



NIGERIAN ABORTION LAW IN THE LIGHT OF PRESENT REALITIES*

1.1 INTRODUCTION

Abortion has become one of the most controversial issues of our time. It has given rise to raging debates and highly charged division between the "pro-life"¹ and "pro-choice"² schools. The schools appear to be irreconcilable in principle and any search for a consensus or compromise is unlikely to yield fruits at present³. Consequently, any legal regime is unlikely to prove satisfactory to one or other side of the debate. The present contribution however, is not intended to join any side of this debate. Our focus here is only to examine the present state of the Nigerian Law on the subject and determine whether the law is still justified or needs amendments in the light of present realities.

2.2 THE NIGERIAN ABORTION LAW

The Nigerian abortion law is to be found in two statutes namely, the Criminal Code⁴ which operates in Southern Nigeria and the Penal Code⁵ operating in Northern Nigeria. Both statutes are closely linked with their English counterpart because of our Colonial experience with the United Kingdom of Great Britain. The leading provisions of the Criminal Code are sections 228, 229, 230 and 297.

Section 228 of the Criminal Code provides:

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 seven years.

Section 229 provides:

Any woman who, with intent to procure her own miscarriage, whether she is or is not with child, unlawfully administers to herself any poison or other



noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a felony, and is liable to imprisonment for seven years.

Section 230 provides:

Any person who unlawfully supplies to or procures for any person any thing whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, is guilty of a felony, and is liable to imprisonment for three years.

Similar provision prohibiting abortion is contained in section 232 of the Penal Code as follows:

“Whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the Life of the woman, be punished with imprisonment for a term which may extend to fourteen years imprisonment or fine or both”

3.3 MEANING OF ABORTION

The word “abortion” does not appear in any of the Codes, neither is it defined. Rather, the Codes only employ the term “miscarriage”.

From the provisions of these Codes abortion is the unlawful administration of any poison or other noxious thing or force of any kind or other means whatever to a woman with intent to procure her miscarriage. It does not matter whether she is actually pregnant or not⁶. Attempt to procure abortion or miscarriage is also an offence punishable under the codes. Where a woman procures or attempts to procure her own miscarriage or abortion she is also guilty of an offence.

Any person who unlawfully supplies or procures for any person anything whatever knowing that it is intended to be unlawfully used to procure abortion or miscarriage is also guilty of an offence and punishable upon conviction.

Medical science would appear to classify abortion into safe and unsafe or spontaneous and induced abortion. Spontaneous abortion is that which occurs without external intervention while induced abortion is one which is deliberately caused, such as when a woman wants to terminate unwanted



pregnancy. A safe abortion is one performed by a qualified medical practitioner while an unsafe abortion is one performed by a quack.

However, the law does not contain such classification. There is only one category recognised by the law which is what the medical science classified as induced abortion and this is illegal in Nigeria unless justified under the law – done for the preservation of the life of the mother.

4.4 DEFENCES FOR LEGAL ABORTION

Section 297 of the Criminal Code provides a defence to the crime of abortion if the miscarriage is procured for the purpose of preserving the life of the woman as follows:

A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.

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The interpretation of the phrase "preservation of the life of the mother" was rendered in R. v. Bourne⁷, an English case which involved the abortion for a girl with unwanted pregnancy arising from rape. The Court held that the phrase ought to be interpreted reasonably to include "preventing the mother from becoming a physical or mental wreck." Accordingly, it was held that the Doctor who performed abortion on the young girl who had been raped by a gang of soldiers in order to prevent her from becoming a physical and mental wreck was not guilty of an offence.

