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# Policy on Abortion in the Nigerian Society: Ethical Considerations

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## DEDICATION

I affectionately dedicated this master's thesis to my best friend lady Shirley John Ijeoma Ezenwanne who taught me that there is more credit in making right enemies than making wrong friends. I love you and I will always do. Without you I will get lost, with you I am secured.

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TABLE OF CONTENTS

**1.0 CHAPTER ONE: GENERAL INTRODUCTION……………………………......4**

1.1 BACKGROUND OF THE STUDY…………………………………………………4

1.2 STATEMENTS OF THE PROBLEM………………………………………………7

1.3 RESEARCH QUESTIONS………………………………………………………..8

1.3 PURPOSE OF THE STUDY………………………………………………………9

1.4 RESEARCH METHODOLOGY…………………………………………………10

**2.0 CHAPTER TWO: CONCEPTUAL ANALYSIS AND DELINEATION………11**

2.1 THE MEANING OF ABORTION……………………………………………......11

2.2 KINDS OF ABORTION…………………………………………………….......13

2.3 THE METHODS OF PROCURING ABORTION……………………………......15

2.3.1 DILATION AND CURETTAGE (D & C)………………………………..16

2.3.2 PROSTAGLANDIN CHEMICAL ABORTION……………………….....16

2.3.3 SUCTION ABORTION…………………………………………………...16

2.3.4 SALT POISONING (SALINE INJECTION)……………………………..17

**3.0 CHAPTER THREE: POLICY ON ABORTION IN NIGERIAN SOCIETY……………………………………………………………………………......18**

3.1 LAWS GOVERNING ABORTION PRACTICE IN NIGERIA……………………18

3.1.1 CRIMINAL CODE……………………………………………………..….20

3.1.2 PENAL CODE…………………………………………………….......21

3.2 HISTORY OF ABORTION LAW IN NIGERIA……………………………..…..24

3.3 THE EFFECTS OF ILLEGAL ABORTIONS IN NIGERIA……………………..…26

3.3.1 INFECTION……………....……………………………………………….27

3.3.2 BLEEDING………………………………………………………………..28

**4.0 CHAPTER FOUR: ANALYSIS OF THE ETHICAL PROBLEMS OF ABORTION…………………………………………………………………………..30**

4.1 THE FOETUS RIGHT……………………………………………………….....30

4.2 THE OBLIGATIONS OF THE PREGNANT WOMAN TO THE FOETUS……..33
4.3 THE SOCIETY AND ITS OBLIGATIONS TO THE PREGNANT WOMAN…...34
4.4 MEDICAL PROFESSIONALS AND ABORTION………………………………..41
4.5 UTILITARIANISM: CONSEQUENCE- BASED THEORY…………………...….43

**5.0 CHAPTER FIVE**: CRITICAL EVALUATION…………………………………...47
5.1 CRITIQUE OF THE ABORTION LAW IN NIGERIA………………………….....47
5.2 MY PROPOSAL TO NIGERIANS ON THE POLICY OF ABORTION LAWS….48
5.3 CONCLUDING REMARK: SUMMARY OF MY THESIS………………………..51

**BIBLIOGRAPHY……………………………………………………………...…….53**

# CHAPTER ONE

# GENERAL INTRODUCTION

## 1.1 BACKGROUND OF THE STUDY

I want to start this thesis by saying that, abortion is most poorly understood, easily misunderstood, easily mixed up and abused subject matter, yet abortion is one of the topics in applied ethics that creates a great deal of public debate.

I have always wanted to research on the morality of abortion, partly due to the incidence of induced abortion, and complications from unsafe abortion around the world. I have seen many women risk their health and life in order to get abortion in countries where abortion is against the law. Everyday, approximately 186 women die around the world due to complications from unsafe abortion; many of these deaths are in countries where access to abortion is legally restricted.[1] The legal restrictions of abortion do not mean that abortion does not happen; it simply is driven under-ground and becomes more dangerous, that is to say, that despite all these legal restrictions and prohibitions of abortion, women still seek for abortion, and when abortion is illegal it is more likely to be unsafe and harmful to women's health, lives, families, and communities. As important, it denies women their most fundamental rights to health and to control their own bodies. Unsafe and often ineffective methods include taking various drugs or caustic substances by mouth; inserting objects into the vagina or flushing the vagina with caustic substances.[2]

With this initial interest, arose the problem of limitation; my supervisor gave me the idea of limiting my research on Africa to make it unique since a lot of people have written on abortion and researching on abortion in relation to Africa perspective will be a welcome development to the field of bio-medical ethics in particular, and applied ethics in general. Unfortunately I have a problem of getting relevant materials in researching about the issue of abortion in Africa perspective, and then another suggestion came from my

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[1] WHO, 2004.
[2] Okonofua, F., 2005.

supervisor to limit my research on the policy of abortion in the pluralistic Nigerian society. To reflect ethically on the incidence of induced abortion in Nigeria, to argue intelligently and offer ethical proposal that will be appropriate to the Nigerian society on the policy of abortion.

Few days later, a priest friend of mine called me from Nigeria and asked me what am I researching on in my master's thesis? When I told him, he said that I know very well that abortion issue in Nigeria is "no go area" what impact do I think I will make in such a sensitive issue like abortion in Nigeria; I told him that the resume of my research is to proffer solutions in reducing the incidence of induced abortion in Nigeria by suggesting that abortion policy in Nigeria should be liberalised and legalised since abortion is recognised as being a major cause of maternal death and considering the fact that the performance of abortion in Nigeria is illegal under criminal code and penal code. In actuality, the performance of abortion in Nigeria is almost totally ignored by the legal authorities in Nigeria and there are virtually no persecutions. It is a law that no one cares to obey and no one cares to enforce in Nigeria. My friend was scandalised and asked me whether I am a pro-choice or pro-life? Since what I want is fewer abortions in Nigeria by suggesting the elimination of quack physicians and making the abortion laws available to women in order to prevent them from seeking for it illegally. This I intend to do by applying the ethical principle of utilitarianism "the greatest happiness, for greatest number" in arguing for liberalisation of abortion laws in Nigeria, with this in mind, I told him that I am a pro-choice.

In reflecting about the incidence of induced abortions in Nigeria in particular, and the whole world in general, a question came into my mind "what are the situations that lead to unwanted, unplanned, or mistimed pregnancies?" The answers to these questions constituted the background of this study which include;

1. Women and men who want to limit their family size or delay child-bearing but do not have access to modern contraception, contraceptive methods that fail or are used incorrectly or inconsistently.

2. Women who maybe not be able to make decisions about sexual or reproductive issues because of family members or lack of access to financial resources; rape and forced pregnancy; laws, polices, and provider interpretation of laws and polices that serve to deny women access to contraception.

3. Young girls or adolescents having sexual intercourse and thinking they cannot become pregnant "the very first time".

4. Lack of male responsibility (for examples, "sugar daddies", or older men who trade their promises of marriage, food, gifts, or money for sexual relations, and who abandon young girls/women as soon as a pregnancy occurs and/or insist that the pregnancy be terminated.

5. The use of alcohol or drugs, leading to unprotected sexual intercourse, resulting in an unwanted pregnancy.

6. Sexual assault (rape) and child sexual abuse-a rapidly growing problem in many areas of the world may result in unwanted pregnancies.

7. The spread in some countries of the false belief that a man with HIV or AIDS can cure himself by having sex with a virgin.[3]

It is an undeniable fact that tens of thousands of rural villages and impoverished neighbourhoods the world over, where there is restrictive abortion laws, the breakdown of family network, the lack of contraception, the lack of money, and the lack of hope contribute to and exacerbate the problem of unsafe abortion.

[3] WHO, 1996.

## I.2 STATEMENT OF THE STUDY

During my undergraduate days in Nigeria, I once visited a friend who just finished having an abortion. She was highly devastated. She was crying bitterly and was in the state of topsy-turvy. I started asking her a lot of questions; what is wrong with you? Why are you so bitter? Is anything the matter? She told me that she is just coming out from abortion clinic. I said, is that why you are crying? She told me that she just underwent abortion. I asked her, did any one forced or persuaded you to go for the abortion? She started telling me her ordeal with the quack physician that performed the abortion; according to her, when she noticed that she was pregnant, she left their home and came back to school with intention of doing an abortion since she doesn't want anyone to know that she was pregnant. On her arrival to the school and due to the obvious truism that abortion is illegal in Nigeria, she decided to go to a quack for an abortion. The quack physician told her among other things that one of his modus operandi is that he must have sex with any of his patients before performing an abortion. She pleaded and the quack blatantly refused. She has no option than to concur and the quack physician finally had sex with her before performing the abortion. It was a very painful and sad experience for this young lady, who under normal circumstance would not allow this man to have sex with her. It was an experience she will not forget in a hurry. I tried to console her and advised her to call the police and report the quack physician, but she was quick to remind me that the Nigerian law, under the criminal code does not permit her to go for an abortion under such circumstance she underwent it.

