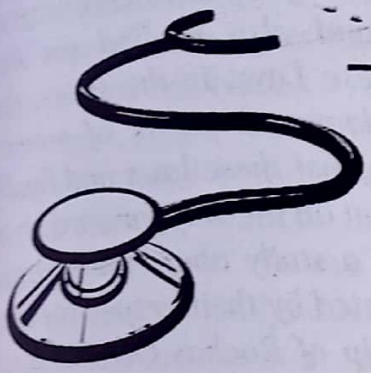

Chapter 15

A Study of the Implied Abortion Laws of Imo and Anambra States, under Dr. Chris Ngige and Rochas Okorocha Regimes

A.U. Abonyi*

Abstract

Among the citizens of most African States including Nigeria, the issue of abortion has remained controversial over the years. The reason for this protracted confusion is not far – fetched. In some quarters, the concept of abortion is seen as an abomination being completely against moral and religious ethics and values of the society bearing in mind the sacred respect accorded life in this part of human existence. Apart from the above reasons, there is also the belief that abortion is a threat to the safety of the woman undergoing same. The situation in Africa may not be the same with the practice in western societies where abortion is recognized and permitted by law though with some restrictive provisions. From the international perspective, it seems correct that abortion is condoned as a standard practice to control pregnancies not wanted for obvious reasons. In some states in Africa including Nigeria, abortion law is now beginning to have inroad into the legal vineyard as abortion laws are increasingly being enacted by parliaments. Some of these enactments do not make specific provisions authorizing abortion but make provisions which by implication permit abortion. In Nigeria, two states, Imo and Anambra have respectively through their Houses of Assembly enacted Abortion Laws which permit abortion by provisions which impliedly support abortion practice in the states.

* HND (MC) LLB, BL, LLM. Department of Commercial/Property Law, Faculty of Law, Anambra State University, Uli, Anambra State, Nigeria.

The aim of this paper is to look at the Abortion Laws of Anambra and Imo States under the Rochas Okorocha and Dr. Chris Ngige's regimes and to ascertain the extent to which they have encouraged abortion or otherwise in the states, and also to find out the challenges facing the application of these Laws in the states, the types of abortions, abortion and fundamental rights of women involved, the criticisms by the people against these laws and finally to make a conclusion and recommendation on the way forward about these Laws. This paper aims at making a study about the abortion Laws of Imo and Anambra States as enacted by their respective State Houses of Assembly under the leadership of Rochas Okorocha and Dr. Chris Ngige as governors of the two states. The study looks at the Law particularly as it concerns women's reproductive and other health rights. The paper intends to find out whether the said Laws of the two states made clear and express provisions legalizing abortion among women in the states in question as an instrument of family planning or control of unwanted pregnancies or whether the Laws merely created implied rights which allow the women to abort a pregnancy or foetus not needed or wanted. The article will highlight the different types of abortion as well as take a look at the human rights perspective of abortion practice.

Introduction

Over the years, abortion has remained illegal in many states. The dominant view is that the practice of abortion not only affects the population rate and the labour force, it is also seriously seen as a threat to human life i.e. the "fetal being" in the womb of the mother. Besides, there is also the considered view by many that abortion can be detrimental and dangerous to the health and safety of the woman involved in the act and that it also erodes the values of the community and runs foul with the divine injunction and commandment of God almighty that "Thou shall not kill[1]". While the views of the anti-abortion practice above is appreciated, it is also fundamental to reason that pro-abortion activists and groups have argued that limitation or ban of abortion by states amounts to unnecessary restriction of women's rights to privacy and also an infraction of their reproductive health rights which should not be the case. This controversy on the need to protect the life of the fetus,

[1]The Holy Bible Revised Edition, Catholic Edition, The Book of Exodus.

"the unborn child" in the womb which will be terminated as a result of the abortion vis – a - vis the so-called women's rights to privacy and reproductive rights has continued in different states and has not indeed been resolved. To make the situation worse, the United States Supreme Court in 1973 in the case of *Roe v Wade*[2] which has not been overturned by any court stated that "A woman has a right to obtain abortion because her decision to abort or not to abort is a matter of privacy". In the first place, the above view of the court when looked critically, does not give a blanket approval of abortion, rather it left the decision and choice to abort to the woman and her doctor. The implication from the above authority of *Roe v Wade* is that the United States Supreme Court allows the state to regulate or ban abortions unless the procedure is necessary to save the woman's life. The views are now shifting away from *Roe's case* in recent years and have supported additional limitations on abortion unless they impose an "undue burden" on a woman attempting to exercise her private rights. The two positions appear to have the same effect hence we submit that by the view of court in *Roe's case*, abortion should be banned unless it is necessary to save the woman's life. This has the same meaning with the recent views that it should be limited unless doing so will impose undue burden on the woman. It seems that though Nigerian law bans abortion, it allows it when it seems there is risk to the life of the woman, her physical or mental health. Abortion is the intentional destruction of the life of the unborn child in the womb other than for the principal purpose of producing a life birth or a removal of dead issue.

With the seeming controversies existing over abortion practice in different states of the world including Nigeria and the outcry that followed the enactment of Abortion Laws by Imo and Anambra States under the leadership of His Excellency Rochas Okorocha and his counterpart, His Excellency Dr Chris Ngige, it becomes germane to look at the exant provisions of these laws and analyse their purport as they relate to women's rights to privacy and reproductive rights vis –a- viz the right to life of the unborn child. While some scholars argue that the "fetus" is unborn and has no life as the life is dependent on the life of the mother, others view that the fetus has life like any other being and is entitled to the right to live and "not to

[2] supra

die" or not to be killed by the mother alone or with the doctor through abortion. This indeed is the crux of the matter.

