Governors and death sentence: A revisit

By Franklin Oseya

THE death penalty is the prescribed mandatory punishment for persons convicted and sentenced for capital offences such as murder, culpable homicide punishable with death, treason and armed robbery. Section 367(1) of the Criminal Procedure Act provides that the death sentence shall be by hanging the offender by the neck till he be dead. In respect of armed robbery, the death sentence shall be by firing squad pursuant to Section 1 (2) (a) (b) of the Robbery and Firearms (Special Provisions) Act 1984.

The TELL Magazine of February 16, 2009, carried a disturbing cover story on pages 18 to 21. In that story, it was reported that over 725 condemned prisoners, including women on death row in Nigeria, live in physical and psychological anguish for periods ranging from five to 20 years, as governors show reluctance in signing their death warrants.

The reason for this aversion to signing death warrants by their excellencies may be as varied as there are personalities but opinion is rife that this attitude is not unconnected with a pervading spiritual or religious motif of the sanctity of human life; thus no man except only God can judge and take the life of another man. Call it the Pontius Pilate complex if you like.

A lot of jurisprudential issues are thrown up by the situation. First, is that a man who has been handed the death sentence after conviction but is prevented from being executed, begins to suffer a separate, disproportionate and even more severe kind of penalty other than the one for which he was convicted, which is death. This immediately contravenes a basic principle of the law that the death penalty is not permissive but mandatory for capital offences. So that the court does not have the discretion to impose a sentence other than the death penalty upon conviction for a capital offence.

But by implication, when a man is sentenced to death, short of execution, by reason that his death warrant has not been signed by the governor, he begins to serve a separate penalty, which is imprisonment for a term uncertain. This is unknown to our laws. For those who await the hangman's noose for upward of five to 20 years in prison, it is a double jeopardy: imprisonment for an unending term plus the terrible anguish of awaiting death itself. Thus, for the 725 inmates on death row across the country, they die each other day expectant of the hangman.

In these circumstances, their fundamental human rights to dignity of human person and personal liberty under Sections 34 and 35 respectively of 1999 Constitution are violated.

Curiously enough, the state also suffers a collateral damage by way of the colossal amount of tax-payers' money required to sustain 725 people who ought to have been executed, for say 20 years.

To further swell the rank of those who ought to suffer the death penalty but are not killed, are pregnant women and young persons. The law is that where a pregnant

woman is convicted of a capital offence, a sentence of death shall not be passed on her; instead a sentence of life imprisonment shall substitute.

The underlining philosophy is that we shall not set the children's teeth on edge because their mothers have eaten soured grapes. Although some have argued that it may even be better to execute a condemned pregnant woman than to allow her breed her same; irrespective of where you stand on this one, the law is that a pregnant woman shall be spared the hangman's noose. The second category is young persons. Under our laws, where the court convicts an offender of an offence punishable with the death sentence and discovers that the offender is a young person, the death sentence shall not be pronounced or recorded; instead such person shall be detained at the pleasure of the president or the governor as the case may be.

Interestingly, the Children and Young Persons Act 1994 has defined a young person as, he who has attained the age of 14 years and is under 18 years.

Now, besides the two general exemptions granted a pregnant woman and young persons, it would appear from the provisions of Sections 371 of the Criminal Procedure Act, that the actual authority to effectively sentence a person to death lies outside the judge who has presided over the case and pronounced the death sentence. Under the above provision, once a court pronounces a sentence of death, that alone is not sufficient to execute the convicted person. The judge shall as soon as practicable transmit to the Minister or Commissioner of Justice of the Federation or of a state, a report containing his recommendations as he thinks fit with respect to the conviction.

The minister or commissioner, who most times doubles as the attorney general, considers the report and refers same to the advisory council on the prerogative of mercy. The council reports back to the A.G. who now recommends to the president or governor as the case may be, that the convicted person be pardoned or that he be executed or that the sentence of death be commuted to life imprisonment.

To this extent, the power to actually sentence to death a condemned criminal has been taken out of the domain of the judge who convicted him in the first place.

The cumulative effect of the above legal and bureaucratic bottlenecks is that many of those sentenced to death under our laws do not get killed. Thus lending credence to the argument that the death sentence be totally abrogated from our laws, having outlived its usefulness.

The world is currently deeply divided between the pro-life advocates and the pro-death advocates. The pro-life advocates are of the view that the death sentence, being mainly retributive, is barbaric and does not serve any practical purpose in the reduction of crime.

The pro-death advocates on the other hand are of the view that he who has taken the life of another (murder) should not be sparred; thus death is the supreme atonement. This is also referred to as the mosaic school of thought.

The pro-life advocates, however, seem to be winning as more countries, mostly the advanced ones in Europe continue to torpedo the death sentence from their laws or at least tilt towards that direction.

In Nigeria, the death sentence is still very much entrenched in our local jurisprudence. The Supreme Court in Kalu v. State (1998) 13 N.W.L.R., Pt. 583, has insisted that the death penalty is lawful in Nigeria and cannot be regarded as a derogatory and inhuman treatment.

My take on the point, however, is that we must decide between the death sentence and life imprisonment, which should be the maximum penalty for capital offences. There should be no middle ground. It is wearisome and defeatist to create laws that inherently circumvent their own enforcement through detailed technicalities as we could see with respect to laws concerning the death sentence.

On death being perceived as the severest of punishment, we may hold a more balanced view, once we begin to appreciate that to confine a man to eternal solitary and anguish can be more punishing than death, to the extent that the later comes along as a relief. This is one of the rationale behind euthanasia.

The case may then be put thus: let him die who has been condemned to death, but since the authorities have demonstrated our natural hesitation to take the life of he who has taken that of another, it is time to expunge the death sentence from our laws.

- Oseya, writes from the Council of Legal Education, Nigerian Law School, Kano.