A week later, I visited her again to know how she was doing; she told me that a young lady died in their hostel an hour ago before my coming, while she was trying to do "self-abortion" (that is, performing an abortion by herself by drinking local herbs in order to abort her unwanted pregnancy). The story had it that the deceased who was raped by a group of armed robbers few weeks ago and lost her virginity in the act, later found out that she was pregnant. She wanted to terminate the pregnancy, but when she went to the quack physician, he insisted of sleeping with her before performing the abortion, unlike my friend she refused and decided to do it in her own way and on the processed she died.

These are some of the problems Nigerian women are passing through, due to restrictive nature of abortion policy. At the end of this research work, I will be able to affirm with strong arguments and empirical evidences that legalisation of abortion is necessary in Nigerian society due to the bad effects illegal abortions are causing to the Nigerian women and should be included and considered in the Nigerian policy on abortion.

**1.3 RESEARCH QUESTIONS**

1. Could Nigerian government reduce the incidence of induced abortion in Nigeria?

2. Should Nigerian government soften their laws on abortion, in order to limit the number of women turning to illegal practices which are harmful to their women?

3. Will legalisation of abortion reduce or increase the number of induced abortions in Nigeria?

These three inter-related questions constituted my research questions which I am going to examine in this thesis. To be able to investigate these moral and empirical questions requires other pertinent analytical questions. Such questions include:

1. Should parents or spouses be notified before a woman has an abortion?

2. Is unsafe abortion a leading cause of material mortality and morbidity in Nigeria?

3. Does liberal legislation of abortion promote abortions?

4. What regulations of any should apply to abortion providers?

5. Is a foetus a person? If it is not a person, can it have any moral standing?

I am going to do an extensive analysis of the policy of abortion in Nigeria, which will enable me to answer the core moral questions in this research and then make proposals to Nigerians on what to do to stop or better put reduce the practice of illegal abortions and complications arising from unsafe abortions.

## 1.4 **PURPOSE OF THE STUDY**

I intend through this research and with the aforementioned analytical questions as my research guide to explore some of the problems connected with the formulation and application of policy on abortion, with particular reference to Nigeria, I will outline what is meant by abortion. Though different bioethicists or moralists have given so many definitions on the concept abortion, I will make use of one specific definition which was given by a moral philosopher F.J. Higgins.

I will go further in making distinction between the two main types of abortion which: non-induced abortion, which is when abortion is not wilfully planned and that is the type which is popularly known as miscarriage. While in the induced abortion, the destruction of the foetus is deliberately done.

Nevertheless, in carrying out the induced abortion, there arise some ethical problems which have become the major issue in the controversy on the abortion debate and these ranges from the foetus' rights, the obligations of the pregnant woman to the foetus, the society and its obligations to the pregnant woman, and finally the problems which are faced by medical professionals in taking decisions on performing abortion. All these will be critically analysed. I will look at how ethical decisions will be made in the practice of abortion in Nigeria. I will discuss specific ethical issues that arise in connection with abortion in line with utilitarianism. I will juxtapose utilitarianism with the practice of abortion in Nigeria, and make policy proposals regarding how to handle abortion issues in Nigeria.

## 1.5 **RESEARCH METHODOLOGY**

The method adopted here is expository and critical evaluation. It brings to openness the incidence of induced abortion in Nigerian society. The critical evaluation will help me to disclose the soundness of this issue. In other words, the work is going to be an ethical analysis of the policy of abortion laws, with particular reference to Nigeria. It will conclusively involve an attempt or attempts at proffering possible solutions to the lingering incidence of induced abortions in Nigeria.

# CHAPTER TWO
# CONCEPTUAL ANALYSIS AND DELINEATIONS

## 2.1. THE MEANING OF ABORTION

In spite of efforts by philosophers, bioethicists and other scholars to give a concise and clear-cut definition of abortion, complete success has not been met. The definition of abortion is replete with controversies. Much bioethicists ink has been spilt on arbitrating on the meaning of abortion, what is usually emphasized in the meaning of abortion is the ethics of destruction, but there is a balancing ethics of creation and for many people, conflict about abortion is a conflict within that ethics.

The ferocity of the debate surrounding abortion shows no sign of abating given the variety of the different parties' convictions, and the strength with which they are held it is unlikely that there will ever be agreement on this issue. However, philosophers have done much to help to clarify the moral and philosophical aspects of the debate, and showing every sign of continuing to do so as they engage in one of the most important moral arguments of the 21st century.

Etymologically speaking, the term abortion is derived from the Latin infinitive "aboriri", which means "perish", but literally translated as the loss of foetal life. Abortion, in its most common usage, refers to the voluntary or induced termination, generally through the use of surgical procedures or drugs and as a result of that, birth does not take part.[4]

In continuation, an abortion is the removal or expulsion of an embryo or foetus from the uterus, resulting in or caused by its death. This can occur spontaneously as a miscarriage, or be artificially induced by chemical, surgical or other means. Commonly, "abortion" refers to an induced procedure at any point during pregnancy; medically, it is defined as miscarriage or induced termination before twenty weeks' gestation, which is considered

[4] Dictionary by LabourLawTalk, 2004.

nonviable[5]. In ethical discourse, abortion is understood as the deliberate choice to terminate a pregnancy through an action which either directly destroys the foetus or causes its expulsion from the uterus before viability[6].

Pro-lifers, who regard embryos and foetuses as "pre-born children", consider pregnant women to have the same moral obligations to their foetuses as they do to their born children.[7] Abortion is morally as wrong as killing a child would be. It is also morally wrong to engage in behaviours likely to result in fetal harm or death.[8] Thus, pro-lifers will condemn behaviours such as using illicit drugs, abusing alcohol or smoking during pregnancy because of the risk these pose to the developing foetus, without providing any significant or morally important benefit to the pregnant woman.[9] The point I am trying to make is that, pro-lifers may claim that abortion is an inescapable moral dilemma. It is a problem that cannot wait; it must be confronted, while a pro-choice will not see any moral problem in the act of abortion and will support that a pregnant woman should have the freedom to choose an abortion if she does not want to have a baby. Pro-choicers, who view the early foetus as incapable of being harmed obviously cannot condemn such behaviours during the pregnancy on the ground that these harm the foetus.[10]

Many people use the words, "remove", "flush", "wash", "terminate", "evacuate", while referring to the act of abortion, pro-lifers will tell you, whether you are removing, or flushing, or terminating, or washing or evacuating, know that somebody dies, while for pro-choicers, abortion is morally permissible in most cases and not an act of killing.

In a common man's language, abortion means miscarriage or premature delivery. The conceptus can be expelled alive or dead. T.J. Higgins differentiated between foeticide and

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[5] http://en.wikipedia.org/wiki/abortion
[6] Clarkey, P. B., 1996, p.1
[7] Bonnie, S., 1998, p.137
[8] Ibid.
[9] Ibid.
[10] Ibid.
Pro-lifers are those who oppose abortion, while the term "pro-life" represents a full legal protection of embryos and foetuses.
Pro-choicers are supporters of liberal abortion laws, while the term "pro-choice" is an advocation of woman's right to her own body.

abortion, according to him, foeticide entails the killing of the foetus in its mother's womb before it is flushed out while abortion is the expulsion of living and non-viable.[11] By "non-viable" Higgins meant the period before the conceived baby is capable of maintaining an independent existence. The salient points in the above definitions are that pregnancy could be terminated:

1. Non- intentionally, i.e., spontaneously
2. Internationally, i.e., by induction.

On this basis, abortion can be said to have two kinds, namely, induced and non-induced abortions.

**2.2 KINDS OF ABORTION**

Abortion is non induced when it occurs spontaneously, in such case as miscarriage. This may be affected by a disease or some defects or mal-functioning in the woman's physiological system. Such an abortion is neither intended nor is it aided in any way at all. Unless due to culpable neglect, this would not be a human act and therefore would not attract moral sanctions.

In induced abortion, one purposely decides to interfere with the life of the conceptus. One does not only intend but takes effective measures to ensure the expulsion of the conceptus. According to Higgins, an abortion is "induced when it is the result of intentional interference with the foetus".[12] This raises some moral questions as this involves the exercise of the will. My main pre-occupation will therefore be on induced abortion and it is pertinent to note at this juncture that when I use the term "abortion" in this section, what I mean is induced abortion.

[11] Higgins, T. J., 1956, p.412
[12] Ibid, p.70
The term "conceptus" means that which is conceived. It embraces all the stages of human development from the moment of the fusion of the sperm and egg till birth. The conceptus undergoes the following stages of human development: zygote, embryo and foetus.

Induced abortion is normally classified into two; therapeutic and non therapeutic abortions. An abortion is said to be therapeutic when there are medical indications why it should be procured and is non therapeutic when such is not evident. For some, once an abortion is advised by two or more medical doctors it is therapeutic and legal. Such a view is not only erroneous and rash but fails to distinguish between matters of law and matters of moral.

In most cases, some of these conditions are seen as medical indications for therapeutic abortion: psychoses, severe neuroses, renal failure, chronic renal disease, cancerous womb, intra-uterine infection, etc. These conditions cannot be approved licence for abortion; rather, in the course of the treatment of the pregnant woman, the conceptus may lose its life. This is exemplified in the case of a football which was mistakenly over pumped. In an attempt to deflate it to appropriate size it could get punctured. The puncturing may be accidental or deliberate. In the same way, the death of the conceptus might be brought about if the conceptus is not able to withstand the medical therapy on which the mother is placed or that it is accidentally discharged.[13] Each of these is a serious matter and has to be placed on a moral judgement seat.

