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EDITORIAL COMMENT

We are happy to publish the Volume 5 of the Nasarawa State University Law Journal, an annual publication of the Faculty of Law, Nasarawa State University, Keffi. The journal presents a unique set of articles written by some of the best brains in the legal profession in Nigeria. After being peer reviewed, the articles were accepted for publication.

The articles are generally well articulated and thought provoking which form the substance of the journal.

We are desirous of publishing this journal twice a year. Consequently, submission of articles is welcome on diverse aspects of law addressing contemporary issues of importance to the legal profession and the society.

We wish to express our sincere appreciation to – Prof. Ephiphany Azinge, Director General - Nigerian Institute for Advanced Legal Studies (NIALS) for his immense support and encouragement towards the publication of this edition of the journal.

Maxwell M. Gidado Ph.D. (Warwick)
Editor-in-Chief

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ol to finance protection of natural areas and increase their economic aportance.

LEGALIZING ABORTION, HUMAN RIGHTS AND SOCIO-ECONOMIC FACTORS: A MATTER OF GOOD PUBLIC HEALTH AND POLICY

By

M.K. Adebayo*

INTRODUCTION

The incidence of unsafe abortion and the consequent toll on the lives and health of Nigerian women is one of the reasons why the African continent is frequently assured of a pride of the place in the indices of human misery. This misery and degradation ought to be challenged, not because it is a falsification of events, but rather given the political weakness and willingness, the misery and degradation can be substantially minimized and ameliorated, at least if not eliminated altogether.¹

The law has since the advent of colonialism been a potent instrument in the establishment and sedimentation of restrictive and inaccessible abortion regimes that are no paradigmatic of much Africa; in the age where the indivisibility of human rights has been firmly inscribed in international human rights law.

Nigerian abortion laws have been instruments of oppression rather than freedom. With few exceptions, they are characterized by indifferent rather than social justice, compassion and care.

The remarkable degree of success of the reproductive health issues is truly breathtaking. There is need for a platform to called for a human life amendment of the unborn child by giving the embryo the same rights as everyone else, not to organization that advance abortion rights.

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1. Ngwena, C 'Reproductive Health & Human Rights' Paper Presented at the International Conference on Law, Nicon-Nuga Hilton, Abuja, 19th -22nd August, 2002.

Restrictive abortion laws violate women's reproductive rights including the right to health, life, liberty, security, privacy, and freedom from gender discrimination. Lack of safe legal abortion services jeopardize adolescent health and undermine their right to make decisions concerning childbearing.

Adolescent females worldwide are disproportionately victims of unsafe abortion because they have the least access to quality, confidential reproductive health services and information, including contraception. Adolescent females are also less likely to have the social contacts, access to transportation, and financial means to obtain safe abortion. To address unsafe abortion, government should consider enacting laws that permit abortion without restriction as to reason or on broad grounds taking into consideration that many abortions in Nigeria and indeed in Africa are self induced, for instance based on external factors like poverty, environment, educational levels, cultural attitudes, gender relations, inequality in the distribution of wealth and resources, wars and starvation.²

The paper seeks to explore the development of abortion laws in Nigeria with a particular focus on determining the extent of access to safe legal abortion. Also it seeks to appraise abortion law against the backdrop of notions of contemporary human rights and reproductive sexual health.

The privacy of citizens, their homes, correspondence, telephone conversations, and communication is guaranteed and protected under the Constitution of the Federal Republic of Nigeria 1999. Though the marginal notes to Section 37 of the 1999 Constitution reads 'right to privacy and family life', the limitation of the constitutional right to privacy of citizens is suggestive that the predominant consideration of the drafters of the Constitution was not the protection of the right of privacy as it pertains to family life, thus making it difficult to appreciate why the right to family was mentioned in the Constitution without any qualification. Furthermore, Section 45 of the same Constitution allows for restrictions of this right and many others by means of laws that are reasonably necessary and justified in any democratic society. This implies a limitation on the scope of the enjoyment of

2. *Ibid.*

the right to privacy in order to probably protect the public health, public morality, and public safety or in the interest of peace or security. Given the high rate of maternal mortality (female adolescent) in Nigeria resulting from unsafe abortion, there is high need for urgent and serious rethink of the restrictive abortion laws rather than in cases where the life of the mother is in danger, because not most adolescent females have recourse to medical or illegal service usually rendered by quacks resulting in most cases to medical or health complications and even death in some cases. The theme of the paper is to advocate for a broader interpretation of the right to privacy provided for in the Constitution to encompass a woman's/girl's decision whether single or married as to or not to terminate her pregnancy free from unwarranted governmental intrusion to matters fundamentally affecting her person.

