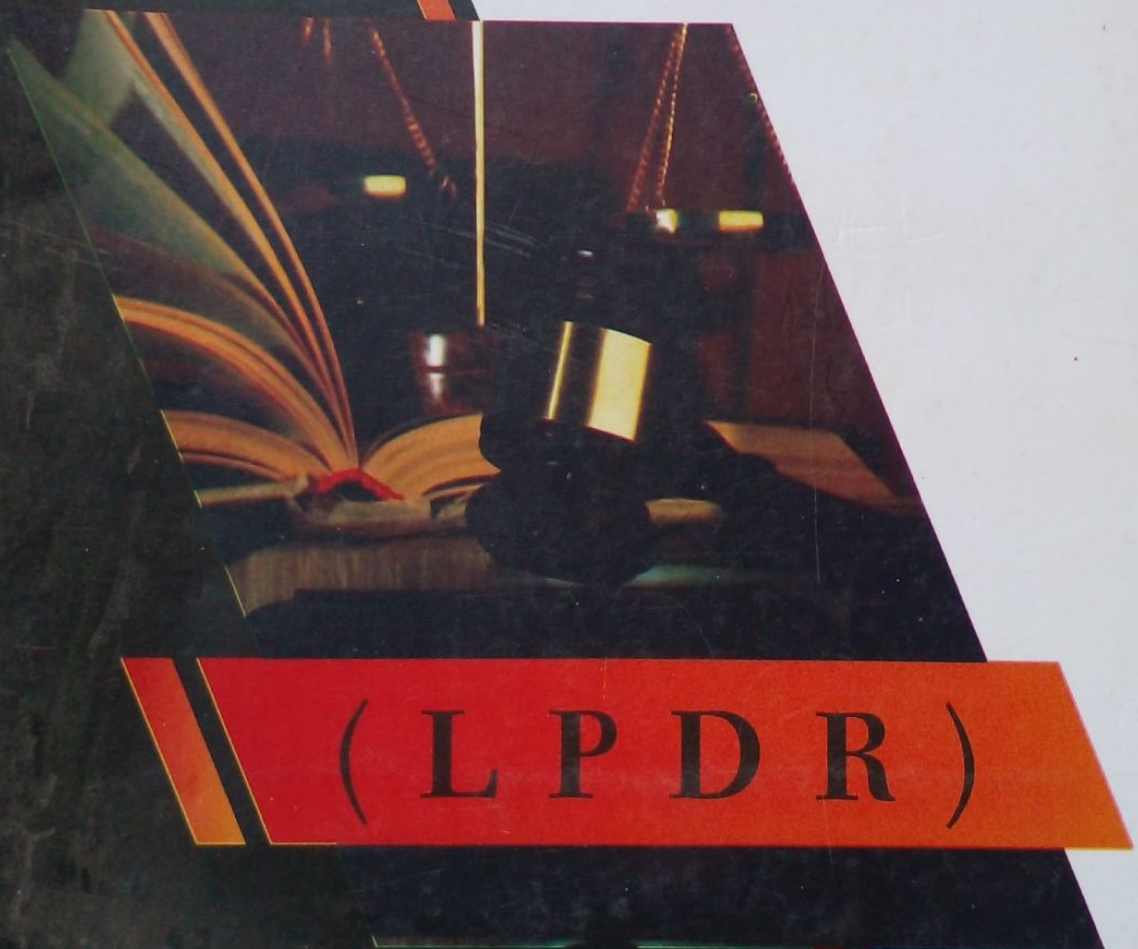
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CHAPTER FOURTEEN

Capital Punishment in Nigerian Courts: The Position of Abolitionists Vis-À-Vis Islamic Jurisprudence

By

*Ahmed Abiodun Muhammed-Mikaaeel**

ABSTRACT

Pronouncement of capital punishments have seen many light of the day to in the Nigerian Courts to the extent that a group of people (otherwise known as Abolitionists) have kicked against pronouncement of capital punishment with a view to abolish same. This made our courts to timeously intervene and confirmed the constitutionality of death sentence in our criminal law jurisprudence. The Islamic law jurisprudence is also firm on capital punishment in deserving cases. This study is essentially literature based with particular emphasis on the Constitution of the Federal Republic of Nigeria, 1999 As Amended as well as other relevant criminal law legislations. The study carefully examines the nature and types of capital offences under Common and Islamic Law. It goes further to x-ray the object of capital punishment and the attitude of courts to pronouncements in capital related offences vis-à-vis the Abolitionists campaign hinged on the Nigerian constitutional provision. The paper contends that under the Common Law, the attitudes of courts to pronouncement of capital punishment is positive such that once the offence has been successfully proved beyond reasonable doubt, death sentence is not negotiable. More so, under the Shariah, neither the Qadi nor the executioner can lessen or reduce the hadd punishment ordained by Allah (SWT). The study recommends practical independence of judiciary so that they can continue to stand firm against the Abolitionists in their mission to get rid of the much important capital punishment.