The interpretation of the requirement of good faith was given in a similar provision under section 232 of the Penal Code in the case of Pam-Tok v. State⁸. In that case, the appellant was convicted of causing miscarriage contrary to section 232 of the Penal Code already reproduced.⁹ The case for the prosecution was that the appellant performed an operation and thereby caused a female student to miscarry a "three-month" old child. The appellant's defence was that he performed the operation when the student had partial miscarriage and was bleeding and the operation was necessary to save the student's life. The trial Court convicted him as charged. On appeal, he argued that the trial Court did not consider his defence adequately. The



Appeal Court held however, to the contrary and upheld both conviction and sentence by the trial Judge. Dismissing the appeal, the Court of Appeal held that the onus was on the appellant to lead evidence that he acted in good faith and this he failed to discharge.

5.5 CRITICISM OF THE NIGERIAN ABORTION LAW

A number of criticisms have been leveled against the Nigerian abortion law¹⁰. Some have sought to impugn this law by recourse to the Constitution arguing that the law is unconstitutional. One writer argues that it infringes the woman's right to the fundamental human right guaranteed under the Nigerian Constitution¹¹

. Since there is yet no case on the point in Nigeria, analogy is drawn from the United States Supreme Court's decision in the cases of Roe v. Wade and Doe v. Bolton¹². The first case involved a victim of rape who sought to terminate the pregnancy. The second involved a poor mental patient who had been advised that having a fourth baby would damage her health more than having abortion would.

It is clear that even under the Nigerian abortion law these cases would have succeeded under the provisions of section 297 of the Criminal Code and 232 of the Penal Code as one done for the preservation of the life of the mother without any recourse to the Constitution. However, it is submitted that the decision of the United States Supreme Court that the right of privacy under the U.S. Constitution "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" is not applicable to Nigeria. For one thing, the fundamental right to privacy under the 1999 Constitution of Nigeria¹³ is not *impari materia* with the due process clause of the 14th Amendment to the U.S. Constitution as to be construed to embrace a woman's right to abortion under the Nigerian Constitution. Indeed, the American decisions are still controversial with the authority waning by every case. The decisions were by a majority of 7 to 2 but the voting margin has since declined to 5 to 4. Such a slim majority is no longer authoritative. It is interesting to note that even the U.S. Supreme Court in 1989 through its 'Webster Decision', invited the State legislatures to enact restrictions on the application of its decision in *Roe's case* thus, narrowing down this authority. The Court finally conceded that the right of privacy under the U.S. Constitution should only be



extended to protect personal decisions that are 'implicit in the concept of ordered liberty' or those that are deeply rooted in American history and tradition¹³. It is clear that the decisions are not rooted in Nigerian history and tradition to be applicable in Nigeria.

Furthermore, the derogation from fundamental rights contained in the Nigerian Constitution appropriately justifies the Criminal Code and Penal Code provisions prohibiting abortion in Nigeria – Section 45 provides:

Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society –

- (a) in the interest of defence, public safety, public order, public morality or public health; or
- (b) for the purpose of protecting the rights and freedom of other persons”.

It is submitted that abortion, being one of the offences relating to morality, is reasonably justifiable in the interest of public morality and public health within the meaning of this section and therefore constitutional. Accordingly, it is submitted that there is no fundamental right to abortion under the Nigerian Constitution as erroneously claimed..

The claim that the Nigerian abortion law contravenes the woman's right against discrimination and her right to dignity of her human person¹⁴ can also be rejected as an attempt to stretch the constitutional provision too far. If the Criminal Code prohibition of rape which is singularly and peculiarly protective of only women is not regarded as discriminatory, it is ridiculous to regard the abortion law as discriminatory against women within the meaning of section 42 of the Constitution. The argument is simply naive as the provision does not envisage anything like the Nigerian abortion law. Section 42 provides:

- (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person –
 - (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or



(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.

(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

(3) Nothing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or a member of the Nigeria Police Force or to an office in the service of a body corporate established directly by any law in force in Nigeria”.

