

# Same Sex Marriage, Human Rights and Death Penalty: Common and Islamic Law Perspectives

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## Abstract

There has been a growing movement in a number of countries to regard marriage as a right which should be extended to gay and lesbian couples. The agitations for legal recognition of same-sex marriage cut across race, ethnicity, age, religion, political affiliation, and socio-economic status. This is a serious challenge to marriage as a sacrosanct institution. However, the response to these agitations varies from one country to the other with religion and culture as determinant factor. Islam prescribed capital punishment for same sex marriage and treats the couples as miscreant, while the Common Law sees same sex marriage as fundamental human rights and abrogated capital punishment. But freedom of religion is in itself a fundamental right. In contradistinction with law as the will of the people, religion is a complete way of life to the Muslims.

**Keywords:** Human Rights, Same Sex Marriage, Death Penalty, Legal, Islamic

## 1. Introduction

Since the establishment of the United Nations (UN) in 1945, it had not discussed Lesbian, Gay, Bisexual, Transsexual and Inter sex (LGBT) rights regarding equality regardless of sexual orientation or gender identity until December 2008, when a Dutch/French-initiated, European Union-backed statement was presented to the General Assembly. The statement, originally intended to be adopted as a resolution, prompted an Arab League-backed statement opposing it.<sup>1</sup> In 2011, the UN Human Rights Council passed its first resolution recognising LGBT rights, which were followed up with a report from the UN Human Rights Commission documenting violations of the rights of LGBT people.<sup>2</sup>

In response to the UN Universal Declaration of Human Rights (UDHR), the Cairo Declaration on Human Rights in Islam (CDHRI)<sup>3</sup> provides an overview on the Islamic perspective on human rights, and affirms Shari'ah as its sole source. CDHRI declares its purpose to be a general guidance for Member States of the Organisation of Islamic Countries (OIC).<sup>4</sup>

While LGBTTT-rights activists are making great progress in non-Muslim societies, gay communities in the Muslim world are left fighting for even the most basic of human rights, and in many cases, their very lives.<sup>5</sup> Laws allowing gay rights seldom mean a thing in Muslim majority nations where the laws of Islam triumph over the laws of the land. For instance, the Iranian government alone was said to have put to death an estimated 4,000 homosexuals since the Islamic revolution of 1979. There are also death squads operating in Iraq,<sup>6</sup> killing gays and lesbians (or effeminate men and masculine women suspected of homosexuality) on sight and a shocking 68 gay and trans-gendered men have been killed, often by having their anuses glued shut, followed by induced diarrhea.<sup>7</sup> However, death penalty has been practiced by most societies as a punishment for criminals and political or religious dissidents, often accompanied by torture and executions mostly in public.<sup>8</sup>

Amnesty International opposes the death penalty in all cases without exception regardless of the nature of the crime, the characteristics of the offender or the method used by the state to kill the offender. It sees the death penalty as an ultimate denial of human rights, a premeditated and cold-blooded killing of a human being by the state, as well as a cruel, inhuman and degrading punishment done in the name of justice and a violation of the right to life as proclaimed in the Universal Declaration of Human Rights.<sup>9</sup>

The aim of this paper is to examine human rights, same-sex marriage and death penalty with a view to seeing

<sup>1</sup> The proposed declaration includes a condemnation of violence, harassment, discrimination, exclusion, stigmatization, and prejudice based on sexual orientation and gender identity that undermine personal integrity and dignity. It also includes condemnation of killings and executions, torture, arbitrary arrest, and deprivation of economic, social, and cultural rights on those grounds.

<sup>2</sup> "LGBT and Islam", <[http://en.wikipedia.org/wiki/LGBT\\_in\\_Islam](http://en.wikipedia.org/wiki/LGBT_in_Islam)>.

<sup>3</sup> A declaration of the member states of the Organisation of the Islamic Conference adopted in Cairo, Egypt, in 1990.

<sup>4</sup> See Cairo declaration on Human Rights in Islam", <[http://en.wikipedia.org/wiki/Cairo\\_Declaration\\_on\\_Human\\_Rights\\_in\\_Islam](http://en.wikipedia.org/wiki/Cairo_Declaration_on_Human_Rights_in_Islam)>

<sup>5</sup> Wikislam, "Islam and Homosexuality", <[http://wikiislam.net/wiki/Islam\\_and\\_Homosexuality](http://wikiislam.net/wiki/Islam_and_Homosexuality)>

<sup>6</sup> Iraq does not officially have any laws discriminating against same-sex relationships,

<sup>7</sup> Wikipedia, "Capital Punishment", <[http://en.wikipedia.org/wiki/Capital\\_punishment](http://en.wikipedia.org/wiki/Capital_punishment)>

<sup>8</sup> Ibid

<sup>9</sup> Amnesty International, "Abolish Death penalty", <<http://www.amnesty.org/en/death-penalty>>

whether there is any point of agreement. In doing so, the paper focuses on human rights, same-sex marriage and death penalty from both common law and Islamic perspectives.

