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THE DOCTRINE OF CAPITAL PUNISHMENT: A COMPARATIVE ANALYSIS OF ITS JUSTIFICATION AND IMPACT ON PUBLIC POLICY

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Abstract

It is trite that for any human act to constitute an offence, such act or conduct must be defined in a written law as an offence and a punishment prescribed therein. Offences are however of varying types just as their prescribed punishments varies. For instance, offences are severed into; felonies, misdemeanors and simple offences and each of these categories of offences are punishable in varying degrees as well. Regarding the Legal doctrine of punishment, several scholars have developed various theories such as retributive, reformative, deterrent, demand command, theories amongst others and the several purposes each of these kinds of penalties serve in the society. Generally, not all offences attract the same kind of punishment. Hence, while some offences attract jail term such as term of years or life imprisonment as punishment, others attract death penalty also known as capital punishment. It is against the background of the legal dabates over the utility of capital punishment that this paper evaluated the sustainability of capital punishment in the fast evolving global legal system.

Keywords: Deterrrence, Criminality, Captial Offences.

1. Introduction

The doctrine of Capital Punishment has been argued by several scholars including social commentators to be cruel, unusual and inhumane while others are of the view that its strict application constitutes a violation of the fundamental right to life and the right to human dignity and therefore should be abolished. However, this abolitionists views of capital punishment are not without criticism as some scholars and even lawyers have also advocated for its retention placing reliance on certain cogent reasons thereby becoming a problem that needs to be addressed. Consequently, it is the objective of this study to examine, inter alia, the relationship between the application of capital punishment doctrine and its deterrent effect on the commission of crime in the Nigerian society, investigate and determine by way of comparative analysis, the justification of capital punishment for offences and their effects on

public policy. The research methodology to be adopted in this work is the doctrinal research methodology.

2. CONCEPTUAL FRAMEWORKS AND LITERATURE REVIEW

2.1 Capital Punishment

Capital punishment refers to the "execution of an offender sentenced to death after conviction by a court of law of a criminal offense."[1] Capital penalty, or "the death penalty", is an institutionalized practice designed to result in deliberately executing persons in response to actual or supposed misconduct and following an authorized, rule-governed process to conclude that the people is responsible for violating norms that warrant execution. Capital punishment, also known as the death penalty and formerly called judicial homicide,[2] is the state-sanctioned practice of killing a person as a punishment for a crime, usually following an authorized, rule-governed process to conclude that the person is responsible for violating norms that warrant said punishment.[3] As Roger puts it, is the "execution of an offender sentenced to death after conviction by a court of law of a criminal offence.[4] He suggested that capital punishment should be distinguished from extrajudicial executions carried out without due process of law.[5]

In Roger's view, the sentence ordering that an offender be punished in such a manner as he described capital punishment is known as a death sentence, and the act of carrying out the sentence is known as an execution. A prisoner who has been sentenced to death and awaits execution is condemned and is commonly referred to as being "on death row". Etymologically, the term capital (of the head) derived via the Latin capitalis from caput, "head" refers to execution by beheading,[6] but executions are carried out by many methods, including hanging, shooting, lethal injection, stoning, electrocution and gassing.[7] Capital punishment is another word for death penalty, which is the execution of a criminal after they are proven guilty of committing a serious criminal offence.[8] Capital punishment is

[1] R. Hoag, 'Capital Punishment' < https://iep.utml.edu> accessed 28th May 2024

[2] S. Maynard, 'The Abolition of Capital Punishment in Italy and San Marino' *American Law Review* [1906] (40) (2) 240-251.

[3] R. Hoag, 'Capital Punishment' Internet Encyclopedia of Philosophy < https://iep.utm.edu> accessed 28th May 2024

[4] *Ibid*

[5] R. Hood, 'Capital Punishment Law also known as death penalty execution Britannica [2024]<https://www.britannica.com>

[6] M. Kronenwetter, 'Capital Punishment: A Reference Handwork' [2001] (2ed). ABC-CLIO. ISBN 9788-1-57607-432-9

[7] Editorial, 'Capital Punishment' < https://en.m.wikipedia.org/wiki/capital_punishment> accessed 28th May 2024

[8] J. Arteno and J. Schubert, 'Capital Punishment/Definition & History' (2023) <https://study.com/learn/lesson/capital-punishment-overview-history.html> accessed 28th May 2024

the supreme sacrifice paid by an offender, who has been adjudged guilty of a capital offence by a court of competent jurisdiction.[9]

Capital punishment is also the death penalty and it is carried out through the execution of the offender.[10] As posited by Uche and Udezo, capital punishment may seem difficult to define because of different world views. It may refer to the infliction of death by judicial sentence of the state. In other words, it means passing a death sentence on an offender who commits a serious offence like murder, treason, felony and armed robbery by a law court.[11] It is the legal infliction of death penalty by the state on a convicted criminal, for an injurious crime, after due process of law.[12]

2.2 Public Policy

Public policy can be generally defined as a system of laws, regulatory measures, courses of actions, and funding priorities concerning a given topic promulgated by a governmental entity or its representatives.[13] Public policy is an institutionalized proposal or a decided set of elements like laws, regulations, guidelines and actions[14] to solve or address relevant and real-world problems, guided by a conception[15] and often implemented by programs. These policies govern and include various aspects of life such as education, healthcare, employment, finance, economics, transportation and all other elements of society.[16] The implementation of public policy is known as administration.

3. THEORETICAL FRAMEWORK

3.1 Retributive (Kantian) Theory

This is one of the theories of punishment. It holds that when a criminal has done a crime then he or she has forfeited his or her rights of equal value. It also says that the punishment should fit the crime. As a result, the criminal should suffer just as the victim did. So it has a backward-looking approach.[17] It is like "an eye for an eye, a tooth for a tooth approach.[18]

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[9] I. E. Okagbue, 'The Law and Human Dignity: Some Aspects of Inhuman and Degrading Treatment' [1985] *Nigerian Current Law Review,* 213

[10] E. Miller, 'Essay on Death Penalty' Edubirdie < accessed 29th May 2024

[11] O. O. Uche and B. O. Udezo, 'Implication of Capital Punishment in the Nigerian Society' [2011] (5) (4) (21) *African Research Review* pp. 423-438

[12] A. F. Uduigwomen, 'Studies in Philosophical Jurisprudence' Jochrisam Publishers [2005].

[13] G. Kilpatrick, 'Definition of Public and the Law' Medical University of South Carolina (2001) <https://www.mainweb-v.musc.edu> accessed 23rd June, 2024

[14] J. Martinez, 'What is Public Policy' University of the People (2022) <https://www.en.m.wikipedia.org> accessed 23rd June, 2024

[15] A. Lassance, 'What is a Policy and What is a Government Program? A Simple Question with no clear answer, until now? SSRN (2020) < https://www.ssrn.com> accessed 23rd June, 2024

[16] P. Hoffman-Miller, 'Public Policy' Salem Press Encyclopedia (2022) < https://www.en.m.wikipedia.org> accessed 23rd June, 2024

[17] E. Karim, 'The Critical Evaluation of the Different Theories of Punishment' [2021] (19) *the Jahangirnagar Review* 475

[18] *Ibid*

Deontologists are mainly the advocates of this theory. The goal of the system of punishment is very different, according to deontological ethics. When a person commits a crime this means that he or she becomes afflicted with guilt. And a guilty person deserves to be punished.[19] This theory is backward looking.[20] The retributive theory of punishment insists that punishments are given because criminals deserve them. This view holds that state-administered punishments are measured responses to the harms committed by criminals; it does not claim to be beneficial for the victims or society more generally.[21] The retributive theory of justice aims to ensure that harms are visited upon those who perform harm. This theory insists that criminals deserve punishment because they choose to break the law. It does not matter if the punishment deters anyone else, benefits the victim, or rehabilitates the criminal.[22] According to Wendel and his co-authors, retributive justice essentially refers to the repair of justice through unilateral imposition of punishment, whereas restorative justice means the repair of justice through reaffirming a shared value-consensus in a bilateral process.[23] It is worthy of mention that like other legal concepts, retributive punishment or justice is not without criticisms. For example, Meyer posited that no punishment theory is without its critics. Many of those who criticize retribution argue that the philosophy is outdated. As societies become more civilized, they should outgrow the need or desire for revenge. Others note that punishing criminals just because they have acted inappropriately does not address any underlying issues that may have led to the crime in the first place.[24] Historically, it is difficult to know when retribution was first used as a philosophy of justice.[25] Though the author has provided a detailed discussion on the above assertion made by Meyer in the literature review of this work, it should be noted that retribution also forbids the punishment of offenders who cannot be held responsible for their actions. Insane or intellectually disable individuals, for example, should not be penalized for acts that result from mental illness or disability. In addition, acts that are truly accidental, as well as those committed by children are not subject to the same punishment as those committed by adults who possess criminal intent.[26]

3.2 Divine Command Theory

This theory contends that an action is morally permissible if and only if and because God permits that action. An action is morally wrong if and only if and because God does not

[19] *Ibid*
[20] T. Honderich, 'Punishment: The Supposed Justifications' (Pluto Press 2007) 17
[21] D. Cole and C. Muscato, 'Theories of Punishment: Utilitarian, Retributive & Restorative' Study.com <https://study.com> accessed 3rd July, 2024
[22] *Ibid*
[23] *Ibid*
[24] J. F. Meyer, 'Retributive Justice' Britannica (2014) < https://www.britannica.com> accessed 3rd July, 2024
[25] *Ibid*
[26] *Ibid*

permits that action.[27] The above suggests that any action including capital punishment which is not permitted by God is wrong and unlawful and as such should be jettisoned. Therefore, one vital question that will come to mind when juxtaposing this position with that of the abolitionists' view of capital punishment regarding murder cases would be whether the later theorists' position conforms with God's intention since God's command in the Holy Bible emphasizes that "thou shalt not kill". In the words of McCartney and Parent, "divine command theory also provides an explanation of why ethics and morality are so important. In religions, good acts are rewarded in the afterlife, while bad acts condemn the perpetrator to an everlasting punishment.[28]

According to the divine command theory, actions are right if God decrees them. Human actions, to be morally right, must follow God's commandments. St. Augustine and St. Thomas Aquinas, wrote extensively about the concept of God's moral law. St. Augustine believed contemplation of God's moral law was the highest good humans could attain. Aquinas believed God created humans to fulfill the highest human good.[29] On the question "what is wrong with divine command theory?", Baird and Parent argued that "moral theorists refer to a platonic dialogue containing the Euthyphro dilemma. According to this dialog Plato raises the question of whether an act is right or wrong because God decrees it or God decrees an action because it is morally right or wrong. If the former is true, then God's commands are arbitrary (He could command cruelty, for instance). If the latter is true, then right and wrong are above God, who is supposed to be sovereign and omnipotent (i.e. nothing above Him)."[30] Saint Augustine offered a version of divine command theory that began by casting ethics as the pursuit of the supreme good, which delivers human happiness. He argued that to achieve this happiness, humans must love objects that are worthy of human love in the correct manner; this requires humans to love God, which then allows them to correctly love that which is worthy of being loved. Augustine's ethics proposed that the Act of loving God enables humans to properly orient their loves, leading to human happiness and fulfilment.[31] Augustine supported Plato's view that a well-ordered soul is a desirable consequence of morality.

