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The Campaign Against The Abolition Of The Death Penalty In Nigerian Criminal Jurisprudence: How Far.

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ABSTRACT

Globally, the issue of the death penalty has generated concern and debate for decades and has become a matter of continuing fascination amongst the developed and under-developed nations. Although, there are several reasons that have been canvassed in favour of its retention of the death penalty in the statute books of some nations, such as that it serves as a deterrent to others who may want to commit a capital offence, that it meets the need for retribution and that public opinion demands its imposition. However, in the face of the development of human right, the practice has become archaic owing to some reasons which are obvious, especially on the caprice and mistakes shredded in the practice of executing an innocent defendant or an accused person, and particularly on a weak judicial system shredded with corruption. This paper will canvass that although the death penalty is constitutional in Nigeria as it were, but the narrative is globally changing because of the respect for human rights and Nigeria as a giant of Africa should take the lead in abolishing this heinous practice which violates the sanctity of human right. This paper leans in favour of the abolitionist perspective by arguing that the life imprisonment is rather preferred to death penalty.

Keywords: sanctity of life, death penalty, fundamental human right, constitutionality, capital punishment

1. INTRODUCTION

Death penalty is defined as: "punishment by execution."[1] The Black's Law Dictionary[2] describes it as "judgment of blood". Death penalty as a form of punishment in recent times has become trending in the international community and has generated a lot of concerns for its abolition owing to the development of civilization and of human right. The death penalty abolitionists are of the view that the practice of sentencing to death be replaced with another form of punishment, preferably the life sentence. Death penalty which is sometimes referred to as capital punishment is imposed on those who are convicted of certain extreme crime as society adjudges it to be. But this paper argues that that is a slight difference between the two terms. The death penalty applies to a prisoner who has been sentenced to die, but has not yet been executed while Capital punishment refers to his actual execution.[3]

For almost four hundred years, the death penalty has been carried out in some retentionist countries and this has attracted a lot of debate all over the world. The word "Capital" in capital punishment is derived from the Latin word *capitalis* meaning *"*of the head." Thus, any Noble found guilty where beheaded, while the sentence of hanging was used for Commoners. By the 1700s, the English courts punished 222 crimes with death—beheading the convicts.[4] These crimes included murder and kidnapping as well as

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1 C. Soanes and A. Stevenson, '*Concise Oxford English Dictionary'* (11th ed. New York: Oxford University Press, 2004) 369.

2 *ibid.* 1485.

3 K. Bob, '*The Difference Between Capital Punishment and Death Penalty'*<https://www.socratic.org/question> accessed on 11/1/22.

4 C. Beccaria, '*Of the Punishment of Death' in On Crimes and Punishment'* (Originally Published in Italian, 1764) Philadelphia: R. Bell 1778<www.constitution.org/cb/crim_pun.htm>.accessed on 1st February, 2021.

minor crimes such as stealing or cutting down a neighbour's tree. Hence, a capital crime was originally designed to punish a convict by the severing of his head. However, it is vital to note that capital punishment for heinous crimes has existed all through the history of mankind long before the creation of court systems. However, as civilization progressed, different societies incorporated capital punishment into their legal codes.

One of the reflections appeared in "On Crimes and Punishment," originally published in 1764 by Cesare Beccaria[5]an Italian Judge born into the noble family in Milan in 1738. For him, capital punishment was neither necessary nor useful. He termed it "a war of a whole nation against a citizen." He thought that execution was necessary only if the death of the accused could ensure the safety of the nation. Cesare rejected the death penalty's ability to deter criminals from perpetuating crimes, believing that life imprisonment was more dreaded by the populace. He wrote that "society brutalized itself by inflicting capital punishment. The punishment of death is pernicious from the example of barbarity it affords….Is it not absurd that the law which detest and punish homicide should, in order to prevent murder publicly commit murder themselves?" The erudite judge recognized only one situation in which capital punishment was appropriate: "when the criminal although deprived of his liberty and imprisoned, still has the power and connections to upset a nation's security and foment a revolution."

Capital punishment is a barbarous survival from a less enlightened and unrefined age; it is incongruous and incompatible with our present day standard of civilization and humanity.[6] In other words, abolition of death penalty is a central theme in the development of the human rights law.[7] One major defect of capital punishment is that it deprives the culprit of his opportunity for reformation. The only way to destroy a criminal is by reforming the man who is a criminal, for to destroy his bodily life is nothing but a stupid blunder.[8] Hodgkinson and Rutherford[9] disagreed with this classification and described it as erroneous. They contended that the death penalty and capital punishment are not synonymous because in some States, the death penalty may exist but with no expectation or intention that the capital punishment will ever be carried out. According to them, this describes the situation in Belgium where no attempt has been made in recent years to disturb the state of *de facto* abolition.

Consequently, all considerations of death penalties in Nigeria and Africa in general have to take account of human rights. Thus, the application of capital punishment or death penalty cannot be separated from the issue of human right. Central to this issue, therefore is the generally accepted view that death penalty is a major threat to fundamental human right in the international plane. It is therefore one of the most divisive and impassionate human right issues throughout the world.[10]

The nations of the world have continued to be divided on the issue of capital punishment. For some governments, it is an out-dated and inhumane practice, no matter the methods and no matter the rationale. Others however remain steadfast in their belief that capital punishment is a fair and reasonable practice to put criminals on check, deter crimes, and protect society. Far from resolving itself, this ancient debate just seems to get more complex as human civilization evolve, grow, and continually redefine their moral and legal expectations. However, death penalty has gradually been abolished by some developing and developed State of the world and we expect Nigeria to follow suit.

