An Evaluation of the Punishment for Unlawful Homicide under the Nigerian Law

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Abstract

Culpability in Criminal justice system, where established against a defended, will always result in punishment, reprehension and reprimand of one form or the other. Relying on the doctrinal approach, this paper evaluates the punishments for unlawful homicide in Nigeria. The paper evaluates the efficacy of the punishments to achieve the goal of criminal prosecution. The paper finds that punishment for unlawful homicide, especially the death penalty continues to generate controversies. While not promoting one form of punishment over the other, the paper recommends judicial thoroughness and consistency for the utilisation of any form of punishment for culpable homicide.

Keywords: Homicide, Punishment and Culpability

1 Introduction

Generally, punishment is the imposition, by an authority, of conditions undesirable upon a group or individual in the event of the performance of a particular action or behaviour which is deemed unacceptable or which threatens the norms and standards set up by such authority. Punishment involves some loss to the supposed offender as a response to an offence. Certainly also, before punishment can be imposed, the person to whom the loss is imposed should be deemed responsible for the offence that is established to have been committed as a rule of fair hearing.

The rationale for the imposition of punishments on the commission of crimes is generally for it to serve first, as punishment to the offender, who, it is believed deserves to suffer for his crime so as not to go away with a mindset of having triumph with his crime or

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benefit from it. Secondly, punishment serves as retribution; it is a revenge for the crime committed to pacify those affected by the crime and the society. It could also serve as a deterrent; to discourage future offenders. The justification for punishment, accordingly, may include retribution, deterrence, rehabilitation, incapacitation and restitution. Because crimes may be committed in different forms, punishments also differ. It could include sanctions such as reprimands, deprivation of privileges or liberty, fines, incarcerations, ostracism, the infliction of pain, amputation and the death penalty.

The Administration of Criminal Justice Act provides for the objectives of punishment in Part 38, section 401 (2) as follows:

> 2) In determining a sentence, the court shall have the following objectives in mind, and may decide in each case the objectives that are more appropriate or even possible:
> a) Prevention, that is, the objective of persuading the convict to give up committing offence in the future, because the consequences of crime is unpleasant.
> b) Restraint, that is, the objective of keeping the convict from committing more offence by isolating him from society;
> c) Rehabilitation, that is, the objective of providing the convict with treatment or training that will make him into a reformed citizen;
> d) Deterrence, that is, the objective of warning others not to commit offence by making an example of the convict;
> e) Education of the public, that is, the objective of making a clear distinction between good and bad conduct by punishing bad conduct;
> f) Retribution, that is, the objective of giving the convict the punishment he deserves, and giving the society or the victim revenge; and
> g) Restitution, that is, the objective of compensating the victim or family of the victim of the offence.

The rationale for punishment will always take both the society, the offenders and the victims into consideration. In *Kayode v State*,[1] the Court of Appeal states as follows:

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[1] [2008] 1 NWLR (Pt. 1068) 281 at 305, *per* Abdullahi JCA, at paragraphs C-H.

> In the case of *Sunday Adeleke Osayomi and 7 others v The State* (2007) 1 NWLR (pt.1015) page 352 at page 381, this court *per* Abdullahi, J.C.A. held thus:
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> > The purpose of punishment is to reform and not to destroy or ruin an offender. For if an individual is ruined, the larger society will be at the receiving end.
>
> His lordship further held that:
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> > I am of the considered view that the sentences handed down to the appellants, in view of the fact that they are first offenders are excessive…
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> It is instructive to note that the appellants are first offenders and not only that they are young persons and at the time of their arrest and incarceration, they were students in our tertiary institutions. This being the case it would not be in the interest of the larger society to send these young persons back for retrial after they have spent more than 2 ½ years in prison custody. I am of the considered view that having spent so much time in prison is enough and adequate punishment for the offence they were alleged to have committed. It would be oppressive to send them back to re-trial and I so hold. They ought to have learnt their lesson; I order that they should be released from prison custody forthwith.

The punishment for unlawful homicide has always been strict. Determined by the level of culpability, unlawful homicide may carry death sentence, life imprisonment and a prison term. For murder, the punishment has been death sentence, and with much controversy sounding the death sentence in recent times, it has been limited to life imprisonment in several countries. For manslaughter, the punishment has been determined mainly by level of culpability, and restricted to term of imprisonment or fine.

2. Major Forms of Punishment for Culpable homicide

2.1 Death Sentence

Death sentence has been in wide use across the world as punishment for a wide range of crimes. The Torah, the Eighteenth Century B.C. Code of King Hammaurabi of Babylon; the Seventh Century B.C. Draconian Code of Athens, the Fifth Century B.C. Roman Law of the Twelve

Tablets amongst other ancient legal texts contain various offences punishable by death penalty, carried out by such means as crucifixion, drowning, beating to death, burning alive, impalement, hanging, boiling, burning at the stake, beheading, and drawing and quartering.