## 2. Same Sex Marriage

Same-sex marriage (also known as gay marriage) is a marriage between two people of the same biological sex and or gender identity. Legal recognition of same-sex marriage is sometimes referred to as marriage equality or equal marriage.<sup>1</sup> Recently, the term "same-sex marriage" has been displacing "gay marriage", the term being perceived as less value-laden for the union of two partners of the same sex and also being more inclusive of bisexuals.<sup>2</sup>

Same-sex marriage has been documented in many societies that were not subject to religious influence. In China, especially in the southern province of Fujian where male love was especially cultivated, men would marry youths in elaborate ceremonies. The marriages would last a number of years, at the end of which the elder partner would help the younger find a (female) wife and settle down to raise a family. In Africa, among the Azande of the Congo, men would marry youths for whom they had to pay a bride-price to the father. These marriages likewise were understood to be of a temporary nature.<sup>3</sup>

Legal recognition of a marital union opens up a wide range of entitlements, including social security, taxation, inheritance and other benefits unavailable to couples unmarried in the eyes of the law. Restricting legal recognition to heterosexual unions excludes same-sex couples from gaining legal access to these benefits. While opposite-sex unmarried couples without other legal impediments have the option of marrying in law and so gaining access to these rights, that option is unavailable to same-sex couples. In some instances, lack of legal recognition also makes it more difficult for same-sex couples to adopt children.<sup>4</sup> In many of these countries that legalized same sex marriage, same-sex relationships are treated differently, such as having an unequal age of consent or a ban on marriage. For instance, in Russia, a law banning the promotion of "non-traditional" sexuality to under-18 years was introduced.<sup>5</sup>

However, the UNDHR, African Charter of Human and People's Rights, the Constitution of the Federal Republic of Nigeria and the Marriage Act tend to guarantee or provide for rights to marriage and family life as human rights without a definition of the constituent of parties to marriages that will make up the families. For instance, UNDHR<sup>6</sup> provides that "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution." Though the provision mentioned "Men" and "Women" it did not expressly said marriage must be between a man and a woman for it to be valid.

The African Charter<sup>7</sup> did not come close to the definition of marriage as contained in UDHR. It rather made allusion to the duty of the State to the family as an institution entitle to the protection of the society. In the same vein, the Constitution of the Federal Republic of Nigeria<sup>8</sup> did not expressly define the requirement of the opposite sex of the parties as constituent of family life.<sup>9</sup> The Marriage Act,<sup>10</sup> the substantive Act dealing with marriage in Nigeria did not in any way provide that marriage should be between persons of opposite sex.

In Islam, marriage acts as an outlet for sexual needs and regulates it so one does not become a slave to his/ her desires. It is a social necessity because through marriage, families are established and the family is the fundamental unit of the society. Islam takes a middle of the road position to sexual relations, it neither condemns it like certain religions, nor does it allow it freely. The conjugal relationship between a man and a woman becomes lawful through marriage. Furthermore, it provides a legitimate outlet for recreation as well as procreation. Islam regards sex as natural and good, but restricts it to the partners of marriage so as to ensure the responsibility for its consequences.<sup>11</sup>

In strict compliance with the provisions of the Qur'an and Hadith of the Prophet (SAW), Islam considers same sex marriage a punishable crime and a sin. This is because it clashes with the natural order in

<sup>1</sup> Wikipedia, "same-Sex Marriage", <[http://en.wikipedia.org/wiki/Same-sex\\_marriage](http://en.wikipedia.org/wiki/Same-sex_marriage)>

<sup>2</sup> Syed, op cit

<sup>3</sup> Syed, I. B., "Same Sex Marriage and Marriage in Islam", <[http://www.irfi.org/articles/articles\\_151\\_200/same\\_sex\\_marriage\\_and\\_marriage\\_i.htm](http://www.irfi.org/articles/articles_151_200/same_sex_marriage_and_marriage_i.htm)>

<sup>4</sup> Ibid

<sup>5</sup> BBC News, "Where is it Illegal to be Gay? (10/02/2014) <<http://www.bbc.com/news/world-25927595>>

<sup>6</sup> Article 16

<sup>7</sup> Article 18

<sup>8</sup> Sections 33 - 46

<sup>9</sup> Kabo, Sarinus Ettor, (2013), "Same-Sex Marriage: A Rejected Human Rights Culture in Nigeria", *Journal of Public Law*, Kogi State University, Anyigba, 5, 1, 97.

