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To cite this article: Innocent Ekezie Nwaogazie ‘Diagnosis of Abortion Laws in Nigeria and Human Rights Trajectory: Lessons from Great Britain and United States of America’ (2020-2021) 16 *The Nigerian Juridical Review*, pp 219 – 238.

To link to this article: <https://doi.org/10.56284/tnjr.v16i1.21>

DIAGNOSIS OF ABORTION LAWS IN NIGERIA AND HUMAN RIGHTS TRAJECTORY: LESSONS FROM GREAT BRITAIN AND UNITED STATES OF AMERICA

Innocent Ekezie Nwaogazie*

Abstract

Abortion is the termination of pregnancy before its birth for whatever reason. The present study is concerned with therapeutic abortion which is criminalized in Nigeria been the focus of this study. The Nigerian societal attitude to abortion is one of stereotyped stigmatization notwithstanding the validity of the reasons. The aim of the study is to examine the trajectory between abortion laws and human rights in Nigeria and the lessons Nigeria can learn from Great Britain and United States jurisdictions. The objective is to interrogate the extant abortion laws with a view to locating their inadequacies in the area of both the African and international human rights concerns of sexual and reproductive health of women on abortion rights. Using doctrinal design by reliance on primary and secondary sources analysed through deductive reasoning based on extant statutes and case law, this study interrogated the extant abortion laws in Nigeria in juxtaposition with the British and the United States legal framework on abortion as well as critical examination of the African and international human rights jurisprudences, and found out that the current position of abortion law in Nigeria is not in the same wavelength with both the African and international human rights jurisprudences on sexual and reproductive health rights of females to access safe abortions implicit in the fundamental rights and freedoms of privacy, non-discrimination, right to life, good health and bodily autonomy as it relates to unwanted pregnancies induced by other factors such as rape, incest or severe foetus abnormalities. The study recommended law reform by using the models provided by the British and United States legal framework to allow women access to legal abortion in deserving cases in conformity with African and international human rights treaties.

Keywords: Abortion laws, abortion rights, human rights, law reform, legal abortion

1. Introduction

The issue of abortion is largely located in the medical and health reproductive area of the body of sciences and jurisprudence, and has attracted conversations among philosophers with divergent views. In this study the focus is on Nigeria. The aim of the study is diagnosis of abortion laws in Nigeria and human rights trajectory with lessons drawn from Great Britain and United States jurisdictions. The objective is to interrogate the extant laws that criminalized abortion in Nigeria and identify their inadequacies in the light of international human rights

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jurisprudence and the African human rights treaty (Maputo Protocol) on abortion rights with a view to recommending a legislative reform. Using doctrinal design of data by relying on primary and secondary sources analysed through deductive reasoning based on extant statutes and case law, this study interrogated both the African and international human rights jurisprudence on sexual and reproductive health rights of women and girls to access safe abortions implicit in universal human rights of privacy, right to life, non-discrimination, freedom from torture and bodily autonomy. In order to streamline this conversation, this study examined the two major and leading constitutional democracies of Great Britain and the United States respectively as a case study with comparative references to Cameroon and Moroccan jurisdictions within the African hemisphere to provide the necessary template to guide Nigerian jurisdiction in the proposed law reform.

There seemed to be less controversy in relation to the meaning of abortion. In the medical and health studies, there exist two types of abortion namely, medically-induced abortion and the spontaneous abortion often regarded as miscarriage. The former is deliberate or intentional while the latter is accidental. In this present study, the former is the focus. Thus, abortion situated under medical jurisprudence is the deliberate, intentional and conscious termination of pregnancy through medical procedure (whether by surgery, administration of drugs or other means) for whatever cause by medical personnel.¹ Several scholars and bodies have advanced various definitions of abortion. According to the World Health Organization (WHO), the global health watchdog, abortion is a termination of pregnancy prior to 20 weeks' gestation². This definition of abortion by the global health watchdog (WHO) introduced a gestation period for abortion to be properly situated. Abortion has also been defined as a medical procedure to end a pregnancy either by medicine or surgery to remove the embryo or foetus and placenta from the uterus.³ Medically, abortion is regarded as a loss of pregnancy due to premature exit of the products of conception (foetus, foetal, membranes and placenta) from the uterus due to various reasons.⁴

Statutorily, the Uniform Abortion Act⁵ sponsored by the National Conference of Commissioners on Uniform State Laws which provided a template for legislative framework on abortion in the United States jurisdiction defined abortion as the 'termination of human pregnancy with an intention other

¹<<https://dictionary.law.com>> accessed 12 April 2022.

²World Health Organization, 'Abortion Laws, A Survey of Current Legislation' (World Health Organization, Geneva, 1971).

³ <<https://www.medlineplus.gov>> accessed 5 November 2021.
<<https://languages.oup.com>> accessed 5 November 2021.

⁴ <<https://www.medicinenet.com>> accessed 5 November 2021;
<<https://www.britannica.com>> accessed 5 November 2021.

⁵1971 (revised in 1973) of the United States of America.

than to produce a live birth or to remove a dead foetus,'⁶ and prescribed a limitation period of its occurrence to be 20 weeks⁷ in line with the global gestation period for abortion by the World Health Organization (WHO). In the Nigerian jurisdiction, notwithstanding the criminalization of abortion, there seemed to be no clear statutory definition of abortion, and recourse would certainly be had to the ordinary and plain definition of abortion by the World Health Organization and other medical sources. This obvious lacuna in the definition of abortion as an offence by the statutes that created it in Nigeria is a constitutional monstrosity as shall later be demonstrated in this study.

