

TERMINATING THE LIFE OF THE FOETUS AND PRESERVING THE LIFE OF THE MOTHER: A JUSTIFICATION FOR THERAPEUTIC ABORTION

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Abstract

Abortion is a process that induces the premature expulsion of a fetus before the due date of delivery. A mother's life may be in danger during pregnancy and in order to save the mother's life a therapeutic abortion may be required. A therapeutic abortion is an abortion induced for the purpose of preserving the life or health of the mother. Infact, it is an abortion undertaken for medical reasons. It is actually carried out to save the life of the mother. The objective of this paper is to encapsulate why therapeutic abortion is justified. The researcher adopted the doctrinal and non-doctrinal methods of research. The paper concludes that abortion should be prohibited, but there should be exceptions especially with regards to the need for therapeutic abortion.

Keywords: Abortion, Danger, Pregnancy, Therapeutic.

Introduction

The history of abortion dates back to ancient times when unwanted pregnancies were terminated using such methods as the administration of abortifacient herbs, sharpened implements, the application of abdominal pressure and other techniques. The British common law permitted an abortion before “quickening” but made

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abortion after “quickening” an offence. To “quicken” is generally defined as reaching the stage of pregnancy at which the child shows signs of Life – when the initial motion of the fetus can be felt by the pregnant women. Such feelings usually appears between 16 to 20 weeks into pregnancy. Abortion laws are aimed at protecting pregnant women and their fetuses from injury, not to prosecute them. In America, a state may require a spouse’s prior written consent to an abortion and the Supreme Court has repeatedly invalidated both spousal notification and consent requirement.¹ However, the law of Abortion is most vexed, but intriguing issue in sociological and medical literature has challenged contemporary legal jurisprudence.

Abortion is the spontaneous or artificially induced expulsion of an embryo or foetus². It is the expulsion of a foetus before it is capable of living. Generally, it refers to an intentionally induced miscarriage as distinguished from one which occurred naturally or by accident. But, there has been some tendency to use the word to mean a criminal miscarriage. Although, there would be distinct advantages to assign this meaning to it, but there are so many justification for abortion. Generally, abortion should be prohibited, but there should be exceptions because abortion may be necessary to preserve the life of a woman.

In the United States of America, women have been held to possess a constitutional privacy right to control her³ reproductive functions. In the case of *Roe v. Wade*, it was held that a woman’s right to privacy includes the right to terminate a pregnancy. The case laid out a constitutional right to abortion. In the case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁴, the Supreme Court held that a state may require that a pregnant woman be given truthful, non-misleading information about the nature of the

¹ U.S. 833, 837-838 (1992)

² Black’s Law Dictionary with Pronunciation Sixth Edition, p. 7

³ 410 U.S. 113, 153 (1973)

⁴ 505 U.S. 833 (1992)

procedure, the attendant health risks and those of childbirth, and the probable gestational age of the fetus. It was further stated by the Court that, the state may also require that the woman be informed of the availability of other materials if she chooses to look at them, in order to ensure that the woman is giving informed consent to the abortion. Furthermore, the allowance of a 24-hour waiting period between the time information was provided about the abortion and the performance of the abortion was upheld by the majority in Casey's case.

A therapeutic abortion is an abortion carried out to preserve the life or health of the mother. It literally mean 'an abortion induced for medical reasons'.

Infact, it is an abortion for the purposed of saving the mother's life. Thus, this article is an attempt to encapsulate why therapeutic abortion is justified and an evaluation of the law relating to abortion in Nigeria and in other jurisdiction.

The Need for Therapeutic Abortion

Abortion is "the deliberate ending of a pregnancy at an early stage, especially illegally"⁵ Thus, it is a situation whereby a pregnancy is illegally terminated at an early stage. It has been said to mean a procedure to induce the premature expulsion of a fetus before the proper time⁶ Abortion has also been defined as the expulsion of a foetus prematurely, when it is nonviable.⁷ And the New Webster's Dictionary of English language defines abortion as the spontaneous or induced expulsion from the womb of a nonviable human foetus.⁸ It should be noted that abortion is the destruction of the life of an unborn child or the expulsion of the life of an unborn child from the womb, for the principal purpose of preventing the birth of the

⁵ Oxford Advanced Learner's Dictionary, New Special Price, 6th Edition at p.2

⁶ The Cassell Compact Dictionary, New Edition, Mackays of Chatham Plc., 1998, p.4

⁷ Standard Desk Dictionary, 4th Edition, Phomas 4. Crowell Coy., 1977 p. 2

⁸ International Edition, Child Group, New York, 2000, p.3

unborn child. It is not abortion, when the principal purpose of expelling the life of an unborn child from the womb is to produce a live birth or when it is to remove a dead foetus when it is discovered.

