

DEATH PENALTY AS AN AFFRONT TO HUMANITY AND GLOBAL CIVILISATION: NIGERIA AS A CASE STUDY

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ABSTRACT

The death penalty in Nigeria and indeed all over the world has become a subject of perpetual discourse. This is because protagonists and antagonists are at each other throats on the need for its retention or abolition. It is a thorny and emotional controversy that has not shown any sign of abating. The issue of death penalty transcends regional divide, political ideology, race and civilisation. This piece is an appraisal of death penalty application in Nigeria and its continued relevance in view of the dominant global pulse of human rights, recent positive developmental strides in the areas of civilisation and the error prone criminal justice system. The paper using doctrinal research methodology finds that the 1999 Constitution of the Federal Republic of Nigeria (as amended) does not prohibit its application. The study however finds that there is changing perception of crimes and punishment globally. As a result, international law is becoming paternalistic-moving towards the abolition of death penalty. The study therefore is a clarion call to the law makers to roll back the provision of death penalty and adopt life jail as a viable alternative. By so doing, Nigeria will not trail behind international trends in human rights and civilization. It will also make her stand on a higher pedestal than the depraved offender.

Keywords: Death, Penalty, Affront, Humanity Civilisation

INTRODUCTION

One would much rather that twenty guilty persons should escape the punishment of death than that one innocent person should be condemned and suffer capitally. John Fortescule 1394-1476

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The above maxim which is also restated by Benjamin Franklin² that “tis much more prudent to acquit two persons tho’ actually guilty, than to pass sentence of condemnation on one that is virtuous and innocent³ underlies the imperative of circumspection in the philosophy of punishment for crimes. It is even more important when the offence carries the death penalty. Death penalty as punishment for capital offences is an age-old question that dates back to Plato who in his “Laws” saw the need to punish by death those who commit egregious crimes. It has been visited on all manner of people from prophets, heretics, apostates and kings to prevent inhumanity of man to man. In other words, death penalty has existed since antiquity⁴. The origin of death penalty is also sometimes traced to the religious books of the Bible⁵ and the Quran⁶ in which with respect to punishment for murder, it is provided that “whoever sheds human blood, by man shall his blood be shed for in the image of God made the man”. As a result, the Mosaic Law provided that “he that strikes a man so that he dies shall be surely put to death”⁷. This is clearly put by Emmanuel Kant, a philosopher as follows;

Whoever has committed murder must die, there is in this case, no juridical substitute or surrogate that can be given or taken for the satisfaction of justice. There is no likeness or proportion between life, however painful and death⁸

From Kant conviction, it follows that death penalty is the payment in kind of the evil committed by a person. From the retentionists’ perspective, punishment has to be

² 1706 -1790

³ <https://www.quotePark.com>.

⁴ Olatubosun I.A. “Death Penalty in Nigeria: What is The Balanced View” Being a Ph. D Seminar presented to the Faculty of Law, Obafemi Awolowo University Ile-Ife., September 2005. p.2.

⁵ Genesis chapter 9: verse 6 Exodus chapter 21: verses 12 & 14, Deuteronomy chapter 17 verse 12.

⁶ Quran 5: 36. The Holy Bible specifically says in Leviticus 24: 17 that “And he that killeth any man shall surely be put to death. Verse 20 also says that “Fracture for fracture, eye for eye, tooth for tooth as he hath caused a blemish in man, so shall it be done to him. Numbers 35: 16-21 also provides that “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 smite him with throwing a stone, where with he may die, and he die, he is a murderer, the murderer shall surely be put to death... the avenger of blood shall slay the murderer when he meeteth him.

⁷ Bodaiki A, D (2004) “Singing *Nunc Dimitis*” *Benin Journal of Public Law Faculty of Law University of Benin*, Benin city Vol 2, No.1 p.1.

⁸ Owoade M.A (1988). “Capital Punishment: Philosophical Issues and Contemporary Problems in Nigeria” Second Order, New series. *An African Journal of Philosophy*. Obafemi Awolowo University Press Ltd. Ile-Ife. p.42

proportional to the offence and in the case of murder, death is the equivalent coin. Hegel, another philosopher, also sees punishment as the annulment of crimes, the righting of wrong: and so is the death penalty⁹. Legal positivism also supports death penalty. This legal theory has been the anchor of dictatorial regimes for the past and present generations. The theory is that law is the command of the sovereign, whose legislative competence is unlimited. Disobedience to the sovereign law therefore, attracted the severest punishment of death penalty¹⁰. Little wonder then, that the death penalty was a common punishment in ancient legal systems of the Hebrews, Assyrians, and Babylonians¹¹. The application of death penalty continued until the theory of natural law became a contending force. Questions are being asked; “why the sovereign will should prevail even when it is whimsical, capricious and oppressive? The supremacy of the divinity became key to human existence. All human beings, they contend, are united as God’s creature and should live by the divine precept of respect for human life and dignity¹².

Controversy on the continued application of the death penalty however became prominent in the 19th and 20th century as a result of a new and emerging discourse on morality and human rights concepts. In Nigeria, the controversy was animated following former President Goodluck Jonathan’s directive in 2013 to the state Governors to sign death warrants of those who are on death row¹³. More recently, the incumbent Minister of Interior, Rauf Aregbesola made a similar call as a way to decongest the correctional centres.¹⁴ However, it is heartening to note that there is glimmers of hope when the Federal Government set up the National Study Group on death penalty in 2004 with a view to rolling back the provision of death penalty from the body of our laws.¹⁵ It is important to emphasize that opposition to death penalty cannot be an end in itself but only one element of a more general fight for human dignity. However, issues are being raised as to whether death penalty is the best penalty. What would it accomplish to put someone on death row? The victim sadly is dead

⁹ Ibid p.42

¹⁰ Ibidapo Obe A. A. *Synthesis of African Law. Concept Publication limited. Mushing, Lagos* 2005.p.130.

¹¹ In all the societies mentioned above, death penalty was imposed on offences such as homicide, rape, robbery and heresy.

¹² Ibidapo Obe op.cit, p.131.

¹³ The former President gave the directive at the 2013 Fathers’ Day celebration organised by the Presidential Villa Chapel. He said the Governors must be ready to carry out their responsibility no matter how painful in accordance with the law. As a result of this directive, four condemned prisoners were executed on June 17, 2013 in Edo state.

¹⁴ Onyekwere Joseph. 2021“Prison Decongestion: Politics and Hypocrisy of Death Penalty in Nigeria”. Available at <https://www.guardian.ng>. Last visited, 10 /8/ 2021.

¹⁵ The Reports of the National Study Group recommends a moratorium and a reform of criminal justice system.

and cannot be brought back to life. Does death penalty give increased protection against being murdered? This article argues that death penalty is nothing but a remnant of an old system based on vengeance that he who has taken a life should suffer from the same fate. In furtherance of this argument, the paper posits that the irreversibility of death penalty contradicts the idea that criminals can be rehabilitated and re-socialised. Along this trajectory, the author advances arguments in favour of the abolitionists' perspective and submits that life imprisonment is as effective as death penalty as a means of deterrence. The author also provides evidence that the concept of justice has risen above such a traditional notion of punishment especially with the error prone criminal justice system which presents a clear and present danger that innocent citizens may be executed. The evolving trends, the paper avers, is the adoption of a principle of a symbolic, yet proportional sanction for the harm done and submits that with the present level of development of human civilisation and respect for human dignity, death penalty provides a veritable example of how not to punish in the 21st century and beyond because the most heinous crime can be atoned for– but only by the living.

We examine the available evidence for this proposition in five segments into which this presentation is divided. The second segment analyses the legal framework or constitutional basis of the death penalty against the backdrop of fundamental right to life. The third segment discusses the philosophical theories of retribution and deterrence as the basis of the death penalty. Part four examines the arguments of the protagonists and the antagonists. In both cases, we shall argue that retention or abolition of the death penalty clearly demarcates a closed society from an open one. The indignity and cruelty inherent in the method of administering the death penalty, especially by hanging visited on those on death row engages the attention of the author in the fifth segment. The attitude of Public International Law to the continued application of the death penalty is examined in the sixth part. This introductory segment which is the first is now concluded by clarification of some essential concepts in our topic. Although, ethical or moral considerations are extraneous to legal discussion of this nature, reference is nevertheless made to the books of the two great religions of Christianity and Islam for an insightful discussion.

