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Further inquiries should be directed to:

Denis Asimwe
HURIPEC,
Faculty of Law
Makerere University
P.O. Box 7062
Kampala
UGANDA

Telephone: (256-41) 532-954
Fax No: (256-41) 543-110 or 532-956
E-mail: dasiimwe@law.mak.ac.ug

CONTENTS

ARTICLES

- THE POST-CONFLICT TREATMENT OF CHILD SOLDIERS: A STUDY OF LIBERIAN CHILD SOLDIERS
Lindsay Shott 1
- TOWARDS THE GLOBAL ABOLITION OF THE DEATH PENALTY: THE CRIMINAL LAW IN THE UNITED STATES AND NIGERIA
Oluyemisi Bamgbose 30
- UGANDA'S 2006 MULTIPARTY ELECTIONS: CONSOLIDATING DEMOCRACY AND BUILDING PEACE?
Sabiti Makara 54
- DO THE RIGHTS OF POOR WOMEN REALLY MATTER? GLOBALIZATION AND THE PROTECTION OF REPRODUCTIVE HEALTH RIGHTS IN UGANDA
Ben K. Twinomugisha 81
- LEGAL PERSPECTIVES ON THE CASUALISATION OF WORKERS UNDER NIGERIAN LABOUR LAWS
O.A. Orifiwomo 104
- POLITICAL FEDERATION IN EAST AFRICA: PROGRESS, CHALLENGES AND PROSPECTS FOR CONSTITUTIONAL DEVELOPMENT
Judy Kamanyi 126
- ### COMMENTS
- BEYOND JUBA: DOES UGANDA NEED A NATIONAL TRUTH AND RECONCILIATION PROCESS?
Makau Mutua 142
- THE HISTORY OF TORTURE JURISPRUDENCE IN THE INTER-AMERICAN REGIONAL HUMAN RIGHTS SYSTEM: 1948-2005
Jamil Mujuzi Ddamulira 156

TOWARDS THE GLOBAL ABOLITION OF THE DEATH PENALTY: COMPARING THE CRIMINAL LAWS IN THE UNITED STATES OF AMERICA AND NIGERIA

Oluyemisi Bamgbose*

ABSTRACT

This article begins with a short history of the punishment of death and highlights the methods by which it is carried out. It then discusses the death penalty from a global perspective with emphasis on Nigeria and the United States of America, and considers recent trends towards its abolition. The international and national efforts towards the abolition of the death penalty are examined. The article concludes that the global move toward abolition of death penalty is a move in the right direction.

I. INTRODUCTION

The trend world wide is towards abolition of the death penalty.

Recent years have witnessed a global trend directed towards abolition of the death penalty. A clear majority of countries reject the application of the death penalty. Over the last two decades, nearly all west European states have renounced this form of punishment. The positive stand towards the abolition of capital punishment has not resulted in a total global break-through however. Only one quarter of the global population live in countries without the death penalty. The United States (U.S.), China, Iran and Saudi Arabia account for over eighty percent (80%) of the executions recorded by Amnesty International, with the top ten (10) executing nations being China, Iran, Saudi Arabia, the U.S., Taiwan, Sierra Leone, Kazakhstan, Nigeria, Belarus and Kyrgyzstan.² Six countries that have accounted for all the executions of juvenile offenders since 1990 are the U.S., Yemen, Nigeria, Saudi Arabia, Pakistan and Iran. Out of the six, the U.S. has accounted for half of the executions.³ The U.S., Nigeria,

* Associate Professor (Reader), Department of Private and Business Law, University of Ibadan.
E-mail: <oa.bamgbose@mail.ui.edu.ng> or <oluyemisibamgbose@hotmail.com>

1. Bochenek, Michael (1999) in Y2K means execution for juvenile killers by Frank Green in http://www.apbnews.com/cjsystem/fi.../1999/12/29/juvexecute1229_01.html

2. AMNESTY INTERNATIONAL, PROGRAM TO ABOLISH THE DEATH PENALTY, <www.amnesty-usa.org/abolish/page2.html>

3. *Id.*

Iran and Saudi Arabia are the four countries topping the list of countries still retaining the death penalty as a form of punishment.

The terrorist attack in September 2001 in New York, U.S and the introduction of Sharia Law in some states in Northern Nigeria may further compound the problems in the two countries and dim the hope of rapid steps towards abolishing the death penalty. In these two regions globally, the reintroduction of the death penalty in Europe and certain African countries, and the retention of this form of punishment in many states in the U.S. gives concern to many human rights organizations and opponents of the death penalty. Against this background, this article discusses the criminal laws in the U.S and Nigeria regarding the death penalty and the effect on the global move towards its abolition.

II. A BRIEF HISTORY OF THE DEATH PENALTY

Before the twentieth century, the histories of many countries in the world show a great use of the death penalty as a form of punishment for various offenses. Turnbull noted that in primitive societies, the death penalty was generally given for crimes that threatened society as a whole.⁴ Execution at that time was generally done as an act of atonement rather than retribution. Lester observed that the offender shared the societal belief and was willing to die in his act of atonement.⁵ In the twentieth and twenty-first centuries, the crimes for which the death penalty was then imposed in the earlier centuries would appear ridiculous and outrageous. However, an understanding of the events of that time will show the importance and gravity of such crimes. The first established death penalty law dates as far back as the eighteenth century B.C. in the code of King Hammurabi of Babylon. Reference is made to the death penalty for a total of twenty-five crimes. The death penalty was also part of the fourteenth century B.C.'s Hittites code, and the seventh century B.C. Draconian code of Athens, which made death the only punishment for all crimes. It was also part of the fifth century B.C.'s Roman law of the twelve tablets.⁶

As far back as the 10th century AD, the death penalty was part of the laws of Britain and the usual method of execution was by hanging. In the eighteenth century, the English system of the death penalty was referred to as the "Bloody Code."⁷ By 1795, this Code had the following crimes punishable by execution; treason, theft of animals (sheep, cattle, and horses), arson, murder, rape, burglary, robbery, the

4. C. Turnbull, *Death by Decree*, 87 NATIONAL HISTORY (1978), at 51-66.

5. D. LESTER, *THE DEATH PENALTY ISSUES AND ANSWERS* (1998).

6. LAST MILE TOURS, *CAPITAL PUNISHMENT IN EIGHTEENTH CENTURY ENGLAND* (2000).

7. *Id.*

concealment of effects of bankrupts, and the malicious maiming of cattle. The list of offenses that attracted the death penalty also included stealing in a shop of goods worth up to five schillings and the cutting down of a tree.⁸ During Elizabethan times, horse stealing attracted a capital punishment. This offense was considered a serious one, as the horse was the primary means of travel at that time. In modern days, a suitable comparison to horse theft would be car theft. Sheep stealing on the other hand became punishable with death after 1741, during the economic depression that created a large number of poor individuals and a great increase in the number of sheep thefts. While the death penalty was standard punishment for fifty crimes in 1688, in 1765, one hundred and sixty-five crimes attracted the death penalty and in 1815, two hundred and twenty-five crimes had the death penalty. Due to the escalating number of crimes that attracted the death penalty, Goldsmith in 1766 said:

Nor can I avoid even questioning the validity of that right which social combination have assumed of capitally punishing offenses of a slight nature. In case of murder, their right is obvious, as it is the duty of us all from the law of self-defense to cut off that man who has shown a disregard for the life of another. Against such nature rises in arms; but it is not so against him who steals my property.⁹

Goldsmith went on to add that, "when by indiscriminate penal laws, the nation behold the same punishment affixed to dissimilar degree of guilt, the people are led to lose all sense of distinction in the crime and this distinction is the bulwark of morality."¹⁰

High treason and treason has always been one of the most serious offenses that attract the death penalty. In England, violating the king's companion, the king's eldest unmarried daughter or the wife of the king's eldest son and heir was high treason. The intention of the law was to guard the royal blood from any suspicion of bastardy and to ensure that the transition of rule and the reign of the monarch were unquestionable.¹¹ The fact that the Bloody Code allowed the death penalty for many offenses did not mean that execution was carried out where the offender was found guilty. Instead of constantly carrying out the death penalty where the offender was found guilty in England, the rulers kept potential criminals in a state of uncertainty. The principal aim was social control. It was realized that frequent and indiscriminate use of the death

8. G.M. TREVLYAN, ENGLISH SOCIAL HISTORY: A SURVEY OF SIX CENTURIES FROM CHAUCER TO QUEEN VICTORIA 555 (1978).

9. LAST MILES TOURS, *supra* note 6.

10. *Id.*

11. *Id.*

penalty for a wide range of offenses was self-defeating. At that time in the history of England, pardons were often granted based on a number of factors. Pregnant women and children also received state pardons.