THE HISTORICAL PERSPECTIVE OF ABORTION IN NIGERIA

Historically, the evolution, development and reform of abortion law in Nigeria can be understood through three main phases, i.e. the indigenous, pre-colonial, the colonial and post-colonial phases.

The indigenous or pre-colonial phase has been the least documented of the phases in the development of abortion law in Nigeria, in part because of the tradition of oral history in much of African heritage that has not always allowed contemporaneous documentation of abortion traditions and practices coupled with the fact that abortion was not generally considered as a matter in the public domain for public debate.

Despite these limitations, however, it is clear that abortion is an age old tradition on the continent. It has been practiced by traditional Nigerian communities in the same manner as their counterparts elsewhere. It can be inferred from studies that have been conducted, that in traditional Nigeria, society, abortion was largely regarded as a private matter for resolution by the family than by indigenous courts, with women playing a pre-eminent role;³ the issue of punishment was generally not for the public realm. In the views of

3. Riddle, J. M. 'Contraception and abortion from the ancient world to renaissance' cited in Sebo, E. J. 'Abortion Tradition in Rural Jamaica (1996) 42 Vol. 4 Social Science And Medicine 495.

a Text writer Renne,⁴ whilst abortion was socially frowned upon, and was, indeed, a case for shame for the woman concerned, sanctions meted out by an indigenous court appear to have been the exception rather than the rule.

During the indigenous era, abortion was generally seen to be outside the jurisdiction of the Indigenous courts, for instance from inquiries from persons knowledgeable in customary law; when asked whether there was any law regulating abortion, the general response was that they never heard of any punishment being inflicted for this offence.⁵ The assumption was that abortion was viewed with moral approbation; it is nonetheless remained confined to the censure of the family.

One can thus decipher that during the pre-colonial era, there was both private moral censure and a measure of public tolerance for abortion. At that time there was no public health system in place. Health care was essentially a private matter for the individual and the family; and so was abortion. It was colonialism to say conclusively that brought abortion into the public domain.

During the colonial phase, abortion laws were not a matter of academic or historical interest only as their imprint is still visible today. In the submissions of Braam and Hessini,⁶ as part of the subjugation of colonial people, Colonial powers invariably imposed their own legal system on the conquered not at least in the area of abortion law. Customary law and penal regulations were eclipsed by the imposed law. The irony, however, is that long after the colonial powers themselves have reformed and liberalized their own abortion laws; Nigeria has retained the regressive abortion laws.

Whilst former colonial powers have since made spectacular gains in stemming unsafe abortions, through, inter-alia, the liberalization of abortion laws and the provision of requisite services, Nigeria still retained laws that adversely impact on women's health. Colonial laws are anachronistic and

characteristically restrictive of abortion laws; they are indifferent to the health of women and much less their human rights; this view was subscribed to by Meme.⁷

A common feature of colonial abortion laws, whether originating from the codified laws or the common law of England, is that they all criminalized abortion. The basis of criminalization was invariably ecclesiastical. It was designed to reflect a sign of religious sin and enforce a kind of morality. Abortion law serves to revere and protect unborn life irrespective of the harmful consequences to the mother.

The Roman Catholic Church in particular had an abiding influence in the criminalization of abortion. By the time colonial jurisprudence imposed itself on Nigeria, the Roman Catholic doctrines had firmly permeated and influenced secular laws on abortion. As Cook and Dickens⁸ have pointed out, the redefining of mortal sin by the Roman Catholic Church in the 1869 applied not only from quickening, but rather from conception impacted on secular criminal law and served to reinforce the criminalization of abortion.

In former English colonies, it is the influence of the Offences against the Person Act of 1861,⁹ and judicial interpretation of English Common Law that shaped colonial common law. Abortion was unlawful unless it was procured in good faith to save the life of the mother. This exception became known as the 'Therapeutic Defense'. Most jurisdiction in Anglophone Africa like Ghana and Kenya, adopted statutes to reflect the law as developed under common law what was not articulated was the scope of the therapeutic defence.

The defence of therapeutic abortion was received in an expansive judicial interpretation in 1938 in the English *Locus-Classicus* case of *R v. BOURNE*, in that case the court expanded the defence of therapeutic abortion to cover the circumstances of a 15 years old victim of rape whom it was accepted by the

7. Meme, J. T. 'Abortion and Human Rights in Sub-Sahara Africa' (2000) 3 (2) Initiative in Reproductive Health Policy p. 2.
8. Cook, R. J and Dickens, B. M 'Human Rights Dynamics of Law Reform (2003) 25 Human Rights Quarterly 1 pp. 12-14.
9. Offences against the Person Act, 1861 (statute of General Application in Nigeria).
10. (1938) 3 AER p. 615.

