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Death Penalty In Nigeria: To Be Or Not To Be: The Controversy Continues

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Abstract:

The death penalty has become an engine of controversy in Nigeria like some other countries of the world, with some groups calling for the abolition of the death penalty as a means of punishment for some capital offences like murder, armed robbery, treason et cetera, while other groups are in favour of the use of the death penalty for the same purpose. While the opponents of the death penalty argue that the death penalty is a violation of Human rights, the proponents of it argue that the deterrent effect of the imposition of the death penalty cannot be over-emphasized. This article would look at the history of death penalty in Nigeria, arguments for and against its application and concludes by re-affirming the need for the continued retention of the death penalty in the Nigerian Statute books. It recommends that good governance is a key to the reduction of crimes in the society.

Key words: Capital Offence, Capital Punishment, Death Penalty, Deterrence, Human rights.

1.Introduction

Death Penalty is said to be “the infliction, by due legal process, of the penalty of death as a punishment for crime”¹

Death Penalty, which is a punishment usually meted out on an offender whose offence is considered to be capital in nature,² has been used from earliest times, and by different societies the world over, as a means of punishing various types of proscribed conduct.³

Some capital offences carry the death penalty in Nigeria. Under this circumstance, the judge’s power to sentence is restricted once the accused is found guilty of capital offences. The only option open to the court is to impose death sentence on the offender⁴

According to the Catholic Encyclopedia:

“The first divine pronouncement which seems to sanction the death penalty is found in Genesis 9: .- “whosoever shall shed man’s blood, his blood shall be shed, for man was made to the image of God.” It goes further to say that “When the ancient Israelites had departed from Egypt and were sojourning in the Sinaitic peninsula, they received from the Lord a code of Legislation wherein the death penalty was prescribed for many offences”.

“Thus, in Exodus 21, the death penalty is prescribed for murder, for a willful assault upon the father or mother of an offender for cursing a man’s father or mother and for man-stealing. Down to their latest days the kingdom of Israel and Juda preserved capital punishment as a feature of their criminal code.”⁵

In traditional African society (including Nigeria), offences such as murder, witchcraft, profaning the gods or spirit used to give rise to death penalty⁶.

However, these customary offences were eventually abolished by section 21 (10) of the 1960 constitution of Nigeria.

The said section provided thus:

“No person shall be convicted of a criminal offence unless that offence is defined and the penalty thereof is prescribed in a written law...”

Also, section 36 (12) of the 1999 constitution of Nigeria (as amended), re-echoed the said provision as it provides that:

“... A person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law... a written law refers to an Act of the National Assembly or a Law of a state, any subsidiary legislation or instrument under the provisions of a law.”

The reason for outlawing customary offences appears to be that what should amount to an offence must be certain and the penalty thereto must also be certain and not subject to guesswork. These ingredients were apparently lacking in the customary offences resulting in their being abolished by the various constitutional provisions in Nigeria. It was apparently to avoid this situation also that

sections 37 and 319 of the Criminal Codes Act Cap C38, Laws of the Federation of Nigeria, 2004 and sections 221 and 411 of the Penal Code (Northern States) Federal Provisions Act, Cap 345, Laws of the Federation of Nigeria 1960, expressly state that offences of murder, treason and armed robbery will attract capital punishment.

Furthermore, the legality of the death penalty is well grounded in the Nigerian Constitution. Thus, section 33 (1) of the Nigerian Constitution provides thus:

“Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria”⁷

The implication of this provision of the constitution is that the death penalty is a legal form of punishment when it is carried out in the execution of a sentence of a court of competent jurisdiction in respect of a criminal offence for which a person has been found guilty in Nigeria.

2. Offences That Attract Death Penalty In Nigeria

The Nigerian Law and Statutes including the Sharia Law prescribe the mandatory death penalty for a wide range of offences. The implication of this is that once the accused is found guilty of a capital offence, the judge’s hands are tied and the option open to such a judge is to impose a death sentence as a punishment on the offender.

