



Nnamdi Azikiwe University

JOURNAL OF INTERNATIONAL LAW AND JURISPRUDENCE

Volume 2, September, 2011

List of Contributors

PRINCIPLES OF INTERNATIONAL ECONOMIC LAW, AND THE RIGHT TO ECONOMIC DEVELOPMENT, VIS-A-VIS
THE GUIDING PRINCIPLES OF SUSTAINABLE DEVELOPMENT
Uba S.F. Nnabue Esq.

POWERS AND DUTIES OF THE CORPORATE AFFAIRS COMMISSION AS A REGULATORY BODY IN NIGERIA
Dr. M.N. Umenweke & A.R. Aladegbaiye Esq.

STREAMLINING THE POWERS AND DUTIES OF A RECEIVER/MANAGER AND LIQUIDATOR IN THE ORGANIZATION OF A
COMPANY: AN ANTIDOTE FOR CORPORATE GOVERNANCE
Dr. Olong Matthew Adefi

THE LEGISLATIVE AND INSTITUTIONAL FRAMEWORK OF ENVIRONMENTAL PROTECTION IN THE OIL AND GAS SECTOR
IN NIGERIA: A REVIEW
Ken Kingsley Ezeibe, Esq.

THE LEGAL CHASM BETWEEN RESOURCE CONTROL AND THE DETERMINATION OF THE SEAWARD BOUNDARIES OF
THE LITTORAL STATES IN NIGERIA
Dr. Aniedi J. Ikpong

THE ENVIRONMENT, OIL AND HUMAN RIGHTS IN NIGERIA
Nnamdi G. Ikpeze

CHILD BRIDE AND CHILD SEX: COMBATING CHILD MARRIAGES IN NIGERIA
Ogunniran Iyabode

AN EXAMINATION OF THE CHILD RIGHTS PROTECTION AND CORPORAL PUNISHMENT IN NIGERIA
Iguh, Nwamaka Adaora & Onyeka Nosike

RIGHT TO LIFE AND ABORTION DEBATE IN NIGERIA:
A CASE FOR THE LEGISLATION OF THE PRINCIPLE OF DOUBLE-EFFECT
Dr. Maurice Okechukwu Izunwa & Dr. Sylvia Ifemeje

INSTITUTIONAL MECHANISMS FOR HUMAN RIGHTS PROTECTION IN NIGERIA: AN APPRAISAL
S.O. Nnamani

AN APPRAISAL OF HUMANITARIAN INTERVENTION UNDER INTERNATIONAL LAW
Dr. Innocent Okoronye & Dr. V.O.S. Okeke

THE GLOBALIZED WORLD AND GENDER RIGHTS IN NIGERIA: THE GAINS, THE LOSSES
Dr. Felicia Anyogu & Dr. Carol Arinze-Umobi

LEGISLATING WOMEN'S AFFIRMATIVE ACTIONS AND ITS CONSTITUTIONALITY IN NIGERIA
Dr. Ogugua V.C. Ikpeze

FUNDAMENTAL OBJECTIVES AND DIRECTIVE PRINCIPLES OF STATE POLICY:
A VIABLE ANTI-CORRUPTION TOOL IN NIGERIA
Dr. G.N. Okeke

CONSUMER RIGHTS AS CONSTITUTIONAL RIGHTS: A COMPARATIVE ANALYSIS OF SOME SELECTED JURISDICTION
A.G. Eze (Mrs.)

MONEY LENDING LAW AND REGULATION OF CONSUMER CREDIT IN NIGERIA
Dr. Esege E. Eja & Ecuah E. Bassey

LIMITS OF COPYRIGHT PROTECTION IN CONTEMPORARY NIGERIA: RE-EXAMINING THE RELEVANCE OF
THE NIGERIAN COPYRIGHT ACT IN TODAY'S DIGITAL AND COMPUTER AGE
Dr. Hemen Philip Faga & Ole Ngozi

MENS REA PRINCIPLE AND CRIMINAL JURISPRUDENCE IN NIGERIA
Dr. Ikenga K. E. Oraegbunam & R. Okey Onunkwo, Esq.

CRITICAL ANALYSIS OF ABOLITION OF DEATH PENALTY IN INTERNATIONAL LAW:
AN ANALYSIS OF DEATH PENALTY UNDER THE UNITED STATES AND NIGERIA LAWS
Dr. Joel O. Anwo & Grace A. Arowolo

EFFECT OF GLOBALIZATION ON SOVEREIGNTY OF STATES
Dr. Elizabeth A. Oji & M.V.C. Ozioko

INTERNATIONAL PEACE KEEPING OPERATION: A BREACH OF INTERNATIONAL LAW ON SOVEREIGNTY OF STATE
I.O. Obijaku

THE ROLE OF NIGERIA IN PROMOTING PREVENTATIVE DIPLOMACY IN AFRICA: (1999-2008)
Eme, Okechukwu Innocent & Dr. Okeke, Martin Ifeanyi

