

**DEATH PENALTY AND THE LEGALITY OF EXECUTION BY
HANGING AND FIRING SQUAD IN NIGERIA**

BY

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1. INTRODUCTION

All over the world, the debate on death penalty is always an emotional and controversial one. Recently, president Goodluck Ebelle Jonathan called on the governors of the 36 states to resume the signing of death warrants of persons convicted and sentenced to death (hereinafter referred to as death row convicts) in the nation's prisons. According to the president this will facilitate prison decongestion in Nigeria. Prior to this call, Nigeria exercised a *de facto* self imposed moratorium on death row executions since 2002 in line with growing international discomfort with the continuous retention of death penalty in the Constitutions and penal laws of some countries. Pursuant to this presidential re-awakening, the Governor of Edo State, Comrade Adams Oshiomhole responded to this clarion call and signed the death warrants of two death row convicts. These convicts together with two previous others signed by his predecessors in office namely: Chima Ejiofor, Daniel Nsofor, Osaremwindia Aiguokhian, and Richard Igagu were subsequently executed by hanging. A fifth convict Thankgod Eboh earmarked to be executed with them was reportedly spared the gallows because the mode of his execution was discovered to be by firing squad, which the prison authorities were not prepared for. This effectively brought to an end the over a decade old moratorium on execution of death row convicts by this country.

This issue, always guaranteed to evoke reactions on the side of those against the continuous imposition of death penalty and therefore its abrogation (i.e. the abolitionists) and those clamouring for its retention (i.e. the retentionists), has generated a myriad of both local and international response. The Edo State Governor subsequently defended his actions by maintaining that he acted within the letters of the Nigerian Constitution.

According to the Comrade Governor ;

“The day I was sworn in, I subscribed to obey the Constitution of the Federal Republic of Nigeria. There was no suggestion to me that I shall obey the resolution of the United Nations or the European Union. I do understand that there is no such thing as universal values. As we speak, nations and humans battle ideas on the basis of different value systems and it will be an abuse of my own right and my own value if someone thinks that his views are superior to my own value and views”.¹

The Federal Government has also thrown its weight behind the Comrade Governor through the Minister of Foreign Affairs, Ambassador Olugbenga Ashiru who at a Stakeholders’ Consultative Forum on the 2nd cycle of Nigeria’s periodic review stated that the governor acted strictly within his Constitutional powers.²

Only yesterday, 29th of July 2013, the Edo State House of Assembly has also keyed into the resurgence of the spirit of capital punishment in Nigeria when it followed the examples previously set by its Delta, Imo and Abia States counterparts in passing its anti-kidnapping Law which provides for the death penalty for the offence of kidnapping.

Against this backdrop, this paper seeks to examine the present state of the law on death penalty (used in this paper as synonymous with the term capital punishment) in Nigeria. It shall x-ray relevant constitutional and statutory provisions relevant to this subject as well as case law on the issue with a view to showing whether and to what extent the above actions of the Federal and State Government can be legally and constitutionally justifiable. Reference shall also be made to some relevant judicial decisions from other jurisdictions. In all of these, It shall be pointed out that the state of our law on death penalty must take and

¹ Capital Punishment: I swore to obey the Constitution of Nigeria, not yours – Oshiomhole carpets UN, EU; others, www.Royaltimes.net accessed on 30th July, 2013.

² Vincent Ikuomola, “Edo 4: FG backs Oshiomhole on execution. The Nations Newspaper Accessed on July 30th, 2013, the nationaonlineng.net

indeed has now taken cognizance of the subtle distinction now being drawn between the imposition of death penalty *per se* and the mode or method of execution of the death sentence having regard to the corresponding human right requirement of section 34(1)(b) of the 1999 Constitution prohibiting all forms of torture and inhuman and degrading treatment.