Therapeutic abortion may be direct or indirect.[14] When it is direct, appropriate measures are taken to eliminate the conceptus. In this way a life is preferred to another in the attempt to save one of the two lives. In an indirect non-induced abortion, the termination of the conceptus is not intended but its possibility is envisaged.[15] In other words, it is not a means of treating the mother but an unavoidable consequence of her treatment. For instance, a patient is kept alive by an electric plug by which he is enabled to breathe. It happened that another person is being shocked by the same electric point. Should the switch be turned off the patient will die. Which ever side of the coin that is chosen, the other is not killed but is unavoidably allowed to die. It is therefore necessary to differentiate between taking life and allowing death.

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[13] Ibid.
[14] Ibid.
[15] Ibid. p.72

In an entopic pregnancy, for instance, the conceptus cannot survive so long as it remains in the fallopian tube.[16] An emergency abdominal operation is required to have it implanted in the womb where it can at least have a natural development. The reason being to avoid medical complications that will seriously hamper the life of the mother and the baby. It might be evident that the conceptus will die during the process of the implantation or may not survive the implantation. Nonetheless, the operation is carried out: If the conceptus dies it is an unavoidable accident. This is quite different from taking positive measures to eliminate the conceptus, to get rid of something not wanted.

## 2.3 THE METHODS OF PROCURING ABORTION

There are many methods of abortion. Three common methods are normally used, namely, Dilation and Curettage (D & C), Prostaglandin and Suction Curettage. The choice of the method to be used is based on the uterine size, i.e., gestational age. Dr. J.C. Willike, in his book, *Abortion Questions and Answers*, has divided the methods of abortion into three main categories; those that invade the uterus and kill the child by instruments which enter the uterus through the cervix; those that kill the preborn child by administration of drugs and then induced labour and the delivery of a dead baby; and those that invade the uterus by abdominal surgery.

### 2.3.1 DILATION AND CURETTAGE (D&C)

The most commonly used technique is the D & C carried out between the seventh and twelfth weeks of pregnancy. In D & C the cervic is dilated and the foetus is removed by crushing and tearing. This method is similar to the suction method with the added insertion of a hook shaped knife (curette) which cuts the baby into pieces. The pieces are scraped out through the cervix and discarded.[17]

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[16] Ibid.
[17] Ibid.

### 2.3.2 PROSTAGLANDIN CHEMICAL ABORTION

After the 16th week of pregnancy, abortion culprits resort to prostaglandin. Prostaglandin is a chemical hormone which induces violent labor and premature birth when injected into the amniotic sac.[18] Since prostaglandin results in an unusually high percentage of live births, salt, urea or another toxin is often injected first.[19] The risk of the live birth from a prostaglandin abortion is so great that its use is recommended only in hospitals with neonatal intensive care units.[20] The risk to the mother is also greater with the use of prostaglandin; complications can include cardiac arrest.[21]

> This form of abortion uses chemicals developed by Upjohn Pharmaceutical Co. Which cause the uterus to contract intensely, pushing out the developing baby. The contractious are more violent than normal, natural contractious, so the unborn baby is frequently killed by then...Some have even been decapitated. Many, however, have also been born alive.[22]

### 2.3.3 SUCTION ABORTION

Suction abortion is an alternative method to D & C. This is the most common method of abortion during the first 12 weeks of pregnancy. General or local anaesthesia is given to the mother and her cervix is quickly dilated.[23]

However, if any of the above method is used in older pregnancies the mother may suffer from great haemorrhage. Another method called hysterotomy is therefore used.

> Used mainly in the last three months of pregnancy, the womb is entered by surgery through the wall of the abdomen. The technique is similar to a caesarean delivery, except that the umbilical cord is usually cut while the baby is still in the word, thus cutting off his

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[18] www.prochoice.com/abort_how.html.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] Higgins, T.J., p.80.
[23] Ibid.

oxygen supply and causing him suffocate. Sometimes the baby is removed alive and simply left in a corner to die of neglect or exposure.[24]

### 2.3.4 SALT POISONING (SALINE INJECTION)

Salt poisoning is another method of procuring for an abortion. It is used mainly after the 16 weeks when enough fluid has accumulated. It is also called “salting out”. A long needle injects a strong salt solution through the mother’s abdomen into the baby’s sac. The baby swallows this fluid and is poisoned by it.[25]

It is apparent that a hysterectomy is exactly the same as a caesarean section with one difference, namely, that in a caesarean section the operation is being done to save the life of the baby whereas in the hysterotomy the operation is being done to kill the baby.[26] In each of these methods, the baby is either killed in the womb and expelled or is brought out alive. When it is brought out, it is allowed to die through neglect or killed by strangling or other means.[27] It is much the same as any other except that it looks smaller and weighs less.

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[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid.

# CHAPTER THREE
# POLICY ON ABORTION IN THE NIGERIAN SOCIETY

## 3.1 LAWS GOVERNING ABORTION PRACTICE IN NIGERIA

Law reform in Nigeria is a slow process. Slower on issues on abortion that is very controversial and sensitive. Induced abortion in Nigeria is illegal and carries a heavy jail sentence-up to 14 years imprisonment unless it is performed to save the life of the pregnant woman.[28] The traditional and religious leaders oppose any reform of abortion law. They see such a move as jeopardy to the moral and family life of society. The pro-reform group (those who seek for the liberalisation of abortion in Nigeria) armed with research data and statistics would agitate for reform. They would also argue that in-spite of the criminalization of abortion in Nigeria; there is a conservative estimate of 610,000 abortions being performed every year in Nigeria.[29] They will also argue that the restrictive law forces most of these abortions to be clandestine performed by non-physicians and therefore unsafe. Statistics also show that at least 40% of maternal deaths in Nigeria are associated with complications from unsafe abortion.[30]

Nigeria is the most populous nation in sub-Saharan Africa and is among the ten most populous countries in the world. The population is characterised by a high fertility rate of 5.2 per woman and a population growth rate of 2.9%.[31] High maternal mortality ratio of 704 per 100,000 live births (MICS 1999), as well as the current high prenatal and neonatal mortality rates of 90 per 1000 births (WHO 2001) and 35 per 1000 births (NDHS 1999) respectively constitute strong evidence of poor delivery of maternity services.[32] The trend in infant mortality rate from 91 per 1000 births in 1991 to 105 per 1000 births in 1999 (NDHS 1999) reflects the deteriorating socio-economic conditions.[33] Roughly 125 million people live in Nigeria, making it the most populous

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[28] Mahmoud, P., 2000, p.7.
[29] Ibid.
[30] Ibid.
[31] http://www.guttmacher.org/sections/abortion.php
[32] Ibid.
[33] Ibid.

country in sub-Saharan Africa.[34] The country's population growth rate of 2.8 % per year means a doubling in size every 25 years.[35]

A restrictive law that only allows termination of pregnancy to save the life of the woman contributes to the high rate of unsafe abortion in Nigeria, in other words, abortion policies, therefore; adversely affect the lives and health of women in Nigeria. Of the 6.8 million pregnancies that occur each year in Nigeria, 63% end in planned births, 10% in mistimed or unwanted births, 11% in induced abortion and 16% in miscarriage. Roughly on in five pregnancies each year in Nigeria are unplanned; of those, slightly more than half end in abortion.[36]

In Nigeria, abortion law is the most heartily defended but least enforced laws on national statue book. There is no single legislation regulating abortion in Nigeria. However both the Criminal Code and the Penal Code applicable in the South and the North respectively make abortion illegal except it is done to preserve the life of the woman.[37] Criminal Code is applicable to the Southern States of the country; namely: Awka Ibom, Anambra, Bendel, Cross River, Imo, Lagos, Ogun, Ondo, Oyo, and Rivers, while the Penal Code is applicable to the Northern States; Bauchi, Borno, Gongola, Kaduna, Kano, Katsina, Kwara, Maiduguri, Niger, Plateau, and Sokoto.[38]

> The relevant provisions of the Criminal Code are based substantially upon section 58 of the offences against the person Act, 1861 (of England), while those of the Penal Code are based upon Scottish Common law. The main difference between the two is that, whereas the former applies to anyone acting with the intent of procuring the miscarriage of a woman, "whether or not she is with child", the later applies to those cases where a woman is in fact "with child".[39]

[34] Ibid.
[35] Ibid.
[36] Ibid.
[37] Okagbue, I., 1990.
[38] Ibid.
[39] Ibid.

These laws are part of our colonial heritage. A British parliamentary Act of 1861, the British have since 1967 moved away from this tradition and revised it extensively in 1990.[40] The problem with the law in Nigeria does not lie in the fact that the law is restrictive or the police do not prosecute the crime. It lies in the fact that the law is unclear, and most people think that abortion is illegal under all circumstances; desperate women and girls perform dangerous abortions on themselves or go to backstreet abortionists.

