

CONGENITAL ANOMALIES AS GROUNDS FOR ABORTION IN NIGERIA

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Abstract

Nigerian laws, including Islamic Law applicable in Nigeria, prohibit (indiscriminate) termination of pregnancy; save therapeutic abortion when the life of the pregnant woman is endangered. Yet, the abortion rate remains alarmingly high in Nigeria. The data on therapeutic abortion is virtually non-existent or unreliable. The laws are, however, silent on conditions that endanger the life of the pregnant woman. This has prompted the Nigerian Federal Ministry of Health to formulate guidelines for safe termination of pregnancy. Therapeutic abortion may be necessitated by many conditions, including Congenital Anomalies. These are general foetal defects, the occurrence of which may be major causes of infant mortality in the world. Their severity creates unbearable hardship for the victims, their families and caregivers. If diagnosed during pregnancy, the laws are silent about the step(s) to be taken should abortion be called for to relieve the situation of the pregnant woman. However, the guidelines set out by the Federal Ministry of Health covers situations involving "Severe Congenital Anomalies". The dire overall situations caused by these distressful conditions provoke the question: can the extant laws not be more explicit in recognizing them as valid grounds for abortion? Relying on doctrinal/analytical methodology, the paper observes that Nigerian laws, including the codified (Islamic) Penal Law, do not make adequate provisions to cater for Congenital Anomalies as exculpatory grounds for abortion, and concludes that there are justifiable reasons to include these distressful conditions as specific exceptions to the prohibition against (indiscriminate) abortion.

Keywords: Abortion; Congenital; Anomalies; Islamic law.

INTRODUCTION

Abortion, which can simply be said to be the termination of pregnancy, has over time seen the light of law in Nigeria and other parts of the world unsurprisingly. It has been criminalized by various laws in the country and outside including the Islamic Law to such an extent that it is known to all. The rate of abortion is high in Nigeria with over one million two hundred thousand induced abortion estimated in 2012¹ but ironically, the data for legal abortion

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¹. Akinrinola Bankole, and Others 'The Incidence of Abortion in Nigeria' [2015] (41) (4), *International Perspectives on Sexual and Reproductive Health*, <<https://www.guttmacher.org/journals/ipsrh/2015/10/incidence-abortion-nigeria>> accessed 11 March, 2019.

is not available in the country.² The number increased drastically to over two million in 2018 with major reasons being the availability of abortion pills at chemists and access to private hospitals more concerned about profit-making.³ Report further indicated that in 2017, the annual incidence of likely abortions in Nigeria was 41.1 per 1,000 women within the age range of 15 to 49 years.⁴ Despite the notoriety of induced abortion, there may be instances where abortion is not only legal but also therapeutic and salutary. Lack of adequate data to evaluate which amounted to illegal abortion will limit the question of whether or not the laws have been able to curb illegal abortion in the country.

Congenital abnormality (anomaly or disorder) which can also be a genetic abnormality or foetal deformity is a probable occurrence during pregnancy. Some may pose a threat to the life of the mother while others may not, depending on their causes and effects. The major and directly addressed exception given by the Nigerian laws including the Islamic Law for the illegality of abortion is abortion done to save the life of the woman. This work will try to critically analyze if invariably the law grants a child right not to be born to suffer excruciating physical and psychological pain or in a like term if the parent's option extends to not to give birth to severely abnormal child in the Light of the Nigerian Common Law and Islamic Law.

Abortion under Nigerian Law

The major laws in Nigeria that regulates abortion are majorly the Criminal and Penal Laws. It is worthy of note to state that many states of the Federation have devised their own penal laws without an alarming difference except in the case of Islamic penal enactments which are different from the Nigerian

². Federal Ministry of Health, 'National Guidelines on Safe Termination of Pregnancy for Legal Indication', 2018.

³. Performance Monitoring and Accountability 2020, *PMA2020 Abortion Survey Results: Nigeria* (2018), <https://www.pma2020.org/sites/default/files/AbortionModule_Brief_111518.pdf> accessed 11 March, 2019.

⁴. Akinrinola Bankole, and Others 'The Incidence of Abortion in Nigeria' [2015] (41) (4), *International Perspectives on Sexual and Reproductive Health*, <<https://www.guttmacher.org/journals/ipsrh/2015/10/incidence-abortion-nigeria>> accessed on 11 March, 2019.

Common Law penal law. The Criminal Code Act regulates the Southern States of Nigeria,⁵ the Penal Code Act⁶ regulates some Northern States of Nigeria while the Islamic Penal Laws regulates the largest part of the northern states of Nigeria.

