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KILLING THE KILLER: A RE-EVALUATION OF THE DEATH PENALTY DISCOURSE IN NIGERIA.

Death Penalty: Ultimate Punishment for Ultimate Crime?

The death penalty is very much an emotional subject for many people. Its proponents usually feel that the government should take the life of whoever takes the life of another person as a deterrence. Those against it like me feel that the death penalty is not a deterrent and that it is likely that an innocent person may be hanged. This possibility, abolitionists would say, undermines death penalty's appeal as a viable punishment.

Under the Nigeria law, offences that attract the death penalty are: Murder (sections 319 of the Criminal Code and 221 Penal Code); Treason (sections 37 and 38 of the Criminal Code and section 411 of the Penal Code); Treachery (section 49A of the Criminal Code); Giving False Evidence leading to the conviction and execution of an innocent person (section 159 of the Penal Code); Robbery with Firearms or Offensive Weapons (section 1 of the Robbery and Firearms Act); Trial by Ordeal Resulting in Death (sections 208 of the Criminal Code and section 214 of the Penal Code); Abatement of Suicide by a Person Below 18 years of Age or by an Insane or Intoxicated Person (section 227 of the Penal Code); Adultery for a Muslim and Allied Offences such as Incest or Rape (Shari'a Penal Codes such as Zamfara's); Homicide where the relations of the deceased elect that the offender be put to death (Sharia Penal Statutes); Homicide Committed at an Attempted Robbery (Sharia Penal Statutes); Homicide under Islamic law where the Victim was Lured by his Assailant (Gheelah); Aiding the Enemy and Cowardly behaviour by Members of the Armed Forces (sections 45, 46 and 47 of the Armed Forces Act).

In many parts of the world, the tide of public opinion on the death penalty has shifted dramatically because people are learning more about what happens in capital cases, such as police and prosecutorial misconduct and the failure to reveal to the defense team evidence that would cast major doubt on a defendant's guilt. In America for example, 17 states and the District of Columbia and many countries in Europe have abolished the death penalty, and the legislature in Texas has been examining its support for a flawed and unjust death penalty. In fact, recent legislation gives the accused access to state-paid DNA testing. In the Nigerian criminal justice system, as in other parts of Africa, where hardly is such scientific tool used in investigating murder cases to determine the innocence or guilt of the accused person, it is likely that an innocent person will be executed. Here, it is pertinent to engage some of the

challenges associated with the trial of accused persons in order to gain better understanding of the capital punishment discourse.

Fairness as it Relates to Poverty and Inadequate Defense

Capital cases law procedures require lawyers to be knowledgeable and extraordinarily diligent. A capital case takes many years and resources to properly defend, resulting in enormous financial commitment. In order to properly defend himself, a capital defendant needs significant amount of resources. But in Nigeria, most death row inmates are considerably poor and lack the necessary resources to stage an effective defense. Besides, the capital crimes system is rife with considerable amount of flaws as revealed by the reports of several studies and research groups. An execution that takes place under these factors can hardly be adjudged fair.

Throughout the world the death penalty is applied disproportionately to the disadvantaged, and death sentences are imposed on people at the lower end of the social scale who would not face the death penalty if they had come from a more favored sector of society. In some instances, it is even a means of repression and a brutal way of silencing political opposition. The report presented to the Federal Government of Nigeria by The Nigerian National Study Group on the Death Penalty in October 2004 unambiguously called on the government to impose a moratorium on executions and commute to life imprisonment the sentences of all death row prisoners whose appeals had been concluded. "All executions should be put on hold until the Nigerian justice system can deliver fair trials and due process. It stated categorically that "a system that would take life must first give justice". For me, this assertion is surely a call for the execution of justice rather than the execution of people: a call for the reform of the criminal justice and prison systems rather than the speedy execution of death row inmates. Hence, I find President Jonathan's directive last year to the governors to exercise their constitutional powers to sign death warrants of about 1094 very disturbing and unfortunate. But even more worrying is the execution of 4 inmates in Edo State on June 24, 2013, a week after the President's directive. According to a statement issued by the Avocats Sans Frontieres France (ASFF), all those who were executed had rights to appeal the decision of the Federal High Court. The statement further said *"Recall that in October 2012, the execution warrants of the just executed inmates were signed but a legal suit was filed by the Legal Defence and Assistance Project (LEDAP) an NGO to stop the execution. Although the judgment delivered on Monday in this case was not in favour of the inmates, an appeal was promptly filed against this decision. Unfortunately the appeal was not respected and the executions were carried out in total disregard of the processes filed before the court. ASF France has been rightly informed that the Attorney General of Edo state and the Nigerian prisons were duly served with*