Some of the offences which attract the death penalty as punishment mainly include the following:

“Offences of murder under the criminal code, homicide punishable by death under the penal code, treason, instigating the invasion of Nigeria and the offence of armed robbery under Robbery and Firearms (Miscellaneous Provisions) Act 1984, among others”⁸

Also “the northern penal code includes additional capital offences namely:

- Giving false evidence in a trial which leads to the execution of an innocent person
- Abetting the suicide of a minor, a mentally abnormal or drunken person and
- In the case of a person already serving a life sentence, attempting to commit culpable homicide
- Sodomy
- Adultery (zira)
- Apostasy (ridda)
- Rebellion (bag’yi) and
- Hiraba, translated as highway robbery”⁹

Some other offences which can ground death penalty as punishment include military offences like misconduct in action, mutiny and dereliction of duty¹⁰

Recently, in Nigeria, the offence of kidnapping was made a capital offence by some states with death as penalty on conviction. The states include – Abia, Bayelsa, Akwa-Ibom, Anambra, Ebonyi, Enugu Imo and Edo.

As stated earlier, the sentence of death as a penalty in respect of the capital offences mentioned above excludes the possibility of judicial discretion under any circumstance as the various laws demand the application of death penalty without providing for alternative punishment.

3. Exceptions

There are some categories of offenders who are exempted from death penalty in Nigeria. These include”

3.1. The Juvenile Offender

It should be noted that section 368(3) of Criminal Procedure Act. Capt.C.41, Laws of the Federation of Nigeria 2004,¹¹ provides to the effect that where the court convicts an offender for an offence which is punishable with a death sentence but it is of the opinion that the person had not attained the age of seventeen years at the time the offence was committed, the sentence of death shall not be pronounced or recorded. The court is rather enjoined to order the detention of such convict during the pleasure of the president or state governor for federal and state offences respectively. This appears to be the basis of the Supreme Court decision in *Modupe.v.State*¹² where the court stated thus:

It should be noted that States that are parties to International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights (ACHR) are prohibited from imposing capital punishment for offences committed by persons below 18 years of age. This prohibition is also contained in the International Convention on the Rights of the Child which came into effect in September, 1990. It is also forbidden by the African Charter on the Rights and Welfare of the Child^{13b}.

Akingbehin, E.O, states that the advocacy that juveniles should be exempted from capital punishment is premised on their diminished culpability arising from their susceptibility to immature and irresponsible behaviors. It has also been contended that their vulnerability and lack of control over their immediate surroundings gave them a greater claim than adults, to be forgiven for failing to escape negative influence, as they were still struggling to define their identities¹⁴

3.2. Pregnant Women

According to the Criminal Procedure Act, sections 368(2)¹⁵ pregnant women cannot be sentenced to death and their sentences should be commuted to life imprisonment instead. Section 300(3) of the Criminal Procedure Code, which is relevant in the Northern part of Nigeria, also includes a similar provision^{16a}.

A controversial feature of this genre of exemption is the determination of whether pregnancy should be at the time of the commission of the offence, conviction or execution. The pregnancy here is either at the time of conviction or execution. Hence, where a woman was convicted and sentenced to death, but before the execution of the sentence of death she is found to be pregnant, the sentence of death shall be commuted to life imprisonment.^{16b}

However, in some jurisdictions, there is no exemption of pregnant women from capital punishment. Thus in 2011 in Iran, a woman was raped and she became pregnant. After telling the authorities, she was asked to produce 4 witnesses of which she could not. She was executed while she was 2 months pregnant according to Islamic Laws^{16c}.

3.3. Insanity/Mentally Ill

The provisions of the Nigerian Criminal Code exempt insane offenders including capital offenders from Criminal Liability as a result of the negation of their mental guilt.

Section 28 of the said Criminal Code Provides:

“A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to control his actions or capacity to know that he ought not to do the act or make the omission...”¹⁷

Insanity has been defined as the state where an accused lacks a mental health/capacity so as to justify being exempted from legal responsibility. In legal parlance, it is defined as a condition, which renders the affected person unfit to enjoy liberty of action because of the unreliability of his behavior with concomitant danger to himself and others.¹⁸

However, before an insane offender benefits from this provision of the law, such offender must establish:

- That at the time of committing the crime the accused was in a state either of mental disease or of natural mental infirmity.
- It must then be shown that the disease or infirmity was such as to have deprived him
 - of his capacity to understand what he was doing: or
 - of his capacity to know that he ought not to do the act or make the omission or
 - of his capacity to control his actions¹⁹

3.4. Women With Children

Nigeria is under-treaty obligations not to execute women with nursing children.²⁰

Akingbehin.E.O, has suggested that the category of offenders to be exempted from the death penalty should not be limited to those mentioned above.