Since the re-emergence of democracy in Nigeria in 1999, many states, particularly in the Northern part who are predominantly Muslims, have been agitating for the implementation of Shariah as the law governing their mundane affairs. The Penal Code applicable in the north was seen as not in conformity with the tenets of Islamic Law largely. These agitations have been averagely successful as they gave birth to enactment of Laws like The Shariah Penal Code law of Zamfara State,⁷ Shariah Penal Code Law of Jigawa State, Kebbi State Shariah Penal Code,⁸ The Harmonized Shariah Penal Code⁹ and the Shariah Penal Code Law of Kano State¹⁰ These Penal Laws are mostly similar with slight variations in their provisions. The summary of the provisions of law on abortion as contained in the Criminal and Penal Code can be summarized as contained in the table below.

Table 1. Provisions against Abortion in Criminal and Penal Codes in Nigeria

LEGISLATION	SECTION	OFFENCE	PUNISHMENT
Criminal Code	228	Procurement of Abortion (Felony)	14 years imprisonment
Penal Code Act	232	Procurement of Abortion	Up to 14 years imprisonment
Criminal Code	229	Self-Procured Abortion (Felony)	7 years imprisonment

⁵. Criminal Code Act, Chapter 39, Laws of the Federation of Nigeria 2004.

⁶. Penal Code Act, Chapter 53, Laws of the Federation of Nigeria (Abuja) 2008.

⁷. Zamfara: Sharia Penal Code Law 2000, Law No. 10 of 2000, signed into law on 27th January 2000, came into operation on 27th January 2000, Zamfara State Gazette Vol 3 No 1, 15th June, 2000.

⁸. Kebbi: Penal Code (Amendment) Law 2000, Law No. 21 of 2000, signed into law on 1st December 2000, came into operation on 1st December 2000, Kebbi State Gazette Vol. 2 No 1, Supplement 31st December 2000.

⁹. Prepared by Centre for Islamic Legal Studies Ahmadu Bello University Zaria March, 2002.

¹⁰. Kano: Sharia Penal Code Law 2000, signed into law on 25th November 2000, came into operation on 26th November 2000, no gazette information available; printed and published by Kano Printing Corporation, Kano.

Penal Code Act	232	Self-Procured Abortion	Up to 14 years imprisonment
Criminal Code	230	Aiding Abortion (Felony)	3 years imprisonment
Penal Code Act	234(a)	Unintentional Abortion without knowledge of Pregnancy	Up to 3 years imprisonment/ fine / with both
Penal Code Act	234(b)	Unintentional Abortion with knowledge of Pregnancy	Up to 5 years imprisonment/ fine / with both
Penal Code Act	235	Prevention of Safe Delivery	Up to 14 years imprisonment/ fine / with both

A critical look at the above provisions shows that abortion for no just reason is unequivocally prohibited and punishable. It is further understood that the Penal Code Act provides for more comprehensive punishment by giving other alternative punishments.

From the Islamic law perspective, Ibn Abidin, a Hanafi jurist, defined abortion as the act of removing a foetus from the womb before it completes its gestational period.¹¹ Generally, Abortion after ensoulment is strictly forbidden by all authorities under Islamic law, but the vast majority does make an exception to preserve the mother's life.¹² The same can be said of abortion prior to ensoulment but to the extent that it is a less grievous offence at this stage. This will prompt the question of at what stage ensoulment takes place. There are two major opinions on the period of ensoulment of a foetus, the first opinion is that the period of ensoulment is 40 days of the pregnancy while the

¹¹. Muhammad Ameen Ibn 'Abideen, 'Risalah Ibn Abideen' [no date] (2), *Bouleq Library, Cairo*, 114.

¹². Badawy A B Khitamy 'Divergent Views on Abortion and the Period of Ensoulment' [2013], (13), *Sultan Qaboos University Medical Journal*, 29.

second opinion favoured by the majority of Jurists is 120 days of the pregnancy. Their difference in opinion is based on the variant understanding of the verse of the Quran and Hadith of the Prophet on this issue. The Quran provides that:

12. and indeed we created man (Adam) out of an extract of clay (water and earth).
13. thereafter we made Him (the offspring of Adam) as a Nutfah (mixed drops of the male and female sexual discharge) (and lodged it) In a safe lodging (womb of the woman).
14. Then we made the Nutfah into a clot (a piece of thick coagulated blood), Then we made the clot into a little lump of flesh, Then we made out of that little lump of flesh bones, Then we clothed the bones with flesh, and Then we brought it forth as another creation. so blessed be Allâh, the best of creators.¹³

In corroboration of this verse, the second primary source of Islamic Law the Hadith, as reported by Imam Muslim explained that:

(As regards to your creation), every one of you is collected in the womb of his mother for the first 40 days, and then he becomes a clot for an equal period, and then a piece of flesh for an equal period. Then Allah (s wt) sends an angel to write 4 words: He writes his deeds, time of his death, means of his livelihood, and whether he will be wretched or blessed (in the Hereafter). Then the soul is breathed into his body.....¹⁴

The above is understood by the majority of Jurists to indicate that the three stages as contained in the Hadith take a period of 40days each, which when summed up makes 120 days before ensoulment¹⁵ which equates to 17 weeks and a day. While according to the other opinion the Hadith is said to indicate that the three stages all take a period of 40 days and therefore ensoulment

¹³. Quran Chapter 23 V 12-14.

