

A CONTRADICTION BETWEEN THE ILLEGALITY OF ABORTION UNDER THE NIGERIAN LAWS AND THE REPRODUCTIVE HEALTH RIGHTS OF WOMEN IN NIGERIA: AN ANALYSIS*

Abstract:

Abortion is and remains illegal in Nigeria, except when performed to save the life of the pregnant woman. Abortion is outlawed in the various states in Nigeria, with a minimum penalty of Fourteen (14) years imprisonment for Doctors who conduct abortions and Seven (7) years imprisonment for women who obtains abortion. Despite the fact that abortion is illegal, many women in Nigeria have it performed clandestinely, with potentially hazardous outcomes. Reproductive rights are a category of human rights that includes the freedom to make free and informed decisions about reproduction and sexual health. The International Commission on Population and Development recognized women's reproductive and sexual health rights as critical to their overall health. The Convention on the Elimination of All Forms of Discrimination Against Women contains several articles that serve as the foundation for these rights. These rights include the freedom to choose how many children to have and how far apart to have them, the right to privacy, and the right to be free from prejudice. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was ratified by Nigeria in 1985 and since then has formed part of our body of laws. This article examined the textual framework of women's rights to sexual and reproductive health, as reflected in this and other international human rights instruments and contended that right to abortion is covered in rights to autonomy and privacy in making sexual and reproductive decisions. The paper concluded that criminalization of abortion in Nigeria is criminalization of Sexual Reproductive Rights of Women and this runs contrary to the obligations demanded from Nigeria having signed and ratified several international instruments and convention on protection of women's right. It recommended the review of the watertight criminalization of abortion laws in Nigeria with the view of saving the lives of so many young women who pay the ultimate price while clandestinely obtaining abortion.

Keywords: Reproduction, Human Right, Right to Life, Abortion, Health Rights, Women.

1. Introduction

The International Conference on Population and Development (ICPD), held in Cairo in 1994, heralded the adoption of a new paradigm for tackling human reproduction and health care. For the very first time, there was a clear emphasis on individual needs and women's empowerment, as well as the development of an evolving discourse about the relationship between human rights and health, which linked new conceptions of health to the struggle for social justice and human dignity.¹ The ICPD's approach to reproductive health and rights is based on the belief that women are fundamentally valuable and that their health and well-being are genuinely important. Women's reproductive right has now become a means of empowering women to exercise personal autonomy over their sexual and reproductive health within their social, economic, and political context.

Women have reproductive rights based on core human rights safeguards. These assurances have been included into both traditional human rights instruments and recent international and regional treaties. Articles approved at United Nations conferences, like the 1994 International Conference on Population and Development (ICPD), expressly link nations' commitments to safeguard reproductive rights with international treaties.

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¹ C Shalev, expert member, CEDAW; 'Rights to Sexual and Reproductive Health - the ICPD and the Convention on the Elimination of All Forms of Discrimination Against Women', available at <<https://www.un.org/womenwatch/daw/csw/shalev.htm>>, accessed 16th December, 2024.

As stated in Paragraph 7.3 of the ICPD Programme of Action:

Reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.²

A number of interpretations made by the UN and regional human rights authorities in landmark judgments have given these legal principles more weight and substance. Furthermore, governments are now frequently advised to take steps to protect women's sexual and reproductive rights by the UN treaty monitoring organizations, which are tasked with keeping an eye on countries' adherence to important human rights accords.

Two new documents that specifically acknowledge women's reproductive rights build on these advancements. The first comprehensive international human rights document to explicitly recognize the right to reproductive and sexual health as a human right is the Convention on the Rights of Persons with Disabilities, also known as the Disability Rights Convention.³

At the regional level, a woman's right to control her fertility is explicitly guaranteed by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on the Rights of Women in Africa), which clearly states that women's reproductive rights are human rights. Additionally, it offers a thorough assurance of women's access to family planning and reproductive health services. The protocol explains African governments' responsibilities for women's sexual and reproductive health and upholds women's autonomy and choice in reproductive matters.

Recently, the international development agenda has also included reproductive rights. The UN Millennium Development Goals (MDGs) were adopted in 2000, and governments have since recognized the importance of addressing women's reproductive health in advancing development. Leaders from five countries expressed a clear commitment to attaining universal access to reproductive health by 2015 in the agreement created at the 2005 World Summit.⁴ As there is close alignment between the MDGs and the human rights framework, the MDG agenda provides yet another vehicle for advancing women's reproductive rights.

On the flip side, Abortion is illegal in Nigeria. The termination of a pregnancy before it reaches viability is known as an abortion.⁵ To put it another way, ending a pregnancy before the fetus is mature enough to live on its own. A pregnancy can end purposefully (induced abortion) or naturally (miscarriage or spontaneous abortion). Nonetheless, induced abortion is referred to as abortion in the context of this paper. In Nigeria, induced abortion is unlawful unless it is performed specifically to preserve the woman's life.⁶

² Beijing Declaration and the Platform for Action, Fourth World Conference on Women, Beijing, China, September 4-15 1995, U.N. Doc. A/CONF.177/20 (1996) [hereinafter Beijing Declaration and Platform for Action] available at <http://www.un.org/womenwatch/daw/beijing/platform/> Accessed 24th December 2024.