Clarification of Concepts

(a) The Death Penalty

The death penalty, also referred to as capital punishment involves the forfeiture of life¹⁶. It is the judicially ordered execution of a convicted person. It is also defined as the pre-meditated and cold-blooded killing of a human being by the state in accordance with its law for an offence prescribed by law and for which that person is found guilty of.¹⁷ It is a punishment for capital crimes as it may from time to time, be prescribed by the government of the day. It is the highest possible punishment that can be imposed on a convicted person. Obviously, it is the supreme penalty which any person whether a citizen or foreigner can pay for the commission of an offence under the law of a country.¹⁸ As the severest punishment for a crime, its use is restricted to a small number of criminal offences like murder¹⁹, Treason²⁰, kidnapping²¹, Terrorism²² and Shari' a Penal legislation.

(b) Punishment

Black's Law Dictionary²³ defines punishment as a sanction such as a fine, penalty, confinement or loss of property or privilege assessed against a person who has violated the law.

¹⁶ Ude Jude Ilo & Ajayi O. On the Gallows. *A Publication of The Human Rights Law Service Supported by MacArthur Foundation* (2005).p. 7

¹⁷ Bodaiki A.D. (2004). Op.cit. p, 1.

¹⁸ Fatula A.O (2004) "Capital Punishment: To Be or Not to Be in Nigeria?" *Lesotho Law Journal*, Vol. 14, No1, 2001-2004.p.98. For further reading, see Ijalaye D.A. "Capital Punishment: Quo Vadis Nigeria". Being a Chapter in a book "Law, Justice and The Nigerian Society". Essay in Honour of Hon. Justice Mohammed Bello CON, GCON. Nigerian Institute of Advanced Legal Studies 1995. Some categories of offenders that are exempted from death penalty are (a). Juvenile offenders pursuant to section 405 of the Administration of Criminal Justice Act 2015. *Modupe v. the state* (1988) 4 NWLR (pt. 87) 130. (b). Pregnant women in compliance with section 404 of the Administration of Criminal Justice Act 2015, which suspends the execution until the child is delivered, and (c). The mentally ill persons pursuant to section 28 of the Criminal Code which exempts them from criminal liability.

¹⁹ Section 319 of the Criminal Code Cap. C38 LFN, 2004. Section 221 of the Penal Code Federal Armed Robbery and Firearms (Special Provision) Act

²⁰ Section 37(1) of the Criminal Code

²¹ Section 2(2) of the Laos state Kidnapping Law provides that a kidnapper is liable to death if the victim dies while in hostage

²² Terrorism (Prevention) (Amendment) Act 2013

²³ Tenth edition, p.1428

It is also defined as “the act of a legitimate authority depriving of an offender of a good of which he is no longer worthy.”²⁴ A person must necessarily have been found guilty of committing a crime or an offence prior to his being punished. This is captured by the *dictum* of Lord Atkins in *Proprietary Articles Trade Association v. A-G for Canada*²⁵ as follows

...the criminal quality of an act cannot be discerned by intuition nor can it be discovered by any reference to any standard but one: is the act prohibited by penal consequences? This is, I think, the test of criminality²⁶

According to Okonkwo & Nash,²⁷ punishment is imposed in order to relieve the public’s indignant feelings or to mask with what revulsion they regard the crime. However, the possibility of punishment, is not the only distinguishing mark of a criminal trial, but it is possibly the most important one²⁸

(c) Humanity

An Online dictionary, vocabulary.com²⁹ defines humanity as the human race which includes everyone on earth. It is also a word for the qualities that make us human, such as the ability to love, and have compassion, be creative and not being a robot or alien.

William Burton defines humanity as generation of man, human beings, peoples of the earth³⁰. It also symbolises human love and compassion towards each other”.

(d) Civilisation

The Random House Dictionary Of the English language defines civilisation.as “an advanced state of human society, in which a high level of culture, science, industry and government has been reached”. It includes “those people or nations that have reached such a state.”³¹ Oxford Advanced Learner’s Dictionary defines civilisation as being from a salvage or

²⁴ Overlade O.S & Kuteyi O.S. (2006). Journal of Private & Comparative Law *Ahmadu Bello University Zaria* Vol./1 No2, 2006 op.cit. p. 86.

²⁵ (1931) A.C 310.

²⁶ Ibid, at p. 324.

²⁷ Okonkwo & Nash. Criminal Law in Nigeria, 2nd edition, (2008) Spectrum publishing, Ibadan, Nigeria p.28

²⁸ Udo Jude Ilo & AJayi O. op.cit. p.4. Professor Hart H.A. stated the standard or central case of “Punishment” in his book “Punishment and Responsibility: Essays in the Philosophy of Law”. Oxford, Clarendon Press 1965.

²⁹ Available at <https://www.vocabulary.com/dictionary/humanity>.

³⁰ William C. Burton “Legal Thesaurus”, 3rd edition McGraw-Hill 1979, p. 269.

³¹ The Unabridged edition at p.270.

ignorant condition to a higher one by giving education in methods of government and moral teachings³².

LEGAL FRAMEWORK/ CONSTITUTIONAL BASIS OF DEATH PENALTY

Section 33 (1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended,) (the CFRN) ³³guarantees the right to life by providing that every person has a right to life and no one shall intentionally be deprived of his life save in execution of sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria. This provision has a direct bearing on the applicability of death penalty in Nigeria. Similarly, section 319 of the criminal Code provides that subject to the provisions of this section, any person who commits the offence of murder shall be sentenced to death³⁴

The death penalty is also allowed under several sets of federal and states laws which operate concurrently. It is therefore clear that from the provisions of section 33(1) of the 1999 CFRN, the inalienability of the right to life is unambiguously emphasised. However, a legitimate ground for derogation of this right is provided in the same constitution.³⁵ Accordingly, when statutes prescribed the death penalty for certain class of crimes and so long as such statutes derive its legitimacy from and are not inconsistent with the constitution, they are legally valid and enforceable. However, the ethical question of what crimes should or should not attract the death penalty are fundamentally different questions altogether. What must be continually noted is that constitutional validity of the death penalty in Nigeria has been severally affirmed up to Supreme Court in plethora of landmark cases such as *Onuoha Kalu v. the state*³⁶ and *Ogugu & others v. the state*³⁷. Indeed, to this day, the Supreme Court has not declared the death penalty as being unconstitutional and to that extent, it cannot be validly described as illegal in Nigeria³⁸. What remains controversial is whether in the administration of the death sentence, its mode of execution must be

³² Hornby A.S. Oxford Advanced Learner's Dictionary, 3rd ed. Oxford University Press, (2000)

³³ Cap. C23, LFN 2004

³⁴ The corresponding section in the Penal Code applicable in all the states in Northern Nigeria is section 221 of the Penal Code.

³⁵ Section 33(1).

³⁶ (1988) 12 SCNJ p. 1

³⁷ (1994) 9 NWLR pt. 41 p.249

³⁸ Akintayo Iwilade. (2013). "Legality of death Penalty". Available at <https://www.thenation.ng>. Last visited 20/11/2016.

measured by the provision of section 34 of the 1999 CFRN,³⁹ which forms the basis of our discussion in section five of this paper. In reviewing a number of foreign cases cited by the defence in *Onuoha's case* on the constitutional validity of the death penalty, the Supreme Court stated clearly that the critical consideration is whether the provision of right to life in the constitution is qualified or not. If qualified as in the case of Nigeria. India. Jamaica and some other countries, death penalty is constitutional.

However, what would appear to cast a pall of doubt on the constitutionality of death penalty in Nigeria is section 17(2) of the 1999 CFRN⁴⁰ which provides as follows;

In furtherance of the social order... (b), the sanctity of the human person shall be recognised and human dignity shall be maintained and enhanced. (c) Governmental actions shall be humane.