The death penalty, also referred to as capital punishment relates to the legal killing of a person adjudged to have committed a crime for which the death sentence is imposed by the laws of the state. The crimes upon which the death sentence is imposed are called capital crimes or capital offences depending on the jurisdiction. *Capital*, a term derived from the Latin *capitalis* meaning, *of the head* refers to execution by beheading, a means by which death penalty was carried out in olden days. Presently, the countries that practice capital punishment are far less than those that have abolished it, although, altogether, the population of people living in countries that retain the death penalty are more than the population of those leaving in countries and regions where it have been abolished. The death sentence is usually imposed against adults above the age of 18, but in some countries including Nigeria, there were instances of execution of convicts below that age in the past. In modern times, death sentence is usually carried out by hanging; shooting, lethal injection, electrocution, gas inhalation and beheading.

Death sentence is the major form by which murder has been punished in most of recorded human history. By death sentence, we mean the taking of the life of a person. Simply put, death sentence is the execution of a human being in accordance with a sentence sanction by the authority with such powers. Generally, ancient legal, religious and customary norms aligned with the imposition of death sentence in cases of murder; that is intentional and malicious killing of another human being.

The rationale for the imposition of death sentence for cases of murder could be diverse. Paramount amongst which is the fact that man is created in the image of God, and hence, no man has the authority to intentionally take the life of another man; accordingly, "whoever sheds man's blood, by man shall his blood be shed: for in the image of God made he man."[2] In *Sunday Akinyemi v The State*,[3] Fabiyi, J.C.A., states

[2] Holy Bible, Genesis 9:6
[3] (1999) 6 NWLR (Pt.607) 449

that the death sentence "had the semblance of the Law of Moses- 'An eye for an eye'." And that "It is good law to serve as deterrence in a mundane society where heartless and dangerous citizens abound in plenty."

The basis of the death penalty is primarily that when a person has murdered another person, the murderer should not enjoy the right he has voluntarily denied another forever, and accordingly, the punishment should be proportionate to the crime committed. Again, it is believed that the death penalty will serve as deterrent to others, and where the murderer is a serial killer, it would serve as a termination of the continuation of the crime by the murderer. Based on these reasons and reasons already adduced, the death sentence has survived generations of human civilisation.

However, the fundamental reasons for the death sentence have been questioned across the globe by modern civilisations and even though the death sentence is retained in the statute books of several nations, the basis has been continuously questioned by human right institutions and anti death sentence organisations. The death sentence has been questioned on the basis that the assertion that it serves as deterrent has never been so effective so as to stop the crime for which it is imposed; again, whatever means utilised in carrying out the sentence has been viewed as barbaric, tragic and painful. In addition, the most valid utilitarian argument against the death sentence is the fact that mistakes can be made in which a wrong person is convicted and executed, making it impossible to reverse the verdict.

According to Maimonides;[4] "it is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent man to death." Maimonides further posits that executing a convict without absolute certainty would lead to a slippery slope of decreasing burdens of proof, and this in turn will result to convictions solely based on the judge's caprice. To him, errors of commission are much more threatening than errors of omission, which would eventually result in a decline on the reliance on the rule of law. For example, capital

[4] Available at:< https://en.wikipedia.org/wiki/Maimonides> accessed 24th July 2024

punishment was abolished in the United Kingdom in part because of the case of Timothy Evans, an innocent man who was hanged in 1950.[5]

A historical survey shows that abolishing death penalty has been a subject of consideration over a long period of time, with some countries abolishing it and restoring it back. For example, China, one of the major countries retaining the death penalty in her statutes today, banned it between 747 and 759. In Japan, the Emperor Saga abolished it in 818 under the influence of Shinto, but it only lasted until 1156.[6] In England, as early as the fourteenth Century, The Twelve Conclusions of the Lollards, written in 1395, in the Eleventh conclusion therein, denounces death sentences.[7]

The first major move to abolish the death sentence in modern times was referred to as the abolitionist movement, which was rooted in the writings of such great theorists as Montesquieu, Voltaire, Bentham, and English Quakers John Bellers and John Howard. However, the first major treatise leading to a much more debate on the propriety of the death sentence appeared in Beccaria's *Dei Delitti e Delle Pene* "On Crimes and Punishments," published in 1764. Beccaria considers the death penalty as "a war of a whole nation against a citizen, whose destruction they consider as necessary or useful to the general good."

He opines further that: "The death of a criminal is a terrible but momentary spectacle, and therefore a less efficacious method of deterring others, than the continued example of a man deprived of his liberty, condemned as a beast of burden, to repair, by his labour, the injury he has done to society. If I commit such a crime, says the spectator to himself, I shall be reduced to that miserable condition for the rest of my life. A much more powerful preventive than the fear of death, which men always behold in distant obscurity." According to him: "The terrors of death make so slight an impression, that it has not force enough to withstand the forgetfulness natural to mankind…." He therefore concludes that for a punishment to be just, it should "have only

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5 <https://en.wikipedia.org/wiki/Timothy_Evans> accessed 24th July 2024

6 Encyclopedia of Shinto, <kokugakuin.ac.jp.> accessed 24th July 2024

7 Lollards,<http://sites.fas.harvard.edu/~chaucer/special/varia/lollards /lollconc. htm> accessed 24th July 2024

that degree of severity which is sufficient to deter others." This, to him, a death penalty lacks.