<sup>10</sup> Cap M7 LFN 2004

<sup>11</sup> Prinness, IM., "Marriage in Islam – Purpose and Virtues", <<http://islamgreatreligion.wordpress.com/2011/03/15/marriage-in-islam-purpose-and-virtues-special-article/>>

which God created human beings as it brings destruction of the family and the institution of marriage.<sup>1</sup>

The Qur'an cites the story of the people of Lot (also known as the people of Sodom and Gomorrah), who were destroyed by the wrath of God because they engaged in lustful carnal acts between men.<sup>2</sup>

And (We sent) Lot when he said to his people: What! do you commit an indecency which anyone in the world has not done before you? Most surely you come to males in lust besides females; nay you are an extravagant people. And the answer of his people was no other than that they said: Turn them out of your town; surely they are a people who seek to purify (themselves). So We delivered him and his followers, except his wife; she was of those who remained behind. And We rained upon them a rain; consider then what was the end of the guilty.<sup>3</sup>

The Qur'an further describes that everything has been created in pairs which complement one another. Pairing of male and female is thus part of human nature and the natural order. Marriage and family is the accepted way in Islam for a person's emotional, psychological, and physical needs to be met. The Qur'an describes the husband/wife relationship as one of love, tenderness, and support. Procreation is another way of fulfilling human needs, for those whom God blesses with children. The institution of marriage is considered the foundation of Islamic society, the natural state in which all people have been created to live.<sup>4</sup>

However, the four schools of Islamic jurisprudence dealt with same sex marriage differently, but agreed that homosexuality is worthy of a severe penalty. In the Hanafi School, the homosexual is first punished through harsh beating, and if he/she repeats the act, the death penalty is to be applied. The Hanafi differentiates between the two acts because in homosexuality, anal sex [something that is prohibited, regardless of orientation] may also be involved, while in adultery and fornication, the penis/vagina (which are reproductive parts) are involved.

As for the Shafi'i school of thought, the homosexual receives the same punishment as adultery (if he/she is married) or fornication (if not married). This means, that if the homosexual is married, he/she is stoned to death, while if single, he/she is whipped 100 times. Hence, the Shafi'i compares the punishment applied in the case of homosexuality with that of adultery and fornication. Against this, the Hanbali School held that sodomy is a form of adultery and must incur the same penalty, i.e. death.<sup>5</sup>

Some scholars, based on the Qur'an and various hadiths, hold the opinion that the homosexual should be thrown from a high building or stoned to death as a punishment for their crime, but other scholars maintain that they should be imprisoned until death. Another view is that between two males, the active partner is to be lashed a hundred times if he is unmarried, and killed if he is married; whereas the passive partner is to be killed regardless of his marital status.

Prophet Muhammad (SAW) was reported to have said, "If you find anyone doing as Lot's people did, kill the one who does it, and the one to whom it is done." He even went so far as to condemn the appearance of homosexuality, when he cursed effeminate men and masculine women and ordered his followers to "Turn them out of your houses." This ruling on homosexuals was naturally adopted by his later successors. Caliph Abu Bakr had a homosexual burned at the stake. Caliph Ali ordered homosexuals to be stoned, and even had one thrown from the minaret of a mosque. These actions quite obviously pre-date any sort of Western influence on Islamic thought.<sup>6</sup>

Some scholars<sup>7</sup> quoted the Prophet (SAW) as cursing sodomites in several hadith, and recommending the death penalty for both the active and passive partners in same-sex acts. The Prophet Muhammad (SAW) was reported to have said: "Whoever you find committing the sin of the people of Lut (Lot), kill them, both the one who does it and the one to whom it is done". The overall moral or theological principle is that a person who performs such actions (*luti*) challenges the harmony of God's creation, and is therefore a revolt against God.

With few exceptions, all scholars of Islamic law interpret homosexual activity as a punishable offence as well as a sin. Some scholars<sup>8</sup> argued that the hadith on killing homosexuals are not reliable by any means and no legal punishment can be prescribed based on them."