However, unlike Plato, he believed that achieving a well-ordered soul had a higher purpose; living in accordance with God's commands. His view of morality was thus heteronomous, as he believed in deference to a higher authority (God) rather than acting

[27] M. Flannagan, 'Divine Command Theory' Oxford Bibliographies (2023) <https://www.oxfordbibliographies.com> accessed 3rd July, 2024

[28] S. McCartney and R. Parent, 'Religion or Divine Command Theory' (Ethics in Law Enforcement, 2015) <https://www.opentextbc.ca> accessed 3rd July, 2024

[29] L. Baird and C. Serva, 'Divine Command Theory: Definition, Example & Ethics' (Study.com 2023) <https://www.study.com> accessed 5th July, 2024

[30] *Ibid*

[31] M. W. Austin, 'Divine Command Theory' (Internet Encyclopedia of Philosophy 2006) <https://www.en.m.wikipedia.org> accessed 5th July, 2024

autonomously.[32] However, relating St. Augustine's view above to the subject of the author's discussion in this work would apparently mean that any human action including the doctrine of capital punishment would be illegal, wrong or unlawful of such action is not in accordance with God's command and therefore unjustified; it does not matter whether such action is in line with public policy in that society.

Nevertheless, this theory is also not without criticisms. For example, in his Ethics without God, Kai Nielson argues against the Divine Command Theory and espouses the view that morality cannot be dependent on the will of God. He advances an argument for the claim that religion and morality are logically independent. Nielson admits that it may certainly be prudent to obey the commands of any powerful person, including God. However, it does not follow that such obedience is morally obligatory. For a command of God's to be relevant to our moral obligations in any particular, God must be good. And while the religious believer does maintain that God is good, Nielson wants to know the basis for such a belief.[33] Divine Command Theory has been and continues to be highly controversial. It has been criticized by numerous philosophers, including Plato, Kai Nielson and J. L. Mackie.

The Theory also has many defenders, both classic and contemporary such as Thomas Aquinas, Robert Adams and Philip Quinn.[34] Also, to further support the authors suggestion that any human conduct, the doctrine of capital punishment not exempted, would be morally wrong and unjustified if It is not in accordance with God's command, Adams has offered a modified version of the Divine Command Theory, which a defender of the theory can appropriate in response to the Euthyphro Dilemma. Adams argues that a modified Divine Command Theory "wants to say… that an act is wrong if and only if it is contrary to God's will or command (assuming God loves us)".[35] He claims that the following is a necessary truth: any action is ethically wrong if and only if it is contrary to the commands of a loving God.[36] Another Scholar whose views were similar to those of Adams and Aquinas is Paul Copan who argues from a Christian viewpoint that "man, made in God's image, conforms to God's sense of morality. The description of actions as right or wrong are therefore relevant to God; a person's sense of what is right or wrong corresponds to God's."[37]

[32] P. Connolly; D. Keller; M. Leever and B.C. white, 'Ethics in Action: A Case-Based Approach' (John Willey & Son 2009) <https://www.en.m.wikipedia.org> accessed 5th July, 2024

[33] (n 77)

[34] *Ibid*

[35] *Ibid*

[36] *Ibid*

[37] P. Copan and L. C. W., 'Passionate Conviction: Contemporary Discourses on Christian Apologetics' (B & H Publishing Group 2007) 91 <https://www.en.m.wikipedia.org> accessed 5th July, 2024

4. SELECTED LITERATURE REVIEW

The doctrine of capital punishment has been argued by several scholars including social commentators to be cruel and inhumane while others are of the view that its strict application constitutes a violation of fundamental right to life and the right to human dignity and therefore should be abolished. These group of scholars and commentators are those the researcher refer to as the abolitionists in this work. For instance, the international commission against death penalty,[38] asserted that "the death penalty violates the right to life which happens to be the most basic of all human rights." According to the commission, it violates the right not to be subjected to torture and other cruel, inhumane or degrading treatment or punishment. They further posited that the death penalty undermines human dignity which is inherent to every human being. As Roger Hood puts it, "abolitionists also claim that capital punishment violates the condemned person's right to life and it's fundamentally inhuman and degrading."[39] They argue that, by legitimizing the very behavior that the law seeks to repress-killing-capital punishment is counter productive in the moral message it conveys. This view apparently suggest that the doctrine of capital punishment is morally wrong because the law aims at reducing or where possible, eliminating unlawful killing in society.

The courts in most foreign jurisdictions have ruled against the retention of this doctrine in their corpus juris. In the United States of America, for example, numerous judicial decisions regarding the doctrine has been made. In *Atkins v. Virginia,*[40] where Daryl Renard Atkins was convicted of abduction, armed robbery, capital murder. In the penalty phase of his trial, the defence relied on one witness, a forensic psychologist, who testified that Atkins is mildly mentally disabled. The Jury sentenced Atkins to death, but the Virginia Supreme Court ordered a second sentencing hearing because the trial court had used a misleading verdict form. During resentencing the same forensic psychologist testified, but this time the state rebutted Atkin's intelligence. The jury again sentenced Atkins to death. In affirming, the Virginia Supreme Court relied on *Penry v. Lynaugh*,[41] in rejecting Atkins' contention that he could not be sentenced because he is mentally retarded. However, in a 6-3 opinion delivered by Justice John Pau Stevens, the court held that executions of mentally retarded criminals are "cruel and unusual punishments" prohibited by the Eight Amendment. It is submitted that the later decision of the Virginia Supreme Court is questionable in that could it be rightly said that, within the context of perceiving capital punishment as being cruel and unusual, a person of sound mind if been legally executed rips, such punishment off the veils of cruelty and unusualness? The researcher is of the view that if as claimed by the abolitionists, capital punishment is cruel and unusual, the cruelty and unusualness should not have a boundary. That is, it should

[38] Editorial, 'Why the Death Penalty should be Abolished' ICDP < https://www.icomdp.org>
[39] R. Hood, 'Arguments for and against Capital Punishment' Britannica [2024] < https://www.britannica.com>
[40] 536 U.S. 304
[41] 492 U.S. 302

not only be perceived to be cruel and unusual when applied in cases where the defendant is a mentally retarded person but even to persons of sound mind as well. However, the later is not the case in the circumstance, the position of the researcher anchors on the fact that in a murder case, for instance, the victim right to life which has been violated by the defendant and the pain and agony his inhuman actin has inflicted on the deceased or victim's relations cannot in anyway be juxtaposed with the defendant's insane state. such a thing if allowed to happen by the law will bring to question its genuineness in the administration of justice. This is because justice, as Oputa JSC (as he then was) succinctly puts it, in *Josiah v State*,[42] "justice is not a one-way traffic. It is not justice for the appellant only. Justice is not even only a two-way traffic. It is really a three-way traffic – justice for the appellant accused of committing a heinous crime of murder, justice for the victim, the murdered man, the deceased, whose blood is crying out to heaven for vengeance and finally justice for society at large – the society whose social norms and values had been desecrated and broken by the criminal act complained of. It is certainly in the interest of justice that the truth of this case should be known and that if the appellant is properly tried and found guilty, that he should be punished. That justice which seeks only to protect the appellant will not be even handed justice. It will not even be justice tempered with mercy."

The above decision of the learned jurist is an affirmation to the researcher's justice should not only be viewed on the side of the defendant (who in the above case is the appellant but also on the side of the victim of his unlawful act and the society at large. In fact, though one feels the devastation and trauma the family of a deceased are bound to go through in a murder case, it is even more harmful to the society for one who has taken the life of another to be allowed to live. This is because such happenings are capable of encouraging other criminal minded persons to take the lives of others thereby placing society fragile state of insecurity and desecration. Such a thing should not be encouraged at all rather a proportionate punishment backed up by law should be meted on the convicted killer so that it will serve as a deterrent to other intending killers.