### 3.1.1 CRIMINAL CODE

The provisions of the Criminal Code on abortion contained in sections 228, 299, 230 and 297 are hereby reproduced:

**Section 228:** In this section of the criminal code, it states that any person who, with intent to procure the 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 other means whatever is guilty of a felony and is liable to imprisonment of fourteen years.[41]

**Section 229:** In this section of the criminal code any woman who with intent to procure her own miscarriage, whether she is or is not with a child, unlawfully administers to herself any poison or other noxious thing or uses force of any kind or uses any other means, whatever, or permits any such thing or means to be administered or used on her is guilty of a felony and is liable to imprisonment for seven years.[42]

**Section 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

[40] Ibid, p.2
[41] Ibid.
[42] Ibid.
Due to the fact that I don't have a direct access to the Nigerian criminal and penal codes, I am going to make use of article written by Okagbue Isabella in the journal; Studies in Family Planning, with a title; Pregnancy Termination and the Law in Nigeria in my analysis of the laws.

miscarriage of a woman, whether she is or is not with a child, is guilty of a felony and is liable to imprisonment for three years.[43]

**Section 297:** In this section of the criminal code a person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable having regard to the patient's state at the time and all the circumstances of the case.[44]

This section is limited by its terms to those cases of abortion done by "surgical operation"[45] In the meantime; however, the exact legal position on abortion to preserve the physical and mental health of the pregnant woman in both the North and South of Nigeria remains unclear.[46] The penal code, in the other hand, provides in much clearer terms.

### 3.1.2 PENAL CODE

In Nigeria abortion is regulated in the penal code by section 232, 233 and 234 as fellows:

**Section 232:** Whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage were not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment for a term, which may extend to fourteen years or with fine or with both.[47]

**Section 233:** Whoever with intent to cause miscarriage of a woman whether with child or not does any act which causes the death of such woman, shall be punished with imprisonment for a term which may be extend to fourteen years and shall also be liable

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[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] Ibid.
[47] Ibid. p.1.

to a fine, and if the act is done without the consent of the woman, with imprisonment for life or for any less term and shall also be liable to fine.[48]

**Section 234:** Whoever uses force to any woman and thereby unintentionally causes her to miscarry shall be punished with imprisonment for a term which may be extend to three years or with fine or both and if the offender knows that the woman was with child, he shall be punished with imprisonment for a term, which may be extend to five years or with fine or both.[49]

Nigeria legislation fails to draw any distinction between pre and post implantation procedures and the matters have never arisen for consideration by the courts.[50] The argument can be made, at least with respect to prosecutions in Northern Nigeria under the provisions of the penal code, that requiring proof of the woman's pregnancy-proof that may be very difficult to provide in the very early stages of pregnancy-should make conviction almost impossible for pre-implantation procedures.[51] The same may not be true of Southern Nigeria, where conviction is possible whether or not the woman is shown to have been pregnant.

In my own opinion, the most obvious defect in abortion law in Nigeria today is the absence of a specific legislation on abortion (that is, laws on abortion are not in the Nigerian constitution). This absence and the fact that the so called accesses to abortion, are to be found only in our Penal and criminal codes are grave restrictions in themselves. Neither the seeker, nor the practitioners would think of looking for legal access to abortion in a Penal system. The general notion is that a penal law criminalizes and punishes offences and are not usually permissive of actions that amount to an offence or a crime. The consequence of this is that most people are ignorant of the law on abortion. It is also burdensome to have to search through the Criminal or Penal Code

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[48] Ibid.
[49] Ibid.
[50] Ibid, p.2.
[51] Ibid.

in order to find the legal access to abortion. This perhaps explains why there has been no record of practitioners seeking refuge under this law.

Under both the Criminal Code (Section 297) and the Penal Code (Section 232), abortion is legal and allowed if "performed in good faith and for the purpose of preserving the life of the mother".[52] In the English Case of R V Bourne, (1939) 1 K.B 687, an indictment was preferred against Alex Bourne, an obstetric surgeon on the grounds that he used an instrument with an intent to procure the miscarriage of a 15-years old girl contrary to section 58 of offences against the person Act 1861. This English Case of R V Bourne states that; no abortion is unlawful when performed in order to save the pregnant woman's life.[53] It has been posited in some quarters that even though the law on abortion in Nigeria is restrictive it is adequate if resort is made to judicial intervention, drawing precedents from English authorities to expand the frontiers of "for the purpose of preserving the life of the mother".[54] The protagonists of this position even look further to the United States in the use of judicial intervention. The argument is that the fundamental rights guaranteed in the constitution to personal dignity, privacy, to freedom of expression and association and against discrimination could be used in the Nigerian Courts to fight for the woman's right to abortion.[55] It is apparent that the exact legal position on abortion to preserve the physical and mental health of the pregnant woman in both the North and South of Nigeria is unclear. Both the Criminal and Penal Codes are silent on who can or should perform the abortion. Technically from the law as it stands a butcher can perform an abortion and have the protection of the law if he can show that it was done in good faith for the preservation of the mother's life.

[52] Ibid.
[53] Ibid.
[54] Ibid.
[55] Ibid.

## 3.2 HISTORY OF ABORTION LAW IN NIGERIA

The issue of legalisation of abortion is a very topical one in almost every society. It always generates a lot of arguments and strong oppositions, ranging from the moral, to the religious, the political, the medical and feminist perspectives among others. One argument that has stood out is that legalisation of abortion is unimportant. The rationale for this argument can be found in the situations in Nigeria and the United States of America, two diverse positions on the abortion divide. In Nigeria where abortion is restrictive, it still goes on daily in hospitals and clinics and even in the hands of backstreet abortionists. It goes on unchallenged, undocumented and unprosecuted. In the United States, where abortion is legalised, barriers of access, ranging from economic constraints to the relentless efforts by anti-choice forces to deny women access have increasing limited the gains of legalisation. The situation is pervasive worldwide regardless of the legal status of abortion. Nevertheless one should not conclude from these situations that legalisation is unimportant. Activists throughout the world have learnt that legalisation of abortion even though insufficient to ensure the availability of safe abortion to all women who seek it, concede that it is still necessary.[56] Necessary to create an enabling legal environment for advocacy groups, to see abortion as part of a larger struggle for all the conditions, that will make women's reproductive health a reality.

In Nigeria there have been a number of national moves to liberalise the abortion law. The first was at the Annual General Conference of the Nigerian Medical Association (NMA) in 1972. This initiative fizzled out either due to lack of sufficient commitment or lack of popular support. In 1975, the National Population Council recommended that women should have access to abortion on request for health and welfare reasons. This was supported by the Nigerian Medical Association (NMA) and the Society of Gynaecologists and Obstetricians of Nigeria (SOGON). The issue generated a fresh controversy in 1976 as a result of an address by the Federal Minister of Health to the ninth yearly conference of SOGON to the effect that the Federal Government was

[56] Mahmoud, P., 2000, p.2.

considering a decree to reform the national law on abortion.[57] Many people then interpreted the speech to mean that government was legalising abortion.

In 1981, the Society of Gynaecology and Obstetrics of Nigeria (SOGON) initiated a bill on termination of pregnancy. This was tabled in the House of Representatives of the National Assembly in that year. The bill died out after the first reading in the face of strong opposition from religious groups and the National Council of Women's Societies. The alliance feared that the passage of the bill would promote moral laxity some newspaper headlines of the Daily and Sunday Times of May 1981 captured the mood of the controversy: MPS denounce abortion bill, abortion bill condemned, abortion bill faces mounting opposition.[58] The last caption of May 20 1981 reported as fellows: More and more Nigerians are rejecting the controversial abortion bill, it was revealed on Monday.[59] The then Speaker of the House of Representatives, Mr. Edwin Umeh Ezeoke said the National Assembly, had received more than 1,000 petitions in the form of letters, telephone calls, telegrams and threats from citizens and organisations-all of them against the bill. Mr. Umeh Ezeoke, speaking at a press briefing in Lagos said "not a single letter" had been received in favour of the bill[60]

More recently, between 1991 and 1992, the Campaign Against Unwanted Pregnancy (CAUP) assembled a team of professionals and officials of the ministries of Health and justice organised a law reform meeting. This meeting prepared a draft liberalisation law for the country which was submitted to the Federal Minister of Health. The Ministry slightly modified this draft law and submitted it to the presidency for approval. This law never saw the light of day. However, the comments of the then Minister of Health that the Federal Government was considering a review of the abortion law in view of the unacceptably high morbidity and mortality associated with abortion sparked of fresh debate on reformation the abortion law in Nigeria. This fresh controversy was only forestalled when the Minister made a public statement that the idea was being deferred

[57] Ibid.
[58] Umeh, E., 1981, p. 6.
[59] Ibid.
[60] Ibid. p.8.

until the size of the problem was known and the proposal acceptable to many more people.[61] The size of the problem can only be known to policy makers and the people through qualitative research on incidence of morbidity and mortality associated with unsafe abortions. There is also the need for an in-depth study of the nature of barriers to the enactment of a liberalised abortion law in Nigeria.

