

**AN ANALYSIS OF THE CONCEPT OF THE RIGHT TO  
CHOOSE IN RELATION TO ABORTION IN NIGERIA: A CASE  
STUDY OF THE CONVENTION ON THE ELIMINATION OF  
ALL FORMS OF DISCRIMINATION AGAINST WOMEN  
(CEDAW)**

**GANIAT MOBOLAJI OLATOKUN**

**DOCTOR OF PHILOSOPHY  
UNIVERSITI UTARA MALAYSIA**

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## **ABSTRACT**

The right to choose provision under Article 16(1) (e) of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) has been interpreted to mean an abortion right for all women all over the world by Recommendation 24 of CEDAW Committee. Although this Convention is yet to be domesticated in Nigeria, there is a Reproductive Right Bill, passed in 2005 by a State's House of Assembly, purporting to make abortion legal in the state. It is the contention of this study that abortion right interpretation of the right to choose under CEDAW cannot be sustained in Nigeria bearing in mind that Nigeria has the second highest maternal death rate in the whole world as a result of abortion. Aside from this, the abortion right interpretation of the right to choose under CEDAW is inconsistent with other International Human Rights Instruments with provisions recognizing the right to life of the foetus. The interpretation is also capable of undermining and under-estimating the criminal laws of Nigeria. Despite the fact that Nigerians are in dire need of CEDAW, it is doubtful if the Government of Nigeria will domesticate CEDAW if the abortion right interpretation is upheld. In order to solve these problems, a socio-legal research went underway consisting of a conceptual analysis showcasing the fact that the right to choose under CEDAW represents the right women have to reproduce and not the right to abort. This belief has been found to have a concrete foundation in the Constitution of the Federal Republic of Nigeria and the International Human Rights Instruments. In order to support this conceptual analysis, a case study was carried out within eight (8) states of the Federation of Nigeria. The results, which were influenced by culture, health and religion, reveal that the sanctity of human life, whether born or unborn, is very paramount. Hence, the significance of these results lies in the fact that the right to reproduce interpretation of the right to choose under CEDAW becomes an integral part of future reproductive right policy in Nigeria.

Keywords: Abortion, CEDAW, Nigeria, Right to choose, Right to Reproduce.

## ABSTRAK (BAHASA)

Hak untuk memilih peruntukan yang terkandung di bawah Perkara 16 (1) (e) *Konvensyen Penghapusan Segala Bentuk Diskriminasi Terhadap Wanita* (CEDAW) telah ditafsirkan sebagai hak pengguguran bagi semua wanita di seluruh dunia melalui Syor 24 Jawatankuasa CEDAW. Walaupun Konvensyen ini masih belum diguna pakai di Nigeria, terdapat Rang Undang-Undang Hak Reproduktif, yang diluluskan pada tahun 2005 oleh Dewan Perhimpunan Negeri, yang bertujuan membenarkan pengguguran di sisi undang-undang negeri. Perdebatan dalam kajian ini ialah tentang tafsiran hak pengguguran terhadap tafsiran hak untuk memilih di bawah CEDAW tidak boleh dikekalkan di Nigeria memandangkan negara ini mencatat kadar kematian ibu kedua tertinggi di seluruh dunia akibat pengguguran. Selain itu, tafsiran tentang hak pengguguran terhadap tafsiran hak untuk memilih di bawah CEDAW tidak konsisten dengan Instrumen Hak Asasi Manusia Antarabangsa yang lain, dengan peruntukan yang mengiktiraf hak untuk janin terus hidup. Tafsirannya juga meremehkan dan memperkecilkan undang-undang jenayah Nigeria. Walaupun Nigeria amat memerlukan CEDAW, terdapat keraguan bagi kerajaan Nigeria untuk mengguna pakai CEDAW jika tafsiran tentang hak pengguguran ditegakkan. Dalam usaha untuk menyelesaikan masalah-masalah ini, satu kajian undang-undang dan sosial telah dijalankan. Kajian ini mempamerkan hakikat bahawa hak untuk memilih di bawah CEDAW mewakili keperluan hak wanita untuk melahirkan dan bukannya hak untuk menggugurkan. Kepercayaan ini didapati mempunyai asas yang konkrit dalam Perlembagaan Republik Persekutuan Nigeria dan Instrumen Hak Asasi Manusia Antarabangsa. Dalam usaha menyokong analisis konsep ini, satu kajian kes telah dijalankan di lapan (8) buah negeri dalam Persekutuan Nigeria. Keputusan yang dipengaruhi oleh faktor budaya, kesihatan dan agama, mendedahkan bahawa kesucian hidup manusia, sama ada yang lahir atau yang belum lahir, adalah sangat penting. Oleh itu, kepentingan keputusan ini terletak pada hakikat bahawa tafsiran hak untuk melahirkan terhadap tafsiran hak untuk melahirkan terhadap tafsiran hak untuk memilih di bawah CEDAW menjadi sebahagian daripada dasar hak reproduktif di Nigeria pada masa hadapan.

Kata kunci: Pengguguran, CEDAW, Nigeria, Hak untuk memilih, Hak untuk melahirkan.

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## **DECLARATION**

I hereby declare that this thesis is based on my original work except for quotations and citations which have been acknowledged. I also declare that it has not been previously or concurrently submitted for any other degrees at Universiti Utara Malaysia or other institution.

## **DEDICATION**

To Olatokunbo,  
For many years of love,  
devotion and tolerance, and  
for being willing to entertain the possibility  
that for every dark tunnel, light shall come one  
day, for every hardship, relief shall surely come.

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Convention on the Prevention and Punishment of the Crime of Genocide (1948)  
Criminal Code Act Chapter 77 Law of the Federation of Nigeria (1990)  
Declaration of the Rights of the Child, (1959)  
Draft American Declaration of the International Rights and Duties of Man (1948)  
Draft International Covenant on Human Rights (1947)  
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Women Reproductive Right Law Anambra State (2005)  
Universal Declaration of Human Rights (1948)  
Vienna Convention of the Law of Treaties (1969)

## LIST OF ABBREVIATIONS

AAAC	African Anti Abortion Coalition
ACTs	Artemisinin-based Combination Therapy
AMA	American Medical Association
APBN	Association of Professional Bodies in Nigeria
BMA	British Medical Association
CAN	Christian Association of Nigeria
CEDAW	Convention on the Elimination of All forms of Discrimination against Women
ECHR	European Court of Human Right
ECOSOC	Economic and Social Council
FGS	Focus Group Session
FIDA	Federacion Internacional de Abogadas, (International Federation of Women Lawyers)
FOMWAN	Federation of Moslem Women Association of Nigeria
FRK	Funmilayo Ransome Kuti
GGR	Global Gag Rule
HMO	Health Maintenance Organization
ICPD	International Conference on Population and Development
IFS	Ideal Family Size
KI	Key Informant
LLINs	Long Lasting Insecticide Nets
MDGs	Millennium Development Goals
NCJW	National Council of Jewish Women
NCWS	National Council of Woman Society
NEC	National Executive Council
NGO	Non Governmental Organization
NMCP	Nigerian Malaria Control Plan
NWLR	Nigerian Weekly Law Report
PCCA	President Customary Court of Appeal
RUD	Reservations, Understandings and Declarations
SFRC	Senate Committee on Foreign Relations
STIWA	Social Transformation Including Women in Africa
SUFI	Scale Up for Impact
UDHR	Universal Declaration of Human Right
UK	United Kingdom
UNESCO	United Nations Education, Scientific and Cultural Organization
USA	United States of America
USAID	United States Agency for International Development
VVF	Vesico-Vaginal Fistulae
WHARC	Women Health and Research Centre
WHO	World Health Organization

# CHAPTER ONE

## INTRODUCTION

### 1.1 Background of the Study

One area that has captured the interest of the United Nations is the equality in the rights of men and women.<sup>1</sup> Women, being classified as a minority group therefore, enjoy special considerations, and rights affecting them are given very high priority. Consequently, the United Nations General Assembly adopted the Convention on the Elimination of all forms of Discrimination against Women, (CEDAW) on the 18<sup>th</sup> December 1979. This Convention is a human right instrument which promotes the principle of non-discrimination and equal status of men and women. The Convention focuses on three key issues. One of such issues is reproductive right. The right to choose forms an aspect of reproductive right.<sup>2</sup>

Conversely, the right to choose according to the radical feminists of the 1960s means, the right women have to determine what happens to their bodies.<sup>3</sup> To radical

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<sup>1</sup>Article 2 of the *Universal Declaration of Human Rights* (1948); Devaki Jain, *Women, Development and UN: A Sixty-Year Quest for Equality and Justice*, (Bloomington USA: Indiana University Press, 2005), 11-12; Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," *European Journal of International Law* 19, no. 4 (2008): 655. <http://www.ejil.org/pdfs/19/4/1658.pdf> (accessed November 25, 2011).

<sup>2</sup>Other aspects of reproductive rights includes, fully shared responsibility for child rearing by both sexes, right to maternity and family planning. Reproductive rights under CEDAW are contained in Article 12 dealing with health and Article 16 dealing with marriage and family. The combined effect of these articles is that, in order for the good health of women; women should be able to decide freely and responsibly as regards the number and spacing of their children. The World Health Organization has described birth spacing as a procedure which save lives of mothers and babies, reduces abortion and unwanted pregnancies and improves children's health and mother's health. The World Health Organization, *Birth Spacing Cluster Representatives and Health Volunteers Guide* (2008) 2-3 [www.emro.who.int/mps/pdf](http://www.emro.who.int/mps/pdf) (accessed November 26, 2011).

<sup>3</sup>According to Firestone, a radical feminist, the connection which women usually have with men is an invasion of the women's body, and the resultant effect of that connection, which is pregnancy, should be left at the mercy of the women. R. west, "Jurisprudence and Gender," in *Feminist Jurisprudence* ed. Patricia Smith, (Madison NY: Oxford University Press, 1993), 505-506; Martha C. Nassbaum, "R. west, Jurisprudence and Gender, Defending Radical Feminism," *University of Chicago Law Review* 75, no.3 (2008): 985; The Administrator of the United Nations Development Programme,

feminists, this right extends to the decision whether or not to abort a pregnancy. This decision should be left absolutely with the women. This view was boosted in 1973 by the United States Supreme Court in the case of *Roe v. Wade*.<sup>4</sup> By this decision, the court recognizes that a woman has a right to have an abortion under the 14<sup>th</sup> Amendment to the American Constitution. The court ruled that, when the state interests are compelling, the state can make laws regulating or limiting the woman's fundamental right to privacy.<sup>5</sup>

The court found two conflicting state interests as a woman approaches full term, (i) preserving and protecting the pregnant woman's health, and (ii) protecting the potentiality of human life. The whole process of pregnancy was divided into three trimesters and the court explained how these interests came into play with regard to the decision whether or not to abort a pregnancy. The court held that, during the first trimester, which starts from conception till around the 12<sup>th</sup> week, the woman and her doctor are free to decide on what to do with the pregnancy without any state intervention. During the second trimester, which elapsed at the 28<sup>th</sup> week, the state, while showing interest in maternal health, can adopt regulations seeking to promote safe abortion. When the fetus reaches the point of viability at the third trimester, abortion may be prohibited by the state except when it is necessary to the mother's health.<sup>6</sup>

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when speaking of a 1995 worldwide survey of the status of women, that 'life is dramatically unfair to women'. Mc Elvaine, Robert S, *Eve Seed: Biology, the Sexes and the Course of Human History*, (New York NY: McGraw-Hill Company, 2000), 1.

<sup>4</sup> 410 US 113 (1973).

<sup>5</sup>D. Sperling, *Management of Post-Mortem Pregnancy. Legal Philosophical Aspect* (England: Ashgate Publishing Company, 2006), 2; R. J. Cook and B. M. Dickens, "Human Right Dynamics of Abortion Law Reform," *Human Rights Quarterly* 25, no.1 (2003): 22-25. <http://www.jstor.org/eserv.uum.edu.my/stable/pdfplus/2003.pub> (accessed February 3, 2011).

<sup>6</sup>Sperling, *Management of Post-Mortem Pregnancy*, 2.



In the United States of America, the 14<sup>th</sup> Amendment guarantees a woman's right to privacy, and by implication, a woman's right to choose abortion.<sup>7</sup> Since this decision, most nations of the world began to have a more liberal view towards abortion. According to Susan Cohen, 60% of women of reproductive age (15-44) live in countries where abortion is legal, while the remaining 40% of women of reproductive age live in countries where abortion is restricted.<sup>8</sup>

Nigeria is one of those countries with restrictive abortion laws. Termination of pregnancy in Nigeria is restricted under both the Penal Code (applicable in the North) and Criminal Code (applicable in the South) and carries very heavy jail term of up to 14/years for the provider and 7/years for the woman, except it is performed to save the woman's life.<sup>9</sup> Based on this, some quarters of the Nigerian population believe that this criminal law provision is discriminatory against women. They felt that, since both men and women are equal before the law, there should be no restriction to deprive women from doing whatever they want to do with their bodies. Any attempt to stop women from exercising this right is seen as a discrimination which CEDAW has eliminated through the reproductive rights. The right to choose

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<sup>7</sup>Right to privacy has been held to mean the right an individual, married or single, has to be free from unwanted government intrusion in matters so fundamentally affecting a person as decision whether to bear or beget a child. This was the statement made by the court in the case of *Eisenstand v. Baird* 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349, (1972). The court has also employ the right of privacy clause in *Grisswold v. Connecticut* 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510, (1965), where law banning the use of contraceptive by married couples was declared unconstitutional on the grounds of intruding into the privacy of persons.

<sup>8</sup>Susan Cohen, "Facts and Consequences: Legality, Incidence and Safety of Abortion Worldwide" *Guttmacher Policy Review* 12, no.4 (2009). <http://www.guttmacher.org/pubs/gpr/12/4/gpr120402.html> (accessed June 15, 2012). Previously, 25% of the world population lives in countries where abortion is restricted, and 61% of the world population live in countries where abortion is allowed. Siegrid Tautz, "(un) safe Abortion, A Review and Discussion Paper" *Federal Ministry for Economic Cooperation and Development. Health and Population, Supraregional Project: Promotion of Reproductive Health*. 4320 (2004): 7. [http://www.giz.de/Themen/de/dokumente/de-disk-ssa4\(1\).pdf](http://www.giz.de/Themen/de/dokumente/de-disk-ssa4(1).pdf) (accessed November 20, 2011); Anika Rahman, Laura Katzive and Stanley k. Henshaw, "A Global Review of Laws on Induced Abortion, 1985-1997," *International Family Planning Perspectives* 24, no.2 (1998):57. <http://www.guttmacher.org/pubs/journals/2405698.html/> (accessed November 20, 2011).

<sup>9</sup> Secs 232 and 235 Penal Code Law of Nigeria 1963 and secs 228, 229 and 230 Criminal Code Law of Nigeria 1990.

as defined by radical feminists of the 1960s is thus implored to interpret the right to choose within CEDAW.

However, another segment of the Nigerian population believes that the virtues of African tradition, particularly, Nigerian culture, which is interwoven in their religions and practices, will be subverted, and more problems will emerge if the radical interpretation of the right to choose is imported into the Nigerian laws.<sup>10</sup>

Abortion is a major cause of social and clinical problem in Nigeria.<sup>11</sup> Based on the fact that the Criminal laws of the country prohibit abortion, women in Nigeria take to abortion in clandestine places<sup>12</sup> leading to very high increase in abortion-related maternal morbidity and death.<sup>13</sup> Abortion is also the cause of long term morbidity in

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<sup>10</sup>In Imo state of Nigeria, a state in the East of Nigeria, the State's House of Assembly has been commended for rejecting the Imo State Women's Right Bill (2009). The legislature voted 13-1 against a bill that would have made abortion legal in the pro-life State. A former governor of the State had expressed shock on the wave to legalize abortion in Nigeria in the 21<sup>st</sup> century. The defeat of the bill has demonstrated that Nigeria, as a whole has deep respect for cultural norms and religious tenets. In Owerri, Nigeria, the rejection of the bill was tagged, a 'victory of the superior Imo cultural values over the new global western cultural revolution'. Orji Kalu, "Legalization of Abortion?, No Way" <http://www.sunnewsonline.com/webpages/colomnists/kalu/kalu/20-june-htm> (accessed March 22, 2011).

<sup>11</sup>F E Okonofua, "Clinical Consequences of Unsafe Abortion and their Management in Nigeria," *Clinical Issues in Reproductive Health. Prevention of Morbidity and Mortality from Induced and Unsafe Abortion in Nigeria* (1991): 19-20. (Being a paper delivered at the proceedings of a seminar Organized by the Department of Obstetrics, Gynaecology and Perinatology, Obafemi Awolowo University, Ile-Ife. Nigeria. 4-9 December 1991). [www.popcouncil.org/pdfs/ebert/abormorbmortnigeria.pdf](http://www.popcouncil.org/pdfs/ebert/abormorbmortnigeria.pdf) (accessed November 26, 2011); Singh Susheela, "Hospital Admissions Resulting from Unsafe Abortion: Estimates from 13 Developing Countries" *Lancet* 368, no. 9550 (2006): 1887-1889; Nwogu-Ikojo E. E. and Ezegwui H U, "Abortion Related Mortality in a Tertiary Medical Centre in Enugu, Nigeria," *Journal of Obstetrics and Gynaecology* 27, no.8 (2007): 835-836.

<sup>12</sup>Boniface A. Oye- Adeniran et al, "Induced Abortion in Nigeria: Findings from Focus Group Discussion," *African Journal on Reproductive Health* 9, no.1 (2005):134 <http://www.ingentaconnect.com/content/wharc/ajrh/2005/0000009/0000001/00016> (accessed March 2, 2011).

<sup>13</sup>F. E. Okonofua, *That She May Multiply Without Tears* (2006) being the inaugural lecture delivered by him on 7<sup>th</sup> December, 2006 at the University of Benin, Nigeria, 25; Patrick I. Okonta, Peter N. Ebeigbe and Ileogben Sunday- Adeoye, "Liberalization of Abortion and Reduction of Abortion Related morbidity and Mortality in Nigeria," *Acta Obstetrica et Gynecologica Scandinavica* 89, no.8 (2010):1087.

women including infertility, chronic pelvic pain, recurrent and spontaneous abortion and ectopic pregnancies.<sup>14</sup>

Abortion as a social problem has existed with arguments centring on whether or not to legalize it.<sup>15</sup> It is important to state that the controversy whether or not to legalize abortion in Nigeria dates as far back as 1982. A 1982 move to liberalize abortion by the society of Gynaecologist's and Obstetricians of Nigeria was opposed and the Termination of Pregnancy Bill, sponsored by the same society was defeated at the National Assembly. Religious leaders and the Nigerian Council of Women Societies of Nigeria were opposed to the Bill. They fear that its passage would promote sexual promiscuity.<sup>16</sup>

However, recently, the Anambra State House of Assembly in Nigeria has boycotted the National Assembly by passing a bill purporting to legalize abortion in the state,<sup>17</sup>

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<sup>14</sup>Abasiattai Anieken M. and Umoiyoho Aniefiok J., "A 6-Year Review of Maternal Deaths in A Teaching Hospital in South-South Nigeria," *Internet Journal of Gynaecology and Obstetrics*, 11, no.1 (2009): 5; D. Y. Buowari, "Pattern of Gynaecological Admission at a Rural Hospital in Nigeria," *The Internet Journal of Tropical Medicine* 7, no.1 (2010), <http://www.ispub.com/journal/the-internet-journal-of-tropical-medicine/volume-7-number-1/pattern-of-gynaecological-admission-at-a-rural-hospital-in-nigeria.html#sthash.rc1GV8i8.dpbs>. (accessed January 17, 2013).

<sup>15</sup>In a strongly worded letter by a group, named African Anti-Abortion Coalition (AAAC), to the late president of Nigeria, Musa Yar'Adua, the group informed the president that, some pro-abortion groups have shifted their fight against the Nigerian unborn children to the States' Houses of Assembly, after their crushing defeat at the National Assembly. The group wants the president to act on the issue. African Anti-Abortion Coalition, Chidicon Medical Center, [www.chidicon.com/AAAC.html](http://www.chidicon.com/AAAC.html) (accessed February 5, 2011). Even after the passage of the so-called Women's Reproductive Rights Law, in Anambra State, one of the Eastern States of Nigeria, there was an immediate worldwide condemnation from national and international pro-life groups alleging a constitutional violation, and a call for the outright striking out of the law. In another related development, in Imo State, another Eastern State of Nigeria, the State's House of Assembly has been commended for rejecting the Imo State Women's Right Bill (2009). The Legislators voted 13-1 against a bill that would have made abortion legal in the pro-life state. Kalu, "No Way"

<sup>16</sup>POPULATION POLICY DATA BANK maintained by the Population Division of the Department for Economics and Social Affairs of the United Nations Secretariat. [www.un.org/esa/population/publications/abortion/doc/nigeria.doc](http://www.un.org/esa/population/publications/abortion/doc/nigeria.doc) (accessed November 7, 2011).

<sup>17</sup> Women's Reproductive Rights Law, Anambra State (2005).

despite the fact that CEDAW has not been domesticated in Nigeria.<sup>18</sup> There is a strong claim now that, abortion can be legalized in Nigeria using the right to choose, an aspect of reproductive rights within CEDAW as its basis.<sup>19</sup>

It is the belief of this present research that, the right to choose, which is one aspect of reproductive right, cannot be interpreted radically as it is generally being contended. This believes has its justifications from the consistent nature of all international human rights instruments, in their respect for the unborn child's right to life.

All international human rights instruments are consistent in their right to life provisions of all citizens of the world generally, and in particular, the unborn child's right to life. Abortion is frowned at by all international human rights instruments, by their provisions as regards the right to life of the unborn. For example, Article 3 of the Universal Declaration of Human Rights,<sup>20</sup> states that, "everyone has the right to life, liberty, and security of person". The Preamble to the Declaration of the Rights of the Child, 1959, says 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". The Geneva Declaration of the Rights of the Child 1924, provides that, "the need for such special safeguard including legal protection for the child before as well as after birth". Article 1 of the Draft International

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<sup>18</sup>Theory of dualism holds in Nigeria. No treaty shall have the force of law, unless such treaty has been enacted into law by the National Assembly. Section 12, Nigerian Constitution. Also, General Sanni Abacha v. Gani Fawehinmi (2000) FWLR pt 4 533 at 585-586.

<sup>19</sup> Recommendation 24 of the CEDAW Committee has pointed out that neglect of health services that only women require is discrimination and a deficit that government must remedy. The committee further noted that criminalization of abortion is a barrier that states should improve. It must be pointed out quickly that, CEDAW committee is a body set up to monitor compliance of state parties with CEDAW rules. This being the case, it is not expected of that body to make recommendations contrary to what is contained in the body of the rules, it expected to monitor its compliance. There is nothing within the CEDAW rules to show the intents of recommendation 24. Consequently, many researchers in Nigeria tend to blame the restrictive penal laws for the high rate of maternal mortality, which to them is a discrimination against women. CEDAW is now being used as a means of 'legalizing abortion through the back door'. Sonnie Ekwuowusi, "Why Obasanjo Must Not Sign CEDAW," *This Day Newspapers* (Nigeria) May 16, 2007.

<sup>20</sup>GA. Res. 217A, art 3, UN, GAR, 3<sup>rd</sup> Sess, 1<sup>st</sup> Plen. Mtg. UN Doc A/8 (Dec, 12, 1948).

Covenant on Human Rights 1947<sup>21</sup> stipulates that, “it shall be unlawful to deprive a person, from the moment of conception, of his life and bodily integrity”. The Convention on the Prevention and Punishment of the Crime of Genocide 1948<sup>22</sup> states that, “the concern for the child before as well as after birth is here confirmed”. Other international human rights instruments with right to life provisions for the unborn are: International Covenant on Civil and Political Rights, 1966<sup>23</sup> and American Convention on Human Right, 1969.<sup>24</sup> If all these international human rights instruments are consistent in their provisions for the unborn child’s right to life, then the right to choose, an aspect of reproductive right under CEDAW cannot be interpreted differently. It is therefore submitted by the researcher that the Protocol to the African Charter on Human and People’s Right on the Rights of Women in Africa, authorizing medical abortion in a bid to protect the reproductive right of women, is inconsistent with all international human right instruments. The Protocol to the African Charter on Human and People’s Right of Women in Africa is the only international human rights instrument providing for abortion.<sup>25</sup>

It is further believed that, in the absence of any particular provision under CEDAW itself pointing to the right to abort for women, and in order for the criminal laws of the country to perform their functions of criminalizing abortion, the radical interpretation of the right to choose i.e., the right to abort cannot be sustained in Nigeria.

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<sup>21</sup> UN Doc. E. CN. 4/21.

<sup>22</sup>This Convention was approved by the United Nations General Assembly on the 9<sup>th</sup> December, the day before the Universal Declaration of Human Right was approved and it

<sup>23</sup>Art. 6(5)

<sup>24</sup>Art. 1(2)

<sup>25</sup>Piero A. Tozzi, *International Law and the Right to Abortion* (New York: Legal Studies Series, 2010), 2.

Hence, this research is concerned about giving the right to choose under CEDAW an interpretation suggesting a right to reproduce for women, instead of a right to abort.

## 1.2 Problem Statement

1. All international human rights instruments are consistent in their right to life provision of all citizens of the world generally, and in particular, the unborn's right to life. If the right to choose under CEDAW is interpreted to mean abortion right, that interpretation will be inconsistent with the right to life provision of the fetus under all other international human rights instruments.<sup>26</sup>
2. There is the claim in some quarters<sup>27</sup> in Nigeria that the Federal Legislative Houses has failed in their responsibilities to domesticate and implement CEDAW despite the country's ratification of the Convention since 1985.
3. There is a strong belief by some people in Nigeria, suggesting that the criminalization of abortion is the main cause of maternal mortality-- a discrimination against women, and therefore against her human right.<sup>28</sup> This has led in the use of right instrument-- CEDAW to justify the legalization of abortion in Nigeria.

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<sup>26</sup>For example, Art. 3 of the Universal Declaration of Human Rights, Universal Declaration of Human Right, GA. Res. 217A, art 3, UN, GAR, 3<sup>rd</sup> Sess, 1<sup>st</sup> Plen. Mtg. UN Doc A/8 (Dec, 12, 1948).

<sup>27</sup>Aniekwu Nkolika Ijeoma, "The Convention on the Elimination of all Foms of Discrimination Against Women and the Stuatus of Implementation on Health Care in Nigeria," *Liz Gilbert, David and Lucile Pakard Foundation*, 35. <http://www.wcl.american.edu/hrbrief/13/3ijeoma.pdf> (accessed June 11, 2012).

<sup>28</sup>Notable amongst those people (mostly researchers) that have linked maternal mortality to the restrictive abortion laws in Nigeria are, Professor F.E.Okonofua, Boniface A. Oye-Adeniran , Isaac F. Adewole, amongst others.

4. Clamour for the legalization of abortion in Nigeria on the basis of the right to choose under CEDAW despite the fact that Nigeria has the second highest maternal death rate in the whole world as a result of abortion.<sup>29</sup>

### 1.3 Research Questions

1. What are the fundamental principles of international human rights instruments in relation to the driving considerations to legalize abortion in Nigeria?
2. What is the reason behind the non-implementation of CEDAW in Nigeria in the context of the right to choose in relation to abortion?
3. How should the right to choose under CEDAW be interpreted in relation to women's right to abort in Nigeria?
4. What is the relationship between criminal law and legalization of abortion in Nigeria?
5. How relevant is the provision of the right to choose under CEDAW as the basis for the legalization of abortion in relation to the current move to legalize abortion in Nigeria, considering the high mortality rate as a result of abortion?
- 6.

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<sup>29</sup> This statement was made by the then minister at the 37<sup>th</sup> meeting of the National Council of Health held in Lagos, Nigeria from the 28<sup>th</sup> October to 1<sup>st</sup> November 1991. The background to the seminar on Critical Issues in Reproductive Health. Other sources have lent weight to the statement by the former minister. Ogunjimi Lucas Olusegun, Ibe Rosemary Thomas and Ikorok Maria Michael, "Curbing Maternal and Child Mortality: The Nigerian Experience" *International Journal of Nursing and Midwifery* 4, no.3 (2012): 35; Bosede Olanike Awoyemi and Olanrewaju Olaniyan, "The Demand for Abortion and Post Abortion Care in Nigeria," Paper for presentation at the Centre for the Study of African Economies Conference, 2011 held at St Catherine's college, Oxford, 20-22 March, (2011): 2.

#### **1.4 Research Objectives**

1. To examine the fundamental principles of international human right instruments in relation to the driving considerations for the legalization of abortion in Nigeria.
2. To examine the reason for the non-implementation of CEDAW in Nigeria in the context of the right to choose in relation to abortion.
3. To examine the interpretation of the right to choose under CEDAW in relation to women's right to abort in Nigeria.
4. To examine the relationship between criminal laws of Nigeria and the legalization of abortion in Nigeria.
5. To analyze the views of certain social actors in relation to the current move to legalize abortion in Nigeria using the right to choose within CEDAW as the basis, considering the high mortality rate as a result of abortion in the country.
6. To give recommendations based on the findings of the research.

#### **1.5 Significance of the Study**

The study is significant to many stakeholders in Nigeria, and even beyond. The stakeholders and the benefits they stand to derive from this study are hereunder presented:



The Government of Nigeria:

The major stakeholder in this study is the government of Nigeria. This is because the study intends to provide a policy basis for legislative development in the area of reproductive right and criminal regulations on abortion in Nigeria.

The Legal Profession:

Instrument like CEDAW is a valuable document for the legal profession in justifying that the right to choose, which is an aspect of reproductive right is synonymous with right to choose to reproduce, and by implication, unborn's right to life. The study will serve as a reference point in justifying that all international human rights instruments, including CEDAW, serve one purpose- respect for the dignity of mankind, whether born or unborn.

The Medical Profession:

For the medical profession, the study is significant in that, the unborn's right to life as comprised in CEDAW is synonymous with the contents of the Hippocratic Oath. This will tend to discourage doctors from the habit of performing abortions, because these doctors will now see that, there is, in existence, an international human right instrument which preaches the respect of human dignity just like the oath he/she swore to.

The Country and People of Nigeria:

The country and people of Nigeria as a whole will stand to benefit from this piece of study in terms of criminalizing abortion and a better understanding of the principle of the right to choose within CEDAW.

The World at Large:

The world at large will benefit from the study in that, the whole controversy surrounding abortion might be laid to rest if the right to choose under CEDAW is interpreted to mean the right to reproduce for women. Once this is done, the unborn's right to life will form an integral part of CEDAW. Consequently, the controversial issue as to when life begins as well as the doctrine of person or personhood will have no place. The respect for the dignity of human life will henceforth be the determining factor.

The Area of Study:

Above all, the study is significant to the area of study itself, as it will serve as a reference point in the face of inadequate reference material in this field of endeavour.

## **1.6 Limitations of the Study**

The researcher encountered some problems regarding collection of data from the chosen samples for the study.<sup>30</sup> However, with a short, simple and straight to the point interviewing questions, well planned schedule arrangements and the use of an intermediary with respect to the African traditionalists, the researcher was able to overcome the difficulties.

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<sup>30</sup>The people constituting the samples in this study are mostly social actors and individuals who are likely to be occupied in one way or the other, and the likelihood of having so much time to grant an interview is slim. The doctors amongst them might claim they are either on call, or have a surgery, the NGOs amongst them might be occupied throughout the period of the interview, the married as well as unmarried population may give some excuses, the African Traditionalists may claim that, the researcher is not eligible to see them. Some traditionalists are often engaged in the performance of some traditional rites and rituals, and when this happens, the tendency of wanting to see a female, like the researcher is very slim.

## **1.7 Conclusion**

This chapter provided a brief introduction to what was expected in the body of the research. The next chapter dealt with the methodologies employed in the study.

## CHAPTER TWO

### RESEARCH METHODOLOGY

#### 2.1 Introduction

The aspiration of what the law is capable of doing, informed the objectives of this study which span across, identifying the main goals of international human rights instruments, examining the relationship between criminal law and abortion in Nigeria, the major reason behind the non-implementation of CEDAW in Nigeria, as well as the importance and, or significance of interpretation in order to identify the true notion of the right to choose in Nigeria. In order to realize the stated objectives above (objectives 1 to 4 of this study), a doctrinal research was employed.

It must be noted that, this study also employed the use of social method of research. The choice of this methodology was based on the fact that, one of the questions raised in the course of this study, though a legal research, was of a social nature. Hence, the need to employ the use of some techniques of data collection used in social science researches was very vital. This was indeed vital in order to determine the nature and extent of the law, the adequacy or inadequacy of the existing law, as well as to know whether there was need for a new law, or to ascertain whether an efficacious use of law can offer some kind of solution or answer to the problems or questions or whether law can be used as an instrument of control, change or reform. This method was used to achieve the fifth objective of this study.

Consequently, this chapter consists of research design, instrumentation, data collection procedure, population and samples, technique of data analysis and conclusion.

## 2.2 Research Design

Different authors have different terms and opinions with regards to research design. Research designs comprise the overall procedure involved in the course of a research. The overall decision involves which design should be used to study a topic.<sup>1</sup> In this research, the design employed was qualitative design in form of an explanatory study embedded within a case study research design and strategy. Also employed was a doctrinal research.

### 2.2.1 Case Study Research Design and Strategy

Most studies in the field of law go beyond description and seek to explain a particular phenomenon. Explaining is to state the reason for what happened, or how things are proceeding, or what something or someone is like.<sup>2</sup> Explanatory studies focuses on ‘why’ or ‘how’ something is the case in a particular situation.<sup>3</sup>

Thus, in order to achieve the fifth objective of this study, the researcher went beyond describing, and went on to explain, the views of certain actors on the right to choose within CEDAW being used as the basis for which abortion is to be legalized in Nigeria.

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<sup>1</sup>John W. Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (California, UK, India: Sage Publications Limited, 2009), 3; R K Yin, “Designing Single- and Multiple- Case Studies,” in *Improving Educational Management through Research and Consultancy* eds. Nigel Bennett, Ron Glatter and Rosalind Levacic (London: Paul Chapman Publishing Limited, 1994), 155.

<sup>2</sup>Keith F Punch, *Introduction to social Research: Quantitative and Qualitative Approaches* (London, California, India: Sage Publications, 2005), 15.

<sup>3</sup>*Ibid*; Robert K. Yin, *Application of Case Study Research 3<sup>rd</sup> Edition* (London, California, India: Sage Publications, Inc, 2011), 45.

Hence, this study was explanatory in nature, and in terms of research design, it was qualitative,<sup>4</sup> because, it explained how individuals or group felt about a social or human problem, like the one that was under consideration in this study.

The researcher also had a strong conviction that, there must be an element of fit between the selected method and the research to be carried out.<sup>5</sup> It was this conviction which inspired the selection of a case study as the research strategy in order to achieve the fifth objective of this study.

Several reasons accounted for why a case study was a method of choice for this study. Firstly, a case study ensures the researcher understands an in-depth explanation of an event or process that was carried out. It ensures an in-depth understanding of some real life situations.<sup>6</sup> The event or process in this study was the views of certain social actors in Nigeria on the right to choose within CEDAW as the basis for the legalization of abortion in Nigeria. A case study has the advantage of rendering rich and in-depth information. This will further lead to having as many variables as possible. This advantage is particular to a case study, and it is not usually available while using other methods of social science research. This study was carried out in real life context. It is only with the use of such methodology like case

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<sup>4</sup>Sonia, Ospina, "Qualitative Research," in *Encyclopaedia of Leadership Vol 1* eds. George R. Goethals, James MacGregor Burns and Georgia Sorenson (California, UK, India: Berkshire Publishing Group LLC, Sage Publications, 2004), 1; Creswell, *Research Design*, 4.

<sup>5</sup>There must be reasonable explanation for the choice taken which account for the importance of fit. Janet Houser, *Nursing Research: Reading, Using and Creative Evidence* (Sudbury MA: Jones and Bartlett Learning, 2011), 93 Peter G. Miller, John Strang and Peter M. Miller, *Addiction Research Methods* (Chichester, West Sussex, UK; Ames, Iowa: Blackwell Addiction Press, 2010), 4.

<sup>6</sup>Robert K Yin, *Case Study Research Design and Methods 3rd Edition* (London, California, India: Sage Publications, 2003), 1. A case study tolerates the condition whereby, the boundaries between the phenomenon and its context are not clear. The case study method has sufficient flexibility to cope with this uncertainty. Robert K Yin, "Enhancing the Quality of Case Study in Health Services Research," *Health Services Research* 34, no.5 (1999): 1211. <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1089060/pdf/hsresearch00022-0132.pdf> (accessed January 30, 2012).

study, that the right to choose within CEDAW can be understood and placed in its real context. At the end of the exercise, the right to choose under CEDAW was placed in its proper context.

Secondly, the three conditions set out by Yin in order for a study to fall under the category of research that will use a case study as its strategy was met by the fifth objective of this study. The fifth research question in this study was a ‘how’ question, and according to Yin, this is the first condition in a case study research strategy.<sup>7</sup> The second condition, according to Yin, is the extent of control the researcher has over events. In a case study approach, the investigator has no control over the behaviour of participants.<sup>8</sup>

This study elicited the views and opinions of diverse individuals and groups on the right to choose under CEDAW as the basis for the legalization of abortion in Nigeria. The researcher had no control over the behaviour of the participants, since the researcher was interested in the truth and fact of their opinions. In order to give voice to the powerless and voiceless,<sup>9</sup> in this study, the researcher had no control on their behaviour.

The third condition, as set out by Yin, is the focus on contemporary event and not on historical event.<sup>10</sup> The difference between histories and case studies is that, history

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<sup>7</sup>Yin, *Case Study Research 3<sup>rd</sup> Edition*, 1; Bude Su et al, “The Importance of Interaction in Web-Based Education: A Program-Level Case Study of Online MBA Learning,” *Journal of Interactive Online Learning* 4, no.1 (2005): 5, <http://actxelearning.pbworks.com/f/4.1.1.pdf> (accessed January 15, 2012).

<sup>8</sup>Yin, *Case Study Research 3<sup>rd</sup> Edition*, 1.

<sup>9</sup>Winston Tellis, “Application of a Case Study Methodology,” *Qualitative Report* 3, No.3 (1997): <http://www.nova.edu/ssss/QR/QR3-3/tellis.2html> (accessed December 19, 2011).

<sup>10</sup>Yin Robert K, “The Case Study Crisis: Some answers,” *Administrative Science Quarterly* 26, no.1 (1981): 59; Yin, *Case Study Research 3<sup>rd</sup> Edition*, 2, 5-10. Whenever a case study focuses on a contemporary phenomenon, it is suggestive of the fact that, such a case study will be an explanatory one. Kohlbacher Florian, “The Use of Qualitative Content Analysis in Case Study Research,” *Forum-Qualitative Social Research* 7, no.1 Art 21(2005) <http://nbn-resolving.de/urn:de:0114-fqs0601211> (accessed January 13, 2012).

focuses on historical events, while case study is capable of examining both history and contemporary events. History presupposes the absence of people to provide the evidence, and so, reliance must be made on documents and artifacts as evidence.

This study was of a contemporary nature, as it dealt with the issue of the right to choose under CEDAW as the basis for legalizing abortion in Nigeria, which is, as we speak, a contemporary issue needing an in depth explanation in Nigeria in order to make the issue more understandable to the majority of Nigerians.<sup>11</sup>

Case study tells a story about something unique, special or interesting. This story can be about individuals, organizations, processes, programs, neighbourhood, institutions and even events. The case study gives a foundation story behind the result by bringing to limelight what happened to bring it about. A case study can also be a good opportunity to highlight a project's success, or to bring attention to a particular challenge or difficulty in a project. Cases are selected because, they are highly effective, non-effective, representative, typical or of special interest.<sup>12</sup>

Case Study can also be referred to as a strategy of inquiry in which the researcher takes an in depth look into a program, event, activity, process or one or more individuals. Case studies are viewed as a multi-perspective analysis, in that the researcher considers the voice and perspectives of the actors, as well as paying particular attention to relevant group of actors, and the interaction between them.

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<sup>11</sup>It is a contemporary issue because, a state in Nigeria (Anambra State) has, in 2005, passed a Reproductive Right Law which made abortion legal in that state. The bill was based on the 'right to choose' within CEDAW, an international human right instrument that is yet to be domesticated in Nigeria. This serves as a signal that this is a contemporary issue needing urgent attention.

<sup>12</sup>Tellis, "Application of a Case Study,"



This aspect is a salient point in the characteristics that case study offers. They give voice to the voiceless and powerless.<sup>13</sup>

A case study can also be termed as an in depth inquiry that detail a program, project or facility in its real-life context. The researcher collected detailed information using a variety of data collection procedures over a sustained period of time.

Having presented the reasons for the choice of a case study strategy for this research, it has become necessary to state that, in order to fully utilize the opportunities offered by using a case study research; this study has adapted the case study research design.

A case study research design comprises of making use of multiple sources of data, having a chain of evidence, maintaining a case study protocol, having an initial preposition, identifying the unit of analysis and having a criteria for interpreting findings.

A case study is usually referred to as a triangular research strategy, meaning that, under a case study approach, there is always a means of ensuring accuracy. This can be done by using multiple sources of data.<sup>14</sup> In this study, in order to ascertain the views of certain social actors in relation to the right to choose under CEDAW being used as the basis for which abortion would be legalized in Nigeria, information and evidence necessary were obtained through one-on-one interview, as well as focus group discussion.

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<sup>13</sup>*Ibid.*

<sup>14</sup>Joe Feagin, Anthony M. Orum and Gideon Sjoberg, "The Nature of the Case Study," in *A Case for the Case Study* eds. Joe Feagin, Anthony M. Orum and Gideon Sjoberg (Chapel Hill: University of North Carolina Press, 1991), 6; Dorothy Leonard-Barton, "A Dual Methodology for Case Studies: Synergistic Use of Longitudinal Single Site with Replicated Multiple Sites," *Organization Science* 1, no.3 (1990): 249.

Also, this study established a chain of evidence where different views and opinions were established. Before the commencement of this study, an extensive literature review was embarked upon by the researcher which helped in the formulation of an initial preposition in the form of the right to life for the unborn.

While using a case study research design in the conduct of this case study, the researcher was mindful of the standards and principles for accessing the quality of a case study research. Making use of multiple sources of data was one of the ways proposed by Yin to tackle the criticism of construct validity levelled against case study strategy.<sup>15</sup> Critics have casted doubt on the outcome of a case study research because of potential investigator's subjectivity.<sup>16</sup> This subjectivity was laid to rest by the constant juxtapositions of realities as they emerged from the multiple sources of data.

In most explanatory studies like this one, the issue of subjectivity of the investigator cannot be ruled out, since it is the investigator making the explanation.<sup>17</sup> The internal validity was dealt with by the researcher supplying a rivalry explanation by stating her bias.<sup>18</sup>

In this study, the results of findings were possible of generalization because, in a case study like this present study, cases were chosen, not for statistical reasons but for

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<sup>15</sup>Yin Robert K, *Case Study Research, Design and Method* 2<sup>nd</sup> Edition (London, California, India: Sage Publications, 1994), 4; Tellis, "Case Study Methodology,"

<sup>16</sup>Martin Drapeau, "Subjectivity in Research: Why Not? But...", *Qualitative Report* 7, no.3 (2002), <http://www.nova.edu/ssss/QR/QR7-3/drapeau.html> (accessed January 14, 2012); Arch G. Woodside, *Case Study Research: Theory, Method, Practice* (Bingley, UK: Emerald Group Publishing Limited, 2010), 108.

<sup>17</sup>Drapeau, "Subjectivity in Research,"

<sup>18</sup>Thus, this present study is bias. This stems from the fact that, this researcher is a pro-life. A pro-life is anyone advocating full legal protection for the embryos and fetuses, especially opposing the legalization of abortion. The purpose of stating this bias at this juncture is to let the readers know the areas where objectivity might be at risk, and at the same time, disclosure serves to let the reader know that, the researcher had endeavoured to account for the bias.

theoretical reasons.<sup>19</sup> In this study, the case (the right to choose under CEDAW as the basis for the legalization of abortion) was chosen because it represented a critical case investigating a well formulated theory<sup>20</sup> (the well formulated theory is the view that the right to choose under CEDAW is synonymous to the right to abort).

In order to determine whether this formulated theory is correct or incorrect, a single case<sup>21</sup> (like this study) was used to ascertain whether or not some other alternative set of explanations might be more relevant. A single case like this present case, has presented a significant contribution to knowledge and theory building. Hence, this case study has shown how the right to choose provision under CEDAW can be used to justify the right to reproduce for women, and consequently, unborn's right to life. This actually led to the support of the continued criminalization of abortion.<sup>22</sup> This outcome is susceptible to becoming generalized. The issue of external validity was considered resolved once the study was capable of being generalized analytically.

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<sup>19</sup>Analytical generalization is a process separate from statistical generalization in that, it refers to the generalization from empirical observation to theory, rather than population. Michael Gibbert, Winfried Ruigrok and Barbara wicki, "Research Notes and Commentaries. What Passes As a Rigorous Case Study?," *Strategic Management Journal* 29, no.13 (2008): 1468.

<sup>20</sup>The case chosen for this study is to refute the established theory that right to choose within CEDAW is synonymous to right to abortion for women, so this case was chosen because it is a critical case. Tellis, "Application of Case Study"; Peter Swanborn, *Case Study Research: What, Why and How* (London, California, India: Sage Publications Limited, 2010), 71.

<sup>21</sup>This case represents a critical case investigating a well formulated theory. This study, though a single case study, involve more than one unit of observations. This occurs when in a single case, attention is given to a subunit or subunits. This is called an embedded case study design. The subunits can often add significant opportunity for extensive analysis, enhancing insights into the single case. The single case in this study is the right to choose within CEDAW as the basis for the legalization of abortion, and the subunits are, feminism, right to choose and right to life for the unborn. Pamela Baxter and Susan Jack, "Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers," *Qualitative Report* 13, No.4 (2008): 549-550 <http://www.nova.edu/ssss/QR/QR13-4/baxter.pdf> (accessed January 12, 2012).

<sup>22</sup>What was done by this case study was to refute the well spread theory that the right to choose within CEDAW is synonymous to abortion right for women. A right to life for the unborn model theory was arrived at in this study. A good use of theory according to Yin will help delimit a case study inquiry to its most effective design. Yin R K, *Application of Case Study Research Vol.34* (London, California, India: Sage Publications, Inc, 1993), 4.

In this study, the researcher, by following all the prescribed conditions in a qualitative research, and by extension, all conditions necessary for a case study, the issue of reliability was also resolved by this approach. The main aim of reliability is to minimize the error of bias in a study.<sup>23</sup>

### 2.2.2 Doctrinal Research Design

The use of a doctrinal research,<sup>24</sup> also known as pure legal research, was also employed in the course of this study. The data obtained from this type of research are evidence in words. This led to the realization of the first to the fourth objectives of the study.

Hence, in looking at the concept of the right to choose in relation to abortion in Nigeria, while critically analysing the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), the basic goals and aspirations of international human rights instruments were studied in line with the consistency of the legalization of abortion with these instruments. Also, the relationship which

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<sup>23</sup>Reliability can be defined broadly as the degree of which measures are free from bias and therefore yield consistent results. To increase reliability of a study, Yin proposes a clear documentation of all steps of data collection phase through the use of case study protocol and development of case study data base. Daniel Kauer, *The Effect of Managerial Experiences on Strategic Sensemaking* (Wiesbaden: Dt. Univ. -Verl, 2008), 102; Larissa V. Malopinsky, *Facilitating Organizational Change: The Use of Activity Theory as a framework for Social Construction of Strategic Knowledge* (Bloomington, Ind: Indiana University, 2007). 134.

<sup>24</sup>A research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and perhaps, predicts future development is a doctrinal research. Michael McConville and Wing Hong Chui, "Introduction and Overview," in *Research Methods for Law* eds. Michael McConville and Wing Hong Chui (Edinburg: Edinburg University Press, 2007), 3-4. Doctrinal research aims to understand legal developments from an internal perspective, ie from within the discipline of law itself. Although this approach is a useful reference point, it will not provide a fuller understanding of the law, as it is too narrow. Cheng-Hang Tan, *The Goals and Objectives of Law Schools Beyond Educating Students: Research, Capacity Building, Community Service*. (The National University of Singapore School of Law Experience 2010), 69-70. [http://www.ialsnet.org/meetings/role/papers/TanChengHan\(Singapore\).pdf](http://www.ialsnet.org/meetings/role/papers/TanChengHan(Singapore).pdf) (accessed January 18, 2012). The researcher is mindful of this short coming of pure doctrinal research, and consequently, made this study a socio-legal one, where an attempt is being made in order that the law will be understand better through the 'prism' of outside or external perspective.

criminal law has with abortion was also examined. Also examined was how to go about the interpretation of the right to choose within CEDAW, and lastly, the reason for the non-implementation of CEDAW in Nigeria was examined.

To achieve these objectives, legal, medical as well as other relevant materials were used. Such materials included books, chapters in books, articles in journals, case law, human rights instruments, conference and seminar papers, online data bases and resources available on the Internet. This phase dealt basically with library-based research.<sup>25</sup> Most of the sources listed above will be found in the library and on the Internet.

### **2.3 Research Scope**

The study was limited in its geographical scope to Nigeria with its antecedents of several years of campaign for the legalization of abortion. The choice is based on the position of the Penal Laws in Nigeria, which has its foundation in the Constitution of the Federal Republic of Nigeria, prohibiting abortion, except to save the mother's life, the consequence of which resulted in several unsafe abortions. This attracted some misplaced concerns for the rights of women.

There are different human rights instruments dealing with the rights of women. This research was limited to the choice of the right to choose, an aspect of reproductive rights as provided under the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).

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<sup>25</sup>A library-based research is aimed at producing a critical synopsis of an existing area of research writing. This is otherwise known as using documents for research. Dr Mahdi Zahraa, *Research Methods for Law Graduate Overseas Students* (Malaysia, Selangor, Seri Kembangan: Univision Press, 1998), 49; Anwarul Yaqin, *Legal Research and Writing* (Malaysia: LexisNexis, 2007), 10.

Because this study suggested an alternative interpretation to the right to choose under CEDAW which eventually leads to giving the unborn child the right to life, the Vienna Convention on Law of Treaties as well as International Human Rights Instruments recognizing the unborn's right to life formed part of the choice of this study.

## **2.4 Types of Data**

Data can be of three types namely, primary, secondary and tertiary data. Primary data are generated by the researcher responsible for the design study and the collection, analysis and reporting of the data. These are 'new' data used to answer specific research questions.<sup>26</sup>

Secondary data are raw data that have already been collected by someone else, either for some general information purpose or for a specific research project. Tertiary data have been analysed either by the researcher who generated them or by a user of a secondary data. In this case, the raw data may not be available, only the results of this analysis.<sup>27</sup>

In this study, the researcher employed the use of all the three forms of data. Primary data was collected during the course of the case study, secondary data was collected during the course of the doctrinal research, and tertiary data was collected while analysing the result of the findings of the case study research.

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<sup>26</sup>Norman W. H. Blaikie, *Designing Social Research* (Cambridge UK: Polity Press, 2010), 160.

<sup>27</sup>*Ibid*

## 2.5 Data Collection Methods

The systematic gathering of data for a particular purpose from various sources is known as data collection.<sup>28</sup> In order to fulfil the case study requirement of multiple sources of data, this study has employed the use of interviews and focus group sessions.

This study employed the use of both structured<sup>29</sup> and semi-structured<sup>30</sup> interview model to elicit views and opinions of major social actors on the right to choose as the basis for the legalization of abortion in Nigeria. In recognition of the power asymmetries and the potentially intimidating encounter of the interview, an informal conversation style was adopted by the researcher during the interview process. This stance by the researcher was necessary in order to put the interviewee at ease. Nevertheless, both the researcher's methodological stance and the specific substantive interests made the interview more than a conversation.

In a way, focus group resembles interviews, but focus group transcripts can be analyzed so as to explore the ways in which the participants interact with each other and influence each other's expressed ideas, which obviously cannot happen with

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<sup>28</sup>Ashley S. Hall, *Guidelines for Designing Data Collection and Sharing Systems for Co-Managed Fisheries: Part 2 Technical Guidelines* (Rome: Food and Agricultural Organization of the United Nations, 2005), 5.

<sup>29</sup>This is a formal interview with questions already written down as a guide for the researcher to follow. Mairead Dunne, John Pryor and Paul Yates, *Becoming a Researcher: A Research Companion for the Social Sciences* (Maidenhead: Open University Press, 2005), 28. In a structured interview, the interviewer asks all the respondents the same series of pre-established questions with limited set of response categories. See, Andrea Fontana and Anastasia H. Prokos, *Interview: From Formal to Post-Modern* (Wallnut Creek, California: Left Coast Press, (2007), 19.

