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ABORTION LAWS IN NIGERIA: A CASE FOR REFORM

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ABSTRACT

The available statistics indicate that over 1,000,000 abortions occur in Nigeria annually, representing about 33 abortions per 1,000 women of child bearing age. It has also been asserted that illegal abortion is responsible for about 11% of maternal death in Nigeria and 50% of such deaths involve adolescents and young women. Although, it may be difficult to confirm these reports and statistics by different researchers, mainly because of the absence of official figures owing to the clandestine nature of abortion in Nigeria, there is no doubt that abortions are generally procured by women for various reasons, namely: financial and emotional inability to care for a baby; fear of rejection by partners, parents, peer groups, religious and community leaders and society if the pregnancy is discovered; as means of birth control; physical and mental reasons; if they are too young or too sick to have a baby; desire to get rid of unwanted pregnancies arising from several reasons including rape or failure of contraception, etc. Unfortunately, the state of the law on abortion in Nigeria has failed to recognize these realities thereby unwittingly encouraging illegal abortions with the attendant consequences. This paper examines the state of the law on abortion in Nigeria in comparison with

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other jurisdictions with a view to demonstrating that the Nigerian law is archaic and in dire need of reform.

INTRODUCTION

Abortion is defined as the discontinuation of a pregnancy before attainment of viability.¹ In other words, the termination of pregnancy before the fetus is capable of independent existence.² Pregnancy may terminate on its own (i.e. miscarriage or spontaneous abortion) or intentionally (i.e. induced abortion). However, in the context of this paper, abortion refers to induced abortion. Induced abortion, except where it is strictly done to save the life of the woman, is illegal in Nigeria.³ For this reason, it is impossible for any pregnant woman who does not desire to have a baby, even for the most serious or justifiable reasons⁴, except of course where her life is endangered by the pregnancy, to secure an abortion in any government hospital. Since an average Nigerian woman cannot afford the services of a willing private clinic, she is forced to resort to unsafe abortion⁵ by patronizing untrained personnel who use inappropriate and contaminated instruments under unhygienic conditions to perform it.

The result is the staggering statistics of 1,000 out of every 100,000 maternal deaths arising from the estimated 1,000,000 abortions carried out in Nigeria each year.⁶ Also, it has the effect of jeopardizing the repro-

1. See BLACK'S LAW DICTIONARY (Bryan A. Garner ed., 8th ed. 2004); THE NEW INTERNATIONAL WEBSTER'S COMPREHENSIVE DICTIONARY OF THE ENGLISH LANGUAGE - ENCYCLOPEDIA EDITION (Typhoon Media Corp. 2004).

2. This is about seven months (28 weeks) but may occur earlier, even at six month (24 weeks). *Roe v. Wade*, 410 U.S. 113 (1973); PATRICK A FINNEY, MORAL PROBLEMS IN HOSPITAL PRACTICE: A PRACTICAL HANDBOOK, 24 (Herder Book Co. 1992).

3. Criminal Code Act (1916) Cap. (C38) Laws of the Federation of Nigeria 2004, § 297; Penal Code Act (1960) Cap. (532) Laws of the Federal Capital Territory of Nigeria 2007, § 232.

4. Criminal Code Act (1916) Cap. (C38) Laws of the Federation of Nigeria 2004, § 228. There are several reasons why a pregnant woman may want an abortion, but cannot get it in government hospitals. These include being single, financial difficulty or inability to cater for a child, fear of expulsion from school, and fear of parents for young girls. Y.G. Abbas, Causes and Impact of Unsafe Abortion in Nigeria 18-19 (2014) (unpublished MPH thesis, KIT Royal Tropical Institute) (on file with author).

5. The World Health Organisation (hereinafter WHO) has defined unsafe abortion as a procedure for terminating unwanted pregnancy either by persons lacking the necessary skills or in an environment lacking minimal medical standards or both. World Health Organization [WHO], Preventing Unsafe Abortion, Fact Sheet 2016, <https://www.who.int/mediacentre/factsheets/fs388/en>.

6. An estimated 1.25 million induced abortions occurred in Nigeria in 2012, equivalent to a rate of 33 abortions per 1,000 women aged 15–49. The estimated unintended pregnancy rate was 59 per 1,000 women aged 15–49. Fifty-six percent of unintended pregnancies were resolved by abortion. About 212,000 women were treated for complications of unsafe abortion, representing a treatment rate of 5.6 per 1,000 women of reproductive age, and an additional 285,000 experienced serious health consequences, but did not receive the treatment they needed. See A. Bankole et al.,

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ductive health of our women, particularly adolescents. This is the stark reality of our time which no restrictive abortion law, no matter the penalty can prevent, indeed, which restrictive abortion law is responsible for. It is the expediency of this situation that has inspired this paper which, irrespective of one's personal belief in the sanctity of human life, explores the need for reform of abortion laws in Nigeria.

By way of an outline, the paper will begin with a brief history of the criminalization of abortion with a view to showing, in particular, that abortion has not always been a criminal offense in human history and that even the subsequent criminalization has not remained static. The paper will then examine the position of the law on abortion in Nigeria and around the world to demonstrate how many of the countries of the world have positively responded to the reality about abortion in contradistinction with Nigeria. A case is then made for a reform of the Nigerian position by examining the effect of the criminalization of abortion in Nigeria, the human rights implication and suggesting some reforms in conclusion.

I. HISTORY OF CRIMINALIZATION OF ABORTION

Abortion is not a modern aberration, but a practice common to human communities throughout history. Indeed, abortion has been used throughout the world for thousands of years as a way of ending unwanted pregnancy. Historically, early abortion was tolerated by the Catholic Church, and for centuries, it was not punished under English Common Law (which has a great historical influence on the Nigerian Legal System). The first authoritative collection of Canon law, accepted by the Catholic Church in 1140 AD, was used as an instruction manual for priests until the new code of Canon Law of 1917, contained the conclusion that early abortion was not homicide.⁷

Also, Pope Innocent III had written at the beginning of the 13th century that quickening was the moment at which abortion became homicide⁸ and that prior to that, it was a less serious sin. Pope Gregory XIV had agreed and declared in 1591 that early abortion was not a ground for excommunication. This abortion policy of the Catholic Church continued

The Incidence of Abortion in Nigeria, 41 INT'L PERSP. ON SEXUAL & REPROD. HEALTH 170-181 (2015), available at <http://www.guttacher.org/journals/ipsrh/2015/10/incidence-abortion-nigeria>.

7. JANE HURST, *THE HISTORY OF ABORTION IN THE CATHOLIC CHURCH: THE UNTOLD STORY* 3 (Catholics for a Free Choice 1983).

8. Quickening refers to the time when the woman first feels the fetus move within her, otherwise known as esculent. Pope Gregory XIV also agreed and designated this as occurring after a period of 116 days or about 17 weeks.

until 1869⁹ when Pope Pius IX officially eliminated the distinction between an animated and a non-animated fetus and required ex-communication for abortions at any stage of pregnancy. In fact, much earlier, a Christian theologian, St. Augustine (344-430 AD), had held the view that there is no live soul in a body that lacks sensation and therefore, that such abortion required penance only for the sexual aspect of the sin.¹⁰

Similarly, under common law, abortion before “quickening” of the fetus was not punished from 1307 to 1803, neither was it regarded by society as a moral problem.¹¹ Even after quickening, abortion was considered only as a misdemeanor.¹² This tolerant common law attitude to abortion ended in 1803 with the codification of a criminal abortion law by Lord Ellenborough making abortion of a “quick” fetus a capital offense while abortions performed prior to quickening incurred lesser punishment. Similar legislative efforts were made in the United States of America in the 1820s and in Canada in 1869 (essentially modeled on English legislation of Lord Ellenborough), the criminalization having been spearheaded in all these jurisdictions by doctors,¹³ albeit for possibly ulterior motive.¹⁴

The latter part of the 19th century saw the spread of the restriction or criminalization of abortion by the Western powers (including through colonial powers) to Africa, Asia and beyond.¹⁵ This 19th century’s wave of restrictive abortion laws has been seen as a deviation from the norm.¹⁶ The reason for criminalization of abortion at this time in question was

9. W.W. WATERS, *COMPULSORY PARENTHOOD, THE TRUTH ABOUT ABORTION* 52 (McClelland & Stewart 1996).

10. HURST, *supra* note 7, at 3.

11. A. PRENTICE, *CANADIAN WOMEN: A HISTORY* 165 (Harcourt Brace Jovanovich 1988).

12. H.P. David, *Abortion Policies*, in *ABORTION AND STERILIZATION: MEDICAL AND SOCIAL ASPECTS* 1-40 (J.E. Hodgson ed., Grune and Stratton 1981). This prevailing situation is illustrated by the Twinslayer’s case of 1327 and Abortionist’s case of 1348 where the judges who were Roman Catholics refused to make causing the death of a fetus a legal offense.