³ Rights of Persons with Disabilities, adopted Dec. 13, 2006, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (2006), 1249 U.N.T.S. 13 [hereinafter Disability Rights Convention] (entered into force May 3, 2008)

⁴ See United Nations General Assembly, 2005, 'World Summit Outcome', U.N. Doc A/Res/60/1 (2005).

⁵ BA Garner (ed.), *Black's Law Dictionary*, (8th edition, 2004); The New International Webster's Comprehensive Dictionary of the English Language - Encyclopedic Edition (Typhoon Media Corp. 2004).

⁶ Criminal Code Act (1916) Cap. (C38) Laws of the Federation of Nigeria 2004, section 297; Penal Code Act (1960) Cap. (532) Laws of the Federal Capital Territory of Nigeria 2007, section 232.

Given this, a pregnant woman cannot get an abortion at any government facility if she does not want a child, even for the most serious or legitimate reasons⁷—unless, of course, the pregnancy poses a threat to her life. Because the cost of procuring abortion from the services of a willing private clinic is a exorbitant, she is compelled to have an unsafe abortion⁸ performed by untrained professionals using unsanitary circumstances and improper, contaminated instruments.

The result is the staggering statistics of 1,000 out of every 100,000 maternal deaths arising from the estimated 1,000,000 abortions carried out in Nigeria each year.⁹

As already stated, in all parts of Nigeria, abortion is a criminal offense except where it is performed to save the life of the mother. In the South, the relevant provisions are *sections 228, 229, 230, 297, and 328* of the Criminal Code.¹⁰ In the North, the relevant provisions are *sections 232, 233, 234, 235 and 236* of the Penal Code.¹¹ For the states that have adopted the Sharia Legal System, abortion is also criminalized by the Sharia Penal Code Law.

These Criminalization of abortion runs foul to the reproductive health right of a woman particularly The Right to Decide the Number and Spacing of Children, as this right guarantees that women have the right to determine the spacing of their children as well as when they are mentally and psychologically balanced to bore children.

This Paper intends to review these provisions of the several criminal laws in Nigeria and compare it with Women's Right to Sexual Reproduction and discuss conflicts if there are any.

2. The Contending Rights at a Glance

The Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity, adopted by 29 experts, and the Asian Human Rights Charter, a civil society initiative aimed at establishing a regional human rights treaty, demonstrate the ongoing development of human rights norms that support reproductive rights. A detailed explanation of these developments has been omitted for the sake of conciseness. However, as these and other developments demonstrate, reproductive rights are not only firmly safeguarded by human rights instruments, but their awareness and respect are expanding and deepening on a worldwide scale.

There are twelve human rights key to reproductive rights, to wit:

- (i) The Right to Life
- (ii) The Right to Liberty and Security of Person

⁷ Criminal Code Act (1916) Cap. C38, Laws of the Federation of Nigeria 2004, section 228. There are several reasons why a pregnant woman may want an abortion, but cannot get it in government hospitals. These include being single, financial difficulty or inability to cater for a child, fear of expulsion from school, and fear of parents for young girls; Y.G. Abbas, Causes and Impact of Unsafe Abortion in Nigeria 18-19 (2014) (unpublished MPH thesis, KIT Royal Tropical Institute) (on file with author).

⁸The World Health Organisation (hereinafter WHO) has defined unsafe abortion as a procedure for terminating unwanted pregnancy either by persons lacking the necessary skills or in an environment lacking minimal medical standards or both. World Health Organization [WHO], Preventing Unsafe Abortion, Fact Sheet 2016, <https://www.who.int/mediacentre/factsheets/fs388/en>, accessed 25th December, 2024.

⁹ An estimated 1.25 million induced abortions occurred in Nigeria in 2022, equivalent to a rate of 33 abortions per 1,000 women aged 15–49. The estimated unintended pregnancy rate was 59 per 1,000 women aged 15–49. Fifty-six percent of unintended pregnancies were resolved by abortion. About 212,000 women were treated for complications of unsafe abortion, representing a treatment rate of 5.6 per 1,000 women of reproductive age, and an additional 285,000 experienced serious health consequences, but did not receive the treatment they needed. See A. Bankole *et al*, 'The Incidence of Abortion in Nigeria', 41 INT'L PERSP. ON SEXUAL & REPROD. HEALTH 170-181 (2022), available at <<http://www.guttmacher.org/journals/ipsrh/2022/10/incidence-abortion-nigeria>, accessed on 25th December 2024.

¹⁰Criminal Code Act (1916) Cap. C38 Laws of the Federation of Nigeria 2004, ss 228-230, 297, 328. The Criminal Code Act does not apply throughout Nigeria except with respect to federal offenses, that is, offenses relating to matters on the Exclusive Legislative List of the Constitution. This is because crime is generally a residual matter reserved for states. Individual states have their Criminal Codes, but the provisions are similar to the Criminal Code Act.

