

**ABORTION AND ITS LEGAL CONSEQUENCES
UNDER THE NIGERIAN CRIMINAL LAW.**

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CERTIFICATION

This is to certify that this research work, "Abortion and its Legal Consequences under the Nigerian Criminal Law", was carried out by and is the original work of Ogugbara Chimezie Jacobs Paschal with registration number 06/4143 of the Faculty of Law, Imo State University Owerri, Imo State.

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DEDICATION

This work is dedicated to Most High GOD for his divine providence and favour towards my entire being. And to Mr. Okechukwu Unogu who laboured to secure the machine which prompted this project into fruition. I appreciate you and your kind gesture.

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22. Unborn Victims of Violence Act (2004)
23. Universal Declaration Of Human Rights Article 3

ABBREVIATION

1. ANDA Abortion Non- Discrimination Act, 2002
2. CEDAW Convention on the Elimination of all
forms of Discrimination Against Women
3. Cr. App R Criminal Appeal Report (1908)
4. ECOSOC Economic Social and Cultural Rights
(International Covenant)
5. E.C.S.L.R Eastern Central State Law Report
6. F.W.C.W Fourth World Conference on Women
7. I.C.P.D International Conference on Population
and Development
8. S.C.U.S Supreme Court of United States
9. U.D.H.R Universal Declaration on Human Rights
10. U.V.V.A Unborn Victims of Violence Act, 2004
11. W.A.C.A West African Court of Appeal
(Selected Judgments 1930-60)
12. W.H.O World Health Organization.

ABSTRACT

Abortion is a debate that has been going on in many countries around the world including Nigeria. It is the most poorly understood, easily misunderstood, easily mixed up and abused subject matter, yet it is one of the topics in applied ethics that creates a great deal of public debate. This debate can be traced from the days of the philosophers, St. Augustine and Thomas Aquinas et al.

The basic premise of some schools of thought like the Anti-abortion school, is that everyone has a right to life including the foetus who is yet unborn, and to take such right away, by terminating the life of the foetus before it fully develops is a crime. Under this group is found also those whose judgements and beliefs had been clouded by ethics and religious sentiments.

The Pro-choice school on the other hand postulates that the basic premise of the Anti-abortion school "*that a foetus is a person from the moment of conception is wrong*". They are of the view that the foetus is not yet a human being; therefore it can't enjoy rights which are available to human beings. They also contend that a woman/mother has certain rights which should supersede the rights if any, that the foetus may have. The case that should be noted at the outset is the American case of **ROE V. WADE**, which is of importance because of its impact on the abortion issue, and the controversy which it sparked off.

There cannot be seen or heard of any identifiable and independent case of abortion. The ones seen so far are embedded under either of murder or manslaughter. As a matter of fact, the lack of efficacy and effectiveness of these laws had sabotaged the status of abortion, hence a question begging for answers for decades now.

As a result, this project "**Abortion & its Legal Consequences under the Nigerian Criminal Law**" will

strive to outline the laws governing abortion in Nigeria as well as proffer arguments for the need for the reform of the laws on abortion in order to make it more effective, decrease the number of illegal abortions.

Chapter 1 of this project introduces the meaning, causes, and nature of abortion, the various situations where the unborn child can be said to have a right to life and situations in which the unborn child would not have such right.

Chapter 2, which is the bulk of this project, outlines the laws which govern abortion and the human rights issue on abortion.

Chapter 3 compares the law on abortion in other countries with that of Nigeria. References will also be made of various countries relating to the unborn child, arguments for and against the rights of the unborn child examined.

Chapter 4 basically deals with the problems associated with the present law on abortion in Nigeria.

Chapter 5, makes a case for the reform of the present law in Nigeria, proffers solutions to these problems and makes recommendations for more effective laws as well as brings this project to its conclusive end.

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CHAPTER ONE

1.0 INTRODUCTION

In spite of efforts by philosophers, jurists and other scholars to give a concise and clear-cut definition of abortion, complete success has not been met. The definition of abortion is replete with controversies. The ferocity of the debate surrounding abortion as to liberalization or not, shows no sign of abating given the variety of the different parties, convictions, and the strength with which they are held, it is unlikely that there will ever be agreement on this issue.

In the classical case of **ROE vs WADE**¹, the United States Supreme Court decided that an unborn child is not a person under the American law. This court further went ahead to enunciate the following principles;

1. That a State may not during the first trimester of pregnancy, interfere with or regulate the decision of a

1. (1973)410 U.S 113

woman and her doctor to terminate the pregnancy by abortion;

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

Collorary to this are the provisions of some the Nigerian statutes which stands severely and strongly against the liberalization of the idea of abortion. Hence the 1999 Constitution Of The Federal Republic Of Nigeria, under sections 33, the Criminal Code of the Southern Nigeria, under sections 228, 229, 230, and 297, and the Penal Code of the Northern Nigeria, under sections 232, 233 and 234. Mention worthy also are the cases in Nigeria decided against abortion; viz; **ATTAH vs STATE**² **R vs IDIONG**³ and the following cases of **QUEENSLAND** extended to Nigeria as a

2. (1993) 4NWLR PT 288, 403.

3. (1950) 13 WACA 30.

result of the similarity in both criminal codes; viz; **R vs GOULD**⁴ and **R vs CASTLES**⁵.

1.1 MEANING OF ABORTION

Etymologically speaking, the term abortion is derived from the Latin infinitive "Aboriri", which means "perish" but literally translated as the loss of foetal life. Succinctly put, an abortion is the removal or expulsion of an embryo or foetus from the uterus, resulting in its death. This can occur spontaneously as a miscarriage, or be artificially induced by chemical, surgical or other means.* Commonly, abortion refers to an induced procedure at any point during pregnancy; medically, it is defined as miscarriage or induced termination before twenty weeks gestation. It is also understood as the deliberate choice to terminate a pregnancy through an action which either directly destroys the foetus or causes its expulsion from the uterus before viability. The Black's Law Dictionary⁶ defines abortion as the

4. (1968) 1 ALL ER 849.

5. (1969) QWN 36.

6. The Black's Law Dictionary, 5th ed. Published 1979 by West Publishing

spontaneous or artificially induced expulsion of an embryo or foetus. Under our Criminal laws both the Criminal Code and Penal Code, the simple and concise meaning which connotes and possibly encompasses all qualities and relativity attributable to the concept of abortion is the term "miscarriage". To the layman, it is termination, "one day she is pregnant, the next she is not".

T.J. Higgins differentiated between foeticide and abortion, according to him, foeticide entails the killing of the foetus in its mother's womb before it is flushed out while abortion is the expulsion of living and non-viable. By this, Higgins meant the period before the conceived baby is capable of maintaining an independent existence.⁷

1.2 TYPES OF ABORTION

Medically, all kinds of miscarriage are categorized as abortion but not all such are legally check mated as abortion. On this therefore we have the following categories

7. Higgins T.J.; 1956 pg.412, Man as Man U.S.A, Bruce Publishers (1956).

of abortion; viz; (a) Complete abortion, (b) Habitual Abortion, (c) Spontaneous Abortion, (d) Therapeutic Abortion, (e) Induced Abortion, (f) Inevitable Abortion.

In a proper absorption of the entire idea of the categories of abortion, digest of same one after the other would rather be necessary.

Abortion is non induced when it occurs spontaneously, in such case as miscarriage. This may be effected by a disease or some defects or mal-functioning in the woman's physiological system. Such an abortion is neither intended nor is it aided in any way at all. Unless due to culpable neglect, this would not be a human act and therefore would not attract moral sanctions.

In induced abortion, one purposely decides to interfere with the life of the conceptus. One does not only intend but takes effective measures to ensure the expulsion of the conceptus. According to Higgins, an abortion is induced when it is the result of intentional interference with the

foetus⁸. This raises some moral questions as this involves the exercise of the will.*

Be that as it may, my main pre-occupation will therefore be on induced abortion and it is pertinent to note at this juncture that when I use the term abortion in this section, what I mean is induced abortion.

Induced abortion is normally classified into two; therapeutic and non therapeutic Abortions. An abortion is said to be therapeutic when there are medical indications why it should be procured and it is non therapeutic when such is not evident. For some, once an abortion is advised by two or more medical doctors it is therapeutic and legal. Such a view is not only erroneous and rash but fails to distinguish between matters of law and matters of moral.

In most cases, some of these conditions are seen as medical indications for therapeutic abortion: psychoses, severe neuroses, renal failure, chronic renal disease, cancerous womb, intra-uterine infection, etc. These

8. op. cit pg.4.

conditions cannot be approved license for abortion; rather, in the course of the treatment of the pregnant woman, the conceptus may lose its life. This is exemplified in the case of a car tube which was mistakenly over pumped. In an attempt to deflate it to appropriate size it could get punctured. The puncturing may be accidental or deliberate. In the same way, the death of the conceptus might be brought about if the conceptus is not able to withstand the medical therapy on which the mother is placed or that it is accidentally discharged.