Others<sup>9</sup> argued that "even though homosexuality is a grievous sin, a. No legal punishment is stated in the Qur'an for homosexuality, b. It is not reported that Prophet Muhammad (SAW) has punished somebody for

<sup>1</sup> Wikipedia, "Capital Punishment", op cit

<sup>2</sup> See the following Verses of the Holy Qur'an: 7:80-84, 11:77-83, 21:74, 22:43, 26:165-175, 27:56-59, and 29:27-33,

<sup>3</sup> Qur'an Chap 7 Verse 80 - 84

<sup>4</sup> Huda, "Homosexuality in Islam", <<http://islam.about.com/od/islamsays/a/homosexuality.htm>>

<sup>5</sup> Ibid

<sup>6</sup> Wikislam, "Islam and Homosexuality," op cit

<sup>7</sup> Ibn al-Jawzir

<sup>8</sup> Abu Bakr Al-Jassas (981 AD/370 AH)

<sup>9</sup> Mohamed El-Moctar El-Shinqiti, a contemporary Mauritanian scholar

committing homosexuality, and c. there is no authentic hadith reported from the Prophet (SAW) prescribing a punishment for the homosexuals.”

Some others<sup>1</sup> acknowledged that while Islamic law iterations prohibits pre and extra marital as well as same-sex sexual activity, it does not attempt to regulate feelings, emotions and urges, but only its translation into action. He further argued that homosexual tendencies themselves were not prohibited but had to be suppressed for the public good. He argued further that it seems hypocritical to deny fundamental rights to same-sex couples.<sup>2</sup>

Islamic law permits the use of death penalty as a punishment against intentional murder and spreading mischief throughout the land. This type of crime is interpreted in a variety of ways, but can include rape, adultery, treason, apostasy, piracy, sodomy and homosexual behavior. Muslims who support the death penalty believe that its use provides an effective deterrent against crime and as such, helps to promote justice.<sup>3</sup>

However, LGBT persons in Nigeria face unique legal and social challenges not experienced by non-LGBT residents. Nigeria recently passed a bill outlawing same-sex marriage, punishable with a 14-year prison term. It also has more concerning provisions that ban the formation of groups that support LGBT rights.<sup>4</sup> Nigerian LGBTI in Diaspora against Anti Same sex Law protested the Anti-Same Sex Marriage bill and demanded for the repeal of all existing Anti same sex law. They argued that LGBTI Rights are Human Rights.<sup>5</sup> Federal law classifies homosexual behavior as a felony punishable by imprisonment, but several states<sup>6</sup> have adopted sharia law and imposed a death penalty for men. The law makes it illegal for gay people in Nigeria to hold a meeting or form clubs.

A similar bill is currently pending parliamentary approval. The proposed bill calls for five years imprisonment for anyone who undergoes, "performs, witnesses, aids, or abets" a same-sex marriage. It would also prohibit any display of a "same-sex amorous relationship" and adoption of children by gays or lesbians. The bill is expected to receive little or no opposition in Parliament. The same-sex marriage ban would make Nigeria the second country in Africa to criminalize such unions. In 2005, the Ugandan constitution was amended to ban same-sex marriage. The same bill would also call for five years imprisonment for involvement in public advocacy or associations supporting the rights of lesbian and gay people. The intent of the bill is to ban anything remotely associated with being 'gay' or just gay in the country.<sup>7</sup>

Marriage in Islam provides spiritual, physical, emotional and psychological companionship. This companionship generates and sustains love, kindness, compassion, mutual confidence, solace and succor. It lays a spiritual and legal foundation for raising a family. The children born of the matrimonial union become legitimate and mutual rights of inheritance are established.<sup>8</sup> The Qur'an has described this relationship between men and women, which brings love, harmony, trust and compassion, in the most moving and eloquent terms.

“Among His signs is [the fact] that He has created spouses for you among yourselves so that you may dwell in tranquility with them, and He has planted love and mercy between you; in that are signs for people who reflect”.<sup>9</sup>

The Qur'an also provides that:

“They are a garment for you and you are a garment no them ...”<sup>10</sup> And the believers, men and women, are protecting friends of one another; they enjoin the right and forbid the wrong, and they establish worship and they pay the poor-due, and they obey Allah and His messenger; as for those, Allah will have mercy on them; Lo! Allah is Mighty, Wise. Allah hath promised to believers – men and women – gardens under which rivers flow, to dwell therein, and beautiful mansions in gardens of everlasting bliss; but the greatest

<sup>1</sup>Faisal Kutty, (2014), a professor of Islamic law at Indiana-based Valparaiso University Law School and Toronto-based Osgoode Hall Law School, commented on the contemporary same-sex marriage debate in a March 27 Essay in the Huffington Post.

<sup>2</sup> Wikipedia, “LGBT and Islam”, op cit

<sup>3</sup>Wikipedia, “LGBT Rights at the United Nations”, <[http://en.wikipedia.org/wiki/LGBT\\_rights\\_at\\_the\\_United\\_Nations](http://en.wikipedia.org/wiki/LGBT_rights_at_the_United_Nations)>.