¹⁴. Muslim Hajjaj, *Sahih Muslim* (Darul Sha'ab Cairo No date).Vol 5, 496

¹⁵. Ibn Rajab, Nabd al-Rahman, *Jāmi' u Al-'Ulūm wāl Ḥikam*, (Darul-Ma'rifah, Beirut, 1987), 48, Yacoub, Ahmed Abdel Aziz, *The Fiqh of Medicine*, (Ta-Ha Publishers Ltd, 2001), 211.

occurs after the 40th day.¹⁶ From the two opinions what is certain is that ensoulment does not occur prior to the 40th day of the pregnancy and abortion is ordinarily prohibited at all stages without any cogent legal reason. Accordingly, the Shariah Penal Code Law of Kano State (SPCL)¹⁷ which is similar to other Shariah Penal enactment in Nigeria criminalized abortion via sections 150-154. This is summarized in table 2 below:

LEGISLATION	SECTION	OFFENCE	PUNISHMENT
SPCL of Kano State	150	Willfully causing miscarriage	Payment of <i>Ghurrah</i> ¹⁸ and caning which maybe up to ten lashes
SPCL of Kano State	151	Causing miscarriage by mistake	Payment of <i>Ghurrah</i> ,
SPCL of Kano State	154	Dangerous acts capable of causing death that causes miscarriage	Imprisonment which can extend to a year, payment of <i>Ghurrah</i> and caning which may be up to 100 lashes

Table 2. Provisions against Abortion in Kano State Penal Code Law

¹⁶. Serdar Demirel ‘Abortion from an Islamic Ethical Point of View’ *2nd Global Conference Ethics in Public Life*, <<http://www.inter-disciplinary.net/wp-content/uploads/2010/02/demirelpaper.pdf>> on 9th April, 2017 at 8.

¹⁷. Sharia Penal Code Law 2000 of Kano State, signed into law on 25th November 2000, came into operation on 26th November 2000.

¹⁸. Sec. 56 SPCL of Kano State 2000 defined *Ghurrah* as the compensation which is equivalent of 1/20 of *diyah* paid in respect of causing miscarriage of a foetus. *Diyah* on its own is defined by sec. 59 of the law as ‘ a fixed amount of money paid to a victim of bodily hurt to the deceased agnatic heirs in murder cases, the quantum of which is equivalent one thousand Dinar or twelve thousand Dirham or 100 camels’. This implies that *Ghurrah* will be five camels or six hundred Dirham or fifty Dinars or its equivalence. The current value of *Diyah* is ₦ 53, 753, 300 while that of *Ghurrah* will be ₦ 2, 687,665. See Zakat professional, ‘Zakat Nisab 2018-2019’ at <<https://zakatprofessionals.com/2018/01/12/new-nisab-of-zakat-loading/>> accessed 13 March, 2019.

From the above foregoing, it is quite explicit that all the relevant criminal laws in Nigeria criminalize abortion generally, aside from the exception to be discussed with the notable difference being the punishment for such act as contained in the Islamic Law. It is important to state that while there are codified Islamic Penal Law, they are just a summary of the broad principles that govern the Islamic Law of Crimes as contained in the sources of Islamic law.

The Exceptions to the Prohibition of Abortion

Sections 232 and 235 of the Penal Code Act provide for the exception of the prohibition of abortion by stating that it is legal to abort a pregnancy to save the life of the mother if the pregnancy poses a threat to her life. This exception is not overtly mentioned in the Criminal Code but can be inferred from the provision of section 297 which states thus:

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.¹⁹

The case of *Rex v Bourne*²⁰ has often been used to justify therapeutic abortion in Southern Nigeria.

Under Islamic Law, the overwhelming majority of jurists opined that pregnancy can be aborted at any stage if the life of the mother is endangered by the continuance of the pregnancy.²¹ It is however encouraged that if possible, such should be done before the period of ensoulment. This exception is also recognized by the provision of the Shariah Penal Code Law of Kano State.²²

¹⁹. Sec.207 CPA, Cap 39, LFN 2004.

²⁰. (1939) 1 KB 687.

²¹. Daar AS, Khitamy A 'Bioethics for Clinicians: 21.Islamic Bioethics' [2001]; (164) *Canada Medical Association Journal*, 60–63.

²². Sec 150 SPCL Kano State.

All the Nigerian laws are unanimous on the rule that a pregnancy can be aborted in order to save the life of the mother and this is what is called therapeutic abortion. The laws are however silent on the indications for legal cases of abortion or situations where the life of the mother can be said to be in danger. This will be explained in the succeeding section for the proper digestion of the issue for discussion.

