

Abortion law in Nigeria: Interrogating reforms towards liberalisation

Olaide Gbadamosi

Abstract

The question as to whether abortion should be legalised in Nigeria has been a controversial issue. Abortion is legal in Nigeria only to save the life of a woman. Restrictive legal frameworks on abortion in Nigeria have typically been enacted to control reproductive health and rights of women through the application of criminal law. The effects of Nigerian abortion law generate some human rights questions as they constitute flagrant violations of women's rights provided under the Nigerian Constitution, regional and international human rights instruments. The chapter critically examines abortion laws in Nigeria and barriers to abortion, and canvasses reforms of the restrictive Criminal Code and Penal Code provisions on abortion to pave the way for safe abortion.

1 Introduction

Unsafe abortion is a commonly neglected reproductive healthcare problem in developing countries, yet it poses a serious threat to the health of millions of women during their reproductive lives.¹ Until unsafe abortion and its consequences are eliminated, complications resulting from unsafe abortion will remain a major cause of maternal mortality and morbidity.²

Abortion continues to be a major public health issue that evokes social, political, legal, cultural and religious sentiments and debates in

1 IK Warriner & IH Shah (eds) *Preventing unsafe abortion and its consequences: Priorities for research and action* (2006).

2 As above.

all societies. This is particularly so in countries with restrictive abortion laws.³ Nigerian abortion laws are highly restrictive. Due to the fact that abortion is restricted by law in Nigeria, women seek abortions clandestinely under conditions that are medically unsafe and life-threatening. Current laws that criminalise abortion in Nigeria do not reduce the number of abortions. Instead, these strict laws mean that many women are forced to seek the services of unqualified practitioners with resultant high morbidity and mortality, both of which are an unacceptable price to pay for pregnancy.⁴ While debates over the right of the mother to her privacy and body and the rights of the foetus to life rage on, Nigerian women continue to suffer the consequences of restrictive abortion laws.⁵

Restrictive abortion laws, prohibitive costs, poor access to safe healthcare services and intense social stigma are barriers that prevent women from accessing safe and legal abortion.⁶

The sub-headings under which the pertinent issues in this chapter will be discussed include the socio-political context of abortion in Nigeria; the legal framework on abortion in Nigeria; consequences of Nigeria's restrictive abortion law; the proposed use of abortion laws in the United Kingdom, South Africa and Ethiopia as a model to reform the Nigerian law on abortion; a chronicle of various attempts to reform abortion law in Nigeria; barriers to accessing safe abortion; and recommendations on law reform towards the liberalisation of abortion law in Nigeria.

2 Socio-political context of abortion in Nigeria

Abortion is defined as the discontinuation of a pregnancy before the attainment of viability.⁷ Abortion is criminalised in Nigeria because of the attachment to religion, culture and customs. The political environment in Nigeria has been a complex and volatile one, with strong religious

3 L Omo-Aghoja and others 'The story of abortion: Issues, controversies and a case for the review of the Nigerian national abortion laws' (2010) 7 *East African Journal of Public Health* 323.

4 I Okagbue 'Pregnancy termination and the law in Nigeria' (1990) 21 *Studies on Family Planning* 197.

5 As above.

6 Safe Engage 'Out of the shadows: Saving women's lives from unsafe abortions in Lagos State' (2019), <https://www.prb.org/wp-content/uploads/2019/05/SAFE-ENGAGE-nigeria-presentation-guide.pdf> (accessed 24 March 2022).

7 See BA Garner (ed) *Black's law dictionary* (2004).

and ethnic tensions and a very conservative public attitude towards abortion.⁸ Nonetheless, support for safe abortion has been growing quietly, spreading primarily through the medical community, which has become increasingly knowledgeable about women's reproductive health, in general, and abortion, in particular.⁹

Societal unacceptability of unwed pregnancy, a desire to bear children only after marriage and a fear of parental disappointment possibly lead to unsafe abortion practices to avoid societal scorn.¹⁰

Globally, nearly all countries allow abortion to save a woman's life. Almost all deaths and morbidity from unsafe abortion occur in countries where abortion is severely restricted in law or in practice.¹¹ The percentage of unsafe abortions are higher in countries with highly restrictive abortion laws when compared to countries with more liberal laws.

Unsafe abortion is a major cause of maternal mortality and morbidity in Nigeria, accounting for 30 to 40 per cent of maternal deaths.¹² These reasons cannot be wished away or suppressed by any law, no matter how stringent.¹³ Unfortunately, the state of the law on abortion in Nigeria has failed to recognise these realities, thereby unwittingly encouraging illegal abortions with the attendant consequences.¹⁴

An estimated 3 to 5 per cent of women of reproductive age had an abortion in the 12 months prior to this study, indicating that 1.2 to 2 million abortions occur annually in Nigeria.¹⁵ More than six out of ten abortions were considered unsafe and 11 per cent of women sought care at a healthcare facility following perceived complications.¹⁶

8 BA Oye-Adeniran and others 'Advocacy for reform of the abortion law in Nigeria' (2004) 12 *Reproductive Health Matters* 209.

9 As above.

10 CA Atakro and others 'Contributing factors to unsafe abortion practices among women of reproductive age at selected district hospitals in the Ashanti region of Ghana' (2019) 19 *BMC Women's Health* 60.

11 DA Grimes and others 'Unsafe abortion: The preventable pandemic' (2006) 368 *The Lancet* 1908.

12 FE Okonofua and others 'Assessing the prevalence and determinants of unwanted pregnancy' (1999) 30 *Nigeria Studies in Family Planning* 67.

13 PC Okorie & OA Abayomi 'Abortion laws in Nigeria: A case for reform' (2019) 23 *Annual Survey of International and Comparative Law* 165.

14 As above.

15 PMA 'Abortion survey results (2020): Nigeria', www.pmadata.org (accessed 26 March 2022).

16 As above.

Women procure abortion for several reasons, including financial and emotional inability to care for a baby; fear of rejection by partners, parents, peer groups, religious and community leaders and society if the pregnancy is discovered; as a means of birth control; physical and mental reasons; if they are too young or too sick to have a baby; or a desire to get rid of unwanted pregnancies arising from several reasons, including rape or failure of contraception.¹⁷

As in other parts of the world, abortion has been a highly contentious issue in Nigeria with protagonists and antagonists aligned on seemingly irreconcilable fronts. Based on popular euphemisms, the two opposing sides in the abortion debate can be described as 'pro-choice' and 'pro-life' groups respectively.¹⁸ The pro-choice group supports or canvasses the liberalisation of abortion with the consequence of empowering the person concerned to make the decision or *choice* whether or not to abort. The position of the pro-choice group is grounded in the right to autonomy, which encompasses the right of all people to determine how they use their bodies, including deciding whether or not to carry a pregnancy to term or terminate it. The pro-life group is of the position that abortion is unacceptable as it amounts to the destruction of the sacred *human life* of an 'unborn child'.¹⁹ The traditional and religious leaders oppose any reform of abortion law. They see such a move as a jeopardy to the moral and family life of society.²⁰

Current laws that criminalise abortion in Nigeria do not reduce the number of abortions. Instead, these strict laws mean that many women are forced to seek the services of unqualified practitioners with resultant high morbidity and mortality, both of which are an unacceptable price to pay for pregnancy.²¹ While debates over the right of the mother to her privacy and body and the rights of the foetus to life rage on, women in Nigeria continue to suffer the consequences of restrictive abortion laws.²²

17 As above.

18 SB Odunsi 'Abortion and the law', <https://lawexplores.com/abortion-and-the-law/> (accessed 17 February 2022).

19 As above.

20 LKO Ilobinso 'Policy on abortion in the Nigerian society: Ethical considerations' Master's dissertation, Linköpings Universitet, 2007 20.