¹¹The Penal Code Act, although a federal legislation, does not apply throughout Nigeria, but only in the Federal Capital Territory (except for Federal Penal Code offenses contained in the Penal Code (Northern States) Federal Provisions Act, Cap. (P3) Laws of the Federation of Nigeria 2004). This is because crime is not on the Exclusive or Concurrent Legislative List of the Constitution. The Penal Code applies in states that have not adopted the Sharia Legal System or to non Moslems in states that have adopted the Sharia Legal System in the North. Individual states have their Penal Codes but the provisions are similar.

- (iii) The Right to Health, including Sexual and Reproductive Health
- (iv) The Right to Decide the Number and Spacing of Children
- (v) The Right to Consent to Marriage and to Equality in Marriage
- (vi) The Right to Privacy
- (vii) The Right to Equality and Non-Discrimination
- (viii) The Right to be Free from Practices that Harm Women and Girls
- (ix) The Right to Not be Subjected to Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment
- (x) The Right to be Free from Sexual and Gender-Based Violence
- (xi) The Right to Access Sexual and Reproductive Health Education and Family Planning Information
- (xii) The Right to Enjoy Scientific Progress.

These rights are irreducible minimum in the parlance of sexual reproductive health rights of women. They are necessary guarantees and an offshoot of all the rights as contained in the Universal Declaration of Human Rights.

2.1 The Right to Life

The right to life is one of the human rights that underpins reproductive health rights. According to the World Health Organization (WHO), reproductive health is a state of full physical, mental, and social well-being in relation to the reproductive system. The Sustainable Development Goals (SDGs) of the United Nations acknowledge the importance of reproductive health and rights for economic and social development, gender equality, and overall health.

All international conventions on the rights of women and even regional conventions agree to the fact that right to sexual reproductive health rights cannot be guaranteed without an extensive intercourse with right to life.

The right to life is an inherent human right that protects individuals from arbitrary death. However, other ethicists contend that the right to life depends on additional qualities, such as the capacity to plan for the future. Safe abortion services are a basic human right that safeguard a woman's right to life and health. The choice of whether or not to carry a pregnancy to term belongs to women. This is line with the ambit of the discuss on the expanse of reproductive health right to mean a state of complete physical, mental, and social well-being in all matters related to the reproductive system. This includes the right to have a safe sex life, the ability to reproduce, and the freedom to decide when and how often to do so.¹²

The rights to privacy, health, life, and non-discrimination are all protected by international human rights conventions. Governments are responsible for the high rates of mortality and injury from unsafe abortion practices as well as for limiting access to abortion.¹³

The African Protocol on Rights of Women (2003) requires states to protect women's reproductive rights, including the right to medical abortion in cases of rape, incest, sexual assault, or when the pregnancy endangers the mother's health.¹⁴

¹² Paragraph 7.2 of Programme of Action of the World Conference on Human Rights, Vienna, June 1993.

¹³ Abortion and Human Rights Government Duties to Ease Restrictions and Ensure Access to Safe Services, available at <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/BRB_abortion_hr_revised_3.09_WEB.PDF> accessed 25th December, 2024.

¹⁴ G Olaide and O Titilayo, 'Aderibigbe Justification of Women's Right of Access to Safe and Legal Abortion in Nigeria', <[https://brill.com/view/journals/ajls/7/2/article-p177_1.xml#:~:text=It%20is%20important%20to%20note,women%20who%20can%20afford%20them.&text=Making%20abortion%20legal%20and%20ensuring,health%2C%20economic%20and%20moral%20imperatives.&text=Research%20has%20shown%20that%20Nigerian,maintain%20when%20it%20is%20born](https://brill.com/view/journals/ajls/7/2/article-p177_1.xml#:~:text=It%20is%20important%20to%20note,women%20who%20can%20afford%20them.&text=Making%20abortion%20legal%20and%20ensuring,health%2C%20economic%20and%20moral%20imperatives.&text=Research%20has%20shown%20that%20Nigerian,maintain%20when%20it%20is%20born>)>, accessed 25th December, 2024.

Restrictive abortion laws, especially those that forbid and criminalize abortion under all circumstances, have been repeatedly condemned by the CEDAW Committee¹⁵, which has also established that these restrictions encourage women to have unsafe and illegal abortions.¹⁶ Restrictive abortion legislation have frequently been characterized by the Committee as a breach of the rights to life and health.¹⁷

The Committee has expressed concern regarding high rates of maternal mortality due to high numbers of abortions among adolescents,¹⁸ and unsafe, clandestine, and illegal abortions.¹⁹ It has noted that women's need to resort to unsafe abortion is linked to their due to criminalization of abortion in several countries. The Committee has recommended that states parties increase access to family planning as well as to sexual and reproductive health information to reduce the number of unsafe, clandestine, and illegal abortions—and the maternal deaths that result.

2.2 The Right to Life and Reproductive Choice – Abortion

One of the main causes of maternal death and morbidity is unsafe abortion. Since abortion is illegal in many countries, official data on the matter on these reports consistently show a link between unsafe abortion and high rates of maternal mortality and morbidity, which are manifested as pregnancy complications and hemorrhaging.