Congenital Anomaly as a Ground for Abortion

Generally speaking, the laws of Nigeria including Islamic law do not unequivocally permit abortion based on the consideration of the unborn child status. However, it is our contention that there may be instances where the law needs to take cognizance of the state of the foetus in permitting abortion. These situations will also indirectly affect the parents of the affected foetus. For a proper understanding of this issue, it is pertinent to explain succinctly what congenital anomaly is.

Sadler, a highly respected Embryologist defined congenital abnormality or anomaly as the ‘structural, behavioural, functional and metabolic disorders present at birth’.²³ Similarly, WHO also describes congenital ‘abnormality as structural or functional anomalies (for example, metabolic disorders) that occur during intrauterine life and can be identified prenatally, at birth, or sometimes may only be detected later in infancy, such as hearing defects.’²⁴ It was reported that the leading cause of infant death is a congenital abnormality which is around 25% of the causes of infant mortality.²⁵

These abnormalities can be minor or major with the focus of this instant work being major congenital abnormalities which can come in the following forms as explained by Sadler:

²³. T W Sadler, *Medical Embryology*, (12th edn, Lippincott Williams & Wilkins/Wolters Kluwer Health, 2015), 117.

²⁴. World Health Organization, “Congenital Anomalies”, 2016, <<https://www.who.int/news-room/fact-sheets/detail/congenital-anomalies>> accessed 14 March, 2019.

²⁵. T W Sadler, *note 23*.

1. Malformation: is a complete or partial absence of a structure or in alterations of its normal configuration which occur during structure formation mostly between 3-8 weeks
2. Disruption: this is morphological destruction of the already formed structures
3. Deformation: this is remoulding of a part of the foetus over a prolonged period caused by mechanical forces.
4. Syndrome: this is a group of anomalies occurring together that have a specific common cause²⁶

As earlier explained, the Nigerian abortion laws only allow abortion done to save the life of the mother which is technically called therapeutic abortion. The laws laudably, do not spell out situations which may pose a serious threat to the life of the parents. This is left in the hand of the professionals to decide which prompted the Nigerian Federal Ministry of Health to recently provide guidelines for the termination of pregnancy as well as its legal indications.²⁷ The legal indication refers to the situations where abortion is seen to be necessary and therapeutic.

To start with, the guideline defined therapeutic abortion as “the termination of pregnancy performed when the pregnancy endangers the mother’s health or *when the foetus has a condition incompatible with normal life*”.²⁸ This definition clearly includes termination of pregnancy on the ground of abnormality of the foetus as indicated by the bold portion of the definition.

Importantly, the guidelines are specially made for the health of the woman and no special consideration is given to that of the foetus. Despite this seemingly one-sided approach, it is still an indisputable medical fact that lack of wellbeing of the foetus can have a great effect on the health of the mother including mental health even though they are distinct but interconnected entities.²⁹ This is based on the relationship and bond that exists between them.

²⁶. *Ibid.*

²⁷. Federal Ministry of Health Nigeria, *National Guidelines on Safe Termination of Pregnancy for Legal Indications*, 2018, 19.

²⁸. *Ibid.*

²⁹. ‘Maternal–Fetal Relationship: I. Medical Aspects’ Encyclopedia of Bioethics. Encyclopedia.com: <<https://www.encyclopedia.com/science/encyclopedias-almanacs->

Just as maternal problems can affect the foetus, the foetal problem can also affect the mother. For example, the foetus of a woman diagnosed with diabetes prior to his pregnancy has a very high tendency of congenital malformation, neonatal death among others³⁰ while an ectopic foetus endangers the life of the mother greatly. This implies that even though the target of the guidelines is on the mother, it cannot be treated in isolation of the foetus. Consequently, the guidelines provided for 7 major but broad situations which may make a woman benefit from safe legal abortion. These are:

- Obstetrics and Gynaecological conditions
 - Maternal Heart and Vascular Diseases
 - Kidney Diseases
 - Cancers
 - Blood Diseases
 - Psychiatric and Other Mental Disorders and
 - Other life-threatening conditions³¹
- Among these broad classifications, there are some specifically mentioned situation which affects the foetus directly. They include
- Severe foetal conditions or malformation not compatible with extrauterine life
 - Central Nervous System abnormalities such as anencephaly
 - Hydrocephalus with no demonstrable brain tissue
 - Cardiovascular system abnormalities such as transposition of great arteries without shunts, Atrio-ventricular discordance
 - Disease or congenital heart disease (Bicuspid aortic valve)
 - Congenital cyanotic heart disease
 - Severe Ebstein anomaly³²

[transcripts-and-maps/maternal-fetal-relationship-i-medical-aspectss](#)>Accessed March 14, 2019.

³⁰. T W Sadler, *note 23*.

³¹. Federal Ministry of Health Nigeria, *note 27*.