21 OW Akande and others 'Unsafe abortion practices and the law in Nigeria: Time for change' (2020) 28 *Sexual and Reproductive Health Matters* 1758445.

22 As above.

3 Legal framework on abortion in Nigeria

Historically, restrictions on abortion were introduced where it was dangerous, resulting in death, or where it was considered a sin or a form of transgression of morality or to protect fetal life in some circumstances.²³ With a few exceptions, the abortion laws in African countries are based on very restrictive nineteenth century European penal codes, permitting legal abortion for only a few, narrowly defined indications.²⁴ The legal status of abortion in Africa ranges from highly restrictive (permitted only to save a woman's life) to freely available upon request.²⁵

Abortion is not a modern aberration, but a practice common to human communities throughout history. Indeed, abortion has been used throughout the world for thousands of years as a way of ending an unwanted pregnancy.²⁶ Historically, early abortion was tolerated by the Catholic Church and, for centuries, it was not punished under English common law (which has a great historical influence on the Nigerian legal system). The first authoritative collection of Canon law, accepted by the Catholic Church in 1140 AD, was used as an instruction manual for priests, until the new code of Canon Law of 1917 contained the conclusion that early abortion was not homicide.²⁷

Similarly, under common law, abortion before 'quickening' of the foetus was neither punished from 1307 to 1803, nor was it regarded by society as a moral problem.²⁸ Even after quickening, abortion was considered only a misdemeanour.²⁹ This tolerant common law attitude towards abortion ended in 1803 with the codification of a criminal abortion law by Lord Ellenborough making abortion of a 'quick' foetus a capital offence, while abortions performed prior to quickening incurred lesser punishment. Similar legislative efforts were made in the United States of America in the 1820s and in Canada in 1869

23 M Berer 'Abortion law and policy around the world in search of decriminalisation' (2017) 19 *Health Human Rights* 13.

24 RJ Cook, BM Dickens & LE Bliss 'International developments in abortion law from 1988 to 1998' (1999) 89 *American Journal of Public Health* 579.

25 Warriner & Shah (n 1).

26 Okorie & Abayomi (n 13).

27 J Hurst *The history of abortion in the Catholic Church: The untold story* (1983) 3.

28 A Prentice *Canadian women: A history* (1988) 165.

29 HP David 'Abortion policies' in JE Hodgson (ed) *Abortion and sterilisation: Medical and social aspects* (1981) 1-40.

(essentially modelled on English legislation of Lord Ellenborough), the criminalisation having been spearheaded in all these jurisdictions by doctors, albeit for possibly ulterior motives.³⁰ During the pre-colonial era in Nigeria, abortion is seen as un-African and treated as a Western project that violates African traditions and culture. Abortion in pre-colonial Nigeria was not common and only performed in circumstances where pregnancy would lead to shame and hardship for the girl.

The latter part of the nineteenth century saw the spread of the restriction or criminalisation of abortion by the Western powers (including through colonial powers) to Africa, Asia and beyond.³¹ This nineteenth century wave of restrictive abortion laws has been seen as a deviation from the norm.³² The reason for criminalisation of abortion at this time in question was not necessarily for the safety of the foetus, but rather for the safety of the women who were dying in their huge numbers from abortion for several reasons, inclusive of the state of medical science at the time, which was not as developed as it is today.³³

However, despite the criminalisation of abortion, women unfortunately continued to carry out abortions, under unsafe conditions expedited by the state of the law. This obviously occasioned more deaths than ever and naturally aroused concern by society and government authorities.³⁴ This development eventually gave rise to the liberalisation of abortion laws in most of Eastern and Central Europe in the 1950s and in most of the remaining developed countries during the 1960s and 1970s. A few developing countries, such as China and India, also relaxed their restrictions on abortion in the same period.³⁵ The story has since been one of liberalisation and not criminalisation of abortion around the world.³⁶

Before 1900, Nigeria's abortion law was patterned along the UK's Offences Against the Person Act, 1861. In 1916 the Criminal Code, introduced into Nigeria by the British colonial master, was adopted throughout the country. Forty-two years later, the Penal Code was

30 JC Mohr *Abortion in America: The origins and evolution of national policy* (1978).

31 David (n 29).

32 As above.

33 Okorie & Abayomi (n 13).

34 As above.

35 See SK Henshaw *Induced abortion: A world review* (1990) 22 *Family Planning Perspectives* 78.

36 Okorie & Abayomi (n 13) 169.

introduced to replace the Criminal Code in Northern Nigeria to reflect the norms of the predominantly Moslem society. Since 1967 Britain has progressed, while Nigeria has remained stagnant and unresponsive to the realities of the time.³⁷

Women, including adolescents, with unwanted pregnancies often resort to unsafe abortion when they cannot access safe abortion. Barriers to accessing safe abortion include restrictive laws; poor availability of services; high costs; stigma; the conscientious objection of healthcare providers; and unnecessary requirements, such as mandatory waiting periods, mandatory counselling, the provision of misleading information, third-party authorisation, and medically unnecessary tests that delay care.³⁸

Other impediments include the persistence of outmoded laws; opposition from powerful religious authorities; the activities of anti-choice groups; and a reluctance to publicly address sensitive issues of sexuality and reproduction.³⁹ Procedural, economic, informational, cultural and other barriers continue to impede access to legal abortion services in many developing countries such as Nigeria.⁴⁰

3.1 Criminal Code

Nigeria has a federal government system with 36 states and a federal capital territory. The 19 states in the northern part of the country and the federal capital territory are governed by the Penal Code, while the 17 southern states are governed by the Criminal Code. The termination of pregnancy in Nigeria is highly restricted under both the Penal and Criminal Codes and carries a heavy prison term of up to 14 years' imprisonment for the provider unless it is performed to save the life of the woman.⁴¹

37 As above.

38 WHO 'Preventing unsafe abortion: Fact sheet' (2014), https://apps.who.int/iris/bitstream/handle/10665/112321/WHO_RHR_14.09_eng.pdf (accessed 14 March 2022).

39 S Singh and others *Abortion worldwide: A decade of uneven progress* (2009) 5. See OA Gbadamosi & TA Aderibigbe 'Justification of women's right of access to safe and legal abortion in Nigeria' (2014) 7 *African Journal of Legal Studies* 177.

40 As above.

41 See secs 228-230 & 297, Criminal Code, Cap C 38 Laws of the Federal Republic of Nigeria, 2002. See I Okagbue 'Pregnancy termination and the law' (1990) 21 *Nigeria Studies in Family Planning* 197.

Section 229 prescribes guilt of felony on a woman who induces abortion on herself or submits herself for abortion, who is liable to seven years' imprisonment. Section 230 prescribes guilt of felony on the supplier of the materials used for the abortion who is liable to three years' imprisonment.⁴² Neither the Criminal Code nor the Penal Code prevents the large number of abortions that are performed clandestinely in Nigeria, but they do greatly increase women's vulnerability to unsafe abortion and are a major impediment to the improvement of the sexual and reproductive health and rights of Nigerian women.⁴³

The above provisions of the Criminal and Penal Codes are too restrictive and fail woefully to take advantage of other legal grounds for abortion such as safety of the life of a woman, the preservation of a woman's physical and mental health, in cases of rape, incest or fetal impairment, or for economic or social reasons.

