REVIEW OF THE FUNDAMENTAL HUMAN RIGHT TO LIFE VIZ A VIZ GLOBAL ABORTION LAWS: MAKING A CASE FOR THE UNBORN

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Abstract

An increasing number of women from across the globe now view abortion as their fundamental right. On the one hand, the right to abort unborn babies is viewed as being part and parcel of the third generation right couched as the right of women to reproductive health; on the other hand, it is viewed as being part of a woman's right to her privacy. The major contention is that a woman should not be compelled to carry pregnancy to term when she is not mentally, economically or otherwise ready to do so; and since abortion is a delicate medical process which can endanger the life of the woman if not done well or if done by unqualified medics, the law should preserve the life of women as well as their sensibilities by making abortion legal. In fact it is argued that whatever a woman chooses to do with her body, which is meant to include her pregnancy so to say, is her private business and should not attract the attention of the law or the public. The argument sounds very cogent but the question that refuses to go away is "what about the unborn child?" does he/she have the right to live or is that subject to the will of the would be mother and the whim of the government of the day? This research work sifted through already existing laws to find that the unborn are also protected by law and have the right to live. Recommendations are made towards harnessing these laws for the protection of the rights of both mother and the unborn child.

Keywords: Abortion, Right to Life, Right to Privacy, Women's Right to Reproductive Health.

What is Abortion

The word "abortion" can be defined in several ways. It is the deliberate termination of a pregnancy after, accompanied by, resulting in, or closely followed by the death of the embryo or fetus[1]; the removal of an embryo or fetus from the uterus in order to end a pregnancy.[2]

An abortion is a procedure that ends a pregnancy so that it doesn't result in the birth of a child. Abortions can be medical[3] or surgical. Medication abortion is done up to nine weeks, after that it has to be surgical.

Global Abortion Laws

Britain's Offences Against the Person Act (OAPA) 1861 made it a crime for a woman to procure a miscarriage or enlist another help in doing so. However the Abortion Act of 1967[4] states that an abortion is legal if it is performed by a registered medical practitioner and is authorized by two doctors, acting in good faith, on one or more of certain grounds which includes:

> the pregnancy not exceeding twenty four weeks and the continuance of the pregnancy having the potential to cause physical or mental injury to the woman or any existing children of her family; the substantial risk that if the child is born, it

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1 Abortion Definition & Meaning – Merriam-Webster <https://www.merriam webster.com/dictionary/abortion>

2 Abortion Definition and Meaning/Dictionary.com <https://www.dictionary.com/browse/abortion>

3 In which case pills are used.

4 As amended by the Human Fertilization and Embryology Act 1990.

> would suffer such physical or mental abnormalities as to be seriously handicapped; that the continuation of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated.[5]

In the USA, 30 states had banned abortion outright prior to 1973. However, the Supreme Court decision in Roe v Wade[6] forced these states to legalize abortion.[7] Consequent upon that, abortion became legal in the USA for fifty years. However on the 24th of June 2022, the US Supreme Court in another landmark case of Dobbs v Jackson Women's Health Organization[8] overturned that decision, holding that abortion is not a constitutional right as the Constitution does not mention it and its substantive right was not "deeply rooted" in the country's history.

For example, a 2021 Texas law (S.B. 8) empowered individual citizens to sue anyone they discovered had performed or aided an abortion, even if they had never met any of the parties involved. This regulation had not appeared in Texas' pre-*Roe v Wade* abortion laws.[9]

In response to the overturning of Roe v Wade, crowds of Americans went out on the streets protesting, that the latest judgment infringes the sexual and reproductive rights of women. Banners and placards went up, carrying slogans like "bans off our bodies", "abortion is essential", "my body my choice", "everyone deserves the power to decide." Many prominent people in America were also against the Supreme Court ruling.

With rumors and speculations pervading the population as to the possibility of the rule in Roe v Wade being overturned, President Joe Biden said in a white house statement, "I believe that a woman's right to choose is fundamental, Roe has been the law of the land for almost fifty years, and basic fairness and stability of our law demand that it be not overturned."[10] The president also said he is ready to work with congress in order to codify Roe v Wade as federal law.[11] True to his word, on the third of August, barely six weeks after the Supreme Court ruling, the president signed an executive order to help ensure access to abortion in the light of the Supreme Court decision of June 24th which eliminated the constitutional right to the procedure. According to him, "women's health and lives are on the line."