<sup>30</sup>A method of research which is opened. It allows new ideas to be brought during interview as a result of what the interviewee says. Whiting L. S, "Semi-Structured Interviews: Guidance for Novice Researchers," *Nursing Standard* 22, no.23 (2008): 36; Anil Pathak and Charatdao Intratat, "Use of Semi-Structured Interviews to Investigate Teacher Perceptions of Student Collaboration," *Malaysian Journal of ELT Research* 8, no1 (2012); 3.

one-on-one interview.<sup>31</sup>

Focus group can be likened with or compared to participant observation,<sup>32</sup> which is another method of data collection in a qualitative research. While utilizing this method, the researcher had no option than to learn the perspective held by study participants. Thus, while remaining, inevitably, an ‘outsider’, the researcher learnt what life is like for an ‘insider’. In other words, participant observation often occurs in a naturalistic setting. Participant observation in a naturalistic setting can only occur in settings where there is something immediately available to observe.<sup>33</sup> Participant observation in a non-naturalistic setting, like this study, was made possible through the use of a focus group discussion, where more social psychological topics such as attitudes and decision making were paramount. In this sense, focus group method provides access to participant interaction on topics that are either difficult to observe naturally or rare in occurrence.<sup>34</sup>

This type of approach is known to be susceptible to facilitator’s bias, since it is flexible. It is also possible for the discussion to be dominated by the few vocal individual. Information in a focus group discussion can be difficult to analyze

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<sup>31</sup>Beverly Hancock, Elizabeth Ockleford and Kate Windridge, “An Introduction to Qualitative Research,” (2007): 16-17 Last updated 2009, [http://www.rds-sc.nihr.ac.uk/wp-content/uploads/2011/07/5\\_Introduction-to-qualitative-research-20091.pdf](http://www.rds-sc.nihr.ac.uk/wp-content/uploads/2011/07/5_Introduction-to-qualitative-research-20091.pdf) (accessed February 5, 2012).

<sup>32</sup>Henrik Palsson, “Participant Observation in Logistics Research: Experiences from an RFID Implementation Study,” *International Journal of Physical Distribution and Logistics Management* 37, no.2 (2007): 148-163, <http://www.emeraldinsight.com/journals.htm?articleid=1597751&show=html> (accessed May 8, 2012). This paper suggests that, the comparison between interview studies and participant observation are to a large extent, also valid for focus groups.

<sup>33</sup>Jun Li, “Ethical Challenges in Participant Observation: A Reflection on Ethnographic Field Work,” *Qualitative Report* 13, no.1 (2008): 103 where observation was carried out in respect of female gamblers. <http://www.nova.edu/ssss/QR/QR13-1/li.pdf> (accessed May 8, 2012).

<sup>34</sup>Elizabetha Suter, “Focus Groups in Ethnography of Communication: Expanding Topics of Inquiry Beyond Participant Observation,” *Qualitative Report* 5, no.1 (2000), <http://www.nova.edu/ssss/QR/QR5-1/suter.html> (accessed May 8, 2012).



because, comments should be interpreted in the context of the group setting.<sup>35</sup> With the use of the one-on-one interview model, the researcher was able to counter-act the disadvantages of the focus group stated above. With this done, a balanced and realistic outcome eventually emerged from the study.

### 2.5.1 Instruments

In the course of this study, the researcher made use of certain instruments<sup>36</sup> which serve the purpose of helping to keep track of what is being investigated and how to report it. A pre-drafted interview questions based on the fifth objective of the study was used by the researcher.<sup>37</sup> This was not to suggest however, that the researcher would be restricted to the questions drafted. An unstructured interview model was also used.<sup>38</sup> The use of audio-visual material was also employed to further enhance the quality of information received during the interview process. It has long been recognized that visual media, including photography, etc, and more recently, video, provide unprecedented opportunities for social science research.<sup>39</sup>

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<sup>35</sup>David W. Stewart, Prem N. Shamdasani, and Dennis W. Rook, *Focus Groups: Theory and Practices* (London, California, India: Sage Publications Inc, 2007), 44; Abraham Pizam, *International Encyclopedia of Hospitality Management*. (Oxford, Burlington: Elsevier HB, 2010), 254.

<sup>36</sup> In a qualitative research, the researcher, according to Yin, is likely to be the most important research instrument. Robert K. Yin, *Qualitative Research From Start to Finish* (New York: The Guilford Press, 2010), 103-107.

<sup>37</sup>They are sometimes referred to as interview schedule. Ralph Hall, *Applied Social Research: Planning, Designing and Conducting Real World Research*. (South Yarra: Palgrave Macmillan, 2008), 156.

<sup>38</sup>Unstructured interactive interview are shared experiences in which the researchers and the interviewees come together to create a context of conversational intimacy in which the participants feel comfortable telling their stories. Juliet Cobin and Janice M Morse, "The Unstructured Interactive Interview: Issues of Reciprocity and Risks When Dealing With Sensitive Topics," *Qualitative Inquiry* 9, no.3 (2003): 338, <http://digilib.bc.edu/reserves/sc735/dods/sc73513.pdf> (accessed January 22, 2012).

<sup>39</sup>Hubert Knoblauch et al, "Visual Analysis: New Developments in Interpretative Analysis of Video and Photography," *Forum Qualitative Research*. 9, no.3 Art 14 (2008) <http://www.qualitative-research.net/index.php/fqs/article/view/1170/2587> (accessed April 25, 2012). Recent advances in technology make video interview a viable option for conducting interview. Shannon Frattaroli,

During the data collection period, only two (2) of the participants agreed to be video recorded, while the 2 focus group sessions were audio recorded. In addition to the use of audio-visual and audio materials, the researcher still took down notes.<sup>40</sup> These served as a reference point for the researcher in case there were any grey areas to be touched as regards a particular response.

### 2.5.2 Population and Samples

This study had a population for the research.<sup>41</sup> Population establishes important qualitative distinctions, no matter the point at which the population is constituted. Population boundaries provide qualitative foundations for social scientific statements. They demarcate part of the empirical world as relevant and bracket out the rest.<sup>42</sup>

In this study, the population had been identified. This signifies that, population function as scope condition in all forms of social research,<sup>43</sup> including this study. Scope condition state the circumstances under which a pattern or relationship holds. Hence, the condition that must be met for some relationship between the selected

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“Qualitative Methods,” in *Inquiry Research: Theories, Methods and Approaches* eds. Guohua Li and Susan P. Baker (New York NY: Springer, 2012), 224.

<sup>40</sup>Taking down notes during the interview aside from the video recording, will enable the researcher to counter-act any disappointment that might ensue as a result of malfunctioning of the recorder. Video recording has the disadvantages of being awkward and intrusive. Jerry R. Thomas, Jack K. Nelson and Stephen J. Silverman, *Research Methods in Physical Activity* (Champaign: Human Kinetics, 2010), 357

<sup>41</sup>The aggregate of all units pertaining to a study is called the population or the universe. The population is the target group to be studied. Krishnaswami O. R. and Satyaprasad B. G., *Business Research Methods* (India: Himalaya Publishing House, 2010), 50; Claire Bless, Craig Higson-Smith and Ashraf Kagee, *Fundamentals of Social Research Methods: African Perspective* (South Africa: Juta Legal and Academic Publishers, 2000), 85.

<sup>42</sup>Charles C. Ragin, *Fuzzy-Set Social Science* (Chicago: University of Chicago Press, 2000), 61.

<sup>43</sup>Ibid; Charles C. Ragin, “Fuzzy-set Analysis of Necessary Conditions,” in *Necessary Conditions: Theory, Methodology and Applications* eds. Gary Goetz and Harvey Starr (Lanham: Rowman & Littlefield, 2003), 179.

populations is that, samples must have either a direct or indirect relationship with the discourse on the right to choose for women as the basis for the legalization of abortion process in Nigeria. This in turn, establishes the scope of relationship between all the samples selected. The condition mentioned, will provide the basis that the samples included in the analysis are comparable.

Having identified population as the scope of the research, it is important to mention that, delimiting population by the researcher may undermine its constitution. Hence, the researcher must bear it in mind that, populations are working hypotheses that may be revised at any point in the research process. Population should remain as flexible as possible.<sup>44</sup> The population in this research, in order to remain flexible had imagined that there are different people that would have either a direct or indirect relationship with the abortion legalization discourse on the basis of the right to choose under CEDAW, and has thus, considered variety of people amongst its samples.

The choice of sampling strategy is dependent on the type of approach being used in a study. Rather than select a large number of people, a qualitative researcher, like this researcher identified and recruited a small number of samples that provided in depth information about the central phenomenon.

A qualitative sampling is a non-probability sampling. The type of non-probability sampling that was employed in this study was the purposeful or judgment sampling. While using this sampling method, the researcher purposely choose subjects who, in her opinion, are thought to be relevant to the research topic. In this way, the

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<sup>44</sup>Ragin, *Fuzzy-Set*, 62.

researcher used her own initiative to determine who can supply the best facts to achieve the objective of the study.<sup>45</sup>

While using a purposeful sampling, random sampling might not be helpful.<sup>46</sup> The researcher was not interested in ‘how much’ or ‘how often’. It is therefore, necessary to select samples from which most can be learned. This study was interested in understanding the meaning of a matter of interest which lies in the views of certain social actors on the right to choose as the basis for the legalization of abortion in Nigeria.

The researcher sampled for heterogeneity,<sup>47</sup> where all relevant opinions and views were to be included. The researcher was not concerned about representing the views proportionally, because her primary aim was to get broad spectrum of ideas, not identifying ‘average’ or ‘modal instance’. Here, what were sampled are not the people, but their ideas and opinions.

It has been imagined that, there is a universe of all possible ideas relevant to the topic, and the researcher, in order to sample these ideas, have included a broad and diverse range of participants, including the ‘outliers’ or unusual ones in order to get the ideas required.

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<sup>45</sup>Kumar, R., *Research Methodology: a step by step guide for beginners* (London, California, India: Sage Publications, 1996), 162; Sarantakos S., *Social Research* (Basingstoke: Macmillan Press, 1998), 152

<sup>46</sup>Donald E. Pokinghorne, “Language and Meaning: Data Collection in Qualitative Research,” *Journal of Counselling Psychology* 52, no.2 (2005): 140, [http://csuphd.pbworks.com/w/file/etch/47745393/Polkinghorne\\_Language%20and%20Meaning%20data%20collection%20in%20qr.pdf](http://csuphd.pbworks.com/w/file/etch/47745393/Polkinghorne_Language%20and%20Meaning%20data%20collection%20in%20qr.pdf) (accessed January 22, 2012). Random sampling, which is a form of probability sampling, is not necessary or even justifiable in a qualitative research. Merriam S B, *Qualitative Research and Case Study Applications in Education*, (Sanfrancisco: Jossey-Bass Publishers, 1998), 61.

<sup>47</sup>William M. K. Trochim, “Non-Probability Sampling Research Methods Knowledge Base,” *Web Center for social Research Method*. Last Revised 20<sup>th</sup> October 2006. <http://www.socialresearchmethods.net/kb/samprnon.php> (accessed February 10, 2012).

Having regards to the fact that, different people view things differently, the researcher used her own judgment in choosing participants for this study. The views of various social actors having a direct or indirect relationship with the right to choose being used as the basis for the legalization of abortion in Nigeria are hereby selected as samples. These samples included:

i Non-governmental organizations concerning women:

Since the research was concerned about an issue affecting women, it was believed that some women organizations were in the best position to give relevant information needed as regards the stand of women on the right to choose within CEDAW as the basis for the legalization of abortion in Nigeria.

ii League of Moslem and Christian Women:

The researcher had audience with the Federation of Muslim Women Association of Nigeria (FOMWAN) as the representative of the league of Muslim women and the league of Christian women as represented by the Women Wing of the Christian Association of Nigeria (CAN). The religious view on the right to choose as the basis for legalization of abortion in Nigeria was tackled by these groups.

iii. African Traditionalists:

Because of the dearth in the practice of traditional religion, only 2 African Traditionalist were able to take part in the interview. The traditional views on the right to choose as the basis for legalization of abortion in Nigeria were presented by this group.

iv. Medical Practitioners:

The stand of medical practitioners on the legalization of abortion using the right of women to choose as its basis was also elicited. The views of doctors on this issue were relevant because, the doctors are the major actors in the abortion saga.

v. Married and Unmarried men and women:

The views and opinions of this population were seen as necessary because, as women (whether married or not), the right to choose is directed at them, and as men (whether married or not), they have a link with these women, either as husbands or as boyfriends.

Qualitative research requires a lot of labour. Hence, analyzing a very large sample can take a lot of time and often unrealistic.<sup>48</sup> Thus, '15' is said to be the normal acceptable sample for all qualitative research.<sup>49</sup> However, Charmaz<sup>50</sup> has put forward that '25' participants are adequate for small project and going by what was suggested by Ritchie et al,<sup>51</sup> qualitative samples often lie under '50'. Qualitative researchers are of the view that, in interview studies, nothing new comes out of transcripts after you have asked 20 or so people some questions.<sup>52</sup>

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<sup>48</sup>Mason Mark, "Sampling and Saturation in PhD Studies Using Qualitative Interviews," *Forum Qualitative Sozialforschung/Forum: Qualitative Social Research* 11, no.3 Art 8(2010), <http://www.qualitative-research.net/index.php/fqs/article/view/1428/3027> (accessed February 23, 2012).

<sup>49</sup>Bertaux Daniel, "From the Life-History Approach to the Transformation of Sociological Practice," in *Biography and Society: The Life History Approach in the Social Sciences* ed. Daniel Bertaux (London, California, India: Sage Publications, 1981), 35.

<sup>50</sup>Charmz Kathy, *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* (London, California, India: Sage Publications, 2006), 114.

<sup>51</sup>Ritchie Jane, Lewis Jane and Ellam Gillian, "Designing and Selecting Samples," in *Qualitative Research Practice. A Guide for Social Science Students and Reserachers* eds. Jane Ritchie and Jane Lewis (London, California, India: Sage Publications, 2003), 84.

<sup>52</sup>Green Judith and Thorogood Nicki, *Qualitative Methods for Health Research* (London, California, India: Sage Publications, 2009), 120.

In the view of the above, ‘31’ samples were chosen for the purpose of this study.<sup>53</sup> Ten (10) out of these samples were participants from the ‘2’ focus group sessions. Samples were selected on a continuous basis. A list of potential samples was first made.<sup>54</sup> Following this, the researcher picked samples representing each unit of analysis one at a time, until the whole unit of analysis was covered. Initial contacts with selected samples were made through telephone conversations, after which a meeting was fixed according to the convenience of the selected samples.

## 2.6 Data Analysis

In a case study, the unit of analysis might be an individual, an event, an entity or even a process.<sup>55</sup> A tentative definition of a unit of analysis is the same as the

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<sup>53</sup>The sample size was not intended to be this large, but as the interview progressed, (that is after interviewing one sample representing each unit of analysis), the researcher realized that, what was being said corresponds totally with the initial theoretical preposition. Hence in a bid to have a non-bias analysis as well as to gather heterogeneous views, the researcher decided to pursue rival explanations, and more samples were included in the research. Consequently, additional two samples were selected for each unit of analysis. This means that, three samples represented each unit of analysis. By the end interviewing the 31<sup>st</sup> participants in this study, it was discovered that, the same things were being repeated over and over again by the selected samples. This signifies the attainment of saturation. Mark, “Sampling and Saturation,”

<sup>54</sup>The purpose of compiling this first list is, first to identify those that can provide rival or alternative explanations, and secondly, to prepare for unforeseen disappointments by the selected sample for participation. In the list, 5 samples represented each unit of analysis from which 3 were eventually chosen for participation. The 3 chosen were those that are willing to participate in the interview. In respect of the NGOs, National Council of Women’ Society of Nigeria (NCWS) which is the umbrella body under which all women NGOs operates in Nigeria, as well as Women In Nigeria (WIN), a women’s right activist group and feminist organization in Nigeria were part of the list of the initial five. However, due to unforeseen circumstances, the leadership of these two organizations were unable to be reached in both Abuja and Lagos respectively. Those met at the offices declined speaking on behalf of the leadership. After three attempts had failed in getting audience with the leadership of these NGOs, the researcher settled for DA’WAH, FIDA and GIRLS GUIDE organizations. With regards the African Traditional Religion, as a unit of analysis, only two samples were able to be reached, basically because of the advent of Islam and Christianity. In some instances, the chosen sample for participation decline participating at the last minute. The researcher merely reverts to the first list for replacement.

<sup>55</sup>Unit of analysis is the element to be studied and used as the basis of examination and comparison in the analysis of the study data. Margaret Diane Le Compte, Jean J Schensul, *Designing and Conducting Ethnographic Research* (Lanham MD: AltaMira Press, 2010), 164. Identifying unit of analysis is the first step towards choosing the cases that answers the research questions. Prof. Dr.

definition of a case.<sup>56</sup> The unit of analysis in this study is the views of major social actors on the right to choose as the basis for the legalization of abortion in Nigeria. It must be noted here that, it was the views of these social actors on the case<sup>57</sup> that was studied, not the social actors themselves. It was the views of these actors that serve as the basis of examination and comparison in the analysis of the study. These views were able to answer the question of how relevant the right to choose provision under CEDAW was, in the face of the present move to legalize abortion in Nigeria. These views were able to tell the exact meaning of the right to choose under CEDAW. The criterion for interpreting findings of this case study was qualitative content analysis and thematic content analysis which was done after collection of data.

Qualitative content analysis is an overall approach that entails the systematic examinations of forms of communication to document patterns objectively.<sup>58</sup> It has great strength in investigating feelings expressed in natural occurring language data. It is an important tool to help researchers develop a comprehension of a specific research field through identifying how particular issues or topics have been interpreted.<sup>59</sup>

In order to analyse the data collected during the course of interviews, the researcher integrated qualitative content analysis into the analysis of data in this case study research. Data that was collected were analysed using the conventional method of

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Martin Hogl and Hannah Titilyo Seriki, *Teamwork for Innovation in Sub-Saharan Africa* (GnbH: Weisbaden, 2007), 80

<sup>56</sup>John December, "Unit of Analysis for Internet Communication," *Journal of Communication* 46, No. 1 (1996) <http://jcmc.indiana.edu/vol1/issue4/december.html> (accessed January 17, 2012).

<sup>57</sup>The single case in this study is the right to choose within CEDAW as the basis for the legalization of abortion.

<sup>58</sup>Catherine Marshall and Gretchen B. Rossman, *Designing Qualitative Research* (Thousand Oaks: Sage, 1995), 85.

<sup>59</sup>Kyle Fisk et al, "Using Computer-Aided Content Analysis to Map a Research Domain: A Case Study of Institutional Legitimacy in Post Conflict East Timor," *Sage Open* 2, no4 (2012): 1



qualitative content analysis. This method is usually used in case study research.<sup>60</sup> It should be stated at the onset that, in using qualitative content analysis in this study, triangulation has taken place on two different positions. The first and obvious position was that, data has been triangulated by the use of different evidence and the use of two methods of data collection. At the second position, triangulation has taken place by applying a type of analysis (qualitative content analysis) that has not been particularly meant for this purpose to a different research design (case study).<sup>61</sup>

In other words, by using a qualitative content analysis in this case study, a step-by-step theory guided procedure was undertaken, wherein complexity was reduced and the main points of the analysis were filtered out in an iterative process. Hence, qualitative content analysis perfectly matches the credo of case study research, thereby helping to understand complex case study.<sup>62</sup>

Content analysis encompasses two types of content units: unit of analysis and unit of observation.<sup>63</sup> The unit of analysis is concerned with the general idea or phenomenon being studied. In this study, the unit of analysis were the views of certain social actors on the right to choose under CEDAW being used as the basis for legalizing abortion in Nigeria. The unit of observation concerns the specific item measured at an individual level and in this study, the unit of observation were feminism, right to choose under CEDAW and legalization of abortion in Nigeria.

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<sup>60</sup>Conventional method of qualitative content analysis involves several participants and asking them multiple questions to determine what they thought about a particular subject. There is also the directive content analysis method which deals with comparative analysis, as well as the summative content analysis method which entails using quantifiable methodology to look at certain words or context. Hsiu-Fang Hsieh and Sarah E. Shannon, "Three Approaches to Qualitative Content Analysis," *Qualitative Health Research* 15 (2005): 1279-1285.

<sup>61</sup>Kohlbacher Florian, "The Use of Qualitative Content Analysis in Case Study Research," *Forum Qualitative Sozialforschung/Forum Qualitative Social Research* 7, no1 Art 21 (2005) <http://www.qualitative-research.net/index.php/fqs/article/%20view/75/153January%202006> (accessed April 21, 2013).

<sup>62</sup>*Ibid.*

<sup>63</sup>Alexander Thayer et al, "Content Analysis as a Best Practice in Technical Communication Research," *Journal of Technical Writing and Communication* 37, no3 (2007) : 271

In order to examine units of observation, there are two general measurements available. A process known as ‘coding’ deductive measurement requires the development of specific coding categories before a researcher starts content analysis.<sup>64</sup> In using this measurement, the researcher’s objective was to get at aspects of meaning by examining the data qualitatively and so, allowance was given to themes to emerge naturally from the sets of data available. The researcher allowed unanticipated themes to emerge, without given undue weight priori to any preconceived themes. Despite the fact that, there were no pre-determined codes in this study, the deductive measurement was used because of the presence of a research question before the outset of content analysis. The researcher must locate a source of communication relevant to the research question and ask questions that can be solved by content analysis.<sup>65</sup>

The second measurement method is inductive.<sup>66</sup> This method was also used extensively in this study because of its support for emergent coding which means that basic research questions for a content analysis emerges from the units of observation. All the research questions used for the conduct of the interviews in this study emanated from the units of observation. It entails creating coding categories during analysis.

In this study, the researcher employed the use of manual thematic analysis rather than computer-based analysis of content.<sup>67</sup> While computer-based analysis is

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<sup>64</sup>*Ibid*

<sup>65</sup>Devi Prasad, “Content Analysis: A Method in Social Science Research,” in *Research Method for Social Works*, eds. Lal Das, D.K and Bhaskaran V (Rawat: New Delhi, 2008), 173-193.

<sup>66</sup>Thayer et al, “Content Analysis as Best Practice,” 271.

<sup>67</sup> Often among qualitative researchers, there are two camps, those who feel that software is central to the analysis process and those who feel that it is unimportant and in fact can result in wrong kind of analysis taking place. Welsh Elaine, “Dealing with Data: Using Nvivo in the Qualitative Data Analysis Process,” *Forum: Qualitative Social Research* 3, no. 2 (2002) <http://www.qualitative-research.net/index.php/fqs/article/view/865/1880#gcit> (accessed July 25, 2013).

powerful, such analysis is limited in what they can economically tally and what they can logically interpret. In order to understand how the different themes knit together to form a whole, it is first necessary to analyse individual themes. Using a computer-based analysis like Nvivo is difficult because it is not possible to show the whole model on screen at once. It is easier to do this on a large piece of card so that the researcher can view the whole picture and inter-relationship at a glance. In order therefore to relate the themes to the other ideas, it is necessary to consider the memos written during analysis process.<sup>68</sup> When performing the content analysis in this work, the researcher paid attention to words, paragraphs, items, concepts and semantics.<sup>69</sup>

Therefore, the researcher's first task in this study was to manually transcribe all the data received from various sources into a book in an organized form. It was then typed out. The researcher thereafter familiarizes herself with the contents of the book. The content of the book was reviewed and a check list was formulated by the researcher. The researcher again made another review of the typed document. Reconciliation was made if the researcher noticed any differences between the document and the checklist. It is after this, that the researcher applied coding.

In this study, the coding unit applied was defined according to the recording units by using separations created by the researcher.<sup>70</sup> Thus, the separations used for coding in this study was according to the research questions<sup>71</sup> which comprised five separate recording units (feminism awareness, body sensitivity, importance of right to choose,

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<sup>68</sup> *Ibid*

<sup>69</sup> Frank Taylor, "Content Analysis and Gender Stereotype in children's Books," *Teaching Sociology* 31, no. 3 (2003): 304.

<sup>70</sup> Stemler Steve, "An Overview of Content Analysis" *Practical Assessment, Research and Evaluation* 7, no. 17 (2001) <http://pareonline.net/getvn.asp?v=7&n=17> (accessed April 21, 2013).

<sup>71</sup> Code should flow from the principles that underpin the research, and the specific questions one seeks to answer. David F. Mark and Lucy Yardley, *Research Methods for Clinical Health and Psychology* (London: Sage, 2003), 59.

relevance of right to choose and right to choose for justifying abortion), with each idea belonging to only one category.<sup>72</sup>

The researcher's epistemological stance was objectivity. Hence, the researcher went back to the typed document (the transcribed document) by grouping and distilling from the text, a list of common themes in order to give expression to the communication of voices of the participants. Thus, a resort was also had to thematic content analysis.<sup>73</sup>

Here, the researcher marked with electronic highlighter all descriptions that were relevant to the topic of inquiry. The researcher coded each line of the document according to their meaning and content. Similarities and differences between codes were identified in order to be able to group them into descriptive themes. These descriptive themes were used to answer the research questions which gave the analytical themes<sup>74</sup>

The process of translation, through to the categorization of descriptive and analytical themes were carried out in a rigorous way that facilitated transparency of reporting. The analytical themes that emerged while using the process of thematic content analysis are the same with the categories that emerged while using the process of

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<sup>72</sup>Steve, "Overview,"

<sup>73</sup>Thematic content analysis is a good tool for teasing out the main themes expressed in a text. Michael S. Lewis-Beck, Alan Bryman and Tim Futing Liao, *The Sage Encyclopedia of Social Science Research Methods* (Thousand Oaks: Sage, 2007), 186. Alhojailan Mohammed Ibrahim, "Thematic Analysis: A Critical Review of its Process and Evaluation," *WEI International European Academic Conference Proceedings, Croatia* (2012): 10. <http://www.westeastinstitute.com/wp-content/uploads/2012/10/ZG12-191-Mohammed-Ibrahim-Alhojailan-Full-Paper.pdf> (accessed April 21, 2013)

<sup>74</sup>James Thomas and Angela Harden, "Methods for the Thematic Synthesis of Qualitative Research in Systematic Reviews," *BMC Medical Research Methodology* 8, no. 45 (2008) <http://www.biomedcentral.com/1471-2288/8/45> (accessed April 21, 2013).

qualitative content analysis. These two methods were used by the researcher in order to show reliability of the analysis.<sup>75</sup>

In order to analyse data collected while utilizing the doctrinal form of research, the researcher adopted legal research to analyse the laws, rules and norms associated with the problems presented in the study. Most legal scholars like the researcher, use the techniques and resources of legal research.<sup>76</sup>

## **2.7 Conclusion**

This was a Socio-legal research, thus suggestive of the need to combine both legal methods of research with the social methods of research. The choice of this methodology was to give a solid and basic understanding to the right to choose under CEDAW in relation to abortion in Nigeria. The methodology employed in this study represented empirical and conceptual research which found expressions in the works of past researchers. The next chapter was dedicated to reviewing literatures of past researchers.

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<sup>75</sup>This is a way employed by the researcher to test-re-retest reliability. An initial impression of reliability can be gained by applying the codes to the same piece of text on two occasions. Mark and Yardley, *Research Methods for Clinical Health*, 62.

<sup>76</sup>Legal research is used by scholars to analyse the development of rules and social norms, or to critique legal decisions or to advocate changing policy. Julia Beckett, "Legal Research Method," in *Handbook of Research Methods in Public Administration* eds, Kaifeng Yang and Gerald J. Miller (New York NY: CRC Press, 1999), 190.

## **CHAPTER THREE**

### **LITERATURE REVIEW**

#### **3.1 Introduction**

This study was inspired by the failure of previous researchers to recognize the fact that, the right to choose provision under CEDAW means the right women have to reproduce, and not that women have human right to abort. This automatically guaranteed for the unborn the human right to life. Recognizing this was the first step in justifying and ensuring the continued criminalization of abortion in Nigeria. This study was further inspired by the continuing controversy to legalize abortion in all countries of the world, including Nigeria. This controversy has been connected with a number of issues including feminism, human rights and abortion itself, as well as interpretation of treaties.

#### **3.2 Definition of Operational Terminologies**

Some operational terminologies within this work include;

**Abortion:** The removal of an embryo or fetus from a woman's uterus (stomach), in order to end the pregnancy. It could be therapeutic (induced), which is an abortion brought about intentionally. It could also take the form of a spontaneous abortion that is a miscarriage. Any pregnancy that is not viable. When the fetus cannot survive, or where it is born before the twentieth week of gestation. In the course of this study, the researcher embraced in totality this definition of abortion.

**Right to Choose:** This refers to the right a woman has to make medical and personal decision about her own body with regards to reproduction and sexuality. In the case

of an abortion, it means the right to choose when a pregnancy occurs and to decide whether or not she wishes to continue the pregnancy. The researcher in this study took a different stand, and identified the right to choose with reproduction and not with abortion.

**Right to Life:** The right is enshrined in Article 3 of the Universal Declaration of Human Rights. It is to the effect that, every human being has an inherent right to life. The right shall be protected by law. No one shall be arbitrarily deprived of his life. This definition was embraced by the researcher in this study.

**Human Rights:** These are basic rights and freedoms that all people are entitled to regardless of nationality, sex, age, national or ethnic origin, race, religion, language or other status. This human right definition was adopted by the researcher throughout this study.

**Hippocratic Oath:** An oath stating the obligation and proper conduct of doctors, formerly taken by those beginning medical practice. The researcher also, embraced this definition.

**Personhood:** According to the most modern Biology textbook, scientists define anything living as having seven signs of life. These are; capability to maintain a constant state, possession of one or more cells, possession of energy, maintenance of a high rate of growth, ability to change over a period of time, response to stimuli and capability of reproduction. At this point in a fetus existence, it cannot reproduce the same way a three year old child cannot, but if allowed to develop into an adult, this fetus will in fact be capable to reproduce. Hence, the fetus is a living human and rightly and scientifically, a fetus is a person. The researcher absolutely embraced this definition throughout the course of this study.

### 3.3 Feminism

Feminism is the main foundation of the campaign for a guaranteed women's right to choose abortion. Consequently, the radical feminists vigorously canvassed for equal right of men and women. They felt that in order for women to have equal right with the men, women should be given the right to choose to do whatever they want with their body. This, in the main, informs the choice of the topic of this study. Radical feminists want to possess the right to determine whether or not to abort their babies. A right which they claim should be absolute without any intervention.

Any form of intervention, be it from the government or from any other quarters is suggestive of the fact that women are not being treated equally with their male counter parts. Radical feminists, since the 1960s have continued to campaign in order to ensure that, the right to choose whether or not to abort their babies is left to the women. This campaign has remained visible all over the world.

Thus, the problem of inequality of the sexes stand in complex relation to the problem of survival so, the most obvious feminist method is first to raise the consciousness of women to a level of self-creation and responsibility.<sup>1</sup> By so doing according to Scales, feminists will be able to resist abstraction. She has envisaged however, that feminists will be exhausted by bringing feminist method to bear. Although, sounding a little bit confident, she has reiterated the fact that feminists must face law makers and interpreters to hear that which they have been trained to ignore (talking about

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<sup>1</sup>Ann C. Scales, "The emergence of Feminist Jurisprudence: An Essay in Feminist Jurisprudence," in *Feminist Jurisprudence* ed. Patricia Smith (New York NY: Oxford University Press, 1993), 105; Catherine A. Mackinnon, "Feminism, Marxism, Method and the State: An Agenda for theory," in *The International Library of Essays in Law and Theory Schools 15.1 Feminist Legal Theory* ed. Frances Olsen (Dartmouth: New York University Press, 1995), 515; Rachael M. Cologero and John T. Jost, "Self-Subjugation among Women: Exposure of Sexist Ideology, Self-Objectification and the Protective Function of the Need to avoid Closure," *Journal of Personality and Social Psychology* 100, No.2 (2011): 211.



women's voices).<sup>2</sup> Giving a word of encouragements to her fellow counterparts, she said that, feminists have to come together and be committed in the struggle to describe life to each other.

The battle line has been drawn here by Scale's statement seeming to suggest that from the onset, the feminists have a planned and detailed agenda to fight against any inequality in all ramifications.

Some of them fought against inequality in the work place, like Hillkay,<sup>3</sup> who admits that, in order to maintain women's equality of opportunity during her pregnancy, aspects of her work should be modified as far as reasonably possible, so that she will not experience employment disadvantages arising from her reproductive activity that are not encountered by her male co-worker. The above contention has found place in so many national and international laws. Most countries have special concession now for women who are pregnant. A lot of packages are now being enjoyed by women once they are satisfied pregnant, e.g. closing early from work and even being given salary during maternity leave.<sup>4</sup>

Be that as it may, Hillkay is only one of the few feminists that fought along her line.

Most of the feminists prominent in the right to choose campaign are mainly radical in

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<sup>2</sup>Women are from time, confine to the private life. They are invisible to the law. This invisibility masked the absence of human rights. Hilaire Barnett, *Introduction to Feminist Jurisprudence* (London, Sydney: Cavendish Publishing Limited, 1998), 65. Women have become a recurrent issue as women now have access to decision making. Damilola Taiye Agbalajobi, "Women's Participation and the Political Process in Nigeria: Problems and Prospects," *African Journal Of Political Science and International Relations* 4, no.2 (2010): 080; Fionnuala Ni Aolain, "Advancing Feminist Positioning in the Field of Transitional Justice," *International Journal of Transitional Justice* 6, no.2 (2012): 205-206.

<sup>3</sup>Herma Hillkay, "Equality and Difference: The Case of Pregnancy," in *The International Library of Essays in Law and Theory Schools 15.1 Feminist Legal Theory* ed. Frances Olsen (Darmouth: New York University Press, 1995), 224; Joanna L. Grossman, "Pregnancy, Work and Promise of Equal Citizenship," *The Georgetown Law Journal* 98, no.3 (2010): 567; Jessica Riggin, "The Potential Impact of CEDAW Ratification on US Employment Discrimination Law: Lessons from Canada" *Columbia Human Right Law Review* 42, (2011): 541.

<sup>4</sup>Sec 54 of the Labour Act 2004 (Cap L1 LFN) Nigeria 2004; sec 60 Employment Protection (Consolidated) Act UK 1978 which is similar to sec 54 Labour Act 2004 (Cap L1 LFN).

their thinking and the very foundation of the frame of mind of these radical feminists is their claim suggesting that women are not human beings.

To radical feminists, all the modern American legal theorists, either explicitly or implicitly embraces the 'separation theses' about what is meant by being human. Being human, implies that one is physically separated from all other human beings. If this assumption is true of men, it is untrue of women according to the radical feminists. For them, the central insight of feminist theory of the last decade has been that, women are essentially connected and not essentially separated from others. This explains why women are not considered as human beings, and thus, not on equal footing with men.

Because women are not separated from the rest of human life both materially through pregnancy, intercourse and breastfeeding, and existentially through the moral and practical life, women are not human beings. If women are capable of being called human, they should be separated from all others. In other words, women should not even go near men for intercourse, not to talk of getting pregnant.

The notion of equality of men and women portrayed by Hillkay is quite different from the views expressed by Scales. Both women have different perception on the issue of equality of men and women. The crave for equality of men and women in the work place is a welcome development to most women, even to some men folks. But when one is now particular about women to be separated from those that have been destined that they should be connected to, it leaves more to be desired. When women are not viewed as human beings, under what specie of being will women be classified? That question was not answered by these feminists.

This group of feminists<sup>5</sup> viewed pregnancy as a form of an unwelcomed intervention into a woman's body. This view about pregnancy marked the beginning of feminist argument for reproductive freedom. This argument relates to the fact that pregnancy, as an unwelcomed intervention into the body of a woman by the other, should be treated as an injury. Pregnancy connects women with the life of the other. Radical feminists believe that women should protest against this unwelcomed intervention into their bodies.

According to Firestone and Marilyn, pregnancy is the cause of patriarchy.<sup>6</sup> This is because women's body has been intruded by the others. For Firestone, especially, the implication of this is quite clear. She has proposed the technological removal of reproduction from the female body as a necessary condition for women's liberation. This contention by Firestone has shown the extent radical feminist are prepared to go in order to ensure that women, all over, are given the right to choose, to determine what to do with their bodies. The view of the radical feminists can further be explained by way of making reference Dworkin's statement below<sup>7</sup>:

A human being has a body that is inviolable; and when it is violated, it is abused. A woman has a body that is penetrated in intercourse: permeable, its corporal solidness a lie. The discourse of male-truth-literature, science, philosophy, and pornography- calls that penetration violation. This it does with some conscience and some confidence. Violation is a synonymous for intercourse. At the same time, the penetration is taken to be a use, not an abuse; a normal use; it is appropriate to enter her, to push into ('violate') the boundaries of her body. She is human, of course, but not by standard that does not include physical privacy. She is, in fact, human by standard that precludes physical privacy, since to keep a man out all together and for life time is deviant in extreme, a psychopathology, a repudiation of the way which she is expected to manifest her humanity.

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<sup>5</sup>Robin West, Firestone, Andrea Dworkin and Mckinnon.

<sup>6</sup>Robin West, "Jurisprudence and Gender," in *Feminist Jurisprudence* ed. Patricia Smith (New York NY: Oxford University Press, 1993), 506; Barnett, *Feminist Jurisprudence*, 57.

<sup>7</sup>West, "Jurisprudence and Gender," 508.

Earlier, these feminists have affirmed that women are not human beings. It is surprising that, Dworkin is now referring to some standards to portray women as human beings, the standard which was not considered by them before they declared that women are not human beings. This seems to suggest that there is no correlation in the arguments they are putting forth. Also, by the quotation, it can be seen that, Firestone, Dworkin as well as West, share the same opinion that women's connection with the others – either through pregnancy or intercourse constitutes an unwelcomed intervention into their lives and by implication, it also constitute an assault upon their freedom.

For radical feminists, pregnancy has become a metaphor for disease.<sup>8</sup> Today's radical feminist's biomedical paradigm provides the theoretical basis for allowing doctors to kill in the name of women's reproductive rights. By giving women such rights, today's women are now at liberty to choose whether or not to abort their babies.

Olsen, in her work has observed that women should be given a voice of their own. They should be given autonomy in order to be able to decide whatsoever they choose to do with their bodies. Any regulation by the state limiting or preventing women from choosing to do whatever they want to do with their body is a form of patriarchy.<sup>9</sup> This view is connecting the right to choose to women's autonomy.<sup>10</sup>

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<sup>8</sup> Rita Joseph, *Human Rights and the Unborn Child*, (Netherlands: Martinus Nijhoff Publishers, 2009), 316. Shulamith Firestone is famous or on famous for her advocacy of new reproductive technologies as means of freeing women from the tyranny of biology by liberating them from pregnancy. Sarah Franklin, "Transbiology: A Feminist Cultural Account of being after IVF," *The Scholar and Feminist Online* 9.1-9.2, (2010/11). [http://sfoonline.barnard.edu/reprotech/print\\_franklin.htm](http://sfoonline.barnard.edu/reprotech/print_franklin.htm) (accessed December 29, 2012).

<sup>9</sup> Olsen F., "Statutory Rape: A Feminist Critique of Rights Analysis," in *Feminist Legal Theory: Readings in Law and Gender* eds. Bartlett, K. T. and Kennedy R. (Boulder, Co: West view Press, 1991), 306-308; Christiana Brooks Whitman, "Review Essay: Feminist Jurisprudence," *Feminist Studies* 17, no.3 (1991): 496.

<sup>10</sup> One of the more significant branches of right of privacy concerns the right of an individual to make personal decisions about his or her life free from governmental control: that is the right of individual autonomy. Jeffery M. Shaman, "The Right of Privacy in State Constitutional Law," *Rutgers Law Journal* 37, no.971 (2006): 972-973. From a feminist perspective, emphasis on female personal space

Failure to make this connection is suggestive of the fact that women have been denied of their rights and therefore, it is a form of inequality between men and women, a form of patriarchy.

Another bold step being taken is to argue that feminists should be less concerned with abstract rights. In her words, Rhodes,<sup>11</sup> expressed that less preoccupation be given to abstract rights and that more concern should be given to the context in which those rights are exercised. To her, it has been a mistake to allow the abortion debate to proceed under pro-life and pro-choice labels. The issues must be reframed to encompass not only fetus's abstract entitlement to life, but also, the quality of that life and the lives of those surrounding it. Feminists must re-appropriate that label and claim abortion as a means of ensuring the quality of existence for women and their children.

Rhodes is more concerned about the fact that the fetus has no right at all and that feminists should base their arguments for abortion right on the premises that, getting an abortion will improve the quality of life of the woman and her existing child, if any. This is what Jeffery meant when he said, having right meant having a fundamental entitlement to a certain level of capability.<sup>12</sup> However, unlike other radical feminists, Rhodes contended that the claim of abortion cannot rest with some narrow abstract understanding of 'right to choice'. To her, no adequate notion of reproductive freedom can exclude the public benefits essential for its existence. Nor

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implies that intelligent women must secure privacy in order to remain an independent, free thinking individual within a patriarchal society. Lamia Atafaireet, "Charlotte and Elizabeth: Guardians of the Female Mind in *Pride and Prejudice*," *Artifacts (Literary Analysis)* 6 (2012). <http://artifactsjournal.missouri.edu/2012/03/charlotte-and-elizabeth-guardians-of-the-female-mind-in-pride-and-prejudice/> (accessed December 30, 2012).

<sup>11</sup>Deborah L. Rhodes, "Reproductive Freedom," in *Feminist Jurisprudence* ed. Patricia Smith (New York NY: Oxford University Press, 1993), 314.

<sup>12</sup>Jeffery Spring, "On the Rescuing of Rights in Feminist Ethics: A Critical Assessment of Virginia Held's Transformation Strategy," *Praxis* 3, no.1 (2011): 68. [http://www.castela.net/praxis/vol3issue1/Praxis3.1\(spring\).pdf](http://www.castela.net/praxis/vol3issue1/Praxis3.1(spring).pdf) (accessed December 30, 2012).

can feminists who advocate choice limit their claims to abortion on demand. Their objectives must encompass broader societal support for contraceptive research, education, counselling and distribution that will make abortion less necessary.

From the above assertions by Rhodes, it is obvious that, while the author is in support of reproductive freedom, she is more inclined to the use of more contraceptive and less abortion. Here, she can be seen to go in line with Sanger, who founded the early 20<sup>th</sup> century birth control campaign. Sanger and her followers disavowed any support for abortion and presented their preventive approach as a sufficient alternative.<sup>13</sup>

Radical feminists to the core will not support Rhodes or Sanger, because to them, use of contraceptives by women will further suggest their inequality to men. Radical feminists want women to be able to determine reproduction by the use of abortion, not contraceptive usage. Radical feminism, being the bedrock of the right to choose, is hereby submitted to be a westernized idea which permeates the society into believing that the biological role of women has become a burden which a woman can choose to do without. This idea sounds strange to the ears, especially in an African set up like Nigeria. In this society, it is unbelievable how on earth, pregnancy and mothering which were the best sources of economic security and social status amongst Africans generally, and Nigerians in particular, can so much be dreaded by westernized women in the guise of radical feminism. According to Zaynab Alkali,

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<sup>13</sup>Rhodes, "Reproductive Freedom," 307. Margaret Sanger was credited with founding the birth control movement in the US. Ellen C. Dubois et al, "Feminist Discourse, Moral Values and the Law-A Conversation," The James McCormick Mitchell Lecture (1984): 199.

the views by these radical feminists should be curtailed in Nigeria as they constitute destructive elements.<sup>14</sup>

However, while the views of these radical feminists can be described as destructive elements, the views of some other feminists, who are cultural in nature and context, cannot suffer the same fate, and are also important to be considered.<sup>15</sup>

The views of cultural feminists can be likened to what obtains in Africa, generally, and in particular, Nigeria. According to cultural feminists, women are more capable of providing physical, loving and emotional care than men. This capacity for care dictates the moral terms in which women differently, construct social relations. Cultural feminism simply identifies and celebrates patriarchy as a way that distinguishes women from men. Women's intervention by the other is a welcome idea by cultural feminists. To them, it is the only way to show a woman's different nature from that of men. Anything that shows the different nature of women from men is worth celebrating.<sup>16</sup>

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<sup>14</sup>Isaac Attah Ogezi, "A Celebration of Zaynab Alkali's, The Descendants," Africanwriter.com (2010) [http://www.africanwriter.com/articles/125/1/A-Celebration-of-Zainab-Alkali's-the-Descendants/page1.html\(2010\)](http://www.africanwriter.com/articles/125/1/A-Celebration-of-Zainab-Alkali's-the-Descendants/page1.html(2010)) (accessed July 7, 2011). In Zaynab Alkali's "The Cobwebs and other Stories", female radicalists were likened to the cobwebs who wreck homes in the name of radicalism; Sonnie Ekwonusi, "Nigeria: Women's Conference in New York" This day Newspapers (2010) [http://allafrica.com/stories/2010\\_03170300.html](http://allafrica.com/stories/2010_03170300.html). Here, it was expressed that the western concept of liberation of women is incompatible with the values of African civilization. It tends to separate the well being and right of the mother from the well being and right of the child. Furthermore, the resistance against the cultural elements that mark women's bodies as females was examined by Khadidiatou. Gueye Khadidiatou, "Tyrannical Feminity," in Nawal El saadawi's *Memoirs of a woman Doctor*, *Research in African Literature* 41, no.2 (2010): 160.

<sup>15</sup>Gilligan, Nel Noddings, Suzanna Sherry as well as Nancy Chodorow. West, "Jurisprudence and Gender," 504. Cultural feminists distant themselves from what they call, 'negative perception of feminism', particularly lesbianism and separatism from men.

<sup>16</sup>Hilaire Bernett, *Source Book on Feminist Jurisprudence* (London, Sydney: Cavendish Publishing Limited, 2012), 234. Feminine values are those culturally defined values, historically associated with women, which include concern for others, nurturance and collaboration. Cultural feminists celebrates those qualities associated with feminity. Jawad Syed and Peter A. Murray P., "A Cultural Feminist Approach towards Managing Diversity in Top Management Teams," *Equal Opportunity International* 27, no.5 (2008): 413-432. [http://www.academia.edu/694845/Syed\\_J.\\_Murray\\_P.\\_2008\\_A\\_cultural\\_feminist\\_approach\\_toward\\_s\\_managing\\_diversity\\_in\\_TMTs.\\_Equal\\_Opportunities\\_International.\\_Vol.\\_27\\_No.5.\\_pp413-432](http://www.academia.edu/694845/Syed_J._Murray_P._2008_A_cultural_feminist_approach_toward_s_managing_diversity_in_TMTs._Equal_Opportunities_International._Vol._27_No.5._pp413-432) (accessed December 30, 2012).

To cultural feminists, mothering and caring are deeply related. Women, having given birth and entered lactation are naturally loving and caring towards their infants. The views of cultural feminists, it must be stressed, is in absolute consonance with the Nigerian views of the all important function of women.<sup>17</sup>

The importance of reviewing the literatures on feminism was not far-fetched, the reason being that, as a result of feminist movement, feminist consciousness and awareness became broadened and expanded to the extent that, women now assume that they have a right to choose to do whatever they want with their bodies. This of course, now leads us to reviewing the literatures on human rights, which is also a necessary step, for in the subsequent review; the exact place of the right to choose within national and international laws have been ascertained.

### **3.4 Human Rights**

The right to choose abortion, which has its foundation and bedrock in the views and aspirations of the radical feminists of the 1960s, is now being considered as a form of human right for women. It has however been said that human rights have a place in morality and in law at both national and international levels.<sup>18</sup> These rights are directed primarily to national governments requiring compliance and enforcement.

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<sup>17</sup>Remi Akujobi, "Motherhood in African Literature and Culture," *CLCWeb: Comparative Literature and Culture* 13, no.1 (2011): 1-5, <http://docs.lib.purdue.edu/clcweb/vol13/iss1/> (accessed June 11, 2012).

<sup>18</sup>Statement by H. L. A Hart in his famous article on Natural Rights in, Anthony Pagden, "Human Rights, Natural Rights and Europe's Imperial Legacy," *Political Theory* 31, No.2 (2003): 172-173 <http://www.jstor.org/stable/3595699> (accessed February 28, 2011); Nickel James, "Human Rights," in *The Stanford Encyclopaedia of Philosophy* ed. Edward Zalta (spring 2012 edition). <http://plato.stanford.edu/archives/spr2013/entries/rights-human/> (accessed December 30, 2012). There is the presence of international human rights standard in national law. Benjamin Mason Meier et al, "Bridging International Law and Rights-Based Litigation: Mapping Health-Related Rights through the Development of the Global Health and Human Rights Database," *Health and Human Rights: An*



The requirements of compliance and enforcement is a function which governments must strive to achieve beginning with the foundation of the contemporary concept of human right--the Universal Declaration of Human Rights 1948 (UDHR), which sets out a list of more than twenty-four specific human rights that countries should respect and protect. An example of such right is the minority and group rights which centre on the equal rights of disadvantaged groups. One of such disadvantaged group is women. From this assertion, it can be inferred that the right to choose, being an aspect of reproductive right, is recognized as a human right<sup>19</sup> having fallen under the disadvantaged group which is one of the main concerns of the UDHR.<sup>20</sup>

Concern for the equal rights of the disadvantaged group is a long standing interest of the human rights movement. Human rights instruments have always provided that all people are the same before the law, and that everyone including women has the same basic rights and should be able to enjoy them without discrimination from anybody.<sup>21</sup> Since 1964, the General Assembly of the United Nation has mainly dealt with rights

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*International Journal* 14, no.1 (2012). <http://www.hhrjournal.org/index.php/hhr/article/view/473/750> (accessed December 30, 2012).

<sup>19</sup>Executive Summary on the *Report of the Global Safe Abortion Conference, 'Whose right? Whose choice?, Who Cares?'*(2007), 3. [http://www.mariestopes.org/sites/default/files/Global\\_safe\\_Abortion\\_Conference\\_Report.pdf](http://www.mariestopes.org/sites/default/files/Global_safe_Abortion_Conference_Report.pdf). (accessed December 30, 2012). Here abortion was recognized as a human right; Christina Zampa and Jaime M. Gher, "Abortion as Human Rights- International and Regional Standards," *Human Rights Law Review* 8, no.2 (2008): 249. In a related development, the United Nations Human Rights council passed a resolution last week endorsing guidelines supporting abortion as human right. Bethamy Monk, "UN Pushes Abortion as Human Right," *Citizen Link* October 8, 2012. <http://www.citizenlink.com/2012/10/08/un-pushes-abortion-as-human-right/> (accessed December 30, 2012).

<sup>20</sup> By Article 1 of the *Universal Declaration of Human Rights*, specifically providing for the equality of all human beings, there is the basic assumption that both men and women are equal before the law. To concretize this effort Article 2 further provides that, everyone is entitled to all the rights and freedoms set forth in the declaration without distinction, such as race, colour and sex. Women are seen to be within the contemplation of the UDHR.

<sup>21</sup> *Ibid.*

of women through specialized treaties such as, the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).<sup>22</sup>

Cook, in one of her writings gave an insight to the General Recommendation 24 of CEDAW. The recommendation employs state parties to eliminate all forms of discrimination against women in the field of health and health care, and should ensure that women can exercise and take advantage of human rights and fundamental freedoms on the basis of equality with men. The recommendation makes it clear that, discrimination occurs against women when health systems refuse or neglect to provide health services that only women need, such as safe abortion services. The recommendation further argues that states are obliged to remedy the situation.<sup>23</sup>

While opposing this stand respectfully, it should be stressed that the stand of this research is that, the right to choose under CEDAW is not the same as the right to choose abortion canvassed by the radical feminists of the 1960s. Better still, the health system should only be in favour of human rights which recognizes right to life. This has become very important because of the special position which physicians hold in relation to the protection and preservation of life.<sup>24</sup> The researcher is of the view that CEDAW recommendation providing for state parties to

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<sup>22</sup> By this convention, all forms of discrimination against women are hereby eliminated. Art 1 of the convention states that, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex, which has the effect, or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field.

<sup>23</sup>Rebecca J. Cook, “Abortion, Human Rights and the International Conference on Population and Development (ICPD),” in *Preventing Unsafe Abortion and its Consequences, Priorities for Research Action* eds. Ina K. Warriner and Iqbal H. Shah (New York NY: Guttmacher Institute, 2006), 27. However, the World Health Organization, in one of its publication has made it clear that, health should be made an integral part of human right. *WHO, 25 (Twenty Five) Questions and Answers on Health and Human Rights* (2002), 18; Marilyn Porter, “Transnational Feminism in a Globalized World: Challenges, Analysis and Resistance,” *Feminist studies* 33, no.1 (2007): 54 (the author here also linked reproductive right to health right, and consequently, human right). <http://www.jstor.org/stable/20459120> (accessed October 6, 2011).

<sup>24</sup> Medical practice has always been to heal, to alleviate suffering and to preserve life. Momoh Anate, *Women Reproductive Health in Africa: A Continuing Tragedy* (2008) 11. Being his Inaugural Lecture, delivered at the University of Ibadan. Nigeria.

ensure abortion right is not a licence to our health service system to promote abortion because, this will be inconsistent with the right to choose provisions under CEDAW, after all, within the body of CEDAW itself, there is no such provision.

The right to choose granted under CEDAW to women should be interpreted in line with other international human rights instruments which promote the unborn's right to life.<sup>25</sup> In order for the unborn to enjoy the right to life, through the right to choose to reproduce granted under CEDAW, the researcher is of the opinion that, the health care system has an important assignment in making sure that women receive enough information regarding family planning.<sup>26</sup>

In one of her detailed writings, Cook had a different idea concerning the provision of CEDAW in relation to health care services. It was provided under CEDAW that:

State parties shall take appropriate measures to eliminate discrimination against women in the field of health care, in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.<sup>27</sup>

There is nowhere in the body of CEDAW that made reference to abortion. Cook has however conceived this provision as referring to abortion. This is far from the contention of this research. Health care system should support human right to reproduce, which eventually leads to the right to life for the unborn.

