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Exemptions of the Vulnerables From Capital Punishment In Nigeria: Expanding The Frontiers

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Abstract

Capital punishment is the prescribed treatment meted to an offender who has been adjudged guilty of a capital offence. However, some categories of persons are exempted from capital punishment due to their vulnerabilities. The vulnerabilities arose from their diminished capacity to control their actions. These exemptions attune with the elementary principle of criminal law across the jurisdictions that there shall be no liability without fault. This article therefore discusses the range of such exemptions under the Nigerian law. The author critically examines the exemptions of the juveniles, the pregnant women, the insane and mentally retarded and the aged. The author delved on the comparative overview of the exemptions through the statutes and case law, of other jurisdictions and concluded by making recommendation for the aged and mentally retarded offenders to be accommodated within the range of people that are exempted from capital punishment in Nigeria.

Keywords – capital punishment, vulnerable, juvenile, insane, mentally retarded, aged, pregnant women, retentionist countries, diminished responsibility.

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1. Introduction

Capital punishment[1] is the supreme sacrifice paid by an offender who has been adjudged guilty of a capital offence by a court of competent jurisdiction. Simply put, it is a sentence of death, mostly for the commission of serious offences. It is a non – institutional disposition method of treating an offender, and it is principally premised on the penological theories of deterrence, elimination and retribution.[2]

Capital punishment is currently a global issue which has generated much controversy over the years. Different groups and persons have viewed the subject from different perspectives. Thus, the attitudes of nations vary from one to the other. This variance is confirmed by the fact that crimes that attract the capital punishment in the retentionist countries differ from jurisdiction to jurisdiction. In some countries, the list is short, while in others, the list is long. Hence there is no universal yardstick to classify which crime will attract capital punishment.[3]

The protagonists of capital punishment are of the view that certain needs of the society are best achieved by the execution of the criminal. They assume that capital punishment attuned with proportionality in relation to various offences. This belief might have been premised on the utilitarian or hedonistic principle of *felicitic calculus* in the promotion of common will and "greatest happiness of the highest number."[4]

Nigeria is one of the retentionist countries. The Nigerian Constitution[5] prescribes capital punishment as a legal form of punishment when it is carried out in the execution of a sentence of a court in respect of capital offence, for which a person has been found guilty. The Criminal Code[6] and the Penal Code[7] which apply in the Southern and Northern States respectively prescribe capital punishment for the offences of murder, treason and armed robbery *inter alia*. The *Shariah Penal Code*, as exemplified by the Zamfara State *Shariah Penal Code* and applicable in some states of the Northern Nigeria, further prescribes capital punishment for sex related offences ranging from rape, adultery, and incest to sodomy and the offences of murder and armed robbery.[8]

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1 It is also called the death penalty. See Okagbue I., "The Law and Human Dignity: Some Aspects of Inhuman and Degrading Treatment" *Nigerian Current Law Review (1985)* p.213. However, Hodgkinson and Rutherford disagreed with this classification and described it as erroneous. They contended that the death penalty and capital punishment are not synonymous because in some states, the death penalty may exist but with no expectation or intention that the capital punishment will ever be carried out. According to them this describes the situation in Belgium where no attempt has been made in recent years to disturb the state of *de facto* abolition. See Hodgkinson P., & Rutherford A., *Capital Punishment: Global Issues and Prospects* (Winchester, Waterside press, 1996) pp 12 -13.

2 It has been contended by Badaiki that retribution is not a protectionist theory. See Badaiki A. D., " Singing *Nunc Dimitis* to Death Penalty". *Benin Journal of Public Law*. Vol.2, No 1 (2004) p2 **.** A Publication of the University of Benin, Nigeria.

3 Although, there is an international prescription that the punishment should be imposed by the retentionist countries (if at all) only for the most serious crimes. See Article 6(2) of the International Covenant on Civil and Political Rights (Hereinafter referred to as *I.C.C.P.R*) Adopted by General Resolution 44/125 of 20 November 1989 and currently ratified by 191 countries.

4 See Iyaniwura W., "The Death Penalty: A Negation of the Right to Life?" *Ado Readings in Law* (1998) p 68. Faculty of Law, University of Ado Ekiti, Nigeria. However, it must be emphasized that capital punishment has been in use before the emergence of Jeremy Bentham.

5 See the *Constitution of the Federal Republic of Nigeria* Promulgation Act. Cap C23, *Laws of Federation of Nigeria 2004*. Section 33 (Hereinafter referred to as *CFRN* 1999).