The decline and repeal of the Bloody Code was partly on account of the general rise in humanitarianism and enlightenment.¹² In 1861, murder became the only offense for which the death sentence was used in peacetime in England. In 1957, the Homicide Act in England restricted the types of murder for which the death penalty was used. In 1965, the Murder Act abolished the death penalty for offences of murder in England. The above explanation is necessary because the legal systems of both the U.S. and Nigeria were greatly influenced by the English legal system.

III. METHODS OF EXECUTION

Major changes have occurred in the method of executions used by different countries. From the 5th century B.C. under the Roman Law of Twelve Tablets through the Draconian Code of Athens in the 7th century B.C. to the Hittite Code in the 14th century B.C. and the Code of Hammurabi of Babylon in the 18th century to the laws of various countries in the 19th and 20th centuries, dramatic changes have taken place in the execution process as well as offences which attract the death penalty. Punishment during the early centuries included boiling, burning at the stake, beheading, drowning, quartering, hanging, crucifixion, beating to death, impalement, and stoning.

With the emergence of the abolitionist groups that opposed the execution of condemned prisoners, and public outcry, the issue of the death penalty was revisited in many countries of the world. This led in most cases to Congress in America reconsidering the death penalty as a form of punishment. Various countries reacted in diverse ways. In England, after a lot of debate and experimenting on how to temper the effect of the death penalty or to restrict the application to murder cases¹³ the death penalty was finally totally abolished for all types of offences including murder.¹⁴ The majority of other countries including Austria also adopted total abolition. However, some countries still retain the death penalty, having modified the old methods of execution or adopted new ones in the execution of convicted persons.¹⁵ Here below I outline some of the methods that have been commonly used.

12. TREVLYAN, *supra* note 8.

13. Homicide Act, 1957.

14. Murder Act, 1965.

15. See, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 1996 (1997), Bulletin Table 2.

- (i) The use of cyanide gas was introduced in the State of Nevada in the U.S. as "a more humane way of execution."¹⁶
- (ii) The first electric chair used for execution was built in New York in 1888 and used for the first time in 1890.¹⁷
- (iii) Lethal injection was introduced as a method of execution in Oklahoma in 1977.¹⁸
- (iv) Pennsylvania abolished the death penalty for all offenses except first-degree murder and it is the first state in the U.S. to ban public executions.¹⁹
- (v) Stoning is an old method of execution that is still used in some Islamic States. According to reports, in executions carried out in the year 2000 one hundred and forty-five cases were by stoning.²⁰
- (vi) Beheading of the convict is another old method of execution that is still adopted in Saudi Arabia, an exclusively Islamic (Muslim) kingdom, for murder and sexual immorality such as rape, adultery, homosexuality, drug offenses, armed robbery and apostasy (renunciation of the Muslim faith). These executions are carried out in public.²¹
- (vii) Shooting was a method of execution used in Nigeria for the offense of armed robbery and this was done in public as well. However, execution by shooting is no longer used in Nigeria. However in China and Afghanistan shooting is still used for execution and it accounts for 80% of all executions worldwide.²² In China, shooting is a method of execution used for a drug trafficking offense. A single bullet to the head in public does this. In the United Arab Emirates, dealing in drugs is a capital offense and the convict is executed by firing squad.²³
- (viii) Hanging is the third most common method of execution; it is also the most common method of execution adopted in Nigeria. It is however not done in

16. R. BOHM, *DEATH QUEST: AN INTRODUCTION OF THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES* (1999).

17. SOCIETY FINAL SOLUTION: A HISTORY AND DISCUSSION OF THE DEATH PENALTY (L. Randa ed., 1997).

18. LESTER, *supra* note 5.

19. BOHM, *supra* note 16; Randa, *supra* note 17.

20. Overview 2000, <<http://www.geocities.com/capitolHill/6142/overview.htm>>. See also, H. Hillman, *The Possible Pain Experienced During Execution by Different Methods*, 22 PERCEPTION (1993), at 745-753.

21. Overview 2000, *supra*.

22. *Id.*

23. R. HALPERIN, *DEATH PENALTY NEW WORLD WIDE* (2000).

- (ix) Crucifixion as a method of execution has resurfaced with the introduction of Sharia Law in some states in Northern Nigeria. An offender convicted of robbery where death occurred and property was seized is liable to death by crucifixion.

Regardless of the forms of execution adopted, they are all painful to the person executed, as well as being mutilating and horrifying. There is none where death is instantaneous. They all lead to fear and horror for the condemned.²⁵

IV. THE DEATH PENALTY FROM A GLOBAL CONTEXT

Capital punishment is the infliction of the penalty of death for a crime under the sentence by a properly constituted authority.²⁶ In many parts of the world, the death penalty is recognized as a legal form of punishment. The crimes, which attract capital punishment, vary from one country to the next, and the range can be said to vary extensively. In some countries, the list is short, while in others it is very long. In many countries the death penalty is restricted to murder or treason or both.²⁷ In Poland, the death penalty was used for crimes such as homicide, assault, rape, robbery, and offences against the state including crimes particularly harmful to the nation's economy.²⁸ The list in China is extensive. According to Getting, about 68 offenses are listed.²⁹ Tax, fraud evasion and drug trafficking are capital offenses in China.³⁰ Other crimes include smuggling, accepting bribe, and separatism (which is the support for the independence of territories such as Tibet and Xinjiang). In Iran, crimes like sodomy³¹ and homosexuality³² under the Islamic Penal Code carry the death penalty.³³ In Libya, any offense against the principle of the revolution-high treason and premeditated murder are capital offenses.³⁴ Dealing in drugs is a serious offense in the United Arab Emirates and

24. Overview 2000, *supra* note 20; Hillman, *supra* note 20.

25. Turnbull, *supra* note 4.

26. Capital Punishment, 5 ENCYCLOPEDIA BRITANNICA (11 ed. 1910), at 278.

27. *Id.*

28. LESTER, *supra* note 5.

29. J. Getting, *Corrupt Minister Likely to Escape Execution in China*, THE GUARDIAN, 24 October 2001.

30. AMNESTY INTERNATIONAL, WEEKLY DEATH PENALTY ACTION (6 December 2001).

31. Iran Islamic Penal Code, art. 108 (Passed 30 July 1991; Ratified 28 November 1991).

32. *Id.*, art. 110.

33. *Id.*

34. Libya Criminal Code 1973

attracts the death penalty.³⁵ In Kenya, the death sentence is mandatory for treason, murder, robbery with violence or attempted robbery with violence and for the administration of an unlawful oath to commit a capital punishment.³⁶ There is no yardstick to determine what classes of crimes will fall under the category of capital punishment and from the list from various countries it would be a wild guess.