The late Jonathan Mann once said that there exist a synergy between public health and human rights.<sup>28</sup> This can be visualized from the above provision of CEDAW,

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<sup>25</sup>For example, the *Universal Declaration of Human Right (1948)*, the *Geneva Declaration of right of the Child (1924)*..

<sup>26</sup>To be able to exercise the right to choose to decide freely and responsively on the number and spacing of children as provided by CEDAW, the health care service should be able to disseminate information regarding family planning.

<sup>27</sup> Art 12(1) CEDAW

<sup>28</sup>Mann observed that, human rights thinking and action have become much more closely allied to, and even integrated with public health work, and that the 'skills and expertise needed in public health

which conveniently brought in public health within its framework. Health care is necessary in order to help women express their right to choose to reproduce, (the right to determine the number and spacing of their children) not to abort. Family planning cannot be likened to abortion. They are completely different phenomena. While family planning basically deals with the way and manner which women will go about in spacing the number of children they intend having, abortion is concerned with the killing of already implanted life in the womb of a woman.

It is here reaffirmed by the researcher that, the killing of an already implanted life in its mother's womb is not within the contemplation of CEDAW as seen in the right to choose granted by CEDAW. This can be seen from its provision of Article 12 on health, whereby, the right to life of children is already being anticipated by the provision of family planning. According to this provision on health, both the mother's right to life as well as that of the children is being defended. It is however contended by the researcher that, in order to stay alive and healthy, women need to plan their family adequately.

Adequate planning of the family is the only key that will ensure right to health for women, and not abortion. With due respect, the comments of Professor Oye-Adeniran that, reproductive health is part of women's human right to abortion,<sup>29</sup> is wrong. This is because it does not correspond with the aims and aspirations of public

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include, epistemology, biostatistics, policy analysis, economics, sociology and other behavioural sciences', but also that, 'in modern world, public health officials have two fundamental responsibilities to the public: to protect and promote public health and to promote human rights. Cook, "Abortion and Human Right," 17; Mann J. M, "Medicine and public Health, Ethics and Human Rights," *Hastings Centre Rpt* 27, no.3 (1997): 6-13. The O'Neill institute for national and global health law at Georgetown University, the World Health Organization and the Lawyers Collective have come together to develop the searchable global health and human right database that maps the intersection of health and human right in judgement, international and regional instruments and national constitutions. Meier et al, "Bridging International Law,"

<sup>29</sup>"Nigeria-Abortion: Between Law and Human Rights," *International Consortium for Medical Abortion* December 27, 2007. <http://www.medicalabortionconsortium.org/news/nigeria-abortion-between-law-and-human-rights-128.html> (accessed March 22, 2011).

health. He further called on the government to respect the basic human right of women by ensuring that no hindrances are placed in the access to reproductive health services, including abortion.

The researcher asserts that, there is a misconception here. It has already been established that there exist a synergy between health and human right. The professor had linked right to abort to women's health. Respectfully, the researcher affirms that this is not the case. There is nothing healthy in abortion. Thinking of this nature will jeopardize the main intention of CEDAW that made provision for the right to choose.

In order to maintain that the right to choose to reproduce is read into CEDAW, and not right to choose to abort, the African Anti-Abortion Coalition (AAAC), in a strongly worded letter to the late president of Nigeria, Musa Yar'Adua, informed the then president that, some pro-abortion groups, having failed to convince individuals in Nigeria about abortion rights, have shifted their fight against the Nigerian unborn child to the State's Houses of Assembly, after their crushing defeat at the National Assembly.<sup>30</sup>

This is evidenced from the fact that a bill named, 'Women's Reproductive Rights Law', authorizing abortion throughout the terms of pregnancy was passed in Anambra state, one of the States in the Eastern part of Nigeria<sup>31</sup> The first contention of the AAAC was that, section 6 of the law, which empowers state government to authorize reproductive right for women (the right to choose) is a violation of the

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<sup>30</sup>African Anti-Abortion Coalition, Chidicon Medical Centre, [www.chidicon.com/AAAC.html](http://www.chidicon.com/AAAC.html) (accessed March 22, 2011). In a recent development, the African Anti-Abortion Coalition (AAAC) council for corporate social responsibility, on 26<sup>th</sup> September 2012, has petitioned the present president of Nigeria, President Goodluck Jonathan over the so-called USAID's \$8.3m loan (#1.245billion Nigerian Naira) targeted towards reproductive healthcare services in Nigeria, including abortion clinics and human-egg pouching fertility clinics. The Centre call on the president to stop USAID and insist on compliance with the provisions of the laws of the Federal Republic of Nigeria. The Gambia Echo (Online Newspaper) September 26, 2012. <http://thegambiaechos.com/index.php/permalink/3667.html> (accessed December 30, 2012).

<sup>31</sup>Sec 6, Women's Reproductive Right Law (2005), Anambra State.

Fundamental Human Rights provision of the Constitution of the Federal Republic of Nigeria, which provides, specifically, under section 33 for the right to life of everyone.

The AAAC have also taken the right to choose under CEDAW to mean right to choose abortion. It has been contended by this study that the right to choose under CEDAW should be rightly interpreted to mean the right to reproduce, because, there is consistency in all international human rights instruments which guarantees unborn's right to life. By the name of the bill, 'Reproductive Right Bill', interpretation of abortion right cannot stand.

The reproductive right to choose provided for under section 6 of the Anambra State's Law should in fact be interpreted to mean the right to reproduce, which will then be consistent with the right to choose provisions under CEDAW as well as the provisions of the Constitution of Nigeria, which guarantees right to life to everyone. When a woman exercises her right to choose, she indirectly gives her unborn child a right to life. It is therefore submitted that, the Reproductive Right Law of Anambra State, is not inconsistent with the Constitution of Nigeria.

This is suggestive of the fact that proper interpretation be given to reproductive right to stand for the right to reproduce (consequently the unborn's right to life) and not the right to abort. Once this is done, the reproductive right granted under the Anambra State law will be consistent with the reproductive right granted under CEDAW, and since the right to life granted by the Constitution of the Federal Republic of Nigeria is consistent with the Reproductive right under the State law, and vice versa, the Reproductive Right Law of Anambra State will be taken as

reinforcing the right to life under the Nigerian Constitution, and consequently, the unborn's right to life as envisaged under CEDAW's reproductive right.

In the spirit of consistency with the constitution of Nigeria, the House of Assembly in Imo state of Nigeria, (another state in the East of Nigeria), has been commended for rejecting the Imo State Women's Right Bill (2009). The legislature voted 13-1, thereby defeating the bill that would have made abortion legal in the State.<sup>32</sup> A former governor of the State had expressed shock on the wave to legalize abortion in Nigeria in the 21<sup>st</sup> century. The defeat of the bill has demonstrated that Nigeria, as a whole has deep respect for cultural norms and religious tenets. In Owerri, Nigeria, the rejection of the bill was tagged, a victory of the superior Imo cultural values over the new global western cultural revolution.<sup>33</sup>

Interestingly however, various human rights instruments have addressed the issue relating to human rights differently and it thus seems that, the new global western Cultural Revolution has found its way into a human rights instrument. In 2003, the African Union adopted the Protocol to the African Charter on Human and People's Right on the Rights of Women in Africa.<sup>34</sup> Article 14(2) of the Protocol provides,

State parties shall take all appropriate measures to protect the reproductive right of women by authorizing medical abortion in cases of sexual assault, rape, incest and where the continued pregnancy endangered the mental and physical health of the mother or the life of the mother or the fetus.

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<sup>32</sup>Kalu, "Legalization of Abortion?, No Way," <http://www.sunnewsonline.com/webpages/columnists/kalu/kalu/20-june-htm> (accessed March 22, 2011); Patrick B Craine, "Nigerian State Rejects Abortion-Legalizing Bills Pushed by American Group," <http://www.lifesitenews.com/news/archive/1dn/2009/jun/09061909.html> (accessed March 22, 2011).

<sup>33</sup>*Ibid*

<sup>34</sup>AU, Protocol to the African Charter on Human and People's Right on the Right of Women in Africa, 2003, <http://www.achpr.org/english/-info/women-en.html> (accessed June 15, 2011).

It must be stated here that this protocol is the only human rights instrument that made a categorical statement about the right to abort. The Right to choose, as provided under CEDAW cannot be linked with abortion. The researcher re-affirms that there is a misconception by this Protocol in trying to associate abortion with reproductive right to choose. The best interpretation to be given to the right to choose, as guaranteed by CEDAW, is the right to reproduce, never the right to choose to abort. By providing for abortion right therefore, the protocol is inconsistent with CEDAW as well as all other international human rights instruments.

Also, the Protocol is inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, which granted right to life for all Nigerians. Both CEDAW as well as the Protocol has been ratified by Nigeria. Despite ratification, both instruments are yet to be domesticated and implemented.

The researcher is of the opinion that the non-domestication and non-implementation of CEDAW is due to the misconception on the meaning of the right to choose, granted under CEDAW. Nigeria will be more than willing to domesticate CEDAW once the interpretation of the right to choose to reproduce is accorded to the right to choose granted under CEDAW. As regards the protocol to the African Charter on Human and People's Rights on the Right of Women in Africa, domestication of the protocol will be contrary to the spirits and intents of CEDAW as well as the fundamental principles of the all international human rights instruments. This is because; the unborn's right to life is the underlining principle.

In an elaborate work undertaken by Joseph,<sup>35</sup> a convincing expression was given suggesting that international instruments do recognize the unborn's right to life. The

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<sup>35</sup> Joseph, *Unborn Child*, xviii.



author was convinced about this fact and said that her three decades of researching, lecturing as well as writing had influenced her belief in the presence of such right for the unborn. While opposing the abortion rights under the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003), as being contrary to the fundamental principles of international rights instruments as well as contrary to the values of Africa, she has also affirmed that the CEDAW committees, as it is also asserted in this study, are inciting an abortion regime by promoting abortion as a form of human rights.<sup>36</sup>

While in total support of Joseph's contentions, the assertion being made by this study is that CEDAW committee and CEDAW itself is not one and the same thing. The committee's duty is to monitor compliance, while the CEDAW is to be complied with. If the committee is to monitor compliance, then, by the interpretation of the right to choose to mean the right to reproduce, now read into CEDAW by this study, the committee will have no option than to monitor the compliance of the right to reproduce instead of monitoring the compliance of the right to abort.

The recommendation 24 of the CEDAW committee has been taken by many, including Joseph (the author) to mean a provision granting abortion rights. It has been maintained earlier that, this is a misconception. If this misconception is allowed to continue, it will negate the unborn's right to life which all human rights instruments attest to.

The following statements further shed more lights on the issue of unborn's right to life granted by international human rights instruments, and non-human rights instruments:

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<sup>36</sup>Ibid, 245-246.

- i. “whereas 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”.<sup>37</sup>
- ii. “Although there have been many changes in medicine, the spirit of the Hippocratic Oath cannot change and can be reaffirmed by the profession. It enjoins the motive of service for the good of the patients. The duty of caring, the greatest crime being co-operation in the destruction of life by murder, suicide and abortion”.<sup>38</sup>
- iii. “Textbooks on human embryology at the time recognized that human embryo is a distinct new human being to be treated by doctors with respect; the end of the process of fertilization marks the initiation of life of a new individual”.<sup>39</sup>
- iv. “The woman bears the children and loves them before they even come into the world”.<sup>40</sup>
- v. “The need for such special safeguards including legal protection for the child before as well as after birth”.<sup>41</sup>
- vi. “It shall be unlawful to deprive a person, from the, moment of conception, of his life or bodily integrity”.<sup>42</sup>

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<sup>37</sup>Preamble to the *Declaration of the Rights of the Child* (1959).

<sup>38</sup>Statement by the Council of the British Medical Association to the World Medical Association, June 1947, re-issued by the Medical Education Trust and reproduced at <http://www.donoharm.org.uk/leaflets/war.htm>. (assessed June 15, 2011); Joseph, *Unborn Child*, 8.

<sup>39</sup>Joseph, *Unborn Child*, 8. Embryo is a biological human, it is living and it is genetically distinct. US Congress, ed., Congressional Record V 150, Pt 17, October 2004 to November 2004 (United States Government Printing Office 2009): 231113.

<sup>40</sup>The quotation was made by Eleanor Roosevelt, Chairwoman of the drafting committee of the Universal Declaration, in Human Rights and the Unborn Child. Joseph, *Unborn Child*, 8.

<sup>41</sup>*Geneva Declaration of the Rights of the Child* (1924).

<sup>42</sup>UN Doc. E. CN. 4/21.Art 1 of the Draft *International Covenant on Human Right* (1947).

- vii. “Special protection and assistance must be provided to expectant mothers in all situations”.<sup>43</sup>
- viii. “The concern for the child before as well as after birth is here confirmed”.<sup>44</sup>
- ix. “Every person has the right to life. This extends to the right to life from the moment of conception; to the right to life of incurables, imbeciles and the insane”.<sup>45</sup>
- x. “The common heritage of the rule of law included, we must remember, not only a tradition of common law protection for the unborn child, but also widespread legal protection for the child at risk of abortion”.<sup>46</sup>
- xi. “Sentence to death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women”.<sup>47</sup>
- xii. “Every person in general from the moment of conception has the right to have his life respected”.<sup>48</sup>

All the statements above justify the position that one of the human rights that need to be guided and protected is the unborn’s right to life, which can only be guaranteed if women are able to exercise their human right to choose to reproduce as enshrined under CEDAW’s reproductive right to choose.

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<sup>43</sup>*Geneva convention relating to the protection of civilian persons in time of war*, eg, Arts 14, 23, 50 and 89, also, Protocol additional to the Geneva convention of 12 August 1949, and in relation to the protection of victims of International armed conflicts ( Protocol 1 ) Arts 70, 76 and 77.

<sup>44</sup>*Convention on the Prevention and Punishment of the Crime of Genocide (1948)*. This convention was approved by the United Nation General Assembly on the 9<sup>th</sup> December, the day before the *Universal Declaration of Human Right*.

<sup>45</sup>*Draft American Declaration of the International Rights and Duties of Man (1948 )*.

<sup>46</sup>A/3764 para.113. It was pointed out that legislation of many countries accorded protection to the unborn child, A/c.3/SR817 para 25;A/c.3/SR818 para. 28

<sup>47</sup>*International Covenant on Civil and Political Rights (1966) Art 6 ( 5 )*.

<sup>48</sup>*American Convention on Human Right (1969) Art 1 (2)*.

### 3.5 Abortion

The main aim of radical feminists is to secure for women, an abortion regime free from all interventions as well as scrutiny. Hence, the asserted right to choose is linked solely to the right a woman has to determine whether she wants an abortion or not. However, following the flow of events from the time of conscious awareness of feminists, down to the era of human rights envisaged within the context of the right to choose, leading in the main to the present state of abortion, it appears imperative therefore, to review some literatures centring on abortion.

To do this effectively, the literatures have been classified into two *viz*, those in support of abortion, and those against abortion. But before that, a quick analysis of the foundation of the abortion debate was given.

The decision by the Supreme Court of the United States in the case of *Roe v. Wade*<sup>49</sup> brought to prominence the issue of the right to choose abortion by a woman. The decision in effect, recognizes a woman's right to choose and this right, at least in the early months of pregnancy, was ruled to prevail over the fetus's right to life. This is because, there is little reason for extending legal protection to human life until a person comes into existence.

The court held that, during the first trimester, which starts from conception till around the 12<sup>th</sup> week, the woman and her doctor are free to determine whether or not to abort the baby without regulation by the state. During the second trimester, which elapsed at the 28<sup>th</sup> week, the conflicting interest of the state in maternal health allows the state to adopt regulations that promote safe abortion. When the fetus reaches the

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<sup>49</sup>410 US 113 (1973). The Supreme Court of the United States declared that the fetus is not a person within the language and meaning of the fourteenth Amendment to the United States Constitution and so, does not deserve a right to life. It is only when the fetus reaches the point of viability that the State may prohibit abortion, except when necessary to protect the health of the mother.

stage of viability at the third trimester, the state may exercise its power to prohibit abortions except when necessary to protect the health of the mother.<sup>50</sup> In other words, by this decision, fetus is not a person and therefore, there is no reason to accord it a right to life.

With due respect to the justices of the Supreme Court of America, this decision leaves more to be desired because, going in line with all the international human rights instruments, life begins at conception.<sup>51</sup> Also, traditional Roman Catholics maintained that human person come into existence at the moment of the ovum being fertilized.<sup>52</sup> Even at this opinion by the Catholic Church, some theologians, like Thomas Aquinas, try to extend the time when fetus can be termed a person by claiming that, there are several stages a fetus needed to pass through before it can be concluded that, a fetus is a person. The likes of Aquinas, argues that the fetus cannot assume the stage of a person at conception as postulated by the Catholic Church, because the fetus is not conscious of happenings in its surroundings. If this argument holds true, it can then be said that, killing a new born baby is normal since the baby too is not conscious of the happenings around it. Happily, the view expounded by the Catholic Church is the widely accepted view.

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<sup>50</sup>Sperling D, *Management of Post-Mortem Pregnancy. Legal Philosophical Aspect* (England: Ashgate Publishing Company, 2006), 2.

<sup>51</sup>Such as, *Draft American Declaration of the International Rights and Duties of Man* (1948).

<sup>52</sup>Marc Stauch, Kay Wheat and John Tingle, *Source Book on Medical Law*, (London: Carvendish Publishing Limited, 1998), 407; Pope John Paul II, *The Evangelium Vitae* (Librenia Editrice Vaticana, 1995).[http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_25031995\\_evangelium-vitae\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html). (accessed January 18, 2013). Any human society, if it is to be well-ordered, must lay down as a foundation this principle, namely, that every human being is a person, that is, his nature is endowed with intelligence and free will. All fetuses retain the right to life. Christopher McCrudden, "Legal and Roman Catholic Concepts of Human Rights: Convergence, Divergence and Dialogue?," *Oxford Journal of Law and Religion* 1, no.1 (2012): <http://ojlr.oxfordjournals.org/content/early/2012/01/11/ojlr.rwr019.full> (accessed January 2, 2013).

Robertson,<sup>53</sup> in one of his ambitious work, has defined reproductive freedom in two ways. To him, the first way is to avoid reproduction, which means abortion, and the second way is the freedom to reproduce which means carrying the pregnancy to term. He was of the opinion that the position the woman takes depends on her interest and justification for taking such a stand. He went further to say that, the denial of one type of reproductive liberty necessarily implicates the other. Robertson's writing is still in line with the famous contention on the right to choose abortion. He sees nothing wrong in a pregnant woman choosing between the right to reproduce and the right not to reproduce; abortion. Whichever the woman chooses, to him, is best judged by the woman's interests and justifications.

This liberty to choose as portrayed by Robertson cannot be maintained by this research. This researcher maintains that since the right to choose has found its way into CEDAW, which happens to be an international human rights instrument most concern about the preservation and protection of human life, there can only be one interpretation to the right to choose and that is the right of any pregnant woman to reproduce in order to give her fetus the right to life. It is hereby affirmed that, an international human rights instrument like CEDAW cannot be a license to destroy life, but to promote and preserve life.

Any woman, who happens to find herself in a state of pregnancy, will have no other alternative than to choose to reproduce. To be able to act contrary to reproduction,

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<sup>53</sup>John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (United Kingdom NJ: Princeton University Press, 1994), 26; D.A. Caeton, "Choice of a Lifetime: Disability, Feminism and Reproductive Rights," *Disability Studies Quarterly* 31, no.1 (2011). <http://dsq-sds.org/article/view/1369/1501> (accessed January 2, 2013). Caeton, like Robertson is asserting also that, reproductive right can also mean abortion choice for women. When reproductive right is viewed as right to reproduce, there will be no place for regret, because regret is only possible where women have a choice. Susan Frelich Appleton, "Reproduction and Regret," *Yale Journal of Law and Feminism* 32, no.2 (2011): 270. <http://law.wustl.edu/scholarshipspotlight/documents/Appletonscholarship.pdf> (accessed January 2, 2013).

she must act fast by preventing the pregnancy, and that is the spirit of the right to choose under CEDAW. That is that, women should be able to decide freely and responsibly on the number and spacing of their children through family planning, and not abortion.

### 3.5.1 Literatures supporting abortion

Having presented the genesis, basis as well as the foundation surrounding the issue of abortion, it is imperative to note that literatures in support of abortion abounds. In Nigeria, these types of literatures are found all around supporting as well as canvassing that the right to choose for women wholly relates to abortion right and that abortion should be legalized.

While drawing a framework for research on abortion in Nigeria, Professor Lawrence A. Adedokun,<sup>54</sup> was of the view that undergoing abortion under unsafe condition<sup>55</sup> carries with it unacceptable social and economic circumstances. He therefore said that the first step to curb the problem of unsafe abortion is to legalize abortion. By legalizing abortion, means going against the right to choose provision as granted under CEDAW.

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<sup>54</sup>Lawrence A. Adedokun, "Systematizing Determinants of Abortion: A Frame work for abortion Research in Nigeria," *Critical Issues in Reproductive Health. Prevention of Morbidity and Mortality from Induced Abortion in Nigeria* (1991):110. (Being a paper delivered at the proceedings of a seminar organized by the Department of Obstetrics, Gynaecology and Perinatology, Obafemi Awolowo University, Ile-Ife, Nigeria, 4-6, December 1991).

<sup>55</sup>An unsafe abortion is a procedure for terminating an unwanted pregnancy either by persons lacking the necessary skills or in an environment lacking the minimal standards or both. This definition was contained in the in the WHO, *The Prevention and Management of Unsafe Abortion, Report of a Technical Working Group Geneva* (Division of Family Health WHO, 1992), 3. [http://whqlibdoc.who.int/hq/1992/WHO\\_MSM\\_92.5.pdf](http://whqlibdoc.who.int/hq/1992/WHO_MSM_92.5.pdf) .(accessed January 18, 2013). In Nigeria, it is very common for women to resort to this type of abortion because, under the Penal Laws, legal and safe abortion can only be granted when the life of a woman is at stake; Olukunmi Lanre Olaitan, "Attitudes of Unversity Students towards Abortion in Nigeria," *Journal of Neuroscince and Behavioural Health* 3, no.6 (2011) 75. <http://www.academicjournals.org/jnbh/PDF/pdf2011/June/Olaitan.pdf> (accessed January 2, 2013).

In the whole of the body of CEDAW, the child's interest is the major consideration in all cases. Consequently, Art 5(b) has provided that, family education should include proper understanding of pregnancy as a social function and that the recognition of the common responsibility of men and women in the upbringing and development of their children should be upheld. With this laudable provision which already had in contemplation, the right of children both born and unborn, legalization of abortion has no basis within Nigeria. The same argument can be posed with respect to the provision of Art 12 which provides that pregnant women should be entitled to family planning services. Abortion cannot be contemplated if there is the provision for adequate family planning. The provision regarding a woman's right to decide freely and responsibly as to the number and spacing of her children, can further be hinged on the access to family planning.<sup>56</sup> If all these are within the main body of CEDAW, it is appropriate to restate it that, abortion has no basis.

To legalize abortion according to the Professor is also going against the Constitution of the Federal Republic of Nigeria<sup>57</sup> as well as going against the Penal laws of the country,<sup>58</sup> all of which guarantees the right to preserve and protect life and not the right to destroy and disrupt life.

In a follow up development, still suggestive of the fact that abortion should be legalized in Nigeria, Ogiemien<sup>59</sup> compared Nigeria with the UK and the USA, and came to a conclusion that, Nigeria should imitate these countries in which abortion

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<sup>56</sup>Art 16 CEDAW.

<sup>57</sup>Sec 33 of the Constitution of the Federal Republic of Nigeria grants the right to life to everybody.

<sup>58</sup>By criminalizing abortion except when necessary to save the life of the mother, the Penal and Criminal Codes are upholding the right to life of the unborn.

<sup>59</sup>Ogiemien T. B. E., "A legal Frame Work to Legalize Abortion in Nigeria," *Critical Issues in Reproductive Health. Prevention of Morbidity and Mortality from Induced Abortion in Nigeria* (1991): 84-89. (Being a paper delivered at the Proceedings of a Seminar Organized by the Department of Obstetrics, Gynaecology and Perinatology, Obafemi Awolowo University, Ile-Ife, Nigeria. 4-6 December 1991).



has been legalized. The researcher has a strong view that there is a misplaced misconception, which is so grave, by the slight reference to the UK and USA. By referring to the UK, the author seems to be confused by the mentioning of the case in *R v. Bourne*<sup>60</sup> as being the case which legalized abortion in the UK.

The decision in the above case did not legalize abortion in the UK, but rather, gave prominence, while being guided by the Offence against Person's Act of 1861, to the good intention of Dr Bourne, who was a highly respected and eminent obstetrician and gynaecologist at that time. The doctor explained to the jury that lawful abortion could be performed in circumstances when the mother's life was at risk and also, when the likely consequences of continued pregnancy would make the mother a physical or mental wreck. The acquittal of the doctor theoretically paved the way for doctors to perform abortion lawfully, if they could justify the circumstances as falling within the criteria used in *Bourne*. Even at this, the doctors were wary to carry out abortion because, they don't know whether their criteria (which was restricted), will fall within those used in *Bourne*.<sup>61</sup>

This was the situation in the UK until the Home Office of the Ministry of Health Department Committee forwarded a recommendation that the law should specify by formal amendment, to the effect that, the doctors who act in good faith to perform an abortion when he is satisfied that the continued pregnancy is likely to endanger the

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<sup>60</sup>(1939) 1 KB 687.

<sup>61</sup>Keown J, *Abortion, Doctors and the Law: Some Aspects of the Legal Regulation of Abortion in England form 1803-1952* (United Kingdom: Cambridge University Press, 1988), 78-79; Cara E. Davies, "Bill C-510 and the Dilemma of Differences: Assessing the Role of Anti-Violence Legislation in the Woman-Protective Anti-Abortion Movement," being a thesis submitted in conformity with the requirements of the degree of Masters of Law, Graduate Department of the Faculty of Law, University of Toronto. (2010) 12. [https://tspace.library.utoronto.ca/bitstream/1807/30114/1/Davies\\_Cara\\_E\\_201011\\_LLM\\_thesis.pdf](https://tspace.library.utoronto.ca/bitstream/1807/30114/1/Davies_Cara_E_201011_LLM_thesis.pdf) (accessed January 2, 2013).

life of the woman or seriously to impair her health does not act unlawfully.<sup>62</sup> If the effect of *Bourne* is to make lawful a ‘therapeutic abortion’, the question then arises as to the limits at common law of this notion.

Even with the *Bourne’s* case, what was lawful still remained uncertain. The consequence served as a spring board for the 1967 Abortion Act. The Act and its subsequent amendment, the Human Fertilization and Embryology Act 1990, provide for greater formal opportunities for women to obtain abortion, but not without exception. The UK law officially handed the power of decision making on abortion to the medical profession. The UK laws made no effort to offer right to anyone involved in abortion issues except the doctors who have legal authority to decide whether or not a particular case of a woman fits within the legally defined defences to a charge of criminal abortion. In other words, except on four grounds specified, abortion is still a criminal offence in the UK.

Under the 1967 Act as amended, four grounds of performing abortion lawfully exists in the UK—“(i) where the pregnancy has not exceeded its 24<sup>th</sup> week, and the continuance of the pregnancy would involve risks greater than if the pregnancy were terminated or of injury to the physical or mental health of the pregnant woman or existing children of her family, (ii) where the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman, (iii) where the continuance of the pregnancy would involve risk of life of the pregnant woman greater than if the pregnancy were terminated, and (iv) where there is substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped”.

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<sup>62</sup>Report of the International Committee on Abortion, HMSO, London, 1939.

Be that as it may, the British Medical Association (BMA) played a very prominent role in the design of today's abortion laws in the UK. In the wake of this design, the BMA was much concerned about the fetus's right to life<sup>63</sup> as well as the medical profession's autonomy.<sup>64</sup> The BMA guarded against a situation when abortion will be obtained on demand without just cause, or to be obtained from people who are not medical practitioners. An abortion law of the UK was properly designed to guard against misuse of the law.

On a careful digestion of the process leading to the present state of abortion law in the UK, it will be seen that Nigeria, being compared to the UK is a mismatch. There is nothing to show in Nigeria that respect should be accorded to the unborn in all the millions of demand for the legalization of abortion. The only comparison which can be identified, and which Ogiemien is blinded to, is the fact that, the Penal Laws in Nigeria are also trying to do what has been done by the Abortion Laws in the UK, by guarding against abortion on demand by insisting on the fetus's right to life except in cases where the life of the mother is at stake.<sup>65</sup>

If the Penal Laws are not expanded and abortion is not legalized in Nigeria, the only reason that can be given for such a stand is the necessity to preserve the life of the

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<sup>63</sup>If they were not concerned about the right to life of the fetus, abortion would have been available on demand. To show their concern, availability of abortion was restricted to the four grounds above. Abortion services are available to meet existing need in Britain. Reed Boland, "Second Trimester Abortion Laws Globally: Actuality, Trends and Recommendations," *Reproductive Health Matters* 18, no.36 (2010): 3. [http://www.medicalabortionconsortium.org/uploads/file/rhm36\\_521.pdf](http://www.medicalabortionconsortium.org/uploads/file/rhm36_521.pdf). (accessed January 2, 2013); Sam Rowlands, "Abortion Pills: Under Whose Control," *Journal of Family Planning and Reproductive Health Care* 38 (2012): 118.

<sup>64</sup>Drew Halfman, "Historical Priorities and the Response of Doctors to the Abortion Reform Proposal in Britain and the United States 1960-1973," *Social Problems* 50, no.3 (2003): 570-574 <http://www.jstor.org/stable/3648870> (accessed February 13, 2011). In Britain, emphasis of clinical autonomy was evoked and prominent doctors successfully agreed that legal and ethical responsibility should remain 'firmly on the shoulders of the medical profession'. Duncan Wilson, "Creating the 'Ethics Industry': Mary Warnock, in Vitro Fertilization and the History of Bioethics in Britain," *Bioscientias* 6, no.2 (2011) <http://www.palgrave-journals.com/biosoc/journal/v6/n2/full/biosoc201026a.html> (accessed January 2, 2013).

<sup>65</sup>Secs 232 and sec235, Penal Code and secs 228, 229 and 230 Criminal Code.

unborn, which incidentally, is the message according to this researcher, being passed by the right to choose granted under CEDAW.

With Ogiemien's reference to the USA, it is the contention of this study that, as a matter of fact, there is a graver misplaced conception, than the one he had by referring to the UK. This is because, despite the constitution of the USA, granting as it were, the right to choose abortion, the abortion issue is far from being settled even as at today. It must please everyone who cares to know that, the decision reached in *Roe v. Wade* (as mentioned earlier), was as a result of the non-challant attitude of the American Medical Association (AMA), who refused in their duties to advise the judiciary of that time properly on the matter.<sup>66</sup> In contrast to the BMA, the AMA was never shown to be concern about the right to life of the unborn nor were they particular about laws regulating abortion. AMA never for once contacted policy makers about abortion issues. Despite being physicians, they were never at the forefront of any abortion legislation.

At the peak of the case of *Roe v Wade* (as mentioned earlier), when the judiciary seems confused on the all important issue of determining when human life actually begins, the abortion right attorneys contacted the AMA to file an *amicus*. It was a big shock that the AMA of that time refused to forward any *amicus*.<sup>67</sup> It is here maintained that, the refusal at that time to submit any convincing statement by those who are supposed to know all the intricacies surrounding the concept of life,

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<sup>66</sup>Statement made by the author of the decision in *Roe v. Wade*, Justice Blackmun, when speaking on when life begins. He said emphatically, "We need not resolve the difficult question of when life begins, when those trained in the respective discipline of medicine, philosophy and theology are unable to arrive at a consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer". James Risen and Judy L Thomas, *The Wrath of Angels: The American Abortion War* (New York NY: Basic Books, 1998), 38. Forty-two *amicus curiae* were received by the court in the heat of the *Roe v Wade* case. *Roe v Wade* (Supreme Court Drama). <http://www.enotes.com/roe-v-wade-reference/roe-v-wade> (accessed January 2, 2013). No *amicus curiae* came from the American Medical Association. .

<sup>67</sup>Halfman, "Historical Priorities," 579.

influenced Justice Blackmun into thinking that, the concept of when life actually begins is not a necessary factor when considering a matter on abortion. The consequence of this assertion culminated into the dreadful decision in *Roe v. Wade* (as mentioned earlier).

Had it been that the AMA, in 1973, stood on their feet like the BMA, who was particular about the unborn's right to life, abortion would not have been legalized in the USA. The judiciary in the USA then was deceived into handing down the decision legalizing abortion. It will however be surprising to know that the main actress<sup>68</sup> of the historic case never had an abortion. Before the case could be resolved, the poor girl was delivered of her burden. It is worth asking then, why the craze for abortion? This question is important when reviewing the state of affairs regarding abortion, when thinking that the person that brought about the whole controversy did not abort her baby eventually. At this juncture, she can be said to have exercised her right to choose to reproduce as embodied in today's CEDAW.

Hence, comparing Nigeria with the USA can best be termed, a misplaced priority, because the genesis of the legalization of abortion in the USA is flawed right from the start, and up till today, the USA is still in a confused state with regards to the legalization of abortion.<sup>69</sup>

The Global Gag Rule (GGR), first introduced in 1984, and reintroduced by President George Bush in 2001, brought to lime light, the situation in America as regards abortion. The GGR prohibits organizations in receipt of US funding from using the

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<sup>68</sup>In 1970, Roe, who was pregnant a third time, and has no means of taking care of the baby, brought an action supported by her two attorneys, demanding for a right to have an abortion.

<sup>69</sup>INTERNATIONAL PLANNED PARENTHOOD FEDERATION, *Death and Denial: Unsafe Abortion and Poverty* (London UK: International Planned Parenthood Federation, (2004). [http://jp.ippf.org/NR/rdonlyres/8D4783F5-D516-47D3-8B34-61F6D510202A/0/Death\\_Denial\\_unsafe\\_abortion\\_poverty.pdf](http://jp.ippf.org/NR/rdonlyres/8D4783F5-D516-47D3-8B34-61F6D510202A/0/Death_Denial_unsafe_abortion_poverty.pdf) (accessed January 2, 2013).

US money to provide abortion information, services and care, or even discussing abortion or criticize unsafe abortion. The GGR intends to reduce the global incidence of abortion. Does this not look surprising? That a country wherein abortion is legalized can embark on such a mission as the GGR. By reintroducing the GGR, the former President intends to make abortion rare. To him, the only way to minimize recourse of women to abortion is to keep it illegal- he made this statement at the 28<sup>th</sup> anniversary of *Roe v. Wade* in 2001.<sup>70</sup>

To further demonstrate the confused state of America with regards to abortion legalization, on April 18, 2007, the United States Supreme Court upheld the Partial-Birth Abortion Ban Act, which was signed into law by President George Bush in 2003. The justices, 5 to 4, ruled that, the law passed by congress in 2003, and signed into law by Bush was not unconstitutional. The majority said its ruling reflects government's profound legitimate and substantial interest in preserving and promoting fetal right to life. The partial-birth abortion is an intact dilation and extraction of the fetus and it has been held illegal. Does this not sound surprising again? This sudden compassion for the fetus never came up in the decision of *Roe v Wade* (as mentioned earlier). This is to show that the composition of the court in America determines whether a fetus is entitled to right to life or not. The republican platform of 1980 for instance, openly proclaimed a commitment to the appointment of conservatives to the federal bench. Particularly appointed to the federal judiciary during the Ronald Regan's regime were men and women who respected the traditional family values and the sanctity of innocent human life.<sup>71</sup>

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<sup>70</sup>*Ibid.*

<sup>71</sup>David S. Law, "Appointing Federal Judges: The President, the Senate and the Prisoner's Dilemma," *Jurocracy and Distrust* (2005): 157. This article originally began at 26 *Cardozo Law Review*, 479 (2005), [http://www.cardozo.yu.edu/cms/uploadedFiles/FLOERSHEIMER/FLOR\\_LAW.pdf](http://www.cardozo.yu.edu/cms/uploadedFiles/FLOERSHEIMER/FLOR_LAW.pdf) (accessed

The appointment of Justice Elena Kagan by President Barack Obama shows that, United State of America is set for a more liberal view on abortion. These liberal moves were the result of more than 170 ballot initiatives and referendums held across the United States of America, as it re-elected Democratic President Barack Obama for four more years.<sup>72</sup> This buttresses the fact that, comparing Nigeria with the USA, where the state of abortion discourse is in a confused dilemma is a graver misplaced conception perpetrated by Ogiemien.

Additional works by Ilumoka<sup>73</sup> and Kilanko,<sup>74</sup> both women, also subscribe to the legalization of abortion. According to Kilanko, a clear space will be made for the legalization of abortion, once the right to choose is in vogue. Ilumoka preoccupied her writing with monitoring the use of words in the Penal code and the Criminal Code, and according to her, a comprehensive improvement on women's health is possible only when abortion is not criminalized.

The right to choose, which is an aspect of reproductive right has found its way into CEDAW. It is already in vogue, although the author meant the right to abort choice, rather than the right to reproduce choice which, according to this research is the

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January 2, 2013); Susan B. Haire, "Judicial Selection and Decisionmaking in the Ninth Circuit," *Arizona Law Review* 48 (2006): 269-270, <http://www.arizonalawreview.org/pdf/48-2/48arizrev267.pdf> (accessed January 2, 2013); Neil S. Siegel, "Interring the Rhetoric of Judicial Activism," *DePaul Law Review* 59 (2010): 559-560.

<sup>72</sup>"US Elections: America Goes Liberal with Gay Marriage, Abortion and Cannabis Votes," *The Telegraph*, November 7, 2012. <http://www.telegraph.co.uk/news/worldnews/us-election/9660532/US-election-America-goes-liberal-with-gay-marriage-abortion-and-cannabis-votes.html> (accessed January 2, 2013).

<sup>73</sup>Toun Ilumoka, "Policy and Law relating to Abortion in Nigeria: The quest for balance," *Critical Issues in Reproductive Health. Prevention of Morbidity and Mortality from Induced Abortion in Nigeria*. (1991): 74-77 (Being a paper delivered at the proceedings of a seminar organized by the Department of Obstetrics, Gynaecology and Perinatology, Obafemi Awolowo University Ile-Ife, Nigeria. 4-11 December 1991).

<sup>74</sup>Glory A. K. Kilanko, "Women Autonomy and the Right to Fertility Choice," *Critical Issues in Reproductive Health Prevention of Morbidity and Mortality from Induced Abortion in Nigeria* (1991) 68-70. (Being a paper delivered at the proceedings of a seminar organized by the Department of Obstetrics, Gynaecology and Perinatology, Obafemi Awolowo University Ile-Ife, Nigeria. 4-11 December 1991).

message being passed by the provision of CEDAW. When following this interpretation, legalization of abortion will be inconsistent with the provision of CEDAW. Furthermore, when there is a clamour for a comprehensive improvement of women's health, criminalization of abortion should not be opposed, because it has already been settled that, there is a close link between health system and human rights.<sup>75</sup> In order to ensure that women's health is improved, they must be able to exercise their right to choose to reproduce. Once this is done, abortion will be out of the way, because with abortion, this researcher opines that, it is not likely that there can be an improvement in the health of women, considering all the implications surrounding it.

The implication surrounding the procurement of abortion is so enormous, and the Penal Laws in Nigeria have made it a crime for both procurer of abortion as well as the giver of the abortion, except when it is done to save the mother's life. While recognizing that the strict Penal Laws on abortion in Nigeria are not the main cause mortality of women, Okonofua still wants policy makers to look into the workings of legalization of abortion.<sup>76</sup> One will be tempted to ask why the erudite Professor wants policy makers to look into the possibility of legalizing abortion without any law in support of his claims. For there to be a legalized abortion regime in Nigeria, there must be a law to back it up. It has been understood that, the provisions of CEDAW are in opposition to abortion, so also are the provisions of the Penal Laws,

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<sup>75</sup>Mann, "Medicine and Public Health,"

<sup>76</sup>F. E Okonofua et al, "Perception of Policy Makers in Nigeria Towards Unsafe Abortion and Maternal Mortality," *International Perspective on Sexual and Reproductive Health* 35, No.4 (2009): 195. Additional work by the same author suggesting legalization of abortion as well as putting blame on restrictive laws in Nigeria;-F. E Okonofua, "Abortion and Maternal Mortality in Developing World," *Journal of Obstetrics Gynaecology* 28, no.11 (2006): 974-979, <http://www.sogc.org/jogc/abstracts/full/200611-WomensHealth-1-pdf>. (accessed March 3, 2011). Also, Grimes D.A, et al, "Unsafe Abortion, The Preventable Pandemic," *Lancet* 368, No.9550 (2006):1917; Olukunmi Lanre Olaitan, "Attitudes of University Students towards Abortion in Nigeria," *International Journal of Tropical Medicine* 6, no.3 (2011): 52, <http://docsdrive.com/pdfs/medwelljournals/ijtm/2011/52-57.pdf> (accessed May 28, 2012).



as well as the provision of the Constitution of the Federal Republic of Nigeria, all of which recognize the right to life of everyone. The Professor, with due respect, has no basis for the request to legalize abortion, more so when he has recognized that the law is not the only reason for maternal mortality.<sup>77</sup>

Even while giving recommendation at the close of his inaugural lecture, Professor F. E. Okonofua<sup>78</sup> suggested under recommendation 6, that an adoption of the principle of reproductive health will provide an integrated and holistic framework for improving women's health in Nigeria. According to him again, this approach will save cost,<sup>79</sup> and then went further to suggest the creation of a National Institute of Reproductive Health, which will be saddled with the responsibility of coordinating activities for promoting reproductive health in Nigeria. He however expressed disappointment because; the bill was not allowed to scale through in the National Assembly.

The National Assembly members were not unaware of the various moves showed in the past and present by the Professor in his bid to ensure that abortion is legalized in Nigeria. Being a prominent figure within the population council in the UK, as well as the founding father of the Women's Health and Action Research Centre (WHARC), which is one of the leading promoters of research and service delivery in women's health, the principle of reproductive health suggested could at best be interpreted to

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<sup>77</sup>Because of the restrictive law on abortion in Nigeria, many people seek abortion clandestinely resulting in unsafe abortion leading to a lot of deaths of the women.

<sup>78</sup>F. E Okonofua, *That She May Multiply without Tears*, (2006) 42. Being the Inaugural Lecture delivered by him at the University of Benin, Nigeria, 7<sup>th</sup>, December 2006.

<sup>79</sup>Delphine Hu et al, "Cost-effectiveness Analysis of Unsafe Abortion and Alternative First-Trimester Pregnancy Termination Strategies in Nigeria and Ghana," *African Journal of Reproductive Health* 14, no.2 (2010): 92,

<http://www.thefreelibrary.com/costeffectiveness+of+safe+abortion+in+Nigeria+and+Ghana.-90247520218> (accessed February 18, 2011). The authors are of the opinion that, increasing access to safe abortion, i.e., legalizing abortion is the single most important factor in saving lives and social costs.

mean legalizing abortion. His contention has always been that, when abortion is legalized, maternal health will be improved.

Whether or not this contention is true is not within the contemplation of this study. This research is about giving an analysis of the concept of right to choose in relation to abortion in Nigeria, while using CEDAW as a case study. The research is most concerned with giving a progressive interpretation of the right to choose (an aspect of reproductive right under CEDAW) to mean the right to reproduce. This is suggestive of the fact that the unborn's right to life is being protected. Once this foundation is solidly laid, the Penal Laws in Nigeria will be seen as being consistent with CEDAW in their bid also, to preserve the life of the unborn, except where the mother's life is at stake. The researcher submits that, when this happens, the CEDAW, Penal and Criminal codes as well as the Constitution of the Federal Republic of Nigeria will be united in one single vision, i.e. preservation of life of the unborn through the right to reproduce under CEDAW. When this end is achieved, there will be no more room for the campaign for the legalization of abortion in Nigeria.

When Grimes<sup>80</sup> was suggesting legalization of abortion as a necessary but insufficient step towards improving women's health, he did not avert his mind to the fact that, health and the human rights of women have a close linkage.<sup>81</sup> The health of a woman is more glaring when she expresses her right to choose to reproduce. Abortion cannot improve a woman's health. It will rather have a negative impact on women's health.<sup>82</sup> The issue of health and human right have been imported into

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<sup>80</sup>David A. Grimes, "Unsafe Abortion: The Silent Scourge," *British Medical Bulletin* 67 (2003): 110, <http://www.sph.emory.edu/student/gemma/grimmes-unsafe-ab.pdf> (accessed March 30, 2011).

<sup>81</sup>Mann, "Medicine and Public Health,".

<sup>82</sup>Complications as a result of abortion always have negative effects on women. Abasiattai Anieken M. and Umoiyoho Aniefiok J., "A 6-Year Review of Maternal Deaths in A Teaching Hospital in South-South Nigeria," *Internet Journal of Gynaecology and Obstetrics*, 11, no.1 (2009): 5.

CEDAW. Grimes should try and have an insight into the progressive linkage of health and reproductive right. Once he is able to do this, it will be realized that, by ensuring the right to health of a woman, through her exercise of the right to choose to reproduce, the sanctity of life, for the unborn will be maintained.

The researcher maintains that, the respect for the sanctity of life, which the right to choose under CEDAW seeks to promote, is the main justification for the criminalization of abortion in Nigeria. The mere fact that abortion is a criminal offence in Nigeria does not mean women are being targeted or, that women are being discriminated at. The previous thoughts that women have a right to choose abortion based on CEDAW has hereby, become obsolete in the face of a preservative interpretation of the unborn's right to life as envisaged within CEDAW's right to choose. The restrictive nature of the Penal Laws in Nigeria can no longer be tenable to justify the legalization of abortion. The Penal Laws in Nigeria, as well as CEDAW are promoting both the unborn's right to life as well as the reproductive right to choose of the woman.

### **3.5.2 Literatures opposing abortion**

Literatures in opposition to abortion also abound. Most of these literatures centre on the sanctity of life. These literatures suggest that, the life of the unborn is as important as the life of the living. While this is virtually true, this research, in order to see that there is a continuous respect for the sanctity of life of the unborn, has tried to link this notion to the human right of women to have a right to choose to reproduce, and not to abort. Happily, this right to choose to reproduce has consequently found itself under an international human rights instrument, CEDAW.

The right to choose to reproduce as comprised under CEDAW is a basic human right for a woman which also guarantees for them a right to health. When women are able to exercise their right to choose to reproduce, they become healthier, because they are able to determine the number and spacing of their children.<sup>83</sup> In trying to link reproductive right with public health as envisaged in the works of Rebecca Cook and the late Jonathan Mann, Professor Momoh Anate in his inaugural lecture has reiterated the fact that medical practice has always been to heal, to alleviate suffering and to preserve life.<sup>84</sup> He was of the opinion that it is very wrong to think that the license given to physicians to practice also confers on them the right to terminate life at will. He went on, “by the Hippocratic Oath, the physicians should not take with impunity legally or illegally, the lives of the defenceless ones (the fetus and the unborn child)”<sup>85</sup>

The erudite professor is in strong opposition to abortion based on the oath taken by all physicians like him. He is very much concerned about the unborn’s right to life. This should be the primary concern of all physicians. Today however, things have changed. One writer has expressed the view that nowadays, medical practitioners have turned themselves into businessmen and entrepreneurs, forgetting the primary purpose for which they are created; preservation of life.<sup>86</sup>

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<sup>83</sup>The World Health Organization has described birth spacing as a procedure which save lives of mothers and babies, reduces abortion and unwanted pregnancies and improves children’s health and mother’s health. The World Health Organization, *Birth Spacing Cluster Representatives and Health Volunteers Guide* (2008) 2-3 [www.emro.who.int/mps/pdf](http://www.emro.who.int/mps/pdf) (accessed November 26, 2011).

<sup>84</sup>Anate, *Women Reproductive Health in Africa*, 11; Selvakone Meera, “Doctors in Detention and the Hippocratic Oath,” *Canadian Medical Association Journal* 181, no.10 (2009): E243.

<sup>85</sup>“Worldwide Medical Code and Medical Ethics,” *World Medical Association Bulletin* 1, No.3 (1949): 111. File revised on June 8, 2002. [www.cirp.org/library/ethics/intlcode/](http://www.cirp.org/library/ethics/intlcode/) (accessed February 12, 2011; Isaacs David, “The Hippocratic Oath,” *Journal of Paediatrics and Child Health* 47, no.6 (2011): 321

<sup>86</sup>Edmund D. Pellegrino, “Medical Profession as a Moral Community,” *Bull. N.Y Acad. Med.* 66, No.3 (1990): 221-222; Paul Sunday Omoyefa, “Physicians and Sanctity of Life: Emerging Ethical Issues,” *Ethno Med.* 4, no.2 (2010): 99.

The researcher has a strong feeling that, a progressive interpretation of the right to choose granted under CEDAW, meaning the right to choose to reproduce (not to abort), will perform a great function of insisting on doctors to perform their primary responsibility, a duty which can only be performed when a woman with pregnancy insists on the exercise of her right to reproduce, leading in the giving of life to a new and distinct individual.

The insistence on the right to choose to reproduce by women has led Kalu,<sup>87</sup> to express with dismay that in the 21<sup>st</sup> century, people could be agitating for the legalization of abortion. He is of the opinion that women resort to abortion not because they were exercising free choice, but because they felt that they had no choice. He went further to say that, if a child is born and there is nobody to take responsibility of the child, the church should take over the care, after all, what are churches meant for. He however, suggested reintegration back into the society those women who have the misfortune of having an unwanted pregnancy which has resulted into the birth of the child.<sup>88</sup>

The war against legalization of abortion is not only an African or a Nigerian affair. In fact, it cuts across nations as well as religions. It was maintained that the agenda by International Conference on Population and Development (ICPD) to use birth control

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<sup>87</sup>Kalu, "No Way,"

<sup>88</sup>Recently, a Nigerian by name, Sony Pat-Natson, said in a statement to the press, his intention to build a home for girls who are pregnant and have no place to stay. He said this will discourage pregnant girls from doing abortion, and let the baby live. Noah Ebije, "My House for Girls with Unwanted Pregnancy will Fight Abortion-Ex-Lecturer," *The Sunnewsonline* October 20, 2012. <http://sunnewsonline.com/new/national/my-home-for-girls-with-unwanted-pregnancies-will-fight-abortion-ex-lecturer/> (accessed December 3, 2013).

as well as abortion, to limit population was flopped by Roman Catholics the world over in association with orthodox Muslims.<sup>89</sup>

Arif Abdul Hussain,<sup>90</sup> in one of his elaborate writings about abortion in Islam, brought to the fore that, there is a consensus amongst Muslim *Ulamas* that, ensoulment occurs at four months when the spirit causes the prominence of potentiality for rational thoughts.<sup>91</sup> This point, a significant change in status of the fetus has occurred and abortion after this stage is prohibited, except to save the mother's life.

There is no consensus amongst the different schools of Islamic jurisprudence on whether any other reasons for abortion are permitted, and if so, which stage of pregnancy. The *Hanafi* School stipulated that, abortion is permitted until the end of the fourth month. The *Shafii* School allows abortion until the end of 120 days, while the *Maliki* and *Hanbali* Schools allow abortion until the end of the 40<sup>th</sup> day.<sup>92</sup>

In spite of the different position of the Sunni schools, there is a consensus among theologians that abortion after 120 days is categorically prohibited, except to save the life of a mother. The 120 days limit is based on the tradition of 'forties' in which the Holy Prophet (SAW) informs that the fetus is held as '*nutfa*' (drop of sperm) for 40

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<sup>89</sup>Verburg Peter, "The Bitter Politics of Population," *Alberta Report/ Newsmagazine* 21, no.41 (1994) (1994): 41.

<sup>90</sup>Arif Abdul Hussain, "En soulment and the Prohibition in Islam," *Islam And Christian-Muslim Relations* 16, no. 3 (2005): 245.

<sup>91</sup>*Ibid.*

<sup>92</sup>Kiarash Aramesh, "A Shite Perspective towards Abortion," *Medical Ethics and History of Medicine Research Center, Tehran University Daru Supp.* no 1 (2006): 37. [http://journals.tums.ac.ir/upload\\_files/pdf/\\_/4920.pdf](http://journals.tums.ac.ir/upload_files/pdf/_/4920.pdf) (accessed January 3, 2013).

days, as ‘*alaqa*’ (clot of blood) for another 40 days and as ‘*mudgha*’ (lump of flesh) for an additional 40 days. In about 120 days, ensoulment takes place.<sup>93</sup>

However, recent rulings by *Shi’a* Scholars<sup>94</sup> on abortion at an early stage are interpreted in terms of potentiality for ensoulment. The difference that exists between passive and active potentiality for ensoulment clarifies the reasons why Muslim jurists hold different conviction on whether the prohibition of abortion applies before the stage of implantation.

Making a clearer perception of the views above, the period at which the soul comes into the fetus is four months, and any termination of pregnancy after this time is prohibited, except when necessary to save the mother’s life. This is agreed to by all *Shi’a* Scholars.<sup>95</sup> The difference in opinion arises when a pregnancy not up to four months is about being terminated. Here, the principle of potentiality for the ensoulment is being imported in order to determine which fetus should be aborted. In order therefore, to be properly guided by this principle, the difference between active and passive potentiality has to be known, so that a fetus with an active potentiality will not be aborted and a fetus with a passive potentiality will be aborted.