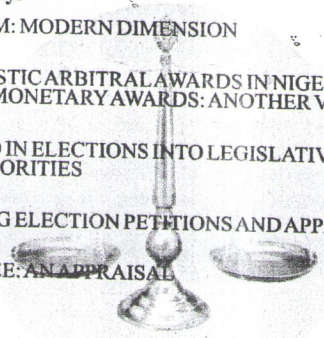
A LEGAL APPROACH TO COMBATING TERRORISM: MODERN DIMENSION
Dr. G.N. Okeke

THE MACHINERY FOR ENFORCEMENT OF DOMESTIC ARBITRAL AWARDS IN NIGERIA -
PROSPECTS FOR STAY OF EXECUTION OF NON-MONETARY AWARDS: ANOTHER VIEW
Dr. Chukwuemeka E. Ibe

THE REQUIREMENT OF GEOGRAPHICAL SPREAD IN ELECTIONS INTO LEGISLATIVE HOUSES IN NIGERIA:
A CRITIQUE OF STATUTORY AND JUDICIAL AUTHORITIES
Steve Unachukwu, Esq.

STRATEGIES AND PROCEDURES FOR EXPEDITING ELECTION PETITIONS AND APPEALS
Dr. C.J. Ubanyionwu

PROJECT WORK BY STUDENTS FOR FIRST DEGREE: AN APPRAISAL
Dr. S.A.M. Ekwenze



CRITICAL ANALYSIS OF ABOLITION OF DEATH PENALTY IN INTERNATIONAL LAW: AN ANALYSIS OF DEATH PENALTY UNDER THE UNITED STATES AND NIGERIAN LAWS*

Abstract

The death penalty has been an issue of debate for decades and several reasons have been given that make recourse to the death penalty appears necessary, such as, that it serves as a deterrent, it meets the need for retribution and that of public opinion demands its imposition. Conversely, more convincing arguments have been raised for its abolition, amongst which is the argument that it is a violation of human rights¹. Africa is seen as one of the "death penalty regions" in the world, as most African states still retain the death penalty despite the growing international human rights standards and trends towards its abolition. Further, the African Charter on Human and People's Rights makes no mention of the death penalty. The death penalty in Africa is therefore an issue that one has to be particularly concerned about. During the 36th Ordinary Session in 2004 of the African Commission on Human and People's Rights, for the first time, the death penalty was one of the issues discussed by the Commission². This article examines the death penalty in some states especially the United States and Nigeria and concludes that joining the international trend for the abolition of the death penalty ought to be universal, considering that the justifications for the retention of death penalty are fundamentally flawed, and that alternatives to the death penalty exist. It concluded with a number of recommendations geared towards the abolition of the death penalty in Africa.

Introduction

In Nigeria, offences are classified as simple, misdemeanours and felonies which is regarded as more serious offences and it includes capital offences³. Some capital offences carry death penalty in Nigeria, e.g. offences of murder under the Criminal Code, homicide punishable with death under the Penal Code⁴, treason, instigating invasion of Nigeria and the offence of armed robbery under Robbery and Firearms (Miscellaneous Provisions) Act, 1984 among others⁵. The judges power to sentence is restricted in this situation once the accused is found guilty of a capital offence. The only option opens to the court is to impose death on the offender⁶. The operative word "shall" is used in most of these sections which makes it mandatory to impose the sentence of death.

** Joel O. Anwo, LL.B (Hons), B.L, LL.M, LLD (Fort Hare), South Africa and Grace A. Arowolo LL.B(Hons), B.L, LL.M: Lecturers, Department of Public Law, Faculty of Law, Lagos State University, Ojo, Lagos State

¹ See Chenwi Lilian M.; *Towards the abolition of the Death Penalty in Africa: A Human Perspective*, University of Pretoria Press, 2005, p.iv.

² *Ibid* p.iv; Commissioner Chirwa initiated debate about the abolition of the death penalty in Africa, urging the commission to take a clear position on the subject.

³ See Obaje Enemaku: *Introduction to Nigerian Criminal Law and Procedure*, Sam Atrade, Lagos, 2007, p.20.

⁴ See Sections. 315-317 Criminal Code Act, Cap C38, LFN, 2004 and Sections 220-222 Penal Code law Cap P3, LFN, 2004.

⁵ See Sections 37(1), 315-317 Criminal Code Act, Cap C38, LFN, 2004, Sections. 159(2), 220-222 & 411 Penal Codes law Cap P3, LFN, 2004 and Section 3(1) Geneva Conventions Act, 1960.