Key Words: Attitude, Abolitionists, Common Law, Capital Punishment, Death Sentence, Prouncement, Islamic Law, Shariah, Hadd and Qadi.

INTRODUCTION

The primary function of law in any society is to ensure justice and orderliness. Any society that is devoid of law will certainly resort to lawlessness which makes anarchy the order of the day. The Role of courts in complementing the aim of the law in ensuring justice and orderliness cannot be over emphasized.

In the time past, when law had not taken its full fledge, mankind indulged in several acts that were anathema to orderliness and justice in the society. Taking the life of

another with no just cause depicts nothing to them. These atrocious acts went to an extent in which the legislature[1] was prompted to make an amendment in order to cub the situation. The Constitution of the Federal Republic of Nigeria is very apposite when it says: "every person has a right to life, and no one can be deprived intentionally of his life."[2]

It follows that anyone who commits the offence of murder shall be sentenced to death.[3] However, adverting one mind to the comprehensiveness of Islamic Law, same is not silent on the foregoing issue as the Holy Qur'an[4], in unequivocal term provides that "and kill not anyone who Allah has forbidden, except for a just cause."[5]

It is thus amazing in the recent time that people are now having bellyful of audacity to even challenge the legality of the law[6] enacted to ensure sanctity of human life, justice and orderliness on earth. In fact, technicality is now being employed to attempting to abolish the capital punishment as defined in a written law.

Based on the foregoing, this research examines the nature of capital offences under the Common and Islamic Law vis-à-vis the object of capital punishment under the two laws. It also appraises the attitude of courts to pronouncement in capital related offences with a view to proffer recommendations.

NATURE AND TYPES OF COMMON LAW CAPITAL OFFENCES

Capital offences, as its name imply, are offences that, prima facie, attract capital punishment. They also mean offences punishable by death.[7] In the hierarchy of offences in criminal law, they are at apex in terms of their grievousness. The criminal has classified them as such because they are offences against the humanity. It imperative to note that when capital offences has been committed, the accused has done great injustice not only to the innocent soul of the victim whose blood cries to the heaven but also to the society whose social norms and values had been desecrated and broken by the criminal act complained of.[8]

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[1] This is the body empowered to make laws for the country. This is in contradistinction to the Islamic law principle which stipulates that Allah (SWT) is the Supreme Legislature.

[2] This is contained in Section 33(1) of the Constitution of the Federal Republic of Nigeria, 1999.

[3] See section 319 (1) of Criminal Code, Cap 77 Vol. V, LFN, 1990

[4] The Holy Quran which is the direct declarations and ordinances of Allah, the Law Giver.

[5] Q6:151

[6] This is evident in the contention of the Abolitionist to abolish capital punishment from our criminal law

[7] Leslie and Sheila (ed), *A Dictionary of Modern Legal Usage*, Second Edition, p. 130

[8] Godwin Josiah vs. the State (1985) 1 NWLR (Pt. 1) p. 125

The Nigerian constitution,[9] like other constitutions across the globe, strives to put an end to menace of the capital offences when it accorded the Nigerian citizen fundamental rights to life and dignity of human person. To this end, the legislature, having adverted their minds to the grievousness of theses offences, deemed it appropriate that in case of their commission, the capital punishment inevitably follows. These capital offences vary form one legal system to another. Invariably, what may be termed capital offences in the Asia might not be termed so in Africa and vice versa.[10] In Nigerian situation with respect to its common law, capital offences have been carefully defined by both the criminal and penal codes.[11] The combined provisions of the two (2) codes therefore pointed to the fact that there are main three capital offences that can be committed in Nigeria. They are, simply, murder,[12] armed robbery,[13] and treason.[14] However, the nature of these capital offences are such that before any conviction can be secured in their respect, they must be proved beyond reasonable doubt in that any iota of doubt must be resolved in favour of the accused.

OFFENCES OF MURDER, ARMED ROBBERY AND TREASON

Murder

Murder has been described as "to kill (a human being) unlawfully with malice aforethought or to kill wickedly, inhumanly, or barbarously."[15] It follows that anyone who murders or is guilty of murder is a murderer for this purpose.[16]

According to Sir Edward (Chief Justice) Coke, murder is when a man ... unlawfully killeth ...any reasonable creature in *rerumnatura* under the king's peace, with malice aforethought, either expressed by the party, or implied by law, so as the party wounded, or hurt, etc. die of the wound, or hurt, etc within a year and a day after

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[9] See the Constitution of the Federal Republic of Nigeria, 1999 As Amended, at Chapter (IV), sections 33 and 34 thereof.

[10] For instance, in Malaysia, drug trafficking offences attracts capital punishment while in Nigeria and some other African countries, it is not treated as a capital offence. Another case in point is the recent move in Nigeria to emulate other countries in the Asia to classify commission of corrupt offences as capital offences that attract capital punishment. This is yet to see the light of the day in Nigeria.

[11] Criminal code as far as Nigeria is concerned has its territorial limitation within the Southern part of Nigeria, while that of the Penal Code only operated in the Northern part of Nigeria.