The argument on dignity of the human person under the Constitution being violated by the abortion law is similarly to be rejected as section 34 of the Constitution has no relevance to abortion. The section only provides against torture, inhuman or degrading treatment, slavery or servitude and forced or compulsory labour in clear, unambiguous terms not susceptible to any other strained interpretation¹⁵

Another criticism of the Nigerian abortion law is that the law is responsible for many cases of unsafe abortion leading to maternal morbidity and mortality in Nigeria. It is argued that Nigeria's restrictive abortion law has driven woman into the hands of quacks resulting in unsafe abortion with the attendant high risk of maternal morbidity and mortality. In other words, the fear of being caught and prosecuted under this law has resulted in the attitude of women seeking secret means to terminate unwanted pregnancies rather than from government/public health institutions where better and safer services would have been available for safe abortion. It has therefore been argued that a more liberal abortion law would promote openness and lead to a decrease in the incidence of abortion¹⁶.

With due respect, this argument cannot be entirely correct in Nigeria. There are other very important factors responsible for the attitude of secrecy in obtaining abortion services in Nigeria. Although by Section 10, of the 1999 Constitution of Nigeria, the Government of the federation or of a state shall not adopt any religion as state religion, Nigeria is a highly religious and moral



society where abortion is regarded as highly immoral. The Nigerian Society largely regards life as starting from conception and any attempt at abortion is condemnable. This partly accounts for the secrecy with which abortion is done being a thing of shame as far as the society is concerned.

Also to be considered, is the economic factor. In a country bedeviled with poverty, access to qualified medical practitioners for abortion services is greatly limited with the fees chargeable by medical practitioners¹⁷. It is hardly likely therefore that with a liberalized abortion law, access to specialized abortion services by qualified practitioners will be enhanced unless they are ready to reduce fees chargeable for these services. Rather, it is feared that some doctors may seize the opportunity of liberalization of the abortion law to attract more money arising from the "business" of a mere routine abortion for cash¹⁸.

Furthermore, even with a liberal abortion law, it may well be that because of the charged moral context of abortion in Nigeria, women's access to abortions will be dependent on the ethical position of individual doctors. Accordingly, many doctors are not likely to allow abortion on demand even in a system of liberal abortion law and this will also affect access to abortion in Nigeria. For this cause, it is interesting to note that an abortion statute in Britain¹⁹ provides for a right of conscientious objection for this group of professionals who are therefore not under any legal obligation to participate in such terminations except to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman^{19a}

^a. A third criticism of the Nigerian abortion law is that it is overdue for amendment in line with developments in more civilized societies, notably Britain. It is argued that whereas our law is modelled after the 1861 statute in Britain, the latter had since been amended while we are still retaining essentially the provisions of it.

While we will consider the reform of the abortion law in Britain presently, it is necessary to observe that many laws normally take root from the moral values of the society in which they apply and not from another society. The Nigerian abortion law has a strong foundation in the moral and religious values of our people which recognise the sanctity of human life from conception²⁰. In this regard therefore, it would appear that a little more needs to be done to secure any reasonable amendment of the law in Nigeria.



Accordingly, not all grounds for abortion under the English Statute or any other country's law may be acceptable as an amendment to the Nigerian law.

6.6 ABORTION LAW IN THE UNITED KINGDOM

The Offences Against the Person Act 1861 is the principal statute containing the fundamental rules relating to abortion in Britain. Section 58 makes it an offence for a pregnant woman to administer noxious substances to herself or to use any instrument in order to procure her own miscarriage. It is also an offence for any other person other than the woman herself with intent to procure a woman's miscarriage to administer noxious substances or to use any such instruments. Such other person will be guilty of an offence even if it turns out that the woman was not actually pregnant provided he believed that she was pregnant. Section 59 of the Act also makes it an offence to unlawfully supply or procure any poison or other noxious thing, or any instrument or thing, knowing it to be intended to be unlawfully used to procure a miscarriage²¹.