In majority of third world countries who illegalized abortions, it is reported that haemorrhage and infection after abortion are major causes of death, though actual figures are not ascertainable given the illegality of abortion. The Dominican Republic, similarly, reported that 'clandestine abortions' are the third leading cause of maternal death (following toxemia, and haemorrhages during childbirth).²⁰

The criminalization of abortion is especially egregious because it not only denies women the freedom to make important decisions about their lives, but it also exposes them to the grave health risks associated with unsafe abortion, which violates their rights to bodily integrity and, in the worst situations, to life itself.

There are exceptions to the criminal norm in many nations, which permit abortion under specific conditions, such as when the mother's or the fetus's life is in jeopardy or when rape resulted in the pregnancy. However, in Indonesia, rape is not a legal reason for an abortion, thus the state is essentially making the sexual violence against the woman worse by making her bear the resulting pregnancy.²¹

3. The Right to Life and Reproductive Choice – Family Planning

Women who have the right to reproductive choice are able to make decisions about whether or not to have children, including whether to carry or end an undesired pregnancy and which family planning and contraceptive technique they prefer.

Given the risk of maternal mortality and the fact that abortion is banned in many nations, women's sexual and reproductive health as well as reproductive choice are greatly impacted by their right to family planning education, information, and services.

¹⁵ See, e.g., Andorra, 48, U.N. Doc. A/56/38 (2001); Antigua and Barbuda, 258, U.N. Doc. A/52/38/Rev.1, Part II (1997); Belize, 56, U.N. Doc. A/54/38 (1999); Bolivia, 82, U.N. Doc. A/50/38 (1995);

¹⁶ See, e.g., Antigua and Barbuda, 258, U.N. Doc. A/52/38/Rev.1, Part II (1997); Chile, 19, U.N. Doc. CEDAW/C/CHI/CO/4 (2006).6

¹⁷ See, e.g., Belize, 56, U.N. Doc. A/54/38 (1999); Chile, 228, U.N. Doc. A/54/38 (1999); Colombia, 393, U.N. Doc. A/54/38 (1999); Dominican Republic, 337, U.N. Doc. A/53/38 (1998); Paraguay, 131, U.N. Doc. A/51/38 (1996).

¹⁸ See Mexico, 445, U.N. Doc. A/57/38 (2002)

¹⁹ *Ibid.*

²⁰ C Shalev, expert member, CEDAW, Rights to Sexual and Reproductive Health - the ICPD and the Convention on the Elimination of All Forms of Discrimination Against Women <https://www.un.org/womenwatch/daw/csw/shalev.htm> Accessed 6th January, 2024.

²¹ *Ibid.*

With the risk of maternal death and the illegality of abortion in many nations, women's sexual and reproductive health and reproductive choice are greatly impacted by their entitlement to family planning education, information, and services.

In countries like the Dominican Republic, where abortion is prohibited, birth control education is offered by non-governmental organizations, family planning services are especially crucial. It can be argued that the state's primary responsibility is to at least provide the family planning services that ensure women's reproductive autonomy.²²

Preventing pregnancy is better for women's health than abortion, even in nations where it is allowed. However, in many cases, there are insufficient family planning options to sustain the legal option of abortion.

4. Women in Vulnerable Situations

In recent years there has been a growing focus in human rights work on vulnerable groups. This has been a result of a new interest in economic and social rights and the concomitant concept of social justice. Whereas the previous emphasis on civil and political rights drew mainly from the concept of liberty and focused on individuals as such, attention is now given to violations of rights of individuals as members of vulnerable groups within a given society. Thus, health practices and policies should be examined in light of the needs of the most disadvantaged groups in society. These include, among others, rural and marginal urban groups, women in situations of armed conflict, and women in prostitution.²³

Women in situations of armed conflict are particularly vulnerable to sexual violence and torture, with the health consequences of mental harm, susceptibility to sexually transmitted disease and related reproductive health problems, including unwanted pregnancy. As a result of such abuse, women may be isolated, stigmatized and rejected by their families and communities. Women are often reluctant to report these violations because they are felt to be shameful, as indicated by a non-governmental report on women in East Timor.

Women who are internally displaced as a result of armed conflict may have limited access to reproductive health services. Thus, a study of women in five internally displaced person settlements in Azerbaijan, conducted by a United Nations High Commissioner of Refugees reproductive health field worker, found that women overwhelmingly consider family planning as a primary health concern, but that there had been bureaucratic hurdles to supplying condoms. Similarly, in Croatia, it appeared that refugee women were not legally entitled to all the services provided under the comprehensive publicly funded health care scheme.²⁴

Women in prostitution are significantly marginalised in all societies and are at an extremely high risk of suffering rape and other forms of violence. This is of increasing concern, given the alarming growth in the international trafficking in women and girls. At the same time, they are often singled out for discriminatory treatment by public health programs that fail to address the broader concerns and underlying determinants of the issue under concern. In Indonesia, for example, the Department of Social Affairs disseminates information on the danger of HIV/AIDS "in the vicinity of the location of prostitutes", while there have been reports that under sporadic urban "cleansing" programs, women detained as suspected prostitutes are at risk of being forced to undergo vaginal examinations during interrogation.²⁵

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

5. Analysis of Illegality and Criminalization of Abortion in Nigeria

Abortion is not a contemporary anomaly; rather, it is a procedure that has been utilized for thousands of years to terminate unintended pregnancies in human cultures worldwide. The Catholic Church has historically approved of early abortion, and English Common Law (which has a significant historical effect on the Nigerian legal system) for centuries did not penalize it.

