

X-RAYING THE RIGHTS OF AN UNBORN CHILD UNDER THE ENGLISH COMMON LAW: THE NIGERIAN EXPERIENCE

By

Khairat Eletu* Ahmed A. Muhammed-Mikaaeel and Halimat Tope Akaje*****

Abstract

Major focus in the global discourse of rights have been on human rights. This presupposes the rights of persons who have been born alive. Little attention is paid to the rights of the unborn child under the common law jurisprudence. Hence, this paper is poised into making an enquiry into the rights of an unborn child under the English common law. In doing so, the study adopts the doctrinal method of legal research. The paper finds that there appears no consensus among scholars on when human life begins, while some opine that it is at birth, quickening is said to mark the beginning of life by some; the pro-life advocates opine that conception is the beginning of human life. The paper finds further that the underlying principle as regards the unborn child in Common law jurisdictions is the 'born alive rule' with an exception found in the American experience of the rule. The paper finds also that Nigerian constitutional provisions on the protection of human life vis-à-vis appropriate sanctions for violation are by extension applicable to an unborn child. The paper concludes that such rights can be overridden in the interest of the mother. The paper recommends legal jurisprudence expansion to harmonize various issues relating to the rights of an unborn child under the law.

Keywords: Unborn Child, Rights, Child, Common Law, Fetus, Abortion

1.0 Introduction

The foundation of the modern legal system of Great Britain and much of its commonwealth, the United States and Canada were laid in England in the Middle Ages. This body of ‘common law’- the sources of, among many other things, the concept of trial by jury- has its origin in the twelfth century reigns of Henry II and Richard Lionheart. Refined and expounded upon by English legal scholars over centuries, English common law has influenced the judicial system of most western societies.

¹

This study seeks to enquire as to what extent the rights of an unborn child is protected under the common law. By this, the study sets out to examining the legal personality and status of an unborn child with a view to ascertain its rights in that circumstance. This is because, much focus is laid on human rights pertaining to an already born person. This paper sets a new dimension to examine the rights of an unborn child so that breaches of such rights could be realized and adjusted.

The focus of this chapter is on analysis of the legal personality of an unborn child under common law vis-à-vis the answer to the question of when life begins and the legal personality of the fetus, Abortion and the rights of an unborn child to life and the rights of an unborn child under the Nigerian law.

* LL.B; LL.M; Barrister, Solicitor and Legal Consultant; Lecturer at the Department of Public Law and Jurisprudence, Faculty of Law, Kwara State University; Email: khairat.eletu@kwasu.edu.ng; Tel: 2347060503160

** Ph.d Scholar in Islamic Law, Faculty of Law, Al-Hikmah University, Ilorin, Nigeria. He is also a Barrister, Solicitor, Notary Public and a Lecturer at the Faculty of Law, Kwara State University, Malete, Nigeria. Tel: +2347035064745; Email: ahmed.muhammed-mikaaeel@kwasu.edu.ng

*** LL.B. LL.M, Ph.D. Law. Lecturer Department of Jurisprudence and Public Law, Faculty of Law, Kwara State University, Malete E-mail: halimat.akaje@kwasu.edu.ng

¹ FG Scott, ‘Bioethics and the New Embryology: Spring Board for Debate’ available at: http://books.google.com.ng/bppks/Biotheics_and_the_new_embryology.html?id=jg23QzWT6m4C&redir_esc=y accessed 25 July 2025

2.0 Legal Personality of an Unborn Child under Common Law

In determining whether the unborn child is accorded any legal personality under common law thereby making him recipient of certain rights, two things must be considered because they form the foundation of the legal personality of the fetus:²

- i. When human life begins.
- ii. The legal status of the unborn child.