Some of the legislations retaining death penalty under the Nigerian laws are as follows: sections 220-222 of the Penal Code applicable in the Northern part of the country; and sections 315-317 of the Criminal

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[5]*ibid.*

[6]M. L. Chenwi, '*Towards the Abolition of Death Penalty in Africa: A Human Perspective'* (University of Pretoria Press 2005), 4.

[7]M. L. Chenwi, '*Towards the Abolition of Death Penalty in Africa: A Human Perspective'* (University of Pretoria Press 2005), 4.

[8]Human Right Advocacy Law and Our Right; Death Pealty: Should it Exist or Not? Issues No.212, Oct.22, 2005 http://www. thedailystar.net/law/2005/10/04/index.htm>accessed on 3/2/2021.

[9]P. Hodgkinson & A. Rutherford, '*Capital Punishment: Global Issues and Prospects'* (Winchester: Waterside Press, 1996) 12–13.

[10]T. Fine, '*Moratorium 2009: An International Dialogue Towards A Ban On Capital Punishment'* (30 Columbia Human Right Law Review, 1999) 421.

Code applicable in the Southern part of the country. There are still other laws relating to armed robbery which prescribes death penalty as punishment in Nigeria.[11] This view has been recognized by the United Nations Commission on Human Right (UNCHR).[12]

2. Abolition of the Death Penalty on Grounds of Human Right

Defining death penalty as human right issue has been rejected by some countries that retain death penalty. These countries[13] reject the argument that judicial execution violates basic human rights and regard their criminal justice system as a matter of national sovereignty reflecting their cultural and religious values.[14] At the 57th Session of the United Nation Commission on Human Rights, a Representative of Libya stated that death penalty concerns the justice system and it is not a question of human right."[15] Similarly, Singapore and Trinidad and Tobago have equally asserted that death penalty is not a human right issue.[16] However, death penalty has been held to be a violation of human right—the right to life,[17] the right not to be subjected to cruel, inhuman or degrading treatment or punishment and the right to a fair trial.[18] This is because the implementation of death penalty is irreversible, and in case of erroneous judgment can led to the execution of the innocent—where the appellant was erroneously executed when his appeal was still pending in court.[19] At the international level, a broader understanding of human right had led to the abolition of the death penalty in some countries.[20] In Africa, human considerations were the basis for the abolition of death penalty in South Africa.[21] This is therefore a good evidence to support the view that the death penalty is a human right issue, and that its abolition is linked to the development of and respect for human right. As noted by Russ Feingold,[22] "One thing is clear: no matter how hard we try, we cannot overcome the inevitable fallibility of human being. That fallibility means that we will not be able to apply the death penalty in a fair and unjust manner."

The use of formal execution extends to the beginning of recorded history. Most historical records and various primitive tribal practices indicate that the death penalty was a part of their justice system. Thus, the practice of death penalty dates back to antiquity. It constitutes amongst punishments meted out to anyone who commits a serious offence against the society or the state. Communal punishment for wrongdoing generally in ancient times included compensation by the wrongdoer, corporal punishment, shunning, banishment and execution. For clarity purposes, the punishment of death penalty is classified as capital punishment. The use of the word capital punishment in lieu to the death penalty has been misconceived by some scholars. Whilst, the death penalty is a result of capital punishment, capital punishment is not a result of death penalty. This is because it is not all capital punishments that

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[11] S. 402 (1) & (2)(a)(b) of the Criminal Code CAP C38, LFN 2004.

[12] Now Known as The Human Rights Council of the United Nations.

[13]Luxembourg, Nicaragua and Norway has abolished the death penalty for all crimes, while Brazil, Fiji and Peru abolished the death penalty for ordinary crimes, France and Cape Verde also has abolished death penalty for all crimes. See also, note : 292, 293, 294, 285 of chapter six of this Thesis.

[14] R. Hood, **'***The Death Penalty: A Worldwide Perspective'* (Oxford Press 2002)18.

[15] R. Hood, '*Introduction: The Importance of Abolishing Death Penalty' in council of Europe. Death Penalty: Beyond Abolitio*n(2004) P.17. cited by M. L. Chenwi, *'Towards the Abolition of Death Penalty in Africa: A Human Right Perspective'* (University of Pretoria Press) 2005, 4.

[16] R. C. Dieter, '*The Death Penalty And Human Right: U.S. Death Penalty and International law*'<http//www.death penaltyinfo.org/oxfordpaper.pdf> accessed on February 2021.

[17] *ibid*.

[18] See sections 34(1)(a) and 36(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

[19] *Nafiu v Attorney General of Oyo State (1986) 5NWLR (Pt.45) 828*

[20] R. C. Dieter, '*The Death Penalty And Human Right: U.S. Death Penalty and International law*'<http//www.death penaltyinfo.org/oxfordpaper.pdf> accessed on February 2021.

[21] *S v Makwanyane (ICCT*3/94) (1995) ZACC 3: (6) BCLR 665; (1995) (3) SA 391; (1996) 2 CHRLD 164; 1995 (2) SACR 1 ; 2011 (7) BCLR 651 (CC) (6 JUNE 1005) in which it declared the death penalty as unconstitutional.

