

CAPITALIZATION OF OFFENCES IN NIGERIA: AN APPRAISAL OF THE INTERNATIONAL LAW RESTRICTIONS*

Abstract

There have been global moves towards the abolition of capital punishment. The United Nations, in its systemic strategy, towards attaining an outright abolition across the jurisdictions, has placed a myriad of restrictions on the retentionist countries in the capitalization, imposition of capital punishment and the execution of death sentences on condemned prisoners. The restrictions are contained in the ICCPR and other regional instruments like the ACHR and ACHPR. The restrictions include non-expansion of scope of capital punishment with drastic reduction in scope. It also includes non-use of retroactive legislations for capital punishment. The instruments also seek to restrain the retentionist states from imposing death penalty on certain vulnerable groups. The appraisal of the various restrictions placed on the member states in the capitalization process constitutes the thrust of this paper. The writer concludes and proffers robust recommendations on the way forward.

Key words: Capitalization, Retentionist Countries, Capital Punishment, Condemned Prisoners, Vulnerable, Retroactive Law.

1. Introduction

Capital punishment is a global issue that has generated so much controversy over the years. Different groups and persons have considered the subject from different perspectives. The attitudes of nations vary from one to the other, and this is shown in the fact that crimes that attract capital punishment in the retentionist countries differ from jurisdiction to jurisdiction. In some countries, the list is short while in other countries, it is long. Consequently, there is no universal yardstick to classify which crime will attract capital punishment, and which one will not.¹ The protagonists of capital punishment are of the view that certain needs of the society are best met by the execution of the criminal. They assume that capital punishment attunes with proportionality in relation to heinous offences. Their beliefs might have been predicated on the utilitarian or hedonistic principle of *felicific calculus* in the promotion of common will and in achieving the greatest happiness of the highest number².

Capital punishment has been defined as the prescribed treatment meted to an offender who has been adjudged guilty of a capital offence.³ Capital punishment is therefore the supreme sacrifice paid by an offender, who has been adjudged guilty of a capital offence by a court of competent jurisdiction. It is a sentence of death, mostly, for the commission of serious offences. Capitalization is the process of making certain offences punishable with death penalty. Offences can also be de-capitalized, like the drug trafficking offence, which was capitalized in Nigeria in 1984 but de-capitalized in 1986⁴. Globally, a number of restrictions have been placed on the imposition of capital punishment, in that, it has to be imposed in accordance with the law. The substantive and procedural Safeguards, for its imposition also

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¹ Although, there is an international prescription that the punishment should be imposed by the retentionist countries, (if at all), only for the *most serious crimes*. See Article 6(2) of the International Covenant on Civil and Political Rights (Hereinafter referred to as ICCPR). The ICCPR has been ratified by 50 African states and signed by only two. See the status of ratification of principal international Human Rights Treaties at <http://www.unhcr.ch/pdf/report> (accessed 21 October, 2016). The ICCPR was adopted in December 16, 1966 and it entered into force on March 23 1976 vide G.A Res. 2200 A (XXI)

² This is the thesis of the Neo-Classicists of which the precursor is Jeremy Bentham. They postulated the rationality of humans and advocated punishment accordingly, on the ground that choices were made upon calculations, to commit crimes, though, they made a case for certain exemptions on the ground of diminished responsibility. See also W. Iyaniwura, 'The Death Penalty, A Negation of the Right to Life?', *Ado Readings in Law* (1998), Faculty of Law, University of Ado-Ekiti, Nigeria, p. 68.

³E. O. Akingbehin, 'Exemptions of the Vulnerables from Capital Punishment in Nigeria: Expanding the Frontiers', *University of Ibadan Law Journal*, vol. 2, November, 2012, p. 308.

⁴See Special Tribunals (Miscellaneous Offences) Amendment Decree No 22 of 1986, which also allowed appeals to a Special Tribunal.

must be respected⁵. There is no doubt that most offences are capitalized because of the security threat which they pose to the society. However, what constitutes a threat varies from one society to another. It is against the attainment of uniformity in the imposition pattern of capital punishment and capitalization process generally that certain international and regional instruments have imposed some restrictions towards delimiting the scope of capital offences. Some of these safeguards are aimed at restraining the retentionist countries from extending the scope of capital offences. The instruments are also aimed at preventing the retentionist countries from the enforcement of retro-active laws on capital punishment and restraining the retentionist jurisdictions from imposing capital punishment on certain categories of offenders.⁶

It is therefore, the aim of this paper to assess the capitalization of offences within the context of the International Law restrictions. The paper is divided into five parts. The first part constitutes this introduction. The writer discusses the reduction in scope and restriction on scope expansion in the second part. The third part, delves on non-retroactive enforcement of capital punishment legislations while the paper analyses the exclusion of certain categories of offenders from capital punishment in the fourth part. The paper concludes in the fifth part and the writer proffers recommendations.

