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## THE CONSTITUTIONALITY OF DEATH PENALTY IN NIGERIA

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### ABSTRACT

This paper discusses the constitutionality of death penalty in Nigeria. It examines death penalty and religious views by specifically focusing on the two principal religions prevalent in Nigeria – Islam and Christianity. It also briefly discusses death penalty and international law by making reference to some global jurisdictions and relying on important international human rights Instruments with relevant decided cases where necessary. It equally examines various countries that have abolished death penalty, citing dates of abolition respectively along with jurisdictions that still retain death penalty. It looks at sentences in various countries of the world including Nigeria between 2007 and 2012. It concludes with the suggestion among others that Nigeria should revisit the issue of death penalty with the aim of abolishing it as many other countries have done, more so as taking such step is imperative for her being a prominent member of the United Nations and as an aspirant of permanent membership of the United Nation's security council and the African Union.

Keywords: Constitutional Rights, Death Sentences, Criminal Law.

### 1. INTRODUCTION

Death Penalty as a capital punishment has been a topical issue all over the world including Nigeria. Some jurisdictions approve of it by buttressing their support with cogent and concrete reasons while many others abhor its retention and also advance convincing and compelling reasons for their stand. The issue of the constitutionality of death penalty in Nigeria has been raised and decided upon by the Supreme court in the case of *Kalu v. the State*.<sup>1</sup> In that case, the appellant was on the 6<sup>th</sup> day of March 1982 arraigned before the Lagos State High Court for the offence of murder punishable under section 319(1) of the Criminal Code.<sup>2</sup> At the conclusion of the trial, the court found the appellant guilty as charged and he was accordingly sentenced to death. Dissatisfied with the decision, the appellant unsuccessfully appealed to the Court of appeal and thereafter to the Supreme Court. At the Supreme Court, the appellant obtained the leave of the Court to raise the issue of the constitutionality of death penalty in Nigeria. After granting the leave, the court invited eminent counsel as *amici curae* to assist it by

<sup>1</sup> (1988) 13 NWLR (Pt. 583) p. 531

<sup>2</sup> Cap 31 Laws of Lagos State.

proffering arguments on this important constitutional issue.<sup>3</sup> The appellant, the respondent and all the *amici curiae* filed briefs of argument. After hearing arguments of the briefs, the Supreme Court unanimously dismissed the appeal. On whether death penalty is unconstitutional in Nigeria, the court held that under section 30(1) of the 1979 Constitution (now section 33(1) of the 1999 Constitution), the right to life, although fully guaranteed, is nevertheless subject to the execution of a death sentence of a court of law in respect of a criminal offence of which he has been found guilty in Nigeria. The qualifying word “save” used in the section seems to be unmistakable key to the construction of the provision. The court held that, it is plain that the 1979 Constitution cannot by any stretch of imagination, be said to have proscribed or outlawed the death penalty. On the contrary, the court held that section 30(1) of the 1979 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. In his lead judgment, Iguh, JSC dwelt extensively on the issue of constitutionality and held that, death penalty in Nigeria is constitutional.<sup>4</sup> According to the court:

“It is plain to me that apart from the provisions of section 30(1) there are also provisions of sections 213(2)(d) and 220(1)(e) of the Constitution which, again, in no mistakable terms, recognize the death penalty as a form of sentence. I have also taken great care to go through the entire 1979 constitution and have not been able to find any single section thereof which abolished or outlawed the death penalty. And I ask myself, having regard to the combine effect of the provisions of sections (30)(1), 213(2)(d) and 220(1)(e) of the Constitution, whether it can be seriously argued, as the appellant now appears to do so, that section 319(1) of the Criminal code of Lagos State which prescribes the death sentence is inconsistent with section 31(1)(a) or, indeed with any other section of the constitution. I think not. To argue otherwise, if I may say with respect, will amount to embarking on an exercise aimed at defeating the clear provisions of the Constitution.”<sup>5</sup>

In his concurring judgment, Uwais, CJN held: The position in Nigeria is very clear. Death sentence is a reality. It is provided for by our criminal laws including section 319 subsection (1) of the Criminal Code of Lagos State. Our constitution also recognizes the death sentence. Therefore, the sentence of death in itself cannot be degrading and inhuman as envisaged by section 31 subsection (1) (a) of the Constitution. The Constitution is not intended to approbate and reprobate. Were it to be so, we are to interpret it in such a manner that its objects and purposes should not be defeated (see) *Nafiu Rabiu v. The State*.<sup>6</sup>

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<sup>3</sup> The Amici, Curiae invited are the DPP of the Federation; Mr. Clement O. Akpangbo, SAN; Dr. Ilochi A. Okafor, SAN; chief F.O. Akinrele, SAN and Mr. A.B. Moahmoud.

