

RIGHT TO LIFE AND ABORTION DEBATE IN NIGERIA: A CASE FOR THE LEGISLATION OF THE PRINCIPLE OF DOUBLE-EFFECT*

Abstract

The controversy as to whether abortion on demand will be legalized in Nigeria has been long and protracted. This is not unconnected with the fact that the issues that border on life are always sensitive for society and all the more for the legislature and the Courts. Notwithstanding the comparatively conservative status of law on abortion in Nigeria, arguments from differential fields of knowledge relating to the amendment of the law as it is, are far reaching. A great many insist that all forms of willful abortion should be criminalized. In this school of thought, we find the Catholic Church at the baseline. Nevertheless, the leftist pro-choice school defends the opinion that it is only fair and just that a woman should be left to decide in such a grave matter about her life and health. This essay makes an ethical detour in differential arguments as a necessary prerequisite for the much needed legal mediation of the rival camps. It proposes the legislation of the “principle of double effect” as the legal middle course.

Introduction

The end of civil and criminal laws is to safeguard relationships and environments conducive to life as well as to protect life together with the property that enhances same.¹ When laws municipal and/or international derail from this objective, doom is obviously impending. A proper understanding of the ultimate essence of law is therefore the intensification of conditions and circumstances favourable to life and human coexistence. A primary principle of Natural law relates to the preservation of life *connatus essendi* from the same derives the imperative of procreation and the inviolability of the human family as secondary principles. Hence any legal system that is properly inspired by the Natural law is likely to oppose all threats to life and living conditions of citizens.

In modern society, one of the most aggressive challenges to human life is the question of *legal abortion*². Here, what started with modern irreligion and craze for materialism is sought to be given a legal affirmation by a legislative act. Presently, many countries in Europe and America have given the seal to that culture of death. Down here in Nigeria, the debate continues and the two camps to the debate are flexing muscles for legislative recognition. The questions that have been addressed by both parties to the controversy include: when does life begin? Is a fetus a human person? What is the effect of fetal viability in the ascertainment of right? Is the health of the mother and/or her convenience a sufficient reason for a legislative action in favour of abortion? These questions and many more are para-legal concerns before a dependable legal position can be taken by our courts and law makers.

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¹ There is a natural inclination for the preservation of life in man. And all precepts which help to preserve life are of the natural law. They work to order the society for the benefit of man.

² Hence Alphonse De Valk writes that “almost everywhere in the western world, the question of abortion and its legalization is the subject of intense controversy” see. D.V. Alphonse, *Christianity Reason and Human Right*, No. 2, Albertta, Life Ethics Centre, 1992, P. 1

In this work, after an extensive inquiry into the nature and development of abortion debate, the position of the two opposing camps is set out for evaluation. What emerges as the legal contribution of this article is the recommendation for the legalization of the “principle of double effect”. It is strongly defended in this article that only the exceptions set out in the ethical principle of double effect can justify any form of abortion. The article further argues that save as provided in the “principle of double effect”, abortion is a disguised politics of human injustice against the unborn and the society at large. It stands against what the law is set out to protect that is - preserving security of life and property in the state³. Indeed, this article advances the legal abortion project as a ploy to perfect injustice, and man’s inhumanity to the unborn.

An Overview of the Concept of Abortion

What is Abortion?

Life presents itself as a mystery, even to the possessor. This is because its ‘where from’ and ‘where to’ even its ‘why’ is quite beyond his comprehension. However, philosophical thinking traces life to the ultimate being – ‘*Esse in se*’ or God in the language of religion. Accordingly, a novel perspective arises in which human life is seen as sacred, having a sublime purpose and thus should be judiciously guarded. In the above light, the immanent instinct to preserve life known as the law of self preservation which is operative in all living things is preeminent especially in ‘human’ beings.

Sequel to the above analysis, abortion as we shall try to understand it is one of the most fundamental anti-life preservation devices. Etymologically, it comes from two latin words *abortus* and *abortive* meaning miscarriage, premature birth or perishing by an untimely birth respectively.

Hence, in the widest intention of the word, abortion includes all cases of fetal expulsion from the womb whether inadvertently – miscarriage or spontanous abortion or induced – abortion on demand.⁴

However, in its most concise extension, abortion so to speak denotes all cases of induced abortions. It is in this understanding that Fagothey states that: “abortion is the expulsion of a non viable foetus, that is of one too young to live outside the womb.”⁵ In the opinion of Callaham, it is the “ending of a pregnancy before the embryo or foetus can live outside the female body.”⁶ For Mathews, it is “the termination of pregnancy before independent viability of the foetus develops.”⁷ These aforestated definitions excluded the natural cases of abortion because to expel or to terminate, lexically speaking suggests a human subject with an intention to achieve expulsion. It is also only induced abortion that can be of interest to criminal law.

³ D. Lloyd, **The Idea of Law**, England, Penguin Books, 1991, p. 330

⁴ **Roe v. Wade** (1973) 410 U.S. 113, 93 S.Ct. 705. See also **Webster v. Reproductive Health Services** 109 S.Ct. 3040, 106 L. Ed. 2d 410.

⁵ A. Fagothey, **Right and Reason** Collumbus, c.u. Moshby Co., 1959, p. 241.

⁶ D. Callaham, “Abortion” **World Book Encyclopedia** Chicago, Child-craft International inc., 1979, p. 149.

⁷ H.M. Leonard, “Abortion” **Encyclopedia Britanica** New York: William Benton Pub., 1972, p. 42.

Viewed in its right perspective then, abortion is synonymous with “murder” as it interferes with nature in a way that results to the death of a person.

Following the above line of thought, in this essay, we shall delineate abortion to mean all cases of artificially induced termination of pregnancy with the implicit or explicit intention of bringing about the death of the foetus and in which case the intention is realized. Comprehending it this way will help eliminate the deficiencies of the above definitions which relegated to the background, the question of intention and its realization.

Abortion, strictly speaking must not be confused with foeticide, which is abortion plus some other elements. According to Higgins, it involves: “the direct killing of the foetus in the Mother’s womb after which it is expelled.”⁸ In any case, the concept of abortion and foeticide is interwoven as many abortion methods kill the foetus before inducing expulsion.

