

A Philosophical Critique of Abolition of Capital Punishment

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ABSTRACT: Death penalty as a form of punishment has generated controversies among scholars, philosophers and stakeholders in the criminal justice system. While some scholars are of the view that death penalty should be abolished from criminal justice system, others opine that it should be retained.

The basis of the abolitionism is hinged on the fact that death penalty is cruel, crude and inhumane. They also argue that death penalty violates the sanctity of human life and it antagonises the right to life as guaranteed by the state. Retentionisms on the other hand, argued that death penalty deter would be criminals from committing crime because every sane man values his life and guides it jealously.

This paper examines the various postulations of the two schools of thought. It further examines the extent at which death penalty has deterred criminals from committing crime. The paper submits that a continuous retention of death penalty is tantamount to occasional taking of innocent's life. This is due to the undeniable fact that men (judges) are fallible and also that forensic science cannot guarantee certainty in detection of criminals.

Keywords: criminal, capital punishment, penalty, society.

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I. INTRODUCTION

One of the most controversial issues in criminal law is capital punishment. Also known as death penalty, it has been used as a punishment for some offences including: murder, rape, treason, armed robbery, kidnapping etc depending on the jurisdiction. Its ultimate goal is rooted in retribution, revenge and permanent incapacitation.

In recent time, public support for capital punishment has been eroded. The question to be asked is thus: does death penalty deter? Does the execution of capital offenders provide closure for victim? Can we as a society afford to use this form of punishment given the risk of executing an innocent person? These and many more shall be the concern of this paper. We shall conclude that whether one is in favour of or against capital punishment, no person of sound mind could favour executing the innocent

MEANING OF CAPITAL PUNISHMENT

To understand the meaning of capital punishment, it is imperative to understand the meaning of the concept of punishment itself. Various authors as well as scholars have attempted to define what punishment is. This paper will examine some of the definitions.

The origin of punishment can be traced to the bible when Adam and Eve disobeyed God's instruction.¹ Since then, punishment has been incorporated into the society as a sanction for disobedience. Stearns defines punishment as an evil inflicted upon a wrongdoer on behalf and at the discretion of the society in its corporate capacity, of which he is a permanent or temporary member.² Douglas defines it as the binary compound of anger and positive self feelings.³

The sociological origin of punishment is a reaction of annoyance or irritation expressed towards one who is in some way under supervision and control. Thus, punishment by society is an expression of irritation and annoyance at individuals who do not conform with the conduct or pattern prescribed for the group.⁴ From the above, it means that punishment can only emanate from an authority that is higher than the wrongdoers. There are various forms of punishments. Punishment is the authoritative imposition of an undesirable or unpleasant outcome upon a group or individual, in response to a particular action or behaviour that is deemed unacceptable or threatening to some norm. The unpleasant imposition may include a fine, penalty, or confinement, or the removal or denial of something unpleasant or desirable.

¹ Genesis 3 vs 13- 19.

² Stearn, A. W. The Evolution of Punishment. Journal of Criminal Law and Criminology. 27(2), 1936. P. 219.

³ Douglas, Husak, Kinds of Punishment. New Jersey: Rutgers. 2017.

⁴ Stearn, A. W. Op. cit.

For Emile Durkheim, punishment is a passionate reaction of graduated intensity that society exercises through the medium of a body acting upon those of the members who have violated certain rules of conduct.⁵ From the various definitions of punishment enunciated above, the following four conditions are considered necessary to describe an action as punishment. They are:

- a. It is imposed by an authority
- b. It involves some loss to the supposed offender
- c. It is in response to an offence and;
- d. The person to whom the loss is imposed should be deemed at least somewhat responsible for the offence.

Capital punishment is thus a punishment i.e the sentence of death for a serious crime especially murder. It is also known as death penalty. It involves the legal killing of a person who has committed a serious crime such as armed robbery, murder, treason etc.