[12] Section 319 of Criminal Code, Cap 77, Laws of the Federation of Nigeria 2004.

[13] Section 402, Criminal Code, Laws of the Federation of Nigeria 2004.

[14] Section 37 (Treason), 38 (instigation invasion of Nigeria) and 49A (Treachery) of Criminal Code, Laws of the Federation of Nigeria 2004. These are also applicable to the penal code at the applicable sections.

[15] Burchfield, E.W., *The English Oxford Dictionary*, Second Edition, (Clarendon Press, Oxford), p. 108

[16] *Ibid*

punishment cannot be imposed on the accused after his confession, unless it is made clear that he is not insane, or mentally troubled. If he is free from such deficiency, he should then be submitted to the legal punishment.[36] The best of mankind, Prophet Muhammad (SAW) corroborated the foregoing position of Abu Yusuf when he carefully said that "my Ummah[37] will be forgiven for crimes it commits under duress, in error or as a result of forgetfulness."[38]

It is therefore worthy of note that capital offences in Shariah are grievous in nature to the extent that Al-Mighty Allah (SWT) has divinely prescribed capital punishment i.e. death penalty in cases of their commission after being proved beyond reasonable doubt.

THE POSITION OF SHARIAH

Murder

Islamic law recognizes, guarantees and protects the sanctity of human life and *strict senso* disallows unjustifiable shedding of human blood by anybody whosoever. Allah (SWT) makes the law very explicit when He says: "Do not kill a soul which Allah has made sacred except through the due process of law."[39]

Thus, an offence of murder can be said to have been committed when a person has killed another innocent soul unlawfully with malice or when the culprit has killed another sacred soul wickedly, inhumanly, or barbarously.[40] According to Anafi Abubakar Garrba,[41] one of the justifiable circumstances where the life of a person may be taken without unlawful homicide being committed is a situation of an offence of murder. This is because the offence of murder is not only regarded as an offence against the deceased and Allah, but also an offence against the whole world.[42]

The foregoing underscores the basic fact that murder is a grievous act under Shariah which Allah (SWT) has regarded spreading of mischief in the land which offence is bitterly proscribed pursuant to various Ordinances in the Holy Qur'an.

There are established legal sanctions[43] for offence of murder under Shariah which include retaliation, (Qisas), Blood money (Diya), expiation (Kaffara), and spiritual consequences also follows.[44] In view of the topic under reference, major concern here

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[36]Abdur Rahman, I.D., *Shariah the Islamic Law*, p.227

[37] This refers to Muslim Community across the globe.

[38]Abdur Rahman, I.D., *Shariah the Islamic Law*, p.228

[39] Q17:33

[40]Anafi, A.G., 'The Punishment for Unlawful Homicide: A Comparative Analysis of the Common and Islamic Laws' *Al-Maslaha (Journal of Law and Religion)*, Volume 3, 2004-2206, p. 157.

[41]*Ibid*

[42] Q5:32

[43] Oba, A.A., 'Rethinking the Law of Homicide: A Shariah Perspective', *Essay in Honour of Professor C.O. Okonwo (SAN)*, (Porthacrourt: Jite Books, 2000) edited by E.S. Nwachueet al, p. 04

[44] Though this is not the concern of Islamic law or the State but between the culprit and Allah (SWT), Our Creator.

is place on the retaliation (Qisas) as consequence of offence of murder under Shariah. The word 'Qisas', in Shariah parlance, means retaliation. It is an Arabic word which literally means he cut or he followed his track in pursuit, and it comes therefore to mean Law of Equality for the murder already committed[45]. The rationale for the doctrine of retaliation in Shariah is to the effect that treatment of murderer should be the same as the horrible act. For this, Allah says in the Glorious Qur'an:"O you who believe! The Law of equality is prescribed to you in cases of murder ... whoever exceeds the limits of Allah shall be in grave penalty."[46]

In another verse of the same Qur'an Allah (SWT) further declares in corroboration thus: "We ordained therein for them: life for life ...."[47]

It is therefore important to note that Islamic Jurists are having difference of opinion concerning the mode of punishment of Qasas. While Hanafis and Hambalis are of the view that the criminal should be killed by sword whether or not the criminal employed the same method in killing the deceased; the Malikis, Shafi's and Zahiri's opined that the murderer should be put to death in the same manner he has killed the victim.[48] However, adverting one's mind to the leniency of Shariah, the easy and fast method of execution should be adopted in order to void suffering of pain as much as possible by the culprit.[49]

Apostasy (AR-RIDDAH)

Another capital offence under Shariah is Apostasy (Ar-Riddah). Ar-Ridaah means rejection of Islam in favour of any other religion either through an action or words of mouth. Thus, apostacy puts an end to one's adherence to Islam. In Islamic legal system, the act of apostacy is a very serious one to the extent that Allah (SWT) has prescribed capital punishment[50] for it. The acts that constitutes apostacy may be summarized thus:[51]

a) The rejection of the fundamental principles of faith such as Iman i.e. faith in the existence of Allah (SWT) or in the Messengership of the Prophet Muhammad (SAW);
b) The rejection of the belief in Qur'an, the message contained therein, the Day of Resurrection, Reward and Punishment of Allah (SWT);
c) The rejection of the obligatory ritual practices such as Salat (prayer), Zakat (giving of the poor-rate), Siyam (fasting in the month of Ramadan), and Hajj (pilgrimage);
d) And imitation of the practices of non-Muslim in their prayers, etc.