This is a reproduction of section 17 (2) (b) and (c) in the corresponding chapter of the 1979 constitution of the Federal Republic of Nigeria. In interpreting this provision in the case of *Archbishop Okogie v. A-G (Lagos state)*⁴¹ the Supreme Court held that;

“although section 13 of the 1979 constitution makes a duty for all organs of Government to conform and apply the provisions of chapter II, section 6. 6(c) of the same constitution makes it clear that no court has jurisdiction to pronounce any decision as to whether any organ of government is doing so. Therefore, section 13 has not made chapter II justiciable”.⁴²

PHILOSOPHY OF DEATH AS A PUNISHMENT

In the interest of maintaining a crime-free society, every legal system develops a policy on punishment in enforcement of its criminal laws. The Nigerian approach is for the legislature

³⁹ The section provides for the right of dignity for every individual and specifically says in section 34(1) (a) that no person shall be subjected to torture or to inhuman or degrading treatment.

⁴⁰ Chapter two of the Fundamental Objectives and Directive Principles of State Policy

⁴¹ (1981) 2 NCLR 337

⁴² *Ibid* at p. 350.

to criminalise a conduct and specify a sentence which is definite in its nature, type and quantum for each offence created by law.⁴³ From the practices of court in pronouncing death sentences, two relevant philosophies have been identified, i.e., retribution and deterrence which will be examined *seriatim*.

(a) Retribution

The theory of retribution has been vigorously grounded on the basis that when a criminal stoops so low as to take another's life, he or she by his or her action is deemed to have forfeited his or her right to live. It is also assumed that people who kill have no wish to be reformed and as such murderers are beyond salvation⁴⁴. This school of thought argues that punishment should be equal to the harm done. The theory preaches vengeance or what is described by Paul G. Cassel⁴⁵ as just punishment which according to the Bible is "life for life, eye for an eye, tooth for tooth and wound equal for wound"⁴⁶ i.e. *lex talionis*. Retribution, from another perspective, involves a process of "looking backward" at the circumstances of the crime committed and deciding what punishment the accused deserves for his indiscretion. In its crudest form, this approach to punishment involves mere retribution or the wrecking of vengeance and infliction of pains by the society on behalf of itself or the victim's family on the wickedness of the murderer⁴⁷. In other words, we may say that punishment is imposed in order to relieve the public's indignation to the offence committed⁴⁸. In espousing the theory of retribution further, Paul G. Cassel opined as follows;

Perhaps the most important goal of a criminal justice system is to impose just punishment. A punishment is just if it recognises the seriousness of the crime. "Let Punishment fit the crime" is a generally accepted and sound precept. In structuring criminal sentences, the society must determine what punishment fits the pre-meditated taking of innocent life. To be

⁴³ Bodaiki A.D. op. cit p.13

⁴⁴ Udo Jude 11o & Ajayi O. op.cit. p.16

⁴⁵ Ibid.

⁴⁶ Exodus 21:23-25

⁴⁷ Oyelade O.S.& Kuteyi O.S. op cit p. 86

⁴⁸ Ibid.

proportionate to the offence of cold blooded murder, the penalty for such an offence must acknowledge the inviolability of human life. Murder differs from other crimes not merely in degree, murder differs in kind⁴⁹.

This argument appreciates the fact that it is only allowing for the possibility of a capital sentence can society fully recognise the seriousness of homicide. It is not surprising therefore, that the proponents of death penalty argue that substituting life imprisonment for capital punishment in cases of murder does not in any way emphasise the seriousness of crime of murder. Life, they say, must be respected, nothing short of life can be used to pay back for life⁵⁰. Thus, in *Williams's case*⁵¹ the theory of retribution was applied as a vindication in the sense of society's claim to amend for the crime committed and the proportionality of punishment to the seriousness of the offence. The trial judge said;

I fully appreciate that it is going to be a matter of comment about you for years to come and I think the kindest thing I can do is to visit upon you the outrage which I think anybody with decent feelings would feel about it so that nobody can say, in your village that you haven't paid for it.

In *Llewellyn's case*,⁵² the trial court sentenced the accused to four years imprisonment. On appeal it was argued that the heavy punishment was not called for on deterrent ground. The court of appeal retorted as follows;

this court is quite satisfied that this is not a deterrent sentence. It is a sentence which is fully merited, in the opinion of this court, as a punishment for very grave offences, and as

⁴⁹ Ibid.

⁵⁰ In seeking further justification for the theory of retributive justice, Paul O Casey argues that those who should abolish the death penalty sometimes caricature this argument and portray capital punishment as nothing more than revenge. This view, according to him, misunderstands the way in which criminal sentences operate. He said revenge means that private individuals have taken the law in their hands and exerted their own penalty. Capital sentences are not imposed by private individuals but rather by the state.

⁵¹1974, Crim. L.R. 558 cited in Cross, *The English Sentencing System*. London Butterworth's: 2nd Ed. 1975, p. 115.

⁵² (168) 1 Q. B. 429 (1967) 3 All E. R 225

expressing revulsion of the public to the whole circumstances of the case.

Along the same trajectory, Smith and Hogan⁵³ say that;

if punishment is assessed in accordance with the degree of moral blameworthiness, it seems to follow that it is imposed because of the moral blameworthiness.⁵⁴

Hegel⁵⁵, on his part, says that “wrong being a negation of right, punishment is the negation of that negation.”⁵⁶

In a judicial statement of the retributive attitude to punishment, Stephen J. said;

I am of the opinion that this close alliance between criminal law and moral sentiments is in all ways healthy and advantageous to the community. I think it is highly desirable that criminals should be hated, that the punishment inflicted upon them should be so contrived as to give expression to that hatred... punishment is justified because it provides an orderly and socially accepted outlet for the revenge emotion just as marriage provides a socially accepted outlet for sexual appetite .⁵⁷

Also, in his evidence before the Royal Commission on capital punishment, Lord Denning M.R. had this to say;

the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being

⁵³ Arian J.C/ Criminal Law 8th Edition Butterworth. London. 1986.

⁵⁴ *Ibid.*

⁵⁵ Owoade M. A. *op.cit.* p.46

⁵⁶ *Ibid* p..43

⁵⁷ HCL 81-82 Cited by Olatunbosun A. *op.cit.*

deterrent or reformatory or preventive and nothing else.... The ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime...⁵⁸

The mainstay of the retributivists' argument is the concept of responsibility or culpability on the part of the accused person⁵⁹. The theory espouses the belief that a crime is a moral wrong and in the opinion of Lord Denning L.J referring to the time of King Henry, when for an act to be punishable, "it must be, morally blameworthy and it must be a sin"⁶⁰. The implication of the retributivists' argument is that if death sentences are not applied for capital crimes, it would be like a complacent money lender who encourages his victims to plunge deeper and deeper into debt. By this, retributive punishment is conceived as a privilege of the criminal to still worse fate.

Akintayo Iwilade⁶¹ in his reaction to an article recently written by Femi Falana on the legality of death penalty, sums up the retributive argument as follows;

The first responsibility of the state, where any murder takes place, is to ensure restitution, and direct justice for the victim. To do otherwise is to deny the dignity of victims while also mocking the memory of law abiding citizens who get felled by perpetrators that now turn round to demand what they gruesomely took away from their victims"⁶²

Criticising the abolitionists, especially the human rights activists, Iwilade said;

While convicted perpetrators of gruesome killings have all shades of opinions advocating for them, one wonders who, in the human rights

⁵⁸ Owoade M.A, op cit, p. 46

⁵⁹ Overlade O.S. & Kuteyi, O.S. op cit

⁶⁰ Olatubosun A. op.cit

⁶¹ Akntayo Iwilade op. cit.

⁶² Ibid.

community, speaks for the many victims of these perpetrators' killings⁶³.