4. Renne, E. P. 'The Pregnancy that Doesn't Stay: the Practice and Perception of Abortion by Ekiti Yoruba Women' 42 (4) Social Science and Medicine 483.

5. *Ibid.*

6. Braam, T and Hessini, L.: 'Ensuring Reproductive Choice: Saving Women's Lives in Africa: Action to Reduce Maternal Mortality in Africa' Regional Consultation on Unsafe Abortion (2000) 1 pp. 25-36.

court would have become a 'mental wreck' had she been forced to continue with the pregnancy. Thus BOURNE's case brought about a measure of judicial liberalization of abortion laws. Through the judicial application of the common law doctrine of necessity, BOURNE's case expanded the defence to include protecting the physical and mental health of the woman. Some legislatures and some courts in Anglophone Africa were later to develop abortion laws along the lines of BOURNE's case.

The judicial liberalization of abortion in BOURNE'S case at least gave the Anglophone countries a semblance of an edge over their Francophone counterparts in terms of the possibilities of liberalization given the political, legislative or judicial willingness. The colonial legacy on abortion has not been a positive one; the worrying fact is the failure by post colonial Nigeria government to overhaul the legacy of restrictive laws on abortion.

The next stage worthy of examination is the post colonial and reforms of abortion laws. This period was characterized by stagnation rather than progress. Nigeria for instance, retained bulk of colonial laws on abortion, making little or no attempt to review them, by still recognizing the fact that legal abortion can only be procured on grounds of necessity, to save the mother's life.

There exist a kind of middle band situation where there has been some reform of colonial abortion laws, but the reforms neither recognized abortion on socio-economic grounds, nor forming a link with the notion of reproductive rights as human rights. Let's take for instance the position in Zimbabwe, a former British colony as well. The Zimbabwe's Termination of Pregnancy Act,¹¹ which was an inherited statute of general application as at Zimbabwe's Independence in 1980. The Act permits abortion on other grounds to wit: if the continuation of the pregnancy would endanger the life of the woman; continuation of the pregnancy would constitute a serious threat of permanent impairment to the woman's physical health; where there is serious risk that the child to be born will suffer from a physical or mental defect as to be

11. Zimbabwe's Termination of Pregnancy Act, 1977.

permanently, seriously handicapped; or the pregnancy is the result of unlawful sexual intercourse such as rape, incest or sexual intercourse with a minor.

By analysis, the Zimbabwe's Act sought to clarify the common law position and render abortion law more certain. It was, however, not inspired by any notion of abortion as a public health issue and much less a human rights issue. The restrictive language of the Act is unmistakable. In respect of abortion on the ground of the woman's health, the threat to her health must not only be serious, but that it should pose a threat of permanent impairment. Even more revealing of the conservative and restrictive orientation of the Act is that it confines the threat to the woman's physical health, thus, ruling out mental health or socio-economic circumstances as grounds for abortion.

One may argue that the legislative intention behind the Act is that the provisions must be interpreted stringently. Not surprisingly, the Act has created a need for unsafe abortion, thus procuring abortion under the Act has been described as lengthy, restrictive and cumbersome. According to Brook,¹² it is estimated that between 60-80,000 abortions occur annually in Zimbabwe and the consequent maternal mortality and morbidity from unsafe abortion have been identified as a major public health problems.

Under the Zimbabwe's Act, in an attempt to rule out abortion on socio-economic grounds, a distinction has to be made between physical health and mental health grounds for abortion. In respect of mental health, not only was there a requirement of a serious threat of injury, but the existence of a danger of permanent damage. Equally, deterring of an abortion, were onerous administrative procedures for procuring abortion is involved, in such a situation for an abortion to be procured, an application has to be made to the medical superintendent of the facility by the doctor intending to perform the abortion that must certify that the woman has met the legal grounds for abortion.

To obtain abortion on grounds of unlawful sexual intercourse, there must have been a complaint lodged with the police. If a complaint had not been lodged,

12. Brook, R *et-al* 'Reducing Unplanned Pregnancy and Abortion in Zimbabwe through Post-abortion Contraception' (2002) 33 (2) *Studies in Family Planning* p. 195.

the complainant had the burden of proving that there was a good and acceptable reason why a complaint was not lodged. One of the certifying practitioners must have been a surgeon who examined the woman following the lodging of the complaint. In addition, a Magistrate has to certify that a complaint has been lodged or that there was a good and acceptable reason why it was not so lodged; and that on the balance of probabilities unlawful sexual intercourse has taken place.

In all cases of all abortions, the superintendent is required to submit the details of the abortion including the name and address of the patient to the Department of National Health, thus putting paid to any semblance of the ethic of trust and confidentiality and the patient's right to privacy.