Therapeutic abortion may be direct or indirect. When it is direct, appropriate measures are taken to eliminate the conceptus. In this way a life is preferred to another in the attempt to save one of the two lives. In an indirect non-induced abortion, the termination of the conceptus is not intended but its possibility is envisaged. In other words, it is not a means of treating the mother but an unavoidable consequence of her treatment. For instance, a patient is kept alive by an electric plug by which he is enabled to

breathe. It happened that another person is being shocked by the same electric point. Should the switch be turned off the patient will die. Whichever side of the coin that is chosen, the other is not killed but is unavoidably allowed to die. It is therefore necessary to differentiate between taking life and allowing death.

In an ectopic pregnancy, for instance, the conceptus cannot survive so long as it remains in the fallopian tube. An emergency abdominal operation is required to have it implanted in the womb where it can at least have a natural development. The reason being to avoid medical complications that will seriously hamper the life of the mother and the baby. It might be evident that the conceptus will die during the process of the implantation or may not survive the implantation. Nonetheless, the operation is carried out: If the conceptus dies it is an unavoidable accident. This is quite different from taking positive measures to eliminate the conceptus, to get rid of something not wanted.

1.3 THE METHODS OF PROCURING ABORTION

There are many methods of abortion. Three common methods are normally used, namely, Dilation and Curettage (D & C), Prostaglandin and Suction Curettage. The choice of the method to be used is based on the uterine size, i.e., gestational age.

Dr. J.C. Willike, in his book, *Abortion Questions and Answers*⁹, has divided the methods of abortion into three main categories; those that invade the uterus and kill the child by instruments which enter the uterus through the cervix; those that kill the preborn child by administration of drugs and then induced labour and the delivery of a dead baby; and those that invade the uterus by abdominal surgery.*

1.3.1 DILATION AND CURETTAGE (D&C)

The most commonly used technique is the D & C, carried out between the seventh and twelfth weeks of

9. Questions and Answers, pg.30 JC Willike; Hays Publishing 1985-1990.

pregnancy. In D & C the cervix is dilated and the foetus is removed by crushing and tearing. This method is similar to the suction method with the added insertion of a hook shaped knife (curette) which cuts the baby into pieces. The pieces are scraped out through the cervix and discarded.

1.3.2 PROSTAGLANDIN CHEMICAL ABORTION

After the 16th week of pregnancy, abortion culprits resort to prostaglandin.

Prostaglandin is a chemical hormone which induces violent labor and premature birth when injected into the amniotic sac. Since prostaglandin results in an unusually high percentage of live births, salt, urea or another toxin is often injected first. The risk of the live birth from a prostaglandin abortion is so great that its use is recommended only in hospitals with neonatal intensive care units. The risk to the mother is also greater with the use of prostaglandin; complications can include cardiac arrest. Which cause the uterus to contract intensely, pushing out

the developing baby. The contractions are more violent than normal, natural contractions, so the unborn baby is frequently killed by them.

1.3.3 SUCTION ABORTION

Suction abortion is an alternative method to D & C. This is the most common method of abortion during the first 12 weeks of pregnancy. General or local anesthesia is given to the mother and her cervix is quickly dilated. However, if any of the above method is used in older pregnancies the mother may suffer from great hemorrhage. Another method called hysterectomy is therefore used.

Used mainly in the last three months of pregnancy, the womb is entered by surgery through the wall of the abdomen. The technique is similar to a caesarean delivery, except that the umbilical cord is usually cut while the baby is still in the womb, thus cutting off his oxygen supply and causing him suffocate. Sometimes the baby is removed alive and simply left in a corner to die of neglect or exposure.

1.3.4 SALT POISONING (SALINE INJECTION)

Salt poisoning is another method of procuring an abortion. It is used mainly after the 16 weeks when enough fluid has accumulated. It is also called salting out. A long needle injects a strong salt solution through the mother's abdomen into the baby's sac. The baby swallows this fluid and is poisoned by it. It is apparent that a hysterectomy is exactly the same as a caesarean section with one difference, namely, that in a caesarean section the operation is being done to save the life of the baby whereas in the hysterectomy, the operation is being done to kill the baby. In each of these methods, the baby is either killed in the womb and expelled or is brought out alive. When it is brought out, it is allowed to die through neglect or killed by strangling or other means. It is much the same as any other except that it looks smaller and weighs less.

1.4 CAUSES OF ABORTION

The causes of abortion could be explained from three stages:

1.1 FIRST STAGE

The first stage is called the first trimester (i.e. the first three months) 80% of the causes are unknown, it could be due to genetic factors, foetal abnormalities, and hormonal or uterine abnormalities. Also this could be caused through excessive smoking due to ignorance on the mother's part.

1.2 SECOND STAGE

This is called the 2nd trimester (i.e. the 4th month to the 6th). It could be caused by the cervical incompetence i.e. the inability of the cervix to hold the contents of the womb, through damage or deformity. Also trauma could cause an abortion in this stage. This could be due to accidents, stress or induced trauma.

1.3 THIRD STAGE

The third stage is called the third trimester (i.e. the 7th month to the 9th month). This basically is caused by trauma. It may imply that a termination of pregnancy after seven months is no longer abortion. This raises the question as to whether such would constitute murder.

1.5 WHO IS AN UNBORN CHILD

According to Black' Law Dictionary¹⁰, an unborn child is an individual human life in existence and developing from fertilization until birth.*

Viewed medically, the period from the beginning of the third month to the end of the intracellular life is known as the foetal period. It is characterized by maturation of the tissues, organs and rapid growth of the baby. During this period, striking changes take place, the foetus develops human looks, which in the third month the length increases; it grows hair during this period. During the last couple of

10. Op.cit pg.3.

months, the foetus obtains well rounded development. When the foetus is 28 weeks old, it is able to survive on its own although with great difficulty¹¹.

Taking the medical conception into consideration, one can say that it supports the Black's Law Dictionary's definition that "*an unborn child is an individual human life in existence and developing from fertilization until birth*".*

This is radically different in the view of erudite Professor Okonkwo in his book OKONKWO AND NAISH: CRIMINAL LAW IN NIGERIA SECOND EDITION, who asserted thus "a child becomes a human being and therefore capable of being killed when it had completely proceeded in a living state from the body of its mother, whether it had breathed or not, and whether it has an independent circulation or not, and whether the navel string is severed or not¹².

11. Sædler Longman's Medical Embryology 5th Ed pg.79-(1990).

12. Okonkwo and Naish: criminal law in Nigeria 2nd ed. Pg.209. Spectrum Law Series 1980.

Okonkwo continued by citing the Queensland case of **R vs CASTLES Supra**, wherein the accused induced an abortion on a female about 22 weeks pregnant as a result of which the baby was born alive but died about 2 hours later. Medical evidence showed that the child had no prospect of continued survival because of the stage of its development and its weight. On a charge of manslaughter, the accused argued that section 292 of the Queensland Criminal Code (our section 307)* must be construed as referring to a viable child i.e. a child capable of continued independent existence. Rejecting the argument, the court held that a child who lives albeit doomed to die, for some period after it has proceeded from the body of its mother, is within the section. The court observed however that it was a most unusual indictment for manslaughter; it was a very strong case of abortion and the accused should have been charged with that offence rather than with manslaughter". The child as held in **R vs POULTON**¹³ must have been completely extruded from its

13. (1832) 5C & P 329.

mother's body. If the child is incompletely delivered as where part of its body is yet to be extricated, it is not murder to kill the child at that stage because it has not completely proceeded in a living state from the body of its mother." It is immaterial in this case that the child had cried and would have lived if it had not been killed.

He therefore concluded by saying that "to prove that the child was born in a living state, it is necessary to prove that life existed in the child when it was born. But the mere fact that the child breathed is not conclusive evidence of the fact that it was born in a living state".

1.6 RIGHTS OF THE UNBORN CHILD

According to Black's Law Dictionary¹⁴, "*Rights*" taken in an abstract sense means; justice, ethical correctness, or consonance with the rules of law in the principles of morals. As a noun taken in a concrete sense, it means a power, privilege, faculty, or demand inherent in one person and

14. Op.Cit pg.3.

incident upon another. Rights are defined generally as "*powers of free action*" and the primal rights pertaining to men and enjoyed by human beings purely as such, being grounded in personality, existed and are antecedent to their recognition by positive law. A right is something which can be claimed, demanded, asserted, and insisted on, secured, waived or surrendered. There can be a right to do something, or to have something, or to have something for oneself or to be in a certain attitude.

Having canvassed the nature and qualities of rights, the next issue is the rights of the unborn i.e. is it a person capable of enjoying such right? In the proper understanding of a right, only a person can logically have a right, because only a person can be the subject of such predications. Rights therefore are not the sort of things which non-persons can be subjects.

This however raises the question whether a foetus is a person and if so, at what stage does it become a person.

Before attempting an answer, it is important to look into the legal position relating to an unborn child.*

Chapter IV of the Nigerian Constitution 1999 provides for Fundamental Rights, **sections 33, 34, 35, 37** deals with the rights to life, dignity of human persons, personal liberty, private and family life respectively. These are the rights, which are most important to the issue in this project. Basically, Chapter IV of the Constitution guarantees for every human being's fundamental right. The law ensures that everyone has a right to privacy i.e. a right to enjoyment of his life without unnecessary interference from the state and other people as was decided in the case of **KATZ V. U.S**¹⁵.