According to him, it is desirable that the Nigerian Government includes the aged especially those who are above 70 years old at the time of the commission of the capital offence into the categories of those to be exempted from capital offence. This he stated was because “from age 70 and above a lot of people may develop some diseases that are associated with old age like dementia, thereby becoming senile. This can subject them to a state of attenuate responsibility”²¹

Having looked at the meaning of death penalty, the origin, the offences that can attract death penalty and the exemptions thereto, the next aspect of this write up is to discuss whether Nigeria should continue the application of death penalty as stated in its statute books or otherwise. This constitutes the kernel of this paper.

4. Death Penalty In Nigeria: To Be Or Not To Be?

The current argument to the application of death penalty or otherwise in punishing some offences raised its head after the execution of some four condemned criminals who had being on death row in Edo state, Nigeria in June, 2013. These prisoners were convicted either of murder or armed robbery. Note should be taken that before this execution, the year of last known execution in Nigeria was in 2006.²²

The question may be asked as to the reasons for the infliction of capital punishment as a means of punishing offences.

According to Okonkwo and Naish²³

The first view involves a process of ‘looking back’ at the circumstances of the crime committed and deciding what punishment the accused deserved for his conduct having regard to his responsibility for the crime... Punishment is imposed in order to relieve the public’s indignant feelings or to mark with what revulsion they regard the crime. Thus, the purpose of capital punishment, though it may be partly deterrent, contains also the idea that who kills must be killed.

Proponents of death penalty, including the writers herein, argue that death penalty in Nigeria is constitutional and legal.

Akintayo Iwilade²⁴, submits that the foundation for the legality of the death penalty in Nigeria is as provided under section 33(1) of the 1999 constitution (as amended)

The said section of the constitution provides thus:

“Every person has a right to life and no one shall be deprived of his life, save in the execution of the sentence of a court in respect of a criminal offence which he has been found guilty in Nigeria”

The learned author goes further to state that “while the inalienability of the right to life is unambiguously emphasized by the constitution, a legitimate ground for derogation is provided for in the same constitution. Accordingly, when statutes prescribe the death penalty for certain classes of crimes and so long as such statutes derive their legitimacy from, and are not inconsistent with the constitution, they are legally valid and enforceable”²⁵

According to Chinwe C.C., "...the constitutional guarantee of the right to life is subject to a provision in favour of death sentence ordered by a court as punishment following on a conviction for criminal offence"

He goes further to state that while some authors have insisted that the death penalty is inhuman and degrading punishment and therefore unconstitutional, the Nigerian courts in a plethora of cases have held otherwise. The court of Appeal in *Adeniji .v. State* held that "the death penalty as per section 33(1), 233(2), 243 of the constitution is expressly recognized by the said constitution"^{26a}

The Supreme Court in *Okoro .v. State* stated that the death penalty and its method of execution is lawful and valid as same is sanctioned by both sections 33(1) and 34(1)(a) of the 1999 constitution. In *Kalu .v. State*, the Supreme Court states the Nigerian position in respect of death penalty as it held that "...under S.33(2) of the 1999 constitution, the death penalty can by no stretch of the imagination be said to be proscribed or outlawed ..."^{26b}

Nigeria has applied the death penalty for more than fifty years. Research has shown that majority of Nigerians favour its retention²⁷ Proponents of death penalty have also argued that it deters crime, prevents recidivism and that it is an appropriate form of punishment for the crime of murder²⁸

To Chinwe C.C., the overall rationale of Nigerian cases upholding the death penalty is the values of the punishment in deterrence. He cites the decision of *Fabiyi J.C.A, in Akinyemi .v. state*²⁹ on the propriety, justification of death sentence where the court concluded by holding "the sentence was well pronounced for the capital offence... it is good law to serve as deterrence in a mundane society where heartless and dangerous citizens abound in plenty"³⁰

This decision found favour in the decision of Edo state government of Nigeria, to execute four criminals on death row in that state. According to Henry Idahagbon, the Attorney General of Edo State, one of the convicts on death row, Richard Igagu "...went with his gang to a house to rob. After robbing the man of his possessions, they raped his wife. And after raping the wife, they took a bottle and inserted the bottle into the private part of the wife until she bled to death"³¹ It is the submission of the writers herein that the death penalty was appropriate because "heartless and dangerous people abound in plenty" and such people should not be allowed to live and continue with their wickedness.

According to Betty Miller³², the use of death penalty goes beyond the reduction in the number of violent murders by eliminating some of the repeat offenders, but rather it is being "used as a system of justice, not just a method of deterrence"

Jeremy Bentham³³ states that "death is regarded by most men as the greatest of all evils: and that especially among those who are attached to life... it appears to be more efficacious punishment than any other."

