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The Legality of Death Row Phenomenon in the Nigerian Criminal Jurisprudence: Where Lies the Power to Abolish Death Penalty?

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Abstract

This essay reviews the laws giving life to death sentence in Nigeria: Constitutional, case laws and the penal codes with a view to finding out the legal backing, if any, of the State Governors' reluctance in signing execution warrants for years now. It is opined that the inaction of the Governors in neither granting pardon nor executing court orders amount to usurpation of power. It is then suggested that it is only by an Act of the National Assembly that death row phenomenon can be cured by removing death sentence from our criminal jurisprudence. However, it is concluded that notwithstanding the clamour around the world for the abolition of death sentence, it should be retained in our body of laws to reduce the incidence of jail break prevalent in our country; congestion of prison and the indiscriminate abuse of executive powers in the granting of pardon and non-signing of death execution warrants.

Keywords: Death Row Phenomenon, Criminal Jurisprudence, Constitution, Supreme Court

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Introduction

There is a global trend which shows hostility to the imposition of death penalty. In many jurisdictions death sentence is frowned upon, resisted or abolished. Despite the retributive, deterrent and other positive effects of capital punishment, there has been over the years series of public outrage against execution of capital offenders worldwide. Similarly, campaigns against capital punishment have gained wide publicity at conferences, seminars and debates both at the international and national levels. Nigeria is not a colony of any state, and capital punishment is firmly entrenched in the Nigerian penal legislations and specifically authorized by the Constitution. Consequently, in Nigerian criminal jurisprudence, right to life is not absolute but qualified as it is forfeited at the event of execution of death penalty imposed by a court of competent jurisdiction upon conviction[1]. Under our laws, capital punishment is not restricted to murder but extends to economic and religious crimes.

Using the Nigerian criminal jurisprudence as a barometer, this paper reflects on the legality of the prolonged confinement of condemned prisoners on death row and critically appraised the question as to whether the abolition or retention of death penalty in Nigeria is within the province of the executive. It posits that despite the global aggression and resistance to death sentence, by reason of the doctrine of separation of powers, the question of abolition or retention of death penalty in Nigeria is clearly not a matter for the executive. As a matter of law such repeal or revocation is within the exclusive jurisdiction of the legislature. It contends that the death row phenomenon in the Nigerian criminal jurisprudence with its mental agony constitutes cruel, torture and dehumanizing treatment frowned upon by the Constitution. The state wishing to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable. The shifting perception and the plausible arguments against death penalty notwithstanding, the incessant prison breaks in the country and colossal abuse of power to grant pardon makes death penalty a necessary evil in Nigeria.

The Legality of Capital Punishment in Nigeria

[1] See section 33, 241(1)(e) and 233 (1)(d) of the 1999 Constitution of Federal Republic of Nigeria (as amended).

In recent times, there has been a vociferous and unending global debate for and against the retention or abolition of death penalty.[2] Whereas in some jurisdictions capital punishment is firmly entrenched, in others it is frowned at, resisted or abolished. Thus, death penalty is not peculiar to Nigeria as abolition or retention of death sentence is a matter within the exclusive jurisdiction of each individual state. Abolition of death sentence is not necessarily an indication of civilization, rather in some cases it is based on historical circumstance of some countries.[3]

The opponents of imposition of capital punishment strongly argue that it is retributive rather than reformative[4]. They posited that death penalty once executed cannot be reversed. The greatest and most plausible argument against capital punishment is that the criminal justice system is not immune from flaws, thus an innocent man may be executed. The argument predicted on the irreversibility of death sentence once executed finds favour in the light of the unfortunate and helpless situation in the notorious case of *Bello v A-G Oyo State*[5] where the deceased was executed during the pendency of his appeal against capital punishment.

Empirically, the argument that the criminal justice is not immune from erroneous conviction may not be baseless as proof beyond all reasonable doubt is not equivalent to proof with mathematical exactitude or precision.[6] Denning J. (as he then was) in *Miller v Minister of Pensions*[7] declared that reasonable doubt need not reach certainty, but must carry a high degree of probability since proof beyond reasonable doubt does not mean proof beyond all shadow of doubt. The Supreme Court, *per* Oputa, JSC, in *Bakare v State*[8], opined that absolute certainty is impossible in any human adventure including administration of criminal justice. The learned justice maintained that proof beyond reasonable doubt does not mean proof to a scientific certainty. The argument advanced against death penalty also finds support on