<sup>4</sup> Saner, E., “Gay Rights around the World: The Best and Worst Countries for Equality”, <<http://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries>>

<sup>5</sup> Nigeria LGBTI in Diaspora against Anti Same Sex Laws,” <<http://nigerianlgbtindiaspora.wordpress.com/category/same-sex-marriage-bill-in-nigeria/>>.

<sup>6</sup> In some part of Northern Nigeria, like Sokoto, Zamfara, Katsina and Kano where Sharia law is implemented as a state law

<sup>7</sup> Wikipedia, “Same Sex Marriage in Nigeria”, < [http://en.wikipedia.org/wiki/Same-sex\\_marriage\\_in\\_Nigeria](http://en.wikipedia.org/wiki/Same-sex_marriage_in_Nigeria)>

<sup>8</sup> ibid

<sup>9</sup> Qur'an Chap 20 Verse 30

<sup>10</sup> Qur'an Chap 2 verse 187

bliss is the good pleasure of Allah: This is the supreme felicity.<sup>1</sup>

### 3. Human Rights

Human rights are rights inherent to all human beings, irrespective of nationality, place of residence, sex, ethnic origin, colour, religion, language, or any other status. These rights are all interrelated, interdependent and indivisible. Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups. The principle of universality of human rights is the cornerstone of international human rights law. This principle, as first emphasized in the Universal Declaration on Human Rights in 1948, has been reiterated in numerous international human rights conventions, declarations, and resolutions.<sup>2</sup>

The 1993 Vienna World Conference on Human Rights noted that it is the duty of States to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems. This principle applies to everyone in relation to all human rights and freedoms and it prohibits discrimination on the basis of a list of non-exhaustive categories such as sex, race, colour and so on.<sup>3</sup> The principle of non-discrimination is complemented by the principle of equality, as stated in the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights."<sup>4</sup>

However, the legitimacy and authenticity of these international instrument (whether they are binding on parties or not) are more often being challenged in some quarters<sup>5</sup>. It is to be noted that under international law, a treaty once ratified by a state becomes binding on that state to fulfill all the obligations arising under that treaty. This is in line with the principle of *'pacta sunt servanda'*, which provides that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'.<sup>6</sup>

From the Common law point of view, therefore, the UN human rights have been incorporated in to a body of Nigeria's domestic law. It is legislation with international flavour containing the bills of rights. The position of international treaties in the body of domestic laws is stated in *Abacha V. Fawehenmi*,<sup>7</sup> in the following words: '...suffice it to say that an international treaty entered in to by the government of Nigeria does not become binding until enacted by the National Assembly.'

It is further stated that:

"where the international treaty is enacted in to law by the National assembly and incorporated in to municipal or domestic law, like the African Charter on Human and Peoples' Rights (ratification and Enforcement) Act<sup>8</sup>, it becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the courts."

The 1999 Constitution of the Federal Republic of Nigeria provides that: 'before its enactment in to law by the National Assembly, an international treaty has no such force of law as to make its provision justiciable in our courts.'<sup>9</sup>

Under the Islamic Law, human rights are rights granted by God and not by any king or any legislative assembly and since it has been conferred by God, no legislative assembly in the world or any government on earth has the right or authority to make any amendment or change in the rights conferred by God.<sup>10</sup> Islam not only recognises absolute equality between men irrespective of any distinction of colour, race or nationality, but makes it an important principle and a reality. The Almighty God has laid down in the Holy Quran:

"O mankind, we have created you from a male and female." In other words all human beings are brothers to one another. They all are the descendants from one father and one mother. "And we set

<sup>1</sup> Qur'an Chap 9 Verse 71 - 72

<sup>2</sup> United Nations Human Rights, "What are Human Rights?", <<http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>>

<sup>3</sup> Ibid

<sup>4</sup> Article 1

<sup>5</sup> Lifu, P. O., (2011), "Crisis and Conflict in International Law: Bridging the Gap between the Developed and Developing Nations", *University of Ibadan, journal of Private and Business Law (UIJPBL)*, 6, 115.

<sup>6</sup> "Article 26 of the Vienna Convention on the Law of Treaties, entered into force on 27 January 1960" [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

<sup>7</sup> (2000) 4 SC (Pt 2) 1 at P. 20, (Per Ogundare, JSC.)