Definition of Terms

There are some key words or terms that are important in this study and hence, there is the need for their comprehensive and clear meanings to be ascertained. The terms are defined below.

a) Abortion: The Cambridge Advanced Dictionary defines abortion as "an end of pregnancy."[3] From the above definition, it follows that abortion refers to an abrupt ending or termination of pregnancy. The same dictionary, in its explanatory notes, defines abortion to mean "the intentional ending of a pregnancy, usually by a medical operation"[4] It is not in doubt from the definitions above that abortion is not only deliberate but is also an intentional act after several considerations by the person or persons involved in the act and cannot by any stroke of imagination be regarded as an accident, as in the case of miscarriage of a pregnancy. In the general sense, abortion is taken to mean the termination of pregnancy so that it does not result in the birth of a child. It is a situation where the pregnancy is removed from the womb either by taking pills (medical abortion) which involves taking medicines to cause a miscarriage, or by surgery (surgical abortion) where the pregnancy is removed from the womb through surgical operation.[5] Abortion is known to Nigerian law as a serious crime and an offence which any person or persons that commit it (the act is referred to as a deliberate killing of a child or intentional prevention of delivery of a child) shall be liable to imprisonment for life upon conviction by a competent court.[6] It means that abortion which is regarded as a destruction of a fetus or unborn child is indeed by the Nigerian law a felony which attracts severe punishment.

The above definitions of abortion received judicial support in *Roe v Wade*[7] when the United States Supreme Court held and defined abortion as the "termination of pregnancy by various methods

[3] *Cambridge Advanced Dictionary, Third Edition.*
[4] *Ibid.*
[5] *Bpas Abortion Report 2013 (accessed bpasonline.com, 12th November 2014)*
[6] *Section 328 of the Criminal Code LFN, 1990 Criminal Code, Cap.C38 LFN 2004, s. 328.*
[7] 410 U.S. 113 (1973).

including medical surgery before the fetus is able to sustain independent life." Summarily, therefore, the working definition of abortion adopted in this study is that abortion is the willful, deliberate and intentional decision by a person or persons to end, terminate and / or destroy a pregnancy by whatever means not limited to medical process but including other means that result in one single event which is a loss of life.

It is therefore indicative that the following elements must exist for abortion to be complete:

1. The act or decision to abort must be willful, deliberate and intentional (if not, it becomes accidental and will be miscarriage rather than abortion).
2. The act must arise from the decision by a person or persons targeted at ending, terminating or destroying a pregnancy by various ways including, but not limited to, medical process and which result in a loss of life.

Our considered view is that once the above elements have been satisfied; the act of abortion is completed.

b) **Pregnancy:** The Cambridge Advanced Dictionary defines pregnancy as "the state of being pregnant"[8]. In the area of biological science and medicine, where the spermatozoa (ie the male sperm) fertilize the ovary, the resultant effect is pregnancy by the female species. Thus, a man releases the sperm which fertilize the ovary to form a fetus brought into full life in the form of pregnancy. A life at this point is deemed conceived. The result of a successful pregnancy is a child and a woman incapable of concluding the biological process of bringing forth a child is regarded in common parlance as being barren. Pregnancy therefore is the result of a successful intercourse between a man and a woman which instead of destroying a released sperm fertilizes it into a normal fetus that graduates into a full normal being. It is important that the sperm which could not or is not fertilized dies since it is not of any biological value.

c) **Fundamental Rights:** Legally, rights refer to one's entitlement or a person's claim permitted by law. When the right or rights are

[8] Cambridge Advanced Dictionary, *op.cit.*

citizens' entitlements which they hold by virtue of their being human beings and they enjoy them without restriction unless in manners permitted by law, they are known as fundamental rights. The Cambridge Advanced Dictionary defines the term fundamental to mean "forming the base, more important than anything else and still "a base where everything else develops"[9]

It is indicative from the above that fundamental rights generally refer to the basic rights of a person which are enjoyed and protected by law. These rights have been recognized by the Constitution of Federal Republic of Nigeria, 1999 as amended in 2010 under Chapter IV and the rights are provided for from Sections 33 to Section 46 of the said constitution. Fundamental rights are enforceable, inalienable and justiciable. Of importance in this study are the rights to privacy, dignity of human person and right to life.[10]

d) Implied Rights: As stated earlier in this work, right refers to one's claim and entitlement. Usually, these rights are statutorily created and are directly and expressly provided for. However, when a right is said to be implied, it means that there is no direct provision anywhere in the statute or legislation prescribing for the right or rights as the case may be but they are rather contemplated to exist even though not expressly provided.

e) Woman: A woman means an adult female. Indeed, the Cambridge Advanced Dictionary, defines a woman to mean "an adult female human being."[11] Our considered view is that a woman is an adult citizen of a state and who, like other citizens, is entitled to all constitutionally guaranteed rights including rights to life, privacy and even dignity of human person. It means from the above that not every female specie is a woman in the proper sense of it as a girl between one year to 13years cannot be regarded as a woman.

f) Unborn Child: A child is a human being with life. A child is entitled to all the rights that every other citizen is entitled to. An unborn child is a human specie not yet born. Life starts at conception

[9] *Ibid.*
[10] 1999 CFRN (as amended in 2010); Fundamental Rights (Enforcement Procedure) Rules, Order I.
[11] Cambridge Advanced Dictionary, *op.cit.*

and it will be wrong to say that the fetus has no life. An unborn child means "a child not yet born or a child in the mother's womb". From the above, it is clear that an unborn child has a life but only has to stay in the mother's womb to complete the normal biological circle under the shelter and protection of the mother before delivery. Thus it will be wrong to assert that such a child has no life.

g) **Unwanted Pregnancy**: When something is unwanted, it means that it is not needed. A pregnancy is unwanted when it is not intended to be kept. The Cambridge Advanced Dictionary defines it as "Not wanted" or "unwanted pregnancy". A pregnancy may not be wanted for reasons either as a means of family planning or child control or for any other reason not restricted to or limited to the safety of the mother or advice by professionals in the health sector that keeping it will not be safe and healthy for the mother or for such other reasons ranging from family and/other social considerations.