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[45] Abdur Rahman, I.D., *Shariah the Islamic Law*, p. 232
[46] Q2:178
[47] Q5:48
[48] El-Awa, M.S., *Punishment in Islamic Law*, (Indianapolis: American Trust Publication, 1993), p. 72
[49] For instance, execution of death sentence may therefore be carried out by gun. See Bambale, Y.Y., *Crimes and Punishments under Islamic Law*, (Mathous Land Books, Second Edition) p. 73
[50] Abdul-Qadir, Z., *The Exegesis of Legislative Verse in the Holy Quran and Traditions*, p. 105
[51] Al-Ajuz, A.M., al-Din, *Manahijal-Shariah al-Islamiyyah*, (Beirut, 1969), Vol. 1, p. 105.

The offence of apostasy is well established in the Holy Qur'an and in the traditions of the Prophet (SAW). The Qur'an says: "How shall Allah give those who reject faith after they accepted it and bore witness that the Apostle was true and clear signs and come unto them. But Allah guides not the unjust of such the reward is that on them rests the curse of Allah, of His Apostle and of all mankind in that they dwell; nor will their penalty be lightened, nor respite be their lot, except those that repent (even) after that and make amends: for verily, Allah is oft-forgiving, Most Merciful "[52]However, the punishment for apostacy is expressly provided for in the Sunnah of the Prophet (SAW) when he said: "Whoever changes his religion (from Islam to anything else) brings to an end his life."[53]

It follows that all the school of thoughts in Islamic jurisprudence unanimously agreed upon the punishment by death in cases of commission of the offence of apostacy. It must therefore be noted that in a situation where one is forced to pronounce a statement that amounts to apostacy while his heart is satisfied with Iman (faith), the issue of death penalty would not arise. This is because, Allah warns in the Holy Qur'an thus: "Anyone who after accepting faith in Allah, alters unbelief, except under compulsion, his heart remaining firm in faith; but such as open their breast to unbelief, on them is wrath of Allah and theirs will be dreadful penalty."[54]

The issue repentance is also worth of note before infliction of punishment in cases of apostasy. On this issue, the jurists are not unanimous.[55] Al-AwaZa'I and Al-Layth opined that he should be given the opportunity to repent and if he dies, he is discharged. But others said, he is not given the chance.[56] However, this only applies in the case of a Muslim who blasphemes.[57]

Therefore, in Islamic jurisprudence, the offence of apostacy can be likened to the situation of Al-firar Min Al-Zahf i.e. running away from the battle field in Jihad. This act is frown at by Allah (SWT) and ordained in respect of it that:"O you who believe! When you meet the unbelievers in hostile way, never turn your back to them. If anyone of you do turn his back to them on such a day – unless it be in a stratagem of war, or to retreat a troop (of his own) – he draws on himself the wrath of Allah, and his abode is hell, an evil refuge indeed."[58]

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[52] Q3:86-89; Also, Q2:161-162.

[53] Al-Bukhari.

[54] Q16:106.

[55] Al-Amir, *Subul al-Salam Shariah Bulugh al-Maram*, (Dar Ihya' al Turath al-'Arabi, Beirut, 1960), Vo. III, p. 266

[56] *Ibid*

[57] In the case of a (Dhimi) non-Muslim who blasphemes, the majority of the Ulamas held the view that he should be warned only without execution. See Al-Amir, *Subul al-Salam Shariah Bulugh al-Maram*, p. 266.

[58] Q8:15-16.

Adultery (AZ-ZINA)

In legal term, Zina means connection or insertion of male and female sexual organs between those who are not legally married.[59] It is an unlawful sexual intercourse between a man and a woman who are not legally married to each other. Islamic scholars have preferred various definition for the term Zina in Islamic jurisprudence. Maliki School defined it as the entry of male organ into the frontal sexual part or in the rectum of a woman or a man without legal right or any doubt of it being legal.[60]Hanafi School, on their part, defined Zina as sexual intercourse of a man and a woman who is neither his wife nor his slave girl nor is there any valid reason to believe that the sexual act was committed under apprehension that a woman was his wife or his slave girl.[61]Shafi'i defined Zina as the insertion of a male organ into a female sexual organ.[62]

Ruud Peters,[63] explained Zina as follows:"whoever, being a man and a woman fully responsible, has sexual intercourse through the genital of a person over whom he has no sexual rights and in the circumstances in which no doubt exists as to the illegality of the fact, is guilty of offence of Zina."[64]