Induced abortion, been the focus of this study, is usually propelled by many reasons such as preservation of the life, physical or mental well-being of the mother, accidental pregnancy caused by rape or incest, prevention of the birth of a child with severe deformity or general genetic abnormality and socio-economic factors⁸ which might result in great difficulty in the training and education of the child such as financial or paternity denial of the child by the supposed biological father that ordinarily would result to social stigma especially in some traditional African societies.

Notwithstanding the validity of reasons for therapeutic abortion, the societal attitude to it in Nigeria has been one of scorn, disapproval and sometimes the woman or the girl involved is stigmatized. It is in the light of that unfortunate situation that this present study is imperative especially when juxtaposed with the criminalization of abortion in Nigeria that appears to reflect the social construct in order to disabuse the stereotype attitude of the larger Nigerian society.

Whether abortion rights should be tolerated or liberalized, restricted or proscribed has generated much conversation among theologians, philosophers, medical and health experts and even human rights advocates. This view was judicially acknowledged by the Supreme Court of the United States in the case of *Jane Roe & Ors v Henry Wade*⁹ where the Court observed thus: 'We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitude toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to colour one's thinking and conclusions about abortion'.¹⁰ The United States Supreme Court in that case equally

⁶Ibid s 1(a).

⁷Ibid s 1(b)(2).

⁸<<https://www.britannica.com>> (n 4).

⁹410 US 113 delivered on 22 January 1973.

¹⁰Ibid 2 coram Justice Blackmun.

recognized the growing influence of ‘population growth, pollution, poverty and racial overtones’¹¹ as some factors that had somewhat complicated the issue of abortion. However, in the global community, each jurisdiction adopts a legal framework that shapes and underpins its attitude to abortion rights. Across jurisdictions in the world, attitude towards abortion rights keep changing with time. Historically, different jurisdictions had different attitude towards abortion. Within the Roman-Greece early civilization, abortion, as a social construct, was normative as it was acceptable as a means to the limitation of family size. The Chinese jurisdiction also adopted abortion around the 20th century as a permissive State policy to check and control population growth. Thus, there was nothing abnormal about abortion and it was not criminalized in those jurisdictions with a liberal attitude.

From historical point of view, three main reasons have been advanced for the restriction placed on abortion. The first was the acclaimed understanding of abortion as a risky adventure that resulted to the death of several women. Thus, anti-abortion laws were intended to protect the public health and well-being of women. Secondly, abortion was regarded as a sin and ethical issue from the angle of social construct and religious sentiment. Hence, anti-abortion law was used to regulate and protect social morality, advanced religious ethics and served as deterrent measure by its criminalization. And thirdly, an unborn child was regarded as possessing human personality within the realm of Christian ethics and social construct capable of being protected from being killed through abortion procedure.¹² Those reasons are still valid today in the jurisdictions that criminalize abortion.

Ironically, while abortion remained criminalized in the earliest centuries before its reformation in several jurisdictions, there were indeed traces of clandestine, unsafe and unhygienic abortions with attendant health-related consequences that included several deaths in some cases. Thus, the underlying philosophy in the criminalization of abortion was, and still remains, the State’s legitimate interest to protect and secure public health as it affects especially the life of women and the unborn child, which unbridled performance of abortion will frontally attack. The right to life is a universal civil claim that inures to all persons under international human rights law¹³ and recognized at several regional human rights instruments¹⁴ and domestic Constitutions of democratic

¹¹Ibid 3.

¹² Marge Berer, ‘Abortion Laws and Policy Around the World’ <<https://www.ncbi.nlm.nih.gov>> accessed 12 April 2022.

¹³Universal Declaration of Human Rights adopted by General Assembly Resolution 217A (111), 10 December 1948, art 3; International Covenant on Civil and Political Rights adopted by General Assembly Resolution 2200A (XXI), 16 Dec 1966, art 6.

¹⁴African Charter on Human and People’s Rights 1981, art iv; European Convention on Human Rights, 1953, art 2; American Convention on Human Rights 1978, art 2.

countries especially Nigeria¹⁵. Thus, a State has an obligation to secure, advance and protect this right to life to the end that it cannot be taken away except on constitutionally permissible grounds. Abortion is not one of those constitutionally permissible grounds as several deaths have been recorded from unsafe abortions.

Unfortunately, the status of an unborn child with respect to human personality issue was not addressed by the framers of the international bill of rights instruments. There is no contextual provision in the international bill of rights that recognizes the right of an unborn child. Thus, a foetus has no international protection under the human rights law. This lacuna seems worrisome and leaves the State Parties the option to adopt a legal framework peculiar to each State Party to protect the unborn child. Nigeria has a legal framework that protects an unborn child and criminalizes any killing of an unborn child as an offence of infanticide with penal sanctions.¹⁶

The State legitimate public health interest to protect human life of both the pregnant woman and the unborn child faces the competing human rights of the pregnant woman who seeks legal abortion to terminate unwanted pregnancy caused by rape or incest, or a pregnancy with irreversible foetal abnormalities or where the life and health of the pregnant woman is in great and grave danger to the end that carrying such a pregnancy to full term will be suicidal. In order to strike a balance between the two competing interests, a need arose to introduce some reform in the anti-abortion law by several jurisdictions to allow limited or legal abortion in exceptional circumstances. The mischief sought to be cured by recent reforms is to expand the scope of permissible grounds for abortion within a specified gestation period and under a regulated procedure. In such circumstance, abortion will be legal. Thus, any abortion done outside the legal framework remains criminalized.