<sup>4</sup> Arriving at this decision, the Supreme Court relied heavily on some other countries’ decisions on the death penalty. Those countries have similar qualified provisions as Nigeria’s on the right to life. See in this regard the Tanzania case of *Mbushuu and Another v. the Republic* (1955) 1 LRC 216; the Jamaican cases of *Noel Riley and Others v. A.G. for Jamaica and Another* (1983) 1 AC 719 (PC) and *Earl Pratt and Another v. A.G. Jamaica and Another* (1994) 2 AC. 1 (PC); the Indian case of *Bacan Singh v. State of Punjab* (1983) 2 SCR 583; the U.S. Supreme Court decision in *Gregg v. Georgia* 428 U.S. 153 (1976) 173, 176-187 (Stewart, Powell & Stephens JJ); See also, *District Attorney for Suffolk District v. James Watson and Others* (1980) 381 Mass.648; *Jurex v. Texas* 428 US (1976); *Woodson v. North Carolina* 428 US 242 (1976)

<sup>5</sup> Per Iguh, JSC pp. 588-589; other Justices of the Supreme court that concurred in this judgment are ML Uwais, CJN, SMA Belgore, A.B. Wali, IL Kutigi, M.E Ogundare and EO. Ogwegbu JSC.

<sup>6</sup> (1980) NSCC 291 2 NCLR 293.

Though, the paper associates itself with the Supreme Court judgment relying on the main thrust of the positivist school of jurisprudence which advocated strict interpretation of the provisions of the law in spite of whose horse is gored,<sup>7</sup> yet it vehemently refuses to support the retention of death penalty in Nigeria's statute books as it strongly believes that the punishment is a threat to the right to life. It is opined that the law be urgently amended so that Nigeria will align with the abolitionist countries of the 21<sup>st</sup> century.

## 2. DEATH PENALTY AND RELIGIOUS VIEWS

### *(a) Islam*

Scholars of Islam hold death penalty to be permissible but the victim or the family of the victim has the right to pardon.<sup>8</sup> In Islamic jurisprudence (Fiqh), to forbid what is not forbidden is forbidden. Consequently, it is impossible to make a case for abolition of the death penalty, which is explicitly endorsed<sup>9</sup>. The paper disagrees with this because of the basic fact that laws are made for man and not otherwise therefore, laws can be reviewed or amended to sooth existential circumstances. Sharia law or Islamic law may require capital punishment, there is a great variation within Islamic nations as to actual capital punishment.<sup>10</sup> Apostasy in Islam and stoning to death in Islam are controversial topics.<sup>11</sup> Furthermore, as expressed in the Qur'an, capital punishment is condoned. Although, the Qur'an prescribes the death penalty for several Hadd (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 decide whether the offender is punished with death by the authorities or made to pay Diyah (wergild) as compensation.<sup>12</sup> If anyone kills a person unless it be for murder, or for spreading mischief in the land, it would be as if he killed all the people. And if anyone saves a life, it would be as if he had saved the lives of all people.<sup>13</sup> Spreading mischief in the land can mean many different things, but it is generally interpreted to mean those crimes that affect the community as a whole, and destabilize the society. Crimes that have fallen under this description have included: treason, apostasy, piracy (essentially armed robbery), murder, terrorism, rape, including paedophilia, adultery, homosexual intercourse.<sup>14</sup> However, there is also a minority view within some Muslims that capital punishment is not justified in the light of the Qur'an.<sup>15</sup>

### *(b) Christianity*

Although, some Christians maintain that Jesus' teachings condemn violence in the Gospel of Luke and the Gospel of Matthew, regarding turning the other cheek, and Pericope Adulteral in which Jesus intervenes in the stoning of an adulteress, rebuking the mob with the phrase "may he who is without sin cast the first stone", most scholars agree that it was certainly not part of the original text of St. John's Gospel and others consider<sup>16</sup>to support death penalty. Many Christians have understood that Jesus' doctrine of peace speaks of personal ethics and is

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<sup>7</sup> Samba, J.N. *Fundamental Concepts of Jurisprudence*, (Makurdi; Peach Gobal Publishers, 2003) p.47.

<sup>8</sup> El-Awa, M.S., *Punishment in Islamic Law* (Indianapolis: American Trust Publications, 1986) p. 41

<sup>9</sup> *Ibid*, at p. 43

<sup>10</sup> *Ibid*, at p. 46

<sup>11</sup> *Ibid*, at p. 49

<sup>12</sup> Capital Punishment in Islam, Islam, about. Comm. [http://islam . about. Comm.es/law/a/punishment.htm](http://islam.about.com/es/law/a/punishment.htm). Accessed 2010/08/23

<sup>13</sup> Amnesty International, *Why the Death Penalty is Un-Islamic?*

[Http://likashifshahzada.comm.2010/11/20/Why-the-death-penalty-is-un-islamic](http://likashifshahzada.comm.2010/11/20/Why-the-death-penalty-is-un-islamic) (Accessed on 2015/11/20)

<sup>14</sup> Qur'an 5:32

<sup>15</sup> *Ibid*.