Section 33(1) of the Nigerian Constitution¹⁶ provides that:

" Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of the sentence of a court in respect of a

15. (1967) 389. U.S. 347.

16. The Laws of the Federation of Nigeria, Cap.62 1999.

criminal offence of which he has been found guilty in Nigeria”.

Section 34(1) continued thus;

Every individual is entitled to respect for the dignity of his person, and accordingly (a) no person shall be subject to torture or to inhuman or degrading treatment;

(b) no person shall be held in slavery or servitude; and

(c) no person shall be required to perform forced or compulsory labour

Section 35(1) of the same enactment provides that:

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

Section 37 provides that:

"The privacy of citizens, their homes, correspondence, telephone conversation and telegraphic communication is hereby guaranteed and protected".

The right to privacy basically means the right to be alone; it also implies freedom from governmental intrusion. Privacy establishes the barrier against freedom from the outside world as individual volition determines what be done in that realm of protected behaviour, Right to Freedom deals with the human beings right to do what he wants at his lawful occasion without harm to others or a breach of the law.

Right to liberty is the right to freedom from all restraints such as one justly imposed by law. Liberty here denotes the fullness of individual existence, in a negative sense; this denotes the necessary restraints on all, which is needed to promote the greatest liberty for each person.

According to Black's Law Dictionary, the word liberty includes and comprehends all personal rights and their enjoyment, it embraces freedom from duress, freedom from governmental interference in exercise of intellect, formation of opinions, in the expression of them and in action or inaction dictated by judgement.

In another limb, the **CHILD`S RIGHTS ACT, 2003**¹⁷, the law reads thus under **section 17** "A child may bring an action for damages against a person for a harm or injury caused him wilfully or through neglect before, during or after his birth; and where any parent of the unborn child dies intestate before the child is delivered, the unborn child is entitled to share in the estate". Basically the direct import, intendment and spirit of this section is to the effect that an unborn child upon attainment of childhood i.e. upon birth can now exercise all the right incident to human beings. •

17. The Laws of the Federation of Nigeria, Cap.115 2004

But who can enforce these rights? Basically all persons can enforce these rights since they are fundamental to the existence of a human being. On the position of the law in when a person is considered a human being **section 307** of the **Criminal Code** of Nigeria provides that a person is considered a human being from the moment it becomes independent of its mother's body, whether the umbilical cord has been severed or not at birth.

Having dealt with the issue of rights and the extant legal position, it is imperative to analyze the position of schools on whether the foetus is a person.

1.7 IS THE FOETUS A PERSON OR AT WHAT STAGE DOES IT BECOME A PERSON

Related to the issue of the right of the unborn child, is the question of whether the foetus is a person capable of enjoying such right. The issue of abortion does centre on the

question of where rights begin which is when a human being does exist, not when it might.

There are different schools of thought regarding this question but it is broadly divided into 2 schools of thought; the one which is opposed to the idea of abortion in any form i.e. the Pro-life school and the Pro-choice school which advocates their right to have an abortion.

1.8 PRO-LIFE SCHOOL OF THOUGHT

According to the Pro-life school of thought, the foetus is a person, because life begins at conception and anything done (from that period of conception to the birth of the foetus) to the foetus which results in the termination of its life is killing, and it should not be allowed. To this school they believe that the foetus being a person (though not born) has a right to life, which should supersede all other rights, which the mother might have e.g. rights to privacy, freedom and liberty. To them, the mother's rights are only relied on for selfish reasons.

To this school belongs the Roman Catholic Church. In America for example when the decision in **ROE V. WADE** *supra* supported abortion, the catholic hierarchy reaffirmed its position that any person who undergoes an abortion would be subject to excommunication. This group sees abortion as a human rights issue; they compare abortion to the killings in Hitler's Germany and in Vietnam. To this school also belongs the Association of Lawyers for the Defence of the Unborn Child. To them the foetus or unborn child is completely human, no matter how small or how young it may be, and whether it begins life in the fallopian tube or in a test tube, it has a human father and a human mother and has the chromosomes unique to human beings, so it is illogical and absurd to suggest that the unborn child is not a human being.

This school of thought otherwise known as the Anti-abortion school has a basic premise which is that everyone has a right to life including the foetus who is yet unborn, and

to take such right away by terminating the life of the foetus before it fully develops is a crime.

1.9 PRO-CHOICE SCHOOL OF THOUGHT

The Pro-choice school postulates that the premise that "*a foetus is a person from the moment of conception*" is wrong. It is their view that the foetus is not a person from the moment of conception but more of something having potential life and can be said to graduate into a person. The period at which the foetus can survive outside the womb has been described as the viability point, and to the Pro-choice school, that period when the foetus can survive on its own without the help of the mother is the point when the foetus will be seen as a person and a human being. By this, a viable foetus is warranted the same recognition as an infant.

In support of the Pro-choice school is the case of **ROE V. WADE** *supra*, where the U.S Supreme Court in its judgement held that a pregnant woman is free to procure an abortion without any state interference for the period of

pregnancy prior to this compelling period, and that only after the point of viability may the state prohibit abortion, except when necessary to save the mother's life.

The compelling point is at viability, this is the presumption that the viable foetus already has the capability to survive outside the womb. Thus extermination of the zygote before the viability point is not the same thing as taking life or killing it. The Pro-choice school also contends that the mother of the foetus has certain rights, which should supersede the rights (if any at all) that the foetus may have.

On the issue of when the foetus right may properly begin. They had this to say; individual rights begin at birth, with the creation of a new, separate human being. Rights are a concept applicable only to individual, actual individual human beings, not a merely potential one. The foetus may become a human being, but until it is born and the umbilical cord is severed, it is part of an actual human being i.e. the

mother. It is only the mother who has rights, and her rights necessarily include the right to control her own body, before, during and after pregnancy. The timing of the woman's decision has no impact on when the foetus becomes a rights-bearing entity i.e. when it is born.

To this group, abortion is a political right, and like many rights-protected actions, is not necessarily moral. Morality is an issue of rationality, and a woman who becomes pregnant on a whim, then capriciously chooses an abortion, is an immoral and irrational. This may be true of a woman who delays such a decision past the point of safety to herself. Such an action, however immoral and irrational, is not a crime; it does not involve the initiation of force against any human being.

Apart from the aforementioned schools, there are also various societal groups with varied views on the rights of the unborn child. The religious groups for example contend that it is against the laws of God to deny

an unborn child the right to life, since that means killing it and killing is a sin. The philosophers who are not guided by religion, work within the natural law thought and reasoning of man to lay basic moral principles have mixed ideas about this issue. Some are of the view that the unborn child has such a right, while others feel that if anyone at all has such a right it is the mother who has the right to decide what to do with her body.

The Nigerian Legislature on the other hand has made provisions on this issue. In law, the unborn child is only regarded as a human being when it is independent of its mother's body whether the naval cord has been severed or not (**Section 307** of the Criminal Code). This is in line with the position in law that only human beings or artificial persons are capable of having enforceable rights.

CHAPTER TWO

2.0 ABORTION LAW AND PRACTICE IN NIGERIA

Why the law and practice of abortion in Nigeria is not developed may be as a result of the subject matter itself which is viewed by a large percentage of the populace as a taboo or even due to the developing nature of Nigeria where other political and economic issue concern the leaders and legislators. In fact, it is even more difficult to find cases and statute book bordering on abortion. Mostly such cases must either be embedded in murder or manslaughter or any other crime ancillary to it. Hence in the view of his lordship in **R vs CASTLES¹ supra**, wherein the accused induced an abortion on a female about 22 weeks pregnant as a result of which the baby was born alive but died about 2 hours later. Medical evidence showed that the child had no prospect of continued survival because of the stage of its development and its weight. On a charge of manslaughter, the accused'

1. (1969) QWN 36

argued that section 292 of the Queensland Criminal Code* (our section 307) must be construed as referring to a viable child i.e. a child capable of continued independent existence. Rejecting the argument, the court held that a child who lives albeit doomed to die, for some period after it has proceeded from the body of its mother, is within the section. The court observed however that it was a most unusual indictment for manslaughter; it was a very strong case of abortion and the accused should have been charged with that offence rather than with manslaughter". Also the cases of **ATTAH vs STATE**² and **R vs IDIONG**³ *supra* are indeed illustrative.

The issue of abortion is better versed in the developed countries. Nevertheless, I would try and canvas the applicable laws in Nigeria.

2. (1993) 4 NWLR Pt 288 Pg 403

3. (1950) 13 WACA 30

2.1 LEGAL CONSEQUENCES UNDER NIGERIAN CRIMINAL LAW

The laws governing abortion all over the world vary from the very restrictive to the very permissive societies with more or less restriction in between for medical, eugenic, humanitarian, medico-social, or social reasons.

The applicable law is in the Nigerian Criminal Code and **section 228** provides:

"Any person who, with intent to procure miscarriage of a woman whether she is or not with child unlawfully administers to her or causes her to take any poison or other noxious thing or uses any force of any kind, or uses any other means whatever, is guilty of a felony, and is liable to imprisonment for fourteen years".

Section 229 states:

"Any woman who, with intent to procure her own miscarriage, whether she is or not with child, unlawfully administers to herself any poison or 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 for imprisonment for seven years" .

