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INDUCED ABORTIONS AND THE LAW IN NIGERIA

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ABSTRACT

Abortion is debatably the most contentious issue in forensic medicine. But while much has been written on the subject matter in Nigeria, particularly on the need for relaxation of the law in that respect, a remarkably little attention has been given to the scope of the law relating thereto. This paper aim at filling that gap, by examining in material details and making clear distinctions between that offence and all other related crimes. In the final analysis, far reaching recommendations are made, for instance the paper recommends inter alia that there should be provisions for improved access to contraception information and services, and sexuality education so as to at least reduce the necessity for the procedure in the first place:

KEY WORDS: *Abortion, Miscarriage, Induced, Administer, Abortifacient, Maternal Death.*

INTRODUCTION

Much has been written, on the subject of the law on abortion in Nigeria.¹ The bulk of the writings, however, have been concerned with addressing the theme in the broad, ethical, philosophical, sociological, criminological and sometimes moral issues that surround it. Remarkable spared attention has however been given to the scope of the law while most researches that has considered the extent of the law in that regard has tended to focus mainly on the need for its relaxation. This paper is a modest contribution to remedying the omissions.

Adopting a legal perspective, the paper examines the offence of induced abortion and all related or connected offences, the extent to which that aspect of the law has influenced the practice of abortion and the degree to which the law has achieved its aims. It does not however, present a social-political history of the development of the Law.² Nor does it directly address issues such as the legal status of an unborn child, the rights and duties of its parents or of the doctor in the procurement of abortions.

1. See Olopade O, *Abortion Law in Nigeria* (College Press & Publishers, Ibadan 2008); Dada J.A, *Legal Aspects of Medical Practice in Nigeria* (University of Calabar Press, Calabar 2002) 120-129; Chukudebelu W.O, & Nweke P.C, in *Medical Practice and the Law in Nigeria*, Umerah B.C ed. (Longman Nigeria Limited 1989) 60-67; see also Ibidapo-Obe A, *Comparative Perspectives on Nigerian Abortion Laws* (1987) 16 Nig. J. Contemp. Law.
2. For a good historical account of the law relating to abortion in Nigeria see Olopade O, *Law and Medical Practice in Nigeria* (College Press and Publishers Ltd, Ibadan 2008).

THE APPLICABLE LAWS

There is no definite corpus of laws branded as 'Abortion Act' in Nigeria. Law on abortion is rather embodied in the provisions of two principal penal statutes: one applicable to all the northern States³ and the other applicable to all the southern States,⁴ both of which specifically prohibit abortion in all instances except when necessary to preserve the life of a woman.⁵ In addition, in the southern States, the English decision in *Rex v Bourne*⁶ which interpreted life to include physical and mental health is applied. Thus, termination of pregnancy in Nigeria is highly restricted under both the Penal and Criminal codes.

WHAT IS AN INDUCED ABORTION?

The term induced abortion (or as interchangeably used in this paper *abortion*) is not defined in either of the applicable penal statutes. In the present context however, it is understood to mean miscarriage brought about by a purposely human intervention or by means of any instrument, dilatation, curettage, medicine, drugs, insertion of objects or other means⁷ in order to cause the death of or otherwise prevent the fetus from developing,⁸ particularly, prior to the embryo or the immature product of conception acquiring the power to sustain an independent life.⁹ It may also be described as the act