2.1 Beginning of Human Life in Common Law

The question of when life begins has been thought about and asked throughout history. It has been expounded and argued upon countless of times by lawyers, doctors, philosophers and theologians.³

Science has not provided a conclusive answer to the question of when human life begins, and opinions among scientists are not totally consistent. According to some scholars, the process of a non-human being becoming a human is gradual and does not occur at a certain point.⁴

The beginning of human existence has been identified by several scientists as occurring at different phases of development, which are listed below:⁵

- i. Fertilization (the acquisition of novel genome)
- ii. The time of or surrounding birth (the acquisition of independent breathing and viability outside the mother's body)
- iii. Quickening (which is the most popular position in Common Law)

² LH Ramos, *et al.* 'The Unborn Child and its Personality Rights' available at: https://ijaers.com/uploads/issue_files/4IJAERS-11202271-TheUnborn.pdf accessed 4 June 2025

³ A Kurjak, 'The Fact and doubts about beginning of human life and personality' available at: <https://pmc.ncbi.nlm.nih.gov/articles/PMC7245522/> accessed 3 July 2025

⁴ *ibid*

⁵ FG Scott, 'Bioethics and the New Embryology: Spring Board for Debate' available at: http://books.google.com.ng/bppks/Biotheics_and_the_new_embryology.html?id=jg23QzWT6m4C&redir_esc=y accessed 25 July 2025

2.1.1 View 1: Life Begins at Fertilization

According to this "genetic" view of human existence, a new person is created during fertilization, or conception, when the genes of the two parents unite to create a new genome with distinct characteristics. This is a position that some scientists hold and can be upheld with or without religious beliefs.⁶

In actuality, the organism created by fertilization is a human embryo with the potential to mature into an adult. The question of whether or not these facts are enough to give him personality is one that is shaped less by science and more by philosophy, theology, and opinion. According to some biologists, the early embryo is not even an individual until it undergoes gastrulation.⁷

2.1.2 View 2: Life Begins at or Near Birth

This perspective holds that when a fetus is capable of supporting itself outside the womb, it ought to be regarded as human. The respiratory system imposed the natural limit of such viability; a fetus could not survive outside the womb until its lungs were properly grown, which happens at around 28 weeks.⁸

Some people believe that human life begins when a person has completely separated from their mother and developed a functioning circulatory, alimentary, neurological, and respiratory system. This traditional "birthday" is frequently marked by the baby's head emerging or the cutting of the umbilical cord.⁹ The advantage of such moments is that they are public, well defined and obvious, that is the crowning of the head, the cutting of the umbilical cord, the first breath or first cry.¹⁰

2.1.3 View 3: Common Law Position

It is crucial to note that the English Common Law determines that human life begins at quickening, which is the moment when the fetus is felt moving within the uterus. At around 120 days (4 months) of gestation, quickening takes place. However, human life is

⁶ *ibid*

⁷ *ibid*

⁸ *ibid*

⁹ Kurjak, (n 3)

¹⁰ *ibid*

considered to begin at viability outside the mother's womb, according to the 1973 *Roe v. Wade* ruling, which cited precedence for abortion in the United State.¹¹

2.1.4 The Islamic Law Position

Although the focus of this work is in Common Law, since we will be talking about Nigeria and Nigeria being a country with tripartite legal system comprising of Common law, Islamic and Customary law. The answer to the question of when life begins in Islam has been inferred by jurist based on the Quranic and hadith provisions that the soul enters the body of the fetus at 120 days after gestation. Therefore, after 120 days, it is no longer a lifeless object, but rather a living being.¹²

Thus, in the absence of a clear consensus on when life begins, there are people who feel that birth is the only indisputable moment at which a fetus becomes a human.¹³

3.0 Legal Status of the Unborn Child

In general, maternal autonomy may always take precedence over fetal autonomy if the unborn child is given little or no legal personality. However, the way is open to balancing fetal and maternal autonomy, where the fetus is given substantive legal personality which could lead to giving one priority over the other.¹⁴

The "born alive" rule circumscribes the fundamental stance about the legal status of the unborn child under common law jurisdiction. This rule states that, excluding a statute, a person cannot be held accountable for harm done to a fetus while it is still in the womb until it is born alive.¹⁵

¹¹ Scott, (n 5)

¹² Qur'an Chapter 23 verses 12-14, Qur'an Chapter 22 verse 5; the Quran does not explicitly state the exact time the soul enters the fetus, but Islamic scholars interpret verses of the Quran and Hadiths to mean the soul is breathed into the fetus after 120 days (4 months).

