.net/blog/fathers-rights-abortion/ > accessed 18 April 2020. [↑](#footnote-ref-19)
20. BBC ‘Abortion and the Father <https://www.bbc.co.uk/programmes/genres/religionandethics >accessed 18 April 2020. [↑](#footnote-ref-20)
21. F.O. Emiri, *Medical Law and Ethics in Nigeria* (Malthouse Press, 2012) p.141. [↑](#footnote-ref-21)
22. [1979] QB 276. [↑](#footnote-ref-22)
23. [1980] 3 EHRR 408. [↑](#footnote-ref-23)
24. Findlaw (note 3 above). [↑](#footnote-ref-24)
25. (1976) UKSC 74-1151. [↑](#footnote-ref-25)
26. F.O. Emiri (note 21 above) [↑](#footnote-ref-26)
27. [1988] QB 135. [↑](#footnote-ref-27)