However, the Abortion Act 1967²² provides a set of defined defences in mitigation of the basic prohibition and the crimes created under the 1861 Act and these constitute the grounds for legal abortion. Under the 1967 Act²³ abortion is allowed where two doctors have formed the opinion, in good faith:

- (i) that the pregnancy has not exceeded its twenty – fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family;
- (ii) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or
- (iii) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or



- (iv) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped²⁴.

A major feature of this Law is that it has abandoned the issue of legal abortion for doctors²⁵ and, in consequence, the interpretation of these provisions are left for the medical profession rather than the Courts. Indeed, it would appear that the Courts are reluctant to question the judgment of doctors on the existence of grounds for abortion²⁶. However, there is one reported case of a successful prosecution. In *R. v. Smith*²⁷ the prosecution's case against the doctor was that he had not formed an opinion in good faith as required by the Act. The abortion was carried out privately and incompletely. The evidence showed that he had not examined the patient internally and did not inquire into her personal history or situation. The singular entry in the doctor's notes relating to the grounds on which the Act permits abortions was that the patient was "depressed". There was a conflict of evidence on whether the doctor who gave the second opinion ever examined the patient. In his summing-up, the trial judge invited the jury to consider whether 'there was any balancing of the risks involved in allowing the pregnancy to continue and allowing the pregnancy to be terminated, or was this a mere routine abortion for cash?'²⁸ The doctor was convicted and the Court of Appeal upheld the conviction.

It is to be observed that the first three grounds (except the limb involving the children's lives) for a legal abortion are not fundamentally different from the defence available under section 297 of our Criminal Code which though is more tersely and differently worded. It is suggested that these three grounds could, with proper interpretation be accommodated under this section for the preservation of the mother's life. However, the limb affecting children of her family and the fourth ground (foetal handicap ground) may have to be brought in by necessary amendments, if we are able to surmount certain obstacles to be highlighted presently.

7.7 STRATEGIES FOR THE REFORM OF ABORTION LAW IN NIGERIA

The crusade for the liberalization of the Nigerian abortion law cannot hope to succeed on a platter of gold. There are many obstacles and hurdles to cross before achieving such a goal in Nigeria. Accordingly, a lot of factors



needs to be taken into account by proponents of liberalization. Even then, it will be asking for too much to expect a full decriminalization or liberalization of the law at once. Furthermore, a wholesale adoption of the English model reform in the 1967 statute in Nigeria should not be expected giving the differences in our cultural, religious and moral backgrounds. Our reform must take into consideration these backgrounds to be successfully enacted. Although Nigeria is a secular State under our Constitution, religion and morality play a dominant role in the lives of majority of the people.

Among the dominant religious sects in Nigeria, the predominant belief is that Life begins from conception and that abortion is the destruction of life and therefore is tantamount to murder²⁹. This belief is also widely held by most women hence the secrecy with which abortion is done in the country so as not to attract the condemnation of the society. Many doctors from these backgrounds also hold the same belief on the issue of abortion. Indeed, the use of contraceptives for prevention of pregnancy may be more tolerable to these groups, who are in the majority, in the country and, even at that, after much persuasion and education. These groups would prefer discipline and abstinence in matters of sexual intercourse as the best way to prevent unwanted pregnancies rather than abortion. This is because, the view is widely held that it is sexual promiscuity that leads to unwanted pregnancies, in many cases, giving rise to abortion demands. "Prevention" they say, "is better than cure." Where the law is reformed to allow abortion, it is suggested that a conscientious objection clause should be inserted to allow doctors and other professionals who may object to participation on moral/conscience ground freedom from participation.

Another major factor to contend with is the suspicion that some doctors and other professionals may like to cash in on such liberalization of the abortion law to try to expand their "markets" and make more money and this would defeat the purpose. It is feared that since abortion services will not be free, even if liberalized, the poor women in the majority in this country will still not have access to safe abortion despite liberalization unless the Government regulates the fees chargeable by doctors. If this is not done, majority will still resort to unsafe abortion from quacks due to poverty on their part.