⁶ See Doherty O., *Criminal Procedure in Nigeria: Law and Practice*, Blackstone Press Ltd. London (1999), p.317

There are however two exceptions to the general rule that death is mandatory punishment to be imposed on an accused person convicted of a capital offence. Firstly, a death penalty must not be passed on a pregnant woman convicted and a young person under the age of 17 years convicted of a capital offence⁷. Customary laws in Nigeria recognized death penalty as an appropriate way of eliminating offenders who were dangerous to the community⁸. Offences warranting the death penalty included murder, witchcraft, adultery and profaning of the gods⁹. With the advent of British rule, the consequent abolition of customary criminal and penal codes, capital crimes were reduced to include murder, treachery, treason and participating in a trial resulting in death¹⁰. The Military forcefully took over government and ruled the country from 1966 to 1999, handed over power to civilian to rule only between 1979-1983, added a number of crimes punishable by death.¹¹ These additions include armed robbery¹², setting fire to public buildings, ship or aircraft¹³, dealing in Indian hemp and sabotaging the production and distribution of petroleum products¹⁴, importation and exportation of mineral oil without authority¹⁵, dealing in narcotics¹⁶ and counterfeiting bank notes or coins¹⁷.

Capital punishment is a barbarous survival from a less enlightened and unrefined age; it is incongruous and incompatible with our present standard of civilization and humanity. In other words, abolition of death penalty is a central theme in the development of international human rights law¹⁸. Consideration of the death penalty in Nigeria and Africa in general has to take account of human rights. Application of capital punishment death penalty cannot be separated from the issue of human rights. Central to this issue, therefore, is the generally accepted view that the death penalty is a major threat to fundamental human rights. It is one of the most divisive and impassionate human right issues throughout the world¹⁹. Death Penalty has been abolished by many states and countries, and we are looking forward to the day when the other governments will follow suit including Nigeria. Some of the legislations retaining taking of life as punishment in Nigeria are Sections 220-222

⁷ See Izzat Ullah & ors, *Mandatory death penalty: Sentencing Policy and the attitude of Courts in Nigeria*. ABULJ. Vol. 24-25, 2006 p.26

⁸ Onuoha, Chinwe C., "The quality of justice is strained: The death penalty in Nigeria, p.10 available at [www.nigerianlawguru.com/.../human%20rights%20law/...visited on 12th July, 2011](http://www.nigerianlawguru.com/.../human%20rights%20law/...visited%20on%2012%20July%202011).

⁹ Prof Chukkol K. S., *The Law of Crime in Nigeria*, Zaria, (1988), p. 8.

¹⁰ Sections 37, 49(a) 208 & 319 Criminal Code Act, Cap C38, LFN, 2004.

¹¹ See Nigeria: Past, Present and Future, Legal Framework: <http://www.nigeriaembassyusa.org/nppf.shtmlvisitedon28-10-10>. See also State Security (Detention of Persons) Decree No.2, 1984, Robbery and Firearms (Special Provisions) Decree, 1984 and The Special Military Tribunal (Misc. Offences) Decree No.20, 1984 among others.

¹² See Robbery and Firearms (Special Provisions) Decree, 1984.

¹³ The Special Military Tribunal (Misc. Offences) Decree No.20, 1984

¹⁴ *Ibid.*

¹⁵ The Special Military Tribunal (Misc. Offences) Decree No.20, 1984.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ See Chenwi Lilian M.; *Towards the Abolition of the Death Penalty in Africa: A Human Perspective*, University of Pretoria Press, 2005, p.iv.

¹⁹ See s.30 Right to Life, 1999 Constitution of Federal Republic of Nigeria; s.18 of 1963 Constitution & s. 30 of 1979 Constitution. See also T. Fine' *Moratorium 2009: An international dialogue towards a ban on Capital Punishment* (1999) 30 *Columbia Human Rights Law Review* 421.

Penal Code applicable to the Northern parts of the Country and Sections 315-317 Criminal Code applicable to the Southern States of Nigeria. There are still other laws relating to armed robbery which prescribed death as punishment²⁰.

This view has been supported by the United Nations Commission on Human Rights (UNCHR)²¹ which has expressed its conviction that the 'abolition of the death penalty contributes to enhancement of human dignity and to the progressive development of human rights'.²²

Defining the death penalty as a human rights issue has been resisted by some countries that retain and use the death penalty. These countries reject the argument that judicial execution violates basic human rights and regard their criminal justice system as a matter of national sovereignty reflecting their cultural and religious values²³. At the 57th session of the United Nations Commission on Human Rights, a representative of Libya stated that 'death penalty concerns the justice system and is not a question of human rights'²⁴. Similarly, Singapore and Trinidad and Tobago have equally asserted that the death penalty is not a human rights issue²⁵.

The death penalty has been held to be a violation of human rights- the right to life²⁶, the right not to be subjected to cruel, inhuman or degrading treatment or punishment, and the right to a fair trial. Implementation of the death penalty is irreversible, and in case of an erroneous judgement, can lead to the execution of the innocent²⁷. At the international level, a broader understanding of human rights had led to the abolition of the death penalty in some countries²⁸. In Africa, human rights considerations were the basis for the abolition of the death penalty in South Africa²⁹. This is therefore good evidence to support the view that the death penalty is a human

²⁰ See Sections. 315-317 Criminal Code Act, Cap C38, LFN, 2004 and Sections 220-222 Penal Code law Cap P3, LFN, 2004.