Next are the cases of miscarriage, still birth,⁹ and hastened births,¹⁰ these in the strictest sense of the word are not abortion. For instance, miscarriage is an act of man and not a human act; therefore, it is devoid of all imputability and moral responsibility.

Kinds of Abortion

According to Callaham, “an abortion results to the death of the foetus and may be either spontaneous or induced.”¹¹ Therefore, we distinguish between two major kinds of abortion-induced and spontaneous types.

Induced Abortion

This is also called *abortus provocatus*.¹² It is abortion *qua* abortion, since it is here and only here that the question of end, intention, and the presence of human act can rightly be asked and where moral responsibility and social imputability, praise or blame, could be assigned. Abortion is induced when the act is intentionally carried out throughout the period of “gestation.”¹³ For Niedermeyer, it is “abortion induced by external action,”¹⁴ in which case it is unnatural. This was why Callaham noted that “in induced abortion, the foetus is removed by artificial, usually medical means.”¹⁵ Induced abortion is further divided into direct and indirect abortion.¹⁶

Direct Induction

Abortion is said to be directly induced when the fetal expulsion is the aim of the act or a means of achieving an aim, for instance aborting to save the mother’s life. In direct induction, three conditions are fulfilled:

1. It is directly intended as an end or a means

⁸ J.T. Haggins, *Man As Man*, Baltimore, Bruce Pub. Co., 1949, p. 252.

⁹ Hastened Birth: Premature Induction of birth for medical safety.

¹⁰ Still birth: Expulsion of dead foetus.

¹¹ D. Callaham, *op. cit.*, p. 149.

¹² Induced abortion.

¹³ Gestation: time lapse between conception and delivery.

¹⁴ A. Niedermeyer, *Compendium of Pastoral Medicine*, New York, Joseph F.W. Inc., 1960, p. 211.

¹⁵ D. Callaham, *op.cit.*, p. 149.

¹⁶ *Ibid.*

2. It is artificially carried out
3. The end result is always the death of the foetus or embryo¹⁷

Indirect Induction

Under indirect abortion, the end of the action is never intended to be the death of the foetus, rather, it is permitted as an unavoidable side effect of a directly willed end. An example is where the death of the foetus results in an attempt to treat a cancerous uterine wall of the mother. Jonas expressed this view when he wrote: "Some medical treatment is performed for a serious purpose other than abortion but abortion results."¹⁸ It is precisely in this connection that the "principle of double effect" can intervene to justify abortion.

Therapeutic Abortion

Abortion is therapeutic if "the purpose is the saving of the mother's life or health."¹⁹ In which case, it is an intentional removal of the foetus from the uterus owing to some medical indications. Further still, the issue of therapeutic abortion concerns not only the mother's health but also the foetus. Jonas clarified this in the following statement "This is a case of legitimate pregnancy that is developing into a serious threat to life of the mother, the child or both."²⁰ But the question is, how therapeutic is that which takes away the fetal life?

We can further distinguish direct and indirect; criminal and legal therapeutic abortions.

It is directly therapeutic if "the doctor intends the death of the child in order to cure the mother."²¹ But it is indirectly therapeutic if the child accidentally dies, in the doctor's process of saving the mother. In which case it is not directly willed, not a free act but simply permitted as an undesirable side effect.

Therapeutic abortion is criminal, if it is procured outside the stipulations of the law-legal indications. It is however legal when it is carried out within confines of the law. Instances of this abound, like in the 1973 American Supreme Court decision, which allowed, abortion if the doctor approves the woman's intention to do so, and which must fall within the first three months of pregnancy.

In Search of Objective Grounds for a Just Law on Abortion

The fight for an Abortion Law which will prevail is between the pro-choice and pro-life advocates. Areas of conflict include but not limited to: when does life begin? Which rights attach to man as moral subject? What is the criterion of personhood? Are the life and health of the mother of greater value to that of the foetus? What is the effect of the quality of fetal life and its viability on its right to life? Could abortion be justified by global population pressure?

¹⁷ Ibid.

¹⁸ J. Okoye, **Abortion and Euthanasia the Crime of Our Day**, Awka, Kecena Damian press, 1987, p. 17.

¹⁹ Ibid., p. 18.

²⁰ *Loc. Cit.*,

²¹ Obielu, **Studies in Ethics**, A moderated Research Work, St. Joseph's Seminary, Ikop Ekpene.

Pro-choice (pro-abortion) advocates variously aver that life begins at viability, at birth, or until there is capacity for social interaction.²² A variant of the argument is that the “human being does not begin to exist until the embryo is fully implanted in the uterus...”²³ In **Paton v. British Pregnancy Advisory Service Trustees**,²⁴ the court affirmed that “the fetus cannot, in English law have a right of its own at least until it is born and has separate existence from its mother.” This decision of the court in **Paton’s case** was brought before the European Commission on Human Rights. The Commission considered the decision vis-à-vis the provision of Article 2 of the European Commission of Human Rights which states that “Everyone’s” right to life shall be protected by law.” At the end of their considerations they felt that the term “Everyone” applied only to post-natal and that a pre-natal construction of the same will fail.²⁵

Personhood criterion has been invoked by pro-abortion groups to justify legal abortion laws. It is here argued that right attaches to a person and that a foetus is not a person. For them, “a person in the strict sense of that term is an adult moral agent having three characteristics of self consciousness, rationality and moral awareness.”²⁶ And if the foetus is not a person all that it can have is a privilege accorded to it by the community and/or law. In fact, the pro-abortionists argue that “to speak of abortion as murder is nonsense because the human foetus is not a person.”²⁷ This pro-abortion view-point received legal seal in **Winnipeg Child and Family Services v. G**²⁸ where the Supreme Court of Canada held that the law does not recognize the unborn child as a legal or judicial person possessing any rights but has always treated the mother and the unborn child as one legal entity.