The issue of consent on the part of parents (for the unmarried women) and that of the husband (for the married), is another factor to be seriously

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considered in our reform of the law. Under English law the consent of the parents or husband, as the case may be, is not required. But this may not be acceptable in Nigeria, giving our cultural, religious and moral background. After all, pregnancy is not a one-sided affair and it would appear unfair if a prospective father (husband) is not allowed a say in the decision whether or not to terminate it especially in respect of the grounds other than the preservation of the life of the mother or to prevent serious risk to her mental or physical health.

Another factor is the HIV/AIDS scourge all over the country. It is arguable that liberalization of the abortion law will encourage promiscuity and this in turn will facilitate the spread of the HIV/AIDS in the country especially among the adolescent class which is more sexually active. Where they know that abortion on demand is available, this is likely to spur them to sexual promiscuity leading to increase in the spread of the HIV/AIDS. In this connection, it is suggested that any reform of the abortion law should be preceded by a corresponding education on the use of preventive measures such as the use of condoms in this country as a safeguard against HIV/AIDS infection.

However, in addition to the ground of preserving the life and health of the pregnant woman, it seems that a reform of the law to allow abortion in cases of pregnancies from incest, rape and where the child is discovered to have contracted HIV/AIDS, will not be difficult to secure in view of the obvious objections by the society to these pregnancies.²⁹ So also will the society be willing to allow a reform of the law to allow abortion in cases where the child will be severely handicapped upon birth. But terminations on the ground of the sex of the child will not be easily acceptable to the average Nigerian³⁰. So also, it seems, the ground of parental poverty³¹ will not be acceptable without much persuasion and education.

8.8 CONCLUSION

From the foregoing critical examination, it seems that within the framework of the existing present statutes, by judicial interpretation many of the grounds for abortion in Britain as already demonstrated will be allowed under the Nigerian law and reform of the law by way of amendments to the existing statutes will be needed only in the more morally contentious areas as highlighted. There is no doubt, that the reform of the Nigerian law is desirable. But in view of the charged religious and moral context of the issue of abortion in Nigeria at present, it is recommended that proponents of liberalization or decriminalization should embark on education of the society especially the Government, law makers, community leaders and womenfolk through the press and other information media on the desirability of the reform. This will pave the way to a successful reform of the Nigerian abortion law in the light of present realities.



END NOTES AND REFERENCES

1. P. Ehi Oshio, Esq., Associate Professor, Faculty of Law, University of Benin City, Nigeria.
2. The 'Pro-life' school believes that life begins from conception and abortion results in the killing of the child which is tantamount to murder.
3. The 'pro-choice' school insists on the woman's right to choose to terminate her pregnancy at any time.
4. See J. Montgomery, *Health Care Law*, Oxford University Press, 1997, P. 359; S. McLean, "Abortion Law: Is Consensual Reform Possible" (1990) 17 JLS, 106; R. Dworking, *Life's Dominion: An Argument About Abortion and Euthanasia*, Harper Collins, London 1993, Chapter 1.
5. Cap. 77 Vol. 5, Laws of the Federation of Nigeria 1990.
6. Penal Code Law (No. 18) of 1959.
7. Although it appears that prosecution has to prove that the accused believed that she was actually pregnant, *R. v. Price* (1968) 2 All E.R. 282.
8. (1939) 1 K.B. 687; (1938) 3 All E.R. 195; see also *R.v. Edgal* (1938) 4 W.A.C.A. 133.
9. FCA/K.78, see also *R.v. Smith* (1974) 1 All E.R. 376.
10. Contrast this with sections 228, 229 and 230 of the Criminal Code where there is no option of fine.
11. Okonofua, F.E., "Preventing Unsafe Abortion in Nigeria" *African Journal of Reproductive Health*, (1987) Vol. 1 No. 1, p.25 – 36; F.E. Nunes "Unsafe Abortion: From Awful Silence to Positive Action" *African Journal of Reproductive Health* (2000) Vol 4, No. 2 p. 7 – 9; J. Ezeilo, "Legal Constraints to Adolescents, Sexual and Productive Health Rights in Nigeria", WHARC Occasional Works Paper Series, 1998, p. 13 – 14.
12. E. Ene "Family Planning, Fertility Control and the Law in Nigeria – the Choices for a New Century, *African Journal of Reproductive Health* (1988), Vol. 2 No. 2, p. 89 – 90; T.B.E. Ogiemien, *Abortion Law in Nigeria The Way Forward* Women Health and Action Research Centre (WHARC) Benin City, Nigeria, Occasional Working Paper Series, 2000, p. 21 – 22.
13. 935 Ct. 705 (1973); 945 Ct. (739) 1993 and 410 US. 113; see generally, S.R. Shapiro "Validity Under Federal Constitution of Abortion Laws" 35 L. Ed. 2nd 735 (1973)
- 13.A Section 37 provides: "the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.
14. See Ogiemien, op. cit. p. 12
15. E. Ene op. cit., p. 88 – 89
16. Section 34 provides; "Every individual is entitled to respect for the dignity of his person, and accordingly – (a) no person shall be subjected to torture or to inhuman



