Justification of Women's Right of Access to Safe and Legal Abortion in Nigeria

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Abstract

Abortion remains one of the most controversial, emotional and burning political issues of our time. Unsafe abortion is a serious public health problem and human rights issue. The pervasive criminalization of abortion in Nigeria is a serious obstacle to improving access to safe and legal abortion. Women's lack of access to safe legal abortion is a major cause of high rates of maternal mortality. The Nigerian government's failure to fulfill its human rights obligations under national, regional and international law is largely responsible for this situation. Overcoming these considerable barriers requires governments to sustain a firm commitment to women's human rights and to ensure access to safe and legal abortion services. Women's restrictive legal access to safe abortion services violates their human rights and is perhaps one of the pervasive manifestations of unjustified discrimination against women. This article attempts a justification of women's right of access to safe and legal abortions within national, regional and international laws to which Nigeria is a signatory. Criminalization of abortion leads women to obtain unsafe abortions which threaten their lives and health. The denial of free access to abortion service is a denial of their fundamental human right. Using an analysis of legislations and case laws, we posit that advancing access to safe abortion by the Nigerian government is a necessary requirement to save women's lives, protect their rights to health, equality and human dignity as specified under the Constitution.

Keywords

Abortion – access to care – legal barriers – maternal death – restrictive laws

1 Introduction

Access to safe abortion is both a fundamental human right and is central to women's health. Where abortion is illegal or inaccessible, the search for abortion humiliates women and undermines their self-respect and dignity.¹

Today, as throughout history, women in every region of the world sometimes choose to end unwanted pregnancies by abortion. They take this step even when pregnancy termination is against the law, and even when an unsafe abortion may threaten their lives.²

In legal terminology, abortion denotes the intentional interruption of pregnancy by the removal of the embryo from the womb.³ Abortion denotes "the performance of any of the following acts for the purpose of procuring premature delivery of the embryo or foetus":⁴

- (a) Administration of any drug, poison or any other substance on a pregnant female;
- (b) or use of any instrument or any other means whatsoever on a pregnant female.

Medically, safe abortion is the termination of a pregnancy by trained health care providers using correct, sanitary technique and equipments. It is a simple,

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- 1 Z. Hlatshwayo and B. Klugman, *Advocating for Abortion Access, The Johannesburg Initiative* (Women's Health Project, Johannesburg, 2001), Preface, p. 10.
- 2 S. Singh, D. Wulf, R. Hussain, A. Bankole and G. Sedgh, *Abortion Worldwide: A Decade of Uneven Progress* (Guttmacher Institute, New York, NY, 2009), 9.
- 3 R.D. Weinberg, *Laws Governing Family Planning* (Oceana Publications, New York, NY, 1968). See the Draft proposal/rule by the Bush administration setting new restrictions on domestic family planning programs which defines abortion as: "any of the various procedures – including the prescription, dispensing and administration of any drug or the performance of any procedure or any other action – that results in the termination of the life of a human being in utero between conception and natural birth, whether before or after implantation." See J. Mohr, 'Abortion in America: The Origins of and Evaluation of National Policy, 1800–1900' (Oxford University Press, New York, NY, 1978), VIII.
- 4 See http://www.actionnetwork.org/ct/MDG_57P61HXn2 (accessed 5 May 2012).

life-saving health service.⁵ Unsafe abortion entails a procedure to terminate an unintended pregnancy that is performed by individuals without the necessary skills, or in an environment that does not conform to the minimum medical standards, or both.⁶ Women's access to legal abortions is restricted by law in some countries of the world. In Nigeria, legal abortion is permissible only to save the life of the pregnant woman and not for any other reason. Where law permits abortion, women may only have limited access to safe abortion services. Only few countries prohibit abortion in all cases.⁷

With a population of roughly over 125 million, Nigeria is the most populous country in Sub-Saharan Africa. It has a population growth rate of 2.8% every year. Each year, about 750 000 Nigerian women have induced abortions.⁸

While it is acknowledged that family planning is a basic human right, "it remains meaningless unless individuals and couples have access to contraceptives, information and services to enable them to exercise that right".⁹ According to Human Rights Watch (HRW):

Abortion is a highly emotional subject and one that excites deeply held opinions. However, equitable access to safe abortion services is first and foremost a human right. Where abortion is safe and legal, no one is forced to have one. Where abortion is illegal and unsafe, women are forced to carry unwanted pregnancies to term or suffer serious health consequences and even death.¹⁰

HRW states further that "the denial of a pregnant woman's right to make an independent decision regarding abortion violates or poses a threat to a wide

5 International Women's Health Coalition, *Access to Safe Abortion is a Human Right*, Fact sheet on abortion, available online at <http://www.iwhc.org> (accessed 3 April 2012).

6 The Alan Guttmacher Institute, *Sharing Responsibility: Women, Society and Abortion Worldwide* (Guttmacher Institute New York, NY, 1999).

7 A. Rahman, L. Katzive and S.K. Henshaw, 'A Global Review of Laws on Induced Abortion, 1985–1997', 24 *International Family Planning Perspectives* (1998), 56–64.

8 Guttmacher Institute, *Facts on Unwanted Pregnancy and Induced Abortion in Nigeria*, available online at http://www.guttmacher.org/pubs/2006/07/13/FB_Nigeria.pdf (accessed 24 March 2012).

9 Babatunde Osotimehin, message by the Executive Director of the United Nations Population Fund (UNFPA) at the World Population Day, New York, 10 July 2012.

10 Human Rights Watch (hereinafter referred to as HRW), *Abortion*, available online at <http://www.hrw.org/news/2009/03/31/abortion> (accessed 14 July 2012).

range of human rights.”¹¹ It is widely acknowledged that in countries in which abortion is legally restricted, women seek abortions clandestinely, under conditions that are medically unsafe and therefore life threatening.¹²

A woman’s ability to exercise her rights to control her body, to self-determination, and to health depends, in part, on her right to determine whether to carry a pregnancy to term.¹³ Women and girls who face punishment for having an abortion are not less likely to attempt abortion, but are more likely to have medically unsafe services. When law restricts abortion, as in Nigeria, trained providers may be reluctant to perform abortions. In situations where abortion is allowed to save the woman’s life, some medical personnel refuse due to conscientious belief, societal reprimand or even fear of legal repercussions. Such situations force women to seek unsafe abortions.¹⁴

As early as 1967, the World Health Assembly identified unsafe abortion as a serious public health problem in many countries.¹⁵ The number of declarations and resolutions signed by various countries, including Nigeria, over the past two decades indicate a growing consensus that unsafe abortion is an important cause of maternal death. This can, and should, be prevented through the promotion of sexuality education, family planning, and safe abortion services within the law, and post-abortion care in all cases.¹⁶

11 Q & A: *Human Rights Law and Access to Abortion* | *Human Rights*, available online at <http://www.hrw.org/news/2005/.../qa-human-rights-law-and-access-abortion> (accessed 10 June 2012).