13. D.P. Kommers, *Abortion in Six Countries: A Comparative Legal Analysis*, in *ABORTION, MEDICINE AND THE LAW* 313 (J.D. Butter & D.F. Walbert eds., Facts on File 4th ed. 1992); J.C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY* (Oxford Univ. Press 1978); C. BACKHOUSE, *PETTICOATS AND PREJUDICE: WOMEN AND THE LAW IN NINETEENTH CENTURY CANADA* (Women’s Press 1991).

14. It has been suggested that they were concerned not only for the welfare of the potential victims of abortion but also to further the process of establishing and consolidating their status, gain control over the practice of medicine and elevate the status of their profession as women were turning to midwives, herbalists, drug dispensers and quacks for abortion. See Terry, *England, in Abortion and Protection of the Human Foetus* 78 (S. Frankowski & G.Cole eds., 1987); MOHR, *supra* note 13, at 244.

15. David, *supra* note 12, at 4.

16. MOHR, *supra* note 13, at 4.

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not necessarily for the safety of the fetus, but rather for the safety of the women who were dying in their huge numbers from abortion for several reasons, inclusive of the state of medical science at the time which was not as developed as it is today.

However, despite the criminalization of abortion, women continued to perpetrate the acts, unfortunately, under unsafe conditions expedited by the state of the law. This obviously occasioned more deaths than ever and naturally aroused concern by the society and the government authorities. This development eventually gave rise to the liberalization of abortion laws in most of Eastern and Central Europe in the 1950s and in most of the remaining developed countries during the 1960s and 1970s. A few developing countries, like China and India, also relaxed their restrictions on abortion in the same period.¹⁷ The story has since been one of liberalization and not criminalization of abortion around the world.

II. REVIEW OF THE LAWS ON ABORTION IN NIGERIA

As already stated, in all parts of Nigeria, abortion is a criminal offense except where it is performed to save the life of the mother. In the South, the relevant provisions are sections 228, 229, 230, 297, and 328 of the Criminal Code.¹⁸ In the North, the relevant provisions are sections 232, 233, 234, 235 and 236 of the Penal Code.¹⁹ For the states that have adopted the Sharia Legal System, abortion is also criminalized by the

17. See S.K. Henshaw, *Induced Abortion: A World Review*, 1990, 22 FAMILY PLANNING PERSPECTIVES 78 (1990). The reasons that have been adduced for the liberalization of abortion law in this era include the fact that attitudes towards sexuality and procreation were changing, there was reduced influence of religious institutions, there was concern about population growth, illegal abortion was posing a serious public health hazard and finally, certain calamities that occurred in some countries created awareness of the need for legal abortion. Examples of certain calamities include the rubella epidemics and thalidomide – a tragedy in Britain in 1960s when doctors prescribed a drug to pregnant women which caused serious malformations in their unborn babies. See also S.K. Henshaw, *Recent Trends in the Legal Status of Induced Abortion*, J. PUB. HEALTH POL'Y 165-72 (1994); WATTERS, *supra* note 9, at 4.

18. Criminal Code Act (1916) Cap. (C38) Laws of the Federation of Nigeria 2004, §§ 228-230, 297, 328. The Criminal Code Act does not apply throughout Nigeria except with respect to federal offenses, that is, offenses relating to matters on the Exclusive Legislative List of the Constitution. This is because crime is generally a residual matter reserved for states. Individual states have their Criminal Codes, but the provisions are similar to the Criminal Code Act.

19. Penal Code Act (1960) Cap. (532) Laws of the Federal Capital Territory of Nigeria 2007, §§ 232-236. The Penal Code Act, although a federal legislation, does not apply throughout Nigeria, but only in the Federal Capital Territory (except for Federal Penal Code offenses contained in the Penal Code (Northern States) Federal Provisions Act, Cap. (P3) Laws of the Federation of Nigeria 2004). This is because crime is not on the Exclusive or Concurrent Legislative List of the Constitution. The Penal Code applies in states that have not adopted the Sharia Legal System or to non-Moslems in states that have adopted the Sharia Legal System in the North. Individual states have their Penal Codes but the provisions are similar.

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Sharia Penal Code Law. In Bauchi State, for example, the relevant provisions of the Sharia Penal Code Law²⁰ are sections 208, 209, 210, 211, and 212.²¹ This section of the paper shall attempt a brief review of the above provisions as well as some provisions of the Constitution of the Federal Republic of Nigeria 1999 that are relevant to the subject matter.

A. THE CRIMINAL CODE

1. Section 228 – Attempt to Procure Abortion

“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 whatsoever, is guilty of a felony and is liable to imprisonment for fourteen years.”

Under this provision, it is an offense punishable with 14 years imprisonment for any person (including medical practitioners and health workers) to attempt to terminate any pregnancy by any means whatsoever, even where the woman is not certified pregnant.

2. Section 229 – Attempt to Procure Owns Miscarriage by a Woman

“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.”

Under this provision, it is an offense punishable with 7 years imprisonment for a woman to attempt to terminate her pregnancy by any means whatsoever. It is also immaterial that the woman is, in fact, not pregnant. It would technically, therefore, constitute an offense under this provision where, for example, a woman, upon suspicion that she is pregnant (perhaps after missing her monthly period) drinks salt water with the inten-

20. Bauchi State Shari'ah Penal Code Law (2001) Cap. (198) Laws of Bauchi State 2007, §§ 208-212 (Nigeria).

21. See also Zamfara Sharia Penal Code Law No. (10) (2000) §§ 207-211 (Nigeria); Kano Shari'ah Penal Code No. (1) (2002) §§ 150, 151, 152, 153 and 154 (Nigeria). The provisions of the laws of the States that have adopted the Shari'ah Penal Code are similar in content though the numbering of the sections may differ.

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tion of securing a miscarriage even if it turns out that she was never pregnant.

3. Section 230 – Supplying Drugs or Instruments to Procure Abortion

“Any person who unlawfully supplies to or procures for any person anything 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.”

The provision creates an offense against any person who supplies or procures anything which he or she knows is intended to be used to procure abortion whether or not the woman is pregnant. It follows that a local chemist who sells drugs to a pregnant woman or the errand boy who mixes salt water being aware of the use intended, may well be guilty of an offense under the provision.

4. Section 328 – Killing Unborn Child

“Any person who, when a woman is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had died, he would be deemed to have unlawfully killed the child, is guilty of a felony, and is liable to imprisonment for life.”

Under this provision, it is an offense to kill a child when it is about to be born but before it is born. It seems that this provision is intended to ensure that all aspects of killing a child before it is born are covered by the Code. However, it should be noted that the definition of abortion by the WHO does not include termination after viability, which is probably why this provision is not in the same chapter of the criminal code with abortion.²²

22. Whereas provisions on abortion proper are covered by chapter 21 relating to offenses against morality, the offense of killing an unborn child, on the other hand, is covered by chapter 27 of the code dealing with homicide and allied offenses.

5. Section 297 – Surgical Operation (Lawful Abortion)

“Any 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.”²³

Two basic issues of interpretation arise from this provision. First, what qualifies as a surgical operation? Is it synonymous with medical? Does it, for example, include the administration of prostaglandins considered by many doctors to be one of the safest and most effective methods of procuring abortion or other methods of abortion like menstrual extraction or anti-progestin termination (abortion pill)?²⁴ It would seem that the term “surgical operation”, is strict and is deliberately used to indicate the necessity to save the life of the mother. It is, therefore, unlikely that the defense will countenance other means of procuring a miscarriage.