Beccaria's book influenced the Grand Duke Leopold II of Habsburg and future Emperor of Austria to abolished the death penalty in the then-independent Grand Duchy of Tuscany, which was the first permanent abolition in modern times, eventually calumniating in the modern celebration of *Cities for Life Day*.[8] Okafo[9] re-echoed Beccaria's conclusions, when he states that:

> Without doubt, the killing of a criminal offender is an extreme way to condemn his or her conduct. However grievous the crime is, there are always questions as to whether or not the offender deserves to be done away with permanently in such a premeditated and brutal manner. Normal human sensibilities usually accommodate some moderation in disapproving others' behaviours. This allows the condemner to always remember that even a bad person has some good qualities. Thus, it seems unnecessary to "throw away the bath water with the baby" in the process of condemning or punishing an offender. Because of this general human incline, it is normal to wonder whether capital punishment is justifiable.

Okafo went further to identify several grounds upon which it has been conclusively argued that the death penalty is not desirable. Such issues in his estimate includes that: death is an extreme form of punishment; capital punishment appears to be imposed and executed selectively; race and capital punishment decisions; death penalty is final and irreversible once it is carried out; great expenses are involved in the implementation of the death penalty; capital punishment arouses high emotions and needless eruptions of sentiments for and against the penalty; capital punishment erodes the State's moral standing. Both Beccaria and Okafo convincingly demonstrated the injustice inherent in the death sentence, and the lack of any deterrent effect on the populace.

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8 City for Life Day, <https://en.wikipedia.org/wiki/Cities_for_Life_Day> accessed 24th July 2024

9 A Sensible and Compelling Substitute for Capital Punishment: Alternative Model; Salient Matters Arising in Nigeria and the USA, Chukwunọnso Okafọ, Vol. 3, 2012: *Law and Policy Review*, pp 1-25.

Notwithstanding the debates for and against the death penalty, the death penalty is still provided for in Nigeria, and is applicable to such crimes as murder, kidnapping, etc. By virtue of section 221 of the Penal Code:

> 221. Except in the circumstances mentioned in section 222 culpable homicide shall be punished with death-
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> a) if the act by which the death is caused is done with the intention of causing death; or
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> b) if the doer of the act knew or had reason to know that death would be the probable and not only a likely consequence of the act or of any bodily injury which the act was intended to cause.

Under the Criminal Code, by virtue of section 319(1):

> 319. (1) Subject to the provisions of this section any person who commits the offence of murder shall he sentenced to death.
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> (2) Where an offender who in the opinion of the court had not attained the age of seventeen years at the time the offence was committed has been found guilty of murder such offender shall not be sentenced to death but shall be ordered to be detained during the pleasure of the President and upon such an order being made the provisions of Part 44 of the Criminal Procedure Act shall apply.
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> (3) Where a woman who has been convicted of murder alleges she is pregnant or where the judge before whom she is convicted considers it advisable to have inquiries made as to whether or not she be pregnant the procedure laid down in section 376 of the Criminal Procedure Act shall first he complied with.

By virtue of section 402 of the Administration of Criminal Justice Act,[10] the punishment of death is inflicted by hanging the convict by the neck until he is dead or by lethal injection. In pronouncing the sentence, the court shall state it in the following form: "The sentence of the court upon you is that you be hanged by the neck until you are dead or by lethal injection."

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[10] CPA section 367, CPC 269 and ACJL Lagos State section 301

Commenting on this provision, the Supreme Court in *Ejelikwu v The State*,[11] states that where the words used therein are not used by the court, there would be no miscarriage of justice, even though "It is the duty of the Judge, under the law, to pronounce the manner in which the sentence is to be carried out, and failure to do so might raise apprehension that the execution could be carried out by any other means as for example by poisoning, drowning or any other means..." the Court was of the view that:

> Section 269 of the Criminal Procedure Code does not expressly state that non-compliance with its provision shall vitiate the proceedings and render the trial a nullity. It depends on the circumstances in each case and the appeal court is to consider whether such an omission or non-compliance result in failure of justice. See *Eme v The State* (1964) 1 All N.L.R. 416.

In *Ayodele Adetokunbo v The State*,[12] the court held that:

> In my view this is sufficient to infer that the trial judge pronounced sentence of death in the terms provided by section 367(2) of the Criminal Procedure Act. The decision of this Court in *Ntibunka & Anor v The State* (1972) 1 S.C. 71 at 75 seems to support my view. It is therefore not necessary to remit the case to the trial court for pronouncing sentence as the Court of Appeal did. It is also not necessary to exercise our power to pronounce the sentence.

Upon the sentence being passed, a certificate under the hand of the registrar, or other officer of the court, that a sentence has been passed, and naming the convict against whom it has been passed, shall be sufficient authority for the detention of the convict.[13] A Judge who pronounces a sentence of death shall issue, under his hand and the seal of the court, a certificate to the effect that sentence of death has been pronounced upon the convict named in the certificate, and the certificate

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11 [1993] 7 NWLR (Pt. 307) 554

12 (1972) 2 SC 26; (1972) 1 All NLR 89

13 ACJA 406, CPA section 371, ACJL Lagos State section 303

shall be sufficient and full authority in law for the detention of the convict in safe custody until the sentence of death pronounced upon him can be carried into effect and for carrying the sentence of death into effect.[14]