In Zimbabwe, there was no way in which the state could be said to have attempted to seriously address the issue of unwanted pregnancy and the choices of women. One could say that abortion laws there are paternalistic, authoritarian and sought to retain the criminalization of abortion. The notion of reproductive health was alien philosophy. The woman had no right to abortion. At best she had a mere privilege to be considered for eligibility for abortion by a multiplicity of player's doctors and state officials and magistrates. The same position is obtainable in Nigeria.

In respect of any of the grounds for abortion, it requires not less than four doctors to determine whether the woman has met the criteria for abortion. In practice, these procedures fail to serve the needs of women; instead they served to encourage recourse to unsafe abortion, especially among the poor women; hence the reform of the abortion laws. Any reform therefore, that does not recognize in its provisions or implementation, that the majority of abortions are sought on socio-economic grounds because the women regarded such pregnancy as unwanted; that women will choose to have abortion regardless of the legal proscriptions, and that the State has a duty to provide services to render abortions safe, which will always fall short of serving the needs of women; such reforms would therefore create a need for unsafe abortion.

A realistic approach of abortion laws reform can be seen for instance in the position in Tunisia. The Tunisia government in 1965 took a bold step in liberalizing abortion. Abortion is available on request in the first twelve weeks of pregnancy, thereafter abortion is permitted on the grounds of danger to the physical or psychological health of the woman or on foetal grounds.

The Tunisia position in liberalizing abortion was highly remarkable in the sense that the country is predominantly Muslims taking into consideration the fact that religion is often associated with implacable opposition to abortion and the stalling of reforms. The Tunisia experience exhibits the fact that too much simplistic approach which lacked the attribute of progressive liberal reforms of abortion laws due to religious oppositions alone cannot stand. There must be interplay of other factors, for instance lack of commitment on the part of the government, competing health priorities, finances, bureaucratic indecision and the shifting requirements of international donors in establishing feasibility of legal reform of abortion laws.

A reform of the nature has been adopted and implemented in country like Zambia in 1972, following the reform based on the English Abortion Act of 1967. Under the Zambian Law, abortion is allowed not only on grounds of danger to the life of the woman or danger to the physical or mental health, or foetal health ground, but merely more significantly on socio- economic grounds. However, the Zambian Law falls short of granting abortion at the request of three doctors certifying that the woman has satisfied any of the prescribed grounds for abortion.

The South Africa carried this reform forward by radically reforming her abortion law too vide the passing of the Choice on Termination of Pregnancy Act,¹³ and the Abortion and Sterilization Act.¹⁴ These two Laws provide for abortion on request in the first twelve weeks of pregnancy. Mere request and consent on the part of the woman suffice. There is no requirement to furnish supporting reasons. However, from the 13th-20th week, abortion is permitted if a medical practitioner in consultation with the woman is of the opinion that any of the following grounds are satisfied: i) that continued pregnancy would

13. Choice on the Termination of Pregnancy Act, 1996.

14. Abortion and Sterilization Act, 1975.

pose a risk to the woman's physical or mental health; ii) that there exit a substantial risk to the physical and mental health of the foetus; iii) that the pregnancy resulted from rape, incest, or that the continued pregnancy would significantly affect the social or economic circumstances of the woman.

After the 20th week, a danger to the woman's health, a risk of severe malfunction of the *foetus*; or the risk of injury to the foetus constitutes the grounds for abortion.

Under Nigerian law, interfering with pregnancy no matter how early this takes place is regarded as criminal unless such interference is undertaken for therapeutic reasons as prescribed by the Criminal and Penal Code to wit: *in good faith to preserve the mother's life*. One view posits that the reason for this is that the foetus is regarded as human life from the moment the ovum is fertilized, it becomes one in which the society has an interest that must be protected by law. It is only when the mother's life is at risk, that it is conceded that there is an overriding interest that allows abortion to be tolerated.

Feminist critics however, assert that this position rather than being informed by interest in foetal life is in fact, the result of male quest to control women's fertility to reinforce a phallocentric world. This rule of law follows the English Offences Against the Persons Act, 1861 that expressly modified the old common law rule that life commenced after the quickening of the child in the womb. This common law rule is itself premised on the ancient thought that a foetus did not begin to live until sometime after conception, at a moment when quickening takes place. Even though there was a debate as to the time when quickening takes place which has given rise to difficulties for legal proof purposes, the distinction between quick and non-quick pregnancies remained important, at least for the purposes of punishment.

