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The Death Penalty – A Negation of the Right to Life

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Introduction- There is belief by the protagonist of the death penalty, that certain needs of the society which cannot be achieved by other methods are met by the execution of the criminal. That is the solution to certain crimes is the killing of the perpetrator of such crimes. The final solution to a deviant. The under-standing philosophy is that whether the executions are carried out in public or shielded form behind the prison walls, death penalty is necessary, at least for the good of the society. Probably it is on the Benthamite, utilitarian or hedonistic, principle (felicific calculus) the promotion of the common will and the “the happiness of the greatest number.” This believe or argument has it major flaws.

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The Death Penalty – A Negation of the Right to Life

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I. INTRODUCTION

There is belief by the protagonist of the death penalty, that certain needs of the society which cannot be achieved by other methods are met by the execution of the criminal. That is the solution to certain crimes is the killing of the perpetrator of such crimes. The final solution to a deviant. The understanding philosophy is that whether the executions are carried out in public or shielded form behind the prison walls, death penalty is necessary, at least for the good of the society. Probably it is on the Benthamite, utilitarian or hedonistic, principle (felicific calculus) the promotion of the common will and the "the happiness of the greatest number." This believe or argument has it major flaws.

First, it cannot justify the violation of fundamental human rights, torture cannot be justified by arguing that in some situation it might be useful. International law has clearly demonstrated that a cruel in human or degrading, punishment is always prohibited, even in the time of the gravest public emergency. It has been established that despite centuries of experience with death penalty and many scientific studies of the relationship between the penalty and crime rates there is no convincing evidence that it is uniquely able to protect society from crime or to meet the demands of justice. In many ways it does the opposite.

There is a serious moral problem with death penalty. The criminal in the case of murder kills somebody while the rest of us uses the collective will of the state to kill him. In certain instances we are faced with problem. If a state execute individuals claiming such killings are necessary and beneficial the evidence of supporting its case should be beyond reasonable doubt and, not merely speculative. In the words of a leading member of the United Kingdom Parliament during a debate on capital punishment and death penalty in 1983 "if the deterrent case us to be accepted, if we are to vote for capital punishment as a deterrent, we at least ought to be sure that it deters. If where are to hang men and women by the necks until they are dead we ought to do more than to launch a supervision, a

vague impression"¹ The death penalty is presented as magic panacea and an appropriate way to prevent and punish crime, but numerous studies concluded in different countries and using different methodologies have failed to established that it deters crime more effectively than other types of punishment.

II. DEATH PENALTY AND THE TIGHT TO LIFE

Under the 1979 constitution of the Federal Republic of Nigeria, the right to life of every citizens is guaranteed² there are also similar provisions in the constitutions of most countries., this right it the most fundamental of all the rights conferred on a person,. This right is further restated under international law where it is stated that "Everyone has the right to life".³ In Nigeria, there are however, exceptions to this constitutional guarantees and they cover circumstances in which at common law, the taking of human life can be justified. These include acts in the defence of property, self defence, effecting lawful arrest, prevention of the escape of lawful detainee or suppression of riot, insurrection or mutiny.⁴ Prisoners are not excluded from this constitutional guarantee and this includes those who have had a death sentence passed on them. This right has been upheld by judicial decisions of the Nigeria courts.⁵ What operates in reality is definitely a negation of the safeguards provided by various constitutions and the international felon.

The death penalty is not about taking life, it is also about a process that entails the deliberate abuse of a condemned prisoner's right to humanity and dignity, in particular, the right to be free from cruel, inhuman or degrading treatment. Killing constitutes the ultimate denial of the human and dignity if the condemned prisoner. The death penalty is humans because it involves by its very nature, a denial of the executed person's humanity, and it is degrading because it

¹ Roy Hattersley, Speaking in a debate on death penalty in the United Kingdom House of Common (Lower House of parliament) on 13th July 1983.

² Section 30, Nigerian Constitution, 1979

³ Article 3, Universal Declaration of Human Rights. See section 30 (2) of 1979 constitution of Nigeria.