3. The 19 States in the Northern part of Nigeria and the Federal Capital Territory (FCT-Abuja) are governed by the Penal Code, (Northern Nigeria) (Federal Provisions) Act, Cap P3 LFN 2004.
4. The 17 Southern States are governed by the Criminal Code Act, Cap. C38 LFN, 2004; see Ofori-Amankwa E. H, *Criminal Law in the Northern States of Nigeria* (Gaskiya Corporation Ltd., Zaria 1986); Okonkwo C.O, *Criminal Law in Nigeria* (2nd edn Spectrum Books Ltd, Ibadan).
5. The only statutory justification for induced abortion under Nigeria criminal law: see Ss. 297 CC & 235 PC respectively; see also *R v Edgal R v Edgal* (1938) 4 WACA 133. Cf. *R v Bourner* (1938) 3 All E.R 615, (1939) 1 K B per McNaughten at 687.
6. (1939) 1 K.B in that case, a young girl of 15 years became pregnant as a result of gruesome rape by several unruly soldiers. There was consensus of opinion in medical circle that to prevent the girl from becoming 'a physical and mental wreck' the pregnancy should be terminated. And a surgeon, with the consent of her parents performed an abortion on the girl. The court held that though there was no immediate danger to the girl's life, if the pregnancy continued, the girl would suffer psychologically. 'Preserving the life of the mother' was thus declared to extend beyond acts to save physical existence only, that a woman's life depended on both physical and mental health. The physician was acquitted. This case thus set a precedent that life includes mental and physical health and for future abortion cases performed on the grounds of pregnant woman's physical and mental health.
7. Note that this definition excludes a spontaneous (unwilfull) abortions or a miscarriage which is impulsive, self generated due to therapeutic or other reasons because they are of no interest to our criminal law.
9. In medical parlance, abortion is defined as the termination of pregnancy, spontaneously or by induction, prior to viability. While in the layman's terms abortion may be simply described as an act of destroying the life of an unborn baby, either by way of killing it in the womb, or by taking it out of the womb before it is able to survive.
9. That is, before the 28th week or approximately 6 months and 5 days of pregnancy. A fetus is said to have acquired power to sustain an independent life or separate existence after this period. So when the life of such a child is terminated it can not amount to abortion but either killing an unborn child or child destruction. Similarly, an expulsion or removal of an unborn child from the womb for the principal purpose of producing a life birth or removing a dead fetus and other abortion related offence(s) like child destruction for instance under s. 297 is not abortion: see Black H C, *Black Law Dictionary* (8th edn. West Publishing Co. 2004) 6; see Dada J. A. *Legal*

of causing a pregnancy to end early in order to prevent the fetus from developing and being born alive.

ABORTION AND RELATED OFFENCES

Abortion and abortion related offences under Nigerian Law include: causing miscarriage¹⁰ or attempt to procure abortion,¹¹ knowingly supplying things to procure abortion,¹² killing an unborn child,¹³ child destruction,¹⁴ concealment of birth.¹⁵ And where the woman dies, culpable homicide punishable with death (or murder)¹⁶ or culpable homicide not punishable with death (or manslaughter)¹⁷ depending on the peculiar facts of each case.

(i) Causing Miscarriage

This offence is committed under the penal code by whoever causes a woman with a child¹⁸ to miscarry, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman.¹⁹ The explanatory notes to section 232 provided that a woman who causes herself to miscarry is within this section. And it is submitted that these covers where she procures or permits any person to cause her to miscarry.

The offence, where proved, is punished with improvement for a term which may extend to fourteen years or with fine or with both²⁰ and it makes no difference how it was

Aspect of Medical Practice in Nigeria (University of Calabar Press, Calabar 2002) 122. see Ademba, Re (1886) IL R I X Mad 369; Roe v Wade (1973) 41 OUS 113, 93 SCT 705; Webster v Reproductive Health Service, 109 SCT 3040, 106 L. Ed. 2d 410; See also Ogwuche A.S, Compendium of Medical Law, Espee Printing and Advertising Lagos 2006) 97.

Thus, Olopade description of an abortion as a premature procurement of a miscarriage or interruption of a pregnancy at any time from the moment of conception *to the time of full term delivery*, appears not to have averted itself to abortion related offences such as child destruction or killing an unborn child both of which are discussed post: see Olopade O, (n2) 33; see also Olopade O, Law and Medical Practice in Nigeria (n3) 8-9. Cf. John Keown in 'Morning after Pills, Miscarriage and Muddle,' Journal of the Society of Legal Scholars, July 2005, vol. 25; n. 2 at 296-319.

10. Ss. 232 PC.

11. Ss. 228-229 CC.

12. S. 230 CC.

13. S.235 P C and 328 CC.

14. S 297 CC.

15. S. 239 P C and Ss.329 & 239 CC.

16. S.221 PC and 316 CC.

17. Ss. 222 PC & 317 CC respectively.

18. This follows that under the Penal Code a woman and of course any other person is relieved of liability where she attempts to induce a miscarriage of a non-existent pregnancy.

19. S. 232 PC; This section substantially embodies the common law rule on the subject embodied in R v Bourne (1939) I K B, to the effect that a miscarriage can (only) be justified if its done in good faith and for purpose of preserving the life of the mother: see D I Pam-Tok v The State FCA/K/85/78.