V. CRIMINAL LAW IN NIGERIA

The genesis of criminal law in Nigeria is the English Common Law of crime. The bulk of the Nigerian criminal laws are to be found in two codes. The Criminal Code Act³⁷ is applicable to the southern states of Nigeria and the Penal Code Act³⁸ is applicable in the northern states. Customary criminal laws are no longer enforceable under the laws in Nigeria. Therefore, by virtue of Section 4 of the Criminal Code Act,

no person shall be liable to be tried or punished in any court in Nigeria for an offense except under the express provisions of the Code, or some other ordinance, or some other law, or of some order in council

Crimes in the Criminal and Penal Codes in Nigeria are classified under three basic categories. These are, simple offenses, felonies, and capital offenses. This classification is according to punishment for the crime. Simple offenses are crimes where the punishments range from alternative punishment to imprisonment and a term of imprisonment of less than three years. Felonies have punishment of three years imprisonment to a life sentence. Capital offenses are crimes that have a punishment of the death penalty. This classification confirms the recognition of the death penalty under the criminal justice system in Nigeria.

VI. THE DEATH PENALTY IN NIGERIA

Nigeria is one of the countries that has retained the death penalty as a means of punishment. Not only is the death penalty a punishment for certain crimes committed, but juvenile offenders are also condemned and executed for crimes they have

35. TRAVEL ADVICE: UNITED ARAB EMIRATES (2007).

36. Robert Oduol, Capital Punishment: Texas to Kenya, <<http://www.g21.net/africa8.html>>

37. The Criminal Code Act, Cap 38, Laws of the Federation of Nigeria (2004).

38. *Id.*

39. *Id.*, § 4.

committed before reaching the age of 18. The Criminal Code and the Penal Code both contain offenses that attract the death penalty. Section 17 of the Criminal Code recognizes the death penalty as a form of punishment for a crime. Murder is the most common offense that attracts the death penalty in all the countries that retain this form of punishment and Nigeria is no exception. In Nigeria there are no degrees of murder. Murder is defined as "unlawful killing by a person of another in the circumstances listed in subsections 1-6."⁴⁰ Another offense that attracts a death penalty in Nigeria is the directing, controlling or presiding over an unlawful trial by ordeal that results in death.⁴¹ The offense is defined as "the trial by the ordeal of sasswood, *esere-bean* or other poison, boiling oil, fire, immersion in water or exposure to attacks of crocodile or other wild animal or by any ordeal, which is likely to result in death or bodily injury to any party to the proceeding."⁴² Treason is another offense that attracts the death penalty in many of the countries where execution is still practiced. Under both the Penal Code and the Criminal Code in Nigeria treason is punishable with death.⁴³ In addition, instigating an invasion of Nigeria is regarded as treason and a person found guilty under the law is liable to a punishment of death.⁴⁴

Treachery is another offense for which a person found guilty on conviction "shall suffer death."⁴⁵ Treachery is defined as an intention to help the enemy, in any act designed or likely to give assistance to the naval, military or air operation of the enemy and impede the operation of the Nigerian force or endanger life.⁴⁶ Apart from offenses in the Criminal and Penal codes that attract a punishment of a death sentence, there are other offenses that attract a similar punishment in other legislation.

Robbery is an offense under the two codes.⁴⁷ However, in the wake of attacks of armed robbers in Nigeria in the 1980s, the government set up special tribunals which had regular features of the court system under the military rule and they were constitutionally recognized. Armed robbery is an offense punishable with death. The sentence however, cannot be executed until the government confirms it.⁴⁸ The introduction of Sharia law in some northern states in Nigeria has enlarged the number

40. *Id.* § 316.

41. *Id.* §§ 208 & 214(b).

42. *Id.* § 207.

43. *Id.* §§ 37 & 411.

44. *Id.* §§ 38 & XX.

45. *Id.* §§ 49A & XX.

46. Treason and Other Offenses Special Provisions Decree of 1986, Cap. 444, Laws of the Federation of Nigeria (as amended). See also, The Treason and Treasonable Offenses Decree, No. 28 of 1993.

47. Criminal Code Act, *supra* note 37, § 401; Penal Code Act, §§ XX.

48. Robbery and Firearms (Special Provisions) Act, Cap R11, Laws of the Federation of Nigeria (2004).

of offenses that attract the death penalty, which is a point that I take up and discuss in the section on recent trends in capital punishment.

The Constitution of the Federal Republic of Nigeria⁴⁹ gives legality to the death penalty. Section 30 states,

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 offense of which he has been found guilty in Nigeria.

However, Section 31 of the Constitution gives a right against "torture and inhuman or degrading treatment. The Criminal Code recognizes the death penalty as a form of punishment for criminal offenses, but excludes juvenile offenders who have not attained the age of seventeen years⁵⁰ and pregnant women⁵¹ from the death penalty. In spite of this provision, juvenile offenders have unfortunately been executed in Nigeria. For example, in 1989, Matthew Anu, a juvenile offender, believed to be seventeen years or younger was executed by firing squad with two other condemned men on February 26 for an offense he committed in 1987.⁵²

On the issue of the constitutionality of the death penalty in Nigeria, the issue has been clearly laid to rest by the Supreme Court. The court declared the death penalty constitutional on December 18, 1998, in two cases involving two prisoners on death row who challenged their convictions and sentence to death. In *Onuorah Kahu v. State*⁵³ and *Azeez Okoro v. State*,⁵⁴ a full court presided over by the Chief Justice of the Federation held that there was nothing in the Constitution that rendered the death penalty unconstitutional. The court in the two cases declined to consider whether the death penalty violated the right not to be subjected to torture or inhuman or degrading punishment stating that it lacked original jurisdiction to consider the matter of violation of fundamental rights extrinsic to the trial. The court also refused to determine whether the process of execution of the death sentence in Nigeria was barbarous. The court held,

49. The Constitution of the Federal Republic of Nigeria (Promulgation) Act, Cap C23, Laws of the Federation of Nigeria (2004).

50. Criminal Code Act, § 39(1); Penal Code Act, § 319(2).

51. Criminal Code Act, § 39(2); Penal Code Act, § 319(3).

52. AMNESTY INTERNATIONAL, WEST AFRICA: PROGRAM TO ABOLISH THE DEATH PENALTY (2003).

53. Suit No. SQ/24/96.

54. Suit No. SC/135/97.

Although the argument against capital punishment may be the proper basis for legislative abolition of the death penalty, the authority for any action abolishing the death penalty is clearly not a matter for the law courts. Nor have I found myself able to hold that this court is entitled to repeal laws ostensibly based upon notions of public policy or sanctions simply because such laws, for one reason or the other are said to be acceptable to a group of persons or a section of society.⁵⁵

The above cases would have been a good opportunity for the Supreme Court to pronounce on whether the process of execution by hanging was barbarous or not or whether it was a violation of the right not to be subjected to tortured or inhuman or degrading punishment but unfortunately the Supreme Court did not pronounce on these vital issues.

VII. DEATH PENALTY IN THE UNITED STATES: A BRIEF NOTE

The use of the death penalty by the United States was greatly influenced by Britain. The European settlers brought the practice with them and the first recorded execution in the U.S. was in the James colony in Virginia in 1608. In 1612, the governor of Virginia enacted the Divine, Moral and Martial Law which provided the death penalty for even minor offenses such as stealing grapes, killing chickens and trading with Indians.⁵⁶ After this, the laws were introduced into other colonies (now states) and it varied from state to state.⁵⁷ Not all fifty states impose the death penalty. Out of the fifty, only twelve and the District of Columbia have totally abolished the death penalty. These are: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia and Wisconsin. The other remaining thirty-eight states and the federal government have retained the death penalty and this has given rise to concern among international human rights organizations.⁵⁸ The United States military also uses the death penalty. The U.S. Supreme Court reintroduced the death penalty in the United States in 1976 after a twelve-year ban.⁵⁹ The U.S. is one of only a few developed democratic countries using the death penalty as a form of punishment for adult and juvenile offenders.