2. Meaning of Death Penalty

Death penalty has been defined simply as the ‘punishment of a crime by death’.³ According to the Encyclopedia Britannica, it is the execution of an offender sentenced to death after conviction by a court of law of a criminal offence.⁴ To the leading international human rights organization, Amnesty International, which is understandably more passionate in its definition, “Death penalty is the ultimate denial of human rights. It is the premeditated and cold blooded killing of a human being by the state”.⁵

The judicial decree that heralds the penalty of death is usually referred to as a *death sentence*, whilst the actual process of the convicted offender is an *execution*. It is however instructive to note that capital punishment must be distinguished from extra-judicial executions carried out without due process and state sponsored or sanctioned assassinations.

3. History of Death Penalty

Historically, death penalty is as old as human race. It has been employed by nearly all societies throughout human civilization. The world’s leading religions have recognized, justified and indeed prescribe it for different offences. Followers of Judaism and Christianity

³ Chambers, 21st Century Dictionary (Revised Edition) (Edinburg: Chambers Harrop Publishers, 1997), 344.

⁴ Encyclopedia Britannica, www.Britannica.com, accessed 30/7/2013

⁵ Amnesty International, Abolish the Death Penalty, www.amnesty.org Accessed on 30/7/2013.

for example, have claimed justification for capital punishment mostly in retributive terms such as the biblical verse:

... life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe”.⁶

Further biblical support is also readily found in the biblical verse: “*Whosoever sheddeth man’s blood, by man shall his blood be shed...*”⁷ Under Islamic Law, capital punishment is also recognized in the Quran. The Quran prescribes the death penalty for several Hadd (fixed) crimes including robbery, adultery and apostasy of Islam.⁸

According to Encyclopedia Britannica, capital punishment for serious offences such as murder, treason, arson and rape was widely used in ancient Greece under the laws of *Draco* (7th Century BC). It was also widely practiced by the Romans around this time.⁹

In Medieval and early Europe, it was employed as a generalized form of punishment. During the reign of King Henry VIII of England, as many as 72,000 people were estimated to have been executed.¹⁰

China has a long history of death penalty with the earliest available record dating back to the *Shang dynasty* (1700 – 1027 BC). It is a long historical tradition throughout the dynasty rule, the republic era and modern times. It is today one of the most vigorous enforcer of capital punishment. Death penalty was justified on grounds of retribution, deterrence and incapacitation. Some popular Chinese sayings such as ‘a life for a life’, ‘killing one to warn

⁶ Exodus 21: 23 – 25, Holy Bible KJV

⁷ Genesis 9:6 ((bid)

⁸ Supra note 4.

⁹ Ibid.

¹⁰ Wikipedia.org

a hundred’, ‘killing chicken to warn monkey’ are embodiments of these retributive and deterrent beliefs.¹¹ In post revolution China, death penalty was used and is still being used to suppress what is often referred to by Chinese authorities as ‘counter revolutionary activities’, corruption and to maintain social order. According to human rights organization, *Dui Hua*, about 4,000 people are executed annually in China. A large number of those executed are those said to be *white collar criminals*.¹²

In America, the first known execution in the territory now known as the United States of America was of *Captain George Kendall* who was shot by firing squad in Jamestown in December 1607. He was accused of sowing discord and mutiny. Since then the death penalty has almost always been an integral part of the American Justice System.¹³

America’s case law is replete with a tradition of legal challenges to the constitutionality of the death penalty. One of these legal challenges culminated in the landmark 5-4 decision of the United States Supreme Court in the case of *Furman v Georgia*.¹⁴ This decision struck down federal and state death penalty laws as unconstitutional. These laws were referred to by the court as ‘arbitrary’ and ‘capricious’. With the majority of the court holding that these laws amounted to cruel and unusual punishment within the contemplation of the Eight and Fourteenth Amendment of the American Federal Constitution. But in 1976, the case of *Gregg v. Georgia*¹⁵ once again permitted under certain circumstances, the death penalty. This in effect created the template for modern American death penalty jurisprudence. The

¹¹ See: LU Hong, China’s Death Penalty: Reforms on Capital Punishment, www.eai.nus.edu. Accessed 30/7/2013.

¹² Mamta Badkar, 222 *Chinese people who were handed the death penalty for white collar crimes*, www.businessinsider.com accessed 30/7/2013.

