
LEGAL RIGHT TO AN ABORTION: A DISCOURSE FROM PRO-CHOICE APPROACH

Nomeh Monday¹

Department of Philosophy,
University of Nigeria
nomehson2017@gmail.com

&

UgwokeUdoka Williams²

Department of Philosophy
University of Nigeria

Abstract

Man by nature seeks freedom to choose between immediate or future attack to her life. The rationality of man implies his ability to make choice which makes him responsible for his actions, either to be blamed or not. The question of one having a choice over her body, to choose whether to abort a fetus or not becomes a challenge to our legal rights. The choice of any one is dependent on his intention for that act which he is involved in, either good or bad. This paper examines the individuals' choice to an abortion or and reasons why individuals should be backed by law of their land to choose either their fetus or their future based on consent and confidentiality. The aim of this paper is to find a meeting point between the controversial ideas against ones' choice to engage in an abortion in her country. From the pro-choice viewpoint, it is proposed that, there is a need to legalize abortion in every sovereign state to be a fundamental human right to every citizen in order to promote one's choice in a manner that makes it blame worthy or praise worthy. For effective research on this paper, the critico-analytic research design was adopted for this study. Data for the study were collected from books, articles, journals and periodicals. From here, this research finds out that, legal right to an abortion should be part of individuals' right to defend herself against any immediate or future attack to her life while considering the consent of the patient and the confidentiality of the medical practitioner.

Keywords: Abortion, Choice, Law, Intentionality, Human Right

¹. Dworkin Ronald, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, (New York: Alfred Knopf Press, 1993), 155.

². Dworkin, *Life's Dominion*, 11.

Introduction

The issue of legalization of abortion is one that has been on controversies. Whereas many are of the notion that abortion should be legalized, others are not. The term 'Abortion' is the intentional termination of any stage in pregnancy. The word intentional is the rationale behind abortion whether on health grounds or future reasons too. 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.

From the above analysis, Dworkin appeals to the sacred which leads him to conclude that “we may describe most people's beliefs about the inherent value of human life, beliefs deployed in their opinions about abortion, as essentially religious beliefs”. Dworkin continues and pointed out that, the duty of government to protect the fetus is not derived from constitutional rights”. He argues on the value of sacredness thus:

The hallmark of the sacred as distinct from the incrementally valuable is that the sacred is intrinsically valuable because, and therefore only once, it exists. It is inviolable because of what it represents or embodies. It is not important that there be more people. But once a human life has begun, it is very important that it flourishes and not be wasted.³

Dworkin goes further to posit that the sanctity of life is a highly controversial and contestable value. It is controversial because whether abortion or childbirth best serves the intrinsic value of life when a fetus is deformed, or when having a child would seriously depress a woman's chance to make something valuable of her own life too. The question of abortion either to save the mother or to save a future of a young lady is the same act, because it involves intentionality of the parties involved. Too, no women needs a child and still opt in for abortion. Therefore, the fetus is a hindrance to the woman's life or future.

Views on Abortion

Although abortion became legal four decades ago in some parts of the world, Americans remain staunchly divided over its acceptability. While researchers have been interested in the factors shaping abortion attitudes, there have been many reviews on legalizing abortion. We examine the

³. Dworkin, *Life's Dominion*, 73-4.

factors shaping Nigerians attitudes towards abortion's right. In examining the factors that are associated with attitudes in legalizing abortion in Nigeria, we will examining the views of schools who are in support or against abortion's right.

Pro-choice: Abortion is ok whenever the mother chooses it. Fetuses are neither persons nor members of the moral community. Women are undeniable persons and members of the moral community. Laws that deny women the right to obtain abortion, or that make safe abortion difficult to obtain are unjustifiable violation of the basic moral and constitutional rights.

To be an advocate of pro-choice initiatives raises serious ethical, moral, and philosophical questions. Since the beginning of time, women were given the title of caregivers and nurturers; entrusted with the welfare of the offspring and organization of the home. Pro-choice advocates tend to focus greater attention on parents who do not want to have a child considering the future implications of having an unwanted child.

Pro-life: Abortion is morally wrong because it kills a life. A woman's right to control her body extends to birth control [and sterilization] but not abortion. A fetus is a human life and has value.

There are two main approaches to pro-life: one of moral perspectives and the second of religious perspectives; and although they sometimes intertwine, for this discussion, both views will be treated separately. The religious perspective has very little to be debated considering it embraces the belief in a supernatural Almighty entity; and there is, in fact, very little literature discussing the logics of religion.

Moderate: Morally willing to allow abortions in certain cases, legally ok. The supporters of a moderate perspective on abortion are not conservative nor liberals; face the following questions: (a) how far within the pregnancy is abortion acceptable? (b) What are morally justifiable reasons for an abortion? The majority of moderate supporters believe that abortion is justifiable if the (a) pregnant woman was victim of rape or incest; (b) the pregnancy is life threatening to the woman; and (c) doctors concluded that severe and long-lasting physical damage will occur to the pregnant woman. Some others suggest that most people have a tendency to be two-faced on matters related to abortion, simply because they fear to be judged and excluded from their groups; in these cases, people who are part of church or pro-life oriented groups could have been faced with abortion issues within their families or could have had an abortion themselves. Others might have been

close to someone who was an actual victim of rape or incest, or even known a woman who could have died giving birth. In any case, people seem to change their minds when a painful decision such as an abortion comes closer to home.

