

Crime and Punishment: Reflections on the Application of Death Penalty in Nigeria and Beyond

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The debates and controversies on the application of death penalty in Nigeria are ongoing. The scope of the application of death penalty has recently been expanded in some Nigerian states to cover cattle rustling and cultism. This article explores the law and practice of death penalty in Nigeria. The analysis addresses the nature, weakness, ineffectiveness, discriminatory and arbitrariness of the Nigerian criminal justice system and in particular, paying attention to how death penalty is being applied to non heinous crimes in Nigeria in defiance to Nigerian obligations under the international legal regime. The findings of this article reveal that the application and pronouncement of death penalty had dwindled across the globe because people have recognized that innocent people remain on death row across the globe. Death penalty is on the decline and a significant reduction in execution is noted. In Sub Saharan Africa, more than a few countries have either abolished death penalty or put an end to the mandatory application of death penalty. After a critical analysis of the Nigerian legislative framework, case law and the administration of the criminal justice system in Nigeria, this article calls for the abolition of the death penalty in Nigeria because of its injustices against the lowly and the poor, arbitrariness, continuing expanded scope and irreversibility.

1. Introduction

The discourse on the continued application of death penalty in Nigeria varies between groups. Some have argued that the application of death penalty should be retained² and extended to cover new and emerging crimes such as cyber crime, kidnapping and banditry, while others

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² Nzeribe Ejimneonye Abangwu Adekunbi, "Death Penalty in Nigeria: To Be or Not To Be: The Controversy Continues," *Arabian Journal of Business and Management Review* (OMAN Chapter) 3, no.3; 2013, 10.

have argued that death penalty should be abolished.³ The former group argues that death penalty has the benefits of deterrence and correcting the wrongs perpetuated by the wrong doers while the abolitionists argue that global trends favour the abolition of death penalty. They argue that death penalty violates the right to dignity and right to life of the wrong doer. The abolitionists further argue that death penalty has failed as a deterrent⁴.

The application of death penalty as punishment for wrongdoing in Nigeria dates back to pre-colonial days in Nigerian traditional societies and applied on conviction for offences such as murder and witchcraft and treating the gods with irreverence⁵. In those days, death penalty was hardly applied because the alternative of banishment was considered more humane and effective. Death penalty is historically reserved for heinous crimes long before the creation of court systems. As civilization progressed, different societies incorporated capital punishment into their legal codes.⁶ In Nigeria, section 21(10) of the 1960 constitution of Nigeria provides:

*No person shall be convicted of a criminal offence unless that offence is defined and the penalty thereof is prescribed in a written law...*⁷

Section 36(12) of the 1999 Constitution as amended provides:

Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.

The above constitutional intervention puts to end the concept of customary criminal law in Nigeria. For an act or omission to constitute a crime in Nigeria, it must specifically be regarded as a crime in a written⁸ and valid law.

³ Nicholas K., "When We Kill: Everything you think you know about the death penalty is wrong," *New York Times*, <https://www.nytimes.com/2019/06/14/opinion/sunday/death-penalty.html>

⁴ "The death penalty does little to serve victims or deter crime." António Guterres, UN Secretary-General, remarks at Panel on "Transparency and the death penalty", October 10, 2017, www.un.org/sg/en/content/sg/statement/2017-10-10/secretary-generals-remarks-panel-%E2%80%9Ctransparencyand-death-penalty%E2%80%9D

⁵ Dundas K., "The Organisation and Laws of some Bantu Tribes in East Africa," *Journal of Royal Anthropology Institute* 45, (1915): 258-259.

⁶ Ezedike E. U., "Violent Crimes, Economic Development and The Morality of Capital Punishment in Nigeria: A Retentionist Perspective" *JORIND* 9, no.1, (2011): 447.

⁷ This Constitution has since been repealed. However, the provision is retained in § 36(12) of the constitution of Nigeria, (1999) (as amended).

⁸ Agaba, J., *Practical Approach to Criminal Litigation in Nigeria* (Ibadan: Emerald Publishers, 2015)3.

While some have call for the abolition of the death penalty, others call for its retention⁹, and some others question the constitutionality or otherwise¹⁰ of the death penalty. This article explores the law and practice of death penalty in Nigeria. The first part of this article gives a brief background while the second part examines the nature of application of death penalty in Nigeria. The Third part explores the global trends on death penalty, while reflecting on the application of death penalty in Nigeria. This article concludes that death penalty be abolished in Nigeria because it is not being applied to the most heinous of offences and particularly because of the many challenges confronting the Nigerian criminal justice system. The article adopts the library-based research methodology.

1.1 Relevant Theories on Death penalty

It is generally agreed and acknowledged by scholars and criminologists that offenders must be punished but there is huge divergence of views on the objectives of the punishment and how the punishment should be applied.¹¹ There are three major different schools of thought on these divergent opinions: the deterrent, the retributive and the reformative. Deterrence theory is premised on the presumption that punishment sends a strong message to the society that the severity of the punishment deters individuals from getting involved in crimes, having witnessed the awful consequences of committing a crime¹². However, in capital punishment the question often arises as to when the message is sent: is it at sentencing or during execution? The answer to this question is significant in jurisdiction where capital sentence is only imposed without execution¹³. This theory is based on the Mosaic law of an eye for an eye and a tooth for a tooth¹⁴. Retribution is to publicly stand by fairness and justice. Sentencing is pronounced in public to signal government's recognition of the seriousness of the crime, the harm the crime has caused, and the state's duty to respond to it.¹⁵ This theory seeks to rectify past wrongs and seeks benefits for the future by doing so. Proponents of this position argue that if justice is to be done in cases of murder and violent crime, only the death penalty should be the recourse given

⁹ Nzeribe Ejimneonye Abangwu Adekunbi, "Death Penalty in Nigeria: To Be or Not To Be: The Controversy Continues," *Arabian Journal of Business and Management Review* (OMAN Chapter) 3, no.3, (2013).