2. Reduction in Scope and Restriction on Scope of Expansion

The International Covenant on civil and political Rights (hereafter called the ICCPR), in a bid to ensure total abolition of capital punishment, provides that the scope of capital punishment should be restricted to the *most serious crimes*⁷. The phrase *most serious crimes* is evidently nebulous because of the problem of lack of universal interpretation of most words. *Most serious* can attract different interpretation, depending on national culture, tradition and political complexion. It has been contended that the phrase *most serious offences* in Article 6(2) is nothing more than a marker for the policy of moving towards abolition through progressive restriction.⁸ The phrase is to be construed as meaning the most egregious offences. The golden question at this juncture is: what constitutes the *most serious crime*? It is imperative to realize that the meaning of *most serious* would need to be teleologically interpreted in an ever restricted way. The first attempt at this definition was in 1984, when the Economic and Social Council of the U.N, adopted by resolution, the safeguards for the protection of the Rights of those facing Death Penalty. The first safeguard stipulates that the scope should not go beyond intentional crimes with lethal or other extreme consequences. This safeguard should be construed to depict that the offences should lead to loss of life or be life threatening in the sense that death is the likely consequence of the action.⁹

Another attempt at the definition of *most serious offences* was made in Article 4(4) of the American Convention on Human Rights (ACHR) which stipulates that Capital Punishment shall not be imposed for political offences. The U.N Commission on Human Rights, in its Resolution 1991/61 and 2004/67 also urge all states that still retain the death penalty to ensure that it is not imposed on non-violent financial crimes or non-violent religious practices or expression of conscience. There have been other attempts made to illuminate the foggy concept of *most serious crime*. The U.N Special Rapporteur Philip Alston, has also adopted a similar definition of the amorphous phrase when he said that death penalty can only be imposed where it can be shown that there was an intention to kill which resulted in

⁵L. Chenwi, *Towards the Abolition of the Death Penalty Penalty in Africa: A Human Rights Perspective* (Pretoria: PULP, 2007) p. 35.

⁶ See Article 6 of the International Covenant on Civil and Political Rights.

⁷ Article 6(2) ICCPR. *Op Cit* (n 1 above). UNGA Ordinary Resolution, 21st session, supp. (No 16) at 52, UN Doc. A/632 6(1966) 999 UNTS 171

⁸ R. Hood and C. Hoyle, *The Death Penalty: A World-Wide Perspective*. 4th edition (London – Oxford University Press, 2015) p. 21. It was in (resolution 28/57) 1971 and again in (resolution 32/61) in 1977 that the aspiration was reinforced by the United Nations General Assembly which stated that the main objective of the UDHR and Art. 6 of the ICCPR is to progressively restrict the number of offences for which capital punishment might be imposed with a view to its eventual abolition.

⁹ The Human Rights Committee has laid it down that the concept of *most serious crimes* employed in the covenant (Article 6 para. 2) must be read restrictively to mean that the death penalty should be quite an exceptional measure.

the loss of life.¹⁰ Quite unfortunately, this amorphous phrase has been left open-ended such that Viljoen once wondered if there are no clear indications of what the most serious crimes are.¹¹ Consequently, it is doubtful if the offences like apostasy and illicit sex (capitalized in Sudan), endangering or corrupting the society (capitalized in Libya), embezzlement and other non-violent economic offences (capitalized in China and Japan), adultery (capitalized in Yemen and Nigeria) and sex between a non-Muslim and a Muslim female (capitalized in Saudi Arabia and Sudan) are compatible with the ICCPR and the regional instruments as regards the restriction of capital offences to the most egregious ones.¹² The Chinese position deserves a special mention. In China, the death penalty is imposed for certain offences, which by international standards, do not fall within the scope of most serious or heinous crimes. Specifically, offenders found guilty of corruption, embezzlement, VAT fraud and other non-violent economic crimes are liable to be sentenced to death and executed.¹³ Inasmuch as it may be argued that such economic crimes are unduly capitalized, and violative of the international prescriptions, it is the writer's submission that any crime that is damaging to the economy and could lead to unemployment and hunger for the citizens should be viewed with seriousness, so as to attract capitalization on the basis of *seriousness continuum*.