12 Centre for Reproductive Rights, *Safe and Legal Abortion is a Woman's Human Right*, available online at http://www.reproductiverights.org/sites/crr...net/.../pub_fac_safeab_10.11.pdf (accessed 8 July 2012).

13 *Ibid.*

14 *Ibid.*

15 WHO, *Safe abortion: Technical and policy guidance for health systems*, second edn. (WHO, Geneva, 2012), 28; See Resolution WHA20.41, ‘Health aspects of population dynamics,’ In: Twentieth World Health Assembly, Geneva, 23 May 1967 (WHA20/1967/REC/1) (WHO, Geneva, 1967).

16 Resolution WHA57.12. Reproductive health: strategy to accelerate progress towards the attainment of international development goals and targets. In: Fifty-seventh World Health Assembly, Geneva, 17–22 May 2004 (WHA57/2004/REC/1) (WHO, Geneva, 2004). See *International Conference on Population and Development (ICPD) Programme of Action* (A/CONF171/13/Rev.1) (United Nations Population Fund, New York, NY, 1995); Resolution S-21.2. Key actions for the further implementation of the Programme of Action of the International Conference on Population and development. In: Twenty-first special session of the United Nations General Assembly New York, 30 June–2 July 1999 (A/RES/S-21/2) (United Nations, New York, NY, 1999); see *Plan of Action on Sexual and Reproductive Health and Rights (Maputo Plan of Action)* (The African Union Commission, Addis Ababa,

1.1 *Evolution of Abortion Laws in Nigeria*

Abortion practices in Nigeria date back to as long as women can recall. Traditionally, Nigerian women had local herbs and traditional practices used to voluntarily induce termination of an unwanted pregnancy.¹⁷ It is, therefore, not a Western import. Restrictive abortion laws, however, date to colonial times. During and after the colonial period, most colonized countries adopted restrictive laws based on European countries' laws.¹⁸ The first condemnations of abortion appeared in the Code of Canon Law of the Roman Catholic Church in the 12th century. By the late 19th century, the Church had decreed that abortion at any time following conception was a crime punishable with excommunication.¹⁹

The United Kingdom was the first country to prohibit abortion at all stages of pregnancy with passage of the 1803 Irish Chalking Act. Offenders were punished with life imprisonment.²⁰ This law laid the groundwork for the British 1861 Offences against the Persons Act, which criminalized abortion in England and was the basis for criminalizing abortion throughout the Commonwealth countries, of which Nigeria is one.²¹ Legislative prohibition of abortion was first introduced into Nigeria in 1959. The predominantly Muslim northern states of Nigeria contain about half of the population of the country and the Penal Code governs abortion.²² The other half of the population, which consists of the southern states, is predominantly Christian, there the Criminal Code is operational.²³ Both laws, with slight variations in the wordings, generally prohibit abortion except to save the life of the pregnant woman.

Sections 228, 229 and 230 of the Criminal Code provides:

2006); *Access to Safe and Legal Abortion in Europe* (Resolution 1607 of the Parliamentary Assembly of the Council of Europe) (Council of Europe, Strasbourg, 2008).

- 17 T. Aderibigbe, *My Womb is tired: A Socio-Legal Perception of the Reproductive Autonomy of Women in South-west Nigeria with a Focus on Abortion* (Ph.D. Thesis, Kent Law School, University of Kent, Canterbury, 2006), p. 187.
- 18 IPAS, *The evidence speaks for itself: Ten facts about abortion*, available online at <http://www.ipas.org/~media/Files/Ipas%20Publications/TENFACE10.ashx> (accessed 14 July 2012).
- 19 C. Francome, 'United Kingdom', in: P. Sachdev (ed.), *International handbook on abortion* (Greenwood Press, New York, NY, 1988), pp. 458–459.
- 20 *Ibid.*
- 21 R. Cook and B. Dickens, *Abortion laws in Commonwealth countries* (Geneva: WHO, 1979).
- 22 Laws of the Federal Republic of Nigeria, no. 18 of 1959.
- 23 *Ibid.* The Criminal Code was first introduced in 1916 during the English colonization of Nigeria.

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

229. Any woman who, with intent to procure her own miscarriage, whether she is or is not with child, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a felony, and is liable to imprisonment for seven years.

230. Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, is guilty of a felony, and is liable to imprisonment for three years.²⁴

It is noteworthy that the above provisions do not define 'unlawfully', thereby creating a problem of determining 'lawful abortion.' With the above provisions, it can be argued that abortion in whatever manifestation is absolutely unlawful in Nigeria. Whereas, the judicial intervention in the English case of *R v. Bourne*,²⁵ permits abortion to save the life of the mother,²⁶ no similar case has been brought to Nigerian courts challenging the provisions of both Codes, even fifty-two years after Nigeria's independence from England.

According to Justice Ishaq Bello, the Nigerian law on abortion as it is represents an ideal situation of pregnancy on grounds that it believes that all women would get pregnant by their husbands or by men they reached an agreement with for such purpose. The abortion law inherited in 1861 from Britain (which the former colonial masters have reformed more than three times in their own country since then), did not envisage pregnancies that were the results of rape and incest. The Nigerian law on abortion is unnecessarily punitive in view of

24 Criminal Code Act Sections 228–229. Cap C 38, Laws of the Federation, 2004. See also Criminal Code of Southern States of Nigeria Section 228. Cap C 38, *Ibid.* See also Penal code of the Northern states of Nigeria. Sections 232–233, *Ibid.*

25 (1939) 1 KB 687.

26 *Ibid.*, 202.

the fact that women who become pregnant because of rape and incest and who would prefer to terminate such pregnancies are not covered.²⁷

1.2 *History of the Abortion Law Debate in Nigeria*

Religious, moral, and cultural factors continue to influence the static state of abortion laws Nigeria. It is the doctor who decides when the pregnant woman's life is in danger and when abortion should be done, the right of bodily control and choice by the pregnant woman is taken from her and given to the doctor.²⁸ Though abortion performed without the woman's consent is considered feticide, the law is silent on the right of a woman who has an abortion performed on her by a medical doctor without her consent even when it is to save her life. There is a lacuna in the law in this regard, which we opine is a fundamental human rights issue. In Nigeria, it is the practice, that parental consent (especially that of the father of the pregnant girl) is sought if their minor daughter requests an abortion.²⁹ This is against the decision in the English case of *Gillick v. West Norfolk and Wisbech Area Authority*,³⁰ where the House of Lords recognized the human right of a 16 year old girl to seek abortion without the consent of her parent. Also, while other jurisdictions recognize the bodily integrity of a woman and do not require the consent of the foetus' father before an abortion, as was decided in the European Court of Justice in the case of *Paton v. United Kingdom*,³¹ in Nigeria, it is the practice that doctors inform the putative father when an abortion is necessary in emergency situations.³²

There is no provision in Nigeria for abortion in cases of rape or incest, whether the foetus' development is impaired, whether it could be born physically or mentally disabled, whether the mother's physical or mental well-being

27 Nigeria: Judge Calls for Reform of Abortion Law. "News News News", *news@ippf.org* (accessed 5 July 2010).

28 This is the same reasoning Sally Sheldon gives in the case of the British abortion law which has been liberalized to give British women greater control over their pregnancy choice and by extent some measure of bodily control, S. Sheldon, *Beyond Control Medical Power and Abortion Law* (Pluto Press, London, 1997).