Thereupon, the Registrar of the Court by which the convict is sentenced to death shall, as soon as practicable after the sentence has been pronounced, hand two copies of the certificate issued by the Judge to the Commissioner of Police, one copy of which shall be retained by the Commissioner of Police and the other handed to the superintendent or other officer in charge of the prison in which the convict is to be confined. The Registrar shall also transmit to the Sheriff one copy of the certificate; and file one copy of the certificate with the record of the proceedings in the case.[15]

Where a convict has been sentenced to death and has exercised his legal rights of appeal against the conviction and sentence, and the conviction and sentence have not been quashed or the sentence, has not been reduced, or has failed to exercise his legal rights of appeal or having filed an application for leave to appeal, or an appellant has failed to perfect or prosecute the application or appeal within the time prescribed by law or; the convict desire to have his case considered by the Committee on Prerogative of Mercy, he shall forward his request through his legal practitioner or officer in charge of the Prison in which he is confined to the Committee on Prerogative of Mercy. The Committee on Prerogative of Mercy shall consider the request and make their report to the Council of State which shall advice the President.[16]

The president shall, after considering the report and after obtaining the advice of the Council of State, decide whether or not to recommend that the sentence should be commuted to imprisonment for life, or that the sentence should be commuted to any specific period, or that the convict should be otherwise pardoned or reprieved. Where, for the purposes of subsection (1) of this section, the Council of State is required to advise the President in relation to any person sentenced to

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[14] ACJA 407, CPA section 371B, ACJL Lagos State section 305

[15] ACJA 408, CPA section 371C, ACJL Lagos State section 306.

[16] ACJA 409, CPA section 371D, compare CPC section 301, ACJL Lagos State section 307.

death, the Attorney – General of the Federation shall cause a record of the case to be prepared and submitted to the Council of State, and the Council of State shall, in giving its advice, have regard to the matters set out in that record. The states also have a similar procedure.[17]

Where the President decides that the sentence should be commuted or that the convict should be otherwise pardoned or reprieved, he shall issue an order, one copy of which shall be sent to the superintendent or other officer in charge of the prison in which the convict is confined, and another in charge of the prison in which the convict is confined, and another copy of which shall be sent to the Sheriff, directing that the execution shall not be carried out, and the Sheriff and the superintendent or other officer in charge of the prison in which the convict is confined shall comply with the directive.[18]

The Attorney-General of the Federation shall communicate the decision to the Judge who presided over the trial or to his successor in office sending to such Judge a copy of his order and such Judge shall cause the order to be entered in the record of the court.[19] The Supreme Court explained the implications of a pardon thus:[20]

> The Constitution of the Federal Republic of Nigeria, 1999 section 36(10) of the Constitution provides:
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> > No person who shows that he has been pardoned for a criminal offence shall again be tried for that offence.
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> This lays down the principle of criminal law that where a person accused of committing a criminal offence(s) which are recognized by law and where he has shown that he has either been pardoned of that offence(s) by the appropriate authority or that he has been tried by a court of law or a Tribunal set up by law, then he cannot be subjected to any further trial by any court or Tribunal on that same offence(s). A bar to further prosecution has now been placed between him and those offences. See *North Carolina v Pearee* (1969) 395 US 711;

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17 ACJA 410, CPA section 371E, ACJL Lagos State section 308.

18 ACJA 411, CPA section 371G, compare CPC 299, ACJL Lagos State section 310.

19 ACJA 412, CPA section 372.

20 *Army v Aminun-Kano* [2010] 5 NWLR (Pt. 1188) 429 at 467, *per* Muhammad JSC at paragraphs C-H.

> *Imade v I.G.P.* (1993) 1 NWLR (pt.271) 608; *Barno v State* (2000) 1 NWLR (pt.641) 424 at P.440-C.

Where, however, the President decides that the sentence should not be commuted or that the convict should not be pardoned or reprieved, the order of the President shall be duly signed by him and sealed. The order of the President shall state the place and time, where and when the execution is to be and give directions as to the place of burial of the body; or may direct that the execution shall take place at such time and such place and the body of the convict executed shall be buried at such place as shall be appointed by some officer specified in the order. When the place or time of execution or the place of burial is appointed by some person and is not stated in the order of the President, the specified officer shall endorse on the order over his signature the place and time of execution and place of burial. The later part becomes necessary were there was no appeal for clemency.[21] A copy of the order issued by the President shall be forwarded to the official in charge of the prison in which the person sentenced is confined, and the official in charge of the prison shall give effect to the order of execution.[22]

Where a woman convicted of an offence punishable with death alleges that she is pregnant, the court shall, before sentence is passed on her, determine the question whether or not she is pregnant, based on such evidence as may be presented to the court by the woman or on her behalf or by the prosecutor. Where in proceedings under this section the court finds that the woman in question is not pregnant, the court shall pronounce sentence of death upon her; but where the court finds the woman in question to be pregnant, the court shall sentence her to death subject to the provision of section 404 of the ACJA.[23] By virtue of the said section, Where a woman found guilty of a capital offence is pregnant, the sentence of death shall be passed on her but its execution shall be suspended until the baby is delivered and weaned.[24]

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[21] ACJA 413, CPA section 371F, 373, ACJL Lagos State section 309.

[22] ACJA 414, Compare CPA section 374.

[23] ACJA 415, CPA 376, ACJL Lagos State section 311.