In summary, abortion involves a deliberate act which leads to the destruction or expulsion of the foetus, which is done for a purpose other than for the removal of a dead foetus in order to save the life of the mother.⁹ When there is a manifest act to intentionally destroy or expel a foetus, for purposes other than the preservation of the mother's life, then there is abortion at free – will, which is criminal in medical parlance.

There are a lot of situations requiring abortion as a matter of urgency, it could be necessary to preserved the life of the woman. This need is of great importance. Thus, in the case of *Planned Parenthood of Southern Pa. v. Cassey*¹⁰ The Court held that after viability the state in promoting its interest in potential human life, may regulate or prohibit abortion unless it is necessary to preserve the life or health of the mother. And in the year 2000, the court in the case of *Stengberg v. Carhart*¹¹ considered abortion rights and reaffirmed Casey's case in holding the Nebraska law unconstitutional because it failed to provide an exception to preserve the health of the mother.

In Nigeria, many women have terminated pregnancy for the purpose of saving their lives. Some have up to twelve children and have been advised not to be pregnant again as their lives could be in danger. Where such women mistakenly get pregnant, they will be compelled to terminate the pregnancy. This is because it is better to terminate the foetus in order to preserve the life or the health of the mother.

⁹ R. v. Bourne (1939) K.B. at 687.

¹⁰ (55 U.S. 833, 112 S.Ct. 2791 (1992)

¹¹ 530 U.S. 914, 120 S. Ct. 2597 (2000)

Moreover, the condition of a woman may cause her doctor to advise that, medically she should not bear additional child. And if such woman should get pregnant by chance, her medical condition will warrant an abortion to be carried out for the purpose of preserving the life of the mother.

The preservation of the life of the mother is very important because, in a situation where the mother has other children, it is important for the mother to live so that she can continue to perform her duties as a wife to her husband and mother to her children. This is mostly important where the mother is the bread winner of the family. On the other hand, if the life of the foetus is preserved and leads to the eventual death of the mother, the child cannot perform the duty of the mother as a wife to the father and mother to his brothers and sisters, including acting as a bread winner in certain circumstances. The child will even cause more problem to the family because, somebody will be employed to care for the child, which will definitely worsen the situation in the family, Hence it is important to terminate the life of the foetus and preserve the life of the mother where there is need for therapeutic abortion.

The Law Relating to Abortion in Nigeria

The degrees of offences and punishments to procure abortion in Nigeria can be found in Sections 228 to 230 of the Nigeria Criminal Code. Section 228 provides that:

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 imprison for fourteen years.

Section 229 provides as follows:

Any woman who, with intent to procure her own miscarriage, whether she is or is not with child, unlawfully administer to herself any poison or other noxious thing or uses any force of any kind, 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.

While it is provided by Section 230 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 not with child, is guilty of felony, and is liable to imprisonment for three years.

The above provisions are similar to the position in England save for slight differences. For example, Section 58 of the Offences Against the Person Act, 1861 provides that:

Every woman being with child, who with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with, the like intent, shall be guilty of felony, and being convicted thereof shall be liable to [imprisonment] for life.

Moreover, Section 59 of Offence Against the Person Act, 1861 provides that:

Whosoever shall unlawfully supply or procure any poison or other noxious thing or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman whether she be or be not with child, shall be liable to [imprisonment] not exceeding five years.

Despite these provisions, people furtively practice abortion. However, in England, abortion is unlawful if not carried out for the purpose of preserving the life of the pregnant woman. And the use of the word “unlawfully” twice in this Section could be interpreted to mean that, there must be some situations in which it is lawful to procure abortion.

Moreover, what amounts to ‘poison or noxious thing’ which is not defined in the provisions, could be said to be anything which in medical parlance, and in the context of the provisions is in the nature of substance, harmful, and which if administered, causes miscarriage or loss of pregnancy.

In the Northern part of Nigeria, the Penal Code operates and provides for the same offence but with an option of fine and differently phrased. Section 230 of the Criminal Code was applied in the case of *Idiong and Umo v. The King*¹². In this case, Idiong had the services of Umo, a native doctor, to procure an abortion by administering native medicine which resulted in the death of the woman. After giving evidence, the court found that Umo acted innocently, as he believed that the medicine was required to relieve the pain which the woman was suffering, as a result of the retention of the placenta and Umo lacked knowledge that the poisonous thing he supplied would be unlawfully used to procure the miscarriage of a pregnant woman by Idiong.