the court processes comprising of the notice of appeal and motion for stay of execution”

The question is: Why was the Governor in such haste to execute them and what are the implications of this blatant disregard for the rule of law, human rights and dignity by the Governor? And is anybody holding him accountable? It is pertinent to remind that capital punishment is not the only way that society has to express its moral outrage at crimes. We have long outgrown the literal application of the biblical injunction of ‘an eye for an eye, and a tooth for a tooth. We all agree that punishment, to some degree, should be commensurate with the offence, but there is no requirement that it must be identical to the crime; imprisonment, for example, is sufficient as a manner of expressing anger and punishing the offender.

“Nigeria: Waiting for the Hangman”, a report on the death penalty in Nigeria by Amnesty International and LEDAP presents a near succinct understanding of the challenge of fairness in death penalty administration in the light of poverty and inadequate representation, not only for Nigeria, but for Africa and other developing nations. It reveals a litany of failings in Nigeria's criminal justice system, noting that hundreds of those awaiting execution on death row did not have fair trials and may therefore be innocent. Although prohibited in Nigeria, in practice, torture by police occurs on a daily basis. Almost 80 percent of inmates in Nigerian prisons say they have been beaten, threatened with weapons or tortured in police cells. Judges know that there is widespread torture by the police but they continue to sentence suspects to death based on these confessions, leading to many possibly innocent people being sentenced to death and executed.

Questions of guilt and innocence are almost irrelevant in Nigeria's criminal justice system. It is usually about if you can afford to pay to keep yourself out of the system - whether that means paying the police to adequately investigate your case or paying for a lawyer to defend you. Those with the slimmest resources face the greatest risk in Nigeria's criminal justice system. So how can we justify the death penalty, morally or legally, when inmates on the death row are almost exclusively poor?

The Ultimate Blunder: Killing the Innocent:

Abolitionists of the death penalty feel if capital punishment must exist, the court must take the most painstaking care to establish the guilt of the accused beyond any reasonable doubt to avoid the execution of innocent people. But quite often innocent defendants have been convicted, sentenced to death and executed, while some defendants are exonerated many years after their convictions with the help of new evidence and the use of DNA evidence which have been

valuable in exposing the fallibility of other forensic evidence that jurors often relied on as possessing scientific certainty. For example, Ray Krone was sentenced to death in Arizona because an expert said his teeth matched bite marks on the victim and blood tests helped send Robert Miller to death row in Oklahoma among other examples. These convicted persons were later exonerated with the aid of DNA evidence that luckily still existed in their case. Nonetheless, complacent belief in the ‘almighty’ DNA evidence can equally lead to fatality. For DNA evidence to be dependable, absolute care must be taken by the police who collect the evidence, the lab technician who tests it, and the expert who testifies about the result. If the evidence is contaminated or misinterpreted, the information the jury receives can be doubly damaging, as it could lead to the conviction and execution of innocent an innocent person.

Despite its flaws, however, if DNA testing is introduced in the Nigerian criminal justice system, several inmates on death row could be exonerated. The police are over-stretched and under-resourced; thus, they rely heavily on confessions, which are often extracted by torture, to ‘solve’ crimes, resulting in wrongful convictions and a high likelihood that innocent people have been executed.