### 3.3 THE EFFECTS OF ILLEGAL ABORTIONS IN NIGERIA

Induced abortion involves risks. Repeated abortion by dilation and curettage for instance, weakens and damages the cervix.[62] This often leads to premature delivery or spontaneous abortion in subsequent pregnancies. Again, the cavity of the uterus may be damaged leading to the formation of scar tissue and consequently secondary infertility.[63] Even when the abortion is procured by suction, the womb may be displace from its natural position. When the womb is not in its proper position, conception may take place in the fallopian tube but the zygote cannot be nourished by the wall of the uterus. As a result of this, the zygote dies away.[64] In some women, frequent abdominal pain occurs. Abdominal pains are not conducive for pregnancy and miscarriage may occur. In the case of some young girls it is even worst. Some of them also suffers from psychological disturbances and attracts aspersions to themselves. Not only do the moral consequences of their act weight them down, their social relationship too is marred. They may need good counselling and other kinds of asylum, confidence and self-esteem.

It is undeniable truism that in Nigeria, the risk of the death following complications of unsafe abortion procedures is several hundred times higher than that of an abortion performed professionally under safe condition. The Society of Gynaecologists and Obstetricians of Nigeria estimate that about 20,000 Nigerian women die from unsafe abortions each year.[65] Unintended pregnancy is a problem in all parts of the world, Nigeria is no exception. In Nigeria, women experience pregnancies that are unplanned.

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[61] Ibid.
[62] http://dictionary.labortalk.com/abortion
[63] Ibid.
[64] Ibid.
[65] Okonofua F., 2005.

Illegal abortion has adverse effects on pregnancy women in Nigeria because most of the abortion providers are not only non physicians but quacks.

> Each year, Nigeria women obtain approximately 610,000 abortions, a rate of 25 abortions per 1,000 women aged 15-44. The rate is much lower in the poor, rural regions of Northern Nigeria than in the more economically developed Southern regions. An estimated 40% of abortions are performed by physicians in established health facilities, while the rest are performed by non physician providers.[66]

The effects of abortion in Nigeria can be break down into two main categories; infection and bleeding:

### 3.3.1 INFECTION

Infection is one of the major factors that affect illegal abortion practice in Nigeria. Studies looking at long-term consequences of poorly performed abortions indicated that about 20%-30% of unsafe abortions in Nigeria cause Reproductive Tract Infection (RTIs).[67] Reproductive Tract Infections are defined as any infections of the productive system. They include sexually transmitted infections (STIs), and other infections of the reproductive system that are not caused by sexual contact but by overgrowth of the bacteria and other organisms that normally live in the vagina.[68] 20%-40% of these RTIs lead to Pelvic Inflammatory Disease (PID) which is an infection in the female reproductive organs (uterus, fallopian tubes and ovaries), and consequent infertility.[69] Further, Nigeria women may experience a higher incident of ectopic pregnancy from PID, and premature delivery from damage of the cervix and increases risk of spontaneous abortions in subsequent pregnancies. The effects of illegal abortions in Nigeria associated with infection include;

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[66] Henshaw, S., 1998.
[67] Ibid.
[68] http://www.engenderhealth.org/wh/inf/drti.html
[69] Henshaw, S., 1998.

1. **Nulligravidity:** The number of pregnancies, complete or incomplete, experienced by a female.[70]
2. **Nulliparity:** Never having carried a pregnancy. Nulliparity is unusual vaginal discharge; it could be bacterial vaginosis.
3. **Previous pelvic inflammatory disease (PID):** this includes, gonorrhoea, Chlamydia infection etc.[71]

### 3.3.2 BLEEDING

Bleeding is one of the effects of illegal abortions in Nigeria because of the majority of the abortion providers are quacks and the methods they use are unprofessional, based on this, erosion of the wall of the uterus may occur causing profuse bleeding during menstrual period or during child bearing. This is very fatal as excessive bleeding during child bearing or post natal bleeding may lead to shock and death. Risk factors associated with bleeding includes;

1. **Genital sepsis:** is a several medical condition in which bacteria enter the blood after an operation or accident. Sepsis is considered present if infection is highly suspected or proven and two or more of the following systemic inflammatory response syndrome (SIRS) criteria are met.
2. **Haemorrhage:** is a medical term for a sudden loss of a large amount of blood in a short time. In other words, haemorrhage means several and serious bleeding. Technically speaking, it means, escape of blood to extravascular space. Haemorrhage generally becomes dangerous, or even fatal, when it causes hypovolemia (low blood volume) or hypotension (low blood pressure).

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[70] http://www.online-medical-dictionary.org/nulligravidity.asp.
[71] http://www.biology-online.org/dictionary/nulliparty

Apart from infection and bleeding which are the two major factors that affect illegal abortion practice in Nigeria, certain characteristics of the women herself are also included in the effects, such as her general health, female circumcision, age, parity and gestational age.

## CHAPTER FOUR

## ANALYSIS OF THE ETHICAL PROBLEMS OF ABORTION

Abortion is clearly one of the most controversial and divisive contemporary moral problems. The ethical problems which involved in the abortion debate range from the right of the foetus, the women and their obligations towards the foetus, the society and its obligations to the foetus, and medical professionals obligations to the foetus. Hence I am going to limit my discussion in this chapter to these aforementioned problems after which I will delve into utilitarianism as a consequence-based theory which is the ethical theory I intend to use in my proposal to the Nigerian society in their policy of abortion.

### 4.1 THE FOETUS' RIGHTS

The subject of the foetus' rights is occupying the minds of many politicians, lawyers, ethicists and medical scientists on a worldwide basis. It should be noted at this juncture that the most debates on the ethics of abortion focus on whether the foetus is a person, and if it is not a person, can it have any moral standing.

Establishing the point in time when foetus becomes a person is open to debate since the definition of personhood is not universally agreed upon. Pro-lifers will tell you that there is something too human about a foetus which looks so much like a baby, while the pro-choicers will tell you that the foetus is not a person and that something can only be a person if it is self aware and has temporal awareness.

Primary arguments against permitting women to choose abortion are that human foetuses, from conception, are human beings, and thus have the same moral rights to life as other human beings.[72] This is the official position of the Roman Catholic Church, which holds that abortion is never morally permissible, even when it is the only way to save the potential mother's life.[73] Another argument against abortion is that

[72] Warren, M. A., 1998, p.127
[73] Ibid.

foetuses have a right to life by virtue of their potential to become human beings.[74] As the debates go on, it is pertinent to note that the issue that the foetus is a person or a human being can neither be proved nor disproved to the satisfaction of all. To say of a foetus, that it is or it is not a person is in part to make a moral decision, and one which reflects ones views on whether a creature of such or such a sort ought to be treated in the way we think it appropriates to treat persons.

While pro-choicers would say that the foetus has no rights to stand in the way of abortion, pro-lifers, like Karl Barth have the view that the foetus has its own autonomy, saying that it has its own brain, nervous system and even its own blood circulation. That it can have its own illness without the mother being sick and it may be healthy when the mother is critically ill. It may also die as the mother still live or live and could be rescued through surgical operation after the mother's death. It is a human being in its own right.[75] While some pro-choicers would say, that a foetus has some moral standing since it does not have any trait of a person and therefore not a person, pro-lifers would say, that it is wrong to forfeit the foetus its right to life.

The question whether or not the foetus has rights cannot be answered without reference to a theory which outlines what can be and what cannot be said to have a right. The function of rights is to protect the interests of the right bearers; linking this to the subordinate thesis that foetus has no interests in the relevant sense and therefore cannot sensibly be regarded as a bearer of rights.[76] To speak of the rights of the foetus is simply a shorthand way of speaking of such rights of the child as relate to events occurring before it was born.[77] What appears as a right of the foetus is in reality a right of the unborn child, the phrase "unborn child" referring to a foetus from which a child does in fact develop.[78]

[74] Ibid.
[75] Barth, K., 1987, p.398.
[76] http://www.ejcl.org/64
[77] Ibid.
[78] Ibid.

The moral basis of rights is to be traced to the protection or furtherance of the interests of the rights bearers. The tie between rights and interests is so close that it is inappropriate to use the language of rights where there are no such interests to be protected or furthered. For a being to have interests it is necessary for it to be conscious so that we can regard it as having experience or awareness. Thus we cannot have duties to any being which does not have interests in the sense of concerns, and only such beings can be the bearers of rights. In this case there can be no question about the fact that the foetuses, certainly at an early stage, does not have interests in the relevant sense, and cannot therefore have the right to live, as it cannot sensibly be regarded as having any rights at all.[79] The foetus in the late stage of its development has experiences that may be described as wants, desires, likings, preferences and concerns; it can therefore properly be regarded as a right bearer. It must be recognized, in accordance with the principle of proportionality, that the justification of abortion and hence of abrogating the foetus's rights may vary in degree. Hence, a six months foetus has the right to well being to a greater degree than does a three –months foetus, and the latter more than a four weeks foetus, and so forth, so that there is correspondingly less justification for abortion the greater the approach to maturation.[80]

Some pro-choicers would simply say, that foetus is only a potential human being and potentiality alone is insufficient to provide the basis for a duty owe to the being that has the potential. Potentiality cannot therefore be used to demonstrate that a foetus possesses rights because a potential agent is not the same as a prospective agent, for the latter already has the proximate abilities of a generic features of action even if he is not currently acting. To equate a potential with an actual, is vicious, to advocate the sacrifice of the latter to the former is unspeakable.