[24] CPA section 368, CPC 290, ACJL Lagos State section 302(1). CPA section 369, compare CPC 300, ACJL Lagos State section 303(2).

Where a convict who, in the opinion of the court, had not attained the age of 18 years at the time the offence was committed is found guilty of a capital offence, sentence of death shall not be pronounced or recorded but in lieu of it, the court shall sentence the child to life imprisonment or to such other term as the court may deem appropriate in consideration of the principles in section 201 of this Act.[25] Where the age of the accused is in issue, it would be an issue of inquiry for the court to make.[26] Onu, J.C.A.,[27] states that:

> It is now settled that if a trial Judge arrives at the view that an accused standing trial before him has put his age low, he is at liberty acting pursuant to Section 208 of the Criminal Procedure Law (applicable to the former Eastern States and in *pari materia* with Section 208 of the Criminal Procedure Act) to call medical evidence or cause an inquiry to be made to ascertain such an accused's age. This is the more compelling as in the instant case involving a murder charge, where at the end of the day, the evidence adduced as to the appellant's age prosecution or defence-wise was conflicting and needed to be resolved one way or the other. It is immaterial in my view as submitted by learned Administrator General for the respondent, Mr. Ezenagu, that the case of *Modupe v State* (1988) 9 S.C.N.J. 1; (1988) 4 N.W.L.R. (Pt. 87) 130, was decided before the case in hand. The learned Senior Advocate, Chief Debo Akande did not pitch his tent on *Modupe's case (supra)* alone but had all along been on a stronger wicket by his reliance on the provisions of section 208 (*ibid*) and the earlier decided authorities of *Oladimeji v The Queen (supra)* and *R v Bagal (supra)* until learned Administrator General saw the futility of his argument by finally throwing in the

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25 CPA section 370, ACJL Lagos State section 303(2).

26 *Okara v State* (1990) 3 N.W.L.R. (Pt. 140) 536 at 548, *per* Onu, J.C.A., *Akinbi v Mil. Govt. Ondo State* (1990) 3 N.WLR. (Pt. 140) 525 at 540, *per* Olatawura. J.C.A.

27 *Okara v State* (1990) 3 N.WL.R. (Pt. 140) 536 at 548, *Salihu v State* (1994) 3 N.W.L.R. (Pt. 332) 352 at 361-362, *per* Abdullahi, J.C.A., *Akpan v State* (2000) 3 N.W.L.R. (Pt. 649) 498 at 503, *per* Opene, J.C.A., *Okoro v State* (1998) 4 N.W.L.R (Pt. 544) 115 at 126; *Effia v State* (199S) 2 N.W.L.R. (Pt. 537) 275 at 288, *per* Akpabo. J.C.A.

> towel and conceding that Section 368(3) Criminal Procedure Law be applied for the appellant to be detained in prison custody at the pleasure of Governor of Imo State. I see the wisdom in his action though belatedly indicated.

2.2 Imprisonment

This is another means by which culpable homicide has been punished. By imprisonment, we mean the legal conferment of a person by the powers of the state.

Imprisonment could be for correctional purposes, for penitence, for remand or for reprimand. Imprisonment denies the prisoner certain liberties and freedoms. As have been said earlier, culpable homicide could be punishable with death or not punishable with death. When it is not punishable with death, it is usually punished with prison term; which could be life imprisonment, or term of imprisonment.

2.2.i Life imprisonment

When a person is sentenced to life imprisonment, he remains in prison until death; unless granted pardon by way of release or reduction of the term. It must be stated that life imprisonment may be applied as punishment of a wide range of offences not limited to murder, manslaughter and attempted murder, it could also be applicable to such other offences as severe child abuse, rape, espionage, high treason, drug dealing, human trafficking, severe cases of fraud, and aggravated cases of arson, burglary, or robbery which result in death or grievous bodily harm and in certain cases genocide, crimes against humanity, or certain war crimes. Life imprisonment, even though a popular means of punishment across the globe, has been abolished in some countries, starting with Portugal, which abolished life imprisonment in 1884.

Usually, life imprisonment is the imprisonment of the offender for a period lasting the rest of his life. It could result when a person sentenced to death is granted clemency in culpable homicide cases, or by the imposition of the law. Under the Criminal Code, by virtue of section 325 therein, any person who commits the offence of manslaughter is liable to imprisonment for life. Again, section 326 of the Criminal Code states that any person who procures another to kill himself; or counsels another to kill himself and thereby induces him to

do so; or aids another in killing himself; is guilty of a felony, and is liable, to imprisonment for life.

By virtue of section 224 of the Penal Code, whoever commits culpable homicide not punishable with death, shall be punished with imprisonment for life or for any less term or with fine or with both. By virtue of section 229 (1) of the same Penal Code, whoever does any act not resulting in death with such intention or knowledge and in such circumstances that if he by that act caused death, he would be guilty of culpable homicide punishable with death shall be punished with imprisonment for life or for any less term or with fine or with both; and section 229(2) states that when any person being under sentence of imprisonment for life commits an offence under this section, he shall, if hurt is caused, be punished with death.

By section 405 of the Administration of Criminal Justice Act,[28] where a convict who, in the opinion of the court, had not attained the age of 18 years at the time the offence was committed is found guilty of a capital offence, sentence of death shall not be pronounced or recorded but in lieu of it, the court shall sentence the child to life imprisonment or to such other term as the court may deem appropriate in consideration of the principles in section 201 of this Act.