No doubt, the basis of retributive justification of capital punishment is rooted in psychological feeling of vengeance. While it is conceded that vengeance is a natural human emotion, it should however be tempered, just as we control other natural feelings of fear, lust and greed. Penal law, it is humbly submitted should not be grounded on the extremities of our base emotions, but should be based on their tempered forms. When we decide to curtail our natural inclination to vengeance, there will be little inclination towards capital punishment. In his critique of the retributivists view, Owoade⁶⁴ stated that "the theory's stance sounds like instinctive and popular emotional reaction than a reasoned argument". According to him, "it is surprising that it does not occur to the retributivists that if the crime of murder is wrong, putting the offender to death cannot right it. Hanging the offender cannot bring his victim back to life⁶⁵. It is therefore submitted here that the fact that one took another's life does not in any way remove the inviolability of his own life. Taking a life should not be used to emphasise the seriousness of capital crimes, after all, there are many other ways to show condemnation for a criminal act which cause irreparable injury both mental and physical to a human being which many regard as being worse than death.

(b) Deterrence

This school of thought believes that death penalty is capable of creating greater happiness for greater number of people. As a result, they define deterrence as the restraint which fear of criminal punishment imposes on those likely to commit crime⁶⁶. To this school, death penalty is justified if it prevents criminals from repeating their crimes, or deter crimes by discouraging would be offenders, for both contribute to a greater balance of happiness in society. A corollary of this presupposition is that the more severe a punishment, the greater its subsequent deterrent effect. This approach tends towards the prevention of crime in future and therefore can be described as "forward looking". This, despite its possible

⁶³ Ibid

⁶⁴ Owoade M. A. op.cit.

⁶⁵ Ibid

⁶⁶ Moneke Francis (2007) "Saddam Hussein's Execution: Philosophical reflections on capital punishments" Available at <https://www.Vanguard.ng>. Last visited, 10/10/2014.

objections, constitutes the moving force of the proponents of death penalty⁶⁷ which is also affirmed by Okonkwo and Nash⁶⁸ when they wrote that;

prevention of crime by rational measures is the primary aim of punishment and that the notion of just desert should operate merely as a limitation on this principle.⁶⁹

It is along this line of thought that Paul G Cassel opines as follows;

The death penalty is also justified because of its deterrence effect which saves the lives of innocent persons by discouraging potential murderers. Logic supports the conclusion that capital punishment is the most effective deterrent for premeditated murders. A capital sentence is certainly a more feared penalty than a prison term....⁷⁰

There is no doubt that the concern of the deterrent school of thought is not the good of the convict but that of the society. It is believed by the adherents of death penalty that it is the surest to produce desirable result by keeping potential convicts away from crimes through the terror of death. Their supposition demonstrates that normal human being fears death more than any other type of punishment and therefore it is the strongest deterrence. This leads Sir Stephen J. to say that;

No other punishment deters men so effectually from committing crimes as the punishment of death... Was there ever yet a criminal who, when sentenced to death and brought out to die, would refuse the offer of a commutation of his sentence for the severest secondary punishment? Surely not...⁷¹

⁶⁷ Owoade M.A. op.cit, p 48

⁶⁸ Okonkwo C O. op.cit pp.32-33

⁶⁹ Ibid. at pp.32-33.

⁷⁰ Ude Jude Ilo & AJayi O. op.cit pp.18-19

⁷¹ Ibid p. 48

The justification of deterrence as the overall rationale of criminal justice system in Nigeria seems to be confirmed by the Court of Appeal in the case of *Akinyemi v the state*⁷² where the court held that

The sentence was well pronounced for the capital offence... It is good law to serve as a deterrence in a mundane society where heartless and dangerous citizens abound in plenty⁷³

Professor Hart however describes the argument of the school of deterrence as impressive but quickly identifies its problem to the fact that the theory compares the life-death situation of the convict waiting for the hangman with that of the murderer contemplating his crime.⁷⁴ He is of the view that since the situations differ, considerations that will determine their choice cannot be expected to be the same.⁷⁵ The latter has more considerations including the possibility of escape from being arrested which is not open to the latter. He likens the problem of this school to that of the concepts of justice which ignores other ethical consideration in the interest of protecting the public. Thus, it is not surprising that a South African judge says,

The punishment of A in order to deter B, C and D from crime may be open to moral objections. In theory, it conflicts with the principle that a human being must be treated as an end in himself and not as a means to the benefiting of other person. But it provides a practical justification for punishment that a few persons of common sense would, on reflection reject⁷⁶.

The deterrence argument is further beset by other flaws; first the crusaders of death penalty bears the burden of proof to show that the same objectives could not be realised with less

⁷² (1999) 6 NWLR 465

⁷³ *Ibid*, at p. 607. Per Justice Fabiyi (JCA.). Similarly, many Nigerians believe that the judgment of Hon. Justice Olubunmi Oyewole of the Lagos High Court on January 11, 2007 which sentenced Rev. Chukwuma Ezeugo a. k. a Rev King to death for killing a member of his Christian Praying Assembly, late Miss Ann Uzor was commendable as most apt. This is because according to them it will serve as a deterrence to the likes of the Reverend who parade themselves as men of God.

⁷⁴ Owoade M. A. op. cit p. 48

⁷⁵ *Ibid*.

⁷⁶ *Ibid*.

severe punishment such as life imprisonment since their ultimate goal is to increase happiness and reduce unhappiness, In this connection, Cesaria Beccaria, an Italian political theorist is of the view that death penalty is not necessary to deter, and that long term imprisonment is a more powerful deterrent since execution is transient⁷⁷ secondly, since this school is making a factual claim about the social beneficial consequence of death penalty, it is incumbent upon it to support the claim with empirical evidence. In the absence of such reliable evidence, Beccaria claims, its position becomes untenable⁷⁸. Thirdly, Beccaria believes that the theory of deterrent fails to account for the ratio of innocent lives saved per execution, at best, according to him, for every five dangerous convicts executed, five innocent lives might be saved in future. However, as the number of execution increases, the number of innocent lives saved will definitely not increase proportionately. It may eventually come to the absurd situation where it takes one thousand additional execution to save one additional live. Ultimately, it must be determined how many executions will justify the saving of one life. The pertinent question at this juncture is whether the Nigerian society has attained greater happiness since execution of those guilty of capital offences have started about fifty years ago? The answer lies in the death toll that have been recorded in the spate of high-profile unresolved murders in the country⁷⁹ terrorists attacks in the north east, banditry and kidnapping in the north west, farmers/herders bloody conflicts all over the country and separatist agitations in the south east and south west Nigeria. As Beccaria had argued that since the ultimate aim of punishment is the protection of society, no results can be achieved by the terror of death. It is therefore submitted with humility that it is a contradiction of terms and absurdity that the law which represents the common will and detests and punishes homicide should itself commit and, in order to keep citizens from committing murder, orders a public execution. We wholeheartedly support the proposition that the certainty of small punishment will make stronger and lasting impression than the fear of one more severe punishment.

⁷⁷ Moneke Francis,. op.cit

⁷⁸ Ibid. Adeyemi . A.A. in his fairly old book, "An Introduction to the Principles of Morals and Legislation, chapter XVI as well as his Principles of Penal Laws part 2, Book1, chapter VI says that no consistent pattern could be established between the number of executions and murder rates and armed robbery.

⁷⁹ Such unresolved murders include that of Dele Giwa in 1986, Chief Alfred Rewane who was killed in October 1995. Chief Bola Ige who was murdered in December 2002, Aminasoari Dikkibo who was assassinated in 2004, Marshall Harry who was brutally murdered in cold blood in 2003. Also outrageous is the mindless killing of Kudirat Abiola in June 4, 1996, Barnabas Igwe and his wife in September 2002 and the killing of Chief Funso Williams in July 2006 among many others.

THE ARGUMENTS

In justification of their respective claims, the following are the arguments put forward by each side of the divide.

