

MANDATORY DEATH PENALTY: SENTENCING POLICY AND THE ATTITUDE OF COURTS IN NIGERIA.

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Whereas a host of penalties await a convicted offender the sentence of death stands at the apex of the categories of punishments¹ that are provided under the Nigerian penal laws. Death Penalty is recognized as a legitimate punishment by the Constitution² as well as by the Criminal Code and Penal Code.

In Nigeria, like virtually every other country, offences are subject to classification. Some offences are regarded as simple, others are called misdemeanours. More serious offences are labelled felonies while we also have some as capital offences³. The sentence of death is provided in both

In this paper an attempt has been made to examine the sentencing policy and the attitude of the courts pertaining to certain offences punishable with mandatory death sentence, namely – the offence of murder under the Criminal Code, offence of homicide punishable with death under Penal Code and the offence of armed robbery under the Robbery and Firearms (Miscellaneous Provisions) Act, 1984. Suggestions for reforms, wherever required, have been made.

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¹ Kinds of punishments which may be inflicted under the Criminal Code are: Death, imprisonment, fine, forfeiture of property and caning (see section 17). Under Penal Code, the punishments to which offenders are liable are: Death imprisonment, fine, forfeiture of property, caning and detention in a reformatory [see section 68(1)]. Under section 68(2), the punishment of Haddi lashing for offenders of Moslem faith is prescribed in addition to punishments specified under sub section (1).

² On the issue whether death penalty is unconstitutional in Nigeria, the Supreme Court in *Kalu V. State* (1998) 13 NWLR (part 583) 531, while upholding the constitutional validity of the capital punishments stated that under section 30(1) of 1979 Constitution, the right to life, although fully guaranteed, is nevertheless subject to execution of death sentence of a court of law in respect of a criminal offence of which one has been found guilty in Nigeria.

³ Jaiybo, O. O.; 'Human Rights Issues and the Death Penalty within the Nigerian Legal System,' in Agbede & Ankani (Ed.) *Current Themes in Law*, University of Lagos Press, Lagos (1997) P. 207. the principal penal statutes – the Criminal Code, 1916 and the Penal Code, 1960 as well as under some of the special federal laws.

A person convicted of any capital offence such as murder⁴, culpable homicide punishable with death⁵, treason⁶, instigating invasion of Nigeria⁷, treachery⁸, armed robbery⁹, giving or fabricating false evidence on account of which an innocent person suffers death¹⁰, abetment of suicide of a child or an insane person¹¹ and trial by ordeal where death of a person results¹², will be sentenced to death¹³. Willful killing of a person protected by the Geneva Conventions also attracts death sentence¹⁴. This is mandatory, and not merely permissible, punishment of death. The judge has no discretion in the matter after an accused has been found guilty of a capital offence. The only sentence open to the court to impose is one of death.¹⁵ In *Michael Onyibo Nnamah V. The State*¹⁶, where the appellant stabbed the deceased with a knife which led to the death of the latter, the Court of Appeal held that by virtue of section 274(1) of the Criminal Code Law of Anambra State (applicable to Enugu State) any person who commits the offence of murder shall be sentenced to death. The operative word "Shall" in the section shows that it is mandatory on the court to impose the sentence of death.

There are two exceptions to the general rule that death is mandatory punishment to be imposed on an accused convicted of a capital offence. Firstly, a death sentence must not be passed on a pregnant woman convicted of a capital offence. Where it is found that a woman is pregnant, instead she should be sentenced to imprisonment for life.

Secondly, a young person under the age of 17 years convicted of a capital offence must not be sentenced to death, but detained pending the pleasure of the President or Governor of the State¹⁷. In *Emmanuel Audu V. the State*¹⁸ the Court of Appeal held that by virtue of section 270 of the Criminal Procedure Code, no sentence of death shall be imposed on a person who is under 17 years of age or on a pregnant woman.

⁴ CC, Section 319

⁵ PC, Section 221,

⁶ CC, Section 37; PC, section 411

⁷ CC, Section 38

⁸ CC, section 49 A(1)

⁹ Robbery and Firearms (Special Provisions) Act, 1984; section 1(2)(a), (b).

¹⁰ PC, section 159(2)

¹¹ PC, section 227

¹² PC, section 214(b)

¹³ Doharty, O.; *Criminal Procedure in Nigeria: Law and Practice*, Blackstone Press Ltd. London (1999) p. 317.

¹⁴ Geneva Conventions Act, 1960, section 3(1).

¹⁵ Doharty, op. cit. p. 317

¹⁶ (2005) 9 NWLR (part 929) 147.