Section 230 equally states:

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

The offender cannot be arrested without warrant. In examining these sections, one finds that the criminal code made no provisions whatever for any case where abortion was lawful except in **Section 297** where it states that:*

"A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case"⁴.

Accordingly, it can be said that this provision caters for cases of therapeutic abortion.

4. Cap 777 Laws of the Federation 1990

However, analyzing **Section 228**, the word "unlawfully" is not defined on **Section 1** of the criminal code, therefore its use in Section 228 is not clear, and it gives an impression of there being other instances.

In **R V. EDGAL**⁵, it was held that the word has the same meaning which it bears at common law. At common law, (There have been changes introduced by the Abortion Act (1967) U.K) an abortion is unlawfully if it is not done for the purpose of preserving the life of the mother⁶. If the substance administered causes a miscarriage it is clearly a "poison or noxious thing" as held in **STATE V. NJOKU**⁷. But a substance which has a harmful effect can rank as a poison or noxious thing although it is not an abortifacient as equally held in **R V. MARLOW**⁸.

Apart from **Section 228–230** which unlawful abortion and **Section 297** which exculpates a person from criminal

5. (1938) 4 WACA 133

6. Okonkwo and Naish 2nd Edition Criminal Law Pg 263

7. (1973) 3. E.C.S.L.R 638

8. (1965) 40 Cr App .R 49

responsibility if the abortion is done in good faith and with reasonable care and skill in the protection of the mother's life, there is no other section in the criminal code which deals with abortion.

PENAL CODE: **Section 232** of the Penal Code provides that:

"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..."

Section 233 of the Penal Code provides for that:

"Whosoever with intent to cause 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 14 years and shall be liable to fine and

b) If the act is done without the consent of the woman, with imprisonment for the life or any less term and shall be liable to fine"

It is not necessary that the offender should be aware that the act is likely to cause death.

A woman who causes herself to "*miscarry*" within the meaning of **Section 232** of the Penal Code, provisions appear to have followed the common law by not excusing a woman, who is rarely prosecuted as the police are prone to show indulgence to the mother largely for the fact that her evidence is required against the professional abortionist.

Also where the expectant mother has operated on herself or takes drugs without the intervention of another, she may cause such injury to herself that requires help and it is most undesirable that she should be deferred from seeking this help through the threat of punishment.

In Nigerian law, the consequences of partaking in unlawful abortion, under both the criminal and penal code is that a person can be convicted of a felony and will be liable to be imprisoned for a term ranging from 3 years to 14 years. From the above sections, it is clear that the Nigerian abortion laws are very restrictive in nature and can only cause for greater tragedies than the tragedy of abortion itself, and the record of therapeutic abortions extremely low⁹.

2.2 **THE ILLEGALITY OF ABORTION**

Though abortion is illegal in Nigeria, in reality it is widely practiced by both the medically trained and untrained personnel. A tragic consequence of this clandestine procedure is the large number of maternal death from abortion, particularly those carried out by unskilled hands. 34,000 Nigerian women die annually of complications of

9. Akinola O. (1970) Abortion in Africa Hall , R.E (1970) In A Changing World, Vol. 1, pg 291 Columbia University Press.

unsafe abortions according to the publication by Centre for Reproductive Rights. Some years ago, while working in a rural area, a youth corper doctor reported that the hospital he worked in was run by missionaries who did not believe in any form of family planning techniques apart from abstinence and who frowned on abortion for whatever reasons. As might be expected the natives turn to the next available source of medical attention i.e. the quack doctors for family planning advice. The result was that during his 12months in that hospital, they received an average of three mutilated schoolgirls every week from these quacks, out of which one usually died from severe haemorrhage and septicaemia¹⁰.

Though the above report was of a situation in the rural area, it is more or less the same in the urban areas; the difference being only that in the urban areas, there is easier access to medically trained personnel for an illegal abortion.

¹⁰ Wale Okediran; The Guardian Newspaper Monday, November 18 1991 "The Abortion Debacle"

The reason for this is quite simple, since the abortion laws are very restrictive in nature; an avenue has been created for quack doctors to operate through the back door or under the cloak of illegality. And in practice, the law enforcement authorities do not prosecute physicians performing illegal abortion even if they know about it.

Basically, the Nigerian society is a multi-ethnic one made up of various ethnic groups with different cultural backgrounds. Each group in the society has its strong views on the issue of abortion. Thus the issue of abortion is often a sensitive one within the Nigerian populace. It has fundamental religion beliefs; it therefore reverberates into the political and social economic life of the people thereby creating many diverse views.

Dr. Adekola¹¹ is of the view that women with unwanted pregnancies should not be left to the whims and caprices of the quack doctors who do abortions illegally for a fee at the

¹¹ Dr. Adekola; The Guardian Newspaper 7th November 1991; The Heart of the Matter

risk of the patient losing her life and posits that abortion should be legalized in the country. While Dr. Stephen O. Doneil¹² opines that people clamouring for legislation of abortions have not made efforts to learn from the experience of other countries where abortion has been realised. His view is that the legalization of abortion has not reduced the number of illegal abortions in other countries therefore; there is no reason to think that it will in Nigeria. Another position is that of Marshal Kebby¹³ who asseverates that "abortion is murder and no responsible government would legalize murder". His reason for this is that "once a woman takes in; she should be assisted to get the foetus developed in her womb so that a healthy child could be born, since it is to the glory of God that this should be done. To cut the pregnancy short and destroy the foetus is a sin against God and the human race".

¹² Dr. Stephen O. Donell; The Guardian Newspaper 6th November 1991 "Abortion; Learn from the West"

¹³ Marshall Kebby; The Lagos Weekend Magazine 15th 1992

Abortion offences usually get detected only when they result in death¹⁴. It is thus one of the offences where the 'dark figure' that is, the unreported, non-investigated, and unprosecuted cases are very high. The reasons for this are not far-fetched; abortion is carried out secretly and surreptitiously and surreptitiously. A pregnant woman may even carry out an abortion on herself without the knowledge of any other person. Where members of her family subsequently become aware of the action, they quite normally have interest not to report it. In cases, where the abortion is carried out by a person other than the pregnant woman herself, a situation of victim participation occurs and both the abortionist and the victim are kept silent by their complicity.*

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Again in the few instance when abortion are detected by law enforcement agents, pity and chivalry are aroused in them by the woman's predicament. It has been variously estimated that there are a hundred hidden abortions for every one brought to official notice.

2.3 **ABORTION AND HUMAN RIGHTS**

While the international community has yet to recognise a woman's right to terminate a pregnancy, some attention has been paid to the impact of restrictive abortion laws on women's enjoyment of certain fundamental rights. United Nations human rights bodies and government delegations at key global conferences have taken note of the effects of unsafe abortion on women's rights to life and health. The International community has been slower to acknowledge the substantial textual support for a right to choose abortion on the basis of the right to freedom from discrimination and rights that guarantee autonomy in decision-making regarding intimate matters.

2.3.1

THE RIGHTS TO LIFE AND HEALTH

While bodies engaged in interpreting and enforcing human rights law have been reluctant to address the matter of abortion directly, it has been given some recognition in the context of women's right to life and health. The right to life is a legal right protected in the most of the principal human rights instruments. It is recognized in **Article 3** of the **Universal Declaration of Human Rights (UDHR)**, **Article 6** of the **International Covenant on Civil and Political Rights (Civil and Political Rights Covenants)**, **Article 4** of the **African Charter of Human and People's Right's (African Charter)**, **Article 4** of the **American Convention on Human Rights (American Convention)**, and **Article 2** of the **European Convention for the Protection of Human Right and Fundamental Freedom (European Convention)**. While traditionally read to protect individuals only from arbitrary execution by the state, the right to life has been interpreted by the Human Right

Committee, the body that monitors compliance with the civil and political rights covenant, to require governments to adopt "positive measures" aimed at preserving life¹⁵.

The right to health is recognized in **Article 12(1) of the International Covenant in Economic, Social and Cultural Rights (ECOSOC), (Economic, Social and Cultural Rights Covenant)**, which requires states to "*recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*"

Article 12(1) of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) (Women's Convention) further requires governments to "*take all appropriate measures to eliminate discrimination against women in the field of health care...*"

It is widely acknowledged that in countries in which abortion is legally restricted, women seek abortions clandestinely, under conditions that are medically unsafe.

¹⁵ Human Rights Committee, The Right to Life (Article 6) Para 5, 30/7/82, General Comments

Because unsafe abortion is closely associated with high states of infant mortality, laws that force women to resort to unsafe procedures infringe upon women's right to life. This was acknowledged by the Human Rights Committee in its 1996 evaluation of the report of the Peruvian Government to the Committee.

In reference of Peru's restrictive abortion law, the committee noted: The committee is concerned that abortion gives rise to a criminal penalty even if a woman is pregnant as a result of rape and that clandestine abortions are the main cause of maternal mortality. These provisions not only mean that women are subject to inhumane treatment but are possibly incompatible with **Article 3, 6 and 7 of the Covenant**¹⁶. **Article 3, 6, and 7 of the Covenant on Civil and Political Right** respectively, protect the right to non-discrimination, the right to life, and the right to freedom from torture and cruel, inhumane of degrading treatment.