The protection and/or preservation of the mother’s life or health had been a 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. It may even relate to the mothers age. Thus, it then appears that the health of the mother including her psycho-social convenience is to be sufficient reasons for a legal abortion. The major assumption behind this position is that the foetus is a part of the maternal body and so abortion should be available to any woman without “insolent inquisitions, or ruinous financial charges...”²⁹ Hence, The English Abortion Act provides that a person shall not be guilty of abortion where it is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman or where the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated.³⁰ It gradually became a legal position that psychological

²² Scientists for life, eds., **The Positions of Modern Science on the Beginning of Human Life and Why A Human Embryo is Not A Parasite** Virginia, Sunlife Grestone Pub., 1984, p. 5.

²³ McSweeney, **Sex and Conception**, Ibadan, African University Press, 1979, p. 15.

²⁴ (1979) QB 276; (1978) 2 ALLER 987 (QBD)

²⁵ See also **R v. Collins and others ex parte S** (1998) The Times 8 May.

²⁶ Fagothey, *op. cit.*, p. 252.

²⁷ *Ibid* p. 253.

²⁸ (1998) 3BHRC 611 Can

²⁹ B. Stella., “Review of Abortion problem”, **Journal of American Medical Association**, 128, 1945, p. 472; see also D. Callaham, Abortion Law Choice and Morality, in **World Book Encyclopedia**, Chicago, Child-Craft International Inc., 1979, p. 160.

³⁰ Section 1, The English Abortion Act, 1967.

inconvenience of the mother makes an abortion lawful. This was, for the first time in the English Law established in **R. v. Bourne**.³¹ There it was declared that ‘preserving the life of the mother extended beyond acts to save her physical existence to ensuring her psychological balance.’³² What this requires is that whenever the mother feels that the child is not prepared for life like in cases of rape, incest etc.; she may wish to assume responsibility for it or may not wish to. “And if assuming responsibility for it may require large sacrifices then (she) may refuse.”³³

The leftist pro-choice further insists that a defective foetus should not be allowed to come to term. Aborting such a foetus will save a future child from gross pain and suffering. It will also save a certain family from the embarrassment (physical and mental) of caring for a defective child. Indeed, it has been fashionable for advocates of abortion to argue that “not only does a seriously affected foetus not have a right to be born, it has a right not to be born when the outcome will be intense suffering and certain death.”³⁴ And the only “appropriate” medical response to such defective life is “to abort immediately”³⁵ this action would even avoid the suffering such a defective life would inflict on the family. It is today a common argument to say that for the good of the race parents have no right to bring such life to term as such may jeopardize the genetic future of society.³⁶ They have the obligation to control the consequences of reproduction. In line with these positions, the English Abortion Act provides that where there is “a substantive risk that if the child was born it would suffer for physical or mental abnormalities as to be seriously handicapped, abortion is allowed.”³⁷ However, it must be noted that section 1(1) and (2) of the English Infant Life (preservation) Act limits the legality of abortion to those circumstances where the foetus or unborn child is not capable of being born alive.³⁸

Viability had also been an angle from which justification of abortion has been sought to be achieved. Fadden defines viability as “that point of fetal development at which the foetus is capable of living outside the uterus.”³⁹ By then the evidence that a woman had been pregnant for 28 weeks or more raises a presumption that her child is capable of being born alive.⁴⁰

It is also interesting that over-population has been projected as a reason for a legal abortion. Increase in population when not matched with food availability breeds misfortune for the nations. A good measure of the hunger, deprivation and crime rate is an outcrop of over population. Hence, advocates proffer that only involuntary contraceptive abortion and sterilization measures can prevent the impending

³¹ (1937) 1 KB 687

³² A.S. Ogwuche, ed., **Compendium of Medical Law**, Lagos, Espee Printing & Advertising, 2006, p. 99.

³³ J.J. Thomas, “A defence of Abortion” in **Philosophy of Public Affairs**, cited by A. Danagan, **The Theory of Morality**, Chicago, University of Chicago press, 1977, p. 169.

³⁴ Fagothey op. cit. p. 343.

³⁵ D. O’Brien, “More Question on Anamcephaly,” **Ethics and Medics**, Masseurhusettes, Russel E.S. Pub., 1989, p. 2.

³⁶ Fagothey, p. 343.

³⁷ Section 1(d) of the English Abortion Act, 1967.

³⁸ Section 1 (1) and (2), English Infant life (Preservation) Act, 1929.

³⁹ J.M.C. Fadden, “The Dignity of Life” in **Our Sunday Visitor**, St. Louis, C.V. Hosby & Co., 1963, p. 243.

⁴⁰ English Infant life (preservation) Act, *supra*.

catastrophe of over population.⁴¹ The substance of this argument is that pre-viability foetus has no right but simply an unjust aggressor and a parasite. In such a case, the mother is allowed an adequate defence against such an aggressor. And the only defence is the elimination of the foetus.⁴²

Pro-Life Advocates Argues for Conservative Abortion Law Taking Issues with the Beginning of Human Life

There is no scientific doubt whatsoever that human life begins when the ovum of the mother and the sperm of the father unite. And at that point the whole genetic plan and code of that individual is there.⁴³

The above words of Marks, the world leader of the pro-life movement, summarizes the stand of the anti-abortionists. The gist of the argument is that the fetal life, totally different from the mother's, has separate and complete genetic constitution of forty-six chromosomes, and begins at conception. And any calculated attempt to abort it is morally reprehensible and ought also to be legally unlawful for law is a promoter of morals. In which case, what is moral and ethical will be defended by a legislative act.

The anti-abortionists hold that after conception, the embryo is alive and can now replace its own dying cells and needing nothing more but food and time to grow into a mature adulthood. This was demonstrated in Sweeney's writing to the effect that "What is often called a cloth of blood is in fact a human being. Under electronic microscope, the different parts of a child's body (head, eyes, arms, legs, etc.) are visibly forming within three weeks of conception."⁴⁴ Advocates of Pro-life tacitly hold to the scientific claim that by twenty-five days, the heart is beating already and that by thirty days the brain is fully formed and all the organs are set for action. Hence, efforts have been made especially in the United States to challenge the precedent in **Roe v. Wade**⁴⁵ which legalized abortion-on-demand for the major reason that life does not begin at *conception* and/or fertilization. An amendment of the U.S. constitution has been proposed which purports to recognize that life begins at conception from when any abortion will be criminal. The said amendments are: (a) The National Right to Life Committee (NRLC) Human Life Amendment of 1974 (b) The Paramount Right to Life Amendment and (c) The NRLC Unity Human Life Amendment of 1981. The substance of these amendments is that: "...right to life is vested in each human being from the moment of fertilization without regard to age, health, or condition of dependency."⁴⁶

Personhood Criterion

A person in the strictest sense of the word cannot exclude the foetus, thus relegating our common humanity which is the criterion for giving rights, the anti-

⁴¹ B. Sarvis and R. Hyman, **The Abortion Controversy**, New York, Columbia University press, 1974, p. 2.

