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**15/LAWO1/164**

**HEALTH LAW II**

**LPB 514**

**Question**

**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.**

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

Termination of pregnancy is also known as abortion. Abortion is defined as the discontinuation of a pregnancy before attainment of viability.[[1]](#footnote-2) In other words, the termination of pregnancy before the fetus is capable of independent existence.[[2]](#footnote-3) It is also the intentional expulsion of the product of conception any moment from conception up till the birth of the child.

In all parts of Nigeria, abortion is a criminal offense. In the South, the relevant provisions are *sections 228, 229, 230, 297, and 328* of the Criminal Code.[[3]](#footnote-4) In the North, the relevant provisions are *sections 232, 233, 234, 235 and 236* of the Penal Code.[[4]](#footnote-5) For the states that have adopted the Sharia Legal System, abortion is also criminalized by the Sharia Penal Code Law. In Bauchi State, for example, the relevant provisions of the Sharia Penal Code Law[[5]](#footnote-6) are *sections 208, 209, 210, 211, and 212*.

1. Grounds for Lawful Termination of Pregnancy
* Surgical Operation:

*Section 279* of the criminal code states that: “Any 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.”

From this provision, it would seem that the term “surgical operation”, is strict and is deliberately used to indicate the necessity to save the life of the mother. It is, therefore, unlikely that the defense will countenance other means of procuring a miscarriage.

Also, does the term “preservation of the mother’s life” mean that she must actually be in danger of dying? Nigerian courts have not interpreted this term. However, the English case of *R v. Bourne*, decided under a similar provision, indicates that the preservation of the mother’s life should include safeguarding her physical and mental health.[[6]](#footnote-7) In that case, a leading gynecologist, Dr. Aleck Bourne, tested the law by openly inviting the police to prosecute him for performing an abortion on a 14-year-old girl who had been raped. The Court acquitted him on the grounds that he acted in good faith to preserve the life of the woman who might otherwise have become a “physical and mental wreck”. In other words, the abortion of a pregnancy of a 14-year-old resulting from rape was to safeguard her physical and mental health and therefore, to preserve the life of the mother.[[7]](#footnote-8)

* Abortion is also legal where the child when born would be seriously handicapped
* Where the pregnancy is as a result of rape or incest
* Where circumstances show that the unborn child is not capable of being born alive.
* Where the pregnancy is ectopic. Ectopic pregnancy is when a pregnancy grows outside of the uterus, usually in the fallopian tube. Unfortunately, it is not possible to save the pregnancy. It usually has to be removed using medicine or an operation.[[8]](#footnote-9) Ectopic pregnancy is a common life threatening emergency in pregnancy and the leading cause of pregnancy-related deaths in the first trimester. It results in significant morbidity for the mother and inevitable loss of the pregnancy. Apart from fetal wastage, maternal mortality and morbidity, ectopic pregnancy is also associated with repeat ectopic gestation and impairment of subsequent fertility.[[9]](#footnote-10)
1. Legal Rights of the Potential Father in Decision Making

If a man's pregnant partner seeks to have an abortion, the father's consent is not 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. Under these circumstances, the principle of autonomy is considered. This is the capacity to think, decide and act on the basis of such thought and decision freely and independently, without hindrance. The woman can make independent decisions that affect her once she meets the requirements of autonomy.

In the United States, the Supreme Court has found laws requiring a spouse’s consent for an abortion to be unconstitutional. In [*Planned Parenthood v. Danforth*](https://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=428&invol=52)[[10]](#footnote-11), 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.

While courts have largely treated fathers’ rights in abortion decisions as secondary to those of the mother, other means exist for fathers to influence the decision, namely, through private agreements.[[11]](#footnote-12)

1. See Black’s Law Dictionary (Bryan A. Garner ed., 8th ed. 2004); The New International Webster’s Comprehensive Dictionary of The English Language - Encyclopedic Edition (Typhoon Media Corp. 2004). [↑](#footnote-ref-2)
2. This is about seven months (28 weeks), but may occur earlier, even at six month (24 weeks). *Roe v. Wade* 410 U.S. 113 (1973) [↑](#footnote-ref-3)
3. Criminal Code Act (1916), Cap.C38, LFN 2004 [↑](#footnote-ref-4)
4. Penal Code Act (1960), Cap.532, LFCTN 2007 [↑](#footnote-ref-5)
5. Bauchi State Shari’ah Penal Code Law (2001), Cap.198, Laws of Bauch State 2007 [↑](#footnote-ref-6)
6. *R v. Bourne* (1938) 3 All ER 615 (Eng.) [↑](#footnote-ref-7)
7. P.C. Okorie and O.A. Abayomi, ‘Abortion Laws in Nigeria: A Case Reform’ (2019) <https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1215&context=annlsurvey> accessed 17th April 2020 [↑](#footnote-ref-8)
8. <https://www.nhs.uk/conditions/ectopic-pregnancy/> accessed 17th April 2020 [↑](#footnote-ref-9)
9. G.O. Udigwe and O.S. Umeononihu, ‘Ectopic pregnancy: A 5 year review of cases at Nnamdi Azikiwe University Teaching Hospital (NAUTH) Nnewi’ (2010) <http://www.nigeriamedj.com/article.asp?issn=0300-1652;year=2010;volume=51;issue=4;spage=160;epage=163;aulast=Udigwe> accessed 18th April 2020 [↑](#footnote-ref-10)
10. 428 U.S. 52 (1976) [↑](#footnote-ref-11)
11. <https://family.findlaw.com/paternity/fathers-rights-and-abortion.html> accessed 19th April 2020 [↑](#footnote-ref-12)