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DEATH PENALTY IN NIGERIA: THE NEED TO REDUCE THE CAPITAL CRIME LIST

Ikenga K. E. Oraegbunam, Ph.D*

Introduction

Today there is generally a move towards the abolition of capital punishment. Indeed, for most if not all parts of Europe, abolition of death penalty is a *fait accomplis* for it is a condition precedent for any country wishing to belong to the Council of Europe. Yet outside Europe, the principle of territorial sovereignty and integrity plus the monistic approach to international legal instruments have made it possible for some countries to remain retentionist in spite of being signatories to the relevant international laws, if they so desire. For instance, even as article 6 of International Covenant on Civil and Political Rights (ICCPR) clearly approves of a country's choice to abolish the death penalty, it still does not require the country, unlike the European Council Charter, to eliminate the use of capital punishment in order to be party to the Covenant. Therefore, the practice in retentionist nation States is not inconsistent with existing international conventions and protocols, so that each State still enjoys the right to choose whether to retain or abolish capital punishment including the right to classify criminal acts which constitute capital crimes. This paper discusses the attitude of Nigeria as a sovereign state to the global question of death penalty. It equally seeks to juxtapose the Nigerian position with what obtains in other African countries. The study will finally hand in some recommendations.

Legal Position on the Death Penalty in Nigeria

Ever since its inception *via* the amalgamation of the Northern and Southern Protectorates in 1914, Nigeria has not witnessed any serious shift in the position of the law on death penalty in the course of administration of criminal justice. Death penalty had been recognized and enforced under the various constitutions that Nigeria had ever operated, whether colonial or autochthonous. Besides, in pre-independence era in Nigeria, the colonial authorities had under the operative laws recognized and executed the death penalty.[1] This legal *status quo* has remained and maintained by the 1999 Constitution. This is implicated in the wordings of section 33 (1) of the Constitution which states that "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."

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1. *R. v. Nungu* (1953) W.A.C.A. 379; *R. v. Adi* (1955) 15 W.A.C.A. 6; *R. v. Obi* (1957) W.R.N.L.R. 19 are some of the pre-independence cases that involved death penalty.

It is thus observed that death penalty is allowed as a claw back or derogation from the fundamental right to life as framed in the clause: "...save in execution of the sentence of a court in respect of a criminal office of which he has been found guilty in Nigeria". It is equally observed that the only possible sentence of a court relating to right to life and in respect of a criminal offence, which one can be found guilty, must be that of death. Therefore, even as the expression "death penalty" is not used, its implication is quite glaring in the provision of section 33 (1) of 1999 Constitution. No doubt, this derogation has a fundamental basis on section 45 (1) (a) & (b) which allows for a general restriction of the exercise of fundamental rights in the interest of defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedom of other persons.[2] The constitutional legitimacy of this derogation seems necessary for if a murderer is allowed a field day without execution of a death sentence on him as a result of his fundamental right to his life, then public safety, order, or rights and freedoms of other persons might well pay dearly for it. We are however not oblivious of the burning question of whether or not it is only by death penalty that the dastardly act of a particular murderer is curbed, or whether death penalty would even deter future murderers. But one thing is certain, namely, if a murderer, X, whom a court of competent jurisdiction finds guilty is executed by facing the death penalty, that murderer, X, will never commit any murder again since he had ultimately been removed from his society and any other society.

Besides, a cursory look at the provision of section 33 (1) of the Constitution of the Federal Republic of Nigeria 1999 would reveal its identity, in every material particular, with the provisions of section 18(1) and section 30(1) of the Republican Constitution 1963, and the Constitution of the Federal Republic of Nigeria 1979, respectively. Be that as it may, a challenge was posed to the above time-honoured constitutional penal measure in the case of *Onuoha Kalu v The State*.[3] In this case, the appellant had been convicted of murder at the Lagos State High Court. The Court of Appeal affirmed the conviction. At the Supreme Court, the appellant obtained leave to raise the issue of constitutionality of death penalty imposed on him. Succinctly put, this issue, arising for the first time for judicial construction and determination was whether the death penalty amounts to torture, inhuman and degrading treatment and therefore unconstitutional, null and void.

On Friday, 18th December 1998, the Supreme Court delivered its judgement in this case that, *inter alia*, decided and reiterated the constitutional validity of death penalty in Nigeria. In coming to this decision, the apex court took the view that the right to life guaranteed by section 30 (1) of the 1979

2. Although section 45 of C.F.R.N 1999 seems to be specific to the fundamental rights to private and family life (section 37), religion, thought and conscience (section 38), expression and press (section 39), peaceful assembly and association (section 40), and movement (section 39), for the purpose of the derogations, yet in our considered view, nothing prevents the intention of the legislature from being extended to other fundamental rights.

3. (1998) 13 N.W.L.R. (Pt. 583) 531.

Constitution, under which the case was determined, is qualified to the extent that life may be lawfully terminated in execution of the sentence of a court in respect of a criminal offence of which a person has been found guilty. The Supreme Court further held that the combined effect of sections 30 (1), 31(1), 213 (2) (d) and 220 (1) (e) of the 1979 Constitution as well as sections 319 (1)[4] of the Criminal Code Law of Lagos State establishes beyond doubt that death penalty is real and constitutional in Nigeria, provided that it is inflicted pursuant to the sentence of a court of law in a criminal offence of which an accused person has been found guilty. Making a comparative analysis of similar provisions in the constitutions of Tanzania, Zimbabwe, South Africa, India, The United States of America, Hungary, and Jamaica, the Supreme Court held that death penalty is not peculiar or unique to Nigeria. It concluded that death penalty is advocated and supported in other jurisdictions including the United States of America. Consequently, the full Supreme Court in a unanimous decision rejected the contention of the appellant that the death penalty prescribed under section 319 (1) of the Lagos State Criminal Code is inconsistent with the Constitution of the Federal Republic of Nigeria 1979. It may be interesting in this connection to reproduce a part of the *dictum* of Iguh J S C in delivering the leading judgement:

> It is plain to me that the death penalty prescribed by section 319 (1) of the Lagos State Criminal Code cannot be said to be inconsistent with the Constitution of the Federal Republic of Nigeria, 1979. The death penalty as per sections 30 (1), 213 (2) (d), 220 (1) (e) of the Constitution of the Federal Republic of Nigeria, 1979 is expressly recognized by the said Constitution. It is also the rule of interpretation that to take away a right given by common law or statute, the legislature should do that in clear terms devoid of any ambiguity. Accordingly if the legislature had intended to take away the right it recognized under section 30 (1) of the Constitution by section 31 (1) (a) of the same document, it seems to me that it would have done this by clear terms and not by implications as learned counsel for the appellant appears to suggest. Besides, the right to life prescribed under the said section 30 (1) of the Constitution is clearly a qualified right. It is not an unqualified right. It is also not in dispute that the imposition or execution of the death sentence in Nigeria is not

4. Note that section 31 (1) of the 1979 Constitution provided for the fundamental right of every individual to respect for the dignity of the person, and paragraph (a) thereof holds that no person shall be subjected to torture, or to inhuman or degrading treatment. Section 213 (2) (d) of the Constitution provides for the exclusive jurisdiction of the Supreme Court to hear appeals from the Federal Court of Appeal on the decision on any criminal proceedings in which any person has been sentenced to death by the Federal Court of Appeal or which the Federal Court of Appeal has affirmed a sentence of death imposed by any other court. Hence, section 220 (1) (e) provides for the appellant jurisdiction of the Federal Court of Appeal as of right in the decision in any criminal proceedings in which the High Court has imposed a sentence of death. All these provisions of the 1979 Constitution are *in pari materia* with sections 34 (1), 233 (1) (d) & 241 (1) (e) of 1999 Constitution, respectively. In the same way, section 319 (1) of the Criminal Code of Lagos State provides for death penalty for the offence of murder.