[2] The call by the former President Goodluck Jonathan urging the Governors to sign death warrant was stiffly opposed.
[3] Per Belgore, JSC, in *Kalu v State* (1998) 13 NWLR (pt. 583) 531.
[4] Kayode Williams, Prison Reforms and Rehabilitation Mission International on Channel TV 3/07/13.
[5] (1982) 3 NCLR 915.
[6] Evidence Act 2011, section 135.
[7](1947) 2 ALL ER 372.
[8] (1987) 1 NWLR (pt.52) 579.

the express admission by the Supreme Court that it is infallible not because it is immuned from fallibility or clothed with the wisdom of King Solomon. Rather, it is infallible because nobody can cavil its decision. The decisions of the Supreme Court as the Apex Court pursuant to section 235 of the Constitution are forever and not appealable[9].The Apex Court decision in *Adegoke Motor Ltd. v Adesanya*[10] is an authority for the above proposition. The Supreme Court per Oputa, JSC held:

> We are final not because we are infallible, rather we are infallible because we are final. Justices of this Court are human beings, capable of erring. It will certainly be short-sighted arrogance not to accept this obvious truth. It is also true that this Court can do inestimable good through its wise decisions. Similarly, the court can do incalculable harm through its mistakes. When therefore it appears to learned counsel that the decision of this court has been given *per incuriam*, such counsel should have the boldness and courage to ask that such decision be overruled. This Court has the power to overrule itself (and has done so in the past) for it gladly accepts that it is far better to admit an error than to persevere in error.[11]

On the contrary, imposition of capital punishment has been hailed and credited with all manner of achievements in many quarters. The proponents of death sentence maintain that it is a necessary evil targeted at deterring man from being a wolf to his fellow man. Jurisprudentially, death sentence and its enforcement by the state instruct the citizenry on the inadmissibility of certain conducts[12]. Thus if we remove capital punishment and we let loose anarchy. St. Augustine in his *Civitas Dei* declared thus; "remove justice and what are kingdoms but gangs of animal on large scale." In *Mohammed v State,* the *Supreme Court per.* Muhammed, JSC, held as follows:

[9] Okonkwo v FRN (2011) LPELR-CA/A/158/2009
[10] (1989)3 NWLR (pt.109) 250.
[11] *Ibid.*, at page 274 -275, para. G-A.
[12] IKE Oraegbunam, 'Penal Jurisdiction of the Nigerian Criminal Jurisprudence: Any Justification thereof?' *Capital Bar Journal* 2010.

> In conclusion, I would only want to observe, as did the learned trial judge that the facts of this case are miserable, sordid and morbid. The deeds carried out by the appellants are most shameful to remember, too ghastly to believe and most irritating to hear. The appellants are hideous, hypocritical and merciless human beings. The precious and sacred human life means nothing to them. Life except in their own persons, can easily be exchanged for money. They thought they could use the illegally gotten money to sustain their living. No way! The law has caught up with them and is never a respecter of persons. More so, when our society is seriously sick, the harbingers of such sickness are those who cause havoc and disorder such as appellants who can spill the blood of an innocent man in order to make '*Awure*' i.e. concoction for money making. The continued existence of such evil people in the society is unwanted and detrimental. Such people deserve to be vanished from the society in accordance with the provision of the law of the country.[13]

In *State v Njoku*, the Court of Appeal per Saulawa, on the origin of capital punishment and argument for and against its use held thus:

> It is pertinent, that capital punishment (known as death sentence) has a very ancient historical background which may be traceable to the well known doctrine of *lex talionis* i.e. an eye for an eye: this doctrine is most undoubtedly traceable to the Holy Scriptures especially the Holy

[13] (2007) 11 NWLR (pt. 1045) 303 at 330, paras. D-G.

> Bible, the Holy Torah and the Holy Quran, respectively.[14]

However, despite the retributive deterrent and other positive effects of capital punishment, there has over the years been series of public outrage against execution of capital offenders worldwide. Some arguments that have so far been put up against the death penalty are predicated on the following points:

1. The possibility of human error to the extent that an innocent person could be executed knowing that it is irreversible.
2. The death penalty is applied arbitrarily and disproportionate on the poor and minorities. In the case of *Furman v Georgia,*[15] the US Supreme Court temporarily curbed the death penalty because its application was arbitrary and capricious.
3. Deterrence argument is wrong because the claim that the capital punishment reduces violent crime is inconclusive.
4. Prisoners sentenced to death remain on the death row for long time which negates the validity of the deterrence argument, resulting in endless appeals, delays, and legal technicality to no ends.[16]

As far back as 1953, Lord Denning, MR was reported to have given evidence before the Royal Commission thus: 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 deterrent or reformative 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; and from this point of view, there are some murder which, in the present state of public opinion, demand the most emphatic denunciation of all, namely the death penalty.