55. Sam Amadi, *Nigeria Supreme Court allows Death Penalty*, 1 HURILAWS NEWSLETTER (Nov-Dec., 1999).

56. MICHIGAN STATE UNIVERSITY INFORMATION CENTRE, THE DEATH PENALTY 2000: HISTORY OF THE DEATH PENALTY (2000) <<http://deathpenaltyinfo.msu.edu/c/about/history/history/html>>

57. Randa, *supra* note 17.

58. <<http://www.ustrek.org/odyssey/semester1/120200/120/200.naddeath.html>>

59. ADAMS HURTER CAPITAL PUNISHMENT: THE CASE FOR ABOLITION (1998).

In the U.S., the movement for the abolition of the death penalty is not a recent move. As far back as the 17th century there were moves to abolish the death penalty and some states actually considered the issue and modified the law on the death penalty. Pennsylvania was the first state to consider degrees of murder in relation to the death penalty and in 1794 the state abolished the death penalty for all offenses except first-degree murder.⁶⁰ In the early part of the 19th century, many more states in the U.S. reduced the number of offenses that attracted the death penalty and built penitentiaries. In 1834, Pennsylvania became the first state to ban public executions.⁶¹ In 1846, Michigan banned the death penalty for all crimes except treason and later Rhode Island and Wisconsin abolished the death penalty for all crimes. Many other states followed suit by the end of the nineteenth century.⁶² In 1888, New York built the first electric chair and used it for the first time in 1890 and soon after other states adopted this method of execution.⁶³ In 1924, Nevada introduced the use of cyanide gas as a more humane way of execution.⁶⁴

In the 1960s, the fundamental legality of the death penalty was challenged for the first time. It was suggested that the death penalty was a cruel and unusual punishment and therefore unconstitutional under the Eighth Amendment of the United States Constitution. The case of *Furman v. State*⁶⁵ was a vital case that brought about the suspension of the death penalty for several years. The Supreme Court held that the severity of the death penalty under the Georgia statute violated the eighth amendment and was cruel and unusual. The effect of this case is that many states modified their laws on the death penalty and changed the method of execution. In the United States, the Fifth Amendment gave legality to the death penalty. It states:

No person shall be held to answer for a capital or otherwise infamous offense, unless on presentation or indictment of a grand jury . . . nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, property without due process of law. . .

The Eighth Amendment states, amongst other things, that cruel and unusual punishment shall not be inflicted. The Supreme Court has in many cases affirmed the legality of the

60. BOHM, *supra* note 16; Randa, *supra* note 17.

61. CHANGES IN DEATH PENALTY (2000).

62. BOHM, *supra* note 16.

63. Randa, *supra* note 17.

64. BOHM, *supra* note 16.

65. 408 U.S. 238 (1972).

death penalty. The *Furman case*,⁶⁶ *Woodson v. North Carolina*,⁶⁷ and *Edmund v. Florida*⁶⁸ illustrate the attitude of the court toward the death penalty. Juvenile offenders are not exempted from execution in the U. S. Although the United States of America is a signatory to an International treaty that bans the execution of juvenile offenders, the government entered a reservation clause that the U.S. would execute juvenile offenders found guilty of crimes that are punishable by the death penalty. Among juvenile offenders executed are Charles Rumbaugh and Curtis Harris who were both 17 years old at the time they committed their offenses for which they were executed on September 11, 1985 and July 21, 1993 respectively.⁶⁹ On December 11 2001, an execution took place in Georgia in the U.S. and since then several executions have taken place in other states within the U.S. The truth is that while capital punishment is in decline through most of the Western World, it is an expanding practice in the U.S.

VIII. GLOBAL ABOLITION OF THE DEATH PENALTY: RECENT TRENDS

There are many changes all over the world concerning the death penalty. These include the move towards the abolition of death penalties, a reduction in the number of capital offenses, a move towards making the death penalty more discretionary rather than mandatory, the number of executions being reduced, a move from public to private executions, ensuring more swift and painless methods of execution and the reintroduction of the death penalty in countries where it had been abolished.⁷⁰ Amnesty International welcomed a new legislation in China under which the Supreme Court would review all death penalty verdicts, but urged the authorities to abolish the death penalty once and for all.

Under the new legislation which came into effect on 1 January 2007, all death penalties handed down by provincial courts must be reviewed and ratified by the Supreme People's Court. Amnesty International has been urging China to accelerate reforms aimed at abolishing the death penalty. According to a source it is hoped that this is a step towards full abolition of the death penalty.⁷¹

The 21st century global trend is towards the abolition of the death penalty. In recent times, there are more abolitionist countries that do not contemplate the death

66. *Id.*

67. 428 U.S. 280 (1976).

68. 458 U.S. 782 (1982).

69. AMNESTY INTERNATIONAL, *supra* note 52.

70. F. Harting, *Trends in the Use of Capital Punishment*, 284 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE (1952), at 8-19.

71. Amnesty International Press Release, AI Index: ASA 17/057/2006 (31 October 2006).

penalty in their laws either for any crimes (whether ordinary crimes, crimes in wartime or other exceptional circumstances), or for ordinary crimes.⁷² The Jordanian Government's decision to abolish the death penalty for some crimes has been considered a positive but insufficient step. According to the International Federation for Human Rights (FIDH) as it released the preliminary findings of a fact-finding mission that visited the country in July 2006, Jordanian Parliament started deliberations over the proposed amendments in August 2006.⁷³ Among the nations of the western world, the U.S. stands on top of the list of countries that still retain the death penalty for crimes and still execute juvenile offenders.

The United Nations has now classified countries in relation to their position on the death penalty. Countries are classified as abolitionist, abolitionist *de facto* or retentionist. Countries that do not contemplate the death penalty in their laws, either for any crimes—in wartime or other exceptional circumstance—or for ordinary crimes only are called abolitionist. Countries that retain the death penalty for ordinary crimes but have not executed any one during the last ten years or more are considered abolitionist *de facto*. All other countries are defined as retentionist meaning that the death penalty is in force and executions do take place, although in some retentionist countries such executions might be rare. Nigeria and the U.S. top the list of the retentionist countries. Kenya on the other hand is an abolitionist *de facto* country. Although no known execution has taken place in the country since 1987, the death sentence remains formerly in the statute book and today more than a thousand are currently under the sentence of death.⁷³

The increase in the number of organizations advocating for the total abolition of the death penalty is another recent trend. Many human rights organizations in both the U.S. and Nigeria have condemned the death penalty as a barbaric and ruthless form of punishment. Topping the list of such organization is Amnesty International in all the countries of the world and several other national and local organizations.

The method of campaigns used by the various organizations has been increased with diverse innovations to catch the attention of the government and mobilize the public. These include publications and press releases.⁷⁴ The press releases give information to the public about the actions of the governments of various countries on the death penalty and information about executions that have taken place, the number of executions, pending executions and many issues about the death penalty. According

72. Jordan: *Abolition of the Death Penalty for Some Crimes Symbolic at Best*, FIDH Press Release, 16 August 2006.

73. Oduol, *supra* note 36.

74. AMNESTY INTERNATIONAL, *supra* note 30.

to one such report by Amnesty International⁷⁵ a total of 106 countries have abolished the death penalty in law and practice. Eighty-six countries including the U.S. and Nigeria retain the use of the death penalty. Human right activist have joined in the global trend and glamour to abolish the death penalty.