> subjected to any form of arbitrary, discriminatory or selective exercise of discretion on the part of any court or any other quarters whatever. I therefore entertain no doubt that the death penalty in Nigeria can by no stretch of the imagination be said to be invalid or unconstitutional.[5]

Having dismissed and disposed of the appellants complaints against the constitutional legitimacy of the death penalty, the Supreme Court next turned to the issue of whether the death penalty amounts to torture, inhuman and degrading treatment and thus a violation of section 31 (1) of the 1979 Constitution, which if favourably determined will render the death penalty unconstitutional. However, relying on section 42 of the Constitution, the Supreme Court tacitly refused to resolve the issue, holding instead that it is a matter that falls for determination by a High Court in a separate proceeding that should be instituted by the appellant for that purpose. In order to appreciate the argument of the Supreme Court, it may be helpful to state the provision of section 42 (1) & (2) of 1979 Constitution which is followed *ipsissima verba* by section 46 (1) & (2) of 1999 Constitution:-

> 42 (1) Any person who alleges that any of the provisions of this chapter (chapter iv) has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.
> 42(2) subject to the provisions of this constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provision of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that State of any rights to which the person who makes the application may be entitled under this chapter (brackets mine).

By virtue of this provision, especially that of subsection (2), the Supreme Court declined jurisdiction to entertain the issue of whether death penalty amounts to torture, inhuman and degrading treatment and which issue touches on fundamental right. The Supreme Court therefore held that original jurisdiction on such issues clearly vests on a High Court in the State. Therefore, since the matter was first raised in the Supreme Court, it would be a misnomer for it to be entertained by the Supreme Court as of first instance. The Supreme Court thus concluded that it is a matter that falls for determination by a High Court in the State, namely, Lagos State in accordance with the provision of section 42 (1) & (2) of 1979 Constitution.

[5] *Onuoha Kalu v. The State* (Supra), 393.

Okafor and Obidimma, observe that, though there is nothing wrong with the Supreme Court decision on this issue when placed *parri passu* with the provision of section 42 of the Constitution, yet they argue that "the approach of the Supreme Court has opened the Pandora box that could lead to endless litigation adroitly to be exploited by opponents of death penalty to delay eventually the execution of death sentences".[6] They further give a reason for their submission:

> This is because the implication of the approach is that after a decision by the Supreme Court dismissing his appeal (at which time he would have exhausted the appellate remedies), an appellant can go back to the High Court to initiate another proceeding to determine whether or not the execution of this death sentence in the facts and circumstances of his case impermissibly violates his constitutional right not to be subjected to torture, inhuman and degrading treatment. Given the nature of our judicial process, it is most likely that this new action would take many years, upwards of fifteen to twenty years to get a final resolution in the Supreme Court. At the end of it, certainly the appellant would have spent inordinate number of years awaiting his fate (i.e. since the commission of the offence) to entitle him to another option to go back to the High Court to initiate still another proceeding. And so, the circle may continue endlessly.[7]

Although Okafor and Obidimma rightly observe that our judicial process is very slow, yet they are silent on whether the apex court would have heard the matter in spite of the original jurisdiction vested on the High Court in relation to fundamental rights issue, such as in the instant case, as stipulated by section 42 of 1979 Constitution. They are equally silent and do not advert their minds on whether the circumstances are such that section 22 of the Supreme Court Act[8] would have been invoked for the Supreme Court to hear the matter as of first instance based on the general power of the Court as enshrined in the section.[9]

[6] E. A. Okafor and E. O. C. Obidimma., "Case Comment on Onuoha Kalu v. The State" *UNIZIK Law Journal*, vol. 1, No 3, November 2001, 251.

[7] *Ibid.*

[8] Cap. S15 L.F.N. 2004 (formerly Cap. 424, L.F.N. 1990).

[9] Section 22 of the Act provides that "the supreme court may, from time to time, make any order necessary for determining the real question in controversy in the appeal and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Supreme Court thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have *full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted at the Supreme Court as a courts of first instance and may rehear the case in whole or part* or may remit it to the court below for the purpose of such rehearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court.

However that may be, in spite of the complaint on the slowness of our legal process, it has to be noted that a convict has a right of appeal under the Constitution up to the Supreme Court and which right must be exhausted before he can be executed.[10] Thus, can it rightly be sustained that a convicted accused is subjected to torture, inhuman and degrading treatment in the course of the period he is utilizing for the exercise of his constitutional right to appeal or in pursuit of his appellate remedies? Ironically, the convicted appellant in this case contended that there has been a breach of his rights under section 31 (1) (a) of the 1979 Constitution as a result of the long delay in carrying out the death sentence imposed on him. There is no doubt that even a convict has a right.[11] But then, a consideration of the circumstances of the instant case would suggest that this right seems pyrrhic amounting of course to saying to the authorities: "kill me quickly; kill me without allowing me to exercise my right of appeal."

The question of constitutional validity of death penalty was also an issue in *Lateef Adeniji v. The State*.[12] The facts of this case are that the appellant was arraigned on an information before the High Court of Lagos State, Ikeja Division on a charge of murder contrary to section 319 (1) of the Criminal Code Law of Lagos State. The case of the prosecution was that the appellant was a herbalist from whom the deceased received treatment for infertility of the womb. On 20th May 1984, the deceased was said to have gone to a place at Otta with the appellant. The deceased drove out of her house in her car, a Toyota Panel Van with registration number LA 922 KE and that was the last time she was seen alive. The appellant was said to have driven off the deceased to the house of P.W.6 at Mushin on 21st May 1984 and represented to him that he bought the vehicle from a friend of his at Apapa. The appellant could not produce purchase receipt when requested for by P.W. 6. He kept the vehicle in the House of P.W 6 against the wish of P.W.6. P.W.6 subsequently informed the police who arrested the appellant and linked him with the car of the deceased. The appellant took the police and some relatives of the deceased to Sango Otta where bones, skull of human being and the apparel worn by the deceased on 20th May 1984 were seen. In his statement to the police made on 23rd May, 1984, the appellant explained that he went with the deceased to the clinic of a medical doctor at Alimosho in Agege area of Lagos State. The doctor was not at his clinic. The deceased and the appellant then drove back. The appellant dropped off the car at Ikeja bus stop. The deceased headed towards Lagos as she said she was going to Maroko. The appellant denied ever taking the deceased to Otta.