¹³ *ibid*

¹⁴ C Gerard, 'Pregnant Woman and Unborn Child: Legal Adversaries' available at <https://researchrepository.ucd.ie/server/api/core/bitstreams/8723c8e1-509b-47d6-a90a-d9d24a806278/content> accessed on 25 July 2025

¹⁵ *ibid*

Charge of murder or manslaughter is very sacrosanct. This is because, it shows to the whole world a heinous crime against a life which is sacrosanct which no one can recreate. However, the termination of the life of a foetus seems technical. It is difficult to classify it as either murder or manslaughter. Thus, it is important to note that killing an unborn child while still in its mother's womb may therefore be a statutory offence tagged abortion which the law frowns at. The position will however be different if the termination of the soul occurs after child is born alive. The person who is responsible for the termination is guilty of murder or manslaughter depending on the circumstances.¹⁶

The foregoing brought to the fore the operation of born alive rule. It is important to note that narrative has changed in United State of America regarding the rule. This is because circumstances of the earlier operation of the born alive rule no longer exist in the USA. The rule has been abrogated both in the civil and criminal laws. The rule is, however, still extant in the English law. Scholars of medical law have consistently asserted that born alive rule is very much unassailable under the English law.¹⁷

There seems to be problem of conceptualization leading to conflicting decisions in English law of tort cases. The born alive rule has been used to contend that the consequential implication is that unborn child lacks legal personality. In the case of *Walker v. Great Northern Railway Co. of Ireland*,¹⁸ claim for damages was made against a transport company for injury inflicted on the plaintiff. At the time of the accident, the plaintiff was *en ventre sa mere*. O'Brien J declined to award damages to the plaintiff on the ground that, at the time of the accident, the plaintiff lacked legal personality, i.e., he had no actual existence not being human being. The court held that the plaintiff was then *pars viscerum matris*. The court held further that the plaintiff has not referred to any authority or principle of law to show that a legal duty has ever been held or arise towards

¹⁶ Halsbury's Laws of England (4th ed. Reissue, 1990) 11 (1)

¹⁷ K Ian and G Andrew, 'Principle of Medical Law' available at:

<http://ukcatalogue.oup.com/product/9780199544400.do> accessed 3 July 2025

¹⁸ (1891) 28 L.R (Ir) 69.

that which is not in existence. Such fictitious existence is not capable of implicating a negligent act a breach of duty against the defendant.¹⁹

However, after forty years had lapsed, the court, in *Montreal Tramways v. Leveille*²⁰ departed from the principle laid down in *Walker's* case. The judges in the latter case thought it proper to depart from the principle of *Walker* with view to awarding damages to the plaintiff in the similar case. Cannon J in awarding the damages held that the plaintiffs right to *compensation* came into existence only when she was born with the bodily disabilities from which she suffered; it was only after birth that she suffered the injury and it was then that her rights were encroached upon, and she commenced to have rights. The germane issue is not to actually focus on the fetus' legal personality but rather to concentrate and recognize the fact that the fetus and the child are biologically continuous.

4.0 Born Alive Rule in English Law

In the Sims case (1601) charges of trespass and assault was brought against Sims who was alleged of beating a woman.²¹ The case report says, "if a man beats a woman who is great with child, and after the child is born living, but have signs and bruises in his body, received by the said battery, and after died thereof, I say that this is murder." Four elements must be present for this to be a case of murder:

- i. The woman must have been pregnant.
- ii. The child must have been born alive and died subsequently.
- iii. The assailant must have battered the woman and
- iv. The child's death must have been caused by the assailant's battery.

The significance of the child been born alive is noted to be what appears to be evidential reason, the difference is where the child is born dead, it is not murder because it is not

¹⁹ *ibid*

²⁰ (1993) 4 D.L.R. 339.