Death Penalty is also said to be equated with the principle of self defense which the law permits.³⁴ It is a known fact that there is always a tendency for people to defend themselves against assailants or kill attackers if their own lives are in danger. The same goes to Nigerian state. Nigerian society seems justified in using lethal force to defend itself. Government needs to deprive some people of their right to life in order to protect that right for the vast majority of its citizen.³⁵ The right to life is therefore limited so that those who threaten death to others either lose or deserve to have their own right to life overridden by the rights of others³⁶

It has also been argued that death penalty is Scriptural in that before the various government laws established the practice of death penalty, the idea of capital punishment was already provided for by God in the Old Testament of the Bible.³⁷

Also, Leviticus 24:17, says "And he that killeth any man shall surely be put to death"

24:20: "Breach for breach, eye for eye, tooth for tooth; as he hath caused a blemish in man, so shall it be done to him"

It has also been said that death penalty is good for the environment.³⁸ citing the Biblical book of Numbers 35:16-21, which states "And if he smite him with instrument of iron, so that he die, he is a murderer: the murderer shall surely be put to death. And if he smites him with throwing a stone, wherewith he may die, and he die, he is a murderer: the murderer shall surely be put to death... the revenger of blood shall slay the murderer when he meeteth him..."

35:34: "So ye shall not pollute the land wherein ye are: for blood defileth the land: and the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it..."

This means that the murderous action of the convict could pollute the environment and the best way to clean up the environment is to use his blood by sentencing the convict to death followed by his execution.

From the foregoing it is submitted that death penalty may be imposed either to deter the convicted criminal from offending again or imposed with a view of discouraging the public from doing what the convict did. This in a way can bring sanity and orderliness to the society. These arguments and others are the ones the proponents of death penalty use to support their stand.

5.Arguments Against Death Penalty

The current worldwide movement to abolish the death penalty has its roots in the liberal utilitarian and humanistic ideas initiated by the Enlightenment in Europe at the end of the 18th century. Although, the enlightenment saw the essence of partial Abolitionism, the 19th century saw the abolition of death penalty by some countries. Abolition experienced a delay in the 20th century before the adoption of UDHR in 1948. After the adoption of UDHR, abolition gained ground³⁹.

Some of the reasons given by opponents of death penalty include that: it conflicts with human rights. The death penalty is said to be in itself a violation to the right to life as it allows for the taking of a convict's life⁴⁰.

Again, it is said to violate the right not to be subjected to cruel and inhuman treatment both in context and method of execution. This cruelty extends beyond the prisoner to his family, friends, and administrators among others⁴¹.

It is also contended that the death penalty in Nigeria violates the right to fair trial which involves adequate investigation, personal disposition of the judge, judicial error and delays in carrying out the death sentence and manner in which the case is conducted.

Implementation of the death penalty is irreversible and in the case of an erroneous judgment can lead to the execution of the innocent⁴².

Opponents of death penalty also contend that the irreversibility of the death penalty contradicts the idea that criminals can be rehabilitated and resocialised and for this reason, contradicts the notion of freedom and dignity⁴³

Death penalty is said to be unjust, vindictive, and retributive in deterring crime in a pluralistic society like Nigeria⁴⁴. Also it is said to be nothing but a remnant of old system based on vengeance that he who has taken a life should suffer from the same fate. It is contended by the opponents of death penalty that justice has risen above such a traditional notion of punishment by adopting a principle of symbolic, yet proportional sanction for the harm done⁴⁵.

Opponents of death penalty also contend that the evolution of international law tends towards the abolition of the death penalty. The Rome Statutes of the International Criminal Court and the UN Security Council Resolutions establishing the International Criminal Tribunal for the Former Yugoslavia and for Rwanda do not provide for the death penalty in the range of sanctions. Specific international and regional instruments have been adopted which aims to abolish capital punishment⁴⁶.

The UN second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) aimed at the abolition of the death penalty (to which Nigeria is not a signatory), the guidelines to European Union (EU) policy towards third world countries on the death penalty, adopted by the European Union on 29 June, 1998 stressed that one of the EU's objectives is "to work towards the universal abolition of the death penalty as a strongly held policy view agreed by all EU members"⁴⁷.

The opponents of death penalty also make reference to United Nations General Assembly Resolution 62/149 and 63/148 of 2007, which purports to place a moratorium on the implementation of death penalty.

Opponents of death penalty are doubtful as to whether it has served as a deterrent for crime, especially homicide cases. They argue that while the Nigerian courts continue to refer to the death penalty's value in deterrence, much evidence shows little effect in that regard⁴⁸.

