

# NAME: UKOMADU, CHIJIOKE

# MATRICULATION NUMBER: 15/LAW01/195

# COURSE: HEALTH LAW

# LECTURER: PROFESSOR OLARINDE, E.S.

# DATE: 17 APRIL 2020.

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.

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

*ABSTRACT*

*Reproduction is an imminent part of life and an important aspect of marriage. This has been the orthodox view over time. Women have been made to bear as many children as they could and men have been lured into taking care of this many children, having no room to object because reproduction is a gift from God. This is the reality of some families in our present day irrespective of our claim to civilization. The reason for this is not farfetched. People are unaware of what is referred to as ‘Reproductive rights’. This right enables individuals, spouses to determine whether or not they want to reproduce. This right can be exercised in several ways but the most prominent is the right to terminate a pregnancy-Abortion. The aim of this paper is attempt a discourse on the issue of abortion particularly in Nigeria and the grounds for a lawful termination of pregnancy alongside the legal right or otherwise of a potential father in the event that his wife choses to terminate her pregnancy.*

INTRODUCTION

A Brief look into Reproductive rights.

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.”[[1]](#footnote-1)*

The term ‘reproductive rights’ refers to the freedom of individuals to control decisions regarding contraception, abortion, sterilization, and childbirth.[[2]](#footnote-2) It is a relatively recent concept in Western, affluent societies, and is closely related to the rise of social movements advocating access to birth control, legal abortion, and women's control over pregnancy and childbirth.[[3]](#footnote-3) Although, much mention is made of the woman, this does not mean a man does not have reproductive rights. It only indicates that his rights are somewhat secondary to that of the woman simply because when it comes to reproduction, there is a more adverse effect on the woman than on the man.

Reproductive rights can conveniently be classified as a human right because it embodies the necessary rights of a person. Talk about right to life, right to autonomy, right to Liberty and Security of the Person, right to Health, Right to Decide the Number and Spacing of Children, Right to Consent to Marriage and Equality in Marriage, Right to Privacy, Right to Equality and Non-Discrimination, Right to be Free from Practices that Harm Women and Girls, right to education and information amongst other human rights.

Since reproductive right has been stated to include the right to decide whether to terminate a pregnancy, the need to discuss abortion arises.

WHAT IS ABORTION?

Etymologically, it comes from two Latin words ‘abortus’ and ‘abortive’ meaning miscarriage, premature birth or perishing by an untimely birth respectively.[[4]](#footnote-4) Hence, in the widest intention of the word, abortion includes all cases of fetal expulsion from the womb whether inadvertently – miscarriage or spontaneous abortion or induced – abortion on demand.[[5]](#footnote-5) An abortion is a procedure to end a pregnancy. It uses medicine or surgery to remove the embryo or fetus and placenta from the uterus. The procedure is done by a licensed health care professional.[[6]](#footnote-6)

Abortion in Nigeria

Abortion in Nigeria is governed by two different laws. In the predominantly Muslim states of Northern Nigeria, which contain about half the population of the country, the Penal Code, Law No. 18 of 1959, is in effect. In the southern part of the country, which is largely Christian in religion, the Criminal Code of 1916 is in effect.[[7]](#footnote-7) Under both laws however, abortion is illegal. For the criminal code, the relevant sections criminalizing the act are Section 228, 229, 230 and 328.

*228. Attempts to procure abortion.*

*Any person who, with intent to procure miscarriage of a woman whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony, and is liable to imprisonment for fourteen years.*

*229. Attempt to procure own miscarriage.*

*Any woman who, with intent to procure her own miscarriage, whether she is or is not with child, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a felony, and is liable to imprisonment for seven years.*

*230. Supplying drugs or instruments to procure abortion.*

*Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, is guilty of a felony, and is liable to imprisonment for three years.*

*328. Killing unborn child.*

*Any person who, when a woman is about to be delivered of a child prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had then died, he would be deemed to have unlawfully killed the child, is guilty of a felony, and is liable to imprisonment for life.*

As for the Penal code, we have sections 232, 233 and 234. However, section 297 of the Criminal Code provides 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.”*

This section operates to the effect that abortion does not carry the flag of illegality if it is done to preserve the life of the carrier of the child- the mother. Mother’s life and health are altogether referred to as maternal indications. These indications can be purely medical, physical, emotional and/or psychological. It may even relate to the mothers age. Thus, it then appears that the health of the mother including her psychosocial convenience is to be sufficient reasons for a legal abortion.[[8]](#footnote-8) This was, for the first time in the English Law established in *R. v. Bourne*.[[9]](#footnote-9) There it was declared that ‘preserving the life of the mother extended beyond acts to save her physical existence to ensuring her psychological balance.[[10]](#footnote-10) What this requires is that whenever the mother feels that the child is not prepared for life like in cases of rape, incest etc.; she may wish to assume responsibility for it or may not wish to. “And if assuming responsibility for it may require large sacrifices then (she) may refuse.”[[11]](#footnote-11) In such a situation, a mother can lawfully terminate her pregnancy.