[22]R. Feingold's statement on the Federal Death Penalty Abolition Act, November16, 2000 http://www.senate.gov. accessed on 3/2/2021.

lead to death penalty, some may lead to life imprisonment.[23] Over the years, the practice of putting to death those who seriously offend society has been refined and limited—but it persists today, even though most of the world's nations have abolished it.[24]

The first time death penalty was used in terms of human relationship was by the Almighty God himself.[25] That is, the origin of capital punishment is traced to the religious books of the Bible[26] and Qur'an,[27] in which with respect to punishment for murder, it is provided that whoever sheds a man's blood, by man shall his blood be shed: for in the image of God made he man. Accordingly, the Mosaic Law provided that he that strikes a man, so that he dies, shall surely be put to death. And the prescribe mode of execution is by crucifixion, by stoning to death, or being thrown into a lion den as shown in the execution of Daniel, St. Stephen's and Jesus.[28] The Torah (Jewish Law), also known as the Pentateuch (the first five books of the Christian Old Testament), lays down the death penalty for murder, kidnapping, magic, violation of the Sabbath, blasphemy, and a wide range of sexual crimes, although evidence suggests that actual executions were rare.[29] Suffice it to say that the biblical *cliché* is "An eye for an eye, and a tooth for a tooth." Thus, the four books of the Hebrew Bible included this citation. The Book of Leviticus[30] contains the most direct reference to a civil death penalty, in this divine proclamation to Moses:

> If a man takes the life of any human being, he shall surely be put to death….. If a man injures his neighbour, just as he has done, so it shall be done to him. Fracture for fracture, eye for eye, tooth for tooth; just as he has injured a man, so it shall be inflicted on him.

The Old Testament however prescribes the penalty of death for dozens of misdeeds other than murder. Many of these offences are minor offences but the punishment is so extreme that the penalty is death. For instance, trying to convert an Israelite to another religion, attempting to communicate with the dead, adultery, sexual activity before marriage—fornication and even cursing one's parents are all punishable by death. In reality, few of these convicts were executed because the standards of proof were so high. Even a murder verdict required not one but two eye-witnesses. Biblical scholars are careful to point out that this advice was given to the Israelites as a society, not to individuals who would create mayhem by carrying out their personal revenge.

The Romans' Laws of the Twelve Tables (circa 450B.C.) named capital punishment for several crimes, including amongst others, murder, poisoning and assassination. Murder within the family was punished most cruelly. The later *lex Cornelia* (Cornelian Law) said that " He who killed a father or mother, grandfather or grandmother, was punished by being whipped till he bled, sewn up in a sack with a dog,

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[23]P. Hodgkinson & A. Rutherford, '*Capital Punishment: Global Issues and Prospects'* (Winchester: Waterside Press, 1996) 12–13. They contended that the death penalty and capital punishment are not synonymous because in some States, the death penalty may exist but with no expectation or intention that the capital punishment will ever be carried out. According to them, this describes the situation in Belgium where no attempt has been made in recent years to disturb the state of *de facto* abolition.

[24]*Ibid.*

[25]Gen. 9:6. King James Version.

[26] Holy Bible KJV, Genesis 9:6; Exodus 21:12&14.24; Qur'an5:36.

[27] A. D. Badaiki, 'Singing Nunc Dimitis to Death Penalty' *Benin Journal of Public Law) 2004, Vol.2 No.1.,* 2.5. See also Exodus 21:12.

[28] Mathew 26:63-65. King James Version; Acts:

[29]J. L. M. Jimenez, '*A Research Paper on the Study of Death Penalty'* submitted to the Division of City Schools Tondo High School Manila.

[30]Leviticus 24: 17-21

cock, viper, and ape, and thrown into the sea."[31] Slaves and foreigners under the Romans suffered at the hands of the law more severely than Roman citizens. For instance, a slave could be tortured for killing his

master before undergoing the severe punishment prescribed by the cornelian law. Execution by crucifixion was reserved for non-citizens who had committed the worst crimes: the suffering of Christ was standard procedure, including whipping and carrying the cross to the site of execution. Victims who were nailed to the cross actually died of asphyxiation, while those who were bound to it died of starvation, some surviving as long as nine days.

The Islamic laws of the Koran were recorded in the seventh century A.D. and included capital punishment for many crimes, including robbery, adultery, and religious crimes. Oddly, murder was not mentioned among them; murder was to be treated as a civil crime between families and decided by the relatives of the victim, who could choose death or retribution payment. Scholars of Islam are of the view that death penalty may be a permissible murder case but the victim or his family has the right to pardon the culprit.

In Islamic jurisprudence (*Fiqh*), it holds that "to forbid what is not forbidden is forbidden" making it is impossible to canvass against the abolition of the death penalty, which is explicitly endorsed. Sharia Law or Islamic law may require capital punishment in certain serious cases. However note that there is a great variation within Islamic nations as to actual capital punishment. Thus, apostasy in Islam and stoning to death in Islam are controversial topics. Furthermore, as expressed in the Qur'an, capital punishment is condoned. Although the Qur'an prescribes the death penalty for several hard (fixed) crimes including rape—murder is not among them. Instead, murder is treated as a civil crime and is covered by the law of *qisas* (retaliation), whereby the relatives of the victim decides whether the offender is punished with death by the authorities or made to pay *diyah* (*wergild*) as compensation. The law provides that, "If anyone kills any person—unless it be for murder or for spreading mischief in the land—it would be as if he killed all people. And if anyone saves a life, it would be as if he saved the life of all people."[32] "Spreading mischief in the land" can mean many different things, but is generally interpreted to mean those crimes that affect the community as a whole, and destabilize the society.

