

LAW SEMINAR

ON

**LEGAL ASPECTS OF REPRODUCTIVE
HEALTH / FAMILY PLANNING
PRACTICES**

ORGANIZED BY:

**THE EDO STATE CHAPTER OF THE
PLANNED PARENTHOOD FEDERATION
OF NIGERIA (PPFN) AT ST. PHILOMENA
CATHOLIC HOSPITAL, BENIN CITY ON
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PRESENTED BY:

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LEGAL ASPECTS OF REPRODUCTIVE HEALTH / FAMILY PLANNING PRACTICE

INTRODUCTION:

I want to commend the organizers of this workshop for including the subject of the Legal Aspects of Reproductive Health / Family Planning Practice. It affords the rare opportunity to discuss what I think are serious legal issues which are often glossed over, taken for granted or dismissed with a wave of the hand.

The subject of reproductive health care has assumed a topical dimension in recent times. No doubt, the current developments and advancements in the field of medicine have greatly stimulated attention in almost every aspect of medical science.

Consequently, it has become incumbent on government and non-governmental organizations like the PPFN, to examine some burning issues on the subject of reproductive health care.

In this paper, we shall attempt to examine some legal considerations in some aspects of reproductive health care.

We shall undertake a legal critique of the practice of family planning in Nigeria. In addressing the topic, we shall highlight our relevant local legislation on the subject, and articulate some legal developments in some foreign jurisdictions, to give us a picture of the global trend.

Before we proceed further, the point must be emphasized that the development of our legal system has been rather slow. The protracted period of military rule has contributed in no small measure to retard the pace of the

nation's development in all sectors. Presently, some of our laws have become archaic and anachronistic. There is an urgent need to review our laws to accommodate the pace of modern development.

Having made these preliminary remarks, we may proceed to succinctly consider the topic under the following three sub-headings:

- (i) Human Rights and Reproductive Choice;
- (ii) Family Planning and Reproductive Rights; and
- (iii) The Law of Medical Negligence.

HUMAN RIGHTS AND REPRODUCTIVE CHOICE:

Generally, a discussion on the subject of reproductive health must acknowledge the close connection between health and law. Furthermore, it must include as a basic tenet, the recognition of reproductive choice as a universal human right. To enable us comprehend the theoretical basis of elaborating a practice of reproductive right as specie of human right, we must identify some basic principles.

Successive Nigerian Constitutions from the period of independence have always incorporated a bill of rights.

Chapter IV of the present 1999 Nigerian Constitution makes provisions for some constitutionally guaranteed fundamental Human Rights. The rights include **inter alia, the right to life, liberty, privacy, property**, etc. In this paper, we shall restrict ourselves to just three of these rights. The right to life (Section 33), the right to personal liberty (Section 35) and the right to privacy (Section 37).

Section 33 provides that “Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence”.

Section 35 provides that “Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save In accordance with a procedure permitted by law”.

Section 37 provides that “The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected”.

Simply put the right to life guarantees the right to human existence. The right to liberty is the right to freedom from all restraints except such as is justly imposed by law.

The right to privacy basically means the right to be alone; it also implies freedom from governmental intrusion.

Principally, the essence of medical practice is the protection and preservation of human life. In relation to the subject of reproductive healthcare, we are concerned with the rights of both the mother and the unborn child.

The issues involved are, firstly whether an unborn child has any constitutionally protected rights under our law. Secondly, a consideration of the rights of a pregnant woman vis-à-vis the right of her unborn child.

The human rights guaranteed under the constitution are vested in “**every person**”. The issue of whether an unborn child is a person has been a subject of debate that has been on for many years in many countries around the world.

The debate can be traced to the early period of the Philosophers, St. Augustine, Thomas Aquinas, etc.

The Anti-Abortion School (**Pro-Life School**) believes that the foetus is a person because life begins at conception and anything done (from the period of conception) to the foetus which results in the termination of its life amounts to killing, and they are against it.