At trial, the appellant elected not to testify. He did not call any witness. The trial court convicted the appellant of the offences and accordingly sentenced him to death. Dissatisfied with his conviction and sentence, the appellant

10. *Bello v. A.G. Oyo State* (1986) 6 NWLR, (Pt 45), 828 where the Supreme Court reprimanded the Oyo State Government for executing a convict during the pendency of his appeal.
11. *Nemi v. A.G. Lagos State* (1996) 6 N.W.L.R. (Pt 452) 42; *Bello v. AG. Oyo State* (supra).
12. (2000) 2 N.W.L.R. (Pt 645) 354; *Uzoukwu v. Ezeonu II* (1991) 6.N.W.L.R, (Pt 200) 708.

appealed to the Court of Appeal. Although the other issue formulated for the appellate process was whether the prosecution called sufficient evidence in proof of the charge of murder laid against the appellant, we are directly concerned with the first issue, namely, whether the carrying out of the death penalty imposed on the appellant pursuant to section 319 (1) of the Criminal Code Law of Lagos State would amount to infringement of the provision of section 31 (1) (a) of the 1979 Constitution or any part thereof. Hence, at the Court of Appeal, it was contended for the appellant that the learned trial judge erred in law when he passed a sentence of death on the appellant since, as argued, the provisions of the Criminal Code of Lagos State which prescribe death penalty in relation to the capital offence of murder is contrary to and inconsistent with section 31 (1) (a) of the Constitution of the Federal Republic of Nigeria, 1979 and so null and void and of no effect.

However, on 14th February, 2000, the Court of Appeal in a unanimous judgement dismissed the appeal and affirmed the sentence of death as imposed by the trial court. Citing Iguh J.S.C. (as he then was) in *Onuoha Kalu v The State*, Oguntade J.C.A. reiterated that the "death penalty prescribed by section 319 (1) of the Lagos State Criminal Code Law cannot be said to be inconsistent with the Constitution of the Federal Republic of Nigeria, 1979.[13] The Court held that "death penalty as per sections 30 (1), 213 (2), 220 (1) (e) of the Constitution is expressly recognized by the said Constitution. Thus, the death penalty in Nigeria can by no stretch of imagination be said to be invalid or unconstitutional".[14] The Court further held that "the right to life prescribed under section 30 (1) of the 1979 Constitution is clearly a qualified right. It is not unqualified. The imposition or execution of the death sentence in Nigeria is not subjected to any form of arbitrary, discriminatory or selective exercise of discretion on the part of any court or any other quarters whatever".[15]

Therefore, in the light of the constitutional provisions and the relevant case law cited above, and many other decided cases,[16] it is crystal-clear that death penalty is still legitimate in Nigeria.

As if that is not enough, Article 4 of the African Charter on Human and Peoples Rights (ACHPR)[17] implicitly permits death penalty when it provides, *inter alia*, that "no one may be *arbitrarily* deprived of his right to life". Hence, though the Article recognizes human beings as inviolable and holds that every human being shall be entitled to respect for his person, yet its further provision that "no one may be arbitrarily deprived of his life underscores a claw back to or derogation from the right to life under relevant situations. The express mention of the word "arbitrarily" in the context of the Article implies that there can be

13. *Adeniji v. The State* (supra).
14. *Ibid.*
15. *Ibid.*
16. *Musa v. The State* (1993) 2 NWLR (Pt 227) 550; *Ibe v. The State* (1993) 7 N.W.L.R (Pt 304) 185; *Odogu v. A.G.F.* (1996) 6 N.W.L.R (Pt 456) 508; *Okonkwo v. The State* (1998) 4 N.W.L.R. (Pt 544) 142; *Peter Nemi v. The State* (supra); *Uzoukwu v. Ezeonu II* (supra), etc.
17. 20 June 1981. Entry into force 21 October 1986.

circumstances in which one can be deprived of his right to life provided such circumstances are not arbitrary. Therefore, it is inappropriate for Ibidapo-Obe to regard the tone of Article 4 of the African Charter as non-derogable.[18] It has to be noted that the provisions of the African Charter on Human and Peoples Right have now become part of the Nigerian body of laws after having been domesticated and incorporated pursuant to African Charter on Human and Peoples Rights (Ratification and Enforcement) Act[19] in line with section 12 (1)[20] of the Constitution of the Federal Republic of Nigeria 1999. The net effect is that as part of Nigerian domestic laws, the provisions of African Charter can be enforced by the Nigerian courts in accordance with its judicial powers as provided for in section 6 of the Constitution, and in all other laws relating thereto.[21]

Again, even as Nigeria has not domesticated the provisions of International Covenant on Civil and Political Rights 1966[22], yet it has been a signatory to the instrument, which Article 6 provides for possibility of death penalty. Article 6 (1) states to the effect that "every human being has the inherent right to life which shall be protected by law. Like Article 1 of African Charter, it also holds that "no one shall be *arbitrarily* deprived of his life. Thus, granting that there is the possibility of circumstances that can result to a derogation from one's right to life, it even recommends in Article 6 (2) that death sentence in countries which have not abolished death penalty be imposed only for the most serious crimes in accordance, *inter alia,* with the law in force at the time of the commission of the crime. Although the general tone of Article 6 (1)-(6) is that of antipathy to death penalty, yet it accedes to the fact that situations can arise in which death penalty can be meted out. Be that as it may, the provisions of the Covenant had not been ratified pursuant to section 12 (1) of the 1999 Constitution, and as such not yet part of Nigerian body of laws. But if the monistic theory of the relationship between international law and municipal law were anything to go by, then Nigeria would have an obligation to abide by the provisions of the Covenant. Epitomized in the doctrine, "*pacta sunt servanda*", monism bars a State party to a treaty from invoking its municipal law to defeat its international obligations. Monism therefore holds that international law takes precedence over domestic law and may limit the applicability of national laws. But unfortunately in Nigeria, by virtue of section 12 (1) of the 1999 Constitution in *pari materia* with section 12 (1) of 1979 Constitution, Nigeria is in sympathy with the opposite theory of 'inverted monism' by which domestic law takes precedence over international law with the effect that "no treaty between the Federation of Nigeria and any other country shall have the force of law except to

18. A. Ibidapo-Obe, *A Synthesis of African Law*, (Concept Publications Ltd, Lagos, 2005), 117.
19. Cap. A 9, L.F.N. 2004. The effect of this domestication has received judicial blessings in *Abacha & Ors v. The State* (1994) 9 N.W.L.R. (Pt 366) 1; *Abacha v. Fawehinmi* (2000) 6 N.W.L.R. (Pt 660) 228; *Nemi v. A. G. Lagos (Supra)*.
20. Section 12 (1) states that "no treaty between the Federation any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly".
21. *Abacha & Ors v. The State (supra); Abacha v. Fawehinmi (supra)*.
22. Adopted on 16 December 1966 and entered into force on 23 March 1976.

the extent to which any such treaty has been enacted into law by the National Assembly".

Besides, it is thanks to the above inverted monistic approach that Nigerian attitude to death penalty is saved from the embarrassment of a conflict that could have emanated from being a party to Universal Declaration of Human Rights (UDHR) 1948. Article 3 of the UDHR to which Nigeria is a signatory provides that "everyone has the right to life, liberty and security of persons". Thus, unlike the 1999 Constitution, the African Charter, the International Covenant on Civil and Political Rights, the right to life declared by UDHR is not qualified. The effect is that death penalty is not by any stretch of imagination saved by the provisions of Article 3 thereof.