The key thing to be done by the court is to ensure that such suspected killer is properly arrested, arraigned, tried and convicted in accordance with the due process of law as anything done to the contrary should be jettisoned. It is submitted that this position does not, in anyway, contradict the express intendments of some international and municipal legal instrument including the Universal Declaration of Human Rights (UDHR) 1948 and the Constitution of the Federal Republic of Nigeria 1999 (as amended). For example, the Universal Declaration of Human Rights which is a milestone document in the history of human rights and drafted by representatives with different legal and cultural backgrounds from all regions of the world, sets out certain fundamental human rights to be universally protected. One of these rights is inter alia the "right to life" provided in Article 3 of its provision and it provides thus; "everyone has the right to life, liberty and security of

[42] (1985) LLJR- SC.

person." Again and in consonance with the position of the UDHR, the Nigerian Constitution also recognizes and gives credence to the protection of this fundamental right. Section 33 (1) of its provisions is to the effect that "every person has a right to life and no one shall be deprived intentionally of his life…" However, as important and reasonable as the protection of this fundamental right may be, it is not an absolute right as their exceptional instances where the right to life can be violated. Some of these instances are where a person's life is taken by the state "in execution of the sentence of a court in respect of a criminal offence which he has been found guilty in Nigeria." For purposes of clarity, it may be necessary to reproduce the said provisions of Section 33 hereunder for the reader's appreciation. The Section 33(1) provides thus "Every person has a right to life, and no one shall be deprived intentionally of his life, save in the execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria." Subsection (2) provides;

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

From the above provisions of the Nigerian Constitution, it is apparently easier for the researcher to drive home his argument that the fundamental right to life is not an absolute right as there are exceptions to it. As Prof. Wigwe puts it, the purport of this provision is that there is a common good which is the security of life. Immediately flowing from this common good is the passive duty placed on all to abstain from willfully taking or doing something capable of endangering the life of other persons. According to the erudite Professor of Law and Dean of the Law Faculty of the Rivers State University, a further dissection of Section 33(1) CFRN (as amended) in 1999, "reveals another common good which is the recognition of the fact that in every society there must be a system of punishment of offenders to serve as a deterrent to others and also to protect public safety by removing dangerous and evil persons (e.g. serial killers). Based on this common good, the Section recognizes the duty placed on the courts and judges to adjudicate and give sentence in execution of which the life of a person may be taken. This is in order to deter people with criminal tendencies and reduce the crime wave in the society."[43]

The above provision is also in line with S. 45 of the 1999 Constitution which provides for curtailment, limitation, restriction and/or derogation from fundamental human rights in

[43] C. C. Wigwe, 'Jurisprudence and Legal Theory' (Readwide Publishers, 2011)

the interest of public safety, public security, public health, public morality, period of emergence, etc.[44] the point being made here is that for certain offences such as that of murder, the imposition of capital punishment on offenders who have been arrested, duly arraigned, tried and convicted is appropriate and should be highly commended because apart from its impact in the administration of justice which serves as some sort of consolation to the victim's family, it also serves as a deterrent to others who may also intend to unjustly take the lives of others. Most importantly, retributive punishment for the offence of murder and others which the law deems to be capital in nature should be upheld if there should be sanity in the society at large. The argument that the doctrine of capital punishment is cruel and inhumane should not be allowed to see the light of the day because though reliance on the combine effects of Art. 3 of the Universal Declaration of Human Rights and Section 33(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) guarantees the protection of a person's right to life, in certain instances such as where he has been found guilty of unlawfully taking the life of another by a court of competent jurisdiction, this right can be taken away from him by the state thereby giving public interest a priority over such a person's life. This position is in congruence with the view of the inimitable Lord Denning M.R. who stated that there are certain circumstances where the interest and/or rights of individuals will have to take a second place for the sake of public interest. It is also why "the lives of persons are also taken in execution of sentence of a court by the hangman or by firing squad as the case may be. Thus, there is no absolute right without limitation in order to secure law and order in the society for as it is often said, one's right stops where another's right begins."[45]

Generally, major arguments against the death penalty focus on its inhumaneness, lack of deterrent effect, continuing racial and economic biases, and irreversibility.[46] However, looking at the inhumaneness perception of the doctrine of capital punishment reasonably suggest and it is, in fact, true that some of those against capital punishment believe that human life is so valuable that even the worst murderers should not be deprived of the value of their lives. They believe that the value of the offender's life cannot be destroyed by the offender's bad conduct – even if they have killed someone. Their argument is that – everyone has an inalienable human right to life, even who commit murder; sentencing a person to death and executing them violates that right.

The question to be reasonably asked in this respect is –whether such abolition proponents of capital punishment also put into consideration first, the right to life of the murdered man, the victim of murder whose innocent blood is restlessly crying to heaven for vengeance. What about the continuous existence of such a murderer will pose on the society at large? It is submitted that sparing the life of a murderer simply for the respect

[44] *Ibid*

[45] (n 114)

[46] E. Strouse, 'Death Penalty: Issue in the Debate' (U.S. Department of Justice 1987) <https://www.ojp.gov> accessed 6th August, 2024

for his inalienable right to life will further desecrate the sacred norms and values of any given society and is likely to encourage others with similar motive to do so to other innocent men thereby giving room for insecurity, chaos and anarchy to thrive. Hence, such a dangerous man should be executed so as to preserve the sanctity and common good of the society. Gladly, the view of the medieval philosopher and theologian, Thomas Aquinas, is instructive in this regard. It states thus;

> "Therefore, if any man is dangerous to the community and is subverting it by some sin, the treatment to be commended is his execution in order to preserve the common good… therefore to kill a man who retains his natural worthiness is intrinsically evil, although it may be justifiable to kill a sinner just as it is to kill a beast, for, as Aristotle points out, an evil man is worse than a beast and more harmful."[47]

One has no choice but to agree with this great philosopher as his argument is clearly full of reasoning and moral-based. What he is saying is that certain contexts change a bad act (killing) into a good act (killing to repair the violation of justice done to the person killed, and killing a person who has forfeited their natural worthiness by killing).

Going further, Emmaline Soken-Huberty,[48] while evaluating public opinion on capital punishment, asserted that opinions are divided but over the years, support for the death penalty has waned. According to her, supporters say it is a valuable crime deterrent while opponents argue that it fails in this purpose. She therefore relied on these claims to postulate 10 reasons why the death penalty is wrong and should be abolished. The reasons she gave for calling for the abolition of capital punishment are as highlighted hereunder:

- It's inhumane
- It inflicts psychological torment
- It burdens taxpayers
- It doesn't determine
- It doesn't address the root causes of crime
- Its biased against people experiencing poverty
- Its disproportionately hurts people with disabilities
- It has a racial bias
- It's used as a tool of authoritarianism
- Its irreversible

[47] Thomas Aquinas, 'Summa Theologica' Xist Classics (2015) <https://www.xistpublishing.com> accessed 6th August, 2024. Note that this work was unfinished at his death in 1274.

[48] E. Soken-Huberty, '10 Reasons why the Death Penalty is Wrong' Human Rights Career (2020) <https://www.humanrightscareer.com> accessed 8th August, 2024

As earlier acknowledged, above are the reasons enunciated by Emmaline Soken-Huberty for the call for the abolition of the doctrine of capital punishment. The reasons though numerous, were subsumed and categorized as ten in number. As a process of examining these stated reasons in order to ascertain their validity as well as their realistic nature, the researcher in this work ventures to critically assess and analyze same. First, Emmaline like other scholars expressed the view that the doctrine of capital punishment also known as death penalty is inhumane when viewed vis-à-vis the provisions of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment which is an international treaty intended to prevent actions considered inhumane. She asserted that for those who believe that there can be a humane execution, there is still the problem of botched (badly conducted) execution citing the 2014 Oklahoma case where Clayton Lockett was subjected to a badly conducted execution as a basis for her argument.

It is respectfully submitted that an execution no matter how conducted is an execution since the expected outcome of every execution concerning death penalty is the death of the convicted criminal. Again, morally speaking, in a case of murder, for instance, a person who have been arrested, arraigned, tried and from the facts adduced before the court has been found guilty and convicted for unlawfully killing another, deserves no nice treatment. This is because at the time of taking the life of his victim whose blood is crying to heaven for vengeance, he has devised his own right to life absolutely to the state. this is because the same way such a killer is vested with the rights conferred on him by the convention, that is, right against torture and other cruel, inhuman or degrading treatment or punishment is the same way the inalienable right of his victim is also protected by the convention. For example, in some murder cases, victims were inhumanely tortured by the killers before they finally give up the ghost. Let us take the "Nigerian Aluu Four" lynching as a case study. Here is a case involving the gruesome torture and subsequent murder of four students of the Department of Geology in the University of Port Harcourt, Nigeria. "Their names were: Ugonna Obuzor, Lloyd Toku, Chiadika Biringa and Tekena Elkanah and they were all lynched after being wrongfully accused of theft in Aluu, a community in Ikwerre Local Government Area, Rivers State, Nigeria on 5 October 2012."[49] On the screaming by the debtor, Mr. Bright, who claimed that they were thieves, a mob started chasing the four men through the streets with sticks and stones. Unfortunately, the students were caught, stripped naked, beaten and tortured until they became unconscious. They were then dragged through the mud, had concrete slabs dropped on their heads and car tires filled with petrol wrapped around their necks in order to set them ablaze. No one was able to stop the mob including the Nigerian Police Force. In the voice of a sister of Tekena who met the scene accidentally and tried to intervene by screaming and reiterating their innocence but was overpowered by the

[49] V Duthiers, 'Did Misunderstanding Lead to Horrific Nigeria Mob Killings?' (CNN 20212) <https://www.en.m.wikipedia.org> accessed 12th August, 2024

size of the innocence but was overpowered by the size of the mob "I watched them kill my brother." What a pathetic story! In the light of the above verifiable facts, it is submitted that such killers should not be perceived as deserving the protection of the right against torture, degrading or inhuman treatment or punishment. It is also believed that if Emmaline was the sister to the gruesomely tortured and murdered Tekena, she wouldn't have been heard advocating for the abolition of capital punishment but would rather desire that a greater punishment be meted on the perpetrators of such evil against her late brother and his friends.

The doctrine of capital punishment, if retained, will certainly deter the commission of similar crimes by others in any given society. In the Aluu instance, for example, no sane person with his/her right senses would experience it and advocate for the protection of the right of a murderer who himself have tortured, degraded the dignity of his victims by stripping them naked before killing them to be respected and protected. He has already waved that right by his inhumane conduct. This view is given without prejudice to the sensitivity of the above mentioned author. Rather, it is intended to aid the development of relevant and pragmatic contributions in order to abridge the gap in existing literature.