Another trend in the global abolition of the death penalty includes non-violent direct actions by different organizations, including peaceful demonstrations. The Abolitionist Action Committee, an ad-hoc group of individuals committed to visible and effective public education for alternative to the death penalty planned a peaceful demonstration on January 17, 2002.⁷⁶ Other activities that are organized in the abolition move include fasting and vigils⁷⁷ encouraging persons to be walking billboards for the abolition of the death penalty by wearing t-shirts, sweatshirts or buttons that advocate the abolition of the death penalty.⁷⁸ In the recent wake of terrorism worldwide, some countries have reacted by enacting Anti-Terrorism Laws with offenders facing a death penalty. In the United States, the September 11 incident led Congress to pass the Anti-terrorism Act.⁷⁹

Amazingly, with the increase in the number of countries abolishing the death penalty globally, a few countries are reintroducing it while some are adding it to the list of offenses that already have the death penalty. In addition, some countries are still contemplating and debating the issue. According to Uschanova, Britain remains the only country in Western Europe where a return to the death penalty is regularly seriously proposed.⁸⁰

In Nigeria, the introduction of Sharia law in certain parts of northern Nigeria is another trend in the global move to abolish the death penalty. A brief historical discussion is necessary for a proper understanding of the history of the Penal Code in Nigeria was greatly influenced by Islamic Law. The introduction of Sharia into northern Nigeria is not new or strange. What can be said to be new is the adoption of the Sharia as the foundation of governance and its expansion into the criminal justice system. The principles in the Sharia Laws are deeply rooted in the religion of Islam. Islamic Law in Nigeria has its origin from Saudi Arabia. It was imported into northern Nigeria through the early movement of spreading the religion beyond the frontiers of Saudi Arabia. According to Johnston, the arrival of Islamic law in northern Nigeria took place in the middle of the 14th century. The strongest and most distinguishing

75. THE DEATH PENALTY IN THE WORLD CAPITAL PUNISHMENT WORLDWIDE: FACTS AND FIGURES (June 1999), <<http://amnesty.it/pdm/world.html>>

76. See, Abolitionist Action Committee, at <<http://www.abolition.org>>

77. *Id.*

78. See, Abolition Wear, at <<http://www.cuadp.org/abolitionwear.html>>

79. See, Anti-terrorism and Effective Death Penalty Act, <<http://www.ftip.dk/uk/art-02.html>>

80. T.P. USCHANOV, CAPITAL PUNISHMENT IN MODERN BRITISH LAW AND CULTURE (N.D.).

character of Islamic Law is that it is essentially religious, as against other types of laws that are mainly secular. It is regarded as divinely inspired and consequently immutable. According to Al-Mawardi, crimes under Islamic Law are legal prohibitions imposed by God and punished with the penalties of *hadd* or *tazir*.⁸¹ Unlike Customary Law, it does not derive its validity from popular acceptance. The West African Court of Appeal in *Ayoola & ors v. Folawiyo & ors*⁸² held that customary law and Islamic law "mean the same thing." However, Karibi-Whyte, Justice of the Supreme Court, disagreed with this equation, arguing that equating Mohammedan law with customary law is demonstrably wrong and clearly misleading; that the two systems of law are not indistinguishably similar.⁸³

Under strict Islamic legal theory, offenses must be defined and the punishment stipulated. Islamic law punishment for criminal offenses is one of the most controversial elements of Shari'a law, and the introduction of Sharia law into some northern states in Nigeria has created a lot of controversy, led to religious disturbances resulting in many deaths. Most relevant to this article is the death penalty aspect of the law that has led to the intervention by many organizations on the issue of human rights and the death penalty.

About twelve States in the northern part of Nigeria have adopted Sharia law, with some similarities in the provisions of the laws in the different states that have adopted it. Zamfara state was the first state to adopt the Sharia Penal Code Law in the year 2000,⁸⁴ followed by Jigawa, Kebbi and Kano States in the same year. Bauchi, Bornu, Gombe, Katsina, Niger, Yobe States adopted the Law in 2001, while Kaduna and Sokoto did so in 2002. In section 93 of the Zamfara Sharia Code, the death penalty⁸⁵ is listed as one of the punishments to which offenders are liable. There is however a special provision for juvenile offenders. A juvenile offender who has reached his seventeenth year of age, but has not reached his eighteenth yet may have his death sentence reviewed.⁸⁶ Several offenses attract a penalty of death under Sharia law. Adultery and fornication-known as *zina*,⁸⁷ rape,⁸⁸ sodomy,⁸⁹ incest,⁹⁰ lesbianism

81. AL-MAWARDI, LAWS OF THE MIDDLE EAST 226 (1955).

82. (1942) 8 W.A.C.A. 39.

83. See KARIBI-WHYTE, HISTORY AND SOURCES OF NIGERIA CRIMINAL LAW (1993).

84. Zamfara State of Nigeria, Sharia Penal Code Law (Zamfara State Law No. 10/2000).

85. Referred to as Qatl.

86. Zamfara State of Nigeria, *supra* note 84, § 95.

87. *Id.*, § 127.

88. *Id.*, § 129.

89. *Id.*, § 131.

90. *Id.*, § 133.

known as *sihaq*,⁹¹ robbery where death results, but property was not seized,⁹² and robbery where murder was committed and property was seized.⁹³

It is important to point out that in all the offenses except the last, the death penalty is stoning and the sexually related offenses only apply to women. In the last offense, the execution is by crucifixion. The introduction of Sharia law into some states in Northern Nigeria has resulted in religious upheaval in Nigeria. Coupled with this was the story of a woman sentenced to death under Sharia law in the Northern State of Sokoto for having been found guilty of premarital sex. The event was monitored by all international human right agencies and letters of appeal were sent to the Nigerian President. Human Rights Watch condemned the ruling of the Sharia court that sentenced Safiya Husaini Tungar-Tuder to death by stoning⁹⁴. The pregnant convict had her male partner set free for lack of sufficient evidence.⁹⁵ The cruelty of this sentence was enhanced because the convict was pregnant. There was an outcry that the sentence was against international law that strictly prohibits the imposition of the capital punishment on pregnant women. With the outcry from many organizations within and outside Nigeria and keen international interest shown in the case, the convict was released by a court of law. This case was the second sexual case that brought the Sharia law into international headlines. In September 2000, the Sharia court in Zamfara State sentenced another teenage girl to 180 lashes for premarital sex.

Another noticeable trend involving the death penalty is the recent debate in some countries to resuscitate the death penalty that had for years lain dormant in those countries. Oduol gave the example of Guatemala and the Philippines that both adopted death by lethal injection of those on death row after the officials of both countries visited the U.S. to witness how it was done. This is certainly a dangerous trend.⁹⁶ Until now, opponents of the death penalty appeared to be gaining ground. This is because many countries of the world have abolished the death penalty either in whole or in part. These countries include Mauritius, Moldavia, South Africa, and Spain. The new Constitution of the Ivory Coast included a clause on the abolition of death penalty.⁹⁷ There appear to be a set back for the abolitionists. This is because of the introduction of the death penalty in some countries. For example, the Gambia reinstated the death

91. *Id.*, § 134.

92. *Id.*, § 153.

93. *Id.*, § 153(d).

94. See, HUMAN RIGHTS WATCH, NIGERIA: WOMAN SENTENCES TO DEATH UNDER SHARIA (2001). See also, Human Rights Watch, Reverse - Womans Sentence of Death by Stoning <www.hrw.org/press/2001/10/nigeria1023.html>

95. *Id.*

96. Oduol, *supra* note 36.

97. *Id.*

penalty that had been abolished since 1988 and shortly after this Zimbabwe also hanged a prisoner. This was significant because it was Zimbabwe's first execution of a condemned prisoner since 1988.⁹⁸ In Kenya, there are fears that Kenya might be eager to go Zimbabwe's way. In the write up by Oduol, the last execution in Kenya was carried out in 1987, but in 1996 there were debates urging the resuscitation of the death penalty.⁹⁹

IX. INTERNATIONAL AND NATIONAL EFFORTS TOWARDS ABOLITION

Members of the international community have shown a sustained interest in the issue of the death penalty. Human right groups, the United Nations and many non-governmental organizations have contributed in diverse ways to the abolition movement of the death penalty. In the United Nations, resolutions have been passed to limit the application of the death penalty. In 1971, the General Assembly passed Resolution 2857 (XXVI). In order to guarantee fully the Right to life, provided for in Article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offenses for which capital punishment in all countries.¹⁰⁰ The United Nations Convention on the Rights of the Child (CRC)¹⁰¹ prohibits execution of anyone who is under the age of eighteen at the time of crime. Nigeria ratified this instrument on 19 April 1991. It has now been domesticated into a national law and the Children's Rights Act of 2003. The United States is yet to ratify it. This is not the only international instrument prohibiting imposing death penalties on juvenile offenders. Another international instrument is the International Covenant on Civil and Political Rights (ICCPR).¹⁰² Both Nigeria and the United States ratified the treaty however; the United States reserved the right to execute juvenile offenders. Other legal international instruments relevant to the efforts towards abolition of death penalty globally include the following: The American Convention on Human Rights to Abolish the Death Penalty;¹⁰³ Protocol No 6 of the European Convention on Human Rights concerning the Abolition of Death Penalty; the Geneva Convention relative to the protection of Civilian Persons in Time of War of August 1949;¹⁰⁴ Protocol No. 1 of