¹⁷ Doharty, op. cit. at p.319

¹⁸ (2003) 7 NWLR (part 820) 516

The Law and the Sentencing Policy

The definitions of murder and culpable homicide punishable with death go beyond cases of doing a purposive or willful act *with the intention of causing the death of another*. Under section 316 (2) of the Criminal Code the intentional infliction of grievous harm, if it causes death, is murder. Doing an act likely to endanger human life in the prosecution of an unlawful purpose is also murder if the death results even though the doer of the act does not intend to cause death [section 316 (3) C.C.].¹⁹ Thus, in *Joseph Idowu V. the State*²⁰ it was clearly shown that the appellant caused the injury on the deceased which in turn resulted directly in her death, the act was done in prosecution of an unlawful purpose that is likely to endanger human life namely, having carnal knowledge of a girl of thirteen years of age contrary to section 218, Criminal Code Law. Thus, in the instant case, the act of ravishing a four years old girl was an unlawful purpose. Conviction of sentence of death was upheld, while proof of rape was not required by the court.

The remaining subsections of section 316 which define murder (i.e subsections 4,5 and 6), like subsection 3 enact constructive murder. The offender is guilty of murder principally because he is engaged in some unlawful pursuit- i.e. facilitating the commission of an offence which is such that the offender may be arrested without warrant or facilitating the flight of an offender who has committed or attempted to commit any such offence.

Under the Penal Code, the second head of culpable homicide punishable with death in effect punishes a reckless killing. The offence is committed "if the doer of the act knew that death would be the probable and not only a likely consequence of the act or of any bodily injury which the act was intended to cause" [section 221 (b) P.C.].²¹ In *Garba V.State*²², where the appellant struck the deceased with a stick with such a force on the head that the deceased collapsed and died on the spot, the Supreme Court held that if from the intentional act of injury committed the probability of the death resulting is high, the finding should be that the accused intended to cause death or injury sufficient in the ordinary course of nature to cause death. Where bodily injuries intended to be inflicted are sufficient in the ordinary course of nature to cause death the offence falls under section 221 (b) of the Penal Code. In the instant case,

¹⁹ Okonkwo, C.O.; Death Penalty : Myth or Reality ? in *Narcotics ; Law and Policy in Nigeria*, Federal Ministry of Justice Law Review Series, Vol.8, Lagos (1991), p.266

²⁰ (1998) 13 NWLR (part 582) 391

²¹ Okonkwo, op. cit at pp. 266 – 67

²² (2000) 6 NWLR (part 661) 378

the court rejected the appeal and affirmed the conviction for the offence and sentence of death.

The Robbery and Firearms (Special Provisions) Act, 1984²³ translated armed robbery into the class of capital offences. By reason of this legislation, any person who while committing the offence of robbery, is armed with any firearms or any offensive weapon or is in company with any person so armed or at or immediately before or immediately after the time of robbery, the said offender wounds or uses any personal violence to any person, the offender shall be liable upon conviction to sentence of death.²⁴

The fact of possession of firearms or any offensive weapon in the course of robbery or being in the company of a person so armed immediately before or after the robbery, constitutes the *actus reus* of the offence, the punishment for which is the death sentence²⁵. In *Micheal Alor V. State*²⁶, the Supreme Court clearly spelt the sentencing policy on the offence of armed robbery under this Act. It held that punishment on conviction for robbery with firearms, that is, armed robbery is sentence of death. It is immaterial whether offender is found guilty as a principal offender or as a participant or as an aider or abettor or a person who has counselled or procured the commission of the offence or a conspirator or one who has committed the offence. If the accused was among the robbery gang that committed the offence, it does not matter that he himself was not armed.

The criminal policy of any administration manifests itself most forcibly in the nature of sentence prescribed by the law or imposed on person convicted for criminal offences, on the discretion of judges who have tried the criminals and have found them guilty²⁷. The sanctions prescribed in the Criminal and Penal Codes suggest clearly a tendency towards the deterrent and retributive rather than the reformatory theories of punishment. Generally the reformation of the offender does not appear to be a conscious aim of the prescribed sentence. The sentence prescribed is determined by the nature and gravity of the offence²⁸. Where the sentence is one fixed by law, such as capital offences or mandatory

²³ R11, Laws of the Federation of Nigeria, 2004.

²⁴ See section 1(2) of the Act.

²⁵ *Jaiybo*, op. cit at p. 211

²⁶ (1997) 4 NWLR (part 501) 511.

²⁷ Karibi-Whyte, A. G.; *Two Decades of Criminal Policy – The Nigerian Experience 1966 – 86*, (1990) *JUS* Vol. 1. No. 5., p.21

²⁸ *Ibid*

sentences the judge has no discretion but to impose the sentence so prescribed²⁹.