<sup>8</sup> Cap, 10, LFN 1990 (as amended)

<sup>9</sup> Section 12

<sup>10</sup> Maududi, S., "Human Rights in Islam", <<http://www.islam101.com/rights/>>

you up as nations and tribes so that you may be able to recognize each other"<sup>1</sup>

This means that the division of human beings into nations, races, groups and tribes is for the sake of distinction, so that people of one race or tribe may meet and be acquainted with the people belonging to another race or tribe and cooperate with one another. This division of the human race is neither meant for one nation to take pride in its superiority over others nor is it meant for one nation to treat another with contempt or disgrace, or regard them as a mean and degraded race and usurp their rights. "Indeed, the noblest among you before God are the most heedful of you"<sup>2</sup>

In other words, the superiority of one man over another is only on the basis of God-consciousness, purity of character and high morals, and not on the basis of colour, race, language or nationality, and even this superiority based on piety and pure conduct does not justify that such people should play lord or assume airs of superiority over other human beings. Assuming airs of superiority is in itself a reprehensible vice which no God-fearing and pious man can ever dream of perpetrating. Nor does the righteous have more privileged rights over others, because this runs counter to human equality, which has been laid down in the beginning of this verse as a general principle. From the moral point of view, goodness and virtue is in all cases better than vice and evil.<sup>3</sup>

However, Amnesty International argued that the right to freedom of thought, conscience and religion, which includes the freedom to hold beliefs, is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief."<sup>4</sup>

### 3. Death Penalty

Death penalty is a legal process whereby a person is put to death by the state as a punishment for a crime. The judicial decree that someone be punished in this manner is a death sentence, while the actual enforcement is an execution. Crimes that can result in a death penalty are known as capital crimes or capital offences. Death penalty has been outlawed in a majority of the world's nations, but continues to be used widely in the Middle East. One of the main reasons for the use of capital punishment in this region is that it is clearly permitted by the Quran. As such, most nations<sup>5</sup> that consider Islam to be the state religion permit and often encourage the use of the death penalty. For example, a favorite quote in the Quran regarding the death penalty states,

"...Take not life, which God has made sacred, except by way of justice and law. Thus does He command you, so that you may learn wisdom."<sup>6</sup>

Basically, this means that although murder is considered a sin, it is permissible to utilize capital punishment when required by law. Muslims who support the death penalty believe that its use provides an effective deterrent against crime and as such, helps to promote justice. Islamic law permits the use of death penalty as a punishment against intentional murder. The second crime for which capital punishment can be applied is a bit more open to interpretation. "Spreading mischief in the land" can mean many different things, but is generally interpreted to mean those crimes that affect the community as a whole, and destabilize the society. Crimes that have fallen under this description have included: treason, apostasy, terrorism, piracy, adultery, homosexual behavior and rape, etc.<sup>7</sup>

Although capital punishment is still widely supported in Islamic states, there are growing groups of Muslims that support the abolishment of the death penalty. Those who oppose capital punishment disagree with the mainstream interpretation of Quran passages regarding capital punishment.<sup>8</sup>

"... If anyone kills a person - unless it be for murder or for spreading mischief in the land - it would be as if he killed all people. And if anyone saves a life, it would be as if he saved the life of all people..."<sup>9</sup>

However, there were varying opinions on how the death penalty is to be carried out. Abu Bakr recommended toppling a wall on the evil-doer, or else burning alive, while Ali bin Abi Talib ordered death by stoning for one "Luti" and had another thrown head-first from the top of a minaret. According to Ibn Abbas, this

<sup>1</sup> Qur'an Chap 49 Verse 13

<sup>2</sup> Qur'an Chap 49 Verse 13

<sup>3</sup> Basic Rights in Islam, <<http://www.islam101.com/rights/hrM2.htm>>

<sup>4</sup> Amnesty International, op cit

<sup>5</sup> These are: Iraq, Kuwait, Qatar, the United Arab Emirates, Afghanistan, Bahrain, Brunei, Iran, Mauritania, Oman, Pakistan, Saudi Arabia and Yemen.

<sup>6</sup> Qur'an 6 verse 151

<sup>7</sup> The Role of Death Penalty in the Qur'an, <<http://www.ocadp.org/the-role-of-the-death-penalty-in-the-quran.html>>.

<sup>8</sup> Ibid

<sup>9</sup> Qur'an 5 Verse 32

last punishment must be followed by stoning.<sup>1</sup>

Therefore, actual methods of capital punishment vary from place to place. In some Muslim countries, methods have included beheading, hanging, stoning, and firing squad. Executions are held publicly, to serve as warnings to would-be criminals.<sup>2</sup>

However, Amnesty International opposes the death penalty in all cases without exception regardless of the nature of the crime, the characteristics of the offender, or the method used by the state to kill the prisoner. According to them, the decision of a Sudanese court to sentence a heavily pregnant Sudanese Christian woman to death by hanging for apostasy, and to flogging for adultery is abhorrent.<sup>3</sup>