¹⁰ Onyekachi Duru, "The Constitutionality of Death Penalty under Nigerian Law," September 6, 2012. SSRN: <https://ssrn.com/abstract=2142981> or <http://dx.doi.org/10.2139/ssrn.2142981>

¹¹ Taylor D., "Capital Punishment in Theory and Practice," in *Crime, Policing and Punishment in England, 1750–1914, Social History in Perspective* (London: Palgrave, 1998).

¹² Bouffard J. A., Nicole Niebuhr, and Lyn Exum M., "Examining Specific Deterrence Effects on DWI Among Serious Offenders," *Crime and Delinquency* 63, no. 14 (2017).

¹³ Bades S.A., "All Bathwater, No Baby: Expressive Theories of Punishment and the Death Penalty," *Michigan Law Review* 116, no. 6(2018): 916.

¹⁴ Exodus 22:24.

¹⁵ Ibid.

by law. According to the Reformatory theory, punishment should not be imposed as a means for the benefit of others. Punishment should be given to educate or reform the offender himself. The crime committed by the criminal is an end, not a means as in the Deterrent theory. This theory has been criticized for lacking punitive element and hence, contrary to the basic principle of sentencing that necessitates infliction of harm on the offender.

2. Application of Death Penalty in Nigeria

Nigeria is a federation with 36 states and a Federal Capital Territory (FCT) Abuja. There are three principal enactments that are relevant to criminal litigation and proceedings in Nigeria: The Criminal Procedure Act, CPA¹⁶ which is applicable to the Southern region,¹⁷ The Criminal Procedure Code which applies to criminal proceedings in the Northern region¹⁸ and the Administration of Criminal Justice Act (ACJA) 2015 which has repealed the applicability of CPA and the CPC in the federal courts and High courts in the Federal Capital Territory¹⁹. ACJA applies to all criminal causes emanating from offences created by the Act of National Assembly. In addition to the primary enactment, there is Criminal Code of Law in states in the Southern region, Penal Code in the states in the Northern region and the Penal Code Act for the FCT. All the secondary enactments are related to substantive criminal law. These legal instruments have various provisions prescribing death penalty for the violations of certain offences, some of which are to be discussed later in this article.

2.1 Statutory Framework

In *Adeniji v. State*²⁰, the Court held that death penalty is expressly recognized by the Nigerian Constitution. In addition, section 33(1) of Constitution of Federal Republic of Nigeria 1999 as amended provides:

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

¹⁶ Cap c41 Laws of the Federation of Nigeria (2004).

¹⁷ Except for Lagos State that has enacted the Administration of Criminal Justice Law of Lagos State, ACJL (2007) and Ekiti State that has enacted the Administration of Criminal Justice Law of Ekiti State, ACJL (2014).

¹⁸ Cap 30, Laws of Northern Nigeria, (1963) now re-enacted as State Laws of the states of the former Northern Nigeria.

¹⁹ Eleven states in Nigeria have passed the equivalent of the ACJA in their various jurisdictions. These states are: Ondo, Kaduna, Ekiti, Akwa-Ibom, Oyo, Rivers, Anambra, Abuja, Cross-River, Enugu and Lagos.

²⁰ *Adeniji v. State*, 645 NWLR 356 (2000).

In *Kalu v. State*²¹ HURILAWS litigated the constitutionality of the death penalty in a bid to abolish the death penalty in Nigeria. The Supreme Court held that the death penalty is permitted by the Nigerian Constitution. However, the court recommended that the National Assembly can take steps to remedy the issues surrounding the practice and application of the death penalty in Nigeria. Nevertheless, the Court refrained from pronouncing on whether remaining on death row for a significant amount of time might amount to a procedural rights violation.

In *Peter Nemi v The State*²² the appellants were convicted of armed robbery and conspiracy to commit armed robbery. They were sentenced to death. They commenced this suit to challenge their non execution for a prolonged period. They further challenged the dehumanizing conditions under which they were kept. The Court of Appeal held “prisoners have enforceable rights as citizens and suggested that prolonged incarceration of convicted prisoners could constitute breach of their right to dignified and humane treatment”²³.

In *Nasiru Bello v The State*²⁴ the Supreme Court awarded reparation to the family of the deceased who was executed by the Oyo State government while his appeal was pending at the Court of Appeal. The Court further held that the execution of a convicted prisoner is the last act, in a series of acts beginning from his arrest; his trial and conviction, his appeals, and even after the appeals, the Governor of a State still has to consider the Report of the trial judge sent pursuant to the Criminal Procedure Law and finally, the report of the Committee for the Prerogative of Mercy. It is after all these have been exhausted that the Appellant goes under the hangman’s noose or (as in the instant case) faces the firing squad.