Emmaline also raised the issue that the doctrine of death penalty inflicts psychological torment. According to her, apart from severe physical pain on victims of death penalty, the time spent on death row can inflict psychological torment placing reliance on reports from the Death Penalty Information Centre and that of NPR in 2022. As against this assertion, the reasonable and impartial question would be – doesn't a murderer's act of killing the deceased inflict psychological torment also on the deceased's family members? The undeniable answer to this question, one would agree, will be in the negative. This is because it is a known fact that the feeling of losing a family member or loved one to the cold hands of death is usually very painful. How much more going through such pain with the consciousness that it was someone's act or omission that resulted to the death of that family member. It is worse so that in some instances the psychological trauma caused by such happenings is worsen when the victim's relative sees the offender walking freely without facing a proportionate penalty. An offence such as murder which is a serious offence in many legal systems should be controlled with severe and proportionate punishment. According to Meyer,[50] "… the severity of the punishment is proportionate to the seriousness of the crime." Thus, in the light of the above argument, one can respectfully simply submit without equivocation that Emmaline's assertion that capital punishment such as death penalty inflicts psychological torment on the offender is baseless and nugatory on the face of it. Retributive justice (an eye for an eye) is what is required in this circumstance. Even the Christian code (Holy Bible) approves of this position as it provides in Exodus 21:24

[50] J T Meyer, 'Retributive Justice' Encyclopedia Britannica <https://www.britannica.com> accessed 13th September, 2024

(KJV)[51] thus; "Eye for eye, tooth for tooth, hand for hand, foot for foot." Though the above provision in Exodus 21:24 of the Holy Bible appears to be standing on its own and therefore may make its understanding difficult for the reader, the preceding verses of same chapter of the book of Exodus could make it clearer, unambiguous and better appreciated. For instance, Exodus 21:20 seems to be very apt and in line with the researcher's point of view regarding the offence of murder. It provides thus; "And if a man smite his servant, or his maid, with a rod and he die under his hand; he shall be surely punished." Though many critics of this scripture would contend that the same Bible admonishes us to imbibe the culture of forgiveness as provided in Mathew 18:21-22. In that chapter, the Lord Jesus admonished us to forgive for a maximum period of seventy times seven. However, the phrase "he shall be surely punished" used in Exodus 21:20 above simply connotes that there are no alternative penalty for murder other than death. Chapter 21:12 states that; "He that smiteth a man, so that he die, shall be surely put to death"It is submitted in the light of verse 12 above that this is the justification for capital punishment.

Furthermore, rather than calling for capital punishment to be abolished as the abolitionist school of thought has often requested, it would be most proper and reasonable to consider proposing death penalty as punishment for some serious crimes such as kidnapping and others in all legal systems of the world if one desires a peaceable co-existence in our society. This is because it is written that; "And he that stealeth a man, and selleth him, or if he be found in his hand, he shall surely be put to death."[52] Unfortunately, many legal systems in the world including the Nigerian jurisprudence have treated the offence of kidnapping with apparent levity. For example, though the Nigerian Criminal Code and Penal Code which are the application of criminal laws in the Southern and Northern parts of Nigeria prescribes death penalty for murder offence, it did not do same for kidnapping and other related offence. This also the case with some foreign jurisdictions.

The Nigerian criminal law provides for several offences which are punishable by death and others which are not but have lesser punishments prescribed for them. Some of these statutory provisions can be found in Sections 382, 401, 364, 315 of the Criminal Code which apply to the South and 286, 221, 271 of the Penal Code which applies to the northern part of the country. Section 316 cc,[53] for example provides for the offence of murder. It states thus; "Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say –

(i) If the offender intends to cause the death of the person killed, or that of some other person;
(ii) If the offender intends to do to the person killed or to some other person some grievous harm;

[51] King James Version
[52] Exodus 21:16
[53] Criminal Code Act

(iii) If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;
(iv) If the offender intends to do grievous harm to some person for the purpose of facilitating the commission of an offence which is such that the offence which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such offence;
(v) If death is caused by administering any stupefying or overpowering things for either of the purposes last aforesaid;
(vi) If death is caused by willfully stopping the breath of any person for either of such purposes; is guilty of murder.

In the second case it is immaterial that the offender did not intend to hurt the particular person who is killed. In the third case it is immaterial that the offender did not intend to hurt any person. In the three last cases, it is immaterial that the offender did not intend to cause death or not know that death was likely to result."

Though some of these provisions which penalizes serious offences with capital punishment in both our municipal jurisdiction as well as some selected foreign jurisdictions will be exhaustively discussed in Chapter three of this work, it is imperative to briefly examine those of Sections 319 and 221 of the Criminal Code and Penal Code respectively which provides for punishments for the offences of murder and culpable homicide respectively. Section 319 of the Criminal Code provides that; "(1) Subject to the provisions of this section any person who commits the offence of murder shall be sentenced to death."

The above provision as can be seen, is in line with the researcher's argument that a proportionate punishment should be imposed on serious crimes just as the Christian code (Holy Bible) admonished. It thus delights the author of this work that our own domestic laws upholds this position in this area by prescribing death penalty for the offence of murder. On the other hand, Section 221 of the Penal Code provides for the offence "culpable homicide punishable with death." It states that; "Except in the circumstances mentioned in Section 222 culpable homicide shall be punished with death –
(a) If the act by which the death is caused is done with the intention of causing death; or
(b) If the doer of the act knew and had reasons to know that death would be the probable and not only a likely consequence of the act or of any bodily injury which the act was intended to cause."

It is mind blowing that the Penalty Code which is applicable to the northern part of the country also prescribes death penalty for the offence of culpable homicide punishable with death. Therefore, while one appreciates the monumental feat our *corpus juris* have attained by prescribing death penalty which is a proportion punishment for a serious offence such

as death, it is hoped that serious offences such as kidnapping and others will through the recommendations of this work, be considered by our lawmakers and prescribed to be punishable by death considering the dangerous effect and threat their commission poses on human life.

Furthermore, some of Emmaline's 10 reasons for advocating for the abolition of capital punishment are that, "it burdens taxpayers," "it doesn't deter crime," "it is biased against people experiencing poverty"; it disproportionately hurts people with disabilities;" "it has racial bias;" "it is used as tool for authoritarianism;" "it is irreversible." The author's submission with regard to Emaline's stated reasons is that most (if not all) of the reasons given in her work are incidents of ineffective, intransparent and unprofessional governmental institutions. Thus, rather than calling for the abolition of capital punishment for heinous crimes such as murder, the call should rather be for reforms in these governmental institutions. Let's take for example, her argument that capital punishment is biased against people experiencing poverty. It is a known fact that bias in the circumstance can only be attributed to the conduct of people who in this respect, are the human beings working as officers or agents of the government like the prison officers, judicial officers and even lawmakers in some cases. If a judicial officer such as a judge deciding in two different cases of murder where one of such cases has a poor man as the defendant and in the other case, the defendant is a wealthy man and the judge becomes bias or selective in his judgment even though the facts of those cases are in all fours the same, it cannot be proper to put the blame of the doctrine of capital punishment rather the blame should be put on the judge who is an agent of an institution of the government.

5. LEGAL AND INSTITUTIONAL FRAMEWORK

5.1 Domestic Legislation

This is also popularly known as municipal laws. It simply refers to the entire body of national or local laws, rules and regulations regulating the doctrine of capital punishment in Nigeria.

(a) Constitution of the Federal Republic of Nigeria (as amended) 1999

The Constitution of the Federal Republic of Nigeria is an embodiment of the fundamental laws, customs, conventions, general principles, rules and regulations which governs the country's affairs. It is the basic law of the land. It is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.[54] In the decided case of *Orji v Anyaso*, it was held that "by virtue of the doctrine of hierarchy of legislations, the Constitution of the Federal Republic of Nigeria is at the apex of legal document followed by the Act of the National Assembly with the various state laws coming next.[55] In *Adisa v Oyinwola*,[56] the court held that the Constitution of Nigeria is the basic law

[54] Section 1 CFRN 1999 (as amended)
[55] [2000] 2 NWLR (Pt. 643) 1 CA
[56] [2000] 10 NWLR (Pt 674) 116 SC

of the land that is the supreme law and its provisions has binding force on all authorities, institutions and persons throughout the country. The Supreme Court, in the case of *AG Federation v AG Abia State*,[57] held that "the Constitution is the fountain of all laws; it is the composite document setting out how the country is to be held together and the very foundation of the nation's existence." The 1999 Constitution under Chapter IV of its provision recognized the fundamental rights of citizens. The right to life is one of those rights that is expressly provided for. This right is enshrined in Section 33[58], particularly, in subsection (1) where it states thus; "(1) 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.

The above constitutional provision simply indicates that though the right to life is an inalienable right enjoyable by an individual, the right can be derogated in certain instances and one of such instances as can be seen above is in the execution of the sentence of a court in respect of a criminal offence of which an accused person has been tried and found guilty. Thus, death penalty as a doctrine is recognized by our extant laws and as such in line with public policy.

In the case of *Nwokeji v Anambra State Government*[59], the Supreme Court held that the Constitution is not a mere legal document, rather, it is an organic legal instrument which compels power and creates rights and limitations. Thus, though Section 33[60] recognizes a person's right to life, the exercise of that right is not absolute as it can be limited in certain instances as can be manifestly seen in the exception to the right to life in Section 33(1) of the constitution above.

One of the reasons why the Constitution is different from other laws particularly a legislation is that the Constitution determines the framework of government. It outlines the structure, power and limitation of government and the institutions of government. For example Sections 4,5 and 6 of the Constitution provides for legislative, executive and judicial powers respectively. The point being made here is that the executive arm of government of the federation is empowered to execute the laws made by the legislature. And in the exercise of this power, the police and other law enforcement agents make arrests, investigate and prosecute suspects who are accused of serious offences such as murder, kidnapping, treason, etc. Section 6[61] of the Constitution vested the judicial powers of the federation in the courts. Therefore, the courts are under a sacred obligation to hear matters brought before them and to adjudicate on such matters and administer justice thereof. In this light, the judiciary, through the instrumentality of the court, plays a significant role in the doctrine of capital

[57] 3PLR/2001/67 SC. Per Belgore JSC
[58] CFRN 1999 (as amended)
[59] [2022] 7 NWLR (Pt. 1828) 29
[60] (n 5)
[61] *Ibid*

punishment. Take for instance, a case of murder where someone who has been accused of committing the offence of murder is brought before the court, the court will usually hear the cases of both prosecution (which is usually the state in criminal cases) and the defendant and with reliance on facts and law relevant to the matter, give judgment, by convicting the accused person (if found guilty) and imposing death penalty as required by law. It is pertinent to state that the legislature, executive and judiciary are all institutions of government and as such, they have been imbued with various functions the effective performance of which will eliminate the so called bias capital punishment is attributed with as asserted by Emmaline.