⁴ J.O Akande, "A Decade of Human Rights' Nigeria Institute of Advanced Legal Studies Law Series (NIALS) P. 10 at P. 104

⁵ See e, g Bellow V Attorney General of Oyo State (1986) 5NWLR 828. Also Onwuka V The State

stripes the convicted person of all dignity and treats him or her as an object to be eliminated by the state.⁶

Right from the moment he enters the condemned cell, the prisoner is enmeshed in a dehumanizing environment of near hopelessness. He is in a place where the sole object is to preserve his life so that he may be executed. "The prisoner is the living dead" stated the Zimbabwe Supreme Court in 1993.⁷ Prison Accounts of the lives of condemned prisoner are harrowing. They live each day in morbid fear. Each uncertain movement, noise or sight of a warder can be terrifying. Each time one prisoner is removed to be executed, there is renewed anxiety amongst the others, but they all must live each day under this menacing shadow of death. Not only that, they think that dying can be accompanied by extreme pain. In some countries gallows are near to the death row cells. Recurrently, condemned prisoners are forced to endure the harrowing screams and noise made during the executions which can last for hours.

Emile Short, Appeal Court Judge and commissioner for Human Right and Administrative Justice in Ghana, was reported to have insisted, after a tour of Prisons in Ghana that "The death penalty is degrading cruel and inhuman. It violates the constitution's and those who are sentenced to death go through mental torture. It must be abolished" ⁸

Four methods of execution are used in Africa-firing squad, hanging (followed, in some countries by public crucifixion), stoning and beheading. At times in Nigeria, the armed robber is executed in a place where his kinsmen can watch him die. What a humiliation. The execution of a prisoner through any of these methods is a sordid act, often brutally painful and added to the pain suffered during and after protracted period of waiting, execution are intensely cruel. On 2nd August 1994, 38 people were executed by firing square in Enugu South Eastern Nigeria. One of them Simon Agbo, apparently survived, stood up an hour later bleeding profusely to protest his innocence and pleaded for water. Police reportedly threw him on to a lorry load of corpses. His subsequent fate is unknown. All these exemplify the fact that the death penalty not only denies the right to life but that processes leading up to the infliction and its actual infliction, violates the right not to be subjected to cruel and inhuman or degrading punishment. In some cases the violence used during executions has unintended consequences for other people. In 1995, a prison driver was reportedly killed by a stray bullet during a public execution in Warri, Nigeria.

III. DETERRENCE

The deterrence argument is the most frequently used for the death penalty, that it is necessary to kill an offender to dissuade others from committing the same kind of crime. We have a common faulty that men can frighten men into decency or at least goodness or moral neutrality. Perhaps it can be justified, but only in the small sphere of human relations, too simple to be of any social consequence. At first glance, this appears to be a plausible argument. What move could effectively stop those willing to kill or commit other serious crimes than the threat of the most terrible of punishments, death? What more forceful way could be found to respond to the strong desire of ordinary people to be protected against crimes? Empirical evidence, however does not support the argument. Moreover, its common sense logic rests on questionable assumptions.

The idea of deterrent can be reduce to very personal rudiments: If I know I will be punished so severely, I will not commit the crime. The logic is undeniable yet, in the thick sets of real life and real crime deterrence, while central to practically all punishment, is often very uncertain and, its effect on prospective murderers is especially unclear. Capital punishment discussions usually consist of flat-out pronouncements. Capital punishment says conservative commentator William F. Burkley "is a strong plausible deterrent". "No" declares New York former governor Mario Cuomo "there has never been any evidence that death penalty deters".

Scholars evidence too does not make much a case for deterrence. It is incorrect to assume that all or most of those who commit such serious crimes as murder do so after rationally calculating the consequences.

Murders are often committed in moments of passion, when extreme emotions overcome reason, they may also be committed under the inference of alcohol or drugs, or in moments of panic, for example when the perpetrator is caught in the act of stealing. Some people who commit violent crime are highly unstable or mentally ill. In none of these cases can fear of the death penalty be expected to deter.