3.2 Judicial decisions of the provisions of the Criminal Code

The judicial decisions on the provisions of the Criminal Code can be found in the following cases: In *State v Njoku*⁴⁴ the first defendant had sexual intercourse with A, resulting in A's pregnancy. The first defendant wrote to A, advising her to procure her own miscarriage and also sent her some tablets and ampoules to be injected, giving directions for their use. He also gave A N6.00 (six Naira) to pay for the abortion. The second defendant arranged for the sum of N5.00 (five Naira) to be paid to the third defendant, a native doctor, and brought A to the third defendant's house where the latter administered to A some powdered medicine stuffed in *garri*, which caused A to miscarry.

The Court held that by sending the tablet and ampoules to A with the intent that she should use them to procure her miscarriage, the first defendant was guilty of felony under section 230 of the Criminal Code.

In *R v Edgal*⁴⁵ the appellants were convicted of supplying drugs to procure abortion contrary to section 230 of the Criminal Code. On appeal, it was held by the West African Court of Appeal, in deciding the question of when it is lawful to procure a miscarriage, that it is only

42 Okorie & Abayomi (n 13).

43 As above.

44 [1973] ECSLR 638.

45 [1938] 4 WACA 133.

lawful for the purpose of preserving the life of the mother. In all other cases, it is unlawful.

In *State v Akpaete*⁴⁶ the accused, a practitioner of indigenous medicine, performed an operation on the deceased to secure her abortion of a two months-old pregnancy by inserting a nut into her vagina. On withdrawing it, the deceased bled and, later, contracted tetanus and died. He was charged with murder. The Court found him guilty of manslaughter on the ground that no reasonable man in the community in which the accused lived could have thought that his act would endanger human life or cause death. However, the fact that the deceased consented to the abortion did not exonerate the accused from criminal responsibility.

In *R v Idiong and Umo*⁴⁷ the two defendants had been convicted of murder on the grounds that the first accused had obtained the services of the second accused, a native doctor, to apply herbal concoctions to carry out an abortion which resulted in the woman's death. The West African Court of Appeal found that the second accused had acted innocently believing that the medicine would relieve pain. He was found guilty of manslaughter instead of murder. The first accused was found criminally responsible for causing the abortion and was found guilty of manslaughter instead of murder, but was found not guilty of murder.

3.3 Penal Code

The relevant sections of the Penal Code on abortion law that operate in Northern Nigeria are sections 232, 233 and 234 respectively. Section 232 prescribes 14 years' imprisonment or the option of a fine or both for the person who performs the abortion. In section 233, it stipulated that if the procedure resulted in the death of the woman, the person is liable to imprisonment which may extend to 14 years and is also liable to pay a fine. If it was done without the consent of the woman, the person who undertook the procedure is liable to a prison term for life or less and also liable to pay a fine. Section 234 prescribes punishment for some who unintentionally caused miscarriage by force. If it was unknown that the woman was pregnant, the person is liable to three years' imprisonment or

⁴⁶ *Akpaete* [1976] 2 FNR 101.

⁴⁷ (1950) 13 WACA 30.

the payment of a fine or both. Knowledge of the woman's pregnancy may cause the prison term to be extended to five years.⁴⁸

The provision of section 233 was applied in the case of *Attorney-General of the Federation v Ogunro*.⁴⁹ In this case the deceased, while pregnant, was admitted to a hospital as she was suffering from breathlessness and was in a poor condition. She was advised to terminate the pregnancy, but she refused. She died as a result of congestive cardiac failure. However, the family of the deceased, being dissatisfied with the hospital's version of the story, laid a complaint which led to the trial of the owner of the hospital under section 233 of the Penal Code. He was found not guilty by the High Court and Court of Appeal. The Court of Appeal held that in a charge of intent to cause the miscarriage of a woman, which resulted in the death of such woman, the prosecution cannot succeed in establishing the guilt of the accused unless it not only establishes the cause of death but also establishes that the act of the accused caused the death of the deceased.

The said provisions of the Criminal Code are in violation of constitutional provisions on the right to dignity and freedom from gender discrimination.⁵⁰ It is important to point out that the provisions of the Penal Code are *in pari materia* with that of the Criminal Code, except for the fact that in the Penal Code, the punishment for procuring abortion is 14 years whether the woman herself or someone else is charged. However, the Penal Code does not appear to have a provision for attempted abortion by anybody because the wording of the law is clear to the effect that 'whoever voluntarily causes a woman with child to miscarry'.⁵¹

What is more, the Penal Code allowed therapeutic abortion if caused in good faith for the purpose of saving the life of a pregnant woman.⁵² This exception, as explicitly provided in the Penal Code, however, is latent in the Criminal Code Act. It is only implied therein by the use of the word 'unlawfully'.⁵³ Hence, 'whoever administers abortion "unlawfully"

48 Penal Code, Cap P 3, Laws of the Federation of Nigeria 2004.

49 [2001] 10 NWLR (Pt 720) 175.

50 Sec 34 Constitution of Nigeria (1999), which provides that 'every individual is entitled to respect for the dignity of his person'.

51 Sec 232 Penal Code Act, Nigeria.

52 Okorie & Abayomi (n 13).

53 Sec 228 Criminal Code Act, Cap C 38, Laws of the Federation of Nigeria, 2004.

is guilty of an offence'. The question then remains as to what constitutes a 'lawful' administration of abortion under the Criminal Code operated in Southern Nigeria. Following the decision in the English case of *Rex v Bourne*,⁵⁴ the courts have held that a lawful abortion is one procured for the purpose of saving the life of the mother. It was argued by MO Izunwa that Nigeria's legal defence of abortion on the ground of protection of the mother's life is unjust and unacceptable to rational jurisprudence.⁵⁵ While the Penal Code provides for an exception to the general provision in the event of a need to preserve life, the provisions of the Criminal Code appear to be more stringent, imposing a complete ban permitting no exceptions.⁵⁶

Due to the failure of the Nigerian government to fulfil its obligations under the International Covenant on Civil and Political Rights (ICCPR),⁵⁷ it is apparent that the present state of the law on abortion is a violation of women's reproductive rights. Nigeria is a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Despite that, provisions conceding certain reproductive health rights to women under CEDAW are inaccessible because they are yet to be domesticated by the Nigerian state through the Acts of Parliament.⁵⁸ Unlike a number of other African countries, Nigeria has yet to reform restrictive domestic laws and policies that place women's and girls' health and lives at risk and prevent them from exercising their reproductive rights – rights to which the Nigerian government has been committed under international law.⁵⁹

54 *Rex v Bourne* (1939) 1 KB 687.

55 MO Izunwa & S Ifemeje 'Right to life and abortion debate in Nigeria: A case for the legislation of the principle of double-effect' (2011) 2 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 111, <https://www.ajol.info/index.php/naujilj/article/view/82392> (accessed 22 March 2022).

56 C Onyemelukwe 'Medico-legal abortion law in Nigeria' (2018) 2 *BeyHealth Quarterly* 3.

57 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, art 9(1).

58 L Ugehbe 'An examination of the Nigeria's abortion law with today's realities' *NBF News* 28 December 2010, <http://www.nigerianbestforum.com/blog/an-examination-of-nigeria%E2%80%99s-abortion-law-with-today%E2%80%99s-realities/> (accessed 24 May 2022).

59 Ipas 'Abortion law and policy in Nigeria: Barriers to women's access to safe and legal care' (2015), <https://www.ipas.org/wp-content/uploads/2020/07/ALPNIGE15-AbortionLawNigeria.pdf> (accessed 24 May 2022).