<sup>16</sup> Holy Bible King James Version (KJV) Matthew 7 v 3-7; Luke 6 v 6-12 (England: Clays Press Ltd, 1984) Pp.685-727

distinct from civil government's duty to punish crime.<sup>17</sup> Also Leviticus 20:2-27 has a whole list of situations in which execution is supported. Christians position on this, varies.

### 3. DEATH PENALTY AND INTERNATIONAL LAW

Historically, international law was viewed as a law of sovereign states.<sup>18</sup> However<sup>19</sup>, as Schabas points out, this views evolved in the twentieth century. He states that international law is no longer restricted to the rights and obligations of states, between themselves but now encompasses rights and obligations that states undertake to respect viz-a-viz individuals. It has as one of its aims, the protection of the human rights of the individual against his or her own government. Therefore, human rights can be seen as one of the principal themes of international law as they have been incorporated into it.<sup>20</sup>

Some international instruments merely place restrictions on the use of death penalty while others make no mention of it. As a result, some people have conceded that death penalty has not been abolished by international law, for example, Malabo of Zambia, who was once President Chiluba's legal adviser, insisting that the death penalty in Zambia has a constitutional basis and is in line with the International Covenant on Civil and Political Rights (ICCPR), which reserves the death penalty for the most serious crimes.<sup>21</sup> Also, Justice Chaskalson acknowledged the fact that capital punishment is not prohibited by public international law in *S.v. Makwanyene*.<sup>22</sup> He points out that capital punishment is not prohibited by public international law and that is a factor that has to be taken into account in deciding whether it is cruel, inhuman or degrading punishment.<sup>23</sup>

Arguably, capital punishment is not prohibited by international law.<sup>24</sup> Article 3 of the Universal Declaration of Human Rights (UDHR), for instance, provides that "everyone has the right to life, liberty and security of person", but makes no reference to death penalty. Since most African States still retain death penalty, it is submitted that they could read this provision as allowing for its imposition. Article 6(1) of the ICCPR is silent on death penalty. It provides that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." The ICCPR therefore allows for the imposition of death penalty as long as is not arbitrary, as Article 6 of the ICCPR goes further to place restrictions on the use of death penalty. According to Article 6(1), death sentence is acceptable as long as it is not imposed on someone below 18 years of age and a pregnant woman. The second Optional Protocol to the ICCPR does not provide for absolute abolition of death penalty, as Article 2(1) of the Protocol allows states to apply death penalty in time of war to a conviction for a most serious crime of a military nature committed during war, if a reservation was made to this effect at the time of ratification or accession. Also, the United Nations Convention on the Rights of the Child (CRC) does not abolish death penalty. It merely prohibits its imposition on persons below 18 years of age.<sup>25</sup>

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<sup>17</sup> Romas 13:3-4

<sup>18</sup> Dugard, J., *International Law: A South African Perspective* (2000) 1. It also includes non-binding rules and principles, such as those enshrined in resolutions of for example, the U.N. General Assembly.

<sup>19</sup> Schabas, W., 'International Legal Aspects' in Hodgkinson P and Rutherford A (eds) *Capital Punishment: Global Issues and Prospect* (1996) 17.

<sup>20</sup> *Ibid*, at p. 19

<sup>21</sup> AFRICANEWS 'Zambia: Prisoners Challenge Capital Punishment' <http://lists.peacelink.it/afrinews/msg00190.html> (accessed 12 February 2016).

<sup>22</sup> Makwanyane (1995) para.36

<sup>23</sup> *Ibid*.

<sup>24</sup> *Prosecutor v. Klinge* (1946) 13 Ann Dig 262 (Supreme Court, Norway) cited in Schabas op. cit., pp. 235 and 260

<sup>25</sup> Article 37(a). the CRC was adopted by the UN General Assembly on 20 November, 1989, entered into force on 2 September 1990, GA Res. 14/25, UN Doc. A/44/49 (1989)

Furthermore, treaties of international humanitarian law do not prohibit death penalty, but merely provide rules regarding its imposition in times of war. The third Geneva convention protects prisoners of war by limiting the scope of imposing death penalty on them and provides that where a death sentence has been passed, the execution shall not be carried out before the expiration of a period of at least six months.<sup>26</sup>

The Fourth Geneva Convention protects civilians in times of war. It does not prohibit the imposition of death penalty. It prohibits only the deprivation of the right of petition for pardon or reprieve for those condemned to death.<sup>27</sup> The Geneva Convention has two Protocols limiting the scope of application of death penalty but not abolishing or prohibiting its use. Protocols I and II prohibit the application of death penalty on pregnant women or mothers and on juveniles.<sup>28</sup> Death penalty is thus a valid punishment as long as certain conditions are met.