(b) The Criminal Code Act

This is an Act enacted by the National Assembly in order to establish a code of criminal law in Nigeria. Paragraph 1 of its commencement clause states that the Act may be cited as the Criminal Code Act. Under Section 2, it states that;

> "An act or omission which renders the person doing the act or making the omission liable to punishment under this code, or under any Act or law, is called an offence."

Section 3 of the Act divided offences into three kinds, namely; felonies, misdemeanors and simple offences. It provides thus; "Offences are of three kinds, namely felonies, misdemeanors and simple offences. A felony is any offence which is declared by law to be a felony, or is punishable without proof of previous conviction, with death or with imprisonment for three years or more. A Misdemeanor is any offence which is declared by law to be a misdemeanor is punishable by imprisonment for not less than six months, but less than three years. All offences, other than felonies and misdemeanours are simple offences."The distinction between felonies, misdemeanours and simple offences is material in the following respects;[62]

- Method of arrest of offender: The question whether an accused person can be arrested with or without warrant will depend on the division of the offence. Thus where the offence is a felony, the offender can be arrested without a warrant. For example, Section 5 of the Criminal Code Act provides for 'arrest without warrant'.
- Punishment in certain cases: Apart from the punishment imposed by law on offences generally, the division of offences will also determine the nature of the punishment in specific cases. For example see Sections 135, 330, 331, 356, 408, 411-417, 427, 433, 508-511, 514-517A and 519-521 of the Criminal Code. These are all felonious offences enshrined in the Act.
- Type of force to be used to prevent the escape of a suspect: This will also be determined by the division of offence. Thus, where the offence is a felony, the law permits the police

[62] A M Adebayo, Criminal Code Act and other Related Acts Annotated with Cases (1st Edn, Princeton Publishing Co, 2012)

> to preserve the escape of a suspect and may kill the suspect where the offence is punishable by death. See Sections 271-273 of the Criminal Code.

The above provisions is yet another affirmation that the Criminal Code Act recognizes and acknowledges the doctrine of death penalty. Some of the sections in the Code which provides for death penalty as a punishment for offences are as follows; Section 319 the extract of which has been previously provided in this work. However, to further buttress the researcher's line of argument, it is instructive to examine two Nigerian decided cases.

First is the case of *State vNjoku*[63] where the respondents were arraigned for murder. They were alleged to have murdered one Boniface Ibeabuchi contrary to Section 319 (1) of the Criminal Code. At the conclusion of the trial, the trial court found the respondents guilty of manslaughter and sentenced them to 10 years imprisonment each. Being aggrieved by the verdict, the appellants appealed to the Court of Appeal which in allowing the appeal considered the provisions of Section 319 of the Criminal Code among others. It was held per Saulawa JCA (as he then was) thus;

> "It is trite that by virtue of the provisions of Section 319 (1) of the Criminal Code, the punishment for the offence of murder, of which the respondents were each convicted, is that of death by hanging. It is pertinent that capital punishment (known as death sentence) has a very ancient historical background which may be traceable to the well-known doctrine of lex talionis i.e. 'an eye for an eye.' This doctrine is most undoubtedly traceable to the Holy Scriptures especially the Holy Bible, the Holy Torah and the Holy Quran, respectively.

Despite the retributive, deterrent and other positive effects of capital punishment, there has over the years been a series of public outrage against execution of capital offenders worldwide. Some of the arguments that have so far been put up against the death penalty are predicated on the following points;

- The possibility of human error to the extent that an innocent person could be executed, knowing that it is irreversible.
- The death penalty is applied arbitrarily and disproportionately on the poor and minorities.
- The deterrence argument is flawed, because the claim that the capital reduces violent crime is inconclusive.
- Prisoners sentenced to death remain on the death row for a long time which negates the validity of the deterrence argument, resulting in endless appeals, delays and legal technicalities to no end."

[63] [2010] ALL FWLR (Pt. 523) 1924 CA

The learned justice of the Court of Appeal, Justice Saulawa's argument in the above case clearly takes the position of the abolitionists scholars suggesting that capital punishment should be abolished in its entirety. Nevertheless, respectfully submitted that the learned justices' view is lopsided as it tends to advocate for justice only in favour of an accused person and ignores that to which the victim in a murder case is also entitled to. Such happenings is apparently unfair as it is essential to consider justice on the part of the victim of murder as well. This view is in consonance with the Supreme Court's decision per Aniagholu, JSC in the case of *Okegbu v State*[64] where he held thus;

> "It often happens that in murder cases, the defence usually talks of justice only in relation to the accused person. Very often as it affects the victim of the murder charge is either forgotten or ignored by the defence. But just as it is essential that justice be done to the prisoner so must it also be done to the deceased who ever in the lonely depths of his grave, cries out loudly for the circumstances of his death to be justly examined and justice meted him."

The above dictum as enunciated per Aniagholu presupposes that justice should not be a one-way thing. It must consider all the circumstances surrounding a matter both as it affects the accused, the victim and the society at large. And this view is in line with that of the erudite Justice Oputa JSC (of blessed memory) established in the case of *Josiah v The State*[65] where he stated thus;

> "And justice is not a one-way traffic. It is not justice for the appellant only. Justice is not even only a two-way traffic. It is really a three-way traffic – justice for the appellant accused of a heinous crime of murder, justice for the victim, the murdered man, the deceased, "whose blood is crying to heave for vengeance" and finally justice for the society at large – the society whose social norms and values had been desecrated and broken by the criminal act complained of. It is certainly in the interest of justice that the truth of this case should be known and that if the appellant is properly tried and found guilty, that he should be punished. That justice which seeks only to protect the appellant will not be even handed justice. It will not even be justice tempered with mercy."

Other provisions in the Criminal Code Act that establishes the validity of capital punishment in Nigeria include;
"Section 37 CC Treason

[64] [1979] 11 SC 56 SC
[65] [1985] 1 NWLR (Pt. 1) 125

(i) Any person who levies war against the state, in order to intimidate or overawe the president or the governor of the state, is guilty of treason and is liable to the punishment of death.

(ii) Any person conspiring with any person, either within or without Nigeria, to levy war against the state with the intent to cause such levying of war as would be treason if committed by a citizen of Nigeria, is guilty of treason and is liable to punishment of death.

Provided that nothing in this Section prevents any act from being treason which is so by the Law of England as in force in Nigeria. In the case of *Ibori v Federal Republic of Nigeria*,[66] the Court stated that; "Treason is the offence of attempting to overthrow the government of a state to which one owes allegiance, either by making war against the state or by materially supporting its enemy. Treason relates to the entire country and can consequently be tried in Abuja which is the seat of government." An impartial and unsentimental view on the consequences of treason on the people of a country and the overall wellbeing of a state justifies the imposition of capital punishment on a person convicted of committing treasonable felony. This principle is well established in the case of *Boro & Ors v The Republic*[67] where the court held inter alia that; "The head of state is the embodiment of the state, and to intimidate (or overawe) him is the same as intimidating (or overawing) the state. Under Section 37 (1) of the Criminal Code, to overawe the Head of State suggests the creation of a situation in which government feels compelled to choose between yielding to force and exposing its members or the public to very serious danger. It is not necessary that the danger should be the danger of personal injury to the head of state…"

A lawful process of self-determination should not be criminalized at all. Section 38[68] prohibits the instigation of the invasion of Nigeria and thus makes it criminal and punishable by death. It provides thus; "Any person who instigates any foreigner to invade Nigeria with an armed force is guilty of treason, and is liable to the punishment of death." Section 49A[69] of the Code punishes the offence of treachery by death while subsection (1) of the above stated Section of the code justifies the doctrine of capital punishment for the offence of treachery against the state. it is important to state that Section 17[70] of the Code prescribes various kinds of punishments which may be inflicted on convicted persons as well. It stated thus; "Subject to the provisions of any other written law, the punishments which may be inflicted under this code are death, imprisonment, canning, fine and forfeiture."

[66] [2009] ALL FWLR (Pt. 487) 159
[67] [1966] N.S.C.C. 314
[68] Criminal Code Act
[69] *Ibid*
[70] Criminal Code Act

Apparently, the rationale behind this variation of punishment is based on the fact that not all offences are equal. For example, while some acts constitute felony, some constitutes misdemeanor and others constitutes simple offence. Thus, the kind of penalty to be meted on an offender depends on the nature of the offence committed by the prisoner. And as such, where a person has heartlessly committed any offence punishable by death, the law should take its course. The principle of Lex Talionis should be encouraged and upheld.

5.2 The Penal Code

Numerous offences are punishable with death under the Penal Code and they enshrined in the following sections; Section 221 of the Code provides for culpable homicide punishable with death. It states as follows; "221. Culpable homicide punishable with death. Except in the circumstances mentioned in Section 222 culpable homicide shall be punished with death – It is however mention worthy that whether death is the probable or only a likely consequence of an act or any bodily injury is a question of fact. By virtue of Section 220 of the Penal Code, whoever causes death –

> "(a) By doing an act with the intention of causing death or such bodily injury as is likely to cause death; or
> (b) By doing an act with the knowledge that he is likely by such act to cause death; or
> (c) By doing rash or negligent act, commit the offence of culpable homicide."

5.3 The Police Act, 2020

This Act repeals the Police Act Cap. P19, Laws of the Federation, 2004 and enacts the Nigerian Police Act, 2020 to provide for a more effective and well organized police force driven by the principles of transparency and accountability in its operations and management of its resources. It also establishes an appropriate funding framework for the police force in line with what is obtainable in other federal government key institutions in the bid to ensure that all police formations nationwide are appropriately funded for effective policing. This Act further;

> "(a) enhances professionalism in the police force through the provision of increased training opportunities for police officers and other persons employed by the police force; and
> (b) Creates an enduring cooperation and partnership between the police force and communities in maintaining peace and combating crimes nationwide."[71]

This Act is of extreme relevance to this study because it regulates and facilitates the affairs of the Nigerian Police Force whose primary duty is to enforce the laws made by the relevant law-making bodies in the country. Without the police, it wouldn't be easy to arrest,

[71] Explanatory Memorandum of the Act

investigate and prosecute crime in the country. In other words, those who commit serious crimes such as murder, culpable homicide punishable with death, etc, will go unpunished and such happenings has the tendency to create lawless society where only evil doers will exist or survive.