However, around the 19th century, the entrance of Christianity and its teachings introduced a new thinking and attitude towards abortion as a moral wrong and sinful which led to a paradigm shift from cultural approval to disapproval with penal sanctions in many jurisdictions with strong Christianity background. However, around the 21st century and with strong advocacy for human rights concerns, attitude towards abortion rights changed in many European and American jurisdictions from criminalization to regulated decriminalization of abortion in response to human rights concerns.

2. Abortion and the Law in Nigeria

The Nigerian jurisprudence has an intolerant attitude towards abortion, and it is criminalized with penal sanctions. This is prescribed in two criminal laws

¹⁵ Constitution of the Federal Republic of Nigeria 1999 (as amended), s 33.

¹⁶ Criminal Code Act Cap 38 Laws of the Federation of Nigeria (LFN) 2004, s 328; Penal Code (Northern States) Act Cap P3 LFN 2004, ss 235 and 236.

operative in Nigeria at the federal level which have been domesticated by various States. Under the Criminal Code Act (CCA),¹⁷ which is operative in the Southern States the offence of abortion is created thus: ‘Any person who, with intent to procure miscarriage of a woman whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony, and is liable to imprisonment for fourteen years’.¹⁸ The CCA 2004 further created a novel provision prohibiting self-induced abortion thus: ‘Any woman who, with intent to procure her own miscarriage, whether she is or not with child, unlawfully administers to herself any poison or other noxious thing or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used on her, is guilty of a felony, and is liable to imprisonment for seven years’.¹⁹

Curiously and unlike the CCA 2004, the Penal Code Act (Northern States) (PCA)²⁰ operative in the Northern States which proscribed abortion in its provision also took cognizance of health rights of the woman in creating a window where legal abortion could be permissible in rare circumstances. It provided thus:

Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth and does by such act prevent that if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment for a term which may extend to fourteen years or with fine or with both.²¹

Thus, under the PCA 2004 domestic jurisdictions in Nigeria, the only authorized legal abortion is when the life of the woman is at risk. Curiously and strangely, this window created for legal abortion under PCA 2004 is absent under the CCA 2004 in the Southern States of Nigeria.

As earlier observed in this present study, there is no statutory definition of abortion in the Nigerian jurisdiction which statutorily is a crime. It is submitted that the absence of statutory definition of abortion in Nigeria which is criminalizes abortion is a clear negation of the provisions of the Constitution²² which provides that:

Subject as otherwise provided by the Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law, and in this section, a written law refers

¹⁷CCA (n 16).

¹⁸Ibid s 228.

¹⁹Ibid s 229.

²⁰PCA (n 16).

²¹Ibid s 235.

²²Constitution of the Federal Republic of Nigeria (as amended) 1999.

to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.²³

In effect, any statute or subsidiary legislation creating an offence must not only prescribe the penalty but must also define the offence thereby created. It is submitted that what the two extant anti-abortion laws operative in Nigeria in their separate provisions contextually did were merely to describe what constituted the offence of abortion namely, the illegality of the process, the outcome and the penal consequences. There was no clear statutory definition of the offence of abortion itself. Thus, this lacuna itself has brought the extant anti-abortion laws in Nigeria in direct conflict with the Constitution and ought to suffer the consequences of been rendered void²⁴ for been inconsistent with the grundnorm. It is hoped that the Legislature would address this obvious statutory lacuna in future.

When juxtaposed with each other, an examination of the two federal anti-abortion laws in Nigeria revealed a striking dissimilarity. While the CCA in its contextual provision presented an absolute proscription without regard to the health of the woman or the underlying health challenges of the unborn foetus, the PCA in its contextual anti-abortion provision, recognized a permissible ground for abortion when the life of the woman is at stake. In that situation, abortion could be done to save her life. Curiously, the PCA's legal framework did not consider the inherent deformity or genetic abnormality of the foetus which is implicit in the health and life the law sought to address or pregnancy that resulted from rape or incest.

A fortiori, the PCA 2004 that somewhat provided for permissible legal abortion on the 'woman-life-saving' ground did not provide for any regulatory legal framework by way of subsidiary legislation to provide for the procedure, the gestation period, the type of clinic or hospital to perform abortion, expert advice, qualification and number of medical personnel required to give concurrent opinion on the desirability of the intended abortion and such other procedures to ensure standardization and elimination of quackery. This lacuna could be exploited to introduce a climate of unhealthy and unsafe abortion practices by quacks in unhygienic and unlicensed clinics that may even endanger the lives of the pregnant women the law intended to save. Notwithstanding the differential penal sanctions in the two anti-abortion federal laws and the seemingly restricted permissive legal abortion rights under the PCA 2004, the legal framework on abortion in Nigeria jurisdiction calls for diagnostic legal reform to accord with the African and international human rights law and practice.

²³Ibid s 36(12).

²⁴Ibid s 1(3) which provided thus: 'If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void'.

The criminalization of abortion in Nigerian criminal justice system is a reflection of the colonial legacy from Great Britain which was essentially modelled after the British Offences against the Person Act.²⁵ Curiously, while Britain has adopted legislative reform on her abortion laws to meet with the changing present realities, the Nigerian criminal jurisprudence on abortion remains static, anachronistic and not in tide with the wave of human rights of pregnant women and other health-related issues associated with foetal abnormalities or unwanted pregnancies resulting from rape or incest. Across jurisdictions in the international community, legislative reforms have been introduced on abortion laws to grant restrictive legal abortion in deserving cases by progressive extension of grounds for abortion hitherto limited to where risk to the life of the pregnant woman or permanent injury to her physical or mental health was at stake.