6 The *Criminal Code Act*, Cap C. 38, *Laws of Federation of Nigeria 2004*. Sections 319 and 37.

7 The *Penal Code* (Northern states) *Federal Provisions Act*. Cap 345 *Laws of Federation of Nigeria* 1960, Sections 221 and 411.

8 On the 27th October 1999, Zamfara State Governor, Alhaji Sanni Ahmed officially launched the *Shariah Penal Code,* which came into force on the 27th January 2002. Thereafter, eleven other Northern states have adopted the *Shariah Penal Codes* as their states' laws. The States are Kano, Katsina, Sokoto, Bauchi, Niger, Gombe, Jigawa, Kaduna, Borno, Kebbi and Yobe.

Globally, a number of restrictions have been placed on the imposition of death penalty in that, it has to be imposed in accordance with the law. Also,the substantive and procedural safeguards for its imposition must be respected.[9] Similarly, Article 6 of the ICCPR provides the procedural safeguards for the imposition of death penalty. These include the reduction in the scope, non extension of scope, non retro-active use of the death penalty and the non imposition ofthe death penalty on certain categories of persons.[10]

The appraisal of the categories of persons who have committed capital offences but are exempted from capital punishment because of their vulnerabilities, therefore constitutes the kernel of this paper. This paper seeks to critically examine the exempted categories of juveniles, the pregnant women, the insane or mentally retarded and the aged, against the background of Nigerian situation, but with a comparative overview of the other jurisdictions.

2. The Juveniles

States that are parties to the *International Covenant on Civil and Political Rights* (ICCPR) and the *American Convention on Human Rights* (ACHR) are prohibited from imposing capital punishment for offences committed by persons below 18 years of age.[11] This prohibition is also contained in the *International Convention on the Rights of the Child* which came into effect in September1990 and has now been ratified by every country except the United States of America and Somalia.[12]It is also forbidden by the *African Charter on the Rights and Welfare of the Child*.[13]

At the beginning of the 21st Century, both the U.N Sub – Commission on the Promotion and Protection of Human Rights[14] and the Inter – American Commission on Human Rights in 2002[15] were able to adopt a principle that the death penalty should not apply to persons who committed capital offences when under the age of 18 years, as part of customary international law.

However, several countries which are parties to the Convention on the Rights of the Child have not yet formally abolished the powers to sentence juveniles to death. There is no doubt that the advocacy that juveniles should be exempted from capital punishment is premised on their diminished culpability arising from their susceptibility to immature and irresponsible behaviours. It has also been contended that their vulnerability and lack of control over their immediate surroundings gave them a greater claim than adults to be forgiven for failing to escape negative influences, as they were still struggling to define their identities.[16]

Nevertheless, even with the above justification, the United States'Courts have decided that any person who is above 15 years of age can be sentenced to death penalty in the case of *Thompson*

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

10 The other safeguard is the one that places a restriction on abolitionist states from re – introducing death penalty. The only instrument on this is the American Convention on Human Rights. (ACHR) Adopted in 1969, entered into force in 1978 (reprinted in Basic Document Pertaining to Human Rights in the Inter – American System. OCA/SER. L/V/1.4 Rev. 9. 31 January 2003, 27) Article 4(3) prohibits the re – introduction of the death penalty in states that have abolished it.

11 Article 6(5) ICCPR and Article 4(5) ACHR. *op.cit*. (nn5&10 *ante*)

12 Article 37(a) ICCPR. *op.cit*. (n.5 *ante*). Also, the prohibition is contained in the *Draft U.N Standard Minimum Rules for the Administration of Juvenile Justice*, adopted in 1984, (known as the Beijing Rules and adopted by the General Assembly Resolution 40/33 of 29 November 1985)

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

14 Resolution 2000/17, UN Doc. E/CN. 4/SUB .2/RES/2000/17 (17 August 2000)

15 Amnesty International, *The Exclusion of Child Offenders from the Death Penalty Under General International Law.* Act/50/004/2003. P.*1*

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

v.*Oklahoma*[17]. It is gratifying that the U.S recently appeared to be hearkening the progressive global call when its court in *Roper* v. *Simmons*[18], held that the Eighth and Fourteenth amendments forbade imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. This decision heralded the commutation of sentences of 70 prisoners who were on death row and who fell within the age brackets of 17 to 18 years at the time of commission of their offences.[19]

There is no doubt that the global move towards the exclusion of juvenile offenders from the scope of capital punishment has attained substantial international acceptance. Prokosch rightly noted that exclusion of juvenile offenders from capital punishment is so widely accepted in law and practice such that it is approaching the status of a *jus cogens*, a norm of customary international law.[20]

In Africa, it has also been held in the Kenyan case of *Turon* v. *R*[21] that a death sentence should not be pronounced on a person under the age of 18 years.