With regard to human rights instruments in the various regional human rights systems, most of them have not abolished death penalty absolutely. In the European human rights system with regard to states that are yet to ratify Protocol No. 13,<sup>29</sup> death penalty can be imposed as an exception to the right to life under article 2(1) of the European Convention on Human Rights (European Convention).<sup>30</sup> Perusing Article 2, it is submitted that it does not envisage the abolition of death penalty. Moreover, it makes little provision for safeguards or limitations on the use of death penalty. Subsequently Protocol No. 6 to the European convention was adopted,<sup>31</sup> which does not completely abolish death penalty. In *Sovering v. United Kingdom*,<sup>32</sup> the European Court of Human Rights pointed out that Article 2 of this Protocol does not preclude death penalty as it allows member states to use death penalty in times of war.

In the Inter-American Human Rights system, the American Convention does not preclude death penalty but merely places limitations on its use. Article 4(3) of the American Convention prevents states that have abolished death penalty from reintroducing it. Therefore, the American convention is an abolitionist Instrument only to the extent that states that abolished death penalty before ratifying the American Convention are bound as a matter of international law not to use the death penalty. However, those that have not or did not abolish death penalty before ratifying the Convention are free to use it as long as they adhere to the safeguards on its use. The American convention further provides safeguards and limitations on death penalty, excluding its use for political crimes and related common crimes and for juveniles and the elderly persons,<sup>33</sup> but in other cases, death penalty is a legitimate sentence. The American Convention was supplemented by a Protocol dealing with the abolition of death penalty.<sup>34</sup> However, the Protocol does not

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<sup>26</sup> Article 100 and 101, Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (3<sup>rd</sup> Geneva Convention), 75 UNTS 135. Cited in Chenwi, L., *Towards The Abolition of the Death Penalty in Africa: A Human Rights Perspective* (Pretoria: Pretoria University Law Press, 2007) p. 24.

<sup>27</sup> Articles 68 and 75, Geneva Convention relative to the Protection of Civilian Persons in time of 12 August 1949 (4<sup>th</sup> Geneva Convention), 75 UNITS 287.

<sup>28</sup> See Protocol Additional to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Articles 76(3) and 77(5); and Protocol Additional to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) article 6(4); Chenwi, L., *op.cit.* at p.26.

<sup>29</sup> Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, adopted by the Committee of Ministers in February 2002, entered into force on 1 July, 2003. Thirty –Seven Countries have ratified Protocol No. 13 and 7 countries have signed but are yet to ratify the Protocol.

<sup>30</sup> Adopted in 1950, entered into force on September 3 1953 (ETS 5, 213 UNTS 222). The Convention is the only instrument to attempt an exhaustive list of exceptions to the right to life.

<sup>31</sup> Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, adopted on 28 April, 1983, entered into force on 1 March 1985 (ETS 114)

<sup>32</sup> *Sovering v. United Kingdom* ECHR (1989) Ser A Vol. 161 para. 103 hereinafter referred to as *Soaring* 1989.

<sup>33</sup> Articles 4(4) and 4(5) of the American Convention respectively.

<sup>34</sup> Protocol to the American Convention on Human Rights to Abolish the Death Penalty, adopted on 8 June 1990, entered into force on 28 August 1991 (OAS Treaty Series No. 73 (1990), reprinted in Basic

prohibit death penalty as Article 2 makes provision for a reservation to be made by state parties regarding the application of death penalty in War times in accordance with international law for extremely serious crimes of a military nature.

In the African Human Rights System, the African Charter in Article 4 prohibits the 'arbitrary' deprivation of life. This Article can be read to imply that, it permits death penalty as the Charter as a whole makes no mention of death penalty or the need to abolish it.<sup>35</sup> In addition, as noted earlier, the African Children's Charter and the African Women's Protocol do not preclude the death penalty except for certain category of persons.

Regarding the Islamic system, capital punishment is considered an integral part of the law. The Islamic human rights system has no convention, but the Islamic council has adopted a Universal Islamic Declaration of Rights which guarantees the right to life and provides for death penalty under the authority of the law in its Article 1(a).<sup>36</sup> In addition, the League of Arab States has adopted the Arab Charter on Human Rights,<sup>37</sup> which proclaims the right to life in its Article 5. It goes further to provide for the imposition of death penalty for the most serious crimes, prohibits its imposition for political offences, on persons under the age of 18, a pregnant woman prior to her delivery or a nursing mother within two years from the date on which she gave birth.<sup>38</sup> Thus, death penalty is a legitimate punishment in the Islamic human rights system.