Life imprisonment therefore, under the Nigerian law as regards homicide cases is reserved for culpable homicide not punishable with death. There are basically two types of life imprisonment. Life imprisonment with parole and life imprisonment without parole. In the first instance, the person could be release later, while in the second case, there is no opportunity of being released until death. In the United States for example, there are two types of life sentences, determinate and indeterminate. A determinate life sentence is a conviction for life without the possibility of parole, while in indeterminate life sentence; the person has less stringent sentences permitting limited years of jail term upon which parole can be granted.

It must be stated that just as the death penalty has been criticised, imprisonment for life as a form of punishment has also been criticised. The major arguments for retaining the death penalty is that it is an alternative to the death sentence. And hence, with life imprisonment,

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[28] CPA section 370, ACJL Lagos State section 303(2).

all the controversies surrounding the death penalty is erased. Notwithstanding this, it has also been argued that imprisonment for life may not be effective in cases where the convict eventually finds himself out of prison to commit same crimes again, or even commit the crimes there in prison. Again, it has also been argued that it could also been seen as respecting the criminal more than the victim.

Ironically, from the extreme, while those that are against the death penalty are of the opinion that imprisonment for life is an option, those against imprisonment for life are of the opinion that it is worse than the death penalty. For example, in the hearing to decide whether to set free those accused of complicacies in the assassination of Rajiv Ghandi, the supreme court of India states that:[29]

> All of us live in hope, if this is the prevailing situation then there will be no hope for such convicts. What is the point in keeping a man in jail for whole life... Give him the death sentence. That will be better.

The argument of those against the death penalty therefore is that in a reformatory penal system, a person on life imprisonment ought to be on parole so that where such a person has changed, he can always be giving another opportunity at life outside the walls of the prison.

In the American case of *Miller v Alabama*,[30] the Supreme Court of the United States of America in a split decision of five to four Justices was of the opinion that mandatory life without parole for those under age of 18 at the time of their crime violates the 8th Amendment's prohibition on cruel and unusual punishments. It is the opinion of the court that mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features; among them, immaturity, impetuosity, and failure to appreciate risks and consequences. The court also held that it prevents taking into account the family and home environment that surrounds him, and from which he cannot usually extricate himself, no matter how brutal or

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[29] A five-judge constitutional bench, headed by Chief Justice H. L. Dattu.
[30] United State Supreme Court cases Volume 567, United States Reports.

dysfunctional. In Nigeria, life imprisonment is legal and applies in homicide cases.

2.3.2 Imprisonment for a term of years

Besides life imprisonment, imprisonment in cases of culpable homicide not punishable with death could be for a term of years. Under the Penal Code, section 224 of the Penal Code makes it explicit that conviction for culpable homicide not punishable with death could carry a term of imprisonment.

By virtue of section 225 of the Penal Code, whoever commits culpable homicide not punishable with death could be punished with imprisonment for life or for any less term or with fine or with both. This is also the position in relation to whoever causes the death or any person by doing any act not amounting to culpable homicide but done with the intention of causing hurt or grievous hurt. Again, whoever causes the death of any person by doing any act not amounting to culpable homicide which constitutes an offence punishable with imprisonment for one year or with any greater punishment or by any act done in committing such an offence, shall be punished with imprisonment for a term which may extend to ten year or with fine or with both. Under section 228 of the Penal Code, if any person commits suicide, whoever abets the commission of such suicide shall be punished with imprisonment for a term which may extend to ten years and shall also be liable to fine.

Under section 229 (1), whoever does any act not resulting in death with such intention or knowledge and in such circumstances that if he by that act caused death, he would be guilty of culpable homicide punishable with death shall be punished with imprisonment for life or for any less term or with fine or with both. By section 232, whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment for a term which may extend to fourteen years or with fine or with both.

Under the Criminal Code, the imposition of terms of imprisonment for manslaughter was not explicitly stated. In *Afaha*

Okpon Isang v The State,[31] the court was of the opinion that life sentence under the Criminal Code is not mandatory. The court held as follows:

> The provision applicable to this appeal is the later section, which section is "liable to imprisonment for life." This is certainly a very lazy provision, which is in no way mandatory or peremptory. On the contrary, it is permissive and therefore empowers the court to exercise its discretionary power. Like the exercise of every discretionary power of the Court, the section 325 discretion must be exercised judicially and judiciously.