In the final analysis, I have this to say that the debates on the foetus' rights is very difficult and sensitive, no one approaches it or makes a decision about whether a foetus has a right lightly. That haven been said, I suggest that an abortion can no longer be

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[79] Barth, K.,p.22
[80] Gewirth, A., 1978, p.143

carried out if the foetus can be considered to have attained a viable (able to continue to exist as or develop into a being) independent existence, and finally the stage from viable independent existence until the actual birth.

## 4.2 THE OBLIGATIONS OF THE PREGNANT WOMAN TO THE FOETUS

There has been a great deal of discussion concerning the question of whether the mother has obligations in relation to the foetus. Some are of the opinion that a foetus has its own right to life and a right to be born healthy; others believe that the woman has a right to refuse treatment for the foetus. Pro-lifers would tell us that, the foetus is a pregnant woman's offspring, and so she has a special obligation to sustain it, while some pro-choicers will have a different view about this.

However, a woman is not assigned to a special class when she becomes pregnant. Like other human beings, she possesses basic human rights such as: the right to life, personal autonomy, self determination, freedom of movement and freedom of religion. The right to bodily integrity gives her the right to provide or refuse consent to medical treatment like other legally competent human beings. The foetus has no rights as a person and therefore it is very misleading to refer to a tension between the woman's autonomy and a foetus right to life.[81] The implication of this is that the mother will be in a position to decide not only how the interests of the foetus are to be protected, but also whether they will be protected. The significances of this approach are that it enables the woman to elect to determine that her interests should prevail over that of the foetus.

Nevertheless, there are number of good reasons why any attempts to force women into a legal corner concerning their decisions during pregnancy must be avoided. Arguing purely from autonomy-based rights, the woman and only the woman is a rights bearer in these situations. There is no other legal person in existence and nobody else who can consent on the competent woman's behalf. She and she alone is custodian of her

[81] http://www.austil.edu.au/au/journals/ajhr/1996/6.html

physical integrity.[82] The woman has no autonomy-based obligation to the foetus because the foetus is not a person and cannot be thought to possess subjective interest. So if we do not concede that the foetus is a person, then we own it no duties and obligations, even if we may offer it some respect.

In my own view, and from the above arguments, concerning the obligations of the pregnant women to the foetuses, it is apparent that the pregnant woman has no strict obligations to the foetus based on her personal autonomy as a person. The pregnant women therefore, must truly and totally understand potential risks and realise that medical science does not have all the answers, especially as far as risks to the foetus are concerned. A woman can be given information and advice but cannot be forced to accept treatment even where it will save her life. It is obvious that we may all desire and wish that every pregnant woman acts in an unimpeachable manner-many, if not most surely do, but we cannot enforce this since the pregnant woman still possess her fundamental human rights which includes, freedom of choice and forcing her to do otherwise would entails unwarranted intrusion into all aspects of a woman life solely because of the fact of her pregnancy.

## 4.3 THE SOCIETY AND ITS OBLIGATIONS TO THE PREGNANT WOMAN

Many contemporary societies have faced conflict over the morality of abortion. I want to note at this juncture that, the society must learn that absolute, uninterrupted respect for the pregnant woman and the foetus developing in her womb is the most sacred obligation.

All things being equal, if a society develops a very restrictive policy on abortion, some women would be threatened by the continuation of pregnancy against their wish, the child would thereafter place a great economic and psychological burdens on the family in particular, and the society as a whole. Most at times, the career of some women would be in jeopardy and this may lead to having infants who will be physically and mentally misbalance or damage. Suffice to say at this juncture, what a pro-choicer

[82] Ibid.

friend of mine told me about the relationship between the pregnant woman and the developing foetus. He said to me, Louis-Kennedy do you know that when a woman says that she doesn't want the foetus in her womb, the foetus immediately takes notice of it, and if she eventually forced to give birth to this unwanted foetus, it will live with the impression that it is not wanted for the rest of its existence and often behave very queer in character. He continues, the same is applicable to a woman that wants a baby boy and eventual have a baby girl, the child even in the womb is aware of the mother's intention of having a baby boy and when it comes out, it will start behaving like a boy in order to please the mother and does almost like a boy rather than a girl she actually became. And that a mother's attitude towards unwanted baby who she is forced to have is quite different from that of a baby she deliberately wanted and desired. I don't know how truthful this story is, but the message my friend is trying to pass on is that the society should make policy on abortion available to the woman in order to exercise her human autonomy with regards to freedom of choice, and her choice whether to abort the foetus or not should be supreme and uninterrupted by the societal policy. However, some argue that, if legal policy of a particular society makes abortion available, it will lead that society to diminish its reverence for life and possibly to a lessening of the citizens' collective instinct for protecting the developing foetus.

## ABORTION LAWS IN AFRICA

As the abortion issue becomes more hotly debated, many countries allow abortion laws where it is found most important to preserve the physical health of the woman. Policy on abortion fluctuates from country to country, ranging from total prohibition to authorization granted simply upon a request being made by the woman in question. In Africa, as in a good number of Southern countries, the laws are on the whole fairly restrictive. These laws are written into the civil codes of States that define the conditions relating to them (such as reasons, duration of the pregnancy, required authorization, sanitary conditions for the practice of the act, possible penal sanctions etc). Sometimes they are remnants of a colonial past. In most French speaking African countries, they are still modelled on the French law of 1920 restricting access to

contraception, and in the English speaking countries they are modelled on of the 1861 law on “crimes against the person”.[83]

It should be noted that no Africa country prohibits the abortion laws completely, but legal access to it remains extremely restrictive in almost the 53 African countries.[84] 25 countries out of 53 countries in Africa will only permit abortion if the life of the mother is in danger; Sudan adds to this condition the possibility of aborting in the event of rape or incest.[85]

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[83] http://ceped.cirad.fr/avortement/gb/chap1/800/chapitrel-800.htm
[84] Ibid.
[85] Ibid.

**Figure 1 (c) Ceped Centre Population et Development.**[86]

[86] Ibid.

In Zimbabwe, abortion is legal only if the life or physical health of the woman is threatened, or in the event of rape, incest or malformation of the foetus. In 23 countries, abortion is only possible if life or physical or mental health is threatened. In addition to these conditions Cameroon stipulates that abortion is also possible in the rape or incest, and six other countries add to these possibilities recourse to abortion if the foetus is malformed. Mozambique adds to this health conditions permission to abort in the event of contraceptive failure. In Zambia abortion is legal if life or physical or mental health is threatened, or for economic or social reasons or in case of foetal impairment. Only Cape Verde, Tunisia and South Africa permit abortion upon demand by the woman.[87]

In most African countries, the decision as to whether or not to seek an abortion does not always belong to the woman alone. Even when abortion is liberalized, very often there are legal restrictions connected to its access. In certain countries the woman's (written) consent is sometimes requested before carrying an abortion. This is the case in Angola, Burundi, Cape Verde, Eritrea, Ethiopia, Ghana, Kenya and Libya. Such consent can help to prevent dangerous practices. However in many countries women do not have sole control over their decisions. The husband's consent is required in Egypt (unless a doctor certifies that the abortion is necessary), Kenya and Malawi theoretically and Guinea-Bissau.[88]

If the woman is single, if she is a minor or considered to be "incapable", various authorizations are sought. Authorization from a father or legal guardian is sought in Guinea-Bissau or Libya, from a close relative or guardian in Eritrea and Ethiopia, and from the family in Togo. In most countries in Africa, authorization from the medical profession is also necessary in order to decide whether a woman may abort-this is a decision which must be taken by one or several doctors, and sometimes by specialists such as gynaecologists and psychiatrists. In certain countries such as Benin, Senegal

[87] Ibid.
[88] Ibid.

and Cote d’Ivoire, the law demands that doctors authorising abortions be officially designated by the courts. In Zambia the consent of a psychiatrist may be requested.[89]

In addition to these restrictions regarding time limits and authorizations required from a family or doctors, there are constraints on the staff and organizations authorized to carry out abortions. Abortion should only be carried out in certain number of medical structures, frequently a (public) hospital or clinic approved by the government. They should be carried out by specific personnel such as doctors or surgeons. These two conditions explain why abortion is far more available in urban areas. For examples, in Tunisia, where abortion is permitted on demand, women living in rural areas have no access to abortion due to the absence of medical organizations in a position to carry out the procedure.[90]

These restrictions on the legal terms and conditions of abortion and the authorizations necessary to carry it out are the major contributions to the enduring practice of illegal abortion in Africa. Most women in Africa find it difficult and sometimes impossible to enter into the legal framework surrounding abortion, for example in the case of teenage girls who want to terminate their pregnancies without the knowledge of their parents.[91]

The penalties set out for breaking the law vary greatly depending on the country. A prison term and/or a fine are sometimes imposed on the person carrying out the abortion, but also on the woman who has sought the abortion. In Cote d’Ivoire, anyone who carries out or attempts to carry out an abortion with or without the consent of the woman is liable to between one and five years in prison and a fine of between £230 and £2,300. If they regularly carry out abortions then the prison term can be between one and five years and the fine can reach between £1,500 and £15,000. A woman who attempts an abortion or accepts an abortion is liable to between six months’ and two years’ imprisonment and a fine (United Nations and Population Division, 2001). In reality these penalties are rarely imposed in Cote d’Ivorie, since abortion is “tolerated”