George Bernard Shaw, the famous 1925 Laureate in literature described the death penalty necessity against murderers in just the same manner we react to mad dogs, and other dangerous animals. Accordingly,

*Dogs are friend of Man; but an exceptional dog sometimes goes mad and runs amok through the street, baiting and infecting everybody it comes across. Fond as we may be of dogs, we must kill it on the spot.*⁶

Death penalty can be imposed by any of these methods. They are:

Hanging: hanging is an extremely quick process that is designed to cause instant and deep unconsciousness and also benefits from requiring simple and quick preparation of the prisoner. It also seems to have substantial deterrent value.

Lethal Injection: it may appear to be more humane than other methods to those who have to administer and witness it, but it is a very slow process. It is essential that the catheter actually goes into a vein rather than through it or round it if the prisoner is to die a pain free death. If it doesn't, then the person may suffer a great deal of pain but will be unable to communicate this due to the paralysing effects of the second drug. The biggest single objection to lethal injection is the length of time required to prepare the prisoner, which can take from 20 to 45 minutes depending on the ease of finding a vein to inject into.

Gas Chamber: this seems to possess no obvious advantage as the equipment is expensive to buy and maintain, the preparations are lengthy, adding to the prisoner's agonies, and it always causes a slow and cruel death. It is also dangerous to the staff and witnesses.

Electrocution: electrocution can cause a quick death when all goes well, but seems to have a greater number of technical problems than any other method often with the most gruesome consequences

Shooting: it can be shooting by single bullet or shooting by firing squad. Shooting by a single bullet in the back of the head seems greatly preferable to shooting by a firing squad in that it is likely to cause instant unconsciousness followed quickly by death rather than causing the prisoner to bleed to death, often whilst still conscious.

HISTORICAL DEVELOPMENT OF CAPITAL PUNISHMENT

Capital punishment can be traceable to the bible where the Law of Moses provides that he who kills must be killed. Before the advent of colonialism and English law, the African traditional society also passed the sentence of death on persons who have committed some sacrilegious offences. This means that the concept of death penalty is not alien to the Nigeria traditional criminal justice system. Death sentence in the traditional society is usually carried out via beheading the offenders by the "akoda".

Death penalty was ushered into Nigeria criminal justice system by the provision of section 33(1) of the Constitution which provides that:

*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.*⁷

Hence, death penalty through the provision of the constitution and various criminal procedure laws has been incorporated into our criminal justice system.

PHILOSOPHICAL BACKGROUND OF CAPITAL PUNISHMENT

The philosophical basis of death penalty is rooted in retributive theory of punishment. The rationale for the theory of retribution as means of punishment is as a result of vengeance meaning an "eye for an eye". This

⁵ Emile Durkheim. Op. cit.

⁶ Ibid

⁷ 1999 Constitution of the Federal Republic of Nigeria; See also section 367(2) of CPA.

theory is traceable to mosaic laws.⁸ The essence of this theory is that punishment should be meted on individuals because they deserve it not because such punishment would benefit the society at large. The theory is embedded in the maxim that “we do not punish people for who they are, we punish them for what they do”.⁹

More recently, a theory of retribution based on the notion of “mutual political obligation” has emerged.¹⁰ The mutual political obligation is that through the criminal justice system, we mutually agree not to engage in certain behaviours, though sometimes it might be to my individual advantage to engage in such conduct. I defer to the law knowing that you will also do so in the instances when violating the law would be to your advantage. Thus, we cannot tolerate those who take advantage through violating the law while the rest defer taking such advantage.

One of the problems of this theory however is that it is difficult to measure the standard of punishment that is commensurate with a particular crime except in murder cases. This is because our perception about crime differs. A prostitute may not see rape as a serious offence to warrant life imprisonment whereas someone who is religious will see it as sacrilegious which ought to be meted with capital punishment. Another thing is that retribution is borne out of desire to inflict pain similar to the offence committed on offender without recourse to the society.

CAPITAL PUNISHMENT: WHETHER OR WHETHER NOT?