98. *Id.*

99. *Id.*

100. U.N. Res. 2857 (XXVI).

101. U.N.G.A. Res. 44/25 of 20 November 1989, art. 37(A).

102. U.N.G.A. Res. 2200A (XXI) of 16 December 1966, art. 6(5).

103. Art. 4(5).

104. Fourth Geneva Convention, art. 68.

1977 Additional to the Geneva Convention of 1949;¹⁰⁵ Protocol II of 1977 Additional to the Geneva Conventions of 1949;¹⁰⁶ the African Charter on Human Rights and Safeguards Guaranteeing the Protection of the Right of those Facing the Death Penalty.¹⁰⁷ All the above instruments are international and national treaties binding on all state parties. Any state, which becomes a party to one or another without entering any reservation to a particular article, is bound under international law to respect the prohibition of use of the death penalty against juvenile offenders. In case of the Safeguard Guaranteeing Protection of the Rights of those facing the Death Penalty, it is not a legally binding instrument. The UN General Assembly without a vote, a sign of a strong consensus among nations that the provisions should be observed endorsed it.¹⁰⁸

X. MYTHS AND ARGUMENTS ON DEATH PENALTY

There are arguments for and against the imposition of the death penalty. There are also myths and religious beliefs held in different countries. The effect is that while there are global efforts to abolish death penalty, there are some groups of people still pressing for the enlargement of its already deemed wide scope.

A. Arguments Against

It is argued that Death Penalty is irreversible; therefore there are higher chances of innocent persons being executed. It is said that where an error is found in the identity of the accused person, once execution has been carried out, the innocent person can never be brought back to life. This is illustrated by several dramatic pre-execution releases, where the innocence of the convict is proved before the execution. In Nigeria, the case of *Nosiru Bella v. State*¹⁰⁹ illustrates this argument. The accused person, who had been sentenced to death by the High Court, was executed, while the appeal was pending before the Court of Appeal. The death penalty is also argued to be an expensive method of punishment. For example, in Texas, taxpayers are said to spend an average of \$2.3 Million on each execution while lifetime incarceration costs from \$800,000 to

105. Art. 77(5).

106. Art. 6(4).

107. UN Economic and Social Council Resolution 1954/50 adopted on 25 May 1984 and endorsed by the UN General Assembly in resolution 39/118 adopted without a vote on 14 December 1984.

108. AMNESTY INTERNATIONAL, *supra* note 52.

109. (1986) 5 N.W.L.R. 828.

\$1 Million. It is argued that the exorbitant cost of execution takes away resources for other community interests such as hospitals, public safety and jobs.¹¹⁰

Another line of argument contends that the long interval between the death sentence and actual execution is unjust. The time lag varies from two to over seventeen years. It is argued that the psychological suffering caused by foreknowledge of death, an inherent expectation of death, defies quantitative description. A criminologist who conducted intensive studies on death row prisoners concluded that they often lose all individual personality traits.¹¹¹ Byron Parker was executed in Georgia on the 11th of December 2001. He was sentenced to death in 1984 and has been on death row for seventeen years.¹¹² It has also been recorded that during public execution, other crimes are committed. In England, it was recorded that at public execution, pick pocketing, rioting and similar offences for which the death penalty was imposed are committed. The argument therefore is that death penalty is not a unique deterrence.¹¹³

The death penalty is argued to be morally wrong and barbaric. It is said to be an assault against a person already restrained by the state.¹¹⁴ The physical pain caused by electrocution, gassing and hanging has been argued as being unquantifiable. According to an Amnesty International report, prisoners undergo burning of the flesh during electrocution, asphyxiation during gassing, tearing of the spinal cord during hanging, respiratory paralysis during poisoning and destruction of vital organs or the central nervous system during shooting.¹¹⁵ It was further reported that at a Florida execution in 1990, a malfunction of the electric chair equipment caused flames to leap six inches above the condemned man's head each time the current was turned on. In 1992, eleven minutes elapsed before a prisoner died after he reacted to the drugs used in the lethal injection used in his execution in Oklahoma. It is also argued that the death penalty does not accord with the civilization of the 21st century and global movement towards abolition of death penalty.

Several critics of the death penalty have argued that it does not advance justice, particularly since the taking of human life cannot be regarded as justice. Coretta Scot King, whose husband and mother-in-law were murdered, said:

As one whose husband and mother-in-law has both died the victim of murder, I stand firmly and unequivocally opposed to death penalty.

110. AMNESTY INTERNATIONAL, *supra* note 52.

111. Amnesty International, Cruel and Degrading Punishment, <<http://www.amnesty-usa.org/abolish/cruellanddegrading.html>>

112. AMNESTY INTERNATIONAL, *supra* note 30.

113. LAST MILE TOURS, *supra* note 6.

114. AMNESTY INTERNATIONAL, *supra* note 52.

115. *Id.*

An evil deed is not redeemed by an evil deed of retaliation. Justice is never advanced in the taking of a human life. Morality is never upheld by legalized murder.¹¹⁶

The religious argument against the death penalty is that the scripture preaches forgiveness and that the argument of "an eye for an eye" is an Old Testament argument. It was further argued that the first recorded murder by Cain of his brother in the bible did not result in the killing of Cain but another punishment of banishment and blacklisting of Cain and the name became anathema. Regarding the use of DNA testing in order to connect an alleged murderer to a crime, an expert on DNA argues that the test is not infallible.¹¹⁷ Genetic tests are a powerful tool if everything is done correctly. However, it is argued that the human element should be considered and human beings are not perfect.¹¹⁸

B. Arguments in Favor

The supporters of the death penalty have argued that the mosaic rule in the scripture supports the death penalty. "An eye for an eye," which is a retributive theory, should therefore be invoked. Others argue that the death penalty offers a sense of finality and it is carried out relatively quickly. It is further said to offer both, specific and general deterring effects. The death penalty is argued to offer a form of restitution to the victim or to the victim's family. It is argued that death penalty is the most severe form of punishment for the gravest crimes. Moreover, with recent technology, the element of error and execution of innocent prisoners is removed. The Kenya government justifies the use of the death penalty on the basis of international law. It is said that International Law does not know any legal norm or custom that stipulates that the legitimate administration of death penalty after the due process of law had been followed amounts to a breach of human rights.¹¹⁹

116. *Id.*

117. Death Penalty News and Update: Death Penalty and Execution News (2001), <<http://www.smu.edu/~deathpen>>

118. *Id.*

119. Oduol, *supra* note 36.

C. Religious Beliefs

Religious groups have expressed different views on the issue of the death penalty as a form of punishment.¹²⁰ According to the Secretary General of the Supreme Council of Kenya Muslims, the application of the penalty is justified if after a proper trial, the accused is convicted. He stated that the Koranic view is that God ordains life and everyone who commits murder must be punished by death. His views differ radically from those of Usha Sha, Convenor of the women's wing of the Hindu Council who says that the Hindus are completely opposed to the death penalty. The Head of the Catholic Church in Kenya is also of the view that capital punishment should be abolished because as he says "Nobody has a right to take another person's life."¹²¹

XI. CONCLUSION: A PROGRESSIVE MOVE

The United States and Nigeria have continued to retain the death penalty in their laws. The United States is perceived as a democratic developed country that had given direction to other countries in many ways. The United States is recognized as a progressive force for human rights and a pacesetter on many political issues. However, the stand taken by the United States on the issue of the death penalty largely negates all the claims and actions which the country has espoused in favor of human rights. The United States declared the week starting on the 9th of December 2001 as "Human Rights Week." Human rights organizations expressed concern that even during that very week, two executions took place in two States in the United States. The fact that this outdated punishment undermines the United States claims to be a progressive force for human rights should propel the government to declare a Federal moratorium on capital punishment.