It is also incumbent upon Nigeria to modify its legal provisions for abortion and fortify programmes to provide safe abortion services and post-abortion care in line with the Programme of Action of the 1994 International Conference on Population and Development (ICPD). The Programme of Action of the 1994 ICPD emphasised the rights of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children, the right to information and access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as the right of access to appropriate healthcare services that ensure safe and healthy pregnancy and childbirth.⁶⁰

Nigeria ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) in 2004 with a national commitment to guarantee the rights of girls and women to sexual health, but is yet to liberalise its abortion law. The Nigerian government should honour this commitment by providing affordable and accessible healthcare services for women in compliance with article 14(2)(c) of the African Women's Protocol which provides that state parties shall take all appropriate measures to protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape or incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus. It is incumbent upon Nigeria to meet their international obligations to respect, protect, promote and implement the right to non-discrimination and imperatively take all necessary measures to remove socio-cultural structures and norms that promote and perpetuate gender-based inequality.⁶¹

By failing to revise its laws on abortion, the Nigerian government is failing in its obligations under the African Women's Protocol which it has ratified without reservations, to ensure women's access to abortion in cases of sexual assault, rape, incest, severe fetal abnormality, and where

60 UN Department of Economic and Social Affairs *World population policies 2017: Abortion laws and policies – A global assessment* ST/ESA/SER.A/447 (2020).

61 General Comment 2 on arts 14(1)(a), (b), (c) and (f) and art 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003).

the continued pregnancy endangers the mental or physical health or life of the pregnant woman.⁶²

Treaty-monitoring bodies have found that restrictive abortion laws violate a range of human rights, including the rights to health, life, privacy, freedom from gender discrimination or gender stereotyping, and freedom from ill-treatment.⁶³ For instance, treaty-monitoring bodies have repeatedly recognised the connection between restrictive abortion laws, the high rates of unsafe abortion and maternal mortality.⁶⁴

Specifically, treaty-monitoring bodies have recognised that abortion must be legal, at a minimum, when a woman's life or health is at risk, in cases of rape and incest, and in cases of severe or fatal fetal impairments.⁶⁵ The CEDAW Committee also calls on states to permit therapeutic

62 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2nd ordinary session, Assembly of the African Union, adopted 11 July 2003, art 14, para 2(c), CAB/LEG/66.6, entered into force 25 November 2005, ratified 16 December 2004. See Centre for Reproductive Rights 'Supplementary information on Nigeria scheduled for review during the Pre-Session Working Group of the 67th session of the CEDAW Committee' 28 September 2016, https://www.ecoi.net/en/file/local/1232443/1930_1484131572_int-cedaw-ngo-nga-25331-e.pdf (accessed 29 December 2022).

63 See, eg, *KL v Peru* Human Rights Committee, Communication 1153/2003, UN Doc CCPR/C/85/D/1153/2003 (2005); *LC v Peru* CEDAW Committee, Communication 22/2009, UN Doc CEDAW/C/50/D/22/2009 (2011) para 8.15. See Centre for Reproductive Rights 'Breaking ground: Treaty monitoring bodies on reproductive rights' (2018) 30.

64 See, eg, CEDAW Committee Concluding Observations: Paraguay, UN Doc 8 November 2011, CEDAW/C/PRY/CO/6 (2011) paras 30-31; Chile, 24 October 2012, UN Doc CEDAW/C/CHI/CO/5-6 (2012) paras 34-35; ESCR Committee, Concluding Observations: Philippines, 26 October 2016, UN Doc E/C.12/PHL/CO5-6 (2016) paras 51-52; Human Rights Committee, Concluding Observations: Zambia, 9 August 2007, UN Doc CCPR/C/ZMB/CO/3 (2007) para 18.

65 See, eg, *LC v Peru* (n 63) para 12(b); *KL v Peru* (n 60); Human Rights Committee, Concluding Observations on the 4th periodic report of Ireland, 19 August 2014, UN Doc CCPR/C/IRL/CO/4 (2014) para 9; CEDAW Committee, Concluding Observations on the 3rd periodic report of Bahrain, 10 March 2014, UN Doc CEDAW/C/BHR/CO/3 (2014) para 42(b); CAT Committee, Concluding Observations: Paraguay, 14 December 2011, UN Doc CAT/C/PRY/CO/4-6 (2011) para 22; CRC Committee, Concluding Observations: Chile, 30 October 2015, UN Doc CRC/C/CHL/CO/4-5 (2015) para 61; Costa Rica, 3 August 2011, UN Doc CRC/C/CRI/CO/4 (2011) para 64; Concluding Observations on the combined 3rd to 5th periodic reports of the Dominican Republic, 6 March 2015, UN Doc CRC/C/DOM/CO/3-5 (2015); ESCR Committee Concluding Observations on the 4th periodic report of Chile, 7 July 2015, UN Doc E/C.12/CHL/CO/4 (2015) para 29.

abortion and other services necessary to protect the physical and mental health of pregnant women.⁶⁶

3.4 Abortion law under the Shari'a Penal Code in Northern Nigeria

For the northern states of Nigeria that have adopted the Shari'a legal system, abortion is also criminalised by the Shari'a Penal Code Law. Bauchi State Shari'a Penal Code Law, 2001 provides for various offences relating to abortion.⁶⁷ The provisions in substance are similar to the provisions of sections 232, 234, 233, 235 and 236 of the Penal Code and differ only on the punishment prescribed for the various offences. The punishment under the Shari'a Penal Code ranges from compensation (*Ghurrah* and *Diyyah*)⁶⁸ to caning and retaliation (*Qisas*).⁶⁹

From all the statutory provisions discussed above, abortion at any stage of pregnancy in Nigeria is a criminal offence except where it is performed for the purpose of saving the life of the mother. Both the Penal Code and the Criminal Code can be faulted. They have both failed to consider the social consequences attached to their provisions. One other striking fault in these laws is the fact that the legal position on abortion to preserve the physical and mental health of the pregnant woman in both Codes is unclear.⁷⁰ The laws are silent on who can perform abortion or the kind of facility in which abortions may take place.⁷¹ The decisions of Nigerian courts on abortion followed the English case of *R v Bourne*⁷² which firmly established that an abortion that is performed to preserve the life of a mother did not constitute a violation of the Criminal Code.

⁶⁶ See *LC v Peru* (n 63) para 8.15.

⁶⁷ Bauchi State Shari'a Penal Code Law (2001) Cap 198 Laws of Bauchi State 2007, secs 208-212. See also Zamfara Shari'a Penal Code Law 10 of 2000, secs 207-211; Kano Shari'a Penal Code 1 of 2002, secs 150, 151, 152, 153 & 154.

⁶⁸ Okorie & Abayomi (n 13).

⁶⁹ *Ghurrah* means compensation, which is equivalent to one-twentieth of *Diyyah* paid in respect of causing miscarriage of the foetus: *Diyyah* means a fixed amount of money paid to a victim of bodily hurt or to the deceased's agnatic heir in murder cases, the quantum of which is equivalent to 1 000 dinar, or 12 000 dinar or 100 camels.

⁷⁰ Centre for Reproductive Law and Policy 'Policy on abortion in the Nigerian Society: Ethical considerations. Centre for Reproductive Rights, Women's Reproductive Rights in Nigeria: A Shadow Report' (1998).

⁷¹ As above.

⁷² 1938 3 All ER 615.