⁴² Fagothey, p.253.

⁴³ P. Mark, "Interview on Abortion" **Touch Magazine**, No. 95 July-November, 1990, p.16.

⁴⁴ Mc. Sweeney, *op. Cit.*, p.16.

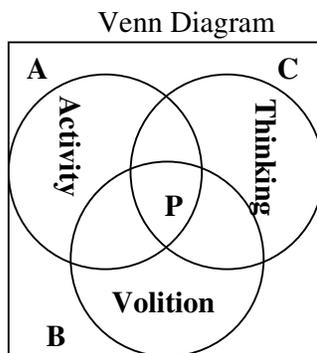
⁴⁵ R.V. Wade (1973) 410 U.S. 113, 93 S.Ct. 705.

⁴⁶ Willke, **Abortion: Questions and Answers**, Ohio, Hayes Pub. Co., 2003, p. 39

abortionists insist. They contend that developed activities should not be the criteria. Commenting on that, William writes, “If the society discriminates among those who share common humanity, deeming some only ‘biologically’ human and others ‘personally’.... We are on the road to a society in which some humans...are subordinated to the interest of others.⁴⁷ Hence, the anti-abortionists bought Williams definition of a person as:

The being of human species that has the inborn capacity or potentiality to acquire and develop – unless impeded by disease or injury – those skills such as speech writing...questioning and finding explanation for the wonder the world presents.⁴⁸

This definition is substantiated further by Boethius’ understanding of person as an individual substance of a rational nature. What this refers to is that the criterion for personhood is that which is constant and most perfect in nature. It is the common essence of all that is man properly so called. See illustration below⁴⁹



E = Universal Set
 P = This is the intersection and it is that which is most fundamental to other factors of Personhood.

In fact, section 2 of the NRLC Human Life Amendment proposed for the Amendment of the United States Constitution provides that:

With respect to life guaranteed to persons by the Fifth and Fourteenth Articles of Amendment to the constitution, the word “person” applies to all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring, at every state of their biological development, including fertilization.⁵⁰

Interestingly, under the Irish Constitution, a child has the right to life itself and the right is protected against all threats directed to its existence whether before or after birth.⁵¹ The right to life necessarily implies the right to be born. Thus, it would

⁴⁷ E. M. William, *Zygotes, Embryo and Persons*, *Ethics and Medics*, *Op. Cit.* pp.2-3.

⁴⁸ *Ibid.*, p.2.

⁴⁹ O. M. Izunwa, *Abortion, the Politics of Human Injustice: A Socio-economic Enquiry*, Bigard Memorial Seminary, Enugu, an unpublished paper tendered in partial fulfillment for the requirement of the Bachelor’s Degree in Philosophy, 1993, p. 26.

⁵⁰ Section 2 of The NRLC Human Life Amendment to U.S. Constitution, 1981.

⁵¹ Article 40, section 3(3) of the Irish Constitution (the Eight Amendment) 1983.

appear that in some jurisdictions, the unborn child has a legal personality. This appears to be a very reasonable jurisprudence recommended for global legislative considerations.⁵²

Quality of Fetal Life

Emphasis, the anti-abortionist, maintains should be levied not on the quality of life but on its sacredness. It is the sacredness of life that makes it integral. As viewed by Fagothey, “the principle of respect for personal life and its integrity recognizes the preciousness of life which the sanctity of life position stresses.”⁵³ In his opinion, it is rather this novel understanding of life that can see us through cases, of extreme fetal abnormality like anencephaly, in which all physical bases for personhood seems to be lacking.⁵⁴

For pro-life advocates, the *manness* in man is entirely intrinsic and so physical, physiological and even psychological imbalance or depravities do not reach to the core of man and thus not enough a license to allow abortion.⁵⁵ In this vein, Singer observes that, “by possessing a spiritual nature humans are linked with God and angels...”⁵⁶ To the pro-abortionist question, “Isn’t it cruel to allow a handicapped child to be born to a miserable life? The anti-abortionists respond to the effect that: “Though it may be both common and fashionable to believe that the malformed, enjoys life less than normal, this appears to lack both empirical and theoretical support.”⁵⁷

In the face of these grounds, they maintain that any attempt at the fetal life for any reason is but murderous, inhuman and out rightly unjust. All just laws of just nations must fight it.

Maternal Indications

Maternal indications, which summarily can be put under the issue of freedom of the mother to be healthy physically and socio-psychologically is unacceptable to the anti-abortionists. This is as a result of the fact that such a choice “can never contribute to the chooser’s authentic human fulfillment.”⁵⁸

In all cases, whenever a woman has become pregnant, she has to allow the pregnancy come to term despite all contrary indications because “the protection of the child’s right to life is not legalism but the correct use of law.”⁵⁹ Any law that proves inimical to the fetal life is immoral. For instance, recently the Supreme Court of Ireland was moved to legalize abortion but the Irish College of Bishops vehemently warned them that “No court judgement, no act of legislation can make it morally right.”⁶⁰ What is not morally right ought not to be defended by law.

⁵² *Ibid.*

⁵³ Fagothey, *op. cit.*, p.252.

⁵⁴ *Ibid.*

⁵⁵ Cf. P. Singer, “Value of Life,” **Encyclopedia of Bioethics**, London: Macmillian Pub., 1978 p. 825.

⁵⁶ *Ibid.*

⁵⁷ Vanhoeck and Paul Camerom in *Life or Death, op. cit.* p.4.

⁵⁸ Daniel O’ Brien, *Op. Cit.*, pp.1-2.

⁵⁹ Fagothey, *Op. Cit.*, p.255.

⁶⁰ L’Osservatore Romano, No. 11-18, 1992, p.11.

