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**COURSE: HEALTH LAW**

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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.

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

**ABSTRACT**

*Health laws strive to protect the rights of individuals and in the context of reproduction, the rights of the father and mother of the unborn child as well as the unborn child. These laws protect these individuals from harm and neglect and also preserve their rights to autonomy, dignity and life. Reproductive rights generally, guarantee the freedom of individuals to choose whether or not they want to reproduce. The extent of these rights varies in different jurisdictions. This work attempts to look at the grounds for lawful termination of pregnancy in Nigeria and the rights of the potential father regarding the decision to terminate a pregnancy.*

**INTRODUCTION**

Reproductive rights refer to rights of individuals to decide whether to reproduce and have reproductive health. This may include the right to plan a family, terminate a pregnancy, use contraceptives, learn about sex education in public schools and gain access to reproductive services.[[1]](#footnote-1) These rights began to appear as a subset of human rights in the 1968 proclamation of Teheran which recognizes in Paragraph 16 that parents have a basic human right to decide freely the number and spacing of their children. This had been reiterated in the United Nations Convention on the Elimination of all forms of Discrimination against Women (CEDAW) which has been ratified in Nigeria and goes further to include the right to access information., education and the means to enable them express these rights.

Abortion refers to the termination of pregnancy before the fetus is viable by natural or artificial means. It may be undertaken to save the mother’s life or to permanently remove the ability to have children. It is the termination of a pregnancy after, accompanied by, resulting in, or closely followed by the death of the embryo or fetus.[[2]](#footnote-2) Under the Nigerian Criminal Code (governing Southern states) and the Penal Code (governing Northern states), abortion is viewed as a crime. Section 228, 229, 230 and 328 of the Criminal Code as well as sections 232, 233 and 234 of the Penal Code criminalizes abortions and labels it a felony. However, Section 297 of the Criminal Code makes room for exceptions where a procedure to terminate a pregnancy would not be termed an offence. It 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 goes to show that preservation of the mother’s life takes precedence over the unborn child. The performance of this procedure must be done with reasonable care and skill and the state of mind of the patient as well as all relevant circumstances of the case must be taken into consideration. These circumstances may be purely medical, physical, emotional or psychological. In the English case of *R. v. Bourne*[[3]](#footnote-3)*,* it was established that preserving the life of the mother extended beyond acts to save her physical existence to ensuring her psychological balance.[[4]](#footnote-4) Where the mother is not in the best psychological state to raise a child, there is a lawful ground to terminate the pregnancy.

**What are the grounds for lawful termination of pregnancy?**

Abortion is permitted under there Nigerian law where:

1. The continued pregnancy would endanger the life of the woman as provided in Section 297 of the Criminal Code,
2. The child when born would be seriously handicapped,
3. The pregnancy came as a result of rape or incest,
4. The pregnancy is terminated by a registered medical practitioner, and
5. Two registered medical practitioners are of the opinion 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.

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

One of the most important rights in medical law is the right to autonomy. Health law aims to preserve the patient’s right to make informed decisions about their treatment options in line their preferences and values without interference or hindrance. This right also forms part of the reproductive rights as a person has a choice to decide whether or not to have children.

Discussions about abortions largely focus on the rights of the mother or the unborn child with rare considerations of the interest of the expectant father. This is hinged on the need to protect the right to autonomy and right to privacy in medical decisions on the part of the mother and the fact that the mother is more directly affected by pregnancy.[[5]](#footnote-5) A woman may choose to terminate a pregnancy contrary to the wishes of the expectant father as his consent is not legally required.[[6]](#footnote-6) In *Planned Parenthood v Danforth[[7]](#footnote-7)* the court found that while both prospective fathers and mothers have an interest in the decision, when the two disagree, only one partner’s position can prevail and this is the woman since she actually carries the pregnancy and the balance weighs in her favour preventing the man from vetoing her choice. There is also no legal duty on the mother to inform the expectant father of her decision to abort a pregnancy.[[8]](#footnote-8) In *Planned Parenthood v. Casey*[[9]](#footnote-9) the court held that this was unconstitutional as this would place undue burden on women in abusive relationships who feared for their safety and that of their children.

Arguments have been raised for the protection of father’s rights and equality of the man’s right to have children to that of the woman.[[10]](#footnote-10) George W. Harris put forward the argument that there are circumstances that a woman’s choice to terminate a pregnancy would do harm to the father and therefore, be morally wrong.[[11]](#footnote-11) Despite these arguments, 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.

In *Paton v Trustees of the British Pregnancy Advisory Service*[[12]](#footnote-12), a husband sought injunctive relief to restrain the defendants from terminating his estranged wife’s pregnancy. The court per Sir George Baker P held that the father had no right under the Abortion Act[[13]](#footnote-13) to be consulted in respect of the termination of the pregnancy. His argument that he sought to secure the injunction under the right to respect for his private and family life in *Paton v United Kingdom*[[14]](#footnote-14) was dismissed and described as ‘manifestly ill-founded’. The court found that his estranged wife’s right to respect for her private and family life prevailed. In *Kelly v Kelly*,[[15]](#footnote-15) a Scottish man sought an injunction to prevent his wife from having an abortion in 1997. This injunction was withdrawn by a higher court.

From the decisions of the courts in the aforementioned cases, we can reach a conclusion that the potential father has no say in the mother’s decision to terminate a pregnancy.

**CONCLUSION**

Despite the fact that abortions are criminal offences in Nigeria, they are still being carried out most times in unsafe conditions and by unskilled providers or quacks contributing significantly to the high levels of maternal deaths in the country. Even though many people in the country view this act as morally wrong and illegal, there are certain circumstances where the law permits it be done. This decision to terminate the pregnancy can also be made without the consent of the potential father or contrary to his wishes. The courts have been of the opinion that the mother’s choice outweighs that of the father and despite arguments put up in many cases, no contrary view has been given.

**REFERENCES**

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3. *R. v. Bourne* [1937] 1 KB 687 [↑](#footnote-ref-3)
4. A.S. Ogwuche, *Compendium of Medical Law*, (Lagos, Espee Printing & Advertising, 2006) p. 99. [↑](#footnote-ref-4)
5. Findlaw, ‘Father’s rights and abortion’ available at <https://family.findlaw.com/paternity/fathers-rights-and-abortion.html> accessed 17 April 2020 [↑](#footnote-ref-5)
6. Ibid [↑](#footnote-ref-6)
7. Planned Parenthood of Missouri v Danforth [1976], USSC No. 74-1151 [↑](#footnote-ref-7)
8. Ibid. [↑](#footnote-ref-8)
9. *Planned Parenthood v. Casey* [1992] USSC 91-744. [↑](#footnote-ref-9)
10. Ethics Guide, “Father’s Rights”, <https://www.bbc.co.uk/ethics/abortion/kegal/fathers.shtml> accessed 17 April 2020. [↑](#footnote-ref-10)
11. This is where the father has a morally legitimate interest in raising the child and has been misled by the woman into doing specific things under the guise that she would give him a child if he does them. [↑](#footnote-ref-11)
12. *Paton v Trustees of the British Pregnancy Advisory Service* [1979] QB 276. [↑](#footnote-ref-12)
13. Abortion Act 1967 c.87 [↑](#footnote-ref-13)
14. *Paton v United Kingdom* [1980] 3 EHRR 408 [↑](#footnote-ref-14)
15. *Kelly v Kelly* [1997] SLT 896 [↑](#footnote-ref-15)