In the case of *Okegbu v State*, Aniagolu, JSC was reported to have aptly remarked, in his usual erudite characteristic, thus:

> It so often happens that in murder cases the defence usually talks of justice only in relation

[14] (2010) NWLR (pt. 1175) 243 at 278 – 279, paras. B-D.
[15] 408 U.S. 238 (*1972*).
[16] AB Danbazau, *Criminology and Criminal Justice* (Kaduna: Nigeria Defense Academy Press, 1999) pp. 160 – 161.

> to the accused person. Very often as it affects the victim, the murder charge is either forgotten or ignored by the defence. But just as it is essential that justice be done to the prisoner, so must it also be done to the deceased who even in the lonely depth of his grave cries out loudly for the circumstances of his death to be justly examined and justice meted to him.[17]

While death penalty is outlawed in many jurisdictions, Nigerian criminal jurisprudence in its retributive character retains it.[18] In the annals of the Nigerian legal system, it is settled beyond argument that the right to life guaranteed by section 33 of the 1999 Constitution is not absolute but qualified as it is forfeited in execution of death sentence passed by court of competent jurisdiction. The Supreme Court reiterated the constitutional validity of death penalty in Nigeria in the landmark decision of *Kalu v State.*[19] The Apex Court, after a thorough review of the relevant statutes and judicial precedents, held that the right to life guaranteed by section 30(1) of the 1979 Constitution (now section 33) is qualified to the extent that life may be lawfully terminated in the execution of death penalty in respect of a criminal offence in which a person has been convicted. Similarly, the Supreme Court, *per* Ogundare JSC, in *Okoro v State*[20] relied on the authority of *Kalu v State (supra)* to hold that death penalty as enshrined in section 319 of the Criminal Code is not inconsistent with section 30(1) of the 1979 Constitution. In the same vein, the Apex Court in the recent authority of *Amoshima v State*[21] per Onnoghen, JSC, held that despite the global aggression and hostility against death penalty, it is authorized by the Constitution. The distinguished learned Justice remarked that Nigeria is a sovereign state with its legal regime, it matters not what is obtainable in other jurisdictions.

[17] (1979) 11 SC 56 at 68.
[18] See section 319 of the Criminal Code, section 1(3) of the Robbery and Firearms (Special Provisions) Act, Cap. RII, FRN, 2010.
[19] (1998) 13 NWRL (pt. 583) 531.
[20] (1998) 64 LRCN 5214.
[21] (2011) 14 NWLR (pt. 1263) 530.

Historically, death penalty has been part of the Nigerian criminal justice system even before the attainment of independence in 1960[22]. However, it must be noted that death penalty is not peculiar to Nigeria. Comparatively, the position of the law regarding imposition of death sentence in all the jurisdictions is not uniform[23]. In *Mbubusuu & Anor v the Republic*[24], the Tanzanian Court of Appeal held that although the death penalty is a form of cruel, inhuman and degrading treatment, it affirmed that death penalty nevertheless is constitutionally permissible, having regard to the qualified nature of the right to life as entrenched in the Tanzanian Constitution. In the same vein, the Supreme Court of Zimbawe per Gubbay C.J. in the case of *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General of Zimbabwe & Anor*[25] held that right to life under the Constitution of Zimbabwe is qualified and thus upheld the constitutional validity of the death penalty in Zimbabwe. In *Bacan Single v State of Punjab*[26]**,** the constitutionality of Article 21 of the Indian Constitution was raised before the Supreme Court of India. The Court in its well considered judgment held that by no stretch of the imagination can it be said that death penalty either *per se* or because of its execution by hanging constitutes an unreasonable, cruel or unusual punishment prohibited by the Constitution. Similarly, the 5th Amendment of the United States' Constitution refers to in specific terms to capital punishment and thereby impliedly recognizes its validity. Right to life in the United States of America is qualified and accordingly, the United States' Supreme Court has repeatedly held that the death penalty is not intrinsically unconstitutional. Consequently, in *Gregg v Georgia*[27], the Supreme Court held that death penalty does not in itself violate the Constitution. The position in the United States is that capital punishment is not *per se* unconstitutional although in certain circumstances where its application is arbitrary, it is unconstitutional[28]. Again**,** in *Noel Riley and Ors v Attorney-General for Jamaica & Ano*r[29] Lord Bridge of Harwich in interpreting section 14(1) of the Constitution of Jamaica which states that no