5.4 The Nigerian Correctional Service Act, 2019

This Act repeals the Prison Act Cap. P29, Laws of the Federation of Nigeria, 2004 and enacts the Nigerian Correctional Service Act to address new issues that are not covered under the repealed Act and provide clear rules setting out obligations of the Nigerian Correctional Service and the rights of inmates. It was enacted by the National Assembly of the Federal Republic of Nigeria. However, paragraph (c) of Section 2 of its provisions is of utmost importance to the researcher in this study. This is because inasmuch as it appears ideal to the researcher that corrections and promotions of reformation, rehabilitation and integration of offenders should be encouraged, this should not include inmates who have committed serious crime such as culpable homicide punishable with death, murder, kidnapping, etc. the justification for this argument is that it will be unreasonable and unfair and in fact against public morals to integrate a murderer (for instance) into the vulnerable society. It is worse so when such a person having been integrated into the society is seen walking freely by the relatives of his victim who will certainly feel denied of justice and may be tempted to take laws into their hands by resorting to self-help.

5.5 Case Laws

Case laws are laws enunciated by the courts with respect to matters brought before them. In virtually all legal jurisdictions of the world, there are hierarchies of courts and one unique feature about the doctrine of hierarchy of courts is that it is associated with the doctrine of judicial precedents. The doctrine of judicial precedent is almost as old as the English Common Law. Judicial precedent is otherwise known as case law. It is based on the doctrine of stare decisis. The theory of case law is that judges do not make laws but merely declare and apply them to the facts before them in a particular case. The realist school of thought with Oliver Wendell Holmes as its chief proponent, view judicial precedent as their main cardinal point of ascertaining what the law is. Stare decisis principle which judicial precedent is based on means that like cases should be treated alike. The general rule is that all courts (courts below) are bound to follow decisions made by higher courts in the hierarchy and appellate courts are usually bound by their own previous decisions. Thus, in *Young v Bristol Aero Plane Co. Ltd*[72], the English court held that "it was bound by its own decision…"

It is instructive to note that there are numerous judicial authorities establishing the doctrine of case law also known as judicial precedents. However, the area of interest to the research work is on how and why decided cases on capital punishment should be followed as a

[72] ([1944] KB 718 CA)

precedent in subsequent matters of similar issues and facts. It is respectfully submitted that the courts ought to follow previous decisions on cases of similar facts and issues and not to give consideration to primordial sentiments of the defence craving for the abolition of capital punishment. They should rather look at the impact doing otherwise will have on the greater society. As earlier stated, the doctrine of capital punishment is a well-established doctrine both at the international stage and at municipal level. In Nigeria, for example, the following cases are few among many in which the courts have imposed death penalties.

In *Eyo v State*,[73] the appellant was charged with the murder of the deceased person by stabbing him with a knife. The deceased was heard to have shouted the appellant's name while the later was seen running away from the scene of the crime. At the trial, the appellant raised the defence of accident which was rejected by the trial court. He was accordingly convicted and sentenced to death. Aggrieved, he appealed to the Court of Appeal. It was held that the accused person was rightly convicted by the trial court. Also, in *Adekunle v State*,[74] the appellant, a Sergeant in the Nigerian Police Force was charged with the murder of the deceased person. The case of the prosecution was that the appellant was on patrol duty along Sagamu-Benin highway when he fired at a bus moving along the highway. One of the occupants of the bus died while the others sustained gunshot wound. At the trial, the appellant raised the defence of accidental discharge. The trial court however found him guilty of the offence of murder and sentenced him to death. Aggrieved by the decision, the appellant appealed to the Court of Appeal which affirmed the decision of the trial court. The appellant further appealed to the Supreme Court which also dismissed the appeal. Other cases decided and punished by death include *Sowemimo v State; Garba v State; Audu v State; Edoho v State.*[75]

6. INTERNATIONAL LEGAL FRAMEWORK

Generally, there are several arguments that the use of the death penalty is not consistent with the right to life and the right to live free from torture or cruel inhuman or degrading treatment or punishment. The UN Human Rights Office, with its mandate to promote and protect all human rights, advocates for the universal abolition of the death penalty. Their position is based on the fundamental nature of the right to life, the unacceptable risk of executing innocent people and the purported absence of proof that the death penalty deters crime. Accordingly, the General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights (Right to Life) was adopted by the Human Rights Committee on 30th October 2018.

Paragraphs 2,4,5 and 6 of Article 6 of ICCPR set out safeguards in the use of the death penalty and the General Comment 36 discusses these safeguards.

[73] (2010) ALL FWLR (Pt. 533) 1913 CA
[74] (2006) ALL FWLR (Pt. 332) 1452
[75] (2004) LLJR-SC.

At the international stage, drug trafficking and usages are some of the offences that are punishable with death. As Turk puts it, many have witnessed a clear failure of the "war on drugs". He argued inter alia that there is a failure to protect the dignity, health and futures of the 296 million users around the world. A failure to effect the transformative policy change needed urgently to avert further human rights reversals. He further argued that the current international drug regime which according to him is characterized by punitive approaches and repressive policies has had devastating impacts on human rights at all levels. That the war on drugs has militarized law enforcement responses in a number of countries all around the world. However, though the researcher in this work supports the call for a moratorium of death penalty with reference to drug related offences, this should not be extended to offences such as murder, culpable homicide punishable with death and other serious offences. The reason for this stance have already been established previously as the views of the human rights office of the United Nation are not different from those of other abolitionist advocates.

Another justification for the author's position is that although Article 6 of the ICCPR permits the use of death penalty in limited circumstances, it also provides that "nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any state party to the present covenant." Hence, in view of the above provision in the International Covenant on Civil and Political Rights, the call for abolition of death penalty will constitute a violation of the treaty by member states who are parties to the said covenant. As a general rule, parties are bound by their agreements – "pacta sunt servanda." The use of the death penalty worldwide has been reported to be relevant in evaluating U.S. standards of decency and what should be considered cruel and unusual punishment under the Eight Amendment. Some justices of the Supreme Court have therefore referred to international law as further affirmation of their own conclusions about the death penalty, particularly as it may apply to specific classes of defendants such as juvenile offenders. Furthermore, the Eight Amendment of the U.S. Constitution and its protection against cruel and unusual punishment has been often cited as the justification for the call to abolish capital punishment in that legal jurisdiction. But the view has been overruled by the Supreme Court in *Coker v Georgia*[76] when it ruled that the death penalty does not violate the Eight Amendment's ban on cruel and unusual punishment, but the Eight Amendment does shape certain procedural aspects regarding when a jury may use the death penalty and how it must be carried out. In the above case, the U.S. Supreme Court held that a penalty must be proportional to the crime; otherwise, the punishment violates the Eight Amendment's prohibition against cruel and unusual punishment. In performing its proportionality analysis, the Supreme Court looks to the following three factors;

- a consideration of the offence's gravity and the stringency of the penalty;
- a consideration of how the jurisdiction punishes its other criminals; and
- a consideration of how other jurisdictions punish the same crime.

[76] (1977) 433 U.S. 584.

To impose a death sentence, the jury must be guided by the particular circumstances of the criminal and the court must have conducted an individualized sentencing process. This rule was established by the Supreme Court in the case of *Kennedy v Louisiana*[77] with a view to extend its ruling in *Coker v Georgia*.[78]

7. INSTITUTIONAL FRAMEWORK

Generally speaking, several governmental institutions are involved in the administration of justice in any legal system. These include the legislature, executive, judiciary and many others. Institutional framework simply refers to the set of formal organizations that regulate the behavior of specific actors in a country. These institutions have a set of rules and enforcement powers to enable them to influence individual behaviours through regulatory and normative actions.

7.1 The Legislature

The legislature is one of the three main arms of government. It is primarily vetted with the law-making power of a country. Section 4 of the Nigerian Constitution established this arm of government and vested the National Assembly with legislative powers. It provides thus in Section 4 (1) and (2) as follows; "4(1) The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the federation which shall consist of a Senate and House of Representatives; (2) The National Assembly shall have power to make laws for the peace, order and good government of the federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part 1 of the Second Schedule to this Constitution"

Interestingly, Subsection (3) of same Section vested the National Assembly with the power to make laws for the peace, order and good government of the federation to the exclusion of the Houses of Assembly of states. However, this does not in any way imply that states houses of assembly are not empowered to make laws. They are empowered to make laws with respect to matters contained in the concurrent legislative list set out in the First Column of Part II of the Second Schedule to this Constitution to the extent prescribed in the Second Column opposite thereto. Section 4 (6) confers the legislative powers of a state of the federation on the house of assembly of the state.

With the aforesaid law-making power conferred on the legislative arm of government, it enacts legislations and statutes which addresses specific matters as substantive laws. Some of these substantive laws include the Criminal Code and Penal Code which inter alia prescribes capital punishment as a proportionate penalty for capital offences. Substantive laws in our corpus juris therefore affirm the validity and justification of the doctrine of capital punishment. This is because statutes such as the Criminal Code Act and the Penal

[77] (2008) 554 U.S. 407.
[78] (n' 25)

Code are all substantive laws and they all have express provisions recognizing and acknowledging the validity of the doctrine of capital punishment.

7.2 The Executive

This is another governmental institution which is relevant in the administration of the doctrine of capital punishment. By virtue of the provisions in Section 5(a) of the executive powers of the federation of Nigeria is vested in the president and may, subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the vice-president and ministers of the government of the federation or officers in the public service of the federation. In other words, the president may decide to exercise the said executive powers himself or he may delegate the powers to either the vice-president or ministers of the government. Subsection (b) of Section 5 extends these powers of the president to the execution and maintenance of the Constitution of Nigeria as well as all laws made by the National Assembly and all matters which the National Assembly is empowered to make laws. One of the ways in which the president exercises this powers is by assenting to legislative bills which becomes laws with binding effect after his assent. Although he may decide not to assent to such bills and the onus then lies on the legislature to exercise its veto power after due process has been followed to make such un-assented bills by the President to become valid law.