(a) The Retentionists⁸⁰

One of the moving forces for the advocates of death penalty is that public opinion supports it. This is closely related to the concept of democracy which believes that the voice of the people is the voice of God, which by extension is the voice of the government. The advocates of death penalty say that by upholding it, the government is given meaning to the voice of the people. It is also true that in spite of the criticisms of many distinguished scholars, they have been constrained in calling for its abolition because the sensibilities of public opinion will be offended. The fear is that the public should not be alienated from the criminal justice system so as not to make members of the public resort to jungle justice⁸¹. However, Okagbue has faulted this argument on the ground that it overlooks the fact that alienation from the justice system is not dependent on the presence or absence of capital punishment⁸². He however concedes the fact that there is a need to respond to social fact and not too far in advance of public opinion, but public opinion, according to him, has its problems and limitation. Apart from that, it can be irrational, based and misinformed. It is difficult to define who determines public opinion. The views expressed in the mass media by a few people who have access to them may not be the view of the majority in the absence of any opinion polls⁸³

Closely related to public opinion is victim's wish. The proponents of death penalty believe that its retention satisfies the secondary victim's need and helps the victims to move on. In support of this practice in some countries like Iran, victims are allowed to have a say in the implementation of death penalty in spite of the attendant inconsistency this might visit on the criminal justice system.⁸⁴ While not questioning a victim's right at this stage, we respectfully submit that the victim gains nothing from the death of someone who has committed a crime against him beyond the satisfaction of the thirst for retribution.

⁸⁰ Some of the countries of the world that still apply death penalty are Nigeria, China, Japan, U.S.A. (Some of the states), Others are Iran, Iraq, Afghanistan, India, Japan, Libya, Tanzania, and Zimbabwe.

⁸¹ Badaiki A.D. op. cit p. 18

⁸² Okagbue E. Isabella. (1991). "The Death Penalty. as an Effective Deterrence to Drug Abuse and Drug Trafficking. Myth or reality?" Nigerian Institute of Advanced Legal Studies. Lagos, 1991, p. 32

⁸³ Ibid.

⁸⁴ Udo Jude Ilo & Ajayi O. op cit p.23.

The adherents of death penalty note that the collective consensus by which human society prescribed extreme penalties for certain degree of offences was more informed by the notion of justice and respect for human life. As a result, they vigorously argue that death penalty is for the protection of the society from harm by incapacitating murderers from killing again. It is their view that the extreme penalty has a deterrent force which no other form of punishment has. Killing the Killers is therefore a service to humanity rather than an act of callousness to mankind. Abolishing the death penalty, they say derogates seriously from the value of the life of the innocent victim but exalts that of the murderers⁸⁵. As stated earlier under the philosophy of deterrence, there is no empirical evidence that death penalty produces a greater benefit to the society than other less severe punishment. Paul G Cassel⁸⁶ in his argument on the efficacy of death penalty as a deterrence says that;

...To be sure, the death penalty does not deter all murders. But because a capital sentence is more severe than other penalties, it is reasonable to assume that its existence will lead at least some potential murderers to decide against risking execution... There are carefully contemplated 3murders such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act⁸⁷.

An interesting argument in support of death penalty is based on the analogy that death penalty is to society what self defence is to the individual. Since individual is justified in using deadly force in defence of himself, it is argued that society being as it were, a large political body is in a like manner, justified in using deadly force through death penalty in defence of itself.⁸⁸ This reasoning, logical as it is, is beset with a problem - the principle of self defence is permissible only when there is no other alternatives open to the potential

⁸⁵ Okecwukwu Emeh Jr. "Capital Punishment: A Humanistic Response". *Daily Champion*, Available at <https://www.champion.ng>. Last visited 18/8/2018.

⁸⁶ Udo Jude Ilo & Ajayi O. op cit. p.9

⁸⁷ Ibid. References are often made to Saudi Arabia, Iraq and Singapore which impose the death penalty on convicted offenders. While it is conceded that the rate of crime in such countries is low, it is still a matter for debate whether it is the severity of punishment or the certainty of it that deters crimes.

⁸⁸ Moneke Francis op.cit.

victim. Now it is clear that long term imprisonments is a viable alternative to death penalty.⁸⁹ Again this reasoning ignores the fact that self defence with deadly force draws from our moral right of self-preservation, and moral rights do not inure for inanimate and abstract entities or institutions.⁹⁰ It is respectfully submitted that the analogy between capital punishment and self defence is clearly untenable. The fact is that several philosophers have argued that the death penalty should be abolished on the ground that it is undignified, inhuman and contrary to love. In advancing their position, the retentionists accuse the abolitionists of undermining the fact that punishing crime in human society emanated more from collective desire and will to preserve life and existence in human society than from the sheer love of punishing a criminal.⁹¹ The abolitionists, according to the proponents of death penalty, forget that deterrent as an element of penal philosophy has never been an end in itself, but a means of keeping within manageable proportions the common inclination in every man to be calculatingly aberrant- especially when he considers the possibility of detection remote. Crime, they contend is a compulsive inclination in human nature and no humanistic philosophy of punishment can reverse the inclination. Having accepted that the justice system, including appeals in many countries are extremely flawed, leaving room for permanent miscarriage of justice, the retentionists contend that the argument for proscribing death penalty in totality and in all circumstances is not acceptable, especially in cases of wilful and inexcusable homicide⁹². They say the collective consensus, by which human society (of all races and tribes) prescribed extreme penalty for certain degrees of offences was more informed by the notion of justice and respect for human life- a respect which is better served by striking an equilibrium between the criminal's right to life and the victim's right to life.⁹³ The question now is; if death penalty should be retained for certain offences like wilful and inexcusable homicide, what waterproof legal measures should be in place to ensure that those found guilty are not victim of "extremely flawed justice system?" Is it not said that it is better for ninety-nine guilty person to escape justice than for one innocent person to suffer an unjust and irreversible death? It is safer, in our view, to argue for a blanket abolition of death penalty for all offences and in all circumstances. This is more so

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ Dibia Leonard, Okerefor & Chinweze Chinelo "Did Tochi Deserve to Die" Available at <https://www.thisday.ng>. Last visited 14/6/ 2017.

⁹² Mamah Willy & Ogwo Frances "Tochi Soul Searching Question for Singapore" Available at <https://www.thisday.ng>. Last visited 12/6/2020.

⁹³ Ibid

since there is no empirical evidence that it deters potential murderers better than other several alternatives like the imposition of life sentence.

(b) Abolitionists⁹⁴

The case for the abolition of death penalty in criminal jurisprudence is undoubtedly a persuasive one, especially as it rightly asserts the fact that extreme penalties (like death penalty) have neither deterred criminal behaviour in human society. Neither has it taken due cognisance of the fact that opportunistic criminality is largely a product of the basic instinct for survival, than the sheer indulgence of base instinct.⁹⁵ However, the pristine argument of the abolitionists, particularly those of the two great religious faiths is the emphasis placed on the individual worth and the sacredness of life. For instance, the Christian faithful believe that human being is an infinite value in the sight of God. This is anchored on the Biblical scriptural injunction that “Thou shall not kill⁹⁶. They often point to passages in the New Testament that advocate love and forgiveness⁹⁷. They are very quick to refer to the statement of Jesus Christ in the Book of Mathew, Chapter 5 verses 38 - 39 that says;

You have heard that it was said ‘eye for eye and tooth for tooth. But I tell you do not resist an evil person. If someone strikes you on the right cheek, turn to him the other also...⁹⁸

Because of their belief in the sacredness of life, the abolitionists say man’s right to life is inviolable. They maintain that the state should not descend to the level of moral paucity of a murderer in order to inflict punishment. From this perspective, the opposition of the church to execution is absolute. For instance, a confirmation of the Catholic Church position was highlighted in the official statement issued by the former Vatican spokesman Fr. Federico Lombard on the execution of former Iraqi dictator, Saddam Hussein as follows;

⁹⁴ Some of the countries that have abolished death penalty are Australia, Belgium, Denmark and France. Others are Germany, South Africa, United Kingdom, Burundi, Congo Venezuela Netherland, and only recently Sierra Leone in West Africa.

⁹⁵ Dibia Leonard, et,al op.cit

⁹⁶ Exodus chapter 20, verse 13. This is applicable to individuals, institutions and the state.

⁹⁷ Mathew chapter 3 verses 39 - 46.

⁹⁸ They also refer to story of a woman who was caught in the act of adultery. She was to be put to death in accordance with the Old Testament standard. Jesus saves her life against the wish of teachers of law when he tells them that whoever is innocent should throw the first stone. He later tells the woman to go and sin no more.