On the other hand, the **Pro-Choice School** postulates that the foetus is not a person from the moment of conception but more of something having potential life to graduate into a person. The members of this group have identified the **viability point** of the foetus as the period at which the foetus can survive outside the womb without the help of the mother. That viability point is the point when the foetus can be regarded as a human being, with certain human rights. Usually put at between 6 – 7 months, period.

Around the world today, individuals, private organizations, politicians and governments are striving to liberalize their laws on abortion. Much has been achieved in many countries, especially in Northern and Eastern Europe, Russia, Japan and more recently in the United States. But there are still many countries, notably in Africa and South America, where abortion is highly restricted. Nigeria is one of such countries.

In the classical American case of **ROEV WADE 410 U.S. 113 (1973)**, the United States Supreme Court decided that an unborn child is not a person under American law. In the said judgement, the court laid down the following guidelines:

- (i) that a State may not, during the first trimester of pregnancy, interfere with or regulate the decision of a woman and her doctor to terminate the pregnancy by abortion;

- (ii) that from the end of the first trimester until the foetus becomes viable (usually 24 – 28 weeks), a State may regulate abortion only to the extent that the regulation relates to the protection of the mother's health;
- (iii) that only after the point of viability may a State prohibit abortion except when necessary to save the mother's life.

Advocates of the Pro-Choice group are in favour of a liberalization of our abortion laws, to reflect the American model. They argue that abortion should be permitted in cases of pregnancy resulting from rape, incest, pre-marital or extra-marital sex. Presently, the Nigerian abortion law is very restrictive in nature.

The provisions prohibiting abortion are contained in Sections 228, 229 and 230 of the Criminal Code.

Section 228 prohibits attempt to commit abortion, Section 229 provides for a situation where the pregnant woman procures an abortion on herself and Section 230 prohibits anyone from supplying drugs or instruments for the procuring of abortion.

In examining, these Sections it must be observed that the Criminal Code made no provisions for cases where abortion is lawful except in Section 297 where it states that the person who carries out a surgical abortion in good faith and with reasonable care and skill upon an unborn child for the preservation of the mother's life, will not be criminally responsible. Accordingly, we may conclude that Section 297 caters for cases of **therapeutic abortion**, i.e. abortion to save the life of the woman.

Basically, the modern trend seems to support the liberalization of abortion laws. In Germany for instance, although the law still technically protects the unborn child, they have passed an abortion statute, to permit abortion in some situations. Holland, Norway, Belgium, Italy, etc have all legalized abortion to some extent. But African countries like Ghana, Sierra-Leone and Uganda still prohibit abortion. However, Cameroun and Morocco have legalized abortion.

It is evident that the present law does not encourage the development of medical expertise in the area of reproductive health. Medical personnel are understandably afraid to exercise their skills for fear of criminal sanctions for any breach of abortion laws. The need for legal but regulated abortion procedures far outweighs the present outright ban.

FAMILY PLANNING AND REPRODUCTIVE RIGHTS:

In 1974, the International community gathered at the **World Population Conference** in Bucharest, Romania, to consider the problem of population. They focused on the basic premise that population growth was an impediment to development.

At the end of the conference, the World Population Plan of Action included a decision to protect the reproductive rights of the individual. They decided as follows:

“All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children...”

Although the population movement and women’s movement were the moving forces behind the articulation of the right to reproductive choice, many other international organizations and conferences have formally recognized the

right as well. For example, the right to decide freely and responsibly on the number and spacing of children was adopted by the **U. N. General Assembly** in the **Declaration on Social Progress and Development**, by the **World Food Conference** in Rome in 1974.

The effect of all these declarations, is that there is, undeniably an internationally recognized right of couples and individuals to control their reproduction freely and responsibly.

But we must be conscious of the **Malthusian theory** of a direct linkage between population and resources in the economic and social development equation and gear our policies to this end. This underlines the basis of the practice of family planning.