It is therefore to be noted that Islam does not only prohibits Zina but also sees it as an act which opens the gate for many other shameful or humiliating acts which destroy the basis of family thereby leading to quarrels and murder, ruin reputation and property, and spread numerous diseases. No wonder the Qur'an says: "And come not near to the unlawful sexual intercourse. Verily it is a Fahisah (i.e. anything that transgresses limit), and an evil way (that leads one to Hell unless Allah forgives him)."[65]

The Prophet (SAW) also instructed the Muslims in most of his traditions never to go near Zina. For instance, he was reported to have cautioned that even a mere look at strange woman (in a passionate look) is also a sin.[66] In another tradition, the Prophet (SAW) posited that: "There is no sin after 'association' greater in the eyes of Allah than a drop of semen which a man places in the womb which is not lawful for him."[67]

The offence of Zina is of two (2) folds, viz: Adultery – the one committed by a married person; and fornication – the one committed by unmarried person. An unmarried person, for this purpose, is defined as a free, matured person who has not

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[59] Mohammed, N.U., 'Taming the Beast of Zina', *Al-Maslaha*, p.236.
[60] *Ibid*
[61] *Ibid*
[62] *Ibid*
[63] Ruud, P., *Islamic Criminal Law in Nigeria*, p. 62.
[64] Q17:32
[65] Q17:32
[66] Mohammed N.U., 'Taming the Beast of Zina', *Al-Maslaha*, pp. 240-241
[67] *Ibid*

consummated any valid marriage.[68] It is important to note that mere penetration is sufficient to constitute the sexual intercourse necessary to the offence of Zina. Also, mere seeing a man and a woman on top of each other does not mean they have committed the crime of Zina. Likewise, seeing a man and a woman naked, standing, sitting or on top of each other does not indicate the commission of Zina.

More so, the fact that a person has committed Zina is not an end in itself but a means to an end in that there are conditions precedents to be met. Thus, the hadd punishment of Zina is inflicted provided the following conditions are met:[69]

e. The offender should be an adult male or female
f. It should be committed or done voluntarily
g. The adulterer/fornicator must be a Muslim
h. He/she should be a free person and not a slave
i. The adulterer should not only have been legally married but must also have consummated the marriage with his wife[70]
j. The hadd punishment is applicable to non-Muslim who voluntarily requests for it.

The punishments of Zina are of two (2) types of: (a) flogging and exile[71]; and (b) flogging and stoning to death (Rajm).[72] It is important to note that the punishment of Rajm is valid and still subsisting under Shariah notwithstanding the arguments of some unscrupulous scholars that the punishment of Rajm (stoning to death) is not justifiable because the Qur'an is silent on same. The foregoing made Caliph Umar to posit thus: "I am afraid that after a long time has passed, people may say: 'we do not find the verse of Rajm (stoning to death) in the book of Allah', and consequently they may go astray by leaving an obligation that Allah has revealed. Lol! I confirm that the penalty of Rajm be inflicted on him who commits illegal sexual intercourse if he is already married and the crime is proved by witness or pregnancy and confession."[73]

Highway Robbery (HIRABAH)

The term highway robbery is the common usage but it comprises any armed robbery whether in town or in highway. It is a capital offence in Shariah which attracts capital punishment.[74] Al-Hirabah or highway robbery is a serious crime according to the Holy Qur'an.[75] The Qur'an called it "a war against Allah and His Messenger" and an

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[68] Al-Amir, *Subul al-Salam Sharh*, (Dar, Beirut, 1960), Vol. IV, p. 4

[69] Mohammed N.U., 'Taming the Beast of Zina', *Al-Maslaha*, pp. 240-241

[70] Al-Amir, *Subul al-Salam Sharh*, p. 5

[71] Q24:2

[72] Al-Bukhari, *Kitab al-Hudud*

[73] The second orthodox Caliph who succeeded Caliph AbubakarSiddiq. The Hadith was reported by Ibn 'Abbas.

[74] Abdul-Qadir, Z., *The Exegesis of Legislative Verse in the Holy Quran and Traditions*, p. 114

[75] Q5:32

attempt to spread mischief in the word. Highway robbery can therefore be defined as an exercise of group of armed people or a single person who may attack travelers or way farers on the highway or any other place depriving them of their property through the use of force in the circumstances when the victims are away from receiving an immediate help.[76] In the same vein, Ruud defined Hirabah as follows: "whoever, acting alone or in conjunction with others in order to seize property or to commit an offence, or for any other reasons voluntarily causes or attempts to cause any death or hurt or wrongfully restraint or fear of instant death or of instant hurt, or of instant wrongful restraint in the circumstances that render such person helplessness or incapable of defending himself, is said to commit the offence of Hirabah."[77]

On the basis of the foregoing, Hirabah is an offence which attracts capital punishment in Shariah and is bitterly and expressly proscribed by Allah (SWT). The Quran says: "The punishment of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting of the hands and feet from opposite sides, or exile from the land (imprisonment outside his hometown); that is their disgrace in this world and heavy punishment is theirs in the next world."[78]