4 Consequences of Nigeria's restrictive abortion law

Restrictive legislation that denies access to safe abortion is one of most damaging ways of instrumentalising women's bodies and a grave violation of women's human rights. The consequences for women are severe, with women sometimes paying with their lives.⁷³

In countries that prohibit abortion, women who seek healthcare services in relation to the termination of a pregnancy, whether in order to carry out the termination or to seek medical care after a miscarriage, may be subjected to prosecution and imprisonment. Prohibition does not reduce the need and the number of abortions, but merely increases the risks to the health and life of women and girls who resort to unsafe and illegal services.⁷⁴

Based on the general outlook of the consequences of unsafe abortion worldwide, and also in the Nigerian scenery, it is evident that the practice of unsafe abortion has had no positive impact on the health of women.⁷⁵ The impact of unsafe abortion is that it has exposed Nigerian women to suffering and inhuman treatment as well as the premature deprivation of life as some authors would put it, thereby infringing on their constitutional rights to life and protection from degrading treatment.⁷⁶

Another knock-on effect of Nigeria's restrictive abortion law is that those who cannot embrace unsafe abortion are railroaded into carrying unwanted pregnancies to term, notwithstanding their physiological, mental and other unpreparedness and disinclinations at the time. This involuntary motherhood has some negative health and other implications for the mothers and the unwanted children.⁷⁷

73 Office of the United Nations High Commissioner for Human Rights "Unsafe abortion is still killing tens of thousands women around the world" – UN rights experts warn' 28 September 2016, <https://www.ohchr.org/en/2016/09/unsafe-abortion-still-killing-tens-thousands-women-around-world-un-rights-experts-warn> (accessed 29 December 2022).

74 As above.

75 SA Cohen 'Facts and consequences: Legality, incidence and safety of abortion worldwide' (2009) 12 *Guttmacher Policy Review* 2.

76 SB Odunsi & F Olaleye 'Courts and the need for dynamism in the promotion of reproductive health rights: A Nigerian perspective' in SB Odunsi & F Olaleye *A Nigerian perspective on courts and reproductive health rights* (2011), <https://www.mak.ac.ug/documents/Makfiles/EAJPHR/vol17No1/OdunsiEtAlCourtsandtheNeedforDynamism.pdf> (accessed 10 February 2022).

77 SB Odunsi 'Abortion and the law' (2016), <https://lawexplores.com/abortion-and-the-law> (accessed 21 February 2022).

As a result of forced and premature maternity, teenage pregnancy has been said to remain a major health concern in Nigeria because of its nexus with probable higher mortality and morbidity for a teenage mother who is exposed to immense physiological risks.⁷⁸ It is evident that the presence of the restrictive abortion law in Nigeria constitutes a serious burden on the life of the woman and her child and similarly exposes them to some serious health issues.⁷⁹

The criminalisation of abortion results in a 'chilling effect', whereby medical professionals may not understand the bounds of the law or may apply the restrictions in a narrower way than required by the law. This may be because of a number of reasons, including personal beliefs, stigma about abortion, negative stereotypes about women and girls, or the fear of criminal liability. It also deters women and girls from seeking post-abortion care for complications due to unsafe abortion or other pregnancy-related complications.

The continued criminalisation of abortion in Nigeria, therefore, is unrealistic and a dangerous trend. It is unrealistic because it is not known to have reduced the rate of abortion, but has only succeeded in making abortion clandestine with the attendant consequences. It is dangerous because of the maternal deaths and damage to women's reproductive health resulting from the inevitable use of quacks and self-help. In addition, abortion has been shown to be a human right, hence its criminalisation is a violation of that right.⁸⁰ Dr Fred Sai, former president of the International Planned Parenthood Federation, once exclaimed that '[b]y continuing to adhere to archaic colonial laws, by failing to implement international agreements, and by failing to act on growing evidence, we have allowed abortion to become the killing field for women in Africa. We know what to do to save women's lives – it's time for us to work together to make that happen.'⁸¹

There is, therefore, a need for the amendment of the law to accommodate the realities of today. This need is underscored by the

78 AO Ajala 'Factors associated with teenage pregnancy and fertility in Nigeria' (2014) 5 *JESD* 62.

79 Odunsi (n 18).

80 Okorie & Abayomi (n 13).

81 IAO Ujah & SO Shittu 'A situation analysis on abortion in Nigeria', <http://www.ifo.org/sites/default/files/NIGERIA%20Situational%20Analysis%20with%20authors.doc> (accessed 21 January 2022).

high population and low age of the sexually active, the lack of access to contraceptives and the high rate of maternal mortality in Nigeria.⁸²

Access is further impeded by restrictive laws and requirements that are not medically justified, including the criminalisation of abortion; mandatory waiting periods; the provision of biased information or counselling; third party authorisation; and restrictions regarding the type of healthcare providers or facilities that can provide abortion services.⁸³ Restrictive abortion regulations can cause distress and stigma, and risk constituting a violation of the human rights of women and girls, including the right to privacy and the right to non-discrimination and equality, while also imposing financial burdens on women and girls.⁸⁴

Legal restrictions can cause women to be reluctant to seek timely medical care in case of abortion-related complications, which further puts women's health and well-being at risk. Evidence shows that restricting access to abortions does not reduce the number of abortions.⁸⁵ The proportion of unsafe abortions is significantly higher in countries with highly restrictive abortion laws than in countries with less restrictive laws.⁸⁶

5 Utilising the abortion laws in the United Kingdom, South Africa and Ethiopia as a model to reform the Nigerian law on abortion

The progressive and liberal abortion laws in the United Kingdom, South Africa and Ethiopia have resulted in better protection of women's reproductive rights in their respective countries. The liberal nature of the abortion laws in the UK, South Africa and Ethiopia is responsible for lower abortion-related mortality rates, unlike Nigeria with restrictive abortion laws and, consequently, higher mortality rates.

82 Okorie & Abayomi (n 13).

83 WHO 'Abortion', <https://www.who.int/news-room/fact-sheets/detail/abortion> (accessed 1 February 2022).

84 As above.

85 J Bearak and others 'Unintended pregnancy and abortion by income, region, and the legal status of abortion: Estimates from a comprehensive model for 1990-2019' (2020) 8 *Lancet Glob Health* e1152.

86 B Ganatra and others 'Global, regional, and sub-regional classification of abortions by safety, 2010-14: Estimates from a Bayesian hierarchical model' (2017) 390 *The Lancet* P2372.

Nigeria can learn from the UK, South Africa and Ethiopia due to their recognition of the right to abortion on broad grounds. The provisions of abortion laws in the above-mentioned countries, which can be utilised as a model to reform Nigeria's abortion law, are explained below.

5.1 Abortion law in the United Kingdom

The abortion law in the UK is the Abortion Act 1967 as amended by section 37 of the Human Fertilisation and Embryology Act 1990. This Act makes it lawful for a registered medical practitioner to terminate a pregnancy, if two registered medical practitioners are of the opinion, formed in good faith, that the pregnancy has not exceeded 24 weeks and that its continuance would involve risk, greater than if the pregnancy were terminated, or injury to the physical or mental health of the pregnant woman or any existing children of her family; or the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated.⁸⁷

However, a registered medical practitioner does not require the opinion of two registered medical practitioners to terminate a pregnancy if he is of the opinion, formed in good faith, that the termination is necessary to save the life or prevent grave permanent injury to the physical or mental health of the pregnant woman.⁸⁸

5.2 Abortion law in South Africa

Prior to November 1996, South Africa permitted abortion only when there was a threat to a woman's life or in the cases of rape, incest or fetal impairment.⁸⁹ With the passage of the Choice on Termination of Pregnancy Act 92 of 1996 (Choice Act) abortion became legal without restriction as to reason during the first 12 weeks of pregnancy.⁹⁰

87 Sec 1(1) British Abortion Act, 1967.

88 Sec 1(4) British Abortion Act.

89 UNFPA and Centre for Reproductive Rights 'ICPD and human rights: 20 years of advancing reproductive rights through UN treaty bodies and legal reform' (2013).