29 T.J. Joyce, S.K. Henshaw, A. Dennis, L.B. Finer and K. Blanchard. *The Impact of State Mandatory Counseling and Waiting Period Laws on Abortion: A Literature Review* (Guttmacher Institute, New York, NY, 2009), available online at <http://www.guttmacher.org/pubs/MandatoryCounseling.pdf> (accessed 14 January 2010); see also Aderibigbe (*supra* note 17), 187–190.

30 *Gillick v West Norfolk and Wisebech Area Authority* [1986] AC 112, [1985] 3 All ER 402, [1985] 2 BMLR 11 (HL).

31 *Paton v United Kingdom* (1980) 3 EHRR 408.

32 Aderibigbe (*supra* note 17), 226.

is endangered, or whether there are socioeconomic considerations that could be taken into contemplation,³³ as is applicable in other jurisdictions.³⁴ These issues negate the constitutionally guaranteed equality and human rights of Nigerian women. These become of greater concern because women without the means to access medically safe abortion often resort to medically unsafe providers of illegal abortions or attempt to perform the abortion themselves.³⁵

1.3 *Controversies between the Pro-Life (Anti-Abortion) and Pro-Choice (Pro-Abortion) Groups Women's Abortion Right*

Abortion attracting criminal penalties, even when pregnancy is the result of rape or incest has resulted in a raging controversy between the pro-life (anti-abortion) and pro-choice (pro-abortion) groups on the justification of a women's right to abortion in Nigeria.

Opposition to women's access to safe abortion comes from many sources: religious groups, opponents of women's equality and of abortion as Western feminist concepts, health professionals who believe abortion is unethical, and community leaders who worry that liberalizing the abortion law will make them lose elections or lead to unrestrained sexual activity among young people.³⁶

Liberalizing abortion laws is a burning political and emotional issue, especially in Nigeria where the legislators have consistently refused to amend the law to meet with the extant needs of contemporary woman. Some of the reasons advanced by those opposing abortion are as follows:

abortion constitutes a danger to women's life and health;
legalizing abortion condones promiscuity; and
abortion amounts to killing of the foetus.

Culturally, opposition to abortion stems from the deeply held conviction that the destruction of a foetus is equivalent to murder of a human being. In Nigeria, the culturally held belief is that each child comes to this world with his own

33 *Ibid.*, 329–332.

34 C. Salter, H.B. Johnson and N. Hengen, 'Care for Postabortion Complications: Saving Women's Lives', 25 *Population Reports Johns Hopkins School of Public Health* (1997) 1–31.

35 M. Bloom, "Need Abortion, Will Travel", *RH Reality Check* (25 February 2008).

36 Women's organisations and NGOs have an important role to play in advocating for medically safe abortion, see <http://www.medicalabortionconsortium.org/articles/print/?tid=138&bl=en>

destiny, predetermined by its creator.³⁷ However, it is not certain whether that predetermined destiny is from the minute of conception or when the child is born. Advocates of the right to abortion reject the view that the foetus in its early stages of existence is a human being.³⁸ Dworkin argued that there are considerable doubts as to the veracity of the belief that a foetus is a 'human being' from the very moment of its conception.³⁹

Restrictive abortion laws infringe on women's human rights and on medical ethics. Research shows that restrictive criminalization of abortion does not stop women from obtaining unsafe abortions to end unwanted pregnancies.⁴⁰ Therefore, a restrictive legal framework regulating abortion directly affects the safety of the abortion procedure. It also means the quality of the services is not regulated and cannot be provided openly. In countries like Nigeria, where abortion is illegal, the risk of death and injury to women seeking abortion is on average thirty times higher than countries where abortion is legally permitted.⁴¹ Where abortion is permitted, it is possible for the legislature to regulate the access and quality of the abortion service based on the age of the pregnancy. In effect, there is some measure of protection for women dying from unqualified abortion providers who do not have the skills to provide the service.

1.3.1 Abortion and Faith

From a religious point of view, the traditional tenets of Islam, to which about half of the Nigerians are faithful, only forbid abortion after animation of the foetus. Muslim jurists have agreed unanimously that after the foetus is completely formed and has been given a soul, abortion is *haram* (*sin*). It is also a crime, the commission of which is prohibited to the Muslim because it constitutes an offense against a complete, living human being. However, there is one exceptional situation. Some Islamic jurists are of the opinion that if, after the baby is completely formed, it is reliably shown that the continuation of the pregnancy would necessarily result in the death of the mother, then, in accor-

37 In the Yoruba ethnic mythology, it is thought that a child's 'ori' or 'destiny' cannot be changed or tampered with, otherwise the gods will punish whoever attempts to do so, see T. Aderibigbe, 'Broken Calabashes: Yoruba Traditional Faith', in: E. Blyth and R. Landau (eds.), *Faith and Fertility, Attitudes towards reproductive practices in different religions from ancient to present times* (Jessica Kingsley Publishers, London, 2009), pp. 179–204.

38 L.B. Curzon, *Jurisprudence* (Cavendish Publishing, London, 1993), p. 259.

39 *Ibid.*

40 G. Sedgh, S. Henshaw, S. Singh, E. Ahman and I.H. Shah, 'Induced abortion: Estimated rates and trends worldwide', 370 *The Lancet* (2007), 1338–1345.

41 IPAS, *supra* note 18, p. 12.

dance with the general principle of the Shari'ah, that of choosing the lesser of two evils, abortion can be performed.⁴²

The reason for this is that the mother is the origin of the foetus; moreover, her life is well-established, with duties and responsibilities, and she is also a pillar of the family. It would not be possible to sacrifice her life for the life of a foetus which has not yet acquired a personality and which has no responsibilities or obligations to fulfill.⁴³

From the above position, it is evident that every human being has the right to be born, the right to be, and the right to live as long as Allah permits. The foetus is regarded by all schools of Islamic law as having the right to life, as indicated by the fact that the death sentence on a pregnant woman can be carried out only after she has given birth. This right to life is absolute in Islam: it cannot be overridden, even in cases of rape or concerns regarding foetal deformity.⁴⁴

Judaism, from where Christianity originated, and equally followed by the remaining half of Nigerians, does not consider the embryo a human being independent of its mother until it is at the point of birth.⁴⁵ Weitzman says that according to the Jewish teaching '[t]he embryo is considered to be like water until it is forty days old in the utero', but it does not permit the destruction of embryos as it is considered a potential human. However, the destruction of unwanted and unused embryos left for clinical research may be permissible.⁴⁶ The Christian doctrine is that all life is worthy of protection absolutely from the moment of conception. It also means that all unborn are to be treated as humans worthy of protection by the state.⁴⁷

Catholics have a substantial following in the southern part of Nigeria. They regard human life as sacred and inviolable at every moment of existence, including the initial phase which precedes birth. The Catholics belong to the school of thought that constitutions must protect all human life, which begins

42 T. Guntari. 'Say 'No' To Abortion', available online at <http://tutut-guntari.blogspot.com/2011/01/say-no-to-abortion.html> (accessed 21 January 2011).