Early embryos have passive potentiality for development into persons. Early embryos do not possess ‘unique genetic identity’ and ‘ongoing ontological identity’

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<sup>93</sup>Elisabetta Necco, “The Bioethics Looks on Abortion in Islam. A Special Case: Egypt,” in *Islam and Bioethics* eds. Berna Arda and Vardit Rispler-Chaim (Ankara: Universitesi Basimevi, 2012), 86. <http://kitaplar.ankara.edu.tr/dosyalar/pdf/846.pdf> (accessed January 3, 2013).

<sup>94</sup>Hussain, “Ensoulment,” 244. The expression by the 5<sup>th</sup> *Shi’a* Imam, Mohd Al-Baqri, when he talked about the time of ensoulment.

<sup>95</sup>Sayyid Ali-Al-Husyni al-sistani of Najaf Traq and Ayatullah Sane’I of Iran.

which are said to be necessary conditions for ensoulment. The early embryos have low probability of developing into a more developed fetus.<sup>96</sup>

Using this criterion according to some scholars, is not within the contemplation of the Muslim *Ulamas* (scholars), because this will be tantamount to permitting abortion at the very slight excuse that the fetus has a passive potential. So therefore, since a fetus with an active potential cannot be aborted because, it has the potential of living a good life outside its mother's womb, likewise, a fetus with a passive potential cannot be aborted, because, if given a little more time, that fetus with a passive potentiality will grow into a fetus with an active potentiality. If fetus with passive potentiality is allowed to be aborted, license will be given to women to abort their babies at the slightest excuse of passive potentiality. The argument by the author brings to the summary that, abortion is not permitted in Islam.

Actual ensoulment has different implications on the legal identity of the fetus in Islam. Taking the issue of payment of blood money, for instance before ensoulment,<sup>97</sup> less money is being paid for causing the miscarriage of a pregnancy, but once the fetus reaches four months, full blood money is being paid. This further shows that, abortion is not allowed in Islam, from the time of conception.

The fetus in Islam can therefore be said to have the fundamental right to life from conception. The right to choose as granted under CEDAW, when interpreted to mean the right to reproduce will be in all force compatible with the Islamic doctrines.

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<sup>96</sup>This sums up what is meant by a fetus having a passive potentiality. Deckers J., "Why Eberl is Wrong: Reflections on the Beginning of Personhood," *Bioethics* 21, no.5 (2007): 270. <http://www.ncbi.nlm.nih.gov/pubmed/17845472> (accessed January 3, 2013).

<sup>97</sup>In payment of blood money, the stage of ensoulment is a demarcation point in the status of the fetus, as indicated by the requirement to pay full blood money in the case of an abortion at four months. The gradual increase of blood money penalty prior to the stage of ensoulment indicates that abortion is unlawful. There is an increase in penalty as the growing fetus approaches the stage of ensoulment. Whatever the cause of abortion, Islamic jurists insist that the payment of blood money (*diya*) according to related rules is incumbent; Aramesh, "Shite Perspective," 38.



To further show that the unborn's right to life is recognized, the Quran has stated that, the parents are expected to make necessary preparations for the safe delivery of their child and much elaboration was made in the Quran about the stages of the pregnancy in the womb from conception to delivery.<sup>98</sup>

The prophetic tradition that made reference to fetal development was elucidated in Al-Naawawis Forty Hadith.<sup>99</sup> By this prophetic tradition, it is shown that the unborn fetus's right to life is inherent in Islam. It shows that Allah is the creator of the child and He alone has the right to take it back at the time. No one has the right to put a stop to the growing life of the fetus.<sup>100</sup> The right to choose granted under CEDAW interpreted progressively will follow up the sequence which has been described in the prophetic tradition, which will lead to the eventual birth of a child, if that child is destined to live.

Even if that child is not destined to live, Islam has stipulated that the miscarried fetus or still born baby is to be properly buried.<sup>101</sup> By this single act, the importance of every life is portrayed. That even in death, Islamic law still recognizes that the fetus has a right to be buried. Islam is therefore against abortion. The right to life is

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<sup>98</sup>Quran, 22:5 (Surat Al-Hajj).

<sup>99</sup>Al- Nawawi's Forty Hadith. Hadith four precisely; Hussein, "Ensoulment," 244; Necco, "Bioethics Looks,"

<sup>100</sup>The fetus is the creation of Almighty God. No one, not even the mother has the right to make decision about his life, unless its presence threatens the life of the mother; Aramesh, "Shite Perspective," 37.

<sup>101</sup>Al-Shawkaii, Muhammad Ibn Ali, "Nayi al-awtar min a Hadith Saujid al-Akhyasr, Sarh Muntaqa-al-Akbar," *Beirut Daral-jil* 14 (1973): 82-4. The 6<sup>th</sup> Imam, Al-Sadiq and the 8<sup>th</sup> Imam, Al-Rida, both attest to this. Mohammad Khalid, "Death and Burial: Period of Liddat after Death," *Muslim Guide, Cradle to Grave* (2008-2009)

[http://www.aurstudios.com/clients/muslim\\_guide/death/12\\_Period\\_of\\_iddat\\_after\\_death.htm](http://www.aurstudios.com/clients/muslim_guide/death/12_Period_of_iddat_after_death.htm) (accessed January 3, 2013). For babies less than four months gestation, the fetus will be wrapped and buried. After four months, the fetus will be named, washed, wrapped and buried with the option of janazah funeral). David Morrison, "Dealing with Fetal Demise," *Canadian Society of Diagnostic Medical Sonographers* (2006): 14. (Annual Meeting, Charlottetown, P.E.I. May, 13 2006) <http://www.strathmor.com/assets/pdf/FetalDemise.pdf> (accessed January 12, 2013).

therefore seen to be inherent and even in death; the personhood of the child is still recognized.

The unborn child in Islam has been shown to be entitled to inheritance according to Iyssa.<sup>102</sup> The author wrote extensively on the inheritance of the unborn child and came to the conclusion that, the unborn has access to inheritance of all or part of the estate of deceased relative on equal footing with its adult counterpart (if any), provided it is born alive, even for a short period. This is another significant point suggestive of the fact that Islam has regard for the fundamental right to life of the fetus from the time of conception.

The right to choose, an aspect of reproductive right granted under CEDAW, when interpreted in a progressive form to mean the right to reproduce and not the right to abort will be conforming to the tenets and teachings of Islam. Aside Islam, the Christian faith also has some basic teachings regarding the right to life of the fetus.

The giver of life according to the Christian faith is God. It thus becomes obvious that, if God creates a living being, He will be displeased at its ungrateful destruction.<sup>103</sup> Going by the words in the Bible, conception of a human being is seen as an act of God, whereby a person is created by God's own sovereign will.

In the work of MacArthur Jr., "a soul is said to be breathed into the living tissue by the Holy Spirit. The soul's destiny is already known to God and determined by Him

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<sup>102</sup>Yssa Ade Bello, "Right of the Fetus (unborn children) in Islamic Law," *University of Ilorin Law Journal* 2, (2005): 82; Al-Muhaqqiq al-Hilli, in his *Shara'I al-Islam*; the text of the 6<sup>th</sup> Imam, Al-Sadiq. Al-Muhaqqiq al-Hilli states in his *Shara'I al-Islam* as follows; 'A halm (pregnancy/foetus) will inherit with its live separation (i.e., living birth), thus if the foetus is still-born, then it will have no share (of inheritance). If however, it dies after birth, then its share will be for his inheritors'. The 6<sup>th</sup> Imam, Al-Sadiq said; 'my father (i.e, Al-Baqir) stated that, if a new born moves in a discernible manner (prior to dying), then it will inherit and will be inherited.

<sup>103</sup>Acts 17: 28 and Psalm 86: 9.

before the foundation of the world”<sup>104</sup>. Abortion then becomes a violent anti God-act. It is not only a murder of the individual; it is an affront to the Creator.<sup>105</sup>

Just like the content of the fourth *hadith* in Islam, Christianity also acknowledges that an unborn is already known by its God who created him with its destiny. This has shown that both Islam and Christianity stand on the same level as far as the recognition of the right to life of the fetus (from conception) is concerned.

However, it must be pointed out that, even within the church, opinions are divided on whether or not abortion is permitted before ensoulment.<sup>106</sup> A school of thought under the church has maintained that, abortion before the soul comes in is not a sin.<sup>107</sup> In the same vein, another school of thought, still within the church put forth the argument that, embryos acquired a soul at conception.<sup>108</sup>

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<sup>104</sup>John F. MacArthur Jr, “The Biblical view on Abortion,” *Bible Bulletin Board* (1986): pt 182, transcribed and added to the John MacArthur Collection by Tony Capoccia, <http://www.biblebb.com> (accessed April7, 2011).

<sup>105</sup>The pro-life movement has several seemingly Hauerwasian qualities. Most importantly, it is closely identified with Christian churches. The movement also is strongly prophetic, condemning the state for its role in millions of deaths. Steven Ertelt, ‘Obama Celebrates Roe v Wade Decision, 54 Million Abortions,’ *Lifenews.com* <http://www.lifenews.com/2012/01/22/obama-celebrates-roe-vswade-decision-54-million-abortions/> (accessed January 22, 2012). In trying to explain why abortion should not be allowed, he argued that; ‘we failed show for ourselves or others, why abortion is an affront of our most basic conviction about what makes life meaningful and worthwhile...’David A. Skeel jr., ‘Hauerwasian Christian Legal Theory,’ *Law and Contemporary Problems* 75, no.4 (2012): 127.

<sup>106</sup>‘The Church and Abortion, AND The Church on Abortion’ posted on the web on November 12, 2008. [www.presbyterianchurchofafrica.co.za/detail.php?3](http://www.presbyterianchurchofafrica.co.za/detail.php?3) (accessed April 7, 2011); Vincent Barry, *Bioethics in a Cultural Context: Philosophy, Religion, History, Politics* (Boston, USA: Cengage Advantage Books, 2011), 155.

<sup>107</sup>Augustine maintains that, coming of the fetus occurred 40 days after conception for boys, and 80 days after conception for girls. To him, a human soul cannot live in an unformed body. Abortion before the soul comes in, is not a sin. St Jerome is of the opinion that, the seed gradually take shape within the uterus, and its abortion does not count as killing until the individual elements have acquired their limbs. Pope Innocent III, wrote a letter which ruled that, the monk, who had arranged for his female lover to have an abortion, could not be guilty of murder if the fetus is not animated. Thomas Aquinas, has said that, only abortion of animated fetus was to be considered murder. [www.presbyterianchurchofafrica.co.za/detail.php?3](http://www.presbyterianchurchofafrica.co.za/detail.php?3) (accessed April 7, 2011); Frank K. Flinn, *Encyclopaedia of Catholicism* (New York NY: Infobase Publishing, 2007), 4.

<sup>108</sup>Notable among this school is the Pope John Paul II. He said that, procured abortion is the deliberate killing of a human being in the initial stage of his or her existence. From the time, the ovum is fertilized, a new life begun. From the first instance, there is established the program of what this living being will be, - a person. Hieronymus Florentinius (1658), promoted the idea that, all embryos or fetuses, at any stage of gestation, which is in danger of death must be baptized. Pope Pius IX called for the excommunication of those responsible for abortion at any stage.

Despite this divided opinions, recently, Christian philosophers have taken this challenge further by maintaining that, they must articulate and promote philosophical position according to which morality is conceived in richer terms than the mere respecting of individual rights.<sup>109</sup> Peter has argued that it is very important to stress that genuine and intense insight into social morality is equally concerned with obligations to others, including those who are most vulnerable, helpless and unable to speak for themselves. By adopting this position, the author feels that the pro-abortion movement will be confronted with a more radical philosophical approach.<sup>110</sup>

The author is concerned about the pro-choice group (a group that believe in abortion right) now finding their way into the churches and he is determined to confront them with the neighbour's principle, rather than the right issue, suggesting that he has responsibility towards the defenceless; the fetus.<sup>111</sup>

Patrick Lee,<sup>112</sup> another Christian philosopher, is bent on indicating the truth at all cost, thereby, following Aristotle's advice that, matters relating to morality do not proceed smoothly and one has to be determined in the cause of bringing about a solidified conclusion. The author defended the pro-life position and argued that, a zygote is a human being and must not be killed. He was of the view that humans comes into being from the time of conception, and like the Quranic provision, he was of the view that parents have responsibility over their children, which entails that, they ought not to choose abortion. Sounding a note of caution to his fellow philosophers, he implores them to pursue this debate, and thereby, heed the teachings

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<sup>109</sup>Peter Koritansky, "The Role of Philosophy in the Contemporary Abortion Debate," *Christian Bioethics: Non-Ecumenical Studies in Medical Morality* 10, no.1 (2004): 67.

<sup>110</sup>*Ibid.*

<sup>111</sup>*Ibid.*

<sup>112</sup>Patrick Lee, "A Christian Philosopher's View of Recent Directions in Abortion Debate," *Christian Bioethics: Non-Ecumenical Studies in Medical Morality* 10, no.1 (2004): 7-10.

and exhortations of the late Pope John Paul II. The author, Lee, more vigorous in his approach, was all out to see that right to life is granted to the fetus from conception.

When the right to choose is interpreted to mean, the right to reproduce, this will in turn show that, its provision is consistent with the teachings and tenets of Christianity, which recognizes fetus's right to life from conception.

The right to life for the unborn is also recognized by the African Traditional Religion.<sup>113</sup> It thus becomes important at this juncture, to include the views of African Traditional Religion as regards abortion. This is because, followers of African Traditional Religion abounds in Nigeria, and their teachings, practices as well as tenets are worth celebrating, knowing full well that our fore fathers were strict adherers to these beliefs before the coming of Islam or Christianity.

Even before the coming of the religion of Islam or Christianity, there has always been in existence respect for life, children are treasured and abortion is an abomination. The sacredness of human life is guarded by taboos and rituals. There is respect for the dignity of man; each man has his own inalienable '*chi*'.<sup>114</sup> The entire statements above serve as elements to be admired in African Traditional Religion.<sup>115</sup>

All the elements above, equally fits into both Islam and Christian religions. This explains the reason why people that oppose abortion in Nigeria cuts across ethnic, race or religion. The pro-life group in Nigeria is united in one struggle; right to life of the fetus, which according to this study can further be guaranteed by the provision of the right to choose under CEDAW.

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<sup>113</sup>Fr. Bonaventure Turyomumazima, "No Place for Abortion in African Traditional Life- Some Reflections," <http://www.consciencelaws.org/background/procedures/abortion019.aspx> (accessed February 15, 2013).

<sup>114</sup>"*chi*" means Selfhood and Destiny.

<sup>115</sup>"Elements to be admired in African Traditional Religion," [www.afrikaworld.net/afrel/atr-admire.htm](http://www.afrikaworld.net/afrel/atr-admire.htm) (accessed March 2, 2011).

Saipong<sup>116</sup> in his ambitious work demonstrates that, a vital concept of African Traditional Religion is the respect for the sacredness of life. To give birth is on the path of men and women, the greatest thing that can happen to a human being. Life must be given, life must be lived, life is to be enjoyed, and life is to be whole, life is to be honourable, life is to be long and peaceful. Therefore, in true African setting, wilful abortion or even contraception was a rarity, if not impossible.<sup>117</sup>

According to the author, the modern world plays around with life and allowed itself to be dominated by crude technocracy. A better acknowledgement of African Traditional Religion could bring a corrective notion to the anti-life mentality. It could provide a reminder of God's original intention in creating the human being in his image.<sup>118</sup>

The above gives a summary that children were highly valued in Traditional African Religion. Children are seen as precious. In Africa, marriage without procreation is incomplete.<sup>119</sup> If children could be viewed as this important, then abortion has no place. Abortion is an emotive issue, and according to a writer, cultural and religious values have always made it a taboo.<sup>120</sup>

The right to choose, an aspect of reproductive right under CEDAW, when interpreted to mean the right to reproduce for women, will fit perfectly into the views of the African Traditional Religion. This is because, the right to life has been accorded to

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<sup>116</sup>Peter K. Saipong, "Can Christianity Dialogue with African Traditional Religion?," [www.africaworld.net/afrel/saipong.html](http://www.africaworld.net/afrel/saipong.html); Fr Humphrey Tawah Mbuy, "The Vatican Strongly Endorses African Traditional Religion," [www.leffortcamerounais.com/2007/10/the-vatican-str.html](http://www.leffortcamerounais.com/2007/10/the-vatican-str.html) (accessed March 2, 2011).

<sup>117</sup>*Ibid.*

<sup>118</sup>*Ibid.*

<sup>119</sup>Remi Akujobi, "Motherhood in African Literature and Culture," *CLCWeb: Comparative Literature and Culture* 13.1, no.1/2 (2011): 4-5, <http://docs.lib.purdue.edu/clcweb/vol13/iss1/2> (accessed February 15, 2013).

<sup>120</sup>"Elements to be admired," [www.afrikaworld.net/afrel/atr-admire.htm](http://www.afrikaworld.net/afrel/atr-admire.htm) (accessed March 2, 2011). Taboo means something totally forbidden under African traditional religion.

the unborn children even before these children are born as seen from the assertion that, a marriage without children is not complete.<sup>121</sup>

African Traditional Religion values the unborn's right to life. So it can be said with all confidence that, an African instrument legalizing abortion, like the Protocol to the African Charter on Human and People's Right on the Rights of Women in Africa, has no place within an African setting. This protocol is the only human right instrument that sanctions the right to die by its outright grant of the right to abort. All other human rights instruments, including CEDAW values the right to life, because the right to choose has been taken to mean the right to reproduce and not the right to abort.

### **3.6 Criminal Law**

The continued criminalization of abortion is desirable if the Penal Laws in Nigeria must be kept in line with the provision of the right to life for everyone as provided by the Constitution of the Federal Republic of Nigeria, and the provisions of the right to life of the unborn as provided by all the human rights instruments of the world.

By criminalizing abortion, the right to choose under CEDAW would have successfully attained the position of being viewed as a right favouring the reproduction of children rather than aborting them except to save the mother's life. When this happens, the Penal Laws in Nigeria will be seen to be consistent with all the human rights instruments, including CEDAW in their bid to preserve life, and the clamouring for legalization as a result of restrictive laws will be laid to rest. The maternal mortality usually used as an excuse for the legalization of abortion will also

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<sup>121</sup>Akujobi, "Motherhood in African Literature and Culture," 4-5.

be dropped, because the position of the Penal Laws will then be appreciated as being concerned for the unborn fetus's right to life, through the right to choose to reproduce granted under CEDAW.

The concern for the sanctity of the life of the unborn fetus has been identified as the main reason for the criminalization of abortion in Nigeria, and to this end, Stephen Schulhofer<sup>122</sup> had demonstrated in his work the concept of criminal law theory, that criminal law is viewed as the mathematician of fault, where elegance and consistency of the entire structure is what satisfies it. The criminal law is also viewed as the monk, which suggests that principles must, on no account, be watered down to permit its stand to be tainted by opportunistic acquiescence in what contemporary politics considered acceptable. The purity of criminal law is very paramount. Criminal law as a monk is working to refine an important form of moral truth and to preserve it for use, in the hope that, a time more receptive to its message will arrive.

While the criminal law is still hoping as a monk, the criminal law is also considered to be a militant whose efforts are geared towards maintaining justice and fair play. The militant hopes that his work will shape contemporary debate and influence those who litigate, decide cases and enact statutes. The criminal law, as a militant, also hopes to have impact, the sooner the better.<sup>123</sup> It is also possible for the criminal law

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<sup>122</sup>Stephen J Schulhofer, "The Mathematician, the Monk and the Militant: Reflections on the Role of Criminal Law Theory," *California Law Review* 88, no.3 (2000): 708. By this theory of criminal law, it can be said that criminal law legislate morality. Every law is said to spring from a system of value and beliefs.; Michael Bauman, "Law and Morality," *Christian research Journal* 21, no.3 (2009) <http://www.equip.org/articles/law-and-morality/> (accessed, January 19, 2013). For proposition suggesting that morality appears to be a stronger mediator of deviant behaviour than the law; Henry F. Fradella and Brenda Vogel, "An Empirical Analysis of the relationship between Law, Morality and Personal Conduct: Implication for Theory and Policy," *Applied Psychology in Criminal Justice* 5, no.2 (2009): 203, [www.apcj.org/documents/5\\_2\\_5%20Fredella.pdf](http://www.apcj.org/documents/5_2_5%20Fredella.pdf) (accessed November 19, 2011).

<sup>123</sup> Criminal law as a militant can also be viewed from the fact that a great number of modern constitutions include a reference to fundamental moral values, that is, they have explicitly positivised moral contents. Jose Antonio Marina, "Genealogy of Morality and Law," *Ethical Theory and Moral Practice* 3, no.3 (2000): 303.



to be a theorist and as a theorist; it is careful and reflective, willing to follow the truth where ever it may lead.<sup>124</sup>

The theories of criminal law above show exactly what the criminal law in Nigeria is trying to achieve. The criminal law finds satisfaction in the consistent nature of the entire structure of law, as seen in its consistency with all laws guaranteeing the unborn's right to life. The criminal law is not also prepared to compromise its stand as far as moral truth is concerned, as seen in the way the law has maintained its position up till today despite pressure from all angles to see that abortion is legalized. The criminal law has refused to be used by opportunists, who are concerned about their political ambitions as well as western tendencies. The criminal law is prepared to refine the moral truth in anticipation that a time more receptive of its use will arrive. It is the contention of this study that, the time so much talked about, is now.

By the insistent of this study on a progressive interpretation of the right to choose under CEDAW to mean the right to reproduce and not the right to abort, the criminal law will be used to refine the moral truth that, any act of destruction against the unborn fetus is a crime except when done to save the mother's life. By so doing, the criminal law would have been successful in shaping contemporary debates as well as influence all those concerned about the issue of abortion in Nigeria. The criminal law will then, be looked upon as a guide for all people to follow.

In the spirit of being a guardian, another writer,<sup>125</sup> has explained that, criminal law exists to perform two important functions. Firstly, criminal law must define the

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<sup>124</sup> Schulhofer, "The Mathematician," 708.

<sup>125</sup> Paul H. Robinson, "Fair Notice and Fair Adjudication: Two Kinds of Legality," *University of Pennsylvania Law Review* 154, no.2 (2005): 369 <http://www.jstor.org/stable/25047590> (accessed February 20, 2011); John M. Darley, Paul H. Robinson and Kevin M. Carlsmith, "The Ex Ante Functions of Criminal Law," *Law and Society Review* 35, no.1 (2001): 165; Jerome E. Bickenbach, "Law and Morality," *Law and Philosophy* 8, No.3 (1989): 292. <http://www.jstor.org/stable/3504589>

conduct that is prohibited or required, and secondly, criminal law set the minimum condition for, and extent of liability, which is performed by the adjudication process. It thus seems to suggest that the criminal law provides guidance and direction to the community as a whole, as to the conduct that must be avoided or must be performed, and where a violation of rules of conduct occurs, the criminal law must take on the role of adjudication.

### **3.7 Interpretation of Treaties**

Having resolved that the issue of feminism which brought about the several episode of abortion is a westernized idea, and having emphasized that the right to choose, which is an aspect of reproductive right within CEDAW, does not signify abortion right for women, it is has become apparent, based on this study that, abortion is a criminal act. However, in order to properly justify the definition of the right to choose under CEDAW as representing the right to reproduce (and by extension, the right to life for the unborn) and not the right to abort, judicial power, including that of statute and treaty interpretation which is vested in the courts of law must be invoked.

Mahoney has argued that, the courts should infer from modern contract theory in developing canons of treaty interpretation. Because according to him, treaties cannot be regarded as Acts of Legislation but rather as contracts, so textualism which has

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(accessed November 20, 2011). Here, the basis for the relationship between law and morality was stated. Morality dictates the actual content of legal norms or provides procedures of practical reasonableness that necessarily regulate the particular law.

had a major impact on statutory interpretation should not be applied to treaty interpretation.<sup>126</sup>

According to Mahoney, contracts can only be valid when there is a mutual assent by the contracting parties to a shared preposition. The text of the contract document is important in determining the scope and limit of the agreement. In the legislative context, the text of the statute is the agreement. As a result of this, the interpreter in a contractual agreement or dispute is interested primarily in how the parties themselves would interpret the terms of the contract. On the other hand, an interpreter of statutes following a textualist methodology focuses on the meaning that neutral third parties ascribe to particular terms of the agreement.<sup>127</sup>

Mahoney was of the view that, contract analogy of interpretation should prevail while interpreting treaties. However, he went on to say that, within the framework of contract formalism, textualism would continue to have impact in treaty interpretation and application. While examining the treaty interpretation in the United States Supreme Court, he stressed that a treaty interpreter should commence interpretation with the text of the treaty agreement.<sup>128</sup>

It can be deduced from the above contentions of Mahoney that, in starting with the text of the treaty during the interpretation, textualism,<sup>129</sup> despite its affinity to statutory interpretation, cannot be ignored while interpreting treaties.

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<sup>126</sup>Curtis J. Mahoney, "Treaties as Contracts: Textualism, Contract Theory and the Interpretation of Treaties," *The Yale Law Journal* 116, no.824 (2007): 824. Textualism means plain language or plain meaning..

<sup>127</sup>*Ibid*, 826-827.

<sup>128</sup>*Ibid*, 829.

<sup>129</sup>Textualism means plain language or plain meaning. Stephen M. Durden, "Textuality Canons: Cabining Rules or Predilective Tools," *Campbell Law Review* 33, no.1 Art 3 (2010): 116. Textualism refers to the school of thought that interprets the constitution in accordance with the text's original meaning. William Michael Treanor, "Taking Text Too Seriously: Modern Textualism, Original Meaning, and the case for Amar's Bill of Rights," *Michigan Law Review* 106 (2007): 488.

Thus, a treaty shall be interpreted in “good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose”.<sup>130</sup> This, according to Kerstin is the principles of interpretation of international treaties contained in the Vienna Convention of the Laws of Treaties (VCLT) and is considered to be the customary international law principle of treaty interpretation. The interpretation of human right treaties requires that the specific characteristics of these treaties be taken into consideration.<sup>131</sup>

While opposing the stand of Tobin that the VCLT rule is not capable of resolving the question of how to choose a meaning for the text of a treaty, it is maintained by this study that, the criteria for interpreting treaties given by Tobin can fit properly into the VCLT rule. It is further maintained by this study, that Tobin was just playing with words when he invented his own doctrine of interpretation known as Persuasive Appeal of Interpretation.<sup>132</sup>

Since this study centres on the interpretation of a human rights instrument like CEDAW, the principles as contained in the VCLT will be invoked. However, having identified that, the principles of textualism cannot be divorced from interpretation of treaties, judges are reminded that, treaty interpretation should be no different from the construction of other legal writings, and the schools or techniques of treaty

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<sup>130</sup> Article 31 and 32 of the Vienna Convention of the Law of Treaties.

<sup>131</sup> Kerstin Mechlem, “Treaty Bodies and the Interpretation of Human Rights,” *Vanderbilt Journal of Transnational Law* 42 (2009): 909. Icelandic Human Rights Centre, “Interpretation of Human Rights Treaties,” <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightscasesandmaterials/theconceptsofhumanrights/introduction/interpretationofhumanrightstreaties/> (accessed February 16, 2013).

<sup>132</sup> Tobin formed the idea of a persuasive appeal of interpretation based on four criteria namely, that the interpretation must be principled, clear and practical, it must be coherent in its reasoning and consistent with the system of international law. It must also be sensitive to the nature of socio-political context within individual states and throughout the international legal order. John Tobin, “Seeking to Persuade: A Constructive Approach to Human Right Treaty Interpretation,” *Harvard Human Right Journal* 23, (2010): 3-4., Looking at these criteria closely reveals VCLT principles.

interpretation largely replicate those of statutes, contracts, wills and constitution. Those were the writings and comments of Bederman.<sup>133</sup>

Chief Justice Wilmott, as far back as 1767 wrote;

words are only pictures of ideas on paper, sometimes the picture is unclear because the idea (or legislative policy) was also fuzzy. Sometimes, the word painters (parliamentary Counsel) had inadequate instructions or sufficient time to complete the portrait to their fullest satisfaction. Sometimes too, distorting amendments are inserted in the committee run by persons not completely *au fait* with the big picture.<sup>134</sup>

It is therefore, the responsibility of the courts of law to put the wordings of the legislatures in their correct perspectives. This statement by the Chief Justice summarizes the whole controversy surrounding the right to choose contained under CEDAW. This is not to suggest that, the right to choose appears fuzzy or unclear, but just to show that the drafters of CEDAW have a different picture of the right to choose from the one which the CEDAW committee has, talking about the distorting amendments by the committee. This leaves us to see the distortion and incompatibility between CEDAW rules and that of its committee. The committee of CEDAW, included abortion rights as an amendment, when in the actual fact, no such 'word' is contained in the whole body of CEDAW by its drafters.

Treaty interpretation, and conversely, statute interpretation is suppose to be neutral and objective. That is to suggest that the ordinary meaning of the words in the treaty or statute is to be used in interpreting the treaty or statute. Meaning of the treaty or statute must first of all be sought in the language in which the treaty or statute is

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<sup>133</sup>David J. Bederman, *Spirit of International Law* (Athens: University of Georgia Press, 2002), 70-73.

<sup>134</sup>Justice Keith Mason, "Legislator's Intent: How Judges Discern it and what they do if they find it" in *Drafting Legislation: A Modern Approach* eds. Constatin Stefanou and Helen Xanthaki (England, USA: Ashgate Publishing Limited, 2008), 49-50; Lawrence M Fried-Man, "Some Comments on Legal Interpretation," *Poetics Today Interpretation in Context in Science and Culture* 9, no.1(1988): 95, <http://www.jstor.org/stable/1772889> (accessed October 20, 2011); David A., "Statutes Domains and Judges' Prerogatives," *University of Chicago Law Review*, 77, Supplementary (2010): 1262-1263.

framed, and if that is plain and unambiguous, the sole function of the court is to enforce it according to its terms.<sup>135</sup> Conversely, “a treaty should be interpreted in good faith in accordance with the ordinary meaning given to the terms in their context and in the light of its object and purpose”.<sup>136</sup>

Women should have the reproductive right to decide freely and responsibly on the number and spacing of their children, in order for them to be healthier. Here lies the basic principle of the right to choose under CEDAW. The sole function of the court therefore, is to apply the plain and ordinary meaning of the wordings of the law.

In applying the ordinary meaning of deciding freely and responsibly on the number and spacing of children, the first thing that comes to mind is the ordinary and plain meaning of ‘spacing of children’, which is family planning, and not abortion. There are no ambiguities in the words used and the strict ordinary meaning should be adhered to. In interpreting the right to choose under CEDAW’ therefore, the plain and ordinary meaning of the words should be employed.

The committee of CEDAW by its recommendation 24 has however imported some form of ambiguity into the meanings to be ascribed to the right to choose. Thus, the right to choose is now capable of two meanings- that which is ascribed to it by the drafters of CEDAW (right to reproduce), and that ascribed to it by the CEDAW committee (right to abort).

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<sup>135</sup>Brian Flanagan admits in his article that, there are controversies surrounding whether or not the literal meaning can legally justify the outcome of a statute, but was certain that the legal truth of a statute flows from its literal meaning. Brian Flanagan, “Revisiting Contribution of Literal Meaning to Legal Meaning,” *Oxford Journal of Legal Studies* 30, no.2 (2010): 255, <http://ojls.oxfordjournals.org/content/30/2/255.short> (accessed January 21, 2013); Mullins Sr., Morell E “Coming to Terms with Strict and Liberal Construction,” *Albany Law Review* 60, no.1 (2000): 9, [findarticles.com/p/articles/mi-hb3243/is-1-64/ai-n28803039/pg-9/](http://findarticles.com/p/articles/mi-hb3243/is-1-64/ai-n28803039/pg-9/) (accessed November 21, 2011).

<sup>136</sup>Vienna Convention on the Law of Treaties.

By the recommendation 24 of the committee of CEDAW, the ordinary and plain meanings of the right to choose has been thwarted, and resort to the intention of the drafters as well as negotiating history of CEDAW have become imperative. The intention of the drafters as well as negotiating history of the law are to be resorted to, only when the text is ambiguous or obscure, or when the plain meaning of the text leads to a result that is absurd or unreasonable.<sup>137</sup>

The intent of the drafters of CEDAW is to uphold the unborn fetus's right to life in line with the protection of human dignity as an objective of international law which had its first expression in the laws of war. By so doing, the unborn fetus's right to life will be seen as becoming part and parcel of CEDAW's right to choose. The right a woman has to choose to reproduce will be enhanced if she has the right to decide freely and responsibly on the number and spacing of her children.

In upholding the unborn fetus's right to life, which according to this research is within the contemplation of CEDAW's right to choose, Huang<sup>138</sup> wrote extensively on another rule of interpretation, while proposing his own rule. He felt that, it is perhaps true that there is no moral principle that has been more widely accepted than the so-called 'Golden Rule' of interpretation. This simply entails that, you do unto others what you would have them do unto you. This goes hand-in-hand with its negative formulation, sometimes called the 'Silver Rule'. That is, do not do unto others what you would not have them do to you.

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<sup>137</sup>Reservations to the *Convention in the Prevention and Punishment of the Crime of Genocide Opinion*, 1951; Baderman, *Spirit*, 70-73.

<sup>138</sup> Yong Huang, "A Copper Rule versus the Golden Rule: A Daoist-Confucian Proposal for Global Ethics," *Philosophy East and West* 55, no.3 (2005):394-396. Bill Puka, "Golden Rule" *Internet Encyclopedia of Philosophy*, last updated, September 16, 2010. <http://www.iep.utm.edu/goldrule/> (accessed January 12, 2013).

The right to choose under CEDAW, when interpreted in line with the golden rule, will be saying that women should not venture into the killing (abortion) of their children because, these women would not want themselves to be killed.<sup>139</sup>

The ultimate test of international law is how well it manages issues and problems within states and other international actors. International law would be a failure if it could not adequately meet the needs of the international community in constructively resolving problems that arise in international affairs. In order to save CEDAW, an international human rights instrument from this imminent failure, (failure in the sense that, an international human rights instrument should not favour abortion) the right to reproduce interpretation must be given to the provisions of the right to choose under CEDAW. This will further enhance conformity and unification with other international human rights instruments. When this is done, multitude compliance with the CEDAW rule will be achieved and this will show the real success story of an international human rights instrument, called CEDAW.

### **3.8 Conclusion**

This chapter has been able to give an insight into what is being proposed to be studied in this research. The research started on the door step of feminism which is the genesis of feminist awareness. It is because of this awareness that led in the main

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<sup>139</sup>The very term, 'golden', as pointed out by Marcus Singer, *Golden Rule* (1998) 405; indicates that it is considered to be of 'inestimable worth as a first principle conduct. Despite the controversies or critics that human beings are different, and that, what a person likes to be done to him, might not go down well with others, in this issue of "killing", no one likes being killed. However, Paul Weiss, made an excellent summary of all these criticisms in one sentence, 'there is no evil it could not be made to justify if only the perpetrators be willing to embrace it when he views himself (herself) as victims as well'. Paul Weiss, "The Golden Rule," *Journal of Philosophy* 38, no.16 (1941): 421-430; Huang, "A Copper Rule", 394-396. The importance of treating others with compassion was stressed by Oth Vilaythong T., Linder Nicole M. and Nosek Brian A., "Do unto Others: Effect of Priming the Golden Rule on Buddhists and Christian Attitudes towards Gay People," *Journal of Scientific Study of Religion* 49, no.3 (2010): 494 -495.



to the struggle for the era of the right to choose for women, and consequently, abortion rights in 1973. Having gotten the abortion rights, and having placed the right amongst the rights within the international human rights, controversies ensued leading to viewing the literatures in support, and those in opposition of abortion. Having done that, it was realized that two camps emerged; - those in support of abortion rights favoured the legalization of abortion: and those in support of the right to reproduce (therefore, opposing abortion right) favoured the continued criminalization of abortion. These two camps were well represented in the literature review. The fact that abortion is a crime in Nigeria necessitated the review of literatures relating to criminal law. It is this background that informs the doctrinal research wherein the researcher answered the first to fourth research questions of this work. This conceptual analysis gained ground in the next chapter.

## CHAPTER FOUR

### CONCEPTUAL ANALYSIS OF THE STUDY

#### 4.1 Introduction

A doctrinal analysis appears necessary in order to achieve the first to fourth research objectives of this study. The combined effect of this has further buttressed the fact that, the right to choose under CEDAW cannot represent abortion right for women. It has also showcased the regard given to the right to life for the unborn fetus. In a bid to achieve this, conceptual analysis was carried out in four dimensions in order to achieve the stated objectives in this study. Firstly, the reason for the non-implementation of CEDAW to date in Nigeria has been explicated and this borders on its application within the ambit of the Constitution of the Federal Republic of Nigeria. Secondly, fundamental principle of international human rights instruments in relation to the driving consideration for the legalization of abortion has been examined. Thirdly, the relationship between criminal laws and abortion has also been examined and lastly, an alternative interpretation of the right to choose under CEDAW has further been suggested in order to show the disparity which exist between the true notion of human right to reproduce and the right to abort.

#### 4.2 Non-implementation of CEDAW in Nigeria

Culture is the established pattern of behaviour among a people, an all embracing and heterogeneous concept that encompasses every aspect of man's life and experiences. It is perceived as a way of life. It is a collective and integrated whole, comprising

everything about man's ideas, behaviour, values, traditions, believes and habits acquired by man as a member of society.<sup>140</sup>

The need to give equal consideration to cultural activities and values in all spheres of life has been loudly recognized in the post-independent development of Nigeria. General ideas of Nigerian development were connected to authentic cultural values.<sup>141</sup> One of such cultural and traditional value is the respect for human dignity. There is the belief that life begins before birth.<sup>142</sup> In African societies, Nigeria inclusive, there is a huge value placed on pregnancy and childbirth.<sup>143</sup>

Thus, Chapter 2 of the Constitution of the Federal Republic of Nigeria 1999 made provisions concerning the “fundamental objectives and directive principles of state policy”. These principles comprise economic, social and cultural rights for all.<sup>144</sup> For example, “It shall be the duty and responsibility of all organs of government and of all authorities and persons exercising legislative, executive and judicial powers to conform to, observe and apply the provisions of the fundamental objectives and directive principles of state policy”.<sup>145</sup> In *Attorney-General of Ondo State v. Attorney-General of the Federation & 35 ors*,<sup>146</sup> the Supreme court held that the forgoing sections does not only impose a solemn duty to observe the mandate

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<sup>140</sup>Ajayi A. T, “The Preservation and Conservation of Nigerian Cultural Heritage: An Impetus for Her Development,” *The Social Sciences* 4, no. 5 (2009). <http://www.medwelljournals.com/fulltext/?doi=ssscience.2009.407.410> (accessed April 28, 2013).

<sup>141</sup>*Ibid*; Uwem Edimo Essiet et al, Nigeria (The Federal Republic of Nigeria). <http://www2.hu-berlin.de/sexology/IES/nigeria.html> (accessed April 22, 2012).

<sup>142</sup>Oladele Abiodun Balogun, “Proverbial Oppression of Women in Yoruba African culture: A Philosophical Overview,” *Thought and Practice: journal of the Philosophical Association of Kenya* 2, no.1 (2010): 34.

<sup>143</sup>Titilayo Cordelia Orisaremi, “An Explorative Study of abortion among Tarok in Central Nigeria,” *African Sociologist Review* 16, no. 1 (2012): 61.

<sup>144</sup>Sec 17 Constitution of the Federal Republic of Nigeria.

<sup>145</sup><sup>145</sup>Sec13 Constitution of the Federal Republic of Nigeria; Jacob Abiodun Dada, “Human Rights under the Nigerian Constitution: Issues and Problems,” *International Journal of Humanities and Social Science* 2, no. 12 (2012): 36.

<sup>146</sup>(2002) 9 NWLR (pt 772) 222 at 381.

contained in chapter 2 on all organs of government and all authorities and persons exercising legislative, executive and judicial powers, but also on private individuals as well.

Hence, the social structure making up the order is founded on ideals of freedom, equality and justice. Consequently, in the advancement of the social order, the state “shall direct its policy towards ensuring that there are adequate facilities<sup>147</sup> for religious and cultural life”.<sup>148</sup>

The Constitution of the Federal Republic of Nigeria can therefore be said to contain provisions relating to the rights of Nigerian people to develop and promote their culture and to apply their cultures as an instrument to further the progress of national identity and unity.<sup>149</sup> The legislative list of the Constitution of the Federal Republic of Nigeria defines the mandate of the federal government, as well as the state and provincial authorities in the field of culture.

Hence, going by the legal development of Nigeria, the radical definition of the right to choose under CEDAW is not compatible with Nigerian culture and tradition where the majority of women identify with the popular form of feminism as opposed to the intellectual feminism. The intellectual feminism is propagated by the urban and educated women. They condemn aspects of African culture, and they tend towards western form of feminism.<sup>150</sup> Popular feminism on the other hand, has its foundation in culture and lived experiences of African women. Popular feminism appeals to

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<sup>147</sup>The researcher is of the view that, facilities for cultural and religious life will be available if Nigerians are able to be guided by their cultures and religious belief.

<sup>148</sup>Sec 17(3) Nigerian Constitution

<sup>149</sup>Uwem Edimo Essiet et al, “Nigeria (The Federal Republic of Nigeria),”

<sup>150</sup>Intellectual feminism is largely sponsored by the west, and thus suspected by ordinary African of being channels through which the west tries to preach to them. Their agendas are also sensationalist and reductionist, and as not allowing ‘for serious reflection on African women’s condition and on the appropriate solutions to the problems. Louise de Toit, “Old Wives Tales and Philosophical Delusions: on the Problem of Women and African Philosophy,” *South African Journal of Philosophy* 27, no.4 (2008): 420, [www.ajol/index.php/sajpem/article/ViewFile/31528/5890](http://www.ajol/index.php/sajpem/article/ViewFile/31528/5890) (accessed March 13, 2012).

African women who identify their culture as vital to their identity. This popular movement caters for the majority of African women, and by implication Nigerian women.<sup>151</sup>

Mere Kisekka, has once expressed the view that several women's associations in Nigeria have striven to operate cautiously within traditional gender boundaries, and they are steadily articulating the theory of complementary rather than competitive roles in gender relations. The Nigerian National Commission for Women has characterized Nigerian feminism as an armless movement that is non-confrontational and supports a positive uplifting for women for motherhood, nationhood and development.<sup>152</sup>

As a follow up on the choice of popular feminism, the religious women groups in Nigeria have pursued agendas that are different from those of the intellectual feminism. For example, the Federation of Muslim Women Organization (FOMWAN), the umbrella body for Muslim women organization, do not see themselves as feminists in the western sense. FOMWAN has therefore made its own interpretations concerning the right to choose under CEDAW to mean family planning which is permissible in Islam and geared towards spacing, rather than

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<sup>151</sup>Tawanda Sachikonye, "African Feminism Driven by African Women," *NGO News and Views* January 20, 2010 <http://www.ngopulse.org/article/african-feminism-driven-african-women> (accessed March 13, 2012). Popular feminism is based on the vestigates of the matriarchy practiced in most ancient African societies where women enjoyed privileged status, and on the other hand, it is enshrined in the progressive values introduced by nationalist struggle for independent. Toit "Old Wives," 420. Matriarchy is a cultural feminist theory that envisaged a society of strong women guided by essentially female concerns and values. These included, most importantly, pacifism, cooperation, non-violent settlement of differences, and a harmonious regulation of public life. Josephine Donovan, *Feminist Theory: The Intellectual Traditions* (New York: Continuum, 2000), 48.

<sup>152</sup>Joyce Gelb and Marian Leif Palley, *Women and Politics around the World: A Comparative History and Survey Volume 1* (Santa Barbara: ABC-CLIO, 2009), 514; Remi Akujobi, "Motherhood in African Literature and Culture," *CLCWeb: Comparative Literature and Culture* 13, no.1 Art 2 (2011), <http://docs.lib.purdue.edu/clcweb/vol13/iss1/> (accessed March 12, 2012)..

limiting births. Such practice according to FOMWAN must be practiced with the full agreement of both spouses.<sup>153</sup>

In the same vein, the women wing of the Christian Association of Nigeria has urged women to kick against the wilful termination of the foetus. The statement was made by the director of education, Christian Association of Nigeria during the Annual Convention of the Association.<sup>154</sup> Evangelical Christians and Catholics have supported and actively encourage a pro-life value and have totally been opposed to pro-choicers and their institutional agenda of sexual right that included abortion. The Church's theology of life asserts strongly and publicly the dignity and sanctity of life, and regarded abortion as fuelling a culture of violence and death. Unless it is spontaneous or to save the mother's life, the church believes abortion is totally unacceptable.<sup>155</sup>

The researcher hereby maintains that, within the context of the Constitution of the Federal Republic of Nigeria, the Nigerian government in promoting the cultural rights of its people will not sanction the radical definition of the right to choose under CEDAW, because culture as well as religion abhors abortion.<sup>156</sup>

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<sup>153</sup>At the FOMWAN International Seminar held in Lagos, Nigeria, 24-27 July 1986, family planning methods which have the same principles as *coitus interruptus* (the main reason for this stand was because, this method was practiced by the Holy Prophet Mohammed) was approved, and they include, sexual relations during safe periods, the use of condom and diaphragm. Birth control methods such as oral contraceptives, intrauterine devices, injections, castrations, sterilization and abortion were not approved. They are concerned about promiscuity and believe abortion is justified only when the life of the mother is at stake. Catherine M. Coles and Beverly Blow Mark, *Hausa Woman in the Twentieth Century* (Madison, Wisconsin: University of Wisconsin Press, 1991), 101; Kathleen McGavey, *Muslim and Christian Women in Dialogue: The Case of Northern Nigeria* (Oxford NY: Peter Land, 2009), 185..

<sup>154</sup>Ben Atonko Sunday, "Say No to Abortion-Cleric Charges Women," *Sunday Trust Magazine* November 14, 2010, [http://sundaytrust.com.ng/index.php?option=com\\_content&view=article&id=5196:say-no-to-abortioncleric-charges-women&catid=19:sunday-sermon&Itemid=28](http://sundaytrust.com.ng/index.php?option=com_content&view=article&id=5196:say-no-to-abortioncleric-charges-women&catid=19:sunday-sermon&Itemid=28) (accessed March 15, 2012).

<sup>155</sup>Professor Matthews A. Ojo, "Religion and Sexuality: Individuality, Choice and Sexuality in Nigerian Christianity," *Understanding Human Sexuality Seminar Series* 4 (2005): 10.

<sup>156</sup>Omo-Aghola L. O. et al, "Perception and Attitudes of a Rural Community to Abortion in Niger-Delta Region of Nigeria," *Nigerian Journal of Clinical Practice* 12, no4 (2009): 443; Olukunmi Lanre

Section 21 of the Constitution of the Federal Republic of Nigeria further provides that, the State shall preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives and directive principles of state policy. The Nigerian culture which abhors abortion is one culture which the government of Nigeria seeks to promote by its non-implementation of CEDAW. Furthermore, the Constitution of the Federal Republic of Nigeria has given regard to the sanctity of human persons. Also, human dignity shall be maintained and enhanced.<sup>157</sup>

The concept of human dignity is commonly associated with Judeo-Christian doctrine that humans are created in God's image. Also, it is associated with the notion that every single human being has natural and intrinsic worth by virtue of being human, and that this worth entitles him or her to respect from all other human beings.<sup>158</sup>

Human dignity is an attribution of characteristic value to human beings. Human dignity belongs to every human being.<sup>159</sup>

Hence, the Constitution of the Federal Republic of Nigeria, by recognizing the cultural values of people of Nigeria has accorded human dignity to all human beings which included the unborn child, because culturally, life begins from pre-conception. The Constitution of the Federal Republic of Nigeria can therefore be said to be created in line with a global trend which considers human dignity to be the

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Olaitan, "Attitude of University Students Towards Abortion," *International Journal of Tropical Medicine* 6, no. 3 (2011): <http://www.medwelljournals.com/fulltext/?doi=ijtmed.2011.52.57> (accessed April 22, 2013).

<sup>157</sup>Sec 17(1)(b) and sec 34 Constitution of the Federal Republic of Nigeria.

<sup>158</sup>Rainer Ebert and Reginald M. J. Oduor, "The Concept of Human Dignity in German and Kenyan Constitutional Law," *Thought and Practice: A Journal of the Philosophical Association of Kenya (PAK)* 4, no1 (2012): 44-45; Christopher McCrudden "Human Dignity and Judicial Interpretation of Human Rights," *The European Journal of International Law* 19, no4 (2008): 659.

<sup>159</sup>Lanre-Abass, Bolatito Asiata, "Suicide and Human Dignity: An African Perspective," *Humanities and Social Science Journal* 5, no1 (2010): 51.

fundamental value or one of the fundamental values of a society that adequately respect human rights.

The researcher here affirms that, the combined effect of sections 17, 21 and 34 of the Constitution of the Federal Republic of Nigeria is that, right to life be given to the unborn child because, cultural belief and religion in Nigeria frowns at abortion, and so the radical definition of the right to choose within CEDAW cannot stand in Nigeria.

### **4.3 Fundamental Principles of International Human Rights Instruments**

Most people who study jurisprudence or political philosophy are invited at some stage to read Thomas Aquinas's "treaties on law".<sup>160</sup> Here, they read his definition of Natural Law as "*participatio legis aeternae in rationali creatura*: the participation of the eternal law in rational creatures".<sup>161</sup> Each of us is not only subject to the protective care of God, but is actually a participant of such care. Thus, Natural Law is concerned with the reason whereby, we perceive or recognize what is good and what is bad. This is simply the feeling and impress in us of the divine light. However, some people are more receptive of this light than others. It is worthy to note that, every (sane and conscious) person grasps the general principle of practical reasonableness.<sup>162</sup>

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<sup>160</sup>Question 90-7 of the first part of the second part of his *Summa Theologiae*.

<sup>161</sup>*Ibid*

<sup>162</sup>John Finnis, *Natural Law and Natural Right* (Oxford, NY: Oxford University Press, 2011), 398-402; William E. May, *Introduction to Moral Theology* (Huntington: Our Sunday Visitor Publication, 2003), 83.



The Natural Law originates nothing, sustains nothing; they are merely responsible for uniformity in sustaining what has been originated and what has been sustained.<sup>163</sup> Hence, when it comes to establishing a strong conceptual framework of human right principles, the theories of relativism and positive law, untethered from universal principles, has no place in the drafting of the Universal Declaration of Human Rights (Declaration).<sup>164</sup>

The writing of the Declaration<sup>165</sup> represents such a bulwark.<sup>166</sup> It also represents a tremendous leap in the progress of the moral conscience.<sup>167</sup> The drafters of the Declaration clearly understood their role as representatives of the conscience of mankind. Hence, the dignity and worth of human person is the founding premise of the Declaration.<sup>168</sup>

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<sup>163</sup>Henry Drummond, *Natural Law in the Spiritual World* (Rockville MD: Arc, Manor Publishers, 2008), 20.

<sup>164</sup>Rita Joseph, *Human Right and the Unborn Child* (Leiden, Boston: Martinus Nijhoff Publishers, 2009), 39. While speaking on the immutability of Natural Law, Hans Kelsen was of the opinion that, Natural Law claims absolute validity and therefore, in harmony with its pure idea, it presents itself as a permanent, unchangeable order. Positive Law on the other hand, with its merely hypothetical-relative validity is inherently, an infinitely changing order which can adjust itself to conditions as they change in space and time. Hans Kelsen, *General Theory of Law and State* (Clark NJ: Lawbook Exchange, 2007), 396-397.

<sup>165</sup>The declaration is universally regarded as an authoritative elaboration of the human rights provisions of the United Nation Charter. Many, if not all of the rights elaborated in the Declaration are widely recognized as constituting rules of Customary International Law. Samuel M. Natale and Mark B. Fenton, *Business Education and Training: On the Threshold of the Millennium* (Lanham Md: University Press of America, 2000), 208.

<sup>166</sup>Natural law is thought best to combat the arbitrariness of the power of the Nazi Movement which is rooted in racism. Abortion today, is not a different act from that of doctors purposely killing fetuses and new born babies in order to preserve the Nazi racial social party. The extent of such power is evidenced in George J. Annas and Michael A. Grodin, *The Nazi Doctors and the Nuremberg Code: Human Right in Humanitarian Experimentation* (Oxford NY: Oxford University Press, 1955), 22.

<sup>167</sup>Joseph, *Unborn Child*, 39.

<sup>168</sup>*Ibid.* In view of the Nazi's crime against humanity, the United Nation Commission on Human Rights was charged with writing a declaration of human rights which reaffirms the faith in fundamental human right in the dignity and worth of human person... this is the basic premise. The peace and security of mankind are dependent on mutual respect for the rights and freedoms of all. Suzanne McIntire and William E. Burns, *Speeches in World History* (New York: Facts on File, 2009), 387-391; Mary Ann Glendon, *A World Made New* (New York: Random House, 2001), 175; Vicki C. Jackson, "Constitutional Dialogue and Human Dignity: States and Transformational Constitutional Discourse," *Montana Law Review* 65, (2004): 15.

Eleanor Roosevelt,<sup>169</sup> Dr. Johannes Van Aggelen,<sup>170</sup> Charles Malik,<sup>171</sup> and a host of others who had close connections with the drafting of the Declaration, made constant reference to the premise, basis and foundation of the Declaration as the respect for the dignity, sanctity as well as worth of human person.