¹³ University of Alaska Anchorage, History of Death Penalty and Recent Developments, www.alaska.edu accessed on 30/7/2013

¹⁴ 408 US 238 (1972)

¹⁵ 428 US 153 (1976)

subsequent cases of *Atkins v. Virginia*,¹⁶ and *Roger v. Simmons*¹⁷ imposed further restrictions on the death penalty by declaring death sentence unconstitutional for persons suffering from mental retardation in the former and for offenders under the age of 18 years in the latter case. At present, 32 states in the US retain the death penalty, whilst 18 other states have abolished it. The latest to abolish it, being the State of Maryland in May, 2013.¹⁸

In Africa, death penalty was adopted in precolonial times in traditional African societies. The customary law of most of these societies prescribed it for every serious offences where the offender was deemed to be a threat to the peace and security of the community or as having offended the gods; such offences range from murder, witchcraft, profaning the gods or spirits. Many African societies however, adopted the option of banishment as an alternative to death penalty.¹⁹

Worldwide, according to Amnesty International, 140 countries have today abolished the death penalty. The death penalty has been abolished virtually in all the countries of Western Europe.²⁰ In the case of *Soering v. United Kingdom*,²¹ the European Court of Human Rights in its interpretation of the 6th protocol to the European Convention of Human Rights, stated that the death penalty no longer exists in times of peace in Western Europe.

Nigeria is one of the 18 countries remaining in Africa still retaining the death penalty. In this regard, although Nigeria is a party to the International Convention on Civil and Political

¹⁶ 536 US 304 (2002)

¹⁷ 543 US. 551 (2005)

¹⁸ Death Penalty Information Centre, www.deathpenaltyinfo.org/states-and-withoutdeathpenalty accessed on 31/7/2013.

¹⁹ Isabella Okagbue, *The Death Penalty from a human Rights Perspective*, Current L. V. 1995, 144, cited by Chinwe, C. Onuoha, *Quality of Justice is strained: The Death Penalty in Nigeria*, www.nigerianlawguru.com. Accessed 31/7/2013

²⁰ See: The Death penalty Worldwide, www.infoplease.com accessed 31/7/2013.

²¹ Reported in (1989) 11 EHRR 439

Rights (ICCPR), it opted out of the 2nd optional Protocol that seek to abolish the death penalty preferring to adopt a self-imposed but now defunct moratorium on the execution of death row inmates.

4. Forms of Execution of Death Penalty

There has been various forms of execution of death row convicts. From ancient times until well into the 19th century, many societies adopted various forms ranging very much in time, space and degree of cruelty. For instance, convicted felons were executed by decapitation with the use of an axe, or sword, guillotine, hanging on the cross or stoning etc. Other forms of execution include impalement, spearing, burning at the stake (especially for religious heretics and witchcraft practitioners), burying alive (“The pit”), slow strangulation, crushing by the use of elephants and weight or exposure to be eaten up by wild beasts. Even up to the early 19th century, gruesome methods of executions such as breaking on the wheel, garroting, beheading, gas chambers, etc were adopted. Presently the common methods of execution in vogue are by hanging, electrocution or by lethal injection. In Africa, death by hanging and firing squad are the modes of choice; although some Muslim countries adopt stoning as their preferred method.²²

5. The Law on Death Penalty in Nigeria

The Law on death penalty in Nigeria is both statutory and constitutional.

²² See study on the question of the Death Penalty in Africa, being a report submitted by the working group on the Death Penalty in Africa, www.archpr.org.

5.1. Statutes

Statutorily, the death penalty has been an integral part of penal laws in Nigeria. As a product of British colonialism, the criminal code and the penal code are the principal enactments that regulate criminal law in Nigeria.

The Penal Code is made applicable to the Northern States of Nigeria and the FCT, whilst its Criminal Code counterpart is applicable to the South. They are correspondingly complemented by the Criminal Procedure Act (also made applicable to the South) and the Criminal Procedure Code (applicable to the North) in terms of procedure. These various penal laws recognize and make extensive provisions for capital punishment for various offences. Under the Criminal Code, those offences range from murder²³, treachery²⁴, treason²⁵, directing and controlling or presiding at an unlawful trial by ordeal leading to the death of another.²⁶ Although the Criminal Code prescribes the punishment of life imprisonment with or without caning for the offence of armed robbery,²⁷ arising from a surge in the crime of armed robbery after the Nigerian civil war, the military promulgated the *Robbery and Firearms (Special Provisions) Decree of 1970*. This law prescribes the death penalty for the offence of armed robbery. This could be carried out either by hanging or firing squad. Special military tribunals were set up to expeditiously try offenders. The Robbery and Firearms (Special Provisions) Decree 1984 (now Act) replaced the previous decree of 1970. It however retained the death penalty for convicted armed robbers.

