

Abstract

Abortion is the expulsion of a foetus from the uterus before it has reached the stage of viability in human beings, usually about the 20th week of gestation. Generally, the term 'abortion' is used to refer to the termination of pregnancy, whether it occurs with medical intervention such as medications or surgical procedures or whether it occurs on its own. In that sense, an abortion may be brought on purposefully, in which case, it is called an induced abortion, or it may occur spontaneously, in which case, it is called a miscarriage. For the purposes of this article, abortion, a highly debated topic entails the purposeful ending of pregnancy and raises ethical, moral, legal, and medical debates. This procedure includes stopping foetal development, sparking heated debates on matters such as reproductive rights, bodily autonomy, religious beliefs, socio-political stances, healthcare accessibility, and the definition of personhood. In Nigeria, abortion is prohibited by law and is governed by the Criminal Code which applies to the southern states of the country, and the Penal Code which applies to the northern states. Violations of the relevant sections of any of these pieces of legislation can lead to substantial prison term of up to 14 years, except in cases where the procedure is necessary to save the life of the pregnant woman. In the US, abortion is also criminalized but the laws are not uniform because the USA is a federal state. Consequently, the laws regulating abortion differ from state to state. Abortion is allowed in some states, while in some states, a partial ban is imposed, and in some, a complete ban has been imposed. The aim of this paper is to review the laws regarding abortion in Nigeria and the US. By adopting doctrinal research methodology, this article scrutinized the relevant legislative provisions on abortion in Nigeria, as well as the constitutional provisions on abortion in the US alongside the legislative provisions of some US federating states, for the purposes of a comparative study. This study found that abortion is criminalized in Nigeria with a uniform penalty of up to 14-years imprisonment in both the southern and northern parts of the country, while in the US, though abortion is criminalized in some of the states, the penalties vary from state to state. Finally, this study recommended among other things, that, Nigeria should make legislation to clearly reflect the protection of physical and mental health of the pregnant person. In that sense, there will be more liberal laws to clearly include access to abortion in cases of incest, rape, sexual assault, and in cases of mental health of the pregnant woman, and fatal foetal abnormality just like in the US.

Keywords: Abortion, Pregnancy, Termination, criminalized, Restrictive.

1. Introduction

The World Health Organization (WHO) defines abortion as 'pregnancy termination prior to 20 weeks 'gestation'.¹ The Term 'abortion' is generally used to refer to the termination of pregnancy, whether it occurs with medical intervention such as medications or surgical procedures or whether it occurs on its own, such as miscarriage.² Abortion is a procedure to end a pregnancy'. It can be achieved by two different ways, that is, either by medical abortion or procedural abortion. Medical abortion means the terminator of pregnancy by the use of medicines, while by procedural abortions is meant the termination of pregnancy through a procedural that is sometimes called surgical abortion.³ Those are: Medical Abortion: this is a method of pregnancy termination by administering medicines to the patient.⁴ Procedural Abortion: this means the termination of pregnancy through a procedure that is sometimes called surgical abortion.⁵ Abortion has been a very contentious, issue of great concern which discourse has generated reactions and contributions globally by political actors, government, and non-governmental Organizations (NGO). There are diverse opinions depending on which part of the divide one finds oneself, as to the causes of abortion (particularly, induced abortion). In Nigeria, the abortion laws in both the southern and northern states are very restrictive, and despite this state of the laws, there is still high incidence of induced abortion in Nigeria and because most of the procedure takes place clandestinely and most times performed by unqualified medical practitioners, they are mostly unsafe, thereby, leading to high rate of maternal mortality and morbidity.

In the US, federalized abortion policy had been central to social policy discussions for decades, and the highly divided political landscape we experience today has, to a significant extent, been formed and influenced by the *Roe v Wade*⁶ decision. For nearly fifty years, right to abortion was protected at the national level by the US Constitution. However, in *Dobbs v Jackson Women's Health Organization* in 2022, the US Supreme Court held that the United States Constitution does not protect abortion as a constitutional right, overturning their previous opinion in *Roe v Wade* and *Planned Parenthood v Casey*.⁷

2. Laws Governing abortion in Nigeria

Constitution of the Federal Republic of Nigeria 1999 (As Amended)

The Constitution of the Federal Republic of Nigeria 1999 does not specifically mention abortion. However, the Constitution is pro-life because most of its provisions are life-sensitive. Right to life is provided in section 31(1) which states: 'every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria. This right is built on the principle of natural law which respects the sanctity of human life. It has been argued that this right extends to an unborn child and by implication, any law which permits abortion is unconstitutional.⁸

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¹ What Is Abortion According to WHO? <<https://www.emedicine health.com>> accessed 15th august 2023.