²¹ LW Levy, Sim's Case: The Fugitive Slave Law in Boston available at <https://heinonline.org/HOL/LandingPage?handle=hein.journals/malghis7&div=9&id=&page=> accessed on 15 July 2025

constant whether the child was living at the time of the battery or not, or if the battery was the cause of the death, but when it is born living, and the wound appear in his body, and then die, the batterer shall be arraigned for murder because now it may be proved whether the wound was the cause of death or not.²²

In *R v. Shepherd*²³ the appellant was charged under Section 4 of The Offences Against the Person Act 1861 for soliciting a pregnant woman to kill her child. The court held that for the purposes of the section, the person whose murder was solicited or encouraged do not have to be in existence at the time of the incitement: it was sufficient if it were in existence at the time when the act of murder is to be committed. The court held that the child having been born alive, the incitement to murder it was an incitement to murder a person within the meaning of the section notwithstanding that at the date of the incitement it was incapable of being a subject of murder.

The court in *Earl of Bedford's* case held that the child though posthumous, should take under the will, Chief Justice Eyre remarking that all infant *in ventre matris*, who by the course and order of nature was then living, came clearly within the description of children living at the time of his death. It must be noted that although the child was considered, for the purposes of inheritance, as if it were already born, nonetheless, it had to be born alive before there could be any transfer of property to it.²⁴

Similarly, in the case of *Wallis v. Hodson*²⁵ Lord Hardwicke LC held that the plaintiff was *en ventre sa mere* at the time of her brother's death, and consequently a person in *rerum natura*, that by the rules of common law and civil law she was to all intent and purposes a child as much as if born in the father's lifetime. Given that the status of being a person in *rerum natura* is generally denied to the unborn child, it is quite remarkable that Lord Hardwicke asserts it here. It could be argued, however, that the context of Lord

²² *ibid*

²³ Court of Criminal Appeal (CCA) 31 March 1919, (1919) 2K.B. 125

²⁴ *The English Reports*, LXXVII King's Bench Division VI, containing Coke, parts 5 to 13. 7 Co. Rep. 7a-9b. Coke's Reports extend from 1572-1616 and are to be found in Vols. 76 and 77 of *The English Reports*. The reference "Mich. 28 and 29 Elizabeth" establish these cases as occurring in the years 1586-1587.

²⁵ *The English Reports* XXVL, 473; 2ATK.117

Hardwicke's statement is such that the attribution of personhood to the child in *utero* is impliedly restricted to cases of inheritance and not cases of criminal or tort law.

In the English case of *Attorney-General's Reference (No. 3 of 1994)*, the idea that the fetus was but part of the mother which persisted in English law was rejected, referring to Human Fertilization and Embryology Act 1990; "an embryo is in reality separate organism from the mother from the moment of its conception...the fetus cannot be regarded has an integral part of the mother but a separate entity."²⁶

In summary, under both English Civil and Criminal law, the unborn child had, has only a shadowy half existence not been quite nothing, and yet not being quite something either unless or until it was born alive when personhood will be attributed to him. This is contrary to his position under the law of inheritance where he is treated in such a way as if he was already in existence although property rights transfers to him only when he is born alive.

5.0 American Experience

Despite abortion protections under Roe's case (before its overruling) a lot of States in the USA have long treated the fetus as a separate legal entity in criminal and tort contexts and this still remains intact even post the decision of the Supreme court in *Dobbs Vs Jackson Women's Health Organization*²⁷. In the instant case, the Court held that the Constitution does not confer a right to abortion and regulatory power now rests on individual State's legislatures to make laws on abortion in their jurisdictions²⁸. The reality in the USA now is that abortion laws now vary from State to State. While States like Alabama, Kentucky, Oklahoma, Tennessee and some other republican States have a total ban on abortion, some States still allow abortion with strict gestational limits.²⁹

²⁶ (1998) A.C 245 at 267.

²⁷ (2022) 597 U.S

²⁸ This is a clear departure from the decision in *Roe V. Wade* which was the law in the United States of America for a long time. In this case, the constitutional right to abortion under the 14th Amendment's right to privacy was established.