90 Sec 2(a) South Africa's Choice on Termination of Pregnancy Act 92 of 1996.

From the thirteenth to twentieth week of gestation, with the woman's consent, abortion can be procured if a medical practitioner believes that the pregnancy threatens the mental or physical health of the woman or foetus, if the pregnancy resulted from rape or incest, or if it affects the woman's socio-economic situation⁹¹ and, after the twentieth week, termination of pregnancy is permissible if a doctor, upon consulting another doctor or trained midwife, finds that continuation of the pregnancy would threaten the health of the woman or pose a severe handicap to the foetus.⁹² In addition, pregnant minors are advised to consult anyone *in loco parentis* of their decision, but their consent for the procedure is not a prerequisite.⁹³

The South African legal system is commendable for its safeguard of the 'right to bodily integrity' in its Constitution⁹⁴ and for its reformist law on abortion, with the passage of the Choice Act, which changed the law on abortion from being that of restrictive access depending on race and status towards that which recognised the procedure as a constitutionally guaranteed right for all women in the country.⁹⁵ The enactment of the Choice Act has portrayed South Africa as the leading country in Africa, in terms of the safeguard of reproductive rights.⁹⁶ South Africa is recognised as Africa's most liberal nation regarding abortion law. The United Nations (UN) has described this law as the most liberal in the world;⁹⁷ no doubt, because it permits abortion under certain instances throughout the pregnancy, even on socio-economic grounds.⁹⁸

91 Sec 2(1)(b) Choice on Termination of Pregnancy Act.

92 Sec 2(1)(c) Choice on Termination of Pregnancy Act.

93 Sec 5(3) Choice on Termination of Pregnancy Act.

94 Sec 12(2)(a) of the Constitution of the Republic of South Africa, 1996, which provides that '[e]veryone has the right to bodily and psychological integrity which includes ... the right to make decisions concerning reproduction'; and sec 27(1)(a) which states, among others, that '[e]veryone has the right to have access to ... health care services, including reproductive health care'.

95 C Ngweni 'Access to legal abortion: Developments in Africa from a reproductive and sexual health rights perspective' (2004) 19 *South African Public Law* 330; LB Pizzarossa & E Durojaye 'International human rights norms and the South African Choice on Termination of Pregnancy Act: An argument for vigilance and modernisation' (2019) 35 *South African Journal on Human Rights* 50.

96 See RJ Adebimpe 'Liberalisation of Nigeria's abortion laws with a focus on pregnancies resulting from rape: An empirical analysis' (2021) 21 *African Human Rights Law Journal* 469.

97 United Nations 'South Africa: Abortion policy', <http://www.un.org/esa/population/publications/abortion/doc/southafrica.doc> (accessed 19 January 2022).

98 As above.

The passage of the Choice Act changed the law on abortion from being that of restrictive access depending on race and status towards that which recognised the procedure as a constitutionally guaranteed right for all women in the country.⁹⁹ After the enactment of the law, abortion-related deaths dropped by 91 per cent in South Africa from 1994 to 1998 to 2001.¹⁰⁰ This manifests in the reduction in the number of women reporting for medical treatment over complications arising from abortion, even shortly after the commencement of the Choice Act.¹⁰¹ This makes it a model for Nigeria to follow.

5.3 Abortion law in Ethiopia

In 2005 Ethiopia liberalised its abortion law making it another good example of a liberal law for sub-Saharan Africa. Previously, abortion was allowed only to save the life of the woman or to protect her physical health. The law allows abortion in cases of rape, incest or fetal impairment, as well as if the life or physical health of the woman is in danger, if she has a physical or mental disability, or if she is a minor who is physically or mentally unprepared for childbirth.¹⁰²

6 A case for law reform towards the decriminalisation of abortion in Nigeria

Significant attempts have been made to amend the Nigerian abortion law. The various attempts were unsuccessful at the floor of the legislature essentially because all failed to be sensitive to the *volgeist* – the spirit of the people for whom the laws are to be passed.¹⁰³ Some of these attempts started in 1982 when the Society of Gynaecology and Obstetrics of Nigeria initiated a Bill sponsored by Dr Obatayo Oguntayo for the

99 Adebimpe (n 96).

100 R Jewkes and others 'The impact of age on the epidemiology of incomplete abortions in South Africa after legislative change' (2005) 112 *British Journal of Obstetrics and Gynaecology* 355.

101 R Jewkes and others 'Prevalence of morbidity with abortion before and after legalisation in South Africa' (2000) 324 *British Medical Journal* 1252.

102 Ethiopia's Law on Abortion (2005).

103 MO Izunwa & S Ifemeje 'Right to life and abortion debate in Nigeria: A case for the legislation of the principle of double-effect' (2011) 2 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 111.

reform of the existing law.¹⁰⁴ This Bill was titled the Termination of Pregnancy Bill. The Bill would have permitted abortion if two physicians certified that the continuation of a pregnancy would involve risk to the life of a pregnant woman, or of injury to her physical and mental health or to any existing children in her family greater than if the pregnancy were terminated. The Bill would also have allowed abortion if there was a substantial risk that the child, if born, would suffer such physical and mental abnormalities as to be seriously handicapped. Abortions performed on these expanded grounds could have been carried out only in the first 12 weeks of pregnancy, except to save the life of the woman. The Bill also would have permitted physicians to refuse to perform an abortion on grounds of conscience. However, the Bill was defeated after the first reading in the face of strong opposition from religious groups and the National Council of Women's Societies with the fear that the passage of the Bill would promote moral laxity.¹⁰⁵

Another attempt was in the early 1990s when the Campaign Against Unwanted Pregnancy organised a team of professionals and officials of the Ministries of Health and Justice for a law reform meeting.¹⁰⁶ This meeting prepared a draft liberalisation law for the country which was submitted to the Federal Minister of Health.¹⁰⁷ The Ministry slightly modified this draft law and, based on this, the late Prof Olikoye Ransome-Kuti, the Nigerian Minister of Health at the time, called on the government to legalise abortion.¹⁰⁸ The idea is to have a new, more liberal abortion law for Nigeria. This attempt failed just as its forbearer did.

In 2006 Senator Daisy Ehanire-Danjuma (Edo-South) sponsored an abortion Bill otherwise called the National Institute of Reproductive Health Bill 2006 which, likewise, was dismissed by the National Assembly Health Committee for lack of merit and for being incompatible with public morality and public interest.¹⁰⁹ Current efforts to reform the abortion law in Nigeria lie in the Violence against Persons (Prohibition)

104 O Olopade *Law of abortion in Nigeria* (2008) 76.

105 *Ilobinso* (n 20) 27.

106 As above.

107 As above.

108 JM Guilfoyle 'Abortion in Nigeria: US connection?', <https://www.pop.org/content/abortion-nigeria-us-connection> (accessed 27 January 2022).

109 A Ibiyeye 'Sexual and reproductive justice: A need for the flexibility of the Nigerian abortion law', <https://www.academia.edu> (accessed 5 February 2022).