In Nigeria, the Children and Young Persons' Act defines a young person as a person who has attained the age of 18 years.[22] Both the *Criminal Procedure Act*[23] and the *Criminal Procedure Code*[24] provide that where the court convicts an offender for an offence which is punishable with a sentence of death, but it is of the opinion that the person has not attained the age of seventeen years at the time the offence was committed, the sentence of death shall not be pronounced or recorded. The court is rather enjoined to order the detention of such convict during the pleasure of the president or state governor for federal and state offences respectively.[25]

Consequently, the Supreme Court has pointed it out in *Modupe* v. *State*[26] that under Section 368(3) of the CPA;

> *"If at the time the offence was committed, an accused charged with capital offence has not attained the age of 17 years, it will be wrong for any court not only to sentence him to death, but also to even pronounce or record such sentence"*

Hence, in determining the age of a juvenile offender,[27] the court may form the opinion that the convicted person has not attained the age of 17 years from any of the following circumstances;

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17 487 U.S 815 (1988). Also, in *Stanford* v. *Kentucky* 492 U.S 361 (1989), the court merely raised the age of exemption to 16 years. This is still below the prescription of the international instruments which is 18 years.

18 *Supra (*n.16 *ante*)

19 However, it is on record that the first documented execution of a child in the United States was in 1642. See B Stevenson, "Capital Punishment in the United States of American" in *The Death Penalty: Condemned,*. by the International Commission of Jurists in September 2000. p.47. Also, in 1833, a nine year old boy was sentenced to death in Britain for pushing a stick through a cracked window and pulling out some printer's colour valued at two pence. See Radzinowicz I. A*., History of English Law*. Vol .1 (London, Stevens, 1948) p 15.

20 Prokosch E., "The Death Penalty versus Human Rights" in *Death Penalty: Beyond Abolition* (Strasbourg Cedex: Council of Europe Publishing, 2004) p.28

21 (1967) E.A 789 (C.A) It is worrisome however, that Liberia still imposes the death penalty for crimes committed by children under the age of 18 years.

22 See Section 2, *Children and Young Persons' Laws of Lagos State*. Cap. C. 10 Laws of Lagos State 2003. See also, Section 2 of the *Child's Rights Act 2003* pegging a young person's age at below 18.

23 Section 368(3) *Criminal Procedure Act*. Cap. C. 41, Laws of Federation of Nigeria 2004.

24 Section 272(1) *Criminal Procedure Code*, Cap. 30, Laws of Northern Nigeria 1963.

25 It must be noted that the age limit of 17 years in these two procedural laws must have been superseded by the age limit of 18 years contained in the Child's Rights Act.

26 (1988) 4 NWLR (Pt..87) 130, (1988) 9SC. 1.

27 . Section 32, *Children and Young Persons' Laws of Lagos State .Ibid* (n.22 *ante*).

(i) The record of proceedings

(ii) The court may take evidence as to the age of the offender

(iii) The court may order for medical examination of the accused.

However, where the court decides to take evidence on the age of the accused, the prosecution and the defence are at liberty to call witnesses, provided that the witnesses shall be examined, cross – examined and re – examined by either side.[28]

The relevant age of the juvenile offender for the purpose of exemption from capital punishment is the age whenthe offence was allegedly committed and not when he was convicted. The initial aberration which was contained in section 368(3) of the C.P.A which put the relevant age as the age at conviction, has since been amended.[29] This amendment has been adopted by all the states in the Southern states of Nigeria. Thus, in *R.*v*Bangaza*[30], where the court purportedly construed the old Section 368(3) of the CPA as fixing the relevant age as the age of the accused at the time of conviction, the decision was legislatively reversed. The reversal was carried out against the backdrop of the criticism of the case as being inequitable.[31]

Osamor has rightly contended that the provision of Section 272 of the CPC is clear on the relevant age as the age at the time the offence was allegedly committed, notwithstanding the suggestion to the contrary contained in section 270 of the CPC.[32] Thus, in *Guobadia* v. *State*[33], the Supreme Court quashed the sentence of death passed on the appellant on the ground that he was below 17 years old at the time of the commission of the offence.