It is submitted that notwithstanding the aforesaid, it should be borne in mind that caution has to be taken in dealing with capital punishment in international law because capital punishment is also related to domestic jurisdictions. Each country has its own laws on death penalty. However, these laws have to be in accordance with international human rights law. International law is comprised of global and regional (human rights) treaties. The silence of some of these treaties, for example, the African Charter on death penalty, the work contends, is not a bar to calling for the abolition of death penalty. International law contains minimum obligations. States may go beyond these obligations by elevating international law standards in their domestic systems. Thus, the international law argument is not conclusive. The line of reasoning that death penalty is allowed under international law is subject to compliance with the restrictions placed on its imposition and procedural safeguards with regard to its imposition. In the light of the progressive acceptance of human rights, a systematic reading of the existing human rights instruments inevitably leads to the conclusion that death penalty is a violation of human rights.<sup>39</sup> In the African continent, 'human rights' have been the basis for the abolition of death penalty in south Africa in the landmark judgment passed by the South African constitutional court in which it declared the death penalty unconstitutional.<sup>40</sup>

Although, Article 3 of the Universal Declaration of Human Rights (UDHR) makes no mention of death penalty, if one looks at the interpretation of this Article by the UN General Assembly and Economic and Social Council (ECOSOC) Resolutions, it is clear that death penalty

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Document Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II. 82 doc 6 rev. 1 at 80 (1992). In the extension of the application of the death penalty in some states and proposals from Uruguay and other states on the abolition of the death penalty prompted the Inter-American commission on Human Rights to raise the idea of an additional Protocol to the American Convention on Human rights. The Inter-American Commission Justified the need for a Protocol on the basis that when the American convention was adopted, prevailing conditions would not have permitted abolition, but that there had been progress since then. See Schabas (Note 145 above).

<sup>35</sup> Generally, the African Charter has been criticized as falling short of truly effective human rights protection (see Flinterman, C. and Henderson, C.) 'The African Charter on Human and Peoples' Rights' in Hanski D. and Suksi M. (eds.) *An Introduction to the International Protection of Human Rights* (1999) 395.

<sup>36</sup> Adopted on 19 September 1981 (21 "Dhul Qaidah 1401).

<sup>37</sup> Adopted on 15 September 1994, reprinted in (1997) 18 *Human Rights Journal* 151

<sup>38</sup> Articles 10, 11 and 12 respectively of the A5ab Charter on Human Rights.

<sup>39</sup> Slama, B., 'The Death Penalty as an exception to the right to life: To What extent is capital punishment a violation of human rights?' in Heyns C (ed.) *International Yearbook of Regional Human Rights Master's Programmes* (2001) 427

<sup>40</sup> Makwayane (1995) 49.

has been considered to be incompatible with the right to life.<sup>41</sup> Moreover, the UDHR cannot be used to justify the application of death penalty, especially considering the fact that the right to life is not qualified.<sup>42</sup>

Under the ICCPR, the third and Fourth Geneva Conventions, the European Convention, the American Convention and the African Charter, the imposition of death penalty will be a valid punishment only if the safeguards and restrictions on its implementation are respected. Moreover, the paper contends, that the very restrictive nature of any possible reservation to the Second Optional Protocol to the ICCPR supports a trend towards abolition. The Protocol states in its preamble that the “abolition of death penalty contributes to the enhancement of human dignity and progressive development of human rights.” The Protocol thus envisages the abolition of death penalty. Over the years, states have increasingly ratified the Second Optional Protocol.<sup>43</sup>

Furthermore, with the adoption of Protocol No. 13, it is the study’s view that the European convention cannot be used at present, even by states that have not ratified the protocol to justify the argument above that death penalty is provided for in international law. If one takes into consideration, for example, the developments in the European system after 1994 as well be seen below, Article 2 of the European Convention could be interpreted to imply that it precludes death penalty.<sup>44</sup> The Parliamentary Assembly of the Council of Europe in Recommendation 1246 (1994):

Considers that the death penalty has no legitimate place in the penal systems of modern civilized societies, and that its application may well be compared with torture and be seen as inhuman and degrading punishment within the meaning of Article 3 of the European convention on Human rights.<sup>45</sup>

The parliamentary Assembly further acknowledged the importance of countries that had not yet abolished death penalty joining the trend towards abolition. In Resolution 1044 (1994), it calls:

Upon all the Parliaments in the world which have not yet abolished the death penalty, to do so promptly following the example of the majority of the Council of Europe member states.<sup>46</sup>

In the same Resolution, the Assembly made it obligatory for all new member states to sign and ratify Protocol No. 6 and to introduce a moratorium on executions.<sup>47</sup> Abolition of death penalty became a pre-condition for membership of the Council of Europe. In Resolution 1097 (1996),<sup>48</sup> the Parliamentary Assembly, referring to Resolution 1044 (1994) reminded applicant states to the Council of Europe that the willingness to sign and ratify Protocol No. 6 to the

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<sup>41</sup> Roosevelt, Chairperson of the drafting committee of the UDHR, referred to movement in progress in some states to abolish the death penalty and recommended that it might be better not to make explicit mention of the matter (UN Doc E/CN 4/ACI/SR2,10).

<sup>42</sup> Ibid.

<sup>43</sup> See ‘Ratification of International Treaties’ <http://web.amnesty.org/pages/deathpenalty-treaties-eng>. (accessed 31 December, 2015)

<sup>44</sup> Generally, the object and purpose of the European Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (McCann and Others v. United Kingdom ECHR (1995) Ser A No. 324, Application No. 1898/91 Para. 146).

<sup>45</sup> Parliamentary Assembly of the council of Europe recommendation 1246 (1994) on the abolition of capital punishment, para. 7 adopted on 4 October, 1994.

<sup>46</sup> Parliamentary Assembly of the council of Europe Resolution 1097 (1996) on the Abolition of the Death Penalty in Europe, para. 7, adopted on 4 October 1994.

<sup>47</sup> Resolution 1044 (as above) para. 5. Chenwi L., op. cit., pp.21-28.

<sup>48</sup> Parliamentary Assembly of the council of Europe Resolution 1097 (1996) on the Abolition of the Death Penalty in Europe, para. 6, adopted on 28 June 1996.

European convention and to introduce a moratorium upon accession had become a pre-requisite for membership on the part of the Assembly.

The Parliamentary Assembly of the Council of Europe has also indicated its interest in deleting the second sentence of Article 2(1) of the European Convention, which allows for death penalty so as to match theory with reality.<sup>49</sup> A major breakthrough has been the adoption of Protocol No. 13 to the European Convention, which abolishes death penalty in all circumstances, that is, in both peace time and war time.<sup>50</sup> Protocol No. 13 provides in its preamble that: “Abolition of death penalty is essential for the protection of the right to life and for a full recognition of the inherent dignity of all human beings”.

In the study’s view, this Protocol changes the interpretation of Article 2 of the European convention and rebuts article 2 of Protocol No. 6 stated above. Article 1 of Protocol No. 13 abolishes death penalty, Article 2 goes on to prohibit any derogation and Article 3 prohibits any reservations in respect of its provisions. Article 5 of the Protocol provides that:

Article 1 to 4 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention in the light of this Protocol inevitably lead to the conclusion that the death penalty is precluded.

In addition to the above, Article 2(2) of the Charter of Fundamental Rights of the European Union prohibits the imposition of death penalty and executions.<sup>51</sup> With regard to the Convention on the rights of the Child (CRC), African Children’s Charter and African women’s Protocol, their scope are limited to the protection of specific vulnerable groups. Death penalty has been prohibited for those groups in the above instruments. Thus, they preclude death penalty as far as their scope reaches. Furthermore, the fact that Article 4 of the African Charter makes no mention of death penalty could be interpreted, in the light of Article 60 of the Charter to imply that it precludes death penalty. Also, adopting Schaba’s view on the UDHR mentioned earlier, it could be said that the African Charter is abolitionist in outlook, as it makes no mention of death penalty unlike other human rights instruments in the African system or other regional systems. Even if an interpretation is to the effect that death penalty is allowed, its application is however limited. Nonetheless, similar provisions in other jurisdictions prohibiting the arbitrary deprivation of life have been interpreted to preclude death penalty.<sup>52</sup> In other words, death penalty has been seen to be an arbitrary deprivation of life. Also, the conclusions of Justice Chaskalson and other Judges of the South African Constitutional Court that death penalty is ‘arbitrary’ are powerful support for an interpretation of Article 4 of the African charter to the effect that it prohibits capital punishment.<sup>53</sup>

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<sup>49</sup> The reality that strengthened the interest of the Parliamentary Assembly is that more modern national constitutional documents and international treaties no longer include such provisions. See Parliamentary Assembly Opinion No. 233 (2002) on the draft Protocol to the European convention on Human Rights concerning the abolition of the death penalty in all circumstances, para. 5. Similarly, with regard to amending article 2, the European court of Human Rights has noted that the abolition status of the death penalty throughout Europe should be seen as an agreement by contracting states to amend article 2(1) of the European convention, See *Ocalan v. Turkey*, Application No. 46221/99 (2003) ECHR 125, Judgment of 12 March 2003, par4a. 175; (2003).