Most empirical studies on the deterrent effect of the death penalty have been conducted in countries with developed traditions of statistical research and the resources to conduct the research⁹. However, evidence from other countries and relating to other crimes as well as murder, has also failed to establish that the death penalty deters more effectively than other punishments. A Japanese prison psychiatrist studied one hundred and forty five convicted murders between 1955 and 1957. He could find none who remembered thinking

⁶ Excerpt from the judgment of the South Africa constitutional court, paragraph 10.

⁷ Gubbay C.J in Catholic Commission for Justice and Peace in Zimbabwe V Attorney General of Zimbabwe and others (at 268 E-H)

⁸ National Herald, New Delhi 15th August 1996

⁹ United Nations, the question of death penalty and the new contributions of the criminal sciences to the matter chapter six.

they might be sentenced to death before committing the crime. "Despite their knowledge of the existence of the death "penalty" the prisoners have been incapable, because of their impulsions and their inability to live except in the present, of being exhibited by the thought of the capital punishment.¹⁰ After 35 years in the prison Medical Service, a British Doctor found that "Deterrence is by no means simple affair that some people think....A high proportion of murderers are so tensed up at the time of their crime as to be impervious to the consequences to themselves, others manage to persuade themselves that they can get away with it"¹¹.

In Nigeria A.A. Adeyemi, a Professor of law and criminology compared statistics on murders and executions between 1967 and 1985 and found that "murder incidents have consistently increased during most of this period" murder incidents have consistently increased during most of everyone knew this. Armed robbery too had Nigeria in 1970. The Professor found that between 1967 and 1970 and average of 994 armed robberies were committed each year but that the annual average rose to 1500 between 1971 and 1985. He concluded that the studies in Nigeria "have demonstrated clearly that no efficacy can be shown for the operation of the death penalty" for murder and armed robbery in Nigeria¹².

Another major weakness of the deterrent argument is that offenders who plan serious crimes in a calculated manner may decided to proceed despite the risks in the belief that they will not be caught. The key to deterrence in such cases is to increase the likelihood of detection, arrest and diverts official and public attention from efforts needed to bring about real situation in Nigeria, notably our ill trained equipped police force which cannot be trusted to detect crimes or combat them. This is also coupled with the absence of a well co-ordinate social defense mechanism at all levels of our criminal justice administration system. This should include a system of rehabilitation and co-ordinate social welfare system.

The deterrence argument is not borne out by these facts. If the death penalty did deter potential offenders more effectively than other punishments one would expect to find that in analysis of comparable jurisdictions, those which have the death penalty for a particular crime would have a lower rate of that crime than those which do not. Similarly a rise in the rate of crimes hitherto punishable by death would be expected in states which abolish the penalty and a decline in crimes. Yet study after study has failed to establish any such link between the death penalty and crimes rates.

From a survey of seven European Countries, Zealand and individual states within Australia and USA the Commission concluded that, "there is no clear evidence in any of the figures we examined that the abolition of capital punishment has led to an increase in the homicide rate, or that is reintroduction has led to a fall"¹³. Recent crime figure from abolitionist countries similarly fail to show that abolition has harmful effects. Although there were more murder and manslaughter convictions in South Australia in the five years after abolition than in the five years before, a long term study showed "that abolition death penalty had no effect on homicide trends in that state". The death penalty abolished there in 1976. In Jamaica, there was little change in the homicide rate during a moratorium on execution between 1976 and 1980; despite a rash of political shootings during the 1980 general election. In Canada, the homicide rate per 100,000 population fell from a peak of 3.09 in 1975, the year before the abolition of the death penalty for murder to 2.74 in 1983, and in 1986, it reached its lowest level in 15 years. In the United Kingdom, the number of homicide has risen since the abolition of the death penalty for murder but the increase has been far smaller for other serious violent offences¹⁴.