#### 4. Points of Agreement

The ratification of any Convention under international law implies acceptance of the obligation to guarantee the exercise of all the rights recognized by it. By accepting any obligation, the state assumes the duty to harmonize its domestic legislation with the norms of that Convention. Whether a state that is a signatory to international accepted principles can make legislation that may tend to violate those principles is conflicting and raises serious grounds of questioning.<sup>4</sup>

For the most part of past centuries, scholars of constitutional law, have ignored the conflicts between international law and domestic law and focused more on the domestic judicial system and have persistently opined on the proposition that the constitution holds primacy over all existing law. In few instances that they have scrutinized this relationship, they clearly assign priority to domestic laws.<sup>5</sup>

However, the right of every nation state to make internal legislation without interference from others is recognised under international law. This right defines the relationship that exists between international law and domestic legal systems and, more specifically, in determining which law has priority.<sup>6</sup> For instance, the America's legislation that established a woman's right to an abortion without medical or legal justification is a clear and outright violation of the fundamental human Right to Life, but is considered legal.<sup>7</sup>

One stands to reason that abortion kills an innocent child, while capital punishment kills someone convicted of an unthinkable crime. Abortion can be done for virtually any reason; capital punishment is punishment meant to deter the worst offences. Abortion is left entirely to the choice of one woman, with no representation of any kind for the baby's interests (even non-binding informational requirements are too much to ask of the average abortion defender); capital punishment is carried out only after an investigation, a trial with a constitutionally guaranteed legal defense, conviction by a jury of one's peers, sentencing, and a lengthy appeal process,<sup>8</sup> yet it is considered inhuman.

The first thing that we find in Islam in this connection is that it lays down some rights for man as a human being. In other words, it means that every man whether he belongs to this country or that, whether he is a believer or unbeliever, whether he lives in some forest or is found in some desert, whatever be the case, he has some basic or is found in some desert, human rights simply because he is a human being, which should be recognized by every Muslim. In fact it will be his duty to fulfill these obligations.<sup>9</sup>

As far as the question of taking life in retaliation for murder or the question of punishment for spreading corruption on this earth is concerned, it can be decided only by a proper and competent court of law. In any case, no human being has any right by himself to take human life in retaliation or for causing mischief on this earth. Therefore it is incumbent on every human being that under no circumstances should he be guilty of taking a human life. If anyone has murdered a human being, it is as if he has slain the entire human race.<sup>10</sup> These instructions have been repeated in the Holy Quran in another place saying: "Do not kill a soul which Allah has made sacred except through the due process of law."<sup>11</sup>

<sup>1</sup> Wikipedia, "LGBT and Islam", op cit

<sup>2</sup> Huda, op cit

<sup>3</sup> Amnesty International, "abolish the Death Penalty", <<http://www.amnesty.org/en/death-penalty>>

<sup>4</sup> Prinness, IM., "Marriage in Islam – Purpose and Virtues", <<http://islamgreatreligion.wordpress.com/2011/03/15/marriage-in-islam-purpose-and-virtues-special-article/>>

<sup>5</sup> Ajulo, K., "Opinion: Whose Human Rights Protection: The Nigerian Anti Same Sex marriage Legislation or the United States Abortion Law?" <<http://thewillnigeria.com/news/opinion-whose-human-right-protection-the-nigerian-anti-same-sex-marriage-legislation-or-the-united-state-abortion-law/>>

<sup>6</sup> Ibid

<sup>7</sup> Prinness, I. M, op cit

<sup>8</sup> ibid

<sup>9</sup> Basic Rights in Islam, <<http://www.islam101.com/rights/hrM2.htm>>

<sup>10</sup> Ibid

<sup>11</sup> Qur'an Chap 6 Verse 151

## 5. Conclusion

Millions of people around the globe continue to live in places that frown at same-sex relationships and prosecute them for their sexual orientations. In some countries, same sex relationship is punishable with the death penalty, while in others, it is punishable with imprisonment for a term as may be specified. In other countries, gay and lesbians cannot freely associate on the basis of their sexual orientations.

Much as sexual orientation varies from country to country, it also varies from society to society and to insist that state parties accord LGBTs the right to marriage by the UN under the pretext of human rights is in itself an absurdity. This goes to challenge the very fabric of marriage institution and promotes moral decadence in our societies.

Same-sex marriage cannot and should not legally be a right to be entrenched in fundamental human rights because it is not all encompassing to qualify as a right. The abolition of death penalty is a breach of fundamental human rights that is sanctioned by Islam, which in itself a fundamental right.