²¹ Now the Human Rights Council of the United Nations.

²² This conviction was expressed in the UNCHR Resolution 1997/12 of 3 April, 1997 and has been reiterated in Resolution 1998/8 of 3 April, 1998. Recently, in Resolution 2005/59 of 20 April, 2005 (UN Doc. E/CN. 4/2005/L.10/Add.17), the UNCHR also condemned the death penalty as a violation of human rights declaring that abolition is essential for the protection of the right to life. The United Nation Special Rapporteur on extrajudicial, summary or arbitrary executions, in support of the above conviction, has emphasized that 'the abolition of capital punishment is most desirable in order to fully respect the right to life' (See Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc.E/CN.4/2005/7), he reiterated that the use of the death penalty is potentially inconsistent with the respect for the right to life.

²³ R. Hood: **The Death Penalty: A Worldwide Perspective**, Oxford, (2002), p.18

²⁴ R. Hood, 'Introduction-The importance of abolishing the death penalty' in Council of Europe, **Death penalty: Beyond abolition** (2004)17. Cited by Chenwi Lilian M, **Towards the Abolition of the Death Penalty in Africa: A Human Perspective**, University of Pretoria Press, 2005, p.iv.

²⁵ See R.C. Dieter, 'The death penalty and human rights: US death penalty and International Law' <http://www.deathpenaltyinfo.org/oxfordpaper.pdf> (accessed 4th March. 2010).

²⁶ *Ibid*, R.C. Dieter is the Executive Director, Penalty Information Center in United States.

²⁷ See the case of **Nafiu Bello v. Attorney General Oyo State** (1986) 5NWLR(Pt.45),p.828 where the Appellant was erroneously executed while his appeal was still pending in court.

²⁸ Death penalty was abolished in Switzerland and Spain on human rights grounds. See R.C Dieter (note 6 above)

²⁹ In the landmark judgment passed by the South Africa Constitutional Court in **S v. Makwanyane** (CC13/94)(1995) ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1;; 2011 (7) BCLR 651 (CC) (6 June 1995) in which it declared the death penalty unconstitutional.

rights issue, and that its abolition is linked to the development of and respect for, human rights³⁰.

Nature of the Problem

In 1986, Forty Six (46) countries had abolished the death penalty for ordinary crimes.³¹ Sixteen years later, the number of countries in the same category had almost doubled to 89³². Moreover, another 22 countries had stopped using the death penalty in practice, bringing the total of non-death penalty countries to 111, far more than the 84 countries which retain an active death penalty³³. Roger Hood, in his book about "world developments in the death penalty", noted that: "The annual average rate at which countries have abolished the death penalty has increased from 1.5 (1965-1988) to 4 per year (1989-1995), or nearly three times as many."³⁴ International law expert, William Schabas, noted that fifty years ago this topic did not even exist because there were virtually no abolitionist countries.³⁵

For a world in which the death penalty has been practiced almost everywhere for centuries, this is a dramatic turnaround. Although formal abolition of the death penalty dates as far back as 1867 for Venezuela and 1870 for the Netherlands, and even earlier for the state of Michigan (1846), most of the movement towards elimination of capital punishment has been fairly recent.³⁶

The arguments against capital punishment are many and cogent, but the pleas advanced in its favour are few and specious.

Punishment is supposed to be for the protection of society, and for the reformation of the wrongdoer. It purports to protect society by preventing the same criminals from repeating their crimes, and by acting as a deterrent to other prospective criminals. Capital punishment is a notorious failure in these respects. It does indeed remove the particular culprit from the possibility of repeating his crime; but this is of very small account in view of the fact that murder is seldom a career of repeated acts, but consists of single acts perpetrated by different individuals. The man whom we remove from the scene, therefore, is not the man who, if suffered to live, would have been likely to endanger our safety.

If application of death penalty is to be seen as a deterrent to other murderers, it has proved a significant failure, as may be seen by comparing the criminal statistics of those countries where the punishment is in force with those of countries where it has been abolished. Nor is the reason of this failure far to seek. Murders are nearly always committed in sudden fits of passion or temporary insanity, when no consideration of

³⁰ *Ibid* n.23 above; R. Hood: *The Death Penalty: A Worldwide Perspective*, Oxford, (2002), p.18.

³¹ See Amnesty International, United States of America: The Death Penalty 228 (Appendix 12) (1987) (exclusive of crimes committed under military law or in time of war).

³² See Amnesty International, "Facts and Figures on the Death Penalty", (1st Jan.,2007), 2007 www.amnesty.org/en/death-penalty/numbers visited on 28th March, 2011. Cited in R. Hood: *The Death Penalty: A Worldwide Perspective*, Oxford, (2002), p.214.