Reviewing the evidence on the relation between changes in the use of the death penalty and crime, the report on the death penalty prepared for the UN Committee on Crime Prevention and Control in 1988 states that , although no definite conclusion could be drawn about the impact of changes on the death penalty alone (as these could have been associated with other social and penal changes affecting crime), nevertheless "the fact that evidences that countries to point in the same direction is persuasive a priori evidences that countries need not fear sudden and serious changes in the curve of crime if they reduce their reliance upon the death penalty"¹⁵.

Some protagonist of death has tried in some way to establish that it has a clear deterrent effect. A notable person is the American Economist, Isaac Ehrlich who used a statistical method known as "regression analysis" to examine the possible effect of execution and other variables on homicide in USA as a whole between 1932 and 1970. During that period, and especially in the 1960s, homicides increased while executions declined. In an article published in 1975, Isaac Ehrlich "deterrent effect of capital punishment" and suggested on that "an additional execution per year over the period in question may have resulted on

¹⁰ SadakataKogi "Etude criminologique et psycho-pathologique de condames a mort ou aux travaux forces a perpetuite.

¹¹ W.E. Roper, "Murders in custody" in the hanging question, ed, Louis Blom-Cooper Duckworth, London, 1969, pg. 103

¹² A. A Adeyemi "Death penalty; Criminological perspectives the Nigerian situation" in the Death penalty pg. 489-494

¹³ United Kingdom Royal Commission on the Commission on the Capital Punishment 1949-1953. A report presented to Parliament by Command of Majesty, Her Majesty's stationery office, London, 1953 pages 23, 358-359

¹⁴ United Nations, The question of the death penalty and the new contributions of the criminal sciences to the matter, op. cit. page81.

¹⁵ Ibid. page 80.

average, in 7 to 8 fewer murders”¹⁶. Ehrlich’s study has been criticized on methodological grounds. Although his research included a number of variables likely to affect the homicide rate, he had omitted others which might also have done so, such as the increasing availability of guns. Crime homicides were less than that of other crimes against the person. The decline in executions could not have affected homicides rates in places where the death penalty had already been abolished or fallen into disuse, yet the not carry out executions as in those that previously did. A panel comprising experts, established by the US National Academy of Sciences in 1975 to provide: “an objectives technical assessment” of studies of the effects of provided “no useful evidences on deterrent of capital punishment”. More broadly, the panel also found that “the current evidence on the deterrent effect of capital punishment is inadequate for drawing any substantive conclusions.”¹⁷

IV. PREVENTION OF THE PRISONER FROM REPEATING THE CRIME (RECIDIVISM)

This is the incapacitation argument that is that a prisoner must be Killed and thus incapacitated to ensure that he or she does not repeat the crime. Clearly, once killed, a person is incapacitated forever. A policy of execution in order to incapacitate cannot, however; be based solely on the undeniable fact that dead people cannot commit crimes. Such a policy must rely on the assumption that the state can accurately determine at the same time of willing to include to include among those executed a considerable number of people who will not do so. The incapacitation-by-death argument also assumes that it is impossible to find any other effective means of preventing recidivism (offenses being committed after release). All their assumptions parole institutions are not borne out by facts. Sufficient experience has accumulated to enable of selected prisoners. Their judgments are based on the most-up-to date character and monitored behavior in prison. However, the arguments of incapacitation require that accurate assessments of potential future dangerousness be made at the time of sentencing when much is less known about a prison. It is unfortunate that both suspended sentence and parole has never been put into use or tested in Nigeria to determine their efficacy or otherwise.

It has been said that those who do not learn from history are condemned to repeat it. This may not be true of criminals learning from punishments. In this sense the deterrent argument both general and specific

has yield no fruitful results. Lord Nugent mentioned that in 1940, a man named Thomas Temple man was executed at Glasgow for the murder of his to be sure, a boy could not be hanged for stealing a pocket handkerchief – a been so transported. But Barrington, the facile princes of the profession, declares that even when the offence was swinging above them, as their happiest opportunity, because they shrewdly agreed. “Everybody’s eyes were on one person, and all were looking up”¹⁸. As earlier noted the man who is about to kill someone does not always, if ever think of the consequences, still less of such a consequence as capital punishment. As a matter of fact there seems to be sort of indifference with regard to the consequences of the act, which the prosecutor labours so hard to prove in each capital case.