The *domino* effect of the foregoing discussion is that death penalty as prescribed by the criminal legislations in Nigeria is not unconstitutional. Murder,[23] culpable homicide punishable with death,[24] intentional homicide,[25] presiding over or being present at unlawful trial by ordeal leading to death,[26] directing, controlling or presiding at unlawful trial by ordeal resulting to death of a party[27] are all capital offences. Other offences that attract death penalty include brigandage with culpable homicide punishable with death / lurking house trespass or housebreaking where death is caused,[28] fabricating or giving false evidence leading to death of an innocent person,[29] death of the woman or of child in the course of abortion,[30] abetment of suicide of child, insane person, delirious person, idiot, intoxicated.[31] Still others are treason,[32] treachery,[33] armed robbery,[34] adultery,[35] rape,[36] sodomy,[37] witchcraft and juju offences,[38] possession of criminal charms,[39] cannibalism,[40] unlawful possession of human corpse or any part thereof,[41] incest,[42] and certain types of kidnapping and deprivation of

23. Section 316 of Criminal Code (CC).
24. Section 221 of Penal Code (PC).
25. Section 200(a) of Sharia Penal Code (SPC).
26. Section 214(b) of PC.
27. Section 208 of CC.
28. Section 302 of PC.
29. *Ibid*, Section 159(2).
30. Sections 209(b) & 210(a) of SPC.
31. Section 227 of PC.
32. Sections 37(1) & (2) and 38 of CC; section 411 of Penal Code (Northern States) Federal Provisions Act, Cap. P3, Laws of the Federation of Nigeria 2004.
33. Section 49A (1) of CC.
34. *Ibid*, Section 402(2); section 1(2) of Robbery and Firearms (Special Provisions) Decree No 47 of 1970.
35. Section 127(b) of SPC.
36. *Ibid*, Section 129(b).
37. *Ibid*, Section 131(b).
38. *Ibid*, Section 406.
39. *Ibid*, section 407.
40. *Ibid*, section 408.
41. *Ibid*, section 409.
42. *Ibid*, section 133(b).

liberty.[43] The implication is that, death penalty in relevant cases is still the law in Nigeria and which law is consistent with the constitution in force.

A Look at other African Jurisdictions: South Africa

South Africa, a country that was known for its extensive use of the death penalty especially in the apartheid era, abolished it in 1995 through a Constitutional Court decision. This judicial method distinguishes it from other abolitionist African countries such as Angola, Cape Verde, Cote d'Ivoire, Guinea-Bissau, Mauritius, Mozambique, Namibia, and so on, in which death penalty was removed through repeal of legislation. Thus, in a landmark decision of *S. v. Makwanyane & Mchunu,*[44] the Constitutional Court decided that capital punishment was incompatible with the prohibition against cruel, inhuman or degrading punishment and with a human rights culture, which made the rights to life and dignity the cornerstone of the South African Constitution. It is noted that the Interim Constitution applicable at the time provided for the right to life without qualification. The Constitutional Court in Makwanyane described the rights to life and dignity as the most important of all human rights, and the source of all other personal rights in the Bill of Rights of the South African Constitution. The Court relied on a decision of the Hungarian Constitutional Court that stresses the absolute nature of the rights to life and dignity. According to the Hungarian court, other rights may be limited, and may even be withdrawn and then granted again, but ultimately the absolute limitation of State power is to be found in the presentation of the twin rights of life and dignity.[45] It was pointed out that right to life requires the State to take the lead in re-establishing respect for human life and dignity in South Africa considering South Africa's history of apartheid, which demeaned the value of life and dignity.[46] This respect for life and dignity was linked with the African philosophical concept of "*ubuntu*" whose dominant theme is a culture that considers the life of another person as "at least as valuable as one's own".[47]

The Court pointed out that the right to life in the South African Constitution is textually unqualified and noted that it differs materially from the constitutions of the United States, Canada, Hungary and India, and from international instruments such as the ICCPR and the ECHR.[48] These instruments all qualify the right to life by providing that it may not be deprived arbitrarily or other than in accordance with a sentence of a court of law. This, it was acknowledged, explains why challenges to the death sentence failed in those jurisdictions.[49] It was thus held that the absence of qualification in the South African regime indicated that the draftsmen of the Interim Constitution intended

[43]. Sections 3A&3B of Criminal Code (Amendment) Law 2009 of Anambra State of Nigeria.
[44]. 1995 (3) S A 391 (CC).
[45]. Per Chaskalson, P. paragraph 83-85. Also Decision 23/1990 (X31) AB.
[46]. Per Langa, J. Paragraph 217.
[47]. Per Sachs, J., Para 225 & Mokgoro, J. Para 308.
[48]. Per Chaskalson, P., Para 85.
[49]. *Ibid*, Para 38.

the Constitutional Court and not the Parliament to decide the difficult question of whether the death penalty should be retained or not.[50]

Chaskalson, P., who wrote the leading judgement, signed by all the other judges, rejected the argument that those convicted of murder have forfeited their right to life and held that constitutional rights vest in every person, including criminals convicted of vile crimes.[51] He held that the death sentence is a form of cruel, inhuman or degrading punishment. A majority of the other members of the Court found that death penalty also violated the right to life.[52] Although they did not offer a comprehensive definition of the right to life, most of them agreed that the right must, at least, incorporate the right not to be deliberately and systematically killed by the State.[53]

Chaskalson, P. also rejected the contention that the death penalty acts as a deterrent and a preventive measure fulfilling the States constitutional obligation to protect life. The Court held that whether one sees the death sentence as forming part of the States' duty to protect life or not, it remains a form of punishment which needs to conform with the Bill of Rights and in particular, with the prohibition of cruel, inhuman and degrading form of punishment.

Thus, the death penalty was rendered an unconstitutional form of punishment in South Africa and the text on the right to life in the Interim Constitution was retained in South African Constitution. In 1997, the Criminal Law (Amendment) Act removed all references to capital punishment from the statute books. However, the Court did not discuss the issue of the death penalty in time of war. Steytler argues that different considerations could apply under a limitation analysis pursuant to section 36 of the South African Constitution because no argument was heard on the matter.[54]

Tanzania

The High Court of Tanzania in 1994 ruled that infliction of capital punishment constituted an unconstitutional deprivation of the right to life, infliction of inhuman or degrading punishment, and a denial of human dignity.[55] The Court stated that each of the rights in question is protected under the Constitution of Tanzania.[56] It further held that international human rights instruments and court

[50]. *Ibid*., Para 25, O'Regan, J., Para 324.
[51]. Per Chaskalson, P., Para 137.
[52]. Per Ackermann, J., para 166; Didcoth J., para 174; Kriegler, J., paras 208- 214; Langa, J. paras 217 & 234; Mahomed, J. para 268; Mogkoro, J., para 313; O' Regan, J., paras 318 &344; and Sachs, J., para 350 & 357.
[53]. Mahomed, J., para 269; Ackermann, J., para 166; Diocoth, J., para 176; Kriegler, J., para 208; Langa, J., para 217 and O'Regan, J., para 334.
[54]. N. Steytler, *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa*, (Butterworths, Durban, 1998), 414.
[55]. *Republic v. Mbushuu* (1994), Tanzania Law Reports 146, 173.
[56]. Constitution of the Republic of Tanzania: Article 13 (6) (d) provides that human dignity shall be protected in the execution of a sentence; Article 13 (6) (e) provides that no person shall be subjected to torture or inhuman or degrading punishment or treatment; and Article 14 provides that every person has the right to life and to the protection of his life by the society in accordance with the law.