3. Non Retroactive Enforcement of Capital Punishment Legislations

The cardinal principle of criminal law, which prohibits the enforcement of retro-active laws, finds expression in the latin maxim *nulla poena sine lege*. Put simply, it is that, no act should be punished which is not already prohibited by law. In other words, a criminal charge should be based on a crime which exists in a written law at the time of the commission of the crime. Article 6(2) of the ICCPR¹⁴ allows for the imposition of death penalty to be for only crimes that are capitalized in a written law at the time of the commission of the offence. The United Nation's Safeguard No 2 for the Protection of the Rights of those facing the Death Penalty added a further condition that if, subsequent to the commission of a crime, provision is made by law for the imposition of a lighter penalty, the offender shall be subjected to the lighter penalty but not conversely.¹⁵ The Constitution of the Federal Republic of Nigeria 1999, as amended in 2010 and 2011, also forbids the imposition of heavier sentence on an offender than the sentence which prevailed when the offence was committed.¹⁶ In addition, the African Charter on Peoples and Human's Rights also prohibits retro-active invocation of any penalty, including capital punishment thus: 'No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty, no provision was made at the time it was committed'.¹⁷

However, few countries have introduced the death penalty and applied the law retroactively. For example, after the 2nd World War, Israel passed a legislation which made it possible to punish severely

¹⁰ See the Report of the Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions A/HRC/4/20 of 29 January, 2007, para. 65. See also M. H. Cramer, *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and its Consequences* (Oxford: Oxford University Press, 2011) pp. 187 and 223 where it was contended that capital punishment would have to be limited to extravagantly evil actions with sadistic malice or heartlessness or extreme recklessness that is connected to severe harm in the absence of any significant extenuating circumstances.

¹¹ F. Viljoen, 'Introduction to the African Commission and the Regional Human Rights System' in C. Heyns (ed) *Human Rights in Africa* (Leiden: Martinus Nijhoff Publishers, 2004) p. 400.

¹² R. Hood and C. Hoyle *Op Cit* (n 8 above) pp. 136 – 169.

¹³ R. Hood *et al* wrote that Cheng Kejie, a former vice chairman of the standing committee of the National People's Congress and a former Provincial Governor was executed in 2000 for corruption and taking of bribes amounting to over 41 Million Yuan (about US \$15 Million). Also, in 2006, two ex-employees of China's third largest bank were executed by lethal injection for defrauding customers of millions of dollars. The former head of China's State Food and Drug Administration, Zheng Xiaoyu was also sentenced to death in May 2007 after pleading guilty to accepting a bribe to the value of US \$850,000

¹⁴ *Op Cit*, (n 1 above).

¹⁵ *Empasis mine*.

¹⁶ See the Constitution of the Federal Republic of Nigeria, Promulgation Act, Cap C23, Laws of the Federation of Nigeria (hereinafter referred to as CFRN 1999), as amended in 2010 and 2011 (Signed into Law on the 10th day of January, 2011). Section 36 (8).

¹⁷ Article 7(2) ACHPR. Some other African States have also incorporated similar provisions in their Constitutions to prohibit retroactive imposition of the death penalty. See for example, the Constitutions of Ethiopia, 1994 Article 22, Zambia 1996, Article 18(4) and Ghana 1996, Section 19 (5).

the Nazis found guilty of perpetrating atrocities during the Holocaust. Adolf Eichmann was executed under this provision.¹⁸ Also, Iraq, under Saddam Hussein's regime, invoked the death penalty retroactively in 1980 for membership of the outlawed political parties. By virtue of Decree 115 of 1994, the death penalty could be applied retroactively to person who had evaded military service for the third time.¹⁹ In Nigeria, the military government extended the Death Penalty Offences Decree, 1984, retroactively to cover 19 miscellaneous offences. Three men were executed for drug related offences which were committed before the Decree was promulgated. Drug offences were subsequently decapitalized in 1986.²⁰ Also, under the Shari'ah Penal Code, in Niger State of Nigeria, Fatima Usman was sentenced to death by stoning for adultery offence, which she allegedly committed before the Shari'ah Law was enacted.²¹ It is submitted that the offence of adultery does not satisfy the requirement of most serious crime as laid down in the ICCPR. It is further submitted that the sentence is also condemnable on the ground of retroactive enforcement of laws, which is an infraction of the provisions of International Instruments and Nigerian Constitution.²² In Sudan, the death penalty was applied retroactively for adultery between married persons in 1983 and to apostasy in 1991. Also, some countries like Burundi, Chad, Guinea, Lebanon and South Korea have informed the United Nations that if a crime becomes punishable by a lesser penalty than death, an offender under sentence of death would not be eligible to receive that lesser sentence.²³

4. Exclusion of Certain Categories of Offenders from Capital Punishment

Globally, a number of restrictions have been placed on the imposition of death penalty, in that it has to be imposed in accordance with the law. Also, the substantive and procedural safeguards for its imposition must be respected.²⁴ Similarly, Article 6 of the ICCPR provides the procedural safeguards for the imposition of the death penalty on certain categories of persons.²⁵ These are the genre of people who have actually committed capital offences but are exempted from capital punishment because of their vulnerabilities. The exempted categories include the juveniles, pregnant women, insane people and the aged. These categories will be appraised against the background of Nigerian situation, but with comparative overview of the other jurisdictions.