<sup>50</sup> The adoption of Protocol No. 13 followed a recommendation of the Parliamentary Assembly of the Council of Europe that the Committee of Ministers draw up an additional Protocol abolishing the death penalty in both peace and war time.

<sup>51</sup> Proclaimed by the European Parliament, the council and Commission at Nice on 7 December 2000 (2000/C364/01); cited in Chenwi, L., *towards the abolition of the Death Penalty in Africa: A Human rights Perspective* (Pretoria: Pretoria University Law Press, 2007) pp. 21-28.

<sup>52</sup> *Ibid*, at p. 30

<sup>53</sup> *Ibid*, at p. 32



It is therefore questionable, whether death penalty is provided for in international law, as death penalty is a violation of human rights.<sup>54</sup> The retention or use of death penalty in Nigeria, it is submitted in a matter of concern, as it contravenes international human rights law standards and defies the international community's effort to abolish it. International developments and even developments in Africa, show a trend towards the abolition of death penalty. These developments raise serious questions for those countries in Africa including Nigeria that still retain and use death penalty.

### *3.1 Jurisdictions that have Abolished Death Penalty: Date of abolition*

Countries that have abolished death penalty for all crimes include:<sup>55</sup> Andorra 1990; Angola 1992; Australia 1985; Austria 1968; Azerbaijan 1998; Belgium 1996; Belgaria 1998; Cambodia 1989; Canada 1998; Cape Verde 1981; Colombia 1910; Costa Rica 1877; Croatia 1990; Czech Republic 1990; Denmark 1978; Dominican Republic 1966; Ecuador 1906; Estonia 1998; Finland 1972; France 1981; Georgia 1997; Germany 1987; Greece 1993; Guinea-Bissau 1993; Haiti 1987; Honduras 1956; Hungary 1990; Iceland 1928; Ireland 1990; Italy 1994; Kiribati 1987; Liechtenstein 1998; Lithuania 1979; Luxembourg 1995; Macedonia 1995; Marshall Islands 1962;<sup>56</sup> Mauritius 1990; Micronesia 1990; Moldova 1997; Monaco 1982; Mozambique 1989; Namibia 1979; Nepal 1979; Netherlands 1992; New Zealand 1997, Nicaragua 1976; Norway 1989; Palau 1965; Panama 1990; Paraguay 1990; Poland 1989; Portugal 1997; Romania 1976; San Marino 1989; Sao tome and Principe 1997, Slovakia 1996;<sup>57</sup> Slovenia 1987; Solomon Islands 1998; South Africa 1995; Spain 1972; Sweden 1992; Switzerland 1994; Tuvalu 1992; United Kingdom 1967; Uruguay 1992; Vanuatu 1973; Vatican City State 1969; Venezuela 1863.<sup>58</sup>

### *3.2 Jurisdictions that Still Retain Death Penalty<sup>59</sup>*

Algeria, Antigua and Barbuda, Armenia, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Chad, Chile, china, Comoros, Cuba, Dominica, Egypt, Equatoria-Guinea, Eritrea Ethiopia, Gabon, Ghana,<sup>60</sup>Guatemala, Guinea, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, Kazakhstan, Kenya, North Korea, Nigeria, South Korea, Kuwait, Kyrgyzstan, Laos, Lebanon, Lesotho,<sup>61</sup>Liberia, Libya, Malawi, Malaysia, Mauritania, Mongolia, Morocco, Myanmar, Oman, Pakistan, Palestine, Philippines, Qatar, Russian Federation, Rwanda, St. Christopher, Nevis, St. Lucia, Saint Vincent and the Grenadines, Saudi Arabia,<sup>62</sup>Sierra Leone, Singapore, Somalia, Sudan, Swaziland, Syria, Tadzhiistan, Taiwan, Tajikistan, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Turkmenistan, Uganda, Ukraine, United Arab Emirates, USA, Uzbekistan, Vietnam,<sup>63</sup>Yemen, Yugoslavia, (Federal Republic of);, Zaire, Zambia and Zimbabwe.

It is submitted that for a world in which death penalty has been practiced virtually everywhere for centuries, this is a dramatic turnaround. Although, formal abolition of death

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<sup>54</sup> See Makwanyane (1995). It should be noted that members of the supreme court of Nigeria have shown some interest in the arguments by which Article 4 is held to prohibit capital punishment. See *Nemi and Others v. The State* (1994) 1 LRC 376.