In condemning the hasty execution of the death sentence, Chukwudifu Oputa JSC (as he then was) held that the premature killing of Nasiru Bello in the surrounding circumstances of this case was both unlawful and illegal. He stated that it was also wrongful in the sense that it was injurious to the rights primarily of Bello to life and secondarily of his dependents who by his death lost their bread-winner; it was needless in the sense that it was premature and unconstitutional; it was unjust in the sense that Nasiru Bello was not allowed a just determination of his appeal by the Federal Court of Appeal; it was reckless in the sense that it was done in complete disregard of all the constitutional rights of the deceased, Nasiru Bello”

²¹ *Kalu v. State*, 13 NWLR (Pt.583)531(1998).

²² *Peter Nemi v. The State*, 6 NWLR (PT 452) (1996).

²³ Human Rights Law Service, “Public Interest Litigation.” Accessed September 3, 2019, <https://hurilaws.org/public-interest-litigation/>

²⁴ *Nasiru Bello v The State*, 2 N.S.C.C. 1257 (1986).

In *James Ajulu & Ors v Attorney-General of Lagos State*²⁵ the Lagos High Court (Per Olokoba J.) held that while the death penalty is not unconstitutional, the execution of the applicant (condemned prisoners) by firing squad or hanging is unconstitutional as it violates the fundamental right of the applicants to dignity guaranteed by Section 34 of the Constitution: *“every individual is entitled to respect for the dignity of his person, and accordingly, no person shall be subject to torture or to inhuman or degrading treatment; no person shall be held in slavery or servitude; and no person shall be required to perform forced or compulsory labour”*.

From the above constitutional provisions and jurisprudence, it is abundantly clear that the Nigerian courts are appropriately mandated to apply the death penalty. There are more than a few capital offences carrying death penalty in Nigeria and the list appears to be growing by the day. The offences that carry death penalty in Nigeria include: Murder,²⁶ under the Criminal Code Act, killing someone unintentionally while committing another unlawful act is deemed murder and carries the mandatory death penalty.²⁷ In states applying the Shariah law, an act of terrorizing people for the purpose of robbery or other purposes (hirabah) is punished with mandatory death penalty when resulting in death,²⁸ house trespassing resulting in death, any act of witchcraft or *juju* that results in death carries the mandatory death penalty,²⁹ rape committed by a married person carries the mandatory death penalty by stoning.³⁰ Armed robbery resulting or not resulting in death of the victim carries the mandatory death penalty³¹. Armed robbery or robbery resulting in harm is also punishable with the mandatory death penalty pursuant to the Criminal Law of Lagos State of 2011.³² Under Shariah law, applied in 12 Northern states, a married person who commits adultery shall receive a mandatory death sentence by stoning.³³ Also in those 12 Northern States applying Sharia Law, homosexual consensual sex carries the mandatory death sentence by stoning.³⁴ Across the federation, treason, conspiring to wage war against Nigeria, and treachery are punishable by death³⁵. Abetment of suicide of a child or an

²⁵ Suit No. ID/76M/2008.

²⁶ Criminal Code, §319.

²⁷ Criminal Code, § 316, 319.

²⁸ Center for Islamic Legal Studies of Ahmadu Bello University, Harmonised Sharia Penal Code Annotated, (Zaria: Center for Islamic Legal Studies of Ahmadu Bello University, Mar.2002), ch. VIII, § 152(c)(d).

²⁹ Ibid., § 330(2), "Juju" includes the worship or invocation of any object or being other than Allah. Bello University, Sharia Penal Code, § 408.

³⁰ Bello University, Sharia Penal Code, § 128(b). Zamfara State Shari'ah Penal Code, § 129(b), Jan. 2000.

³¹ § Criminal Code Act of Nigeria; § 1(2)(3), Robbery and Firearms (Special Provisions) Act.

³² Criminal Law of Lagos State, § 295(2) (2011).

³³ Bello University, Sharia Penal Code, 126 (b), Zamfara State Shari'a Penal Code, §126, Jan. (2000).

³⁴ Bello University, Sharia Penal Code, § 130, Zamfara State Shari'a Penal Code, § 130, Jan. (2000).

³⁵ Criminal Code Act of Nigeria, §§ 37–38, 49A.

insane person giving false evidence on account of which an innocent person dies is punishable with death.³⁶ A person inside or outside Nigeria who knowingly commits, attempts, assists, or is an accessory to any act of terrorism resulting in death is liable to be sentenced to death.³⁷ While in Rivers State, conviction for cultism now attracts a death sentence³⁸, and in Katsina State death penalty is now the punishment for cattle rustling.³⁹

Methods of Execution

The pronouncement of death penalty is often carried out by hanging in Nigeria. Hanging is the most preferred execution method,⁴⁰ and shooting by firing squad is permissible under section 1(2) of the Robbery and Firearms (Special Provisions) Act⁴¹. It is significant to note however, that the High Court of Lagos in *Ajulu v Attorney General of Lagos State*⁴², declared that execution by hanging or firing squad is unconstitutional as it violates the prisoner's rights to dignity of the human person and to be free from torture and inhumane or degrading treatment under Section 34(1)(a) of the Constitution. Under Shariah law, applied in some northern Nigerian states, executions can be carried out by firing squad and beheading for certain types of offenses.⁴³ Stoning (rajm) is a Shariah punishment applied in some northern Nigerian states and reserved for Muslims.⁴⁴ The punishment applies for zina (adultery),⁴⁵ rape (if the offender is married),⁴⁶ incest (if the offender is unmarried),⁴⁷ and homosexual sodomy.⁴⁸ Lethal injection is a permitted method of execution pursuant to section 402(1) of the Administration of Criminal Justice Act.