The philosophy on which the existing sentencing policy in Nigeria is based are retribution and deterrence³⁰. Mandatory death sentence, wherever prescribed in our penal laws, presupposes exclusion of judicial discretion in sentencing of offenders. It also implies that sentencing court is precluded from considering any mitigating factors like old age, previous good record, offender showing remorse, serious illness of the offender, effect of sentence on the family, passage of time after he committed the offence, etc. Thus, in *Salisu Yahaya V. The State*³¹, commenting on the nature of the offence and punishment thereof, Mohammed Lawal Uwais, C.J.N said:

"Under Nigerian Laws, a sentence of ten years is not regarded as sufficient punishment for murder. Thus, although to remain in prison custody for ten years awaiting trial is outrageous and is such a long period that should evoke sympathy and concern, in the instant case the nature of the offence with which the appellant was charged – murder – is so grave that there is no offence under Nigerian laws which carries heavier sentence".

In *Micheal Onyibor Nnamalis case*³². The Court of Appeal held that the use of word "Shall" in the Criminal Procedure Law obviates the need for any further plea for mitigation after conviction. Once the charge is considered sufficiently proved by the court it must pronounce the sentence.

Attitude of the Courts

From the above discussion it is obvious that the then law makers³³ - the former Colonial Rulers and the successive Military Administrations, by prescribing mandatory death sentence for certain offences, had demonstrated that they did not harbour any hope for the reform or correction of such offenders. They seem to concur with the views of Nigel Walker on mandatory sentences who says that these (mandatory

²⁹ Ibid

³⁰ Oluruntimehin, O.; "Towards a More Appropriate Sentencing Policy in Nigeria" in (Ed. Obi) *Law Reform*, Issue No. 3, Jan. 1983, Nigerian Law Reform Commission, Lagos. . p28.

³¹ (2002) 3 NWLR (part 754) 289 at 305.

³² Supra at p. 165

³³ While Criminal Code and the Penal Code were authored by our former Colonial Rulers, the Robbery and Firearms (Special Provisions) Act, 1984 was promulgated during Military Administration of General Buhari.

sentences) are rare, and are invariably the result of a fear that court will be too lenient³⁴.

Mandatory sentences, being safeguards against leniency, are assumed to maximize the deterrent effect of penalties, and are seldom advocated for corrective reasons³⁵. The Nigerian courts have similarly adopted the theories of retributive and deterrent punishment for treatment of such offenders. The attitude of the Nigerian sentencing judge on the point is well articulated in the case of *Sunday Akinyemi V. The State*³⁶, where a soldier killed a fellow soldier in a market place with a dagger. Fabiyi, J.C.A., speaking for the Court of Appeal on the propriety, justification and purpose of death sentence under section 319(1) of the Criminal Code for the offence of murder committed by the appellant, while upholding the sentence of death by the trial court said:

"The sentence was well pronounced for the capital offence. It has the semblance of the law of Moses – "An eye for an eye". It is a good law to serve as deterrent in a mundane society where heartless and dangerous citizens abound in plenty".

However, to quote Justice Krishna Aiyer,³⁷ "the judge, even the best is not to blame. He is a prisoner of Penal Code and Procedure Code".

The judges in Nigeria are enjoined to use abundance of caution while awarding the sentence of death. In *Egbeyon V. State*³⁸, the Court of Appeal said that where there is an appeal in a capital offence case, the attitude of the appellant court is to consider on liberal grounds all available legal and equitable defences open for consideration for the appellant.

In *Nwachukwa V. State*³⁹, the Court of Appeal laid down that a judgment sending a man to the gallows must be seen to be the product of logical thinking based upon admissible evidence in which the facts leading to his conviction are clearly found and legal deductions therefrom clearly made. Such a judgment can not be allowed to stand if founded upon scraggy reasoning or on perfunctory performance. It is so in all cases and more so in capital offences.

³⁴ Walker N.; *Sentencing In A Rational Society*, Penguin Books (1972), P. 183.

³⁵ Ibid.

³⁶ (1999) 6 NWLR (part 607) 449 at p465

³⁷ Aiyer, V.R.K 'Consciousness, Criminal Behaviour and Crime,' *Civil & Military Law Journal*, Vol. 19 (1983) no. 4, p. 209.

³⁸ (2002) 4 NWLR (part 654) 559

³⁹ (2002) 12 NWLR (part 680) 128

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Thus in *Udofia V. State*⁴⁰, the Supreme Court has held that it is fundamental to a fair trial of serious criminal charge like murder that the accused person should not be left unrepresented at any stage of trial, as this is tantamount to depriving the accused person of the right which he has to be defended by the counsel.