² *Ibid.*

³ Abortion-Also called Induced Abortion <<https://www.medlinePlus.gov>> accessed on the 15th August 2023.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ 410 US 113 [1973]. See B Orrell. Life After Roe: Supporting Women and Families Facing Unexpected Pregnancies [2022] *American Enterprise Institute*, <<https://www.jstor.org/stable/resrep42743>>

⁷ 505 U.S. 833 [1991].

⁸ P C Okorie, and OA Abayomi, 'Abortion Laws in Nigeria: A case for Reform' [2019] 23(1) *Annual Survey of International & Comparative Law* <digital commons.law.ggu.edu>

Criminal Code Act

This applies to the whole of the Southern Nigeria and the relevant sections are sections 228-230 and 297 & 238.⁹ The Criminal Code does not apply throughout Nigeria except in respect of federal offences, that is, offences relating to matters on Exclusive Legislative list of the Constitution. This is because crime is generally a residual matter reserved for states. Individual states have their Criminal Codes, but the provisions are similar to the Criminal Code Act.

Section 228 – Attempt to Procure Abortion:

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

This section makes it unlawful for any person including medical practitioners or health workers to attempt to terminate any pregnancy by any means whatsoever, even if it is later discovered that the woman was not pregnant.

Section 299- Attempt to Procure Own Miscarriage by a woman:

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

Under this provision, the offence attracts punishment of 7-years imprisonment for an attempt by any woman to terminate her pregnancy by any means whatsoever. The question of being pregnant in fact is immaterial, therefore, the offence is complete when, for example, a woman drinks salt water with the intention of securing a miscarriage upon suspicion that she is pregnant perhaps after missing her monthly period, even if it turns out that she was never pregnant.¹⁰

Section 230 – Supplying Drugs or Instruments to Procure Abortion:

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

The purport of this section is to make it an offence for any person to supply or procure anything which he or she knows is to be used to procure abortion whether or not the woman is pregnant¹¹

Section 328 – Killing Unborn Child

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 born alive and had died, he would be deemed to have unlawfully killed the child, is guilty of a felony and is liable to imprisonment for life.

This section makes it an offence to kill a child when it is about to be born but before it is born. The purpose of this section seems to be to make sure that all aspects of killing a child before it is born are covered by the code; however, it should be noted that the definition of abortion by WHO does not include termination after viability, which is probably why this provision is not in the same chapter of the criminal code with abortion.¹² This section also seems to take care of situations where, for whatever reasons, it is not practicable for a pregnant woman to secure an abortion earlier than when the child is to be born.

Section 297 – Surgical Operation (Lawful Abortion):

Any 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 to all the circumstances of the case.

According to Okorie and Abayomi,¹³ there are two issues of interpretation arising from this provision. First is, what qualifies as a surgical operation? Does it only imply medical? Or does it, for example, include the administration of prostaglandins which many doctors consider one of the safest and most effective methods of procuring abortion or other methods of abortion like menstrual extraction or anti-progestin termination (abortion pill). Okorie and Abayomi go on to say that it seems the term 'surgical operation' is strict and is deliberately used to indicate the necessity to save the life of the mother, and it is therefore, unlikely, they suggest, that the defence will countenance other means of procuring a miscarriage. The second issue lies in the question whether the term 'preservation of the mother's life' means that she must actually be in danger of dying. Again, the Nigerian courts have not interpreted this term, but the English case of *R v Bourne*¹⁴ decided under a similar provision, indicates that the preservation of the mother's life should include safeguarding her physical and mental health. Okorie and Abayomi contend that the implication of the provisions of the Criminal Code, if strictly applied,

⁹ Criminal Code Act (1916) Cap. (C38) Laws of the federation of Nigeria 2004⁹.