It can therefore be said that, the concepts of dignity, sanctity, status, and worth of individual person underpin the Declaration's understanding and acceptance of the first principle of natural law, that is, the moral importance to do good and avoid evil, and emanating from this, the precept that affirms preservation of any human life. Natural Law principles such as these, found concrete expression in the Declaration, and were declared by the drafters to be universal.<sup>172</sup>

This being the case, Fereydoun Hoveyda, looking back to his experience as a young Iranian law graduate assistant to the Iranian delegate in the third committee debates, confirms this great emphasis on the universality of the Declaration. He is however troubled that the very concept of universality of the Universal Declaration of Human Rights is being harmed by several fragmentations being imported into the declaration which, according to him has the tendency to nullify the Declaration. In his words;

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<sup>169</sup>Former first lady in the white house (1933-1945), and became head of the United Nation Commission on Human Rights. At a meeting of the United Nation in Paris, 1948, she addressed United Nations officials, diplomats and world leaders at the Sorbonne University on the document she helped write- the Universal Declaration of Human Rights. McIntire and Burns, *Speeches in World History*, 387.

<sup>170</sup>Close associate of John Humphrey, Director of the United Nations Division of Human Rights, first appointed to oversee the drafting of the Universal Declaration. Joseph, *Unborn Child*, 40; Van Aggelen Johannes, "The Preamble of the United Nations Declaration of Human Rights," *Denver Journal of International Law and Policy* 28, no.2 (2000): 133-4.

<sup>171</sup>A Lebanese philosopher and diplomat, president of the United Nations Economic and Social Council. He served as rapporteur of the Commission on Human Rights at the time of drafting the Universal Declaration. Joseph, *Unborn Child*, 39; Charles Malik, International Bill of Human Rights (United Nations Bulletin, 1948), <http://www.udhr.org/history/ibrmalik.htm> (accessed January 29, 2013).

<sup>172</sup>Joseph, *Unborn Child*, 40.

Abandoning the Declaration in the name of cultural differences would constitute a setback. There is no Islamic, Buddhist, Hindu, Zoroastrian, Christian, Judaic etc rights. There are human rights, pertaining to human beings where ever they live, and whatever their creed.<sup>173</sup>

It is hereby stated, adding to Hoveyda's contention, that abandoning the concept of universality in the name of radical feminist ideology would also constitute a setback.<sup>174</sup> For, there are no feminist rights, there are only human rights, pertaining to human beings where ever they live, pertaining even to the smallest human being, who, for a short nine months, enjoy the natural right to live and grow in utero. An important influence in bringing about this development undoubtedly was the experience of the World War II, which had shown horror that may result from excluding certain people from the status of full human being and from not granting equal right to all.<sup>175</sup>

Also, there is no evidence whatsoever that, the drafters ever contemplated the removal of legal protection from the unborn children. If the drafters were clear and united about anything, they were clear and united on this; "henceforth, absolutely, no

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<sup>173</sup>*Ibid.* 41; Hoveyda Fereydoun, "The Universal Declaration and 50 Years of Human Rights," *Transnational Law and Contemporary Problems* 8, (1998): 435. Hence, the Universal Declaration drew upon the intellectual well springs of Africa, the Americas, Asia, and Europe in a distillation of universal rights. Eva Brems, *Human Rights: Universality and Diversity* (The Hague: Nijhoff, 2001), 7. The Universal Declaration of Human Rights drew on the experiences of non-Western societies and the valid aspirations of the people within those societies to overcome the oppression and repression. Stephen P. Marks, "From Single Confused Page to the Dialogue for Six Billion Persons: The Root of the Universal Declaration of Human Rights in the French Revolution," *Human Right Quarterly* 20, no.3 (1998): 485. The universality concept implies a positive attitude to cultural and ideological diversity in the sense that, it interprets the multitude of different cultures and philosophies. Brems, *Human Rights*: 3-20.

<sup>174</sup>*Joseph, Unborn Child*, 41; Ganiat Mobolaji Olatokun and Rusniah Ahmad, "Fundamental Principle of International Human Right Law- Basis for the Right to Life for the Unborn Child," Paper delivered at the 7<sup>th</sup> UUM International Conference. November 13, 2013.

<sup>175</sup>*Ibid.*; John P Humphrey, "The Universal Declaration of Human Rights: Its History, Impact and Judicial Charter" in *Human Rights: Thirty Years after the Universal Declaration* ed. B. G. Ramcharan (The Hague, Boston, London: Nijhoff, 1979), 29.

one was to be excluded from human right protection and no jurisdiction was ever again to be exempted from the universality of that protection”.<sup>176</sup>

Thus, giving the human child at the early periods of development other names such as, ‘embryo’ or ‘fetus’, and referring to the child as ‘it’,<sup>177</sup> does not affect the child’s human nature or the child’s right ‘by nature’ to the vested and inherent dignity<sup>178</sup> and inalienable rights of all members of the human family.<sup>179</sup> The term inalienable rights of all members of the human family applied to the child before birth. The right to life is inalienable. This suggests that, this right cannot be taken from the child by anyone, not by the neo-Nazi state,<sup>180</sup> not by the doctors and not even by the child’s mother. Judge Robert Hanson of Wisconsin said; “My whole legal conscience rebel at the theory that, this (right to life of the unborn) is a matter between the mother and her doctor”.<sup>181</sup>

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<sup>176</sup>Joseph, *Unborn Child*, 36. Experience had shown that excluding certain class from the protection of human right could be disastrous. The drafters of the Declaration were unanimous on this believe.

<sup>177</sup>Capelon et al, “Human Rights Begins at Birth: International Law and the Claim for Fetal Rights,” *Reproductive Health Matters* 13, no.26 (2005): 120-9.

<sup>178</sup>Considering the fact that ‘dignity’ is becoming common place in the legal text providing for human right protection in many jurisdiction, it is however contended here that, what must be borne in mind is the spirit and intents of the drafters of the Universal Declaration of Human Rights that human dignity is a symbol of natural law, that is, the moral imperative to do good and avoid evil. Christopher McCrudden, “Human Dignity and Judicial Interpretation of Human Rights,” *European Journal of International Law* 19, no.4 (2008): 656.

<sup>179</sup>Joseph, *Unborn Child*, 44-46. A child before birth is a member of the human family biologically, genetically and genealogically. To be eligible for membership of human family, one has to be human. Morsink Johannes, “Women’s Right in the Universal Declaration,” *Human Right Quarterly* 13, (1991): 230; Joseph, *Unborn Child*, 48. Present in former president Regan’s description of the fetus, was the notion of public fetus. The fetus to him was one of America’s unborn children and a member of the human family. The fetus was not of the mother; the fetus was of the society. Michael Weiler and W. Barnett Pearce, *Regan and Public Discourse in America* (Alabama: University of Alabama Press, 1992), 278. The fetus is thinking, sensing, feeling and learning about life in that watery world. We need to revisit the roots of our humanity as members of the human family... ;Roy Ridgway and Simon H. House, *The Unborn Child: Beginning of a Whole Life and Overcoming Problems of Early Origin* (London: Karnac, 2006), xiv.

<sup>180</sup>Joseph, *Unborn Child*, 179.

<sup>181</sup>Francis C. Dunn, “Sometimes they Cry,” *American Bar Journal* 56, (1970): 1020

Mr Grassley, while addressing the US senate in support for the Partial-Birth Abortion' Ban Act 2003, said; "When abortion advocates say that abortion is a matter just between a woman and her doctor, they are rejecting the right of an innocent human being".<sup>182</sup>

It is not the act of 'being born' that grants or confers human rights. It is 'being human' that confers human rights and the child before birth, at whatever stage of life, embryonic or fetal, is a distinct human being, a new and irreplaceable human being, an identifiable member of the human family whose rights are equal and inalienable.

Hence, the contention by Capelon et al, that the wordings of Article 1 of the Declaration which says that, 'All human beings are born free and equal' excludes the unborn child from the human right to life granted by Article 3 of the Declaration, because the unborn child is not 'born' is wrong.<sup>183</sup>

Although there were several definitions giving to the word 'born' in Article 1 during the negotiation history of the Declaration, it is here stated by the researcher that, the understanding of the word 'born' as used within the Declaration can only be given by those who were part and parcel of the drafting of the Declaration. This understanding was given by Charles Malik, who was the chairman of Economic and Social Council (ECOSOC), and of the third committee that steered the Declaration to its conclusion.

In his words;

Then in Article 1, human beings are said to be 'born free' and equal in dignity and right. Certainly, the word 'born' means that our freedom, dignity and rights are natural to our being and are not generous grant of some external powers...

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<sup>182</sup> *Congressional Record-Senate*, March 13, 2003: 6154.

<sup>183</sup> Capelon et al, "Human Right Begins at Birth," 120-9.

This quotation was from the speech on Human Rights to the U.S Chambers of Commerce Committee on International, Political and Social Problems given at the Waldorf Astoria in New York, November 4, 1949. With this understanding, the views of Capelon et al are false.<sup>184</sup>

Having established that the Universal Declaration of Human Rights was established on the basis of natural law,<sup>185</sup> which recognizes the dignity, sanctity and worth of human persons, from which the right to life is thereby granted to everyone including the unborn child, it is here argued that the forbidden of abortion is a legal norm considered so fundamental to its peremptory norm of international law. The protection of the child before as well as after birth is a fundamental principle of *jus cogens* of the system of international protection of human rights based on universal recognition of international community.<sup>186</sup>

The protection of the child before as well as after birth is recognized irrevocably by the Declaration as a common standard of achievement for all persons and for all nations.<sup>187</sup> It is on this basis and premise that, all other international human rights instruments, except the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa,<sup>188</sup> recognizes and protects the child both before as well as after birth.

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<sup>184</sup>Joseph, *Unborn Child*, 58.

<sup>185</sup>The right to life, because it is inalienable rules out abortion. The natural law principle relevant here is that, a human entity should be allowed to persist in being and that, one must not directly attack any basic good in any person, not even for the sake of avoiding bad consequences. That this basic aspect of human well being is never to be directly suppressed, is cited by Professor John Finnis as the principle of natural law that provides the rational basis for absolute human rights, for those human rights that prevail *sempe et ad* (always and on every occasion) and even against the most specific human enactment and commands. *Joseph, Unborn Child*, 42.

<sup>186</sup>*Ibid.* 105.

<sup>187</sup>*Ibid*; Preamble Universal Declaration of Human Rights.

<sup>188</sup>The arbitral exception of assault, rape and incest in Article 16 ( c) of the Women's Protocol purporting to justify the authorization of abortion are not consistent with the long standing human

All known international human rights instruments are consistent in their right to life provisions of all citizens of the world generally, and in particular, the right to life of the unborn. Abortion is objected to at by all international human rights instruments; by their provisions as regards the unborn fetuse's right to life. For example, Article 3 of the Universal Declaration of Human Rights<sup>189</sup> provides that; "everyone has the right to life, liberty, and security of person". The Preamble to the Declaration of the Rights of the Child 1959 States 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".

Furthermore, the Geneva Declaration of the Rights of the Child 1924, also states that; "the need for such special safeguard including legal protection for the child before as well as after birth".<sup>190</sup> Article 1 of the Draft International Covenant on Human Rights 1947 provides that; "it shall be unlawful to deprive a person, from the moment of conception, of his life and bodily integrity". The Convention on the Prevention and Punishment of the Crime of Genocide, 1948<sup>191</sup> states that; "the concern for the child before as well as after birth is here confirmed".

Other international human rights instruments with the right to life provisions for the unborn fetus are, International Covenant on Civil and Political Right, 1966<sup>192</sup> which states that; "sentence to death shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women", American

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right obligations towards the unborn child, and thus, not valid. Joseph, *Unborn Child*, 250. The child before birth, being innocent of any crime should not be deprived arbitrarily of his or her life, because the inherent right to life shall be protected by law and no one shall be arbitrarily deprived of his or her life. (Article 6(1) International Convention on Civil and political Rights)

<sup>189</sup>GA. Res. 217A, art 3, UN, GAR, 3<sup>rd</sup> Sess, 1<sup>st</sup> Plen. Mtg. UN Doc A/8 ( Dec, 12, 1948),

<sup>190</sup>UN Doc. E. CN. 4/21

<sup>191</sup>This Convention was approved by the United Nations General Assembly on the 9<sup>th</sup> December, the day before the Universal Declaration of Human Right was approved.

<sup>192</sup>Art. 6(5)

Convention on Human Right, 1969<sup>193</sup> which provides that; “every person in general from the moment of conception has the right to have his life protected” and the draft American Declaration of the International Rights and Duties of Man 1948 which states that; “everyone has the right to life. This extends to the right to life from conception, to the right to life of incurables, imbeciles and insanes”.

If all these international human rights instruments are consistent and unanimous in their provisions for the right to life of the unborn, the researcher hereby submits that the Protocol to the African Charter on Human and People’s Rights on the Right of Women in Africa, authorizing medical abortion in a bid to protect the reproductive right of women, is inconsistent with all international human right instruments. The Protocol to the African Charter on Human and People’s Rights on the Right of Women in Africa is the only international human right document authorizing abortion.

Upholding and maintaining the fundamental principles of international human rights instruments lies on the legislature of every sovereign state as the primary defenders of the human rights of the unborn children. It is trite to mention at this juncture that, one area that has often eluded efforts at international regulation is abortion. Tribunals and similar bodies involved in the implementation of international human rights instruments have stylishly and cautiously avoided taking a clear position on this subject, given the existence of wide disagreement from one country to another. The European Court of Human Right has therefore evoked what it calls the ‘margin of appreciation’ doctrine by which controversial matters (like abortion) on which there

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<sup>193</sup>Art. 1(2)



is no consensus are not addressed, thereby declining a pronouncement on the subject.<sup>194</sup>

Therefore, African politicians in general and Nigerian politicians in particular, must conform and adhere to the universally recognized rights, as enshrined in the Universal Declaration of Human Rights, to which African states in general, and Nigeria in particular is Committed. States must provide legal protection against abortion which constitutes arbitrary deprivation of life in breach of the fundamental principles of international human rights instruments.

The researcher re-affirms and maintains that, based on the above examination, the fundamental principles of international human rights instruments is to uphold the dignity and sanctity of human persons, whether born or unborn. Hence, an international human rights instrument like CEDAW cannot be used to perpetrate an act which is against such principles.

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<sup>194</sup> Although the doctrine was first used within the frame work of the European Court system, it has been transplanted to the jurisprudence of other international human rights mechanisms. The United Nation Human Right Committee has implicitly employed the doctrine in the case of *Shirin Aumeeruddy-Cziffra and 19 other Mauritanian women v. Mauritius*. Onder Bakircioglu, “The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality” *German Law Journal* 8, No.7 (2007): 713, [http://www.germanlawjournal.org/pdfs/Vol08No07/PDF\\_Vol\\_08\\_No\\_07\\_711-734\\_Articles\\_Bakircioglu.pdf](http://www.germanlawjournal.org/pdfs/Vol08No07/PDF_Vol_08_No_07_711-734_Articles_Bakircioglu.pdf) (accessed April 17, 2012). The United Nations Human Right Committee has also avoided the question of abortion. The closest the committee had come to the subject was its admonition in its general comment on the equality between men and women of March 2000, that States provide information on any measures to help women prevent unwanted pregnancies and ‘ensure that they do not have to undergo life-threatening clandestine abortion’. “Human Rights Committee, General Comment 28, Equality of rights between men and women (article 3)”, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), *Human Rights Library* <http://www1.umn.edu/humanrts/gencomm/hrcom28.htm> (accessed March 27, 2012). The texts themselves lend support to the view that there is some protection for the life of the unborn. They tend to rebut the arguments of those who maintained that abortion is authorized by international laws, because the unborn are not yet human beings, and therefore, they are not protected. David P. Forsythe, *Encyclopaedia of Human Rights Volume 1* (Oxford NY: Oxford University Press, 2009), 445-446.

#### **4.4 Criminal Law and Abortion**

Section 1(1) of the 1999 Constitution of the Federal Republic of Nigeria provides that; “this Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria”.

Section 1(3) provides further; “if any other law is inconsistent with the provisions of the Constitution, this Constitution shall prevail and that other law shall to the extent of the inconsistency be void”.

The above gives an insight into how laws in Nigeria will be and consequently implies that, the Constitution of Nigeria is supreme. All laws of National Assembly, subsidiary legislations and all other forms of law must conform to the letters and spirit of the Constitution.

Be that as it may, section 36(1) of the Constitution of the Federal Republic of Nigeria provides; “subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty thereof is prescribed in a written law”.

A written law, by virtue of this subsection refers to an Act of National Assembly or a State law, any subsidiary legislation or instrument under the provisions of the law. Furthermore, the Constitution of the Federal Republic of Nigeria provides under section 17(2) that; the sanctity of human person shall be recognized and human dignity shall be maintained and enhanced”. Also, section 21 of the Constitution provides that; “states shall protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives and directive principles of State policy.

Hence, it can be deduced that, the criminal laws of Nigeria (Criminal Code and Penal Code) are Acts of National Assembly, because they both constitute written laws and contained well defined offences. The criminal laws, being acts of National Assembly must conform to the provisions of section 17(2) and section 21 of the Constitution, for it to remain valid.

Prohibition of abortion under sections 232 and 235 of the Penal Code (Northern Nigeria) and sections 228, 229 and 230 of the Criminal Code (Southern Nigeria) is in consonance with section 17(2) as well as section 21 of the Constitution which promotes the dignity of human persons as well as the cultures which respects human dignity. Hence, the misconception about criminal law as the cause of maternal mortality is wrong.

The researcher here affirms that, relationship between criminal law and abortion has been determined by the Constitution of the country. The criminal law of Nigeria is operating within the ambit of the Constitution of the Federal Republic of Nigeria which is the supreme law of the land.

In another dimension, the criminal law has three basic functions. Firstly, the criminal law defines and announces the conduct that is prescribed (or required). Such rules of conduct supply *ex ante* direction to members of the society as to the conduct which they must keep away from. Secondly, when a violation of the rules of conduct occurs, the criminal law takes on a different role, and must decide whether the violation merits criminal liability. Thirdly, where liability is to be imposed, criminal law doctrine must examine the relative seriousness of the offence.<sup>195</sup>

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<sup>195</sup>Paul H. Eobinson, "A Functional Analysis of Criminal Law," *North West University Law Review* 88, (1994): 857.

In order to operate within the ambit of the supreme norm (Constitution), the criminal laws of Nigeria have defined the act of abortion as a conduct that must be avoided. Where a person is found to commit an abortion, the criminal laws decide the liability and extent of liability of the criminal.

By this elaboration, the researcher maintains that the criminal laws of the country, by prohibiting abortion, are protecting the dignity of citizens against the actions of other citizens. This obliges the State to protect individuals against attack by others and entails the creation of criminal prohibitions.<sup>196</sup> The State in protecting individuals against attack by others are mindful of the unborn child as needing protection from any attack by others, either the mother or the doctor. Hence, the prohibition of abortion to stop any attack and consequently, to give right to life to the unborn child.

#### **4.5 Interpretation of the Right to Choose Under CEDAW**

One of the ultimate challenges of the 21<sup>st</sup> Century is that of giving greater substance and credence to existing norms of human rights.<sup>197</sup> The lack of specific content and context of the right to choose and family planning under CEDAW has given rise to some concerns like those envisaged in this study. The lack of specific content of the term ‘family planning’ in international human rights instrument, like CEDAW, have given rise to some scepticism. There exist considerable difficulties in reaching consensus worldwide on the exact meaning of the notion.<sup>198</sup>

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<sup>196</sup>Tatjana Hornle and Mordechai Kremnitzer, “Human Dignity as a Protected Interest in Criminal Law,” *Israel Law Review* 14 (2012): 147.

<sup>197</sup>Ganiat Mobolaji Olatokun and Harlida Abdu Wahab, “Alternative Interpretation to ‘Right to Choose’ within CEDAW: A Suggestion,” paper delivered at the 7<sup>th</sup> UUM International Conference. November, 13 2013.

<sup>198</sup>Maja Kirilova Erickson, *Reproductive Freedom: In the Context of International Human Rights and Humanitarian Law* (Netherlands: Kluwer La International, 2000), 184. CEDAW not only defines equality, it discusses a wide range of topics such as sexual right, reproductive right and right to health

Article 12(1) of the CEDAW provides;

States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on the basis of equality of men and women, access to health services, including those related to family planning.

Reading the Convention further, Article 16(1) (e) provides;

State parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on the basis of equality of men and women; 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 exercise these rights.

These being the original contents of the Convention, the CEDAW general recommendation No. 24 embodying the key elements of Article 12 provide among others;<sup>199</sup>

The obligation to respect rights requires state parties to refrain from obstructing action taken by women in pursuit of their health goals. State parties should report on how public and private health care providers meet their duties to respect women's rights to have access to health care. For example, state parties should not restrict women's access to health services or to the clinics that provide those services on the grounds that women do not have the authorization of husbands,

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care. The Convention is very careful in addressing these issues and refers only to a woman's right to decide freely and responsibly on the number and spacing of their children and to have access to information, education and means to enable these rights. Cheshmak Farhoumand-Sims, "CEDAW and Afghanistan," *Journal of International Women's Studies* 11, no.#1 (2009): 138, <http://www.bridgew.edu/soas/jiws/Nov09/Cheshmak.pdf> (accessed April 16, 2012).

<sup>199</sup>General recommendations of CEDAW Committees are interpretations of an accord to assist state parties in implementing their obligations. Hanna Beate Schopp-Schilling, "The Role of the Convention on the Elimination of all forms of Discrimination Against Women and its Monitoring Procedures for Achieving Gender Equality in Political Representation" being a paper presented at the International Institute for Democracy and Electoral Assistance (IDEA)/CEE Network for Gender Issues Conference. The Implementation of Quotas: European Experiences, Budapest, Hungary, 22-23 October, (2004), 3 [http://www.quotaproject.org/CS/CS\\_Cedawbudapest04BSS.pdf](http://www.quotaproject.org/CS/CS_Cedawbudapest04BSS.pdf) (accessed April 3, 2012). The Committee on the elimination of discrimination against women was established to monitor state parties' compliance with the obligations under the convention. It also gives general recommendations on issues affecting women that deserves more attention by state parties. "CEDAW and the Reporting Process to the Committee on the Elimination of Discrimination against Women: A Guide for UNICEF field Staff" (2009): 7 <http://www.crin.org/docs/CEDAW.pdf> (accessed April 16, 2012).

partners, parents or health authorities, because they are unmarried or because they are women. Other barriers to women's access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures.<sup>200</sup>

Recommendation No. 24 of the CEDAW committee, in contravention and contradiction to the provisions of the Articles 12 and 16 of CEDAW, can therefore, be interpreted to include abortion,<sup>201</sup> because by its wordings, state parties should not criminalize any medical procedure needed by only women. The only medical procedure needed by women as far as reproductive right is concerned is abortion.<sup>202</sup>

Despite the fact that the legal status of the general recommendations of CEDAW committee is that of a soft law,<sup>203</sup> it has become imperative for this study to suggest alternative interpretations that reveals alternative perspective that highlights the disparity between the true notion of human rights principles of reproductive rights and women's freedom to abort.

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<sup>200</sup>key element No.14 under recommendation No.24 of the CEDAW committee. [www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm](http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm) (accessed April 3, 2012).

<sup>201</sup>Within the UN, the issue of women's access to legal abortion and counselling as well as to services has been of major concern of expert members of CEDAW. Erickson, *Reproductive Freedom*, 301.

<sup>202</sup>Abortion continued to be the most commonly privately funded medical procedure. Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart, 2001), 85. Abortion has also been referred to as 'life threatening medical procedure' in Nancy Ehrenreich, *The Reproductive Rights Reader: Law, Medicine and the Construction of Motherhood* (New York: New York University Press, 2008), 157. The American Medical Women's Association has also referred to abortion as a medical procedure. *Congressional Record V. 145 pt 18, October 14, 1999 to October 25, 1999: 26023*.

<sup>203</sup>This is because, some state parties do not accept general recommendations as legally binding, although the UN treaty bodies, including CEDAW committee, expect state parties to act on them in good faith. Schopp-Schilling, "The Role of CEDAW," 3. Several writers in the legal domain do not consider them binding on state parties to the convention. A. Byrnes, "The 'Other' Human Right Treaty Body: The Work of the Committee on the Elimination of All Forms of Discrimination against Women," *Yale Journal of International Law* 14 (1989). As at present, the committee has no formal power to interpret the women's convention authoritatively, except in the course of its work implicitly. Recommendations of CEDAW have the status of 'soft law'. "The Optional Protocol to CEDAW: Mitigating violations of Women's Human Rights," International Training Seminar for NGOs and Women's Rights Activists in Berlin, Germany 13-15 March (2003), 3 [http://www.institut-fuer-menschenrechte.de/uploads/tx\\_commerce/documentation\\_the\\_optional\\_protocol\\_to\\_cedaw.pdf](http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/documentation_the_optional_protocol_to_cedaw.pdf) (accessed April 16, 2012).

In order to accomplish this aim, recourse must be had to the Vienna Convention of the Law of Treaties 1969 (VCLT).<sup>204</sup> This is because VCLT is the approved law app for interpreting human rights instruments like CEDAW. According to Article 31, paragraph 1 of the Convention; “A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose”.

Thus, as the principal provision on interpretation of treaty, Article 31(1) VCTL list the most frequently utilized interpretative methods; good faith, ordinary (literal) and contextual interpretation and interpretation in light of a treaty’s objective and purpose; here, is a combination of several of the theoretical approaches that were and still are prevalent in international legal theory. To decide on the actual meaning of a particular treaty provision, scholars and courts may refer to and combine several elements of Article 31 VCLT.<sup>205</sup> The approaches to interpretation of treaties are hereunder elaborated;

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<sup>204</sup>Despite the fact that a special principle of treaty interpretation has been advocated in international human right law based on the debate about the extent to which the Vienna Convention on the Law of Treaties principles are still adequate to deal with the multiplication and sophistication of international law, critiques of the VCTL have commonly fail to appreciate how non-codified principles have been interpreted and applied, and neglect to actually formulate new principles. It is one thing to say that the VCTL principles of interpretation are unsatisfactory and it is another thing to construct new and more acceptable principles. Isabella Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford, NY: Oxford University Press, 2009), 60. The frequent use of the VCTL, which has come to be acknowledged as customary international law principle, in the interpretation of international treaties demonstrates that the VCTL is still relevant. R. K. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), 142. The VCTL depicts generally accepted principles of law on the interpretation of treaties. Erickson, *Reproductive Freedom*, 304.

<sup>205</sup>Gardiner, *Treaty Interpretation*, 142; Villiger M, *Commentary on the 1969 VCLT* (Leiden, Boston: Martinus Nijhoff Publishers, 2009), 422; Anthony Aust, *Handbook of International Law* (Cambridge, UK, New York: Cambridge University Press, 2010), 83; Daniel H. Joyner, *Interpreting the Nuclear Non- Proliferation Treaty* (Oxford, New York: Oxford University Press, 2011), 157.

### 4.5.1 Ordinary (Literal) Interpretation

This rule is usually the first point of reference for treaty bodies. This is because; it takes the actual wordings and text of the treaty as a starting point.<sup>206</sup> The general rule of interpreting treaties requires that the interpreters must give words, which are clear, plain and unambiguous, their normal meaning,<sup>207</sup> disregarding the literal meaning only in very exceptional circumstances.<sup>208</sup>

In all legal system, whether common law or civil law, where the meanings of the wordings in the statute are clearly defined, the duty of the judge is to give the words their clearly defined meaning and apply them strictly. This is the literal rule of interpretation.<sup>209</sup> If only one construction is available, to which the clear, plain or unambiguous word is unequivocally susceptible, the word must be so interpreted.

Using this method is also in line with the linguistic approach to the interpretation of words. Thus, it can be said that, the use of ‘ordinary meaning’ in the VCLT, refers to the meaning that can be possibly ascribed to the terms by making use of the

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<sup>206</sup>It is the general principle of interpretation of legal instruments that the text is the primary source of interpretation; other sources are subordinate to it. The lead speech by Lord Steyn, while commenting on sec 3 Human Right Act 1998 in the case of *R v A (No 2)* (2002) 1 Ac 45, (2001) 3 All ER 1; Michael Zander, *The Law-Making Process* (Cambridge: Cambridge University Press, 2004), 185.

<sup>207</sup>William Schabas, *War Crimes and Human Rights: Essays on the Death Penalty, Justice and accountability* (London: Cameron May, 2008), 437. The court has described the plain meaning as the normal meaning of the words used in the case of *Denmark v Commission* (C-233/96) [1998] ECR I-5759 at [38]; also, *Germany v Commission* (C-245/97) [2000] ECR I-11261 at [72].

<sup>208</sup>If the literal meaning does not accord with the overall scheme of the treaty under consideration, the court will disregard the plain wordings in order to achieve an interpretation that promotes the main objective of the treaty. Gabriel Moens and John Trone, *Commercial Law of the European Union* (Dordrecht, New York: Springer, 2010), 342. This was also the contention of Lord Steyn while commenting on Article 3 of the Human Right Act 1998, that the court can depart from the language of the statute to avoid absurd consequences. Articles 3 of the Human Right Act, like Article 31 of the VCLT were most concern about an interpretation compatible with the treaty or convention under consideration.

<sup>209</sup>Gary N. Heibronn, *Introducing The Law* (Sydney: CCH Australia Limited, 2008), 150; Gary Slapper and David Kelly, *The English Legal System 2009-2010* (Oxon, USA, Canada: Routledge Carvendish, 2009), 87; Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws, with a Chapter on the Interpretation of Judicial Decisions and the Doctrine of Precedents* (Clark, NJ: Lawbook Exchange Limited, 2011), 392.



principles of etymology, that is , that part of grammar that reveals the origin of words, for better distinguishing and establishing of their true signification.<sup>210</sup> To be able to interpret the ordinary meaning to be given to the contents of the treaty, the interpreter need to be familiar with the vocabulary and the rule system of the language used.<sup>211</sup>

Literal rule can therefore be said to mean that, if the provision of a treaty contains an expression whose form has a close similarity to an expression of ordinary language, then it should be understood in accordance with the rules of the language.

Hence, in applying the literal rule of interpretation of treaties as provided by the VCLT, Article 31(1), recourse has been made to the combined effect of Articles 12(1) and 16(1) CEDAW in order to ascertain the interpretation of the right to choose. The researcher asserts that, by so doing, the ordinary meaning of the right to choose (legally and linguistically), was revealed to include, the right a woman has to choose to reproduce by means of the availability of the right to decide freely and responsibly as to the number and spacing of her children, through the use of information and services relating to family planning. It can thus be justified to say that, the only construction and interpretation that could be given to the right to

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<sup>210</sup>Steve McCaffery, *Prior Meaning: The Protosemantic and Poetics* (Evanston: Northwestern University Press, 2001), 82.

<sup>211</sup>The rule system of a language can be divided into 3 categories; morphological, syntactical and pragmatic. Morphological rule describe how the words are inflected and word forms are constructed, syntactical rules describe how phrases and sentences are put together, and pragmatic rules describe how linguistic expressions are used in certain kind of situations. Linderfalk Ulf, *On the Interpretation of Treaties-The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer, 2007), 61-62; Anja Inagabire, “Unveiled: A Judicial Assessment of France’s Concealment Act 2010-1192 with the International Covenant on Civil and Political Rights Article 18 and the Convention on the Elimination of All forms of Discrimination Against Women Article 5(a)”, being a doctoral thesis submitted to the Faculty of Law, Lund University, Raoul Wallenberg Institute of Human Right and Humanitarian Law (2011): 16.

choose under CEDAW is as stated here. This is the literal rule of interpretation- the ordinary and conventional meaning of the term as used within the instrument.

The ordinary meaning of the right to choose as envisaged under Articles 12 and 16 CEDAW, appears clear, plain and unambiguous, and did not in any respect lead to absurd result. Hence, on this note, no effort should be made to interpret the term further.<sup>212</sup> However, reference has been made to Recommendation 24 of the CEDAW Committee, which provides an interpretation contrary to the ordinary meaning, context and content of the right to choose with respect to the term, family planning.

#### **4.5.2 Contextual Interpretation**

To clarify the contrary and confusing interpretation provided by the Recommendation 24 of the CEDAW committee, a contextual interpretation<sup>213</sup> of the right to choose is hereby proposed. It must be noted from the onset that, the context is always employed in relation to the ordinary meaning. In order to interpret the right to choose contextually, reference has been made to the actual text of CEDAW,<sup>214</sup> the elements set out in Articles 31(2) and 31(3) of VCLT.

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<sup>212</sup>The reference to other methods of interpretation different from the literal or ordinary one could be employed only in case the interpretation leads absurd results. Moens and Trone, *Commercial Law*, 342; Zander, *The Law Making Process*, 185.

<sup>213</sup>Contextual interpretation, at least in common law, is also sometimes called the 'logical method' or the 'golden rule' of statutory construction expressed in Latin maxim, '*nemo enim aliquam partem recte intelligere potest antequam totum iterum atque iterum perlegerit*'. Under the golden rule, the court must read the whole statute together and interpret it so as to give the words their ordinary meaning. Paul Latimer, *Australian Business Law* 31<sup>st</sup> edition (Australia: CCH Australia Limited, 2012), 74; Madhuku Lovemore, *Introduction to Zimbabwean Law* (Harare: Weaver Press, 2010), 150.

<sup>214</sup>The context of a treaty can be deduced from its preamble and annexes. M. Fitzmaurice, O. A. Elias and Panos Merkouris, *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Leiden Boston: Martinus Nijhoff Publishers, 2010), 157; Ibrahim F. I. Shihata, *The World*

The phrase, ‘context of a treaty’ according to Article 31(2) means,

any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty, any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by other parties as an instrument related to the treaty.

Particular importance is also attached to other means of interpretation stated in Article 31(3) especially with reference to any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provision.<sup>215</sup>

A detailed understanding of the preamble (text) to CEDAW shows that, due regard and recognition is given to the following; the dignity of human person, equality between men and women, sovereignty of nations, as well as the innate gift of women in the area of procreation and upbringing of children. While recognizing these important elements, CEDAW emphasizes that, under no circumstances should women be discriminated at. It is on this basis that all state parties agreed to be part of CEDAW.<sup>216</sup>

Of all the important elements of the preamble to CEDAW, the dignity of human person as well as the natural role of women in the area of procreation and upbringing of children has direct bearing with the ordinary and literal interpretation of the right to choose.

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*Bank Legal Papers* (The Hague: Nijhoff, 2000), 1; Dr Michael Lang, *Tax Treaty Interpretation* (Wien: Linde, 2001), 209.

<sup>215</sup>Michael Lang and Florian Brugger, “The Role of the OECD Commentary in Tax Treaty Interpretation,” *Australian Tax Forum* 23 (2008): 97, [http://www2.wu-wien.ac.at/taxlaw/publikationen/LangBrugger\\_australiantaxforum\\_95ff.pdf](http://www2.wu-wien.ac.at/taxlaw/publikationen/LangBrugger_australiantaxforum_95ff.pdf) (accessed April 20, 2012).

<sup>216</sup>Preamble to the CEDAW rules. In its preamble, the Convention explicitly acknowledges that, ‘extensive discrimination against women continued to exist and emphasizes that such discrimination violates the principles of equality of rights and respect for human dignity. Hasna Cheema, *Benchmarking National Legislation for Gender Equality: Findings from five Asian Countries* (Thailand: UNDP Asia-Pacific Regional Centre, 2010), 5, <http://www4.unescobkk.org/nespap/sites/default/files/benchmarkingnationallegislationforgenderequality.pdf> (accessed April 16, 2012).

The dignity and worth of human person is the founding premise of the Universal Declaration (the universally accepted authoritative elaboration of the human rights provisions of the United Nation Charter).<sup>217</sup> Constant reference was made to the fact that, the premise, basis and foundation of the Declaration lies in the respect for the dignity, sanctity and worth of all human persons.<sup>218</sup> It is also the first principle of natural law, that is, the moral importance to do good deeds and avoid evil, and emanating from this, is the precept that affirms preservation of all human life.<sup>219</sup>

The natural role of women as the means of procreation and the nurturer of children, is therefore rooted in natural law, and consequently, has found expression in human rights instruments, notably CEDAW. Hence, a contextual interpretation of CEDAW's right to choose, bearing in mind the contents of the preamble in consonant with the ordinary meaning, has been interpreted to mean, the right to choose to reproduce with the use of family planning information and services that promote the preservation of life, and not those that destroys life or have the tendencies to destroy life.

With reference to Article 31(2) (a) and (b) VCLT, to interpret a treaty contextually, the rule is that, where there exist a conflict between two possible ordinary meanings of a provision, then the later meaning as expressed in the instrument created by two or more parties, but accepted by other parties as an instrument related to the treaty must be adopted.<sup>220</sup>

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<sup>217</sup>Natale and Freton, *Business Education and Training*, 208.

<sup>218</sup>Most people that took part in the drafting of the Declaration made reference to this fact; McIntire and Burns, *Speeches in World History*, 387-391; Joseph, *Unborn Child*, 39; Malik, "International Bill of Human Rights".

<sup>219</sup>Natural law principle such as these, found concrete expression in the Declaration and were declared to be universal. Finnis, *Natural Law and Natural Rights*, 398-402.

<sup>220</sup>Inagabire, *A Judicial Assessment of France's Concealment Act*, 18.

Although, as far as Nigeria is concerned, no such agreement or instrument was made in respect of CEDAW,<sup>221</sup> reference has been made to the negotiating history of CEDAW to show that the ordinary meaning of the right to choose was intended by the parties to CEDAW, Nigeria inclusive. According to the account of CEDAW's negotiating history, some countries were against the mentioning of 'family planning services'. Since these services (family planning) are not applicable everywhere, it could result in the refusal to ratify the convention, so the supporters of CEDAW emphasize that, the Convention calls on State Parties to take 'all appropriate measures', thereby, leaving it to State governments to determine what constitutes access to "family planning".<sup>222</sup>

In support of this, the negotiating history of the Convention has been referred to which indicates and suggests that the text ('all appropriate measures') was left intentionally ambiguous to allow State Parties to ratify CEDAW.<sup>223</sup>

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<sup>221</sup>This is because, Nigeria ratify CEDAW in 1985 without any reservation. Women Aid Collective (WACOL) for Nigeria NGO Coalition on CEDAW Report (2008): 1, <http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/NigeriaNGOCoalition41.pdf> (accessed April 7, 2012).

<sup>222</sup>Lars Adam Rehof, *Guides to the Travaux Preperatories of the United Nation Convention on the Elimination of All forms of Discrimination against Women* (Dordrecht: Nijhoff, 1993), 143.

<sup>223</sup>Ibid. Furthermore, still on the issue of allowance given to state parties to devise their own method and approach of 'family planning', Maria Isabel Plata, as far back as 1991, concerned about her country, Columbia where women's group in the country used the women's convention to promote equality and reproductive health. The Columbian Women Movement lobbied for the incorporation of the principles of women's convention into the 1991 constitution. In particular, the provision of the women's convention on the right to decide freely and responsibly the number of one's children is now part of the constitution. The women in Columbia has devised their own meaning of 'family planning' to include, the availability of a full range of reproductive health services, including infertility services, safe and effective contraception, integrated treatment of incomplete abortion and the treatment of menopausal women. Plata had urged CEDAW, as far back as 1991 to issue a general recommendation clarifying the terms, women's health and 'family planning' programs. Such a recommendation would explain that, in order to comply with the convention, states need to develop comprehensive reproductive health services that 'empower women and not use women as a means to limit population growth, save the environment and speed development. Rebecca J. Cook, *Human Rights of Women: National and International Perspective* (Philadelphia: University of Pennsylvania Press, 1994), 19.

To tackle the concerns of some Convention opponents, in 1994, the Clinton administration put forth an understanding to CEDAW that said the United States understands that, Article 12 allows state parties to determine which health care services are appropriate in connection with ‘family planning’, pregnancy, confinement and post-natal periods as well as when the provision of free services are necessary and does not mandate the provision of particular services on cost free basis. In June 2002, under the chairmanship of former senator Joseph Biden, the SCFR (Senate Committee on Foreign Relations) held hearings on CEDAW ratification in the USA. On July 30, 2002, the committee reported the Convention favourably by a vote of 12 to 7, subject to several RUDs.<sup>224</sup>

One of the understandings was a proposal from a ranking member senator Jesse Helms that stated; “nothing in this convention shall be construed to reflect or create any right to abortion and in no case should abortion be promoted as a method of ‘family planning’”. This Helm’s understanding was included as a compromise to alleviate the concerns of pro-life advocates who were concerned that CEDAW ratification could affect US abortion laws.<sup>225</sup>

The reference to the negotiating history in context, has also lend weight to the ordinary meaning of the right to choose under CEDAW for it shows that, right from the onset, there were inhibitions expressed by state parties in respect of ‘family planning’ mentioned within the ‘right to choose’ to be taken to mean abortion. It showed that, these inhibitions were respected and acknowledged by the leverage given to state parties to adopt the meaning that best suit their countries as far as

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<sup>224</sup>Luisa Blanchfield, *United Nation’s Convention on the Elimination of All forms of Discrimination against Women (CEDAW): Issues in the US Ratification Debate* (Congressional Research Service, 2010), 16-18

<sup>225</sup>*Ibid*

‘family planning’ is concerned, showing in the main, the respect for national sovereignty as expressed in the preamble to CEDAW.<sup>226</sup> This accounted for reservations made by some state parties.

The researcher asserts again that, using the provisions of Article 31(2) VCLT to interpret the right to choose contextually, bearing in mind the ordinary meaning of the term meant nothing more than the right to choose to reproduce for women using the best approach of ‘family planning’ thought best by individual country.

Subsequent practices by states as well as relevant rule of international law,<sup>227</sup> as provided by Article 31(3) VCLT, can also be used to interpret the right to choose contextually. The non-domestication and implementation of CEDAW till date as well as the continued criminalization of abortion<sup>228</sup> by Nigeria has shown the necessary subsequent practice required to interpret the right to choose.

International law<sup>229</sup> has recognized worldwide problems which appears particularly significant in regions where ‘clashes of culture’ are imminent.<sup>230</sup> In such regions with

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<sup>226</sup>This, perhaps, shows why Nigerian government did not thought it necessary to show any reservations to the CEDAW Treaty in 1985.

<sup>227</sup>The application of a technique of interpretation that permits reference to other rules of international law, as provided for under Article 31(3) VCLT, offers the enticing prospect of averting conflict of norms, by enabling the harmonization of rules rather than the application of one norm to the exclusion of all others. Campbell McLachlan, “The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention,” *International and Comparative Law Quarterly* 54, no.2 (2005): 286, [http://www.biicl.org/files/2140\\_campbell\\_mclachlan\\_the\\_principle\\_of\\_systemic\\_integration.pdf](http://www.biicl.org/files/2140_campbell_mclachlan_the_principle_of_systemic_integration.pdf) (accessed April 8, 2012).

<sup>228</sup>Secs 232 and 235 Penal Code (applicable in the Northern Nigeria) and secs 228, 229 and 230 Criminal Code (applicable in the Southern Nigeria)

<sup>229</sup>L. Oppenheim, *International Law 8<sup>th</sup> Edition* (London: Longman, 1955), 26; David Kennedy, “The Sources of International Law” *American University Journal of International Law Review* 2, no.1 (1987): 4, <http://www.auilr.org/pdf/2/2-1-1.pdf> (accessed April 9, 2012).

<sup>230</sup>Karen B. Brown and David Snyder, *General Report of the XVIIIth Congress of the International Academy of Comparative Law/ Rappports Generaux Du XIII Condress De L’Academie Internationale De Droit Compare* (Dordrecht, London: Springer, 2012), 583. Article 31(3)( C) VCLT also acknowledges that the complex and entangled relationship between custom and treaties must be taken into account when interpreting the latter if relevant and applicable. Leena Grover, “A Call to Arms: Fundamental Dilemmas Confronting Interpretation of Crimes,” *European Journal of International*

marked cultural diversity<sup>231</sup> and distinct political decentralization, culture-related differences in interpreting human rights texts are visible.<sup>232</sup> Hence, in a bid to interpret the right to choose under CEDAW in Nigeria, the relative (limited or moderate) universalism approach<sup>233</sup> was opted for.

This approach recognizes treaty-based human rights as such (or at least the core of it), but allows consideration of particular cultural aspects when interpreting the often obscure formulated-human right, when filling up a margin of appreciation,<sup>234</sup> or particularly significant, when weighting human rights and public interests. This approach shows that, any interpretation of normative texts in any country is interdependent with local and regional culture.<sup>235</sup> Nigeria, as a country, in recognizing these facts, has interpreted the right to choose to exclude abortion. Hence, the literal and contextual interpretation of the right to choose under CEDAW is taken to mean, the right to choose to reproduce and not the right to choose to abort.

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*Law* 21, no.3 (2010): 543, <http://www.lexisnexis.com.eserv.uum.edu.my/ap/academic/> (accessed April 19, 2012).

<sup>231</sup>Nigeria has a population of 140 million (National Population Commission Nigeria), making it the most populous country in Africa. Anjuwon Grace et al, "Assessment of Scholarly Publications of the Nigerian Health Science Researchers in MEDLINE/PubMed (1996-2007)," *Sierra Leone Journal of Biomedical Research* 3, no.2 (2011): 90, <http://www.ajol.info/index.php/sljbr/article/viewFile/71809/60765> (accessed March 8, 2012); Arnim Langer and Ukoha Ukiwo, "Ethnicity, Religion and the State in Ghana and Nigeria: Perceptions from the Streets," *Centre for Research on Inequality, Human Security and Ethnicity* 34 (2007): 3-4, <http://www.crise.ox.ac.uk/pubs/workingpaper34.pdf> (accessed March 8, 2012).

<sup>232</sup>The process of interpretation is also an integral part of the legal system in which the text is situated. Legal texts only make sense within the legal context of the system that gives them authority and meaning. McLachlan, "The Principle of Systematic Integration," 286.

<sup>233</sup>Other approaches are, (i) absolute relativism, which totally denies, for whatever conflicting cultural reasons, the universal or at least, quasi-universal normative effect which result from the human right treaties, and (ii) universality through culture, which confirms an inner link, not a contrast between both dimensions saying that cultural adaptation increases or even creates sociological acceptance of the normative prescription and therefore, gives real efficacy to human right. These two approaches are seldom in nature, and cannot be upheld. Brown and Snyder, *General Report*, 583.

<sup>234</sup>Bakircioglu, "Margin of Appreciation," 713.

<sup>235</sup>What is decisive is the readiness of the interpreter to objectivize his/her culture-shaped mindset and to duly respect the international obligations. Thus, the need for universality is satisfied and cultural particularity is observed to the extent that the universal document explicitly or implicitly allows it. Brown and Snyder, *General Report*, 583.



### 4.5.3 Objective and Purposive Interpretation

As mentioned earlier, the right to choose as used under CEDAW is clear and unambiguous, which has necessitated the ordinary meaning interpretation. However, the interpretation posed by Recommendation 24 of the CEDAW Committee has created a conflict that needs rectification. This is the reason why a contextual interpretation has been proffered earlier, and the same reason why an object and purposive interpretation is hereby, presented.

The object and purpose of human rights treaties plays a crucial role in their interpretation,<sup>236</sup> and in the light of Article 31(1) VCLT, the object and purpose of a treaty is not construed in isolation of the other means of interpretation. Rather, it is always construed in relation to the ordinary meaning. It is meant that, where the ordinary meaning is unclear, the object and purpose shall assist in more precisely, to determine the meaning of the provision.<sup>237</sup>

Object and purpose of a treaty as provided in Article 31(1) VCLT has been subjected to many controversies, because the term ‘object and purpose’ is considered as vague and ill-defined. Vague in the sense that it is considered wide and can accommodate a lot of issues. However, the most difficult and controversial issue is the reconciliation

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<sup>236</sup>The object and purpose of a treaty constitutes a key concept. Daniel Rietiker, “The Principle of ‘Effectiveness in the recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law-No Need for the Concept of Treaty Sui Generis,” *Nordic Journal of International Law* 79 (2010): 255. The expression, ‘teleological’ refers to an interpretation of treaty upon the intention and purpose of the provision under consideration. It goes beyond other methods of interpretation because; it is not restricted by the wordings, background or context of the provision in issue. Rather, it is dynamic in that, it is purposeful in its application, seeking to give effect to the spirit or the overall scheme and objectives of the specific provision under consideration. Moens and Trone, *Commercial Law*, 344. The court’s interpretive method is generally described as purposive or teleological, meaning that, when interpreting a rule, account is taken of the purpose, aim and objective that the rule pursues. Nicole Busby, *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford New York: Oxford University Press, 2011), 135.

<sup>237</sup>Article 31(1) VCLT states; ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objective and purpose’. Moens and Trone, *Commercial Law*, 342.

of the objective and the subjective approach in treaty interpretation, a task that is almost impossible.

However, Koskenniemi has observed that, according to the subjective approach, treaties bind because they express consent, and according to the objective approach, treaties bind due to the requirements of consideration of teleology, utility, reciprocity, good faith or justice.<sup>238</sup>

According to some writers,<sup>239</sup> recourse to preparatory work<sup>240</sup> (*travaux préparatoires*) helps to distinguish the proponents of the objective approach from the proponents of the subjective approach. This is so in the sense that, the former would be more reluctant, whereas, the latter would be more liberal in permitting recourse to preparatory work in order to determine the true meaning of the treaty.<sup>241</sup>

Article 32 VCLT refers to '*travaux préparatoires*',<sup>242</sup> which it characterizes as supplementary means of interpretation. Article 32 makes it clear that, recourse to '*travaux préparatoires*' is acceptable in order to aid interpretation governed by the principle established in Article 31, and they (supplementary means of interpretation) are neither autonomous nor alternative means of interpretation.<sup>243</sup> Resort to '*travaux préparatoires*' is strictly regulated and permitted only on two occasions; (i) in order

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<sup>238</sup>Marti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Publishing Company, 1989), 291-294, 298-299. He was also of the view that, the principal goal of interpretation (to give an expression to the subjective party interpretation) cannot be achieved since it is impossible to ascertain real subjective party intent. Sir I. Sinclair, *The Vienna Convention and the Law of Treaties* (Manchester: Manchester University Press, 1984), 116.

<sup>239</sup>Notably, Marti Koskenniemi and Sir I. Sinclair.

<sup>240</sup>Article 32 VCLT.

<sup>241</sup>Koskenniemi, *From Apology to Utopia*, 291-294, 298-299.

<sup>242</sup>*Travaux préparatoires* consist of written records, negotiations preceding the conclusion of a treaty. It includes all documents and memoranda, minutes of conferences and draft of treaty under negotiation. It also includes all materials which document the negotiations and other circumstances that culminated in the former conclusion of a treaty.

<sup>243</sup>"Report of the International Law Commission on the work of its 18<sup>th</sup> Session," *Yearbook of International Law Commission* Vol II, (1966): 223, UN Doc A/CN/41191.

to confirm the meaning resulting from the application of Article 31 or, (ii) when such application produces ambiguous, obscure or manifestly absurd results.<sup>244</sup>

It must be pointed out that, '*travaux préparatoires*' of a treaty can be very ambiguous and confusing.<sup>245</sup> Because *travaux préparatoires* may include obsolete negotiation position, they may mislead the interpreter as to the intentions of the signatories at the period of signing the treaty. Primarily for such reasons, commentators have been reluctant to endorse the frequent recourse to *travaux préparatoires*.<sup>246</sup>

Despite these controversies, it must be emphasized that the VCLT does not rule out the application of either the subjective or teleological methods of interpretation of treaties. The objective and the subjective approach in the discovery of the object and purpose of a treaty are reflected in the text of the treaty.<sup>247</sup> The subjective and

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<sup>244</sup>L. Oppenheim, R. Y. Jennings and A. Watts, *Oppenheim's International Law Vol. 1* (Harlow: Longman, 1992), 1277-1282.

<sup>245</sup>This is because, during treaty negotiations, many views may be advanced by drafters. Some of these views might be abandoned before adoption of the final version of the treaty. Also, certain provisions are absent in the *travaux préparatoires*. Crucial debates, for example often occur in private, and thus, never appear in the negotiation record.

<sup>246</sup>Martin Ris, "Treaty Interpretation and the ICJ Recourse to *Travaux Préparatoires*: Towards a proposed Amendent of Articles 31 and 32 of the Vienna Convention on the Law of Treaty," *Boston College International and Comparative Law Review* 14, no.1 Article 6 (1991): 112-113. Those commentators that are reluctant to make recourse to *travaux préparatoires* are those that believe that the objective approach is best to view the object and purpose of a treaty. Art 31(1) VCLT; Moens and Trone, *Commercial Law*, 342.