Second, does the term “preservation of the mother’s life” mean that she must actually be in danger of dying? Again, Nigerian courts have not interpreted this term. However, the English case of *R v. Bourne*, decided under a similar provision, indicates that the preservation of the mother’s life should include safeguarding her physical and mental health.²⁵ In that case, a leading gynecologist, Dr. Aleck Bourne, tested the law by openly inviting the police to prosecute him for performing an abortion on a 14-

23. Although the argument has not yet been canvassed, it would seem that in strict construction of the provisions, there appears to be no specific prohibition of termination of pregnancy before the woman is about to be delivered. Sections 228 and 229 create the offense of attempt only which is not committed where the act of termination is completed. As was rightly asserted by Dr. J. Ademola Yakubu, in line with section 4 of the criminal code, for a person to be liable for attempt, “it must be shown that he began to put his intention into execution by means adapted to its fulfillment and he must also manifest his intention by some overt act . . . it must however, not be a mere preparation and he must not have proceeded to the extent of committing the offense, otherwise, he may be charged with the commission of the offense itself.” J.A.Yakubu, *Abortion Conundrum: The Legal Dimension*, in *ESSAYS IN HONOUR OF PROFESSOR C.O. OKONKWO (SAN)* 56 (E.S. Nwauche & F.I. Asogwah, eds., Jite Books 2000). Unfortunately, in this case, there is no section creating the offense itself. Section 230 deals only with supplying drugs or instruments to procure abortion. Section 328 deals with preventing a child from being born alive “when a woman is about to be delivered.” Section 297 does not create an offense but a defense. It is arguable, therefore, that no section of the criminal code, strictly speaking, creates the offense of abortion as defined.

24. This question has also been raised in A.O. Ilumoka, *Reproductive Rights: A Critical Appraisal of the Law Relating to Abortion*, in *WOMEN’S HEALTH ISSUES IN NIGERIA* 89 (M.N. Kisekka ed., Tamaza Pub. Co. Ltd. 1993).

25. *R v. Bourne*, [1938] 3 All ER 615 (Eng.).

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year-old girl who had been raped.²⁶ The Court acquitted him on the grounds that he acted in good faith to preserve the life of the woman who might otherwise have become a “physical and mental wreck”. In other words, the abortion of a pregnancy of a 14-year-old resulting from rape was to safeguard her physical and mental health and therefore, to preserve the life of the mother.²⁷

It has been contended that the implications of the provisions of the criminal code, if strictly applied, would appear to be that all chemists, doctors and organizations (including family clinics) supplying and administering the IUD and the “morning after pill”²⁸ are guilty of offenses under the criminal code, for these are both examples of post conception methods of birth control.²⁹

B. JUDICIAL INTERPRETATION OF THE PROVISIONS OF THE CRIMINAL CODE

There is generally a dearth of authority on the interpretation of these provisions of the criminal code. Indeed, some of the cases relating to these provisions were murder cases arising from abortion and not strictly charges of abortion. These provisions have been applied in the following cases.

In *State v. Njoku*, the first defendant had sexual intercourse with A, resulting in A’s pregnancy.³⁰ The first defendant wrote to A, advising her to procure her own miscarriage and also sent her some tablets and ampoules of injection, giving direction for their use.³¹ He also gave A N6.00 (six Naira) to pay for the abortion. The second defendant arranged for the sum of N5.00 (five Naira) to be paid to the third defendant, a native doctor, and brought A to the third defendant’s house where the latter administered to A, some powdered medicine stuffed in garri, which caused A to miscarry.³² The court held as follows:

26. Dr. Bourne was charged with unlawfully procuring the abortion of the girl under section 58 of the Offences against the Person Act, 1861. *Id.* at 615.

27. In any case, the language of this provision is far from being satisfactory as it seems that it authorizes non-medical personnel to perform abortion provided it is aimed at protecting the life of the mother. As Dr. Oye Adeniran put it, even a carpenter with reasonable skill can perform an abortion. NATIONAL TRIBUNAL ON REPRODUCTIVE HEALTH AND ABORTION IN NIGERIA (CIRDDOC Nigeria Publication) 16 (Fourth Dimension Publishing Co. Ltd. 2002).

28. A hormone preparation administered orally when there is a possibility of conception but before it can be verified.

29. Ilumoka, *supra* note 24, at 8.

30. *State v. Njoku*, [1973] ECSR 638 (Nigeria).

31. *Id.*

32. *Id.*

- (a) That by sending the tablet and ampoules to A with intent that she should use them to procure her miscarriage, the first defendant was guilty of felony under section 230 of the criminal code.
- (b) That since the date of the giving of the N6.00 stated in the charge differed from the date stated by A in her evidence in court, the prosecution had failed to prove its case as charged, with respect to that count.
- (c) That it was proved that the third defendant caused A to swallow medicine with intent to procure and which in fact procured her own miscarriage, and he was therefore guilty of a felony under section 228 of the criminal code. The word "poison or noxious thing" in the section means any substance calculated to injure the health of the woman concerned by causing her to miscarry. It was not a necessary pre-requisite for a conviction to establish that the substance was an abortifacient.
- (d) A was an accomplice in the conspiracy to procure her own abortion.³³

In *R. v. Edgal*, the appellants were convicted of supplying drugs to procure abortion contrary to section 230 of the criminal code.³⁴ On appeal, it was held by the West African Court of Appeal in deciding the question of when it is lawful to procure a miscarriage that it is only lawful for the purpose of preserving the life of the mother.³⁵ In all other cases, it is unlawful.³⁶

In *State v. Akpaete*, the accused, a native doctor, performed an operation on the deceased to secure her abortion of a two months old pregnancy by inserting a not into her vagina.³⁷ On withdrawing it, the deceased bled and later, contracted tetanus and died.³⁸ He was charged with murder.³⁹ Ndoma Egba, I, found him guilty of manslaughter instead on the ground that no reasonable man in the community in which the accused lived could have thought that his act would endanger human life or cause

33. *Id.*

34. *R. v. Edgal*, [1938] 4 WACA 133 (Nigeria).

35. *Id.* at 137.

36. *Id.*

37. *State v. Akpaete*, [1976] 2 FNR 101 (Nigeria).

38. *Id.*

39. *Id.*

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death.⁴⁰ However, the fact that the deceased consented to the abortion did not exonerate the accused from criminal responsibility.⁴¹

C. PENAL CODE

1. Section 232 – Causing a Woman to Miscarry

“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 or with fine or with both.”

The provision makes induced abortion illegal except if done in good faith for the purpose of saving the life of the woman. The provision also applies to a woman who causes herself to miscarry.⁴² The provision combines the offense of causing a woman to miscarry with the defense of good faith for purpose of saving the life of the woman contained in section 297 of the criminal code. However, unlike the criminal code, there is less ambiguity here⁴³ as to the mode of procuring legal abortion.

This provision was the subject of the decision in *Pam-Tok v State*.⁴⁴ There, the appellant was convicted of causing miscarriage contrary to section 232 of the Penal Code.⁴⁵ The case for the prosecution was that he performed an operation and thereby caused a secondary school female student to miscarry a “three-month” old child.⁴⁶ The appellant put up a defense 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.⁴⁷ The trial court convicted the appellant.⁴⁸ On appeal, he argued that the trial court did not consider his defense adequately.⁴⁹ The court held that the appellant’s defense was well considered by the learned Trial Chief Judge as borne out in his summing up of the evidence adduced by the appellant. Moreover, the onus was on the appellant to show that he acted in good faith for the purpose of saving the life of the

40. *Id.*

41. *Id.*

42. See the explanatory note to section 232 of the Penal Code.

43. With the absence of the term “Surgical Operation”.

44. *Pam-Tok v. State*, No. FCA/K78 (Nigeria).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

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student. Since the evidence adduced by the prosecution established the contrary, the appeal was dismissed and the conviction and sentenced affirmed.