(VAPP) Act which was signed into law in May 2015. The Act seeks to end violence, particularly sexual violence, and protect the rights of survivors to receive comprehensive medical services. The VAPP Act is meant to provide aid to sexual assault and relationship violence survivors. The Act is helping women to obtain the contraceptives they need to prevent unwanted pregnancy, the leading cause of abortions.¹¹⁰ The Act is an important tool to reduce unsafe abortions because it ensures comprehensive medical services for victims of rape and incest. Without the VAPP Act, victims of abuse may feel compelled to take the procurement of abortion into their own hands and risk compromising their physical and reproductive health. These guidelines are to be developed at all levels of the healthcare system to ensure that women can access modern methods of contraception as well as comprehensive abortion care to the full extent of the law.¹¹¹ Although the provisions of the VAPP Act can be extended to justify abortion in cases of rape and incest, it should be noted, however, that the VAPP Act is a federal law that still needs to be enacted by states in order to have nationwide coverage.¹¹² In 2013 an anti-domestic violence law, initially enacted in the Imo state, containing provisions allowing abortion in similar circumstances, was repealed by the governor amidst strong protest from religious bodies.¹¹³

The Criminal Code is on the concurrent legislative list in Nigeria.¹¹⁴ With this position, Lagos state has reformed its Criminal Code in 2011 to provide that abortion is legal to preserve the life *and* physical health of a woman. Under the Code, abortion medication, such as Mifepak and Mariprist is allowed up to nine weeks of gestation, as stipulated by the National Agency for Food and Drug Administration and Control. The protection of a woman's physical health as a condition for legal abortion is a unique feature of the Lagos Criminal Code.¹¹⁵ Furthermore, the Lagos State Ministry of Health is currently taking steps to disseminate

110 C Onyemelukwe 'Legislating on violence against women: A critical analysis of Nigeria's recent Violence Against Persons (Prohibition) Act, 2015' (2016) 5 *DePaul Journal of Women, Gender and Law* 1.

111 Ipas (n 56). See sec 40 of the Violence against Persons Law of Imo State which provides for abortions in cases of incest and rape.

112 Okorie and Abayomi (n 13).

113 Violence Against Persons (Prohibition) Law 12 of 2012, Imo State House of Assembly, Nigeria.

114 Onyemelukwe (n 110).

115 Safe Engage (n 6).

the 2011 Criminal Code across the health system and to require that safe abortion services be provided within legal indications, including to protect the physical health of the woman.¹¹⁶

Despite the restrictive position of Nigeria's abortion laws, very few people have been arraigned, prosecuted and convicted for performing the act of abortion in Nigeria. Worse still, it has been and remains a very viable means for the law enforcement agencies to extort money from abortion service providers, and it drives the practice underground with quacks and backstreet professionals taking centre stage.¹¹⁷ Interestingly, the colonial masters who imposed restrictive abortions laws on most of the countries that still hold tenaciously onto these laws, have all since liberalised their laws with a drop in abortion rates, morbidity and mortality resulting from abortions.¹¹⁸

The decriminalisation of abortion means removing specific criminal sanctions against abortion from the law, and changing the law and related policies and regulations to achieve not punishing anyone for providing or having a safe abortion, not involving the police in investigating or prosecuting safe abortion provisions or practices, not involving the courts in deciding whether to allow an abortion, and treating abortion like every other form of healthcare – that is, using best practice in service delivery, the training of providers, and the development and application of evidence-based guidelines, and applying existing law to deal with any dangerous or negligent practices.¹¹⁹

The major purposes for the legalisation of the abortion law in Nigeria should be to enhance the attainment of safe motherhood, by eliminating the deaths and complications associated with unsafe abortion, and to enhance the dignity and sacrosanctity of human life by reducing the incidence of induced abortion.¹²⁰

Barriers rooted in stigma not only impede legal reform, but also slow implementation when legal criteria have been expanded. The persistence of stigma – even where abortion has been safe and legal for many years – means that many women remain reluctant to openly seek services and

116 As above.

117 As above.

118 As above.

119 M Berer 'Abortion law and policy around the world in search of decriminalisation' (2017) 19 *Health and Human Rights* 13.

120 Illobinso (n 20) 54.

may instead decide on a clandestine abortion even when they have legal options.¹²¹

The toll of unsafe abortion on women's health is greatest where abortion is legally restricted. Decades of evidence reaffirms the benefit to the well-being of women and their families that comes with liberalising abortion laws and broadening access to services.¹²² The path towards safer abortions is clear: The benefits of expanding legal grounds for abortion begin to accrue as soon as women no longer have to risk their health by resorting to clandestine abortions. Although legality is the first step towards safer abortion, legal reform is not enough in itself. It must be accompanied by political will and full implementation of the law so that all women – despite their inability to pay or reluctance to face social stigma – can seek out a legal, safe abortion.¹²³

Law reform can be achieved in many ways, and usually a combination of strategies is used. For example, advocacy often integrates efforts from legal, medical, research and women's associations and organisations to collectively present the benefits gained from reforming the law. In addition, global and regional treaties, agreements and conventions can provide the basis for urging signatory countries to change their abortion laws to be in compliance with the provisions of such agreements.¹²⁴

Another strategy is to use the courts to give judgments that would emphasise the need for expanding access to safe abortion services. A legal challenge to the denial of access to safe abortion services as a violation of women's rights has been used in many countries to initiate a process of law reform. For example, Colombia's landmark Constitutional Court decision is a good example of holding countries accountable to rights guaranteed in treaties that they have ratified. The landmark decision of 11 May 2006 by Colombia's highest court has ruled that abortion must be permitted when a pregnancy threatens a woman's life or health, in cases of rape and incest and in cases where the foetus has malformations incompatible with life outside the womb.¹²⁵ The decision came as a

121 S Singh and others 'Abortion Worldwide 2017: Uneven progress and unequal access' Guttmacher Institute (2018), <https://www.guttmacher.org/report/abortion-worldwide-2017> (accessed 1 February 2022).

122 Singh and others (n 121) 5.

123 As above.

124 As above.

125 Centre for Reproductive Rights 'Landmark decision by Colombia's highest court liberalises one of the world's most restrictive abortion laws' 5 November 2006,

result of a constitutional challenge filed by Colombian lawyer, Mónica Roa. Roa's challenge to Colombia's abortion law was the first to use international human rights law, arguing that Colombia was violating its obligations under international treaties ensuring women's rights to life and health.¹²⁶

Furthermore, in February 2022 the Constitutional Court of Colombia issued a landmark ruling to decriminalise abortion up to 24 weeks of gestation, a move expected to have far-reaching impacts on the exercise of sexual and reproductive health and rights in the country.¹²⁷

In *KL v Peru*¹²⁸ the United Nations Human Rights Committee found the Peruvian government at fault for its failure to ensure access to legal abortion services. The plaintiff in that case was a young woman who was forced by state-employed healthcare officials to carry a fatally impaired foetus to term. This ruling establishes that it is not enough to just grant a right on paper. Where abortion is legal, it is governments' duty to ensure that women have access to it.¹²⁹

The legal grounds for abortion law in Nigeria should be broadened to allow abortion to be conducted where it is necessary to preserve the physical and mental health of the pregnant woman, where the pregnancy is caused by rape, sexual assault or incest and when there is a substantial risk that the child, if born, would be seriously handicapped, and for economic and social reasons.

Restrictive laws applying to abortion should be reviewed or amended in accordance with the international human rights standards. Nigeria should honour its commitments under regional and international human right treaties which ensure access to safe abortion when a woman's life, physical or mental health is in danger.

<https://reproductiverights.org/landmark-decision-by-colombias-highest-court-liberalizes-one-of-the-worlds-most-restrictive-abortion-laws/> (accessed 3 April 2022).

126 As above.

127 Centre for Reproductive Rights 'Colombia's highest court rules to decriminalise abortion' 22 February 2022, <https://reproductiverights.org/colombia-court-decriminalize-abortion/#:~:text=The%20Constitutional%20Court%20of%20Colombia,and%20rights%20in%20the%20country> (accessed 30 December 2022).

128 *KL v Peru* (n 63).

129 As above.

7 Conclusion

The controversy as to whether abortion will be legalised in Nigeria has been a protracted issue. The liberalisation of abortion laws is an important strategy to reduce mortality that arises from unsafe abortion. Where abortion is illegal, the risk of complications and maternal mortality is high. The problem of unsafe abortion in Nigeria is exacerbated by its restrictive and archaic abortion laws. Restrictive abortion laws constitute discrimination against women. Treating abortion as an essential public health and reproductive rights issue is a major step forward.