Types of Abortion

Abortion which is an intentional ending of pregnancy has its origin from the classical Latin word "abortio" which means to abort.[12] It is interesting that medicine has identified different kinds of abortion prevalent and adopted globally. They include the following:

a) Spontaneous
b) Induced Abortions.

Induced abortion may be: be grouped into two classes including:

i) Therapeutic Abortion.
ii) Elective Abortion.

a) **Spontaneous Abortion:** The Ohio Medical College Dictionary defined spontaneous abortion to mean "an abortion that occurs naturally without any medical intervention particularly when there is a physical problem with a pregnancy. It is also called a miscarriage."[13] Thus, it follows that for a spontaneous abortion to occur, there must be proof that there was no medical intervention to terminate the pregnancy rather the pregnancy ended as a result of

[12] Webster New World College Dictionary, Published by Willey Publishers Inc. Cleveland, Ohio.
[13] Ohio Medical College Dictionary, 2nd Edition, John Willey and sons Inc.

physical problem or a miscarriage. It seems to be correct from the above that in this type of abortion, though it does not involve medical intervention, but the physical problem may be intentional at other times, not within the conceivable mind of the woman.

Thus, a hard push leading to a fall, or hard labour, or any physical activity which tends to strain unbearably on the pregnant woman may be one of the obvious causes of this type of abortion.

b) Induced Abortion: Abortion is induced when it is an outcome of any procedure done by a licensed physician or someone under the supervision of a licensed physician purposefully to end a pregnancy. For an abortion to be induced, the following must be established: that it is as a result of procedure carried out by a licensed physician or someone who may not necessarily be a licensed physician himself but supervised by a licensed physician. It is therefore not clear from the above position as to the status to be attained by the person to be supervised by a licensed physician to qualify him or her to carry out an abortion. It becomes an issue for debate whether only medical doctors are qualified to carry out abortion or whether other workers including roadside patent medicine dealers are competent to carryout abortion in so far as they are supervised by a licensed physician. Our considered view is that the issue of abortion is not, and should not be, an all – comers' affair and should only be a procedure to be done either by a physician or any other person learned in the field of medicine and nothing more than that. This issue is indeed a subject of further research.

The induced abortion within a broader area has two basic classifications:
i. Therapeutic and
ii. Elective abortion.

i. Therapeutic Abortion: Therapeutic abortion is the type of abortion done to save the life of a pregnant woman; preserve a pregnant woman's mental or physical health; terminate a pregnancy that would result in a child with a fatal congenital disorder; selectively reduce the number of fetuses born with high risk of multiple pregnancy.

ii. Elective Abortion: As for Elective abortion, it is an abortion performed for other reasons – most commonly after contraceptive failure results in an unplanned pregnancy. What the above means is that where a woman has undertaken the option of using contraceptive to check pregnancy and the procedure fails resulting in a pregnancy; the termination of such pregnancy is called elective abortion.

Having reviewed the various types of abortion, it is our reasoned opinion that much of the concern is not necessarily the type of abortion but whether the abortion – spontaneous or induced, therapeutic or elective has the permission of law. If it does not, it becomes illegal; if it does, then the issue is as to what extent and whether it will be of any utilitarian value to the community when the rights of the mother and those of the unborn child in the womb are placed side by side in a balanced scale.

Reasons for Abortion

The pro-abortion campaigners have argued and still contend that abortion is necessary on the basis of the following reasons:

a) Abortion is safe and preserves the life of the woman involved in the act, most particularly when it appears necessary to save the woman's life or where it will occasion undue burden on the woman to have the baby.

(b) Abortion is done or carried out by the woman involved in exercise of her right to privacy.

However, the anti-abortion activists have a different view on the above position of the proponents of abortion practice and they contend that whereas the right and safety of the woman is important, the right to life of the unborn child is fundamental, not just to the said child but also to the state and should not be wasted for whatever means.

Whatever is adopted at the end, what is clear is that for every abortion done, there is a conflict between the women's right to reproductive health and privacy and the child's right to live (i.e. the unborn child.}

The Position of Abortion Law in Nigeria and other Jurisdictions

As part of the resolve to make a comprehensive handling of this study, there is need to consider the face and position of abortion law in Nigeria as well as other jurisdictions. For a balanced view point, three countries have been selected including United States to represent the congregation of American States "OAS States"; Great Britain standing for the European League of states and South Africa for the African Community of States.

a. Abortion and Nigerian Law

The Nigerian criminal law prohibits abortion as an illegal act. Abortion in Nigeria is an offence and a crime which attracts punishment and sanctions against the doer of the act if found guilty by a competent court.[14] It is our firm view which also supports the above position that abortion is illegal under Nigerian law and the combined reading of sections 228, 229, 230, 327A, 328, 329 and 316 of the Criminal Code makes the act of abortion illegal in Nigeria. Specifically, section 328 of the Criminal Code stipulates that:

> Any person who when a woman is about to be delivered of a child prevents the child from being born alive by any act or omission of such a nature that if the child had been alive and had then died she would be deemed to have unlawfully killed the child is guilty of a felony and is liable to imprisonment for life.

From the above clear provisions of Section 328 of the Criminal Code, the act of abortion is a felony under the Nigerian law and any one found guilty is liable to imprisonment for life. The wordings of the section above also show that the offence or crime of abortion under Nigerian law contains the following elements, to wit:

1) The offence is committed when a woman is about to be delivered of a child and

2) The child is prevented from being born alive by an act or omission.

[14] Ekwowusi 'Lagos Lawyers Calls for Repeal of Abortion in Anambra" Interview on Abortion Law of Anambra State, 12th September 2013.

Looking at the two elements above, it seems there is a problem most particularly with the use of the phrase "when a woman is about to be delivered of a child" mainly because it is common knowledge that many abortions are carried out either medically or through unorthodox ways at the preliminary and early stages of pregnancy when delivery is neither anticipated or expected. Thus, the situation on that single issue, in our view, is neither here nor there. It is therefore immaterial the time the act took place since it is itself illegal.

