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**COURSE: HEALTH LAW II**

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**Question**

1. Termination of pregnancy:

A 30-years-old lawyer, Charity, is happily married and has a good income. She has just discovered she is pregnant. She does want children at some point but has also just 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 a right to an abortion.

a. What are the grounds for a lawful termination of pregnancy?

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

**ANSWERS**

Abortion on the face of it is illegal in Nigeria pursuant to the provisions of the Penal and Criminal Code. The Criminal Code in **Section 229** provides that ‘any woman who with the 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 force of any kind or uses any other means whatever or permits any such thing or means to be administered or used is guilty of a felony and is liable to imprisonment for seven years’.

**Section 230** further provides that, 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. In ***Rex v Edgar****[[1]](#footnote-2)*, it makes it acceptable under the criminal code if the procedure was practiced to preserve the mother’s life.

The Penal Code also regulates abortion in the north and provides in **Sections 232, 233, 234**. The provision in the penal code is *pari materia* to the criminal code with the slight difference in the fact that the procedure may be justified where there is need to save the life of the mother. Punishment under the Penal code includes imprisonment, fine or both.

However, there are outlined exceptions as stipulated in the Act in Section 297 of Criminal Code. 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 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 all the circumstances of the case.

1. Where the Child when born would be seriously handicapped
2. Where the pregnancy is a result of rape or incest; before the position of the law in the case of *Roe v Wade[[2]](#footnote-3)*, few states tolerated abortion in instances of rape and incest. In America, only the state of Mississippi allowed abortion if the woman in question conceived as a result of rape while no state permitted abortion on the justification of incest.
3. When the pregnancy is terminated by a registered medical practitioner
4. When two registered practitioners are of the opinion formed in good faith:

* That the pregnancy has not exceeded its 20th week and the continuing of the pregnancy would invoke risk greater than if the pregnancy were terminated
* That the termination of 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 pregnant 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.

However, on the Authority of *Roe v Wade*[[3]](#footnote-4)(persuasive) abortion can be said to be legal only in America. It was a landmark legal decision issued on January 22, 1973, in which the US Supreme Court struck down a Texas statute banning abortion, effectively legalizing the procedure across the United States. The court held that a woman’s right to an abortion was implicit in the right to privacy protected by the 14th Amendment to the Constitution. Prior to *Roe v Wade,* abortion had been illegal throughout much of the country since the late 19th century.

Therefore if Charity, a Nigerian, can prove any of the above exceptions, she would be granted the right to abort her pregnancy and not just on mere personal and selfish grounds. But on the contrary, any act of termination of the pregnancy done by Charity would make her liable for conviction under the Criminal Code.

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

On the face of it, a potential father in the scenario above does not have any legal right to the decision making due to the following reasons:

From the laws available in Nigeria such as The Constitution of the Federal Republic of Nigeria, The Childs Right Act etc., it is evident that the woman is seen as the sole determinant when it comes to reproductive rights. The consent of the spouse to affirm or not is overridden in most circumstances or better said not recognized because the law is out to protect the life of the woman who is the host of such foetus.

**Right to bodily autonomy of the woman**: a woman has autonomy over her body and can take rationale decisions in that respect. Therefore, she can decide whether or not to keep a pregnancy without her husband’s interference and objection. A woman as a patient in this sense has the right to object to keeping the foetus in her womb and she can also agree so to do. At instances where she objects to keeping the foetus and aborting it, her right should be respected by the doctor, her spouse or partner and family members. Any contrary act to make her keep the child would be seen as an infringement of her fundamental right. An argument has gone forth that it is the woman’s body that hosts the embryo or foetus as the case might be and as such, she has the right to state if she intends on continuing the hosting or not. Marsha Garrison, a professor at Brooklyn Law School, stated that U.S. courts acknowledge "that embryo is in the woman's body; it is within her and can't be separated from her, so it's not just her decision-making about whether to bear a child, and it’s about her body".[[4]](#footnote-5)

**Right to life**: this is a very germane fundamental right of a woman and it transcends to her reproduction. Fundamental right to life is personal and the law recognizes it as such, the law would respect the woman’s right and respect her life, so as to abort a pregnancy if it is seen that it would be a risk to her life. The state serves as a guardian for the life of her citizens and would go to any length to protect it. In Nigeria for instance, **Section 307 of the Criminal code** provides that a foetus would be regarded as a person when it has been completely detached from the mother. As such if the foetus is not yet a person, the life of a person who in this sense is the mother would be safeguarded, overriding any other opinion to the contrary. Thus, it can be deduced that the law only recognizes the woman as the sole determinant in the case and not the interest of the man.

**The Pro-choice argument**: this argument recognizes the inherent right of a woman in reproduction which could be said to be quite fundamental. They invariably argue that life begins at birth, or until there is capacity for social interaction[[5]](#footnote-6). The preservation of the health of the mother has been the major argument in the hands of the advocates of a legal abortion. Mother’s life and health are altogether referred to as maternal indications. These indications can be purely medical, physical, emotional and/ or psychological. Therefore abortion is seen from this point as purely the mother’s choice as she hosts the child and if it is seen that the pregnancy poses great harm to the mother, and then it should be detached without any disinclinations so as to preserve her life. A person is not therefore guilty of abortion where it is necessary to prevent grave permanent injury to the physical and mental health of the pregnant woman or where the continuance of a pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy is terminated[[6]](#footnote-7).