In the instant case, the appellant was convicted for the offence of matricide by the trial court and sentenced to death. The Court of Appeal confirmed the conviction and sentence of death of the trial court. The Supreme Court ordered the re-trial of the case since it was found that the appellant was practically left unrepresented at almost all the stages of the trial so much so that the situation could be aptly described as a conspiracy between the prosecution and the counsel to the appellant not to impede his conviction for the offence.

Regarding the plea of guilt, the Supreme Court in *Tobby V. State*⁴¹ has held that a plea of guilty is never recorded for an accused in a murder case. Even when he so pleads in error, a plea of not guilty is always recorded on his behalf.

Judges should never be blood thirsty⁴². Indeed, the Nigerian sentencing judges are not blood thirsty. There are many instances of cases where facts on which an accused is convicted fell under two different sections, of which one prescribed the mandatory death sentence, while the other prescribed a lesser sentence. In such case the courts have generally convicted the accused under the section which did not prescribe mandatory death sentence. Thus, for example, in *Sowemimo & Another V. State*⁴³, where the deceased, suspected of receiving a share of stolen money, was beaten mercilessly by the appellant with plastic hose pipe, electric cable and horse tail. The appellant had taken him to Ikeja General Hospital for treatment, after beating, where he died. The trial court convicted the appellant and sentenced him to death under section 319(1) of the Criminal Code. The Court of Appeal, however, convicted the appellant for manslaughter under section 317, C.C. The first appellant and the second appellant were sentenced to 10 years and 7 years rigorous imprisonment respectively. The Supreme Court, on appeal, upheld the judgment of the Court of Appeal.

⁴⁰ (1998) 3 NWLR (part 84) 533

⁴¹ (2001) 10 NWLR (part 720) 23

⁴² Sharma, B.V. "To Abolish the Death Penalty For the New Millennium" (2001) Cri. L.J. 168 at p.173

⁴³ (2004) 11 NWLR (part 885) 515; See also *Agunbiade V. State* (1999) 4 NWLR (part 599) 391.

In *State V. Sunday Bisong and Another*⁴⁴, the accused were tried for the offence of armed robbery under the Robbery and Firearms (Special Provisions) Decree, 1984. The Tribunal held that the definition of robbery under section 13(1) of the Decree of 1984 – presently section 15(1) – fell into both section 1(1) and section 1(2)(b). The phrase “uses any personal violence to any person” was common to both sections but both sections differ in the punishment attached to each. Yet the offence proved came under both sections. Since the information on which the first accused was charged contained words which were appropriate to include both the graver and lesser offence, the Tribunal, acting pursuant to rule 18 of the Robbery and Firearms Tribunals Rules of Procedure, invoked section 179(1) and (2) of the Criminal Procedure Act and reduced the offence from section 1(2)(b) (Punishable with death) to section 1(1) (Punishable with 21 years imprisonment).

In *Shande V. State*⁴⁵, the Supreme Court reduced the offence from murder to manslaughter. In that case, the deceased had caused the appellant and her children to be deprived of her husband’s love and care. And that the appellant had it in mind to cause the deceased some bodily injuries to keep her away from her husband and so she poured kerosene on the deceased and set her ablaze. In the given circumstance of the case, the Supreme Court reduced the offence from culpable homicide punishable with death under section 221, Penal Code to culpable homicide not punishable with death by virtue of section 222 (1) of Penal Code, if offender whilst deprived of power of self control by grave and sudden provocation caused death of any person by mistake or accident.

Therefore, from the above decisions it may be inferred that while the law makers still prefer the retributive and deterrent approach to deal with the convicts of offences which are punishable with mandatory death sentence, the courts in Nigeria have for quite some time exhibited the tendency to embrace the rule of humanist jurisprudence.

⁴⁴ Unreported. Charge No E/6/ART/85, decided on 30/9/85. Quoted in Ilegbune, T.; “Combating Crimes of Violence in Nigeria: The Case of Robbery and Armed Robbery”. The Nigerian Law Journal, Vol. 14. No. 1 (2001) P. 73.

⁴⁵ (2005) 12 NWLR (part 939) 301; See also *Lado V. State* (1999) 9 NWLR (part 619) 369 A.B.U.L.J. Vol. 24 – 25, 2006

The modern trend in penology and sentencing procedures is to emphasize the humanist principle of individualizing punishment⁴⁶. For all the offences in which death sentence is the punishment, it may be noted that it is the extremity of the penalty that is the concern⁴⁷.