Laws, the great warden of SingSing Prison in Ossining, New York, and an opponent of capital punishment, saw one hundred and fourteen people go to their punishment, saw one hundred and fourteen people go to their legal deaths, and he never was convinced that the criminal was ever deterred by the knowledge or even was going to be sentenced to death. Among the many instances cited, here is one of the most telling. Writes Lawes:

“Before Morris Wasser’s Execution, when I told him that the governor had refused him a last minute respite, he said bitterly; ‘All right, warden. It doesn’t make much difference what I say, now this here system of burning a guy, but I want to set you straight on something.’”

“What’s that? I asked.

‘Well, this electrocution business is the bunk. It don’t do no good, I tell you, and I know, because I never thought of the chair when I plugged (killed) that old guy.

‘And I’d probably do it again if he had me on the wrong end of the rod’

‘you mean,’ I said that you don’t feel you’ve done wrong in taking another man’s life?’”

‘No, Warden it aim’s that,’ he said impatiently, ‘I mean that you just don’t think of the Hot seat when you plug a guy’ Something inside you just make you kill,’ cause you know, if you don’t shut him up, its curtains for you’.

‘I see. Then you never thought of what would happen to you at the time?’

‘Hell, no and lots of other guys in here, Harry, and Brick and Luke, all says the same thing. I tell you The Hot Seat Will Never Stop A Guy From Pullin’ A Trigger’¹⁹. From Wasser’s statement from the great old Sing it is conclusive that death penalty can never deter a prospective killer, there is a greater deal of

¹⁶ Isaac Ehrlich, “The deterrent effect of Capital Punishment: A Question of Life and Death” vol. 65 No. 3 (June 1975) pages 398-414.

¹⁷ Alfred Blunstein, Jacqueline Coher and Daniel Nagin (eds). Deterrence and Incapacitaion: Estimating the Effect of Criminal Sanctions on Crime Rates, Nation Academy of Sciences, Washington, 178, p.62.

¹⁸ Charles Phillips, Vocation Thoughts on Capital Punishment, J. Ridgway, 1858.

¹⁹ Warden Lawes, Meet Murder, Harper, 1940 pp. 178-9.

psychological and emotional power behind killing, that the deterrent theory can never explain.

V. RETRIBUTION

The retribution arguments maintains that certain offenders must be killed not to prevent crime but because of the demands of justice. Execution is deemed to be a repayment for an evil deed; by killing the offender, society shows its condemnation of the latter's crime. It is an eye for an eye doctrine that is the killer cannot be allowed to get away with the killing. Execution is primarily a vengeance mechanism and vengeance is a way society gestures to itself that justice has justice have against injustice. The persuasiveness of the argument that certain offenders deserve to die is rooted in the deep aversion felt by law abiding citizens to terrible crimes. However, a close examination of how the death penalty is fundamentally flawed. Because of the unique nature of the death penalty, retribution as a basis for it makes impossible demands on the criminal justice system. Demand for the death penalty as a matter of justice runs up against the injustice and arbitrariness of the death penalty in certain cases practice. A society's restraints on using the death penalty in certain cases along with the biases inherent in all legal system and sheer fallibility of human judgment, preclude the possibility of creating a system which can ever met out death in a fair way. For example Section 318 of the Criminal Code of Southern Nigerian provides that if a person kills another in the heat of passion caused by grave and sudden provocation and before there is time for his passion to cool, he is guilty of manslaughter but not murder. It is settled law that the punishment for murder is death by hanging while manslaughter is imprisonment. The best summary of the law of provocation is that contained in *Lee Chueu v Regina*.²⁰ The three elements are the act of provocation, the loss of self control both actual and reasonable, and the retaliation proportionate to the provocation. The defense cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. How can a provoked man be expected to be reasonable?