2. Section 233 – Causing Death of a Woman with the Intent of Causing Her Miscarriage

“Whoever with intent of causing the miscarriage of a woman, whether with child or not does any act which causes the death of such woman, shall be punished- a. with imprisonment for a term which may extend to fourteen years and shall also be liable to fine; and b. if the act is done without the consent of the woman, with imprisonment for life, or for any less term and shall also be liable to fine.”

This provision provides a specific offense for causing the death of a woman with intent to cause her miscarriage, unlike under the Criminal Code where death resulting from abortion may be murder⁵⁰ or manslaughter⁵¹ depending on the circumstances. In either case, consent is not a defense. However, under the Penal Code, consent is a mitigating factor.

The provision of section 233 was applied in the case of *Attorney-General of the Federation v. Ogunro*.⁵² There, the deceased, while pregnant, was admitted to a hospital as she was suffering from breathlessness and was in a bad condition.⁵³ She was advised to terminate the pregnancy, but she refused.⁵⁴ She died as a result of congestive cardiac failure.⁵⁵ However, the family of the deceased, being dissatisfied with the hospital's version of the story, laid complaint which led to the trial of the owner of the hospital under section 233 of the Penal Code. He was found not guilty by the High Court and Court of Appeal.⁵⁶ The Court of Appeal held that in a charge of intent to cause the miscarriage of a woman which resulted in the death of such woman, the prosecution cannot succeed in establishing the guilt of the accused unless it not only establishes the cause of death but also establishes that the act of the accused caused the death of the deceased.⁵⁷

50. Criminal Code Act (1916), §§ 316, 319. The punishment for murder is death penalty.

51. *Id.* §§ 317, 325. The punishment for manslaughter is life imprisonment.

52. Att'y-Gen. of the Fed'n. v. Ogunro, [2001] 10 NWLR pt. 720, 175 (Nigeria).

53. *Id.* at 182.

54. *Id.*

55. *Id.*

56. *Id.* at 181, 186.

57. *Id.* at 184.

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3. Section 234 – Using Force on a Woman to Cause Her Miscarriage

“Whoever uses force to any woman and thereby unintentionally causes her to miscarry, shall be punished-

- a. with imprisonment for a term which may extend to three years or with fine or with both; and
- b. if the offender knew that the woman was with child he shall be punished with imprisonment for a term which may extend to five years or with fine or with both.”

This provision creates an offense where a person unintentionally causes a woman to miscarry by using force on her. The miscarriage need not be intended, the force need not be unlawful and the offender need not know that the woman was with child. Therefore, this would seem to be a strict liability offense.

4. Section 235 – Preventing a Child From Being Born Alive

“Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, shall if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment for a term which may extend to fourteen years or with fine or with both.”

This provision creates the offense of attempt to prevent a child from being born alive except where such attempt is made in good faith for the purpose of saving the life of the mother. It would appear that the offense is committed even where the child is born alive since the offense relates only to doing any act with the intention of preventing the child from being born alive and not preventing the child from being born alive per se. It would also seem that where the act in fact prevents the child from being born alive, it goes beyond this provision and comes within the provision of section 236. Of course, needless to say that the second aspect of the provision relating to causing the child to die after its birth does not create the offense of abortion but one of homicide.

5. Section 236 – Causing the Death of Unborn Child

“Whoever does any act in such circumstances that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child shall be

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punished with imprisonment for life or for a less term and shall also be liable to fine.”

This provision creates the offense of abortion of a quick fetus, that is, fetus that has life in it.

D. SHARI'AH PENAL CODE

As earlier stated, Bauchi State Shari'ah Penal Code Law, 2001, provides for the various offenses relating to abortion in sections 208, 209, 210, 211, and 212.⁵⁸ The provisions in substance are similar to the provisions of sections 232, 234, 233, 235 and 236 of the Penal Code and differ only on the punishment prescribed for the various offenses. The punishment under the Sharia Penal Code ranges from compensation (Ghurrah and Diyyah)⁵⁹ to caning and retaliation (Qisas).⁶⁰

E. THE CONSTITUTION

1. Section 33 – Right to Life

“Every person has a right to life and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.”

It has been argued that the right to life guaranteed by this provision extends to an unborn child and by implication, any law which permits abortion is unconstitutional. This argument is untenable, as it seems that the Nigerian law excludes an unborn child from the class of persons capable of being killed.⁶¹

58. Bauchi State Shari'ah Penal Code Law (2001) Cap. (198) Laws of Bauchi State 2007, §§ 208-212 (Nigeria).

59. 'Ghurrah' means compensation, which is equivalent to one twentieth of Diyah paid in respect of causing miscarriage of fetus: 'Diyah' means a fixed amount of money paid to a victim of bodily hurt or to the deceased's agnatic heir in murder cases, the quantum of which is equivalent to one thousand dinar, or twelve thousand dirhan or 100 camels. See sections 56 and 59 of Bauchi, Kano and Zamfara States Shari'ah Penal Codes.

60. Bauchi State Shari'ah Penal Code Law (2001), §§ 208 (ghurrah), 209 (ghurrah), 210 (diyyah and qisas), 211 (qisas and diyyah), 212 (ghurrah).

61. The killing of an unborn child is not regarded as murder under the law. A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not and whether it has an independent circulation or not and whether the naval string is severed or not. Criminal Code Act (1916), § 307.

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2. Section 35 – Right to Personal Liberty

“Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law.”

3. Section 37 – Right to Privacy

“The privacy of citizens, their homes, correspondence, telephone conversation and telegraphic communications is hereby guaranteed and protected.”

On the strength of the United States Supreme Court decision in *Roe v. Wade*, 410 U.S. 13 (1973), which liberalized abortion on the basis of right to privacy,⁶² and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), which rejected the right of privacy as its justification and adopted a new liberty standard,⁶³ it is arguable that the above constitutional provisions could invalidate the various criminal legislation on abortion.⁶⁴

However, it is doubtful if these decisions can be properly applied to Nigeria in view of the fact that the Constitution itself subjects these provisions to limitations which include laws reasonably justifiable in a democratic society in the interest of defense, public safety, public order, public morality or public health.⁶⁵ This subjugation creates doubt on whether the liberal attitude of other jurisdictions will be embraced by our courts should they be called upon to interpret these provisions in the light of the right to abortion. In May 2015, however, the Violence against Persons (Prohibition) (VAPP) Act was signed into law. The Act seeks to end violence, particularly sexual violence, and protect the rights of survivors to receive comprehensive medical services.⁶⁶ It has been argued that appropriate standards and guidelines be developed for implementation of the VAPP Act by providing comprehensive medical care and services to victims of rape, incest and sexual assault. These guidelines are to be de-

62. *Roe v. Wade*, 410 U.S. 13 (1973).

63. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

64. See also T.B.E. Ogiemien, *Abortion Law in Nigeria: The Way Forward* 21 (Women's Health and Action Research Ctr., Occasional Working Paper Series, 2000). Note also the American case of *Griswold v. Connecticut*, (1965) 381 U.S. 479, where it was held that “if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwanted governmental intrusion in matters so fundamentally affecting a person as the decision whether or not to bear or beget a child.”

65. CONSTITUTION OF NIGERIA (1999), §§ 35(1)(a) – (&), 45.

66. Violence against Persons (Prohibition) Act (2015), § 38 (Nigeria).

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veloped at all levels of the health system to ensure that women can access modern methods of contraception as well as comprehensive abortion care to the full extent of the law.⁶⁷ Also, Imo state introduced a law in 2012 which had been termed by its opponents as an anti-life legislation encouraging abortion.⁶⁸ Section 40 of the Violence against Persons Law of Imo state provided for abortions in cases of incest and rape.⁶⁹ Public outcry from the traditional and religious leaders led to the repeal of the law in 2013.⁷⁰

From all the provisions discussed above, it can be concluded in a nutshell that abortion at any stage of pregnancy in Nigeria is a criminal offense except where it is performed for the purpose of saving the life of the mother. Although, the provisions of the VAPP can be extended to justify abortion in cases of rape and incest. It should be noted, however, that the VAPP is a federal law which still needs to be enacted by states in order to have nationwide coverage.