²⁹ The following are States where abortion is allowed but with strict gestational limit of 6-15 weeks; Florida, Nebraska, Arizona, South Carolina, Ohio and Wyoming; Guttmacher Institute, 2025 State Abortion Policy Landscape <https://www.guttmacher.org/2023/06/state-abortion-policy-landscape-one-year-post-ro>e accessed 4 of August 2025

Despite the now absent federal right to abortion, the US criminal law has long recognized fetal rights especially in third party feticide. That is, the person will be criminally liable where he harms or kills a fetus during a crime against the pregnant woman.³⁰

In most states of the USA, the assailant of a pregnant woman can, in addition to charges of assault on the woman, be convicted of another offence which is feticide or some variety of homicide, if the woman's unborn child should die. It may seem that the laws defining such crimes would be anachronistic and even unconstitutional after the decision of the court in *Roe v. Wade*,³¹ but there is a vital difference between these feticide law and abortion law founded upon decision in *Roe's* case. There is a distinction in the USA law between 2nd party and 3rd party feticide. A 2nd party feticide or consensual abortion is where the cause of the feticide is the pregnant woman or her agent while a 3rd party feticide is one carried out by an outsider who is neither the mother nor any other person with the right to do so. Feticide law permits 2nd party feticide (abortion) but not 3rd party feticide.

The following are some important judicial authorities recognizing fetal rights:

The court in *Bonbreast v. Kotz*³² allowed recovery for prenatal injury to a viable fetus, rejecting the argument that the fetus was not a legal person until birth. In addition, the supreme Court upheld a criminal conviction for killing a fetus during criminal assault³³. The Massachusetts Supreme Court was the first to expressly depart from the 'born alive rule' holding that a viable fetus could be the subject of homicide.³⁴

It is clear from the above that under the American law legal personality is accorded to the unborn child while in utero and the requirement of the born alive rule has been dispensed with. Thus, the right of the fetus is protected from any form of 3rd party interference.

³⁰ Wesh News, 'Feticide Laws vs Abortion Post-Dobbs' available at: www.wesh.com/article/abortion-laws-in-every-state/44301410 accessed 2 August 2025

³¹ 410 U.S 113

³² 65 F. Supp. 138 (D.D.C 1946)

³³ *State v. Horne*, 462 S.E.2d 739 (S.C 1995)

³⁴ *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984)

6.0 Abortion and the Right of an Unborn Child to Life

The term abortion has been defined in several ways, according to Bakare³⁵ “*abortion is the termination of pregnancy before fetal viability. It has also been defined as a spontaneous action in which the fetus is expelled due to accidental trauma, natural or environmental cause. It may also be induced by deliberate human effort. According to him, this is calculated forced ejection of the fetus from the uterus.*”³⁶

The word abortion was defined by the World Health Organization as “*the termination of an already established pregnancy (in other words a method that acts after implantation). The abortion may be induced (voluntarily performed) or spontaneous.*”³⁷

6.1 Legal Position of Abortion under Common Law

The governing law for abortion under Common Law is contained in the “Offences Against the Person Act 1961”, Section 58 of the Act reads:

“Every woman, being with child who, with the intent to procure her own miscarriage, shall unlawfully administer to herself any instrument or any noxious thing; or shall unlawfully use any instrument or other means whatsoever, with the intent to procure the miscarriage of any woman, whether she be or not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing; or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of an offence; and being convicted thereof shall be liable... to imprisonment for life.”

Another Act was enacted few years later governing the offence to destroy a child capable of being born alive.³⁸ The Act is known as the Infant Life (Preservation) Act. Although

³⁵ NA Bakare ‘Teenage pregnancies, causes, medical implications and prevention’ *LASU Law Journal* (2006) 4, 30.

³⁶ O Ihediwa, ‘Post-abortion psychological sequel’ (A paper presented at the 32nd Annual National Conference of Counseling Association of Nigeria, Ilorin 2008)

³⁷ World Health Organization, ‘The prevention and management of unsafe abortion’ (Report of a technical working group, WHO/MSM192.5, 1992)

³⁸ Infant Life (Preservation) Act 1929

the provisions of this Act run contrary to the provisions of the Abortion Act³⁹, it was not amended by the Abortion Act.