³³ *Ibid*.

³⁴ R. Hood: *The Death Penalty: A World-wide Perspective*, Oxford, (2002), p.214.

³⁵ See A.W.Schabas: *The Abolition of the Death Penalty in International Law*, Cambridge, (1997),p.5..

³⁶ *Ibid*,p.5-6.

37 See
38 See
39 *Ibid*
40 Mal
41 A Se
of H
of
nw.c
42 *Ibid*

reason or self-interest can appeal to the doer. Further, such uncertainty attends the consummation of the death sentence -- due to the natural hesitation and inclination to mercy of judge and jury, to the chances of reprieve and commutation -- that this penalty is far less deterrent than are those penalties which, though less severe, are also more certain³⁷.

Human Rights as a Basis for Abolition and Reform

The reasons why countries have abolished the death penalty in increasing numbers vary. For some nations, it was a broader understanding of human rights. Spain abandoned the last vestiges of its death penalty in 1995, stating that: "the death penalty has no place in the general penal system of advanced, civilized societies . . . What more degrading or afflictive punishment can be imagined than to deprive a person of his life . . . ?"³⁸ Similarly, Switzerland abolished the death penalty because it constituted "a flagrant violation of the right to life and dignity. . . ."³⁹ Justice Chaskalson of the South African Constitutional Court, stated in the historic opinion banning the death penalty under the new constitution that: "The rights to life and dignity are the most important of all human rights And this must be demonstrated by the State in everything that it does, including the way it punishes criminals." ⁴⁰

Death penalty is irrevocable, and the errors of justice cannot be rectified. All possibility of reconsideration is taken away. Innocent persons have been hanged, and judge, jury, and the whole legal machinery involved have thereby been made privy to the very crime they sought to punish. In view of the very uncertain and unequal character of our merely human endeavours to mete out justice, no proceedings of ours should be of this irrevocable character⁴¹. So complex and uncertain is the process of sifting whereby finally a few individuals are sorted out from the mass and consigned to punishment, that the selection seems largely arbitrary, and we find that the actual convicts are no worse, and some perhaps even better, than many whom the hand of the law never reaches. What principle of equity or reason can justify us in singling out for our harshest treatment, by so haphazard a method, a few individuals who for the most part manifest no particular reasons why they and they alone, should be so treated?⁴² Challenging the death penalty is not seen solely as an internal matter among nations. Many European countries, along with Canada, Mexico, and South Africa, have resisted extraditing persons to countries like the United States unless there are assurances that the death penalty will not be sought. The Council of Europe has threatened to revoke the U.S.'s observer status unless it takes action on the death

³⁷ See *Sunrise Magazine*, April/May 1998. Copyright at 1998 by Theosophical University Press. See www.theosociety.org/pasadena/gdpmanu/ryan-wh/wit-hp.htm visited on 28th March, 2011.

³⁸ See R. Hood: *The Death Penalty: A Worldwide Perspective*, Oxford, (2002), p. 15 (Spain had abolished the death penalty for ordinary crimes in 1978).

³⁹ *Ibid.* p.14. See also R.C. Dieter, 'The death penalty and human rights: US death penalty and International Law' <http://www.deathpenaltyinfo.org/oxfordpaper.pdf> (accessed 4th March, 2010).

⁴⁰ *Makwanyane & Anr v. The State*, 16 HRLJ 154 (Constitutional Court of South Africa 1995).

⁴¹ A Summary of Arguments Presented at a Meeting of the Men's International Theosophical League of Humanity, March 31, 1914. [Included in *To Abolish Capital Punishment: A Plea to the Citizens of every Country*, Point Loma, California, 1914.] See also www.theosophy-nw.org/theosnw/issues/pu-vscap.htm visited on 28th June, 2011.

⁴² *Ibid.* n.17 above.

penalty⁴³. Mexico has recently begun a programme to provide legal assistance to its nationals facing the death penalty in the U.S. As discussed more fully below, these Mexican citizens were usually not afforded their rights under the Vienna Convention on Consular Relations. This same violation led Paraguay and Germany to pursue relief at the International Court of Justice in the Hague for their nationals facing execution in the U.S.

The U.S is committed to the pursuit of international human rights as evidenced by the then President, Bill Clinton's signing of an Executive Order on the 50th anniversary of the U.N.'s Declaration on Human Rights in 1998. The Order stated:

It shall also be the policy and practice of the Government of the United States to promote respect for international human rights, both in our relationships with all other countries and by working with and strengthening the various international mechanisms for the promotion of human rights, including . . . those of the United Nations. .