²³ Section 319(1) Criminal Code, 221 Penal Code

²⁴ Section 49A Criminal Code.

²⁵ Section 37 (1) Criminal Code, 411 Penal Code

²⁶ Section 208 Criminal Code.

²⁷ Section 402 Ibid.

The Penal Code, in addition to the above also has in stock and indeed, classified, capital offences as follows: fabrication of evidence leading to the conviction and execution of an innocent person,²⁸ abatement of suicide by a person under 18 years of age or by an insane or intoxicated person.²⁹

In the past, death penalty has also been prescribed for some other serious offences such as counterfeiting of Nigerian bank note, economic sabotage, arson in public buildings, offices, ships, aircrafts, etc. This was however subsequently commuted to various terms of imprisonment by the *Special Tribunal (Miscellaneous Offences) Decree No. 20 of 1986*.³⁰

Mention must also be made of the *Special Tribunal (Miscellaneous Offences) Decree No. 20 of 1984* which sought to confront the scourge of drug trafficking and the resultant bad image it was giving the country. Under the Decree, (Section 3(2)(k) thereof, 3 Nigerians, Bartholomew Owoh, Lawal Ojuolape and Bernard Ogedegbe were controversially executed by firing squad on April 14, 1985.

In the area of procedure to be adopted in the pronouncement of mandatory sentence, and execution of convicted offenders, the Criminal Procedure Act and the Criminal Procedure Code come in quite handy. Under the Criminal Procedure Act, Chapter 7 Part 39 thereof, elaborate provisions are spelt out covering this area. Under this chapter, the punishment of death is inflicted by hanging the offender by the neck till he be dead.³¹ By section 367(2) it shall be done this way:

²⁸ Section 159 (2) Penal Code

²⁹ Section 227 Ibid

³⁰ Idris T. A., *Capital Punishment and its Effect on Nigerian Criminal Law*, dspace.unijos.edu.ng,2421

³¹ Section 367(1) CPA

“The sentence of the court upon you is that you be hanged by the neck until you be dead and may the Lord have mercy on your soul.”

Also under this chapter, pregnant women and offenders under the age of 17 at the time of commission of the offence are spared the gallows. The Governors of the various States are empowered, upon the recommendation of the State Minister designated for that purpose, upon a report having been forwarded to him by the judge who presided over the case, to order one of the following:

- (a) that the law shall take its course, or
- (b) that the sentence be commuted to imprisonment for life, or
- (c) that the sentence be commuted for such a specific period as he may consider just.³²

Obviously, the Comrade Governor choose to adopt option (a) above. Where the Governor decides to so choose, he shall give an order for the execution of the convict in the form and manner so specified.³³

Some States such as Abia, Imo, Akwa Ibom and only a few days ago Edo, have expanded the frontiers of offences that carry the death penalty by passing various Anti-terrorism and Anti-kidnapping Laws stipulating this punishment. Furthermore, the introduction of Sharia based criminal Law in some Northern States has also added even more offences. For example a Muslim may be sentenced to death under the Sharia for the murder of another Muslim, adultery, apostasy (deserting Islam), a third conviction for drinking alcohol and a

³² Section 371 CPA

³³ Section 373 Ibid

fifth conviction for theft. A non-Muslim living in a Muslim State can be executed for sex with a Muslim woman, and persecution of Islam: sodomy, lesbianism and rape.³⁴

5.1. Death Penalty Under the 1999 Constitution

The 1999 Constitution clearly recognizes the death penalty. Section 33(1) of the Constitution 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 (underlining supplied).