The Supreme Court of the United States decided in the case of *Roe v. Wade*⁴⁰ that the American constitution gave a woman a right to privacy which encompassed her decision whether to terminate her pregnancy. However, the court also declared that the right is not absolute and that the law could regulate the conditions for abortion between the end of the first trimester (or three months) of the pregnancy and the stage of viability, and moreover once viability has been reached that the law could prohibit abortions altogether, except those necessary to preserve the life or health of the mother⁴¹. It is important to state that abortion in the USA is now a matter of State legislations, and each State can now make laws to govern abortion within its jurisdiction as opposed to what was held in the instant case, where abortion was seen as a constitutional right hinged on a woman's right to privacy.

6.2 Legal Conditions for Carrying out Abortion.

The main conditions and grounds for which the procurement of abortion is authorized as found in legal texts and documents are:⁴²

1. Risk to the woman's life: "To save the mother's life" is one of the primary justifications for abortion legalization. This could be stated explicitly or implicitly, for instance, based on "necessity." The majority of penal codes have general rules regarding necessity, which permit actions that would normally be deemed unlawful to be taken without consequence when they are required to protect a good. The circumstances in each country will determine if this defense is successful.⁴³
2. Risk to her mental health: Although there are many different ways to define mental health, the Attorney General of the United States of America's 1999 definition, which

³⁹ Abortion Act 1967

⁴⁰ *Roe v. Wade* 410 U.S. 113 (1973)

⁴¹ <http://www.care.org.uk/student/abortion/> accessed 25 July 2025

⁴² V Marcel, *et al*, 'Access to Safe Abortion: A tool for accessing legal and other obstacles' available at: http://www.ippf.org/system/files/access_to_safe_abortion.pdf accessed 15 July 2025

⁴³ *ibid*

states that "mental health is a state of successful performance of mental function, resulting in productive activities, fulfilling relationship with other people, and the ability to adapt to change and cope with adversity," is a useful definition that would be adopted. Personal wellbeing, relationships with family and others, and participation in a community or society all depend on mental health.⁴⁴

Risk to a woman's mental health can overlap with other motives, for example in cases of rape or severe strain caused by psychological or socio-economic circumstances. In the case of *R v. Bourne*⁴⁵ it was shown that there is no difference between saving her life and preserving her mental health. In this case, a doctor was charged with using an instrument with the intent to procure abortion for a fourteen-year-old girl, a rape victim. His defense was that the operation was not unlawful because if the operation had not been performed, she would have suffered a complete mental collapse. MC Nagthen was of the view that not only is there a right, but it is a duty to perform the operation.

3. Pregnancy after rape, incest and other criminal offences- Abortion in cases where a woman is pregnant as a result of a crime, such as rape, incest, or another similar offense: A criminal offence is offence understood as rape and incest and can include statutory rape. In addition, sexual relation with a woman living with mental disabilities or mental illness or sexual relation obtained under threat and unnamed conditions summarized with the wording "when pregnancy result from an unlawful act" constitute ground for the procurement abortion.⁴⁶
4. Fetal impairment (risk to the fetus)- A common legal justification for an abortion is the possibility of fetal impairment. Some countries specify this type and level of impairment necessary to justify this ground. Some countries do not specifically list fetal impairment but include it in "preserving physical health".⁴⁷

⁴⁴ US Department of Health and Human Services (1999) *Mental Health: A Report of the Surgeon General—Executive Summary*, Rockville, MD: US Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, Center for Mental Health Services, National Institutes of Health, National Institute of Mental Health.

⁴⁵ (1939) 1 KB 687

⁴⁶ Marcel, *et al*, (n 42)

⁴⁷ *ibid*

5. Socio-economic grounds- This is one of the most ambiguous terms in abortion legislation. It is sometimes differentiated from “available on request”. This can consider circumstances such as a woman’s resources, age, marital status or the number of existing children.⁴⁸
6. Available on request- this is the most liberal condition; time limit is however stricter here. Various requisites can limit the liberality of the condition such as imposed delays, parental or spousal notification or permission, administrative steps, mandatory counseling, specific category of clinical settings etc. abortion on request is sometimes based on the notion of “distress.”⁴⁹