[22] See *R.v Nungu* (1953) WACA 379, *R v Adi* (1955) 15 WACA; *R v Obi* (1957) W.R.N.L.R
[23] *Kalu v State (supra)*.
[24] Criminal Appeal No. 142 of 1994, 30th Jan., 1995.
[25] (1993) (2) SCR 583.
[26] (1983) (2) SCR 583.
[27] 428 U.S 153
[28] *Furman v Georgia* 408 U.S 238 (1972); *Woodson v North Carolina* 428 U.S 242 (1976), *Jarek v Texas* 428 U.S
[29] (1983), A.C 719.

person shall intentionally be deprived of his life save in the execution of the sentence of a court in respect of a criminal offence of which he has been convicted, declared that the validity of the penalty is put beyond all doubt by the express provision of section14 (1) of the Constitution.

In the same vein, in *Early Pratt and Anor. v Attorney-General for Jamaica and Anor*[30] Lord Grittihs observed that as hanging was the prescription of punishment for murder provided by Jamaican law immediately before independence, the death sentence for murder cannot be held to be an inhuman prescription of punishment for murder. The combined effect of the two cases above illustrates the validity of the death penalty in Jamaica on the ground that right to life as entrenched in Jamaican Constitution is qualified and not absolute[31].

In contrast, section 54(1) of the Constitution of the Republic of Hungary states that every person has the inherent right to life and human dignity and no one shall arbitrarily be deprived of his life. By this provision, death penalty in Hungary is considered an arbitrary deprivation of life. Thus, right to life in Hungary is not qualified. In *Jones v Wittenberg*[32] it was held that death penalty was unconstitutional on the ground that it is inconsistent with the right to life under section 54(1) of Hungarian Constitution. In *State v Makwanyane & Anor* [33] it was held by the South African Court that death penalty was a violation of the Constitutional protection of freedom from cruel, in human and degrading treatment under section 11(2) of the South African Constitution.

On the issue of where lies the power to abolish death penalty in Nigeria, the Supreme Court in *Amoshima v State (supra)* held that the retention or abolition of death penalty is clearly not matter for the court but within the exclusive reserve of the legislature.

The Court noted that where there is dissatisfaction with the state of the law as it exists and desire for change thereof expressed by the people, it is the duty of the legislature which made the law in the first place to effect the needed reforms by amendment thereto. The duty to amend the law or make the law is

[30] (1994) 2 A.C 1
[31] Kalu v State Supra.
[32] 33f Supp. 707.
[33] (1995) (6) BCLR (cc).

the exclusive function of the legislature.[34] Reiterating the above trite law, the Supreme Court per Belgore, JSC, in *Kalu v State (supra),* while remarking that the abolition of death penalty is not a question of civilization, held that the retention or abolition of death penalty is not the function of the court as such repeal, amendment or revocation lies with the legislature. It is also a cardinal principle of law that statutes are not repealed by inference or implication but by direct provision of the law. The Supreme Court per Iguh, JSC, *Ibidapo v Lufthansa Airlines*[35] held that the omission of Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953 from LFN, 1990 does not derogate from its continued validity and effect. That where it is intended to repeal a legislation, this should be expressly so stated as the courts generally lean against implying the repeal of an existing legislation unless there exists clear proof to the contrary. It follows on the strength of the above authorities that neither the global hostility or the shifting perception against death sentence can repeal capital punishment by implication. The salient question arising from the refusal of some Governors despite the persistent call by the Presidency to sign death warrants is whether the retention or abolition of death penalty is within the province of the Governors? Does the prolonged confinement of condemned prisoners on death row without pardon not amount to a naked act of executive abolition of death penalty? Does the power to grant pardon vested in the Governors by section 212 of the Constitution extend to prisoners convicted of offences created by the Act of the National Assembly?

It is a trite law in the Nigeria jurisprudence that a judgment or an order of court no matter how incorrectly arrived at subsists until set aside or vacated by a court of competent jurisdiction, and all persons and authorities, including the court that made the order or to which the order is directed, must obey the order unless and until that order or discharged or set aside. This is so even in the case where the person affected by the decision believes it to be irregular, harsh, unjust or even void.[36] As long as the judgment or order