³⁶ Penal Code, S. 159 (2).

³⁷ Terrorism (Prevention) Act of Nigeria, §. 4(2), (2011); Act. No. 10 of (2011), Jun. 2, (2011), as amended by Terrorism (Prevention) (Amendment) Act of Nigeria, §. 2(c), Feb. 21, (2013).

³⁸ Amnesty Intl., Death Sentences and Executions in 2018, 43, accessed April 10, 2019, ACT 50/9870/2019.

³⁹ Abdur Rahman Alfa Shaban, "Nigeria's Katsina state legislates death penalty for kidnappers, rustlers," *African News*, May 25, 2019, <https://www.africanews.com/2019/05/25/nigeria-s-katsina-state-legislates-death-penalty-for-kidnappers-rustlers/>, "Masari Approves Death Penalty For Cattle Rustlers, Kidnappers In Katsina," *Sahara Reporters*, May 24, 2019, <http://saharareporters.com/2019/05/24/masari-approves-death-penalty-cattle-rustlers-kidnappers-katsina>.

⁴⁰ CPA, § 367(1), CPC, § 273 and ACJL, S. 301.

⁴¹ Robbery and Firearms (Special Provisions) Act, Cap. 398 LFN (1990).

⁴² *Ajulu v Attorney General of Lagos State*, Suit No. ID/76M/2008.

⁴³ Center for Islamic Legal Studies of Ahmadu Bello University, Zaria, Harmonised Sharia Criminal Procedure Code Annotated, sec. 241(a), Oct. 2005.

⁴⁴ Bello University, Criminal Procedure Code §. 44.

⁴⁵ Bello University, Sharia Penal Code, ch. VIII, §. 126.

⁴⁶ *Ibid.*, ch. VIII, §. 128(b).

⁴⁷ *Ibid.*, ch. VIII, §. 132(b).

⁴⁸ *Ibid.* ch. VIII, § 130.

2.2 Analysis of Relevant Case Law on Armed robbery

The aim of this segment is to show that to be convicted of armed robbery, the convict need not to have been in possession of lethal weapons that are capable of producing significant bodily harm or death. In *Emmanuel Ekpulor v The State*,⁴⁹ the appellant was among a gang of armed robbers that gained entrance by force into the premises of a fishing company; the appellant made a confessional statement that he was not armed and he only stood by the gate of the factory while other gang members went inside. One of the other gang members that went inside was armed with a gun but was able to escape police arrest; the appellant was convicted for armed robbery and sentenced to death by firing. The Supreme Court upheld the conviction of the appellant for murder.

In *Patrick Ikemson & Ors v The State*,⁵⁰ Karibi-White JSC stated:

*“The contention that if there was robbery, the court should hold that the Appellant was not armed will take the appellant’s nowhere. Once it was established by the prosecution that appellant was among the robbers and they armed with offensive weapons...the appellant is guilty of armed robbery. In law, it matters not that the appellant does not carry weapon. Once it was established that the appellant was among the robbers not as a casual onlooker, but a full participant and his accomplices now at large not only carried firearms but actually engaged the police, who challenged them in cross fire, the appellant was guilty of the offence of armed robbery.”*⁵¹

Offensive weapon has been interpreted to include a toy gun and any weapon that may put the victim in fear of violence⁵². A horsewhip laced with sharp blades has been interpreted by the court as an offensive weapon.⁵³

2.3 Exceptions

2.3.1 Juvenile

An infant, a child or a young person is not subject to the pronouncement of death penalty in Nigeria. Where such a person has committed a capital offence punishable with death, such a person shall not be sentenced to death. In *Modupe v State*⁵⁴ the Supreme Court held that:

⁴⁹ *Emmanuel Ekpulor v The State*, 12 SCNJ 71 76(1990).

⁵⁰ *Patrick Ikemson & Ors v The State*, 1 CLRN 23 (1989).

⁵¹ *Ibid.*

⁵² *Cpl. Andrew Emwenya v Attorney General Bendel State*, 6 NWLR part 297, 29 36 (1993).

⁵³ *Abubakar Ibrahim v The State*, 5 SCNJ 129 138 Wali JCA (1991).

⁵⁴ *Modupe v State*, 4 NWLR 9 SC pt. 87 130 (1988).

If at the time the offence was committed, an accused charged with capital offence has not attained the age of 17 years, it will be wrong for any court not only to sentence him to death, but also to even pronounce or record such sentence⁵⁵.

Section 368 (3) Criminal Procedure Act⁵⁶ prescribes that death penalty shall not apply to anyone who has not attained the age of 17 years at the time of the offence neither shall sentence of death be recorded rather, such a person can be detained during the pleasure of the President. However it is significant to note that under section 405 of the ACJA, a death sentence cannot be pronounced upon anyone who has not attained the age of 18 years.⁵⁷ Such a person can only be sentenced to life imprisonment or to any such other term as the court deems appropriate.