3. Pregnant Women

The exemption of a pregnant woman from death penalty is consistent with the jurisprudence that the forbearance of a sentence of death on her is for the benefit of the unborn child. In other words, a child's teeth should not be set on edge because his mother has eaten sour grapes.[34]

At the international level, Article 6(5) of the *ICCPR* excludes the death penalty for crimes committed by persons below 18 years of age and further provides that the death penalty shall not be executed on pregnant women.[35] Also, the *African Women's Protocol* prohibits the execution of death sentences on pregnant women.[36]

The penal laws of some African States embrace the approach in the ICCPR in which the death sentence, if imposed cannot be executed on a pregnant woman. Some states commute the death sentence after its imposition. In other jurisdictions, the execution is deferred till after delivery.[37]

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28 *Jibril* v. *State* (1969) NMLR 71

29 *Criminal Justice (Miscellaneous Provisions) Act 1966*.

30 (1996) 5 FSC

31 See also *Ekang* v. *State (*2001) 11 NWLR (Pt 723) 1 @ 27

32 Osamor B., *Fundamentals of Criminal Procedure Law in Nigeria.* (Dee – Sage Nigerian Publishers, 2004) p. 386.

33 (2004) 6 NWLR (Pt. 869) 360. However, regardless of all the statutory safeguards, a Lagos High Court sentenced 12 juveniles to death in 1990 in the case of *Mohammed Garuba &Ors* v. *Attorney General of Lagos State & Ors*. Unreported, Suit No. ID/559^{m}/90. High court of Lagos State, Ikeja Division.

34 Osamor B., *Ibid*. (n.32 *ante*) p. 384..

35 ECOSOC Safeguard 3 provides that persons below 18 years of age shall not be sentenced to death nor shall the death penalty be carried out on pregnant women or new mothers, or on persons who have become insane.

36 Article 4.(2) (j) of the *African Women Protocol.*

37 Chenwi L., *op.cit*. (n.9 *ante*) p.40.

Article 118 of the Ethiopian PenalCode 1957, for example, prohibits the imposition of the death penalty and its execution on sick prisoners,pregnant women or nursing mothers.[38]

In the same vein, Article 436, of the Code of *Criminal Procedure of Libya* provides that the death penalty is to be executed after two months of delivery. This is shorter than the interval after delivery in the *Sudanese Constitution* which postpones execution till two years after lactation.

In Nigeria, both the *Criminal Procedure Act*[39] and the *Criminal Procedure Code*[40] prohibit the imposition of the sentence of death on pregnant women. Under the two adjectival laws, where a pregnant woman is convicted for a capital offence, the sentence of death shall not be passed on her, instead, a life imprisonment shall be imposed. The determination of the pregnancy may be ordered by the court *suo motu* or upon the allegation of the pregnant woman or the prosecutor.[41] However, the finding of the court that the woman is pregnant, is subject to appeal and the appellate court may set aside such finding or quash the sentence of death and substitute a sentence of life imprisonment.

Another salient, but controversial feature of this genre of exemption is the determination of whether the pregnancy should be at the time of the commission of the offence, conviction or execution. Quite unlike the case of a juvenile capital offender whose relevant age is the age at the time of the commission of the offence,[42]the pregnancy here is either at the time of conviction or execution. Hence, where a woman was convicted and sentenced to death, but, before the execution of the sentence of death, she is found to be pregnant, the sentence of death shall still be commuted to life imprisonment.[43]

In January 2007, a judge was reported by Hood and Hoyle to have spared the life of one of the worst offenders in a 21 member drug trafficking gang, because she had become pregnant in prison. The remaining convicted co-accused faced the firing squad.[44] It is submitted that the exclusion from execution on the ground of pregnancy beyond the time of conviction is not justifiable, as the only means of escaping execution may be to just get impregnated by prison warder while awaiting execution.

There is no international instrument barring sentencing of women to death, though they have been generally exempted from capital punishment in some countries.[45] However, there are reports of

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38 It should be noted here that the Ethiopian provision is wider than the provision of the ICCPR and the African Women's Protocol by extending the exemptions to sick people and nursing mothers. Some countries merely defer the execution till shortly after delivery rather than commuting the sentence to life imprisonment. For example, Section 33(2) of the *Constitution of the Republic of Sudan* 1998 prohibits the execution of pregnant women or suckling women, but merely postpones the execution to two years after lactation. See also, Section 193(2) of its *Criminal Procedure Act*. 1991.