Under common law, Abortion remained merely a misdemeanour.²⁶ This permissive common law view of abortion came to an end in 1803, when Lord Ellenborough codified a criminal abortion legislation that made abortion of a "quick" fetus a deadly offense and abortions performed before quickening carried a less penalty. Similar legislative measures were made in the United States of America in the 1820s and in Canada in 1869.

Despite the illegality of abortion, women continue to practice it, often under risky conditions caused by the legislation criminalizing abortion. This seriously caused more deaths than ever and naturally aroused concern by the society and the government authorities.

As a result of this evolution, there were moves to finally liberalize abortion laws in most of Eastern and Central Europe in the 1950s and in most of the remaining developed countries during the 1960s and 1970s. A few developing countries, like China and India, joined in the liberalization and restrictions on abortion in the same period. The tale has since been one of liberalization and not criminalization of abortion over the world till date.

In Nigeria, the situation has been different. A community reading of several provisions of the Criminal Code and Penal Codes²⁷ in Nigeria inputs criminal liability on persons who carry on abortion procedures or who procures another to carry on the abortion procedures. In all parts of Nigeria, abortion is a criminal offense except where it is performed to save the life of the mother. Additionally, abortion is illegal in states that have enshrined the Sharia legal system.

Two distinct and significant attempts have been made to change and cause an amendment on the Nigerian abortion laws, 'The Termination of Pregnancy Bill.' It proposed as follows:

It shall be lawful and legal when a pregnancy is terminated by a registered practitioner if two registered practitioners are of the opinion formed in good faith:

- (i) that the continuance of the pregnancy would involve risk to life of a pregnant woman or of injury to the physical or mental health of the pregnant woman or any existing children of the family, greater than if the pregnancy was terminated; or
- (ii) that there is substantial risk that if the child was born it would suffer such physical or mental abnormalities as to be seriously handicapped.

This bill would have forged a landmark in the enhancement of women reproductive rights in Nigeria if it had scaled through.

Under the Criminal Code²⁸ which is applicable through out the Southern part of the country, an attempt to procure abortion is an offense punishable with 14 years imprisonment for any person (including medical practitioners and health workers) to attempt to terminate any pregnancy by any means whatsoever, even where the woman is not certified pregnant.²⁹ Also an attempt to it is an offense punishable with 7 years imprisonment for a woman to attempt to terminate her pregnancy by any means whatsoever. It is also immaterial that the woman is, in fact, not pregnant. It would technically, therefore, constitute an offense under this provision where, for example, a woman, upon suspicion that she is pregnant (perhaps after missing her monthly period) drinks salt water with the intention of securing a miscarriage even if it turns out that she was never pregnant.³⁰

²⁶ HP David, *Abortion Policies*, in JE Hodgson (ed.), *Abortion and Sterilization: Medical and Social Aspects*, (Grune and Stratton, 1981)1-40.

²⁷ Criminal Code Act, Sections 228, 229, 230, 297, and 328, and the Penal Code Act, sections 232, 233, 234, 235 and 236.

²⁸ The Criminal Code Act, Section 228 and 229.

²⁹ Criminal Code Act, Section 228.

³⁰ Criminal Code Act, Section 229.

The courts have given judicial blessings to this provision of the law, for example in *State v. Njoku*,³¹ the first defendant had sexual intercourse with A, resulting in A's pregnancy. The first defendant wrote to A, advising her to procure her own miscarriage and also sent her some tablets and ampoules of injection, giving direction for their use. He also gave A N6.00 (six Naira) to pay for the abortion. The second defendant arranged for the sum of N5.00 (five Naira) to be paid to the third defendant, a native doctor, and brought A to the third defendant's house where the latter administered to A, some powdered medicine stuffed in garri, which caused A to miscarry.

The court held as follows:

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

Also in *R. v. Edgal*,³² the appellants were convicted of supplying drugs to procure abortion contrary to section 230 of the criminal code. On appeal, it was held by the West African Court of Appeal in deciding the question of when it is lawful to procure a miscarriage that it is only lawful for the purpose of preserving the life of the mother. In all other cases, it is unlawful.

Under the Penal Code, which applies in the Northern part of Nigeria, a community reading of Sections 232 and 233 discusses about a woman 'miscarrying her pregnancy'.