In the African traditional criminal justice system, including Nigeria, death penalty was rarely used. Its use was restricted to circumstances in which the society hardly had any rational solution to a particular prevalent crime. According to Adeyemi, instances of the death penalty in African societies included repetitive commission of highly socially disruptive acts by means of witchcraft and cases of habitual and incorrigible offenders. He notes that the society had preferred banishment of the offender as an alternative to capital punishment.[33] Aja,[34] aligning with Adeyemi's position, also stated that in the Igbo society, in the case of willful murder, the murderer could be sent to exile. Upon his return after a stipulated period, after having performed the stipulated sacrifices and having made prescribed restitutions, he would be integrated into the community. The penalty of death was also used in pre-colonial Uganda,[35]and Sierra Leone.[36]Chenwi, also contends that Capital punishment has arguably been used since pre-colonial times

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[31]W.B.Thaya, *'Leges Corneliae*,' <https://www.penolope .uchicago.edu/Thaya /text/secondary /SMIGRA/Leges_corneliae.html>accessed on 1/2/2021

[32] (Qur'an 5:32).

[33]A. A. Adeyemi, '*Death Penalty in Nigeria: Criminological Perspective'* Nigerian Current Law Review, (1988/1991), Published by Nigerian Institute of Advanced Legal Studies, Lagos in 1993, 1.

[34] E. Aja, '*Crime and Punishment: An Indigenous African Experience'* in L. May (ed.), '*Legal Philosophy: Multiple Perspectives*' (Snaap Press, 2000), 231.

[35] In Pre-Colonial Uganda, for example, the Lango imposed a mandatory death sentence on those caught in the act of witchcraft, incest and sexual aberrations. See J. Driberg, '*The Lango: A Nilotic Tribe of Uganda'* (London: T. Fisher Unwin, 1923), 209. Among the Yoruba of Southern Nigeria, death was the penalty for adultery with chief's wives. See P. Talbot, *'The Peoples of Southern Nigeria'* (London: Oxford University Press,1926), 629. See also A. Milner, 'The Sanctions of Customary Criminal Law: A Study in Social Control.' *Nigerian Law Journal (1965), 173-186*. Also, see Karibi-Whyte, A.G., '*History and Sources of Nigerian Criminal Law*' (Spectrum:1993), Chapter 4.

[36] Death was also a form of punishment for witchcraft and cannibalism in pre-colonial Sierra Leone. See the Report of the National Co-coordinator of Sierra Leone, Abdul Tejan-Cole, presented at the First International

in some African societies.[37] According to Elias, the penalty for sorcery or witchcraft, willful murder, treason and certain types of political offences was death by shooting, spearing, hanging, drowning or the

impalement of the convicted person.[38] Hatchard and Coldham also state that the above offences were seen in pre-colonial African societies as threatening the security of the community, and beyond redress by the payment of compensation to the victim.[39] However, Ellis was of the view that death was imposed when the offender was caught in the act. In some cases, the infliction of death was a consequence of practices such as trial by ordeal, a medium used to ascertain guilt.[40] Interestingly, under the pre-colonial African traditional criminal justice system, there was much reliance on compensation of the victims of offences by offenders. Accordingly, the death penalty existed as an exception not the norm. According to Elias,[41] African courts were prepared to promote reconciliation and order payment in cases of murder to the victim's family.

The practice of death penalty in Nigeria was very much a component of the British Criminal Justice system, and consequently part of English common law which was also part of Nigeria's received English Law.[42] The Nigeria's customary laws[43] which traditionally recognize the death penalty as an appropriate way of eliminating offenders who were dangerous to the community were later codified. Offences warranting the death penalty included murder, witchcraft,[44] adultery and profaning of the gods. With the advent of British rule and colonization and the consequent abolition of Customary Criminal and Penal Codes, capital crimes were reduced to include murder, treachery, treason and participating in a trial resulting in death.[45] The military government in power from 1966 to 1979 added a number of crimes punishable by death.[46]These additions include armed robbery, burning at stake, impaling and beheading.

Conference on the Application of the Death Penalty in Commonwealth Africa, in Entebe, Uganda, from 10-11 May 2004.

[37]L. Chenwi, '*Towards the Abolition of the Death Penalty in Africa. A Human Rights Perspective'* (Pretoria: Pulp, 2007) 18.

[38] T. Elias, '*The Nature of African Customary Law*.'(Manchester, Manchester University Press: 1956), 260.

[39] E. Hatchard and Q. Coldham, ' *An Eye for an Eye,'* Quoted in J. A. Joyce, '*Capital Punishment: A World View'* (New York: Thomas Nelson & Sons, 1961), 189.

[40]E. Hatchard and Q. Coldham, ' *An Eye for an Eye*,' cited in J. A. Joyce, '*Capital Punishment: A World View*' (New York: Thomas Nelson & Sons, 1961), 189.

[41] T. Elias, '*The Nature of African Customary Law'* (Manchester, Manchester University Press: 1956), 260.

[42] The English Common Law of Crime was transplanted through the introduction of English Common law in 1863 in the Colony of Lagos. In 1904, the Lugard Administration in Northern Nigeria introduced, by Proclamation, a Criminal Code, which was made applicable in the whole Country after the amalgamation of the South and North in 1914. See S. Akinbiyi, *'*Crimes, Defences & Sentences in Nigeria.*'* (Lagos: Streame Communications, 2006), 31.

[43]E. Peiffer, '*The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria'* William & Mary Journal of Women and the Law (Article 9)(2005) vol. 11(3) 507, available online at <http://scholarship.law.wm.edu/wmjowl> (accessed 02/ 02/2021).

[44]K. Dundas, 'The Organization and Laws of some Bantu Tribes in East Africa' 4*5 Journal of Royal Anthropology Institute (1914)2 5 8–2 5 9.*

[45] Sections 319, 49(a), 37 & 208 of the Criminal Code Act, Cap. C. 38, Laws of Federation of Nigeria 2004, respectively.