The Court then held further:

> I was struggling with my mind as to the justice of such a pecuniary sentence when my research took me to the Supreme Court decision in *Thomas v The State* (1994) 4 NWLR (Pt. 337) 129. In that case, the appellant who was initially charged for murder was convicted for manslaughter, like as in this case. The learned trial Judge sentenced him to 10 years imprisonment without an option of fine. One appeal, the Court of Appeal of this Division affirmed the conviction but reduced the sentence to a fine of N1,000.00 or 3 years imprisonment in the alternative. The appellant appealed against the affirmation of the conviction by the Court of Appeal but not against the sentence. The Supreme Court dismissed the appeal. Mohammed, J.S.C dealt with the issues at pages 138 and 139.
>
> Under section 382(1) of the Criminal Procedure Code where a court has authority under any written law to impose imprisonment for any offence and has not specific authority to impose a fine for that offence, the court may, in its discretion, impose a fine in lieu of imprisonment. The Court of Appeal is right therefore to impose a fine in lieu of imprisonment. It is however important to bear in mind that the power given in section 382(1) of Criminal Procedure Act should rarely be used in respect of more serious felonies like the case in hand. In *Asuquo Etim and Another v The Queen* (1964) 1 All NLR 38, this court observed that forgery and conspiracy to defraud are serious offences and only in exceptional cases could a fine be an

[31] (1996) 9 NWLR (Pt. 473) 458

> appropriate punishment. In a case of manslaughter which is more serious than forgery and where the victim of the attack died on the same day from injuries he sustained when he fell down following the assault of the appellant, a sentence of fine is not an appropriate punishment.

By virtue of section 23(1) of the Criminal Procedure Code and section 382(1) of the Criminal Procedure Act, where a court has authority under any written law to impose imprisonment for any offence and has not specific authority to impose a fine for that offence, the court may, in its discretion, impose a fine in lieu of imprisonment. This provision has been utilised to reduce the life imprisonment terms in case of manslaughter under the Criminal Code to fine in some cases. However, it has been held that where a term of imprisonment is imposed and fine is an additional punishment, this provision will not be applicable. In *Kayode v State*,[32] interpreting section 23 of the Criminal Procedure Code, the court held as follows:

> Section 23 of the Criminal Procedure Code relied by the appellants' counsel provides thus:
> 23(1) where a court has authority under any written law to impose imprisonment for any offence and has no specific authority to impose a fine for that offence the court may in its discretion impose a fine in lieu of imprisonment.
>
> A cursory look at the provision of the section produced (*supra)* the section gives discretion to a trial judge only where he has no specific authority to impose a fine. I am of the view that it is only in the absence of specific authority to impose fine that section 23 of the C.P.C. will empower the judge to give a fine in lieu of imprisonment. This being the case, I now examine the provision of section 11(1) of the Secret Cults and Secret Societies in Educational Institutions (Prohibition) Law, 2004 with a view to finding out whether the law gives the trial judge specific mandate to impose both term of imprisonment and fine. The section provides:
> "11 (1) Any student or person who contravenes the provisions: of section 6(1), 7 and 9 of this Law shall be guilty of an offence

[32] [2008] 1 NWLR (Pt. 1068) 281 at 304, *per* Abdullahi JCA, at paragraphs C-H.

> and shall be liable on conviction to *ten years imprisonment and to a fine of Fifty Thousand Naira (N50,000.00)*
>
> The above section is clear and self-explanatory. The Law gives the trial Judge specific mandate to impose both the term of imprisonment and fine. I am of the considered view that the law provides ten years imprisonment *and* Fifty Thousand Naira Fine AND as used in the action is conjunctive and I hold that the trial court had no discretion in the sentence passed after convicting the appellants. This issue is resolved in favour of the respondent.

2.3 Fine

Under the Penal Code, culpable homicide not punishable with death could attract fine. The provisions of the penal code clearly shows that fine is provided as alternative or complementary to prison term in cases of culpable homicide not punishable with death; it could be optional or in some cases mandatory.[33] As we have mentioned above, under the Criminal Code, there was no such provision, but the Courts have relied on the provisions of section 382 to impose fine in manslaughter cases.

However, it must be stated that the new Administration of Criminal Justice Act does not make such provisions, and hence, in could not be utilised there under. The corresponding section 420 of the ACJA and section 316 of the Lagos State Administration of Criminal Justice Law does not contain the discretionary powers to impose fine in lieu of prison term.

2.4 Conviction for an offence not charged, lesser or higher in homicide cases

It is possible in a criminal trial to convict a person for a higher offence or a lower one depending on the situation. Under the Administration of Criminal Justice Act,[34] where on the trial of a defendant for a lesser offence it appears that the facts proved in evidence amount in law to a higher offence not charged, the defendant shall not by this reason be acquitted of the lesser offence; and the said defendant is not also liable afterwards to be prosecuted for the higher offence proved either. However, the court may in its discretion stop the trial of the lesser

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[33] Sections 224-239 of the Penal Code

[34] ACJA section 228, Compare CPA section 172, ACJL Lagos State section 164.

offence or direct that the defendant be charged and tried for the higher offence, in which case, the defendant may be dealt with in all respects as if he had not been put to trial for the lesser offence. Where the prosecutor then brought for the higher offence pursuant to this section, the defendant shall be tried before another court.

Also, where a defendant is charged with an offence consisting of several particulars, a combination of some of which constitutes a lesser offence in itself and the combination is proved but the remaining particulars are not proved, he may be convicted of, or plead guilty to the lesser offence although he was not charged with it.[35] Again, where a defendant is charged with an offence and facts are proved which reduce it to a lesser offence, he may be convicted of the lesser offence although he was not charged with it.[36]

Where a no case submission is made, the trial Judge, on a submission of no case to answer, finds that although the prosecution have *prima facie* not proved the offence charged but the lesser offence, then he is obliged to rule that there is a case for the accused person to answer and to proceed with the trial by asking the accused person to enter his defence.[37] This is done by substitution of the crime charged. In *Akwule & Ors v Queen*,[38] Ademola. C.J.F., states as follows:

> Arguments have been put to us about the powers of the Court to substitute another section for the one charged in such a case. We have given consideration to this and we are satisfied that under section 218 of the Criminal Procedure Code, when read with Section 27(2) of the Federal Supreme Court Act. 1960, we are not without power to substitute, in this case, Section 312 of the Penal Code for the Section 315 charged. An authority for this is the case of *Coorav v R.* (1953) A.C. 407.