¹⁶ Human Rights Committee, Concluding Observation of the Human Rights Committee, Para. 15, 18/11/96

Where unsafe abortion does not result in death, it can have devastating effects on women's health. The health effects of unsafe abortion were addressed at two recent United Nations Conferences, the **International Conference on Population and Development (ICPD)**, (Cairo, 1994) and the **Fourth World Conference Women (FWCW)** (Beijing, 1995). The programme of Action adopted at the **ICPD**, while noting that "*in no case should abortion be promoted as a method of family planning*", and called upon governments to consider the consequences of unsafe abortion on women's health.

The programme of Action states:

All Governments and relevant intergovernmental and non-governmental organization are urged to strengthen their commitment to women's health, to deal with the health impact of unsafe abortion as a major public health concern and to reduce the recourse to abortion through expanded and improved family planning services. Prevention of

unwanted pregnancies must be given the highest priority and every attempt should be made to eliminate the need for abortion. In circumstances where abortion is not against the law, such abortion should be safe. The following year, at the **(FWCW)** the international community reiterated this language and urged governments to "*consider reviewing laws containing punitive measure against women who have undergone illegal abortion*¹⁷". In addition, in a paragraph addressing research on women's health, the platform for Action urges governments to understand and better address the determinants and consequences of unsafe abortion.

Implicit in these developments are acknowledgements that the rights to life and health require governments to protect women from the harmful effects of unsafe abortion. Despite the correlation between restrictive abortion laws and widespread resorts to unsafe procedure, the international

¹⁷ The Beijing Declaration and the Platform for Action, Fourth World Conference on Women, Beijing, China, 4-15, September 1995, Para 106.

community remains reluctant to put any significant pressure upon countries to modify highly restrictive abortion laws.

2.3.2 **THE RIGHT TO EQUALITY AND FREEDOM FROM DISCRIMINATION**

The right to equality is a fundamental principle of human rights law. Freedom from discrimination in the enjoyment of protected human rights is ensured in every major human rights instrument. This protection appears in **Article 2 of the Universal Declaration, Article 3 of the Civil and Political Rights Covenant, Article 3 of the ECOSOC Rights Covenant, Article 2 of the African Charter, Article 1 of the American Convention, and Article 14 of the European Convention. Article 1 of CEDAW** defines discrimination against women as, *"any distinction, exclusion, or restriction made on the basis of sex which has the effect in the purpose of impairing or nullifying of their marital status, on a basis of equality of men and*

women, of human rights and fundamental freedom in political, economic, social, cultural, civil or any other field”.

To qualify as a form of discrimination against women under the above definition, restriction on abortion would have to have either the "effect" or the "purpose" of preventing a woman from exercising any of her human rights or fundamental freedom on a basis of equality with men. There are strong arguments to support the view that restrictive abortion laws have both that effect of denying women access to a procedure that may be necessary or their enjoyment of their right to health care. Abortion is a medical procedure. When a pregnancy puts a woman's life or health at risk, abortion may be the only means of ensuring her safety. A number of countries that restrict access to abortion make no explicit exception for a woman whose life or health is endangered by a pregnancy. In these countries, health providers fearing criminal persecution may be reluctant to perform an abortion even to save a woman's life.

In addition, health facilities in such countries may be ill-equipped for abortion services and health professions may lack the training necessary to perform in the procedure safely. By not taking steps to ensure access to the therapeutic abortion services, governments compromise women's rights to life and health. **CEDAW** has noted that "*Laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures*" constitute a barrier to appropriate health care for women, compromising the right to non-discrimination in the area of health¹⁸. Indeed, the health consequences of unsafe abortion are suffered only by women, as are the physical effects of carrying an unwanted pregnancy to term.

The discriminatory purpose of the restrictive abortion laws of a number of countries also bears examination. The tendency to define women by their reproductive capacity remains highly prevalent throughout the world.

¹⁸ Committee in the Elimination of Discrimination against Women (CEDAW), Women and the Health, Para. 14, 02/02/99. General Recommendation 24.

Governments continue to downplay the importance of women's participation in the areas of political, economic, social, cultural and civil affairs. Were women permitted to play a role comparable to that of men in guiding the affairs of the state and commerce, governments would grow to value their contribution to society as something other than the bearers of the next generation?

Societies that have welcomed women's participation in affairs outside the home have increasingly recognized that reproductive decision making is best left to women themselves.

2.3.3 **AUTONOMY IN DECISION-MAKING IN PRIVATE MATTERS**

A woman's rights to terminate a pregnancy, emanates from her right to make decisions regarding her own body and reproductive capacity. Textual support for this right is found in a number of human rights instruments, which contain provisions that ensure autonomy in decision-making

about intimate matters. Such provisions include protections of the right to privacy, the right to decide freely and responsibly the number and spacing of one's children, and the right to physical integrity.

Freedom from interference in one's privacy and family life is protected by **Article 12 of the UDHR, Article 17 of the Civil and Political Rights Covenant, Article 11 of the American Convention** and **Article 8(1) of the European**. Decisions one makes about one's body, particular by one's reproductive capacity, i.e. lie squarely in the domain of private decision-making. This principle was acknowledged in the 1979 case of **BRUGGEMAN AND SCHEUTEN V. FEDERAL REPUBLIC OF GERMANY**¹⁹, which was brought before the European Commission of Human Rights. In its initial review to determine

¹⁹ Application No. 6959/75, European Commission of Human Rights, July 12, 1977, 3 EHRR 24 (1981).

admissibility, the commission found that pregnancy and abortion were within the scope of the European Convention's protection of privacy in **Article 8(1)**. On the merits, the Commission determined that the protection of **Article 8(1)** was not absolute and that government could legitimately intervene in private matters to protect foetal life. However the **BRUGGEMAN** case is a clear acknowledgement of the privacy interests that are infringed upon by restrictive abortion legislation.

Three years after **BRUGGEMAN**, in the case of **PATON V. UNITED KINGDOM**²⁰, the European Commission again took note of a woman's right to privacy in reproductive decision-making. It held that the privacy interests of a woman deciding to have an abortion outweighed those of her husband, who unsuccessfully sought a right to be consulted in the matter.

²⁰ Application No. 8416/78 European Commission of Human Rights May 13, 1980. Para. 27, EHRR 408 (1981).

The right to determine the number and spacing of one's children relates to the right to privacy, but also suggests a government duty to facilitate decision-making in matters of family planning. In 1968, the final act of the International Conference on Human Rights stated that "*Parents have basic human right to determine freely and responsibly the number and spacing of their children and a right to adequate education and information to do so*²¹". This right was restated at the world population conference in Bucharest in 1974, the International Conference on Population in Mexico City in 1984, the **ICPD** in 1994, and the **FWCW** in 1995. In addition **Article 16(e)** of **CEDAW** provides that women and men shall have an equal opportunity to exercise this right.

A woman's ability to exercise her right to determine the number and spacing of her children could depend upon her access to abortion services. A number of scenarios bring to light the manner in which restrictive abortion law infringe

²¹ Final Act of The International Conference in Human Rights, International Conference on Human Rights, Tehran, Iran, May 12 1968.

upon a woman's right to plan her family. A woman who becomes pregnant through the act of non-consensual sex would be forced to bear a child where she is denied the right to abortion. Women who live in settings in which family planning services and education are unavailable may have no means to prevent unwanted pregnancy. Access to safe abortion service may be their only means to prevent unwanted pregnancy and controlling their family size. Finally contraceptive failure will inevitably occur among some of those women who regularly use contraception. Given the many circumstances in which abortion may be the only means of exercising the right to determine one's family size, denying women access to abortion would clearly violate this right.

The right to physical integrity, while commonly associated with the right to freedom from torture is derived from the right to respect for the dignity of the person, the rights to liberty and security of the dignity of the person,

and the right to privacy. The right to physical integrity is explicitly recognized in **Article 4 of the African Charter** and the **Article 5(1) of the American Convention**. Implicit in the right to physical integrity is the right to freedom from unwanted invasion of one's body. A government that forces a woman to carry an unwanted pregnancy to term is, in effect, appropriating her body to accommodate the needs of another, namely the unborn foetus. A woman's right to physical integrity entitles her to decide whether or not she will carry a pregnancy to term.

2.3.4 **COMPETING CONSIDERATIONS: THE FOETUS'S RIGHT TO LIFE**

As noted above the right to life is a fundamental right, recognized in nearly all-major human rights instruments. Where this protection is interpreted to protect the right to life of an unborn foetus, all the rights discussed above would be considerably narrowed by this competing consideration.

However, while the phrase "*right to life*" has been associated with the campaigns of those who oppose abortion, it has not been authoritatively interpreted in an international setting to protect the unborn foetus absolutely.

Even Article 4 of the American Convention, which goes so far as to protect the right to life "*in general, from the moment of conception*" has been interpreted not to preclude liberal national-level abortion legislation. In a challenge to the liberal stance on abortion taken by the U.S Supreme Court in the 1973 case of **ROE V. WADE**, members of an anti-abortion group submitted a petition to the inter-American Commission on behalf of an aborted foetus, referred to as "*Baby Boy*". Because the United States was not a party to the Convention, the challenge was brought under the American Declaration Human Rights, which protects the right to life, but does not specify that protection begins at the "*moment of conception*". The

language of **Article 4** of the Convention was relied upon to assist in the interpretation.