20. Ibid.

committed, it could be by surgical instrument or by the use of noxious substance²¹ or even by the use of manual manipulation.²²

In addition under the penal code whoever uses force to any woman and thereby unintentionally causes her to miscarry shall be punished with imprisonment for a term which may extend to three years or with fine or with both.²³ If the offender knows that the woman was with child, he shall be punished with imprisonment for a term which may extend to five years or with fine or with both imprisonment as well as fine.²⁴

The Criminal Code equivalent, i.e. Attempt to procure abortion is however, not as simple and straight forward. There under, the offence is committed when any person who, with intent to procure²⁵ miscarriage of a woman whether she is or is not with child,²⁶ unlawfully²⁷ administers²⁸ to her or causes her to take any poison or other noxious thing²⁹ or uses any force of any kind or uses any other means whatsoever.

The offence of attempting to procure an abortion is a felony which attracts an imprisonment for fourteen years.³⁰ However, where any woman who with intent to procure her own miscarriage whether or not with child, unlawfully administers to herself any poison or other noxious thing, or means whatsoever, or permits any such thing or means to be administered or use to her, is guilty of a felony, she is liable to

21. R v Hillman (1863) 169 ER 1424.

22. P v Spicer (1955) 39 Crim. App Rep.189.

23. S 234 (a) PC.

24. Ibid. Sub-Section (b).

25. Generally attempt to commit offences under s. 4 of the Criminal Code is a preliminary offence which merges with the successful completion of the act constituting the offence. In the peculiar case of abortion however, the attempt to procure an abortion itself is an offence.

26. The criminal code does not distinguish, for the purpose of liability, whether the woman whose abortion is being 'procured' is actually pregnant or not the fact that the woman is in fact not pregnant thought unknown to the offender is immaterial whereas relieves a woman of liability where she attempts to induce a miscarriage of a pregnancy which turn out to be non-existent.

27. The word 'unlawful' in the provisions dealing with abortion is not defined: see 297 C.C but it has been held that such administration is unlawful if on reasonable grounds and with adequate knowledge the probable consequences of the continuance of the pregnancy will not make the woman a physical or mental wreck or if it is not done for the purpose of preserving the life of the mother which is the meaning if bears in common Law R v Edgal (1938) 4 WACA 133, see also the *locus classicus* case of R v Bourne (1938) 3 All ER615, (1939) 1 KB per McNaughten at 687; see also Hogget, 'The Abortion Act 1967' (1968) Cr. L R 247; see also Okonkwo and Naish: Criminal Law in Nigeria (2nd ed. Spectrum Books Ltd; Ibadan 2003)

28. To 'administer' is to 'give' what ever is being administered: see Hornby A. S, Oxford Advanced Learner's Dictionary of (6th ed Oxford University Press 2001) 14.

29. A noxious thing has been grammatically or literally defined as any 'poisonous or harmful: noxious gases/chemicals/flumes' or substances which when absorbed by a living body may kill, or gravely harm it thought not necessary an abortifacient: see Hornby A.S, (n29) 800; see R v Marlow (1965) 49 Cr App R 49.

In law, 'if a substance administered causes miscarriage, it is clearly poison or noxious thing; see Newton v Stungo (1958) Cri. L.R. 69; State v Njoku (1973) ECLSR 638-639; see also Ibidapo-Obe (n.). Furthermore, it is immaterial that such substance is not an abortifacient:(1965) 46 Crim. App. R 49; R v Edgal (1938) 4 WACA 133 or that it is not harmful at all when administered in certain doses.

30. S. 228 CC.

imprisonment for seven years.³¹

(2) Knowingly Supplying things to Procure Abortion

Any person³² who unlawfully supplies to or procures for any person, any poisonous thing, or any instrument or any thing whatsoever, knowing that the same to be is intended to be unlawfully used or employed to procure the miscarriage of a woman whether she is or is not with child, is guilty of a felony and on conviction, he is liable to imprisonment for three years.³³

This section it should be emphasized speaks of the supply of not only of drugs, poison or noxious substance but of 'anything whatsoever' so the prosecution would not be required to prove that the substances are in fact noxious.³⁴ Indeed, even if what is supplied is ordinary water, so far as some is administered to procure an abortion the result would not be different provided the supplier is charged under section (suggest s.230 --) since the intention however fallacious is to procure an abortion.³⁵

(3) Killing an Unborn Child.