Section 232 of the Penal Code Act, makes induced abortion illegal except if done in good faith for the purpose of saving the life of the woman. The provision also applies to a woman who causes herself to miscarry. The provision combines the offense of causing a woman to miscarry with the defence of good faith for purpose of saving the life of the woman contained in section 297 of the criminal code. However, unlike the criminal code, there is less ambiguity here as to the mode of procuring legal abortion. This provision was the subject of the decision in *Pam-Tok v State*.³³ There, the appellant was convicted of causing miscarriage contrary to section 232 of the Penal Code. The case for the prosecution was that he performed an operation and thereby caused a secondary school female student to miscarry a "three-month" old child. The appellant put up a defence that he performed the operation when the student had partial miscarriage and was bleeding and the operation was necessary to save the student's life. The trial court convicted the appellant. On appeal, he argued that the trial court did not consider his defence adequately. The court held that the appellant's defence was well considered by the learned Trial Chief Judge as borne out in his summing up of the evidence adduced by the appellant. Moreover, the onus was on the appellant to show that he acted in good faith for the purpose of saving the life of the student. Since the evidence adduced by the prosecution established the contrary, the appeal was dismissed and the conviction and sentenced affirmed.

³¹ *State v Njoku* [1973] ECSLR 638 (Nigeria).

³² *R. v Edgal*, [1938] 4 WACA 133.

³³ *Pam-Tok v State*, No. FCA/K78.

Section 233 of the Penal Code provides a specific offense for causing the death of a woman with intent to cause her miscarriage, unlike under the Criminal Code where death resulting from abortion may be murder³⁴ or manslaughter³⁵ depending on the circumstances. In either case under the Criminal Code consent is not a defense., however, under the Penal Code, consent is a mitigating factor.

The provision of section 233 was applied in the case of *Attorney-General of the Federation v. Ogunro*.³⁶ There, the deceased, while pregnant, was admitted to a hospital as she was suffering from breathlessness and was in a bad condition. She was advised to terminate the pregnancy, but she refused. She died as a result of congestive cardiac failure. However, the family of the deceased, being dissatisfied with the hospital's version of the story, laid complaint which led to the trial of the owner of the hospital under section 233 of the Penal Code. He was found not guilty by the High Court and Court of Appeal. The Court of Appeal held that in a charge of intent to cause the miscarriage of a woman which resulted in the death of such woman, the prosecution cannot succeed in establishing the guilt of the accused unless it not only establishes the cause of death but also establishes that the act of the accused caused the death of the deceased.

There is generally a dearth of authority on the interpretation of these provisions of the Criminal Code and Penal Code. Indeed, some of the cases relating to these provisions were murder cases arising from abortion and not strictly charges of abortion.

Under the constitution, by virtue of Section 33, 'every person has a right to life and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.'³⁷

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

6. International Perspective on Right to Abortion

6.1 World Health Organization (WHO)

WHO defines health as a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity³⁸. Making health for all a reality, and moving towards the progressive realization of human rights, requires that all individuals have access to quality health care, including comprehensive abortion care services – which includes information, management of abortion, and post-abortion care.³⁹ Lack of access to safe, timely, affordable and respectful abortion care poses a risk to not only the physical, but also the mental and social, well-being of women and girls.⁴⁰

Induced abortion is a simple and common health-care procedure. Each year, almost half of all pregnancies to the tune of 121 million are unintended; 6 out of 10 unintended pregnancies and 3 out of 10 of all pregnancies end in induced abortion. Abortion is safe when carried out using a method recommended by WHO, appropriate to the pregnancy duration and by someone with the necessary skills. However, when women with unwanted pregnancies face barriers to obtaining quality abortion, they often resort to unsafe abortion.⁴¹

³⁴Criminal Code Act.

³⁵*Ibid*.

³⁶[2011] 10 NWLR pt. 720, 175.

³⁷Constitution of the Federal Republic of Nigeria (CFRN) 1999 (As amended), Section 33.

³⁸Constitution of the World Trade Organization, Article 1.

³⁹World Health Organization, 'Abortion Care Guideline. Geneva: WHO; 2022', available at <

⁴⁰*Ibid*.

⁴¹*Ibid*, p 137.

Ensuring that women and girls have access to abortion care that is evidence-based, which includes being safe, respectful and non-discriminatory, is fundamental to meeting the Sustainable Development Goals (SDGs) relating to good health and well-being (SDG3) and gender equality (SDG5).⁴²

Restricting access to abortion does not reduce the number of abortions; however, it dramatically affects whether abortions attained are safe.⁴³ Nearly half of all abortions are unsafe. Unsafe abortions contribute to preventable maternal mortality and morbidity. Each year an estimated 7 million women in developing countries are treated in hospital facilities for complications from unsafe abortion.⁴⁴ Barriers to safe, timely, geographically reachable, affordable, respectful and non-discriminatory abortion care can cause emotional distress and violate women's and girls' right to privacy; right to equality and non-discrimination; and right to be free from torture, cruel, inhuman and degrading treatment and punishment. It also has financial and social implications for people and communities including negatively impacting women's and girls' possibilities to obtain education and full and effective participation in society.⁴⁵

6.2 Council of Europe

The Council of Europe, through its Parliamentary Assembly and other bodies, has expressed strong views on access to safe and legal abortion in Europe, advocating for the protection of women's reproductive health and rights. While not directly imposing a legal requirement on member states to legalize abortion, the Council has repeatedly emphasized the importance of ensuring access to safe and legal abortion care, free from discrimination and harassment.