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35 *Sunday Udofia v The State* (1988) 3 NWLR (Pt. 84) 533, *The Queen v Izobo Owe* (1961) 1 All NLR 680.

36 ACJA section 236, CPA section 179, ACJL Lagos State section 171; *Rasulu Oladipupo v The State* **(1993) 6 NWLR (pt. 298) 131**.

37 On the procedure to follow when the prosecution has not proved the charge but a lesser offence, the Supreme Court in *Adeyemi v State* (1991) 6 N.W.L.R. (Pt. 195) 1 at 29, *per* Wali. J.S.C.

38 (1963) 3 N.S C.C 157 at 162.

When trying for a lesser offence in such cases, the court have distinguished what would in such cases constitute a lesser offence. In *Adeyemi v State*,[39] the Supreme Court states as follows:

> Attempt was made in *Torhamba v Police* (1956) N.R.N.L.R. 94, to provide a guide for the determination of what constitutes a lesser offence. In that case Bairamian Ag. CJ., laid down the test required by section 179 as follows – "... the lesser offence is a combination of some of the several particulars making up the offence charged; in other words the particulars constituting the lesser offence are carved out of the particulars of the offence charged. For example if the charge is wounding with intent to do grievous harm, the lesser offence is unlawful wounding; and if unlawful wounding is proved but not the intent to do grievous harm, the defendant may be convicted of unlawful wounding. Again if a person is charged with murder, he may be convicted of manslaughter; for murder is unlawful killing with malice and manslaughter is unlawful killing merely, or it may be murder reduced to manslaughter by provocation which furnishes an example under sub-s(2) ...." It seems to me that a helpful test is to discover whether the elements of the two offences are the same as in murder and manslaughter, or different as in stealing and unlawful possession. Where the elements are the same, there can be a lesser offence in respect of which an accused can be convicted without a charge.

In prosecuting culpable homicide, a prosecutor may not be able to establish for example, murder, but could establish manslaughter. Generally, for an offence having lesser gravity of punishment to be substituted for a greater offence, a trial on the offence charged must have been conducted;[40] the particulars of the lesser offence must form a combination of some of the several particulars which make up the offence charged; the combination of particulars making up the lesser offence must be proved; and the evidence adduced before the trial court

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[39] (1991) 22 N.S.C.C. (Pt. II) 233 at 258; (1991) 6 N.WL.R. (Pt. 195) 1 at 37, *per* Karibi-Whyte J.S.C.

[40] *The State v Musa Danjummai* (1996) 8 NWLR (Pt. 469) 660.

and facts must be insufficient for convicting on the charge framed but must support the lesser offence in respect of which conviction can be sustained against the accused.[41]

> For an accused charged with the offence of culpable homicide punishable with death to be convicted on a lesser offence of culpable homicide not punishable with death under section 224 of the Penal Code, the law requires that the prosecution must prove that death of the person in question has occurred; that such death was caused by the act of the accused and that the accused intended by such act to cause death or that he intended to cause such bodily injury as was likely to cause death or that he caused the death by a rash or negligent act.[42]

For example, in determining whether the offence of manslaughter has been established, credible evidence must be led to show whether any force used either by the accused or deceased was provoked or reasonable or justified or just merely accidental.[43] Where the offence of murder is not established, the mere fact that it was proved that there was fighting between the accused and the deceased is not sufficient for a substitution for manslaughter.[44] Manslaughter is not established merely by showing that the deceased died. It must also be shown that it was the act of the accused which caused the death of the deceased.[45]

3. Conclusion

Generally, in criminal prosecution, punishment is meant to serve specific purposes. It could be restorative, retributive, or compensational. Whichever is the purpose, in cases of homicide, the stake is always higher, most especially as lives are involved. That of the defendant and that of the person that was killed and closely knitted to this is the emotional sentiments that attach to the loss of a person.

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41 *R. v Adokwu* 20 NLR 103; *Torbambo v Police* (1956) NRNLR 94; *Agumadu v Queen* (1963) 1 SCNLR 203.

42 *The State v Musa Danjummai* (1996) 8 NWLR (Pt. 469) 660.

43 *Alfred Odele v The State* (1986) 4 NWLR (Pt. 38) 756.

44 *Onwe v State* (1975) 9-11 S.C. 23; *Oka v The State* (1975) 9-11 S.C. 17.

45 *R. v Oledima* 6 WACA 202; *Onyenankeya v The State* (1964) NMLR 34.

This paper only dealt with issues relating to where homicide results from the acts of a human person and not that of a corporation. That been so, judicial thoroughness and consistency is necessary so as to determine, first, the nature of culpability, and then, the applicable punishment. In cases of murder, it is expected that thoroughness is necessary in the determination of culpability. This would aid in restraining the imposition of death penalty.