Abortion laws around the world come in degrees, ranging from abortion on demand where abortion is totally free to abortion being allowed in certain circumstances. It can be categorized as follows:

Category 1

Abortion not permitted under any circumstances, including when the pregnant woman's life or health is at risk. 24 countries fall within this category.

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[5] British Pregnancy Advisory Services "Britain's abortion Law/Briefings/Advocacy," <https//www.bpas.org>

[6] 410 U.S. 113 (1973). This was a landmark decision of the US Supreme Court in which the court ruled that the constitution of the United States conferred the right to have an abortion.

[7] https://worldpopulation review.com/country-rankings/countries-where-abortion-is-legal

[8] 2022 U.S. LEXIS 3057

[9] *supra*

[10] https://www.aljazeera.com/news/2022/5/3/us-reacts-to-report-on-overturning-abortion-ruling.

[11] Ibid.

Category 2
Abortion permitted when the pregnant woman's life is at risk. 42 countries fall within this category.
Category 3
Abortion permitted on the basis of health or therapeutic grounds. 52 countries are in this category.
Category 4
Abortion permitted under a broad range of circumstances, including a pregnant woman's actual or reasonably foreseeable environmental and her social or economic circumstances in considering the potential impact of pregnancy and childbearing. 13 countries are in this category.
Category 5
Abortion allowed on request. 72 countries fall within this category.[12]

There are twenty four countries in which abortion is illegal in all circumstances.[13] However, most countries have adopted a more nuanced approach. In some countries abortion is legal in cases in which the pregnancy is the result of rape, incest, or if the fetus has a noticeable developmental impairment.[14] In some countries, like China, South Korea, Singapore, India etc, gender based abortion is legal; and due to cultural biases, female fetuses are generally targeted for abortion much more often than males.

Gestational Limits
Nearly every country in which abortion is legal has what is known as a gestational limit, which means a fetus or embryo can be aborted early in the pregnancy, but cannot be aborted once it reaches a certain stage of development. This is usually twelve weeks, but may be as low as six weeks or as high as twenty four weeks.[15] Gestational limits often vary depending on the legal framework, including circumstances under which abortion is allowed. In countries allowing abortion on request, the most common gestational limit is 12 weeks. However, these countries often permit abortion under a range of circumstances after this limit has expired.[16]

UN treaty monitoring bodies have not explicitly provided guidance on gestational limits. The working Group on the issue of Discrimination against Women in Law and Practice recommends that states allow women to terminate a pregnancy on request during first trimester and later on in pregnancy where the woman's life or health is at risk and in cases of rape or incest.[17]

The World Health Organization (WHO) stated in its *Safe abortion: technical and policy guidance for health systems* that efforts to impose gestational limits on abortion may have negative consequences for women whose pregnancies have exceeded these limits and may "force some women to seek services from unsafe providers, or self-induce with misoprostol or a less-safe method, or force

[12] Usetoday.com
[13] The Center for Reproductive Rights has noted that "laws that make no explicit exception to save a woman's life are normally interpreted to permit life-saving abortions on ground of the general criminal law defense of 'necessity'"- Eva Chen Countries where abortion is legal/illegal amid Roe v Wade overturn. https://www.usatoday.com>news
[14] Ibid.
[15] Countries Where Abortion is Illegal 2022. http://worldpopulationreveiw.com/country-rankings/countries-where-abortion-is-illegal.
[16] Law and Policy Guide: Gestational Limits, reproductiverights.org
[17] Human Rights Council, (33rd session, 2016), Report of the Working Group on the issue of discrimination against women in law and in practice, paragraph 107 (c), U.N.Doc.A/HRC/32/44 \92016).

them to seek services in other countries, which is costly, delays access and creates social inequalities."[18]

According to statistics, the practice of abortion in Nigeria is widespread and that has the pro-abortion campaigners rooting for it. According to them, since the law has proved ineffective in preventing the thousands of abortions conducted in safe clandestine establishments, perhaps the time has come to consider an alternative course of action by legalizing the performance of abortion practices across Nigeria.[19] The argument also rests on the primacy of autonomy due to the woman in question, enshrined (they say) in their legal right to privacy under the constitution of the Federal Republic of Nigeria, 1999. It is contended that [20]

In the face of this overwhelming support for abortion by member states of the United Nations, it becomes not just pertinent but imperative to reiterate the position of international law as it concerns the right of the unborn child.