On the other hand, the executive powers of a state is vested on the governor of that state and he can either decide to exercise this power by himself or delegate same to the deputy governor or commissioners of the government of that state or officers in the public service of the state. His powers shall extend to the execution and maintenance of the Constitution, all laws made by the House of Assembly of the state and to all matters on which the House of Assembly has power to make laws for the time being. However, this power shall not be exercised by the governor of a state in a way which shall not impede or prejudice the exercise of the executive powers of the federation or endanger any asset or investment of the federal government in that state. Therefore, the importance and relevance in giving legal teeth to the laws made by the legislative cannot be overemphasized. This is because cooperation between the legislative and executive arms of government facilitates the business of government include the administration of justice performed through the instrumentality of the judicial arm of government.

Relating the role of the executive in the applicability of doctrine of capital punishment is of utmost importance to this work. Thus, the researcher which to this by way of an illustration. Let's take for instance, Mr. A deliberately shoots at Mr. B with the intention to kill him and B could not survive the gunshot injury and dies instantaneously or afterwards. Upon a formal complain to the police, which is an agent of the executive arm of government, the police will carry out an investigation as to determine the suspected killer, arrest such person and other person(s) who is an accomplice (if any) take their statements, arraign him and prosecute him in court. By carrying out this function which is a part of the executive arm of

government has enforced the law made by the National Assembly of the federation or the House of Assembly of a state and assented to by the Executive (the president or governor respectively). Also, in certain instances, the Attorney General of either the federation or a state plays the role of police depending on the nature of the matter by prosecuting the accused murderer.

7.3 The Judiciary

The judiciary is one of the three main arms of government. This arm of government enjoys certain inherent and sacred powers. The judicial powers of the Nigerian federation is vested in the courts established for the federation. While the judicial powers of a state is vested in the courts established for a state subject to the provision of the Constitution.

By the provisions in Section 6 (5) (a) to (i), the Supreme Court of Nigeria; the Court of Appeal; the Federal High Court; the National Industrial Court; the High Court of the Federal Capital Territory, Abuja; a Sharia Court of Appeal of a state; the Customary Court of Appeal of the Federal Capital Territory, Abuja and a Customary Court of Appeal of a state are all superior courts record. While other courts such as the magistrate court, customary courts, juvenile courts are inferior courts of records.

Generally, the court is vested with an onerous task in the administration of justice must act accordingly. "The power vested on it extends to all matters between persons, between government or authority and to any person thereto, for the determination of any question as to the civil rights and obligations of that person." As can be clearly seen from the above submissions, the doctrine of Capital Punishment is a well established doctrine under both municipal and international law as both national constitutions of countries, case laws in various legal jurisdictions and even international treaties and conventions recognizes and prescribes them in their provisions. It is therefore a justified doctrine. We shall now analyze the data gathered in the next chapter.

8. COMPARATIVE ANALYTICAL PERSPECTIVE

Justification simply refers the defence one puts up for doing a thing. It is a defence in a criminal case, by which a defendant who committed the acts asserts that because what they did meets certain legal standards, they are not criminally culpable for the acts which would otherwise be criminal. For example, to intentionally commit a homicide would ordinarily be considered murder. However, it is not considered a crime if committed in self-defence. Also, the lawful killing of a person does not constitute. In the light of the above explanation of the concept of justification the researcher asserts that capital punishment is a legally justified doctrine. This is sequel to the fact that both municipal laws in many countries and international law recognizes and established its legality.

Section 33 (1) of the Nigerian Constitution establishes a person's right to life which is a fundamental and inalienable right to be enjoyed by everyone. However, this right is not an

absolute right as there are exceptional instances in which a person can be validly deprived of it. The Section provides in its subsection (1) thus; "Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria."

As can be clearly seen in the provision above, capital punishment is a legally justified doctrine which is recognized by the Constitution being the grund norm and the supreme law of the land. The supremacy of the Nigerian Constitution over any other law in the country is provided for in Section 1 (1) of the Constitution whereas Subsection (3) of the same section is to the effect that if any other law is inconsistent with the provision of the Constitution, the Constitution shall prevail and that other law shall to the extent of the inconsistency be void. Also, statutory laws of the country such as the Criminal Code Act, the Penal Code and other legislations affirms the validity of capital punishment in their provisions, some of these provisions include; Section CC and Section 221 of the Penal Code which provides for the punishment for the offence of murder and culpable homicide punishable with death respectively. The doctrine of capital punishment has also been judicially noticed in a plethora of cases in Nigeria some of which are; *Eyo v State; Edoho v State; Garba vState; Audu v State*,[79] among others.

The doctrine of capital punishment is a well-established doctrine in the United States of America. Even the Eight Amendment of the Constitution of the U.S. did not consider the doctrine as a cruel and unusual punishment. The Eighth Amendment provides thus; "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Prior to 1972, constitutional law governing capital punishment was relatively simple and straightforward. Capital punishment was constitutional and there were few grounds for constitutional review. In Furman's case and the fire 1976 cases that followed it, the court inter alia reaffirmed the constitutionality of capital punishment.

In the case of *Trop v Dulles*,[80] the court gave a clearer and unambiguous pronouncement on the doctrine of capital punishment. In that case, the majority refused to consider the death penalty as an index of the constitutional limit on punishment. It held that whatever the arguments may be against capital punishment… death penalty has been employed throughout our history and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. The validity and justification of the doctrine of capital punishment in the U.S. legal system cannot be overflogged. However, the court frowns against the excessive exercise of discretionary power by the jury with respect to the imposition of death penalty. The court held in Furman's case that sentencing discretion must

[79] (2010) ALL FWLR (Pt. 533) 1913 CA
[80] (1958) 356 U.S. 86.

be limited to preventing courts from arbitrarily imposing the death penalty. Though some states have abolished death penalty in the U.S., the doctrine is still valid in many of its states; namely; Alabama, Arizona, Arkansas, California, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, etc. there are five methods of execution in the United States; lethal injection, electrocution, legal gas, hanging and firing squad.

Capital punishment in India is a legal penalty for some crimes under the country's main substantive penal legislation, the Indian Penal Code as well as other laws. Executions are carried out by hanging as the primary method of execution per Section 354 (5) of the Criminal Code of Procedure, 1973 is 'hanging by the neck until dead', and is imposed only in the 'rarest of cases'. India has retained the death penalty on the ground that it will be awarded only in the 'the rarest of the rare cases' and for 'special reasons.' In fact, India is one of 78 retentionist countries and has even retained the death penalty for political offences. Death penalty was challenged in Indian legal jurisdiction as being unconstitutional in the Supreme Court in the case of *Bachan Singh v State of Punjab* where the argument was rejected by the Supreme Court. The courts have repeatedly held that the death penalty is not unconstitutional and does not offend Article 21 of the Constitution of India. Article 21 of the said Constitution provides for protection of life and personal liberty. It expressly states thus; "No person shall be deprived of his life or personal liberty except according to procedure established by law."

The above provision is a fundamental right similar to that of section 33 of the Nigerian constitution and available to every person, citizens and foreigners alike. However, in Machhi Singh V State of Punjab, a three-judge bench of the Supreme Court following the decision in Bachan Singh, observed that the rarest of rare cases is when the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community or when the murder is committed for a motive which evinces total depravity and meanness…

It is pertinent to state that what constitutes a 'rarest of the rare' case is a matter of discretion exercise by the court. Thus, the Supreme Court has made its intentions by refusing to lay down a stark distinction of what constitutes the 'rarest of the rare' case and left it of the discretion of the judges hearing the case. In the light of the few data adduced above regarding the doctrine of capital punishment, it is crystal clear that capital punishment is a justified doctrine in the Indian jurisprudence.

9. IMPACT OF CAPITAL PUNISHMENT ON PUBLIC POLICIES

An impact is also known as an effect. Thus, the impact of capital punishment on public policy in selected countries simply denotes the effect the doctrine of capital punishment has over the laws promulgated by the government of those countries in view. This is because the phrase public policy can be generally defined as a system of laws, regulatory measures,

courses of action and funding priorities concerning a given topic promulgated by a governmental entity or its representatives. According to Amnesty International Report, individuals and groups such as cultural, religious, political and other groups as well as civil society groups often attempts to shape public policy through education, advocacy or mobilization of interest groups… It is reasonable to assume that the process always involves efforts by competing interest groups to influence policy makers in their favour.

In Nigeria, for example, former President Olusegun Obasanjo initiated a parliamentary debate on the issue of death penalty on the 13th of November 2003. In furtherance of this process, the Attorney General of the federation and Minister of Justice inaugurated a panel of experts which will serve as the National Study Group on the Death Penalty with 12 members representing different aspects of the Nigerian society. Amnesty International was invited to supply documentation on the death penalty and it further called for the Nigerian government headed by the then President Obasanjo to;

a) Abolish the death penalty, and pending abolition immediately impose a moratorium on execution and commute all death sentences under Nigerian criminal law and Sharia laws.
b) Ratify international human rights instruments, including the two optional protocols to the ICCPR, and the Protocol to the African Charter on Human and People's Rights on the rights of women.
c) Respect and promote international standards of fair trial and due process.

These calls, had they been heeded to would have influenced the kind of laws that governs the punishment of capital offences in Nigeria and therefore eliminated or abolished the death penalty practice known to our corpus juris and by implication, have a great influence on public policy. But, the reverse was the case and up till now, capital punishment remains a validly recognized doctrine both in the Constitution of the Federal Republic of Nigeria, the Criminal Code, the Penal Code and other statutory provisions in the country. For example, despite the fact that "President Olusegun Obasanjo has on many occasions expressed his opposition to the death penalty in general, the punishment is still on the statute books in the country. The Constitution does not prohibit its application. Accordingly, Section 33(1) permits the derogation of the right to life "in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria." The Penal Code (Northern states), Federal Provisions Act of 1959 (the Penal Code) and the Criminal Code Act applying in Southern Nigeria of 1961 (the Criminal Code) and the new Sharia Codes all prescribe the death penalty for a range of criminal offences, including armed robbery, treason, murder, culpable homicide, zina and so called 'sodemy,' the later two under the new Sharia Penal Laws."