43 *Ibid.*

44 *Ibid.*

45 A.-M. Dourlen-Rollier, 'Legal Problems Related to Abortion and Menstrual Regulation', *The Symposium on Law and Population Proceedings, Background Papers and Recommendations* (1975), pp. 122–123.

46 G. Weitzman, 'Give me Children, or else I am Dead' Orthodox Jewish Perspectives on Fertility', in: E. Blyth and R. Landau (eds.), *Faith and Fertility, Attitudes towards reproductive practices in different religions from ancient to present times* (Jessica Kingsley Publishers, London, 2009), pp. 205–225.

47 J. Richards, 'A Roman Catholic Perspective on Fertility Issues, Objective Truths, Moral Absolutes and the Natural Law', in: Blyth and Landau, *supra* note 46, pp. 35–56.

at conception and ends at natural death and prohibit abortion under all circumstances. Pope Benedict XVI rejected the concept that abortion could be considered a human right. "The fundamental human right, the presupposition of every other right, is the right to life itself, ... [t]his is true of life from the moment of conception until its natural end. Abortion, consequently, cannot be a human right. It is the very opposite, it is a deep wound in society."⁴⁸

The Catholic Church historically has opposed abortion because it perverts the sex act from being strictly a reproductive procedure. In 1991, the then President and Secretary of the Catholic Bishops Conference in Nigeria issued a stern warning to a proposal by the then Minister for Health to liberalize abortion as a way of stemming the high mortality rate of women associated with medically unsafe abortions procedures.⁴⁹ Many theologians contest the Catholic doctrine prohibiting abortion from the moment of conception. They believe that it is possible to interrupt pregnancy when the circumstances of birth make the new life a calamity rather than a blessing.⁵⁰ Other groups however, such as the Catholic Church, the Christian right and most Orthodox Jews, regard abortion not as a right but as a 'moral evil'.⁵¹

Traditionally too, life is sacred and worthy of protection, but the unborn child's life is not seen as greater than that of its mother, because one is a potential life while the other is already in existence with an accrued value. In most ethnic groups amongst Nigerians, it is the belief that if a woman's life is in danger because of the pregnancy, an abortion can be permitted because "it is better for the water to pour away than for the calabash to be broken".⁵² This means that if a woman loses a pregnancy, not all hope is lost because she is alive to have other pregnancies.

Some medieval theologians and lawyers permitted contraception and abortion in the first four months of pregnancy – i.e., "before the foetus is 'infused with life.'" This view, however, is overshadowed by the literalist school of law now prominent in the Middle East, which absolutely forbids contraception and abortion. They argue in favor of a less restrictive policy, in part, as it more faithfully reflects the medieval teaching and practice, and partly for the sake of more effective population control.⁵³

48 Pope Benedict XVI. 'Abortion not a human right,' Address at the former imperial Hofburg Palace in Vienna (Reuters Saturday 8 September 2007).

49 Aderibigbe (2006), *supra* note 17, at 58.

50 Dourlen-Rollier, *supra* note 45, at 122, 123.

51 Catechism of the Catholic Church 2271.

52 Aderibigbe, *supra* note 40, at 190–195.

53 *Supra* note 50.

Nigeria is a developing country, and the lessons to be learned is that countries with permissive abortion laws, primarily developed countries, do not have increased rates of abortion whereas countries with highly restrictive abortion laws – primarily developing countries – do have high unsafe abortion rates.⁵⁴ Forty percent of the world's women (ages fifteen to forty-four) live under highly restrictive abortion laws in developing countries.⁵⁵

Access to contraception and safe abortion services is fundamental to a woman's ability to exercise her rights to control her body, to self-determination, and to maintain her health. In the 21st century, no woman should die or suffer the traumas of an unsafe or illegal abortion. Providing the full menu of services that women and young people need is not only the right thing to do, it's the smart thing to do.⁵⁶

From the public health point of view, unsafe abortion practices significantly accentuate maternal mortality, but limited access to abortion and lack of respect for reproductive rights also make it a question of social injustice.⁵⁷ Those opposed to abortion's availability and legality have actively peddled misinformation in order to curtail women's access to a full range of reproductive choices. They aim to stigmatize the procedure, the providers and the women who get abortions.⁵⁸ The anti-abortion movement has created and propagated many myths, intended to cast abortion as a dangerous procedure that should be prohibited. These distortions of science and good health practices have a detrimental effect on women's health, rights, and lives. Unfortunately, these myths have gained traction in some circles. The pro-choice community's support for a woman's right to have an abortion is based on science, history and human rights.⁵⁹

Since the International Conference on Population and Development held in Cairo in 1994, during which the many countries made commitments to respect women's reproductive rights, many of them have not recorded significant improvements to enact and implement the legal frameworks for abortion. There is still fierce contention between the pro-life (anti-abortion) and

54 Sedgh et al., *supra* note 40.

55 Singh et al., *supra* note 2.

56 A. Germain, 'Helping to shape policy for women's health', 377 *The Lancet* (2011), 803, available online at <http://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2811%2960294-8/fulltext?version=printerFriendly> (accessed 12 November 2013).

57 J. Mohr, *Abortion in America: The Origins of and Evaluation of National Policy, 1800–1900*, (Oxford University Press New York, NY, 1978), VIII.

58 IPAS, *supra* note 18.

59 *Ibid.*, p. 3.

pro-choice (pro-abortion) groups. However, it is widely recognized that restrictive laws on abortion have little effect on reducing the rate of abortion. They commonly lead to the performance of abortions in unsafe conditions, and to increased maternal mortality and morbidity by denying women access to safe services.⁶⁰

1.4 *Challenges to the Enjoyment of Safe and Legal Abortions*

Apart from the legislative, other obstacles may impede women's access to safe and legal abortion services in Nigeria. Legal reform can take many years to achieve. Impediments include the persistence of outmoded laws, opposition from powerful religious authorities, the activities of anti-choice groups and reluctance to publicly address sensitive issues of sexuality and reproduction.⁶¹

Procedural, economic, informational, cultural, and other barriers continue to impede access to legal abortion services in many developing countries like Nigeria.⁶² Access to contraceptive and post abortion services is often inadequate, partly because of insufficient resources.⁶³

Due to stigma, public information about the legal status of abortion and about women's right to a legal abortion are often lacking. Doctors may refuse to provide abortion services because of conscientious objection. Health care workers may fail to refer women seeking a pregnancy termination to an appropriate facility.⁶⁴ Access to safe services might be geographically limited, or compromised by a shortage of trained providers or by requirements that the procedure be performed only by a doctor, or in a hospital or other accredited facility.⁶⁵ Gestational limits, the need for spousal or parental consent, and mandatory waiting periods or counseling may deter some women from obtaining services. Financial barriers are also common: If abortion services are expensive, or are excluded from reimbursement under private and public health insurance plans, many adolescents (who usually have few resources of their own) and poor women may not be able to afford the procedure.⁶⁶

60 E. Alem and M. Damtie, *Women's Reproductive Health Rights* (Ethiopian Women Lawyers Association, Addis Ababa, 2000).

61 Singh et al., *supra* note 2, at 5.

62 *Ibid.*

63 *Ibid.*

64 *Ibid.*

65 Center for Reproductive Rights (CRR), *Abortion worldwide: twelve years of reform, Briefing Paper* (CRR, New York, NY, 2007).