In the popular case of *Onuoha Kalu v. State*,³⁵ the Supreme Court of Nigeria upheld the constitutionality of section 319 of the Lagos State Criminal Code Law and the death penalty.

In that case, the appellant was convicted for murder and sentenced to death. He appealed unsuccessfully to the Court of Appeal and then to the Supreme Court. It was at this point that leave was sought and granted to raise the issue of constitutionality of the death sentence in Nigeria. The Supreme Court after having heard from distinguished lawyers invited on this issue, held that the death penalty was constitutional in Nigeria. According to Iguh JSC (who read the lead judgment):

Upon a careful perusal of the various foreign authorities to which our attention was drawn, the opinion that death penalty per se amounts to torture, inhuman and degrading treatment and therefore intrinsically unconstitutional seems to me a minority view. Indeed a careful study of those decisions reveal that the foreign jurisdictions that have similar provisions in their constitution as ours have repeatedly pronounced the death penalty to be constitutionally valid.

³⁴ Ilo Ud Jude & Ajayi Oluwaseye, *On The Gallows*, a publication of the Human Rights Law Service, at p. 66.

³⁵ (1988) 13 NWLR (Part 583) 531

The decision in Kalu's case (*supra*) presently represents the law on death penalty in Nigeria and its constitutionality. Therefore, the Comrade Governor of Edo State and the Federal Government are actually on firm legal standing in their actions leading to the execution of 4 death row convicts. Nigeria courts have on several other cases also upheld the death penalty. In the case of *Adeniji v. State*,³⁶ the court held that the death penalty is clearly and expressly provided for by the Constitution. Similarly, the Supreme Court also reached the same decision in *Okoro v. State*.³⁷ In the words of Iguh JSC in the Kalu's case,

“In my view, it is plain that the 1979 Constitution can by no stretch of the imagination be said to have proscribed or outlawed the death penalty on the contrary, section 30(1) of the Constitution, permits it in the clearest possible terms. So long as it is inflicted pursuant to the sentence of a court of law in Nigeria in a criminal offence....”³⁸

With profound respect, whilst it is conceded that section 33(1) of the 1999 Constitution in its proviso recognizes the death penalty, it is submitted that the time has now come for the Nigerian apex court and indeed, our courts to depart from this rather restricted and legalistic interpretation of section 33(1) of the 1999 Constitution. The interpretation of the Constitution must be given a broad and liberal interpretation, particularly as they relate to fundamental rights provisions. Certainly no right can be more fundamental than the right to life. The Supreme Court itself has in a plethora of authorities set out some basic principles governing the interpretation of the Constitution. One of these principle is the broad and liberal approach herein advocated.

³⁶ (2000) 645 NWLR 356

³⁷ (1998) 14 NWLR 584

³⁸ *Supra* note 35. Please note that section 30(1) 1979 Constitution is *impari materia* with section 33(1) of the 1999 Constitution.

Some other principles enunciated by the Supreme Court in the interpretation of the Constitution, relevant to this paper include:

- (a) where the provisions of the Constitution are capable of two meanings, the court must choose the meaning that would give force and effect to the Constitution read together as a whole and promote its object and purpose.
- (b) All the relevant provisions of the Constitution must be read together and not disjointedly.

These are encapsulated in the following decisions of the Supreme Court.

(1) *Lafia LG v. Executive Government of Nasarawa State*³⁹

(2) *Nafiu Rabi v. State*⁴⁰

(3) *A. G. of Bendel State v. A.G. Federation*⁴¹

(4) *A. G. Ogun v. A.G. Federation*⁴²

Of these principles, the ‘whole reading rule’ also called *the community reading rule* has been said to be the most important. It requires Constitutional provisions to be read in community and not in isolation.