¹⁰P C Okorie, and OA Abayomi, 'Abortion Laws in Nigeria: A case for Reform' [2019] 23(1) *Annual Survey of International & Comparative Law*, 170 <digital commons.law.ggu.edu>

¹¹ *Ibid*, 171.

¹² Provisions on abortion are covered by chapter 21 relating to offences against morality. The offence of killing an unborn child is on the other hand covered by chapter 27 of the code dealing with homicide and allied offences- See P C Okorie, and OA Abayomi, 'Abortion Laws in Nigeria: A case for Reform' [2019] 23(1) *Annual Survey of International & Comparative Law*, 171 <digital commons.law.ggu.edu>

¹³P C Okorie, and OA Abayomi, 'Abortion Laws in Nigeria: A case for Reform' [2019] 23(1) *Annual Survey of International & Comparative Law*, 172-173 <digital commons.law.ggu.edu>

¹⁴[1938] ALLER 615.

would appear to be that all doctors, chemists and organisations (including family clinics) supplying and administering the IUD and the morning after pill are guilty of offences under the criminal code, for these are both examples of post conception methods of birth control.

Penal Code Act

This applies to the northern part of Nigeria.¹⁵ The Penal Code, although a federal legislation, does not apply throughout Nigeria but only in Federal Capital Territory (except for federal Penal Code offences contained in the Penal Code (Northern States) Federal Provisions Act, Cap. (P3) Laws of the Federation of Nigeria (2004). This is because crime is not on the Exclusive nor Concurrent Legislative List of the Constitution. The Penal Code applies in states that have not adopted the Sharia Legal System or to non-Moslems in states that have adopted the Sharia Legal System in the North. Individual states have their Penal Codes but the provisions are similar.

Section 232 – Causing A Woman to Miscarry

whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be 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'. This provision combines the offence with the defence of good faith as in section 297 of the criminal code for the purpose of saving the life of the woman; however, unlike the criminal code, there is less ambiguity as to the mode of procuring legal abortion by not including the phrase 'surgical operation'.¹⁶

Section 233- Causing Death of a Woman with the Intent of Causing Her Miscarriage

Whoever with intent of causing the miscarriage of a woman, whether with child or not does any act which causes the death of such woman, shall be punished – (a) with imprisonment for a term which may extend to fourteen years and shall also be liable to fine; and (b) 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.

This section deals with the offence of causing the death of a woman with intent to cause her miscarriage, quite unlike under the criminal code, where death resulting from abortion may be murder or manslaughter depending on the circumstances.¹⁷

Section 234 – Using Force on A Woman to Cause Her Miscarriage

'Whoever uses force to any woman and thereby unintentionally causes her to miscarry, shall be punished'.

- i) With imprisonment for a term, which may extend to three years or with fine or with both; and
- ii) If the offender knew that the woman was with child, he shall be punished with imprisonment for a term which may extend to five years or with fine or with both'.

Under this section, it is an offence to cause a woman to miscarry by using force on her even if the act was unintentional. The offender need not know that the woman was with child and the force need to be unlawful. This, therefore seems to be strict liability offence.¹⁸

Section 235 – Preventing A Child from Being Born Alive:

Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, shall if such act be not caused, in good faith for the purpose of saving the life of the mother, be punished with imprisonment for a term which may extend to fourteen years or with fine or with both.

It seems that this section creates the inchoate offence of attempt to prevent the child from being born alive unless such attempt is made bona fide in trying to save the life of the mother. It seems the offence is complete even if the child is born alive since the offence relates to only doing any act with the intention of preventing the child from being born alive and not preventing the child from being born alive per se.¹⁹ 'It also appears that where the act in fact prevents the child from being born alive, it goes beyond this provision and comes within the provision of section 236, and of course, the second aspect of the provision relating to causing the child to die after its birth does not create the offence of abortion but one of homicide'.²⁰

Section 236 – Causing The Death of Unborn Child: 'Whoever does any act in such circumstances that if he thereby caused death he would be guilty of culpable i with imprisonment for life or for a less term and shall also be liable to fine'. This section creates the offence of abortion of a foetus that has life.