The Juveniles

The states that are parties to the ICCPR and the ACHR are prohibited from imposing capital punishment for offences committed by persons below 18 years of age.²⁶ This prohibition is also contained in the International Convention on the Rights of the Child which came into effect in September 1990 and has now been ratified by every country except the United States of America and Somalia.²⁷ It is also

¹⁸ See the Report of the Secretary-General, Capital Punishment and Implementation of the Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty, E/1995/78, 8 June 1995, para. 62

¹⁹ Amnesty International Report, 1995, p. 50.

²⁰ See Special Tribunal (Miscellaneous Offences) Decree 20 of 1984 and Special Tribunal (Miscellaneous Offences) Decree 22 of 1986. Three people executed through the retroactive enforcement of death penalty law were Bartholomew Owoh, Bernard Ogedengbe and Lawal Ojuolape. It is on record that the executions attracted spontaneous and monumental public outcry. See Newswatch Magazine, December 11, 1989.

²¹ Fatima Usman was actually arraigned and sentenced to a term of imprisonment with an option of fine under the Penal Code when Shari'ah Penal Code was yet to be enacted. By the time she appealed the decision, the Shari'ah Penal Code had been enacted and the lower court was instructed by the Appellate Court to review its judgment in line with the newly enacted Shari'ah Penal Code. The sentence was then changed to death penalty by stoning. This is a clear case of retroactive attempt at enforcing death penalty law. The sentence was eventually quashed on appeal.

²² See Section 36(8) CFRN 1999 *Op Cit* (n 16 above) as amended in 2010 and 2011. See also Article 6(2) ICCPR *Op Cit* (n 1 above). Also see 'BAOBAB for Women's Rights and Shari'ah Implementation in Nigeria: The Journey So Far', pp. 70 – 72.

²³ In the USA, four states which raised the minimum age limit for the sentence of death to 18 in 1987 did not apply this benefit retroactively to those already under sentence of death, contrary, not only to Safeguard No 2 but also to Article 15 (1) of the ICCPR and Article 9 of the ACHR.

²⁴ L. Chenwi, *Op Cit* (n 5 above). P. 35

²⁵ E. O. Akingbehin, *Op Cit* (n 3 above). p. 35.

²⁶ Article 6(5) ICCPR and Article 4(5) ACHR *Op Cit* (n 1 above).

²⁷ Article 37(a); ICCPR *Op Cit* (n 1 above). Also, the prohibition is contained in the Draft UN Standard Minimum Rules for the Administration of Juvenile Justice, adopted in 1984 (known as the Beijing Rules and adopted by the General Assembly Resolution 40/33 of 29 November, 1985)

forbidden by the African Charter on the Rights and Welfare of the Child.²⁸ At the beginning of the 21st century, both the UN Sub-Commission on the Promotion and Protection of Human Rights²⁹ and the Inter-American Commission on Human Rights in 2002³⁰ were able to adopt a principle that the death penalty should not apply to persons who committed capital offences under the age of 18 years, as part of Customary International Law. The advocacy that juveniles should be exempted from capital punishment is, no doubt premised on their diminished culpability arising from susceptibility to immature and irresponsible behaviours. It has also been contended that their vulnerability and lack of control over their immediate surroundings gave them a greater claim than adults to be forgiven for their inabilities to escape negative influences as they were still struggling to define their identities.³¹ It is gratifying to note that the decision in *Simmons' case*³² heralded the commutation of sentences of 70 prisoners who were on death row and who fell within the age bracket of 17 to 18 years at the time of commission of their offences.³³

In Africa, it has been held in the Kenyan's case of *Turon v. R.*³⁴ that a death sentence should not be pronounced on a person under the age of 18 years. In Nigeria, the Children and Young Persons' Law defines a young person as a person who has attained the age of 18 years. Also, the Child Rights' Act stipulates that a young person is a person below the age of 18 years.³⁵ The recently enacted Administration of Criminal Justice Act also stipulates 18 years as the age of majority for the purpose of exemption from Capital punishment.³⁶ It must be noted that the relevant age of the juvenile offender for the purpose of exemption from capital punishment is the age when the offence was allegedly committed and not when he was convicted.³⁷

Pregnant Women

The exemption of a pregnant woman from death penalty is consistent with the jurisprudence that the forbearance of a sentence of death on her is for the benefit of the unborn child. In other words, a child's teeth should not be set on edge because his mother has eaten sour grapes.³⁸ At the International level, Article 6(5) of the ICCPR further provides that the death sentence shall not be executed on pregnant woman.³⁹ Also, the African Women's Protocol prohibits the execution of death sentences on pregnant women.⁴⁰ The penal laws of some African States embrace the approach in the ICCPR in which the death sentence, if imposed, cannot be executed on a pregnant woman. Some states commute the death

²⁸ Article 5(3), African Union, OAU Doc. CAB/LEG/24.9/49 (1990) entered into force 29 November, 1999. p. 3

²⁹ Resolution 2000/17, UN Doc. E/CN. 4/SUB. 2/RES/2000/17 17 August, 2000.