Section 228 and 229 of the Criminal Code criminalize the conduct of both woman and person who aids or attempts the abortion of a woman. According

to Ladan, M.T¹⁵ it has been observed that the woman is rarely prosecuted. It would appear that the prosecutions anger is directed more at the abortionist. There is the tendency of law enforcer to view the woman who elects for abortion as sick psychologically or an innocent victim the subject of coercion or deceit.

This view of woman who seeks or procures an abortion is premised on the social valuation of children and the tendency to homogenize femininity and motherhood. It is thus thought that no woman in her rights senses would desire/like to eliminate her baby.

On the other hand, in Islam, abortion is an intentional premeditated or planned termination of pregnancy after the implantation that is done normally weeks after conception. It may be spontaneous as a result of physical injury to the woman or some biomedical disorder or it may be deliberate through human intervention. Islam upholds the sanctity of life. Thus there are number of verses in the Quran that testify to this. For instance Quran 17:70 provides that *and verily, we have honoured the children of Adam; if anyone slays a human being unless it be punishment for murder or spreading corruption on earth it shall be as if he slain the whole mankind; whereas if anyone saves a life, it shall be as if he had saved the lives of all mankind*(Quran 5:32) *"and do not take any human beings life the life which Allah has willed to be sacred otherwise than in the pursuit of justice"*(Quran 17:13).

Islam in the above verses forbids the termination of pregnancy, but there are situations where pregnancy can be terminated. Islam holds the view that the Holy Prophet (SAW) was endeared by Allah with interpretive power that in any other society would be considered legislative. Thus, the following verses support this assertion: *first, we have revealed unto(Mohammed) the remembrance of the Quran that you explain to mankind that which has been revealed for them.* (Quran 16:44). Furthermore, *whosoever the messenger (Mohammed) gives you take it and whatever he forbids reject it.*¹⁶

15. Ladan, M. T.: 'Review of Existing Reproductive Health Policies and Legislation in Nigeria' A Paper Presented at A One Day Stakeholders' Forum on Reproductive Health in Nigeria, Tahir's Guest Palace Hotel, Kano-Nigeria 20th April, 2006.

16. Mahdi, S Shari'ah Penal and Family Law in the Moslem World: A Right Based Approach (Abuja, Women Rights Advancement and Protection Alternative WRAPPA, 2003) p. 45.

REFORMING ABORTION PRACTICE

Access to abortion from a reproductive and sexuality rights perspective, appeals to the notion of rights as the normative yardstick for evaluating the extent to which women are able to access abortion services. Given the right based approach, the Constitution recognized the right to and protects the right of persons to make decisions concerning reproduction and security in and control over their bodies. The Constitution also protects the right to be informed of and to have access to safe, effective, affordable and acceptable methods of fertility regulation of one's choice, and that women have the right of access to appropriate health care services to ensure safe pregnancy and childbirth.¹⁷

The decision to have children is fundamental to women's physical, psychological and social health and that universal access to reproductive health care services includes family planning and contraception, termination of pregnancy as well as sex education and counseling programmes and services.¹⁸ While recognizing the fact that the state has responsibility to provide reproductive health to all and to also provide safe condition under which the right to choose can be exercised without fear or harm; thus believing that termination of pregnancy is not a form of contraception or population control, but a matter of choice.

In the words of Nwagwu, there are good reasons for restricting and making inaccessible provisions of the abortion laws and sterilization acts. This signifies an attempt to break away from the past where the domestic abortion laws had been characteristically indifferent to human rights.¹⁹

The erstwhile law had been both restrictive and inaccessible to poor women especially with its and consequent toll on women's mortality and morbidity. This necessitates a human rights approach to abortion law. Doubtlessly, abortion law reform in Nigeria requires repeal of penal laws whose only virtue

17. Ngwenya, C *op. cit.* p. 16.

18. *Ibid.*

19. *Ibid.*

have been to stigmatize abortion, infringe the human rights of women, and worse still fuel recourse to unsafe abortion as the only realistic alternatives to poor women with the consequent toll on maternal mortality and morbidity.

According to Cook, R. J & Dickens, D. M, abortion law reform should be more encompassing. It should aspire towards a comprehensive reproductive health framework that will entail transcending the decriminalization model. Furthermore, it entails more than recognizing the right to choose abortion in privacy or the right to self determination as civil political rights.²⁰ If decriminalization and respect for civil and political rights were to become the only preoccupation, then abortion law reform in Nigeria especially would be assured of victory. Such reform would preciously little on a continent where women are disproportionately poor and substantially lack access to health care services. In terms of avoiding piece meal reform, Nigeria has lessons to draw from a developed country the United States whose judicial reform of abortion law was disembodyed from a holistic approach to that of reproductive health.