This includes:

- (i) **Right to Safe Abortion:** The Council has affirmed that abortion should not be banned within reasonable gestational limits and that safe and legal abortion care should be accessible, affordable, and appropriate.⁴⁶
- (ii) **No Abuse:** The Council condemns anti-choice harassment and emphasizes the importance of protecting the right to safe and legal abortion.⁴⁷
- (iii) **Sexual and Reproductive Health:** The CoE promotes comprehensive sexuality education and the availability of affordable contraceptive services as ways to reduce the need for abortion.⁴⁸
- (iv) **No Discrimination:** The CoE advocates for ensuring that all women, including those with disabilities, Roma, refugees, and LGBTI individuals, have equal access to sexual and reproductive health and rights.⁴⁹
- (v) **International Standards:** The CoE's Commissioner for Human Rights has made recommendations to member states, encouraging them to align their legislation and policies with international human rights law and standards on sexual and reproductive health and rights.⁵⁰

⁴²World Health Organization. Abortion Care Guideline, Geneva: WHO, 2022, available at <<https://www.who.int/health-topics/abortion#tab=tab2>>, accessed 1st April, 2025.

⁴³*Ibid.*

⁴⁴*Ibid.*

⁴⁵*Ibid.*

⁴⁶Resolution 1607 (2008) Access to safe and legal abortion in Europe; <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17638> Accessed 20th May, 2025.

⁴⁷*Ibid.*

⁴⁸*Ibid.*

⁴⁹*Ibid.*

⁵⁰Resolution 1607 (2008), 'Access to Safe and Legal Abortion in Europe, available at <<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17638>>

Examples of Council of Europe actions are *inter alia*:

- (i) The Parliamentary Assembly has adopted resolutions and recommendations on abortion, contraception, and sexual and reproductive health.
- (ii) The Commissioner for Human Rights has issued reports and made recommendations to member states on strengthening access to safe and legal abortion care.
- (iii) The Council has collaborated with organizations to promote access to abortion services.⁵¹

6.3 Latin America and the Caribbean

Almost all Latin American and Caribbean countries, except Barbados, Belize, Uruguay⁵² and Cuba, have restrictive abortion laws. In Cuba, elective abortion has been available in government hospitals since the mid-1960s.⁵³ Women of all ages may obtain abortions on request for up to 10 weeks gestation, later abortions require approval.⁵⁴

In 2006, Colombia's highest court ruled that abortions can be performed in cases where the mother's life or physical health is in danger, in cases of rape or incest, or in pregnancies involving fatal or life-threatening fetal abnormalities. This decision has been the object of strong protests by abortion opponents, but remains in effect. Recently, the influx of the Zika virus into South America has further awakened the age long debate on accessibility and legality of abortions.⁵⁵ There have been increased requests for abortion from women who have contacted the virus believed to be linked with incidence of microcephaly in children born to infected mothers. Governments and the dominant Catholic Church have however refused to yield to calls by reproductive health providers for a liberalization of abortion laws. Their solution is to advise women who suspect exposure to the virus to avoid getting pregnant within two years of exposure.

7. Analysis of Contradiction between the Reproductive Health Right of Women in Nigeria and the Current Status of Abortion Laws in Nigeria

In view of the social and human rights implications, it becomes necessary to examine whether there is any basis to justify Nigeria's restrictive abortion legislation. Historically, Nigeria's criminal code provisions constitute colonial legacy bequeathed by Britain, which was enacted in Nigeria on 1 June 1916. It is thus open to question whether Nigeria has a basis to rigidly cling to restrictive abortion provisions tailored for the 19th century society in the 21st century. More so when England, the originator of such provision, has long jettisoned such provisions for a commendably liberal one that meets the needs of their evolving contemporary society.⁵⁶ Most of these restrictive laws originated from European colonial laws from previous centuries, although the European nations discarded their restrictive abortion laws decades ago.⁵⁷

⁵¹ *Ibid.*

⁵² The Uruguay parliament gave its approval in 2012 for terminations of pregnancies up to 12 weeks regardless of circumstances, and up to 14 weeks in cases of alleged rape subject to a medical panel's examination.

⁵³ Abortion is said to be endemic in Cuba. The country's high rate of abortion is attributed in part to the weakened economy following the U.S. embargo against Cuba in 1962. M.M. Bridges, *The Origins of Cuba's "Abortion Culture"* 3 (2014) (unpublished, University of Pennsylvania), available at www.academia.edu/14826066/The_Origins_of_Cubas_Abortion_Culture_. Accessed 20th May, 2025.

⁵⁴ Unintended Pregnancy and Induced Abortion in Colombia, Facts Sheet, Guttmacher Institute (October, 2013) <http://www.guttmacher.org/fact-sheet/unintended-pregnancy-and-induced-abortion-colombia>. Accessed 20th May, 2025

⁵⁵ DA Schwartz, 'Pregnant and Out of Options: The Quest For Abortion In Latin America Due To The Zika Virus Pandemic' 51-65 (Intechopen 2017), www.researchgate.net/publication/325761493, accessed 20th May 2025.