39 Section 368(2) C.P.A. *op .cit* (n.23 *ante)*

40 Sections 270 and 300 C.P.C . *op.cit*. (n.24 *ante*).

41 Sections 376(3) CPA & 271(4) CPC. *Ibid*

42 Sections 376(4) C.P.A & 271 CPC *Ibid*

43 See Section 376(5) CPA. *op.cit* (n.23 *ante*). Although, there is no similar provision in the CPC, the same procedure applies. However, it is a bit curious how a woman who was not pregnant at the time of conviction can get pregnant before execution while incarcerated. This curiosity is; who must have impregnated her? Could it be one of the prison officials who are her custodians or a male prisoner?

44 See Hood R., & Hoyle C., *The Death Penalty: A Worldwide Perspective* (Oxford: Oxford University Press, 2008) p. 195. Chenwi, however reported that the *Shariah Penal Laws* in some states in Nigeria authorize the imposition of death penalties on pregnant women. See Chenwi L, . *op.cit*. (n.9 *ante*) p. 41

45 These countries are those that are mainly associated with the former soviet system like Belarus, Mongolia, Uzbekistan and the Russian federation. The women exemption has been criticized as being illogical and indefensible by Streib. See Streib V., "Executing Women, Juveniles and the Mentally Retarded: Second Class Citizens in Capital Punishment", in Acker J. R., Bohnm R. M., and Lanier C. S., (eds*.) America's Experiment with Capital Punishment*. 2nd edition (St. Paul MN, Thompson West, 2003) pp 301-323 at 322.

women sentenced to death and executed in some of the retentionist countries such as China, Indonesia, Iraq, Japan, United States and Nigeria.[46]

4. The Insane / Mentally Retarded

> *"If a man, non sanae memoriae, kills, he has broken the words of the law, yet he has not broken the law because he has no memory or understanding, but mere ignorance which came to him by hand of God."*[47]

The above quotation expatiates the verdict of not guilty by reason of insanity usually pronounced by the courts on accused persons, after a successful plea of the defence of insanity has been made, especially, in respect of murder cases."[48]

Insanity negates the *mens rea* requirement of an offence which is the mental element. It attunes with the time tested criminal law principle of "no liability without fault."[49] The notion of "no liability without fault" connotes that no one should be held criminally responsible unless, he is to some extent, at fault. The provisions of the *Nigerian Criminal* and *Penal Codes* exempt insane offenders including capital offenders from criminal liability as a result of the negation of their mental guilt.[50]

Insanity has been defined as the state of where an accused lacks a mental health / capacity so as to justify being exempted from legal responsibility.[51]In legal parlance, it is defined as a condition, which renders the affected person unfit to enjoy liberty of action because of the unreliability of his behaviour with concormitant danger to himself and others.[52]

The test for determining the degree of mental disorder requisite for relieving an accused person of criminal responsibility was first seriously propounded in England in the famous M'Naghten Rule, formulated in 1843 by the Judges as advice given to the House of Lords after *M'Naghten's case*.[53] The M'Naghten Rules were formulated in the belief that responsibility is the essence of the Criminal Law and that capacity to choose between right and wrong is the essence of responsibility.[54]

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46 Frances Newton, executed in Texas in 2005 was the first black woman to be executed since 1977 and at least 50 women were on death row by the end of 2006 in the United States. Also, 33 women were executed in China in 1999. See Amnesty International. *Death Penalty Log* and *Hands off Cain Reports*. Available records that traverse Nigerian penal history show that most of those sentenced to death in Nigeria were men, but Essien stated that there were few instances when women have been executed. See Essien C., *Overview of Perspective of Death Penalty as Regards the Vulnerable Groups*. Being a paper presented at the public consultation on Crimes, Punishment and Death Penalty at Hamdala Hotel, Kaduna on the 1st April 2004.

47 *Per* Sergeant Pollard in *Reniger* v. *Forgossa* 1552 1 Ploud 1 at 19.

48 It has been stated that a successful plea of the defence of insanity results in simple acquittal. See Smith & Hogan., *Criminal Law* 10TH edition Butterworths p 27.

49 Akingbehin E. O., *Insanity as a Defence to Murder Under the Nigerian Criminal Law*: *Contemporary Challenges*. Being an unpublished Ph.D Seminar paper delivered to the Faculty of Law, University of Lagos, Nigeria, in December 2008. p.1. See also, Section 24 of the *Criminal Code. op.cit*. (n.6 *ante*)

50 Section 28 of the *Nigerian Criminal Code. op.cit* (n.6 *ante*) See also Section 51 of the *Nigerian Penal Code*. *op.cit* (n.7 *ante*).