44

Despite this commitment, and despite the fact that the founding of the United States was based on the recognition of certain "unalienable rights,"⁴⁵ the concept of human rights per se as it applies within the U.S. is rarely discussed. The notion of human rights is almost exclusively focused on other countries⁴⁶. A search on the Internet for the term "human rights" in conjunction with the term "United States" mainly yields a discussion of international issues with references to organizations such as Amnesty International, Human Rights Watch, and the United Nations⁴⁷.

The U.S frequently exhibits concern about human rights violations in other countries, such as China or Cuba⁴⁸. But within the United States, a different terminology is used. U.S laws speak of "civil rights" or "constitutional rights." Civil rights focus on securing equality under the law for certain groups, such as racial minorities or women. Groups or individuals claiming abuse by the government couch their complaints in terms of their civil or constitutional rights, not their "human rights," not only in courts, but in the public forum. This may be due to the assumption that human rights are a "given" within the U.S., or simply to the U.S.'s reliance on a constitution that uses different terminology to express similar principles. Hence, the evolution of death penalty law in the U.S. does not speak in terms of "human rights," and is not likely to do so in the future. The recent concern about the death penalty and the wave of reforms are mainly concerned with the process by which it is applied and

⁴³ See Associated Press, June 26, 2001. See www.berkeleydailyplanet.com/issue/2001-06-26 visited on 28th June, 2011.

⁴⁴ Executive Order: Implementation of Human Rights Treaties, Dec. 10, 1998 (Former President Bill Clinton).

⁴⁵ The Declaration of Independence of the Thirteen Colonies, In CONGRESS, July 4, 1776.

⁴⁶ See, e.g., D. Cole, "We've Long Been Death Penalty Outlaws," *Legal Times*, April 27, 1998, at 23 (U.S.'s criticism of human rights abuses in other countries, but not at home).

⁴⁷ See Amnesty International & USA, www.amnestyusa.org/our-work/.../abolish-the-death-penalty visited on 28th June, 2011.

⁴⁸ See **Foreign policy of the United States** visited on 28th June, 2011. www.en.wikipedia.org/wiki/Foreign_policy_of_the_United_States

with the limits of what is constitutional under the Eighth Amendment's ban on "cruel and unusual punishment." The notion that the death penalty should be abandoned because it is a violation of human rights would not reverberate with many Americans. Rather their concern is expressed in terms of fairness, risks of fatal error, or simply the morality of the death penalty. Nevertheless, the underlying principles of human rights and U.S. constitutional rights are similar⁴⁹.

Comparable Concepts in Nigeria and the U.S. Courts

Capital punishment is tantamount to a repudiation of the divine nature of man. On what principles of religion or philosophy can we justify the policy of depriving a human being like ourselves of all possibility of reform? If we profess to revere a God of mercy and justice, and if we ourselves supplicate and rely on that divine mercy and justice, how can we reconcile it with our duty, as men created in the divine image, to dismiss thus roughly a fellow human being from our midst and send him into the presence of the Deity whom we have outraged? Surely it is our duty and our privilege to be the agents of divine justice and mercy, and to exert to the utmost our god-given powers in the endeavour to assist our fallen brother to his feet⁵⁰.

The American federal courts' consideration of the death penalty begins with the assumption that it is constitutional and that it is not a "cruel and unusual punishment." That is chiefly because the death penalty clearly existed as a legal punishment at the time the Eighth Amendment was adopted in 1791, thereby demonstrating the founding fathers' constitutional approval⁵¹. Moreover, the Fifth Amendment (and later the Fourteenth Amendment, adopted in 1868) clearly anticipates the deprivation of life, provided "due process" has been accorded the accused⁵².

If the death penalty was determined to be a violation of unalienable rights (comparable to "human rights"), it would be possible (though difficult) to amend the Constitution so that the government could not take a person's life as a punishment for crime. But a more likely path towards abolition would be that individual states will choose to halt this practice. In fact, 12 states and the District of Columbia already do not allow the death penalty⁵³. The U.S. Constitution provides a minimum amount of protection, below which the laws of the states may not go. But states certainly can provide more protection than the Constitution requires. So far, the majority of U.S. states have shown an uninterrupted intention to retain capital punishment throughout

⁴⁹ Ibid. It took additional Constitutional Amendments and numerous Supreme Court cases to extend the same rights to all U.S. citizens. The Bill of Rights plays a key role in American law and government, and remains a vital symbol not be ratified because it failed to protect the fundamental principles of human liberty. See also www.en.wikipedia.org/wiki/United_States_Bill_of_Right visited on 28th June, 2011.

⁵⁰ See A Summary of Arguments Presented at a Meeting of the Men's International Theosophical League of Humanity, March 31, 1914. www.theosophy-nw.org/theosnw/issues/pu-vscap.htm visited on 28th June, 2011.

⁵¹ Discussion on The Eighth Amendment (Amendment VIII) to the United States Constitution www.en.wikipedia.org/.../List_of_amendments_to_the_United_States_Co.. visited on 1st Aug. 2011.