decisions of other countries provide valuable information and guidance in interpreting the basic human rights in the Tanzanian Constitution.[57] The court agreed with the petitioner's contention that "...the emerging consensus of values in the civilized international community as evidenced by the UN human rights instruments, the decision (s) of other courts and the writings of leading academics is that the death penalty is a cruel, inhuman and degrading punishment".[58] This was based on the ICCPR, the work of the UN Commission on Human Rights, Amnesty International, the Council of Europe, the European Court of Human Rights, the examples of other commonwealth countries abolishing the death penalty, and court decisions from Botswana, Zimbabwe, the United States, and India.[59] The Court affirmed, as was argued by the government, that the views of the Tanzanian people should be central to its assessment but concluded that the cruelties of the death penalty, were they truly to be made known in Tanzania rather than kept hidden behind a secretive process would 'move the heart of even the stone-hearted'.[60] The Court concluded, therefore, that capital punishment did constitute cruel, inhuman, and degrading punishment, even by Tanzanian sensibilities.[61] With regard to the right to life, the Court stated that it is not absolute but is 'subject to law' under the Constitution.[62] However, it found that the State failed to meet its burden to justify the public necessity of the legal limitation on the right to life. It was finally held that the death penalty is not 'lawful' within the meaning of the Constitution's guarantee of the right to life.[63]

However, the appellate court reversed this ruling.[64] The Court of Appeal compared the Tanzanian Constitution's protection of the right to life with the expression of that right in many other constitutions and several international human rights instruments.[65] It concluded that the right to life, both under the Tanzanian Constitution and as a general principle, is "inherent and universal" and yet also subject to the possibility of lawful deprivation.[66] It stated that there can be instances in which due process of law will deny a person his right to life or its protection.[67] The Court affirmed that the death penalty amounts to torture, inhuman, cruel, and degrading punishment based on the United Nation's Convention Against Torture (CAT), the Declaration on Torture that preceded it, and precedents of the U.S Supreme Court and the European Court of Human Rights.[68] It cited with approval the U.S. Supreme Court in *Furman v. Georgia*[69] where it was stated that the State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. It further states that

[57] *Ibid.*
[58] *Republic v. Mbushuu (Supra)*, 156.
[59] *Ibid.*, 156-157.
[60] *Ibid.*, 162.
[61] *Ibid.*
[62] *Ibid.*, 163-164.
[63] *Ibid*, 173.
[64] *Mbushuu v. Republic* (1995) T.L.R. 97, 118.
[65] *Ibid.*, 108-109.
[66] *Ibid.*, 109.
[67] *Ibid.*, 104.
[68] *Ibid.*, 110-111.
[69] *Supra.*

members of the human race should not be treated as non-humans or as object to be toyed with and discarded, and that even the vilest criminal remains a human being possessed of common human dignity.[70]

Nevertheless, the Court of Appeal disagreed with the High Court in the examination of 'savings' clause of the Constitution, which it interpreted as permitting derogations from basic human rights in the public interest, provided that the restrictive legislation is not arbitrary and that it is proportional to the need.[71] According to the Court, the State satisfied those conditions.

Thus, although the Tanzanian Court of Appeal agreed that capital punishment was cruel, inhuman and degrading, yet it held that section 197 of Criminal Procedure Code, which provides for the death penalty for murder, was saved by article 30 (2) of the Constitution, which provided for derogation from fundamental rights in the public interest. Curiously, however, it was stated that there was no conclusive proof of the effectiveness of the death penalty but it was for the society to decide what was reasonably necessary.[72]

Zimbabwe

The Constitution of Zimbabwe provides for the right of life in a qualified manner. Section 12 (1) thereof provides that:

> No person shall be deprived of his right to life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.

The Criminal Procedure and Evidence Act equally provides that the High Court of Zimbabwe shall pass sentence of death upon a person convicted of murder or treason.[73] An important case in respect of the death penalty in Zimbabwe is *Catholic Commission of Justice and Peace in Zimbabwe v. Attorney-General & Ors.*[74] In this case, the Catholic Commission for Justice and Peace in Zimbabwe, a human rights organization sought and obtained a provisional order from the Supreme Court interdicting the Attorney-General, the Sheriff of Zimbabwe and the Director of Prisons from carrying out the death sentences of four prisoners convicted of murder who had spent between four and six years on the death row. The Court did this pending determination whether the delay in execution breached section 15 (1) of the Constitution, which provides for the right to protection against cruel, inhuman or degrading punishment or treatment and, if so, whether they should be permanently stayed.

It was argued by the applicant that the death sentences had been rendered unconstitutional due to the prolonged and inordinate delays in carrying

[70] *Mbushuu v. Republic (supra)*, 112.
[71] *Ibid.*, 113.
[72] *Ibid.*, 115-116.
[73] Section 337 (a) & (b) respectively.
[74] 1993 (1) ZLR 242 (S).

them out and the harsh and degrading conditions in which the condemned prisoners were subjected during confinement. The prisoners alleged that they had lived in daily fear of being put to death during their period of incarceration and that they had been regularly taunted by prison officers of their impending hanging. The respondents acknowledged the existence of the 'death row' phenomenon, the acute mental suffering and trauma endured by the prisoners awaiting execution. However, they argued that such stress was an unavoidable consequence of the death penalty. Furthermore, they argued that it was always open to a condemned prisoner to request the court to expedite the execution. Moreover, in any event, the original punishment could not become tainted by past conviction experiences.

The Court held that prisoners did not lose all their constitutional rights upon conviction. They lost only those rights inevitably removed from them by law either expressly or by implication. As such, a prisoner who was sentenced to death still enjoyed the right to protection against cruel, inhuman, or degrading treatment. It was further held that prolonged delay in executing a death sentence, as was the case before the Court, could make the punishment when it became inhuman and degrading and that the reasons for the delay were immaterial. The application was allowed and the death sentences were set aside and substituted with sentences of life imprisonment. This sort of decision was replicated by the Supreme Court in other cases like *Nkomo & Anor v. Attorney-Generals & Ors*[75] and *Woods & Ors v. Minister of Justice, Legal and Parliamentary Affairs & Ors.*[76]

However, these developments were not sustained because the Constitution was amended.[77] Section 15 of the Constitution, which provides for the right to protection against cruel, inhuman or degrading punishment or treatment, was amended by the insertion, *inter alia,* of subsection (5) which provides that "delay in the execution of a sentence of death imposed upon a person in respect of a criminal offence of which he has been convicted shall not be held to be a contravention of subsection (1).

Uganda

The death penalty is provided for in the laws of Uganda. Article 22 of the Constitution of the Republic of Uganda provides:

> No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the law of Uganda and the conviction and sentence have been confirmed by the highest appellate court.

75. 1993 (2) ZLR 422 (S).
76. 1993 (2) ZLR 443 (S).
77. Constitutional Amendment (No 13) Act 1993.