Nigeria being a party to the ICCPR, the Convention on the Rights of the Child (this Act however, is only enforceable in the Federal Capital Territory of Abuja and in states that have explicitly enacted it⁵⁸), and the African Charter on the Rights and Welfare of the Child, is obliged under international law to exclude persons below 18 years of age from capital punishment.⁵⁹ Nevertheless, Nigeria's multiple legal systems have differing definitions of legal juvenility, and there have been reports that Nigeria has sentenced people under 18 years to death.⁶⁰ Finally, in the 12 northern states that operate Shariah law, persons under the age of puberty (taklif) or "the age of attaining legal and religious responsibility" cannot be executed.⁶¹

2.3.2 Mentally retarded

Section 28 of the Criminal Code which is applicable in Southern Nigeria with the exception of Lagos State, provides that an individual is excluded from criminal liability if at the time of the crime, the individual is in "*such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or*

⁵⁵ Such a juvenile offender may only be detained until the pleasure of the Governor.

⁵⁶ Criminal Procedure Act, ch 80, Laws of the Federation of Nigeria 1990.

⁵⁷ See also § 221, 277 of the Child Right Act and § 302 (3) of the ACJA.

⁵⁸ Child Rights International Network, Inhuman Sentencing of Children in Nigeria, 1 Mar. 2013., https://archive.crin.org/en/docs/Nigeria_UPR_CRIN_FINAL.

⁵⁹ Status, Declarations, and Reservations, ICCPR, 999 U.N.T.S. 171, Dec. 16, 1966, accessed June 10, 2019, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en,. Status, Declaration, and Reservations, Convention on the Rights of the Child, 1577 U.N.T.S. 3, Nov. 20, 1989, July 30, 2018, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en,. African Commission on Human and Peoples' Rights, Ratification Table: African Charter on the Rights and Welfare of the Child, <http://www.achpr.org/instruments/child/ratification>.

⁶⁰ Amnesty International., "Death Sentences and Executions in 2016," 6; April 11, 2017 ACT 50/5740/2017. Amnesty Intl., "Death Sentences and Executions in 2015," 8; April 6, 2016 ACT 50/3487/2016.

⁶¹ Criminal Code Act of Nigeria, § 319(2).

of capacity to know that he ought not to do the act or make the omission.”⁶² In *R v Grumah*⁶³ the WACA defined delusion as “a symptom of mental disturbance and a false belief which is unshakable by facts.”⁶⁴ Under section 278(1) ACJA, a person may not be able to stand trial if his mental capacity is in doubt or if such an individual is dwelling in a state of delusion. The court is obliged to order a medical examination to determine the fitness of such an individual to stand trial. In the case of *Popoola v The State*,⁶⁵ the Supreme Court held that the onus of establishing insanity is on the defendant. It is generally established that because the onus of proving mental illness is on the defendant, majority of whom are illiterate, poor and of humble background, without legal or adequate legal representation, there are many cases where mentally impaired persons in Nigeria are tried without adequate support or defense.⁶⁶ In few instances where individuals are found to be suffering from mental illness, they are not adequately treated or sent to medical facilities where their mental health is likely to be evaluated or treated but sent to prison where their mental health deteriorates.

2.3.3 Pregnant Women

A pregnant woman is exempted from the death penalty under s. 368 (2) Criminal Procedure Act. Where a pregnant woman is found guilty of capital offence under the provisions of s 376, she will be sentenced to life imprisonment.⁶⁷ However, under section 404 of the Administration of the Criminal Justice Act, a death sentence may be passed on a pregnant woman but may be suspended until the child is delivered and weaned, and thereafter, execution might take place.

3. Global Trends on the Application of Death Penalty

Recently, there has been a shift in favour of abolition of death penalty globally.⁶⁸ “Only an isolated minority of countries continue to resort to executions. Just four countries were responsible for 84% of all recorded executions in 2017.”⁶⁹ There has been a significant decrease in the number of executions globally and particularly in the sub-Saharan Africa region.

⁶² Ezediufu v the State, 17 NWLR (pt.741) 82 (2001).

⁶³ R v Grumah, WALR 225 (1957).

⁶⁴ Ibid.

⁶⁵ Vol. 222 LRCN (Pt. 2) 8(2013); see also Edoho V.State ,F.W.L.R. pt530 1262 SC(2010).

⁶⁶ The Human Rights Law Service (HURILAWS), “Death Penalty and Mental Health in Nigeria,” accessed June 13, 2019, <http://www.hurilaws.org/publications/articles/91-death-penalty-and-mental-health-in-nigeria>

⁶⁷ See equivalent provisions of Criminal Procedure Code, §§ 270 and 272 (3).

⁶⁸ 106 countries had abolished the death penalty for all crimes and 142 countries had abolished the death penalty in law or practice-Amnesty International, “Global Report on Death Sentences and Executions 2017” <https://www.amnestyusa.org/wp-content/uploads/2018/04/Death-Penalty-REPORT.pdf>

⁶⁹ Ibid., 5.

For example, Guinea has abolished the application of death penalty for all crimes, while Kenya abolished the mandatory death penalty for murder⁷⁰.