The argument on death penalty has generated some controversy. There are two schools of thoughts in this regard namely: Abolitionism and Retentionism. The retentionists have argued inter alia that capital punishment provides severe punishment for those who have committed severe crimes and it is therefore just.¹¹ Some also argues that it serves as a warning to others who may be inclined to commit similar crimes.¹² On the other hand, abolitionists have argued that capital punishment by any means constitutes the type of “cruel and unusual punishment”¹³ and that such punishment dehumanizes society as a whole. They also argue that it is a false that death penalty act as deterrent.¹⁴

Argument for Death Penalty

Incapacitation of the Criminal: Capital punishment permanently removes the worst criminals from society and should prove much safer for the rest of us than long term or permanent incarceration. It is self evident that dead criminals cannot commit any further crimes, either within prison or after escaping or after being released from it.

Cost: Money is not an inexhaustible commodity and the government may very well better spend our (limited) resources on the old, the young and the sick etc., rather than on the long term imprisonment of murderers, rapists, etc. Anti-capital punishment campaigners in the U.S. cite the higher cost of executing someone over life in prison, but this, whilst true for America, has to do with the endless appeals and delays in carrying out death sentences that are allowed under the U.S. legal system where the average time spent on death row is over 12 years.

Retribution: Execution is a very real punishment rather than some form of "rehabilitative" treatment, the criminal is made to suffer in proportion to the offence. Although whether there is a place in a modern society for the old fashioned principal of "lex talonis" (an eye for an eye), is a matter of personal opinion. Retribution is seen by many as an acceptable reason for the death penalty Deterrence.

Does the death penalty deter? It is hard to prove one way or the other because in most retentionist countries the number of people actually executed per year (as compared to those sentenced to death) is usually a very small proportion. It would, however, seem that in those countries (e.g. Singapore) which almost always carry out

⁸ See Deuteronomy 19 v.. which says that if any man hate his neighbour and lie in wait for him, and rise up against him, and smite him mortally that he die, and fleeth into one of these cities: then the elders of his city shall send and fetch him thence, and deliver him into the hand of the avengers of blood, that he may die...

⁹ John B. Mitchell. Crimes of Misery and Theories of Punishment. *New Criminal Law Review*. 15(4). 2012, P.485.

¹⁰ Nicole Lacey, *State Punishment: Political Principles and Community Values* 2. 1988.

¹¹ Vincent R. Jones, *The Problem with Capital Punishment: A Critical Assessment of the Ultimate Punitive Sanction*. *University of Miami Law Review*, 69(27) 2015, P.

¹² Ibid.

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¹⁴ Marilyn Peterson Armour & Mark S. Umbreit, *Assessing the Impact of the Ultimate Penal Sanction on Homicide Survivors: a two State Comparison*. *Marquette Law Review* (1), 2012, P.

death sentences, there is far less serious crime. This tends to indicate that the death penalty is a deterrent, but only where execution is a virtual certainty. The death penalty is much more likely to be a deterrent where the crime requires planning and the potential criminal has time to think about the possible consequences. Where the crime is committed in the heat of the moment there is no likelihood that any punishment will act as a deterrent. There is a strong argument here for making murder committed in these circumstances not punishable by death or for having degrees of murder as in the USA.

Ayo, a learned author writes that

*Whether this argument holds true at all times is a question for determination as crime has refused to stop even in capital punishments crimes- executing states. Whether criminals actually values lives or their own lives is another issue of concern that ruins the deterrence – fear of death argument- afterall, you don't threaten anyone who is willing and ready to die with death.*¹⁵

This shows that the argument that death will deter prospective criminals from further crimes can not be sustained considering the rate of crime in our society despite the practice of death penalty in our legal system. In research conducted by Radelet and Akers in 1996 comprising the American Society of Criminology, the Academy of Criminal Justice Sciences and the Law and Society Association in America, 85% of the over 70 experts concurred that the empirical research on the deterrence effect on potential criminals has shown that capital punishment has never been, is not and never can be more effective than long term imprisonment as a deterrence to crimes. They also stated that the police's random sample poll showed a belief that supported the fact that capital punishment does not substantially reduce the rate at which criminals committed murder.¹⁶

Arguments against the Death Penalty.