³⁰ Amnesty International, 'The Exclusion of Child Offenders from the Death Penalty under General International Law' Act/50/004/2003. P. 1.

³¹ *Roper v. Simmons* 543 U. S 551 2005: at (b)(2) pp. 14 -21.

³² *Supra* (n 31 above).

³³ However, it is on record that the first documented execution of a child took place in the United States in 1642. See B. Stevenson, 'Capital Punishment in the United States of America' in *The Death Penalty: Condemned*, by the International Commission of Jurists in September, 2000. p. 47. Also, in 1833, a nine year old boy was sentenced to death in Britain for pushing a stick through a cracked window and pulling out some printer's colour valued two pence.

³⁴ [1967] E.A 789 (C.A), it is worrisome, however that Liberia still imposes the death penalty for crimes committed by children under the age of 18 years.

³⁵ See Section 2, Children and Young Persons' Law of Lagos State, Cap C. 10 Laws of Lagos State 2003. See also, Section 2 of the Child Rights' Act 2003.

³⁶ Administration of Criminal Justice Act 2015. Section 405. The Act repealed the Criminal Procedure Act and the Criminal Procedure Code which were applicable in the Southern and Northern states of Nigeria respectively. The two legislations in Sections 368(3) and 272(1) respectively prohibit the courts from imposing death sentence on any capital offender convict where the offender has not attained 17 years old at the time of commission of the offence.

³⁷ See *Modupe v. State* [1988] 4 NWLR (Pt 87) 130. See also *Guobadia v. State* [2004] 6 NWLR (Pt 869) 360. The initial aberration which was contained in section 368 (3) of the CPA and followed by the court in *R. v. Bangaza* [1966] 5 FSC which purportedly put the relevant age as the age at conviction, has been corrected in Criminal Justice (Miscellaneous Provisions) Act 1966 which was later adopted by all the states in the federation. The reversal amendment was carried out against the backdrop of the criticism of the case as being inequitable.

³⁸ B. Osamor, *Fundamentals of Criminal Procedure Law in Nigeria* (Dee-Sage Nigerian Publishers, 2004) p. 384.

³⁹ ECOSOC Safeguard 3, provides that '..... nor shall the death penalty be carried out on pregnant women or new mothers.....'

⁴⁰ Article 4 (2) (j) of the African Women's Protocol.

sentence after its imposition. In other jurisdictions, the execution is deferred till after delivery.⁴¹ Article 118 of the Ethiopian Penal Code 1957, for example, prohibits the imposition of the death penalty and its execution on sick prisoners, pregnant women or nursing mothers.⁴² In the same vein, Article 436 of the Code of Criminal Procedure of Libya provides that the death penalty is to be executed after two months of delivery. This is shorter than the interval after delivery in the Sudanese Constitution which postpones execution for two years after lactation.

In Nigeria, the ACJA prohibits the execution of the sentence of death on a pregnant woman.⁴³ However, the provision merely suspends the execution till the child is delivered or weaned.⁴⁴ There is no international instrument barring sentencing of women to death, though they have been generally exempted from capital punishment in some countries.⁴⁵ However, there are reports of women sentenced to death and executed in some of the retentionist countries such as China, Indonesia, Iraq, Japan, United States of America and Nigeria.⁴⁶ Available records that traverse Nigerian penal history revealed that most of those sentenced to death are men, but Essien stated that there were few instances when women have been executed.⁴⁷ Chenwi also reported that the Shari'ah Penal Laws in some states in Nigeria authorize the imposition of death penalties on women.⁴⁸ However the writer found from a research conducted in 2015 that out of the 38 condemned prisoners who have spent above 10 years on the death row, none of them was a woman.⁴⁹ Exemption of women from execution has however, been criticized as being illogical and indefensible by Streib.⁵⁰

Insane Persons/Mentally Retarded

The courts usually pronounce a verdict of non-guilty by reason of insanity on accused persons after a successful plea of the defence of insanity has been made, especially, in respect of murder cases.⁵¹ Insanity negates the *mens rea* requirement of an offence which is the mental element. It attunes with the time tested criminal law principle of 'no liability without fault'.⁵² The notion of 'no liability without fault' connotes that no one should be held criminally responsible, unless, he is to some extent, at fault. Article 6 of the ICCPR places a restriction on the retentionist countries from imposing capital punishment on insane persons *inter alia*.⁵³ The test for determining the degree of mental disorder requisite for relieving an accused person from criminal responsibility was first seriously propounded in

⁴¹ L. Chenwi, *Op Cit* (n 5 above) p. 40.