7.0 Fetal Rights in Property Law

The fetus under the Roman Empire was first recognized as having inheritance rights in property law. So long as the fetus was conceived before and born alive after the death of the testator (typically, but not always, the father), rights in inheritance were on a par with those born during his lifetime.⁵⁰ The fetus was not a personality in law but became one as soon as it was born. The ‘right’ of the fetus to inherit was not predicated on a fetal right to personhood but rather as a way of giving effect to the wishes of the testator.⁵¹

The British Common Law adhered to the Roman tradition; a child born alive within forty weeks after the death of their father had the same inheritance rights as any siblings born prior, based on the principle that supports a testator’s wishes. To ensure that property

⁴⁸ IB Syed, *Abortion* (Islamic Research Foundation International inc.) available at: https://www.irfi.org/articles/articles_101_150/abortion.htm accessed 3 June 2025.

⁴⁹ *ibid*

⁵⁰ JR Schroedel, *Is the Fetus a Person?: A Comparison of Policies Across the Fifty States* (Cornell University press, 2000) 31-33

⁵¹ JR Schroedel, ‘Is the Fetus a Person?: A Comparison of Policies Across the Fifty States’, available at https://books.google.com/books?hl=en&lr=&id=pnJzmzIOF24C&oi=fnd&pg=PR11&dq=The+%E2%80%99Cright%E2%80%99D+of+the+fetus+to+inherit+was+based+not+on+its+personhood+status+but+as+a+means+of+fulfilling+the+testator%E2%80%99s+wishes&ots=TnFYsGvaad&sig=wBIoBO2X1YsmE5dXdi_E3mUnAFY accessed on 15 July 2025

remains within a specific bloodline, fetuses were granted the “right” to inherit, but only if they were born alive within ten lunar months.⁵²

The Common Law practice with regards to fetal inheritance rights has also been adapted by American courts. For example, in *Marsellis v. Thalimer*, the born alive rule was used to deny inheritance rights to a stillborn child. Also, in 1959 the New York Court of Appeal in *re Peabody* stated: “The common law rule of equality...does not justify the conclusion that the fetus is a ‘person’ before its birth. On the contrary... a child *en ventre sa mere* is not regarded a person until it sees the light of the day.”⁵³

In Nigeria, the unborn child has the right to share the property of the father when the child is conceived before the demise of the father. Likewise, in the case of the demise of the mother, the child is considered in the distribution of the estate where the child survives the mother.⁵⁴

8.0 Rights of an Unborn Child under the Nigerian Law

The constitution of the Federal Republic of Nigeria which is the grundnorm is life sensitive, the right to life of the people is important.⁵⁵ Although the right to life does not expressly pass to an unborn child, the unborn child nevertheless, enjoy this right and some other rights subject to fulfillment of some conditions.⁵⁶ The Child's Rights Act (2003), which governs children's rights in Nigeria, guarantees an unborn child's rights, including protection from harm or injury and the right to be taken into account when determining the mother's or father's estate in the event that they pass away intestate and the child was conceived while the father was still alive. In the case of the mother, the

⁵² Z Amin, *et al*, ‘Right of Fetus (Janīn) In Islam And Western Law A Comparative and Analytical Study’, available at <https://journalppw.com/index.php/jpsp/article/download/10842/6995/12729> accessed on 10 August 2025

⁵³ *ibid*

⁵⁴ S. 17 (2)(3) Child’s Right Act, No 26 of 2003, Laws of the Federation of Nigeria

⁵⁵ S. 36 (6) 1999 Constitution of Federal Republic of Nigeria (as altered)

⁵⁶ MO Izunwa, ‘Right to Life and Abortion debate in Nigeria: a case for the Legislation of the Principle of Double-effect’ 12-122, available at <https://www.ajol.info/index.php/naujilj/article/view/82392/0> accessed on 11 August 2025

child survives the mother.⁵⁷ However, it is clear from the above that the enjoyment of these rights is subject to the condition that the fetus is born alive.⁵⁸

Nigeria is a pro-life country, it is therefore not surprising that the relevant statutes relating to abortion in Nigeria are strict against any person including the woman herself, who commits or attempt to commit abortion. The provisions against abortion are generally found in the Criminal Code Act⁵⁹ which is applicable in the Southern Nigeria, and the Penal Code Act⁶⁰ which is applicable in the Northern Nigeria.