In the present study, the British and United States jurisdictions would be considered as a case study by investigation of the legislative reforms and jurisprudence in those jurisdictions with a view to drawing some lessons for Nigeria to advance some legislative reform on abortion laws in the light of African and international human rights jurisprudence. These two jurisdictions are strong constitutional democracies and share common law and constitutional history with Nigeria and possess rich human rights heritage. Historically, their laws and legal systems especially that of Great Britain, have continued to shape the direction of Nigeria's legal system. References to other jurisdictions would only serve the purpose of emphasizing and highlighting comparatively the current paradigm shift in the attitude towards abortion law reform globally.

3. Law Reform in Selected Jurisdictions

Historically, in the British jurisdiction, the earliest codification of abortion law started with the Lord Ellenborough's Act.²⁶ That piece of legislation was repealed and replaced by the Offences against the Person Act²⁷ and later variously amended.²⁸ With the passage of time, the criminal jurisprudence on abortion in England was extended by legislation²⁹ to cover infanticide of an unborn child who was capable of been born alive. This presupposed that all children in the womb that were over 28 weeks' gestation period were capable of been born alive. That new legislative action received judicial approval in the English case of *C v S*³⁰ where the Court of Appeal (Civil Division) declined to grant an injunction to stop the intended abortion of a foetus between 18- and 21-weeks' gestation period. Later, the English courts expanded the frontiers of

²⁵1861 now repealed in Britain.

²⁶1803, ss 1 and 2.

²⁷1828, s 13.

²⁸Offences against the Person Act 1837, s 6 and again by the Offences Against the Person Act 1861, s 58.

²⁹Infant Life (Preservation) Act 1929.

³⁰(1988) QB 135.

reasons for abortion to include cases where pregnancy resulted from rape which M’Naghten described as ‘mental and physical wreck’.³¹

With the new wave of judicial attitude in expansion of the scope of factors to be considered in the trial of abortion cases, legislative reform on abortion became imminent. The English Parliament in 1967 introduced a revolutionary legislation by way of repeal and re-enactment of the Offences against the Person Act³² which new piece of legislation introduced a legal framework on legal abortion. The new law statutorily fixed the gestation period within which any legal abortion could be performed as not exceeding twenty-fourth weeks.³³ The new legislation presented and defined five clear grounds for legal abortion to take place as follows:

1. Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion formed in good faith;³⁴ or
2. That the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated of injury to the physical or mental health of the pregnant woman or any existing children of her family;³⁵ or
3. That the termination of the pregnancy is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman;³⁶ or
4. That the continuation of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated;³⁷ or
5. That there is substantial risk that if the child were born it would suffer from physical or mental abnormalities as to be seriously handicapped.³⁸

Thus, the scope for legal abortion in England, Wales and Scotland was expanded beyond the earliest reason for saving the life of the pregnant woman that was at risk. In the English case of *R v British Broadcasting Corporation, Ex-parte Prolife Alliuor*³⁹ the Court observed thus:

There is some evidence that many doctors maintain that the continuance of a pregnancy is always more dangerous to the physical welfare of a woman than

³¹*R v Bourne* (1939) 1 KB 687 (Court of Criminal Appeal).

³²1967.

³³*Ibid* s 1(1)(a).

³⁴*Ibid* s 1(1).

³⁵*Ibid* 1(1)(a).

³⁶*Ibid* s 1(1)(b).

³⁷*Ibid* s 1(1)(c).

³⁸*Ibid* s 1(1)(d).

³⁹(2002) All ER 756.

having an abortion, a state of affairs which is said to allow a situation of de facto abortion on demand to prevail.⁴⁰

However, until 2020, the scope of the Northern Ireland jurisprudence on legal abortion was limited to abortions performed ‘[i]n good faith for the purpose only of preserving the life of the mother’.⁴¹ That enactment that granted restrictive legal abortion solely on the ground where the life of the pregnant woman was at risk received a judicial disapproval in the case of *Northern Ireland Health and Social Services Board v Hand and Ors*⁴² where the Court declared that such provision did not relate only to some life-threatening situation and extended the meaning of life within the context to mean physical and mental health or well-being of the mother and the doctor’s act is lawful where the continuation of the pregnancy would adversely affect the mental or physical health of the mother.

The legislative reform of the Northern Ireland abortion law was further provoked by the pronouncement of the Supreme Court of the United Kingdom in June 2018 in the case of *Northern Ireland Human Rights Commission v Attorney General of Northern Ireland & Anor*⁴³ which sought for a judicial review of the Northern Ireland abortion laws that restricted legal abortion solely for the purpose of saving the life of the mother and did not cover cases where pregnancy resulted from rape, incest and foetal abnormality and whether the current abortion laws were not inconsistent with the articles 3 and 8 of the European Convention on Human Rights (ECHR).⁴⁴

While dismissing the case by declining jurisdiction since there was no victim presented and who was impacted on the impugned abortion laws provisions, the Supreme Court went further and considered the human rights angle of the abortion laws in issue and concluded that: ‘I would have concluded, without real hesitation, that the current Northern Ireland law is incompatible with Article 8⁴⁵ of the Convention insofar as it prohibits abortion in cases of fatal foetal abnormality, rape and incest but not insofar as it prohibits abortion in cases of serious foetal abnormality’⁴⁶. With respect to the excluded grounds such as rape, the United Kingdom Supreme Court further observed that: ‘To require in every instance a girl or woman to carry to term a foetus which was the consequence of exploitative and abusive behaviour and which is utterly abhorrent to her could not, we concluded, be considered as having struck the

⁴⁰Ibid 761 coram Lord Justice Laws.