III. ABORTION LAWS IN OTHER JURISDICTIONS

A. UNITED KINGDOM (U.K.)

The abortion law in the United Kingdom deserves special consideration because of the relationship between Nigeria's abortion law and the U.K.'s law due to colonialism. Before 1900, Nigeria's abortion law was patterned along U.K.'s Offences against the Person Act 1861 (which had made provisions on abortion). In 1916, the Criminal Code, introduced into Nigeria by the British Colonial master, was adopted throughout the country. Forty two years later, the Penal Code was introduced to replace the Criminal Code in Northern Nigeria to reflect the norms of the predominantly Moslem society. The Penal Code is a product of British law in Colonial India.⁷¹ Britain has, since 1967, progressed while Nigeria has remained stagnant and irresponsive to the realities of the time.

67. *Abortion Law and Policy in Nigeria: Barriers to Women's Access to Safe and Legal Care*, IPAS, <https://www.ipas.org/~media/Files/PubsManual/ALPNIGE15.ashx?utm> (last visited May 26, 2016).

68. Owerri Chidi Nkwopara, *Catholic Priests to Fight Abortion Law in Imo State*, VANGUARD, Sept. 2, 2013, <http://www.vanguardngr.com/2013/09/catholic-priests-to-fight-abortion-law-in-imo>.

69. *Imo Government Repeals Abortion Law*, CHANNELS TV (Oct. 4, 2013), <http://www.channelstv.com/2013/10/04/imo-government-repeals-abortion-law/>.

70. Owerri Chidi Nkwopara, *Imo State Repeals Abortion Law*, VANGUARD, Sept. 27, 2013, <http://www.vanguardngr.com/2013/09/imo-repeals-abortion-law/>.

71. See Ogiemien, *supra* note 64, at 17.

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The current abortion law in the U.K. is the Abortion Act 1967 as amended by section 37 of the Human Fertilisation and Embryology Act 1990. This Act makes it lawful for a registered medical practitioner to terminate a pregnancy, if two registered medical practitioners are of the opinion, formed in good faith that:

- 1) The pregnancy has not exceeded twenty four weeks and its continuance would involve risk, greater than if the pregnancy were terminated, or injury to the physical or mental health of the pregnant woman or any existing children of her family; or
- 2) the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or
- 3) the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or
- 4) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.⁷²

A registered medical practitioner does not however require the opinion of two registered medical practitioners to terminate a pregnancy if he is of the opinion, formed in good faith, that the termination is necessary to save the life or prevent grave permanent injury to the physical or mental health of the pregnant woman.⁷³ The Act also provides that a person may refrain from participating in any of the treatment to which he has a conscientious objection,⁷⁴ except where the treatment is necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman.⁷⁵

In spite of the advance made by this Act, it has been criticized on the following grounds. It does not give women the right to choose since the power to decide whether a woman is entitled to have an abortion rests with her doctors.⁷⁶ The grounds for abortion are badly defined in that

72. Abortion Act 1967 § 1(1) (U.K.).

73. *Id.* § 1(4).

74. *Id.* § 4(1).

75. *Id.* § 4(2). Note that in 1991, RU 486 (a French abortion pill) was approved for use in Britain for pregnancies up to 9 weeks duration.

76. E.D. Harris, *The Abortion Act 1967: Out of Date and Out of Time?*, KEEP CALM TALK LAW (July 31, 2018), <http://www.keepcalmtalklaw.co.uk/the-abortion-act-1967-out-of-date-and-out-of-time/>.

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doctors have immense discretion when permitting abortion which leads to doctors abusing their powers by indulging their personal opinions and even prejudices.⁷⁷ It builds a delay by the requirement of two doctors certifying that a woman has legal grounds prior to a termination.⁷⁸ It does not ensure adequate provisions of abortion services since there is no statutory obligation for health authorities to provide abortion care to those who need it.⁷⁹

Consequently, there are proposals for amendments of the law to include the following: abortion on request in the first 3 months of pregnancy and only one doctor's approval up to 24 weeks; a duty on doctors to declare their conscientious objection and to make clear a woman's right to see or be referred to another doctor; a duty on the health authorities to provide comprehensive and easily available family planning, pregnancy testing, counseling and abortion service to meet the need of local women.⁸⁰ In 2008, members of parliament in the U.K. voted to retain the current legal limit of 24 weeks.⁸¹ However, it should be noted that in Northern Ireland, the Abortion Act of 1967 does not apply. The relevant laws regulating abortion are the Offences against Persons Act 1861 and the Criminal Justice Act (Northern Ireland) 1945⁸², which make abortions illegal except in certain conditions.⁸³ The only exception would be an abortion in good faith for the purpose only of preserving the life of the mother. Preservation of life has been held to include physical and mental health, not just life-threatening situations.⁸⁴

B. EUROPE

According to the WHO, in Europe, 30% of all pregnancies end in abortion,⁸⁵ although there is a huge discrepancy between statistics in western

77. *Id.*

78. Sally Sheldon, *The Decriminalization of Abortion: An Argument for Modernization*, 36 OXFORD J.L. STUD. 334-65 (2016).

79. *Id.* at 345.

80. *The Campaign for Choice: Obstacles to Abortion*, ABORTION LAW REFORM ASSOCIATION, <http://central.gutenberg.org/article/WHEBN0000178922/Abortion%20in%20the%20United%20Kingdom> (last visited Oct. 21, 2016).

81. *MPs Reject Cut in Abortion Limit*, BBC NEWS (May 21, 2008), http://news.bbc.co.uk/2/hi/uk_news/politics/7412118.stm.

82. Reviewed in 2006.

83. Offences against Persons Act, 1861, § 58 (U.K.); Criminal Justice Act (Northern Ireland), 1945, §25. The only ground permissible for abortion under the proviso to § 25 (1) of the Criminal Justice Act is where the act is done in good faith for the purpose of preserving the life of the mother.

84. N. Ir. Health & Soc. Serv. Bd. v. A, [1994] NIJB 1 (MacDermott, L.J.).

85. WHO, Guttmacher Institute, *Facts on Induced Abortion Worldwide* (January 2012), http://www.who.int/reproductivehealth/publications/unsafe_abortion/induced_abortion_2012.pdf.

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and eastern European countries.⁸⁶ Both the highest and lowest sub-regional rates are in Europe, where abortion is generally legal under broad grounds.⁸⁷ Factors such as low contraceptive use and high reliance on methods with relatively high failure rates⁸⁸ in Eastern Europe account for this disparity.

In most parts of Europe, abortion is allowed without restriction up to between 10 and 14 weeks' gestation⁸⁹ and is generally paid for by the government. Abortions can be carried out beyond this point, but only on specific grounds.⁹⁰ Countries such as Greece, Poland, Sweden, Germany and Latvia, allow for abortions where there is fetal impairment, rape and incest and where there is a threat to the mental and physical health of the mother. Largely Catholic Spain and Portugal, which previously had highly restrictive laws introduced changes through a 2007 referendum in Portugal and 2010 law in Spain.⁹¹ However, there are still contentions arising therefrom and in 2015, Portugal adopted a bill aimed at making women pay to end a pregnancy and imposing requirements for more stringent tests before the procedure can be conducted.⁹²

An exception to these restrictions is The Netherlands where abortion is permitted virtually on request at any time between implantation and viability, if performed by a physician in a (licensed) hospital or clinic.⁹³ Russia reportedly has one of the highest rates⁹⁴ of abortion in the

86. *Id.* In Western Europe there were 12 abortions per 1,000 women in 2008, while in Eastern Europe at the same time there were 43. Claire Bates, *Nearly a Third of Pregnancies in Europe End in Abortion*, DAILY MAIL (Jan. 19, 2012), <https://www.dailymail.co.uk/health/article-2088840/Abortion-statistics-Nearly-pregnancies-Europe-end-termination.html>.