But on the other hand, the man’s interest has been argued to require protection. Reproductive Right but the question arises whether there is any right whatsoever pertaining to the putative father of the foetus. This is however a controversial issue which calls for reconciliation with the trend of events. There would be arguments for and against the case in point.

A male’s interest in the reproductive rights of a woman differs as to region. Just in 2011, several countries of the world sought the legalization of the male’s consent and authorization before a woman can abort or terminate her pregnancy[[7]](#footnote-8); but this can be overridden or overlooked in some jurisdictions in severe cases where the maternal health is in issue[[8]](#footnote-9).

Since *Roe v. Wade*, some states in the United States have attempted to enact laws requiring spousal consent. All of these laws have been ruled unconstitutional, spousal consent in the 1976 decision *Planned Parenthood v. Danforth[[9]](#footnote-10)* and spousal awareness in the 1992 decision *Planned Parenthood v. Casey[[10]](#footnote-11)*

It seems to be quite unreasonable that women are given more opportunities with regards to pregnancy and parenthood than men irrespective of the fact that fertilization took place by the efforts of the two parties. From the position of things, it seems normal that a woman can deprive her husband or spouse the right to be a father without the man’s right and interest being considered.

George Harris[[11]](#footnote-12) has argued that if a woman intends on having a child in a mutually consensual manner, then it would be morally unacceptable for an abortion to take place without the consent of the man; therefore a man should have veto over his spouse’s decision to abort or terminate a pregnancy which consensually occurred.

As at 2002 in a United States Gallup special report, it was mentioned that only 38% of the population opposed the notification of the husband of a married woman of an abortion[[12]](#footnote-13).

In a 2003 Gallup poll, 72% of respondents were in favour of notification to the husband, with 26% opposed; of those polled, 79% of males and 67% of females responded in favour of notification inside married couples[[13]](#footnote-14).

If a couple has been in some sort of committed partnership i.e. dating a while, cohabitating i.e. married on the face of it, then the man’s opinions and wants should be taken into consideration when it comes to abortion. For the man’s opinion to be allowed to absolutely trump the woman’s? No. But if you help to create what could potentially become a human being, then you should be part of the decision to end it[[14]](#footnote-15). If the fathers of the foetuses are excluded from participating in an abortion decision that carries the implication that they are irrelevant; and if they are irrelevant then they are excused from any responsibility for the consequences of their actions. That’s not good for society as a whole. Men and women can’t have complete equality when it comes to pregnancy because women carry children. But if women can make the choice to either be a parent or not, then how is it fair that men don’t have a similar choice? How is it fair to force a man to provide financial child support if the woman he impregnated chooses to keep and groom a child?

Therefore, the father of the foetus charity is carrying cannot be said to have legal rights but mere moralistic considerations to his person as the father.

1. 2010 ONCA529 [↑](#footnote-ref-2)
2. 410 US 113 (1973) [↑](#footnote-ref-3)
3. 410 US 113 (1973) [↑](#footnote-ref-4)
4. [Pam Belluck](https://en.wikipedia.org/wiki/Pam_Belluck). "[The Right to Be a Father (or Not)](https://www.nytimes.com/2005/11/06/weekinreview/06belluck.html?ex=1181707200&en=4a4d5075047f2047&ei=5070)." *The New York Times.* (November 6, 2005). <https://www.nytimes.com/2005/11/06/weekinreview/the-right-to-be-a-father-or-not.html> accessed 18th April, 2020 [↑](#footnote-ref-5)
5. Scientists for life, (eds), *The Positions of Modern Science on the beginning of Human Life and why a Human Embryo is not a parasite* (Virgina, Sunlife Grestone Publishers, 1984) p.5 [↑](#footnote-ref-6)
6. Section 1, The English Abortion Act, 1967 [↑](#footnote-ref-7)
7. Abortion Map, ‘World Abortion laws 2011’ <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/AbortionMap_2011.pdf> accessed 18th February, 2020 [↑](#footnote-ref-8)
8. Rahman, Anika; Katzive, Laura; Henshaw, et al, ["](http://www.guttmacher.org/pubs/journals/2405698.html). *International Family Planning Perspectives*. "A Global Review of Laws on Induced Abortion, (1985–1997) **24** (2) [↑](#footnote-ref-9)
9. 428 US 52 (1976) [↑](#footnote-ref-10)
10. 505 US 833 (1992) [↑](#footnote-ref-11)
11. Harris GW. "Fathers and foetuses". *Ethics* (1986). **96** (3): 594-603. <https://en.wikipedia.org/wiki/Paternal_rights_and_abortion#cite_note-20> accessed 18th April, 2020 [↑](#footnote-ref-12)
12. Lydia Saad "Public Opinion About Abortion — An In-Depth Review” . January 22, 2002 <https://news.gallup.com/poll/9904/public-opinion-about-abortion-indepth-review.aspx#2> accessed 18th February, 2020 [↑](#footnote-ref-13)
13. The Pew Research Centre for the People and the Press. (2005-11-02). "Public Opinion Supports Alito on Spousal Notification Even as It Favours Roe v. Wade." *Pew Research Center Pollwatch.*  <http://www.people-press.org/2005/11/02/public-opinion-supports-alito-on-spousal-notification-even-as-it-favors-iroe-v-wadei/> accessed 18th April, 2020 [↑](#footnote-ref-14)
14. The Atlantic, Personal Stories on abortion made public, <https://www.theatlantic.com/notes/2016/08/how-much-say-should-a-guy-have-with-abortion/494051/> accessed 18th April, 2020 [↑](#footnote-ref-15)