Anti-abortionists, frown at any kind of abortion especially those performed at maternal indications, because it treats humanity as a means to a selfish end. Kant in his categorical imperative echoed that we should: “act so that you treat humanity whether in your own person or in that of another, always as an end and never as a means only.”⁶¹

Viability Standard

Viability criteria take fetal life as a thing that begins at viability, probably about the third month of pregnancy. In this connection, the Supreme Court of the United States ruled that: “the state could not forbid to have an abortion during the first three months of pregnancy...”⁶² This is intolerable to the anti-abortionists. They argued that undeveloped potentials, as in the case of the fetal intellectual and volitional capacities, do not imply the absence of such potentials and do not make life violable. They contend that if men could lend themselves to reason and observation, it shall be noticed that 30 years ago fetal viability was about thirty weeks but presently it is as early as twenty weeks. In twenty years to come, it may still come down to ten or twelve weeks. What this then means is that viability is but sophistication of external life support systems, the essence of life remains the same and inviolable. In that case with technological advancement it can be possible to have 3-4 weeks foetus surviving outside the womb. Therefore viability is not indicative of the value and real personhood of the foetus.

Demographic Factor

In the anti-abortionist position, it is a lame argument to think that abortion is necessary in view of population needs, conditioned by limited resources. Death has never solved any problem. In line with Aristotle, it is clear that: “It is the function of nature to provide food for whatever is brought to birth, since that from which it is born has a surplus which provides food in every case.”⁶³ Malthus’s population alarm was challenged for the fact that “the existing wealth was sufficient for everyone, if it were equally divided”.⁶⁴ Interestingly, some great demographers and economists like Julian of U.S.A and Jacqueline of California have said again and again that “... the world’s resources could support very many more people.”⁶⁵ It is here argued that “to kill a foetus is to deprive the world of something intrinsically valuable and so wrong.”⁶⁶

The Status of Nigerian Abortion Law in the Context of the Debate

The Constitution of the Federal Republic of Nigeria is pro-life. This is because most of its provisions are life sensitive but more because in its section 36(3) the right to life is pre-eminent. It is therefore not surprising that the relevant statutes relating to Abortion⁶⁷ in Nigeria are strict against any person, including the woman herself, who

⁶¹ I. Kant, in **Foundations of Metaphysics of Morals: Critique of Practical Reason and Other Writings**, ed. W. B. Lewis. Chicago: University Press, p.87.

⁶² D. Callahan, *Op. Cit.*, p.146.

⁶³ Stidyoylr, **The politics**, transl by Sinclair, T.A., London, Chaucer Press, 1977, p. 120

⁶⁴ William Godwin in **Jacks self Educator**, London, T.C. and E.C. L.T.D, 1931, p. 62.

⁶⁵ Paul Marx, *op. cit.*, p. 16.

⁶⁶ P. Singer, **Political Ethics** London, Cambridge University press, 1979, p. 120.

⁶⁷ Criminal Code Act and Penal Code Act

commits or attempts to commit abortion. The provision against abortion is generally found in the Criminal Code Act⁶⁸ sections 228-230, 297 and in the Penal Code Act⁶⁹ section 232. Indeed, in the Criminal Code Act⁷⁰ it is provided as follows:

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 imprisonment for fourteen years.⁷¹

However, where a woman herself causes or attempts to cause her own miscarriage, whether she is pregnant or not by any administration of poison, force or means, she will be guilty of a felony punishable by seven years imprisonment.⁷² This provision has been criticized for lumping two offences of different magnitudes together namely abortion and attempted abortion. However, that will be an issue for another essay.

It is important to point out that the provisions of the Penal Code is in *pari-materia* with that of the Criminal Code except for the fact that in the Penal Code, the punishment for procuring abortion is fourteen (14) years whether the woman herself or someone else is charged.⁷³ However, the Penal Code does not appear to have provision for attempted abortion by anybody because the wordings of the law are clear to the effect that “whoever voluntarily causes a woman with child to miscarry...”⁷⁴

What is more, the Penal Code allowed therapeutic abortion if caused in good faith for the purpose of saving the life of a pregnant woman.⁷⁵ This exception as explicitly provided in the Penal Code is however latent in the Criminal Code Act. It is only implied therein, by the use of the word “unlawfully.”⁷⁶ Hence “whoever administers abortion “unlawfully” is guilty of an offence.” The question then remains as to what constitutes a “lawful” administration of abortion under the Criminal Code Act operated in the Southern Nigeria? The Courts following the decision in the English case of **Rex v. Bourne**⁷⁷ have variously held that a lawful abortion is one procured for the purpose of saving the life of the mother. Thus: “...since the case of **Rex v. Bourne**, referred to above, the whole Nigeria in practice has allowed therapeutic abortion in order to save a woman’s life or her physical and mental health.”⁷⁸

⁶⁸ Criminal Code Act, Laws of the Federation of Nigeria, 1990, cap. 77.

⁶⁹ Penal Code Act, Laws of Northern Nigeria, cap. 89, 1963.

⁷⁰ Criminal Code Act, Laws of the Federation of Nigeria, 1990, cap. 77.

⁷¹ Section 228, Criminal Code Act, Laws of the Federation of Nigeria, 1990, cap. 77.

⁷² Cf. Section 229, Criminal Code Act, *supra*.

⁷³ Section 232, Penal Code Act, Laws of Northern Nigeria, cap. 89, 1963.

⁷⁴ Section 232, Penal Code Act, Laws of Northern Nigeria, cap. 89, 1963.

⁷⁵ The law states that “whoever voluntarily causes a woman with child to miscarry should, if such is a miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment for term which may extend to 14 years or with a fine or with both.

⁷⁶ Section 228, Criminal Code Act, Laws of the Federation of Nigeria, 1990, cap. 77.

⁷⁷ Rex V. Bourne (1939) 1 KB 687

⁷⁸ Cf. W.O. Chukwudebelu & P.C. Nweke “Abortion and the Law” in B.C. Umerah, ed., **Medical Practice and the Law in Nigeria**, Ikeja, Longman Nigeria, 1989, p. 61.