³². *Ibid*, at 31-33.

The above conditions are further subdivided into other different conditions, for instance, an example of cardiovascular system abnormality is Down's syndrome. It is unfortunate that most severe congenital malformations are often untreated or under-treated or neglected in developing countries due to limited health resources³³and financial resources including Nigeria. Severe congenital malformation in any form subjects the innocent children to excruciating and unbearable hardship which makes life hell for them. They are often moving from one stage of treatment to the other. The reality is that it leads to chronic illness, unending disability, which constitute herculean task for the parents, caregivers, medical practitioners and most importantly the victims. It is this seemingly unrewarding task based on the fact that it is often not curable that accounts for it being the highest cause of infanticide from abandonment or other related acts as a result of frustration. Below are some of the images of congenitally malformed child/foetus



³³. Angela Ballantyne and Others, 'Prenatal Diagnosis and Abortion for Congenital Abnormalities: Is It Ethical to Provide One Without the Other?', [2009], (9)(8)*The American Journal of Bioethics* , 48-56, <<https://doi.org/10.1080/15265160902984996>>accessed 15 March, 2019.

Figure 1: Photograph of newborn showing herniated bowel loops and liver with intact umbilical cord³⁴



Fig 2: Image of Anencephaly³⁵

³⁴. Dharmraj M, Verma AP, 'Gastroschisis Associated with Lower Limb and Spinal Congenital Anomalies'[2012], *Journal of Clinical Neonatology* 217-20, <<http://www.jcnonweb.com/text.asp?2012/1/4/217/106005>> 15 March, 2019.

³⁵. Google Image, Anencephaly, <<https://s3.amazonaws.com/classconnection/717/flashcards/8788717/jpg/anencephaly-152E18A32336B3BE389-thumb400.jpg>> accessed 15 March, 2019.



Fig 3: Ocular Hypertelorism³⁶

The above images represent how some of the congenitally malformed child looks like. Some others may look scarier while some may still be alluring to the eye but with devastating health. There are numerous challenges that congenital malformation often brings to the child, the parents and family. Below are some of the challenges:

1. **Parents and Family:** parents who give birth to congenitally malformed babies often go through serious psychological trauma throughout the period. Couples are suddenly faced with the dilemma of choosing how to live a life with an abnormal child. The early diagnosis brings early trauma and when detected at birth it brings shock, sadness and depression. They suddenly have to plan to live a life with a dependent child whose likelihood of survival is low and requiring increased parenting stress from constant and adequate care without hope of

³⁶. Ocular Hypertelorism, <<http://iuscogens.info/queoinfo-ocular-hypertelorism.html>> Accessed 15 March, 2019.

cure.³⁷The parents have to readjust to the reality of making efforts which is most likely a futile one.³⁸In a setting like Nigeria, they will also be faced with the challenge of family acceptance. Many homes have been broken as a result of rejected malformed children by the husband.³⁹

2. Stigmatization: the conspicuous nature of most congenital anomalies makes it very difficult for the parent to socialize with their child. The parents find it difficult to present such a child to the world and mix freely with other children. Also, as the child grows to understand the reality of his life (if at all the brain function to such stage) sense of shame and inferiority complex takes centre stage. The child, unfortunately, attracts unwanted attention from strangers⁴⁰ by his ironically unique condition which may even make his predicament subject of societal superstitious belief. Parents may later become tired of the situation and take undue advantage of the child who has no choice for exploitative purposes like begging and seeking financial aids from all and sundry. Using malformed and handicapped children as a reason for. It is a notorious fact in areas like Lagos State that caregivers often use their wards for this purpose.
3. Financial Liability: cases of congenital abnormality are always very expensive to manage. This is based on the different health challenges that tend to crop up from time to time. The cost of most of these health challenges is always on the high side when and where they are available.⁴¹

³⁷. Hohlfield, A S J and Harty, M and Engel, M E, 'Parents of children with disabilities: A systematic review of parenting interventions and self-efficacy', [2018] (7), *African Journal of Disability*, 437-445. <<https://doi.org/10.4102/ajod.v7i0.437>>accessed 15 March 2019.

³⁸. Benute GR and others, 'Feelings of Women Regarding End-of-Life Decision Making after Ultrasound Diagnosis of a Lethal Fetal Malformation'[2012] *Midwifery* 472-475

³⁹. A family member of the writer suffered this problem as a result of giving birth to a child suffering from Down's Syndrome.

⁴⁰. Tanner JL and Dechert MP and Frieden IJ.' Growing up with a Facial Hemangioma: Parent and Child Coping and Adaptation', [1998](101) *Pediatrics*, 446-452.

⁴¹. Victor C Emordi and David O Osifo, 'Challenges of Congenital Malformations: an African Perspective' [2018] (14) (1), *Annals of Pediatric Surgery*, 5.