66 *Supra* note 61, at 5–7.

Health systems may stigmatize women seeking reproductive health care, deny pain medication during an abortion or require the authorization of a spouse or third party (even if not required by law). Social values that stigmatize providers who offer safe abortion services constitute another barrier, because providers may stop offering the service.⁶⁷

Translating new laws into service programs that make safe abortions available to all women continues to be a daunting challenge in the developing world. Access to legal services is impeded by barriers of many kinds, including obstacles to setting up facilities and to procuring the commodities required to establish safe abortion services; procedural, economic, and informational barriers and stigma. Factors that can seriously hinder the equitable provision of legal abortion services to all women include administrative regulations that are difficult (if not impossible) to meet; lack of awareness in the general population that the law has been changed; shortages of trained personnel, especially in rural areas; and continuing opposition to the law (often including conscientious objection to providing services) on the part of some medical providers.⁶⁸

Among the complex constellation of obstacles to abortion reform in Nigeria like many less developed countries are the persistence of outmoded colonial and customary laws, opposition from powerful religious authorities, traditional emphasis on high fertility, the activities of well-funded anti-choice groups, and reluctance in many traditional societies to publicly address issues concerning sexual and reproductive behaviour.⁶⁹

1.5 *Abortion as a Human and Reproductive Right Issue*

Nigeria's Constitution explicitly states there should be no discrimination on the basis of gender, ethnic group, place of origin, sex religion or political leanings.⁷⁰ The UNAIDS defines gender as "a person's opportunities, roles, responsibilities and relationships . . . these roles and relations have significant influence on the course and impact of reproductive health."⁷¹

Successive Nigerian governments, since independence, have recognized that women's equality can only be achieved when they have access to con-

67 International Sexual and Reproductive Health Law Programme, Faculty of Law, University of Toronto, *Access to Abortion Reports: An Annotated Bibliography* (University of Toronto, Toronto, ON, 2007).

68 *Supra* note 2, 10–15.

69 *Ibid.*, 15.

70 Chapter IV, Constitution of the Federal Republic of Nigeria, 1999.

71 UNAID, *Gender and HIV/AIDS: Taking Stock of Research and Programmes*, Joint United Programme on HIV/AIDS, 1999.

traceptives, health services and education. However, there has been a resistance to put this into comprehensive reproductive health legislation. Nigerian legislators have viewed such attempts with suspicion. Members of the Senate vehemently opposed a Reproductive Health Bill sponsored by the Society of Gynecology and Obstetrics of Nigeria (SOGON) and thus showed unwillingness to give women genuine reproductive freedom. The Bill covered all aspects of the reproductive health rights of women in Nigeria. But policymakers and critique already termed it an 'Abortion Bill' and started a personal disparage on the Senator who proposed the bill at the Upper Legislative Chamber on behalf of SOGON.⁷² Research has shown that most Nigerian legislators are ignorant of the concept of a reproductive health rights. Policymakers immediately imagine reproductive health rights have to do with abortion. Their misconception is often guided by their personal religious and moral indignation rather than evidence-based facts of the needs of contemporary Nigerian women and the extent of the damage illegally procured abortion procedure do to Nigerian women population.⁷³ Traditional leaders are known to have very strong influence on policymakers, but they are also unwilling to get involved in a controversial issue of reproductive health rights.

1.5.1 International Human Rights Instruments on the Right to Life

Many human rights instruments protect the right to life. In 2000, in elaborating States obligations in reporting on their compliance with the right to life enshrined in the International Covenant on Civil and Political Rights (ICCPR); the Human Rights Committee called upon States to inform it of "any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions."⁷⁴

Several United Nations human rights bodies have framed maternal deaths due to unsafe abortion as a violation of women's right to life.⁷⁵ As a result, they

72 F. Okonofua, 'Nigeria: It's Not Abortion Bill', *This Day Newspaper*, Nigeria, available online at <http://allafrica.com/stories/200603150601.html> (accessed 24 March 2012).

73 F.E. Okonofua, A. Hammed, E. Nzeribe, B. Saidu, T. Abass, G. Adeboye, T. Adegun and C. Okocha, 'Perceptions of Policymakers in Nigeria Toward Unsafe Abortion and Maternal Mortality', 35 *International Perspectives on Sexual and Reproductive Health* (2009), 194–202.

74 Center for Reproductive Rights, *Safe and Legal Abortion is a Woman's Human Right* (Center for Reproductive Rights, New York, NY, 2011).

75 *Ibid.* See, e.g., Report of the Committee on the Elimination of Discrimination against Women (CEDAW Committee), 20th Session, Jan. 19–Feb. 5, 1999, 21st Session, June 7–25, 1999, pt. 2, ch. IV, Belize, para. 56, U.N. Doc. A/54/38/Rev. 1, GAOR, 54th Session, Suppl. No. 38 (1999) (hereinafter CEDAW 1999); CEDAW 1999, pt. 1, ch. IV, Colombia, para. 393; Rep. of the CEDAW Committee, 18th Session, Jan 19–Feb. 6, 1998, 19th Session, June 22–July 10,

have called on States to review restrictive laws that criminalize abortion⁷⁶ and increase access to family planning,⁷⁷ and sexual and reproductive health information⁷⁸ in order to reduce the number of unsafe abortions.

Several United Nations human rights bodies have recognized the deleterious impact of restrictive abortion laws on women's health⁷⁹ and have consistently raised general concerns about the inaccessibility of safe abortion services.⁸⁰

The Programme of Action adopted at the International Conference on Population and Development (ICPD) in 1994 called upon governments to consider the consequences of unsafe abortion on women's health.⁸¹ It states that governments should "deal with the health impact of unsafe abortion as a major public health concern."⁸²

At the 1995 Fourth World Conference on Women, the international community reiterated this language and urged governments to "consider reviewing laws containing punitive measures against women who have undergone illegal

1998, pt. 1, ch. IV; Report of the Human Rights Committee, 76th Session, Oct. 14–Nov. 1, 2002, 77th Session, Mar. 17–Apr. 4, 2003, 78th Session, July 13–Aug. 8, 2003, para. 81(14), U.N. Doc. A/58/40 (Vol. 1), GAOR, 58th Session, Suppl. No. 40 (2003).

76 Center for Reproductive Rights, *supra* note 74. See, e.g., CEDAW 1999, pt. 2, ch. IV, Chile, para. 229; CEDAW 1998, Peru, para. 340; CEDAW Committee, Concluding Observations: Philippines, para. 28, U.N. Doc. CEDAW/C/PHI/CO/6 (2006); Human Rights Committee, Concluding Observations: Poland, para. 8, U.N. Doc. CCPR/CO/82/POL (2004).