It is important to note that pro-abortion activists have tried to market abortion in Africa particularly in Nigeria where efforts have been made to legalize abortion which has remained repugnant in Nigerian socio-cultural and religious setting. Abortion has received stiff opposition in Nigeria but the United Nations and other Agencies inclined to giving support to legalization of abortion have made concerted efforts to achieve their aim in their slogan for "Women's Reproductive Rights". This indeed is another baptismal name for abortion.

In the Nigerian Senate, Senator Daisy Ehanive Danjuma (then representing Edo South at the Senate) sponsored an Abortion Bill at the National Assembly under the euphemism "National Institute for Reproductive Health Bill 2006. This bill sought for the National Assembly to enact into law an Act of the National Assembly to promote women's reproductive health rights which indirectly permit abortion in Nigeria without mentioning abortion anywhere in the Act. Lawyers in the Senate mobilized against the Bill and like Sonnie Ekwowusi rightly stated[15] they opposed the Bill at the public hearing and the National Assembly Health Committee heeded to their argument and dismissed Danjuma's Reproductive Health Bill for lack of merit and for being incompatible with Nigerian law, public morality and public interest.

It is therefore correct to settle the issue that for now, there is not an Act of the National Assembly legalizing abortion in Nigeria and hence the act remains illegal throughout Nigeria. This is

[15] Sonnie Ekwowusi "Anambra's Abortion Law I (accessed on Line November 16th 2014 .

notwithstanding the Abortion Laws of Imo and Anambra States respectively. The two enactments by the states mentioned above cannot even stand the test of constitutionality as the principle of covering the field in our law has not changed to the effect that where a state law runs foul with the law of the federation, the law of the centre prevails.

b. The Face of Abortion Law in United States

America has played vital role in various dimensions in several global issues. In abortion practice, United States before the decision in *Roe vs Wade* had led other American States to restrict and prohibit abortion as an illegal act. In United States, prior to 1973 when the United States Supreme Court delivered the landmark judgment in *Roe vs Wade* which more or less legalized the practice in the states, patients who lacked other options attempted abortions in response to unplanned pregnancies. The situation still remains uncertain among the American States. This brings us to the inevitable questions; what is the effect and impact of the decision in *Roe vs Wade* on abortion law among the American States?, how did the people react to the attitude of court in the decision of *Roe vs Wade* and what was the situation immediately after *Roe vs Wade* and lastly, what is the situation at present?

In response to the above points raised, it is fundamental to submit here that the effect and impact of the decision in *Roe vs Wade* as handed down by the United States Supreme Court is that it made it legal for a woman to obtain a medically induced abortion at any point before the "fetus" becomes viable[16].This is usually and generally considered to be seven months or 28 weeks but may occur as early as 24 weeks.[17]

Indeed, *Roe vs Wade* was the first US Supreme Court decision to give a woman the right to have an abortion under what is generally regarded and recognized as woman's reproductive rights. It is necessary to emphasize that even before the decision in *Roe vs Wade*, it seems also that the courts in United States had started

[16] http://family.findlaw.com/reproductive rights/abortion html
[17] *Ibid.*

expressing the view that the government had no business being involved in certain areas of people's lives.

In 1965, the United States Supreme Court in *Griswold vs Connecticut*[18] overturned the old law prohibiting counseling about and on the use of birth control, noting that what goes on in a married couple's bedroom is not the concern of the State. The same right was later extended to unmarried persons.

It must be noted that the view in *Roe vs Wade* merely promoted the issue of rights of privacy and does not give a blanket approval of abortion; rather it left the decision to abort in the hands of the woman and the doctor and restricts abortion, allowing it only if the procedure is necessary to save the woman's life or where it will impose undue burden on the woman. The case of *Roe vs Wade* opened up other questions including; what rights, if any, does an unborn fetus have? At what time in the pregnancy can fetal rights be assumed?, which is more important; the health of the mother or the fetus' rights to life? The above questions are crucial in the real sense of it and cannot be overlooked.

In the state of Texas, the United States District Court for the Western District of Texas, Austin Division in *Whole Woman's Health Center Case*[19] restated the authority of *Roe vs Wade* when it held in 2014 that "the restrictions which would have closed more than half the state's abortion clinics, place an unconstitutional burden on a woman's right to an abortion". Although, the state disagreed with the court's ruling above when Lauren Bean, a spokesman for the Texas Attorney General stated that the state will appeal and seek immediate relief from the fifth circuit court; what the ruling shows is that the attitude of courts in the United States and most American States has not changed from the position in *Roe vs Wade,* even though the government position, the position of politicians and religious leaders is different on the issue of abortion. The plaintiffs in the above ruling which was delivered by Judge Lee Yeakel, Amy Hagstrom Miller (the Chief Executive of the Whole Woman's Health Centre)

[18] *Ibid.*
[19] No 1: 14-CV-284 LY.

confirmed his joy after the ruling when he stated that "we are extremely pleased by Judge Yeakel's ruling today"[20]. It is imperative to note that Yeakel's decision has followed recent legal victories across Southern American States for abortion rights advocates as federal courts blocked measures that would have forced the closing of the only abortion clinic in Missisippi and three of five in Alabama. All these is a reflection of the still charged legal and political environment surrounding restrictions by republican-led legislatures across the Nations in recent years.

It is interesting therefore to conclude that though *Roe's case* appears to have made abortion legal in the United States and other American states, this is a judicial victory which only the courts have persistently insisted not to overturn.