In the Kalu case (supra) although the Supreme Court said it adopted the whole reading principle in arriving at its decision, with respect, it is submitted that this do not appear to be the case. This is because if the court had read the interpreted the provisions of section 33(1) together with section 34(1) (a) with a broad mindset, it is difficult to see how the execution

³⁹ (2013) All FWLR (PT. 668), 956

⁴⁰ (1981) 2 NCLR 293

⁴¹ (1982) 3 NCLR 166

⁴² (1982) 3 NCLR 1

of death row convicts by hanging and firing squad pursuant to section 376 of the CPA and by firing squad under the Robbery and Firearms Act, could not have been held at least to infringe the provisions of section 34(1) of the Constitution. The apex court quite clearly placed greater weight in its consideration of section 33(1) over section 34(1)(a) of the constitution. This should not be so. When it is imagined the mental torment a convicted death row convict is subject to from the moment the sentence is passed and in many cases the years of waiting, often in isolation for his execution, how else can mental torture be defined. Executions by the gruesome methods of hanging and firing squad, it is submitted, is against the letters and spirit of section 34(1) of the 1999 Constitution. Section 34(1) 1999 Constitution provides:

- (1) Every individual is entitled to respect for the dignity of his person and accordingly,
 - (a) No person shall be subjected to torture or to inhuman or degrading treatment.

A convict on death row is not divested, by the singular act of his conviction, of his constitutionally guaranteed basic rights. Section 34(1) (a) inclusive. Even after death, the law still protect the human dignity of a corpse. It is an offence therefore to improperly or indecently interfere with or to offer any indignity to any dead human remains whether buried or not.⁴³

Death penalty carried out by hanging and firing squad, it is therefore submitted runs contrary to the express provisions of section 34(1) 1999 Constitution. This view formed the fulcrum of the landmark decision of Justice Mufutau Olokoba of the Lagos State High

⁴³ See: sections 242 of criminal Code and section 219 Penal Code for offences relating to dealing with human remains.

Court in the celebrated case of *James Ajulu & Ors v. A.G. of Lagos State*⁴⁴ In this case, the applicants asked the court to declare the prescription of mandatory death penalty for offences such as armed robbery and murder as a contravention of their right to dignity of the human person as well as not to be subjected to inhuman or degrading punishment under section 34(a) of the 1999 Constitution. They therefore sought an order of the court nullifying the mandatory death sentence by hanging or firing squad imposed on them.

After a careful examination of reports filed by expert psychologists, pathologists and forensics, Justice Olokoba held that mental torture was an inevitable consequence of death sentence on the victims. According to His Lordship, the Court may uphold the death penalty under section 33(1) of the Constitution, but declare the method of execution unconstitutional (underlining supplied). In the words of Justice Olokoba:

Death by hanging or by firing squad amounts to a violation of the condemned right to dignity of the human person and inhuman and degrading treatment. It is consequently unconstitutional being violative of section 34(1)(a) of the Constitution of the Federal Republic of Nigeria, 1999.

This decision, it is submitted, quite clearly accord with the dictates of a broad, liberal and communal interpretation of the Constitution being advocated by this paper.. It is also consistent with the judicial decisions in some other jurisdictions.

In the South African case of *State v. Makwanyane*,⁴⁵ the South African Constitutional Court held that the death penalty was inconsistent with the Constitutional protection of freedom

⁴⁴ (Unreported) Suit No. ID/76M/2008

⁴⁵ (1995) ZACC 3

from cruel, inhuman and degrading treatment. Also, in the Malawian case of *Kafatayane v. A.G. of Malawi*,⁴⁶ a similar decision was reached.

6. Conclusion

In conclusion, a portion of an article written by *Professor Chris Bernard* in *R and Daily Mail of June 12, 1978* and which was quoted by the South African Constitutional Court in *State v. Makwanyane* is instructive. The learned professor in his description of what happens in the gallows during the process of execution of a death row convict, wrote:

The man's spinal cord will rupture at the point where it enters the skull, electrochemical discharges will send his limbs flailing on a grotesque dance, eyes and tongue will start from the facial aperture under the assault of the rope and his bowels and bladder may simultaneously void themselves to soil the legs and drip on the floor...

If the above chilling rendition does not infringe section 34(1)(a) of the Constitution, one wonders what else can. The time has now come for our apex court to give judicial endorsement to this self evident fact together with our superior courts having jurisdiction over offences that carry the death penalty and declare the death penalty and the obviously inhuman methods of execution unconstitutional.

⁴⁶ Cited in the James Ajulu case (supra) note 44.