A crime is an event in real life⁴⁸. Factors like the personality of the offender, the circumstances and the motive play a significant role in commission of the crime. Such factors should not be ignored by a sentencing court in arriving at a decision in a criminal case. Judicial decision must by necessity depend on the facts and circumstances of each particular case⁴⁹. Mandatory death sentence for certain offences, however, leave no room for individualized treatment of offenders.

Most of the times, we find in offences of murder committed in fit of passion, the victim would be a neighbour or a relative. For trivial motives the offence takes place. The accused in such type of murder cases is, generally a very good social being except to the victim or to his or her family unlike in offence relating to dacoity or highway robbery. The motive of such accused is diabolical and anybody in the society can be his or her target. To equate all the accused by same measure of punishment in most inequitable⁵⁰.

When the law prescribes an extreme penalty of death sentence, it should also have an inbuilt safety valve in the form of subjective discretion given to the sentencing judge. He should have the freedom to consider circumstances and decide whether the act of the accused qualify for a major penalty like death sentence. Unfortunately, the present sentencing policy puts emphasis only on the gravity of the act of the accused and its impact on the society. The subjective aspect of the inherent weakness of the criminal is not considered while sentencing an accused⁵¹.

Perhaps we have now reached a stage where we should look into the possibility of making finer categorization of the offence of murder / culpable

⁴⁶ Kameshwari, G. and Rao, V.N.; "The Sentencing Process - Problems and Perspectives". 41 JIL 3&4(1999) 456

⁴⁷ Garg, A.; "Death Sentence: Extent of Judicial Discretion and Need of Guidelines" (2005) Cri. L. J. 20 at p. 23.

⁴⁸ Sharma, op. cit at p. 176.

⁴⁹ Prasad, J.E; "Death Sentence As Effective Deterrent ." (2003) Cri. L.J 204 at p. 205

⁵⁰ Rao, K.S, " Criminal Justice System -Required Reforms 43 JIL2 (2001) 161 at p. 170

homicide punishable with death. Here we tend to agree with the views of Professor Okonkwo where he opines that death penalty should be restricted to cases of intentional killing – where the offender's purpose is to cause death of the victim. This may necessitate a re-classification into willful murder and murder, the latter being punishable with life imprisonment⁵². We should lay down clearer principles in this regard and prevent the conviction for murder of an accused who has never intended nor could reasonably foresee the consequences of his action.⁵³

Rational thinking demands that there should be more equitable and discriminative sentences prescribed keeping in view the motives and impact of the actions of the accused on the society at large⁵⁴. What is needed is a sentence, which should serve as an alternative to mandatory death sentence.

Alternative Sentence to Mandatory Death Sentence

Section 17 of the Criminal Code and Section 68 of the Penal Code have enumerated various kinds of punishments that can be awarded to the offenders, the highest being the death penalty and second in the hierarchy of punishments is the sentence of life imprisonment. In Nigeria today, none of the codes or any of the federal laws that prescribes a sentence that is higher than imprisonment for life nor lower than death sentence. In U.S.A., a higher punishment called "imprisonment for life without commutation or remission" is one of the punishment⁵⁵. We, therefore, suggest that section 17 and 68 of the Criminal Code and Penal Code respectively should be suitably amended to include "Imprisonment for life without commutation or remission" as one of the punishment. So also sections 319 C.C, 221 P.C and 1(2) of the Robbery and Firearms (Special Provisions) Act respectively should be suitably amended to provide for imprisonment for life without commutation or remission as an alternative to death sentence. Then the judges will have the discretion to impose this suggested sentence as an alternative to the death sentence. However this discretion should be exercised when the fact of the case, the motive and the circumstance of the case so require. The court must state

⁵¹ Adapted from Cherote, S.; "Death Sentence: Need for a Shift in Philosophy ." (2004) Cri. L.J. 342

⁵² Okonkwo, op. cit at p 267

⁵³ Owoade, M.A.; "Some Aspects Of Criminal Law Reform In Nigeria." The Nigerian Bar Journal, Volume XVI (1980), p 30.

⁵⁴ Rao, op. cit at p.170

⁵⁵ 55 Report Of The Committee On Reforms Of Criminal Justices System, Government Of India , Vol. I(2003) New Delhi, P.176

special reasons in writing for not awarding the death sentence. Such special reasons should include the mitigating factors that favoured the convict for the award of this particular sentence.

In conclusion, it may be said that the existing sentencing policy on mandatory death sentence for certain offences in our penal laws is not consistent with the modern penological thoughts. There is a need to adopt a reformatory mode of sentencing regime that is human rights friendly and which should be able to serve a social function in line with the aspirations of a modern and democratic society.