Capital punishment is always tragic news, a motive of sadness, even when it is a case of a person guilty of a grave crimes. The position of the Catholic against the death penalty has being confirmed many times. They maintain that the execution of the guilty is not a path to reconstruct justice and to reconcile society. Indeed, there is the risk that on the contrary, it may augment the spirit of revenge and sow the seed of new violence...⁹⁹

In a similar vein, Cardinal Paul Poupard, Chair of Interreligious & Inter- Cultural Dialogue at the Vatican said “every person is a creature of God, and no one should regard himself or herself as the owner of the life and death of another except the Creator”¹⁰⁰. It is along this trajectory that President Saparmurat Niyazov of Turkmenistan while signing a Resolution abolishing the death penalty in his country said that

No one has the right to take the life given by God.
Even if someone commits a crime, let him live on
and serve his sentence in jail. But taking
someone’s life is barbaric¹⁰¹

This, it is submitted is one of the unassailable rationales for the abolition of the death penalty.

The position under Islam presents a different proposition. The Muslims believe that Islamic law is an immutable legal system with a divine origin. They believe that there are certain circumstances which led Islamic law to prescribe the sentence of death penalty on certain crimes as these circumstances are fundamental to the existence of mankind. They contend that if modern international human rights law condemns the death penalty as degrading, inhuman and barbaric, Islamic law also posits that killing any human being unjustly is equally a degrading, inhuman and barbaric conduct. The stand of Islamic faithful seems to be that the abolition of death penalty is not feasible under Islamic law. Its abolition is

⁹⁹ Available at <https://www.independent.ng>. Last visited 13/ 6/ 2018.

¹⁰⁰ Available at <https://www.ncronline.org>. Last visited 15/6 2019.

¹⁰¹ Dibia Leonard et.al op.cit.

considered a violation of human rights under Islamic law too.¹⁰² In his denunciation of former President Obasanjo's pledge to a delegation of the European Union on his plan to seek for the abolition of death penalty in Nigeria¹⁰³, Prof. A. H. Yadudu reiterates the position in Islam when he reacted as follows:

We are constrained to note that any attempt to abolish capital punishment will be viewed as a breach of our fundamental freedom of worship and the profession of a religion of our choice and will be treated as direct affront to our unfettered practice of Islam and the undiluted observance of its fundamental law, the sharia¹⁰⁴.

Another motivation for the abolition of death penalty is the risk of killing the innocent. The abolitionists contend that most criminal justice system especially in the third world countries are unpredictable and error prone which may lead to execution of innocent persons.¹⁰⁵ The Human Rights Law Service for instance, said there are gaps in many criminal justice systems such that justice is hard to come by.¹⁰⁶ Besides, in this new political dispensation, desperate and despicable politicians in power may employ the death penalty provision of the law to contrive the elimination of the opponents. In each of these instances, the wrong done was irrevocable and injustice irredeemable. Furthermore, the execution of a convict effectively closes the door to the possibility of reformation of the human personality. To the abolitionists, the death penalty is nothing but a remnant of an old system based on vengeance that he who has taken life should also suffer the same fate. While this writer concedes that history is replete with legally sanctioned execution that were later discovered

¹⁰² Yusuf Abdul Azeez & Abdullahi S, "The Call for the Abolition of Death Penalty: Islamic Law versus International Human Rights Law. Available at <https://www.researchgate.net>. Last visited, 12/9/2021.

¹⁰³ Olatubosun I.A. op cit.

¹⁰⁴ Yadudu A.H (2003) "Why we oppose the abolition of Death Penalty" The Guardian, Sunday August 24,2003.Available at <https://www.guardian.ng>.Last visited 28/7/2017

¹⁰⁵ Udo Jude Ude op.cit. Some years ago, two cases caused uproar and subsequently protest of the death penalty in China. A butcher executed for murder in 1989 was proved innocent when his alleged victim was found alive. Secondly, a man was freed after eleven years in jail when his wife whom he was accused of killing was also found alive. The case of *Aliu Bello v. A-G (Oyo state)* (1986) 5 NWLR pt 45, p... is also illustrative. Nasiru Bello was executed during the pendency of his appeal. The act was condemned in strong terms by the Supreme Court of Nigeria. *The case of Anthony Porter* of the state of Illinois in the U.S.A is also relevant. He spent fifteen years on death row before a group of university students found evidence establishing his innocence.

¹⁰⁶ Udo Jude I op. cit. p.25.

to be a miscarriage of justice¹⁰⁷ it is humbly submitted that the death penalty imposes a certain finality of judicial decision that should not be available to fallible human institution in the 21st century. It is therefore not surprising when Marquis de Marie J. Lafayette said as follows; “Till the infallibility of human judgment shall have been proven to me, I shall demand the abolition of the death penalty”¹⁰⁸.

It must be emphasised that sparing the convict from the hang man does not amount to giving up by the state on one of its citizens. Doing so is not a compliment on the state and the people. Since justice is the sole purpose of law, any law that offends the attainment of justice as in the case of death penalty, for eternity, that law should have no place in any judicial system. The fact simply is that justice has risen above such a traditional notion of punishment. Life imprisonment, as earlier suggested, is a reasonable alternative. It is also a truism that the application of the death penalty mostly affects the people at the lower strata of the society¹⁰⁹ i.e. the poor, the black in the white dominated countries and the vulnerable. That, in no way suggests that the rich and the privileged do not commit murder, rather they are always able to buy themselves out either by having a formidable legal defence team or by bribing their way out. The poor are always the ones to visit the gallows. Many of the lawyers assigned to represent them are poorly equipped for the job and as a result are egregiously incompetent with dire consequences for the accused persons¹¹⁰.

As regard the execution of only the poor in the society, Justice Williams Douglas of the Supreme Court of the United States said that “One searches in vain of the execution of any member of the affluent strata of our society”¹¹¹ Similarly, Lawrence Marshall quoting the Death Penalty Information Centre in Washington said;

Statistics show that race is more likely to affect death sentencing than smoking affects the likelihood of dying from heart disease. In a

¹⁰⁷ Fatula O. op.cit p.112

¹⁰⁸ Available at <https://www.brainyquote.com>. Last visited 16/3/2019.

¹⁰⁹ Udo Jude Ilo & Ajayi O. op.cit. p. 26

¹¹⁰ Ibid. A good example cited in Udo Jude Ilo *et al* is that of one Leonard Onah who was convicted for stealing three hundred naira. He was charged before Armed Robbery and Fire Arms Tribunal. Because he could not afford the sum of ten thousand naira bribe demanded by the police, he was sentenced to death. After some years on death row, he received amnesty and was released. Some of the other reasons given by the abolitionists of death penalty includes comparing the cost of keeping convicts in prisons to its benefits and the convicts' tendency to be brutal.

¹¹¹ Available at <https://www.deathrowsspeaks.info>. Last visited 28/10 2019.

country that is supposed to be committed to equal justice under the law. It should be unthinkable to perpetuate a system in which defendant are being killed on the basis of race.¹¹²

DEATH ROW PHENOMENON AND METHOD OF EXECUTION¹¹³

The debate on whether the application of death penalty as a punishment constitutes a violation of a condemned prisoner's right to life and freedom from torture, inhuman and degrading treatment has being controversial and acrimonious. Judicial authorities across the jurisdictions have however decided that the practice of application of death penalty *per se* does not constitute a violation of any rights. However, the death row phenomenon and methods of execution are considered to be a monumental violation of the convict's fundamental right to dignity of human person as it is considered cruel, inhuman and degrading contrary to the provisions of section 34(1) of the 1999 CFRN¹¹⁴. The reason being that those who have been condemned and kept on death row for many years being under the threat of imminent execution suffer trauma, anguish and distress. Each passing day to the convict, is a living hell. On occasions when they hear heavy footsteps towards their cell, they always think the executioner has come. In his article on the life of the prisoners on death row, Ololade Olatunji said;

The death row is a labyrinth of torment where inmates weep away their lives, and live for the next second. Living on death row is akin to death by instalment. The prisoners fear to tread into the gallows, it is the long wait that kill the inmates. Daily, death feeds on their fear and eats at their insides, living them a band of breathing corpses. They die many times before their death comes

¹¹² Lawrence Marshall "Why the Death Penalty Should be abolished". Available at <https://www.unmah.com/forum/archives.html>. Last vested 12/9/2020. Some of the other reasons given by the abolitionists of death penalty includes the cost of keeping convicts in prisons to the benefits and the convicts' tendency to become to be brutal.