[46]The first military intervention in Nigeria occurred in January 1966 when the civilian government was overthrown in a military coup. This effectively marked the beginning and succession of military governments in the nation's political history. For an excellent legal commentaries on the nature of military rules in Nigeria; see generally A. Ojo, '*Constitutional Law and Military Rule in Nigeria'* (Ibadan: Evans Brothers Nigeria Publishers Ltd., 1987) at 237–287; O. Achike, '*Groundwork of Military Law and Military Rule in Nigeria'* (Fourth Dimension Publishers, Enugu, 1980) 24–139; E. Malemi, '*The Nigerian Constitutional Law'* (Princeton Publishing Co., Lagos, 2006) 54–65; S. T. Hon: *'Constitutional Law and Jurisprudence in Nigeria'* (Pearl Publishers, Port Harcourt , 2004) 362–367; J. K. Jegede, '*The Rule of Law in a Military Government: An Appraisal'* (1999) NLPJ 19 and T. O. Dada, '*General Principles of Law'* (3rd Revised edn. T. O. Dada & Co., Lagos, 2006) 458–491.

But, the death penalty was rarely used in cases of setting fire to public buildings, ships or aircraft, dealing in Indian hemp and sabotaging the production and distribution of petroleum products, importing and exporting mineral oil without authority, dealing with cocaine and counter-feiting bank notes or coins.[47] Today Nigerian Federal law prescribes the death penalty only for treason, homicide and armed robbery.[48] Particularly, under Nigerian criminal law various offences are punishable by death across the Federation including murder,[49] treason,[50] and treachery,[51] conspiracy to commit treason,[52] directing and controlling or presiding at an unlawful trial by ordeal which results in death.[53] More recently, kidnapping has been added as a capital crime in Abia, Imo[54] and Akwa Ibom States.[55] The introduction of Sharia-based criminal law in some States in Northern Nigeria has also widened the number of capital offences to include adultery, sodomy, lesbianism and rape.[56]

3. The Constitutionality of the Death Penalty under the Nigerian Constitution

No doubt the punishment of death by various countries of the world has come under criticism by various international groups and organization in recent times. To them, the right to life is sacrosanct and non-derogable and that nobody has the right to take the life of another, the State notwithstanding. However, section 33(1) of the Constitution of the Federal Republic of Nigeria (as amended) guarantees this right but with some qualifications. The section provides thus:- Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a Court in respect of a criminal offence of which he has been found guilty in Nigeria.[57] 1 It is instructive to note that in Nigeria lawful killing is legally permissible. For instance, s. 33(2)(a-c) of the constitution of Nigeria (as amended) provides that:

> A person shall not be regarded as having been deprived of his life in contravention of this section, (referring to 33(1)) if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary
>
> a) for the defence of any person from unlawful violence or for the defence of property:
> b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
> c) for the purpose of suppressing a riot, insurrection or mutiny.[58]

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[47] However, more recently the punishment of most of these offences has however been reduced into terms of imprisonment.

[48] S. 1 of the Robbery and Fire Arms (Special Provision) Act, Cap B. 11 LFN 2004) see also, T. A. Idris, 'Capital Punishment and its Implication on Nigerian Criminal Law'<displace.unijos.edu/…/232/44pdf> accessed on 12/2/2021.

[49] S. 319 of the Criminal Code Cap. C. 38 LFN 2004; See also, 220 of the Penal Code Cap. 89 LFN 1963.

[50] S. 37(1) of the Criminal Code.

[51] S. 48A of the Criminal Code.

[52] S. 37(2) of the Criminal Code; S. 411 of the Penal Code.

[53] S. 208 of the Criminal Code.

[54]The Imo State House of Assembly passed a Bill on May 4th , 2009 providing for the death penalty for anyone convicted of kidnapping or whose premises are used to hold someone hostage. See also Amnsety International; Press Released, Nigeria: Imo State Death Penalty Division puts victims at risk. Nay 07, 2009<https://www.amnsetyusa.org >accessed on 12/2/2021.; D. Atoki, 'Death Penalty: A Dying Fashion' Vanguard Newspaper, May 6th 2010, https://www.africa.cpm/stories/201005061113.html accessed on 12/2/2021.

[55]News.com, '*Nigerian Governors Support Death Penalty for Kidnappers'.* June 1oth , 2010.

[56] See, Kano State Sharia Penal Code.

[57]Section 33 of 1999 Constitution of the Federal Republic of Nigeria as amended.

[58]*S.* 33(2)

As a matter of fact, it is commonly acknowledged that the constitutionally guaranteed right to life is subject to an express saving provision in favour of a death sentence ordered by a Court as punishment following the conviction for criminal offence of which a person has been found guilty in Nigeria.[59] Most often than not, the primary stage of the argument by the opponents of capital punishment in Nigeria is that it contravenes the right to life. However, there are statutory authorities and constitutional provisions which support the legality of death sentence in Nigeria. For example, in *Adeniji v State*[60] the Court of Appeal held that "The death penalty as guaranteed under sections 33(1), 233(2) and 243 of the Constitution is expressly recognized by the said Constitution." In the same vein, the Supreme Court in *Okoro v State*[61] stated that the death penalty and its method of execution is lawful and valid as same is sanctioned by both Sections 33(1) and 34(1)(a) of the 1999 Constitution of the Federal Republic of Nigeria. And in *Kalu v State*,[62] it was contended by counsel for the defence that the death penalty provision of section 319(1) of the Criminal Code Law of Lagos State,[63] which prescribes death as a penalty for murder, offends section 33(1) of the 1999 Constitution of Nigeria which guaranteed the right to life. The Supreme Court in rejecting this argument stated that the right to life guaranteed under the Constitution is clearly qualified as opposed to an absolute right. Iguh, J.S.C who read the lead judgment, stated that:

> In my view it is plain that the 1979 Constitution can by no stretch of the imagination be said to have proscribed or outlawed the death penalty. On the contrary, section 30(1) of the Constitution permits it in the clearest possible terms so long as it is inflicted pursuant to the sentence of a Court of law in Nigeria in a criminal offence....The plain meaning of the section of the Constitution cannot be derogated from in the absence of any ambiguity whatsoever. It simply guarantees and protects the right to life. But it also recognizes deprivation of life as long as it is pursuant to the execution of the sentence of a Court in a criminal offence of which the accused has been found guilty in Nigeria.[64]

Thus, the authority in *Onuoha Kalu v State*,[65] clearly portrays the principles of law as regards the constitutionality of section 319 of the Lagos State Criminal Code Law *viz-a-viz* the death penalty. In that case, the appellant was convicted for murder and sentenced to death. His appeal to the Court of Appeal was unsuccessful and then he further appealed to the Supreme Court. It was at this point that leave of court was sought and granted to raise the issue of constitutionality of the death sentence in Nigeria. The Supreme Court after having heard from distinguished lawyers invited to make submissions on this issue, held that the death penalty was constitutional in Nigeria. According to Iguh JSC (who read the lead judgment):

> Upon a careful perusal of the various foreign authorities to which our attention was drawn, the opinion that death penalty *per se* amounts to torture, inhuman and degrading treatment and therefore intrinsically unconstitutional seems to me a minority view. Indeed, a careful study of those decisions reveal that the foreign jurisdictions that have similar provisions in their constitution as ours have repeatedly pronounced the death penalty to be constitutionally valid.

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[59] Section 33 of 1999 Constitution of the Federal Republic of Nigeria as amended.

3. E. C. Ibezim, '*Right to Life under International Human Rights Law: A Gender Perspective'* (2008) 10 ABSU L.J. 16

[60](2000) 645 NWLR 356, see also the case of Peter *Nemi v A G Lagos State* (1996) 6 NWLR (PT452) P 42

[61] (1998) 14 NWLR 584, see also Samuel *Bozin v State* (1985) 2 NWLR (PT 8) P 465

[62] (1998) 13 NWLR 537; (1998) 12 SCNJ 1.See, Aigbadion v. State, (1999) (NWLR) pt 586 284

[63] S. 319(1),Criminal Code Law of Lagos State.

[64] O. W. Duru, '*The constitutionality of death penalty under Nigerian law'* Electronic copy, 1985 p.14. Available at: <http://ssrn.com/abstract=2142981>, retrieved on 04/04/2021.

[65] (1988) 13 NWLR (Pt. 583) 531.

Similarly, the Supreme Court also reached the same decision in *Okoro v State.*[66]In the words of Iguh JSC in the Kalu's case,

> …In my view, it is plain that the 1979 Constitution can by no stretch of the imagination be said to have proscribed or outlawed the death penalty. On the contrary, section 30(1) of the Constitution, permits it in the clearest possible terms. So long as it is inflicted pursuant to the sentence of a court of law in Nigeria on a criminal offence...."[67]

With profound respect, whilst it is conceded that section 33(1) of the 1999 Constitution in its proviso recognizes the death penalty, it is submitted that the time has now come for the Nigerian apex court and indeed, our courts to depart from this rather restricted and legalistic interpretation of section 33(1) of the 1999 Constitution. The interpretation of section 33(1) of the Constitution must be given a broad and liberal interpretation. Certainly, no right can be more fundamental than the right to life. The Supreme Court itself has in a plethora of authorities set out some basic principles governing the interpretation of the Constitution. One of these principles is the broad and liberal approach herein advocated.

Some other principles enunciated by the Supreme Court in the interpretation of the Constitution, relevant to this paper include:

a) where the provisions of the Constitution are capable of two meanings, the court must choose the meaning that would give force and effect to the Constitution read together as a whole and promote its object and purpose.
b) All the relevant provisions of the Constitution must be read together and not disjointedly. These are encapsulated in the following decisions of the Supreme Court in the following cases:

a. *Lafia LGA v Executive Government of Nasarawa State*,[68]
b. *Nafiu Rabiu v State*,[69]
c. *A. G. of Bendel State v A.G. Federation*,[70]
d. *A. G. Ogun State v A.G. Federation*,[71]

Of these principles, the 'whole reading rule' also called the community reading rule has been said to be the most important. It requires Constitutional provisions to be read in community and not in isolation. In the Kalu case (supra) for instance, although the Supreme Court said it adopted the whole reading principle in arriving at its decision, with respect, it is submitted that this do not appear to be the case. This is because if the court had read and interpreted the provisions of section 33(1) together with section 34(1)(a) with a broad mind set, it is difficult to see how the execution of death row convicts by hanging and firing squad pursuant to section 376 of the CPA and by firing squad under the Robbery and Firearms Act, could not have been held at least to infringe the provisions of section 34(1) of the Constitution. The apex court quite clearly placed greater weight in its consideration of section 33(1) over section 34(1)(a) of the Constitution. This should not be so. When the mental torture of a convicted death row convict is put into consideration, particularly from the moment the sentence is passed and in many cases the years of waiting, often in isolation for his execution, one could imagine mental torture this convict go through. On the other hand, execution by the gruesome method of hanging and firing squad to a large extent, it is submitted, frowns against the letters and spirit of section 34(1) of the 1999 Constitution. Section 34(1) 1999 Constitution provides: "(1) Every individual is entitled to respect for the dignity of his person and accordingly, (a) No person shall be subjected to torture or to inhuman or degrading treatment."