⁵² R. Hood: 'The Death Penalty: A Worldwide Perspective, Oxford, (2002), p.18

⁵³ See R.C. Dieter, 'The death penalty and human rights: US death penalty and International Law' <http://www.deathpenaltyinfo.org/oxfordpaper.pdf> (accessed 4th March, 2010).

their history⁵⁴. Thus, challenges to the death penalty have focused on procedural defects: the selection of juries; an indigent defendant's right to a lawyer at the government's expense; or the arbitrary application of the death penalty, that is, that those chosen to die are legally indistinguishable from those who are allowed to live.

Many procedural rules have shaped the Supreme Court's oversight of the death penalty. The Court has rejected the notion that the punishment itself is cruel and unusual because of its taking of human life.⁵⁵ Nevertheless, the history of the death penalty in the U.S. is one in which the punishment has been applied to an increasingly narrower class of crimes, and has excluded an increasingly broader group of defendants. To a significant extent, those restrictions on the death penalty parallel a fuller understanding of human rights around the world.⁵⁶

Early American criminal law was brought over substantially from England, which allowed the death penalty for many crimes. In the U.S., the death penalty could be applied for murder, but also for rape, robbery, treason, and even blasphemy.⁵⁷ Gradually, the list of death eligible crimes has been shortened to essentially one: murder⁵⁸. Laws continue to exist which allow the death penalty for other crimes, but no one is on the state or federal death rows for a crime which did not involve the death of another person⁵⁹.

The Supreme Court determined that the death penalty was a disproportionate punishment for the crime of rape in which the victim did not die⁶⁰; it reached a similar conclusion for the crime of robbery.⁶¹ Even felony murders in which the defendant did not intend to kill or harm the victim and did not demonstrate a reckless indifference to human life by his actions, are not punishable by death, even if a victim dies⁶².

These decisions stem from the Court's concept that "death is different"⁶³ as a punishment—a notion similar to the human rights precept that life can only be taken out of utmost necessity. This is not to say that there are no counter-pressures to expand the death penalty to more crimes. In fact, states have been successful in adding to the specific kinds of murder which are death-eligible. In many states, almost any murder can result in the death penalty, despite the U.S. Supreme Court's ruling that statutes are to be narrowly tailored to select only the worst offenders.⁶⁴

Also, the federal death penalty was greatly expanded in 1994 and includes crimes such as certain attempted murders, certain drug crimes, and espionage, even if no one directly died as a result of the defendant's actions.⁶⁵ So far, no one has been

⁵⁴ *Ibid.*

⁵⁵ *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁵⁶ See, e.g., International Covenant on Civil and Political Rights, Article 6, below note 34 (urging limitations on the death penalty where it is still in use).

⁵⁷ See S. Banner, *The Death Penalty: An American History* 5-6 (2002). Cited by R.C. Dieter, 'The death penalty and human rights: US death penalty and International Law' <http://www.deathpenaltyinfo.org/oxfordpaper.pdf> (accessed 4th March, 2010).

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Coker v. Georgia*, 433 U.S. 584 (1977).

⁶¹ *Hooks v. Georgia*, 433 U.S. 917 (1977) (per curiam).

⁶² *Enmund v. Florida*, 458 U.S. 782 (1982).

⁶³ See, e.g., *Woodson v. North Carolina*, 428 U.S. 280 (1976).

⁶⁴ See *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁶⁵ See generally, 18 U.S.C. §§ 3591-99 (1994).

given the death sentence for these non-murder offences, though that may change soon. The Supreme Court has gradually carved out groups of people who may not receive the death penalty. In 1986, it decided that those who are legally insane may not be executed (at least as long as this mental condition continues).⁶⁶ In 1988, the Court declared that a defendant who was 15 years of age at the time of his crime could not be executed, at least in a state that had not specifically determined the appropriate minimum age for the death penalty.⁶⁷ The Court later refused to raise the minimum age to 18,⁶⁸ though it may revisit that issue as public sentiment changes.

Interestingly, one group of people has been excluded from the death penalty by international treaty: pregnant women. The U.S. has signed and ratified the International

Covenant on Civil and Political Rights (ICCPR),⁶⁹ which forbids such executions, and the U.S. has acknowledged this prohibition.⁷⁰ (The ICCPR also forbids the execution of those who were under 18 years of age at the time of their crime, but the U.S. took a reservation to that section of the treaty and continues to carry out such executions, as discussed below.)

Looking at it internationally, the most important in the line of cases restricting the death penalty was the recent decision of the U.S. Supreme Court in *Atkins v. Virginia*⁷¹, regarding a defendant with mental retardation.⁷² Once before, in 1989, the Court had looked at this identical issue and decided that the execution of such defendants was constitutional. In its earlier decision, the Court narrowly (5-4) held that it was not cruel and unusual to apply the death penalty generally to the mentally retarded, though such a condition should be considered by the jury on an individual basis.⁷³ The Court noted that only two states prohibited such executions, and so it hardly could be said that a national consensus had formed against this practice.