The Commission rejected the petitioner's claims under the American Declaration, noting that an absolute protection of the right to life would have conflicted with the laws regulating abortion and the death penalty in most American states. The Commission then turned to **Article 4 of the American Convention**. Examining the drafting history of Article 4, the Commission found that the drafters chose not to include an unequivocal protection of the right to life from the moment of conception. Rather, they inserted the phrase "*in general*" to qualify that protection. The Commission concluded that: in the light of this history, it is clear that the petitioner's interpretation of the definition given by the American Convention on the right to life is incorrect. The addition of the phrase, "in general, from the moment of conception" does not mean that the drafters of the Convention intended to modify the concept of the right to

life that prevail in Bogota, when they approved the American Declaration. The legal implications of the clause, "in general from the moment of conception" are substantially different from the shorter clause, "from the moment of conception" as appears repeatedly in the petitioner's briefs.

Similarly, in the 1980 case of **PATON V. UNITED KINGDOM**, the European Commission ruled that the term "everyone" in **Article 2** of the European Convention (Protecting "everyone's right to life"), does not include the unborn. The Commission did not determine conclusively whether the life of an unborn foetus is entitled to any protection in **Article 2**. It held however, that even where a foetus is entitled to any protection, **Article 2** could not prevent a woman from obtaining an abortion at an early stage of pregnancy to protect her physical and mental health. In **OPEN DOOR AND DUBLIN WELL WOMAN V. IRELAND**²², a recent case before the European Court of Human Rights, the Court held that a State's declared

²² European Court of Human rights, Para. 69 (Oct. 29, 1992).

interest in protecting the right to life of the unborn did not give it unlimited discretion in taking steps to protect that interest.

It has struck down an Irish ruling restricting the right of a woman's health clinic to counsel women on the availability of abortion service in Great Britain. The Court found that the restriction was "*overboard and disproportionate*" concluding in part that the restriction did little to protect unborn life, while creating "*a risk to the health of those women who are now seeking abortion at a later stage in their pregnancy...*"

It is unclear whether the international community will come to recognise a woman's right to choose an abortion. Over 50 countries, including Canada, South Africa and the United States, have grounded liberal policies in notions of a woman's right to make decisions regarding her own body. If change is to occur incrementally at the national level, advocates for women's rights should continue to seek recognition of abortion rights under national-level human

rights protection. International community has an important role to play in supporting such change and in promoting women's equality.

CHAPTER THREE

3.0 ABORTION'S LEGALITY IN OTHER JURISDICTIONS

Around the world today, individuals, private organizations, politicians, and governments are still striving to liberate the laws of Abortion¹. Much had been achieved in many countries, especially in Northern Eastern Europe, Russia, Japan and more recently in the United States, but there are still many countries notably in Africa and South America where induced abortion is permitted only for very strict indications, yet criminal abortion is an open secret.

In this Chapter, I shall examine the practice of these various Countries and their attendant problems, and this will be compared with the situation in Nigeria.

¹ Hall R.E (1970) In A Changing World, Vol. 1, Columbia Press.

3.1 THE UNITED STATES OF AMERICA

Unlike Nigeria, the United States of America is a country where abortion has been made legal. Due to the decision in **ROE V. WADE**² in 1973, abortion was made legal in all the states, the ruling authorized:

- i) That a state may not, during the first trimester of pregnancy interfere with or regulate the decision of a woman and her doctor to terminate the pregnancy by abortion,
- ii) That from the end of the first trimester until the foetus becomes viable (usually 24-28weeks) a state may regulate abortion only to the extent that the regulation relates to the protection of the mother's health,
- iii) That only after the point of viability may states prohibit abortion except when necessary to save the mother's life³.

² S.C Of U.S 1973, 4, U.S 113, 93 S.C

³ Extract from Time Magazine (Whose Life Is It?) May 1, 1989, p.22, Pertis & Carey, Supra, p.183.

However since that decision, it has been common place to carry out an abortion in a proper hospital or such medical centres established solely for such purposes. Notwithstanding this decision, there are still some groups (i.e. pro-life group) who would like to see abortion banned. In 1989, the **WEBSTER V. REPRODUCTIVE HEALTH SERVICES**⁴ case threatened to disturb the decision in **ROE V. WADE** in a negative manner and the pro-life movement were quite hopeful that it will, but it did not fully reverse the decision, it only made the regulations stricter.

The right to life movement postulates that there is no suitable middle ground. Yet an uneasy middle ground is precisely the territory that many Americans occupy. In one of the polls conducted⁵, about forty percent of the public believed abortion should be available only in case of rape, incest or protection of the mother's health, but a large majority of about sixty percent were of the opinion that the

⁴ U.S.S.C July 1989

⁵ Time Magazine op cit 3 pg 64

decision should be left to the woman. It had also been found that majority of those who have abortion are young unmarried women, at least twenty percent of American women, above the age of 15 have had an abortion, eighty one percent were unmarried at the time, sixty two percent were under 25 years and more than twenty five percent were teenagers. More than two-third of them gave the reason that they were not ready for motherhood.

When this is compared with Nigeria, we find the American law on abortion is quite liberal since it allows the mother freedom in the 1st trimester (i.e. 1-3 months) to have an abortion for whatever reasons without interference of the state.

These particular provisions will cover cases of pregnancy, which might have resulted from rape, incest, or where the mother is not financially capable to afford the baby, or teenage pregnancy in cases where the pregnancy is due to pre-marital or extra-marital sex.

The Nigerian abortion law is very restrictive in nature and only caters for therapeutic abortion; all other cases are unlawful thereby leaving those in need of abortion in the hands of the quack. Though the American abortion law is liberal, it still strives to protect the unborn child by the State regulating the second and third trimesters accordingly as it deems fit. When the figures of American women who have undergone abortion operations quoted above is pitched against the Nigerian situation, one finds that access to good medical care on the part of the American women (which is subsidized by the States at times) help them to continue their lives after an abortion without any major negative impact.

3.2 **EUROPEAN STATES**

IRELAND—Ireland is in a different position when compared to Nigeria, since it does not in any way allow abortion. Being a predominantly Catholic society, Ireland has imposed a total ban on abortion whatever the circumstances. Compared with Nigeria it can be said that

though the Nigerian abortion law does not allow abortion, the exception created by **Section 297** of the Criminal Code and the decision of the former West African Court of Appeal in **R V. EDGAL**, no matter how slight gives a chance, or caters for situations of utmost necessity. In a controversy that rocked Ireland and outraged Europe⁶, a 14years old girl who was allegedly raped by her best friend's father and about 12 weeks pregnant was barred by a high court judge from travelling to Britain to get an abortion, even though she declared that she would rather kill herself than have the child. The judge Dean Costello said in a lengthy ruling that he had no choice but to follow the law, though it might be *"very painful, distressing and tragic for the girl and her family"*. This decision had sparked protests across Ireland to Britain with hundreds of demonstrators marching in Dublin and London. They protested that Ireland defends men's right to procreate by rape, that the ruling violated a European community law allowing citizens to travel to another

⁶ Extract from Time Magazine, "A Case of Blind Justice", March 2, 1992, p.39

European community nation to obtain legally available services such as abortion.

Basically in the rest of Europe, the law applicable varies from country to country, but most if not all the countries seem to have liberalized their abortion legislations. In **Germany**, for instance though it still technically protects the unborn child, it has passed an abortion statute. Holland, Norway, Belgium and Italy e.t.c. have in one form or the other legalised abortion in their countries.

3.3 **ASIAN STATES**

INDIA—In India abortion was formerly governed by the provisions of **Section 312** of the Penal Code, but in 1969, The Medical Termination of Pregnancy Bill (1969) was introduced in the Indian Parliament.

The bill provides for significant exemptions from the provisions of the Penal Code and specifies that a pregnancy may be terminated by a medical practitioner, where the

duration of the pregnancy does not exceed 12 weeks. It further provides that where it exceeds 12 weeks but does not exceed 20 weeks, it must be shown that the continuance of the pregnancy will be harmful to the pregnant women's health (physically or mentally) or life or that the child might suffer some mental physical disabilities if born.

SINGAPORE—Also in Singapore, abortion was previously permitted under **Section 312** of the Penal Code (1872) only to save the life of the mother, but in 1965, an Abortion Act was promulgated and later became law in 1970. This law has liberalized the procedure for authorizing abortion, and in its provisions it has gone further than the Indian "Pregnancy Bill" to cater for cases involving finance (i.e. where the woman is not financially capable), illegal sexual relations or intercourse with an insane or feeble-minded person, apart from rape, risk to life (mother), abnormal risk e.t.c.

Singapore authorizes treatment to terminate pregnancy if its Termination of Pregnancy Board is of the opinion:

- a. That the continuance of the pregnancy would involve serious risk to the life of the pregnant woman or serious injury to her physical or mental health
- b. That the environment of the pregnant woman both at the time when the child would be born and thereafter so far as it is foreseeable justifies the termination of pregnancy. (The expression "*environment*" includes family and financial circumstances of the pregnant woman) or
- c. That there is a substantial risk that if the child is born it would suffer from such physical or mental abnormalities as to be seriously handicapped or
- d. That the pregnancy is the result of rape, incest, illegal sexual relations or intercourse with a feeble minded person; thereby catering for almost all the exceptional reasonable circumstances, as the case may be.