¹¹³Death row is the interval of time spent by a capital offender in the detention between the date of conviction and the date of execution. See *Peter Nemi v. A-G (Lagos State)* (1996) 6 NWLR (pt. 452) p. 42.

¹¹⁴ Section 402 of the Administration of Criminal Justice Act 2015 provides that punishment of death penalty is inflicted by hanging the convict by the neck till he is dead or by lethal injection.

calling and the manner of their death is very cruel

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This issue arose in the case of *Onuoha Kalu v, the state*¹¹⁶. The Supreme Court refused to pronounce upon it on the ground that it was not properly before it. The court nevertheless held *obiter*, that death sentence must be distinguished from methods of execution. In *Peter Nemi v. A-G (Lagos State)*¹¹⁷, the prisoner was on death row for eight years without execution. He sought a declaration among other things, that his confinement under the sentence of death constitutes an infringement of his fundamental human right against torture, inhuman and degrading treatment protected by section 31(1) of the erstwhile 1979 constitution. The Court of Appeal held that;

The question whether having had a prolong stay on death row, an applicant is entitled to be heard for redress under the constitution because that to him constitutes his having being subjected to torture or inhuman or degrading treatment ... This being so, it deserves to be tried and adjudicated on merit¹¹⁸

The inexplicable delay in carrying out the execution of the convicts is invariably traceable to the reluctance of the state Governors to lend their signatures to warrants of execution either for political or religious reason¹¹⁹. It is not a weakness on their part but more of a certain sublime regard for the sanctity of human life. Those who are opposed to the reluctance of the Governors to sign the death warrants contend that until the death penalty is extricated from our penal system, it remains the law and the Governors are obligated to execute the warrants¹²⁰. They share the belief of the retributivists that those who take other

¹¹⁵ Ololade Olatunji (2019) "Life on the Death Row" Available at <https://www.thenation.ng>. Last visited 12/8/2019. Some of the methods of carrying the sentence of death are by hanging, Firing squad and by stoning. The latter is applicable under Islamic law.

¹¹⁶ *op.cit.*

¹¹⁷ *op.cit.*

¹¹⁸ *Ibid* at p..57

¹¹⁹ The delay in signing the death warrants of those who are on death row is often cited as one of the reasons for prison congestion. In what symbolises the politics of hypocrisy of death penalty, the Minister of Interior, Rauf Aregbesola recently enjoined the State Governors to sign the death warrants of those on death row in order to decongest the correctional centres in the country, when he was the Governor of Osun State for a period of eight years, he did not sign a single death warrant.

¹²⁰ Editorial. The Guardian Newspaper. Available at <https://www.guardian.ng>. Last visited 12/12/2021

people's lives have no right to keep theirs. While that sounds reasonable, it does not answer the question whether death penalty in itself can answer the problem of crimes. So far, it has not. Nor will it. It is therefore respectfully averred that it is double jeopardy to subject a convict to death penalty and leave him to wait for death that never comes. The experience is traumatic not only to the convicts but also to their relations. We are of the strong view that if the hangman is incapacitated to do his work by reason of non-compliance with the provisions of law by the Governors¹²¹, then, the right thing to do would be to commute the death penalty into life term in jail. To act in neither way is tantamount to shirking a serious responsibility.

As regards the methods of execution by hanging,¹²² Olisa Agbakoba describes hanging by reference to an article by Professor Christ Bernard which was quoted by the South African Constitutional Court in *State v. Makwanyane*¹²³ said as follows;

The man's spinal cord will rupture at the point where it enters the skull, electro-chemical discharges will send his limbs falling in a grotesque dance, eyes and tongues will start from facial apertures under the assault of the rope and his bowels and bladder may simultaneously void themselves to soil the legs and drops on the floor¹²⁴

Similarly, Hennessey C. J in the U.S case of *District Attorney for the Suffolk v. Watson*¹²⁵ said that "the frank description of the execution process leaves little doubt that it is one which is destructive of human dignity". The court in the above case concludes by saying that;

the death penalty is unacceptable under the contemporary standard of decency in its unique and inherent capacity to inflict pain. The mental

¹²¹ The Governors are mandated by law to sign the death warrants before the convicts can be validly executed).

¹²² The methods of execution of death sentence by hanging is provided by section 402(2) of the Administration of Criminal Justice Act 2015.

¹²³ (1995) BCLR 665 (cc)

¹²⁴ Ibid

¹²⁵ 1980) 38 Mass 648 at 664

agony is simply beyond question a horror. We conclude that the death penalty with its full panoply of physical and mental torture is impermissible, cruel...when judged by contemporary standard of decency.¹²⁶

From the above narratives, there is no iota of doubt that the application of death penalty by hanging is unquestionably cruel, inhuman and degrading. Jude Ude Ilo in his Nigeria Country Reports on the Death Penalty Application said the mode of implementation of sentence of death penalty falls below international standard and suggests a less painful mode of execution¹²⁷. Contrary to this view, our respectful opinion is that there is no death process activated by human being that is not painful even if it is by lethal injection. The better alternatives in our view, is a complete rolling back of the death penalty provision from the body of our laws not only because of the barbaric mode of implementing the execution but also because it denigrates the whole essence of humanity and the present level of global civilisation.

DEATH PENALTY AND INTERNATIONAL LAW

For centuries, there was no appreciable change in the attitude of public international law to the issue of retention or abolition of death penalty. The issue could not have been relevant because it was regarded as a matter essentially within the domestic jurisdiction of each state¹²⁸. The involvement of international law began with a clamour for the limitation of death penalty to exclude juveniles, pregnant women and the elderly from its scope¹²⁹. Incidentally, one of the pedestals on which the retentionists anchor their arguments is that public international law does not prohibit the death penalty. However, there is unquestionable evidence to demonstrate that international law has since being rapidly getting more involved, moving away totally from the regime of the death penalty¹³⁰ For instance, the African Charter on Human and Peoples' Rights 1981¹³¹ provides that

¹²⁶ Ibid

¹²⁷ Available at <https://www.dokumen.tips> Last visited 22/4/2020.

¹²⁸ Article 3(2) of the defunct O.A.U. and Article 7(2) of the U. N Charter. Such non –intervention clause is conspicuously absent in the Constitutive Act of the African Union.

¹²⁹ Olatubosun A. op. cit p.31.

¹³⁰ Mamah Willy & Ogwo Francis "Tochi: Soul Searching for Singapore". Available at <https://www.thisday.ng> . Last visited 30/6/2019.

¹³¹ Cap. A9 LFN 2004.

Human being are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of his life¹³²

Although, this provision does not equivocally outlawed deprivation of life, the African Commission on Human and People's Rights nevertheless held that it is the responsibility of government to protect individuals under its jurisdiction, and failure to do so constitutes a failure of Article 4 in respect of execution, irrespective of whether such execution were carried out by government forces.¹³³ Also, the Resolution of the United Nations Commission on Human and People's Rights calls on all states that uphold the death penalty

to abolish it and in the meantime to establish a moratorium on execution, to progressively restrict the number of offences to which it may be imposed, and at least, to refrain from extending its application¹³⁴.