However, the proponents of death penalty had reacted by stating that these cited international treaties and conventions are not legally binding on Nigeria and cannot be elevated to the status of law in Nigeria except their details are enacted into law by Nigeria's valid legislative authorities⁴⁹.

That even if Nigeria entered into a treaty to that effect, such treaty will possess no force of law until domesticated and passed into law in accordance with section 12 of the 1999 constitution (as amended). Section 12 (1) provides that "No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly".

Therefore, where any of the treaties has not been enacted by the National Assembly, it only has the force of persuasion and not law. Even where the National Assembly has taken further steps to enact the above treaties into law, such law still remain invalid by virtue of section 1(3) of the 1999 Nigerian Constitution (as amended) which provides as follows "If any other law is inconsistent with the provisions of this constitution, this constitution shall prevail and that other law shall to the extent of the inconsistency be void"⁵⁰.

6. Conclusion

This paper has endeavored to explain what death penalty means. It goes further to trace the origin of death penalty both statutorily and scripturally. The writers also explained the general reasons for punishment. The paper also pointed out the offences that attract death sentences in Nigeria.

It went further to explain those who are exempted from the application of death sentence in Nigeria - the juvenile, the pregnant women and the mentally retarded.

The writers went into full discussion in respect of the great controversy that exists between the supporters of the application of death penalty and the opponents of it.

The writers conclude by supporting the application of death penalty in Nigeria as same is constitutional. It is also submitted that until the constitution is amended to abolish capital punishment, it is still legal to execute a criminal that has been convicted of the offences that our laws had made capital⁵¹.

Also, government appears to be justified to put certain measures aimed at checking certain criminal acts. Thus, the death penalty seems to have fulfilled this purpose⁵².

7. Recommendations

High rate of crime in the society sometimes can be a fall out of the quality of leadership in a country. Governments at all levels in Nigeria should carry out policies that are for the betterment of its citizenry. Gainful employment opportunities should be provided for the citizens. Failure of this can lead to high rate of crimes as "an idle hand", they say, "is the devil's workshop"

There is urgent need to introduce DNA testing as a deterrent to executing the wrong person in cases where an innocent man or woman is charged with murder. DNA testing is rather a recent development in the death penalty issue. DNA (DeoxyfiboNucleic Acid) is called the genetic building block of life. Everyone has a unique pattern except for identical twins. The scientific community has now discovered a way to test blood to determine if that blood came from that particular individual or actually could not have been from them because of the DNA genetic coding. This has been helpful in determining guilt or innocence, when evidence had been kept with blood stains on it. Even if the blood is old, the DNA code is still present. Other body fluids carry the same DNA coding and can be tested⁵³

Efforts should be made to limit the offences carrying death penalty to the most serious and heinous crimes. To this wise, there is need to amend some of the extant laws on death penalty in Nigeria.

Also, the issue of keeping a convict on death row for an unreasonable period of time before execution should be addressed.

All said, the controversy over death penalty in Nigeria will continue to rage on.

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- 42) see also Anwo J.O. and Arowolo C.A. “Critical Analyses of Abolition of Death Penalty in International Law: An analysis of death penalty under the United States and Nigerian Laws “citing the case of Nafiu Bello .v. Attorney General Oyo State (1986) 5 NWLR (pt. 45) P.828 where the Appellant was erroneously executed while his appeal was still pending in court. Available at www.ajol.info/index.php/naujilj/article/download/82408/72563 by J.O. Anwo -2011 – related article: 4/8/2013
- 43) HURILAWS “ Do we need death penalty “. http://www.hurilaws.org/index.php? Option=com counter it & view=article & id=100 do-we-need death penalty_&catid=39:slides:visited 21.08.2013 9:14am.
- 44) Uche .O.O. and Udezo B.O.S. “Implications of capital punishment in Nigerian society” African Research Reviews, vol. 5 (4) serial No. 21, July 2011, PP. 423-438.
- 45) Supra, Note 43
- 46) Ibid
- 47) ibid
- 48) Supra, Note 3, P.17
- 49) Supra. Note 24
- 50) Solomon Kehinde “Facing the Hangman’s Noose: Any Right under Nigerian law?”. (The Lawyers chronicle) http://thelawyers chronicle.com/index.php?option=com_content&view.. visited 26/07/2013 at 5:49pm.
- 51) Supra, Note 49.
- 52) Supra, Note 50
- 53) Supra Note 32