There are a number of incontrovertible arguments against the death penalty. The most important one is the virtual certainty that genuinely innocent people will be executed and that there is no possible way of compensating them for this miscarriage of justice. There is also another significant but much less realised danger here. The person convicted of the murder may have actually killed the victim and may even admit having done so but does not agree that the killing was murder. Often the only people who know what really happened are the accused and the deceased. It then comes down to the skill of the prosecution and defence lawyers as to whether there will be a conviction for murder or for manslaughter. It is thus highly probable that people are convicted of murder when they should really have only been convicted of manslaughter.

A second reason, that is often overlooked, is the hell the innocent family and friends of criminals must also go through in the time leading up to and during the execution. It is often very difficult for people to come to terms with the fact that their loved one could be guilty of a serious crime and no doubt even more difficult to come to terms with their death in this form. One cannot and should not deny the suffering of the victim's family in a murder case but the suffering of the murderer's family is surely valid too.

Daisy Kouzel postulates 18 arguments against death penalty. According to him, death penalty violates the sanctity of human life. He argued that if abortion is prohibited by the state, death penalty ought to be prohibited too. There is more to life than right to birth. Right to life means right to life not right to birth.¹⁷ To him, death penalty is wasteful and self-defeating. It is a new sin as it necessitates the commission of another crime by the executors. He further argued that death penalty tortures the relatives of the offender during the excruciating months and years. However, these innocent relatives should not be made suffer the pain and horror of saying goodbye on death row.¹⁸

The fact that men are fallible makes defeated the argument of the proponents of death penalty. This is because a legal system where death penalty is being practiced is liable to ignorantly execute innocent life. This itself has defeated the philosophical basis of our criminal justice system that it is better for ten offenders to escape punishment than to punish an innocent soul unjustly. The above reason is enough to eradicate death penalty because it is a height of injustice to take the life of an innocent soul due to strict adherence to capital punishment. The lacuna is further elucidated considering the fact that capital punishment does not give room for discretion of the judge. A little doubt in the mind of the judge notwithstanding will not reduce the capital punishment to life imprisonment.

Further to this, the Court of Appeal of Tanzania per Mwalusanya in the case of *Republic v Mbushuu & Anor*¹⁹ held that death penalty offends the right to dignity of a person in the way the sentence is executed and therefore it offends article 13(6) (d) of the Constitution of the United Republic of Tanzania. This decision is in

¹⁵ T.E Ayo, op.cit . P.541.

¹⁶ Ibid.

¹⁷ <<http://www.ncadp.org/blog/entry/daisy-kouzel-a-life-long-abolitionist>> accessed on 9th August, 2018.

¹⁸ Ibid.

¹⁹ (1995) TLR 97

tandem with the decision of the United States Supreme Court in *Furman v Georgia*²⁰ that the States, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. The Court further held that hangings being conducted in private do not indicate the guilty conscience of the state, but that the privacy surrounding executions is recognition that hangings are inhuman and degrading.

Seighart noted that

*As human rights can only attach to living beings, one might expect the right to life itself to be in some sense primary, since none of the other rights would have any value or utility without it. But the international instruments do not in fact accord it any formal primacy; on the contrary... contains qualifications rendering the right less than absolute and allowing human life to be deliberately terminated in certain specified cases... The right to life thus stands in marked contrast to some of the other rights protected by the same instruments. It may therefore be said that international human rights laws assigns a higher value to the quality of living as a process than to existence of life as a state.*²¹

From the foregoing, it shows that death penalty is in sharp contravention of right to life as right to life should not be subjected to any qualifications and conditions. An absolute and unconditional right to life is the basis and fundamental bedrock to other human rights and not vice versa without which other rights will be of no value and worth.

II. CONCLUSION

Notwithstanding the foregoing, there is one factor that should compel an end to capital punishment and that is: innocent and wrongful convictions. Whether one is in favour of or against capital punishment, no person of sound mind could favour executing the innocent. Nevertheless, it is clear like the summer sky that we will most likely continue to put innocent individuals on death row as long as we continue to use capital punishment. If no other reason than protecting the innocent, the time has come to abolish capital punishment in our legal system. Our society must devise other means of punishing the accused rather than the option of capital punishment because if one's life is taken, it cannot be restored.

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²⁰ (1972) US 238

²¹ P. Seighart, *International Law on Human Rights*. Oxford University Press, 1983, P.130