Child's Rights Act 2003

Section 17 (a) of this Act provides: 'A child may bring an action for damages against a person for harm or injury caused to the child willfully, negligently or through neglect before, during or after the birth of that child'.

¹⁵ Penal Code Act (1960) Cap. (523) Laws of the Federal Capital Territory of Nigeria 2007, Ss 232 -236.

¹⁶ P C Okorie, and OA Abayomi, 'Abortion Laws in Nigeria: A case for Reform' [2019] 23(1) *Annual Survey of International & Comparative Law*, 175 <digital commons.law.ggu.edu>

¹⁷ See criminal code act (1916), Ss. 316, 319, for the punishment for murder, which is death penalty, and also sections 317 and 325 for manslaughter which punishment is life imprisonment.

¹⁸ P C Okorie, and OA Abayomi, P C Okorie, and OA Abayomi, 'Abortion Laws in Nigeria: A case for Reform' [2019] 23(1) *Annual Survey of International & Comparative Law*, 177 <digital commons.law.ggu.edu>

¹⁹ P C Okorie, and OA Abayomi, P C Okorie, and OA Abayomi, 'Abortion Laws in Nigeria: A case for Reform' [2019] 23(1) *Annual Survey of International & Comparative Law*, 177 <digital commons.law.ggu.edu>

²⁰ *Ibid.*

There has been an argument that the right to life as contained in section 31(1) of the Nigerian Constitution does not extend to an unborn child based on section 307 of the Criminal Code.²¹ But it seems this assertion could be met with the argument that, the Child Right Act, being the comprehensive compilation that guarantees a child the right to sue for harm caused 'before' the birth of that child. It could rightly be said that the Child Rights Act considers foetus to be child possessing the right to life as guaranteed by section 31 (1) of the Constitution.

3. Abortion Laws in the United States of America

Quite unlike Nigeria, in the US, legislative power is vested with the federating states, and that is why there are no uniform abortion laws. In the US, some states prohibit abortion throughout pregnancy with few exception, while in others abortion is allowed up to a certain gestational period, or at any stage of the pregnancy. Prior to *Roe v Wade*,²² abortion was highly restrictive that it was only allowed to save the life of the pregnant woman. In *Roe v Wade*,²³ the Supreme Court of America ruled that right to abortion was protected by the Constitution, and that the right to privacy also included the right to take an abortion decision. However, the 2022 case of *Dobbs v Jackson Women's Health Organization*²⁴ changed the Supreme Court's opinion by overturning *Roe* and *Planned Parenthood v Casey*.²⁵ In *Dobbs*, the Supreme Court held that abortion procedure may be regulated by a state prior to viability as long as the regulation is not imposing any undue burden on the right of the woman, and as long as abortion is not completely banned. The case centered on Mississippi's 'Gestation Age Act'²⁶, which prohibited abortions after 15 weeks of pregnancy, except in cases of medical emergencies or severe foetal abnormalities. Following the enactment of this law, a clinic performed surgical abortions beyond the 15-week gestation period. The Act was challenged in court for placing an excessive burden on a woman's right, although the state couldn't entirely prohibit abortion. The Court ruled that the state can enforce regulations on abortion as long as they pass rational basis review²⁷ and align with federal laws and constitutional provisions. Following the ruling, circumstances shifted within the United States. Among all states, approximately thirty-two mandate that abortions must be conducted by licensed physicians. Around nineteen states permit abortions within hospitals, and seventeen states stipulate the necessity of an additional physician during a specific stage of the procedure. Additionally, forty-three states have established regulations prohibiting abortions after a certain gestational period, except in situations involving the woman's life or health.²⁸ *Roe* restricted states from banning abortion but *Dobbs* authorized states to impose a range of restrictions even though it did not completely make abortion illegal. Below are a selected Federating States of the US and their abortion regulations.

Louisiana

Abortion is completely banned in Louisiana with very limited exceptions²⁹. Anyone in Louisiana who needs abortion may need to travel out unless they qualify for an exception such as:

- To save the pregnant woman's life
- To prevent serious risk to the pregnant person's physical health
- If the foetus is not expected to survive the pregnancy.