[89] Ibid.
[90] Ibid.
[91] Ibid.

there, however the illegal status of the act sustains practices that threaten the health of women.[92]

From the above data and statistic about the abortion laws in African countries, it is an undeniable truism that all African countries sanction the abortion laws in order to preserve the woman's life and in 24 countries, it is legally permitted for that sole reason. Access to abortion remains essentially linked to women's health considerations, such as preserving their lives and physical and mental health. This follows the same reasoning as access to family planning, which in many African countries is still essentially only prescribed to married women in order to space out their births and thus preserve their own health and that of their children.[93]

In 11 countries abortion is permitted if the foetus is malformed, however when the poor antenatal care which most women in Africa receive is taken into account, along with the problems they have in gaining access to medical antenatal screening techniques, it becomes clear that this possibility will only concern a limited number of cases. This kind of screening only exists in certain hospitals or private clinics reserved for the higher social classes.[94]

Authorization granted in the event of rape or incest, is certainly not accessible to most African women, and to teenagers in particular-their sexuality is not socially recognised and they have problems managing their sexual relationships, particularly with older partners. Agreement by one or two practitioners is sometimes necessary, as in the case in Botswana.[95]

Thus in Africa, there are few countries with very liberal laws on abortion. Abortion is also rejected insofar as it is a method of birth control in Africa. Given these conditions women seeking abortions in Africa do so illegally and expose themselves to dangerous

[92] Ibid.
[93] Ibid.
[94] Ibid.
[95] Ibid.

practices.[96] In other words, women's sexuality and fertility in Africa is still heavily controlled unlike their counterparts in the Western world, with various restrictive laws stipulating the need for marital or parental authorisation. Therefore women's reproductive rights, with emphasis on the possibility of risk-free sexuality and being able to decide freely when to procreate, are not being respected since recourse to abortion remains very limited and its consequences for women are serious.

The argument so far suggests that women often have compelling reasons that are morally sufficient to justify killing an embryo or foetus that has not yet begun to have experiences. Yet, it has to be noted at this juncture that, abortion is controversial in our time, not only because many people believe that foetuses have a right to life, but also because it has become a potent symbol of the ancient debates over sexual morality and the proper social roles of women.[97] Abortion opponents often fear that women, children and society as a whole will suffer if women and men abandon their traditional familial roles.[98] In contrast, those who favour legal abortion are much less likely to believe that women and men require separate and distinct social roles, or that sexual activity is always morally objectionable, unless there is a mutual commitment to having children.[99]

## 4.4 MEDICAL PROFESSIONALS AND ABORTION

It is apparent that the interruption of pregnancy is a most difficult dilemma for a physician.[100] Abortion appears to counter the medical obligation to treat disease and preserve life and many doctors find it difficult to allow any exception of this rule, while others would accept termination of pregnancy for foetal abnormality in early pregnancy but not later.[101] Nevertheless, the problems the medical professionals encounter are three sets;

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[96] Ibid.
[97] Warren, M. A., 1998, p.133
[98] Ibid.
[99] Ibid.
[100] Njoku, S. I., 2005, p.24
[101] Ibid.

1. The way he or she follows the morality of abortion.
2. How the health care institutional policies affect the personnel.
3. On the questions of professional ethics, which exist even for those who have no personal ethical problem with either issue.[102]

These sets of problems involves, however with such matters like, forced abortion, forced medical treatment, and professional involvement in non-therapeutic abortions. The most pertinent way of resolving these sets of problems is by the decisions of the medical profession, by asking the question; whether abortion is ethical and in that process decides if he will co-operate with his patient. If he finds out that a particular abortion will be unethical, he should ordinarily desist from doing that abortion.

However, since a medical professional should not engage or directly participate in an abortion that he sees to be unethical, there may be reasons for taking care of a patient who is under treatment as a result of doing an abortion.

In offering treatment to his patient, the medical professional has twofold dilemmas, which are interdependent. First, what is the role of the doctor in relation to the woman and the foetus? Are they both patients, or is only one patient, entitled to the best the physician can offer? This question may prove highly uncomfortable for a physician, especially if the second strand is also present, namely that in the view of the doctor that something could be done to help the foetus but the woman refuses to agree to it. The frustration of knowing that a foetus could be helped and could be born healthy as opposed to damaged but for the attitude of the woman can readily be understood emotionally. But it requires further consideration.[103]

To deal with the first strand first. It is inescapable fact that the doctor owes duties to his/her patient. A patient is someone with rights. A patient therefore must be a person. So is the foetus a person?

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[102] Ibid.
[103] http://www.austil.edu.au/au/journals/ajhr/1996/6.html

> …the foetus cannot be thought to possess subject interests. Because of the immaturity of its central nervous system, the foetus has no values and beliefs that form the basis of such interests. It obviously follows from this that the foetus cannot possess deliberative interests, since these, in turn are based on subjective interests and reflection on subjective interests. The latter is a task no foetus can accomplish. Hence, there can be no autonomy based obligations to the foetus. Hence, also, there can be no meaningful talk of foetal rights.[104]

The foetus may manifest diagnosable and treatable symptoms which the physician could resolve or palliate, but the patient is the pregnant woman. Only through her can treatment be given and only by her can it be authorised. Foetuses are not independent persons and cannot be treated without invading the mother's body. Treating the foetus against the will of the mother degrades and dehumanizes the woman and treats her as an inert container.[105]

### 4.5 UTILITARIANISM A CONSEQUENCE-BASED THEORY

Consequentialism is a label affixed to theories holding that actions are right or wrong according to the balance of their good or bad consequences. The right act in any circumstance is the one that produces the best overall result, as determined from an impersonal perspective that gives equal weight to the interests of each affected party.[106]
It is the belief that what ultimately matters in evaluating or judging actions or policies of action are the consequences that result from choosing one action or policy rather than the alternative

[104] Ibid.
[105] Ibid.
[106] Beauchamp T.L, & Childress J.F., 2001, P.340.

Utilitarianism is a form of consequentialism which posits that all action should be directed toward achieving the greatest utility for the greatest number of people.[107] In other words, utilitarianism is an ethical doctrine that the moral worth of an action is solely determined by its contribution to overall utility. This philosophy judges everything in terms of its utility or usefulness.

The moral imperative to avoid harm or pain is fundamental to systems of moral philosophy throughout the world. According to utilitarianism, pains are the greatest evil and pleasure the greatest good. The principle of utility states that we should minimizes pain and maximizes pleasure for the greatest number.[108] In both Buddhism and Taoist philosophy, the duty of ahimsa requires us to avoid harming any living beings. The duty of nonmaleficence in deontological theories also states that we should avoid doing harm.

According to utilitarians, causing pain may be morally justifiable/justified if it is the only means to bring about a greater good. The creed which accepts as the foundation of morals "utility" or the "greatest happiness principle" holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness are intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure.[109]

Utilitarianism of the hedonistic variety is concerned only with pleasure and pain. Therefore we shall be concerned with the amounts of pleasure and pain in situations where abortion is permitted as contrasted with the amounts of pleasure and pain where abortion is forbidden.[110] It might be suggested that the main consideration would be the interests of the foetus: not only can its future life be expectedly happy (or at least having a balance of happiness over suffering). It might also be the case that abortion itself is painful, particularly if it occurs on the late stage of the pregnancy. However,

[107] http://www.agtrade.org/glossary_search.cfm
[108] Ibid.
[109] Stumpf, S. E., 1994, p.709
[110] Ibid

this focus on the foetus is unwarranted. Any suffering involved in the abortion itself can be avoided by simply aborting the pregnancy on the early stage (before the foetus has even developed the capability of suffering), or with painless techniques. The direct suffering of the foetus can therefore be no argument against abortion generally, only the bad practice of it.

It can also be stated that having unwanted baby appears to decrease the happiness in a relationship between the parents in particular, and other family members as a whole, which is also extended into the larger society. In other words, mothers with unwanted births suffer from higher levels of depression and lower levels of happiness than mothers without unwanted births. They spark and slap their children more often than other mothers, and spend less leisure time outside the home with their children. Lower quality mother/child relationships are not limited to the child born as a result of the unwanted pregnancy; all the children in the family suffer.

As in the case with many issues in the utilitarian system, the rightness or wrongness of the act in question turns mainly not on the agent, nor on the being(s) directly affected by the act, but on the less direct effects on the community at large. The issue of abortion is stripped of the language of "rights" and emotional sway over "murdering babies", actually becomes one of the desirability of increasing or decreasing the population.[111]

Considering the harm, or pains as the utilitarians will say, caused by illegal abortions in Nigeria, which decreases happiness to the Nigerian populace and increases pains, I therefore hold the view that the utility principle will be most applicable to the policy of abortion laws in Nigeria.

It should be noted that in utilitarian terms, a general prescription either for or against abortion laws is very hard to justify because each would have its own relevant and specific features. For instances, if the applicability of the utility principle in the

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[111] http://utiliarian.org/abortion.html

Nigerian policy of abortion laws will increase the greater happiness, for the greater numbers, and decreases the pains which the Nigerian populace are passing through due to the restrictive nature of the abortion laws, then utility will favour legalization of abortion in Nigeria, otherwise it will not nod for it.