77 See, e.g., Report of the CEDAW Committee, 32nd Session, Jan 10–28, 2005, 33rd Session, July 5–22, 2005, pt. 2, ch. 4, Burkina Faso, para. 350, U.N. Doc. A/60/38, GAOR, 60th Session, Supp. No. 38 (2005); Report of the CEDAW Committee, 26th Session, Jan. 14–Feb. 1, 2002, 27th Session, June 3–21, 2002, Exceptional Session, Aug. 5–23, 2002, pt. 3, ch. 4, Czech Republic, para. 102, U.N. Doc. A/57/38, GAOR, 57th Session, Suppl. No. 38 (2002); CEDAW Committee, Concluding Observations: Mali, para. 34, U.N. Doc. CEDAW/C/MLI/CO/5 (2006); CEDAW Committee, Concluding Observations: Nicaragua, para. 18, U.N. Doc. CEDAW/C/NIC/CO/6 (2007).

78 See, e.g., CEDAW Committee, Concluding Observations: Bosnia and Herzegovina, para. 36, U.N. Doc. CEDAW/C/BIH/CO/3 (2006); CEDAW Committee, Concluding Observations: Cape Verde, para. 30, U.N. Doc. CEDAW/C/CPV/CO/6 (2006); CEDAW Committee, Concluding Observations: Namibia, para. 25, U.N. Doc. CEDAW/C/NAM/CO/3 (2007).

79 Center for Reproductive Rights, *supra* note 74. See, e.g., Human Rights Committee, Concluding Observations: Argentina, para. 14, U.N. Doc. CCPR/CO/70/ARG (2000).

80 See, e.g., Human Rights Committee, Concluding Observations: Mali, para. 14, U.N. Doc. CCPR/CO/77/MLI (2003); Human Rights Committee, Concluding Observations: Poland, para. 11, U.N. Doc. CCPR/C/79/Add.110 (1999); CAT Committee, Concluding Observations: Chile, para. 7(m), U.N. Doc. CAT/CR/32/5 (2004).

81 Programme of Action of the International Conference on Population and Development, Cairo, Egypt, 5–13 September 1994, para. 8.25, U.N. Doc. A/CONF.171/13/Rev.1 (1995)

82 *Ibid.*

abortions.”⁸³ It urged governments to “consider reviewing laws containing punitive measures against women who have undergone illegal abortions.”

In 1999, at the five-year review of the ICPD, governments recognized the need for greater safety and availability of abortion services. They affirmed that “in circumstances where abortion is not against the law, health systems should train and equip health-service providers and should take other measures to ensure that such abortion is safe and accessible. Additional measures should be taken to safeguard women’s health.”⁸⁴

In 1999, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) recognized “laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures” as a barrier to women’s access to appropriate health care.⁸⁵

The CEDAW Committee has consistently expressed concern about restrictive laws that criminalize abortion.⁸⁶ Furthermore, the Human Rights Committee has recognized that criminalizing abortion, even in cases of rape, is incompatible with the States’ obligation to ensure the equal right of men and women to the civil and political rights set forth in the ICCPR.⁸⁷

The Human Rights Committee has recognized that denying women access to legal abortion services is an arbitrary interference in their private lives.⁸⁸ The Human Rights Committee has stated that criminalizing abortion is incompatible with the right to be free from cruel, inhumane or degrading treatment.⁸⁹

83 The Beijing Declaration and The Platform for Action, Fourth World Conference on Women, Beijing, China, 4–15 September 1995, para. 106K, U.N. Doc.DPI/1766/Wom (1996). In addition, in a paragraph addressing research on women’s health, the Platform for Action urges governments “to understand and better address the determinants and consequences of unsafe abortion.”

84 *Supra* note 76.

85 Committee on the Elimination of Discrimination against Women, General Recommendation No. 24: Article 12 of the Convention (women and health), (20th Session, 1999), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 358, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008).

86 CEDAW Committee, Concluding Observations: Pakistan, para. 40, U.N. Doc. CEDAW/C/PAK/CO/3 (2007), para. 40; CEDAW Committee, Concluding Observations: Chile, para. 19, U.N. Doc. CEDAW/C/CHI/CO/4 (2006).

87 Human Rights Committee, Concluding Observations, Peru, para. 20, U.N. Doc. CCPR/CO/70/PE (2000) (hereinafter Human Rights Committee, Concluding Observations: Peru).

88 Human Rights Committee, Communication No.1153/2003, para. 6.4, U.N. Doc. CCPR/C/85/D/1153/2003 (2005).

89 Human Rights Committee, Concluding Observations, Peru, para. 20, U.N. Doc. CCPR/CO/70/PE (2000).

The Human Rights Committee has also called upon State Parties to amend restrictive abortion laws to help women avoid unwanted pregnancies and unsafe abortions.⁹⁰

The African Protocol on the Rights of Women (2003) 64 provides that member states must take all appropriate measures to “protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus”.

The United Nations treaty monitoring body’s recommendations and regional court decisions to States include the following examples, which involve ensuring comprehensive legal grounds for abortion:⁹¹

- (i) Take action to prevent unsafe abortion, including by amending restrictive laws that threaten women’s, including adolescents’ lives.⁹²

90 Concluding Observations of the HRC regarding: Chile, 18 May 2007, CCPR/C/CHL/CO/5 at para. 8; El Salvador, 22 August 2003, CCPR/CO/78/SLV at para. 14; Madagascar, 11 May 2007, CCPR/C/MDG/CO/3 at para. 14; and Poland, 2 December 2004, CCPR/CO/82/POL at para. 8.

91 WHO, *Safe abortion: Technical and policy guidance for health systems*, second edn. (WHO, Geneva, 2012), p. 98.

92 Human Rights Committee. General comment no. 28: equality of rights between men and women (Article 3), 20 March 2000. United Nations; Human Rights Committee; Concluding observations: Ecuador, 18 August 1998. United Nations; Human Rights Committee, Concluding observations: Guatemala, 27 August 2001. United Nations; Human Rights Committee, Concluding observations: Poland, 2 December 2004; United Nations: Human Rights Committee, Concluding observations: Madagascar, 11 May 2007; United Nations, Human Rights Committee. Concluding observations: Chile, 18 May 2007; United Nations, Human Rights Committee. Concluding observations: Colombia, 26 May 2004; United Nations; Human Rights Committee; Karen Noella Llantoy Huaman v. Peru, Communication no. 1153/2003, UN Doc. CCPR/C/85/D/1153/2003, 2005; Committee on the Elimination of Discrimination against Women, Concluding observations: Colombia, 5 February 1999. United Nations; Committee on the Elimination of Discrimination against Women, Concluding comments: Nicaragua, 2 February 2007. United Nations; Committee on the Elimination of Discrimination against Women, Concluding comments: Brazil, 10 August 2007; United Nations; Committee on Economic Social and Cultural Rights, Concluding observations: Nepal, 24 September 2001; United Nations; Committee on Economic, Social and Cultural Rights, Concluding observations: Costa Rica, 22 April 2008. United Nations; Committee on the Rights of the Child, Concluding observations: Chile, 23 April 2007; United Nations; Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted 11 July 2003, Article 14.2. Maputo, African Commission on Human and People’s Rights.