This offence (nearly equivalent of the crime of child destruction in English Law) is committed when any person by any act or omission of such nature as amounting to culpable homicide caused the death before birth of a child capable of being born alive,³⁶ and on conviction shall be liable to imprisonment for life.³⁷

The section is designed to cover instance where a person kills a child (who has acquired the power to sustain an independent life but) before it has any separate existence from its mother. The purpose may well be to ensure that pregnant woman are treated with utmost care and gentleness at advanced stages of pregnancy.³⁸

However, to the extent that section 307 of criminal code stipulates that a child becomes a person capable of being killed only when it has completely proceeded in a living state from the body of its mother? An 'unborn' child could obviously not be said to have proceeded in a living state from the mother's body so as to be capable of being

31. S. 229 CC.

32. For instance a Pharmacists, Chemists, Herbalists, 'Lekulejas' or other suppliers of drugs or herbs.

33. S. 230 C. C.

34. See *R v Edgal* (1938) 4 WACA 133 where the appellant has merely supplied 'abaisoko leaves' 'blue powder', 'urine,' seeds and potash all of which were not proved to be noxious. It was held that as s. 230 spoke of 'anything whatsoever' the prosecution needed not prove that the substances were in fact noxious.

35. Cf. *R v Isaacs* (1962) Cox Crim. Cases 228.

36. See Ss. 236 P.C & 328 C.C respectively. Evidence that a woman had been pregnant for 28 weeks or more or that the child is a quick unborn child is capable of being born alive'

37. Under the penal code however, the offender may be punished with less term but shall also be liable to fine: see s. 236 *ibid*, but see ss.235 PC and 297 CC under which it may be lawful in certain circumstances to kill an unborn child for the preservation of the life or health of the mother. The only statutory exception or justification for abortion under Nigerian Criminal Law.

38. See *Ibidapo-Obe A*, 25; see also *Madarikan O. O*, and *Aguda A*; *Breth and Macleans: Criminal Law and Procedure of the Six Southern States of Nigeria* (2nd ed. Sweet and Maxwell) 732.

'killed.' And to this extent, the offence has the same thrust as an abortion proper (at least under the criminal code). The entire provisions are *otiose*.³⁹

(4) Concealment of Birth

Under section 239 of the penal code and section 329 criminal codes, it is an offence for any person to endeavor to secretly bury or otherwise dispose of the dead body of a child with a view to concealing the birth of such child. It is immaterial whether the child died before or after or even during its birth.⁴⁰

(5) Culpable Homicide Punishable with Death/ Murder⁴¹

Where death result to the pregnant woman by an act done with intent to cause an unlawful miscarriage. Section 233 P.C generally imposed a penalty of 14 years if the act is done with the consent of the pregnant woman but life imprisonment (or any less term) where the act is done without her consent. And in both instances shall also be liable to fine.

However, where the said unlawful miscarriage is done in a circumstances that the doer of the act knew or had reason to know that death would not only be a likely consequence of the act but probable consequence, such culpable homicide is punishable with death⁴²

In the southern Nigeria where the criminal code applies, death resulting from an unlawful abortion amount would have been caused by means of an act in furtherance of an act and purpose, which act is of such a nature as to be likely to endanger human life⁴³

It is immaterial that the offender did not intend to hurt the woman or that the act is likely to cause death⁴⁴ what must be established is that there is a direct nexus between

39 Of no consequences.

40. The most important ingredients of this offence are (a) an attempt to secretly bury or otherwise dispose of the body of child who died before during or after its birth and (b) the intention or endeavor to conceal of a fetus which is only a few months old or which has not reach 'stage of maturity at the time of birth' such that it could not have been a living child would not be an offence under the section R v Berriman (1954) 6 Cox CC 388 at 390; see also Smith & Hogan, 268.

41. The Northern Nigeria penal code uses the terms 'Culpable Homicide Punishable with Death' to denote homicide punishable as capital offence and so punishable, the southern Nigeria Criminal Code uses the term 'Murder.'

42. S. 221 PC. For the necessary *men rea* under the Criminal Code cf. s.316.

43. See *Aga v State* (1976) 7 SC 173. This appears to be a restatement of the Common Law doctrine of 'Constructive Murder' as enunciated in the case of *DPP v Beard* (1920) A C 479; under which death caused while in the act of committing a felony is murder even though (unlike in Nigeria) the act is of such a nature as to endanger human life.

The same principle is reflected in American Criminal Law as the 'Felony-Murder Rule': see *Ibidapo-Obe* (n2); see *Wolfgang M.E, Patterns in Criminal Homicide* (Science editions, New York, 1966) 3.

The constructive murder doctrine has however been abolished by s.1 of the English Homicide Act of 1957. The effect of this amendment was that a death caused in the doing of an unlawful act without intention to kill or caused grievous bodily harm would no longer be murder but involuntary manslaughter.

44. S. 233 P.C.

the act of the accused and the death of the woman.