The Right to Privacy

Article 12 of the Universal Declaration of Human Rights states that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation" Section 37 of Nigerian constitution protects the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is guaranteed and protected. This provision, as affirmed in *Ezeadukwa v Maduka*[21] makes it illegal and unconstitutional for the police or any other security official to search any person's residence without lawful warrant. It is of note that section 45 of said constitution allows the restriction of the fundamental rights in certain cases which include public morality and the protection of the rights and freedoms of others. Protection of the right to live for the unborn certainly falls within these exceptions.

In the USA, The Right to Privacy was recognized as the 'right to be let alone'. The US Supreme Court however has continued to extend the boundaries of that right. From the right of married couples to purchase of contraceptives, to the right of unmarried couples to do the same, holding the constitutionally protected right of privacy to be inherent in the individual, not the couple. Under the same banner of privacy, the court extended protection to persons of the same sex who choose to engage in sexual conduct, giving them full right to engage in their conduct without government intervention. Then the case of Roe v Wade, where the court held that the concept of personal liberty and restrictions upon state action is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[22]

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[18] WORLD HEALTH ORGANIZATION, SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS 93 (2nd ed. 2012), available at apps.who.int/iris/bitstream/handle/10665/70914/9789241548434_eng.pdf?sequence=1.

[19] Cheluchi Onyemelukwe, Pdf abortion laws in Nigeria , researchgate

[20] Jackson, Emily, Medical Law: Text, Cases and Materials (4th edn, Oxford University Press 2016) 699, as quoted in Cheluchi Onyemelukwe, *op cit*

[21] (1997) LCN/0328(CA)

[22] Legal Information Institute, right to privacy, https://www.law.cornell.edu/wex/right_to_privacy

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Meaning of Sexual Reproductive Right/Health

There is no definite definition of the phrase 'sexual reproductive health', there is rather a plethora of opinions explaining what it entails; we'll try to wade through that. Sexual reproductive health has been defined as a person's right to a health body and the autonomy, education and healthcare to freely decide who to have sex with and how to avoid sexually transmitted infections or unintended pregnancy. Sexual health is an integral part of overall health and well-being, ensuring everyone can have pleasurable and safe sexual experience, free of coercion, discrimination or health risk.[23]

International Conference on Population and Development referred to the term "reproductive rights" as embracing "certain human rights that are already recognized in … international human rights documents and other consensus documents"[24]

Reproductive rights are rights that rest on the recognition of the basic right of couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence.[25] Reproductive health has been defined as "a state of complete physical, mental and social well-being…in all matters relating to the reproductive system.[26]

The three key goals of sexual and reproductive health have been stated as

1. Preventing unintended pregnancy,
2. Improving maternal health and
3. Preventing, diagnosing and treating sexually transmitted infections (STIs) including HIV/AIDS.[27]

Article 12(1) of CEDAW provides that State parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on[28] the basis of equality of men and women, access to health care services, including those relating to family planning.

Article 12(2) Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation

[23] "What is sexual and reproductive health?" <https://www.msichoices.org/what-we-do/learn/what-is-sexual-and-reproductive-health/>

[24] Un.org/womenwatch/daw/csw/shalev.html

[25] Prograramme of action of international Conference on Population and Development.<un.org/womenwatch/daw/csw/shalev.html>

[26] Ibid, paragraph 7.2

[27] Susan A. Cohen, "The Broad Benefits of Investing in Sexual and Reproductive Health" Guttmacher Policy Review, Volume 7, Issue 1. <https://www.Guttmacher.org/gpr/2004/03/broad-benefits-investing-sexual-and-reproductive-health.>

[28]

Legal Framework Protecting Women's Reproductive Rights

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is another human rights document which specifically protects the rights of women. In article 16(1)(e), it charges States Parties to ensure that on a basis of men and women, both get the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise the rights.

These provisions of CEDAW are clear, the intention being that women should not be forced by their men to have children when they are not ready and the advocated means of ensuring this is giving women access to family planning. Again responsible sexual life entails making sure that the woman has intercourse during her safe period or that she uses contraceptives to prevent pregnancy and not easy and endless abortions. As soon as pregnancy occurs, another player has entered the game with his/her own rights, basically the right to live which is protected by law for all humans. The only mention there is of abortion in international human rights documents is made in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo protocol),[29] ratified by Nigeria in 2004. The treaty charged States Parties to ensure the respect for and promotion of women's right to health in which it included sexual and reproductive rights. It held sexual and reproductive rights to include women's right to control their fertility; to decide whether to have children, the number of children and the spacing of children. It includes the right to choose any method of contraception; to self protection and protection against sexually transmitted infection; to have family planning education. Article 14(2)(c) of the Maputo Protocol urges all rectifying countries to "protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus."