In the USA, renowned criminologist Thursten Sellin examined statics on prosecutions, convictions and executions for murder and concluded that retributive justice is tainted by biases and by the influence of the factors beyond the control of courts of justice, such as poverty of the defendant, which prevents him from engaging competent counsel skilled in the art of criminal defense.²¹ Once it is acknowledged that not everyone

who commits murder should die (and the facts show that all societies acknowledges this) then doubts about the fairness of selecting those who are to be executed must arise.²²

Even a decision to execute everyone convicted of a particular crime would fail to meet the fundamental requirements of fairness. Especially in legal systems that rule out consideration of mitigating factors as ground for imposing a less harsh sentence. Mandatory death penalties may create an arbitrary threshold for deciding who is to live and who will die. In Singapore, for example, the death penalty is mandatory for possession of more than fifteen grams of heroin, only a tiny difference in the amount found on a person can make a difference in the amount found on a person can make a difference between life and death.

VI. DEATH PENALTY, POLITICAL VIOLENCE AND REPRESSION

Bombing, kidnappings, assassinations of public officials, aircraft hijacking and other politically motivated acts of violence often kill or main not only the intended targets of attack but by standers as well. These acts understandably provoke strong public outcry and may result in demands for the death penalty to be used. Yet as public officials responsible for fighting such crimes have repeatedly pointed out, executions are as likely to increase acts of terrorism as to stop them. Ezzat A. Fattah, a Professor of Criminology in Canada, observed that "Those who really think that the reinstitution of capital punishment will put an end to or will produce a reduction in the number of terrorists incidents are either extremely naïve or under an illusion. Standard punishments, including the death penalty, do not impress terrorists or other political criminals who are ideologically motivated and dedicated to make sacrifices for the sake of their cause.

Moreover, terrorists activities are fraught with danger and the terrorists runs all trends of deadly risks without being intimidated by the prospects of immediate death. Is it conceivable that he will be deterrent by the remote and low risk of the death penalty?²³

A member of the Palestinian Amas group wired up with explosives in a busy super market or a bus in Tel Aviv is already on a suicide mission.

What has death penalty got to do with such a person? Those responsible for drafting laws have pointed out how hard are to define acts of terror in legal status. It is difficult, if not impossible, to isolate politically

²⁰ [1963] All' ER at page 79.

²¹ Thursten Sellin, The penalty of death sage Library of Social Research, Vol, 102 Sage Publications, Beverly Hills, London, 1980, pages 55.

²² Richard O, Lempert "Desert and Deterrence: an assessment of the Moral bases of 'Capital Punishment'" Michigan Law Review Vol. 79 No. 6 (May 1981) p. 1182.

²³ Ezzat A. Fattah "Current debates on the death as a deterrent" (Paper delivered at the Seminar on "The death penalty in the wold" ,Bologna, Italy, 28-30 October 1982). Amnesty in International London, 1982 AI Index:ACT 05/1982 page 13.

motivated crimes warranting the death penalty without, in effect punishing the perpetrators for their political views as well confer special recognition on the deeds of violent group something governments usually seeks to avoid.²⁴ Executions for politically motivated crimes may result in greater publicity for the facts of terror, thus drawing increased public attention to the perpetrators of political agenda. Such execution may also create martyrs who become a rallying point for their organization. For some men and women convinced of the legitimacy of their acts, the prospects of suffering the death penalty may even serve as an incentive. The late writer Ken Saro Wiwa, an environment activities and leader of MOSOP, which this writer had the morning of his execution that no Ogoniland.

Far from stopping violence execution has been used as the justification for more violence as opposition groups have seized the opportunity to bolster their legitimacy by using in reprisal the same “death penalty” that government claimed the right to impose. It is pertinent to emphasize further that death penalty is used largely, in most countries, as an instrument of political repression. Trials leading to the death penalty are often deeply flawed in many African countries as fair trial procedures either do not exist or are not observed. Confessions made under torture are freely used without investigation. Rights of appeal are sometimes denied, inadequately trained judges and judicial officials are pointed Judges and Jurors and are improperly influenced by the political authorities. During the trial of the Ogoni nine, Gani Fawehinmi billed to appeal for the detainees was barred from appearing, he was infact “deported” from Port-Harcourt a part of his own country. By using judicial procedures that fail to meet internationally accepted fair standards, some African governments attempt to legitimize their elimination and repression of political opposition.