Dallas Morning News (one time strong supporter of death penalty) editorial board once wrote: “...we believe the state of Texas should abolish the death penalty – because we cannot reconcile the fact that it is both imperfect and irreversible. This board has lost confidence that the state of Texas can guarantee that every inmate it executes is truly guilty of murder. We do not believe that any legal system devised by inherently flawed human beings can determine with moral certainty the guilt of every defendant convicted of murder.”

Concurring with this position, *The Chicago Tribune* (March 25, 2007) that previously held the position that the government should have the right to impose capital punishment also had this to say: “We have learnt much, particularly with advances in DNA technology, about the criminal justice system’s capacity to make terrible mistakes. These revelations—many stemming from investigations by this newspaper—shake the foundation of support for capital punishment. The evidence of mistakes, the evidence of arbitrary decisions, the sobering knowledge that government can’t provide certainty that the innocent will not be put to death—all that prompts this call for an end to capital punishment. It is time to stop killing in the people’s name.”

Even in the face of the decisive call for the abolition of the death penalty in the preceding quotation, some have insisted that there are cases where it is crystal clear the person convicted did actually commit a brutal murderous crime.

Therefore, the death penalty should be retained and applied at least in such undisputable cases, without recourse to an arduous process of proving an accused person's innocence. But the important question about innocence is not whether there is unconditional proof that an innocent person was executed, but rather whether our death penalty system poses so great a risk to innocent lives that wrongful executions are unavoidable. It is awful to think how many innocent people may have been executed and may still be executed. Kathleen Hawk Norman, who served as a juror had this to say: "Going into the trial, I wasn't sure where I stood on the death penalty. Today, knowing what I know about wrongful convictions and the kinds of problems that result in putting innocent people's lives on the line, I would no longer vote for a death sentence...." (Blind Justice: DPIC)

The question of innocence was confirmed by the Controller-General of Prisons in Uganda, a strong advocate of the death penalty abolition at the 4th World Congress Against the Death Penalty in Geneva in 2010. Mr. Johnson told the story of a man who had been convicted for murder and had served 20 years in Ugandan prison, awaiting execution. Twenty years down the line, investigations revealed that the man he had been convicted of killing was alive and healthy. And he was released.

Deterrence: How Deterrent?

The deterrence theory holds that executions will deter people other than the person executed from committing capital crimes and render the executed defendant incapable of committing further crimes. The death penalty at least stops the killer from ever killing again, which is the best form of deterrence and that executions will have an incremental impact on the conduct of probable killers, meaning, ten executions will have five times the effect that two executions will. However, no study has shown that the death penalty deters crime. Rather, it results in the 'brutalisation effect,' a situation where crime rate increases rather than reduce when death penalty is applied. Proponents of the death penalty as a deterrence ignore the fact that the causes and solutions to the violent crimes that besiege Nigeria for example, are complex. Crime may be reduced by having better trained and equipped police personnel, improving education and providing employment opportunities, among others. Without meaning to justify crime, a society which parades an army of unemployed youths, where government officials at every level enrich themselves at the expenses of the public, where basic social infrastructure and amenities are lacking incubates and breeds criminals, murderers, deviants and terrorists. This therefore suggests that there is a stronger link between taking the social and economic needs of citizens seriously and a low crime rate than there is between

the death penalty and a low crime rate. In other words, capital punishment does not reduce crime.

In the United States, for instance, a survey by *The New York Times* revealed that states without the death penalty have lower homicide rates than those with the death penalty. The murder rate, for example, in Iowa, a non-death penalty state was 1.5; and in Missouri, a retentionist state, was 6.6. Also, the murder rates discrepancy between bordering retentionists and abolitionists states was also clear when comparing Massachusetts and Connecticut, Wisconsin and Illinois, and West Virginia and Virginia (Death Penalty Information Centre, Washington, DC). Therefore, the absence of an established deterrent effect of the death penalty further undermines not only its justness but also its relevance.