4. Poor Post Natal Hospital Care: there is no adequate hospital care to cater for the type of treatment children suffering from these health challenges need in the country. Very few exist which are predominantly Government-owned hospitals but they are always crowded with patients.
5. Poor Legal Framework for the Protection of Malformed or Disabled Children in Nigeria
6. Excruciating Pain: Victims of this disorder are often faced with the challenge of living a life of unending physical and psychological pain depending on the nature of their problem and how much attention they get.

These are some of the challenges that a congenitally malformed child, their parents and family often face. With the level of technological advancement in the medical world, it is now possible to diagnose most of the severe or lethal congenital abnormalities during pregnancy. Ultrasound, Maternal Serum Screening, Amniocentesis, Chorionic villus sampling (CVS), Nuchal Translucency test are among the major methods of diagnosing congenital disorder during pendency of pregnancy.⁴²

The possibility of diagnosis during pregnancy to a large extent means these situations can be avoided through abortion which will not only save the innocent child from living a regretful life but also save the parents from the tasking challenge which they are to face. This will also serve as a form of management of the mental health of the parents who will be affected most by giving birth to severely or lethally malformed children.

It is in pursuance of this that many countries like Chile are also agitating for the recognition of congenital disorder as a valid indication for legal abortion.⁴³ Countries such as Turkey and England, Scotland and Wales among others have gone way forward by legalizing abortion on the ground of severe or lethal congenital abnormality. Specifically, the Abortion Act of 1967

⁴². T W Sadler, *Medical Embryology*, note 23 at 129.

⁴³. Lidia Casas and Lieta Vivaldi, 'Pregnancies and Fetal Anomalies Incompatible with Life in Chile: Arguments and Experiences in Advocating for Legal Reform' [2017] (19) (1), *Health and Human Rights*, 95-108.
<https://www.researchgate.net/publication/317716201_Pregnancies_and_Fetal_Anomalies_Incompatible_with_Life_in_Chile> accessed 15 March, 2019.

applicable in the three latter states provides that a pregnancy can be terminated if there is substantial risk that the child to be born will suffer from physical and mental abnormality that will make it seriously handicapped.⁴⁴

Under Islamic law, issues of abortion on the ground of congenital abnormality are not explicitly contained in the primary sources of the law. However, it can be inferred through the *Ijtihad*⁴⁵ of Scholars. Based on this, there are three major opinions on termination of pregnancy on the ground of congenital abnormality. Some first opinion is that held by very few scholars who maintained that abortion on this ground is utterly prohibited and the victims of such predicament must take it as a will of God. This is the opinion held in some parts of Egypt and by Mufti Al-Dayar Al-Misriyah.⁴⁶ The second opinion which is that of the majority of the jurist is that termination of pregnancy in severe cases of congenital malformation is allowed before 120 days of the pregnancy after when it totally becomes prohibited. The third opinion is that held by some scholars in Jordan and which grants outright unrestricted permission for termination of pregnancy with major foetal disorder.⁴⁷

The second opinion seems to be more convincing based on the fact that it is a middle cause, majority opinion and an opinion reached by groups of reputable. This is the opinion of the International Fiqh Academy of the World Muslim League comprising of Jurists from countries predominantly Muslim in which Nigeria is also represented and also shared by the highest legal opinion issuing

⁴⁴. Sec 1(d) Abortion Act of 1967 Cap 87 (as amended).

⁴⁵. Personal reasoning of Jurist which requires drawing of inference from the primary sources of Islamic law.

⁴⁶. Alireza Bagheri and Leila Afshar, 'Abortion in Different Islamic Jurisprudence: Case Commentaries', [2011](3) (4) *Asian Bioethics Review*, 357.

⁴⁷. Al-Hagawi S, 'Advisory Opinion and Approval of Abortions for Abnormal Foetuses: Mufti of Jordan. Bahrain. Arabic: Newspaper, Al Wasat; 2007 in Abdulrahman Al-Matary and Jaffar Ali 'Controversies and Considerations Regarding the Termination of Pregnancy for Foetal Anomalies in Islam', [2014], (15) (10), *BMC Medical Ethics*, 4, <<http://www.biomedcentral.com/1472-6939/15/10>> accessed 15 March, 2019.

body of Saudi Arabia.⁴⁸ This opinion likewise does not close the gate of accepting it as a test from Allah. No matter the severity, once the life of the mother is not threatened, termination of pregnancy is prohibited after 120 days. Furthermore, an inquiry into one of the major reasons adduced by some of those who antagonized congenital malformation as a ground for abortion is the fear of the accuracy level of the diagnosis but this fear has been allayed greatly due to the ever-developing science and technology.