However, it is also understandable that the view of the state and the people in and among the American states favour restriction of abortion than its permission. Thus, after *Roe's case*, courts in United States have not shifted in their attitude which is that the women should be allowed to have access to reproductive health rights. This is notwithstanding that the view of the state and the people are not in accord with the position of the courts. Among the American states, the position is that while the judicial attitude towards abortion remains unchanged, favoring abortion, the state promotes measures intended to limit abortion, allowing it on rare cases (eg where it appears to cause undue burden to the woman or where it will be necessary to save the woman's life). The controversy in the United States over abortion is far from being resolved as an answer has not been provided to the questions pertaining the health of the woman and the fetus' rights to life.

c. Abortion Law in United Kingdom (Britain)

In the United Kingdom and indeed in Britain (leading the European league), it may be correct to say that though abortion is restricted, there are perceived indications that the dominant view is that the law should be liberal enough and flexible too so as to allow women enjoy

[20] Comments on the ruling of judge lee Yeakel on Texas Abortion Law http.// Texas Abortion Law Judge Yeakel algml.com.

their reproductive rights. With the existing flexibility of the law, women are encouraged to have access to abortion with restrictions more particularly in cases of rape and fetal abnormality.

The above creates room for exceptions and raises the question of whether it can still be safely concluded that abortion is illegal among the states in the European league. In Northern Island, there is the belief that women should have unfettered access to abortion.[21] In a recent poll by Amnesty International on the attitude of UK states on abortion, it was found that most people in England, Scotland and Wales did not know or wrongly assumed that the law relating to abortion was the same throughout the whole of United Kingdom.[22] When the respondents were informed that many girls in Northern Ireland had to travel to the rest of the UK and pay for abortion, the vast majority (76%) said that this situation was unacceptable. What the response above shows is that abortion is still restricted in most UK States even though majority of the people, particularly women, are inclined to the removal of such limitations or restrictions that will hinder the enjoyment of women's health rights. Amnesty International supports restriction on abortion in United Kingdom and other areas of the world but insists that such restrictions must not be unreasonable such that it will impede and unnecessarily interfere with women's rights to reproductive health.

Opinion varies in the UK over abortion. Politicians in the Westminster and Stortmount like to pass the buck when it comes to abortion. While Westminster leaves it for Northern Ireland to decide, Stortmount says the law should not be changed because that is not what the people want. Reducing the poll to the basics, the Amnesty International[23] reports that in Northern Ireland, the details below were obtained:

(a) In case of rape leading to pregnancy, 69% supports abortion.
(b) In case of incest leading to pregnancy, 68% supports abortion.
(c) In case of fatal fetal abnormality (where no chances of survival exist for the foetus outside the womb, 60% supports abortion.

[21] Sarah Lee, theguardian.com accessed 21/10/2014.
[22] Amnesty International Study Report on Abortion in the United Kingdom, 2013 Vol. I.
[23] Ibid.

(d) In consideration of vital role played by religion on women rights, life and beliefs; in case of pregnancy resulting from rape: 73% of Protestants support abortion while 62% of Catholics support abortion.

Indeed, this is an important debate going on in Northern Ireland and in other UK states and the popular view now in UK is that politicians are called to their obligations to uphold women rights seriously and face the consequences of their action and inaction. According to the Sexual Health Charity (FPA) outfit, approximately 1000 women travel in a year to England from Northern Ireland and pay up to two thousand pounds £2,000 for a private abortion. Couples who have been happily pregnant but found out that the foetus had a fatal abnormality have had to go to England for abortion and transport back their foetal remains home for a proper burial. Teenage girls who have been raped are traumatized and face difficulty looking for a place to access healthcare and abort the unwanted pregnancy. This situation to many is unacceptable and remains a daily human rights abuse in UK that needs an end.[24]

In the UK therefore, it is safe to say that abortion is restricted by the states. This is notwithstanding the fact that greater majority of the people favour the practice. It is also evident that abortion is seriously canvassed in cases of rape, incest and foetal abnormality and no other situation.

d. Abortion Law in South Africa

In her article titled *"South Africa: Abortion Yet Uncertain Reality"*, Jessica Lomclin reasoned that though abortion is still illegal in South Africa, the country has been praised for her progressive laws relating to Women's reproductive health. Thus, according to her, free state-performed abortions have increased to 500,000 since 2004.[25]

Notwithstanding the progressive position of abortion law in South Africa, there is still controversy and resistance which has led to inadequate implementation of the abortion law permitting

[24] *Ibid.*
[25] Jessica Lomclin "South Africa: Abortion a Legal Yet Uncertain Reality" jessicalomcin.com

reproductive rights of women in South Africa.[26] The 1994 South African Choice Termination of Pregnancy Act is purportedly seen as a progressive legislation. This is because the law allows all women irrespective of age, race and nationality to access termination services in state facilities particularly within the first twelve weeks of pregnancy as a matter of choice.[27] Similarly, abortion may also be authorized under the Act from week 13 to 20 if the pregnancy would risk the woman's physical or mental health, or cause the fetus physical or mental abnormality, or if the pregnancy will affect the woman's social or economic conditions, or if the pregnancy resulted from rape or incest.

No matter how fanciful and pragmatic the above law of South Africa may be, it has been resisted and its implementation is still inadequate.[28] The Act indeed placed South Africa as one of the few African states to legalize abortion and provide post - abortion care. Summarily, South Africa respects individual beliefs anchored on interpretation of Bill of Rights and permits a regulated abortion specifically for certain stages of pregnancies and under situations stipulated in the Act as reviewed above. In South Africa, it seems clear and obvious that abortion is legal but the perception and stigma among the people is same with countries where abortion is illegal and criminalized. In 2009, the government survey in South Africa found that 25% of registered community health centers were actually offering abortion services to women.[29]Although, it seems that abortion is legal in South Africa, greater number of abortions are done outside public hospitals. Due to the fear of resistance and combination of barriers perceived to be against abortion, women and girls that do abortions do them illegally, in unauthorized places. This position is confirmed by the survey report of the South African Medical Research Council in 2010 which stated that 50% of abortions undertaken by girls aged (13-19) in South Africa are performed outside a hospital or a clinic.[30]

[26] *Ibid.*
[27] *Ibid.*
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*

It must be concluded that the new pro - abortion law of South Africa has split the nation, with many doctors and nurses refusing on ethical grounds to carry out abortions even though the facilities are provided by government. Some doctors and nurses also support the law and insist that any of their colleagues that obstructs women from having abortion is breaking the law and could face legal action. A nurse or medical professional can be prosecuted for denial of abortion to a woman or failure to give referral information and if convicted may be fined or imprisoned for a term up to 10 years under the South Africa Abortion Act.[31].