Philosophical Considerations: The realm of the debate on abortion appears to be deeply rooted in a philosophical puzzle, and the puzzle consists of three basic sets of questions; 1. Do embryos have a moral value? If they do, what is it? Are they entitled to human rights? 2. What makes abortion ethically permissible? 3. How should a society organize itself towards limiting, facilitating, or banning abortion? It is reasonable to agree that if an unborn is a human, the unborn is entitled to rights; and if a human is entitled to rights, it must have moral values. This statement appears to make abortion unethical from the standpoint that the unborn entity is being deprived from the right of choosing to live, considering someone else is making that choice; and, therefore, society should ban the practice of abortion, that the fetus is not yet a person and does not have a moral value yet. In our view as pro-choice liberalist, what makes abortion ethically permissible and should also to be legally permissible is the fact that (a) the mother does not want the child; (b) the _{father} does not want the child; (c) the mother will possibly die from giving birth; (d) the pregnancy is the result of rape. The fact that the mother does not want the child could embrace several reasons: (a) the mother knows the child will be born with physical or mental abnormalities; (b) the mother is a drug or alcohol abuser, (c) the mother knows she is not financially fit to take care of the child, etc.⁴

Causes of Abortion

It is a universal truth that for every cause of action, there is a corresponding effect and vice versa. These reasons form the thrust of this segment of the paper and are explicitly seen as the causes of abortion. They are as follows: 1.) on health grounds, 2.) Population control policy, 3.) Eradication of bastards, 4.) unwanted pregnancy, 5.) social causes/shame, 6.) Family background, 7.) Peer influence, 8.) Financial burden of raising a child and the fear of being a single parent, 9.) Influence of the sexual partner, 10.) rape, etc. The word intentional is the rationale behind abortion whether in the therapeutic abortion, normally permitted by medical practitioners' or not because of health reasons or in some cases of rape which must be treated as abortion provided the consent of any of the parties is involved.

⁴. Chioma Odo et.al, "The contribution of anti-abortion law on maternal mortality: A case study in Nigeria" *GSC Advanced Research and Reviews*, (USA: GSC Onlinepress, 2023), 26.

Grounds for Legal Rights to an Abortion

The researchers are looking at Abortion from the viewpoint of consent and confidentiality: The consent of patient is the individuals willing to engage in abortion and the confidentiality is for the health worker who will be responsible terminating the fetus.

This research is proposing a legal right to engage in termination of pregnancy on the grounds of the woman's consent, who is responsible for her acts, except when a patient lacks capacity and termination is the patient's best interests. We are of the opinion that, they are factors which must be taken into considerations in the consent process, depending on the age and capacity of the woman (patient).

It should be a fundamental principle of medical law that adults have the right to make decisions on their own behalf, and are supposed to have the capacity to do such, unless proven otherwise. If capacity is challenged, then the responsibility for proving that an adult lacks capacity falls upon the person challenging such choice. As with all other medical procedures, a woman seeking abortion should be provided with sufficient, accurate information to help her make a decision, and her consent must be freely and voluntarily given. The NICE (National Institute of Health and Care Excellence) guideline also argues that, “consent is requirement to make decisions in abortion and woman's consent must be respected at all time.”⁵

It should be noted that a person is regarded as lacking capacity to make a decision if, as a result of the malfunctioning of the mind or brain they are unable to, understand the information relevant to the decision; retain the information relevant to the decision; use or weigh the information; and also communicate the decision by any form. Where an adult couldn't pass any part of this test, the entire test is failed which means that she does not have the relevant capacity to give consent to engage in an abortion, but if she passed the test, then she is qualified for legal right to abortion at any given time. Secondly, the need for abortion to be considered in respect of one who lacks capacity, and who lacked such capacity at the moment of conception, is likely to raise serious questions about her ability to consent to sexual intercourse, and may also require investigation as to ascertain whether a criminal offence has occurred.

It will be noted that a person, regardless of her age, can independently seek medical advice and

⁵. NICE& RCOG, *Abortion Care*: NICE Guideline, www.nice.org.uk/guidance/ng140/resources/abortion-carepdf. [Accessed 15 Jan., 2024].

also give valid consent to medical treatment if, in the opinion of the doctor, they are capable of understanding the terms, nature and possible consequences of the procedure. This was established in the House of Lords' ruling in *Gillick v West Norfolk & Wisbech Area Health Authority*. In the latter case of *R (Axon) v Secretary of State for Health*, then the Court of Appeal (England and Wales) posits that, "the principles in *Gillick* will apply to decisions about treatment and care for sexually transmitted infections, contraception and abortion."⁶ BMA also posits that, "The law is clear that a parent's refusal to give consent for a termination cannot override the consent of a competent young person".⁷

For further clarity, if a lady is assessed as lacking competence, someone with parental responsibility may legally consent on her behalf. In all, the patient's views must be considered. But, if any woman refuses to permit parental involvement, legal advice should be sought about whether the parents should be informed against her wish in the case of under aged, which may require an application to the courts. At all stages, the first duty of health professionals should remain the welfare of the patient because the one came to engage in abortion is a patient to the medical and must be taking care of properly. As for the adults lacking capacity, if a doctor considers a lady to be unable to consent to a termination of pregnancy, this raises the question of whether she was also able to consent to the sexual intercourse which led to such pregnancy.