It is important to further explain that this legal opinion does not just create a blanket allowance for termination of pregnancy on the ground of severe congenital anomaly rather there are guidelines that must be followed as laid down by the International Islamic Fiqh Academy in Makkah. They are succinctly given below:

- The foetus must be less than 120days
- it must be a serious malformation or abnormality incapable of cure
- it must be agreed by a committee of not less than two specialist doctors
- consent of the parents must be sought⁴⁹

Judicial Attitude to Abortion on the Ground of Congenital Anomaly

As earlier noted, there is scarce judicial authority and data on abortion rate in Nigeria not to talk about the issue of abortion on the ground of congenital anomaly. This does not mean that there has not been a plethora of issues that relate to the subject matter in Nigeria. On the few cases on abortion in Nigeria, none directly or indirectly considered the issue of congenital anomaly as a ground for abortion. For instance, in the cases of *R v Edgal*⁵⁰ and *State v Njoku*,⁵¹ the defendants were convicted for giving substances to procure an abortion. There are however a plethora of cases in jurisdictions that have

⁴⁸. Al-Alaiyan S, AlFaleh K M Aborting a Malformed Fetus: A Debatable Issue in Saudi Arabia, [2012] (1) (1), *Journal of Clinical Neonatology*, 6-11 <www.jcnonweb.com/10.4103/2249-4847.92231> accessed on 13 March, 2019.

⁴⁹. Al-Matary and Jaffar Ali 'Controversies and Considerations Regarding the Termination of Pregnancy for Foetal Anomalies in Islam', [2014], (15) (10), *BMC Medical Ethics*, 4, <<http://www.biomedcentral.com/1472-6939/15/10>> accessed on 15 March, 2019. *BMC Medical Ethics* 2014 15:10.

⁵⁰. *R v Edgal*, [1938] 3 W A C A 133.

⁵¹. E C S L R [1973] 638.

similar laws as practised in Nigeria. The Nigerian Criminal Code provision on abortion is in consonance with section 58 of Offences Against the Person Act⁵² of England⁵³ which in itself has for long been reviewed with the Infant Life (Preservation) Act 1929 and Abortion Act of 1967 as amended in 1990.⁵⁴ Importance of cases decided in a jurisdiction such as the United Kingdom cannot be undermined as they serve as precedence and have a persuasive effect on the Nigerian Judiciary and they double as a source of Nigerian Medical Law.⁵⁵

In the case of *Jepson V Chief Constable of Mercia*,⁵⁶ the court of England examined the legality of abortion on the ground of malformation of the foetus, it was held that serious congenital malformation is a legal ground to terminate a pregnancy. The court, however, stressed that what amounts to serious malformation should be treated with caution by the medical practitioners. To buttress the effect of this case and others, a total number of 2,085 abortions were carried out in 2009 on the ground of foetal abnormality.⁵⁷ This means over five abortions are carried out on the ground of foetal abnormality on a daily basis.

Neonatal Remedies to Congenital Abnormalities

It is worthy to note that many countries of the world have recognized the termination of pregnancy on the ground of severe congenital abnormality as a valid indication for abortion such as Greece, Portugal, Finland, Scotland, Spain, Netherland, Sweden,⁵⁸ and South Africa among⁵⁹ others. Despite this, there are some situations or areas where a congenitally malformed child will

⁵². Offences Against the Person Act, 1861, 24-25 Vict., c 100, (Eng).

⁵³. Isabella Okagbue, 'Pregnancy Termination and the Law in Nigeria' ,[1990] (21) (4), *Studies in Family Planning*, 197

⁵⁴. Claudia Carr, '*Unlocking Medical Law and Ethics*' (Hooder Education, 2012) 242-243

⁵⁵. Olusoga Olapade, '*Law and Medical Practice in Nigeria*' (1st edn. College Press & Publishers Limited, 2008) 5.

⁵⁶. [2003] EWHC 3318.

⁵⁷. Claudia Carr, note 54 at 248.

⁵⁸. Shaun Pattinson, '*Medical Law and Ethics* (2nd ed. Thomson Reuter (Legal) Limited, 2009), 247.

⁵⁹. See Sec 2, The Choice on Termination of Pregnancy Act, 1996 (Act No. 92 of 1996).

be delivered due to action or inaction of all or some of the parties concerned. This section will succinctly discuss some of the remedies or legal options often resulted in by the affected parties.