<sup>247</sup>The consent of the parties is fixed in the text of the agreement. The object and purpose or the teleology of a treaty is equally expressed in its text. Isabelle Van Damme, *Treaty Interpretation by the WTO* (Oxford: Oxford University Press, 2009), 36; Isabelle Van Damme, "Treaty Interpretation by the WTO Appellate Body" *European Journal of International Law* 21, no.3 (2010): 605-648, <http://ejil.oxfordjournals.org/content/21/3/605.full> (accessed April 13, 2012). The VCLT, in favouring the textual approach to treaty interpretation realize that the text of a treaty is very important in its interpretation. The presumptions observed through the recourse to the object and purpose of a treaty is confirmed by a general terminological analysis of the text concerned. Hence, the provisions contained in Article 31 VCLT can be achieved by giving effect to the intention of the parties as expressed in the words by them in the text of the treaty. Sinclair, *The Vienna Convention on the Law of Treaties*, 115. What constitute the object and purpose of interpretation process today is the elucidation of the intentions of the parties as reflected in the terms of the treaty. F. A. Engelen, *Interpretation of Tax Treaties under Internatonal Law: A Study of Articles 31, 32 and 33 of the Vienna*

objective interpretation of a treaty cannot be done in isolation of the text of the treaty. The object and purpose of a treaty can therefore be said to refer to the intention of the treaty-the reason for which the treaty exists, as well as the intention of the parties.<sup>248</sup>

The issue revolving around the object and purpose of a treaty can arise both with regard to the object of interpretation (the individual provision or the treaty as a whole) and to its subject, i.e. their respective contents. Regarding the object of interpretation, it is now a common practice both in international law and human rights law to refer either to the object and purpose of the treaty as a whole, or to the object and purpose of the individual provision in question, even though the VCLT itself speaks only of the treaty's object and purpose.<sup>249</sup>

Consensus may legitimate certain human rights interpretations in connection with the object and purpose of the human right treaty either as a whole or with regards to individual treaty provision.<sup>250</sup> For the whole of the treaty, the object and purpose is possibly expressed in the preamble,<sup>251</sup> which informs us about the general scope of the state consensus. As every human right is limited to a particular set of rights, any interpretation which goes beyond that scope is questionable, and likely to be

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*Convention of the Law of Treaties and their application to Tax Treaties* (Amsterdam: International Bureau of Fiscal Documentation, 2004), 109.

<sup>248</sup>All in reference to the text or body of the treaty. Ibid.

<sup>249</sup>Article 31(1) VCLT; Gardiner, *Treaty Interpretation*, 200.

<sup>250</sup>F. Vanneste, *General International Law before Human Right Courts: Assessing the Speciality Claims of International Human Right Laws* (Atwerp, Portland: Intersentia, 2010), 263-294. The court in *East African Law Society v AG of the Republic of Kenya* [2008] 1 East Afr. LR 95, was of the view that, account will have to be taken of the object of the treaty as a whole, without losing sight of the object and purpose of a particular provision. Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge, New York: Cambridge University Press, 2011), 196.

<sup>251</sup>The European court of human rights elaborated on the object and purpose of the Convention by turning to the preamble to the Convention as provided in Article 31(2) VCLT. George Letsas, "Strasbourg's Interpretative Ethic: Lessons for the International Lawyer," *European Journal of International Law* 21, no.3 (2010): 509-541 <http://ejil.oxfordjournals.org/content/21/3/509.full> (accessed April 9, 2012).

illegitimate. Concerning individual treaty provisions, it is the consensus and practice of the state members to the treaty, which may legitimate a subsequent interpretation.<sup>252</sup>

If the majority of state parties to the treaty consent to, and practice a certain interpretation of a particular human right provision, also at the national level, there is a strong indication that this interpretation is legitimate. It must be noted however, that although the consent of state is stressed, it is agreed that, there may also be other actors or affected parties whose consent may also count in the determination of the interpretative scope of an individual provision.<sup>253</sup>

Thus, in interpreting the right to choose according to its object and purpose in Nigeria, the main reason behind the promulgation of CEDAW as a whole has been looked into, and this lies in the fact that, discrimination against women should be prohibited. Elements that will lead to the realization of this objective are found in the preamble to CEDAW.<sup>254</sup> The interpretation of the right to choose provided by Recommendation 24 of the CEDAW Committee goes beyond the scope of the preamble to CEDAW and is therefore, questionable.

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<sup>252</sup>Vanneste has illustrated that the European Court of Human Rights (ECHR) has referred to various actors to determine the object and purpose of individual human ECHR provisions; the existing and emerging consensus of the contracting parties, or of a regional group of contracting parties. Nonetheless, the ECHR has also referred to public opinion or social acceptance of a particular opinion. Vanneste, *General International Law*, 263-294.

<sup>253</sup>*Ibid.*

<sup>254</sup>Preamble to the CEDAW rules. In its preamble, the Convention explicitly acknowledges that, 'extensive discrimination against women continued to exist and emphasizes that such discrimination violates the principles of equality of rights and respect for human dignity. Cheema, *Benchmarking National Legislation for Gender Equality*, 5.

With regards to the object and purpose of the right to choose under CEDAW, the subsequent practice in Nigeria,<sup>255</sup> consensus of group,<sup>256</sup> public opinion as well as

With regards to the object and purpose of the right to choose under CEDAW, the subsequent practice in Nigeria,<sup>257</sup> consensus of group,<sup>258</sup> public opinion as well as social acceptance of the right to life for the unborn fetus<sup>259</sup> can legitimize the subsequent interpretation of the right to choose under CEDAW. The ECHR has also relied on these principles to determine the object and purpose of individual ECHR provisions.<sup>260</sup>

The object and purpose of CEDAW, therefore lies in the text of CEDAW itself reflecting both the subjective and objective views of interpretation of the object and purpose, thereby going in line with the VCLT. The object and purpose of CEDAW is reflected in its preamble, which also represents the intention of the parties to CEDAW.

#### **4.5.4 Good Faith Interpretation**

The ordinary meaning of the right to choose as envisaged under Articles 12 and 16 CEDAW, appears clear, plain and unambiguous, and did not in any respect lead to

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<sup>255</sup>See Secs 232 and 235 Penal Code (applicable in the Northern Nigeria) and secs 228, 229 and 230 Criminal Code (applicable in the Southern Nigeria).

<sup>256</sup>The empirical analysis carried out in this study reveals that, groups (religion and non-religious) acknowledges that the right to choose is not synonymous with abortion. Detail of this has been presented in the preceding chapter.

<sup>257</sup>See Secs 232 and 235 Penal Code (applicable in the Northern Nigeria) and secs 228, 229 and 230 Criminal Code (applicable in the Southern Nigeria).

<sup>258</sup>The empirical analysis carried out in this study reveals that, groups (religion and non-religious) acknowledges that the right to choose is not synonymous with abortion. Detail of this has been presented in the preceding chapter.

<sup>259</sup>This was also evidenced in the empirical analysis. Also, Chapter 2 Nigerian Constitution.

<sup>260</sup>Vanneste, *General International Law*, 263-294.

absurd result. However, reference must be had to Recommendation 24 of the CEDAW Committee, which gives an interpretation contrary to the ordinary meaning and content of the right to choose with respect to the term, family planning. It is in an attempt to give the correct and proper interpretation to the right to choose under CEDAW, that the good faith interpretation is hereby proposed.

The notion of good faith fulfilment of treaty obligations has existed from the earliest formulations of international law. Good faith in its most basic sense is merely a reflection of the proposition that sovereign states must adhere to their international obligations. It is nonetheless also a well recognized principle of international law that the very interpretation of treaty obligations is subject to the premise of good faith. Stated generally, this interpretive norm mandates that sovereign actors construe their treaty obligations on a premise of equality and a mutual intent of faithful performance.

The principle of good faith requires parties to an agreement to deal honestly and fairly with one another, to represent their motives and purposes truthfully. The reference to context and purpose demonstrate that the substance of the principle of good faith is the negation of the unintended and literal interpretation of words that might result in one party gaining an unfair or an unjust advantage over another party. The reference to good faith interpretation therefore, calls on parties to treaties to fulfil their part of the obligation by adhering to the object and purpose of the treaty itself. By adhering to the object and purpose of CEDAW, the parties to CEDAW will be said to have interpreted the terms and contents of CEDAW in good faith.

Furthermore, it can also be said that, the principle of good faith is rooted in a natural law concept of customary international law. The earliest systematic writers on

international law including Grotius, Pufendorf, and Suarez, conceived of international law as founded in natural law, by which they meant the dictates of right reason. Natural law thus conceives of a constraint upon nations to act in a manner that takes into account of reasonable expectations and needs of other nations in the international community. Under this view, a treaty should be implemented in a way that fulfils the purposes of the joint undertaking, including the exchange of reciprocal obligations.

If the right to choose under CEDAW is interpreted radically implying abortion right, it will mean allowing some powerful countries of the world to take advantage of other nations, by imposing their own views and ways on other less powerful nations. If this is allowed, then CEDAW, being an international human rights instrument will not be interpreted in good faith as most, if not all its purposes would have gone down the drain.

The above has given an interpretation of CEDAW's right to choose according to the VCLT. It is the contention of this study that, even when given an interpretation of CEDAW's right to choose based on rules of interpretation of statutes, the same conclusion will be arrived at. This is basically so because, the principles of textualism is the first point of reference when it comes to statute interpretation (the same applies to treaty interpretation) and judges are reminded that, treaty interpretation should be no different from the construction of other legal writings, and the schools or techniques of treaty interpretation largely replicate those of statutes, contracts, wills and constitutions.

Thus, in interpreting the right to choose under CEDAW either employing the use of the VCLT or the rules of interpretation of statute, the researcher has arrived at an



interpretation suggesting the right to choose to reproduce and not the right to choose to abort.

The resultant interpretation will therefore guarantee for the unborn child, the right to life. This right is recognized in Nigeria by the promulgation in 2003, of the Child Rights Act by the Nigerian government. Section 17 of the Act provides;

“A child may bring in action for damages against a person for harm or injury caused to the child wilfully, recklessly, negligently or through neglect before, during or after the birth of the child”.

In a commentary to a paper titled, “Women, Children and Nigerian Law”, presented during the “All Nigerian Judges Conference 2003”, Olubor (PCCA) stated as follows; “I regard the Act as a revolutionary piece of legislation aimed at protecting the child. The Act is so deeply rooted in achieving that aim, that it even protects the unborn child”.

#### **4.6 Conclusion**

This chapter has dealt with the doctrinal analysis of the research, which serve in the main to shed more light conceptually on the meanings to be ascribed to the right to choose under CEDAW in relation to the current move to legalize abortion in Nigeria. At the end of the analysis, it has been revealed that, in order for CEDAW to be implemented in Nigeria, the ambit within which it will operate must conform to the constitutional provisions of Nigeria. It was also revealed that, the fundamental principle of all international human rights instruments including CEDAW is based on natural law.

Furthermore, the chapter has shown that in order for the criminal laws of the country to perform their functions justiceably, abortion must be criminalized. It was revealed beyond reasonable doubt that, using the VCLT to interpret the right to choose under CEDAW, the correct and proper result is the right to choose to reproduce children and not the right to choose to abort children.

The researcher re-affirms that, the results achieved in this chapter further buttress the fact that, the unborn children should be accorded the right to life. This, according to the researcher can be made possible through the right to choose under CEDAW, which represents the right to reproduce. In order to further support the notion that the right to choose under CEDAW represents the right to choose to reproduce and not the right to abort, as well as to further buttress the fact that the unborn children possess a right to life, an empirical analysis was carried out in the form of a case study in Nigeria. The next chapter dealt with the outcome of the findings from the case study research.

## CHAPTER FIVE

### RESULT OF FINDINGS

#### 5.1 Introduction

This chapter concentrated on the attainment of the fifth objective of this study. Consequently, it dealt with the result of findings of the field work which took place in Nigeria. The researcher sampled the views and opinions of certain social actors on the right to choose under CEDAW being used as the basis for which abortion is to be legalized in Nigeria. While using content analysis and thematic content analysis to analyse the data collected, the results proofs revealing.

#### 5.2 Participants' Background

The contemporary nature of the topic of this research arouses quite a lot of concern amongst several people in Nigeria. Consequently, it was not difficult to persuade people to participate in the study. Aside few appointments that were cancelled at the request of some selected participants, all other people that showed interest participated in the study eventually.<sup>1</sup>

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<sup>1</sup>Because of the advent of Islam and Christianity, there exists a dearth in the availability of followers of African Traditional Religion. Hence, it was not possible to lay claim to the three participants representing the unit of analysis of the African traditional religion. With a very strong intermediary, the researcher was able to meet with one strict adherence of African Traditional Religion in person of a renowned author and Chief Priest of Osogbo Land. The other person in this group of unit of analysis happens to be a son of renowned traditionalists who lived several years back. The son, who though, now a Christian was able to give some insight into the belief of African Traditional Religion as he had witnessed his parents do when they were alive. Secondly, it was realized during the conduct of the pilot study that, some people felt that right to choose can serve as the basis for the legalization of abortion if the child is deformed. This response prompted the researcher to search for NGOs dealing with these special children. The search was not an easy one. The researcher found three of such NGOs located at Ilorin, Lagos and Ilesha, but efforts (two different efforts were made by the researcher) to

Collection of data took place between 1<sup>st</sup> March 2012 and May 15<sup>th</sup> 2012. Several gatherings and meetings took place with various participants at different times and venues depending on the convenience and dictates of the participants.<sup>2</sup> The participants were most willing to assist in this regard. While the focus group participants willingly volunteered the venues for the discussion,<sup>3</sup> the individual participants also, willingly gave appointments, fixing the venue at their various places of work, and even homes.<sup>4</sup>

Engaging various actors who had direct or indirect connections with the legalization of abortion in Nigeria was essential as this study seeks to analyse their views to know whether or not the right to choose within CEDAW can serve as the basis for the legalization of abortion in Nigeria.

Ultimately, the researcher utilized 21 key informants and 2 focus group sessions (the focus group '1' comprised of four participants, while the focus group '2' comprised of six participants)<sup>5</sup> consisting of Christians, Moslems as well as a traditionalist.

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meet with the owners of the NGO situated at Lagos and Ilorin proved abortive. However, the researcher was able to meet with the director of the NGO situated at Ilesha.

<sup>2</sup>The participants that took part in the study lived across eight towns within Nigeria namely, Ilorin, Ile-Ife, Osogbo, Ilesha, Lokoja, Ajaokuta, Lagos and the Federal Capital Territory, Abuja. These towns can conveniently be distributed within five different States within the country namely, Kwara State (Ilorin), Osun State (Ile-Ife, Osogbo and Ilesha), Kogi State (Lokoja and Ajaokuta), Lagos State (Lagos) and FCT (Abuja). The choice of location is further to ensure heterogeneity of views.

<sup>3</sup>Focus group 1, which is the Christian Association of Nigeria agreed to host the discussion at the residence of one of their leading members, situated at Sabo-Oke Area in Ilorin. The focus group 2, which is the Federation of Moslem Women of Nigeria, invited the researcher to be part of their Sunday program (*Asalatu*). Since the researcher is a Moslem herself, she finds it easy to blend with the proceedings at the program. After the *Asalatu*, the discussion started in earnest at the FOMWAN Secretariat situated at Murtala Mohammed Way, Ilorin. Kwara State. Nigeria.

<sup>4</sup>The offices, homes and business places of all the individual participants are situated in different places across these five States.

<sup>5</sup>Focus group interview is an interview with a small group of people on a specific topic. Groups are typically 6 to 10 people with similar background who participate in the interview for one or two hours. Patton Michael Quinn, *Qualitative Research and Evaluation Methods* 3<sup>rd</sup> Edition (London, California, India: Sage Publications Inc, 2002). 385.

They came from different backgrounds and professions, had varying qualifications and worked in both government as well as non-government organizations.

Table 5.1

## Background Information of Participants (key Informants)

	Study Areas	Occupation	Education	Religion	Sex	Unit of Analysis
KI1	Ilorin	Politician	MBBS	Islam	M	Doctors
KI2	Ajaokuta	Orthodox Doctor	MBBS	Christianity	M	Doctor
KI3	Lokoja	Orthodox Doctor	MBBS	Christianity	F	Doctor
KI4	Ilorin	Retired Civil Servant	Diploma	Christianity	M	Married Man
KI5	Ilorin	Islamic Cleric	Primary School Certificate	Islam	M	Married Man
KI6	Abuja	Banker	B.sc	Islam	M	Married Man
KI7	Ilorin	Trader	B.sc	Islam	F	Married Woman
KI8	Lokoja	Nurse	School Nursing Certificate	Christianity	F	Married Woman
KI9	Ajaokuta	Hospital Attendant	Primary School Certificate	Christianity	F	Married Woman
KI10	Lagos	Student	Student	Islam	M	Unmarried Man
KI11	Ilorin	Banker	BA	Christianity	M	Unmarried Man
KI12	Lokoja	Civil Servant	BA	Islam	M	Unmarried Man
KI13	Abuja	Teacher	National Certificate of Education	Christianity	F	Unmarried Woman
KI14	Abuja	Civil Servant	Diploma	Christianity	F	Unmarried Woman
KI15	Ilorin	Student	Student	Islam	F	Unmarried Woman
KI16	Abuja	NGO Director	B.sc	Islam	F	(Dawah)Non-Governmental Organization
KI17	Ilorin	Nursery and Primary School Proprietress	B.sc	Christianity	F	(Girls' Guide)Non-Governmental Organization
KI18	Abuja	Secretary FIDA Office	LL.B, BL	Christianity	F	(FIDA) Non-Governmental Organization
KI19	Ilesha	NGO Director	Pharmacist	Christianity	F	(Disabled Children) Non-Governmental Organization
KI20	Ile-Ife	Senior Lecturer, Obafemi Awolowo University, Ile-Ife	PhD	Christianity	M	African Traditional Religion
KI 21	Osogbo	International Renowned author and Chief Priest	.....	Traditionalist	M	African Traditional Religion

\* Source: Field Work 2012 \* KI: Key Informants

Table 5.2

## Background Information of Focus Group Session ‘1’

	Study Area	Occupation	Education	Religion	Sex	Unit of Analysis
FGS1a	Ilorin	Nurse	School of Nursing Certificate	Christianity	F	Women Wing of Christian Association of Nigeria (CAN)
FGS1b	Ilorin	Headmistress of Public School	National Certificate of Education	Christianity	F	Women Wing of Christian Association of Nigeria (CAN)
FGS1c	Ilorin	Trader	Secondary School Certificate	Christianity	F	Women Wing of Christian Association of Nigeria (CAN)
FGS1d	Ilorin	Secretary Women Wing of Christian Association of Nigeria	B.sc	Christianity	F	Women Wing of Christian Association of Nigeria (CAN)

- Source: Field Study 2012
- FGS Focus group session

Table 5.3

## Background Information Focus Group Session ‘2’

	Study Area	Occupation	Education	Religion	Sex	Unit of Analysis
FGS2a	Ilorin	National Trustee of FOMWAN and Proprietor of Secondary School	BA	Islam	F	Federation of Muslim Women Organization of Nigeria (FOMWAN)
FGS2b	Ilorin	Teacher	National Certificate of Education	Islam	F	Federation of Muslim Women Organization of Nigeria (FOMWAN)
FDS2c	Ilorin	Business Woman	Secondary School certificate	Islam	F	Federation of Muslim Women Organization of Nigeria (FOMWAN)
FGD2d	Ilorin	Civil Servant	B.sc	Islam	F	Federation of Muslim Women Organization of Nigeria (FOMWAN)
FGS2e	Ilorin	Civil Servant	B.sc	Islam	F	Federation of Muslim Women Organization of Nigeria (FOMWAN)
FGS2f	Ilorin	Trader	Primary School Certificate	Islam	F	Federation of Muslim Women Organization (FOMWAN)

- Source: Field 2012
- FGS: Focus group session

### **5.3 Analysis of Interviews and Emerging Categories**

The researcher analyzed the responses of the participants on question by question bases while searching for the themes and subthemes.

#### **5.3.1 Feminism Awareness**

Feminism has become the talk of most people around Nigeria. Are you aware of this recent phenomenon called feminism? If so, how would you rate or access the issue of feminism in Nigeria?

According to the manual thematic analysis carried out by the researcher, it was discovered that the issue of feminism was not a new thing in Nigeria. This was because; all the participants had some ideas of what was meant by that phenomenon. However, there were different perspectives of feminism expressed by different participants. As divergent as these perspectives are, the common notion was that, despite the idea and practice of feminism in Nigeria, women should be mindful and sensitive of their position, culturally and traditionally. Here lies the difference between the western notion of feminism and Nigerian notion of feminism. Feminism in Nigeria was explained using attributes that are distinctively Nigerian as opposed to the western form of feminism.

Throughout the data collection period, a constant and persistent theme that kept occurring from majority of the participants was that, western feminism was alien to Nigeria.<sup>6</sup>

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<sup>6</sup>Feminism is a western phenomenon, which is a reflection of the western cultural predilection as a people and such is designed to meet the particular needs of the western women. The conclusion is therefore drawn that such feminism is of no relevance to Africa. Ademola Kazeem Fayemi, "The



This type of feminism is often considered to be the same with radical feminism,<sup>7</sup> men hatred, the rejection of African traditional values and fundamental rejection of marriage and motherhood, and an endeavour to disrupt the power relationship of genders.<sup>8</sup>

While the western type of feminism (radical feminism) is all against men and African traditional set up,<sup>9</sup> it was the view of the participants that, there was, and still in existence a form of feminism rooted in the culture and traditions of Nigerian women. Although, many women in Nigeria find the label, ‘feminism’ too strong a tag to bear, the participants view their behaviours and values as distinctively, a Nigerian women behaviour which they termed as Nigerian feminism. Most women in Nigeria, even the notable and famous ‘feminist writers’ (Zaynab Alkali, Flora Nwapa, Buchi Emecheta, to mention a few.) will not allow themselves to be called feminists. Hence, the use of word ‘feminism’ was just for the sake of convenience to identify women who still portrays the characteristics of Nigerian women. Nigerian women

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Challenges of Prostitution and Female Trafficking in Africa: An African Ethico-Feminist Perspective,” *Journal of Pan African Studies* 3, no.1 (2009): 204,

<sup>7</sup>Radical feminism identifies patriarchy, or male dominance as the root cause of women’s oppression. In other words, women experience discrimination because social relations and social interactions are shaped by male power and privilege. Amanda Burgess-Proctor, “Intersection of Race, Class, Gender and Crime: Future Direction for Feminist Criminology,” *Feminist Criminology* 1, no.27 (2006): 29. <http://www.uk.sagepub.com/tibbettsess/study/articles/10/Burgess-Proctor.pdf> (accessed June 13, 2012).

<sup>8</sup>Norma Masuku, “Perceived Oppression of Women in Zulu Folklore: A Feminist Critique,” being a thesis submitted in accordance with the requirement for the degree of doctor of literature and philosophy in the subject African languages at the University of South Africa. (2005): 22-25, <http://uir.unisa.ac.za/bitstream/handle/10500/1933/thesis.pdf?sequence=1> (accessed June 13 2012). Throughout its long history, feminism has sought to disturb the patriarchal culture and assert a belief in sexual equality.

<sup>9</sup>*Ibid.*

have detected a large dose of racist arrogance which characterizes western form of feminism.<sup>10</sup>

It was expressed by the participants interviewed that, women in Nigeria are still mindful and conscious of the role bestowed on them by culture and tradition. These roles are said to be, roles relating to motherhood.<sup>11</sup> Hence, Nigerian Catherine Acholonu introduced the concept of motherism.<sup>12</sup> She argues and supports the contention that, women are supposed to be perfect nurturers. Her concept of motherism denotes motherhood. She vehemently opposes the doctrine of white feminism which she considers to be anti-mother, anti-child, anti-nature and anti-culture. She considers the tasks of a motherist to include the nurturing of a child, protecting the home front and environment as well. In the same vein, Chikwenye Okonjo-Ogunyemi believed that, motherhood is part and parcel of African culture. She therefore, coined out African womanism which is deeply rooted in traditional African customs.<sup>13</sup>

Remi Akujobi, another Nigerian, expresses the view that motherhood is so crucial in most traditional African societies. To her, Feminists in Africa generally, read meanings that are authoritative and empowering to motherhood.<sup>14</sup> The validity of womanhood is defined basically by the success of the children. The success of a woman is seen in success as a mother. It is not an over statement to say that the

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<sup>10</sup>Maureen Nwakama Azuike, "A Radical Feminist Approach to the Works of Zaynab Alkali," being a thesis submitted to the School of Postgraduate Studies, University of Jos, in partial fulfilment of the requirements for the award of the degree of Doctor of Philosophy in Literature in English of the University of Jos, (2003): 2. See, Masuku, "Perceived Oppression of Women in Zulu Folklore," 25.

<sup>11</sup>Azuike, "A Radical Feminist Approach", 33-36.

<sup>12</sup>Catherine Obianuju Acholonu, *Motherism: The Afrocentric Alternative to Feminism* (Owerri, Nigeria: APA Publications, 1995), 110-111.

<sup>13</sup>Azuike, "A Radical Feminist Approach," 33-36.

<sup>14</sup>Remi Akujobi, "Motherhood in African Literature and Culture," *CLCWeb: Comparative Literature and Culture* 13, no.1 (2011): 1-5, <http://docs.lib.purdue.edu/clcweb/vol13/iss1/> (accessed June 11, 2012).

Nigerian woman considers herself a real woman only when she proved herself to be capable of producing children. This is so in the sense that, motherhood is a condition for social acceptance in Nigeria. Many childless women experience feelings of rejection, frustration and low esteem. Examples abound in African literatures, especially those written by women. For example, ‘Nnu Ego’, in Emecheta’s ‘Joy of Motherhood’<sup>15</sup> never regarded herself a woman until she starts giving birth, ‘Efuru’ in Nwapa’s ‘Efuru’, is frustrated by her inability to procreate and as a result, became a priestess.<sup>16</sup> In life, as well as in literature, motherhood is the criteria in which a woman’s worth is determined and measured.<sup>17</sup>

It is clear from the facts given above that there are different issues as well as different values and concerns raised by both Western feminism and Nigerian feminism. In other words and as rightly pointed out by some authors, ‘it did not occur to the western feminists that, women in other parts of the world had their own culturally specific notion of ‘women’s right’<sup>18</sup>

Table 5.4

Subthemes of Feminism Awareness

Western Feminism	2	3	4	6	7	8	16	20	21												
Nigerian Feminism	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21
Western Feminism Unacceptable							FGS 1					FGS 2									
Nigerian Feminism Acceptable							FGS 1					FGS 2									

- Source: Field work 2012
- Numbering in the table represents key informants

<sup>15</sup>Buchi Emecheta, *The Joy of Motherhood* (USA: African Writers Series, 1994), 7-56.

<sup>16</sup>Flora Nwapa, *Efuru* (USA: African Writers Series, 1996), 24-100.

<sup>17</sup>Akujobi, “Motherhood in African Literature and Culture,”

<sup>18</sup>Reiner Lewis and Sara Mills, *Feminist Postcolonial Theory: A Reader* (New York: Routledge, 2003), 4.

The table revealed that based on the views and opinions of the participants as expressed, Western feminism and Nigerian feminism were the two subthemes that emerged from the category (theme) of feminism awareness. The numberings within the table represents the key informants showing some kind of awareness of the respective themes. The emerging subthemes from the multiple group sessions are similar to those from the key informants. That is to say that, although the western type of feminism is known to the focus group sessions, this kind of feminism is unacceptable. Both focus group sessions subscribes to the Nigerian form of feminism.

The Nigerian feminism as depicted by the participants of this study, means nothing less than, the right to choose under CEDAW being synonymous with the right to choose to reproduce life children.

### **5.3.2 Body Sensitivity**

With feminism, most women are becoming sensitive about what happens to their bodies. Is this fact the same with Nigerian women? If so, would you consider it as a form of opportunity for Nigerian women?

This next set of analysis provoked a lot of issues as most of the participants were not aware of the existence of such opportunity. However, the researcher took time to explain in detail what the question really meant. The following analysis proved revealing. Still on the premises of recognizing the fact that, there is a clear cut difference between western type of feminism and Nigerian feminism,<sup>19</sup> all the

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<sup>19</sup>Tawanda Sachikonye, "African Feminism Driven by African Women," *NGO News and Views* (2010) <http://www.ngopulse.org/article/african-feminism-driven-african-women> (accessed March 13, 2012)

participants said that being sensitive to what happens to a woman's body in Nigeria was a foreign phenomenon which cannot be accepted as an opportunity for women in Nigeria. Viewing it as an opportunity will be equivalent to going radical and western.<sup>20</sup> It was the belief of all the participants that sensitivity to the body of a woman to the extent that the woman will want to abort her baby was quite foreign in Nigeria. The participants will want to believe that, no woman in her right senses in Nigeria will ever take that as an opportunity.

The Western idea of body sensitivity has been connected to female inequality brought about by female biology. The 'Dialectic of Sex',<sup>21</sup> authored by Shulamith Firestone, in 1970 was one of the first studies to indicate a radical feminist explanation of female inequality. According to her, it is the system of reproduction within the biological family which is the core cause of gender inequality.<sup>22</sup> Women are controlled by men primarily because of female biology; menstruation, childbirth and the menopause, all created physical difficulties.

Women are always dependent upon men when they are pregnant. Pregnancy is a form of intervention into a woman's body. Pregnancy usually links women with life, and this is something which all women should protest against. This is the foundation of the original feminist argument for reproductive freedom, which in turn, relates to the decisive feminist insight that pregnancy-- the intervention of the body by the

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<sup>20</sup>*Ibid.*

<sup>21</sup>Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (New York: Farrar, Straus, Giroux, 1970) 8.

<sup>22</sup>*Ibid*

other to which women is distinctively vulnerable-- is an injury and ought to be treated as such.<sup>23</sup>

Women are also very much dependent upon men when they are breastfeeding. Infant feeding occurs in the context of persistence gender inequalities and in the context of a feminist movement that left women exposed to a system that defined male body and mind as the standard. Western feminists argue that, they need a feminist movement that fully include women's needs as biological and reproductive social beings, alongside their needs as productive beings and a movement that defines the female body and mind as the standard.<sup>24</sup> The long period of human infant reliance on its mother created further dependency for women since they are obliged to care for these infants.

This being the case, if women are to attain any form of gender equality, they must first achieve biological equality by getting rid of their biological disadvantages. The way suggested by Firestone is the technological removal of reproduction from the female body, which is a necessary prerequisite for women's liberation.<sup>25</sup>

The feminist truism that, "the personal is political" may never be more apt than in body politics. "Body Politics"-- the dispute over the degree of individual control of the body, eventually became a driving consideration behind the campaign for reproductive right for women. The right for women to make decision about their own bodies was a *sine qua non* for the liberation of women. Feminists believe that, they

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<sup>23</sup>Robin West, "Jurisprudence and Gender," *University of Chicago Law Review* 55, no.1 (1988): 30. Pregnancy was described by Robin West as an 'invasive harm'. Robin West, "Desperately Seeking a Moralist," *Harvard Journal of Law and Gender* 29 (2006): 2. <http://www.law.harvard.edu/students/orgs/jlg/vol291/west.pdf> (accessed June 15, 2012); Robin West, *Caring for Justice* (New York, New York University Press, 1997), 94-178.

<sup>24</sup>Paige H. Smith, "Is It Just So My Right?: Women Repossessing Breastfeeding," *International Breastfeeding Journal* 3, no.12 (2008): 1. <http://www.internationalbreastfeedingjournal.com/content/3/1/12> (accessed June 16, 2012).

<sup>25</sup>West, "Jurisprudence and Gender," 30.

will never be free and healthy if they did not have the right to reclaim their bodies from the sexual slavery of pregnancy. Here lies the reason why feminists focus on sexual liberation and reproductive right, particularly the right to abort an unplanned or unwanted fetus.<sup>26</sup>

While the western idea of body sensitivity has been equated to women's inequality as a result of her biology, and consequently, the hatred for pregnancy, Nigerian women's idea of body sensitivity is in contradiction to the western idea.<sup>27</sup> This is because, in Nigeria, pregnancy is wanted and loved by all, not hated, because, it constitutes power.<sup>28</sup>

Motherhood is usually defined as an automatic set of feeling and behaviour that is triggered off by pregnancy and the birth of a baby. It is an experience that is said to be profoundly shaped by social context and culture. Motherhood is seen as a moral transformation, a dramatic change whereby a woman comes to terms with being different in that she ceases to be an autonomous individual because she is in one way or the other attached to another- her baby inside her. When a Nigerian woman is pregnant, she wholeheartedly gives up her autonomous notions for the sake of the child connected to her <sup>29</sup> It should also be noted that, it is this aspect of connectedness of a baby to her mother has been frowned at by the western women.<sup>30</sup>

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<sup>26</sup>Jill Miller Jaffe, "Borderland Bodies: Queering Intersectional Health Activisms," being a thesis submitted to the faculty of Wesleyan University in partial fulfilment for the degree of Bachelors of Arts with Departmental Honours in Feminist, Gender and Sexuality Studies (2009): 7.

<sup>27</sup>Ganiat Mobolaji Olatokun, Rusniah Ahmad and Harlida Abdul Wahab, "Feminists' Body Sensitivity: Western and Nigerian Perspectives Identified," paper delivered at the 4<sup>th</sup> International Graduate Conference on Engineering, Science and Humanities. Universiti Teknologi Malaysia. April, 16 2013.

<sup>28</sup>Motherhood in some quarters is seen as a sacred and powerful spiritual path for a woman to take. Akujobi, "Motherhood in African Literature and Culture," 1.

<sup>29</sup>*Ibid.*

<sup>30</sup>West, "Jurisprudence and Gender," 30.

Motherhood is said to be a joyful and privileged state for a woman because in pregnancy, the woman is said to “glow and shine” and she receives special attention especially from her husband and her mother-in-law. No matter the skills, the desires, the intelligence and the talents of a woman, her primary function is that of motherhood.<sup>31</sup>

The notion above is however different from the western perception, where reproduction depends on the agreement between couples--whether or not to have children is well spelt out before marriage. This is not so in Africa where women usually aspires to be a mother someday. Motherhood in Africa is viewed as a God-giving role and for this reason, it is sacred. Africans take motherhood to be all about children. Every woman is advised and encouraged to get married and get children in order to express her womanhood.<sup>32</sup>

Despite the fact that, in most Yoruba culture, a wife is referred to as an ‘*eru*’ (slave) yet, it is still the prayers and ambition of almost every girl to get married, because through marriage, she can become a “proud mother”. By becoming a mother, a woman is promoted to the high and esteemed position in which she can be referred to as a “precious stone”. Therefore, it is a tragedy and a great loss for a woman not to have a child, and this is reflected in songs; “*omo l’okun, omo n’ide. Enia t’owa saye ti kobimo, aiye asan lowa*’, meaning ‘a child is a coral bead, a child is silver. A person, who has none, has not lived a fulfilled life’.<sup>33</sup>

A child is referred to as “*okun*” (beads). These are a type of traditional necklace worn by *Obas* (kings) and *Ijoyes* (chiefs). Wearing of “*okun*” therefore symbolises royalty

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<sup>31</sup>Akujobi, “Motherhood in African Literature and Culture,” 1-3.

<sup>32</sup>*Ibid.*

<sup>33</sup>Taiwo Makinde, “Motherhood as a source of Empowerment of Women in Yoruba Culture,” *Nordic Journal of African Studies* 13, no.2 (2004): 167, <http://www.njas.helsinki.fi/pdf-files/vol13num2/makinde.pdf> (accessed May 10, 2012).



and authority. Using royal symbol to describe a child may be interpreted to mean that a child confers on his/her mother the power to exercise authority in her husband's house. The importance attached to motherhood has consequently reduces the negative effect of being referred to as an 'eru' on the personality of women.<sup>34</sup>

Motherhood is considered to be very important in Yoruba culture as the preservation and continuation of humanity depends on the role of mothers in the society.<sup>35</sup> This is another reason why some of the participants interviewed viewed that, the western perception of body sensitivity was quite different from the Nigerians' perception of body sensitivity. The view was that, procreation is an important aspect of Nigerian women.<sup>36</sup>

Other reasons which distinguishes western body sensitivity from the Nigerian women's notion is that, while some of the participants talked about body sensitivity in line with their spiritual beliefs and convictions, some linked body sensitivity to cosmetics and appearances. The former held the view that, they cannot unilaterally take decisions as regards their bodies since their bodies do not belong to them solely. This set of participants continuously and emphatically places the authority of decision making over their bodies on God, followed by their husbands. They

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<sup>34</sup>*Ibid.*

<sup>35</sup>*Ibid.*, 166.

<sup>36</sup>Woman is the creator of human race. She is the first human contact, the first face, the guide and the mentor of humanity. SweetMocha-Monroe, "The Woman- Mother of Humanity," (2009) <http://sweetmocha-monroe.hubpages.com/hub/THE-WOMAN> (accessed June 16, 2012). Women, as females play an indispensable and arduous role in assuring the continuation of human species. The child bearing responsibility is of grave importance: human existence depends upon it. Sarah Shehabuddin, "Female Leadership in Islam," *Islamic Research Foundations International Inc.* Article 433, [http://www.irfi.org/articles/articles\\_401\\_450/female\\_leadership\\_in\\_islam.htm](http://www.irfi.org/articles/articles_401_450/female_leadership_in_islam.htm) (accessed June 16, 2012). To the Yoruba, the primary purpose of marriage is sustaining the Yoruba race through legitimate and responsible procreation. Professor Olugboyega Alaba, "Understanding Sexuality in Yoruba Culture," *Understanding Human Sexuality Seminar Series 4* (2004): 1. <http://www.arsrc.org/downloads/uhsss/alaba.pdf> (accessed June 16, 2012).

acknowledged that, their bodies are the temple of God.<sup>37</sup> Consequently, the wife should be obedient and submissive to the husband.<sup>38</sup>

The participants believed that their bodies are in the image of God. Our bodies would house our spirit. We came to this world so that we might have a body and present it pure before God in the Celestial Kingdom. The great principle of happiness consists in having a body. The devil has no body, and here in is his punishment.<sup>39</sup>

The devil learnt about this truth about the body. Therefore, he does everything he can to get people to abuse or misuse this precious gift; the body. He has filled the whole world with lies and deceit about the body. He has succeeded in tempting many to defile this great gift of the body through unchastity, immodesty, self-indulgence and addiction. He seduces some to despise their bodies; others, he tempts to worship their bodies. In either case, he entices the universe to regard the body as an object.<sup>40</sup>

It is the contentions of the participants that, sensitivity about the body to the extent of wanting to abort babies was a devilish idea. They expressed the view that, it was because the devil has no body that was why he has filled the heart of people with

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<sup>37</sup>Don't you realize that your body is the temple of the Holy Spirit within you, whom you have from God? You are not your own. Corinthians 6:19. *New Living Translation* (2007) [http://bible.cc/1\\_corinthians/6-19.htm](http://bible.cc/1_corinthians/6-19.htm) (accessed June 16, 2012). Following from Apostle Paul's injunction in 1 Corinthians 7:11, the evangelical position is that, every Christian is charged with the responsibility of chastity and to maintain the sanctity of human sexuality within a controlled space from the understanding that the body is 'the temple of Holy Spirit'.

<sup>38</sup>Professor Matthews A. Ojo, "Religion and Sexuality: Individuality, Choice and Rights in Nigerian Christianity," *Understanding Human Sexuality Seminar Series 4* (2005): 5 and 8, <http://www.arsrc.org/downloads/uhsss/ojo.pdf> (accessed June 17, 2012).

<sup>39</sup>Andrew F. Ehat and Lyndon W. Cook, *The Words of Joseph Smith: the Contemporary Account of the Nauvoo Discourses of the Prophet Joseph*. (Provo Utah: religious Study Centre, Brigham Young University, 1980), 60.

<sup>40</sup>In the face of many satanic falsehoods about the body, 'I want to raise my voice today in support of the body. I testify that the body is a gift to be treated with gratitude and respect'. See, Susan W. Tanner, "The Sanctity of the Body," *The Church of Jesus Christ of Latter-Day Saints* (2005), <http://www.lds.org/general-conference/2005/10/the-sanctity-of-the-body?lang=eng> (accessed June 18, 2012).

such an idea so that, the people will do something which was against their body as the temple of God.

The body, just like the temple, should be regarded and respected as a sacred sanctuary of the spirit. Just as no unclean thing may enter the temple, people should be watchful in preventing impurity of any sort from entering the temple of their bodies. Likewise, people should also keep the outside of their bodily temples looking clean and beautiful to reflect the sacred and holy nature of what is inside; just like the church does to the temple.<sup>41</sup>

In trying to keep the outside of the bodily temples clean, the contention connecting body sensitivity to ‘body being the temple of God’ has also gone in line with cosmetics and appearances because, people have been urged to dress and act in ways that reflect the sacred spirit inside them.<sup>42</sup> Hence, the body is God’s sacred creation. People should respect it as a gift from God, and should not defile it in any way. Through the way people dress, people can show the Lord that they know how precious their body is. The way people dress is a reflection of what they are on the inside.<sup>43</sup>

The latter group of participants linked their being sensitive about what happens to their bodies, to cosmetics. These set of participants viewed body sensitivity in the way they look, their appearances as well as their attractiveness. In short, they went cosmetological.<sup>44</sup>

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<sup>41</sup>*Ibid.*

<sup>42</sup>*Ibid.*

<sup>43</sup>*Ibid.*

<sup>44</sup>Body sensitivity is a pervasive phenomenon in traditional Nigerian culture, and language is the poetic route of locating body image and beauty perceptions within traditional African consciousness. Female beauty in particular is inscribed in traditional cultural codes in relation to body parts, complexion, overall physiology and aesthetic appearance, often subject to corresponding moral

Dressings are meant to serve some definite reasons. They are part and parcel of people’s culture and they define their tribal or ethnic identity. Apart from dresses being a means of cultural identity, they are for ornamental or aesthetic purposes, for protection of the body against harsh weather conditions<sup>45</sup> as well as covering the intimate parts of the body.<sup>46</sup>

It is clear from the facts above that body sensitivity as perceived and believed by the western feminists is quite different from the way body sensitivity is perceived by Nigerians.

Table 5.5

Subthemes of Body Sensitivity

Western Idea	1	2	3	4	5	6	10	16	17	18	19	21
Spiritual Idea	4	9	-	-	-	-	-	-	-	-	-	-
Cosmetology	10	11	12	13	14	-	-	-	-	-	-	-
Procreation	7	8	16	18	19	20	21	-	-	-	-	-

Focus Group Sessions

Western Idea	FGS1	FGS2
Spiritual Idea	FGS1	-
Cosmetology	-	FGS 2

evaluation. Taiwo Olorutoba-Oju, “Body Images, Beauty, Culture and Language in the Nigerian African Context,” *African Regional Sexuality Resource Centre* (2007): 4-5, <http://www.arsrc.org/downloads/uhsss/oloruntoba-oju.pdf> (accessed May 9, 2012).

<sup>45</sup>These purposes are important especially, as they form major aspects of person’s personality. The African culture, and particularly that of Nigeria, encourages modest appearance as do Christian and Islamic religions. Jacob Omede, “Indecent Dressing on Campuses of Higher Institutions of Learning in Nigeria: Implications for Counselling,” *Journal of Engineering Trends in Educational Research and Policy Studies (JETERAPS)* 2, no.4 (2011) 228, <http://jeteraps.scholarlinkresearch.org/articles/Indecent%20Dressing%20on%20Campuses%20of%20Higher%20Institutions%20of%20Learning%20in%20Nigeria.pdf> (accessed June 18, 2012).

<sup>46</sup>Quran 24:31 and Quran 33:59, provides that, believing women are enjoined to cover all parts of their body except the face and the hands when they go out of the house or in the public. Islam places much emphasis on modest dressing- the hijab. Abdulmumini A. Oba, “The Hijab in Educational Institution and Human Right: Perspective from Nigeria and Beyond,” *Identity, Culture and Politics: An Afro-Asian Dialogue* 10, no.1 (2009): 51. [http://www.codesria.org/IMG/pdf/3-final\\_Oba\\_New\\_hijab\\_2009\\_codesria\\_revised\\_plus\\_abstract.pdf](http://www.codesria.org/IMG/pdf/3-final_Oba_New_hijab_2009_codesria_revised_plus_abstract.pdf) (Accessed May 10, 2012).

- Source: Field Work 2012
- Numbering in the table represent key informants (KI)

This table reveals that the majority of the participants view the issue of body sensitivity as a western phenomenon which does not fit into the Nigerian set up in terms of spiritual idea, cosmetological idea as well as the Procreational role expected of women in Nigeria generally. The numberings within the table represents the key informants that identifies with the respective subthemes as specified. The emerging subthemes from the multiple group sessions are similar to those from the key informants. While the focus group session ‘1’ linked body sensitivity spiritually, focus group session ‘2’ linked body sensitivity cosmetological. However, both groups were unified in their belief that body sensitivity was a western idea.

Body sensitivity as understood by the participants is not in line with the western idea. Hence, the right to choose within CEDAW should represent the right to choose to reproduce, thereby giving to the unborn child the right to life.

### **5.3.3 Meaning and Relevance of the Right to Choose under CEDAW**

CEDAW is the major human rights instrument specially dedicated to women, hence its inclusion of the right to choose. What, in your view, is the definition of the right to choose within CEDAW? Going by the definition you gave, do you think the right to choose within CEDAW is relevant in Nigeria?

The concept of the right to choose was not familiar to most of the participants. That there was in existence a Convention called, CEDAW, was equally new to most, if not all the participants. The only set of participants that had a faint idea of the concept

and the existence of the Convention, were the educated ones, and even at that, the idea they had was very minimal. The researcher therefore, took extra time explaining the meaning of the concept as well as the reasons for the Convention itself.<sup>47</sup>

After explaining the meaning of the concept and the reasons for CEDAW, the researcher still went ahead to explain the questions to the participants, in order to ensure accurate answers from them.<sup>48</sup> With this done, the participants appeared to be fully aware of the topic under discourse.

Based on the manual thematic analysis carried out by the researcher, the right to choose under CEDAW has been said to represent child spacing and family planning by most of the participants. However, very few participants also viewed that; the right to choose under CEDAW could mean abortion. Be that as it may, all the participants considered the right to choose under CEDAW as very relevant in Nigeria<sup>49</sup> irrespective of their stand. The reasons given by the participants were solely based on the grounds of health of the mother and child.<sup>50</sup>

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<sup>47</sup>This, the researcher did for all the participants. Even those that claimed they had a faint idea, the researcher still gave a detailed explanation so that the questions will be well understood.

<sup>48</sup>The idea to explain the questions was the result of the pilot study conducted before the commencement of data, as most of the respondents for the pilot study appear not to understand the questions, until the researcher explained to them. Most of the problem the participants had in understanding the question was the use of the two phrases-‘right to choose’ and ‘CEDAW’.

<sup>49</sup>Majority of the participants viewed the right to choose within CEDAW as nothing more than adequate child spacing. Miriam H. Lobbok, “Transdisciplinary Breastfeeding Support: Creating Program and Policy Synergy across the Reproductive Consortium,” *International Breastfeeding Journal* 3, no.16 (2008): 3. <http://www.internationalbreastfeedingjournal.com/content/pdf/1746-4358-3-16.pdf> (accessed May 13, 2012).

<sup>50</sup>Birth spacing is an important maternal and child health intervention. USAID, “Healthy Timing and Spacing of Pregnancies,” (2012). [http://transition.usaid.gov/our\\_work/global\\_health/pop/techareas/htsp/index.html](http://transition.usaid.gov/our_work/global_health/pop/techareas/htsp/index.html) (accessed January 26, 2013). Improving access to safe and voluntary family planning counselling and services is essential to reduce high level of unintended pregnancy and short birth intervals. Yohannes Dibaba, “Child Spacing and Fertility Family Planning Behaviour among Women in Mama District, Jimma Zone, South West Ethiopia,” *Ethiopia Journal of Health Science* 20, no.2 (2010): 83. <http://www.ejhs.ju.edu.et/admin/Volume-20-Num2/Yohannes.pdf> (accessed May 11, 2012).

Most of the participants viewed the right to choose under CEDAW as referring to child spacing and family planning. The participants however deferred in the ways and manners to be used in order to achieve the child spacing and family planning. The different ways, methods and modes identified by the participants are discussed below;

**a. Modern Family Planning**

Most of the key informants expressed their views that, the meaning of the right to choose under CEDAW should be taken to mean child spacing and family planning by means of contraceptive usage. The deliberate prevention of fertilization is contraception. Methods of contraception work to prevent the sperm from reaching the site of fertilization, by preventing ovulation or by interfering with implantation.<sup>51</sup> Contraceptives therefore, includes all measures which sexually active women and men resort to using before or after intercourse, which are intended to prevent pregnancies.<sup>52</sup>

The purpose of contraception is to prevent pregnancy.<sup>53</sup> According to medical science, pregnancy starts with the implantation of the fertilized egg in the uterine wall. The process of implantation commences at the close of the first week after fertilization. Methods that delay or inhibit ovulation, block fertilization, or prevent

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<sup>51</sup>Peter J. Russell, Paul E. Hertz and Leverly McMillian, *Biology: The Dynamic Science*, Volume 3 (Belmont CA: Brooks/Cole Cengage Learning, 2011), 1087.

<sup>52</sup>Winnie Koster, *Secret Strategies: Women and Abortion in Yoruba Society, Nigeria* (Amsterdam: Universiteit Van Amsterdam, 2003), 217.

<sup>53</sup>Susheela Sigh and Jacqueline E. Darroch, "Adding Up: Cost and Benefits of Contraceptive Services Estimate for 2012," *Guttmacher Institute* (2012): 14, <http://www.guttmacher.org/pubs/AIU-2012-estimates.pdf> (accessed January 28, 2013); Peggy Smith, Gabrielle Novello and Mariam R. Chacko "Does Immediate Access to Birth Control help Prevent Pregnancy? A Comparison of Onsite Provision versus Off Campus Referral for Contraception at Two-School Based Clinics," *Journal of Applied Research on Children: Information Policy for Children at Risk* (2011): 7 and 8.

implantation of the fertilized egg, are means of preventing pregnancy. Any mechanism that works prior to implantation is by definition contraceptive.<sup>54</sup>

Modern methods of contraception includes, male and female condoms, spermicides, contraceptive sponge, diaphragm, cervical cap, lea contraceptive, the pill, contraceptive patch, contraceptive vaginal ring, contraceptive injection, implants, emergency contraceptive pills and intrauterine devices (IUD).<sup>55</sup>

#### **b. Billing Family Planning**

The Catholics<sup>56</sup> and the Christians participants subscribed to this kind of family planning method. To them, the phrase ‘deciding freely and responsibly on the number and spacing of their children’ should be carried out by means of the billing method. These set of people believed in the use of the natural method of family planning. It is against their belief system to take any form of modern contraception.<sup>57</sup>

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<sup>54</sup>Indirani Sen gupta, "Women and Contraception," in *Human Rights of the Minority and Women's: Human Right and Sexual Minorities* ed. Indrani Sen Gupta (Delhi: Isha Books, 2005), 255.

<sup>55</sup>Russell, Hartz and McMillian, *Biology*, 1087.

<sup>56</sup>Anthony O. Igwebe, Joseph O. Ugboaja and Emmanuel N. Monago, "Prevalence and Determinants of Unmet Needs for Family Planning in Nnewi, South-East Nigeria," *Informational Journal of Medicine and Medical Sciences* 1, no.8 (2009): 328. <http://www.academicjournals.org/ijmms/PDF/pdf2009/Aug/Igwegbe%20et%20al.pdf> (accessed June 22, 2012).

<sup>57</sup>Christian churches have made a great distinction between the values of the secular society and the conservative teaching of the Church. Societal morality and values are conceived as being too accommodating and unhelpful to Christians. Bimbo Odukoya, Tayo Orodiji, W. F. Kumuyi, S. G. Elton, among other pastors have rejected any notion of safe sex involving the use of condom or any contraceptive device. There has been no agreement on the use of artificial family planning methods. Kumuyi insisted on natural means only, and has spoken against frequent sexual intercourse. Catholics do not also accept contraceptives. Ojo, "Religion and Sexuality," 8-9; Patrick A. Edewor, "The Influence of Religion on Contraception and Fertility," *Insight: Journal of Religious Studies* 2. no.1&2 (2005): 93. [http://eprints.covenantuniversity.edu.ng/598/1/The\\_influence\\_of\\_religion\\_on\\_contraception\\_and\\_fertility.pdf](http://eprints.covenantuniversity.edu.ng/598/1/The_influence_of_religion_on_contraception_and_fertility.pdf) (accessed June 22, 2012).



Billing's ovulation method is one of the fertility awareness-based methods<sup>58</sup> of family planning. It is based on the examination of cervical secretions to assess fertility. The underlying theme of this method is that, a woman can reduce her chance of pregnancy by abstaining from coitus during time of fertility.<sup>59</sup> Thus, abstinence, which is another family planning method, falls under this heading.<sup>60</sup>

### c. Islamic Family Planning

The Moslem participants of the study subscribed to this form of family planning. They held a strong view that the right to choose under CEDAW should be seen in line with the Islamic way of family planning. According to those interviewed, the modern methods of family planning are not stated in the Quran,<sup>61</sup> and so they are not in support of the use of modern family planning methods.

It must however be pointed out that, unlike Catholicism, Islam does not have a central authoritative structure of religious interpretation. Instead, this religion plays out

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<sup>58</sup>The fertility awareness-based method is based on the woman's observation of psychological signs of the fertile and infertile phases of the menstrual cycle. This knowledge can be used to plan or avoid pregnancy. It involves sexual abstinence during the fertile time. This is called natural family planning. P Frank-Herrmann et al, "The Effectiveness of a Fertility Awareness-Based Method to avoid Pregnancy in relation to a Couple's Sexual Behaviour during Fertile Time," *Human Reproduction* 22, no.5 (2007): 1310, <http://humrep.oxfordjournals.org/content/22/5/1310.full.pdf+html> (accessed June 22, 2012).

<sup>59</sup>Stephen R. Pallone and George R. Bergus "Fertility Awareness-Based Methods: Another Option of Family Planning," *Journal of the American Board of Family Medicine*. 22, no.2 (2009):147, <http://www.jabfm.org/content/22/2/147.full> (accessed June 22, 2012).