- (ii) Provide legal abortion in cases where the continued pregnancy endangers the health of women, including adolescents.⁹³
- (iii) Provide legal abortion in cases of rape and incest.⁹⁴
- (iv) Amend laws that criminalize medical procedures, including abortion, needed only by women and/or that punish women who undergo those procedures.⁹⁵

93 Committee on Economic Social and Cultural Rights, Concluding observations: Malta, 4 December 2004. United Nations, Committee on Economic Social and Cultural Rights, Concluding observations: Monaco, 13 June 2006. United Nations, Committee on the Elimination of Discrimination against Women. General recommendation no. 24: Women and health (article 12); United Nations, Committee on the Elimination of Discrimination against Women, Concluding observations: Colombia, 5 February 1999; United Nations; Committee on the Elimination of Discrimination against Women, Concluding comments: Dominican Republic, 18 August 2004; United Nations, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 11 July 2003, Article 14.2. Maputo, African Commission on Human and People's Right.

94 Committee on Economic, Social and Cultural Rights, Concluding observations: Nepal, 29 August 2001; United Nations; Committee on Economic Social and Cultural Rights, Concluding observations, Malta, 4 December 2004; United Nations; Committee on Economic, Social and Cultural Rights, Concluding observations: Chile, 1 December 2004; United Nations, Committee on Economic Social and Cultural Rights. Concluding observations: Monaco, 13 June 2006. United Nations; Committee on Economic, Social and Cultural Rights, Concluding observations: Costa Rica, 22 April 2008; United Nations, Committee on the Elimination of Discrimination against Women, Concluding comments: Colombia, 5 February 1999; United Nations; Committee on the Elimination of Discrimination against Women, Concluding comments: Sri Lanka, 1 February 2002; United Nations; Committee on the Elimination of Discrimination against Women. Concluding comments: Honduras, 10 August 2007. United Nations; Committee on the Elimination of Discrimination against Women. L.C. v. Peru, CEDAW/C/50/D/22/2009, 4 November 2011; United Nations, Committee on the Rights of the Child, Concluding observations: Chile, 23 April 2007; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 11 July 2003, Article 14.2. Maputo, African Commission on Human and People's Rights.

95 Committee on the Elimination of Discrimination against Women, Concluding comments: Colombia, 5 February 1999, United Nations; Committee on the Elimination of Discrimination against Women, Concluding comments: Mauritius, 17 March 2006. United Nations; Committee on the Elimination of Discrimination against Women. Concluding comments: Chile, 25 August 2006; United Nations; Committee on the Elimination of Discrimination against Women, Concluding comments: Nicaragua, 2 February 2007; United Nations, Committee on the Elimination of Discrimination against Women, Concluding comments: Brazil, 10 August 2007; United Nations, Committee on the Elimination of Discrimination against Women, Concluding comments: Liechtenstein, 10 August 2007; United Nations, Committee on the Elimination of Discrimination against

In July 2000, CAUP carried out a national conference on abortion in Abuja entitled 'Reducing Maternal Morbidity and Mortality from Unsafe Abortion in Nigeria,' which featured remarks by Nigeria's First Lady:

The emotive nature of the abortion debate has often blinded all sides from acknowledging the obvious: that no woman ever got pregnant with the sole aim of terminating [it] through an abortion . . . Society should, therefore, focus on what to do in order to eliminate or minimise the social and environmental factors that give rise to these situations."⁹⁶

2 Legal Status of Abortion

Increasing legal access to abortion is associated with improvement in sexual and reproductive health. International organisations increasingly regard the denial of safe abortion services as a human rights violation. In 1999, the UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) determined that neglect of health services that only women need is discriminatory and a deficit that governments must remedy. Furthermore, CEDAW noted that criminalization of abortion is a barrier that states should remove.⁹⁷

It is important to note that the African Protocol on Rights of Women (2003) provides, in Article 14(2)(c), that a state's obligation to guarantee the right to health includes protecting "the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother."⁹⁸

Women, Concluding comments: Honduras, 10 August 2007; United Nations; Human Rights Committee, Concluding observations: El Salvador, 18 November 2010; United Nations, Human Rights Committee, Concluding observations: Guatemala, 27 August 2001, United Nations.

96 Campaign Against Unwanted Pregnancy, *Reducing Morbidity and Mortality from Unsafe Abortion in Nigeria. Proceedings of the National Conference, Abuja, 24–28 July 2000* (CAUP, Lagos, 2003).

97 United Nations Committee on the Elimination of Discrimination against Women. General recommendation 24: women and health (20th session), paragraph 31(c). available online at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom24> (accessed 13 July 2012).

98 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 14(2)(c), adopted July 11, 2003, 2nd African Union Assembly, Maputo, Mozambique (hereinafter Maputo Protocol).

Although Nigeria is a party to the protocol, the nation's laws do not yet uphold this commitment.

Access to safe abortion is considered adequate if abortion is legal on broad grounds (for all reasons or for socioeconomic reasons) and safe services are widely available and accessible; medium, if abortion is legal on broad grounds but safe services are lacking for a large proportion of women; and poor, if abortion is legally restricted, services are clandestine, or safe services are available only to women who can afford them.⁹⁹ Making abortion legal and ensuring that safe abortion services are accessible to all women in need are urgent health, economic and moral imperatives.¹⁰⁰ Research has shown that Nigerian women choose abortion mostly to prevent them giving birth to children they do not have the economic capacity to maintain when it is born.¹⁰¹

2.1 *How justifiable is Nigeria's Law on Abortion*

In view of the social and human rights implications, it becomes necessary to examine whether there is any basis to justify Nigeria's restrictive abortion legislation. Historically, Nigeria's criminal code provisions constitute colonial legacy bequeathed by Britain, which was enacted in Nigeria on 1 June 1916. It is thus open to question whether Nigeria has a basis to rigidly cling to restrictive abortion provisions tailored for the 19th century society in the 21st century. More so when England, the originator of such provision, has long jettisoned such provisions for a commendably liberal one that meets the needs of their evolving contemporary society.¹⁰² Most of these restrictive laws originated from European colonial laws from previous centuries, although the European nations discarded their restrictive abortion laws decades ago.¹⁰³

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

99 *Ibid.*

100 *Supra* note 17, at 96–98.