⁴¹Criminal Justice Act (Northern Ireland) 1945, ss 25 and 26 and Offences against the Person Act 1861, ss 58 – 59.

⁴²(1994) NIJB 1.

⁴³(2018) UKSC 27 delivered on 07 June 2018.

⁴⁴Which came into force on 3 September 1953.

⁴⁵Which provided for the right to respect of private and family life.

⁴⁶See (n 37) para 73-134.

right balance between her rights and those of society’⁴⁷. Thus, judicial activism agitated legislative reform in Northern Ireland that led to the promulgation of an expansive legal framework for abortion.⁴⁸

At the level of the American jurisdiction, family law matters are within the domestic jurisdiction of States. Thus, issues relating to abortion laws are within the legislative competence of various States to legislate. However, the Supreme Court of the United States had, by judicial fiat, changed the jurisprudence on abortion in the United States by the recognition of the rights of women under privacy rights and declared abortion statutes void for violation of the Fourteenth Amendment⁴⁹ in the case of *Jane Roe, et al v Henry Wade*⁵⁰ where the Plaintiff, a single woman brought a class action challenging the constitutionality of the Texas criminal abortion laws⁵¹ which prohibited procuring or attempting an abortion except on medical advice for the purpose of saving the mother’s life. She contended that she wished to terminate her pregnancy by abortion performed by a competent, licensed physician under safe, clinical condition and that she was unable to get a ‘legal abortion’ in Texas because her life did not appear threatened by the continuation of the pregnancy, and that she could not afford to travel to another jurisdiction in order to secure a ‘legal abortion’ under safe conditions. She argued that the Texas statutes were unconstitutionally vague and abridged her right of personal privacy protected by the Fourteenth Amendment. However, the Supreme Court of the United States rejected the absolute and unfettered right of a woman to terminate pregnancy in any way and at any time. It declared thus: ‘Though the State cannot override that right, it has legitimate interest in protecting both the pregnant woman’s health and the potentiality of human life, each of which grows and reaches a ‘compelling’ point at various stages of woman’s approach to term’.⁵² Hence the Court proceeded to balance a woman’s right of privacy with a State’s legitimate interest in regulating abortion.

The United States apex court recognized that ‘a compelling State interest’ is a legitimate justification for regulations limiting fundamental rights of privacy and that the legislature must accordingly draw statutes narrowly to express only legitimate State interests at stake. In balancing the compelling State’s interests in the health of a pregnant woman and in the potential life of foetuses for regulation of abortion to be, the Court held thus: ‘For the stage prior

⁴⁷Ibid.

⁴⁸Abortion (Northern Ireland) Regulations 2020.

⁴⁹ Fourteenth Amendment 1862, art XIV s 1.

⁵⁰*Roe v Wade* (n 9).

⁵¹Penal Code chap 9 Title 15, arts 119-1196, Texas. The first Texas laws criminalizing abortion was Texas Laws

c 49 amended by Texas Penal Code 1857, c 7 arts 531-536 repealed by Texas Rev Stat 1879, c 8 arts 536-541 and Texas Rev Crim Stat 1911, arts 1071-1076.

⁵²*Roe v Wade* (n 9) 147-164.

to approximately the end of the first trimester the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician'.⁵³ With regard to the foetus, the Court located that point at capability of meaningful life outside the mother's womb or viability which occurs at about 24 weeks' of pregnancy at which stage, the State's legitimate interest intervenes. The Court held that for the stage subsequent to viability, the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe abortion except where necessary, in appropriate medical judgment, for the preservation of the life and health of the mother.⁵⁴

The United States jurisprudence on privacy rights had continued to hibernate within the realm of freedom of personal choice in matters of marriage and family life as one of the liberties protected by the Due Process Clause of the Fourteenth Amendment expressed in several judicial decisions.⁵⁵ The Supreme Court in the latter case of *Eisenstaedt v Baird*⁵⁶ recognized the right of an individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or begat a child and that right necessarily includes the right of a woman to decide whether or not to terminate a pregnancy, noting further that the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child were of a far greater degree of significance and personal intimacy'.⁵⁷

In a 1992 judgment⁵⁸ of the United States Supreme Court, the decision in *Roe v Wade*⁵⁹ with respect to degree of the State legitimate interest to regulate and proscribe abortion after the first trimester was significantly struck down and a new rule or standard to evaluate abortion laws was introduced which the Court described as 'undue burden' standard, namely a law is void if its purpose or effect was to place substantial obstacles in the path of a woman seeking an abortion before the foetus attains viability' and reiterated that the source of privacy right that underpins woman's right to choose abortion derived from the

⁵³Ibid 163-164.

⁵⁴Ibid 163-165.

⁵⁵*Loving v Virginia*, 388 US 1, 12, 87 S Ct 1817, 1823, 18 L. Ed 2d 1010; *Price v Massachusetts*, 321 US 158, 166, 64 St Ct 438, 442, 88 L. Ed 645; *Skinner v Oklahoma*, 316 US 535, 5411, 62 S Ct 1110, 1113, 86 L Ed 1665.

⁵⁶405 US 438, 453, 92 S Ct 1029, 1038, 31 L. Ed 2d 349 (1972).

⁵⁷Ibid 16.

⁵⁸*Planned Parenthood of Southeastern Pennsylvania v Robert Casey*, 505 US 833, 112 S Ct 2791.

⁵⁹Criminal Justice Act (Northern Ireland) (n 41).

Due Process Clause of the Fourteenth Amendment⁶⁰ to the United States Constitution⁶¹ which placed individual decisions about abortion, family planning, marriage and education within the realm of personal liberty which the Government may not enter'. Thus, the later decision had clipped the right of States to restrict abortion prior to the foetus reaching the viability period.