⁴² It should be noted that the Ethiopian provision is wider than the provision of the ICCPR and the African Women's Protocol by extending the exemptions to sick people and nursing mothers. Countries like Sudan, merely defer the execution for two years after lactation. See Constitution of the Federal Republic of Sudan 1998. See also section 193(2) of its Criminal Procedure Act, 1991.

⁴³ Section 404 ACJA 2015.

⁴⁴ This position is at variance with the repealed CPA and CPC. Both prohibit the imposition of the sentence on pregnant women and provides for substitution with life imprisonment. See Section 368 (2) CPA and Section 270 and 300 CPC.

⁴⁵ These countries are those that are mainly associated with the former Soviet System like Belarus, Mongolia, Uzbekistan, and the Russian Federation.

⁴⁶ Frances Newton, executed in Texas in 2005, was the first black woman to be executed since 1977. At least 50 women were on death row by the end of 2006 in the United States. Also, 33 women were executed in China in 1999. See Amnesty International., *Death Penalty Log and Hand off Cain Reports*.

⁴⁷ See C. Essien, 'Overview of Perspective of Death Penalty as Regards the Vulnerable Groups'. Being a paper presented at the Public Consultation on Crimes and Punishment and Death Penalty at Hamdala Hotel, Kaduna on the 1st April, 2004.

⁴⁸ L. Chenwi, *Op Cit* (n 5 above) p. 41

⁴⁹ The writer conducted a research at the Nigerian Prisons service, Abuja, Nigeria in August, 2015 and found that out of the 38 condemned prisoners on the death row who had spent above 10 years, none was a woman. See Appendix 1 annexed to this paper. Source: Statistics Department, Nigerian Prisons Service.

⁵⁰ V. Streib, 'Executing Women, Juveniles and the Mentally Retarded: Second Class Citizen in Capital Punishment' in J. R. Acker et al (eds) *America's Experiment with Capital Punishment*. 2nd ed (St. Pual MN, Thomson West, 2003) pp. 301 – 323.

⁵¹ It has been stated that a successful plea of the defence of insanity results in simple acquittal. See Smith & Hogan, *Criminal Law*, 10th ed. (Butterworths) p. 27.

⁵² E. O. Akingbehin, *Insanity as a Defence to Murder under the Nigerian Criminal Law: Contemporary Challenges*. Being an unpublished Ph.D seminar paper delivered to the Faculty of Law, University of Lagos, Nigeria, in December, 2008. p. 1. See also section 24 of the Criminal Code.

⁵³ Article 6 ICCPR *Op Cit* (n 1 above).

England in the famous M’Naghten Rule, formulated in 1843 by the judges as advice given to the House of Lords after the *M’Naghten’s Case*.⁵⁴ The M’Naghten Rules were formulated in the belief that responsibility is the essence of the criminal law and that capacity to choose between right and wrong is the essence of responsibility.⁵⁵ In the United States of America, the M’Naghten Rules have been applied in many states, especially, in the District of Columbia. Hence, from the 1870s, the rules that were more favourable to the Psychiatrists’ view were gradually evolved which culminated in the leading case of *Durham v. U.S*⁵⁶ in 1954 in which the test was that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.⁵⁷

The provisions of the Nigerian Criminal and Penal Codes exempt insane offenders including capital offenders from criminal liability as a result of the negation of their mental guilt.⁵⁸ Insanity has been defined as the state of where an accused lack a mental health/capacity so as to justify being exempted from legal responsibility.⁵⁹ In legal parlance, it is defined as a condition which renders the affected person unfit to enjoy liberty of action because of the unreliability of his behaviour and the concomitant danger to himself and others.⁶⁰ However, upon a successful plea of the defence of insanity in Nigeria, the insane offender shall be kept in safe custody pending the decision by the Attorney General. The Attorney General may then order him to be confined in asylum, prison or other suitable place of custody.⁶¹

As regards the mentally retarded persons, who are facing capital offence trials, the position of their protection is blurred in Nigeria and even in Africa. The Nigerian criminal law merely exempts those who are insane or mentally ill but not merely mentally retarded, because they are not totally mentally impaired but partially impaired. Mental retardation is a condition of limited intelligence which is present from birth or early childhood due to arrested or incomplete mental development. This condition is characterized by faulty comprehension, emotional immaturity, poverty of ideas, stuttering (stammering) or cluttering (rushed words). The mentally sub-normal lacks sufficient control judgment and discretion to manage his own affairs or even due to the deficiency, his welfare or safety of others requires protection, supervision and control.⁶² It is not merely that the mentally retarded, which comprises mainly of the borderline defectives and the feeble minded, have a lesser capacity to understand the meaning and consequence of their actions, they are also much more vulnerable, when, as suspects, they are in custody of law enforcement agents. They are more likely to be suggestive, more ready to make wrong confessions and less knowledgeable about their rights. They also do not know whether to answer questions without the advice of a lawyer and less adept at negotiation pleas. Consequently, they are more likely to be wrongly convicted,⁶³ prior to the decision of the Supreme Court in the United States’ case of *Atkins v Virginia*.⁶⁴ However, it is cheering to note that six American states have stipulated