The Criminal Code Act criminalizes abortion in nearly all cases. It classifies the act of procuring a miscarriage, whether or not the woman is pregnant, as a felony. Thus, any person who unlawfully administers poison, uses force, or employs any method to induce miscarriage faces imprisonment for up to fourteen years.⁶¹

The law also punishes woman who attempt to terminate their own pregnancies. A woman who administers any harmful substance to herself, uses physical force or allows others to perform such act with the intent to cause a miscarriage, commits a felony and is liable to seven years imprisonment.⁶² In addition, any individual who provides or procures items intended for illegal abortion, knowing their intended use, faces a penalty of three years imprisonment.⁶³

However, the act allows a narrow exception. A medical practitioner who performs a surgical operation in good faith and with reasonable care to preserve the life of the mother, or for the benefit of the patient, is not criminally liable.⁶⁴ Beyond this exception, any person who causes a woman to miscarry without genuine medical reason to save her life risks imprisonment for up to fourteen years.

⁵⁷ *ibid*

⁵⁸ This is by virtue of Nigeria being a Common Law country and the prevailing law is the “born alive” rule.

⁵⁹ Criminal Code Act, Laws of the Federation of Nigeria, 1990, cap 77.

⁶⁰ Penal Code Act, Laws of northern Nigeria cap 89 1963.

⁶¹ S. 228, Criminal Code Act, Laws of the Federation of Nigeria, 1990, cap 77.

⁶² S. 229, Criminal Code Act, Laws of the Federation of Nigeria, 1990, cap 77.

⁶³ S. 230, Criminal Code Act, Laws of the Federation of Nigeria, 1990, cap 77.

⁶⁴ S. 297, Criminal Code Act, Laws of the Federation of Nigeria, 1990, cap 77.

The Penal Code's provisions are identical to those of the Criminal Code, with the exception that obtaining an abortion carries a fourteen-year sentence, regardless of whether the woman or a third party is charged. Furthermore, the Act's provision does not permit anyone to attempt an abortion because the language makes it clear that "whoever voluntarily causes a woman with child to miscarry" is prohibited...."⁶⁵

In addition, based on the joint reading of Section 232 of the Penal Code and Section 297 of Criminal Code, it can be deduced that therapeutic abortion if caused in good faith for the purpose of saving the life of the pregnant woman is allowed. The courts following the decision in *R v. Bourne*⁶⁶ have variously held that a lawful abortion is one procured for the purpose saving the life of the mother and since then, the whole Nigeria in practice has allowed therapeutic abortion in order to save the life or physical or mental health of the mother.⁶⁷

9.0 Conclusion and Recommendation

The paper finds that there appears no consensus among scholars on when human life begins, while some opine that it is at birth, quickening is said to mark the beginning of life by some while the pro-life advocates state conception as the beginning of human life.

The underlying principle as regards the unborn child in Common Law jurisdictions is the 'born alive rule', this means that unless and until the fetus is given birth to alive, no legal personality will be accorded to him. There are however some exceptions to this general rule as it in the American experience of the rule. The recognition of fetal rights does not however go against laws relating to abortion, provided legal conditions for abortion has been satisfied failure of which such a person will be guilty of an offence and criminally liable. The right of the unborn child is however not limited to right to life alone but also extends to his right of inheritance provided he was conceived during the lifetime of the deceased and was given birth to alive.

⁶⁵ S. 232, Penal Code Act, Laws of Northern Nigeria cap 89 1963.

⁶⁶ *R v. Bourne* 1939 1KB 689

⁶⁷ PC Okorie, *et al*, Abortion Laws in Nigeria: A Case for Reform, available at <https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1215&context=annlsurvey> accessed on 10 August 2025

Nigerian being a pro-life country, its constitution provides for the protection of human life and appropriate sanctions have been provided for its violation, this right extend to the unborn child. This right can however be taken away in the overriding interest of the mother. The right of the unborn child under the Nigerian is not limited to right to life but extends to his right of inheritance. Consequently, there is need to clearly expand legal jurisprudence so as to clarify various issues emanating from the rights of an unborn child under the law.