To address the issue of abortion law in the United States jurisprudence and bring it under uniformity, a legal framework was initiated and sponsored by the National Conference of Commissioners on Uniform State Laws⁶² in 1971 which came up with a legislative⁶³ template for the States to adopt and domesticate. The proposed model abortion law prescribed regulations with respect to legal abortion. It provided that: 'An abortion may be performed in this State only if it is performed'⁶⁴[b]y a physician licensed to practice medicine (or osteopathy) in this State or by a physician practicing medicine (or osteopathy) in the employ of the Government of the United States or of the State (and the abortion is performed in the physician's office or in a medical clinic), or in a hospital approved by the Department of Health or operated by the United States, this State, or any department, agency or political subdivision of either), or by a female upon herself upon the advice of the physician',⁶⁵ and 'within 20 weeks after the commencement of the pregnancy or after 20 weeks only if the physician has reasonable cause to believe'⁶⁶ that 'there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother'⁶⁷ or 'that the child would be born with grave physical or mental defect'⁶⁸ or 'the pregnancy resulted from rape or incest, or illicit intercourse with a girl under the age of 16 years'.⁶⁹ It criminalized any abortion procedure performed not in consonance with this law as felony with penal sanctions.⁷⁰

It is rather curious that the proposed uniform model piece of legislation to regulate abortion procedure in the United States jurisdiction has not been adopted by the States. Each State continues to formulate their respective regulations on legal abortion. Notwithstanding the position each State may adopt, the jurisprudence laid down by the United States Supreme Court on abortion rights remains the current position.

⁶⁰Fourteenth Amendment (n 49).

⁶¹Constitution of the United States 1787.

⁶²(58 A B A), 380 1971.

⁶³Uniform Abortion Act 1971.

⁶⁴Ibid s 1(b).

⁶⁵Ibid s 1(b)(1).

⁶⁶Ibid s 1(2).

⁶⁷Ibid s 1(2)(i).

⁶⁸Ibid s 1(2)(ii).

⁶⁹Ibid s 1(2)(iii).

⁷⁰Ibid s 2.

Although, the jurisdiction of the Great Britain and the United States formed the case study in the present study as a template for the Nigeria jurisdiction to draw some lessons from, it would appear to be a legitimate and reasonable incursion to pry into some jurisdictions in Africa to demonstrate the progressive emerging trend to reform abortion laws to meet with the present realities. For this purpose, Cameroon and Morocco would be discussed.

In Cameroon, abortion is criminalized⁷¹ However, the legal framework provides for exemptions which permit legal abortion to be performed by a qualified person where it is shown to be necessary to save the life of the mother from serious danger to her health, or where the pregnancy resulted from rape where the facts of the rape were verified by the Public Prosecutor's Office.⁷² Thus, legal abortion is guaranteed in Cameroon under the circumstances as prescribed by law.

In Morocco, a legislative reform⁷³ introduced in 1967 guarantees a restricted legal abortion to safeguard the health of the mother and the procedure for it. Although, the restricted field for legal abortion in Morocco appears narrow, it at least provides a procedural legal framework to perform a legal abortion within the sphere of permissive ground, namely where a physician or surgeon considers abortion as a necessary measure to save the life of the pregnant woman, the medical practitioner is at liberty to perform the abortion with the permission of the spouse. However, the requirement of spousal consent may be dispensed with if the medical practitioner is of the opinion that the life of the woman is in grave and imminent danger, provided the Chief Medical Officer of the Prefecture or Province is notified in writing.⁷⁴

4. Abortion and Human Rights Trajectory

The emerging trend in international human rights law is to extend the rights to privacy, equality, non-discrimination, health and life to abortion. Implicit in the right to life is the right to sexual and reproductive health of a woman and the right to privacy are impacted with what a woman does with her body. Although there are no contextual provisions in the international human rights instruments⁷⁵ that specifically provides for right to abortion, there is, however, a

⁷¹Penal Code 1967, s 339.

⁷²'Abortion Laws: A Survey of Current World Legislation', World Health Organization, Geneva, 1971.

⁷³Crown Decree 1967 which amended the Penal Code, s 453.

⁷⁴Crown Decree (n 73), s 23.

⁷⁵Universal Declaration of Human Rights (UDHR) adopted by the General Assembly Resolution 217A (111),

10 December 1948; International Covenant on Civil and Political Rights (ICCPR) ratified by the United Nations General Assembly Resolution 2200A (XXI) 16 December 1966 and International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by the General Assembly Resolution 2200A (XXI) 16 December 1966.

growing body of jurisprudence, treaties and conventions at the level of international law and the African jurisprudence that have added rich scholarship in this area of human rights law.

International jurisprudence advocated by the United Nations Human Rights Committee (UNHRC) have consistently maintained that denying women access to abortion amounts to breach of their rights to good health, right of privacy and even degrading and inhuman treatment.⁷⁶ At several fora, the (UNHRC) had cautioned on the need to ensure that while measures are taken to protect the rights to life and other rights under the Covenant, that restrictions on access to abortion, where they exist, must not ‘jeopardize women’s and girls’ lives or subject them to physical or mental pain or suffering...discriminate against them or arbitrarily interfere their policy’.⁷⁷

On its part, the Committee on Economic, Social and Cultural Rights (CESCR) had stated that as part of the obligation to eliminate discrimination, State Parties should address ‘criminalization of abortion or restrictive abortion laws’.⁷⁸ On the issue of sexual and reproductive rights, the Committee further stated that State Parties ‘have a core obligation to ensure, at the very least, minimum essential levels of satisfaction of the right to sexual and reproductive health which included measures to prevent unsafe abortions’.⁷⁹