<sup>55</sup> Amnesty International, *Facts and figures on the Death Penalty* (A1 Index: ACT 50/2/99) (April, 1999); Amnesty International, *Death Sentences and Executions 2009* (London: Amnesty Publications, 2010) p. 28

<sup>56</sup> *Ibid*, at p. 31

<sup>57</sup> *Ibid*, at p. 34

<sup>58</sup> *Ibid*, at p. 37

<sup>59</sup> 'Call to Abolish Death Penalty in Ethiopia' *Mail and Guardian* 3 October 2003, p. 123.

<sup>60</sup> *Ibid*, at p. 127

<sup>61</sup> *Ibid*, at p. 130

<sup>62</sup> *Ibid*, at p. 132

<sup>63</sup> *Ibid*, at p. 136

penalty dates as far back as 1867 for Venezuela and 1870 for the Netherlands and even earlier for some states in the United States, such as Michigan (1846), most of the movements toward elimination of capital punishment have been fairly recent.<sup>64</sup>

TABLE 1: DEATH SENTENCES BETWEEN 2007 AND 2012<sup>65</sup>

2007	2008	2009	2010	2011	2012
Egypt (79)	Burundi(40)	Burundi (50)	Burkina Faso (2)	Algeria (21)	Burkina Faso (2)
Burundi (99)	Central Africa Republic (2)	CAR (25)	Burundi (14)	Burkina Faso (2)	Burundi (4)
Mali(14)	Egypt (103)	Ethiopia (7)	Cameroon (8)	Burundi (44)	Guinea (2)
Malawi (53)	Guinea (22)	Kenya (126)	Chad (4)	Cameroon (27)	Liberia (3)
Rwanda (164)	Kenya (26)	Libya (2)	DRC (30)	Chad (19)	Nigeria (4)
Zambia (11)	Libya(8)	Nigeria (12)	Ethiopia (6)	DRC (27)	Somalia (8)
	Nigeria (31)	Rwanda (40)	Ghana (1)	Egypt (1)	
	Rwanda (120)	Sudan (120)	Morocco 14	Equatoria	
	Sudan (26)	Togo (1)	Nigeria (1)	Guinea (1)	
	Swaziland (12)	Uganda (24)	Rwanda (18)	Eritrea (7)	
	Tunisia (1)		Sudan (24)	Ethiopia (3)	
			Swaziland(1)	Libya (6)	
				Morocco (1)	
				Nigeria (14)	
				Senegal (1)	
				Sierra Leone (10)	
				Sudan (100)	

TABLE II: EXECUTIONS BETWEEN 2007 AND 2012.<sup>66</sup>

2007	2008	2009	2010	2011	2012
Burundi (2)	Botswana (1)	Nigeria (1)	Botswana (4)	Egypt (6)	Libya (4)
Egypt (22)	Egypt (4)	Sudan (40)	Chad (9)	Sudan (2)	Somalia (6)
	Guinea (22)	Uganda (2)	DRC (15)	Somalia	
	Guinea (7)		Sierra Leone (10)	Tanzania (1)	
	Sudan (3)		Somalia (4)		
	Uganda (2)		Sudan (13)		
			Uganda (7)		
			Zimbabwe (4)		

#### 4. CONCLUSION

The laws in any country are, in an important sense, a product of the social conditions prevailing in that country. Retention of death penalty speaks volumes on the prevailing social conditions in the country. Towards abolishing death penalty, Nigeria is therefore urgently called upon to affirm the unqualified right to life and ensure adequate protection of human rights in its territory. The Nigerian government should immediately establish a moratorium on executions as a first step towards abolishing death penalty in the country. Nigeria, no doubt is always a

<sup>64</sup> Ibid, at p. 139.

<sup>65</sup> See Amnesty International, Facts and figures on the Death Penalty (A1 Index: ACT 50/2/00) (April, 2013)

<sup>66</sup> African National Congress Daily Press Briefing Aug. 27, 2012 (on File with (DPICV)

progressive force and a pacesetter on many fundamental socio-political issues in Africa and beyond. However, its present stance on the death penalty is largely in the opposite. It is therefore advised that Nigeria should revisit the issue of death penalty with the aim of removing it from her criminal justice system. Apart from the Constitution, both the Criminal Code, the Penal Code and of course the Shariah Penal Code needs amendment by simply removing death penalty as a prescribed form of punishment. This step is imperative for Nigeria being a prominent member of the United Nations as an aspirant of permanent membership to the United Nations Security Council and the African Union. Nigeria should not stand aloof while other countries are on the part of progress towards abolishing death penalty in their territories. The National Human Rights Commission, the Ministry of Justice, the Nigerian Bar Association and other contemporary civil societies in the country are therefore called upon to take up the challenge on this issue.

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