87. WHO, *Facts on Induced Abortion Worldwide*, *supra* note 85.

88. Withdrawal and rhythm methods.

89. *Abortion Laws Around the World, From Bans to Easy Access*, GUARDIAN, Jan. 5, 2016, <http://www.theguardian.com/world/2016/jan/05/abortion-laws-around-the-world-from-bans-to-easy-access>. Abortion is allowed on request up to 14 weeks in Bulgaria, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, The Netherlands, Romania, Slovakia, and Slovenia. Sweden allows up to 18 weeks. *Europe's Abortion Rules*, BBC NEWS (Feb. 12, 2007), <http://news.bbc.co.uk/2/hi/europe/6235557.stm>.

90. *Europe's Abortion Rules*, *supra* note 89.

91. *Id.*; *Abortion Laws Around the World, From Bans to Easy Access*, *supra* note 89.

92. *Portugal Tightens Abortion Laws*, Guardian, July 23, 2015, <http://www.dw.com/en/russia-ponders-restrictions-on-abortion-rights/a-18509939>.

93. In The Netherlands, abortion is allowed on request up to 13 weeks and after 13 weeks (up to 24 weeks) if she claims to be in a state of distress. Since November 1984, women in the Netherlands have been able to obtain abortions free of charge under the government-sponsored national health insurance system. Foreigners may have abortions in the Netherlands, but they have to pay. *Europe's Abortion Rules*, *supra* note 89; U.N. Dep't of Econ. & Soc. Affairs, Netherlands: Abortion Policy (2013), https://www.un.org/en/development/desa/population/publications/pdf/policy/WorldAbortionPolicies2013/WorldAbortionPolicies2013_WallChart.pdf.

94. 1 in 3 pregnancies are aborted.

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world⁹⁵, which is enhanced by its very liberal abortion laws. Abortions are permitted within first 28 weeks from conception on health as well as social grounds including imprisonment of either spouse, multiparity and divorce during pregnancy.⁹⁶

C. MIDDLE EAST

Majority of Arab countries forbid abortion at any stage of pregnancy (with a few medical exceptions).⁹⁷ However, in Tunisia, abortion is available on request for all women during the first trimester if performed by a physician in a hospital or clinic.⁹⁸ In Turkey, abortion is legal on request up to the end of the 10th week of pregnancy, but married women need their husbands' consent.⁹⁹

D. AFRICA

Only a few of Africa's 54 countries, including Togo, Tunisia and South Africa have legal abortion on request. Burundi and Zambia have legalized abortion for social health reasons. On the rest of the continent, abortion is restricted under outdated colonial law.¹⁰⁰ However in 2003,

95. *Russia Ponders Restrictions on Abortion Rights*, DW NEWS (June 14, 2015), <http://www.dw.com/en/russia-ponders-restrictions-on-abortion-rights/a-18509939>.

96. U.N. Dep't of Econ. & Soc. Affairs, *Russia: Abortion Policy* (2013), https://www.un.org/en/development/desa/population/publications/pdf/policy/WorldAbortionPolicies2013/WorldAbortionPolicies2013_WallChart.pdf.

97. *The World's Abortion Laws (2019)*, CENTER FOR REPRODUCTIVE RIGHTS, <https://reproductiverights.org/worldabortionlaws>.

98. In Tunisia, gestational limit is 90 days or three months calculated from the first day of the last menstrual period which is considered to occur two weeks prior to conception. Where laws specify that gestational age limits are calculated from the date of conception, these limits have been extended by two weeks. *Id.*

99. *ABORTION IN LAW, HISTORY AND RELIGION* 36 (Childbirth by Choice Trust 1995), available at <http://www.chodarr.org/sites/default/files/chodarr1085.pdf>.

100. As of 2015, an estimated 90% of women of childbearing age in Africa live in countries with one form of restrictive abortion law or another (i.e prohibited altogether, or no explicit legal exception to save the life of a woman - Angola, Central African Republic, Congo (Brazzaville), Democratic Republic of the Congo, Egypt, Gabon, Guinea-Bissau, Madagascar, Mauritania, São Tomé and Príncipe, Senegal; to save the life of a woman - Côte d'Ivoire, Libya, Malawi, Mali, Nigeria, Somalia, South Sudan, Sudan, Tanzania, Uganda; to preserve physical health and to save a woman's life - Benin, Burkina Faso, Burundi, Cameroon, Chad, Comoros, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Guinea, Kenya, Lesotho, Morocco, Niger, Rwanda, Togo, Zimbabwe; to preserve mental health and all of the above reasons - Algeria, Botswana, The Gambia, Ghana, Liberia, Mauritius, Namibia, Seychelles, Sierra Leone, Swaziland. Even where the law allows abortion under limited circumstances, it is likely that few women in these countries are able to navigate the processes required to obtain a safe, legal procedure. Abortion is not permitted for any reason in 11 out of 54 African countries. Five countries in Africa have relatively liberal abortion laws: Zambia permits abortion on socioeconomic grounds, and Cape Verde, Mozambique, South Africa and Tunisia allow pregnancy termination without restriction as to reason, but with gestational limits. *Abortion*

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African countries agreed to a protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa in Maputo which provides for the protection of the rights of women and girls and guarantees the rights to sexual and reproductive health.¹⁰¹ The Maputo Protocol urges all ratifying countries to “protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.”¹⁰² This portion of the Protocol was further elaborated in a General Comment by the African Commission on Human and Peoples’ Rights issued in 2014.¹⁰³ Despite the ratification of this protocol by many African countries, national laws still do not reflect this quantum leap in policy.

E. LATIN AMERICA AND THE CARIBBEAN

Almost all Latin American and Caribbean countries, except Barbados, Belize, Uruguay¹⁰⁴ and Cuba, have restrictive abortion laws. In Cuba, elective abortion has been available in government hospitals since the mid-1960s.¹⁰⁵ Women of all ages may obtain abortions on request for up to 10 weeks gestation, later abortions require approval.¹⁰⁶ In 2006, Colombia’s highest court ruled that abortions can be performed in cases where the mother’s life or physical health is in danger, in cases of rape or incest, or in pregnancies involving fatal or life-threatening fetal abnor-

in Africa: Incidence and Trends Facts Sheet, GUTTMACHER INSTITUTE (May 2016), <http://www.guttmacher.org/facts-sheet/facts-abortion-africa>.

101. Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, art. 14(2)(c), *adopted* July 1, 2003 (entered into force Nov. 25, 2005) [hereinafter Maputo Protocol].

102. Maputo Protocol, art. 14(2)(c).

103. African Commission’s General Comment No. 2 on Article 14 (1) (a), (b), (c) and (f) and Article 14 (2) (a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (adopted April 28–May 12, 2014), *available at* <http://www.soawr.org/blog/general-comment-no-2-article-14-1-b-c-and-f-and-article-14-2-and-c>. This General Comment provides interpretive guidance on the overall and specific obligations of States Parties towards promoting the effective domestication and implementation of Article 14 of the Maputo Protocol.

104. The Uruguay parliament gave its approval in 2012 for terminations of pregnancies up to 12 weeks regardless of circumstances, and up to 14 weeks in cases of alleged rape subject to a medical panel’s examination.

105. Abortion is said to be endemic in Cuba. The country’s high rate of abortion is attributed in part to the weakened economy following the U.S. embargo against Cuba in 1962. M.M. Bridges, *The Origins of Cuba’s “Abortion Culture”* 3 (2014) (unpublished, University of Pennsylvania), *available at* www.academia.edu/14826066/The_Origins_of_Cubas_Abortion_Culture_.

106. ABORTION IN LAW, HISTORY AND RELIGION, *supra* note 99, at 20.

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malities.¹⁰⁷ This decision has been the object of strong protests by abortion opponents, but remains in effect.