(6) Culpable Homicide Not Punishable with Death / Manslaughter⁴⁵

Any unlawful killing which does not amount to culpable homicide punishable death or murder as the case may be is culpable homicide not punishable with death or manslaughter.⁴⁶ This may result from gross negligence in the course of doing a lawful abortion.

Thus, where in the process of performing a lawful or a legally excused abortion⁴⁷ the death of the pregnant woman occurs, the medical personnel may be liable for the offence of culpable homicide not punishable with death or manslaughter if he has failed to exercise the requisite skill or diligence⁴⁸ or exhibit serious incompetence or there is some blameworthiness such as recklessness or gross negligence in his conduct as to show complete disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment.⁴⁹

CONCLUSION

The main thrust of this paper has been to analyze the scope of the law on abortion, and this has been done in relevant details. It has been established that preservation of the life of the mother is the only statutory justification for the procedure of abortion under Nigeria law. Clear distinctions have been made between the offence of induced abortion and all other abortion related crimes.

The law in that respect is arguably the most restrictive aspect of criminal law, thus making it by far an aspect of criminal law which no doubt is overdue for review as the restrictive nature of it has led many women and girls to seek unsafe abortion in the

45. While the Northern Nigeria Penal Code prefers the term 'culpable homicide not punishable with death,' the Criminal Code prefers the term 'Manslaughter' to denote homicide not punishable as a capital offence or not punishable with death.

46. See s. 222 PC and s. 317 CC.

47. An abortion may be lawful or excused if it is done for the preservation of the life of the woman see ss. 231 pc and 297 cc

48. See s.222 (7) P.C and s. 303 C.C respectively.

49. Liability for culpable homicide not punishable with death or manslaughter is a question of facts as the codes are silent as to the degree of negligence but Nigerian Courts have held that the degree is the same as in English Law: see *R v Akerle* (1941) 7 WACA 56.

The negligence must be above the ordinary tortious negligence. Accordingly, simple lack of care or mere inadvertence such as would create civil liability or a mere matter of compensation between subjects is not sufficient: see *R v Bateman*, at 732, see also *R v Akerle* (1941) 7 WACA 56 in which the findings of criminal negligence was reversed by the Privy Council. cf. *State v Okechukwu* (1965) 9 ENLR 91.

Note however, that if the evidence shows that the person though unlicensed, possesses the requisite skill and performed the operation skillfully, he is not guilty of manslaughter simply because he is an unlicensed practitioner: *R v Lawanta* (1961) WNLR 133, *R v Oshinmi* (156) WNLR 51, for evidence of such gross wicked or complete negligence or recklessness may be provided when for instance a medical practitioner performs an operation while drunk: *Ibidapo-Obe*, 28; or a general medical practitioner undertakes an abortion operation normally reserved for a specialist or consultant gynecologist.

hands of providers without requisite skills, bizarre quack chemists, friends, traditional midwives or back-street abortionists and using unsafe methods leading to geometric rise in maternal mortality.⁵⁰ And finally, there is the need for an improved access to contraceptive information and services, and sexuality education to reduce the necessity for abortion.

This also stifles progressive development of medical expertise, in that medical practitioners are most likely to refuse to carry abortions because of the legal consequences.⁵¹ Most qualified doctors would also be unwilling to tarnish their hard earned career with the possibility of imprisonment for engaging in abortion procedures.

There is therefore the need for the liberalization of the law with a view to extending the grounds for legal abortions, particularly where it is done by a registered medical practitioner in good faith, in cases of pregnancy arising from forcible rape, incestuous sexual intercourse, to prevent life threatening fetal abnormalities, and deadly HIV/AIDS infected fetus. The law may however lay down significant restrictions, e.g. a requirement that the woman's husband consent to the procedure, and if the girl is not married and/or under age, that her parent or legal guardian consent be sought in her stead or even leave of court.

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50. Maternal Death according to WHO, is the death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and the site of the pregnancy or its management; but not from accident or incidental causes. The Federal Ministry of Health estimates that about 760,000 induced abortions occur in Nigeria annually. Of this estimate, about 20,000 (ends in maternal deaths) as a result of unsafe abortions and complications thereof: see <http://www.thetidenews.com>. And where the women are lucky to survive the unsafe abortion, (they end in post abortion complications e.g. risks of dying from pregnancy related-causes in their reproductive life time) are unable to conceive pregnancies in their later lives when they really crave it.
51. Indeed, a few of them trying to save lives in that respect are actually breaking the law in order to do so.