There are two parallel systems of criminal justice in Uganda. Generally, everyone in Uganda is subject to the Penal Code Act (PCA), the Trial on Indictments Decree (TID) and the Criminal Procedure Code (CPC). Soldiers and those found guilty of crimes with soldiers are in addition subject to military courts under the National Resistance Army Statute (NRA Statute).[78]

In Uganda, the offences for which death penalty can be imposed are clearly stated in the relevant statutes. Under the PCA, capital crimes include treason,[79] murder,[80] aggravated robbery,[81] treasonous offences,[82] kidnapping with intent to murder,[83] rape,[84] and defilement.[85] While the first three offences are punishable with mandatory death penalty, for the rest, the death sentence is left at the discretion of the court. Under military law, the NRA statute provides for a mandatory death sentence for a variety of offences like treachery,[86] disobedience of a lawful order leading to loss of life,[87] failure to protect or misuse of war materials,[88] offences related to security,[89] and offences in relation to convoys, losing standing or hazarding vessels,[90] murder, treason, mutiny and rape,[91] *inter alia*. Other offences like desertion[92] have the death penalty as the maximum penalty.

The procedural guarantees like the right to fair trial by an independent body, presumption of innocence, adequate time and facilities to prepare ones' defence, and legal representation *inter alia*, are provided for in articles 22, 26 and 28 of the Ugandan Constitution. There are equally right of appeal to the Supreme Court, and right of appeal for pardon and mercy. Hanging in line with the provisions of the Trial on Indictments Decree and the Prisons Act carries out the sentence of death.[93] It is by firing squad for the military offences.

However, Karugonjo[94] observes that the safeguards as provided for in the Constitution are a mere paper tiger since the practice is contrary to the provisions consequent upon corruption in the Ugandan judiciary and the Court-Martial. Although the Constitution prohibits cruel, inhuman and degrading

78. NRA Statute, section 14.
79. PCA sections 25(1) & (2).
80. *Ibid.*, sections 83.
81. *Ibid.*, sections 272 & 273 (2).
82. *Ibid.*, sections 25 (3) & (4).
83. *Ibid.*, sections 235.
84. *Ibid.*, sections 118.
85. *Ibid.*, section 123 as amended by statute 4 of 1990.
86. NRA Statute, section 15.
87. *Ibid.*, section 18.
88. *Ibid.*, section 32.
89. *Ibid.*, section 36.
90. *Ibid.*, section 50.
91. *Ibid.*, section 72.
92. *Ibid.*, section 38.
93. TID, section 98-101.
94. R. Karugonjo, "An Analysis of Capital Punishment in Uganda in the Light of International Standards and Comparable Case Law", L.L.M Dissertation, Submitted to the Faculty of law, University of Western Cape, 2003, 35-38.

treatment in line with the international standards, yet these guarantees are only paid lip service.

Recommendations and Conclusion

In the context of our study above, it is clear that the next global trend, apart from outright abolition, is to restrict the use of capital punishment to the most "heinous" or "serious" crime. Article 6 (2) of ICCPR provides: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious of crimes..." Although no particular or specific offences have been mentioned to fit the category of most "serious" offences, yet several insinuations have been made to act as guidelines for the determination of such offences. For instance, the United Nations Human Rights Commission (HRC) points out that the expression, "most serious of crimes", should be "read restrictively" to mean that death penalty should be a "quite exceptional measure".[95] Similarly, The Safeguards Guaranteeing the Protection of those facing the Death Penalty identifies the "most serious crimes" with "intentional crimes with lethal or other extremely grave consequences".[96] Again, according to the United Nations reckoning, "the offences should be life threatening in the sense that it is a very likely consequence of the action".[97]

In the light of the foregoing, it appears that homicidal acts constitute the most fitting offences into the pigeonhole of the "most serious crimes". No wonder in *Cox v. Canada*,[98] the HRC noted that the applicant was to be tried for complicity in two murders, which were said to be "undoubtedly very serious crimes". Therefore, in reviewing the list of capital crimes in Nigeria and especially making a suggestion on whether to add to or reduce the numbers of capital crimes, we shall be guided by the overall goal of identifying the most heinous or serious crimes consistent with Nigeria's international obligations under a number of U.N. conventions and protocols as well as what obtains in many foreign jurisdictions.

With the above parameter, the list of capital crimes in Nigeria can be shortened drastically. There is no enough reason and justification why non-homicidal offences should be created capital offences. Thus such offences as adultery, incest, rape, sodomy, possession of criminal charms, cannibalism, unlawful possession of human corpse or any part thereof, juju and witchcraft offences, treason, treachery, armed robbery, kidnapping or deprivation of liberty should not attract the extreme penalty once intentional death of any person is not directly traced to each of the offences. This is notwithstanding the religious, ideological and sometimes cultural underpinning and influences that are attendant to the creation of these offences as capital offences.

Moreover, it is also possible to thin down the homicidal capital offences under the relevant statutes. One may be guided by the test of what and what

95. Report of the Human Rights Committee, GAOR, 37th Session, suppl. 40 (A/37/40) 94.
96. ESC Res. 1984/50; GA Res 39/118/
97. UN Doc. E/2000/3, para 79.
98. *Supra.*

homicidal offences were committed intentionally. That is to say, in which of those offences are the two important elements of *actus reus* and *mens rea* present? Certainly, on the application of this test in respect of the homicidal offences studied above, we are left with the offences of murder insofar as it is restricted to subsections (1) & (2) of section 316 of the Criminal Code, and fabricating false evidence which has led to the death of an innocent if the witness in question knew the implications of his testimonies. The offences of culpable homicide punishable with death and intentional homicide can equally be retained as capital offences.

Aside the above offences that are described as heinous and most serious, all other offences can conveniently be reduced to mere corporal offences punishable with terms of imprisonment or other penalties. Our recommendation is no less consistent with international standards. Hence, the Human Rights Committee has mentioned that crimes like espionage, political offences, misappropriation of State or public property, treason and so on do not meet the standard of "most serious crime".[99] The HRC has commented that the imposition of the death penalty for crimes that do not result in loss of human life is contrary to the ICCPR. Again, meting out death penalty for those who violate the offences of adultery, sodomy, incest, and so on would be most inappropriate in spite of the religious bias that informed their being made capital offences. The Islamic Sharia Law that created them so may reconsider a compromise stance as it did in the case of apostasy (*ridaa*) which, though a capital offence under Islamic religion, was not created an offence at all in the Sharia Penal codes in Nigeria. Surely, criminalizing *ridaa* would mean that one is no longer free to convert from Islam to another religion despite the right to religious freedom guaranteed in both the Constitution[100] and paradoxically in the Koran.[101] It is therefore a happy thing that just as in the case of *ridaa,* the legislators of the Sharia Penal codes should toe the path of harmony, peace and modernity in respect of the other religiously related offences. Certainly, criminal law is all about protecting the society. But in capital cases, the inquiry should be whether death penalty fits particular crime. Besides, for each and every capital crime, it should be dared t explore whether alternative penal measure would be a preferable substitute f the penalty of death.