In Nigeria's prisons prisoners, have spent over 20 (twenty) years on death row waiting painfully for execution.⁷⁴ There are presently over 300 (three hundred) prisoners awaiting death or execution in Nigeria. In Ghana, some prisoners spent over ten years on death row⁷⁵. In 2001, there were apparently at least 30 prisoners who had been on death row for between eight and twenty five years in Zambia, and some served at least eight years on death row before being pardoned in Swaziland⁷⁶. Several scholars have expressed concern regarding the nature of life on death row.⁷⁷

In Japan, death row inmates are never notified of their execution dates, and no one knows how the next person to be executed is selected, or how many inmates were

⁶⁶ *Ford v. Wainwright*, 477 U.S. 399 (1986).

⁶⁷ *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

⁶⁸ *Stanford v. Kentucky*, 492 U.S. 361 (1989).

⁶⁹ International Covenant on Civil and Political Rights, 999 UNTS 171 (1976), at Art. 6.

⁷⁰ See U.S. Reservation to Article 6 of the ICCPR, UN Doc. ST/LEG/SER.E/13, p.175.

⁷¹ 536 US 304

⁷² International Covenant on Civil and Political Rights, 999 UNTS 171 (1976), at Art. 6.

⁷³ See U.S. Reservation to Article 6 of the ICCPR, UN Doc. ST/LEG/SER.E/13, p. 175.

⁷⁴ A visit to Kaduna, Ilorin & Kirikiri Maximum Prisons in 1993 by the Committee for Defence of Human Rights (Nigeria) Report. April, 1993.

⁷⁵ Amnesty International: 'president grants amnesty to prisoners' page 111, www.amnesty.org/en/death-penalty visited on 18th March, 2011

⁷⁶ R. Hood: *The death penalty: A worldwide perspective*, Oxford, (2002), p.111.

⁷⁷ See R. Johnson, *Death work: A study of the modern execution process* (1990), ix.

wrongly convicted and executed.⁷⁸ It is lamentable that the method of execution by hanging has not been changed for nearly 140 years in Japan. This would never happen in a democratic society where the public is provided with the necessary information⁷⁹.

Capital punishment sins most by depriving the culprit of his chances of reformation. The only way to destroy a criminal is by reforming the man who is a criminal. To destroy his bodily life is nothing but a stupid blunder⁸⁰.

When the physical life of a criminal is cut short by this summary and unnatural means, we do not bring to an end thereby the evil passions which prompted the crime. They are not slain; they continue to exist. And, having no longer a bodily tenement, they must wander abroad to prey upon the community and inspire fresh deeds of horror in weak and unbalanced natures whom they obsess⁸¹. Thus are accounted for those mysterious outbursts of crime which are distinguished by the frequent confession. In view of this fact, the folly of capital punishment is more glaring than ever⁸².

It is well within the power of existing governments to provide means whereby murderers, as well as other criminals, can be isolated in institutions where they can be humanely treated as patients or people of unsound mind. And this must be made part of a general campaign of educative and remedial treatment of crime outside prison walls. Otherwise prisons will be -- what they too often are -- places for disposing of the materials which we manufacture outside. This process of first carefully manufacturing criminals and then killing them is an insult to our intelligence and culture. We must stop making them; and, if made, we must reform them⁸³.

The world is passing through a crucial stage and the newborn spirit of a kindly intelligence is struggling for manifestation. A new law of human life has been impressed upon us and is superseding the old ideas that served us provisionally in the past. The essence of this law is reformation, peaceful coexistence and mercy,

By abolishing capital punishment in those places where it still prevails like Nigeria, the United States and those other states still retaining such in their various laws. Society at large can register in showing them its protest against all acts of wickedness, ruthless and unintelligent killings. The new law which we all recognize allows no scope for punishment at all -- except in the reformatory sense. Anger and fear are passions, and retribution may be left to the eternal justice.

⁷⁸ See Gustavo Capdevila: 'Death penalty: On Trial for Their Lives - by Public Opinion; Maiko Tagusari, (a lawyer with the Centre for Prisoners' Rights in Japan) comment, 1-12th March, 1020.

⁷⁹ *Ibid.*

⁸⁰ Human Rights Advocacy-Law and Our Rights; Death Penalty: Should it exist or not? Issue No:212, Oct, 22, 2005 www.thedailystar.net/law/2005/10/04/index.htm visited on 18th March, 2011

⁸¹ See A Summary of Arguments Presented at a Meeting of the Men's International Theosophical League of Humanity, March 31, 1914. www.theosophy-nw.org/theosnw/issues/pu-vscap.htm visited on 28th June, 2011.

⁸² *Ibid.*

⁸³ R. Hood: 'The Death Penalty: A Worldwide Perspective, Oxford, (2002), p.21