The Committee on the Elimination of Discrimination against Women (CEDAW), an international treaty has harped on abortion rights of women and girls and called for decriminalization of abortion. The CEDAW expressed concern about the fact that rural women are more likely to resort to unsafe abortion than women living in urban areas thereby putting their lives at risk.⁸⁰ It kicked against abortion laws as discriminatory. The Committee stated thus: ‘It is discriminatory for a State Party to refuse to legally provide for the performance of certain reproductive health services for women’⁸¹, and that ‘[t]he right of a woman or girl to make autonomous decision about her own body and reproductive functions is at the very core of her fundamental rights to equality and privacy, including intimate matters of physical and psychological integrity, and is a precondition for the enjoyment of other rights’.⁸²

Again, CEDAW sees abortion laws or its restrictions as equivalent to gender-violence, cruelty, and torture. It stated thus:

⁷⁶ *LC v Peru*, CEDAW/C/50/D/22/2009 para 8.15; *Whelan v Ireland*, CCPR/C/119/D/2425/2014 paras 7, 8; *Melletv Ireland*, CCPR/C/116/D/2324/2013 para 7.7; *K L v Peru*, CCPR/C/85/D/1153/2003 para 6.4.

⁷⁷ General Comment 36 para 8.

⁷⁸ General Comment 22 (2016) para 34.

⁷⁹ General Comment 22 para 49.

⁸⁰ General Recommendation 34 (2016) para 38.

⁸¹ General Recommendation 24 (1999) para 11.

⁸² Working Group Report, A/HRC/38/46 (2018) para 35.

Violations of women's sexual and reproductive health and rights, such as criminalization of abortion, denial or delay of safe abortion and/or post-abortion care, and forced continuation of pregnancy, are forms of gender-based violence that, depending on the circumstances, may amount to torture and other forms of cruel, inhuman and degrading treatment.⁸³

The CEDAW opines that abortion laws rather than serve as a deterrent, increases more danger of unsafe abortions, health complications and even fatalities. It stated thus: 'Criminal regulation of abortion serves no known deterrent value. When faced with restricted access women often engage in clandestine abortion including self-administering abortifacients, at risk to their life and health in addition to stigmatization impact on women and deprives women of their privacy, self-determination and autonomy of decision, offending women's equal status, constituting discrimination'.⁸⁴

Furthermore, the Committee on the Right of the Child had advocated for legal abortion and called for a review of all laws that criminalized it. It recommended to all States '[t]o decriminalize abortion to ensure that girls have access to safe abortion and post-abortion services, review legislations with a view to guaranteeing the best interests of pregnant adolescents and ensure that their views are always heard and respected in abortion-related decisions'.⁸⁵

It has been demonstrated that the right to affordable good health-care of women and girls, their privacy which underscores their right to individual autonomy to choose whether to carry to full term an unwanted pregnancy or not especially pregnancy that resulted from rape or incest with its societal stigmatization or pregnancy that manifested foetal great abnormalities, freedom from discrimination which denied them access to adequate medications and equality rights which abortion laws have impacted negatively on human rights. Thus, there is a strong nexus between abortion laws and human rights. Indeed, undue restrictions or absolute ban on abortion impinge on the full enjoyment of fundamental rights and freedoms of women and girls as guaranteed in the international human rights instruments and as provided by State Parties' domestic human right provisions in their respective Constitutions. Indeed, laws that tend to diminish full enjoyment of human rights provisions need to be construed narrowly to safeguard the protected rights.

As earlier observed in this study, one of the antiquity reasons for criminalization of abortion was the protection of the unborn child from been arbitrarily killed. That time-tested reason equally stands today as very germane. Notwithstanding the non-recognition of the right of unborn child as a human personality worthy of international protection in the international bill of rights instruments, domestic laws that criminalize unlawful killing of unborn child

⁸³General Recommendation 35 (2017) para 18.

⁸⁴CEDAW/C/OP 8/GBR/1 (2018) paras 42, 52.

⁸⁵General Comment 20 para 60.

either by abortion or otherwise affords the desired legal protection for the unborn child. The legal protection afforded to an unborn child by domestic law in Nigeria and the human right of a pregnant woman to terminate a pregnancy in deserving cases is the concern of this study. Indeed, both sides of the gulf have legitimate concerns deserving of consideration and conversation. Abortion laws, where they exist, should be liberalized and construed narrowly in the overall interest of the health and reproductive rights of women and girls.

At the level of African jurisprudence, the African Commission on Human and Peoples' Rights (ACHPR) has adopted a treaty position to safeguard the health and reproductive rights of women and girls by calling all States Parties to take all appropriate measures to 'protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus'.⁸⁶ The Maputo Protocol treaty recognizes the right of women to sexual and reproductive health which includes the right to control their fertility, the right to decide the number of children and their spacing, the right to choose any method of contraception, and the right to have family planning education.⁸⁷ Thus, at the level of African jurisdiction, there is a growing agitation by the African human rights watchdog for legislative reform of abortion laws to respect the health and reproductive rights of women and girls.

5. Summary of Findings, Recommendations and Conclusion

5.1 Summary of Findings

In the present study, the following findings were made:

- (i) The Nigerian jurisdiction criminalized abortion with penal conditions in the two federal laws operative in the country at the federal level. The Criminal Code Act⁸⁸ operates in the Southern States while the Penal Code Act⁸⁹ operates in the Northern States respectively. While the PCA 2004 granted limited and restrictive legal abortion solely to save the life of the mother, the CCA 2004 created a blanket ban on abortion.
- (ii) There is no legal framework that prescribed regulations for legal abortion in the Northern States where the PCA 2004 granted restrictive access to legal abortion.