Furthermore, it is one of the cardinal features of law generally a legislations in particular that they are dynamic and reflect the pecu circumstances of a given society. Law is a means of "social engineering a control" functioning, as it were, as an "integrative mechanism".[102] Therefore,

99. Cf. concluding Observations, Cameroon, UN Doc. CCPR/C/79 Add. 116, Para 14; Initial Report of Mali UN Dc CCPR/C/1/Add. 49; UN Doc. CCPR/C SR. 200, 19 (1980). UN Doc. CCPR/C/SR 258, Para. 10 (Tomuschat); Report of Mongolia, UN Doc. CCPR/C/1/Add. 38; etc.
100. Section 38 C.F.R.N. 1999.
101. *Koran*, 2: 256.
102. H. C. Bredemeier, "Law as an Integrative Mechanism" in V. Aubert (ed.), *Sociology of Law*, (Penguin Boc England, 1969), 52-67; J. H. Farrah & A .M. Dugdale (eds.), *Introduction to Legal Method*, (Sweet & I London, 1990), 13-31.

other facts be they religious, ideological, or conventional that may impinge on law making should be secondary for the purpose of fostering the common good. It may be helpful to give an instance of where Nigerian leadership, in a cargo-cult mentality, imported a capital crime that was at the time not relevant to Nigerian society.

In the 1980s, the Nigerian dictatorship concluded, albeit, unilaterally that the then "crime of the hour" was drug trafficking.[103] Without regard to any exhaustive legislative debate or period for public commentary, the Federal Military Government added drug trafficking to the list of capital crimes. It was never considered whether drug trafficking constituted such a menace to Nigerian society in such a way that it calls for such draconian reaction from the government. The drug abuse rate in Nigeria was neither analyzed nor the rate of occurrence of drug-related criminal homicides or non-homicidal crimes studied in Nigeria then. Again, there was no demonstration of the extent of the impact of free medical care for or treatment of drug abuse on our hospital resources in the 1980s. It seemed that the overriding interest for punishing drug traffickers in Nigeria then by death penalty was because the Western World, particularly America had a drug problem. At a minimum, it might be for the Nigerian government to pose as an unwitting collaborator in the western media-led propaganda on the drug problem and how it concerned every nation.

Incidentally, the U. S. government refused to deal with the problem from the demand side, which is probing to see why people crave for drugs in the first place and attacking the root cause. Rather it chose to wage the war on drugs by concentrating on the supply side, focusing on interdiction of drug shipments, prosecution of drug offenders, and mandatory prison sentence for drug offenders. The result has been a war that has consumed hundreds of millions of dollars but with little to show for it. This woeful result is hardly surprising for the drug war, which turned out to be a losing battle, was waged in total disregard of recommendations by leading social scientists, emphasizing that effort be weighed heavily on addressing the demand side such as probing why people choose to abuse drugs, provide rehabilitation, and fund other positive social programmes to make a life of drug abuse less appealing to future abusers and wean abusers from drug dependency.

But in spite of the drug problem in America, it was not until 1994 that the U.S. government expanded the capital crime list to include non-homicidal crime. Prior to that time, the only crime punishable by death penalty in America was some form of criminal homicide. Thus, even Americans who had that drug abuse problem did not punish their drug traffickers by death penalty, leading one to ask the question: Why should Nigerian lives be sacrificed in the hope that by so doing Nigeria might help protect American lives or stem the inflow of drugs to meet the demand in U.S.A?

[103]. Cf. W. A. Adeleke", The Penalty of Death: For and Against", *Vanguard*, May 28, 2004, 27.

The lesson that can be learnt from this mistake of the 1980's is that rather than leave decisions on death penalty in the hands of immature or naïve people on the corridors of power, such issues are better handled by professionals willing to seek out the facts, analyze same, and take appropriate enlightened decisions. Mimicking other people's standards would not do. Both the Criminal Code, on the one hand, which history is traceable to the Australian Tasmanian Code, and the Sharia Penal Code and the Penal Code, on the other hand and to the relevant extent, which are sourced from Islamic sensibilities not devoid of Arabic tit-for-tat mindset, need to be reviewed and adopted with proper tailoring to our local needs. This is particularly important in the cases of capital offences that may warrant the loss of life either of the victim or of the offender.

There are yet some other adjectival and other reasons why the list of capital crimes in Nigeria should be cut and restricted to the most serious crimes. These range from the issues in connection with arrest and police investigation, bail, trial, appeal, prison detention, amnesty procedure, and execution.

There is no gainsaying that under common law practice associated with adversarial or accusatorial culture of fact finding, the conduct of investigation belongs to the Police. This is so under the Nigerian justice and police system. Yet, a lot of irresponsibility dots the terrain of the entire arrangement. Thus, the coercive effect of slaps, kicks, knocks on the head and other forms of torture and inhuman treatment is so overwhelming and creates an enabling atmosphere for not only bribery and other sharp practices but also forced confessions, admissions under duress, and so on. This should call for serious doubt with regard to the integrity of any evidence gathered from such *fora*. How then can one rely on such evidence to justify the imposition of the death penalty in the first place not to talk of using it for a whole score of offences? Again, if the Police stand tall to its responsibility of surveillance, there would be no need for refusal of bail by the relevant courts or granting bail with excessive conditions even in capital cases.

Moreover, what happens at trial does not even fare better. There are not a few instances of unfairness in the trial procedures experienced in our courts. This is in spite of the provisions of the ICCPR, which state that imposition of the death penalty following an unfair trial is a breach not only of the procedural norms but also of the right to life itself. According to HRC, the procedural guarantees under articles 6 and 14 of the ICCPR must be observed.[104] These include the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for defence, and so on. The HRC has also stated that where article 14 of the ICCPR, which provides for the right to fair hearing, is violated during a capital trial, article 6 of the Covenant is also

[104]. General Comment 6 (16).

breached.[105] The African Commission also notes that the right to life under article 4 of the ACHPR is violated where the right to fair trail is violated.[106]

Certainly, Nigerian criminal jurisprudence provides for all these procedural guarantees. However, the problem is that of implementation. Sometimes, it is as a result of incompetence on the part of lawyers and the judicial officers. This is true as some lawyers are not diligent enough to prepare themselves even in most serious capital cases. In the same vein, some judicial officers are beneficiaries of patronage appointments that did not consider qualification, which attitude cannot breed anything less than pervasive mediocrity in the system. There are some other key factors such as the demerits of the adversarial system itself which pit the lone individual against the awesome state apparatus, the problem of poverty and hence limited or no access to qualitative defence counsel, lack of legal aid or poor quality thereof. There is no doubt that throughout the world, death penalty is often applied disproportionately to the disadvantaged people on the lower social scale. This was partly why the U.S. Supreme Court struck down the death penalties imposed on Furman[107] and Gregg,[108]and held that the death penalty was imposed discriminatorily against black offenders.

The appeal mechanism is yet another issue worthy of some comments. Article 7 (1) (a) of the ACHPR provides for the right to appeal to competent national organs against acts violating fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.[109] Hence, trials that do not allow any avenue of appeal violate the said provision. Surely, the Nigerian Constitution provides for the right to appeal, which nevertheless can only apply in a wayfaring democracy. Decades of military dictatorship with its command culture had often trampled on this right. However, the appeal mechanisms in place are unlikely to have the effect of reducing the application of the death penalty as envisioned by the ICCPR. For one thing, the Nigerian judiciary is marred by corruption, among other problems. For another, the mandatoriness of death penalty in our statute books is also reinforcement to the application of the extreme punishment in spite of the right to appeal in a country where such rights are rarely exercised due to poverty.