It is the considered opinion of the author that article14(2)(c) is a constructive mess of confusion for these reasons-

1. **Lumping sexual assault together with rape:**
   Rape is when a person intentionally penetrates another's vagina, anus or mouth with a penis, without the other person's consent while sexual assault is when a person penetrates another person's vagina or anus with any part of the body other than a penis or by using an object, without the person's consent.[30] By the foregoing definition, a woman cannot get pregnant by reason of sexual assault. That is to say that any pregnancy a woman would be aborting as a result of a sexual assault would be a pregnancy she was already carrying before the sexual assault. This provision tends to support the termination of already existing pregnancies because of sexual assault.
2. **Advocating abortion for incest:**
   When we talk of incest, who is responsible for it? Should the verdict of death be recommend for the unborn child for an act perpetrated by others? According to a criminal law principle, a person cannot be punished for the crime of another. If the law views incest as wrong or

[29] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) 2003.

[30] Metropolitan police, What is rape and sexual assault? met.police.uk

criminal, then the perpetrators of that act should be punished and not the innocent unborn child.

3. "Mental health" is an ambiguous phrase which has the potential to cover just about any excuse and unreasonable reason.

Most importantly, the ACHPR recognizes that

1. The enjoyment of rights and freedoms also implies the performance of duties on the part of everyone;[31]
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others.[32]
3. Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.[33]

Maputo Protocol mandates States Parties to ensure that, in those countries where the death penalty still exists, not to carry out death sentences on pregnant or nursing women.[34] This provision which is replicated in the laws of all climes is to protect the life of the unborn child by shelving the deserved punishment of the mother.

Article 6(1) of the ICCPR[35] provides that every human being has the inherent right to life. In Article 6(5), it provides that sentence of death shall not be imposed for crimes committed by persons below the age of eighteen years of age and shall not be carried out on pregnant women. In May 2015, the Violence Against Persons (Prohibition) Act(VAPP) was signed into law.

For Nigeria, the law prohibits the use of poison or other noxious thing or the use of any other means to intentionally procure abortion. The contravention of this law is attended by fourteen years imprisonment.[36] Where a woman, intending to procure her own abortion administers to herself any poison, she is liable to imprisonment for seven years.[37] The code allows abortion when done in good fate in order to save the woman's life.[38]

The penal code also which is applicable to northern Nigeria has almost identical provisions.[39] Section 309 Criminal Code Act provides that when a child dies in consequence of an act done or omitted to be done by any person before or during its birth, the person who did or omitted to do such act is deemed to have killed the child.

These various laws and instruments are made based on sure fundamental ideologies connecting to the advancement of continued human existence, avoidance of hurt, promotion and sustenance of

[31] Preamble to ACHPR
[32] African Charter on Human and Peoples' Rights, article 27(2)
[33] Artile 4, ACHPR
[34] Article IV(2)(j), Protocol of the African Charter on Human and Peoples' Rights.
[35] International Convention on Civil and Political Rights
[36] Section 228 of the criminal code act.
[37] Ibid, section 228
[38] Ibid section 297
[39] Sections 232, 233 and 234.

human dignity and the enhancement of human development. These ideologies identify the intricate theory that the child is the foundation of humanity and he or she guarantees its continuity.[40]

Modern laws of different nations tend to agree on timing the life of the child. However, what is important is that this embryo or fetus or pregnancy is human and has life, life that is separate from the mother's, a human life which needs to be protected by the law.

For women who get pregnant as a result of being raped, it is very understandable that they are filled with fury and resentment at the choice being taken away from them. They want to expunge the memory of that terrible experience by aborting the child. However, I will advocate rehabilitation, a second chance to consciously choose the life of that child.

Right to Life for the Unborn Child

The right of the unborn child to life and survival is inherent and protected by international law. Article 3 of the Universal Declaration of Human Rights (UDHR) states that "everyone has the right to life."[41]

Article 6 of the International Covenant on Civil and Political Rights (ICCPR), provides that every human being has the inherent right to life. It went on to say that this right shall be protected by law and no one shall be arbitrary deprived of his life.