51 *The New Websters Dictionary of the English Language*. International (ed.) New York: Lexicon International Publishers, Guild Group, p 500.

52 Black H.C., *Blacks Law Dictionary*. (6th ed). St Paul Minn. West publishing Co. 1990. p. 794.

53 See the *M'Naghten's case* (1843) 10 E I & F, 200. Daniel M'Naghten, a schizophrenic, suffering from delusions that the Prime Minister Robert Peel was at the head of a conspiracy to kill him, shot and killed Drummond, a private secretary to Sir Robert Peel, mistaking him for Peel. At the trial, M'Naghten's lawyer argued that his client was insane at the time of the shooting and that he could not be held responsible for his act. The jury found him not guilty by reason of insanity. See Donnelly, Goldstein and Schwartz, *Criminal Law* (New York: Free Press, 1974), pp.733 – 847.

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

Over the years, the Rule became the object of severe criticism with the growth of medical knowledge. The criticisms, mainly advanced by the psychiatrists, were predicated on the fact that there were many mentally ill people who, though able to appreciate intellectually that an action might be wrong, nevertheless were under intolerable emotional pressure to commit an offence[55]. Consequently, the British Parliament provided, only with respect to murder cases, that if a person were to kill another while suffering from such abnormality of mind as to substantially impair his mental responsibility for his act, he should be guilty only for manslaughter[56]

In the United States of America, the M'Naghten Rules have been applied in many States; but the criticism of the Rules was profound in the District of Columbia. Hence, from the 1870s, the rules of a kind that were more favourable to the psychiatric view were gradually evolved which culminated in 1954 in the leading case of *Durham v. U.S,*[57] in which the test was that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect. A more recent and liberal position of the insanity law in the United States was espoused in the case of *Clark .v. Arizona.*[58]

In England and Wales, the defence of insanity is seldom utilised. It is more common for accused person with mental illness to utilise that fact as a mitigation to reduce his sentence if found guilty. It is submitted that the rarity of the plea of insanity in the jurisdiction is not unconnected with the abolition of the death penalty there. A few years in prison would be preferred to endless detention in asylum.

However, upon a successful plea of a defence of insanity in Nigeria, the insane offender shall be kept in safe custody pending a decision by the Governor or the President, as the case may be. The Governor or President may then order him to be confined in asylum, prison or other suitable place of custody.[59] The conditions for detention during the President's/Governor's pleasure are to be found in section 401(1) of the *Criminal Procedure Act,* which states that:

> *when any person is ordered to be detained during the pleasure of the President/Governor, he shall notwithstanding anything in this Act or in any other written Law contained be liable to be detained in such place and under such conditions as the President/Governor may direct and whilst so detained shall be deemed to be in legal custody.*

Section 233 of the *Criminal Procedure Act* also states that a medical officer of an asylum is empowered to certify that a detainee is no longer a danger to himself or to any other person.[60]

As regards the mentally retarded persons, who are facing capital offences trials, the position is blurred in Nigeria and even in Africa. The Nigerian criminal law merely exempts those who are insane or mentally ill but not merely mentally retarded because they are not totally mentally impaired but partially impaired.

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55 Against the backdrop of the barrage of criticisms levelled against the Rules, the Royal Commission on Capital Punishment (Cmnd 8932), in 1953 was able to declare the M'Naghten's test of responsibility as defective, and consequently recommended the enlargement of the rules by adding an exemption from responsibility in the case of one who was, by reason of his mental disease or deficiency, incapable of preventing himself from committing an unlawful act.

56 See *Homicide Act* 1957, Section 2(1).

57 *U. S. v. Durham*, District of Columbia, Circuit 2145 2d 867 (1954).

58 No. 05 – 5966 (2006) 548, U. S.

59 See section 230 of the *CPA* (*Op cit*). See also *Adams v. DPP of the Federation* (1966) 1 All NLR 12. Also, see the *Criminal Justice (Miscellaneous Provisions) Act* (*Op cit*), Sched.3.