In *Francis Karioko Muruatetu & another v. Republic*,⁷¹ the legality of death penalty was challenged at the Kenyan Supreme Court; the Court declared that the mandatory nature of the death sentence is unconstitutional. The Court further held that the mandatory death penalty is “out of sync with the progressive Bill of Rights” in Kenya's 2010 Constitution⁷² and an affront to the rule of law. The Court relied on global death penalty jurisprudence to find the mandatory death sentence “harsh, unjust and unfair”.⁷³

In *Makwanyane S v Makwanyane and Another*⁷⁴ which was a landmark judgment in South Africa, the Constitutional Court held that the death penalty was inconsistent with South Africa's commitment to human rights expressed in the Interim Constitution. The court invalidated section 277(1)(a) of the Criminal Procedure Act 51 of 1977, which had provided for use of the death penalty, along with any similar provisions in any other law in force in South Africa

Chaskalson P, held that:

the death sentence destroys life, which is protected without reservation under section 9 of our Constitution, it annihilates human dignity which is protected under section 10, elements of arbitrariness are present in its enforcement and it is irremediable [...]. I am satisfied that in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment.”⁷⁵

The Court further held that at every stage of criminal prosecution there is an element of chance and uncertainty. The sanctity of human life cannot be left to chance and uncertainty because:

The outcome may be dependent upon factors such as the way the case is investigated by the police, the way the case is presented by the prosecutor, how effectively the accused is defended, the personality and particular attitude to capital punishment of the trial judge and, if the matter goes on

⁷⁰ Ibid., 5.

⁷¹ Francis Karioko Muruatetu & another v. Republic, Petition No. 15 of 2015 as consolidated with Petition No. 16 of 2015, Supreme Ct. of Kenya, Dec. 14, (2017).

⁷² Ibid., para. 64.

⁷³ Ibid., para. 48.

⁷⁴ S v Makwanyane and Another, ZACC 3(3) S.A. 391 151 (1995).

⁷⁵ S v Makwanyane, 95

*appeal, the particular judges who are selected to hear the case. Race and poverty are also alleged to be factors*⁷⁶.

In striking down the application of death penalty in South Africa⁷⁷, the court condemned the arbitrary and capricious nature of its application and in addition, the court opined that the application of death penalty has not been shown to be more effective than a life imprisonment.⁷⁸

4. Reflections on the Application of death penalty in Nigeria

Nigeria's death row of at least 2,000 inmates is reputed to be the largest in Sub-Saharan Africa.⁷⁹ The death penalty is meant to punish "the worst of the worst," as Justice David Souter stated in 2006, but it does not. Religion, race, class, wealth, corruption, gender and the effectiveness of the defendant's lawyer plays a more significant role in determining punishment than does the heinousness of the crime. The Constitution of Kenya like the Nigerian Constitution provides for the right to life of every person save in the execution of the sentence of a court in respect of a criminal offence of which a person would have been convicted.⁸⁰ Unlike Nigeria however, the death sentence is limited to the offences of treason, murder and robbery with violence and is non mandatory for the Court to impose death penalty.⁸¹ Likewise, in the case of *Makwayane S v Makwanyane and Another* discussed above, the Constitutional Court of South Africa struck down the application of death penalty in South Africa for good reasons. In addition to the reasons canvassed by the courts in these cases, it is noted that:

a. Death sentence is Irreversible when applied

It is beyond doubt that once the pronouncement of death penalty is made and execution carried out, the action is irreversible and the executed is forever gone. The globally acceptable justice standard is that the guilt of an accused must be established by credible evidence and proved beyond reasonable doubt, leaving no room for credible alternative narration. Despite that, there

⁷⁶ S v Makwanyane, 48.

⁷⁷ Other African countries that have abolished death sentence are Cape Verde, Cote d'Ivoire, Liberia, Senegal and Togo.

⁷⁸ See also Article 4 of the African Charter on Human and Peoples' Rights which provides for the right to life; The Second Optional Protocol to the International Covenant on Civil and Political Rights (1989) aiming at abolition of the death penalty, which entered into force in 1991, has been ratified by 57 countries: the statutes of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) as well as the Rome Statute of the International Criminal Court (ICC) and the Sierra Leone Special Court, which prosecute the most serious crimes against humanity, exclude the death penalty.

⁷⁹ Amnesty International., "Death Sentences and Executions in 2018," 41, 43, April 10, 2019, ACT 50/9870/2019

⁸⁰ Constitution of Kenya, 71 (1).

⁸¹ S v Makwanyane and Another ZACC 3 at 151(1995), (3) S.A. 391 (1995).

has been human errors recorded in the past that have occasioned grave miscarriage of justice. The US death penalty information Center has a record of 165 individuals who were innocent but wrongfully convicted and sentenced to death in the US since 1973.⁸² The wrongful convictions were occasioned by a combination of factors ranging from coerced confessions, race, mistaken identity, incompetent defense and perjured identification. If these individuals had been executed, the loss to their families would have been irreversible. The risk of wrongful conviction in Nigeria is far higher than the US. However, there are no available statistics of those wrongful convictions records in Nigeria. Nevertheless, the case of *Nasiru Bello v Oyo State* shows the accused was hastily executed before he had the opportunity to exhaust his appeal. Bello was executed and the wrongful execution can never be reversed.

b. Death sentence is mandatory in Nigeria

Under the Nigerian legal framework, where the death penalty is specified for an offence and the court has found the defendant culpable, the judge must mandatorily apply the death penalty⁸³. The judge's discretion is statutorily fettered. The judge has no discretion but to impose a mandatory punishment of death. Rhodes-Vivour JSC in *State v John*⁸⁴ emphasized this point by stating that:

*“Once a judge finds an accused person guilty of culpable homicide punishable with death...the only sentence he can impose is death. A judge has no jurisdiction to listen to allocutus and no discretion to reduce death sentence to a term of years”*⁸⁵ No judge is permitted to give a lesser sentence as no discretion exists to be exercised in the matter.

c. Fair trial is not guaranteed

The Constitution of the Federal Republic of Nigeria 1999, as amended guaranteed fair hearing and trial to everyone. In Nigeria, the death penalty has been imposed after proceedings that did not meet international fair trial standards. For example, individual and mitigating circumstances of the accused are hardly taken into consideration. People from particularly less privileged families, poor and uneducated continues to be sentenced to death for crimes that at most times did not involve killing. The Nigerian criminal justice framework therefore could not be said to

⁸² Death Penalty Information Center “Innocence by the Numbers” <https://deathpenaltyinfo.org/policy-issues/innocence/description-of-innocence-cases>.

⁸³ Criminal Code, §§ 316, 319; CPA § 367(1), § CPC 273 and § ACJL 301. *State v John*, 12 NWLR pt 1368 337(2013).

⁸⁴ *State v John*, 12 NWLR pt 1368 337 (2013).

⁸⁵ *Ibid.*, In 2017, the Senate passed a bill prescribing the death penalty for abduction- Amnesty Intl., “Nigeria: Still No Accountability for Human Rights Violations,” 1; March 1, 2018, AFR 44/8529/2018

have met the international threshold of “most serious crimes”, as prescribed by Article 6 of the International Covenant on Civil and Political Rights. Mandatory death sentences are being imposed on offences such as armed robbery that does not result in death. Some state assemblies have expanded the scope of the death penalty by adopting new laws that would impose the death penalty for cattle rustling and cultism. In these instances, the application of the death penalty does not seem to be proportionate to the gravity of the crime. It has also been noted that despite the exception of juvenile from the imposition of death penalty, some juveniles have been convicted based on coerced confessions extracted by the police.⁸⁶

Amnesty International reported that juvenile offenders remained on death row in Nigeria.⁸⁷ In 2010, there were 40 death row inmates believed to have been under the age of 18 at the time of the offense.⁸⁸ In *Abdulumuni v. Federal Republic of Nigeria, Kastina State Government, and the Nigerian Prisons Service*⁸⁹ it was the ECOWAS regional Court that saved Maimuna who had been sentence to death at age 13 by a Nigerian Sharia Court. The ECOWAS Court held that the death sentence of Maimuna Abdulumuni, who was convicted of murdering her husband at the age of 13, was a violation of international law and the African Charter on the Rights and Welfare of the Child.⁹⁰ The Court also held that imposing the death sentence on a juvenile was a violation of the Charter on the Rights and Welfare of the Child. The Court ordered a stay of execution and awarded Maimuna damages.⁹¹

d. Death penalty may be abused and applied for religious and political gains

Sani Yakubu Rodi, a cleric, was recently convicted and sentenced to death by a Shariah Court in Kano state by hanging for blasphemy.⁹² Sani Yakubu was executed after being convicted for murder by a Shariah Court. He was hanged in Kaduna prison in 2002 at age 21.⁹³ Ken Saro Wiwa and the Ogoni nine were accused by the Abacha led Military Government of killing some Ogoni Chiefs and acting against the then Government: they were tried by the Special

⁸⁶ Legal Defence and Assistance Project (LEDAP), “Two Juveniles on Death Row in Lagos,” March 11, 2015 <http://ledapnigeria.org/two-juveniles-on-death-row-in-lagos-finally-free/#>

⁸⁷ Amnesty International., “Death Sentences and Executions in 2016,” 2017, 6, ACT 50/5740/2017, Apr. 11, 2017.

⁸⁸ U.N. Committee on the Rights of the Child, Concluding Observations: Nigeria, para. 33, U.N. Doc June 11, 2010, CRC/C/NGA/CO/3-4

⁸⁹ Community Ct. of Justice, ECOWAS, §§ 1–8; June. 10, 2014, ECW/CCJ/jud/14/14.

⁹⁰ Ibid

⁹¹ Ibid

⁹² “Nigeria court in Kano sentences cleric to death for blasphemy,” *BBC*; January 6, 2016, <https://www.bbc.com/news/world-africa-35241608>.

⁹³ “Nigeria: First Execution under Sharia Condemned,” *Human Rights Watch*; January 8, 2002, <https://www.hrw.org/news/2002/01/08/nigeria-first-execution-under-sharia-condemned>.