⁸⁶General Comment No 2 of the Protocol to the African Charter on Human and Peoples' Rights of Women in

Africa (the Maputo Protocol), art 14.1(a), (b) and (f) and art 14.2(a) and (c).

⁸⁷ African Commission on Human and Peoples' Rights General Comment No 2 <<https://www.achpr.org>>

Accessed 15 April 2022.

⁸⁸CCA (n 16).

⁸⁹ PCA (n 16).

- (iii) There is no clear-cut statutory definition of abortion in the two Nigeria criminal statutes on abortion, and that lacuna was seen to negate the express provisions of the Nigeria Constitution which specifically provided that no person shall be convicted of any offence unless that offence is defined and the penalty prescribed in a written law. An examination of the Nigeria criminal statutes on abortion merely shows procedural description of abortion, the outcome and the penal consequences.
- (iv) It was further revealed in the study that there is a growing body of jurisprudence in several jurisdictions that introduced legal reforms to abortion laws which have expanded the scope of the grounds of abortion from the original reason to save the life of the pregnant woman to include other factors like pregnancy that resulted from rape, incest, or extreme foetal abnormality.
- (v) The two jurisdictions of the Great Britain and the United States used as a case study to serve as a template for Nigeria in search of legal reform on abortion demonstrated expansive access to legal abortion at the stage of foetus viability and both jurisdictions have a procedural legal framework that afforded women and girls safe legal abortion rights.
- (vi) It was further shown that international human rights jurisprudence and treaty pronouncement sand the African human rights jurisprudence respectively have denounced laws that criminalized abortion or that granted limited access to legal abortion as violation of universal human rights of privacy, life, equality, non-discrimination, and have called on State Parties to take urgent measures to address the human rights concern negatively impacted by abortion laws. There is no recognition and protection of human rights of an unborn child under international human rights law.
- (vii) The menace of criminalization of abortion or restricted abortion solely on the basis where the life of the pregnant woman is at risk have led to increased clandestine unsafe abortions that has culminated in the growing number of mortality rates as a result of unsafe abortions with its fatality and health complications or consequences. Notwithstanding the crime of abortion, women and girls that would want to get rid of unwanted pregnancies would only go underground to perform it, in most cases, with unqualified and unlicensed practitioners under unhealthy conditions.

5.2 Recommendations

In the light of the rich scholarship that garnished this study and findings deduced, the following recommendations were suggested namely:

- a. There is urgent need to review the current abortion laws in Nigeria jurisdiction by legislative reform. In this regard, a new legislative framework should be introduced to provide for regulated access to legal

abortion in deserving cases such as not only when the life or health of the pregnant female is at risk, but to extend to cases of rape, incest, grave and severe foetal abnormality. The new legislation should define the offence of abortion to be in accord with the Constitutional provision.

- b. It is further recommended that a comprehensive prescriptive regulation framework be enacted as a subsidiary legislation to cover such areas as gestation period for unrestrictive safe and access to legal abortion within the first trimester in accordance with the World Health Organization prescription, medical treatment in designated or regulated hospitals and clinics, concurrent medical opinion and advice of at least two medical practitioners, qualification of medical personnel to carry such abortions, post-abortion health-care services to deal with possible complications, consent provision and situations where its waiver may be dispensed with like cases of extreme danger to life of the pregnant woman and such other incidental matters.
- c. It is also recommended that where the pregnancy has entered into ‘viability period’ of the foetus, abortion should be restricted unless certified medical opinion is on the contrary that continuation of the pregnancy and its delivery would pose greater danger to the life of the pregnant female or where there are indications that the foetus was already dead or likely to be born with extreme life threatening ailments like cancer, brain tumour, et cetera to the end that the eventual birth of the child would pose severe and great pains and challenges to the family.
- d. As a template for the proposed law reform, this present study recommends strongly the legal framework in the two jurisdictions of Great Britain with respect to her Offences Against the Persons Act 1967 and the United States with respect to her model Uniform Abortion Act 1971 respectively with such reasonable modifications that would be necessary and expedient to meet with present realities.
- e. There should be a state-sponsored advocacy for legal abortion to make its performance when necessary, a matter of normal medical routine inclusive of aggressive sex education, counselling and adequate provision of medications in designated hospitals or clinics to obliterate the stigmatization syndrome associated with abortion howsoever caused in African developing countries like Nigeria.

5.3 Conclusion

The present study x-rayed the abortion laws in Nigeria and identified their inadequacies to meet with the present realities from the rich scholarship that enriched this study. Nigeria’s extant abortion laws are vague, anachronistic, archaic, reprehensive and an antithesis to the current jurisprudence in African and international human rights law on sexual and reproductive health of women

and girls to access safe abortion. In order to highlight the current dynamics of jurisprudence on the abortion rights of women, two major jurisdictions, namely Great Britain and the United States were used as a case study with references to Cameroonian and Moroccan jurisdictions. Further incursions were made in the African and international human rights jurisprudence for the Nigerian jurisdiction to draw some tutorials from to shape her proposed law reform. It is hoped that the findings and recommendations in the present study would agitate legislative reform in Nigeria and enrich it. This present study advocates for a new legal framework to recognize the sexual and reproductive health rights of women and girls to access legal abortion in deserving cases demonstrated in this study under the African and international human rights framework. Absolute and unfettered access to legal abortion is not feasible but a regulated decriminalization of abortion is recommended for the Nigerian jurisdiction.