When the United States Supreme Court in 1973 in **ROE v. WADE**²¹ pronounced that a woman had a right to choose abortion in the first trimester without encumbrance of the state interference, the court's decision then seemed highly innovative if not revolutionary. Indeed, **ROE v. WADE**²² justifiably achieved the status of a landmark case, a *cause célèbre* when it charted new waters in reading into the Due Process Clause of the United States Constitution a right that was not specifically enumerated to found fundamental rights to abortion in early pregnancy, notwithstanding the moral dichotomous nature of abortion.

It is only many years later that it has become apparent to many commentators that what **ROE**'s case did was essentially to decriminalize abortion, without more. The sustained efforts by federal and state governments in recent times to deprive abortion services of public funding means that for poor women abortion is legal, but not accessible.

20. Cook, R. J and Dickens, B. M *op. cit.* p. 14.

21. (1973) 93 SC p.-705.

22. *Supra.*

Gerber Fried²³ expressed a different opinion that ROE's case found a negative right to abortion; it required the state to desist from interfering with a decision to choose abortion in early pregnancy, but without imposing on the state a positive obligation to provide facilities and funding for rendering abortion services. This is not the kind of abortion law reform that subscribes to a comprehensive notion of reproductive health rights.

Reform of abortion laws in Nigeria cannot afford the luxury of making abortion a private matter in the sense of allowing states to relinquish all responsibility, save the duty not to interfere with the women's choice as did in ROE's case. If legal reform is to have a lasting impact on the lives and welfare of women, it should seek to move abortion to the public domain so that it becomes part of the mainstream health care delivery to which women are entitled. Access to abortion should become a gender sensitive socio-economic right as envisaged by Convention on the Elimination of All Forms of Discrimination Against Women,²⁴ rather than a mere civil and political rights.

Abortion law must embrace a substantive notion of equality. It must ultimately appeal to social justice and be undermined by recognition of real social and economic disparity between women and other groups. Paragraph C89 of the Beijing Platform of Action requires,²⁵ when it recognizes that a major obstacle to women to the achievement of the highest attainable standard of health is inequality, both between men and women and among women in different geographical regions, social classes and indigenous and ethnic groups. Thus abortion law must search for restitution justice by seeking to relieve and eliminate not only the sources, but also the effects of past disadvantages to our womenfolk.

In the observation of Cook and Dickens there is need to re-echo the comprehensive philosophy to reproduce and sexuality health that has been internationally endorsed and legitimized in recent times. It explicitly

23. Gerber, F. 'Abortion in the United States: Barriers to Access' *Health and Human Rights Journal* (2000) 4 (2) p. 174.

24. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979.

25. Beijing Platform for Action Fourth World Conference on Women (FMWC) held Beijing 1995.

embraces the notions of the right of men and women to be equal not only in fact, but also in substance. It recognizes the right of men and women to be informed of, and to have access to effective affordable and acceptable method of fertility regulation of their own choice, including appropriate health services to ensure safe pregnancy and delivery.²⁶

The obligation to provide access to safe abortion is unambiguously imposed on the state. The question then is how has the development of abortion laws in Nigeria fared in terms of recognizing as a global, the establishment of comprehensive reproductive and sexuality health framework that appeal to substantive equality and social justice for women? The answer is perhaps not difficult to provide. On the whole, recognition and attestation by many jurisdictions of the philosophy of comprehensive reproductive and sexuality health and the commitment to deal with unsafe abortion co-exists with restrictive and inaccessible abortion regimes.

The jurisdiction that permits supports or impede access to early safe legal preponderant of jurisdiction, abortion law has remained embedded in the crime and punishment paradigm. Domestic laws have, on the whole, doggedly refused to accept that the majority of women seek abortion for socio-economic reasons, that women are entitled to safe, legal abortion, and that restrictive legal regimes do not eliminate the need for abortion, but merely fuel unsafe abortion.

Cook, summed up that African abortion laws epitomize obstructive laws; they inhibit rather facilitate access to reproductive health care, they are dysfunctional in practice and contribute adversely to women's health. Reform of such laws is an infallible course to follow.²⁷

RELATING REFORM OF ABORTION LAW TO HUMAN RIGHTS PHILOSOPHY: ARGUMENTS FOR AND AGAINST

The process of securing radical reform of abortion law can be simple, or complex or seemingly intractable. A government in a country where authority

26. Cook, R. J and Dickens, B. *M op. cit* p. 15.

27. Cook, R. J *et al* *Reproductive Health and Human Rights* (oxford, Clarendon Press, 2003) p. 123.

was monolithic and highly centralized was singularly committed to strong effective family planning services, hence abortion law needs reform in order to give expression to the strong commitment to the development of family planning services for the benefits of the population that was not only compliant, but could also identify with the government's strategic goals. Thus utilitarianism rather than human rights philosophies had much to do with reforms.