CHINA—China adopted the one-child policy in 1979 to help slow down the galloping population growth rate. The case of China is somewhat different from other jurisdiction because a family is permitted to have only one child and a subsequent pregnancy becomes illegal and subject to termination by abortion.

In China, parents are routinely sterilized and face large fines if they have more than one child. Many want their one child to be a son, so as a result parents who can afford it have their children screened in the womb, and then abort the girls⁷. The Chinese programme is characterised by incentives and disincentives. However, the policy has been relaxed in some areas, and some parents are allowed to have a 2nd child in return for paying a fee. The government equally claims that it has successfully prevented 250 million births since it was introduced. The shortfall with the Chinese policy is the forced abortion, which makes couple commit abortion against their will.

⁷ The Chinese Govt. legislates against Gender based Abortion

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In the case of African countries, there are some countries where induced abortion is only permitted for very strict indications⁸, but where the existence of criminal abortion is an open secret. Most of these countries have retained their legislation introduced by their colonial masters, and in most cases these are outdated and are doing more harm than good. Both to women whose interest they intended to protect and to the public in general.

Countries like **GHANA, SIERRA LEONE**, and **UGANDA** for example continue to follow the provisions governing abortion in the Offences against the Person Act of (1861). The pattern is same in the French speaking countries. Here the legislation on abortion remains based mainly on the corresponding provisions of the French Penal Code, Public Health Code and Code of Medical Ethics (W.H.O 1971)⁹.

⁸ Oladele Akintola "Africa, Abortion and Law" Nigerian Medical Journal, Vol. 3, No.3 (July 1973), 128.
⁹ W.H.O 1971: Abortion Laws: A Survey of Current World Legislation, W.H.O Publication.

In **COTE D'VOIRE** for example **Section 26** of N0. 62-248 of July 1964 establishing a code of medical ethics reproduces the provisions of **Section 38** of the French Code of Medical Ethics. The same is true of Senegal which reproduced it in its own **Section 35** of Decree of February 1967. However, some French speaking states of Africa have departed from the standard legislation, to which reference had already been made, and made more liberal laws for themselves, for example Cameroun, Morocco and Tunisia.

In the **CAMEROUN**, **Section 339** of her Penal Code promulgated by the law of June 1967 prescribes that the penalties imposed in cases of abortion are inapplicable to acts performed by a qualified person and proved necessary to save the mother from serious damage/danger to her health. Moreover in case where pregnancy has resulted from rape, abortion performed by a physician does not constitute an offence, provided the facts of the cases have been verified by the public prosecutor's office. Though the

situation in Nigeria is not different from this, the Cameroun abortion legislation has taken a step further to cater for rape cases.

In **Morocco**, a Crown Decree in July 1967 repealed the law of 1939 and also amended **Section 453** of the Penal Code which now provides that, abortion is not punishable when it constitutes a necessary measure to safeguard the health of the mother and is openly performed by a physician or surgeon with the permission of the spouse.

Also **TUNISIA's** abortion law of 1967/68 amended **Section 214** of its Penal Code. When these countries i.e. Morocco and Tunisia are compared with Nigeria, like said earlier in Cameroun's case, they have all gone steps further than Nigeria.

3.5 **INTERNATIONAL ORGANIZATIONS**

In recent years, international organizations have recognized the right of all individuals and couples to make

reproductive choices. In 1968, the International Conference on Human Right in Tehran affirmed the right to reproductive choice, which includes the right to have an abortion. This right was re-affirmed at the first UN World Population Conference held in Bucharest in 1974 and again at the second such conference in Mexico City in 1984. In the words of the report of the Bucharest Conference, "*All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education, and means to do so*"¹⁰.

Further, an organization known as the NARAL PRO-CHOICE AMERICA published an article on September 22, 2003 supporting abortion as a legal right for women which invariably means that women have the right to decide/choose whether to have a baby or to abort it at a particular time.

¹⁰ 1968, Final Acts of the International Conference on Human Rights A/Cmf. 32/4. New York: United Nations.

The basic thing which most International Organizations preach are women's right to reproductive choice. The declaration of International Institutions and Global Conferences put government on notice that women should have the right to control their fertility and their own live. Hence, those family planning programs can help women to achieve these rights.

CHAPTER FOUR

4.0 **PROBLEMS OF RESTRICTIVE ABORTION LAWS**

Where the law governing abortion were enacted, it was primarily to stop abortion except in case of therapeutic abortions but so far the laws have not been able to stop abortion i.e. illegal abortion but rather generates a lot of problems which were unforeseen initially when the laws were promulgated. This is as a result of the restrictive nature of the laws, which do not allow for flexibility.

To remedy such a situation and to stop further problems from coming up, the laws should be relaxed in order to avert the crime for which it was made, and not to elevate it.

4.1 **INCREASE IN THE NUMBER OF DROPOUTS**

Basically one of the things to be noted in countries still operating restrictive abortion laws or a total ban in abortion is the high rates of dropouts from schools. When a teenager

is unable to have an abortion, most of the time, she drops out of school temporarily (but some end up being permanently out of school) to have the child and raise it.

This is common in Nigeria, which has restriction on the abortion law. While in United States, the states which made laws stricter by creating more conditions to be fulfilled include Indiana, Louisiana, Massachusetts e.t.c, have all recorded an increase in the rate of dropouts from high school and underachievers in the society¹. When such situation are compared to societies with more liberal abortion laws catering for almost all the other exceptional cases that are not therapeutic e.g. Singapore, Japan, India, and Canada, it is noted that though they have dropouts, the rate is not as high as the female folk in other societies mentioned and the cause is not unrelated to the abortion regime.

¹ Time Magazine: "Abortion's Hardest Cases" July 9, 1990, p.32

4.2 OVER POPULATION

Another problem faced by countries banning abortion outright or operating restrictive abortion law is that of overpopulation of the society.

The high rate of unwanted births will inadvertently result into population explosion. From the last census conducted, it was shown that the Nigerian population amounts to about 150 million. Comparing this figure with the figures from past census, it can be said that the Nigerian population has increased though not yet overpopulated it is moving towards that point. It is worthy to note, that China is practicing compulsory abortion for any couple who² already have one child in the aim of controlling its population growth since they have been grappling with population explosion problem.

² Abortion Questions and Answers, J.C Willke (1985), Jayes Publishing; 1988, 1990, pg. 25.

In America, the story is the same. A study³ conducted between 1980-1984 indicated that the birth rate for 15-17years olds in Minneapolis (in Minnesota,

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³Time Magazine, opp. cit. Pg. 32

olds not covered by such restrictive regulations rose only by 0.3%.

4.3 **POVERTY/ DESTITUTION/ UNDEREDUCATION**

The lower income strata of society suffer a lot of deprivation in societies with strict abortion regime like Nigeria. The situation is different in the developed countries like Britain, which has a high rate of welfare dependants especially single mothers and young unmarried ladies. In America, it has been found that 8 out of 10 girls who have babies at 17 or younger drop out of school. Those children born to U.S teenagers are much more likely to grow up in poverty and be under educated and poorly housed and children born of teenage mothers are twice likely to die in infancy than those born of women in their twenties. The Nigerian situation is not far from this.

4.4

ABANDONED BABIES

This problem is quite peculiar to countries with restrictive abortion laws and those with bans on abortion, Nigeria can serve as a typical example of such societies. For the past few years, there has been an increase in the number of abandoned babies, which have been taken to the motherless baby home. Also in America⁴, it has been said that the main reason why these teenagers resort to this is that they have parents who are neglectful e.g. alcoholic mothers, drug addict fathers' e.t.c.

4.5 **ILLEGAL ABORTIONS/ COMPLICATIONS FROM QUACK DOCTORS**

Until abortion laws are given a closer look and its provisions made wide enough to accommodate the existing situations in society there will continue to be a high rate of illegal abortions. It has been variously estimated that there are a

⁴Time Magazine, opp. cit. Pg. 32

hundred hidden abortions for everyone brought to official notice⁵.

In pre-war Britain, it was said⁶ that about 16% of all pregnancies ended unlawful abortion. This translated into 150,000 abortions per year while German figures for this period were 200,000 abortions per year.

In France, it was reported that for every child born there were four abortions. By 1956, the head of Dusseldorf Criminal Police estimated West German abortion rate at 500,000 as against 1% of this figure shown on police records. By 1960 the figure had risen to 1,000,000 illegal abortions as against 300,000 prosecutions. In Nigeria, in 1981 a newspaper survey reported that at least 1,800 abortions were recorded for the whole year⁷. A point to note here is that most women after illegal abortions in the hands of quack doctors often suffer complications, because of the

⁵ L. Radzinowicz and J. King: *The Growth of Crime*, Penguin Books, 1977, pg. 44.