Since utilitarianism in general is based on the empirical evidence that supports the widespread happiness of many, and looking at the situation of induced abortions in Nigeria, it is my view that legalisation of abortion in Nigeria (especially, at the early stage of pregnancy before the foetus will be considered viable), will be highly important, if that could be of value in reducing abortion associated maternal mortality in Nigeria.

My recommendation for liberation of abortion laws in Nigeria stems from a utilitarianism standpoint. When using the utilitarianism consequential principle of ethics, we establish a set of general morals and rules in which we can apply to every moral question based upon our utilitarian findings. When this is applied to abortion, we can see that abortion is a completely ethical entity that provides the greatest amount of happiness for the greatest amount of people.

# CHAPTER FIVE
# CRITICAL EVALUATION

## 5.1 CRITIQUE OF THE ABORTION LAW IN NIGERIA

The most obvious shortcoming of the current abortion law in Nigeria today is that it does not protect women from the activities of non-physicians. Both the criminal and penal codes are silent on who can or should perform the abortion. Technically from the law as it stands a butcher can perform an abortion and have the protection of the law if he can show that it was done in good faith for the preservation of the mother's life. The CAUP studies provided data which show that at least 610,000 abortions are performed yearly in Nigeria.[112] That 60% of these abortions are performed by non-physician providers, suggesting a high incident of post abortion complications rate. This data causes more pains than happiness to the Nigeria populace which is against the moral principle of utilitarianism. Research shows that 5-50% of approximately 600,000 women who die yearly worldwide from pregnancy and related causes do so from complications of pregnancy terminations or complications created by untrained or unskilled persons.[113] It is certain that a very large proportion of Nigerian women who die or suffer non-fatal but serious pregnancy related health problems like infertility, ectopic pregnancy, infections, genital injuries, anenua, pelvic pain etc do so from the activities of non-physicians. That a law even in its application or interpretation can expose women to this type of danger provide worrisome signals and call for the establishment of meaningful governmental policy that safeguards women' reproductive health.

The abortion law in Nigeria today is silent also in laying minimum standards of facilities where abortion can be performed.[114] This is again another exposure of women to risks. Technically under the law, abortions can be performed at any place other than a properly equipped medical facility. An abortion law that lay minimum standards for practitioners, facilities and even the equipment and procedures to be used exposes

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[112] Mahmoud, P., p.6
[113] Ibid.
[114] Ibid.

women's reproductive health and general well being to serious dangers, which covertly or overtly increases pains and decreases happiness to the whole society as against the utilitarian principle.

The data from the CAUP studies show a high incidence of abortion in Nigeria.[115] This is in spite of the provisions in the criminal and penal codes criminalizing abortion. The situation is evident of the ineffectiveness of the law. It calls for a reformation of the law to meet the yearning reproductive health needs of women in Nigeria.

### 5.2 MY PROPOSAL ON THE POLICY OF ABORTION LAWS IN NIGERIA

Since induced abortion is still a major cause of maternal mortality in Nigeria, I propose that integrated family health education, and contraceptive education, a mass literacy campaign and improvement of the existing national health services are recommended in order to ameliorate the problems of illegal induced abortion in Nigeria.

Other measures that could be of value in reducing abortion associated maternal mortality in Nigeria include training and retraining of physicians in the management of abortion and of abortion complications, family planning education of all fertile women, provision of confidential family planning services and liberalisation of the abortion laws (the early stage of pregnancy, and can longer be carried out if the foetus can be considered to have attained a viable independent existence, and finally the stage from viable independent existence until the actual birth).

Abortion reform in Nigeria should be pursued from the reproductive health position of women. Governments and inter-governmental and non-governmental organisations are strongly encouraged to intensify their commitments toward women's health and to treat the consequences of abortions carried out in unsafe conditions as a major public health problem. The vanguard for reform must listen to and involved not only the supporters of reform but also the opposition. Indeed we can draw a lot of experience from Guyana's success story on liberalising abortion law.[116]

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[115] Ibid.
[116] Ibid. p.7

Guyana is an English speaking country in the Caribbean. It is a small country with a population of only 729,000. Of people of this 51% are east Indians while 43% are black and mixed. 57% of the population is Christian, 33% Hindu and 9% Muslim.[117] The campaign for reform was carried out by a small core group known as the Pro Reforms Group (PRG). The PRG undertook research into why past efforts at liberalisation failed. They also conducted research on different aspects of reproductive health of women. The data from these researches was used for public enlighten and sensitisation. They embarked on public consultation of different interest groups and never confrontation. They employed public dialogue not debate. They formed alliance with different stakeholders on the issue of abortion. They adopted the language of the opposition. They sought and found common interests with the opposition and amplified those interests. They used the shared interests in finding ways to achieve goals, which both sides shared, fewer abortions and stronger families. Rather than confront and denounce religious opposition, the PRG found allies among liberal Christian and Islamic religious leaders and in doing so destroyed the myth of religious opposition to abortion law reform as monolithic and homogenous.[118]

The PRG influenced the language of the debate. The used the tactical tool of women's health rather than women's right as the justification for the abortion law reform. They challenged the dichotomy of anti-abortion, pro-abortion, pro-life and pro-choice. They argued that their members were anti-abortion since they wanted to see fewer abortions.

The PRG was committed. They dialogued, educated, sensitised and developed both national and international linkages in their campaign for the reform of the abortion law. This was achieved in 1995 with the passage of the "Medical Termination of Pregnancy Bill".[119]

[117] Ibid.
[118] Ibid. p.8
[119] Ibid.

I recommend the content of the campaign of PRG as well as the enacted law to any initiative for the reform of abortion law in Nigeria. Luckily this campaign was initiated in Nigeria by practitioners who were irked by the colossal loss of women's lives from unsafe abortions in Nigeria. At the moment the CAUP stands out as the vanguard for the campaign for the abortion law in Nigeria. It has undertaken some studies on the abortion practices and the incidence of induced abortion. The CAUP needs to replicate this study in other parts of the country to have data that is representative of the diversity of the country.[120] It needs to develop linkages with other stakeholders involved and interested in the reform of the law. It should reach out to the different religious leaders and dialogue with them. The CAUP must use its data and international data to eliminate the notion that a liberalised abortion law does not open a floodgate to abortion on demand but reduces its incidence, like the experience of Holland shows.

It is ill advised to try to make an abortion law without popular participation of the various interest groups. If such a bill is not killed by opposition in the National Assembly, it will not be effective in its application. This is because the opposition will not vanish with the passing of the law, it will intensify. However, a law that is reflective of the different perspectives will endure. In the apparent overwhelming differences the common grounds must be sought, emphasised and sustained. None of the interest groups on abortion would accept that our women should continue to die from unsafe abortion. If a reform of the law is what is needed to stop these avoidable deaths, then diverse methods and efforts representative of these interests that will promote law reform in the name of family life, achieving safe motherhood and reducing the need for abortion must be promoted and sustained.

An effective and workable law reform in a complex society like Nigeria must be fully nurtured in the process of its making. The CAUP must be challenged to face this campaign with utmost commitment. The path to the reform of abortion law in any country is often a thorny one, much like the biblical gateway to Heaven.

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[120] Ibid.

However, I want to note at this juncture, the following assertions in support of the legalisation of abortion laws:

1. Prohibitive or restrictive legislation of abortion has failed miserably to contain the practice of abortion.

2. Unsafe abortions are a leading cause of maternal mortality and morbidity.

3. Liberal abortion legislation could lead to a significant reduction and never an increase in the number of abortions.

4. Liberal legislation of abortion respects the sanctity of life and does not promote abortion as the focus of the legislation is women's health.

**5.3 CONCLUDING REMARK**

I will like to conclude my thesis by saying, that the status of this research makes abortion law reform imperative. In pursuing this reform the peculiar cultural and religious circumstances of the country should be taken into consideration. We are also in a good position to draw from the experiences of other developing countries particularly Guyana and South Africa. We should strife and push for an abortion law reform that is socially and religiously responsive to the yearning and needs of a pluralistic society like Nigeria.

The abortion policy in Nigeria must be softened and abortion permitted not only to save the life of the pregnant women but also on the following grounds;

1. To preserve physical health: when the practitioner is of the opinion that the continuance of the pregnancy would involve risk or grave injury to her physical health.

2. To preserve mental health: due to unsound mind of the pregnant woman, she is incapable of taking care of an infant.

3. In the case of rape or incest: when the pregnancy is caused by rape or incest.

4. Foetal impairment: when there is a substantial risk that the child, if born, would seriously handicap.

5. Economic and social reasons: when the pregnant woman's entire social and economic environment, both actual and foreseeable are taken into account.

6. Available on request: up to the eighth week of pregnancy, an abortion should be performing at the request of the pregnant woman by a medical practitioner or person under his or her supervision in any setting.

I also recommend that before any abortion can be performed, the pregnant woman must undergo counselling and wait at least 48 hours. A woman of sound mind does not need the consent of her parents, guardian, or her husband to obtain an abortion.

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.

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