The law should encourage the dissemination of information on reproductive health care and particularly the use of contraception in order to avoid unwanted pregnancies which foist on the women a complete state of helplessness. It should be further emphasised that adequate and effective education on contraception can significantly decrease resort to abortions in Nigeria.¹³⁰

The Nigerian government must respect and protect the sexual and reproductive health and rights of abortion seekers as well as create a conducive environment that will ensure the universal availability, accessibility, acceptability and quality of abortion and post-abortion care. Preventive measures such as comprehensive sexuality education, the elimination of gender discrimination and sexual violence and full access to all modern contraceptive methods and safe motherhood should be accorded top priority by the Nigerian government.

Successfully changing the law on abortion in Nigeria requires political will from government complimented by massive support from the legislature, civil society organisations, the Nigerian Medical Association, the Nigerian Bar Association, women's groups and organisations, the media and national human rights institutions, in order to ensure women's access to safe abortion care and services. The crime and punishment model, which remains the predominant approach for regulating abortion in Nigeria, should pave the way for a liberalised abortion law that will bring it closer to reflecting the realities of women's lives. Removing the restrictions on abortion law in Nigeria makes it safe and reduces the likelihood that women will resort to unsafe abortions.

130 Okorie & Abayomi (n 13).

References

- Adebimpe, RJ 'Liberalisation of Nigeria's abortion laws with a focus on pregnancies resulting from rape: An empirical analysis' (2021) 21 *African Human Rights Law Journal* 469
- Ajala, AO 'Factors associated with teenage pregnancy and fertility in Nigeria' (2014) 5 *JESD* 62
- Akinlusi, FM and others 'Complicated unsafe abortion in a Nigerian teaching hospital: Pattern of morbidity and mortality' (2018) 38 *Journal of Obstetrics and Gynaecology* 961
- Bearak, J and others 'Unintended pregnancy and abortion by income, region, and the legal status of abortion: Estimates from a comprehensive model for 1990-2019' (2020) 8 *Lancet Glob Health* e1152
- Berer, M 'Abortion law and policy around the world in search of decriminalisation' (2017) 19 *Health Human Rights* 13
- Cohen, SA 'Facts and consequences: Legality, incidence and safety of abortion worldwide' (2009) 12 *Guttmacher Policy Review* 2
- David, HP 'Abortion policies' in JE Hodgson (ed) *Abortion and sterilisation: Medical and social aspects* (Grune and Stratton 1981)
- Ebeku, K 'A new hope for African women: Overview of Africa's Protocol on Women's Rights' (2004) 13 *Nordic Journal of African Studies* 264
- Gaestel, A 'Abortions in Nigeria are legally restricted, unsafe – and common' *Aljazeera America* 10 December 2013
- Ganatra, B and others 'Global, regional, and sub-regional classification of abortions by safety, 2010-14: Estimates from a Bayesian hierarchical model' (2017) 390 *The Lancet* P2372
- Garner, BA (ed) *Black's Law Dictionary* (Thompson West) 2004
- Gbadamosi, OA & Aderibigbe, TA 'Justification of women's right of access to safe and legal abortion in Nigeria' (2014) 7 *African Journal of Legal Studies* 177
- Grimes, DA and others 'Unsafe abortion: The preventable pandemic' (2006) 368 *Lancet* 1908
- Guilfoyle, JM 'Abortion in Nigeria: US connection?', <https://www.pop.org/content/abortion-nigeria-us-connection> (accessed 27 January 2022)
- Hurst, J *The history of abortion in the Catholic Church: The untold story* (Catholics for a Free Choice 1983)
- Ibiyeye, A 'Sexual and reproductive justice: A need for the flexibility of the Nigerian Abortion Law', <https://www.academia.edu> (accessed 5 February 2020)
- Ilobinso, LKO 'Policy on abortion in the Nigerian society: Ethical considerations' Master's dissertation, Linköping Universitet, 2007

- Izunwa, MO & Ifemeje, S 'Right to life and abortion debate in Nigeria: A case for the legislation of the principle of double-effect' (2011) 2 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 111
- Jewkes, R and others 'Prevalence of morbidity with abortion before and after legalisation in South Africa' (2000) 324 *British Medical Journal* 1252
- Jewkes, R and others 'The impact of age on the epidemiology of incomplete abortions in South Africa after legislative change' (2005) 112 *British Journal of Obstetrics and Gynaecology* 355
- Mohr, JC *Abortion in America: The origins and evolution of national policy* (Oxford University Press 1978)
- Ngwenja, C 'Access to legal abortion: Developments in Africa from a reproductive and sexual health rights perspective' (2004) 19 *South African Public Law* 330
- Odunsi, SB & Olaleye, F 'Courts and the need for dynamism in the promotion of reproductive health rights: A Nigerian perspective' (2011), <https://www.mak.ac.ug/documents/Makfiles/EAJPHR/vol17No1/OdunsiEtAlCourtsandtheNeedforDynamism.pdf> (accessed 30 December 2022)
- Odunsi, SB 'Abortion and the law' (2016) <https://lawexplores.com/abortion-and-the-law/> (accessed 17 February 2022)
- Okagbue, I 'Pregnancy termination and the law in Nigeria' (1990) 21 *Studies on Family Planning* 197
- Okonofua, FE and others 'Perceptions of policymakers in Nigeria toward unsafe abortion and maternal mortality' (2009) 35 *IPSRH* 88
- Okorie, P and others 'Abortion laws in Nigeria: A case for reform' (1999) 23 *Annual Survey of International and Comparative Law* 190
- Olopade, O *Law of abortion in Nigeria* (College Press and Publishers Ltd, Ibadan 2008)
- Oluwatosin, WA and others 'Unsafe abortion practices and the law in Nigeria: Time for change' (2020) 28 *Sexual and Reproductive Health Matters* 1758445, <https://www.tandfonline.com/doi/full/10.1080/26410397.2020.1758445> (accessed 24 April 2022)
- Onyemelukwe, C 'Legislating on violence against women: A critical analysis of Nigeria's recent Violence Against Persons (Prohibition) Act, 2015' (2016) 5 *DePaul Journal of Women, Gender and Law* 1
- Onyemelukwe, C 'Medico-legal abortion law in Nigeria' (2018) 2 *BeyHealth Quarterly* 3
- Pizzarossa, LB & Durojaye, E 'International human rights norms and the South African Choice on Termination of Pregnancy Act: An argument for vigilance and modernisation' (2019) 35 *South African Journal on Human Rights* 50
- Prentice, A *Canadian women: A history* (Harcourt Brace Jovanovich 1988)
- Sedgh, G and others 'Induced abortion: Estimated rates and trends worldwide' (2007) 370 *The Lancet* 1338

- Singh, S and others 'Abortion worldwide 2017: Uneven progress and unequal access' Guttmacher Institute (2018), <https://www.guttmacher.org/report/abortion-worldwide-2017> (accessed 1 February 2022)
- Ughegbe, L 'An examination of the Nigeria's abortion law with today's realities' *NBF News* 28 December 2010, <http://www.nigerianbestforum.com/blog/an-examination-of-nigeria%E2%80%99s-abortion-law-with-today%E2%80%99s-realities/> (accessed 24 May 2022)
- Ujah, IAU & Shittu, SO 'A situation analysis on abortion in Nigeria,' <http://www.figo.org/sites/default/files/NIGERIA%20Situational%20Analysis%20wiith%20authors.doc> (accessed 30 December 2022)