However, the punishment of Hirabah varies depending on the circumstance of the case. All the jurists agreed that whenever a robber kills with intention to rob and takes away the property, he should be killed for his crime or crucified. But if he kills and cannot get away with the loot, he should be killed but not crucified. Where he takes away the property by the use of force of violence without killings, his hands and leg on the opposite side be cut. But if he frightens only with the intention of taking away the property but fails in the process provided he does not kill, ho should only be exiled.[79]

OBJECT OF CAPITAL PUNISHMENT UNDER COMMON AND ISLAMIC LAW

Capital punishment does not subsist in vacuum except with some objects that go with it. This part of this research will examine the objects of punishment from Common and Islamic Laws' perspectives. In the realm of Common Law, the objects of capital punishment have been summarized as follows:[80] (a) deterrence, (b) retribution, (c) disablement, and (d) educative.

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[76] Abdul-Qadir, Z., *The Exegesis of Legislative Verse in the Holy Quran and Traditions*, p. 114

[77] Ruud, P., *Islamic Criminal Law in Nigeria*, p. 69.

[78] Q5:32

[79] Abdul-Qadir, Z., *The Exegesis of Legislative Verse in the Holy Quran and Traditions*, p. 115

[80] *Ibid*, p. 32

Deterrence

The most important and highly noticeable object of capital punishment is deterrence. Deterrence, as object of capital punishment, seeks to impose punishment with the more general view of deterring the public from doing what the accused did. It is on the basis of this basis that it has been pronounced that 'this type of offence is very common nowadays and a deterrent sentence is called for in this case. Ignorant persons should not be allowed to experiment with lives of others.[81]'

Retribution

Object of capital punishment, in this sense, is retributory in nature. Retribution involves the process of 'looking-back[82]' at the circumstances of the crime committed, and deciding what punishment the accused person deserves for his conduct, having regards to his responsibility/liability for the crime. In this circumstance, the capital punishment is imposed to relieve the public's indignant feeling.[83] This object of capital punishment strives to maintain that a person should be punished only if he has actually committed an offence as defined by law.[84]

Disablement

This is another object of capital punishment. It, *prima facie*, does not focus largely on punishment as may easily be thought. It is logically the most efficient way of preventing further crime. In this situation, capital punishment seeks to impose supreme disabling punishment and in this sense, no other forms of punishment fit in except capital punishment. The foregoing informs the reason Wooton posited that "the criminal courts should unashamedly aim at the reduction of criminal behaviour, and regard should be paid to question of guilt and responsibility only in so far as they relate to this aim."[85]

Educative

Another important aspect of object of capital punishment, aside deterrence, retribution and disablement, is educative aspect. This is because, the purpose of capital punishment in this regard is to educate people out of a certain way of behaviour which is prevalent. Thus, when a penalty is attached to a particular type of human conduct, it is usually the case that most of the community agree that it should be penalized. No wonder the capital punishment for murder is often justified in this way as building up in the community over a long period of time, 'a deep feeling of peculiar abhorrence for the crime of murder.'[86]

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[81] Per Nnameka J., in the case of the State vs. Okechukwu (1965) 9. E.N.L.R. at 94

[82] Hart, C.F., *Punishment and the Elimination of Responsibility*, (Hobhouse Memorial Lecture), 1961

[83] Salmond, C.F., *Jurisprudence*, (Eleventh Edition), p. 121

[84] Section 36(12) of Constitution of the Federal Republic of Nigeria 1999, As Amended – "a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in written law"

[85] Wooton, *Crime and Criminal Law*, (1963 Hamlyn Lectures), p. 117

[86] British Royal Commission on Capital Punishment, Cmnd.8932 (1953)

However, in Islamic jurisprudence, objects capital punishment also hold water. Invariably, much as we have objects of capital punishment under the conventional law, so also we have same in Shariah. Thus, objects of capital punishment in Shariah include preservation of life, preservation of property amongst others.

Preservation of Life

In modern system, preservation of life is held in high esteem such that if right to life is breached, the State becomes a party in all such cases instead of satisfying the aggrieved. But under Shariah, an equal right of revenge is permitted (i.e. eye for eye, ear for ear, limbs for limbs, and LIFE FOR LIFE is the applicable law[87]). The law is made by Allah (SWT) to ensure preservation of life. The reason being that, under Shariah, the underlining principle for object of capital punishment is to ensure total eradication of grievance from the heart and mind of the aggrieved party.[88]

Preservation of Property

In Islamic jurisprudence, greater value is attached to the property which a person can own and dispose without any hindrance from anybody.[89] To this end, Allah (SWT) prescribed severest punishment for capital offence of robbery which goes a long way in denying people of their right of ownership in their properties.[90] Thus, one of the main objects of capital punishment in Shariah is to ensure the preservation of individual and public property.