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[66](1998) 14 NWLR 584.
[67]Supra note 35. Please note that section 30(1) 1979 Constitution is *in pari material* with section 33(1) of the 1999 Constitution.
[68]*(2013) All FWLR (PT. 668), 956.*
[69]*(1981) 2 NCLR 293*
[70](*1982) 3 NCLR 166.*
[71](*1982) 3 NCLR 1 .*

A convict on death row is not divested, by the singular act of his conviction, of his constitutionally guaranteed basic rights, section 34(1)(a) inclusive. Even after death, the law still protects the human dignity of a corpse. It is an offence therefore to improperly or indecently interfere with or to offer any indignity to any dead human remains whether buried or not.[72] Death penalty carried out by hanging and firing squad, it is therefore submitted runs contrary to the express provisions of section 34(1) of the 1999 Constitution.

This view formed the fulcrum of the landmark decision of Justice Mufutau Olokoba of the Lagos State High Court in the celebrated case of *James Ajulu & Ors v. AG Lagos State*.[73] In this case, the applicants asked the court to declare the prescription of mandatory death penalty for offences such as armed robbery and murder as a contravention of their right to dignity of the human person as well as not to be subjected to inhuman or degrading punishment under section 34(a) of the 1999 Constitution. They therefore sought an order of the Court nullifying the mandatory death sentence by hanging or firing squad imposed on them. After a careful examination of reports filed by expert psychologists, pathologists and forensics, Justice Olokoba held that mental torture was an inevitable consequence of death sentence on the victims. According to His Lordship, the Court may uphold the death penalty under section 33(1) of the Constitution, but declare the method of execution unconstitutional. In the words of Justice Olokoba:

> Death by hanging or by firing squad amounts to a violation of the condemned right to dignity of the human person and inhuman and degrading treatment. It is consequently unconstitutional being violative of section 34(1)(a) of the Constitution of the Federal Republic of Nigeria, 1999.

This decision, it is submitted, quite clearly accord with the dictates of a broad, liberal and communal interpretation of the Constitution being advocated by this paper. It is also consistent with the judicial decisions in some other jurisdictions.[74] In *State v Makwanyane,*[75] the South African Constitutional Court held that the death penalty was inconsistent with the Constitutional protection of freedom from cruel, inhuman and degrading treatment. Also, in the Malawian case of *Kafatayane v AG. of Malawi*,[76] a similar decision was reached in respect to torture, inhuman and degrading treatment of the person of the accused.

From the foregoing arguments therefore, it is obvious that death penalty is constitutional under the Nigerian Constitution. While the prescribed mode of killing which is by hanging is unconstitutional by the provisions of s.34(1)(a) under the Nigerian Constitution. Therefore, since a convict cannot be executed under the law as it is, there is the need to abolish the death penalty from the criminal justice system line with the movement for the abolition of the death penalty practice.

4. The Death Penalty In Nigeria: Emerging Issues

Abolishing the practice of the death sentence in Nigeria it is submitted appears to be an impossible venture in view of the extant laws making the practice legal and permissible. Although, there are many protest towards the abolition of the practice of the death penalty in the face of the respect of human right in the advance climes and in the international law, but in Nigeria the position is different. This is obviously glaring when the newly promulgated Administration of Criminal Justice Act, 2017[77]has some provisions relating to the death penalty and the mode of execution of the convict.

5. However in Nigeria, there seems to be paradigm shift in regard to the practice of the death penalty. For instance, a key provision of the bill in respect of the custodial service is made in Section 12(2)(c), where a condemned prisoner on death row can have their sentence reduced to life imprisonment

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[72] See: sections 242 of criminal Code and section 219 Penal Code for offences relating to dealing with human remains.

[73](*Unreported) Suit No. ID/76M/2008.*

[74]South Africa and Malawi

[75]*1995) ZACC 3*.

[76]cited in James *Ajulu & Ors v. A.G. of Lagos State* (Unreported) Suit No. ID/76M/2008.

[77] See generally sections 409- 413 of the Administration of Criminal Justice Act, 2017.

after 10 years without being executed. The law states thus: "that where an inmate sentenced to death has exhausted all legal procedures for appeal and a period of 10 years has elapsed without execution of the sentence, the Chief Judge may commute the sentence of death to life imprisonment." In addition to the foregoing, "Section 12(8) empowers the State Controller of the service to reject more intakes of inmates where it is apparent that the Correctional Centre in question is filled to capacity." The reduction of a sentence term of death for a prisoner who has stayed for more than 10 years without execution to life imprisonment is a welcome development geared towards gradually abolishing death penalty in Nigeria but more than that needs to be done like we have in climes such as in Greece,[78] France,[79] and generally in the United Kingdom[80] (UK). In these climes,[81] the International protocols such as the Geneva Convention, the Second Optional Protocol to the International Convention on Civil and Political Rights aiming at the Abolition of the Death penalty, UN Convention against Torture, Protocol no. 6 of the ECHR, The Human Right Act and International Convention on Civil and Political Rights that forbid any form of brutality or indignities against convicts are enforced.

Suffice it to say that Nigeria's human rights obligations extend to those who are in its prisons. Being deprived of one's liberty does not mean forfeiting other human rights. The UN Basic Principles for the Treatment of Prisoners[82] provides that: "Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights and where the State concerned is a party, the International Covenant on Economic Social and Cultural Rights and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations Covenants. But note that Nigeria is a signatory to the above covenants and has ratified them at various occasions.[83]

With respect to death penalty for prisoners, as well as for everyone held in custody, the right to life and the prohibition of torture and ill-treatment must be respected at all times. Furthermore, Article 10(1) of the International Covenant on Civil and Political Rights (ICCPR) states: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." In addition to the broad provisions of general human rights treaties, the UN and other inter-governmental organizations have developed a comprehensive standard on conditions of detention over the years. In 1955, the UN Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules) were

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[78]In 1997, Greece ratified the 2nd Optional Protocol to the ICCPR aiming for the International Abolition of the Death Penalty. Protocol No. 6 of the ECHR, providing for the abolition the death penalty in peace time was passed in 1998. Greece abolished the death penalty for all crimes, even treason during war time, in 2004. In 2005 Greece ratified Protocol No.13 of the ECHR, concerning the abolition of the death penalty under any and all circumstances.