International Covenant on Economic, Social and Cultural Rights (ICESCR) specifically referred to the unborn in article 12(2)(a), adjuring States Parties to take steps towards the reduction of the still-birth rate.

The United Nations Declaration of the Rights of a Child in its preamble noted that children need special safeguard and care, including appropriate legal protection, before as well as after birth.[42]

The preamble to the Convention on the Rights of the Child (CRC) reaffirms the United Nations' faith in fundamental human rights and in the dignity and worth of the human person. It goes on to declare that "the child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." States Parties recognize that every child has the inherent right to life and are adjoined to ensure to the maximum extent possible, the survival and development of the child.[43]

Nigerian law provides that a child may bring an action for damages against a person for harm or injury caused to the child willfully, recklessly, negligently or through neglect before, during or after the birth of that child.[44]

[40] Onyema Nnaemeka esq., The rights of a child in
[41] UDHR 1948
[42] UNDRC 1959
[43] Article 6(1) & (2), CRC 1989.
[44] Section 17(1) of the Child's Right Act 2003.

Where the father of an unborn child dies intestate, the unborn child is entitled, if he was conceived during the lifetime of his father, to be considered in the distribution of the estate of the deceased father.[45] Where the mother of an unborn child dies intestate before the child is delivered, the unborn child is entitled, if he survives his mother, to be considered in the distribution of the estate of the deceased mother.

From these provisions, it is obvious that international law recognizes and protects the right to life of the unborn child. A sentence of death over a pregnant woman or nursing mother is shelved not for the sake of the woman but for the life of the child. To turn around and hold that the same woman has the right of life or death over the same child is absurd to say the least.

A child is not really a part of a woman's body, he/she is a separate entity only borrowing her body for a while. It is dependent for survival on the woman but so is a new born baby, it must be cared for or it dies. If the dependence of a new born baby on adults to survive does not condemn it to being killed if the said adult doesn't feel like taking care of him/her, then there is no justification for condemning an unborn child to death just because the woman whose responsibility it is to ensure his/her survival doesn't feel like it.

Borrowing from the criminal law principle that a person is responsible for the direct consequences of his actions, a child cannot be unwanted. Biding the possible exception of rape situations, pregnancy cannot come uninvited therefore to call a child unwanted is the height of irresponsibility.

Pope Gregory xiv postulated that a fetus has no soul until the quickening, which is probably the reason modern laws of different nations tend to agree on timing the life of the unborn child. However, what is important is that this embryo or fetus or pregnancy is human and has life which needs to be protected by the law.

Commenting on the American issue, an English Member of Parliament, Carla Lockhart had said that abortion is not a human right in any binding international law. According to her, "giving legal protection to the unborn is arguably a clear recognition of the unborn life, and America have done just that, and I welcome the decision." [46]

In considering the fight by some women to be granted easy access to abortions without end, this dictum by Oputa C.A. comes to mind:

> "freedom does not mean or imply the right to do whatever we please, even if it is evil. True freedom is the right to do whatever we ought. The right to do whatever we please reduces freedom to license. It confuses freedom within the law, including God's laws, with freedom from those laws. Real freedom implies that we are

[45] Section 18(2) of the Child Right Act

[46] Righttolife.org.uk/news/explainer-us-supreme-court-decision-to-overturn-roe-v-wade?gclid=EalalQo>

masters of our judgements; that we make correct choices and that we act responsibly.[47]

Conclusion

It is the considered opinion of the authors that responsible sexual life entails making sure that the woman engages in sexual activities during her safe period or that she uses contraceptive to prevent pregnancy and not resort to abortions on end. A woman's right to her privacy or her private life does not translate to a right to kill the unborn at will; as we have seen that right ends where the unborn child's right to life begins. As soon as pregnancy occurs, another player has entered the game with his/her own rights and a demand on humanity, a demand for the preservation of life which we all are under an obligation to fulfill. The UN should ensure that States parties adhere to the provisions of international treaties by enacting positive laws geared towards protection of the right to life of the unborn.

[47] Oputa, C.A "Abortion and Total Vision of the Human Life" in Okeke, C. ed. Towards Functional Justice: Seminar papers of Justice Chukwudifu A. Oputa [Ibadan: God Press Limited, 2007]:pp. 285-286