Finally, although the Act exists and has indeed legalized abortion in South Africa, 30% of the South African women population still believe that abortion is illegal in the country.[32]

Reviewing the Provisions of Abortion Laws of Imo and Anambra States of Nigeria

Notwithstanding the very obvious fact that abortion is clearly against our people's social orientation and illegal by the provisions of Nigerian criminal law,[33] two states out of the thirty six states in Nigeria – Imo and Anambra States, recently enacted laws legalizing abortion in their respective domains. The two abortion laws in the states sparked off a lot of controversy and the executive governors of the states, Dr Chris Ngige and Owelle Rochas Okorocha (Anambra and Imo respectively) faced severe attacks and criticisms from different groups within and outside the states including lawyers, religious leaders, women groups and even civil society groups.

It will be pertinent to emphasize from the spirit and wordings of the two states' abortion laws that the Imo abortion law made clear and express provisions prescribing abortion as legal in the state while the Anambra law did not. What it seems that the Anambra law has done is that it vested and/ or created implied rights of women and girls in the state to pursue and protect their reproductive health. Thus, the Imo abortion law mentioned the word "abortion" in its provisions and permitted it categorically but the Anambra law granted

[31] Reproductive Health Journal Report on Abortion Act of South Africa, Vol 1, 2013.
[32] *Ibid.*
[33] Section 328 of Criminal Code, LFN, 1990.

reproductive health rights to women in the state from which the right to abortion is implied.

The two abortion laws of the two concerned states are:

- Anambra State Women's Reproductive Rights Law 2005 and the:
- Imo State Violence Against Persons (Prohibition) Law, No 12 of 2012

Looking at the two laws one by one, it is imperative to state that the Anambra State Women's Reproductive Right Law 2005 came into force on the 17th of March 2005 when Dr. Chris Ngige was the Governor of Anambra State and Professor Brian Adinma was the Commissioner for Health, Anambra State[34] The above law of Anambra State which was enacted by the State House of Assembly and signed into law by Dr Chris Ngige is a 12 – paragraph piece of legislation. Prior to the passage of the law by the Anambra House of Assembly, the people were never consulted, let alone invited to debate the Bill on it.[35] The most offensive provision or section of the Anambra Women's Reproductive Rights Law is section 6 subsection (a) which states *inter alia* that "The view of the woman shall be taken into consideration for decisions: on the number, timing; and spacing of the children...."

From the above provisions, it is evident that section 6(a) of the abortion law of Anambra State gave conclusive right or rights to the woman to make or take decisions on issues concerning timing, number and spacing of children. The implication therefore is that the woman has unfettered right to choose the time to give birth to a child, determine for herself the number of children and also decide the spacing of the children. Thus, by this the woman decides which of child that will stay and be delivered and the ones that will not be allowed to see the light of the day outside the womb and can terminate such ones in the form of abortion.

Although there is no mention of abortion anywhere in the Anambra State Women's Reproductive Rights Law 2005, abortion and the right to carry it out is inferred and implied under section 6 (a) of the

[34] Sonnie Ekwowusi "Anambra's Abortion Law(1) ekwosi.com (accessed 16/11/2014).
[35] *Ibid.*

Law. If the woman's view on the number, timing and spacing of the children whenever considered shall be taken, what next? The Law has made no pretence that it permitted abortion without a mention of the word.

Looking at section 6(a) of the law being reviewed, it shows that there is a mandatory obligation on the people involved in considering the issues of number, timing and spacing of the children to respect and take the view of the woman by the use of the word "shall" in the statute. The word "shall" by our elementary rules of interpretation conveys the meaning of "compulsory and mandatory" obligation contrary to a permissive obligation where and whenever the word "may" is used in a statute. This view is supported by the court in the case of *British and French Bank v Akande.*[36]

To the uninformed, section 6(a) of the above law might appear laudable, but to those familiar with reproductive rights or sexual reproductive rights politics, section 6(a) has consistently been interpreted in many countries and places as giving women right to abortion and contraceptive use. Indeed, section 6(a) was first articulated as an abortion right by the controversial proclamation on Human Rights in Tehran in 1968. In 1948 when all nations met and adopted the United Declaration of Human Rights (UDHR), abortion was not accepted as a universal human right. The UDHR is the first and only universal human rights document that has the backing of all the nations[37]. There was even no mention of reproductive rights in UDHR. Reproductive rights began to appear as a subset of human rights in the controversial Tehran Declaration of 1968 which states that "Parents have a basic human right to determine freely and responsibly the number and spacing of their children."

Clearly, a look at the provisions of the Tehran Declaration of 1968 shows that if it was used as the origin and base of the Anambra State Women's Reproductive Law, the law cannot stand because the Tehran Declaration did not specifically vest the right to freely and responsibly take such decision on the woman alone rather on both parents, i.e. the man and the woman. Thus, if the woman decides in

[36] 1961 WNLR 277.
[37] Sonnie Ekwowusi " Abortion Law in Anambra State (1) ekwwousi.com accessed 16/11/2014

favor of abortion and the man kicks against it, then the fetus remains untouched and will be born as there is no consensus to abort by the father and the mother. The consensus issue is fundamental and hence Greg S. Slater restated that in the UN Guide on Consensus on Family Issues edited by Susan Roylance, the United Nations Consensus Language clearly limits abortion rights[38].