Military Court, sentenced to death and hanged for a crime they did not commit and deprived of the opportunity to appeal their convictions.⁹⁴

e. Death penalty does not necessarily deter crime

The deterrence theory and the proponents of the death penalty are of the opinion that it has a deterrent effect on crime in society. It has however been established that there is no proven and credible correlation between the death penalty and deterrence of crimes. In jurisdictions that still maintain the death penalty in their statutes, it is yet to be scientifically confirmed that there has been a downturn in crime due to the application of the death penalty. In a research conducted by the UN in 1998 and updated in 2002 the findings revealed no correlation between the death penalty and homicide rates⁹⁵. In line with restorative justice theory, scholars have called for alternative response to crime and social order⁹⁶. State should not only focus on punishing the wrong doers but must also promote inclusiveness and tolerance.⁹⁷

The principal goal of any criminal justice system should be reform and rehabilitation of offenders. The application of the death penalty negates the principle of rehabilitation of offenders. The justice system must focus on the prevention of crime and reparation of harm as a measure of efficacy, rather than the harshness of a penalty imposed on an offender. The objective of the justice system should be to integrate the offender back into the system, instead of dehumanizing and making a monster out of the offender. In the customary African justice system, the notion of punishment was centered more on reconciliation and compensation than retribution. Alternative punishments such as expulsion, ostracisation and banishment were applied, death sentence was rarely used.

5. Conclusion

The Human Rights Committee had expressed concern about the high number of death sentences passed in Nigeria, particularly without the safeguard of fair trials.⁹⁸ The Committee also noted

⁹⁴ "Nigeria's Military Leaders Hang Playwright and 8 Other Activists," *Deseret News Publishing Company*, accessed June 12, 2019, Deseretnews.com.

⁹⁵ 'There is no conclusive evidence of the deterrent value of the death penalty.' United Nations General Assembly, UNGA Resolution 65/206

⁹⁶ Agaba, J., Practical, 1013.

⁹⁷ Handbook on Restorative Justice Programs, (Vienna: United Nations Office on Drugs and Crime, Criminal Justice Handbook Services, 2006) 5, U.N. Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Nigeria, para. 16, July, 24, 1996 U.N. Doc. CCPR/C/79/Add.65,

⁹⁸ U.N. Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Nigeria, para. 16, U.N. Doc. CCPR/C/79/Add. 65, Jul. 24, 1996.

that the death penalty could be imposed for offenses that do not meet the most serious crimes standard.⁹⁹ Finally, the Committee observed that public executions are incompatible with human dignity. It has also been observed by Azu¹⁰⁰ “most persons who have been sentenced to death are unable to challenge their convictions on appeal due to the exorbitant costs of appeals at both the Court of Appeal and the Supreme Court systems.”

It has been shown above that historically death penalty was applied to the commission of the most heinous crimes but in contemporary Nigeria death penalty applies to both heinous crimes and other crimes that are not so heinous. Research findings have shown above that the efficacy of the application of death penalty as deterrence to the commission of crime is doubtful. In addition, Nigerian courts have expressed reservations on the practice and application of death penalty in Nigeria in the cases of *Kalu v State*¹⁰¹ and *Peter Nemi v State*,¹⁰² though the courts claimed their hands were tied as the application of death penalty is permissible under the Nigerian Constitution. This article reveals the progressive and more pragmatic approach adopted by the Lagos High Court judgment in James Ajulu’s case,¹⁰³ by declaring that though the application of the death penalty is not unconstitutional, the mode of execution by firing squad or hanging is unconstitutional.

In addition, lessons from other countries, in particularly, Guinea, Kenya, and South Africa have shown that only isolated countries still continue to apply the death penalty. Analysis of these jurisdictions have also revealed that death sentence terminates and destroys lives and sometimes, livelihoods of the offender and his dependants. In addition, death penalty violates the dignity of human beings; hence its continued application is unconstitutional. This article has also discussed that in the event of wrongful execution, as noted in the case of *Nasiru Bello*,¹⁰⁴ reversal is impossible and the error of occasioning death by wrongful execution could not be redeemed. Despite the continued application of death penalty and the expansion of its scope, crimes and criminals abound in Nigeria. Discussion on theories of death penalty above reveals that reformation of the offender is more beneficial to humanity, the society, the victim and the

⁹⁹ Ibid.

¹⁰⁰ John Chuks Azu, “Experts divided over 2,194 death row prison inmates,” November 7, 2017, <https://www.dailytrust.com.ng/experts-divided-over-2-194-death-row-prison-inmates.html>,

¹⁰¹ Eleven states in Nigeria have passed the equivalent of the ACJA in their various jurisdictions. These states are: Ondo, Kaduna, Ekiti, Akwa-Ibom, Oyo, Rivers, Anambra, Abuja, Cross-River, Enugu and Lagos.

¹⁰² *Adeniji v. State*, 645 NWLR 356 (2000).

¹⁰³ *Peter Nemi v. The State* 6 NWLR pt 452 (1996).

¹⁰⁴ *Kalu v. State*, 13 NWLR pt.583 531 (1998).

offender. Offenders are human beings and they should be reformed to be useful to the society as the offenders are themselves victims of their backgrounds, upbringing and the society.

In considering the analysis of the Nigerian criminal adjudicatory system's peculiar circumstances, its obligations under international treaties and the global trends as discussed above, Nigerian governments through the National Assembly¹⁰⁵ should take immediate steps to fully abolish the death penalty in law and practice. Life sentences should be imposed for the most serious offences. Current death sentences should be commuted to life sentences. The National Assembly and the state Assemblies should amend all laws that currently permit the death penalty in Nigeria. In particular, the Constitution of the Federal Republic of Nigeria should be amended to prohibit the application of death penalty in the country.

¹⁰⁵ Ibid., the Court recommended that the National Assembly can take steps to remedy the issues surrounding the practice and application of the death penalty in Nigeria.