¹² (1950) 13 W.A.C.A. 30

The court held that Umo acted innocently because criminal negligence was not proved against him. Therefore, he was acquitted of any criminal liability. It must be stated here however, that Verity C.J. did not specifically mention Section 230 of the Criminal Code in his judgement, but on strict interpretation, the judgement rested on Section 230 of the Criminal Code.

Legally, there is serious opposition to abortion in Nigeria as it is seen as a crime and an outright murder of the foetus. The unborn child is considered to have a life and a right of its own recognized by the law from the time of quickening. As soon as the infant is able to stir in its mother's womb almost to the same extent as a newly born baby, the unborn child is protected by the law. Thus, any person who aborts the pregnancy thereby destroying the life of the child is guilty of a felony. The logic is that the right of an unborn child to life is fundamental and inalienable. This right is guaranteed by God and protected by every responsible government. Thus it was stated that, it is the principal purpose of every responsible government to protect the right of a human foetus to life¹³. However, there are two philosophical views concerning the subject of abortion. These views are, the conservatives and liberals views. According to the conservatives, a human foetus is a child who is particularly helpless and vulnerable human being fully, deserving the protection of the law against any destruction of innocent human beings rights to life¹⁴. This assertion is supported by the moralists and the religionists. They condemn abortion in totality. According to them, it is a waste of God's gift of life.¹⁵ Thus, abortion is detested morally. It can be stated that, England fashioned its abortion law after this conservative philosophy because of its strict adherence to the application of the law handed down by the sovereign and its elected parliament.

¹³ Bukton M. Leiser, *Values in Conflict, life Liberty and the Rule of Law* p. 30

¹⁴ Papal Encyclical, 'the Gospel of life' Magazine, 1995, p.4

¹⁵ Finnis, *The Right and Wrongs of Abortion*, 1973, p.16.

According to the liberals, the unborn child is not a person entitled to legal protection as such, inclusive of the right to life as guaranteed by the constitution. As a result unbridled enjoyment of life and the right to privacy should be sacrosanct and devoid of interference. Thus, it can be stated that, the United States of America fashioned its abortion laws after the liberal philosophy as it is believed that women should have the right and freedom to decide together with their physicians whether to carry out abortion or to bear their pregnancy to term.

The Law Relating to Abortion in England

The law relating to abortion in England is of historical antiquity. England passed its first antiabortion law in 1803 when a statutory abortion scheme was introduced in England by The Miscarriage of Women Act, 1803. And pre-quickening abortion was made a felony, while post-quickening abortion was a capital crime. With the abolition of the death penalty in 1837, the quickening distinction was removed and all abortion was punished as a single felony. The Offences Against the Person Act (OAPA.) introduced a replacement statutory scheme in 1861, where, as before all abortion were felonies. The Infant Life (Preservation) Act was passed in 1929. The Act Supplemented the Offences Against the Person Act (OAPA) and included a defence for bona fide efforts to save the mother's life. And in 1938, a common law health exception to the Offences Against the Persons Act (OAPA) was introduced by the case of *Rex v. Bourne*.¹⁶ While maintaining the general prohibition of abortion, the Abortion Act 1967, introduce broad exceptions for genetic defects and the mental and physical health of the mother. Generally, the Abortion Act of 1967, permits abortion if a pregnancy is unwanted, as child birth is seen as more of a health threat than early abortion. It is important to state that this law does not apply uniformly through out the United Kingdom. For example, the law does not apply in Jersey and Manchester.¹⁷

¹⁶ (1939) 1 K.B. 687, (1938) 3 All E.R 615.

¹⁷ <http://www.ncl.ac.uk/anlaw/aticle3edge3.html>

However, the Human Fertilization and Embryology Act, 1990, amended the Abortion Act, 1967 and allows abortion where two medical practitioners agree that the pregnancy has not exceeded its twenty fourth week and where the continuance of the pregnancy would involve risk to the mother, greater than if the pregnancy were terminated of injury to the physical or mental health of the pregnant woman or any existing children of her family, or the termination is necessary to prevent grave, permanent physical or mental health of the woman or there is a substantial risk that if the child were born it would suffer from physical or mental abnormalities as to be seriously handicapped. In order to make the medical professional socially responsible, the Human Fertilization and Embryology Act, 1990 does not alter the fundamental principles of the Abortion Act 1967, but redefined the circumstance for abortion. This however, cannot be effectively enforced by the law as abortion has become virtually obtainable whenever needed. Thus Criminal conspiracy on the art of medical doctors becomes obvious. It is a fact that, whenever a woman's unwanted pregnancy is to be aborted, the doctors will always say that a risk is involved.