The climax of international movement against death penalty is the coming into force of the Statute of Rome which establishes the International Criminal Court in 2002¹³⁵. The crimes within the jurisdiction of the court are terrible crimes which constitute existential threat to human race and which the court does not have the power to impose the death penalty in all of them. Instead, the Statute provides that:

Subject to Article 110, the court may impose one of the following penalties on a person convicted of a crime referred to in Article 5 of the Statute ¹³⁶

Also, the United Nations Security Council Resolutions establishing the International Criminal Tribunals for the former Yugoslavia and Rwanda did not provide for the death penalty in the range of sanctions which the Tribunals have the power to impose. Reference is also made to the United Nations General Assembly Resolutions 62/149 and 63/148 of 2007 which purport to place a moratorium on the implementation of death penalty. It is therefore not

¹³² Article 4 of the African Charter

¹³³ Olatubosun I.A op. cit p.34

¹³⁴ Resolution 2005/59 of the Commission.

¹³⁵ The Statute came into operation in July 1, 2002 to try individual accused of war crimes, crimes against humanity, genocide and possibly aggression pursuant to article 5 of the Statute

¹³⁶ Article 77 of the Statute. of Rome

surprising that death penalty provision is clearly absent in the Statute of Rome. Similarly, Article 6 of the International Covenant on Civil and Political Rights (ICCPR) though, does not expressly provide for abolition of death penalty, it left a clear signal that international law considers the abolition of death penalty as a desirable end. Hence, the 2nd Optional Protocol to ICCPR abolished death penalty stating clearly that no one within the jurisdiction of the state parties shall be executed¹³⁷. Another forward looking International Instrument is the European Convention on Human Rights (ECHR). Although, the Convention does not abolish the death penalty, Protocol No 6 of the Convention abolishes the death penalty in peace time and protocol No13 abolishes it in all circumstances.¹³⁸ It is the policy of Council of Europe to require that all new member states undertake to abolish the death penalty as a condition for admission into the European Union.¹³⁹ From the foregoing, it is increasingly becoming clear that abolition of death penalty in municipal laws is becoming the clear yardstick for separating open society from a closed society. Singapore, Iraq, Iran, and few other countries are epitome of the latter.

We cannot deny the fact that there are obstacles to effective application of these International Instruments in Nigeria. The major one being long process which is required to incorporate and domesticate the Treaties into our local legislations without which, they do not have the force of law pursuant to section 12 (1) 1999 CFRN¹⁴⁰. The retentionists contend that even when the National Assembly takes the necessary action to enact such Treaties into law, it will be invalid and unconstitutional by virtue of section 1(3) of the 1999 CFRN¹⁴¹, It is humbly submitted that in spite of these constitutional bottlenecks, the concern of international law to the global issue of death penalty is a positive development. Many years ago, as we noted earlier, the matter of death penalty was not relevant in international law because, it was regarded as a matter essentially within the domestic jurisdiction of a state. All campaigns for the abolition of death penalty gained international momentum in recent years. Its involvement gained momentum after the realisation of the importance of human rights in post Second World War. II. The provisions of various International Instruments earlier mentioned, except

¹³⁷ Article 1 of the Optional Protocol.

¹³⁸ Mamah Willy & Ogwo Frances op. cit

¹³⁹ Also relevant is the Additional Protocol to the American Convention on Human Rights to abolition of the death penalty.

¹⁴⁰ The section 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.

¹⁴¹ The section provides that "if any other law is inconsistent with the provision of this constitution, the constitution shall prevail and that other law shall to the extent of the inconsistency be void.

the African Charter on Human and People's Rights (Ratification and Enforcement Act) 1983 are only presently persuasive, They represent a foretell of positive development that will certainly happen in future when the contents of those Instruments relating to death penalty will be transformed into binding affirmative actions, after all the Resolutions of the U.N General Assembly are regarded as moral conscience of the world. The Supreme Court of Nigeria will be expected as usual, to lead the march towards the application of International norms as it did in *Abacha v. Gani Fawehimin*¹⁴², where Uwaifo (JSC) puts it succinctly as follows

We cannot afford to be immune from the progressive movement manifesting themselves in international agreements- Treaties, Resolutions, Protocols and other similar understanding as well as in the respectable and respected voices of our learned brethren in the performance of their adjudicating roles in other jurisdictions¹⁴³

CONCLUSION/ THE WAY FORWARD

This paper has highlighted the fact that Nigeria has been practicing the application of the death penalty for more than fifty years without empirical evidence that gruesome murder has abated. It has also been argued that the world over, there are flaws in its application which is enough to bring about the abolition of the practice. Although in the Old Testament of the Christian religion, it used to be "an eye for an eye", in the modern penal process, it is uncalled for. This is informed by the realisation that virtually all religions except Islam now oppose the elimination of human life which is regarded as the exclusive preserve of the Almighty. Life imprisonment as proposed is a reasonable alternative to the death penalty. There are however those who insist that the death penalty is inevitable as a means of checking man's inhumanity to man. They ask: who will protect the victims of murder? How best can victims or their relations be assured that justice has been done? Why should we worry so much about killers and so little about their victims? The truth is that there is no

¹⁴²(2000) 6 NWLR (pt. 660) p.228

¹⁴³ Ibid, at p. 342-343.

evidence that the application of death penalty has had any appreciable impact in reducing crimes rate.¹⁴⁴ We urge the government of Nigeria, nay the world to move beyond the platitude of moratorium and go the whole hog and remove the death penalty from the body of our law. The mere fact that many countries the world over have continued to abolish death penalty is an indication that other form of punishment has been found as a sufficiently effective alternative to death penalty. The experience of Belgian government is commendable with the following instructive words from its Royal Commission on capital punishment;

Since the practice of commuting all death sentences was introduced, no increase in crimes or offences have been observed which would be attributed to the failure to carry out the death penalty.¹⁴⁵

Consequently, the Belgian Ministry of Justice further expatiated in the following words;

The lessons has been learnt that the best means of inculcating respect for human life is to refrain from taking life in the name of the law.¹⁴⁶

The remarks of the U.N Sectary-General, Antonio Gutteres, that the death penalty has no place in the 21st century¹⁴⁷ reflects the global trend away from death penalty. The questions that require urgent answers are; did God create any person a criminal? Certainly, the answer is in the negative. Why then do we have criminals in our society? What should be done to improve the justice system?¹⁴⁸ What do we do to ensure that law abiding citizens are protected? How do we develop alternatives and seek to recapture the offenders and turn him around? These are serious questions that no society can shy away from. Considering the strategic position of Nigeria in Africa, it should not lose track of global development in human rights as a result of dangerous philosophy of deterrence holding sway in countries that still retain the death penalty in their statute books

¹⁴⁴ Ude Udo Ilo & Ajayi.O “On the gallows” op. cit p. 34

¹⁴⁵ Odunsi S, B et al Eds) “A Worshiper in The Temple” Notes on selected Work of D. A. Ijalaye (2016). Faculty of Law, Obafemi Awolowo University Ile-Ife p. 101

¹⁴⁶ Ibid

¹⁴⁷ Available at <https://www.ohch.org>. Last visited 12/6/2020.

¹⁴⁸ Udo Jude Ilo & Ajayi O. op. cit. p. 34.

As events in the past decades have shown, the global trends towards abolition of death penalty is clear. However, the fight is far from being won. The gains that have been achieved over the past years of campaigning cannot even be guaranteed. Even when almost the whole world says 'enough is enough' some countries including Nigeria are still playing the ostrich. The writer is particularly worried that the continued application of death penalty has the tendency to devalue human life and undermine societal values and decency. It is offensive to morality, religion and social humanism. It is however conceded that it is human to resist a change in the existing order especially when it concerns the collective security of the people in a society. However, to resist a change is to embalm the past in order to escape the future. There is no better time than now to hearken the voice of the Secretary-General of the United Nations and the immutable words of Lord Denning L.J when he said;

... if we never do anything that has never being done before, we shall never get anywhere. The law will stand still while the rest of the world goes on and that will be bad for both¹⁴⁹.

If the death penalty is abolished, it certainly will be a paradigm shift from a medieval penal system to a progressive new dawn in Nigeria, after all, the sovereign Lord said "as surely as I live, I take no pleasure in the death of the wicked, but rather that they turn from their wicked ways and live."¹⁵⁰ The dead cannot turn from his wicked ways and live.

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¹⁴⁹ *Parker v. Parker (1953) All E. R. 127 at 12).*

¹⁵⁰ Ezekiel chapter 33, verse 11.

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