Also sec. 297 of the Criminal Code Act⁷⁹ further appears to strengthen the fact that the law of Abortion in Nigeria makes exception for purposes of preserving the life of the mother. There, it is stated that a person is not criminally responsible for performing in good faith and with reasonable care a surgical operation upon “an unborn child for the preservation of the mother’s life...”⁸⁰

While it must be recognized that Nigeria is one out of just a few nations that have not permitted liberal abortion laws, some limitations of its praised conservative position have to be pointed out. It is argued in this article that Nigeria’s legal defence of Abortion on the ground of mother’s life is unjust and unacceptable to rational jurisprudence.⁸¹ The most reputed school of Jurisprudence – Natural Law School, Sociological School and Historical School would find it a bad law. Except on grounds of pure legalism, the termination of one’s life for another is merely an “economic” reason in a scale of preference where the life of the child is an alternative forgone.⁸² Yet to commodify the child’s life is the craze of modern materialism.⁸³ To sanctify such commodification by a legislative act is indefensible. Hence, Fagothey said that “the protection of the child’s right to life is not legalism but the correct use of law.”⁸⁴ Where a person’s conscience and honour is preferred to another’s life, a way is paved for a total disvalue of the greatest treasure available to man and society. Such level of self indulgent utilitarianism is an assault to social conscience and reason. Nigeria needs to consider the legal provisions on abortion in such countries like Korea for legislation. Indeed, Korea does not support abortion for medical reasons.⁸⁵

Attempts Made at Amending the Nigerian Law on Abortion

Two distinct and significant attempts have been made to the end of the amendment of the Nigerian Abortion law. The two were unsuccessful at the floor of the house essentially because both failed to be sensitive to the *volgeist* the spirit of the people for whom the laws are to be passed.

In the second Republic,⁸⁶ Dr. Obatayo Oguntayo sponsored a bill for the reform of the Abortion law in Nigeria. The proposed law derogated from the moral credit of the existing law. Oguntayo’s bill was titled “The Termination of Pregnancy Bill.”⁸⁷ It proposed as follows: that;

⁷⁹ Criminal Code Act, Laws of the Federation of Nigeria, 1990, cap. 77.

⁸⁰ Section 297, Criminal Code Act, *supra*

⁸¹ It is provided in the English Abortion Act that “where a pregnant woman is in immediate danger of death or a termination is necessary to prevent grave permanent injury to her physical or mental health, it shall be necessary to terminate pregnancy”. In Ghana it is a defence to prove that abortion is caused for therapeutic purposes. In Thailand, it is lawful to terminate a pregnancy as a result of rape or danger to the health of the woman and Japan allows abortion for purposes of population control.

⁸² Cf. Scale of Preference as an economic principle.

⁸³ Materialism is an attitude of mind that exalts the tangible over and above other values, spiritual and otherwise.

⁸⁴ Fagothey, *op. cit.* p. 255.

⁸⁵ Cf. Art. 269 and 270 of Korean Criminal Code

⁸⁶ The Second Republic was the republican government of Nigeria between 1979 and 1983 governed by the second republican constitution.

⁸⁷ Cf. O. Olopade, **Law of Abortion in Nigeria**, Ibadan: College Press and Publishers Ltd, 2008, p. 76.

It shall be lawful and legal when a pregnancy is terminated by a registered practitioner if two registered practitioners are of the opinion formed in good faith:

- that the continuance of the pregnancy would involve risk to life of a pregnant woman or of injury to the physical or mental health of the pregnant woman or any existing children of the family, greater than if the pregnancy was terminated; or
- that there is substantial risk that if the child was born it would suffer such physical or mental abnormalities as to be seriously handicapped.

The second attempt at amendment of the Nigerian Abortion law was in 1992 by Prof. Ransom Kuti then of the Ministry of Health. His ministry sponsored a draft decree which was of the same effect with the Oguntayo's titled "The Termination of Unsafe pregnancy and other related matters." This bill failed as its forbear did.⁸⁸

It is the argument of this article that there is no differential value between the life of the foetus and that of the mother. And without prejudice to medical evidence and expertise, fetal abnormality does not reduce the value of life itself. In essence it cannot be said that the life of the blind man is of less value compared that of the man with full sight. The danger in this manner of thinking is that soon humanity will degenerate, as it has began to do, into a world where the blind, the lame, the sick, the aged and the incurably ill are considered as having no human value and therefore expendable. Without doubts the law has a dialectic function and should warn the society of the danger of such irrational procession.

Morality and Law: Towards A New Proposal for Amendment of the Abortion Law in Nigeria

A number of legal writers especially of the modern dispensation have argued that law and morality/ethics go through different pathways. And so, a moral principle cannot be legislated or made into law. This opinion is typical of contemporary liberal democracy.⁸⁹ The two grounds inspiring such opinion includes: (1) that morality cannot be legislated any how (2) that even if morality could be legislated, it should not be, since to do so is somehow improper, even tyrannical, either because there is no morality objective enough to justify legal enforcement or because one's autonomy and individuality would be violated by attempts to legislate morality; or perhaps even because one really has no autonomy that corresponds to any external directive.⁹⁰

But law and Morality are two institutions that greatly influence one another.⁹¹ There is a critical reciprocity between the two, while the moral community would

⁸⁸ *Ibid.*

⁸⁹ Liberal democracy, also known as constitutional democracy, is a common form of representative democracy. According to the principles of liberal democracy, elections should be free and fair, and the political process should be competitive.

⁹⁰ G. Anastaplo, **Aristotle on Law and Morality**, published in 3 windsor (Ontario) year book of Access to Justice 458-64 (1983).