Apart for the foregoing, the following have been proved to be objects of capital punishment in Shariah, viz:

a) To award punishment equal to the magnitude of the guilt of the culprit;[91]
b) To execute the culprit publicly so that the officer may not favour anyone while inflicting the punishment; and
c) To serve as lesson for others so that inclination of crime be removed through the operation (execution exercise) and none may dare commit crime.[92]

ATTEMPT TO ABOLISH CAPITAL PUNISHMENT

An attempt to abolish capital punishment was brought to lime light in the celebrated case of **ONUOHA KALU VS. THE STATE**[93] before the Supreme Court of Nigeria. This is owing to the pending controversy surrounding the constitutionality of capital punishment in Nigeria since the enactment of 1979 Constitution of the Federal Republic of Nigeria.[94]

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[87] Q5:48

[88] Muhammad I.S., *The Penal Law of Islamic Shariah,* (Kazi Publication Undated) p. 12

[89] Q4:32

[90] Q5:32

[91] Muhammad, I.S., *The Penal Law of Islamic Shariah,* p. 10

[92] *Ibid*

[93] (1998) 12 SCNJ 1. Also, (1993) 13 NWLR (Pt. 883) 931.

[94] The 1979 Constitution of the Federal Republic of Nigeria has been replaced by another i.e. Constitution of the Federal Republic of Nigeria, 1999, As Amended. The provisions relevant to this

In KALU'S case (supra), one of the issues raised, *inter-alia*, was 'whether capital punishment is compatible with the provision of the 1979 Constitution. It was contended therefore that death, per-se, amounts to inhuman treatment and reliance was placed on plethora of authorities to this effect. It was further contended that since the advent of 1979 Constitution, there has been much legal opinion to the effect that the provisions of the Constitution have impliedly abrogated the death penalty in Nigeria.[95] The pertinent question at this juncture is: what then brings about the difference of opinion as regards the legality of capital punishment in our Constitution? To answer the instant question recourse shall be made to the problem(s) posed by interpretation of statutes in our courts. This brings to the fore the position of the Legendary Jurist, Lord Denning, M.R., thus: "Whenever a statute comes up for consideration, it must be remembered that it is not within human power to foresee the manifold set of facts which may arise, and even if it were, it is not possible to provide for them in terms free from all ambiguities. The English Language is not an instrument of mathematical precision. Our literature will be more poorer (SIC) if it were."[96]

It is in view of the fore going that Appellant in the case under reference argued that the major death penalty prescribed for murder in section 319(1) of the Criminal Code of Lagos State violates sections 30 and 31 of the 1979 Constitution and as such, the punishment prescribed therein is invalid, null and void. To this end, they place reliance sections 30 and 31 of the 1979 Constitution. Section 30(1) that "every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence which he has been found guilty in Nigeria."[97]While Section31(1) provides that "every individual is entitled to respect for the dignity of his person, and accordingly –no person shall be subjected to torture or inhuman or degrading treatment."[98]

Based on the foregoing provision of the constitution, the so called Abolitionists contended that death sentence has been implied abrogated by the constitution with particular emphasis on section 31(1)(a) quoted above. It is imperative to note that some attempts[99] have been made in the European countries to abolish capital punishment from their criminal systems which attempts were successful. One of such attempts culminated into the enactment of the Murder (Abolition of Death Penalty)

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write up are in *pari-material*, though the numbering of the sections in the 1999 Constitution may vary.

[95]Kalu vs. the State, op cit, p. 5

[96] (1949) 2 K.B. 499

[97] This provision is now in section 33(1) of the Constitution of the Federal Republic of Nigeria, 1999 As Amended

[98] This provision is now in section 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 As Amended

[99] Herbert H.H., *Against Capital Punishment*, (New York, Oxford University Press, 1996), p. 32

Act, 1965. This law, in the case of an adult, substitutes life imprisonment for death penalty and in the case of murder committed by a person under the age of 18, a sentence of detention during Her Majesty's pleasure.[100] In view of the above, the questions that readily come to mind at this juncture are: has an attempt made to abolish capital punishment in Nigeria yielded the same result? Is reverse the case in Nigeria? These shall be addressed below.

CONSTUTIONALITY OF CAPITAL PUNISHMENT BY SUPREME COURT OF NIGERIA

The Supreme Court of Nigeria[101] consisting of seven Justices[102] of the Court gave a unanimous decision affirming the constitutionality of death sentence in Nigeria of which judgment was delivered in December, 1998.[103]Iguh, JSC, delivering the judgment held that "upon a careful consideration of the various foreign authorities to which our attention was drawn by the appellant, the opinion that the death penalty perse amounts to torture, unhuman and degrading treatment and, therefore intrinsically unconstitutional seems to me a minority view. Indeed, a close study of those decisions reveals that foreign jurisdictions that have similar provision in their constitution as ours have repeatedly pronounced the death penalty to be constitutionally valid …."[104]

In the same vein, Wali, JSC, expressed similar view that "the purport of section 30(1) supra is that death penalty is constitutionally recognized in the way and manner prescribed by law. It is not the function of the court to apply canon of interpretation to invalidate a valid and legal legislation for only reason that such legislation is not in line with its social thinking or is not liked by a fractional section of the Nigerian people."[105]

The foregoing view of Wali, JSC, prompted Iguh, JSC to declare that "… nor have I found myself able to hold that this court is entitled to repeal or revoke laws ostensibly based upon notions of public policy or sanction simply because such laws, for one reason or the other, are said to be unacceptable to a group of persons or a section of society."[106]

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[100]*Ibid*

[101]Kalu's case (supra)

[102]Uwais M.L., (CJN); Belogore, S.M.A.; Wali A.B.; Kutigi I.L.; Ogwuegbu E.O.; Iguh A.I.; and one other.