Rarely, is abortion law reform simple? No, the dichotomous nature of abortion often guarantees opposition rather than support with the government. Often abortion law is too complex and multifaceted, at least in a multi-cultural and multi-religious environment like Nigeria.

In the words of Ladan, M. T reform of abortion law requires establishing a constitutional democracy in which the democratic values of human dignity, equality and freedom becomes uppermost in the society. The present Nigeria Constitution undermines the new socio- political dispensation. The policy aim was to grant access to early safe abortion not only as part of sound public health on account of incidence of safe abortion, but as part of the recognition of reproductive freedom.²⁸

In almost every part of the world, abortion has been the subject of religious, social, political and legal discourses. In many part, abortion related laws have witnessed serious challenges especially in the last five decades. While very few remain outside the *sanctified View* i.e. those who argue for absolute restriction on abortion. However, many have argued and advocated for liberalizing of abortion laws while others fight for outright legalization of abortion. Both groups of advocates argued along two main lines i.e the health argumentation and the rights argumentation. While the former thinking contends that the existing abortion laws are too restrictive in the prescription of what constitutes therapeutic reasons, the latter thinking is that the existing abortion law reflects an unwanted, unsupportable infringement of women's right to privacy.²⁹

28. Ladan, M. T *op. cit* p. 22-34.

29. *Ibid.*

Those that adopts the health argumentation points to the fact that restrictive abortion law open up more people to the risk of unsafe abortion as abortion services are made largely unavailable. This may be so because in spite of law in many places, a large number of abortions take place, whether induced by the woman herself, acting alone or with the assistance of other types of health workers. Unsafe abortion is one of the greatest dangers to women's reproductive health and restrictive abortion laws constitute serious delimitation of women's reproductive rights. A variety of complications as well as death occur as a result of unsafe abortions. Permanent disability is also not uncommon.

All this is in spite of the fact that abortion when performed by qualified persons with correct techniques and sanitary standards are a relatively safe procedure. Also it is argued that the restriction on the grounds upon which abortion may be performed to saving the woman's life is too narrow and may be insensitive to the difficulties posed by peculiar experiences of women. For example, rape victim who becomes pregnant is not entitled to abortion even though this is clearly a case of unwanted pregnancy and forced pregnancy.³⁰

The trauma experienced by rape victim who finds herself pregnant should be sufficient to ground liberalization of abortion laws so that they can have access to legal abortion. When it is appreciated that rape carries with it risk also of HIV/AIDS infection, the least the law could do is to be sensitive to the danger and consequent fears of the victim of rape.

Given the Nigeria's high rate of mortality in the female adolescent population resulting from unsafe abortion, there is need for urgent and serious rethink of the restrictive abortion laws. By prohibiting legal abortion except for where the life of the mother is in danger most adolescents have recourse to affordable, illegal service usually rendered by quacks.³¹

30. *Ibid.*

31. Ladipo, A. O *et-al* (eds) Women's Reproductive Health Empowerment and Male Involvement: Findings From Seven States of Nigeria (Badan: Association for Reproductive and Family Health, 1998) p. 29.

EXAMINATION OF EXISTING LAWS

The criminal law in Nigeria makes performance of an abortion a criminal offence unless it is performed to save a pregnant woman's life; hence abortion laws are illegal regardless of the duration of pregnancy; the laws prohibits abortion performed at all stages of foetal or embryonic development from the time of fertilization.

However, the law do not clearly distinguish between abortions performed by registered medical practitioners and unregistered medical practitioners, and do not stipulate the kind of facilities in which abortion may take place.

Spousal consent is not a requirement for operation necessary to save a woman's life, but it is commonly required by medical establishment in Nigeria. The government does not subsidize abortion services and abortions are not available in most public health facilities. Section 297 of the Criminal Code provides that:

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

This provision is designed to protect a medical doctor or probably any other person trained and skilled who carries out any surgical operation including an abortion for the purpose of preserving the woman's life, provided of course that the surgery was carried out in good faith and reasonable skill and care is demonstrated.³²

The controversial question then is what constitutes a standard of reasonable care and skill? Would a mid-wife nurse be expected to have as much skill as a trained medical doctor? Would it suffice if the mid-wife nurse demonstrates a standard of care and skill as can reasonably be expected of those who have no

³² Ladan, M. T *op cit* p. 27.

more than training as mid-wife? How a traditional doctor would for instance be assessed; would the standard of care and skill expected of him be as reasonable to other traditional doctors in the same category as him? Or that of a trained professional.