⁶ *The Growth of Crime* op cit 5 pg. 84

⁷ "Pregnancy Termination and the Law in Nigeria", Okagbue N.M.P. Vol. 16, No. 4, 135, 138 (1988). The author informed that most of the abortions were corrections of botched abortions performed by medically untrained personnel.

unskilled way in which the process is handled and most of the abortions carried out by these doctors are without pre or post surgical care, on an assembly line basis for cash, with far less sophisticated equipment and poor trained (if any) personnel (frequently in a chemist's shop). Clearly the safety of abortions done by such people and in such places cannot be guaranteed.

4.6 **MORTALITY (DEATH)**

The major problem encountered by various countries as a result of illegal abortion, is the death tolls of the victims. In America, there was a case of a 17year old girl who went outside her state (because of its restriction of age) to another state for an illegal abortion and died in the process. There are many such cases in Nigeria, i.e. the Youth Corper doctor who worked in one of the rural hospitals, always got cases of an average of three mutilated school girls every week from quacks out of whom one usually died.

These findings strengthen the points that some positive steps should be taken on the Nigerian abortion laws, because abortion legal or illegal is a fact which cannot be wished away.

The health safety and dignity of the female members of society should be paramount in the formulation of new laws and regulations that will usher in a more humanistic abortion approach in Nigeria.

CHAPTER FIVE

5.0 THE CASE FOR THE REFORM OF NIGERIA'S ABORTION LAW

From the foregoing chapters, a fundamental fact emerges to wit, whether abortion is legalized or not, it will continue to be practiced by women as a way of family planning and though it is illegal now, the number of women indulging in it is increasingly steadily and at the close of the century at least two out of every ten to fifteen women in the society would have undergone an abortive operations sometime in their life. Therefore to prevent more unforeseen problems of the future and to save these women from the hands of the quacks it is only proper and sensible to lessen the strictness of our abortion laws, since its illegality is creating many problems as discussed.

It may be observed that the prosecutions in abortion cases, when they do occur expectedly tend to be directed only against the abortionist, where the subject of the

abortion is dead. The punishment is always imprisonment, as a disposition method for the offence. However, the legislature overlooks the fact that an unwanted child will ultimately create problems for the society. For example, an unwanted child is likely to suffer severe parental deprivation in terms of lack of maternal love and too strict "*discipline*" with its attempted forensic criminal implications¹. The child may even end up abandoned by its mother to die or be adopted. Another problem created by these unwanted children is that of underachievement and dropping out of school on the part of the mother. Most of the time, young girls who get pregnant while in school and end up having the babies often have to interrupt their schooling either temporarily or permanently.

Further, abortions are not easily detected and in the few instance when abortions are detected by law

¹ Maternal deprivation at a tender age (up to 3years) has been held to lead to the child becoming an "affectionless" character prone to violent crime. H.Man.Hein, "Comparative Criminology", Routledge & Kegan Paul, London (1965) Pg. 617.

enforcement agents, pity and chivalry are stirred up in them by the women's predicament.

This is one of the ineffectiveness of the present law on abortion. Again, women who cannot afford expensive abortion due to the illegality of abortion and do not want to be at the mercy of quack doctors, will have no choice but to have such children though they are unwanted. This will inadvertently mean more mouths to feed with too little money to go round. Pertinent to note that since Nigeria does not have any welfare programme of funding provided for those in the lower income bracket during times of need, such families find it difficult to make ends meet and often end up depending on friends and relations who see them as burdens, or end up being destitute.

On another level, the society views itself as the "*victim*" of the abortionist's misdeeds forgetting that the community or society itself has sown the seeds of its own "*victimization*" by creating the festering situation in which the offence

thrives². Since many abortions carried out in Nigeria result from premarital or extramarital sex, that indicates sexual permissiveness in our society.

In this connection, mention ought to be made of studies which have shown large family size may predispose children to delinquency due to lack of discipline, poor housing, feeding and general maintenance. A Swedish study of 120 children born following refusal of abortion request of their mothers showed a high incidence of delinquency, psychiatric problems and criminal behaviour among them³.

In view of the foregoing, it does appear that abortion laws should be an essential component of the individual determinism of a capitalist oriented political system and there is no empirical proof that promiscuity in the country will increase since it is the upbringing of morality and discipline. Therefore for an improvement on the moral

² "Comparative Perspective of Nigerian Abortion Laws". Akin Ibidapo – Obe from Ogun State University Law Journal Vol.1, pg. 43.

³ Bella Okagbue "Pregnancy Termination and the Law of Nigeria" in Nigerian Medical Practitioner, Vol.4, No.16, 135, 138 (1988)

density of the society, parents must learn to take responsibility for their children's moral upbringing and the traditional moral institutions such as the school, church, mosque and the family will also have to be involved.

5.1 **RECOMMENDATIONS**

Since many abortions carried out in Nigeria result from premarital and extra-marital sex, it seems that the drive against "*criminal abortion*" can only be supported by a tripod whose first leg is "*sex and moral education*" especially among school children. For this to succeed, the traditional moral institutions such as the school, church, mosque and the family would have to be involved⁴. This is grounded in the fact that charity begins at home: this also applies to the upbringing of a child. It is in the home that the child learns his first lessons, and it is in the home, which will serve as the beginning of his moral teachings to give him a good foundation. If anything goes wrong from this early stage

⁴ Wale Okediran: The Guardian Newspaper, Monday, Nov 18, "The Abortion Debacle" (1991)

(e.g. lack of parental care and guidance, exposure to bad influence and moral laxity), it is only normal for such a child to build on that beginning and practice whatever he has learnt from that period of his life. Doctors and psychologists have stated , that the first fifteen years of a child forms his personality, and whatever tendencies a person shall have in future, would be formed in those fifteen years of growing up. It is therefore important for the parents to be involved in their children's day to day activities in the early stages of their life and guide and correct them when they deviate from acceptable standards of behaviour. Parents must learn to take responsibility for their children's moral upbringing.

Since another prime reason for abortion is that children are unwanted by either the father or mother, the second step of the tripod against this practice is "*adequate family planning techniques*". Unwanted babies are better prevented before and not after conception⁵. If there is adequate information and knowledge of the advantages of family

⁵ Children Encyclopedia 1975 vol 15 (Parents guild) pg 75
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planning, more people will prevent rather than cure it. In Nigeria, for example one of the problems causing unwanted pregnancy is that there is no proper method of educating the people on the advantages of family planning. It is only recently that the government embarked on a family planning program, and even still, more work needs to be done by the government in this regard.

Most people feel that sex and moral education are esoteric matters not to be talked about freely and openly, a "talk" reserved solely for the bedroom. Most people have inhibitions engaging in such conversations with their children. The result of all these attitudes, are illegal abortions, abandoned babies and unwanted pregnancies. Although abstinence as a form of birth control is good, it is rarely practicable except if one has taken and maintains a vow of celibacy. Therefore sexually active adults need access

to safe, simple and cheap family planning techniques devoid of any religious sentiments⁶ .

The third leg of the tripod is the "*liberalization of abortion laws*". An absolute legalization of abortion will not solve the problem of unwanted pregnancies since the symptoms than the cause of the "disease" will be attacked. Therefore a realistic approach is to make certain provisions for those instances when the health of a mother, the baby, and other children could be jeopardized by an existing pregnancy for whatever reasons. By so doing, women who invariably have to carry the emotional and physical strain of unwanted pregnancies could seek succour rather than take other drastic measures that could harm their lives or those of the babies. The present law stifles progressive development of medical expertise in this area because medical personnel are understandably afraid to exercise their skills for fear of criminal sanctions⁷ .

⁶ Pertis and Carey, Opp. Cit.

⁷ Akin Ibidapo – Obe, Opp. Cit.

CONCLUSION

Irrefutably, it is time that Nigerian policy makers recognize the sheer importance of our criminal law in the face of widespread persistent and often necessary "*criminal*" behaviour. Despite the criminalisation of abortion, majority of needy women merely go ahead and find their own means of getting it, often at grave risk to their lives. The need for improved regulated abortion procedures definitely far outweighs any social harm implicit in retaining laws against it.

Abortion is strictly speaking, a victimless offence unlike stealing or armed robbery for example where other members of society suffer direct disability or financial loss. This and its indubitable social utility are enough justification for decriminalization⁸.

⁸ Chioma Obinna – Vanguard Newspaper, Tuesday, March 30, (2010): "Unsafe Abortion: New Concerns about an old problem".

In countries where abortion has been decriminalized, there may be need to review the restrictive procedure which render liberalization ineffectual. Nigeria should take a cue from Singapore and follow in the line of their Abortion Act (1969). In Nigeria alone, about 760,000 abortions occur annually despite the country's restrictive abortion laws¹¹. Experts say unsafe abortion is one important reason Nigeria reports one of the world's highest maternal ratios of 1,000 deaths per 100,000 live births. It is vital that our government provide safe abortion services to the limit of the law and proper post abortion care services; if not more Nigerian women will be sent to their graves.

We must be conscious of the Malthusian theory of a direct linkage between population and resources in the economic and social development equation and gear our policies to this end.

Finally, one earnestly hopes that the "wind of changes" will soon blow over our nation with respect to her abortion laws. A review of our current system is urgently needed, reflecting the social needs of our time. Nigeria can show her sister societies that attention to social ills of the people is of paramount interest to any progressive government.

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