60 Okonkwo & Naish, *Criminal Law in Nigeria* (2nd ed.) Spectrum Books Ltd, 2002) p.143.

Mental retardation is a condition of limited intelligence which is present from birth or early childhood due to arrested or incomplete mental development. This condition is characterized by faulty comprehension, emotional immaturity, poverty of ideas, stuttering (stammering) or cluttering (rushing words). The mentally sub – normal lacks sufficient control judgment and discretion to manage his own affairs or even due to the deficiency, his welfare or safety of others requires protection, supervision and control.[61]

The mentally retarded are usually divided into two groups. These are the borderline defective and the feeble minded. The border line defective possess intelligent quotient (IQ) of 71 – 78 whilst the feeble minded possess the I.Q of 70 downwards. The latter category comprises of the morons, the imbeciles and the idiots.[62] The morons are generally required to have I.Q between 51 and 70, the imbeciles, I.Q placed between 21 and 60 while the I.Qs of the idiots range below 25.[63] It has therefore been established that there is a relationship between mental retardation and crime.[64]

It is not merely that the mentally retarded have a lesser capacity to understand the meaning and consequence of their actions, they are also much more vulnerable, when as suspect, they are in the custody of law enforcement agents. They are more likely to be suggestive, more ready to make wrong confessions and less knowledgeable about their rights. They also do not know whether to answer questions without the advice of a lawyer and less adept at negotiation pleas. Consequently, they are more likely to be wrongly convicted.[65]

Prior to the decision of the Supreme Court in the United States'Case of *Atkins v. Virginia*[66] in 2002, there was no constitutional bar to sentencing to death the mentally retarded persons convicted of murder. At least 44 prisoners with mental retardation or significant organic brain damage were executed between 1984 and 2001. Some of them had intelligentquotient as low as 59 and lesser than 70 which is equivalent to the mental age of 7 – 10 year old.[67] However, six American States have stipulated mental retardation to be an I.Q which is below 70.[68]

It is time for Nigeria to amend its criminal law statutes with a view of accommodating the mentally retarded in the categories of those to benefit from exemption from capital punishment.

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

62 Akingbehin E. O., *Insanity as a Defence to Murder . op.cit*. (n.49 *ante*) p.19 .

63 See ,*The Mentally Disabled and the Law: The Right of the Mentally Ill*. Lindman, and Mcintyre (eds). University of Chicago Press p.76.

64 Sutherland E., "Mental Deficiency and Crime" in Young K. (ed) *Social Attitudes* (New York: Holt, 1931) p.96

65 Human Right Watch, *Beyond Reason: The Death Penalty and Offenders with Mental Retardation. (*March 2001) Pt IV. A tragic example of this situation was the case of Earl Washington,a man with an I.Q variously assessed as between 57 and 69, who was convicted of rape and murder of a young woman, Culpeper Virginia in 1982 on the basis of a confession he made to the police. It is not clear whether all the members of the jury were aware of his degree of mental retardation. Sixteen years after he was convicted and sentenced to death and three days to his execution, he was exonerated and pardoned, when a DNA test proved that he was innocent of the crime. See Hood R and Hoyle C, *op.cit*. (n.44 *ante*). p. 197.

66 See the Report of the Special Rapporteurs on Extra – Judicial, Summary or Arbitrary Execution E/CN.4/1995/161. December (1994) Para. 380.

67 Keyes D. W., Edwards S., and Perske R., "People with Mental Retardation are Dying Legally as 44 Have Been Executed". *Journal of Mental Retardation* 40(3) (2002) pp 243 – 244

68 They are Kentucky, Maryland, Nebraska, Tennessee, Washington and South Dakata

5. The Aged

There is no general restriction on the exemption of the aged from the death penalty.[69] The rationale behind exempting the aged from the death penalty may either be because of nearness to grave, as in having few more days to live on earth and the question ordinarily would be; why accelerating the death? It may also be because of impairments that are associated with old age like senility and dementia. Whatever the basis may be, it has failed to attract international acceptance.

ECOSOC has urged all member states to establish a maximum age beyond which persons may not be sentenced to death or executed. Only a few countries have done so.For example, in Taiwan, no capital offender who is above 80 years old can be executed. Also, Russia federation pegs its maximum age at 65 years.

However, many countries execute the aged offenders at will. In Japan, a man aged 70 years old was executed in 1993 and Okunishi Mauri, an 86 years old prisoner is currently awaiting execution.[70] Also, in Saudi Arabia, a man aged 97 was reported to be under a sentence of death for a crime committed in 1986.[71]

In Africa, the restriction is not widely accepted.Very few penal laws have provisions for persons over 70 years of age. In Zimbabwe, the imposition of death sentence on any person who is above 70 years old is prohibited.[72] Also, in Sudan, although the death penalty can be imposed on persons above 70 years of age with regard to certain crimes, the person so sentenced to death, cannot be executed.[73]

There is no provision for the exemption of the aged from death penalty in Nigeria. From a study carried out in july 2010,by the writer, it was revealed that Iheonunekwu Ndu, 85years old and Abainta Ubani, 72 years old are both on death rows at Enugu prison in Nigeria.[74] It appears rational that provisions should be made in Nigerian laws so that the aged, especially those above 70 years old will merely spend few years in prison and die naturally[75].