Given the fact that section 297 of the Criminal Code uses the phrase '*any person*' and does not restrict itself to medical doctors only, it can be deduced that the Section recognizes that there are other service providers in this regard i.e abortion practice beyond medical doctors. All that is required by the Section is that there must a demonstration of reasonable skill and care, the standard for which it is submitted is the standard reasonable to service providers in the same group as a trained medical Doctor.

While it may appear to be a fair position given the prominent place of traditional doctors and traditional birth attendants occupy in the provision of health care services in Nigeria, this throw up challenges that must be addressed; hence the need to incorporate a provision in our criminal code that will specifically provide that the abortion procedure must be undertaken by a registered physician only in a government hospital or in an approved private hospital or clinic, or other places.³³

This if adopted, it is submitted would be a better provision in place of the present position of the criminal code; just for any person to carry out the abortion procedure anywhere will be absurd, incongruous and ridiculous.

This will be a welcome position given the prominent involvement of unqualified persons in the practice of abortion in Nigeria. In fact in practice, most complications and deaths results from unsafe abortion carried out by these incompetent persons, it is always difficult a time to identify a qualified person in this category; while medical doctors and mid-wives and such other service providers receive certification and are licensed only after undergoing some prescribed courses of training. It is thus obvious that the present position of the law as it stands expose women more to the risk of unsafe abortion in the hands of unqualified persons.³⁴

³³ *Ibid* p. 30.

³⁴ *Ibid*.

There is sufficient evidence of the grave human costs of abortion carried out by unskilled persons; it has been suggested that the medical profession had a special reasons dictated by professional self interest for mobilizing against abortion carried out by non-doctors. As doctors asserted technical superiority over their competitors who were uncertified midwives and traditional healers.

Other relevant provisions of the penal laws on abortion include infanticide, killing of unborn child and concealment of the birth of children. For instance, Section 328 of the Criminal Code provides that; any person who when a woman is about to be delivered of a child being born alive by an act or omission of such nature that if the child had been born alive and had died, he would be deemed to have unlawfully killed the child, is guilty of felony and is liable to imprisonment for life.³⁵

By this provision, the law criminalizes not only intentional acts or omissions, but also conducts amounting to professional negligence by medical and health related workers including traditional birth attendants. Also by this provision, causing the death of a child on grounds of congenital disease, deformity or whatsoever, would amount to a crime.³⁶

CONCLUSION

The philosophy of reproductive health rights cannot be wished away. It is an integral part of the quest for equitable access to abortion services. It must be commensurately harnessed by all stakeholders, including women groups, and the health professionals in their attempts to secure lasting reform of abortion laws. The ultimate goal in abortion law reforms must be the achievement of substantive equality for women.

According to critics, the issue of rights upon which this abortion reform rests as part of socio economic right, is shrouded in exaggerated absoluteness,

35. Criminal Code Cap C 38 LFN 2004, and Penal Code Cap 102 Laws of Yobe -State of Nigeria Vol. 3, 1994.

36. Omorodion, F 'Reproductive Rights/Choice/Freedom: Establishing Nigeria Women's Priorities' Paper Presented at the International Conference on Law, Reproductive Health and Human Rights: Sheraton Hotel, Abuja, 19-22 August, 2002. P. 21.

hyper individualism and insularity. Rights represent an impoverishment of liberalism and a trivialization of democracy in that it has a tendency to nurture a culture of entitlement without responsibility. This argument has elaborate social welfare infrastructure and national health care systems that at least guarantee universal access to basic necessities including access to services that ensures safe motherhood.

Also the National Policy on Reproductive Health and Strategy, 2001 among its thirteen specific objectives and targets for the year 2001-2006, is targeted at reducing the level of unwanted pregnancy in all women of reproductive age by 50%.

The Federal Ministry of Health proposed reform of the abortion law in 1991, and the Nigerian Medical Association endorsed such efforts, no new legislation has been enacted since then. Health profession and human rights groups have also joined the call for reform of the restrictive abortion laws.

Some of the proposed revisions it is hoped would permit legal abortion for pregnancy resulting from rape or incest. What is required then may be in the form of a regulatory control, for instance, it may be required that the woman should have at least 48 hours period to complete counseling with a trained medical practitioner before the removal. Furthermore, some clinics may be designated as clinics for abortions, to be performed too by a qualified medical practitioner.

For example, is the Protocol on the Rights of Women in Africa adopted on July, 2003 by Africa Nations affirms reproductive choice and autonomy as a key human right, for instance the Protocol represents the first time that an International Human Rights instrument has explicitly articulated a woman's right to abortion when pregnancy results from sexual assault, rape or incest. It also covers cases where continuation of the pregnancy endangers the life or health of the pregnant woman; and in cases of grave foetal defect that is incompatible with life.