or degrading treatment; (b) no person shall be held in slavery or servitude; and (c) no person shall be required to perform, forced or compulsory labour,

16. F.E. Okonofua, op. cit, p. 32 – 33.
17. Ene concedes that poverty is one of the reasons why some women resort to quacks for unsafe abortion – E. Ene, op. cit. p. 88.
18. R.v. Smith (1974) 1 All E.R. 376, 383.
19. Abortion Act 1967.
- 19a. Montgomery, op. cit. p. 369.
20. Christians, Muslims and even believers of the traditional religions were that life begins at conception. The Bible, for instance, only recognizes the right to reproduce or recreate and has no provision for termination of a pregnancy, see Genesis Chapter 1 verse 28 of the Holy Bible.
21. The Infant Life Preservation Act 1929 provides a separate regime to deal with pregnancies where the foetus has reached the age of being capable of being born alive. This is similar to section 328 of the Nigerian Criminal Code..
22. This was amended by the Human Fertilisation and Embryology Act 1990 which is not directly in issue here.
23. Section 1 (1)(a)-(d).
24. Unfortunately, even under English Law there is no direct authority on the meaning of any of the specified grounds as yet.
25. The Act does not provide women with the right to terminate their pregnancies but leaves them dependent upon finding doctors who will cooperate with their wishes. See also, L. Clarke, "Abortion, A Rights Issue" in R. Lee and D. Morgan (eds.) *Burthrights, Law and Ethics at the Beginning of Life* (London: Routledge, 1989); A. Grubb, 'Abortion Law in England: The Medicalisation of a Crime' (1990) 18 *Law, Medicine and Health Care*, 146-61.
26. See Baker P. in Paton v. Trustees of BPAS (1978) 2 All E.R. 987, 992 approved C. v. S. (1987) 1 All E.R. 1230 and declared; "not only a bold and brave Judge..... who would seek to interfere with the discretion of doctors under the (Abortion Act 1967), but I think it would really be a foolish judge who would try to do any such thing, unless possibly there is clear bad faith and obvious attempt to perpetrate a criminal offence,
27. (1974) 1 All E.R. 376.
28. Ibid., p. 383.
29. See also I.J. Keown, "Miscarriage": A Medico – Legal Analysis' (1984) *Crim. L.R.* 604.
30. Contra D. Morgan, 'Foetal Sex Identification, Abortion and the Law' (1988) *Fam. Law*, 355-9.
31. Even in Britain Lord Denning M.R. criticized the idea of 'abortion on demand' under the 1967 Act in RCN v. DHSS (1981) 1 All E.R. 545, 554.