6. Conclusion

This paper has endeavoured to identify the categories of the vulnerables that are exempted from capital punishment. The writer has also adumbrated the underlying basis for such exemptions.

However, the paper has revealed that there are discrepancies in the implementation of the various prescriptions and procedural safeguards laid down by the international instruments. The paper has shown that there is no uniformity in the age limit below which capital offenders can not be sentenced to death. The paper also brought it to fore that the rule pertaining to the pregnant women vary from jurisdiction to jurisdiction. It is also observed that discrepancies abound across the

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69 In Sudan, another exemption under the Islamic law is that a father who kills his son or daughter is exempted from death penalty regardless of his age.

70 Amnesty International*., Will This Day Be My Last*? *The Death Penalty in Japan*. 2006 . http://web.amnesty.org/library/index/engasa 220062006. (Accessed 15 December 2010).

71 *Agence France Presse*, 25 February 2007.

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

73 Sections 27(2) & 48 of the Penal Code 1991 and Section 33(2) of the *Constitution of the Republic of Sudan* 1998. See also, Section 193(1) of the *Criminal Procedure Act of 1999 of Sudan.*

74 Source: The Nigerian Prisons Service Headquarters, Statistics Department. See Appendix" A" annexed to this paper for the table of the condemned prisoners in Nigeria ,who have stayed longer than 10 years on the death row and their respective ages.

75 By doing so, Nigeria will be complying with ECOSOC prescription.

jurisdictions on whether nursing mothers are exempted.The paper also revealed that some jurisdictions exempt the sick.

The paper has also shown that in almost all the jurisdictions, except some states in the United States, mentally retarded capital offenders are not exempted from death penalty, yet they are mentally impaired. It is also realized in the paper that while some countries exempt the aged from capital punishment, many others including Nigeria, have no such provision in their laws. There is no doubt therefore that there is a dire need to expand the frontiers of the vulnerables under the Nigerian law.

Sequel to the foregoing, and in further view of the fact that the time tested principle of "no liability without fault" should be observed, the writer hereby proffers the following recommendations and suggestions:

(1) The Nigerian government should ensure that there is a strict compliance with the international instruments on the age limit below which capital offenders should not be sentenced to death[76].

(2) It is also suggested that for pregnant women to be exempted, pregnancies should be at the time of conviction, and not the time of execution. This is because of the curiosity that is attached to the source of such pregnancy by a prisoner that is incarcerated in the condemned cell. Hence, any female prisoner that is not pregnant at the time of conviction should be made eligible for the execution. In the same vein, such exemption should be extended to suckling or nursing mothers. Hence, rather than postponing their execution, they should be subjected to life imprisonment[77].

(3) It is also recommended that the provisions of Nigerian criminal law statutes on the defence of insanity should be amended with a view of incorporating those suffering from mental retardation and mental sub – normalty into the categories that can successfully plead insanity defence. There is no doubt that any body that suffers from mental retardation is under a mental impairment.

(4) Finally, it is desirable that the Nigerian Government includes the aged, especially those who are above 70 years old at the time of the capital offence commission into the categories of the vulnerables, to be exempted from capital punishment.[78] It is an obvious fact that from age 70 and above, a lot of people may develop some diseases that are associated with old age like dementia, thereby becoming senile. This can subject them to a state of attenuated responsibility.

Sequel to the foregoing, the expansion in the frontiers of the categories of the vulnerables for exemption from death penalty becomes desirable in lifting the Nigerian criminal justice system to a contemporary international standard.

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[76] Regardless of all the statutory safeguards, a Lagos High Court sentenced 12 juveniles to death in 1990 in the case of *Mohammed Garuba* v. *Attorney General of Lagos State. Supra* (n.33 *ante*)

[77] Nigeria should emulate the position in Ethiopia, where Article 118 of its Penal Code of 1957 prohibits the imposition of the death penalty and execution on sick prisoners, pregnant women or nursing mothers. Also ECOSOC safeguard 3 prescribes an exemption for new mothers *inter alia*.

[78] It is instructive to know that in Zimbabwe the imposition of death sentence on any person who is above 70 years old is prohibited by virtue of Section 338 of its *Criminal Procedure and Evidence Act 2000.* Also in Sudan, capital offenders who are above 70 years old can not be executed.