⁵⁴ M’Naghten’s case [1843] 10 E, I & F 200. Daniel M’Naghten, a schizophrenic, suffering from delusions that the Prime Minister, Robert Peel was about to kill him, shot and killed Drummond, a private secretary to Sir Robert Peel, mistaking him for Peel. At the end of the trial, M’Naghten’s lawyer argued that his client was insane at that time of the shooting and that he could not be held mentally responsible for his act. The jury found him not guilty by reason of insanity.

⁵⁵ Okonkwo & Naish, *Criminal Law in Nigeria* (2nd ed) (Spectrum Books Ltd, 2002) p. 130.

⁵⁶ District of Columbia, Circuit 2145 2d 867 [1954].

⁵⁷ A more recent and liberal position of the Insanity Law in the United States was espoused in the case of *Clark v. Arizona* No 05 – 5966 [2006] 548, U. S.

⁵⁸ Section 28 of the Criminal Code. See also section 51 of the Penal Code.

⁵⁹ *The New Webster’s Dictionary of English Language*, International (ed) (New York: International Publishers, Guild Group) p. 500.

⁶⁰ H. C. Black, *Black’s Law Dictionary* (6th ed) (St. Paul Minn. West Publishing Co. 1990) p. 794.

⁶¹ See Section 286(1) ACJA 2015. See also Section 230 of the repealed CPA.

⁶² M. Gelder, et al, *Shorter Oxford Textbook of Psychiatry* (5th ed) Oxford University Press, 2000. P. 322.

⁶³ A tragic example of this situation was the case of Earl Washington, a man with an I.Q variously assessed as between 57 and 69, who was convicted of rape and murder of a young woman, Culpeper Virginia in 1982 on the basis of a confession he made to the police. It is not clear whether all the members of the jury were aware of his degree of mental retardation. Sixteen years after he was convicted and sentenced to death and three days to his execution, he was exonerated and pardoned when a DNA test proved that he was innocent of the crime. See R. Hood & C. Hoyle *Op Cit* (n 8 above), pp. 248 -257.

⁶⁴ At least, 44 prisoners with mental retardation or significant organic brain damage were executed between 1984 and 2001. Some of them had I.Q as low as 59 which is equivalent to the mental age of a 7 year old person. See D. W. Keyes

mental retardation to be an I.Q which is below 70.⁶⁵ It is time for Nigeria and other African countries to amend its Criminal Law Statutes with a view of accommodating the mentally retarded in the categories of those to benefit from the exemption from capital punishment.

The Aged

There is no general restriction on the exemption of the aged from death penalty. The rationale behind exempting the aged from the death penalty may either be because of nearness to the grave, as in having few more days to live on earth, and the question ordinarily would be; why accelerating the death? It may also be because of impairments that are associated with the old age like senility and dementia. Whatever the basis may be, it has failed to attract international acceptance. ECOSOC has urged all member states to establish a maximum age beyond which persons may not be sentenced to death or executed. Only a few countries have done so. For example, in Taiwan, no capital offender who is above 80 years old can be executed. Also, Russia Federation pegs its maximum age of execution at 65 years. However, many countries execute the aged offenders at will.⁶⁶ In Japan, Okunishi Masaru aged 90 years has been on the death row having been sentenced to death for poisoning five women in 1961. Also in Saudi Arabia, a man aged 97 was reported to be under the sentence of death in 2007 for a crime committed in 1986.⁶⁷ In Africa, the restriction is not widely accepted. Very few penal laws have provisions for persons over 70 years of age. In Zimbabwe, the imposition of death sentence on any person who is above 70 years old is prohibited.⁶⁸ Also, in Sudan, although the death penalty can be imposed on persons above 70 years of age with regard to certain crimes, the person so sentenced to death cannot be executed.⁶⁹ There is no provision for the exemption of the aged from death penalty in Nigeria. From a study carried out in August, 2015 by this writer, it was revealed that Vincent Duru of 81 years old, Ufot Udo of 80 years old and Edet Udof of 84 years old are all on the death row in various Nigerian Prisons⁷⁰. It would appear rational that provisions be made in Nigerian Laws to accommodate the aged especially those above 70 years old in the categories of those to be exempted from capital punishment because they would merely spend few years in prison and die naturally. It is submitted that, by doing so, Nigeria will be complying with ECOSOC prescription.