QUESTION ONE

What are the grounds for lawful termination of pregnancy?

Asides the exception stated above, there are grounds or circumstance under which abortion can be carried out and not attract any liability to both the patient and the physician. 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 TWO

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

In answering this question, the writer is coming from an angle of autonomy. Autonomy requires that an adult of competent mind to determine what happens to his body. This right to autonomy allows a woman to decide whether or not to keep a pregnancy.

Most abortion discourse largely center on the interest of the pregnant woman, the fetus and in some rare cases, the state interest. Discourses on the right of other parties such as the doctor and the expectant father rarely enter. This should not be taken to mean that these third parties have no interest in the pregnancy. 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.[[12]](#footnote-12)

If the father's consent isn't required to abort a fetus, does he have a legal right to be notified before it happens?[[13]](#footnote-13)

The Supreme Court addressed this question in *Planned Parenthood v. Casey*[[14]](#footnote-14) and found that such a law was unconstitutional. While most women discuss an abortion with their partners, those who don’t were much more likely to be in abusive relationships, according to the Court. The Supreme Court saw spousal notification requirements as placing an undue burden on women who may fear for their safety, or that of their children.

As for the place of the father, the legal position in virtually all jurisdictions is that the expectant father has no right whatsoever in the determination of whether or not a pregnant woman should have an abortion.

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*.[[15]](#footnote-15) 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. 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*.[[16]](#footnote-16) 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.

In *C v S*,[[17]](#footnote-17) 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 ss1 (1) of the Infant Life (Preservation Act) 1929. A claim which was eventually rejected. In the case of *Kelly v Kelly*,[[18]](#footnote-18) a Scottish man sought an injunction to prevent his wife from having an abortion in 1997. A higher court however subsequently withdrew the injunction.

These cases, however demonstrate that the courts have been reluctant to recognize any paternal right to be involved in the pregnancy termination decision making process. Thus, the potential father has no legal right in his wife’s decision to terminate a pregnancy.

CONCLUSION

The grim reality today is that abortion is regularly carried out in Nigeria without adequate regulation. This appears to be more harmful than if it is made legal. Even though abortion is considered morally wrong and given the illegal status in some jurisdictions of which Nigeria is one, there are exceptional circumstances under which an abortion can be lawfully carried out and which when carried out, both the patient and physician will be absolved of any possible liability.

A woman may make the choice to terminate a pregnancy, even if the alleged father objects to the procedure. The reasoning behind this is twofold, based on the woman’s right to medical privacy and the fact of the female body being more directly affected by the pregnancy. The father has no right whatsoever to determine whether or not the wife can terminate her pregnancy. There is no legal recognition of such right for now, perhaps a case law or statute will make provisions for it in the nearest future.

1. 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 17 April 2020. [↑](#footnote-ref-1)
2. S. Staggenborg, ’Reproductive rights in Affluent Nations’ (2001) International Encyclopedia of the Social & Behavioral Sciences, p.1. [↑](#footnote-ref-2)
3. Ibid. [↑](#footnote-ref-3)
4. M.O. Izunwa, ‘Right to Life and Abortion Debate in Nigeria: A Case for the Legislation of the Principle of Double-Effect’ (2007) *Journal of International law* p.112. [↑](#footnote-ref-4)
5. Roe v. Wade (1973) 410 U.S. 113, 93 S.Ct. 705. [↑](#footnote-ref-5)
6. MedLinePlus, ‘Abortion’ available at <https://medlineplus.gov/abortion.html> accessed 17 April 2020. [↑](#footnote-ref-6)
7. Women on waves, ‘Nigeria: Abortion Law’ available at

   <https://www.womenonwaves.org/en/page/5015/nigeria--abortion-law> accessed 18 April 2020. [↑](#footnote-ref-7)
8. M.O. Izunwa (note 4 above) p. 115. [↑](#footnote-ref-8)
9. (1937) 1 KB 687. [↑](#footnote-ref-9)
10. A.S. Ogwuche, *Compendium of Medical Law*, (Lagos, Espee Printing & Advertising, 2006) p. 99. [↑](#footnote-ref-10)
11. J.J. Thomas, ‘A defense of Abortion’ in *Philosophy of Public Affairs*, cited by A. Danagan (ed.), *The*

    *Theory of Morality* (Chicago, University of Chicago press, 1977) p. 169. [↑](#footnote-ref-11)
12. Findlaw, ‘Father’s rights and abortion’ available at <https://family.findlaw.com/paternity/fathers-rights-and-abortion.html> accessed 18 April 2020. [↑](#footnote-ref-12)
13. Ibid. [↑](#footnote-ref-13)
14. (1992) USSC 91-744. [↑](#footnote-ref-14)
15. [1979] QB 276. [↑](#footnote-ref-15)
16. [1980] 3 EHRR 408. [↑](#footnote-ref-16)
17. [1988] QB 135. [↑](#footnote-ref-17)
18. [1997] SLT 896. [↑](#footnote-ref-18)