Claim for Damages under Section 1 of Congenital Disabilities (Civil Liability) Act, 1976

According to the Congenital Disabilities (Civil Liability) Act, 1976⁶⁰ of the United Kingdom which buttresses the importance attached to abortion in severe foetal congenital malformation, the law recognized the right of the malformed child to claim for damages if such occurrence is preventable.⁶¹ The claimant must, however, show that the action or inaction of the defendant is responsible for his or her disability by his actions or inaction.⁶²

Claim for Wrongful Life and Birth

Claim for wrongful life is a situation where an abnormal child is claiming for damages for deprivation of his mother the option of abortion instead of being born disabled.⁶³ This claim is usually joined with a claim for wrongful birth with the only difference being that claim or wrongful birth originates from the parents. These claims are distinguishable from that of Congenital Disabilities (Civil Liability) Act, 1976 on the ground that here the claimant is not alleging the defendant of causing the disability but that the parents were negligently not informed of the option not to give birth to the disabled child. It could be that the parents were not informed of the possibility of passing such traits causing abnormality to the child or missed diagnosis.⁶⁴ The celebrated case of *Mckay V Essex Area Health Authority*⁶⁵ is a *locus classicus* on this type of claim. The attitude of the British and similar courts to this claim as in the case of *Mckay* has been that the claim cannot be sustained due to various reasons. It may not be surprising if the situation changes soon as the issue of rights continues to take new shape from time to time.

⁶⁰. This law covers the jurisdiction of Northern Ireland but does not cover Scotland.

⁶¹. Sec 1, Congenital Disabilities (Civil Liability) Act, 1976. See also Tony Hope Et al, '*Medical Ethics and Law the Core Curriculum*', (Churchhill Livingstone, 2003) 123.

⁶². Shaun Pattinson, note 58 at 313.

⁶³. Emily Jackson, '*Medical Law, Text, Cases and Materials*' (3rd ed. Oxford University Press, 2013), 725.

⁶⁴. *Ibid* at 726.

⁶⁵. [1982] Q B 1166.

Neonatal Euthanasia

Neonatal euthanasia can be said to be aiding the death of a newborn via action or inaction for the purpose of ending the excruciating pains of the newborn. Euthanasia has been expanded to cover neonates in Netherland.⁶⁶ In Netherland, three categories of neonates can be euthanized, i.e. a child suffering from incurable ailment that cannot even be aided by life-prolonging therapy, a child severely ill whose life can only be preserved with life support therapy but will die without within short while without it the support and a severely abnormal child without hope of normalcy with a very low quality of life.⁶⁷ This led to the Groningen protocol which has been criticized by some writers but has since remained an option available for a congenitally malformed child.⁶⁸

It is the humble opinion of this writer that while Nigeria can borrow leeway from the practices of other jurisdictions as it relates to care for congenitally malformed children. This cannot thus be taken hook line and sinker; borderline must be drawn based on important differences in custom and tradition. For emphasis, the issue of neonatal euthanasia will grossly go against the custom and practices of Nigerians as children with congenital anomalies for instance among the Yorub as are often regarded as a product of the deity.⁶⁹

Conclusion and Recommendation

From above forgone, it has been explained that abortion which simply means bring the life of foetus to an end is generally a crime under the Nigerian Laws and the Islamic Law applicable in most Northern States of Nigeria, The only

⁶⁶. Felipe E. Vizcarrondo, 'Neonatal euthanasia: The Groningen Protocol', [2014] 81 (4)*The Linacre Quarterly*, 389

⁶⁷. *Ibid.*

⁶⁸. Serge Vanden Eijnden and Dana Martinovici, 'Neonatal Euthanasia: A Claim for an Immoral Law', [2013] 8(2/3), *Clinical Ethics*, 76.

⁶⁹. Miles M, 'Children With Spina Bifida And Hydrocephalus in Africa: Can Medical, Family and Community Resources Improve the Life Chances?'[2006] 17, *Disability & Society*, 12.

generally legal ground for termination of pregnancy under the two spheres of law is when the life of the woman is endangered by the pregnancy.

It has also been shown that major or severe or lethal congenital abnormality is a terrible health situation that has no particular cure which subjects the victim and his family into varying degrees of challenges. Diagnosis of these conditions during pregnancy is possible, which is the cause of the agitation of whether or not abortion is legal in such situations. The Nigerian laws are silent on this issue but the guidelines on the legal indication for abortion by the Federal Ministry of Education indirectly recognize the situation that affects the foetus. The favoured opinion for this purpose under the Islamic law recognizes severe congenital abnormality as a ground for abortion if done before 120 days of the pregnancy.

It is consequently recommended as follows:

1. Explicit foetal consideration should be included in the Federal Ministry of Health guidelines for safe termination of pregnancy as the mother's wellbeing cannot be properly achieved if child is perpetually unhealthy
2. The relevant Nigerian laws should be amended to accommodate cases of severe congenital abnormality as a valid consideration for abortion to clear any form of ambiguity
3. The laws should also give medical practitioners autonomy of deciding medical conditions that constitute severe congenital anomaly under stipulated guidelines
4. Parents and health practitioners need to be enlightened on the limitations and allowances of the law so as not place unaware patients under avoidable unbearable hardship.
5. Parents should also be enlightened on the importance of early commencement of antenatal care so as to avoid complications that may later be difficult to address.
6. The government should invest more in the health sector particularly in getting sophisticated gadgets that will aid early diagnosis.
7. The government should create an enabling environment for disabled and handicapped children