While Dr. Chris Ngige has not saved his face from the series of attacks from Anambra people and outsiders alike over the enactment of the Women's Reproductive Rights Law in the state in 2005 and his successor Mr. Peter Obi was under pressure to repeal the said law, Owelle Rochas Okorocha in 2012 signed the Imo State Violence Against Persons (Prohibition) Law No. 12 of 2012 in Imo State. The abortion law of Imo State grants every woman in Imo State the right to enjoy reproductive rights including rights to medical abortion in cases of sexual assault, rape, incest and where the continued pregnancy endangers the life or the physical, mental, psychological or emotional health of the mother. The effect of the law is that by its signing by the Governor, abortion has become legal in the state and just anybody can ask for abortion as a right in the state.

The Governor and his abortion law received attacks and condemnation from within and outside Imo State, including the Catholic Medical Practitioners Association led by Dr. Phillip Njamanze who reasoned that "the Law is anti - God, dehumanizing and totally unacceptable to the association"[39] Even the Catholic Archbishop of Owerri Ecclesiatical Province, His Grace Dr Anthony J.V. Obinna condemned the law and called for its immediate abrogation as he said the law is anti-life.[40]

Particularly, the fundamental section in the Imo State Abortion Law that caused the brouhaha is section 40(g) (i) of the Law. It provides that:

> Every woman shall have the right to enjoy reproductive rights including the right to medical abortion in case

[38] Susan Roylance "Resource Guide to the UN Consensus Language on Family Issues.
[39] Vanguard on line 3/9/2013.
[40] *Ibid.*

> of sexual assault; rape, incest or where the confirmed pregnancy endangers the life or the physical, mental, psychological or emotional health of the mother.

From the clear reading of the section above, the Law conferred on the women of Imo State a qualified right to medical abortion on several grounds including in cases of pregnancy resulting from sexual assault, pregnancy as a result of rape, incest or where keeping the pregnancy will endanger the life and hamper the well-being or health of the woman or mother.

The law therefore affirms the rights of women to make decisions as they relate to their reproductive health and rights including abortion. Indeed the Imo State abortion law made a categorical provision for abortion rights within the provisions and reading of section 40(g)(i) of the Law as against the implied rights provided under the Anambra Law. Regrettably, the above provision made no reference to the unborn child, his own life, health as well as rights as the case may be. What it means is that the state does not give attention or have no interest in the life of the fetus and perhaps has even no wish that the fetus is born eventually. This is unacceptable in this part of the world where life is sacred.

It is also important to note that from section 40(g)(i) of the Imo Abortion Law, the letters and spirit of the law did not give a blanket approval of abortion as an act but merely approved " medical abortion" under the situations and circumstances mentioned and listed in the statute and by the elementary principle in our rules of interpretation, whatever that is not included in an enactment is deemed excluded; hence any form of abortion not coming under any of the situations listed under subsection (1) of section 40(g) shall be deemed excluded and regarded as illegal. It is also doubtful whether there is any other situation that may not come within any of the situations under section 40(g)(i) as the section is not only all embracing but encompassing.[41]

[41]Elvis – Wura Towolawi "Imo State Abortion Law, Twists and Turns. Vanguard on line. Com 25/9/2014.

Findings and Discussions

From the study on the Abortion laws of Imo and Anambra States and from the close look at the practice in other jurisdictions including United States, United Kingdom (Britain, Northern Ireland), Nigeria and South Africa, it was found out that:

1. The question of abortion is a thorny subject in all societies in view of the fact that it is an admixture of morality, autonomy and individual liberty and freedom and because of this, arguments on it are usually not fair and reasonable.
2. It is also our finding that abortion laws create a conflict between the health rights of the woman and the life of the fetal child. It is clear from the reading of the abortion laws of Imo and Anambra States that preference is given to the health of the woman than life of the fetus which though not yet brought outside, maintains similar life of a human being. Life starts from conception; it is sacrosanct and sacred because from beginning, it involves creative force of God and remains forever.[42] Since man cannot play God and create life, it is tantamount to murderous criminality to cut short a budding flower of life for whatever reason.[43]
3. Abortion is a human rights abuse and infringement particularly on the right to life of the growing baby and worst still, when perpetuated by the mother, the carrier of life. While this study appreciates the right to privacy of the woman under the constitution, it is also elementary that the same constitution did not make the exercise of any of the rights absolute. What is more important – the right to privacy of the woman or the life of the child? In our view, the fetus
4. right to life is crucial and cannot be overlooked.
From this study too, it is clear that prior to the enactment of the two Abortion Laws in Imo and Anambra States, there were no consultation by the governments on the people. If there were such consultations in the form of public debate or public hearing on this important issue affecting the destiny of the people of the two states, the situation could have been

[42] Fr Nnabuihe Iwuala/www.lifesitenews.com
[43] Ibid.

different and hence it is our view that the public outcry in the affected states following the two enactments were expected and never came as a surprise. The laws were lacking in popular participation required in every democracy like Nigeria and indeed are unconstitutional and incompatible with public policy, public morality and public interest.

5. There is also conflict between the provisions of the Abortion Laws of Imo and Anambra States and the clear and express provisions of the Criminal Code (a federal law) as it relates to abortion. Under the Criminal Code, the act of abortion and/or omission in that regard is a crime and an offence, which upon conviction, attracts the punishment of imprisonment of life.[44] Thus, in line with the constitutional principle for covering the field, the above laws of the states cannot prevail on the Criminal Code on this same subject matter of abortion rather the rule is the other way round.

6. Our fair finding from this study is that when all these abortion laws are compared, it is clear that while the Nigerian law makes abortion illegal, the Imo Abortion Law makes abortion legal, qualifying the act to "medical abortion" allowed in situations provided and listed under section 40(g)(i) of the Law. This section is wide and too encompassing that it is difficult not to find any situation excluded by it. In the case of Anambra State Abortion Law, 2005, it is evident that abortion as a word is not used nor mentioned but rights to do abortion by the women and girls are implied in the right of the woman to make a decision over the number, timing and spacing of children. Which view shall be taken?