<sup>60</sup>Nigerian Girls' Guide Association, a voluntary non-governmental association concerned with raising Godly and well behaved girls and ladies and rendering help to the less privileged in the society, has as one of its theme, abstinence from sex. In 2011, when on a visit to the Destiny's Child Centre (DCC), a lecture on abstinence from sex was presented by Ranger Catherine Nzekwe, facility tour of the centre. "Girls' Guide Executives Visit DCC' in GiantStrides," *Ministry of Information and Orientation, Calabar, Cross River State Nigeria*. [http://giantstrides.crs.gov.ng/index.php?option=com\\_content&view=article&id=566:girls-guide-executives-visit-dcc&catid=47:social-serviceswelfare&Itemid=11](http://giantstrides.crs.gov.ng/index.php?option=com_content&view=article&id=566:girls-guide-executives-visit-dcc&catid=47:social-serviceswelfare&Itemid=11) (accessed June 24, 2012).

<sup>61</sup>Discussion of contraception in Islamic religious text is fairly sparse. The Koran does not mention it at all. Merrill Wolf and Aisha Abubakar, "Literature Review: Islam and Family Planning with a Special Emphasis on Northern Nigeria," in *Child Spacing Attitudes in Northern Nigeria* (USAID, FHI, CRTU: 2008), 7, [http://pdf.usaid.gov/pdf\\_docs/PNADL911.pdf](http://pdf.usaid.gov/pdf_docs/PNADL911.pdf) (accessed June 23, 2012).

differently across cultures and various schools of law and religious sects offer diverse understandings about how Islam should be practiced. This is quite evidenced in the debate on family planning and in the diversity of arguments on either side of the debate.<sup>62</sup>

Concerned about the need to enlighten Muslim women about their reproductive health, the Federation of Muslim Women Association in Nigeria (FOMWAN) at its first annual conference in 1986 deliberated on Islam and family planning as follows;

the family planning allowed in Islam is geared towards child spacing to promote mother's health and not the prohibition of childbirth out of fear of poverty. In addition, all methods that are harmful to the body are prohibited. While sterilization, harmful contraceptives and injectibles are prohibited, the condom is recommended as much as coitus interruptus which is *azl* recommended by Shariah. Family planning is also a decision to be jointly taken by the married couple.<sup>63</sup>

The Islamic family planning methods acceptable to the participants were, coitus interruptus '*al azl*',<sup>64</sup> as recommended by the Holy Prophet (SAW), as well as exclusive breast feeding '*al radi*' recommended by the Quran.<sup>65</sup>

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<sup>62</sup>Alyssa Browne, "What's Religion Got to do with it? Islam and Fertility in Senegal and Cameroun," being a honour's thesis presented to the College of Agriculture and Life Sciences, Development Sociology of Cornell University in partial fulfilment of the requirement for the Research Honours Program (2012): 4-5, <http://ecommons.library.cornell.edu/bitstream/1813/28633/2/Browne,%20Alyssa%20%20-%20Research%20Honors%20Thesis.pdf> (accessed June 22, 2012). wolf and Abubakar, *Islam and Family Planning*, 6, 8-9.

<sup>63</sup>Hajiya Bilikisu Yusuf, "Sexuality and the Marriage Institution in Islam: An Appraisal," *Understanding Human Sexuality Seminar Series 4* (2005): 12, <http://www.arsrc.org/downloads/uhsss/bilkisu.pdf> (accessed June 25, 2012).

<sup>64</sup>Azl as a form of contraception practiced at the time of the Holy Prophet (SAW) is considered by the majority of religious scholars as permissible. Islamic Relief, *Reproductive Health Policy* (Birmingham: Islamic relief Worldwide, 2009), 6. <http://www.islamic-relief.org.uk/Uploads/documents/Islamic%20Relief%20Reproductive%20Health%20Policy.pdf> (accessed June 22, 2012). Wolf and Abubakar, *Islam and Family Planning*, 7; Sa'diyya Shaikh, "Family Planning, Contraception and Abortion in Islam: Undertaking Khilafah," in *Sacred Rights: The Case for Contraception and Abortion in World Religions* ed. Daniel C. Maguire (New York: Oxford University Press, 2003), 105.

<sup>65</sup>Quran 2:233. Breastfeeding is highly recommended in Islam, and women are expected to breastfeed their babies for at least two years. Cate Lane et al, "Promoting Healthy Timing and Spacing of

#### d. Traditional Method of Family Planning

The African Traditionalists both subscribed to this type of family planning method. There is in existence, traditional methods of family planning. Many communities claim to have traditional method of family planning that pre-dates the introduction of modern contraceptives.

This implies that, contraception is a culturally accepted norm.<sup>66</sup> Reports have also shown that some Nigerians practice this method.<sup>67</sup> This method has the effect of delaying or avoiding pregnancy. The practice of birth control whereby parents are advised to beget the number of children they can cater for is also in existence in Yoruba society.<sup>68</sup> Traditional healers, including traditional birth attendants and herbalists provide women and men with several traditional contraceptives methods, some to be used before, and others to be used after intercourse. There are different types of traditional methods of family planning, which include *oruka* (ring), *igbere* (incision), *aseje* (soup) and *igbadi* (waist band).<sup>69</sup>

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Pregnancy with Young Married Women in Northern Nigeria: A Short Report,” *Africa Journal of Reproductive Health* 16, no.2 (2012): 267, <http://www.ajol.info/index.php/ajrh/article/viewFile/77853/68269> (accessed June 23, 2012).

<sup>66</sup>B. M. Audu, S. J. Yahya and A. Bassi, “Knowledge, Attitude and Practice of Natural Family Planning Methods in a Population with Poor Utilization of Modern contraceptives,” *Journal of Obstetrics and Gynaecology* 26, no.6 (2006): 555. <http://informahealthcare.com/doi/abs/10.1080/01443610600811482> (accessed June 23, 2012).

<sup>67</sup> Lisa Williamson et al, “Limits to Modern Contraceptive among Young Women in Developing Countries: A Systematic Review of Qualitative Research,” *Reproductive Health*. 6, no.3 (2009), <http://www.reproductive-health-journal.com/content/6/1/3> (accessed June 23, 2012).

<sup>68</sup>Oladele Caleb Orimoogunje, “The Concept of Birth Control among the Yoruba,” *Articlesbase* (2009), <http://www.articlesbase.com/parenting-articles/the-concept-of-birth-control-among-the-yoruba-843408.html> (accessed June 23, 2012).

<sup>69</sup>Jinadu M. K. and Anjuwon B., “Traditional Fertility Regulation Methods among the Yoruba of Southwest Nigeria II: A Prospective Study of Use-Effectiveness,” *African Journal of Reproductive Health* 1, no.1 (1997): 65; Koster, *Secret Strategies*, 220. In the Northeast of Nigeria, similar methods of traditional family planning methods are also in use. Abdulkarim G. Mairiga et al, “Sociocultural Factors Influencing Decision-Making Related to Fertility among the Kanuri Tribe in North-Eastern Nigeria,” *African Journal of Primary Health Care and Family Medicine*. 2, no.1 (2010), <http://www.phcfm.org/index.php/phcfm/article/view/94/85> (accessed June 23, 2012); Abdulkarim

The set of participants that subscribed to this method do not believe that the decision of child spacing and family planning should be left with the woman.<sup>70</sup> It should rather be a joint decision making.

**e. Abortion as a Family Planning Method**

Very few participants in the study have expressed the view that in deciding freely and responsibly on the number and spacing of children, abortion can be used as a means of achieving that. It will be recalled that, this is far from the contentions of this study. The right to decide freely and responsibly the number and spacing of children, finding expression in an international human rights instrument, like CEDAW cannot be taken to mean abortion.<sup>71</sup>

The World Health Organization (WHO) defines family planning thus; “Family planning allows individuals and couples to anticipate and attain their desired number of children and the spacing of their births. It is achieved through the use of contraceptive methods and the treatment of involuntary infertility. A woman’s ability to space and limit her pregnancies has direct impact on her health and well being as well as the outcome of each pregnancy”.<sup>72</sup>

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Garba et al, “The Practice of Traditional Family Planning among Rural Kanuri Communities in North Eastern Nigeria,” *International Journal of Biological and Medical Research* 3, no1 (2012): 1279, [http://www.biomedscidirect.com/journalfiles/IJBMRF2011419/the\\_practice\\_of\\_traditional\\_family\\_planning\\_among\\_rural\\_kanuri\\_communities\\_of\\_northeastern\\_nigeria.pdf](http://www.biomedscidirect.com/journalfiles/IJBMRF2011419/the_practice_of_traditional_family_planning_among_rural_kanuri_communities_of_northeastern_nigeria.pdf) (accessed June 23, 2012).

<sup>70</sup>Male involvement in family planning should be encouraged through inter-spousal communication. Peter O. Ogunjuyigbe, Ebenezer O. Ojofeitimi and Ayotunde Liasu, “Spousal Communication, Changes in Partner Attitudes and Contraceptive Use among Yorubas of the South West Nigeria,” *Indian Journal of Community medicine* 34, no.2 (2009): 112-116, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2781116/> (accessed January 28, 2013).

<sup>71</sup>Dorothy Shaw, “The ABC’s of Family Planning,” opEd for Globe and Mail (2010) [http://www.who.int/pmnch/media/membernews/2010/20100322\\_d\\_shaw\\_oped/en/](http://www.who.int/pmnch/media/membernews/2010/20100322_d_shaw_oped/en/) (accessed April 24, 2013).

<sup>72</sup>*Ibid.*

Abortion is nowhere mentioned in the definition of family planning. It is not mentioned in the 2007 WHO handbook, and as agreed in 1994 by the UN Member States in Cairo, abortion is not to be recognized as a method of family planning.<sup>73</sup>

Despite the different meanings attributed to the phrase ‘deciding freely and responsibly on the number and spacing of the children’ under CEDAW by the participants, they were unified on the relevancy of the right to choose in Nigeria. To them, the right to choose is relevant in Nigeria if women are to be healthy.

Because the meaning of the phrase has been linked to family planning and child spacing, the participants were of the view that, if enough space is given within births, Nigerian women will be healthier to exercise their right to choose to reproduce healthy children.<sup>74</sup>

Table 5.6

Subthemes of Meaning and Relevance of Right to Choose

Abortion	1	13	14		-	-	-	-	-	-	-	-	-	-	-	-	-	-	
Contraception	1	2	3	6	7	8	9	10	11	12	13	14	15	18	19	-	-	-	-
Natural Method(Billing)	4	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Quranic Method	5	16	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-

<sup>73</sup> *Ibid*

<sup>74</sup> Birth spacing gives the woman time and opportunity to recover from the nutritional deficiency caused by repeated pregnancies. Zofeen Ebrahim, “Health Pakistan: Spacing Births for Mother and Child,” *Inter Press Service* March 25, 2009, <http://www.ipsnews.net/2009/03/health-pakistan-spacing-births-for-mother-and-child/> (accessed June 24, 2012). Sufficient time between births is encouraged. This will give ample time to the mother to recuperate physically and mentally after delivery before becoming pregnant again. The child would have been well breast fed and thus, would be stronger. Koster, *Secret Strategies*, 224; Odu Abimbola Kemi and Ogunlade Joseph Olurotimi, “Breastfeeding and Child Spacing among Women in South West Nigeria,” *International Journal for Cross-Disciplinary Subject in Education* 2, no.2 (2011): 418. <http://infonomics-society.org/IJCDSE/Breastfeeding%20and%20Child%20Spacing%20among%20Women%20in%20South%20West%20Nigeria.pdf> (accessed June 24, 2012).

Traditional Method	20	21	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Abstinence	17	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Not women's right	10	20	21	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Relevance	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19

### Focus Group Sessions

Natural Method (Billing)	FGS1	-
Quranic Method	FGS2	-
Relevance	FGS1	FGS2

- Source: Field Work 2012
- Numbering in the table represent key informants (KI)

This table reveals that, despite the fact that most of the participants had different notions of the meaning of the right to choose under CEDAW, the majority of the participants considered the right to choose under CEDAW to mean child spacing and family planning through contraceptive usage. Despite the various notions, the right to choose within CEDAW has been endorsed as relevant by the majority of the participants, except those who felt that, child spacing and family planning should not be hinged on the right to choose for women. The numberings within the tables represents the key informants that identified with the themes as stated.

Majorly, the subthemes that emerged from the focus group sessions represent the religious stand on child spacing and family planning, which is also said to be relevant. That is to say that while the focus group session'1' subscribe to the billing method of family planning, the focus group session'2' subscribe to the Quranic

method of family planning. However, both groups admit to the relevance of right to choose within CEDAW.

While expressing the meaning and relevance of the right to choose under CEDAW, most of the participants understood that, such a right will give them the right to choose to reproduce and not the right to choose to abort. Consequently, the right to choose as understood by the participants will give right to life to the unborn child.

#### **5.3.4 Importance of the Right to Choose under CEDAW**

Right to choose is a form of human right for women specifically. This right has found its way into CEDAW. How important is this right to Nigerian women particularly? Can you please, give a brief illustration of the importance of this right to women in Nigeria generally?

According to the manual thematic analysis used in this study, it was revealed that most of the participants considered the right to choose under CEDAW to be important for the Nigerian women basically on the grounds of health (mother and child's health) and economic hardship in the country. Be that as it may, further analysis showed that, some participants do not consider the right to choose as important for the Nigerian women. Both participants in the African Traditional Religion unit of analysis expressed the view that, under Yoruba culture,<sup>75</sup> women have no right to choose. However, majority of the other participants do not share the

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<sup>75</sup>The Yoruba people are located in the tropical region of South Western Nigeria. Aderemi Suleiman Ajala, "The Yoruba nationalist Movements, Ethnic Politics and Violence: A Creation from Historical Consciousness and Socio-Political Space in South-Western Nigeria," *Working Paper* No. 105, Department of Anthropology and African Studies, Johannes Gutenberg-Universitat (2009): 1. <http://ubm.opus.hbz-nrw.de/volltexte/2009/2061/pdf/diss.pdf> (accessed January 26, 2013); Oladele Abiodun Balogun, "The Concept of Ori and Human Destiny in Traditional Yoruba Thought: A Soft-Deterministic Interpretation," *Nordic Journal of African Studies* 16, no.1 (2007): 116, <http://www.njas.helsinki.fi/pdf-files/vol16num1/balogun.pdf> (Accessed 28<sup>th</sup> May 2012).

same view. Above all, the contentions of the participants were unified on the importance of the right to choose within CEDAW on the basis of health of the mother and child.

**a. Child Spacing and Health**

The outcome and benefits of pregnancy planning and child spacing on maternal, infant and child health has been well researched and documented. Research have reveal that family planning can reduce about 25% to 40% maternal mortality (deaths) rate by preventing unplanned and unwanted pregnancies and about 10% of child mortality (deaths) by eliminating inter-birth intervals of less than two years.<sup>76</sup>

The impressive reductions in maternal mortality (deaths) are similar to the effectiveness of such undisputed public health interventions as oral contraception.<sup>77</sup>

Family planning also enhances birth spacing. It also contributed to the reduction of infant mortality risks as well as lowering maternal death and maternal morbidity associated with unintended and unwanted pregnancies.<sup>78</sup> It can be said that family planning programs are initiated for the well being of mother and child. Infant mortality is determined by the preceding birth intervals.<sup>79</sup>

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<sup>76</sup>Dibaba, "Child Spacing and Fertility Planning", 84; Ganiat Mobolaji Olatokun, "Right to Choose within CEDAW: It's Importance to Women in Nigerian," *Journal of Humanities And Social Sciences* 19, no. 1 (2014): 18.

<sup>77</sup>Campbell O. M. and Graham W. J, "Strategies for Reducing Maternal Mortality: Getting on with what Works," *Lancet* 368 (2006): 1284. <http://www.plan.givewell.org/files/Cause1-2/+UNICEF/Lancet%20Maternal%20Mortality%202.pdf> (accessed June 25, 2012).

<sup>78</sup>Amy O. Tsui, Raegan McDonald-Mosley and Anne E. Burke, "Family planning and the burden of Unintended Pregnancies," *Oxford Journals Epidemiological Review* 32, no.1 (2010): 152, <http://epirev.oxfordjournals.org/content/32/1/152.full> (accessed June 25, 2012).

<sup>79</sup>Unnati Rani Saha and Arthur Van Soest, "Does Family Planning Reduce Infant Mortality? Evidence from Surveillance Data in Matlab, Bangladesh," *Discussion Paper* no. 2012-019 (2012): 2, <http://arno.uvt.nl/show.cgi?fid=122012> (accessed June 25, 2012); Olatokun, "Right to Choose," 19.



For many years, studies<sup>80</sup> have demonstrated that when mothers' space births of their children at least two years apart, their children are more likely to survive and to be healthy. When children are spaced at least two years apart, they are less likely to be premature, of low birth weight and be malnourished.<sup>81</sup> Infants given birth to after short intervals between pregnancies are at increased risk of developing autism. The highest risk was associated with pregnancies of less than one year.<sup>82</sup>

In recognition of the adverse outcomes associated with close child birth intervals, the World Health Organization (WHO 2005) recommended a two year waiting period after birth before the next pregnancy.<sup>83</sup> Short inter birth intervals has also been associated with leukaemia.<sup>84</sup>

Based on the facts above, majority of the participants expressed the view that the right to choose under CEDAW is important basically on health grounds for both mother and child.

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<sup>80</sup>Rutstein S. O., "Effects of Preceding Birth Intervals on Neonatal, Infant and Under-Five Years Mortality and Nutritional Status in Developing Countries: Evidence from the Demographic and Health Survey," *International Journal of Obstetrics Genecology* 89, no.1 (2005): S7. <http://www.ncbi.nlm.nih.gov/pubmed/15820369> (accessed June 26, 2012).

<sup>81</sup>*Ibid.* The relationship between chronic malnutrition and birth spacing is statistically significant. There is a clear pattern of increasing chronic and general under nutrition as the birth interval is shorter. Syed Farid-ul-Hasnain, "Prevalence and Risk Factors for Stunting among Children under 5 Years: A Community Based Study from Jhangara Town, Dahu Sindh," *Journal of Pakistan Medical Association*. 60, no.1 (2010): 41. [http://jpma.org.pk/full\\_article\\_text.php?article\\_id=1899](http://jpma.org.pk/full_article_text.php?article_id=1899) (accessed June 26, 2012).

<sup>82</sup>Keely Cheslack-Postava, "Closely Spaced Pregnancies are associated with Increased Odds of Autism in California Sibling Births," *Paediatrics* 127 (2011): 246, <http://www.pediatricsdigest.mobi/content/127/2/246.full.pdf+html> (accessed June 26, 2012); Joan C. Chrisler, *Reproductive Justice: A Global Concern* (Santa Barbara: Praeger, 2012), 154. Pregnancy intervals of less than six months are associated with increased risk of pre-term births and low birth weight. Farwa Rizvi and Ahmad Khan, "Birth Spacing as a Health Intervention," *Ann Pak Institute of Medical Science* 7, no..3 (2011): 113-114, <http://apims.net/Volumes/Vol7-3/Birth%20Spacing%20as%20a%20Health%20Intervention.html> (accessed June 26, 2012).

<sup>83</sup>Chrisler, *Reproductive Justice*, 154.

<sup>84</sup>Cardwell C. R. et al, "Inter Birth Interval is Associated with Childhood Type 1 Diabetes," *Pubmed* 61, no.3 (2012): 702, <http://www.ncbi.nlm.nih.gov/pubmed/22315303> (accessed June 26, 2012).

## **b. Child Spacing and Women's Decision**

In Nigeria, there is always the desire to have many children, especially amongst men who are not very educated and are polygamists.<sup>85</sup> Ideal family size (IFS) is a good signal and indicator of men's attitude towards child bearing. The mean family size was higher among illiterates, not very well educated people, Muslims and polygamists.<sup>86</sup> Educated men tend to have smaller family size because they understand and are mindful of the financial implications of larger family size. While the Christians adopts and maintains the one-man and one-wife rule, the family size here is relatively smaller so that, there will be no competition among wives as to who will produce the greater number of children.<sup>87</sup> However, the ideal family size is 16 children among the Kanuris of Nigeria. Kanuri men are polygamists and can marry up to four wives in order to form a very large family.<sup>88</sup>

While this is so, little or no regard is given to the feelings and wants of the women. Hence, the importance and the need of the right to choose under CEDAW cannot be over emphasized when looked at from the direction of affording the women the opportunity to choose for themselves, the time and spacing of their children.<sup>89</sup>

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<sup>85</sup>Ganiat Mobolaji Olatokun and Rusniah Ahmad, "African Traditional Values and the Right to Choose for Women: A Conflict Resolved," *International Journal of Business, Management and Social Sciences* III no. 1 (2013): 1.

<sup>86</sup>O. O. Odu, K. T. I Ijadunola and D. B. Parakoyi, "Reproductive Behaviour and Determinants of Fertility among Men in a Semi-Urban Nigerian Community," *Journal of Community Medicine and Primary Health Care* 17, no.1 (2005): 17, <http://www.ajol.info/index.php/jcmphc/article/viewFile/32419/6084> (accessed June 24, 2012).

<sup>87</sup>*Ibid*

<sup>88</sup>Mairiga et al, "Sociological Factors Influencing Decision Making," Akinrinola Bankole et al, "Barriers to Safe Motherhood in Nigeria," *Guttmacher Institute* (2009): 7. <http://www.guttmacher.org/pubs/2009/05/28/MotherhoodNigeria.pdf> (accessed June 27, 2012).

<sup>89</sup>Olatokun and Ahmad, "African Traditional Values," The reality is that, in Nigeria, most women do not have a say in decision making that affect their reproductive health and capacity. In any government owned hospitals, women might not be able to obtain family planning services without the consent of their husbands. Most decisions to use contraceptives are influenced by men. Mustapha Duze and Ismaila Mohammed, "Male Knowledge, Attitudes and Family Planning Practices in Northern Nigeria," *African Journal of Reproductive Health* 10, no.3 (2006): 55, <http://www.ajol.info/index.php/ajrh/article/viewFile/7899/13886> (accessed June 24, 2012); Ijadunola

Nigeria, being a patrilineal society, where all decision making on every aspect within the family is solely the responsibility of the men,<sup>90</sup> the right to choose under CEDAW is seen as a weapon in the hands of women to voice out and express their concerns and wishes with regards to the time they want to have another child. Although as it is presently, Nigerian women may not be able to achieve this totally, but at least, they will have a say in deciding the timing of their children. By so doing, the patriarchal nature of sole male decision making syndrome would have been broken.<sup>91</sup>

An exploratory study of women's role in reproductive decision making in Ekiti, a part of Nigeria reveals that women in the State are increasingly becoming active in decision making on issues affecting their daily lives. More women than ever before believed that they could take decisions on family size, when to get pregnant and have a baby, as well as choice of spacing period. Women are now seen to have taken joint decision with their husbands in respect of child spacing.<sup>92</sup>

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M. Y. et al, "Male Involvement in Family Planning Decision Making in Ile-Ife Osun State Nigeria," *African Journal of Reproductive Health* 14, no.4 (2010): 46, <http://www.ajol.info/index.php/ajrh/article/viewFile/67833/55928> (accessed June 24, 2012); O. A. Adeleye et al, "Barriers and Knowledge of Benefits regarding Family Planning Methods among Women attending Antenatal Clinics in a Southern Nigerian Community," *Asian Journal of Medical Sciences* 2, no.4 (2010): 193, <http://maxwellsci.com/print/ajms/v2-190-194.pdf> (accessed June 25, 2012).

<sup>90</sup>Abidemi R. Asiyabola, "Patriarchy, Male Dominance, the Role and Empowerment of Women in Nigeria," being a paper submitted for presentation as poster at the International Union for Scientific Study of Population (IUSSP/UIESP) XXV International Population Conference Tours, France 18-23, 2005. (2005): 12. [http://demoscope.ru/weekly/knigi/tours\\_2005/papers/iussp2005s50005.pdf](http://demoscope.ru/weekly/knigi/tours_2005/papers/iussp2005s50005.pdf) (accessed June 24, 2012). Patriarchy denies women access to and control over decision making. Titilayo Cordelia Orisaremi and Ogoh Alubo, "Gender and Reproductive Rights of Tarok Women in Central Nigeria," *African Journal of Reproductive Health* 16, no.1 (2012): 84, <http://www.ajol.info/index.php/ajrh/article/viewFile/75952/66444> (accessed June 24, 2012).

<sup>91</sup>I. O. Orubuloye, F. Oguntimehin and T. Sadiq, "Women's Role in Reproductive Health Decision Making and Vulnerability to STD and HIV/AIDS in Ekiti, Nigeria," *Health Transition Review Supplementary to 7*, (1997): 329 and 331, <http://htc.anu.edu.au/pdfs/Orubulo8.pdf> (accessed June 24, 2012).

<sup>92</sup>*Ibid.*

Reproductive health knowledge is very important for women. This is because; woman's health and well being, contraception as well as those of her immediate family, may depend on her being able to delay her first child or space the birth of her children.<sup>93</sup>

### c. Child Spacing and Economic Hardship

The post colonial state of Nigeria has been chagrin. It's slow-pace movement towards a sustainable good governance and development is daunting as various measures instituted to combat the soaring poverty ratio appears to have failed, failing or does not suffice. Arguably, the increased level of poverty in the country have been attributed to long military rule, corruption, fiscal indiscipline of expenditure, mismanagement and over reliance on a single commodity (oil) for export and domestic consumption.<sup>94</sup>

Poverty is a condition where an individual finds it extremely difficult to meet the basic and essential needs of life that differentiate him from animal.<sup>95</sup> Poverty can

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<sup>93</sup>O. A. Moronkola, M. M. Ojedian and A. Amosu, "Reproductive Health Knowledge, Beleifs and Determinants of Contraceptive Use among Women attending family Planning Clinics in Ibadan, Nigeria," *African Health Sciences* 6, no..3 (2006): 156, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1831883/pdf/AFHS0603-0155.pdf> (accessed June 24, 2012).

<sup>94</sup>Jonathan S. Maiangwa, "An Overview of Pseudo-Therapeutic Approaches to Poverty in Nigeria," *African Journal of Political Science and International Relations* 3, no.9 (2009): 346. <http://www.academicjournals.org/ajpsir/pdf/Pdf2009/September/Maiangwa.pdf> (accessed June 25, 2012).

<sup>95</sup>*Ibid.* In a study area, 60% of the respondents earn less than #10,000 (RM200 emphasis mine) per month. This shows that, majority are living below poverty level. The household living conditions are correlated with violence and indications of socio-economic status. Majority live in one-room apartment and the average number of person per sleeping room are between 5-10 people. Demographic Health Survey (2003) explained that only 42% of Nigerians has access to clean water. The lack of sanitary facilities poses serious health problem, as majority of residents have no facility for sewage disposal. Adeyemi Ezekiel O. et al, "Economic Reforms, Living Condition and Urban Violence: A Situation Report of Metropolitan Lagos," *Ethiopian Journal of Environmental Studies and Management* 2, no..2 (2009): 37 and 39, <http://www.ajol.info/index.php/ejesm/article/viewFile/45918/32325> (accessed June 25, 2012); UNITED NATIONS CHILDREN'S FUND (UNICEF), "The Nigerian Situation: 2007," [http://www.unicef.org/nigeria/1971\\_2199.html](http://www.unicef.org/nigeria/1971_2199.html) (accessed November 23, 2008).

thus, have a profound influence on the social, physical and developmental needs of children and families.<sup>96</sup>

It is against this backdrop that the participants in this study viewed child spacing and family planning under CEDAW as an important element. According to them, the child spacing and family planning under CEDAW will afford them the opportunity of having the number of children they can cater for. This is also one of the questions of population policy in Nigeria.<sup>97</sup>

Majority of households are experiencing growing food insecurity. Eating fewer meals and smaller amount was commonly reported, with many families cutting down from eating three times to eating twice or even once a day. Women and children suffer disproportionately from food crisis.<sup>98</sup> The recent removal of fuel subsidy by President Good Luck Jonathan of Nigeria has further led to the hick in price of all consumer goods transported by fuel.<sup>99</sup>

This being the case, some of the participants felt that it was of no use bringing forth children into the world when they don't have the means of catering for them. Individuals who experience economic hardship will find it difficult paying bills or

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<sup>96</sup>Rand D. Conger, "The Effect of Poverty and Economic Hardship across Generations," being a report prepared for California Department of Social Services (2005): 1. [http://cppr.ucdavis.edu/pdf/poverty\\_and\\_hardship.pdf](http://cppr.ucdavis.edu/pdf/poverty_and_hardship.pdf) (accessed June 25, 2012).

<sup>97</sup>Helen Nene Avong, "Perception of and Attitudes Towards Nigerian Population Policy, Family Planning Program and Family Planning in Kaduna State Nigeria," *African Reproductive Health* 4, no.1 (2000): 67. <http://www.ajol.info/index.php/ajrh/article/viewFile/7722/13856> (accessed June 25, 2012).

<sup>98</sup>Fiona Samuels et al, "Food, Finance and Fuel: The Impact of the Triple F Crisis in Nigeria with Particular Focus on Women and Children," *Overseas Development Institute* (2011): 4-5, <http://www.odi.org.uk/resources/docs/7359.pdf> (accessed May 12, 2012)

<sup>99</sup>Anna Lekas Miller, "Occupy Nigeria: The Beginning of Sub-Saharan Awakening," *Global Comments* January 14, 2012, <http://globalcomment.com/2012/occupy-nigeria-the-beginning-of-a-sub-saharan-awakening/> (accessed May 12, 2012).

buying things the household needs such as food, clothing, medicine and medical care.<sup>100</sup>

Table 5.7

Subthemes of Importance of Right to Choose

Culture	20	21																
Health	1	3	4	5	6	7	8	9	11	12	13	14	16	17	18			
Economic Hardship	14	15	19															
Women Decides	2	13																
Important	1	2	3	4	5	6	7	8	9	11	12	13	14	15	16	17	18	19
Unimportant	10	20	21															

Focus Group Sessions

Health	FGS 1	FGS 2
Important	FGS 1	FGS 2

- Source: Field Work 2012
- Numbering in the table represent the key informants (KI)

This table reveals that, according to the majority of the participants, the right to choose under CEDAW is important to the generality of the Nigerian women on grounds of health. Very few participants have also viewed that the right to choose is important, because it gave women an opportunity to decide for themselves. Aside these, economic hardship was another reason why the right to choose is important.

<sup>100</sup>With increased resources, parents are able to invest in the development of their children, providing special care, time and services necessary to support their children’s emotional needs. Conger, “Effect of Poverty”; John Mirowsky and Catherine E. Ross, “Economic Hardship across the Life Course,” *American Sociological Review* 64 (1999): 548. <http://www.jstor.org/discover/10.2307/2657255?uid=3738672&uid=2&uid=4&sid=21100870863291> (accessed June 25, 2012).

Culturally, it has also been viewed that the right to choose is important. This is basically so because culture recognizes family planning.

The numberings within the tables represents the key informants that identified with the themes as stated. The themes that emerged from the focus group sessions are similar. That is to say that on the grounds of health both the focus group sessions '1' and '2' were unified in their opinions that the right to choose within CEDAW is important.

The importance of the right to choose within CEDAW based on culture, health, economic hardship as well as power to decide, can be associated with the fact that these participants attributed the right to life to the unborn child. This means that, these participants looked upon the right to choose under CEDAW as giving them the right to choose to reproduce and not the right to choose to abort.

### **5.3.5 Extension and Justification**

With feminism and the right to choose, women can be said to be free to choose whatever they want to do with their pregnancies. Does this extend to right to abort? In your opinion, do you think the right to choose within CEDAW justifies the legalization of abortion in Nigeria?

From the manual thematic analysis, it was discovered that, most of the participants do not feel that the right to choose extends to abortion.<sup>101</sup> There were different reasons given for that. However, there were some alternative explanations seeming to suggest that, the right to choose to determine the number and spacing of one's

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<sup>101</sup>Most of the participants relied on the wordings of Article 16(1)(e) CEDAW, providing that, women has the right to decide freely and responsibly on the number and spacing of their children. These set of participants believed that, this provision refers to family planning and child spacing, not abortion.

children could be expressed by the use of an abortion.<sup>102</sup> It is important to note that, both categories of participants, even while giving their explanations, constantly made reference to culture and religion.

While those who felt the right to choose does not extend to abortion refuse to agree that the right to choose can justify the legalization of abortion in Nigeria, those who felt the right to choose extend to abortion supports the idea that legalization of abortion could be justified on that right.

Two out of these set of participants felt that the right to choose within CEDAW can justify the legalization of abortion in Nigeria on the basis of women's right.<sup>103</sup> To them, it is a woman's body, it is a woman's issue as well as being a woman's decision, and so she ought to be left alone to choose whatever she wants to do without intervention or cohesion. One of the leading radical feminist had asserted as far back as 1977 that, the essence of moral decision is the exercise of choice and the willingness to take responsibility of that choice. That birth control and abortion provide women with effective means for controlling their fertility<sup>104</sup>

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<sup>102</sup>There is evidence to show that some women had induced abortions in places that were supposed to be family planning clinics. See, Ali Ceylan et al, "Post Abortion Family Planning Counselling as a tool to increase Contraception Use," *BMC Public Health* 9, no.20 (2009): 1. <http://www.biomedcentral.com/content/pdf/1471-2458-9-20.pdf> (accessed May 15, 2012). It is no secret that abortions are popular method of family planning. *The Express Tribune* (2012) January 30, 2012. <http://tribune.com.pk/story/329083/family-planning-women-are-using-the-wrong-drugs-for-abortions-as-quick-contraception/> (accessed May 15, 2012).

<sup>103</sup>The United Kingdom Department of International Development (DFID) updated its policy on abortion and supports abortion on the grounds of women's right to reproductive choices. Susan Cohen, "Facts and Consequences: Legality, Incidences and Safety of Abortion World Wide," *Guttmacher Policy Review* 12, no.4 (2009) <http://www.guttmacher.org/pubs/gpr/12/4/gpr120402.html#boxref1> (accessed June 27, 2012).

<sup>104</sup>Carol Gilligan, "In a Different Voice: Women's Conception of Self Morality," *Harvard Educational Review* 47, no.4 (1977): 487 and 490. [http://facweb.northseattle.edu/karchibald/PSYC200/Articles/Gilligan\(1977\) In%20A%20Different%20Voice.pdf](http://facweb.northseattle.edu/karchibald/PSYC200/Articles/Gilligan(1977) In%20A%20Different%20Voice.pdf) (accessed June 27, 2012). Feminists framed women's abortion right as a right to abortion autonomy. Hsiaowei Kuan, "Abortion Law and Abortion Discourse in Taiwan: Rights, Social Movement and Democratization," *Social Science Research Network*. (2008), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1125070](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1125070) (accessed June 27, 2012).



There were arguments on women's right to decide about their lives, their body and on reproductive roles as fundamental human right. The discourse that demanded 'women's right' as human right and reproductive self determination directly and explicitly involved the issue of abortion, defending the autonomy of women's body.<sup>105</sup>

Basically, the reason why these two participants assume this position cannot be divorced from the fact that, they are unmarried.<sup>106</sup> Even in the words of one of the participants, she said if she were to be married, she will not take this stand. But because she is unmarried, she does not need children now, she will rather opt for the right to choose to extend to abortion, and so will support legalization of abortion in Nigeria on the basis of the right to choose. This shows the reason why adolescent girls are the major victims of abortion complications.<sup>107</sup>

The reason why the third participant felt that the right to choose extends to abortion cannot be divorced from his profession. As a doctor, he must have come in contact with many women demanding abortion. Based on this, he finds it easy to attribute

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<sup>105</sup>Tussi Fernanda P., "Abortion in Brazil: Contending Discourses and Women's Experiences," *Thinking Gender Papers* (2010): 4, <http://escholarship.org/uc/item/9jg5d41q#page-4> (accessed June 27, 2012).

<sup>106</sup>In Nigeria, adolescents generally have a low level of contraceptive use, but their reliance on unsafe abortion is very high. Valentine O. Otoide, Frank Orosanye and Friday E Okonofua, "Why Nigerian Adolescents Seek Abortion Rather than Contraceptive: Evidence from Focus Group Discussion," *International Family Planning Perspective*, 27, no.2 (2001), <http://www.guttmacher.org/pubs/journals/2707701.html> (accessed March 5, 2012). Most of those looking for abortions are unmarried young people. Jean Garland and Patrick Idoko, *Every Abortion Stops a Beating Heart* (Plateau State Nigeria: Africa Christian Textbook, 2010), 3.

<sup>107</sup>Youths and unmarried women constituted the majority of patients with abortion complications in a recent study. Collins A. Kalu, O. U. J. Umeora and I. Sunday-Adeoye, "Experiences with the Provision of Post-Abortion Care in a University Teaching Hospital in South-East Nigeria: A Five Year Review," *African Journal of Reproductive Health* 16, no.1 (2012): 108, <http://www.ajol.info/index.php/ajrh/article/viewFile/75954/66446> (accessed June 27, 2012). Adolescents represent a significant proportion of the women who chose abortion. The WHO estimates that, at least 33% of all women seeking abortion hospital care for complications related to abortion are under 20 years of age. Lussy J. Paluku, "Knowledge and Attitude of School Girls about Illegal abortions in Goma, Democratic Republic of Congo," *African Journal of Primary Health Care and Family Medicine* 2, no.1 (2010), <http://www.phcfm.org/index.php/phcfm/article/view/78/48> (accessed June 28, 2012).

‘right’ to abortion. He however sounds cautious on the right to choose under CEDAW being used as the basis for the legalization of abortion in Nigeria. This can better be explained again in view of his professional standing, when in his words, he felt there will be more maternal mortality if abortion is legalized in Nigeria in the absence of both human and material resources.<sup>108</sup>

It is important to point it out here that, the other two doctors within the unit of analysis of doctors also will not support the legalization of abortion in Nigeria on the basis of the right to choose under CEDAW. They fear if there will be enough human and material resources that will cope with the turnout of women needing abortion if it was eventually legalized.<sup>109</sup>

Legalization of abortion alone does not guarantee availability of safe abortion services. In Ethiopia, Cambodia and Nepal, studies have shown that weak health systems possess a significant challenge to the roll out of abortion services.<sup>110</sup> Furthermore, worldwide evidence confirms that abortion promotion only leads to greater numbers of abortion and does not solve the underlying health problems that cause maternal death. For instance, legalized abortion has not bettered the health of the Ghana people, and according to the World Health Organization (WHO), Ghana

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<sup>108</sup>The lack of modern medicines and quality health care, not the prohibition of abortion results in high maternal mortality rate. Legalized abortion actually leads to more abortions- and in the developing world where maternal health care is poor, legalization would increase the number of women who die or are harmed by abortion. Minnesota Citizens Connected for Life Global Outreach. “Does Legalizing Abortion Protect Women’s Health? Assessing the Argument for Expanded Abortion Access around the Globe,” (2009), <http://nrhc.org/UN/MMEnglish.pdf> (accessed June 27, 2012).

<sup>109</sup>Also, ‘functional health system’ and ‘effective health care delivery system’ is needed in order to reduce the high rate of maternal mortality, and not reform of abortion laws. F. E. Okonofua et al, “Perception of Policy Makers in Nigeria towards Unsafe Abortion and Maternal Mortality,” *International Perspectives on Sexual and Reproductive Health* 35, no.4 (2009), <http://www.guttmacher.org/pubs/journals/3519409.html> (accessed June 27, 2012).

<sup>110</sup>Jessica Malter, “Legalization Alone does not Guarantee Availability of Safe Abortion Services,” *Guttmacher Institute*. (2012), <http://www.guttmacher.org/media/nr/2012/05/10/index.html> (accessed June 27, 2012); Thapa K., Karki Y. and Bista K. P., “Myths and Misconceptions about Abortion among Marginalized Underserved Community,” *Journal of Nepal Medical Association* 48, no.176 (2009): 276, <http://www.jnma.com.np/issue/176/276-280.pdf> (accessed May 28, 2012)

remains off-target for achieving the health related Millennium Development Goals.<sup>111</sup>

It is the lack of modern medicine and quality health care which results in high maternal mortality rate, and not prohibition of abortion.<sup>112</sup> In the developing countries where maternal health care is poor, legalization of abortion would further increase the number of women who die or are harmed by abortion.<sup>113</sup>

The following reasons were given by the participants for maintaining the stand that right to choose does not extend to abortion, and so cannot justify the legalization of abortion in Nigeria.

**a. Human and Material Resources**

Chief Executive Officer of Hope Worldwide, Nigeria a partner with the United States Agency for International Development (USAID), at a media briefing in Lagos recently condemned the low ratio of members of social health workers at Primary Health Care centres to Nigerian population of 0-02 to 100,000 to make meaningful difference in the nation's health care drive. The poor state of Primary Health Care is said to contribute to the nation's maternal mortality rate.<sup>114</sup>

The National Executive Council (NEC) of Medical and Health Workers Union of Nigeria, at Owerri, Imo State, Nigeria during its 36<sup>th</sup> National Executive Meeting, also declared that if urgent and radical measures were not taken by the three arms of

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<sup>111</sup>WORLD HEALTH ORGANIZATION, *WHO Country Cooperation Strategy 2008-2011, Ghana* (World Health Organization: 2009), 3. [http://www.who.int/countryfocus/cooperation\\_strategy/ccs\\_gha\\_en.pdf](http://www.who.int/countryfocus/cooperation_strategy/ccs_gha_en.pdf) (accessed January 26, 2013); Minnesota Citizens Concerned for Life Global Outreach, "The Truth about Health Care and Abortion in Ghana," (2011) <http://www.mccl-go.org/pdf/GhanaWhitePaper.pdf>, (accessed May 15, 2012)

<sup>112</sup>Minnesota Citizens Concerned for Life Global Outreach, "Does Legalization of Abortion protect Women's Health? Assessing the Argument for Expanded Abortion Access around the Globe," (2009) <http://nrlc.org/UN/MMEnglish.pdf> Accessed 15th May 2012, (accessed May 28, 2012)

<sup>113</sup>*Ibid.*

<sup>114</sup>"Nigeria May miss MDGs Due to Poor State of PHC," *NBF News* Last Updated March 15, 2012. <http://www.thenigerianvoice.com/nvnews/85256/1/nigeria-may-miss-mdgs-due-to-poor-state-of-phc-say.html> (accessed June 27, 2012).

government to upgrade the health care delivery system in the country, the consequences would be too grave for the country.<sup>115</sup> The Association of Professional Bodies in Nigeria (APBN) has described the rising number of patient to a doctor in the country, following the over three-week strike embarked by doctors in the employment of the Lagos State government. Before the crisis, the ratio in Nigeria was 1:33,000. Now, the ratio is 1:50,000.<sup>116</sup>

Nigerian health system generally has been plagued by problems of service quality, including unfriendly staff attitude to patients, inadequate skills, decaying infrastructure, chronic shortage of essential drugs and well known out-of –stock syndrome. In some hospitals, equipments such as sphygmomanometers, thermometers, weighing scales, delivery kits, waste bins, and mucus extractors are unavailable. Many do not have regular supply of electricity because they cannot maintain standby generators. Some do not even have regular water supply and thus require patients to provide their own water. Coupled with all these, staff is demoralized by inadequate and irregular remuneration. In fact, a 2003 study revealed that only 42% of public facilities in Nigeria met internationally accepted standards for obstetrics care.<sup>117</sup> The health sector as a whole is in a dismal state.<sup>118</sup>

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<sup>115</sup>Victor Ahiuma-Young, “Labor Bemoans Poor Public Healthcare Delivery in Nigeria,” *Vanguard News Nigeria* December 29, 2011, <http://www.vanguardngr.com/2011/12/labour-bemoans-poor-public-healthcare-delivery-in-nigeria/> (accessed June 27, 2012).

<sup>116</sup>Oyetunji Abioye, “APBN Laments Doctor-Patient Ratio,” *The Punch News Papers* May 23, 2012. <http://www.punchng.com/business/apointments-managements/apbn-laments-doctor-patient-ratio/> (accessed June 27, 2012).

<sup>117</sup>Bolatito A. Lanre-Abass, “Poverty, Maternal Mortality in Nigeria: Towards a more Viable Ethics of Modern Medical Practice,” *International Journal of Equity in Health* 7, no.11 (2008): 3, <http://www.equityhealthj.com/content/7/1/11> (accessed June 27, 2012).

<sup>118</sup> *Ibid.* Dr Obielumani Ideh, an obstetrician and researcher at the just concluded conference of the Society for the Protection of the Unborn Children, said the problem of maternal mortality arises mainly because government failed to provide the appropriate resources and infrastructures. Society for the Protection of the Unborn Children Conference on “African Mothers wants Health Care not Abortion,” held in London, March 22, 2012, <http://www.spuc.org.uk/news/releases/2012/march21> (accessed June 27, 2012). The World Economic Forum in its global competitive index ranks Nigeria 127 of 142 countries in all stages of development including health. “The Global Competitive Index

In the just concluded conference of the Society of the Protection of the Unborn Children held in London, professor Robert Walley, a leading obstetrician told the conference that, “in the countries in which I worked, one in 7 mothers will die due to lack of medical equipments...it is ridiculous to supply women with abortion and condom when they need access to emergency obstetrical care...Abortion is a sin of commission, but failing to provide mothers with obstetrical care is a sin of omission”.<sup>119</sup>

In view of the facts above, some of the participants felt that it is doubtful if the present condition and availability of health facilities in Nigeria will be able to cope with the large turnout of patients if abortion is eventually legalized on the basis of the right to choose within CEDAW.

#### **b. Complications**

Complications that arise as a result of abortion, whether carried out by a qualified doctor, or unqualified doctor,<sup>120</sup> prompted the response from majority of the participants that, the right to choose under CEDAW does not extend to abortion, and so cannot justify the legalization of abortion. To these set of participants, there is nothing without risk. Even with qualified doctors, complications arise.

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2011-2012Rankings,”

[http://www3.weforum.org/docs/WEF\\_GCR\\_CompetitivenessIndexRanking\\_2011-12.pdf](http://www3.weforum.org/docs/WEF_GCR_CompetitivenessIndexRanking_2011-12.pdf) (accessed June 27, 2012).

<sup>119</sup>Professor Robert Walley’s message in the Society for the Protection of the Unborn Children Conference. Society for the Protection of the Unborn Children Conference on “African Mothers wants Health Care not Abortion,”

<sup>120</sup>In admitting that by the use of certain substances and procedures, incidences of abortion complication might be reduced; doctors can be seen to attest to the fact that, even with qualified doctors, complications abounds in abortion. Olav Meirik et al, “Complications of First-Trimester Abortion by Vacuum Aspiration after Cervical Preparation with and without Misoprostol: A Multi Centre Randomized Trial,” *The Lancet* 39, no.9828 (2012): 1817, [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(11\)61937-5/abstract](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(11)61937-5/abstract) (accessed June 28, 2012). That every abortion stops a breathing hearth, whether the mother or the child, shows that there are always complications arising out of any abortion, whether by a qualified doctor or unqualified doctor. Garland and Idoko, *Stops a Breathing Heart*.

The Centre for Disease and Control and Prevention reports that, in the United States of America, the world's leaders in modern medicine, over 300 women have died from legal abortions since the procedure was legalized in 1973.<sup>121</sup> If this happens in the United States under the best medical condition, the case of developing countries, where condition may not always be fully sanitary, where emergency facilities and supplies are absent or inadequate, where the doctors may not be trained or equipped to handle trauma and where even basic medical and surgical supplies such as antibiotics and sterile gloves may be scarce or unavailable, the situation will be pathetic as mortality rate would be substantially higher, whether abortion is legalized or not.<sup>122</sup>

To these set of participants, legalization of abortion on the basis of the right to choose within CEDAW, will further add to the already high rate of maternal death. Nigeria has the second highest maternal death rate in the whole world.<sup>123</sup> Of all maternal deaths, 50% occurs as a result of criminal abortions.<sup>124</sup>

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<sup>121</sup>Head Jeanne E. and Hussey Laura, "Does Abortion Access Protect Women's Health," *World and I* 19, No.6 (2004), <http://www.spuc.org.uk/resources/abortionandhealth> (accessed May 15, 2012).

<sup>122</sup>G. O. Igberase, "Exploring the Pattern of Complications of Induced Abortion in Rural Mission Tertiary Hospital in the Niger Delta, Nigeria," *Tropical Doctor* 38, no.3 (2008): 146, <http://td.rsmjournals.com/content/38/3/146.abstract> (accessed May 28, 2012).

<sup>123</sup>Nigeria, which constitute just 1% of the world population accounts for 10% of the world's maternal and under five mortality rates. Nigeria rank second in the world after India. Nigeria ranks as one of the 13 countries in the world with the highest maternal mortality rate and is still not listed among the 10 countries seen to have made rapid progress to meet the MDGs. Ogunjimi Lucas Olusegun, Ibe Rosemary Thomas and Ikorok Maria Michael, "Curbing Maternal and Child Mortality: The Nigerian Experience," *International Journal of Nursing and Midwifery* 4, no.2 (2012): 34, <http://www.academicjournals.org/ijnm/PDF/pdf2012/April/Ogunjimi%20et%20al.pdf> (accessed June 28, 2012).

<sup>124</sup>Maternal Health and Safe Motherhood Programme, "Abortion: A Tabulation of Available Data on the Frequency and Mortality of Unsafe Abortion," (Geneva: World Health Organization, (1994); V. O. Awusi and V. Okeleke, "Post-Induced Abortion Morbidity and Mortality in Oleh, Nigeria," *Benin Journal of Post Graduate Medicine* 12, no.1 (2010): 21-23. <http://www.ajol.info/index.php/bjpm/article/viewFile/63501/51344> (accessed June 28, 2012)

Because the Criminal laws of the country forbid abortion,<sup>125</sup> women resorted to abortion in clandestine places<sup>126</sup> leading to increase in abortion-related maternal morbidity and death.<sup>127</sup> Abortion is also responsible for long term morbidity in women including infertility, chronic pelvic pain, recurrent and spontaneous abortion and ectopic pregnancies.<sup>128</sup>

Women experiencing these complications require immediate treatment, and according to the description of the current health facilities in Nigeria,<sup>129</sup> it is doubtful if such treatment can be given accordingly. These women might ease on, or suffer long term morbidity.<sup>130</sup>

### **c. Morality of Abortion**

The participants in this study viewed that promiscuity<sup>131</sup> will be rampant if abortion is legalized on the basis of the right to choose under CEDAW. Therefore, morality will be down the drain and the society will be in a shamble. This thus, serves as a value judgment indicating that legalizing abortion is bad. To these participants, all rational persons will hold this view.

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<sup>125</sup>Secs 232,235 Penal Code of Northern Nigeria and secs 228, 229 and 230 Criminal Code of Southern Nigeria..

<sup>126</sup>Ordinioha B. and Brisibe S., "Clandestine Abortion in Port Harcourt: Providers' Motivations and Experiences," *Nigerian Journal of Medicine* 17, no.3 (2008): 291. <http://www.ncbi.nlm.nih.gov/pubmed/18788255> (accessed June 28, 2012).

<sup>127</sup>F. E. Okonofua, "That She May Multiply without Tears," (2006):25, being the Inaugural Lecture delivered by him at the University of Benin, Nigeria, December 7, 2006..

<sup>128</sup>Several complications have been linked to abortion. Abasiattai Anieken M. and Umoiyoho, Aniefiok J., "A 6-Year Review of Maternal Deaths in a Teaching Hospital in South-South Nigeria," *International Journal of Gynaecology and Obstetrics* 11, no.1 (2009): 5; Buowari Debota Yvonne, "Pattern of Gynaecological Admission at a Rural Hospital in Nigeria," *The Internet Journal of Tropical Medicine* 7, no.1 (2010): 5.

<sup>129</sup>Lanre-Abass, "Poverty, Maternal Mortality in Nigeria,"

<sup>130</sup>Abasiattai and Umoiyoho, "A 6 –Year Review of Maternal deaths," 5. See also, Buowari, "Pattern of Gynecological Admission," 5.

<sup>131</sup>Characterized by or involving indiscriminate mingling or association, especially having sexual relations with a number of partners on a casual basis. Dictionary.com. <http://dictionary.reference.com/browse/promiscuous> (accessed July 1, 2012).

All persons do not share the same religion, but all persons possess the same human nature and the same desire for justice. All persons belong to the human race and are endowed with the gift of reason, and are born with conscience, an innate moral law that is God-given and natural; the basis for natural law.<sup>132</sup>

The natural law is one of the oldest moral concepts in the history of civilization. Natural law is not invented or formulated by any man, but discovered as inherent in the structure reality, in the nature of things. The natural law is independent of opinion and not relative to culture. It encompasses individuals of all nations, race and religion and is the basis of international law, what the founding fathers call “the law of nature and nature’s God”<sup>133</sup>

It is the view of these participants that, legalizing abortion is a kind of action which the natural law prohibits<sup>134</sup> because of its resultant effect of making the generality of the people to be promiscuous. To them, adultery and fornication will be the order of the day, and since there is a law to back the people up, abortion will be used to get rid of any resultant pregnancy, which in itself is harm to others (killing the fetuses), as well as harm to oneself (being promiscuous result in harm to one because of sexually transmitted diseases).<sup>135</sup>

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<sup>132</sup>Mitchel Kalpakgian, “The Right to Life and Natural Law,” *Life and Learning IX* (1999) 1-3, <http://www.uffl.org/vol%209/kalpakgian9.pdf> (accessed January 28, 2013).

<sup>133</sup>*Ibid*

<sup>134</sup>From the perspective of natural law, only one criterion is decisive: what the fetus is, not what we want the fetus to be. And since it is a human being, only one conclusion is possible, abortion is not right. Jakob Cornides J. D., *Natural and Un-natural Law* (New York: Catholic Family and Human Rights Institute, 2010), 30.