[79] South Africa and Malawi

[80] *(1995) ZACC 3*.

[81] cited in James *Ajulu & Ors v. A.G. of Lagos State* (Unreported) Suit No. ID/76M/2008.

[81] See generally sections 409- 413 of the Administration of Criminal Justice Act, 2017.

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[83] Capital punishment in France is banned by Art. 66-(1) of the Constitution of the French Republic. In 2007, the death penalty was massively voted by parliament to be illegal by amending their Constitution. The law clearly states that: "No one can be sentenced to death." Before this time the death penalty was declared to be illegal on 9/10/1981 when president Francois Mitterrand signed a law prohibiting the judicial system from using it and commuting the sentence of the seven people on death row to life imprisonment.

adopted, representing "as a whole, the minimum conditions which are accepted as suitable by the United Nations" (para 2). Most of the rules apply not only to convicted prisoners but to people in pre-trial detention and people held without charge.[84]

6. CONCLUSION

Abolition of death penalty has a long genealogy. The first countries to abolish the death penalty were Venezuela in 1863, Portugal in 1867 and Costa Rica in 1877. Throughout the world the movement to abolish death penalty has gained momentum. During the period between 2005 and 2017, an average of at least three countries a year have abolished the death penalty for ordinary crimes.[85]

Victor Hugo described the death penalty as '*le signe sṕecial et́eternel de labarbarie.*'[86] The archetypal form of State-authorized premeditated homicide, it is eternal in the sense that it has been with mankind since antiquity. Yet its abolition has been envisaged for at least two centuries, and with the accelerating progress of the movement for abolition, the end of this dark tunnel is now insight. There are many ways to measure society's progress away from barbarism and towards a more humane condition. One is by the progressive development of legal norms. The abolitionist movement's origins can be traced to the eighteenth century, and several States had eliminated the death penalty by the nineteenth century. However, the spread of abolitionist legislation is generally a post-Second World War phenomenon or, to put it another way, a development dating from the adoption of the Universal Declaration of Human Rights, on 10 December 1948. Of seventy-four countries described as abolitionist for all crimes as of December 1999, Sixty-six have abolished the death penalty since 1948. Of the forty-nine States that are abolitionist for ordinary crimes[87] or abolitionist *de facto*,[88] all have conducted executions since 1948. In other words, such partial or *de facto* abolition is a relatively recent development.

The goal of the international community to abolish death penalty is made clear by Article 6(6) of the ICCPR that sets out that nothing therein shall be invoked to delay or to prevent the abolition of death penalty by any State Party to the ICCPR. The goal is also reflected in several international human rights instruments and in several resolutions of political bodies.[89] Moreover, international criminal tribunals do not sentence convicts to death.[90] The carrying out of a death sentence using a particular method of execution may amount to cruel inhuman or degrading treatment or punishment if the suffering caused in execution of the sentence is excessive and goes beyond that is strictly necessary.[91] Among the arguments put forward by abolitionists is that death row phenomenon amounts to inhuman and degrading treatment and this is what the case of Kalu's decision anchors upon. Nigeria should not only endeavour to commute inmate to life imprisonment but take steps to amend its constitution and other penal laws like the Criminal Codes to ensure its legality like Greece, France, and the United Kingdom.

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[84] See. para 4(2) and Rule 95.

[85] Countries that have abolished death penalty for ordinary crimes during that period include Albania, Armenia, Azerbaijan, Bhutan, Bosnia-Herzegovina, Bulgaria, Canada, Côte d'Ivore, Cyprus, East Timor, Estonia, Georgia, Greece, Liberia, Lithuania, Malta, Mexico, Montenegro, Nepal, Poland, Philippines, Rwanda, Samoa, Senegal, Serbia, South Africa, Turkey, Turkmenistan, Ukraine, United Kingdom, Chile, Bolivia, Latvia, and Kyrgyzstan.

[86] V. Hugo, '*Ecrits sur la peine de mort,*' Avignon: Actes Sud, 1979.

[87] That is, crimes contrary to military law or committed in wartime or other exceptional circumstances.

[88] States that have not conducted executions for ten years are deemed to be de facto abolitionist.

[89] For instance, the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty; Protocol to the American Convention on Human Rights to Abolish the Death Penalty; Protocol No. 6 to the Europe Convention on Human Rights, aiming at the abolition of death penalty; Protocol No. 13 to the European Convention on Human Rights, concerning the abolition of death penalty in all circumstances; and UN General Assembly Resolution 1997/12 of April 1997.

[90] See article 77 of the Rome Statute of the International Criminal Court; Article 24 of the Statute of the International Criminal Tribunal for the former Yugoslavia; Article 23 of the Statute of the International Criminal Tribunal for Rwanda; Article 19 of the Statute of the Special Court for Sierra Leone; and Article 24 of the Statute of the Special Tribunal for Lebanon.

[91] African Commission on Human and People's Rights, *Spilg and Mack & Ditshwanelo* (on behalf of Lehlohonolo Benard Kobedi) *v Botswana, Communication* 277/2003, para. 167.