To buttress this position, the Nigerian situation is a clear example. In November 1995, Ken Saro-Wiwa, President of the Movement for the Survival of Ogoni People (MOSOP) and eight others were executed in Nigeria following convictions by a Civil Disturbances Special Tribunal for the murder of four rival Ogoni leaders. A day after the murder, Lt. Colonel Dauda Komo, the Rivers State Military Administrator, publicly accused, the MOSOP leadership of the multinational oil company, Shell which led to the suspension by Shell of oil drilling operations in Ogoniland Unofficially been detained as a prisoner of conscience on several occasions.

All the nine Ogoni men were ill-treated and some were severally tortured during nine months pre-trial detention in military and police custody. The trials were grossly unfair and were influenced by the

government. One of the three judges at the trial was a military officer and the accused has no right appeal. The decrees issued by the government ensured that the tribunal's proceeding could not be reviewed by a higher court. According to Michael Bimbaum, a British lawyer who witnessed the trials. “The judgments of the Tribunal were not merely wrong, illogical or perverse. It is downright dishonest. The tribunal consistently advanced arguments which no experienced lawyer could possibly believe to be logical or just. The only explanation is that the Tribunal first decided on its verdicts and then sought for arguments to justify them. No barrel was too deep to be scrapped”²⁵. Although the convicted prisoner were entitled to ask for a commutation of sentence, they were executed within the prescribed time they could have done this. The Human Rights Committee established under the International Covenant on Civil and Political Rights aiming at the abolition of death penalty considered the executions to be extra judicial.

No matter what the punishment is where a people are committed to asserting their rights, they can never be deterred. As France then Minister of Justice, Robert Badinter said in 1985: “history and contemporary world events refute the simplistic notion that the death penalty can deter terrorists. Never in history has the threat of execution halted terrorism or political crime. Indeed, if there is one kind of man or woman who is not deterrent by the threat of the death penalty, it is the terrorist, who frequently risks his life in action. Death has an ambiguous fascination for the terrorist, be it the death of others by one's own hand, or the risk of death for oneself. Regardless of his proclaimed ideology, his rallying cry is the *fascist viva la muerte* (Long Live death)”²⁶.

VII. THE DEATH PENALTY IN PRACTICE

The decision to apply it means that means that living man and woman must be singled out and put to death. It is the realities of its use around the world and not just theories about the death penalty that underline the urgent need to abolish it. The death penalty does not provide unique protection or benefit to society but it is unique punishment cruel in the extreme and irreversible. When such a punishment is applied by systems which must but subject to human errors and prejudice the result is that justice will not be served but prevented.

²⁴ DouweKorff “The death penalty and terrorism” (Pper delivered at the Seminar on “The death penalty in the world”). Op. cit.

²⁵ ‘A’ Travesty of Law and Justice an analysis of the Judgment in the case of Ken Saro-Wiwa and others page2.

²⁶ Robert Badinter, statement at a Seminar on the abolition of the death penalty and arbitrary, summary and extrajudicial execution, organized by Amnesty International at the Seventh United Nations Congress on the Prevention of crime and Treatment of offenders, Milan, Italy,27 August 1985 Amnesty International, London A1 index:ACF05/27/85.