5. Conclusion and Recommendations

This paper has endeavoured to analyse the international law prescriptions on the capitalization of offences. The work, which is comparative in nature, has been able to underscore the global efforts at achieving the abolition of capital punishment. The writer has shown in this work that the prescriptions aimed at restraining retentionist states from imposing capital punishment on certain categories of people is a disguised strategy towards attaining a gradual outright abolition. The writer has appraised the purport of Article 6 of the ICCPR and other regional instruments and it has been revealed that many member states are not complying with the international safeguards on capitalization and the use of capital punishment. This paper has revealed that state parties to the various international and regional instruments still engage in expanding the scope of capital offences.⁷¹ We also found that offences that do not qualify as the *most serious crimes* have also been capitalized across retentionist jurisdictions.⁷² The paper has also revealed that the scope of the categories of people that require being exempted from

et al, 'People with Mental Retardation are Dying Legally as 44 Have Been Executed', *Journal of Mental Retardation* 40(3) (2002), pp. 243 – 244.

⁶⁵ These are Kentucky, Maryland, Nebraska, Tennessee, Washington and South Dakota

⁶⁶ On the issue of ageing of people detained on death row, see F. Megret, 'The Human Rights of Older Persons: A Growing Challenge' (2011) II *Human Rights Law Review* pp. 37 – 66.

⁶⁷ Agence France Presse, 25 February, 2007.

⁶⁸ Section 338 of the Criminal Procedure and Evidence Act of Zimbabwe (as amended).

⁶⁹ Sections 27(2) & 48 of the Sudan's Penal Code 1991 and Section 33 (2) of the Constitution of the Republic of Sudan, 1998.

⁷⁰ Source: Nigerian Prison Service Headquarters, Statistics Department, August 2015. See Appendix 1 annexed to this work. In the study, 13 of the 38 condemned prisoners who have spent above 10 years on the death row are above 70 years old.

⁷¹ For example, on the 1st of February, 2017, Lagos State, Nigeria capitalized the offence of kidnapping, thereby expanding the scope instead of reduction. See The Punch Newspaper of 2nd February, 2017.

⁷² Sex related offences are capitalized in the Shari'ah States in Nigeria. Also non-violent economic offences are capitalized in Japan and China.

capital punishment in Nigeria does not accommodate the mentally retarded, the aged and that the newly enacted ACJA merely suspends the execution of pregnant women. This paper also disclosed that at a point in time in the history of Nigeria, capital punishment was imposed through a retroactive legislation contrary to Article 6 of the ICCPR.

Consequently, the following recommendations are hereby proffered. Retentionist state parties to the international instruments including Nigeria should desist from expanding the scope of capital punishment forthwith in line with the international law prescription. There should be conscious and spirited efforts by the retentionist countries to desist from retroactive legislations on the practice of capital punishment. The scope of *most serious crimes* should be restrictively construed to extend only to crimes that are life threatening and really egregious. Nigeria should emulate the retentionist countries that practice substitution of death penalty with life imprisonment for pregnant women who are facing the sentence of death. The policy of merely suspending execution should be jettisoned. The frontiers of the categories of capital offenders that should be exempted from capital punishment should be expanded to accommodate the mentally retarded, the Aged, (from 70 years and above) the sick, suckling and nursing mothers in line with other jurisdictions. The President and State Governors should be more sincere and committed to capital crime's prevention through deterrence policy by promptly signing the death warrants of condemned prisoners who have exhausted their appellate rights.⁷³ The writer suggests certainty of punishment rather than severity. Thus, if the punishment is less severe but the chances of apprehension are high. There is need, therefore, to boost the efficiency of the law enforcement agencies through retraining and empowerment with superior gadgets/ammunitions. Our security operatives should also improve on their modern technological skill acquisition. The Nigerian Government should ensure that there is a strict compliance with the international instruments on the age limit below which capital offenders should not be sentenced to death.⁷⁴ It is only if the above recipes are effected, coupled with an atmosphere of a corrupt-free judiciary and a dogged tenacious prosecutorial drive that any penal sanction, no matter how severe, can be meaningful. The recommendations above, if complied with, will go a long way in reducing drastically the volume of prisoners on the death row and also send signal to potential capital offenders that the capital punishment in Nigeria is real and not merely a chimera, thereby paving the way for lifting the Nigerian Criminal Justice System to a contemporary international standard.

⁷³ In a study conducted by the writer in 2015, it was found that 38 condemned prisoners who have exhausted their appellate rights have been on the death row for more than 10 years. See Appendix 1 annexed to this paper.

⁷⁴ It is observed that regardless of all the international and domestic safeguards, a Lagos High Court sentenced 12 juveniles to death in 1990 in the case of *Mohammed Garba & Ors v. Attorney General of Lagos State* (unreported) Suit No: ID/559^M/90, High Court of Lagos State, Ikeja Division.