The above dictum is an extract from the Amnesty International (AI) report of the year 2000 and it indicates and the fact that capital punishment is a legally justified doctrine in Nigeria and the reason for its retention is influenced by the cultural norms and values of the people

of Nigeria who are peaceful in nature and detest violent killings and cruelty. Hence, they believe that he who kills by the sword must die by the sword in order to promote a crime free society. Again, religious codes such as the Holy Bible and the Kuran all uphold this belief that an eye should be paid for an eye. This influence the public policy of Nigeria as well.

In line with the position of this work, AI also acknowledged in its report practical cases of death penalty in Nigeria. It stated that the Nigerian courts have passed at least 33 death sentences since 1999. Of these, at least 22 were handed down under the Criminal Code or Penal Code. As of July, 2003, according to the Prison Rehabilitation and Welfare Action (PRAWA), a Nigerian human rights organization, there are a total of 487 people awaiting the execution of their death sentence in Nigeria, 11 out of these are women. Official statistics from the headquarters of the Nigerian prison services, states that the figure is 448 as of 20 January 2004. The AI acknowledged that executions are being carried out both under the Penal Code, the Criminal Code and new Sharia Penal law and the last person to be executed was Sani Yakubu Rodi who was hanged on 3 January 2002.

In the United States capital punishment remains legal in most states. According to Caron, the persistence of death penalty statutes is attributable to the existence of direct democracy institutions in about half the state. Applying a longitudinal research design that leverages annual estimates of state death penalty opinion, she revealed that these institutions strengthen the connection between public opinion and capital punishment's legality, indicating that they foster policy responsiveness. She extended her argument by stating that because that direct democracy states are more likely to have the death penalty. That direct democracy increases the likelihood that policy will be congruent with majority opinion, especially in states where opinion leans strongly in one direction. Also, individuals, groups and even the courts opinions had influenced public policy with respect to capital punishment. This is evident in Stanley's report of the New Telegraph, the decisions of US courts in *Coker v Georgia; Furman v Georgia*[81]*; Gregg v Georgia*[82]; etc. have all influenced the present laws, governing the punishment of capital offences in the U.S. This include even the American Constitution. Hence, public policy is favours and prescribes capital punishment for certain offences in the country.

Under Indian jurisprudence, capital punishment remains a well-established doctrine has been restricted to the 'rarest of the rare cases. Thus, in the text of the lecture delivered by Prof. Roger Hood on the 10th July 2015 at the India International Centre, Max Mueller Marg, New Delhi, in an event organized by the law commission of India argued that although it is arguable whether all offences for which under Indian Law the death penalty can be imposed fall within the UN 'most serious crimes' category, in practice to murder, terrorist offences

[81] (1972) 408 U.S. 238.
[82] (1976) 428 U.S. 153.

aimed to undermine the integrity of the state, and then only the 'rarest of the rare', the 'worst of the worst' cases. *Stricto sensu,* the death penalty law in India has undergone several amendments. According to Prof. R. Hood, a careful scrutiny of the debates in British India's Legislative Assembly reveals that no issue was raised about capital punishment in the Assembly until 1931, when one of the members from Bihar, Shri Gaya Prasad Singh sought to introduce a Bill to abolish the punishment of death for the offences under the Indian Penal Code. However, the motion was negative after the then Home Minister replied to the motion.

The Government's policy on capital punishment in British India prior to independence was clearly stated twice in 1946 by the then Home Minister, Sir John Thorne, in the debates of the Legislative Assembly. "The government does not think it wise to abolish capital punishment for any type of crime for which that punishment is now provided."

At independence, India retained several laws put in place by the British Colonial government, which included the code of Criminal Procedure, 1998 (Cr. P.C. 1898), and the Indian Penal Code, 1860 (IPC). The IPC prescribes six punishments that could be imposed under the law including death. For offences where the death penalty was an option, Section 367 (5) of the Crpc 1898 required courts to record reasons where the court decided not to impose a sentence of death. The section provides thus; "If the accused is convicted of an offence punishable with death, and the court sentences him to any punishment other than death, the court shall in its judgment state the reason why sentence of death was not passed."

In 1955, the Parliament repealed Section 369 (5), Crpc 1898, significantly altering the position of the death sentence. The death penalty was no longer the norm, and courts did not need special reasons for why they were not imposing the death penalty in cases where it was a prescribed punishment. Afterwards, the Code of Criminal Procedure was re-enacted in 1973 (Crpc) and several changes were made, notably to Section 354 (3) which provides that;

> "When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence."

This was a significant modification from the situation following the 1955 amendment (where the terms of imprisonment and the death penalty were equal possibilities in a capital case), and a reversal of the position under the 1898 law (where death sentence was the norm and reasons had to be recorded if any other punishment was imposed). This is because now judges are required to provide special reasons for why they imposed the death sentence.

These amendments also introduced the possibility of a post-conviction hearing on sentence, including the death sentence, in Section 235 (2), which states that; "If the accused is convicted, the judge shall, unless he proceeds in accordance with the provisions of Section

360, hear the accused on the question of sentence, and then pass sentence on him according to law."

The above argument of Prof. Roger and those of many others is an indication of the validity and justification of capital punishment in India and various laws enacted by the Indian Parliament under which death penalty can be prescribed as a possible punishment in the country are given at Annexure – 1 of Prof. Roger's work and they include Section 121 (Treason, for waging war against the government of India; Section 132 (IPC, abetment of mutiny actually committed); Section 302 (IPC, murder); Section 364 A (IPC, kidnapping for ransom); Section 376A (IPC, Rape and injury which causes death or leaves the woman in persistent vegetative state); etc. However, since these laws are enacted by parliament and parliament, in an ideal sense, are representatives of the people, it is the yearnings and desires of the people the parliament have codified. Thus, people's call for the retention of capital punishment has greatly impacted the public policy in India.

10. CONCLUSION AND RECOMMENDATIONS

This paper critically examined the legal doctrine of Capital Punishment vis-à-vis its justification and impact on public policy found inter alia the following: Firstly, that the doctrine of Capital Punishment is of Ancient origin and is a well established doctrine in several legal jurisdictions of the world and recognized as an integral part of the constitutions of many countries. Hence, it is not unconstitutional as the abolitionists claimed. Secondly, though several scholars, jurists, publicists, legal writers and social analysts have often advocated for its abolition, there has been relatively greater support for its retention because of its deterrence to the commission of crime. Thirdly, that the strict practice of the judicial doctrine of stare decisis and the avoidance of the corruption of public morals constitute some of the basis for the call to retain the doctrine of Capital Punishment. Fourthly, that some primal reasons for advocating for the abolition of the doctrine of Capital Punishment as argued by Emmaline was that the doctrine inflicts psychological trauma on inmates placed on death row. However, she failed to consider the visible traumatic challenges relatives of victims of heinous crimes like murder, culpable homicide punishable with death go through. Thus, the study revealed that relatives of victims of capital offences crave for proportionate penalty to be imposed on the convicted criminal. Fifthly, the doctrine of Capital Punishment is not an alien practice as the laws of many states adopted it from time immemorial even though there are recent calls from some countries and public analysts for its abolition based on certain unjustifiable reasons. However, it is still retained in the Municipal laws of most countries including Nigeria and the United States of America. For example, Section 33 of the Nigerian construction and the Eighth Amendment of the U. S. Constitution has not abolished the doctrine of Capital Punishment – see Kennedy v Louisiana in which the defendant was sentenced to death and also the case of Coker v George, particularly, where it was held by the Supreme Court that the death penalty does not violate the Eight Amendment's ban on cruel and unusual punishment. While in a plethora of Nigerian

cases including Eyo v State[83]; Sowemimo v State[84]; Garba v State[85]; Audu v State[86] and Edoho v State[87] which all inter alia judicially established the doctrine and upheld its justification at different times. Even, international law adopts the doctrine through treaties and conventions. See Article 6 of the International Covenants on Civil and Political Rights. Sixthly, that institutional ineffectiveness is one of the major causes of prolonged death row experienced by convicted inmates. Finally, that crimes must be penalized with proportional punishment.

The primal objective of this work remains to examine, with the aid of relevant data, the impact and justification of the doctrine of Capital Punishment. Having carried out the needed research process and based on available data, this work hereby conclude, among other things, that capital punishment as a legal doctrine has a great impact on public policy. This is because most formal enactment made by public authorities are influenced by customary international laws and religious codes. Accordingly, since this work has revealed in the last chapter that both religions and customary practices adopts the doctrine of Capital Punishment, the inclusion of dear penalty in legal documents is traceable to the customary, traditional and religious beliefs of law-makers, judicial and executive officers.

Also, the doctrine's justification is prima facie evident as it is enshrined and recognized in both municipal and International Laws such as the Constitution of the Federal Republic Of Nigeria 1999 (as amended), the Eighth Amendment of the U. S. Constitution and International Covenants on Civil and Political Rights (ICCPR). Hence, its application cannot be faulted since all these legal instruments including not mentioned here contains and recognizes thereby establishing its validity and as having a binding effect. After a critical examination of the legal doctrine of Capital Punishment and its impact and justification on public policy and with strict reliance on the findings of the study, it is recommended thus: That the doctrine of Capital Punishment should be retained although its application to certain offences needs be reviewed. Again, certain offences such as kidnapping, terrorism, etc., which are not presently punishment with death should be reviewed and punished with death. Governmental institutions should be up and doing in order to adequately address the prolonged death row issue and avert subsequent occurrences.

[83] (2010)ALL FWLR (PT. 533) 1913 CA
[84] (2004) ALL FWLR (PT. 208) 951
[85] (2000) FWLR (PT. 24) 1446
[86] (2003)FWLR (PT.153) 325
[87] (2010) LLJR-SC.