7. The provisions of Imo State abortion law are in tandem with the state of abortion law in United Kingdom. This is because among the states in UK, abortion is allowed and permitted in cases of rape, incest and where it is necessary to save the woman's life or where not doing it will impose undue hardship or cause the woman mental, physical and other related hardships. This situation applies in Northern Ireland. In other European states, there is restriction of abortion by the government even though it appears there is public

[44]Section 328 of Criminal Code LFN, 1990.

support for abortion practice. This is contrary to the situation in Nigeria, particularly Imo and Anambra states where the public sympathy is against abortion because it is not part of their social and religious orientation.

8. Among the American States, the governments (states) as well as the people are against abortion and the law still restricts abortions but pro-abortion advocates have used the judiciary (the courts) to push their advocacy for reproductive rights of women to the extreme. Since the decision of *Roe vs Wade,* the situation appears to be that the United States Supreme Court has made abortion legal without any statutory backing of it and has refused to overturn it. The courts in Texas are of the same attitude and this has not changed.

9. However, in South Africa, although the enactment of the Choice on Termination of Pregnancy Act in the country in 1994 more or less made abortion legal, the controversy and resistance against abortion have made the implementation of the law not only low but difficult. The abortion law in South Africa supports abortion as part of exercise of reproductive rights and in demonstration of its affirmative stand punishes a nurse or health professional who denies a woman access to facilities that will help her obtain abortion services or refuse her such service or refuse or fail to give such woman referral information on where abortion services are offered. Our findings also show that even though the abortion act in South Africa legalized abortion, most women in the country still believe that abortion is illegal. This is merely because as Africans, both the Christians and Muslims oppose abortion because of their support for life. South Africans have a dissenting view about the Act.

10. Our findings also show that international law permits each country to set reasonable limits to abortion and the countries are allowed to decide what is reasonable. This is notwithstanding that Amnesty International would always say that a restriction that posed a risk to the life or long - term health of the woman was not reasonable. Within the mainstream of international law, abortion is not legal. This is because the only United Nations instrument protecting

human rights signed by all the nations is the UDHR and the UDHR does not permit or allow abortion. The only international instrument permitting Women's Reproductive Rights is the Tehran Declaration of 1968 and by the Declaration, the decision as to the number and spacing of the children is done by the parents and not the woman alone. Nigeria is not a signatory to the Tehran Declaration.

Conclusion

Our conclusion in this study is that the subject of abortion is still a controversial one both at the international setting as well as among regional groups and states. In many states, there is a concerted effort to liberalize abortion laws notwithstanding the fact the public perception is that abortion takes life which is sacrosanct and sacred and should not be supported.

Among the African people and their culture, there is always a united support for life and it seems as if it appears that even though some governments in African states make abortion legal, greater number of the people believe abortion is illegal. In Nigeria, abortion is illegal and this is not a surprise as the law is clear on that. However, the abortion laws of Imo and Anambra States have brought a lot of controversy into the abortion debate in Nigeria and created a new regime of rights in the form of women's reproductive rights which under Imo abortion law expressly permits medical abortion and excludes any other form of it. The Anambra abortion law creates implied abortion rights for women to have their views taken on the number, timing and spacing of the children. All these show a serious contest between women's reproductive rights and right to make a free decision about a woman's private life and the life of the fetus threatened by the act of abortion.

Our view and considered opinion is that right to life cannot be equated with right to privacy and it will be unfair to discuss about women's reproductive rights without due regard to the life of the fetus, the child in the womb. Our social and cultural as well as religious orientation preserves life as sacrosanct and sacred in Africa. The woman carries the child as the mother. Our submission is that

abortion takes life, and a day when a mother shall partake in taking the life of her child should not come in our time.

Recommendations

Having considered all the issues involved in this discussion, our reasoned recommendations are as follows:

a. International law must take a definite position on abortion law and if this is done, it will serve as a template for different countries and regional blocks. The situation where international law merely recommends and advices nations to apply reasonable restrictions does not solve the problem because it gives discretion to states which can be abused one way or the other depending on the mindset of who or persons that will take such decision and their orientation against or in favor of abortion.
b. The spirit and letters of the UDHR especially on the issue of abortion should be encouraged and promoted. The UDHR does not permit abortion. States are under obligation to observe the provisions of international treaties to which they are signatories in the spirit of international solidarity; "*pacta sunt servanda*".
c. As for the Imo State abortion law, 2012 and the Anambra State abortion law of 2005, we recommend the immediate repeal of the laws by the concerned states.
d. While the position of the Deputy Chief of Staff of Imo Government House, Mr. Chinedu Offor, that abortion has not been legalized in Imo State is appreciated, the Governor, Owelle Rochas Okorocha, should keep his promise to the people by approaching the House of Assembly as urgently as possible for a Law to repeal the Imo State abortion law, 2012. Only this will place the Governor in history as not just a leader but a listening one.
e. Many have before now called on the immediate past governor of Anambra State Mr. Peter Obi to repeal the abortion law made by Dr Chris Ngige but that could not be achieved before Obi left office. The ban on sale of contraceptives including condoms in Anambra State cannot substitute the call for a repeal of the abortion law because sexual education leading to voluntary abstinence is better than forceful imposition of control of use of condom. The later is the dominant view among greater majority

of the people in Anambra State. To this extent, we recommend that the incumbent Governor of Anambra State, Chief Willie Obiano should as a matter of urgency declare the issue of abortion as a public emergency in the state and go all out to repeal the anti-life law in the state.

f. The leaders of thought in different communities, religious leaders, and other stakeholders should not relent in standing tall to protest against abortion as same terminates life which God himself made sacred.
g. Finally, the government at the centre, states and local governments should work as partners to improve social infrastructure which will discourage young and middle-aged women from wasting their time without engaging in serious activities which encourage unwanted pregnancies.
h. The rule of law should also be strengthened and justice sector reformed to accommodate many spheres of rights as constitutional rights including fetal rights.

In our fair view, if the above issues are addressed, then our society would have become a nice place to live in. To achieve this, all hands must be on deck. The government and the people must work as team players. Anything different from this is unacceptable.