101 *Ibid.*

102 J.K. Mason and R.A. McCall Smith, *Law and Medical Ethics* (Butterworths, London, 1987), pp. 71–73.

103 *Supra* note 17, at 5.

foul.¹⁰⁴ With the unabating occurrence of unwanted pregnancies, demand for abortion is inevitable.¹⁰⁵

Research has shown that modern and safe abortion techniques are more readily available in countries with liberal abortion laws than in countries with narrow and restrictive abortion positions like Nigeria.¹⁰⁶

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

- (i) Those that allow abortion to save a woman's life. Examples: Angola, Iran, Ireland, Mexico.
- (ii) Those that allow abortion to save a woman's life and on other maternal health reasons. Examples: Algeria, Ethiopia, Saudi Arabia, Argentina. Some countries, such as Cameroon, Ghana, Liberia, Namibia and Zimbabwe, have allowed abortion on additional grounds such as rape and incest.
- (iii) Those allowing abortion on the additional grounds of social and economic reasons. Examples: Burundi, Zambia, Australia, China and Russia.
- (iv) Those allowing abortion on request during the first 12 weeks of pregnancy. Examples: Togo, Tunisia, South Africa, Vietnam.

104 S.B Odunsi, 'Human Rights, Maternal Deaths and Dehumanization, Another Look at Nigeria's Abortion laws', 1 *Gender and Behaviour Journal* (2004) 200–214.

105 *Ibid.*, at 208.

106 B.C. Umerah, *Medical Practice and the Law in Nigeria*, (Longman, Ibadan, 1989), p. 62.

Abortion is permitted in the majority of European countries for a number of reasons, mainly to preserve the mother's physical and mental health, but also in cases of rape or incest, of foetal impairment or for economic and social reasons and, in some countries, on request. In member states where abortion is permitted for a number of reasons, conditions are not always such as to guarantee women effective access to this right: the lack of local health care facilities, the lack of doctors willing to carry out abortions, the repeated medical consultations required, the time allowed for changing one's mind and the waiting time for the abortion all have the potential to make access to safe, affordable, acceptable and appropriate abortion services more difficult, or even impossible in practice.¹⁰⁷

The legal frameworks relating to abortion vary widely from country to country and represent a crucial factor in assessing women's ability to access abortion care. Since the ICPD, a number of countries from all regions of the world have reformed their laws to permit women to end unwanted pregnancies under certain circumstances,¹⁰⁸ including: Albania (1996), Benin (2003), Burkina Faso (1996), Cambodia (1997), Chad (2002), France (2001), Guinea (2000), Guyana (1995), Mali (2002), Nepal (2002), South Africa (1996) and Switzerland (2002).

In England, it is lawful to terminate pregnancy by virtue of the Abortion Act (1967) which states that:¹⁰⁹

Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two medical practitioners are of the opinion, formed in good faith: (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman or if injury to the physical or mental health of her family, is greater than if the pregnancy were terminated; or (b) that there is substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

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

108 L. Katzive, 'Abortion law changes since 1994', Unpublished update from the Center for Reproductive Rights; also 'Legal Grounds Reproductive and Sexual Rights in African Commonwealth Courts', available online at http://reproductiverights.org/sites/crr.civicactions.net/files/documents/bo_legalgrounds_2005.pdf. (accessed 2 August 2012).

109 See Section 1.

The termination of the pregnancy must take place in a place approved by the Minister of Health or Secretary of State.” In the USA, the law on abortion is liberal as it allows the mother the freedom to have an abortion for whatever reason without the intervention of the State.

Nigeria needs to take a realistic approach at the negative impact of illegally procured abortion on the lives of its young female population as other developed and developing countries are doing. Ending the silent pandemic of unsafe abortion is an urgent public-health and human-rights imperative. As with other more visible global-health issues, this scourge threatens women throughout the developing world. Access to safe, legal abortion is a fundamental right of women, irrespective of where they live.¹¹⁰

3 Conclusion

Laws that deny access to abortion, whatever their stated objectives, have the *discriminatory purpose* of both denigrating and undermining women's capacity to make responsible decisions about their bodies and their lives.¹¹¹ It is imperative that laws should be enacted to ensure women's reproductive and sexual rights. This includes the right of independent access to reproductive health facilities and information services including safe and legal abortion. Women should have the freedom to determine the number and spacing of children, the right to demand safer sex practices, and the right to legal protection from sexual violence, outside and inside marriage, including legal provisions for marital rape.¹¹²

The United Nations admonishes governments, non-governmental organizations, and women's health and rights advocates to educate and encourage health care providers to perform abortions within permissible liberalized law. Women who wish to terminate unwanted pregnancies should have ready access to reliable information, sympathetic counselling and safe abortion services. Towards preventing and ending grave abuses of women's human rights

110 D.A. Grimes, J. Benson, S. Singh, M. Romero, B. Ganatra, F.E. Okonofua and I.H. Shah, 'Unsafe abortion: the preventable pandemic', 368 *The Lancet* (2006), 1908–1919.

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

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

in accordance with State's obligations under international human rights standards, Amnesty International has called on States to do the following:¹¹³

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

A ban on abortions does not result in fewer abortions, but mainly leads to clandestine abortions, which are more traumatic and increase maternal mortality and/or lead to abortion "tourism" which is costly and delays the timing of an abortion and results in social inequities. The lawfulness of abortion does not have an effect on a woman's need for an abortion, but only on her access to a safe abortion.¹¹⁴

Passage of a liberalized law is only the beginning of making abortion accessible and safe. Translating new laws into service programs that make safe abortions available to all women continues to be a daunting challenge in the developing world.¹¹⁵ Women's right to access to safe, legal abortion is essential for the protection of women's human rights. Unwanted pregnancy can befall anyone who is ignorant, vulnerable and poor. Advancing access to safe and legal abortion would undoubtedly save women's lives and facilitate gender equality.

113 Amnesty International, *Nicaragua: Complete ban on abortion violates Torture Convention*, available online at <http://www.amnesty.org/en/for-media/press-releases/nicaragua-complete-ban-abortion-violates-torture-convention-20090515> (accessed 13 November 2013).

114 Final text of *Access to safe and legal abortion in Europe*, 16 April 2008. European Parliamentary Assembly Resolution 1607 (2008).

115 Guttmacher Institute, *Abortion worldwide. A decade of uneven progress* (Guttmacher Institute, New York, NY 2012).

Denying Nigerian women access to abortion is a form of gender discrimination. Laws that restrict abortion have the effect and purpose of preventing a woman from exercising any of her human rights or fundamental freedoms on a basis of equality with men.¹¹⁶ Restricting abortion has the effect of denying women access to a procedure that may be necessary for their equal enjoyment of the right to health. Only women must live with the physical consequences of unwanted pregnancy. Some women suffer maternity-related injuries, such as haemorrhage or obstructed labour. Consequently, women are exposed to health risks not experienced by men.¹¹⁷ Laws that deny access to abortion, whatever their stated objectives, have the discriminatory purpose of both denigrating and undermining women's capacity to make responsible decisions about their bodies and their lives.¹¹⁸ Nigeria's abortion laws should not merely target punitive justice, but should, in fact, focus on distributive and compensatory justice which requires those who have injured others' interests to compensate the victims appropriately. "Countries around the world are recognizing that a woman can only lead a healthy and fulfilling life if she has access to reproductive healthcare – including safe abortion."¹¹⁹

116 Center for Reproductive Rights, *supra* note 111.

117 *Ibid.*

118 *Ibid.*

119 *Ibid.*