Texas

Abortion remains prohibited in Texas which in most situations includes the distribution or mailing of abortion-inducing drugs like mifepristone and misoprostol. Texas laws only offer limited exceptions, allowing abortion only to save the life or prevent significant harm to the major bodily functions of a pregnant individual.³⁰

Mississippi

The Mississippi law that went into effect July 7, 2022 imposed a complete ban on abortion with very limited exceptions³¹, thus: a) to save pregnant person's life; b) If the pregnancy is as a result of rape

Ohio

Abortion is legal in Ohio³². However, abortion is banned after 21 weeks, 6 days of pregnancy and has some other restrictions on abortion access. A state law that banned abortion after 6 weeks of pregnancy in Ohio went into June 24, 2022.

Florida

Abortion is legal in Florida up until 15 weeks, 6 days of pregnancy with a 24-hour waiting period requirement. For a pregnant person younger 17 years old, a parental consent is also required³³.

²¹ A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not and whether it has an independent circulation or not and whether the naval string is severed or not.

²² 410 U.S. 113 [1973].

²³ *Ibid.*

²⁴ No. 19-1392, 597 U.S. [1992].

²⁵ 505 U.S. 833 [1972].

²⁶ 2018 Miss. Laws (Codified at MISS. CODE ANN § 41-41-191).

²⁷ Rational basis review within the US Constitution refers to the standard evaluation used for constitutional matters, encompassing legal processes and safeguarding laws.

²⁸ S Kapoor, 'Abortion: Comparative Study Between Indian Laws and US Laws' [2022] *Social Science Research Network* <<https://papers.ssrn.com>> accessed on 3rd December 2023.

²⁹ State Guide to Abortion in Louisiana <<https://www.abortionfinder.org>> accessed on 5th December 2023.

³⁰ Abortion and birth control Access in Texas: What you need to know <<https://www.texastribune.org>> accessed on 5th December 2023.

³¹ State guide to Abortion in Mississippi <<https://www.abortionfinder.org>> accessed on 5th December 2023.

³² State guide to Abortion in Ohio <<https://www.abortionfinder.org>> accessed on 5th December 2023.

³³ State guide to Abortion in Florida <<https://www.abortionfinder.org>> accessed on 5th December 2023.

New York

Abortion is legal in New York³⁴ until viability.³⁵ Parental consent is not a requirement in New York, so a pregnant person younger than 18 can consent to an abortion and do not have to notify a parent to get an abortion.

4. Conclusion and Recommendations

From the foregoing, it can be seen that there are differences between Nigeria and the US when it comes to regulation of abortion. In Nigeria, abortion is criminalized both in the Southern and Northern parts of the country with imprisonment of up to 14 years. Abortion can only be accessed on a very narrow exception, which is, to save the life of the pregnant woman. In America, there are no uniform laws on abortion because under the US Constitution, the federated states can make autonomous legislation as they deem fit, so long as it does not conflict with the federal Constitution. For nearly fifty-years abortion was protected in the US as a constitutional right on the authority of Roe but in Dobbs case of 2022, the US Supreme Court declared that the right to abortion is not a constitutional right, and that the process can reasonably be restricted by states. In the light of that, abortion is generally banned or severely restricted just like in Nigeria but with exceptions ranging from death and risk to health of the pregnant person to when pregnancy is as a result of rape, incest, and when there is a lethal foetal anomaly. According to the Supreme Court of America, in *Dobbs v Jackson Women's Health Organization* in 2022, abortion ban by any state must be sustained if it serves legitimate state interest, including respect for and preservation of prenatal life at all stages of development. Since unintended pregnancy is the reason for most instances of induced abortion, the most important, least expensive and positive way to counteract its negative effect on women is to promote access to contraceptive services to prevent such pregnancies. There should be a mass awareness campaign on different methods of contraception together with free counseling services, especially for teenage girls. Nigeria should make legislation to clearly reflect the protection of physical and mental health of the pregnant woman. In that sense, there will be more liberal laws to include access to abortion in cases of incest, rape, sexual assault, as well as in instances of mental health of the pregnant woman, and fatal foetal abnormality just like in the US.

³⁴ State guide to Abortion in New York <<https://www.abortionfinder.org>> accessed on 5th December 2023.

³⁵ Viability means the developmental stage of pregnancy when a foetus can survive outside the uterus with medical help.