⁹¹ This position is tacitly defended in the closing pages of Aristotle's Nichomachean Ethics. It properly touched upon the fact that law is needed if moral values are to be nurtured. What this means is that while the law ought to be derived from moral truths, it can also contribute effectively to the development of intellectual virtues by promoting the conditions that they require.

frown at a law breaker, the law itself would first satisfy the moral criteria so as to attract the sympathy of the moral community.⁹² Hence, it is only when the law itself is fair and just that it would be properly positioned to guard and protect the temper of the moral community. In this way, our criminal laws could contribute to the shaping and moral training of the citizens. Indeed, every piece of legislation presupposes a certain order of morality. It is not possible to isolate a piece of legislation, (Statutory or Judicial) which does not represent an ethical or moral constituency. In fact, what happens in the parliament is but a struggle for pre-eminence among differential systems of morality. In the end, it is a preferred morality that becomes legislated, and made into law. After all, the unwritten law as an example of the “community-will” and conscience had been a vital and perhaps the major aspect of the law among the ancient people.⁹³

If it is granted that behind every positive law is an ethical will, meaning that a certain morality is the shadow of every positive law, it will then be unfortunate for a polity if the morality so legislated is of such nature as is not responsive to the authentic need of man in society. Such is the undoing of most positive laws today. But where the undergirding morality is sound the social order is secured and that is the purpose of every good law.

What this essay is moving next to argue is that the reputable ethical principle of “Double-Effect” should be legislated to govern matters of criminal abortion cases. In this way, morality/ethics to the extent they are presumed by the statutory laws become the grundnorm of the emerging body of laws. This legislation of the said ethical principle is necessary so as to achieve sound habituation of citizens and didactic effectiveness of law. Little wonder Akomolede observes that “legal obligations are created in human beings by laws only because the law operates within the preview of some basic moral norms acceptable in society.”⁹⁴ A case is hereby made for the legislation of the **Principle of Double of Effect**.

On the Principle of Double-Effect

The ethical Principle of “Double-Effect” is one that attempts to define when “an action that has both good and bad results is morally permissible.”⁹⁵ It relates to a set of ethical criteria for evaluating the permissibility of acting when one’s otherwise legitimate act, will cause an effect one would morally be obliged to avoid. This doctrine and/or rule originate from Thomas Aquinas treatment of homicidal self-defence.⁹⁶ As an ethical principle or criteria, it states that an action having foreseen harmful effects, practically inseparable from its good effect is justifiable upon satisfaction of the following:

- The nature of the act itself is good, or at least morally neutral

⁹² A moral community is a group of people drawn together by a common interest in living according to a particular moral philosophy. Moral communities are typically associated with religion and advocate that religion’s conception of a good life.

⁹³ This refers to traditional communities in pre-literate cultures, where the art of writing and records is either unknown or undeveloped, making codification of law difficult or impossible.

⁹⁴ I. Akomolede, **Introduction to Jurisprudence and Legal Theory**, Lagos, Niyak Print & Law Publications, 2008, p. 11.

⁹⁵ www.answers.com/wincandel/double-effect.

⁹⁶ T. Aquinas, *Summa Theologiae*, iia-iiæ Q. 64, art 7.

- The agent intends the good effect and not the bad either as a means to the good or as end itself.
- The good effect outweighs the bad effect in circumstances sufficiently grave to justify causing the bad effect and the agent exercises due diligence to minimize the harm.⁹⁷

Notice that what is central in the principle of double-effect is that “consequentially similar acts having different intentional structures make for ethically different acts.”⁹⁸ Hence in the Principle of Double Effect (PDE), a distinction is made between mere intent and foresight without intent.⁹⁹

Legal Framework for Legislating the Principle of Double-Effect

It is hereby submitted that to allow abortion on demand or to legally permit abortion for any kind of maternal indication (health, rape, insanity, incest) is generally to undermine the ultimate value of life which attaches to human life and which many municipal and international laws had fought to defend.

Further, to legally permit abortion for reasons of fetal abnormality and/or deformity amounts to placing value not on life but on its functionality, in which case expediency and not essence becomes the rule and measure of value. Such will mean setting criteria of evaluation by factors exterior to life itself. It may further lead to a situation where the insane, the mentally retarded and the incurably ill, are consigned to the waste and considered disposable. This will mean a new form of euthanasia where the prerogative of mercy is exercised not on behalf of the child but society into which he is to be born. By the same argument with which suicide, homicide and euthanasia is rejected, this new fashion of ‘homicide’ ought also to be rejected with its kindred implications.

Indeed, the only framework open for escaping the oddity and/or absurdity of extinguishing human life in abortion is to give legal effect to the Principle of Double-Effect. Thus, statutory and case laws should establish evidential burdens which an accused should discharge to be free from criminal liability in abortion, to include only the conditions under which the Principle of Double-Effect applies.¹⁰⁰ In that case, if in the course of treatment of the mother or the foetus abortion occurs, then a complete

⁹⁷ www.answers.com/wincandel/double-effect.

⁹⁸ Double-effect rule has been criticized by consequentialists who consider the consequences of actions entirely determinative of the actions morality.

⁹⁹ In the first place, intent differs from foresight, even in cases in which one foresees an effect as inevitable. Also one can apply the distinction to specific cases found in war situations like terror bombing/strategic bombing. In medical ethics it is applicable to cases of craniotomy/hysterotomy; and in special ethics the whole issue of euthanasia is a proper subject for the principle’s application. This distinction between intent and foresight could have legal relevance in terms of imputability of guilt.

¹⁰⁰ Classically, the Principle of Double-Effect specifies four conditions that must be satisfied before and act is morally permissible:

1. *The nature of the act condition*-Here the action must be either morally good or indifferent.
2. *The means-end condition*- Here the bad effect must not be the means by which one achieves the good effect.
3. *The right-intention condition*- The intention must be the achieving of only the good effect, with the bad effect only an unintended side effect.
4. *The proportionality condition*- the good effect must be at least equivalent in importance to the bad. www.answers.com/wmcandel/double-effect.

defence materializes.¹⁰¹ Otherwise any form of direct abortion for any reason at all will be provided for as criminal except in spontaneous miscarriages. An abortion which results as an indirect effect of a directly meditated act though the possibility of such abortion was foreseen, will be the only occasion of permissible legal abortion. Hence, the operation of the principle of Double-Effect in abortion cases will be cited as follows:

Operations, treatments and medications which do not directly intend the death of the foetus...which has as their purpose the cure of a pathological condition of the mother, are permitted when they cannot be safely postponed until the fetus is viable even though they may or will result in the death of the foetus.¹⁰²

If this principle is positively legislated, that is made into an exclusive defence in an abortion case; the resulting legal provision will appear to respect both the value of life and the value of the health of the mother.