⁵⁶ JK Mason and RA McCall Smith, *Law and Medical Ethics* (Butterworths, London, 1987), pp. 71-73.

⁵⁷ T Aderibigbe, *My Womb is tired: A Socio-Legal Perception of the Reproductive Autonomy of Women in South-west Nigeria with a Focus on Abortion* (Ph.D. Thesis, Kent Law School, University of Kent, Canterbury, 2006), p. 187.

Like so many societies, Nigeria has become highly sexually permissive and perverted. It is common knowledge that because of legal barriers surrounding abortion in Nigeria, there is unceasing recourse to 'illegal' or unsafe abortion procedures and because of its cloak of illegality, abortion in Nigeria is a clandestine activity carried out in uncharted terrain where foul is fair and fair is foul.⁵⁸ With the unabating occurrence of unwanted pregnancies, demand for abortion is inevitable.⁵⁹

Unsafe and illegal abortion is a serious health and rights challenge in all parts of the world, and Nigeria is no exception. The continued restriction on abortion by successive Nigerian governments since independence can be viewed as is an infringement on women's human rights. Each individual should be guided by their personal moral ethics in deciding whether to choose abortion due to the secular nature of the Nigerian State and the constitutional guarantee of freedom of thought. Until abortion is liberalized, avoidable deaths from unsafe abortion will continue to occur. The Nigerian government should remove the legal barriers to abortion services and ensure that safe and high quality abortion services are accessible to all women to the full extent of the law. An absolute prohibition of abortion violates a woman's fundamental right to the highest attainable standard of health, life, non-discrimination, physical integrity, and freedom from cruel, inhuman, or degrading treatment. Nigeria could adopt liberalized access to abortion based on the gestational age of the foetus, as is the case in some other African countries like South Africa. In countries in which abortion is legally restricted, women seek abortions clandestinely, under conditions that are medically unsafe and seriously life threatening.

Abortion is permitted in the majority of European countries for a number of reasons, mainly to preserve the mother's physical and mental health, but also in cases of rape or incest, of foetal impairment or for economic and social reasons and, in some countries, on request. In member states where abortion is permitted for a number of reasons, conditions are not always such as to guarantee women effective access to this right: the lack of local health care facilities, the lack of doctors willing to carry out abortions, the repeated medical consultations required, the time allowed for changing one's mind and the waiting time for the abortion all have the potential to make access to safe, affordable, acceptable and appropriate abortion services more difficult, or even impossible in practice.⁶⁰

8. Conclusions and Recommendations

It has been shown in this article that abortion has a long history and its criminalization is, indeed, a comparatively recent development. It has also been shown that its decriminalization and liberalization are in vogue in most parts of the world today because it is safer to do so. The continued criminalization of abortion in Nigeria is, therefore, unrealistic and a dangerous trend.

Laws that deny access to abortion, whatever their stated objectives, have the discriminatory purpose of both denigrating and undermining women's capacity to make responsible decisions about their bodies and their lives.⁶¹ It is imperative that laws should be enacted to ensure women's reproductive and sexual rights. This includes the right of independent access to reproductive health facilities and information services including safe and legal abortion. Women should have the freedom to determine the number and spacing of children, the right to demand safer sex practices, and the right to legal protection from sexual violence, outside and inside marriage, including legal provisions for marital rape.⁶²

⁵⁸SB Odunsi, 'Human Rights, Maternal Deaths and Dehumanization, Another Look at Nigeria's Abortion laws', 1 *Gender and Behaviour Journal* (2004) 200-214.

⁵⁹*Ibid.*

⁶⁰UN Department of Economic and Social Development, *Abortion Policies - A Global Review* (UN, New York, NY, 1992) 7.

⁶¹Centre for Reproductive Rights, Safe and Legal Abortion, 'Abortion is a Woman's Human Right', *Briefing Paper* (CRR, New York, NY, 2004), p. 3.

⁶²UN Department of Economic and Social Development, *Abortion Policies - A Global Review* (UN, New York, NY, 1992), p. 7.

This is now unrealistic to continue to make abortion illegal because it is not known to have reduced the rate of abortion, from the statistics shown above, but has only succeeded in making abortion clandestine with the attendant consequences. It is dangerous because of the maternal deaths and damage to women's reproductive health resulting from the inevitable use of quacks and self help. In addition, abortion has been shown to be a human right, hence its criminalization is a violation of that right. Thus, the following recommendations are made for the reform of the Nigerian law on abortion:

- (i) Repeal all laws which permit the imprisonment or imposition of any other criminal sanction on women for seeking or having an abortion and all other laws which provide for imprisonment or other criminal penalties solely for those providing information about or carrying out abortions;
- (ii) Provide access to medical services for complications arising from abortion to all women in need in any circumstance, regardless of the legal status of abortion;
- (iii) Take all necessary measures to ensure that safe and legal abortion services are available, accessible, acceptable and of good quality for all women who require them in cases of unwanted pregnancy as a result of rape, sexual assault or incest, and pregnancy which poses a risk to the life or grave risk to the health of the woman. Amnesty International does not take a position on any other aspects of abortion.