<sup>135</sup>The environment can have effect on sexual-decision making. Legalizing abortion might affect social conditions and behavioural decisions. It was hypothesized that legalizing abortion lowered the cost of sexual activity leading individuals to engage in more risky sex, causing an increase of gonorrhoea and syphilis incidences. Individuals consider the costs and benefits of sexual activity before engaging in sexual intercourse. Costs include an unplanned pregnancy. The availability of abortion lowers the expected cost of sexual intercourse, because the pregnancy can be aborted in the event of undesired conception. Jonathan Klick and Thomas Stratmann, “The Effects of Abortion



#### **d. Religion**

Religion is a strong social force, a psychological force that can influence the outcomes of individual human lives.<sup>136</sup> For many people, religion and religious norms and values rank among the most significant influences in their lives and are the primary factor in the formulation of their conscience. By their nature, religious traditions impart values to their believers.<sup>137</sup> It was not surprising therefore, to see some of the participants in this study being influenced by their religion. These set of participants will not agree that the right to choose within CEDAW extends to abortion, and will not support the use of the right to choose within CEDAW for the legalization of abortion in Nigeria on the grounds of their religious conviction.

#### **i. Christianity**

For two thousand years, from the beginning of the Roman Empire, the Christian tradition consistently and persistently defended the sanctity of life from conception until death.<sup>138</sup> Historian John T. Noonan writes,

As soon as the Christian community in the Roman Empire became vocal, (from the 2<sup>nd</sup> century on)... they emphatically and unanimously proclaimed their complete rejection of abortion at any stage of

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Legalization on the Incidences of Sexually Transmitted Diseases,” *Journals of Legal Studies* 32 (2008): 407-409.

<sup>136</sup>Michael E. McCullough and Brian L. B. Willoughby, “Religion, Self-Regulation and Self-Control: Associations, Explanations and Implications,” *Psychological Bulletin* 135, no.1 (2009): 69. [http://www.psy.miami.edu/faculty/mmccullough/Papers/Relig\\_self\\_control\\_bulletin.pdf](http://www.psy.miami.edu/faculty/mmccullough/Papers/Relig_self_control_bulletin.pdf) (accessed July 1, 2012).

<sup>137</sup>Mari Rapela Heidt, *Moral Traditions: An Introduction to World Religious Ethics* (Winona MN: Anselm Academic, 2010), 9. Religion is a popular topic to be considered as one of the major factors that affect people’s life style. Wonsub Eum, “Religion and Economic Development- A Study on Religious Variables Influencing GDP Growth over Countries,” being an undergraduate honour thesis submitted to the Economics Department University of California, Berkeley. (2011): 1. [http://econ.berkeley.edu/sites/default/files/eum\\_wonsub.pdf](http://econ.berkeley.edu/sites/default/files/eum_wonsub.pdf) (accessed July 1, 2012).

<sup>138</sup>Kalpakgian, “The Right to Life,” 3.

pregnancy. The grounds were that it was a horrendous evil which would seriously lead to hell.<sup>139</sup>

The Catholic Church has always expressed complete disapproval of abortion, and considers it a grave evil. Christian writers from the 1<sup>st</sup> Century author of the Didache to Pope John Paul in his Encyclical *Evangelium Vitae* ('the gospel of life'), have maintained that the Bible forbids abortion, just as it forbids murder.<sup>140</sup>

The Bible maintains that God values all human life and that He wants all people to come to repentance to inherit eternal life.<sup>141</sup> The Bible further explains that the entire life of a human from the beginning to its natural end is sacred, since it is God that determines the length of those days.<sup>142</sup>

Although the Bible does not specifically define when life begins, it does give us enough information to formulate a solid biblical position. The Old Testament provides most of the information on God's view of life before birth, since it gives us the law. The law specifically addresses the issue of taking the life of a fetus in the book of Exodus;

And if men struggle with the other and strike a woman with child, so that she has a miscarriage, yet there is no further injury, he shall surely be fined as the woman's husband may demand from him; and

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<sup>139</sup>John T. Noonan Jr ed. *The Morality of Abortion: Legal and Historical Perspective* (Cambridge: Havard University Press, 1970), 8.

<sup>140</sup>The Catechism of the Catholic Church, section 2322 states; 'From its conception, the child has the right to life'. Direct abortion, that is abortion willed as an end, or as a means, is a 'criminal' practice, gravely contrary to the moral laws. The Church imposes the canonical penalty of excommunication for this crime against human life'. According to Cardinal Raymond Burke, who heads the highest court of the Vatican, 'any Catholic who publicly supports legislation permitting the gravest injustice should be punished'. Michael W. Chapman, "Catholic Politicians who supports Abortion, 'Not Really Catholic' says Philadelphia's new Archbishop," *cnsnews.com* September 12, 2011, <http://cnsnews.com/blog/michael-w-chapman/catholic-politicians-who-support-abortion-not-really-catholic-says> (accessed July 2, 2012).

<sup>141</sup>Peter 3:9.

<sup>142</sup>Psalms 139:16.

he shall pay as the judges decide. But if there is any further injury, then you shall appoint as penalty life for life.<sup>143</sup>

Therefore, the law tells us that a man who induces an abortion or miscarriage is to be punished, indicating that God values life before birth. Furthermore, the Bible tells us that, God is involved in our creation from the womb; “Did not he who made me in the womb make him and same one fashion us in the womb?”<sup>144</sup> Another verse provides; “Yet thou art He who didst bring me forth from the womb. Thou didst make me trust when upon my mother’s breasts. Upon thee I was cast from birth; thou hast been my God from my mother’s womb”<sup>145</sup> The Bible went further;

From thou didst from my inwards parts; thou didst weave me in my mother’s womb. I will give thanks to thee, for I am fearfully and wonderfully made. Wonderful are thy works, and my soul knows it well. My frame was not hidden from thee, when I was made in secret, and skilfully wrought in the depths of the earth. Thine eyes have seen my unformed substance; And in thy book they were all written, the days that were ordained for me, when as yet there was not one of them.<sup>146</sup>

The participants who use the Christian religion as the basis for the opposition to the right to choose within CEDAW being used as an extension of abortion and also as a justification for the legalization of abortion in Nigeria, believe that fetuses are human beings because, life to them, begins from conception, from the womb.<sup>147</sup>

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<sup>143</sup>Exodus 21: 22-23.

<sup>144</sup>Job 31:15.

<sup>145</sup>Psalms 22: 9-10.

<sup>146</sup>Psalms 139: 13-16; Isaiah 44:2 and Isaiah 44: 24.

<sup>147</sup>The Catholic Church has spoken definitively on when human embryos are to be respected as human beings- that is, from the moment of fertilization (conception), which occurs when 23 chromosomes of the father joins with 23 chromosomes of the mother to form a unique 46 chromosomed individual, with a gender, who had previously not existed. Medical oaths ranging from Hippocratic Oath to the Geneva Declaration of Physicians concur wholeheartedly to this. Also, this signifies the unadulterated biological and embryological stand point. Fritz Baumgartner, MD “Life Begins from the Beginning: A

This being the case, they believe that aborting that fetus amounts to killing a human being, which equals to murder. To them, both abortion and murder is opposed to in the bible,<sup>148</sup> and it was on that basis that they maintained their stand.

## ii. Islam

Islam teaches that human life is sacred, because its origin is none other than God. A very high regard is given to the sanctity of life. The Quran states; “Whosoever has spared the life of a soul, it is as if though he has spared the life of all people. Whosoever has killed a soul, it is as though he has murdered all mankind”.<sup>149</sup>

It is on this basis that, most Muslim scholars would say that a fetus in the womb is recognized and protected by Islam as human life.<sup>150</sup> No wonder, the Holy Quran, the most important source of Islamic Jurisprudence explain the stages of creation of a human within the uterus.<sup>151</sup> It can be said that, the Muslim participants (those who disagree based on Islam) in this study regarded the fetus in the womb of its mother as

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Doctor gives the Scientific fact on when Life Begins,” *Pro-Life America* (2005), [http://www.prolife.com/life\\_begins.html](http://www.prolife.com/life_begins.html) (accessed July 2, 2012).

<sup>148</sup>Thou shall not kill. See, Exodus 20:13. The value of human life as something special, a gift from God, is found throughout the scripture. The commandment, ‘thou shall not kill’ carries with it the corollary responsibility to save and honour life. However, modern western culture has sanctified a form of infanticide. Abortion is internal infanticide: the murder of a child at the most vulnerable time of life. James R. White, “An Eye for an Eye? Exodus and Abortion,” *Christian Research Institute* (2009). <http://www.equip.org/articles/an-eye-for-an-eye-exodus-and-abortion/> (accessed July 2, 2012). This article first appeared in the viewpoint column of the *Christian Research Journal* 27, No.1 (2004), <http://www.equip.org> (accessed July 2, 2012).

<sup>149</sup>Quran 5:32. God directly affirms and declares human life as sacred. Dr Farooq Hassan, “The Sanctity of Life; Faith as the Underpinning of the Family,” Synopsis of address given at First Family Values Congress on 2<sup>nd</sup> and 3<sup>rd</sup> June 2010 at Baden Powell House, 65-67 Queen’s Gate, South Kensington, London., <http://www.greaterdemocracy.org/wp-content/uploads/2010/06/The-Sanctity-of-Life-and-basis-of-Family.pdf> (accessed July 2, 2012).

<sup>150</sup>Islamic Teachings on Abortion (2007) *studymode.com*. <http://www.studymode.com/essay/Islamic-Teachings-Abortion-118221.html> (accessed July 2, 2012).

<sup>151</sup>We created man of an extraction of clay, then we set him a drop in a safe lodging, then we created of the drop a clot, then we created of the clot, a tissue, then we created of the tissue bones, then we covered the bones in flesh: thereafter we produced it another creature. So blessed be to God, the best of creatures. Quran 23:12-14.

a human being. This explains why the participants do not agree that, the right to choose under CEDAW extends to abortion. They also do not support the idea of using the right to choose under CEDAW as the basis for the legalization of abortion in Nigeria.

Aside from the fact that, the fetus is considered as human, the participants (those who disagree based on Islam) viewed abortion as the killing of children, which the Holy Quran has spoken vehemently against.<sup>152</sup> Allah has stated in His Holy Quran;

O Prophet: when believing women come to you give you their pledge not to associate anybody with God in worship, that they shall not steal, that they shall not commit adultery, that they shall not kill their children, that they shall not utter slander, intentionally forge falsehood, and they shall not disobey you in any just cause: then accept their pledge and pray for their forgiveness, for Allah is oft-forgiving Most merciful.<sup>153</sup>

Thus, to the participants in this study (those who disagree based on Islam), abortion which is seen as a method of birth control and the killing of children is not supported as an extension of the right to choose under CEDAW, and should not be used as the basis for the legalization of abortion in Nigeria. The reason for maintaining this stand by the participants cannot be divorced from the fact that, in Nigeria, acts and actions of Muslims are predominantly guided by the Maliki School of Islamic Jurisprudence.<sup>154</sup>

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<sup>152</sup>Although in the Quran, there is no specific mention of abortion, but there are several Quranic verses which discuss on the prohibition of killing the children. Nor Adila Mohd Noor, Mohd Ashraf Aripin and Kamaruzaman Jusoff, "The Detrimental Crime of Abortion: A Comparative Study between Malaysian Law and Common Law," *Journal of Law and Conflict Resolution* 2, no.3 (2010): 048, <http://www.academicjournals.org/JLCR> (accessed July 2, 2012).

<sup>153</sup>Quran 60:12.

<sup>154</sup>Sec14, Shariah Court of Appeal Law (Northern Nigeria Laws Cap 122; 1963 as adopted by all the Northern States of Nigeria, Section 2, Zamfara State Shariah Court Law: 1999, Section 2, Kano State Shariah Court Law: 2000. The Predominant Muslim Law in Nigeria is the Maliki Law. Abdulmumin A. Oba, "Religious and Customary Laws in Nigeria," *Emory International Law Review* 25, (2011): 886; Ikenga K. E. Oraegbunam, "Shariah Criminal Law, Islam and Democracy in Nigeria Today,"

### e. Culture

The participants in this study, who based their stand on culture, are the Yorubas.<sup>155</sup>

To them, women have no right to choose (decide). Hence, the right to choose, being non-existence cannot justify the legalization of abortion in Nigeria.

Basically, under the Yoruba culture, women are supposed to be subordinate to their husbands. No reasonable woman will take a unilateral decision without seeking the consent of her husband. This underlies, why she has no right to choose to decide the number and spacing of her children. Traditionalists believe that a woman is a man's property. In most Yoruba culture, a wife is regarded as 'eru' (slave). To be an 'eru' implies subordination of the woman to the man. It presupposes that a wife is a property to be owned and used as the owner wishes.<sup>156</sup>

Under the Nigerian customary law, women are regarded as near property or chattel of her husband. The husband owns everything. Women are often, if not always reduced to the status of property-less dependents who always have to submit to the

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OGIRISI (2011): 184, <http://www.ajol.info/index.php/og/article/viewFile/71768/60724> (accessed July 4, 2012).

<sup>155</sup>The Yoruba are the largest single ethnic group in Nigeria. The Yoruba constitute approximately 21% of the Nigerian's total population, and numbered upwards of 30 million individuals throughout the region of West Africa. While the majority of the Yoruba live in South-West of Nigeria, there are also substantial Yoruba communities in Benin, Togo, Sierra-Leone, Cuba and Brazil. "Yoruba," Online Nigerian Community Portal of Nigeria, [www.onlinenigeria.com/finance/?blurb=666](http://www.onlinenigeria.com/finance/?blurb=666) (accessed July 4, 2012); Nicole Mullen, "Yoruba Art and Culture" (2004) <http://wysinger.homestead.com/yoruba.html> (accessed July 4, 2012); Dr Arinpe Adejumo, "Technologizing Oral Texts: Archiving Yoruba Oral Literature through new Technological Media," *LUMINA* 20, no.2 (2009): 1. <http://lumina.hnu.edu.ph/articles/adejumoOct09.pdf> (accessed July 4, 2012); Christopher Anyokwu, "Osundare's Poetry and the Yoruba Worldview," *CLCWeb: Comparative Literature and Culture* 13, no.1 (2011): 5 of 9.

<sup>156</sup>Taiwo Makinde, "Motherhood as a source of Empowerment of Women in Yoruba Culture," *Nordic Journal of African Studies* 13, no.2 (2004): 167. <http://www.njas.helsinki.fi/pdf-files/vol13num2/makinde.pdf> (accessed May 10, 2012). The Yoruba nation, like many other African societies is essentially patriarchal; hence men are understood to be more privileged than the women. Such a society is described as that which is characterized by male super ordination and female subordination. Men show superiority over their women counterparts, who are usually relegated to the background. Therefore, socially, politically economically and religiously, women are to a very large extent disadvantaged since decisions were taken mostly by males. O. O. Familusi, "African Culture and the Status of Women: The Yoruba Example," *Journal of African Studies* 5, no.1 (2012): 300.

will of their husbands in order to survive.<sup>157</sup> From time immemorial, Nigerian society has been a patriarchy society. Patriarchy denies women access to and control over decision making.<sup>158</sup> Hence, decision as the number and spacing of children should be left to the husband, or at best, both of them.<sup>159</sup>

This stand of culture on the right to choose of women has negated it being used as the basis for the legalization of abortion in Nigeria. This being the case, the participants (those who use culture as their basis) still went ahead to express their views on the legalization of abortion in Nigeria which to them, does not accord with the Yoruba culture. This is because, human personhood for the Yoruba begins at pre-conception and the act of abortion is ethically condemnable in Yoruba ethics.<sup>160</sup>

Arguably, the Yoruba from all indications will want to say that life begins from pre-conception, and that the fetus is a potential human being.<sup>161</sup> The Yoruba will not want to consider abortion as a right because of their attitude towards child bearing, marriage, care and love for children, as well as their attitude towards the pregnant woman at the various stages of pregnancy.<sup>162</sup>

They believe that children are the survival of the race and family. This explains the reason why, under the Yoruba culture, no child is unwanted or unplanned. Even

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<sup>157</sup>Austin Obinna Ezeji for "Partriarchy, Marriage and the Rights of Widows in Nigeria," *Unizik Journal of Arts and Humanities* 12, no.1 (2011): 146. <http://www.ajol.info/index.php/ujah/article/viewFile/71750/60707> (accessed May 11, 2012).

<sup>158</sup>Titilayo Cordelia Orisaremi and Ogoh Alubo, "Gender and Reproductive Rights of Tarok Women in Central Nigeria," *African Journal of Reproductive Health* 16, no.1 (2012): 84. <http://www.ajol.info/index.php/ajrh/article/viewFile/75952/66444> (accessed June 24, 2012).

<sup>159</sup>Few women are said to take decision singly or jointly with their husbands as regards child spacing. F. A. Kuponiyi and O. A. Alade, "Gender Dynamics and Reproduction Decision-Making among Rural Families in Orire Local Government Area of Oyo State," *Journal of Social Science* 15, no.2 (2007): 104, <http://www.krepublishers.com/02-Journals/JSS/JSS-15-0-000-000-2007-Web/JSS-15-2-000-000-2007-Abst-Text/JSS-15-2-101-07-366-Kuponiyi-F-A/JSS-15-2-101-07-366-%20Kuponiyi-F-A-Tt.pdf> (accessed June 24, 2012)

<sup>160</sup>Dr Ebinoluwa O. Oduwole, "Personhood and Abortion: An African Perspective," *LUMINA* 21, no.2 (2010): 1, <http://lumina.hnu.edu.ph/articles/oduwoleOct10.pdf> (accessed July 4, 2012).

<sup>161</sup>*Ibid*

<sup>162</sup>*Ibid*

children born out of wedlock had no negative stigma attached to them. A new child is always welcome. The death of a fetus however, is viewed as a bad sign and calamity. The Yoruba strongly believe that one does not know the child that will take care of the parents at old age, so discrimination against any child even those unborn is always discouraged.<sup>163</sup> This shows that, children are like social security in the Yoruba culture.<sup>164</sup>

Culturally, therefore, abortion cannot be legalized in Nigeria on the basis of the right to choose for women because, women don't have such a right, and more importantly because it is a taboo.<sup>165</sup>

#### **f. Murder**

Under the common law, murder was usually viewed as the unlawful killing of human being with malice aforethought.<sup>166</sup> Hence, when a child dies in circumstance 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 him.<sup>167</sup>

It is on this basis that, some of the participants in this study viewed that; the right to choose within CEDAW does not extend to abortion, and at the same time cannot justify the legalization of abortion in Nigeria.

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<sup>163</sup>*Ibid*

<sup>164</sup>Child care under Yoruba culture sometimes appears like ritual. Culturally, child health protection is viewed as a form of investment. The care of children under Yoruba culture is reciprocal in the sense that investment in children would bring about social security for parents at old age. This is expressed in a Yoruba adage, '*bi okete ba dagba tan omu omo re nii mu*', which literally means, 'a rabbit sucks from its offspring at old age'. This is a metaphor indicating parents' dependence on children at old age. Dr Ayodele Samuel Jegede, "The Cultural and Political Dynamics of Technology Delivery: The Case of Infant Immunization in Southwest Nigeria," *West African Social Science and Immunization Network (WASSIN) Paper 3* (2004): 5, <http://www.ids.ac.uk/files/VaccJegedeNigeria.pdf> (accessed July 7, 2012).

<sup>165</sup>Something forbidden for religious reason or, because it is against social custom; The Free Dictionary, <http://www.thefreedictionary.com/taboo> (accessed July 7, 2012).

<sup>166</sup>The Free Dictionary, <http://legal-dictionary.thefreedictionary.com/murder> (accessed July 7, 2012). Malice aforethought referred to a level of intent or recklessness that separate murder from other killings warranting a stiffer punishment.

<sup>167</sup>Sec 309 Criminal Code Act Cap 77 Laws of the Federation of Nigeria 1990.



To these participants, murder is murder no matter how it is being carried out. It is murder whether you kill a 10 year old, a 65 year old and even a baby in the womb, and it does not matter how you kill. It is again murder if you kill with a bow and arrow, a gun, or even causing the abortion of a baby in the womb. They therefore linked abortion with *boko haram*.<sup>168</sup> They felt that, the killings done by the *boko haram* sect in Nigeria is the same as the killings done by abortionists, and felt that, under no circumstances should the government give anybody the license to kill.

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<sup>168</sup>*Boko Haram* was founded by Mohammed Yusuf in the city of Maiduguri in 2002 and converted into salafisttakfriri jihadist group in 2009. According to their religious philosophy, they abhor western education and working in civil service. The sect propagated that the interaction with western world is haram and oppose Christians. Boko Haram is trying to impose Shariah law in Northern Nigeria. After the killing of Mohammed Yusuf, Boko Haram carried out its first terror attack in Borno in 2010 which resulted in the killing of four civilians. In 2012, Abubakar Shehu took control of the group and under his leadership, group's terror cell killed more than 900 innocent people. Boko haram is considered a terrorist sect in Nigeria. Boko Haram is responsible for the many bombings of Churches in the past two years. Just two months after targeting the UN office in Abuja, the sect launched series of attacks in Northern Nigeria Military Hesd Quarter and in Maiduguri. Musa Khan Jalazai, "Boko Haram and Sectarian Terrorism in Nigeria," *Daily Outlook Afghanistan* June 18, 2012, [http://outlookafghanistan.net/topics.php?post\\_id=4631](http://outlookafghanistan.net/topics.php?post_id=4631) (accessed July 7, 2012). Horrific violence is being perpetrated by this militant sect. Tokunbo Adedaja, "25 US Scholars move to stop Boko Haram Designation," *This Day Live* May 25, 2012. <http://www.thisdaylive.com/articles/24-us-scholars-move-to-stop-boko-haram-s-designation/116556/> (accessed July 7, 2012).

Table 5.8

Subthemes of Extension and Justification

Extension	1	13	14																
Right	1	13	14																
Not Extension	2	3	4	5	6	7	8	9	10	11	12	15	16	17	18	19	20	21	
Complications	2	7	8	9	10	11	12												
Morality	20	21																	
Religion	6	10	12	16															
Culture	20	21	2	4	6														
Murder	20	21																	
Basis for Legalization	13	14																	
Not Basis for Legalization	1	2	3	4	5	6	7	8	9	10	11	12	15	16	17	18	19	20	21
Facilities	1	3																	
Morality	2	4	6	20	21														
Religion	6	16																	
Culture	20	21																	
Extinction of World	4	5																	
Taboo	20	21																	

Focus Group Sessions

Not Extension	FGS 1	FGS 2
Not Basis For Legalization	FGS 1	FGS 2
God's Injunction	FGS 1	FGS 2

- Source: Field Work 2012
- Numbering in the table represents the key informants (KI)

This table reveals that some of the participants believed that the right to choose under CEDAW is an extension of abortion on the basis that it is a woman's right. These set of people supports the right to choose being used as the basis for which abortion is to be legalized in Nigeria.

However, majority of the participants do not agree that the right to choose under CEDAW is an extension of abortion because of issues like, complications, morality, religion, culture and crime. This being the case, these set of participants do not agree that the right to choose under CEDAW should be the basis for which abortion is to be legalized in Nigeria. The reasons given for their stand include, lack of medical facilities in Nigerian hospitals, morality, religion, culture, world extinction as well as taboo.

The numberings within the tables represents the key informants that identified with the subthemes as stated. The emerging subthemes in the focus group session replicate those of the key informants. Thus, while both group discussions hold strongly on God's injunctions on abortion, both groups do not subscribe to the right to choose under CEDAW being an extension of abortion and also should not be the basis for which abortion is to be legalized in Nigeria.

The holistic interpretation that can be given to the views as expressed by majority of the participants is that, since the right to choose under CEDAW cannot be extended to the right to abort, and therefore cannot justify legalization for abortion in Nigeria, then the right to life should be accorded to the unborn via the right to choose to reproduce.

## **5.4 Conclusion**

The right to choose under CEDAW does not only mean the right to choose to reproduce, but also does not support the right to choose to abort because, the right to life for the unborn child is paramount. Hence, this study has supported the law that criminalizes abortion instead of the law that legalizes it for many reasons:

### **5.4.1 Conceptual Aspects**

The Constitution of the Federal Republic of Nigeria by its provisions have given due recognition to the dignity and sanctity of the human person. Consequently, the State shall protect, preserve and promote the Nigerian cultures which enhanced the dignity of human persons. Furthermore, all laws in operation in the country must conform to the provision of the Constitution. This means that, the Criminal laws of the countries must conform to the spirit and letters of the Constitution by prohibiting all conducts that are against the dignity and sanctity of human persons. One of such conducts is abortion.

Consequently, the right to choose under CEDAW cannot be looked up to as representing the right to abort. The right to choose as comprised under CEDAW should respect the dignity and sanctity of human person by encouraging the right to choose to reproduce, and by extension, right to life for the unborn.

According to the Worldwide Medical Code and Medical Ethics, by the Hippocratic Oath, the physicians should not take with impunity legally or illegally, the lives of the defenceless ones: the fetus and the unborn child. This further shows that abortion should be criminalized.

#### **5.4.2 Practical Aspects**

Law that criminalizes abortion is a welcome development when looked at from the angle of religion, tradition, culture as well as the understanding background of the society. Nigerians generally, based on their orientation will want to see the right to life being accorded to the unborn children. This can be made possible through the right to choose to reproduce granted under CEDAW. This will further buttress the African content and context within which Nigeria finds herself.

This chapter has dealt with the result of findings of the field work. The result of the findings tallied with the initial preposition for this study suggesting that the right to life be accorded to the unborn child. This will be made possible if the right to choose under CEDAW is viewed as the right to reproduce, instead of the right to abort.

## CHAPTER SIX

### CONCLUSION AND RECOMMENDATIONS

#### 6.1 Conclusion

This work started with the urge of the researcher to know the rationale behind the constant agitation for the legalization of abortion in Nigeria on the basis of the right to choose under CEDAW. The researcher was quite particular about the high rate of maternal mortality and morbidity as a result of abortion in Nigeria, and was very optimistic that, an international human rights instrument, like CEDAW cannot be used to perpetrate such act like abortion.

Despite the fact that the researcher was aware of the general notion about the right to choose under CEDAW being taken to mean abortion, the researcher was never deterred in finding a gap, which most researchers never avert their minds to, and that is suggesting to the world, that the right to choose under CEDAW can never stand for abortion, rather it stands for reproduction. To accomplish this aim, a socio-legal research went underway wherein, both conceptual and empirical analyses were employed. The researcher therefore, set out on a mission of fact finding by asking definite research questions and setting out precise objectives.

The conceptual analysis of the study set out to use the law to justify the claims by the researcher that the right to choose under CEDAW represents the right to reproduce instead of the right to abort. This confirms the criminalization of abortion except done to save the life of the mother.

Consequently, it was revealed that, all international human rights instruments including CEDAW was established on the basis of natural law, which recognizes the dignity, sanctity and worth of human persons, from which the right to life is thereby granted to everyone including the unborn child. This answer has negated the need to legalize abortion in Nigeria on the basis of the right to choose under CEDAW, an international human rights instrument. Here, the first research question was answered leading to the realization of the first objective of the study.

Using the Constitution of the Federal Republic of Nigeria as the basis, it was revealed that, the cultures of Nigeria which enhances the dignity and sanctity of human persons will be promoted by the country. Therefore, if the right to choose under CEDAW is interpreted to mean the right to abort, CEDAW cannot be implemented in Nigeria, because by that interpretation, the dignity of human person is subsumed. Here, the application of CEDAW within the ambit of the Constitution of Nigeria was examined, leading to the realization of the second objective of the study.

The combined effect of all the rules of interpretation of treaties pointed out to just one conclusion, that giving the words the right to choose under CEDAW their ordinary, contextual as well as object and purposeful meaning, abortion right was never contemplated by the parties to the CEDAW agreement. This is more so, when interpreting those words in good faith. Thus, the right to choose under CEDAW represents the right to choose to reproduce, thereby according the right to life for the unborn. Here, an alternative interpretation has been suggested for the right to choose under CEDAW, and consequently, the third objective was realized.

The relationship between criminal law and abortion was examined and it was realized that, the criminalization of abortion in Nigeria has its basis in the Constitution of the Federal Republic of Nigeria which has provided for the dignity and sanctity of human persons. It was revealed that, the Criminal laws of the country must abide by the Constitution. Thus, the Criminal laws must as a matter of necessity criminalize abortion in order to uphold the dignity and sanctity of human persons. By so doing, the right to life for the unborn is being guaranteed by the Criminal laws of the country. The realization of the fourth objective was thus, accomplished.

Having realized the four objectives above, the researcher still went ahead to conduct a field work to support the conceptual analysis. Hence, a case study was carried out to analyse the views of certain social actors on the right to choose under CEDAW being used as the basis for which abortion is to be legalized in Nigeria. The findings of the study supported the conceptual analysis, by showcasing how the right to choose under CEDAW is understood and interpreted in Nigeria taking into account the constitutionality of it, the cultural and religious background of the people of Nigeria. This led to the realization of the fifth objective.

Having realized the fifth objective above, the researcher went ahead to make some recommendations based on the overall findings of this research. These recommendations were dealt with in the next caption. By so doing, the sixth objective of this research was achieved. In the course of this study, it was founded out that, both conceptually and empirically, the right to choose under CEDAW is not synonymous with abortion rights.

In sum, a fact finding mission on the analysis of the right to choose in relation to abortion in Nigeria, using CEDAW as a case study, is hereby completed with a solid



proof asserting that the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) can be used to perpetrate the recognition of the right to life for the unborn in Nigeria by its provision of the right to choose for women.

It has been imagined by the researcher that law might not be the only solution to the problems discussed in this research hence; recommendations which covers both legal and social solutions were proposed based on the findings of this research.

## **6.2 Recommendations**

### **6.2.1 Legal Recommendations**

#### **a. Continued Criminalization of Abortion**

The Constitution of the Federal Republic of Nigeria as the grundnorm is the leading agent in the continued criminalization of abortion by its recognition of sanctity and dignity of human persons.<sup>169</sup> Hence the Criminal laws of the country must as a matter of compliance follow the dictates of the Constitution.

Nigeria is one of the few countries in the world with restrictive abortion laws.<sup>170</sup> Termination of pregnancy is highly restricted under both the Penal Code (applicable in the North) and Criminal Code (applicable in the South) and carries heavy jail term of up to 14/years for the provider and 7/years for the woman, unless it is performed to save the life of the woman.<sup>171</sup>

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<sup>169</sup>Chapter 2 of the Constitution of the Federal Republic of Nigeria. Also, sections 33 and 34 of the Nigerian Constitution.

<sup>170</sup>A recent study (2007) by Allan Guttmacher Institute (AGI) categorized abortion laws around the world and came out with the conclusion that, 25% of the world population live in countries where abortion is restricted, and 61% of the world population live in countries where abortion is allowed.

<sup>171</sup>Secs 232,235 Penal Code and secs 228, 229 and 230 Criminal Code.

The continued criminalization of abortion will further uphold the sanctity and dignity of the life of the most vulnerable-- the unborn child. In addition, it will also serve to assist the Nigerian government in the formulation and implementation of reproductive right policies as it relates to abortion.

Subsequent laws and policies in the area of reproductive rights in Nigeria will have to take a queue from the provisions of the Constitution, and by extension, the Criminal Laws. The continued criminalization of abortion in Nigeria is therefore, the first step in the proper interpretation and understanding of the right to choose provision within CEDAW.

**b. Complete Abrogation of Recommendation 24 of CEDAW Committee**

The Committee on the Elimination of Discrimination against Women was established to monitor state parties' compliance with the obligations under the convention. It also gives general recommendations on issues affecting women that deserve more attention by state parties.<sup>172</sup> Furthermore, General Recommendations of CEDAW Committees are interpretations of an accord to assist state parties in implementing their obligations.<sup>173</sup>

However, contrary to its supposed duty and contrary to the provisions of Articles 12 and 16 of CEDAW itself, Recommendation 24 of CEDAW Committee has included

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<sup>172</sup>“CEDAW and the Reporting Process to the Committee on the Elimination of Discrimination against Women: A Guide for UNICEF field Staff,” (2009): 7 <http://www.crin.org/docs/CEDAW.pdf> (accessed April 16, 2012).

<sup>173</sup>Hanna Beate Schopp-Schilling, “The Role of the Convention on the Elimination of all forms of Discrimination against Women and its Monitoring Procedures for Achieving Gender Equality in Political Representation,” being a paper presented at the International Institute of Democracy and Electoral Assistance (IDEA)/CEE Network for Gender Issues Conference, Budapest, Hungary, October 22-23 (2004): 3, [http://www.quotaproject.org/CS/CS\\_Cedawbudapest04BSS.pdf](http://www.quotaproject.org/CS/CS_Cedawbudapest04BSS.pdf) (accessed January 31, 2013).

abortion, because by its wordings, state parties should not criminalize any medical procedure needed by only women. The only medical procedure needed by women as far as reproductive right is concerned is abortion.<sup>174</sup>

This interpretation by Recommendation 24 of CEDAW Committee is misleading. It is the main reason why abortion interpretation is given to the right to choose under CEDAW, because going by the wordings of Articles 12 and 16 of CEDAW, abortion was never mentioned. It is based on this fact that, it is here recommended that, Recommendation 24 of CEDAW Committee be abrogated with immediate effect in order for CEDAW to propagate its real message of the right to choose to reproduce for women. This in the main will improve on the substance to be given to the interpretation of the right to choose under CEDAW as far as Nigeria is concerned. The abrogation of Recommendation 24 will further enhance the right to life of the unborn.

Since the Convention on the Elimination of all Discrimination against Women (CEDAW) is a creation of the United Nations,<sup>175</sup> the only way to abrogate the CEDAW recommendation 24 is a declaration by the United Nations specifying that the language, ‘reproductive rights’ under CEDAW exclude abortion.<sup>176</sup> By this single act, the CEDAW recommendation 24 becomes irrelevant.

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<sup>174</sup>Abortion continued to be the most commonly privately funded medical procedure. Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart, 2001), 85.

<sup>175</sup>United Nations General Assembly adopted the Convention on the Elimination of all forms of Discrimination against Women, (CEDAW) on the 18<sup>th</sup> December 1979.

<sup>176</sup>Susan Yoshihara, “Lost in Translation: Failure of the International Reproductive Right Norm,” *Ave Maria Law Review* 11, no. 2 (2013): 406.

### **c. Immediate Domestication and Implementation of CEDAW**

According to the views expressed by the participants in this study, it does look extremely important for the Nigeria Government to look into the possibilities of urgently domesticating and implementing CEDAW on the grounds of health. The participants had expressed the view that the right to choose under CEDAW meant the right to reproduce, and not the right to abort.

Affording women in Nigeria the advantages of the right to choose to reproduce under CEDAW meant deciding freely and responsibly on the number and spacing of their children. This amounts to health for the women and consequently, health for the children. Once women are healthy, they will produce healthy children, which also presuppose that the right to life be accorded to the unborn children in Nigeria.

Nigeria is currently being operated on a National Health Policy with a central goal to bring about the most comprehensive health care system, based on Primary Health Care<sup>177</sup> that is promotive, protective, preventive, relative and rehabilitative, to every citizen of the country within the available resources so that every individual and communities are assured of productivity, social well-being and enjoyment of living.<sup>178</sup>

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<sup>177</sup>Primary Health Care as defined by the World Health Organisation in 1978 as, essential health care based on practical, scientifically sound and socially acceptable method and technology, universally accessible to all in the community through their full participation at an affordable cost, and geared towards self-reliance and self-determination. World Health Organization, Alma-Ata Declaration of 1978, adopted by the International Conference on Primary Health Care, jointly sponsored by WHO and UNICEF, 1978, Principle VII. <http://www.righttohealthcare.org/Docs/DocumentsC.htm> (accessed Jun 10, 2012); Menizibeya Welcome Osain, "The Nigerian Health Care System: Need for Integrating Adequate Medical Intelligence and Surveillance Systems," *Journal of Pharmacy and BioAllied Sciences* 3, no. 4 (2011) <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3249694/> (accessed January 5, 2013).

<sup>178</sup>Ganiat Mobolaji Olatokun, Rusniah Ahmad and Harlida Abdul Wahab, "Making a Case for the Domestication of CEDAW in Nigeria: Empirically and Conceptually Justified," *Journal of Law, Policy and Globalization* (2014).

Health, in the Constitution of the Federal Republic of Nigeria 1999, can be found under the Concurrent Legislative List. The implication of this is that, the three tiers of Nigerian Government are vested with the responsibilities to promote and ensure health for all Nigerians. Accordingly, the federal, state and local governments of Nigeria shall support, in a coordinated manner, a 3-tier system of health care. Primary health care is to be provided by all the local governments, secondary health care is the responsibility of all the state governments, while tertiary health care becomes the sole burden of the federal government.<sup>179</sup>

Within the eight (8) important elements of Primary Health Care lies the identification and control or prevention of health challenges. Also, within these elements is, maternal and child care, including family planning. With these two issues forming an essential part of the Constitution of the Federal Republic of Nigeria 1999, reproductive right of Nigerian women can be said to be guaranteed under the Constitution.

Hence, by domesticating and implementing CEDAW on the grounds of health, the Nigerian Government will also be helping in ascribing to the right to choose under CEDAW, the right to reproduce interpretation, and consequently the right to life for the unborn child. This will show that CEDAW will be operating within the ambit of the Nigerian Constitution where paramount importance is given to the dignity of all human persons.

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<sup>179</sup>Federal Ministry of Health (Nigeria) *National Health Policy and Strategy to achieve health for all Nigerians*. (12-13, 53, Sec 5(a)-(c), Annex II (1998); World Bank *Working Papers: Improving Primary Health Care Delivery in Nigeria: Evidence From Four States*, (World Bank Publication, 2010). 33; Federal Ministry of Health (FMH), *National Health Policy Strategy to achieve health for all Nigerians* (Lagos, Nigeria: FMH 1998; Revised National Health Policy Abuja, Nigeria: FMH, 2004).

## **6.2.2 Social Recommendations**

### **a. Guidance and Counselling Units in Hospitals**

Orji Kalu, a former governor of Imo State, Eastern Nigeria, once said that women resort to abortion, not because they were exercising free choice, but because they felt they had no choice.<sup>180</sup> This being the case, the key informant 1 (KI1) of this research, who happens to be a medical practitioner narrated his experience and came to suggest that Nigerian hospitals are in dire need of a guidance and counselling unit where women will be handled by professional counsellors telling them about the dangers associated with abortion. With this done, women will feel that they have a choice to keep their babies safe and alive.

According to KI1, most of his patients, mostly teenage girls came to him in a confused state of mind, believing that abortion was the best solution for them. Most, if not all, are still in school and they are scared of what the society will say about them, especially their parents. He found out that his patients needed somebody to talk to, somebody to share their feelings with. KI1 engages in a heart-to-heart talk with his patients telling them about life as well as appealing to their conscience. With a great sign of happiness and relieve, KI1 informed me that, all his patients left his hospital feeling relieved and determined to face the situation. Based on this fact, it is hereby recommended that, Nigerian hospitals should be equipped with guidance and counselling unit, where women seeking to abort their babies can first be attended to.

Counselling is the service offered to an individual who is undergoing a problem and needs professional help to overcome it. The problem keep him/her disturbed, high

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<sup>180</sup> Orji Kalu, "Legalization of Abortion? No Way," <http://www.sunnewsonline.com/webpages/colomnists/kalu/kalu/20-june-html> (accessed March 22, 2011).

strung and under tension and unless solved, his development is hampered or stunted. Counselling involves two individuals, one seeking help and the other a professionally trained person who will help in solving the problem, to orient and direct him/her towards a goal.<sup>181</sup>

Guidance and counselling unit within a hospital can help prevent millions of teenagers from wanting to procure an abortion. Guidance and counselling unit in a hospital environment can help influence behaviour of women towards having an abortion.<sup>182</sup> It will perform the function of letting the women know that they can confront the situation in which they find themselves.<sup>183</sup> Consequently, abortion will never occur to them as an option.

#### **b. Sex Education in Schools and Homes**

Much of the problems associated with women's health in Nigeria begin at the time of adolescence, leading to adverse consequences and miseries in later life. Nigerian adolescence are increasingly becoming sexually active and due to lack of adequate information, they are at risk of unwanted pregnancy and criminal abortion.<sup>184</sup> Of all

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<sup>181</sup>The term 'guidance and counselling' can be defined as an interaction process co-joining the counselee, who is vulnerable and needs assistance and the counsellor who is trained and educated to give his assistance, the goal of to deal more effectively with himself and the reality of his environment. See, Jack O. Ajowi and Enose M.W. Simatwa, "The Role of Guidance and Counselling in Promoting Student Discipline in Secondary Schools in Kenya: A Case Study of Kisumu District," *Educational Research and Reviews* 5, no. 5 (2010): 263.

<sup>182</sup> It has been revealed that training clinicians in psychological behaviour change techniques such as if-then planning can be effective in influencing contraceptive consultation patterns among teenage women. Family planning clinicians were trained to provide one-to-one behaviour change counselling to deprive teenage women. Jilly Martin, Pauline Slade, Paschal Sheeran, Allison Wright and Tracy Dibble, "If-Then' Planning in One-To-One Behaviour Change Counselling is Effective in Promoting Contraceptive Adherence in Teenagers," *Journal of Family Planning and Reproductive Health Care* 37, (2011): 85-88. [www.ncbi.nlm.nih.gov/pubmed/21454260](http://www.ncbi.nlm.nih.gov/pubmed/21454260) (accessed December 18, 2012).

<sup>183</sup> Guidance plays a vital role in preventing social and emotional problems among secondary school students. Joshua A. M. and Esuong A. E, "Attitude of Secondary School Students Towards Guidance and Counselling Services in Cross-River State," *Edo Journal of Counselling* 3, no. 1 (2010): 87-88. The UNESCO module on guidance and counselling (2000a) posited that guidance is a programme of services to individual based on their needs and the influence of environmental factors.

<sup>184</sup> Unsafe abortions are often the result of unwanted pregnancies. This trend is profoundly demonstrated among adolescents. In Nigeria, up to 80% of patients with abortion-related complications are adolescents. Dr E D Nakpodia, "The Relevance of Sex Education in Secondary

maternal deaths, 50% occurs as a result of criminal abortions, particularly in teenage and young women.<sup>185</sup>

In order to ensure that youth are equipped with the information, motivation or personal insight and skills to protect their sexual and reproductive health, it is imperative that schools, in cooperation with parents, the community, counsellors in schools and also healthcare professionals, play a major role in sexual health education and promotion.<sup>186</sup>

The most important prevention of unwanted pregnancy is to educate oneself about unwanted pregnancy and be able to devise methods of preventing the occurrence. In order to help prevent girls from becoming pregnant, introduction and teaching of sex education in school by teachers, health educators or health workers and at homes by parents, is very important.<sup>187</sup> Study has revealed the need for increased roles of parents and teachers in early sexuality education of adolescent girls. This can be done by increasing capacity of parents to discuss sexuality issues with their children.<sup>188</sup>

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School Curricular in Abraka Metropolis, Delta State, Nigeria,” *Scholarly Journal of Business Administration* 22, (2012): 38. <http://scholarly-journals.com/jba/Nakpodia%20PDF.pdf> (accessed May 12, 2012).

<sup>185</sup>This statement was made by the then minister (Late Professor Olikoye Ransome-Kuti) at the 37<sup>th</sup> meeting of the National Council of Health held in Lagos, Nigeria from the 28<sup>th</sup> October to 1<sup>st</sup> November 1991; The background to the seminar on Critical Issues in Reproductive Health Prevention of Morbidity and Mortality from Induced and Unsafe Abortion in Nigeria. Proceedings of a Seminar Organized by the Department of Obstetrics, Gynaecology and Perinatology, Obafemi Awolowo University, Ile-Ife, Nigeria (4-9 December 1991) 9.

<sup>186</sup>Sex education programmes should be held for young people in secondary schools to help their self-worth, sense of responsibility, understanding and acceptance of diversity and sexual health. Nakpodia, “The Relevance of Sex Education,” 36-37; Ijioma B. C, Ngumah M. O and Egeruoh A. S, “The Integration of Sexuality Education in Secondary School Biology Curriculum for Sustainable Development: Teachers Perception,” *International Journal of Science and Technology Education Research* 2, no.4 (2011): 66.

<sup>187</sup>Olaitan O. Lanre, “Perception of University Students on Unwanted Pregnancy in South West Nigeria,” *American Journal of Social and Management Sciences* 1, no.2 (2010): 196-197.

<sup>188</sup>Ugochukwu U Onyeonono, Daniel C. Oshi, Eugene C. Ndimele, Nneoma C. Chukwu, Ifuanya L Onyemuchara, Sandra C. Ezekwere, Sarah N Oshi and Obiageli F Emelumadu, “Sources of Sex Information and its Effect on Sexual Practices Among In-School Female Adolescent in Osisioma Ngwa LGA South East Nigeria,” *Journal of Paediatric and Adolescent Gynaecology* 24, no.5 (2011):



Early sex education by teachers in schools and parents at home can help prevent Nigerian adolescents from unwanted pregnancies, and consequently, prevent them from seeking abortion clandestinely.

### c. Massive campaign against Abortion by Nigerian Government

Haemorrhage, sepsis, toxæmia and complications from abortion account for 62% of maternal deaths in Nigeria.<sup>189</sup> On the other hand, Nigeria alone accounts for nearly 25% of the total malaria burden within Africa.<sup>190</sup> Malaria is endemic in this country with year-round transmission and as much as 90% of population is at risk of malaria. In Nigeria, malaria accounts for approximately 60% of outpatient visits, 30% of all hospitalization and up to 11% of all maternal mortality, 25% of all infant mortality and 30 % of under-five mortality.<sup>191</sup>

In the last two years, Nigeria has made dramatic progress in the scale-up for impact (SUF) of malaria prevention and control activities. In 2009, the Nigeria Ministry of Health, committed to an ambitious goal of reducing the national malaria burden by

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294. There is the need to introduce sex education in school before Junior Secondary School level and at home, sex education may have greater impact if provided before the age of 14/years. Ochiogu I. N, Miettola J, Ilika AL and Vaskilampi T, "Impact of Timing of Sex Education on Teenage Pregnancy in Nigeria: Cross-Sectional Survey of Secondary School Students," *Journal of Community Health* 36, no. 3 (2011): 375-380. <http://www.ncbi.nlm.nih.gov/pubmed/20924781> (accessed December 18, 2012).

<sup>189</sup>Ogunjimi Lucas Olusegun, Ibe Rosemary Thomas and Ikorok Maria Michael, "Curbing Maternal and Child Mortality: The Nigerian Experience," *International Journal of Nursing and Midwifery* 4, no.3 (2012): 33, 35. <http://www.academicjournals.org/ijnm/PDF/pdf2012/April/Ogunjimi%20et%20al.pdf> (accessed December 18, 2012).

<sup>190</sup>WHO, World Malaria Report 2009 World Health Organization: Geneva. [http://whqlibdoc.who.int/publications/2009/9789241563901\\_eng.pdf](http://whqlibdoc.who.int/publications/2009/9789241563901_eng.pdf) (accessed December, 18 2012); Summary Proceedings, 2<sup>nd</sup> Annual Malaria Control Programme Review Ethiopia and Nigeria held at Carter Centre, Atlanta Georgia on February 25<sup>th</sup> 2011, 26. [http://www.cartercenter.org/resources/pdfs/news/health\\_publications/malaria/2011-summary-proceedings.pdf](http://www.cartercenter.org/resources/pdfs/news/health_publications/malaria/2011-summary-proceedings.pdf) (accessed December 18, 2012).

<sup>191</sup>National Population Commission (NPC) and ICF Macro: Abuja, Nigeria, "Nigeria Demographic and Health Survey 2008," <http://www.measuredhs.com/pubs/pdf/FR222/FR222.pdf> (accessed December 18, 2012); Summary Proceedings, 2<sup>nd</sup> Annual Malaria Control Programme Review Ethiopia and Nigeria held at Carter Centre, Atlanta Georgia on February 25<sup>th</sup> 2011, 26. [http://www.cartercenter.org/resources/pdfs/news/health\\_publications/malaria/2011-summary-proceedings.pdf](http://www.cartercenter.org/resources/pdfs/news/health_publications/malaria/2011-summary-proceedings.pdf) (accessed December 18, 2012); There are an estimated 100 million malaria cases with over 300,000 deaths per year in Nigeria; Nigeria Malaria Fact Sheet, United States Embassy in Nigeria, December 2011 <http://photos.state.gov/libraries/nigeria/231771/Public/December-MalariaFactSheet2.pdf>. (accessed December 18, 2012).

50% by using a combination of proven malaria control and prevention strategies: increasing the availability and appropriate use of accurate diagnostic technologies, improving the quality of malaria case management with ACTs (Artemisinin-based Combination Therapy), distributing long-lasting insecticide-treated bed nets and providing consistent delivery of intermittent preventive treatment to pregnant women.<sup>192</sup> The current malaria control effort in Nigeria will be the largest public health intervention ever to be launched by a country against a single disease.<sup>193</sup>

If such an effort can be taken by the Nigerian government against malaria, which is as deadly as abortion, then nothing stops the federal ministry of health in Nigeria to launch the same massive campaign against abortion. This action by the government will discourage women from making abortion a choice.

In the same vein, it has been suggested by key informant 20 (KI20) of this research that, Nigerian government should intensify its effort in fighting against abortion the same way it is fighting against ‘*boko haram*’,<sup>194</sup> because murder is murder. Such an

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<sup>192</sup>The Nigerian Federal Ministry of Health, “NMCP Strategic Plan for Malaria in Nigeria, 2009-2013 Abuja, Nigeria,” [http://www.pmi.gov/countries/mops/fy12/nigeria\\_mop\\_fy12.pdf](http://www.pmi.gov/countries/mops/fy12/nigeria_mop_fy12.pdf) (accessed December 18, 2012). 13,653,238 LLINs (Long-lasting Insecticide treated nets) were distributed in 9 states in 2009. In 2010, Nigeria distributed an additional 15,293,417 LLINs in the context of mass campaigns conducted in 10 states; “2<sup>nd</sup> Annual Malaria Control Programme Review Ethiopia and Nigeria”

<sup>193</sup>*Ibid.*

<sup>194</sup> This is the name of a sect presently constituting a form of nuisance all over Nigeria. They appear to be invisible and untouchable. They carry on mass killings of innocent people by throwing bombs all over Nigeria. News had it that they were responsible for the bombing of several executive offices and churches. They claim to be a sect fighting for the cause of Islam. The government of Nigeria is leading the fight against these terrorists. Over the last 20 months, boko haram has committed a lot of atrocities. BBC News Africa, 2<sup>nd</sup> May 2012. <http://www.bbc.co.uk/news/world-africa-17926097> (accessed May 28, 2012). More recently, on 25<sup>th</sup> November 2012, *boko haram* attacked a church in Jaji, Kaduna State using two suicide bombers during the church’s weekly religious service. The first bomb killed 30 people, while the second bomb is responsible for majority of the deaths. In the wake of the Jaji attacks, media reports quoted human right group saying that, *boko haram* has killed more people in 2012 than ever before. The group has killed roughly 770 people this year alone. [www.billoreilly.com](http://www.billoreilly.com) (accessed December 19, 2012). Going by the latest report from Human Right Watch (HRW), about 935 has been killed since 2009. Professor Adagba Okpaga, Ugwu Sam Chijioko and Eme Okechukwu Innocent, “Activities of Boko Haram and Insecurity Question in Nigeria,” *Arabian Journal of Business and Management Review (Oman Chapter)* 1, no.9 (2012): 77. [http://www.arabianjbm.com/pdfs/OM\\_VOL\\_1\\_\(9\)/6.pdf](http://www.arabianjbm.com/pdfs/OM_VOL_1_(9)/6.pdf) (accessed December 19, 2012).

effort will discourage most people from perpetrating the act of abortion, since the government has led the campaign against it.

**d. Religious Role**

One of the ways to prevent girls from unwanted pregnancy that will necessitate an abortion is to encourage them to follow their own religious precepts, which usually promote strict sexual guidelines. Whilst Christianity only accepts sex within monogamous marriage,<sup>195</sup> Islam accepts polygamy, but again only endorses sex within marriage.<sup>196</sup> Traditional religion in Africa appears to propagate polygamous marriage, but with varying taboos regarding extra-marital sex.<sup>197</sup> What this emphasises is that underlying traditional, cultural and religious values continue to be the foundation upon which behaviour is based.<sup>198</sup>

Hence, in an attempt to ensure that the right to choose under CEDAW is not synonymous to abortion right, women should be well grounded in their respective religious belief.

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<sup>195</sup>Corinthians 7: 1-40.

<sup>196</sup>Quran 23: 5-6.

<sup>197</sup>Chastity before marriage on the part of the woman is essential. Within marriage, only women should be prevented from having extramarital affairs. *Magun* is a type of traditional magic used to guard against sexual immorality by women. Familusi O. O, "African Culture and the Status of Women: The Yoruba Example," *The Journal of Pan African Studies* 5, no. 1 (2012): 303-305. <http://www.jpanafrican.com/docs/vol5no1/5.1AfricanCulture.pdf> (accessed February 3, 2014).

<sup>198</sup>Oluduro O, "The Role of Religious Leaders in Curbing the Spread of HIV/AIDS in Nigeria," *Potchefstroom Electronic Journal* 22, (2010), <http://www.saflii.org/za/journals/PER/2010/22.html> (accessed February 3, 2014).

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