## REFERENCES

### JOURNALS

1. Kabo, Sarinus Etor, "Same-Sex Marriage: A Rejected Human Rights Culture in Nigeria", *Journal of Public Law*, Kogi State University, Anyigba, Vol. 5, No. 1, 2013, p. 97.
2. Lifu, P. O., "Crisis and Conflict in International Law: Bridging the Gap between the Developed and Developing Nations", *University of Ibadan, journal of Private and Business Law (UIJPBL)*, (2011), Vol. 6, p. 115.
3. Faisal Kutty, a professor of Islamic law at Indiana-based Valparaiso University Law School and Toronto-based Osgoode Hall Law School, commented on the contemporary same-sex marriage debate in a March 27, 2014 essay in the Huffington Post.

### E- RESOURCES

1. Ajulo, K., "Opinion: Whose Human Rights Protection: The Nigerian Anti Same Sex marriage Legislation or the United States Abortion Law?" <http://thewillnigeria.com/news/opinion-whose-human-right-protection-the-nigerian-anti-same-sex-marriage-legislation-or-the-united-state-abortion-law/>
2. Amnesty International, "Abolish Death penalty", <<http://www.amnesty.org/en/death-penalty>> "Article 26 of the Vienna Convention on the Law of Treaties, entered into force on 27 January 1960" "Article 26 of the Vienna Convention on the Law of Treaties, entered into force on 27 January 1960"
3. Basic Rights in Islam, <<http://www.islam101.com/rights/hrM2.htm>>
4. BBC News, "Where is it Illegal to be Gay? (10/02/2014)" <<http://www.bbc.com/news/world-25927595>>
5. Cairo declaration on Human Rights in Islam", <[http://en.wikipedia.org/wiki/Cairo\\_Declaration\\_on\\_Human\\_Rights\\_in\\_Islam](http://en.wikipedia.org/wiki/Cairo_Declaration_on_Human_Rights_in_Islam)>
6. Huda, "Homosexuality in Islam", <http://islam.about.com/od/islamsays/a/homosexuality.htm>
7. LGBT and Islam", <[http://en.wikipedia.org/wiki/LGBT\\_in\\_Islam](http://en.wikipedia.org/wiki/LGBT_in_Islam)>.
8. Maududi, S., "Human Rights in Islam", <<http://www.islam101.com/rights/>>
9. Nigeria LGBTI in Diaspora against Anti Same Sex Laws," <<http://nigeriangbtindiaspora.wordpress.com/category/same-sex-marriage-bill-in-nigeria/>>.
10. Prinness, IM., "Marriage in Islam – Purpose and Virtues", <<http://islamgreatreligion.wordpress.com/2011/03/15/marriage-in-islam-purpose-and-virtues-special-article/>>
11. Saner, E., "Gay Rights around the World: The Best and Worst Countries for Equality", <<http://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries>>
12. Syed, I. B., "Same Sex Marriage and Marriage in Islam", <[http://www.irfi.org/articles/articles\\_151\\_200/same\\_sex\\_marriage\\_and\\_marriage\\_i.htm](http://www.irfi.org/articles/articles_151_200/same_sex_marriage_and_marriage_i.htm)>
13. The Role of Death Penalty in the Qur'an, <<http://www.ocadp.org/the-role-of-the-death-penalty-in-the-quran.html>>
14. United Nations Human Rights, "What are Human Rights?", <<http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>>
15. Wikipedia, "Capital Punishment", <[http://en.wikipedia.org/wiki/Capital\\_punishment](http://en.wikipedia.org/wiki/Capital_punishment)>
16. Wikipedia, "LGBT Rights at the United Nations", <[http://en.wikipedia.org/wiki/LGBT\\_rights\\_at\\_the\\_United\\_Nations](http://en.wikipedia.org/wiki/LGBT_rights_at_the_United_Nations)>.
17. Wikipedia, "Same Sex Marriage in Nigeria", <[http://en.wikipedia.org/wiki/Same-sex\\_marriage\\_in\\_Nigeria](http://en.wikipedia.org/wiki/Same-sex_marriage_in_Nigeria)>
18. Wikislam, "Islam and Homosexuality", [http://wikiislam.net/wiki/Islam\\_and\\_Homosexuality](http://wikiislam.net/wiki/Islam_and_Homosexuality)
19. Wikipedia, "Capital Punishment", <[http://en.wikipedia.org/wiki/Capital\\_punishment](http://en.wikipedia.org/wiki/Capital_punishment)>



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## **LEGISLATIONS**

1. United Nations Declaration on Human Rights
2. African Charter of Peoples' and Human Rights
3. Constitution of the Federal Republic of Nigeria
4. Marriage Act

## **QUR'ANIC VERSES**

See the following Verses of the Holy Qur'an: 7:80–84, 11:77–83, 21:74, 22:43, 26:165–175, 27:56–59, 29:27–33, 20:30, 2: 18, 9: 71 – 72, 49 :13, 7 :80 – 84 and 6:151