In addition, the death penalty, which involves a premeditated and cold blooded killing of a human being by the state in the name of justice, is not a deterrent to crime because the person going to commit crime does not think he or she would be caught. Otherwise, he or she would not commit the crime in the first place. And finally, the greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished, not the death penalty. It is that which is presently lacking in our criminal justice system.

Retribution: Is it Just Enough?

The retributive argument is often cited on moral and sometimes religious grounds. The death penalty proponents commonly present the capital punishment as the only right, just, divine or reciprocal punishment for capital crime. They say a crime can be so horrible that killing its perpetrator is the only correct response. Furthermore, they contend that for every ultimate evil there should be ultimate punishment. As appealing as these arguments appear to be to some people, retribution does not achieve healing and restoration for victims of crime and society. What victims of murder really need is not the State's sanctioned murder of offenders, but rather support and rehabilitation so that they can move on. This support can also help prevent creating more victims. In fact, this is one of the weaknesses of capital punishment—victims are often forgotten. All attention is focused on punishing the offender. In addition, many families of murder victims are opposed to the death penalty. “We have no control over what happened to our daughter, but we can choose how we respond. For us, part of that response involves speaking out for violence prevention and against the death penalty,” explained Amanda and Nick Wilcox, whose daughter Laura was murdered. They have also argued that the death penalty does not help them to heal and is not the way to pursue justice for victims.

Some have argued that the death penalty is necessary in order to preserve public confidence in a government's ability to maintain peace and security. I want to argue that executions merely give the appearance of strong action being taken and the illusion of chaotic situation being brought to order. In reality, taking the life of a person already incarcerated and therefore no longer a threat to society is a futile and grotesque gesture in the fight against criminality. When the public requests solutions to violent crimes, the answer must never be further killings, but a response to the root causes of these crimes. The death penalty, even under the guise of preserving public confidence, will not achieve decrease in criminal activities and improve security of lives and properties. Rather, public confidence in government is achieved by its ability to improve the living standards of its citizens. The death penalty is a cheap way for politicians to give their fearful constituencies an impression that something is being done to combat crime. Nigeria should never be seen as a country where those considered guilty are eliminated, but rather as a country with a system of justice that values life, rehabilitation and restoration over retribution. We must build a society that is founded on the respect of human rights. And the right to life and dignity are the most important of all human rights. And Nigerian's commitment to protecting the lives of citizens must be demonstrated in everything that it does, including the way it punishes criminals.

More so, Nigeria is a signatory to the Universal Declaration of Human Rights and the African Charter on the Human and People's Rights, all of which guarantee each person the unconditional right to life.

Conclusion

The execution of convicted persons under whatever guise, be it deterrence or retribution, has not proved to lower crime rate in any part of the world, and the situation will not be any different in Nigeria. Studies conducted by Amnesty International have shown that the death penalty is "destructive and divisive public policy that is not consistent with widely held values. It promotes simplistic response to complex human problems and distracts from effective measures being taken against criminality. It offers a superficial answer to the sufferings of murder victim's family and extends that suffering to the families of those executed. It diverts resources that could be better used to work against violent crime and assist those affected by it. It is a symptom of a culture of violence, not a solution to it. It is an affront to human dignity"

The truth remains that a system that is operated by fallible humans is susceptible to mistakes and injustice. Hence, so long as the criminal justice system in Nigeria and anywhere else in the world cannot be exonerated of the charge of fallibility, my call for the abolition of the death penalty in Nigeria will go on based on the consciousness that "the state holds in its hands the power of

life and death. It is an awesome power, one that citizens of a democracy must approach in fear and trembling, and in full knowledge that the state's justice system, like everything humanity touches, is fated to fall short of perfection. If we are doomed to err in matters of life and death, it is far better to err on the side of caution. It is far better to err on the side of life. The state cannot impose death – an irrevocable sentence – with absolute certainty in all cases. Therefore, the state should not impose it at all” (Editorial, *Dallas Morning News*).

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