Constitutional Jurisprudence on Abortion in the United States

In the United States of America, the law regarding abortion is more liberalized and cognizance of the constitutional right of women to privacy is highly upheld. The United States gives consideration to the social needs and sentiments as a reflection of peoples' will rather than the dictates of the law *per se*. In 1868, at least 28 of the then 37 states and 8 territories had statutes banning abortion.¹⁸

In the United State, abortion law and cases on the subject differs from state to state. However, the American abortion law is substantially controlled by the Supreme Court of the United States, being the arbiter and apex of justice. The new laws passed by states are usually subjected to review by the court which decides whether

¹⁸ Mohr J., *Abortion in America*, (1978)p.200 cited in Robert E. Oliphant and Nancy ver Steegh, *Family Law*, third edition (2010) Aspen Publishers, New York, p.474

they conform with the federal constitution or not. But, the courts have tried to strike a balance between the right of the woman to do whatever she likes with her body inclusive of any pregnancy she carries and the enforcement of the abortion law statutorily legislated. It is important to state that, the enforcement of all legislation against abortion have been challenged in court in most of the states where abortion law is in force.

In the United States, before the general codification of law became commonplace in the 18th and 19th century, criminal law was based on the common law inherited from England. Eventually, states and territories slowly began to opt for statutory criminal law over common law and abortion laws were inevitably included. And Connecticut was the first in 1821 to pass a law making post-quickening abortion a felony. In 1828 New York followed with a statute making post-quickening abortion a felony and pre-quickening abortion a misdemeanor.

However, besides necessity to preserve the life of the mother, abortion was prohibited. But many states liberalized their abortion laws to some degree, generally allowing abortion in cases of rape and incest, or for various health reasons as a result of the influence of the Model Penal Code, 1962. The Code included “liberalized” features such as the introduction of the first laws to allow abortion “on demand” and elective abortions performed by licensed physicians completely legal for the first 24 weeks and homicide thereafter. These were landmarks for the loosening of abortion regulations which had, until this time, usually banned all abortions except those to save the mother’s life.¹⁹

In the case of *Roe v. Wade*,²⁰ the United States’ Supreme Court dealt with the controversial issue of whether a woman has a constitutional right to terminate a pregnancy and struck down the Texas Law of Abortion. It was in this case that the Supreme Court

¹⁹ members.aol.abrbng/abortl.htm-llk

²⁰ (1973) 410 U.S. 113

first recognized a woman's right to chose to end her pregnancy as a privacy right stemming from the Due Process Clause of the 14th Amendment.

According to the Court:

The right of privacy however based, is broad enough to cover the abortion decision, the right nonetheless is not absolute and is subject to some limitations and at some point the interest as to protection of health, medical standards and prenatal life become dominants.

The case of *Roe v. Wade*²¹ has been superseded by other cases. For example, in the case of *Harris v. McRae*.²² It was held that, although abortion is held to be a constitutional right, it does not mean that the United State is obliged to pay for abortions. It was further held by the court that, the Equal Protection and Due Process Clause simply do not require the United States to fund the exercise of liberties, since this protection is against state interference, not private economic hardship. In the case of *Akron v. Akron Center for Reproductive Health*,²³ questions involving an abortion ordinance dealing with second-trimester abortions and whether *Roe v. Wade*²⁴ would be overturned came before the supreme court. The Court struck down as unconstitutional the provision requiring that all abortion be carried out in a hospital, saying it imposed a heavy and unnecessary burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure. It also struck down a provision containing a blanket determination that all minors under the age of 15 are too immature to make an abortion decision or that an abortion never may be in the minor's best interest without parental approval. The Court also ruled that the requirement that the "attending physician" inform the woman

²¹ Ibid

²² (1930) 448 U.S. 297

²³ (1983) 462 U.S. 416

²⁴ Supra

of the specified information is unreasonable because there are non physicians who are competent to provide the information and counseling relevant to informed consent. It finally held that Akron had failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible waiting period. It further stated that there is no evidence that the abortion procedure will be performed more safely by requiring a 24 hour delay as a matter of course.