Under the cover of the principle, if made into law, a doctor may for instance remove the uterus or fallopian tube of a pregnant woman in cases of aggressive uterine cancer and/or ectopic pregnancy. Doing that, the doctor may know that the procedure will result to the death of the fetus but without directly willing or acting to abort or kill the foetus.¹⁰³ In such a case, the intended effect is to save the woman's life, not to terminate the pregnancy and the effect of not performing the procedure would result to the greater evil of the death of both the mother and the foetus.¹⁰⁴ The most obvious effect of giving legal effect to the double-effect principle is that impliedly, section 297 of Criminal Code will be repealed together with section 232 of the Penal Code, while section 230 of the Criminal Code will be amended to be clearer. This will mean that no abortion will be 'lawful' except that which occurs under the circumstances of double-effect.¹⁰⁵ This is of course, the proper interpretation of the Nigerian Constitution as provided in section 33(6) which reads thus "Every person has a right to life and no one shall be deprived intentionally of his life." In which case abortion, any attempt to procure abortion, and all acts of accomplices, are under strict and consistent jurisprudence criminal offences. Above that, anybody who performs a surgical operation on the unborn for the preservation of the life of the mother will necessarily be criminally liable for a resulting abortion. This is because the pressure on the child appears to be a direct act and not an indirect effect.

¹⁰¹ The difference between this proposal and what is obtainable in Nigeria today is that in the extant law, abortion can be directly willed and effect in so far as the health of the mother is the issue.

¹⁰² D. O'Brien, *op. cit.* p. 2.

¹⁰³ Compare with such cases as **Com. Pol v. Modebe** (1980) INCR 367 & **Pam-Tok v. State** (1979) FCA/K/34/78.

¹⁰⁴ M. Alison, "Doctrine of Double-Effect" in Edward N. Zalta, *Stanford Encyclopedia of Philosophy*, summer 2006 edition; <http://plato.stanford.edu/entries/double-effect/> Retrieved 2007-08-18; see also "Principle of Double Effect" in Catholic United For the Faith.2003. <http://www.cuf.org/FaithFacts/details.view.asp?ffID=56>. Retrieved 2007-08-18.

¹⁰⁵ A.N. Aniagolu, then of the Supreme Court of Nigeria was of like opinion when he defended the position that the "right to life provisions in the constitution means that abortion may never be constitutional, for it means destruction of life in embryo. See A.N. Aniagolu, paper on "Human Life in the Nigerian Constitution," Bigard Memorial Seminary, Enugu, 12th March, 1994, p. 4.

Evaluation

Many countries of the world are shifting grounds to very liberal abortion laws. The United Kingdom from where Nigeria copied her abortion laws has in 1967 gone liberal on her abortion laws. Hence, section 1 of the English Abortion Act of 1967 now permits abortion on demand for health of the mother and risk of fetal abnormality. Notwithstanding that pressures from Europe and America¹⁰⁶ are much on the Nigerian legislators to go liberal on the issue of abortion; Nigeria abortion law had remained conservative. However, the existing law on abortion in Nigeria is still short of justice for the unborn (pre-born). Since it regards as lawful under **Rex v. Bourne**,¹⁰⁷ any abortion performed to save the life of the mother. It must be observed that under strict rational and ethical considerations, the life of the mother is not of any greater value than the life of the child/foetus. To justify abortion on the grounds of maternal indications fails because human life is the same and of equal value whether of the mother or of the unborn. Man's freedom and convenience stops where those of others including the unborn begin. No man can lawfully expend another's life in favour of his own. At conception a distinct subject of right and legal protection is generated by nature's act and reason. Not even when the subject is defective and/or deformed does it qualify for death by killing. "Care not killing" says Fagothey is due to the defective foetus.¹⁰⁸ Killing is not therapeutic. It cannot heal. Both are hermeneutical opposites. Not even the issue of using "viability" defined in terms of "survivability" to determine permissibility of abortion is acceptable to the metaphysics of life. Viability rests on the sophistication of external support system prevailing at a time. It has no relationship with the value of the individual human life.

Indeed, no one can decide for another in a matter as ultimate as having to die. This is the error of most modern legal systems. All freedoms which the laws have sought to defend pivot around the freedom to live and the denial of it amounts to the denial of the entire scheme of human freedom and the projection of a mechanistic world inimical to the moral universe and this defeats the end of our laws. For a law on abortion to be just and worthy to command obedience, it must arise from the value of life *per se* and not compromise value with functional appendage. Hence a review of the extant law on abortion in Nigeria can only be good if it considers seriously the conditions marked out in the principle of double-effect and legislate same.

Conclusion

Every law, to be competent, as to regulate human and socio-political affairs ought to be reasonable and for law to be reasonable, it must draw from the rich deposits of moral, religious and sociological considerations which blend into the normative composite of the richest values of human history. Such values are qualified for consideration, which have inspired society to order and goodness from antiquity.

¹⁰⁶ The world is now a global village and influences from several parts of the world affect others. Through education, politics and even modern day religious groups, some Nigerians are beginning to feel that there is need to make our abortion laws liberal so as to guarantee expanded range of freedom to pregnant women with regard to their bodies. Yet it is doubtful whether such allowance properly defines freedom.

¹⁰⁷ *Supra*

¹⁰⁸ Fagothey, *op. cit.* p. 343.

The law also needed to consider modern circumstances so as to project for the just future of society. In this way, there is the need for a shift in paradigm in the Nigerian law on abortion to exclude all possible ways open to achieve abortion on demand (perhaps for all kinds of maternal indications and conveniences). Good enough, the existing law has not permitted abortion for foetal deformity.

Note, by making abortion criminal under sections 228-230 of the Criminal Code Act and 232 of the Penal Code Act, the Nigerian law on Abortion is set on the way to the needed ethical protection and defence of the human life from womb to tomb. What is left still is a legislative *aggiornamento* which will intuit a set of principles under which abortion on demand or subjugation of the value of fetal life to that of another will be a matter no longer left to the uncritical choice of the mother. Such is the reason for recommending the legislation of the Principle of Double-Effect (PDE), which protects and preserves the legitimate rights of the foetus as a person and allows abortion only as an indirect effect of a directly willed act.