Nigeria returned to democratic rule after decades of military dictatorship. During the military administration, many draconian laws were enacted with harsh penalties. However, with the emergence to power of a democratic government, many of these laws have been repealed. It is my contention that additional steps should be taken to abolish the death penalty. Already the offences that attract death penalties have drastically reduced, and the global move is towards the total abolition of this form of punishment. It is noted that in addition to the reduction in the number of offences attracting the death penalty, the mode of execution has improved with the abolition of death by firing squads. However, the introduction of Sharia Law in Nigeria appears to

120. *Id.*
121. *Id.*

Museveni was determined to stay at the helm of power. Thus, in assessing the contribution of the 2006 elections to the democratization process in Uganda, there is a need to look back at the past twenty years of Museveni's rule, to examine the change from the Movement to multiparty politics, and to gauge how these changes influenced the conduct and outcomes of the 2006 elections. Most importantly we need to inquire whether or not these elections created opportunities for enduring peace and stability in the country.

A retrospective view of Uganda's recent political landscape indicates that the country has had what can only be described as "exceptional politics." While the end of the cold war and the fall of the Iron Curtain heralded a period of transition to democracy in previously authoritarian regimes, especially in Africa, Latin America, Eastern Europe and South Asia, the Ugandan leaders skirted the wave of democratization. By creating the "Movement" or "no-party system," Museveni was able to dodge local and international pressures for a fully functional multiparty democracy.¹ The "no-party system" was used to convince the donor countries as well as multilateral lending organizations such as the World Bank that it was an alternative to both multiparty and one party democracies.² The basis of the no party system was that candidates stand for elections as individuals rather than as agents of political parties.

Uganda achieved independence from the British colonial rulers in 1962 under a multiparty dispensation. The British were not successful in forging a national identity among the colonized peoples, to the extent that ethnic cleavages and conflicts dominated politics, even though the country was largely peaceful during the latter part of the colonial era. However, most of the post-colonial period in Uganda has been dogged by persistent conflicts, dictatorial regimes, economic hardships and the near-collapse of the state. The immediate post-independence "honey-moon" with multiparty democracy was short-lived. Given that then Prime Minister, Milton Obote ousted the non-executive President Edward Mutesa in 1966, the rest of the period up to 1970 was characterized by the harsh reality of Obote suspending elections that were originally due in 1967. Idi Amin's military coup in 1971—ostensibly launched to restore "democratic rule" in the country—followed. As it ironically turned out, Idi Amin's rule (1971 to 1979) was to be the one of the most brutal and cruel regimes in Africa. The post-Amin's period from 1979 to 1985 was one of unstable regimes that lacked either effective control or sustainable economic programs. Moreover, the 1980 general election that returned Milton Obote to power was not only controversial, the results

1. E.D. Apter, *Democracy for Uganda: A Case for Comparison*, DAEDALUS (1995).
2. Most World Bank papers on Uganda credit the Movement as an innovative method of governance.

were fraudulent and seriously contested. This sparked the five-year bloody guerilla war that lasted from 1981 to 1985 led by Yoweri Museveni, which left thousands dead. Against the above history, there was a collective sigh of relief when the NRM eventually assumed power and introduced a new system of governance that came to be known as the no-party system. However, many critics questioned the claims by the regime that the Movement was an "all-inclusive, non-partisan, broad-based" organization, conforming to democratic principles such as participatory democracy, open access to all positions, individual merit as a basis for political competition, transparency and accountability.³

II. BACKGROUND TO STATE COLLAPSE AND THE PERSISTENCE OF CONFLICTS

On ascending to power in 1986, Museveni promised a regime of "fundamental change" that would include democratic governance, effective representation, a better economic life for the ordinary Ugandans and free and fair elections among its benefits. Running the state through a "no-party" system saw Museveni unelected at the helm of power for ten years (1986 to 1996), while organizing other elections for representatives at various local levels that served to legitimize his regime. However, since the writing of a new national constitution in 1995, Uganda has had three presidential elections (in 1996, 2001 and 2006) which Museveni controversially won. At all these elections, most observers have consistently pointed out that the ground has never been level and fair for all the contestants pointing out particularly that the ruling party has not only been part of the state apparatus, funded by state resources for elections of its candidates, but also bending the rules of the polling in its favour. There is no doubt that the no-party system effectively undermined the practice of competitive party politics.

Most analysts acknowledge that the ramifications of state policies and programs undertaken in the 1980s in Uganda reflect the turbulent events the country suffered in the 1970s and 1980s due to bad political leaders.⁴ This had significant implications in

3. Article 70 of the Constitution. See, J.J. Barya, *Political Parties, the Movement and the Referendum on Political Systems, in NO-PARTY DEMOCRACY IN UGANDA* (J. Mugaju & J. Oloka-Onyango eds., 2000). See also, J. Oloka-Onyango & J. Mugaju, *Revisiting Multiparty versus Movement Debate, in NO-PARTY DEMOCRACY IN UGANDA* (J. Mugaju & J. Oloka-Onyango eds., 2000). For a detailed account on "Third Term" politics in Uganda, see J.A. Okuku, *Beyond Third Party Politics: Constitutional Reform and Democratic Governance in Uganda*, 11 EAST AFR. J. PEACE HUM. RIGHTS (2005).

4. P. Collier & S. Pradhan, *Economic Aspects of the Transition from Civil War, in DEVELOPING UGANDA* (Holger B. Hansen & Michael Twaddle eds, 1998); A. Southal, *Isolation and underdevelopment; Periphery and Centre, in DEVELOPING UGANDA* (Holger B. Hansen & Michael Twaddle eds, 1998); and A.E. Brett, *Neutralizing the Use of Force in Uganda: The Role of the Military in Politics*, 33 J. MODERN

terms of understanding the process of democratization. First of all, the process of democratization has to be understood within the framework of the macro-economic reforms undertaken by the NRM government commencing at the end of the 1980s. It is also connected with what has come to be known as the "era of recovery."⁵ Secondly it may be understood in terms of advancing the idea of "good governance."⁶ This implies that the democratization process is premised on returning government to the people and the people to government. But most importantly, this process may be seen in terms of rebuilding the institutions of state and mitigating conflicts. The literature on post-conflict recovery and rebuilding of the state reveals that, by 1986 both the Ugandan economy and society had collapsed.⁷ Collier notes that by 1986 when the NRM came to power, 7% of the population was displaced by conflicts, per capita income had declined by 40% since 1971, the stock of capital investment had greatly declined, contract enforcement had broken down, political and bureaucratic leadership had become opportunistic, and corruption was easily tolerated in public service.⁸ Above all, the system of trust had totally collapsed. While Museveni and his NRM have worked towards economic recovery they have however, presided over a country torn apart by violent conflicts for 20 years.

A. Elections, Conflict Management and Peace Building

Museveni's Uganda has had four fundamental problems connected to the management of political conflict. First, Museveni has had to deal with a fragile country torn apart by decades of conflict. Secondly, he has tried to use the army as a key actor in order to sustain himself in power. Reliance on the military has undermined the legitimate means of organizing competition for political power. In Uganda since 1966, the army has been, and remains the key arbiter in political conflicts. Thirdly, as a regime with an insufficient popular base, the NRM has used the state machinery to suppress legitimate opposition or even simple dissent. Fourthly "personal rule" in Uganda—especially under Museveni's regime—has been aided by cliquism and monolithic tendencies, the kind of regime where leaders keep their positions using the

AFR. STUD. (1995).