It is important to note that several of the holdings just discussed in Akron's case were altered or over-ruled in *Planned Parenthood of Southeastern Pennsylvania v. Casey*²⁵ where the Supreme Court held that a state may require that a pregnant woman be given truthful nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the probable gestational age of the fetus. It must be noted further that in Casey's case, majority upheld the allowance of a 24-hour waiting period between the time information was provided about the abortion and the performance of the abortion.

It is important to emphasize that in *Casey's case*²⁶ the court while striking down the spousal notice requirement upheld a 24 – hour waiting period, an informed consent requirement, a parental consent provision for minors and a record keeping requirement.

Furthermore, while the court was invoking *stare decisis*, the political need or judicial credibility and a consistent constitutional vision, it retained the “central holding” in the case of *Roe v. Wade*²⁷ and overturned its trimester framework and its “strict scrutiny” standard of review, in favour of a new “undue burden” standard, proposed by Justice O’ Connor, where the United States’ interest in foetal life becomes “compelling”. The “undue burden” standard allows limited state regulation of abortion, and also preserved the

²⁵ (1992) 505 U.S. 833

²⁶ (1992) 505 U.S. 833

²⁷ Supra

general access to abortion that was the goal of the case of *Roe v. Wade*²⁸

It is important to also note that the Supreme Court rulings permits the individual states to regulate abortion by banning elective abortions after viability; requiring parental consent or notice before a minor can obtain an abortion, requiring waiting periods before an abortion may be performed, requiring informed consent or counseling to be obtained before an abortion and requiring certain kinds of record keeping. Some States have passed bans on “partial birth” abortions and more are likely to consider it in the future as each state addresses these matters independently. But these procedural bans have not fared well in the courts.²⁹

Conclusion

Generally, abortion should be prohibited, but there should be exceptions especially with regards to the need for therapeutic abortion. Abortion is an artificially induced termination of a pregnancy for the purpose of destroying an embryo or foetus.³⁰ It also means the spontaneous expulsion of an embryo or foetus before viability.³¹ The Nigerian law of abortion should be reformed. Infact, it must be resurrected from rapture. Consideration and serious thought should be given to foreign values and systems. Moreover, differences in socio-cultural circumstances must be weighed. We should see how much of the foreign experience and values are worth imbibing against the backdrop of our social conditions. It is recommended that the law on abortion should be liberalized in Nigeria.

For examples, in a situation, where rape is committed on a woman by two or more men, that is, where there is a group rape, it will be proper for such a woman to carry out an abortion, because, it will

²⁸ Ibid

²⁹ <http://hometown.aol.com/abtrbn/conlaw.htm>

³⁰ Black's Law Dictionary, Eight Edition, p.6.

³¹ Ibid

be difficult, if not impossible, to ascertain who will be the biological father of the unborn child. Especially, in a situation where those who committed the rape cannot be traced. It is true that DNA test can be conducted, in a situation where those who committed the group rape can be found. But this can be faulted as a result of human error or psyche, as no human being is infallible either by way of honest mistake or otherwise.

Three reasons can be given for the above recommendation. In the first place, abortion would obviate the psychological trauma the woman who is a victim of rape and who got pregnant as a result, would have to pass through for the rest of her life. Secondly, the abortion of an unborn child whose pregnancy occurred as a result of group rape would prevent the social stigma such unborn child if born, would have witness in the society when it later knows the circumstances of its birth. Thirdly, it would be a dangerous thing to bred a fatherless child in a society. This is because such child may be so frustrated and may eventually end up being a problem to the society.

It is recommended that Nigeria should take a cue from the law in England. For example, the 1967 Act, as amended, redefined the circumstances for abortion. Thus abortion is permitted where two medical practitioners agree that the pregnancy has not exceeded its twenty – fourth week. Moreover, the law should balance the conflicting interest involved as noted in the case of *Reo v. Wade*³². That:

One’s philosophy, one’s exposure to the raw edges of human existences, one’s religious training, one’s attitude towards life and family, and their values and the moral standards one establishes and seeks to observe are all likely to influence and colour one’s thinking and conclusions about abortion.

³² (1973) 410 U.S. 133.

From the above it is clear that a greater social responsibility is put on the medical profession in matters of abortion. Therefore, a medical doctor must balance his action against considering whether to terminate the life of the foetus and preserving the life of the mother. It must be noted that the life of the mother ranks first, and it is a justification for therapeutic abortion.