Perhaps, it is only the provision for executive clemency that can ameliorate the anomaly. Yet amnesty, pardon or commutation of death sentence is the sole prerogative of the President or the Governor. Although provision is made for the Advisory Committees on the Prerogative of Mercy, their advice is not necessarily binding on the President or the Governor. As such, it is really up to the President or the Governor to decide on when and who to kill or give

105. *Reid v. Jamaica* (No. 250/1987) para 11.5.
106. Communications 25/89, 47/90, 56/91, 100/93.
107. *Furman v. Georgia*, Supra.
108. *Gregg v. Georgia*, Supra.
109. Communication 87/93, Constitutional Rights Project v. Nigeria (in respect of Zamani Lekwot & Ors) & Communications 60/91, Constitutional Rights Project v. Nigerian (in respect of Wahab Akamu & Ors), Eight Annual Activity Report, 1994-5.

amnesty, pardon or whose sentence to commute. This can be abused. It is also unlikely that the President will pardon political offences such as treason.

The above procedural inadequacies most frequently result to loss of life of an innocent party. Thus, it is strongly suggested that considerable restraint be exercised in choice of punishment with a preference for punishment other than death in recognition of our foibles and the possibility of wrongful execution of an innocent, which flows from such fallibility.[110]

The above analysis has also offered us an opportunity to examine other constitutional and statutory problems in relation to loss of life of individuals in criminal justice process. The first to consider is the constitutional derogation from the right to life as it relates to defence of property, effecting a lawful arrest, preventing escape of a person lawfully detained, and suppressing a riot, insurrection or mutiny as provided for in section 33 (2) (a) (b) (c). Whereas killing in self-defence[111] can be excused as a natural protective reaction sequel to the natural instinctive principle of self- preservation, the killing of a human being in defence of property appears rather callous and disproportional. Yet, the courts have at least in one instance, in the case of *Musa v. The State*,[112] upheld a homicide committed in just those circumstances. This attitude does not augur well with our traditional sensibilities. Onwubiko notes that "any form of materialism which ultimately leads to the destruction of life is alien and destructive of African tradition".[113] Happily too, the ACHPR, for one stipulates a right to property made contingent upon the general interest of the community[114] on the ground that it would be inconsistent with the communitarian ethics of Africa and would be promotive of materialism.

Again, the constitutional and other statutory leverage in connection with the power of arrest demands to be properly reviewed. Section 33 (2) (b) of the 1999 Constitution permits the killing of any person in the course of effecting a lawful arrest or preventing the escape of a person lawfully detained.

Similarly, section 261 of the Criminal Code provides that the police officer or any person making an arrest may use such force as is reasonably necessary to overcome any attempt at resistance by the suspect, though the person making the arrest may be liable for any excessive use of force.[115] Often, this force has led to the death of the suspect. More poignantly, section 271 of the Criminal Code provides that where a police officer is making an arrest of a person suspected of having committed a felony and the suspected felon takes to flight in

110. Cf. M. L. Radelet, Becau & Putnam, *In Spite of Innocence: Erroneous Convictions in capital Cases*, (Northeastern Univ. Press, Boston, 1992) cited in W. A. Adeleke, "The Death Penalty: For & Against", *Vanguard*, April 30, 2004, 26.
111. First Limb of section 33 (2) (a) C.F.R. N., 1999.
112. (1992) 2 All NLR 550.
113. O. Onwubiko, *African Thought, Religion and Culture*, (Snaap Press Ltd. Enugu, 1991), 22.
114. Cf. U. O. Umozurike, *The African Charter on Human and Peoples Rights*, (Martins Nijhoff Publishers, 1997).
115. B. Osamor, *Fundamentals of Criminal Procedure Law in Nigeria*, (Dee-Sage Nig. Ltd., Abuja, 2004), 61.

order to escape from arrest, the police officer and any other person assisting him may use reasonable force to prevent his escape. Where the offence for which the escaping suspect was to be arrested is punishable with the death penalty or imprisonment for 7 years or more, the police officer may kill him if he cannot by any means otherwise be arrested. Given these provisions, it is worrisome that one can hide under their cloaks to kill people at random. Although, in *Akpobasa v. The State*,[115] the Court dismissed the appeal of the appellant who shot and killed an unarmed suspect who had a cry of "thief" and was running away from the spot where the cry came from, yet the judicial attitude was different in *Odung v. The State*.[117] In this case, Ilori J (as he then was) virtually declared that the senior police officer deserved a medal for killing an unarmed suspect in front of the African Shrine, a Night Club belonging to Fela, the late radical musician, on the ground that the fellow was escaping from lawful arrest. Such a decision, alarming as it were, tends to reinforce the excessive instinct of police officers. The constitutional power conferred on law enforcement agents to kill in the process of suppressing a riot may be viewed in the same vein. The wanton and unnecessary killing of unarmed youths during students' demonstrations should attract the strongest condemnation by society against the unlawful use of lethal weapons by the Police. It may not be uncommon for these demonstrations to be seen by those at the corridors of power as treasonable even if they are peaceful. The above constitutional provisions need to be expunged.

Finally, the issue of death-row phenomenon smacks of torture and inhuman treatment on the convict who is awaiting execution. It is not uncommon in Nigeria for those who have been convicted of capital offences and sentenced to death to remain in prison detention for donkey years without execution or commutation of the sentences to imprisonment. This death-row phenomenon occasions a brooding horror of contemplating one's own death, alternating between hope and despair over a period of years, in a specially sterile environment and in the company of other men who are liable to be taken out and executed. Yet the squalid condition of these detention cells is nothing to write home about. Surely, these are condemned prisoners, but the courts in a long line of decided cases have held that even condemned criminals have rights to be treated as human beings by provision of clean environment, adequate space, good feeding, and appropriate health facilities.[118]

Besides, once it is inevitable that one should face the death penalty, there should be no need to place him under the phobic condition of fear of death at every moment of his pseudo-existence. Lastly, the various methods of

[115]. Cited in *Ibid.*, 62.
[117]. (Unreported) Suit No. ID/7C/88, Judgment delivered on 2/12/1989.
[118]. Cf. for example section 7 (3) Prisons Act, Cap. P. 29, L.F.N. 2004. According to a report of the Amnesty International in 2004, the Ikoyi Prison in Lagos is seriously overcrowded with facilities for 800 but has an inmate population of 1804. Out of the incarcerated, 94 percent are awaiting trial, and 35 percent of those are for capital offences. At the Kirikiri Medium Security Prison, the alarming trend is that out of the 1676 incarcerated awaiting trial (94 percent of the total number of inmates) on the date of the visit, 75 percent were awaiting trial in capital cases. Cf. Amnesty International, The Death Penalty and Women under the Nigerian Penal Systems, http://www.amnesty.org/en/library/asset/AFR44/001/2004/en/dom-AFR44vo/2i04en.html (Accessed on 13/2/2009).

execution in Nigerian penal systems such as death by hanging, firing squad, stoning, and crucifixion are most cruel and brutal. There is the need for a more humane and painless means of execution, perhaps by the use of lethal injection.