The law should be clear that a decision to terminate a pregnancy rests with the patient concerned and her doctor, and that a woman's partner has no legal right to demand or refuse a termination unless they are legally married. Where a woman does not wish to share information with her partner, confidentiality must be maintained unless otherwise by being legally married to each other.

We have another ground which we called confidentiality of the medical expert. For medical procedures, patients seeking an abortion have a right to expect that the medical expert will not disclose personal health information to a third party without consent. Women wishing for termination may be particularly concerned about confidentiality, and doctors should be sensitive to this as well. This right of confidentiality can only be breached in exceptional circumstances. As mentioned, the need for an abortion to be considered in respect of a woman who lacks capacity

⁶. General Medical Council, *Contraception, abortion and sexually transmitted infections (STIs)*. Available at www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/018_years/contraception-abortion-and-sexuallytransmitted-infections-stis [Accessed 15 Feb., 2024], 53.

⁷. BMA, *The law and ethics of abortion*, (London: BMA House, Tavistock Square, 2020), 19.

may also raise questions about her ability to consent to sexual intercourse and may lead the doctor to believe that a serious crime has been committed to her. This may warrant breaching confidentiality to disclose information in order to prevent the woman (and others who may be at serious risk) from other harm. For instance, there was a case of a minor who opted for an abortion in Anambra state in 2021 where the little girl disclosed that she had done abortion for three times for which her biological father has been responsible since their mother died and that she is tired of doing abortion for the interest of her life. And this led to the arrest of the man who is responsible for the pregnancy because the minor was not willing to undertake an abortion and she was within the age which she should could not decide what she wanted for herself. The duty of confidentiality owed to a person as minor is the same as the duty owed to an adult.

It is clearly desirable that young people have their parents' support them for important and potentially life-changing decisions such as abortion. While young patients are encouraged to share information with their parents or legal guardians is for healthy life and good futures ahead of them. Then, for the case of adults lacking capacity, a young person's need for an abortion may give rise to concerns about her ability to consent to sexual intercourse as well whether insane or not. Thus, this kind will for investigation to ascertain whether rape case or not.

However, where young person is under the age of 13, which they are considered in law to be unable to give consent. Therefore, all the information about sexual activity involving children under 13 should usually be shared. Any decision not to disclose should be discussed with a named or designated doctor for child protection, and the decision and reasons underlying it should be recorded for further actions.

In some cases, there may be circumstances where a health worker has reason to believe that the pregnancy is the result of child abuse, incest or exploitation, and disclosure may be necessary and justifiable. The GMC argues,

That information be shared about abusive or seriously harmful sexual activity involving any child or young person, including that which involves: (a) a young person too immature to understand or consent; (b) big differences in age, maturity or power between sexual partners; (c) a young person's sexual partner having a position of trust; (d) force or the threat of force, emotional or psychological pressure, bribery or payment, either to engage in sexual activity or to keep it a secret; (e) drugs or alcohol used to influence a young person to engage in sexual activity when they otherwise would not; (f) a young person's

sexual partner being someone known to the police or child protection agencies as having had abusive relationships with children or young people.⁸

In this cases, the patient should be told as soon as possible that confidentiality cannot be guaranteed as a result of the above mentioned, and should be offered appropriate help, counseling and support as well.

Conclusion

This research from its findings established for the legalization of abortion as a legal right from the viewpoint of self defense considering consent and confidentiality of both the patient and the medical workers. This work also argues that abortion should only be considered from the choice of the parties involved who understands the pro and cons of their act. We further notes that abortion should be done by the medical professionals to avoid the patients' from dying through the unsafe abortions.

Bibliography

- Dworkin, Ronald. *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom*. New York: Alfred Knopf Press, 1993.
- BMA. *The Law and Ethics of Abortion*. London : BMA House, Tavistock Square, 2020.
- General Medical Council. *Contraception, abortion and sexually transmitted infections (STIs)*. Available at [www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/0-18 years/contraception-abortion-and-sexuallytransmitted-infections-stis](http://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/0-18-years/contraception-abortion-and-sexuallytransmitted-infections-stis), [Accessed 15 January, 2024].
- NICE& RCOG. *Abortion Care: NICE Guideline*. www.nice.org.uk/guidance/ng140/resources/abortion-carepdf, Accessed 15 Feb., 2024.
- Odo, Chioma et.al. "The contribution of anti-abortion law on maternal mortality: A case study in Nigeria". *GSC Advanced Research and Reviews*. USA: GSC Onlinepress, 2023.

⁸. General Medical Council, *Contraception, abortion and sexually transmitted infections (STIs)*. 61