Recently, the influx of the Zika virus into South America has further awakened the age long debate on accessibility and legality of abortions.¹⁰⁸ There have been increased requests for abortion from women who have contacted the virus believed to be linked with incidence of microcephaly¹⁰⁹ in children born to infected mothers. Governments and the dominant Catholic Church have however refused to yield to calls by reproductive health providers for a liberalization of abortion laws.¹¹⁰ Their solution is to advise women who suspect exposure to the virus to avoid getting pregnant within two years of exposure.¹¹¹

F. UNITED STATES (U.S.)

The abortion law in the U.S. is basically judicial. In 1973, the U.S. Supreme Court in *Roe v. Wade* recognized abortion as a right under the United States Constitution.¹¹² The Court ruled that during the first trimester of pregnancy, the state cannot bar any woman from obtaining an abortion from a licensed physician.¹¹³ During the second trimester, the state can regulate the abortion procedure only to protect the woman's health.¹¹⁴ In the third trimester, the state may regulate to protect fetal life but not at the expense of the woman's life or health.¹¹⁵ In 1989, the U.S. Supreme Court in *Webster v. Reproductive Health Service*, 492 U.S. 490 (1989), ruled that states may bar public employees and public hospitals from being used for abortions.¹¹⁶ States may also require doctors to conduct viability test for advanced pregnancies.¹¹⁷ In 1992, the U.S. Supreme Court in *Planned Parenthood* ruled that the requirements of a

107. *Unintended Pregnancy and Induced Abortion in Colombia, Facts Sheet*, Guttmacher Institute (October, 2013) <http://www.guttmacher.org/fact-sheet/unintended-pregnancy-and-induced-abortion-colombia>.

108. DAVID A. SCHWARTZ, PREGNANT AND OUT OF OPTIONS: THE QUEST FOR ABORTION IN LATIN AMERICA DUE TO THE ZIKA VIRUS PANDEMIC 51-65 (Intechopen 2017), available at https://www.researchgate.net/publication/325761493_Pregnant_and_Out_of_Options_The_Quest_for_Abortion_in_Latin_America_Due_to_the_Zika_Virus_Pandemic.

109. This is a disorder causing brain defect.

110. *Vatican Says Abortion is Illegitimate Response to Zika Virus*, GUARDIAN, Feb. 18, 2016, <http://www.theguardian.com/world/2016/feb/18/vatican-says-abortion-is-illegitimate-response-to-zika-virus>.

111. *Id.*

112. *Roe v. Wade*, 410 U.S. 113 (1973).

113. *Id.* at 164.

114. *Id.* at 164.

115. *Id.* at 165.

116. *Webster v. Reprod. Health*, 492 U.S. 490 (1989).

117. *Id.* at 491.

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mandatory 24 hours delay before an abortion, lectures by doctors against abortion, consent from parents of minors and reporting requirements were constitutional.¹¹⁸

IV. A CASE FOR REFORM

A. EFFECT OF CRIMINALIZATION OF ABORTION IN NIGERIA

Throughout history, the criminalization of abortion had forced women in all jurisdictions to embrace unreliable and dangerous means of eliminating unwanted pregnancies. They took pills and potions or certain drugs, many of which were poisonous and caused extreme irritation to the stomach and bowel; some tried to carry out their own abortion using crochet hooks, knitting needles, soap or lead solutions through syringes; hot baths, blows to the back and kicks or heavy pressure on the abdomen were also ways of trying to cause abortion. Everything was tried except qualified personnel and descent hospitals.

Except for the methods of self-help employed, which is more modernized, the story is largely the same in Nigeria today as a result of the continued criminalization of abortion. Pregnant women who desire abortion go to any length (except government hospitals) to get it albeit, at great risk to their reproductive health. In short, the law is a deed letter law observed more in breach than compliance as it fails to recognize the social, cultural, psychological and even medical factors that are responsible for women seeking abortion. Women procure abortion for several reasons including financial and emotional inability to care for a baby; fear of rejection by partners, parents, peer groups, religious and community leaders and society if the pregnancy is discovered; as means of birth control; physical and mental reasons; if they are too young or too sick to have a baby; desire to get rid of unwanted pregnancies arising from several reasons including rape or failure of contraception etc.

These reasons cannot be wished away or suppressed by any law no matter how stringent. It is for the law to respond and cater for these situa-

118. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). However, in 2019, states are taking action to restrict or expand access to abortion amid a national debate over *Roe v. Wade*. Multiple states such as Kentucky and Georgia have passed bills that ban abortion once a fetal heartbeat is detected, around six weeks of pregnancy, while Alabama recently passed the strictest abortion law in the country, banning the procedure with few exceptions. Several other states are considering “trigger” laws that go into effect to ban abortion should *Roe v. Wade* be overturned, while other states like New York have passed bills that enshrine abortion rights. Jessica Campisi et al., *All States Taking up New Abortion Laws in 2019*, THE HILL (May, 27, 2019), <https://thehill.com/policy/healthcare/445460-states-passing-and-considering-new-abortion-laws-in-2019>.

tions, if it is to have any meaning in the society. There is, therefore, need for amendment of the law to accommodate the realities of today. This need is underscored by the high population and low age of the sexually active, the lack of access to contraceptives and the high rate of maternal mortality in Nigeria.¹¹⁹ The figures are generally believed to be underestimated. The World Health Organisation and other United Nations statistical sources estimate maternal mortality at 800 maternal death per 100,000 live births.¹²⁰ It has been asserted that an estimated 1,000,000 abortions are carried out in Nigeria each year and that illegal abortion is responsible for 50% of maternal deaths particularly in adolescents and young women.¹²¹ In 2008, the Society of Gynecology and Obstetrics of Nigeria reported that 11% of maternal deaths in Nigeria are caused by unsafe abortions.¹²²

It should also be noted that restrictive abortion laws do not actually prevent the procurement of abortions nor lower the number of abortions which are carried out. For example, the abortion rate is 29 per 1,000 women of childbearing age in Africa and 32 per 1,000 in Latin America—regions in which abortion is illegal under most circumstances

119. The 2006 census estimate of the Nigerian population stood at 140,000,000 million people. However, the division into age/location in the National Population Commission website still references the 1990 census. This census put Nigeria's population figure at 88.99 million people. It was projected to reach 115 million by the year 2000 and 178.5 million by the year 2015. 45% of this population are under 15 years. 20.6% are between 15 and 24 years. 22% are women within child bearing age. 63.7% constitute rural population (without access to decent hospitals or clinics or reproductive health information). 36.3% constitute urban population. A large proportion of the population consists of women (i.e. adolescents and rural dwellers) with high sexual urge, no access to reproductive health information and no economic power. It is more difficult for these people to prevent unwanted pregnancies or access private clinics and therefore, they stand a greater risk of illegal abortion and unsafe abortion. The Nigeria Demographic Health Survey (NDHS) from 2008 stated the average age of first sexual intercourse at 17.7 for women and 20.6 for men. Nat'l Population Comm'n, *Nigeria: Demographic and Health Survey* (2008), <http://population.gov.ng/images/Nigeria%20DHS%202008%20Final%20Report.pdf>. This information is omitted in the Nat'l Population Comm'n, *Nigeria: Demographic and Health Survey* (2018), <https://www.dhsprogram.com/pubs/pdf/PR118/PR118.pdf>. However, in Great Britain, the national survey on sexual attitudes and lifestyles carried out in 1990 and 200 showed that the age of sexual intercourse had fallen from 17 to 16 for both men and women. Nearly 30 percent of men and 26 percent of women aged 16-19 first had sexual intercourse before age 16. Sexual Behavior, Factsheet, FAMILY PLANNING ASS'N (April 2009), <https://www.fpa.org.uk/sites/default/files/sexual-behaviour-factsheet-april-2009.pdf>.

120. WHO, *Maternal health in Nigeria: Generating Information for Action* (2019), <http://www.who.int/reproductivehealth/maternal-health-nigeria/en>.

121. ABORTION IN LAW, HISTORY AND RELIGION, *supra* note 99, at 20.

122. *Abortion Laws around the World*, PEW RESEARCH CENTER (Sept. 30, 2008), <http://www.pewforum.org/2008/09/30/abortion-laws-around-the-world/>.