5. UGANDA'S RECOVERY: THE ROLE OF FARMS, FIRMS AND GOVERNMENT (R. Reinnika & P. Collier eds, 2001).

6. Brett, *supra* note 4; REGAN, *supra* note 4; and A. NSIBAMBI, *DECENTRALIZATION AND CIVIL SOCIETY: THE QUEST FOR GOOD GOVERNANCE IN UGANDA* (1995).

7. See e.g., M. Ottaway, *Building State Institutions in Collapsed States*, 33 DEVELOPMENT AND CHANGE (2002).

8. P. Collier, *The Challenge of Uganda's Reconstruction, 1986-1996* (Paper written for the World Bank, 1999), at 2. See also, Collier & Pradhan, *supra* note 4.

coercive state structures. These tendencies have reproduced authoritarianism and insurgency. Insurgencies have become a permanent threat to the prospects for democracy in Uganda.

It is often argued that nations achieve and sustain peace when ballots rather than bullets determine who leads the people. In Uganda, much of the country's history has been dominated by leaders who either through military *coups d'etat* or guerilla warfare have shot themselves into power. This negative legacy seems to have been a catalyst for insurgencies. During the time of Idi Amin in the 1970s the people of Lango and Acholi who dominated Obote's army witnessed untold suffering. This was despite the fact that both Obote and Amin originated from Northern Uganda. When Obote returned to power (from 1980 to 1985), the people of Buganda—in the area known as the Luwero Triangle where Museveni staged his guerilla war—suffered at the hands of his unruly soldiers.

When Museveni captured power in 1986, a new wave of insurgency erupted in the North and the East and later in the West. The Northern war (now in its 20th year) has been the longest in the country's history, yet it shows no signs of coming to an end.⁹ It has destroyed social infrastructure, undermined economic growth and retarded human development. People have lived in filthy camps, children have either been abducted or forced to sleep on streets (night commuting), school-going children have lost opportunities for education, avoidable disease and death have easily claimed innocent lives. While there has been relative peace and prosperity in most of the south of the country, there has correspondingly been misery and abject poverty in the north. National statistics show that while the national incidence of absolute poverty is at 40 percent, it is well over 70 percent in Northern Uganda. This, in addition to the high incidence of HIV/AIDS. It is estimated that the national rate of HIV/AIDS infection stands at 6 percent, but for most of northern and eastern Uganda the average is between 18 and 31 percent.¹⁰

Considering the above situation, some political observers have argued that Museveni's regime has created "two Ugandas." For example, it has been argued that, "For the last 20 years, being born in the North means one is literally condemned to poverty, no education, life in camps and ill-health."¹¹ This has created terrible hatred by the Northern people against the people of the South. An Acholi elder from the North

9. At the time of writing the government is involved in on-and-off negotiations with the Lord's Resistance Army (LRA) to bring an end to the war.

10. Filippo Cianta, *HIV Seroprevalence in Northern Uganda: Complex Relationship between AIDS and Conflict*, 4 J. MED. & PERSON (2002).

11. Alice Alaso, *We Need Equal Resource Distribution*, THE DAILY MONITOR, July 19, 2006;

at 23.

be an obstacle in the way of the progressive move towards the abolition of the death penalty in Nigeria.¹²²

It is however apt to state that in November 2003, the then Attorney General of the Federation inaugurated a National Study Group on the Death Penalty. According to the chairperson of the Study Group in the foreword of the report submitted, the study group was inaugurated at a time when there was great concern for improvement in the administration of Criminal Justice in Nigeria.¹²³ At the inauguration of the Study Group, the then Attorney General stated:

Can I say from the onset that the Federal Government of Nigeria has no position on the issue of whether or not to retain the death penalty in the laws of Nigeria. Government believes that ultimately the people of Nigeria must be given the opportunity to participate fully in the discussion on this issue ... The Federal Ministry of Justice welcomes multiplicity of discourse on death penalty grounded in different cultures and religions, and firmly believes that different visions contribute to our understanding of the varied and many issues involved.¹²⁴

Members of the group represent a varied range of interests including academia, religion, civil society, governmental justice agencies, National Human Rights Commission and the media. The mandate of the group was to review arguments for and against abolishing the Death Penalty; consult with all stakeholders, including accepting memoranda on the issue of Death Penalty; and produce a policy document to guide the Federal Government of Nigeria on the issue of Death Penalty.¹²⁵ On the policy options for the Federal Government of Nigeria, the National Study Group on the Death Penalty, advocated for an enhanced investment in the Justice Sector, noted the high number of inmates on death row and recommended that the sentences of these inmates should be commuted to life imprisonment. The Group recognizing that "a system that would take a life must first give justice" made a recommendation for an official moratorium on all

122. Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, Annex 44 U.N.Doc A/44/49 (1989) entered into force July 11, 1991.

123. See, Foreword by the Chairperson of the National Study Group on the Death Penalty, submitted to the Federal Government of Nigeria in October 2004.

124. Address of the Attorney General of the Federation at the inauguration ceremony of the National Study Group on the Death Penalty in November 2003.

125. *Id.*

executions until the Nigerian Criminal Justice can ensure fundamental fairness and due process in capital cases and minimize the risk that innocent people will be executed.¹²⁶ Within the context of Shariah Law, the National Study Group considered the moratorium option. It noted that Islam is a religion that does not confine itself to the preaching of faith alone. Shariah Law stands for equality and social justice to humanity. It stands for the restoration of social justice. The Report of the National Study Group was submitted to the Federal Government in October, 2004 and it is hoped that action will be taken soonest on the implementation of the recommendations of the Group.

Considering the arguments for and against the death penalty, both the United States and Nigeria should revisit the death penalty as a form of punishment. Looking at the theory of punishment and its efficacy, alternative and more humane methods of punishment should be considered. Changes in law and practice concerning the death penalty may cover a number of different issues. It may include new legislation abolishing the death penalty, restricting the scope as well as the ratification of international instruments that provide for abolition of the death penalty. Changes in practice may cover non-legislative measures with a significant new approach regarding the use of the death penalty. For example, while retaining the death penalty, countries may announce a moratorium on its application. Such changes might also include measures to commute death sentences. The cost of execution vis a vis other methods, the benefits of retaining death penalty, the efficacy especially in relation to other offences must be also addressed. Both the United States and Nigeria should consider comparable jurisdictions, terms of economy, values, the roles they play in the international sphere in reconsidering their stand on the death penalty. In revisiting the issue of death penalty as a form of punishment, an important consideration to take note of is the fact that countries where the death penalty has been totally abolished are not worse off than countries where it has been retained.

In addition, other factors that may possibly explain the continued high rate of particular offences in Nigeria and United States should be considered and addressed. The death penalty may not be the solution to the commission of these offences. Nigeria and the United States have to urgently consider the death penalty issue in the light of the protection of human rights. Until recently, bilateral relations between the two countries suffered a set back because the United States imposed numerous sanctions on Nigeria for "human right abuses." The return to democratic rule in Nigeria restored the relationship between the two. Nigeria plays a central role in the Economic Community of West African States (ECOWAS), it has participated in many international policies

126. The Report of the National Study Group on the Death Penalty submitted to the Federal Government of Nigeria in October 2004.

and taken the lead in articulating the views of developing nations on many issues. Nigeria should therefore take the bold steps that have been taken by some other African countries like South Africa and Ivory Coast in abolishing the death penalty. As members of the United Nations and several of its special and related agencies, the United States and Nigeria have a special obligation to abolish the death penalty.

There is still hope for the abolition of the death penalty in a majority of the countries of the world. The global move toward abolition of death penalty is a move in the right direction. The United States and Nigeria should not stand aloof and watch the world adopt progressive measures without them. Restricting the application of the death penalty in the two countries and taking steps to eradicate it completely are steps towards global peace for the United States and Nigeria.