It must be observed that presently, there is no Nigerian legislation at either the Federal or the State level, to regulate the problem of population control. The Federal government policy on four children per couple is not backed by any legislation. It is merely a policy statement. There are no sanctions for violations.

In the same vein, there are no legislations in place to regulate the practice of family planning in the country. It is an indisputable fact that under our law, there are no restrictions on the rights of the individual to bear children. Children can be born within wedlock and outside wedlock. The negative social stigma, previously associated with children born outside wedlock has been laid to rest by the constitutional provision under **Section 42(2)** that “No Citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth”.

Simply put, there are no illegitimate children under Nigerian law. All children are legitimate under the Nigerian constitution.

Modern developments in medicine have introduced some radical dimensions in the area of reproductive rights. The issues range from the subject of **artificial insemination, surrogate motherhood, contraception** and the extreme measure of **sterilization**. Naturally, these developments have some attendant legal consequences. In some advanced countries in the Western world, these developments are already the subject of several litigations in court. Unfortunately, it is too early for us to determine their exact legal implications.

Artificial insemination of a woman through the semen of her lawful husband may not pose any legal problems. But artificial insemination by a donor may involve some legal complications and complexities. For example, what is the legal relationship between the donor and the woman? Also, what is the relationship between the donor and the child under the law? Can the donor claim paternity of the child? These are some of the complexities.

Surrogate motherhood presents another bizarre legal scenario. The technique involves the artificial insemination of another woman with the sperm of the barren woman's husband. At birth, the child is transferred to its biological father and his wife. The entire arrangement is a commercial transaction between the parties. In some of these advanced jurisdictions their contract laws have been modernized to accommodate these modern contracts. Legal problems may ensue where for example the biological mother refuses to surrender the child upon delivery. There is clearly a breach of contract. But such contracts are yet foreign to our legal system. A contract to rent a woman's womb is strange to our jurisprudence.

Our legal system permits the use of contraceptives as a form of birth control. But it must be with the consent of both spouses. Even the extreme measure of sterilization is permissible as a form of birth control. But it must be noted that failure of a spouse to obtain the consent of the other spouse before applying any form of birth control may constitute a valid ground for divorce.

MEDICAL NEGLIGENCE:

Historically, the courts have maintained that a professional man or woman cannot be liable for ordinary negligence but only for gross negligence. The policy has been to protect a professional man from any unwarranted damage to his professional reputation. Thus a medical man should not be found guilty of negligence unless he has done something of which his own colleagues would say: "He really did make a mistake there. He ought not to have done it."

There have been several cases of professional negligence in the practice of reproductive health care. In an English case, a drunken obstetrician removed the small intestine of the patient, mistaking it for an umbilical cord. In another case, the doctor gave the wrong antibiotics.

In a recent case, a Nigerian doctor operated on a woman for appendicitis. He did not know that she was pregnant. She lost the pregnancy.

There are now rampant cases of pregnant women being transfused with HIV infected blood. Mother and child become infected and they die eventually.

In advanced countries, cases of medical negligence are promptly reported and investigated. Victims are awarded huge compensation as damages. In Nigeria, cases of medical negligence are covered up. When exposed, the victims cannot afford to file action. The problems of poverty and ignorance vitiate their rights.

CONCLUSION:

On the whole we have examined the legal aspects of reproductive health vis-à-vis the practice of family planning. We have highlighted the problem of inadequate legislations.

Our laws should be dynamic to adapt to the changes in society. The abortion laws need to be revised to provide for a regulated practice of abortion, therapeutic abortion.

We have seen the leap in medicine in the area of reproductive health. Our laws are still underdeveloped, of course like our medical science. The law of medical negligence is under utilized. There is the need to prevent the loss of lives through the negligence of medical personnel.

I hope I have been able to shed some light in this salient aspect of the law.

Thank you.

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