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in the majority of countries.¹²³ The rate is 12 per 1,000 in Western Europe, where abortion is generally permitted on broad grounds.¹²⁴

B. ABORTION AS A HUMAN RIGHT

Governments, international treaty-monitoring bodies and others¹²⁵ increasingly recognize abortion as an intrinsic human right, integral to women's ability to make their own decisions about the number and spacing of their children.¹²⁶ Apart from the social, psychological and economic reasons, there is, these days, even a more growing global demand for liberalization of abortion on grounds of human rights as women's right to control their fertility is being recognized.¹²⁷ Article 16(1) of the United Nations Convention on the Elimination of All Forms of Discrimination against Women, of which Nigeria has been a state party since 1985, is quite instructive in this regard. It provides that:

“When parties . . . in particular shall ensure, on a basis of equality of men and women . . . the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.”¹²⁸

When this provision is read together with the rights to privacy and liberty (also internationally guaranteed under the U.N. International Covenant on Civil and Political Rights),¹²⁹ it becomes easy to conclude that the present state of the law on abortion is a violation of women's human rights. To put it in the words of Professor Fathalla:

123. *Abortion in Latin America and the Caribbean 2018, Factsheet*, GUTTMACHER INSTITUTE (March, 2018), <http://www.guttmacher.org/fact-sheet/abortion-latin-america-and-caribbean>.

124. *Abortion in Africa: Incidence and Trends Facts Sheet*, *supra* note 100.

125. The United Nations Human Rights Council (UNHRC), the Committee on the Elimination of Discrimination against Women, the European Court on Human Rights, and Colombia's Constitutional Court are some examples of global, regional and national bodies that have called for liberalization of laws criminalizing abortion on human rights grounds. U.N. Human Rights Committee, General Comm. No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights - Right to Life, U.N. Doc. CCPR/C/GC/36, <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx>.

126. Briefing Paper, *Safe and Legal Abortion is a Woman's Human Right*, CTR. FOR REPRODUCTIVE RIGHTS (2011), available at <https://reproductiverights.org/sites/default/files/documents/Safe%20and%20Legal%20Abortion%20is%20a%20Womans%20Human%20Right.pdf>.

127. Henshaw, *supra* note 17, at 5.

128. Convention on the Elimination of All Forms of Discrimination against Women, art. 16(1), Dec. 18, 1979, 1249 U.N.T.S. 13.

129. International Covenant on Civil and Political Rights, art. 9(1), Dec. 16, 1966, 999 U.N.T.S. 171.

“Motherhood, for a woman, should be a free, informed choice. It is a reproductive wrong when fertility control by women is changed into fertility control of women. . . but what is less realized is that from a human rights point of view and from the point of view of reproductive subordination of women, there is little choice between coerced contraception and coerced motherhood. Coerced contraception and coerced motherhood are two sides of the same bad coin. They deny women the dignity of making an informed choice in their lives. Coerced motherhood in one form or another is much more pervasive. Women are coerced into motherhood when women, including adolescents, are denied any other choice in life except child bearing and rearing, and when children are considered the only good that a woman is expected to deliver.”¹³⁰

African countries have also joined the bandwagon in recognizing the important link between human rights and abortion. In 2005, these countries blazed the trail with the approval of the Protocol on the Rights of Women in Africa, marked the first time that an international human rights agreement explicitly recognized abortion rights.¹³¹ In 2006, Ministers of Health and delegates from 48 African countries approved the Maputo Plan of Action, which identified reducing unsafe abortion as one of nine action areas essential for achieving the Millennium Development Goals.¹³² Also, in 2007, the world’s leading human rights advocacy organisation, Amnesty International, adopted a policy supporting women’s right to information and services for safe legal abortion in cases of unwanted pregnancy resulting from rape or incest or posing serious risk to the woman’s life or health.¹³³

C. SUGGESTED REFORMS

In line with development elsewhere in the world and for the protection of our pregnant women, abortion should be decriminalized and a proper

130. M.F. Fathalla, *Reproductive Rights and Reproductive Wrongs: The Case for Maternal Mortality as a Reproductive Wrong*, MacArthur Fifth International Distinguished Lecture on Population Issues (Feb. 16, 2004), available at <https://www.researchgate.net/publication/273448549>.

131. Briefing Paper, *The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights*, 1 CTR. FOR REPRODUCTIVE RIGHTS (Feb. 2006), available at https://www.reproductiverights.org/sites/default/files/documents/pub_bp_africa.pdf.

132. *Safe and Legal Abortion is a Woman’s Human Right*, *supra* note 126, at 25.

133. *Id.*

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abortion law put in place which, having regard to all considerations, should provide for the following reforms, among others.¹³⁴

1. The law should provide for abortion on request in the first 3 months of pregnancy. This should take care of all conceivable reasons for abortion yet without any medical implication since abortion is indisputably safe at the point and the fetus is un-quickened. The law should however, prescribe the qualification of the medical practitioner to carry out the abortion and the minimum standard of facilities that must be present in the hospital (particularly private hospital) that will be authorized to carry out abortion. The law may even limit the reasons if it is thought most desirable. It should also create means of supervision and enforcement to prevent abuse particularly by private hospitals and clinics.¹³⁵
2. The law may prescribe for safety of the mother in the second 3 months and of the fetus in the last 3 months of the pregnancy.
3. The law should provide for conscientious objection and referrals.¹³⁶
4. The law should encourage dissemination of information on reproductive health care and particularly use of contraception to avoid unwanted pregnancies which foist on the women a complete state of helplessness. It should be further emphasized that adequate and effective education on contraception can significantly decrease resort to abortions in Nigeria. Access to contraceptives can lower Nigeria's high rate of maternal mor-

134. It should be noted that the first organized attempt to reform the existing law on abortion in Nigeria was made by the Society for Gynecology and Obstetrics of Nigeria (SOGON) in a memorandum addressed to the federal government in 1999 which attempt yielded no results. Also in 1981, a medical doctor, Dr. Ogunkoye, introduced into the House of Representatives, a bill entitled "Termination of Pregnancies Bill." This bill generated considerable public debate, but was thrown out at first reading. Section 1(1) of the Bill made it lawful for a registered medical practitioner to terminate a pregnancy if two registered medical practitioners are of the opinion formed in good faith that:

- i. The continuance of the pregnancy poses a risk to the life or physical or mental health of the woman or any existing children of her family, greater than if the pregnancy were terminated; and
- ii. There is a substantial risk of the child being born with severe physical or mental abnormalities. Termination of Pregnancies Bill, § 1(1).

135. The present state of the law whereby anybody can perform abortion to save the life of the woman is unsatisfactory.

136. This will enable doctors with a religious or ethical objection not to be involved with abortion procedures, but to refer the patient to another competent doctor. Note rule 21 of the Rules of Professional Conduct for the Medical and Dental Practitioners in Nigeria, 1995, which requires the doctor not to relinquish the management of a patient to the detriment of the patient and to hand over the patient properly to another medical practitioner for further management.

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tality by 70%, prevent unintended pregnancies, unsafe abortions, and HIV/AIDs, and may result in 50% decrease in infant deaths.¹³⁷

V. CONCLUSION

It has been shown in this paper that abortion has a long history and its criminalization is, indeed, a comparatively recent development. It has also been shown that its decriminalization and liberalization are in vogue in most parts of the world today because it is safer to do so. The continued criminalization of abortion in Nigeria is, therefore, unrealistic and a dangerous trend. It is unrealistic because it is not known to have reduced the rate of abortion, from the statistics shown above, but has only succeeded in making abortion clandestine with the attendant consequences. It is dangerous because of the maternal deaths and damage to women's reproductive health resulting from the inevitable use of quacks and self help. In addition, abortion has been shown to be a human right, hence its criminalization is a violation of that right. Overall, some proposals have been made for the reform of the Nigerian law on abortion. Hopefully, the implementation of these reform ideas would save our generation of women from this compelled suicide.

137. *The Case for Legal Medical Abortion in Nigeria*, NIGERIAN STALK (Jan. 22, 2013), <http://nigerianstalk.org/2013/01/22/the-case-for-legal-medical-abortion-in-nigerian/>.