[34] See Section 4 of the 1999 Constitution (as amended).
[35] (1998) 4 NWLR (pt. 498) 124; *Gov of Kaduna State v Kogoma* (182) 6 S.C 87; *Raleighj Industries Ltd v Nwaisu* (1994) 4 NWLR (pt. 341) 760; *Uwaifo v A-G Bendel State* (1982) 7 S.C 124; *Olu of Warri v Kperegbeyi* (1994) 4 NWLR (pt. 339) 416.
[36] *Babinton-Ashaye v E.M.G. Ent. (Nig) Ltd* (2011) NWLR (pt. 1286) 479, *Ebongi v State* (2010) 1 NWLR (pt. 1176) 565.

subsists it must be obeyed to the letter. Reiterating the above settled law, Bello, CJN of blessed memory in the case of *Rossek v A.C.B.*[37]posited:

> It has never been the laws of Nigeria as some of our judges, like judicial robots, have been parroting the dicta of Lord Denning in *MacFoy v UAC* that there is no need for an order of a court which is void to be set aside by a court and thereby implying that all and sundry have the right to disobey that order. It is not also the law of England. It has never been the law that a party may review a judgment, regard it a nullity and disobey it. A prisoner who thinks that his conviction was nullity cannot with impunity walk out of prison. Similarly, a judgment debtor cannot lawfully resist execution because he considers the judgment against him was null and void. Thus, a judgment of a court of law remains valid and effective unless it is set aside by an appeal court or by the lower court itself if it acted without jurisdiction or in the absence of an aggrieved party.

It is statutorily codified in plain terms in section 287 of the Constitution that the decisions of court shall be enforced in any part of the Federation by all authorities and persons. Flowing from the above section is that the court does not exist for academic exercise or mute or hypothetical point[38]. It remains a trite and immutable doctrine that court of law, like nature, does not act in vain but for purpose and the purpose must, exist, be identifiable and indeed be, identified. The executive has no legal power to sit as an appellate court or cavil a decision given by a court of competent jurisdiction. It is posited that except by the express exercise of power of prerogative of mercy in strict compliance with the Constitution, it is unlawful for the Governors to continue the act of indefinite detention. Death row phenomenon is unknown to the Nigeria criminal justice system.

[37](1993) 8 NWLR (pt. 312) 383.
[38] *Chevron (Nig) Ltd. v L.D (Nig)* (2007) 16 NWLR (pt. 1059) 168; *Odedo v INEC* (2008) 17 NWLR (pt. 1117) 554.

Death sentence is carried out by hanging or firing squad.[39] However, from the above cited provisions, another pertinent question is whether or not the indefinite confinement of condemned prisoners on death row with the unimaginable mental agony of suspense of execution constitutes dehumanizing, cruel torture; degrading treatment frowned upon by the Nigerian laws? It is a settled law that the authorization of imposition of death penalty by the Constitution does not divest the condemned prisoners of the rights not to be subjected to cruel treatment.[40] While section 34 of the Constitution in plain terms states that no person shall be subjected to torture, inhuman or degrading treatment, article 5 of the African Charter on Human and Peoples Rights unambiguously provides that every individual shall have right to the respect of the dignity inherent in human being shall not be exposed to any form of cruel, inhuman or degrading treatment. The Supreme Court per Belgore, JSC, in *Kalu v State (supra)* opined that the execution of death penalty must be in line with the provisions of the law as the state is not allowed by law to reduce a healthy man to a bag of bones. Death penalty is not intrinsically unconstitutional. It must however be carried out in the manner that does not degrade or is otherwise dehumanizing.[41] It is contended that the death row phenomenon in Nigeria amounts to cruel and inhuman treatment. A state wishing to retain death penalty must accept the responsibility of ensuring that execution follows as swiftly as practicable.

Conclusion

It is our view that despite the global hostility, aversion and the shifting perception of the society against death penalty, its retention or abolition is clearly not within the providence of the executive. It will take legislative amendment to abolish death penalty in Nigeria. While we lend our modest weight to the campaigns that capital punishment should not be extended to economic and religious crimes, it is submitted that although the plausible arguments against death penalty may be proper basis for its abolition yet on the face of the daunting security challenges and the ugly state of the Nigerian prisons, death penalty remains a necessary evil. The incessant prison break in

[39] See section 367 (1) CPA and Section 273 CPC

[40] *Nemi v A.G. Lagos State* (1996) 6 NWLR (pt. 452); *Ogugua v State* (11994) 9 NWRL (pt. 366) 1.

[41] I.A Okafor and E.O.C. Obidimma; Case Comment on *Onuoha Kalu v State* Vol., 1, No.3, 2001 UNIZIK Journal.

the country and the indiscriminate abuse of power to grant pardon makes a case for retention of death penalty in the Nigerian criminal jurisprudence.