[103] Oba A.A., Capital Punishment, Death Row Phenomenon and the Supreme Court of Nigeria, Unpublished.

[104]Kalu vs. the State, op cit, p. 31. Similar cases where death penalty was affirmed because of the qualified nature of the right to life in the constitution are Gregg vs. Georgia 428 U.S. 153; Jurek vs. Texas 428 U.S. (1976); and Woodson vs. North Carolina 428 U.S. 242.

[105]Kalu vs. the State, op cit, p. 56

[106]*Ibid*, p. 5

is not the function of the courts of law to abolish death sentence. The responsibility is on the legislative body if at all it is necessary.[120]

In the same vein, under Shariah, Qadis are powerless from refusing to apply the hadd punishment as expressly ordained by Allah (SWT). This is because, in Islamic legal system, Allah (SWT) is the Supreme Law-Maker[121] which translate to mean that there is no circumstance that can enhance the Qadis to derogate from Allah's commandments[122] save in cases of doubt.

The dissimilarity between the attitude of courts to Prouncement of capital punishment under the common and Islamic law is that Shariah Courts are bound to apply the hadd punishment (capital punishment) till eternity. While under that of common law, the pronouncement of capital punishment may not be perpetual. This may occur by the legislature dancing to the tune of the section of the society by abolishing the death sentence and substitute same with life imprisonment in some Western Countries. Even when death sentence subsists, the President of the Country or the Governor of a State may reduce it to life imprisonment pursuant to the prerogative of mercies conferred on them by the Constitution.

Under Islamic law, the law is not susceptible to changes as in the man-made law due to infallibility of Allah (SWT). Thus, all hadd punishment with respect to capital offences can never be changed or maneuver and it follows that the Shariah Court will continue to apply them as long as earth subsists.

CONCLUSION

The two systems[123] of common and Islamic law in Nigeria point irresistibly to the fact that pronouncement of capital punishment is a reality in the country. The courts have consistently hold this view till date. It must be noted that section 33 of the Constitution of the Federal Republic of Nigeria, 1999, (As Amended) to a very large extent prevents the commission of capital offences. The section does not make the pronouncement of capital punishment and its subsequent execution inhuman and degrading treatment. Thus, contention of the abolitionist in Nigerian courts that the provision section 30 of the Constitution of the Federal Republic of Nigeria, 1999 has impliedly abrogated death sentence in our criminal law hold no water. Their contention indirectly advocates a scenario that would despise the sanctity of human life and dignity of human person as enshrined in the constitution and Holy Qur'an.

Thus, the attitude of courts to the Prouncement of capital punishment is positive in the sense that they perceive the 'pronouncement of death sentence' as intrinsically

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[120]Kalu vs. the State, op cit, p. 52

[121] Q65:18

[122]Sayyid, Q., *Hadha al-Din (This Religion of Islam)*, (I.I.F.S.O. Publication, USA, Undated), p. 19

[123] The system of law in Nigeria is tripartite in nature. In addition to the common and Islamic laws considered in this research, there also exists a system of customary law duly recognized by the law of the lad with its uniquely distinctive features.

constitutional as rightly upheld by the Supreme Court.[124] Under Shariah, much as the life is sacrosanct, so also is the hadd punishments ordained to preserve same is sacrosanct. Neither the Qadi nor the executioner can lesson or reduce the hadd punishment.[125]

Thus, it has been found that Islamic law, being the Divine Law prescribed by Allah (SWT), is not susceptible to any changes whatsoever no matter the circumstance[126]but common law changes as time goes on. Hence, the common law courts in Nigeria who are the judicial arm of government established to interpret the law of the land (i.e. protecting it) should continue to stand firm against the abolitionists in their mission to abolish the much important capital punishment. This can be achieved through practical independence of judiciary so as to avoid prejudice in their functions and follow the law to the latter in accordance with the justice of the case.

Also, the legislature, being the nucleus of the society who they shapes societal behaviour in all ramifications, should continue to ensure the existence of death sentence in our law and shun every act tending towards abolishing same. It is therefore imperative for Nigerians to ensure they vote people of integrity and good conscience as their legislators because of its inevitable consequences.

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[124]OnuohaKalu vs. The State (1998) 12 SCNJ

[125] Q23:2

[126]Shariah is all about justice and fairness to all. The laws that were applicable yesterday are also applicable today; so also tomorrow (i.e. in future). The laws that are applicable to the poor are also applicable to the rich. The law that are applicable to Arabs are also applicable to non-Arabs. The laws that are applicable to the whites are also applicable to the Blacks.