VIII. THE DEATH PENALTY AND DISCRIMINATION

It would be surprising if such a terrible and final punishment did not tend to be inflicted mostly on the vulnerable members of a society, the poor, the unemployed, the mentally disturbed and members of racial, religious or ethnic minorities. Throughout the world it is applied disproportionately to the disadvantaged, and death sentences are imposed on people of the lower end of the social scale who would not have faced the death penalty if they had come from a more favoured sector of society. This can happen because they are less able to function effectively within the criminal justice system (through lack of knowledge, confidence or funds), or because that system in some way reflects the predominantly negative attitude towards them held by society at large and by those in power. There is also evidence that some offenders are more likely to face the death penalty if their victims come from the more favoured sectors of society. In the USA, a detailed study tried to discover why killers of white victims in the State of Georgia during the 1970s had received the death penalty approximately at times more often than killers of blacks. The researchers found racial disparities in the treatment of similar offenders at every stage of the judicial process from indictment of sentencing²⁷. Under apartheid South Africa death sentences were imposed disproportionately on black defenders (including those officially described as "coloured") by an almost entirely white judiciary. All South African judges under apartheid except for one judge in Bophuthatswana homeland used to be white. Now the South African current constitution has abolished death penalty for ordinary crimes²⁸. In those days the poverty of a large number of black capital trial defendants jeopardized their cases and resulted in harsher penalties for them.

Here in Nigerian in capital trials such as armed robberies counsels are assigned to defend poor defendants by the State. This is under the Legal Aid Scheme and the payment is less than one thousand naira per trial. In a matter that involves life or certain death what a price to pay counsel. In Jamaica the research team of the Official Committee on Capital Punishments and Penal Reform appointed in 1979 interviewed 40 of the 81 prisoner then under death sentence. They found that the large majority were from the lower socio-economic strata of society. They had grown up in violent neighbourhoods and many have received little or no education, four were illiterate and 21

were semi-literate. Most were first offenders and many appeared not to have had the benefit of adequate counsel²⁹.

IX. RISKS TO THE INNOCENT AND JUDICIAL ERROR

The fallibility which leads to the discriminatory or arbitrary imposition of the death penalty also makes inevitable the execution of some prisoners who have been wrong convicted. A poorly prepared defense, missing evidence or even a decision of the investigating authorities to pin the guilt falsely on the accused can all result in wrongful conviction. Such convictions are confining themselves to points of law. During a debate on the death penalty in the House of Commons in the United Kingdom in April 1997, Roy Jenkins, a former Home Secretary (the Cabinet Minister responsible, for decision on commutation of death sentences) said that during two terms in office "I had to deal with 10 capital cases in which there were varying degrees of doubt, some quite simply amounting to wrongful convictions "Not all of the prisoners were hanged"... "But two were, and more would have been had the death penalty not been abolished in 1965". He said, "it is my view that frailty of human judgment.... is too great to support the finality of capital punishment."³⁰ During the past decade prisoner under the sentence of death in several countries have been freed after the courts found that they have been wrongly convicted. Often such wrongful convictions are reversed, only after persistent efforts and there are probably many true facts of which have never come to light.

In Africa, many legal systems are frail and many states are unable or unwilling to offer adequate legal representation to people facing capital charges who cannot afford to pay for a lawyer are themselves. In Nigeria low fee legal aids and Youth Corps lawyers are frequently assigned to cases involving capital punishment, where defendants are poor. The Rwandan legal system was virtually destroyed in the 1994 genocide. The majority of the country's lawyers, magistrates, prosecutors and criminal investigators were either killed or fled the country. The first genocide trials started in late 1996 and resulted in the death sentences being passed after unfair trials.³¹

Even in regular courts there will always be a possibility of error under any system of justice. As the South African Constitution Court has stated "imperfection inherent in criminal trials means that error

²⁷ These finding are reported in David C. Baldus, George Woodworth and Charles A. Pulaski Jr Equal Justice and the death penalty (to be published)

²⁸ Africa- A new future without the death penalty p.3 Published by Amnesty International 1997.

²⁹ Jamaica Committee on the Punishment and Penal Reform, Report of the Committee to consider Death as a Penalty for Murder in Jamaica, December 1981.

³⁰ House of Commons official report parliamentary Debates (Hansard) Vol. 113 No. 85, 1 April, 1987, column 1150.

³¹ Africa- A new future without the death penalty page15. Published by Amnesty International 1997.

cannot be excluded". Furthermore it pointed out "In the infliction of capital punishment judicial and executive error can never be wholly excluded nor, of course, repaired"³². In Nigeria for instance Bodunrin Baruwa was acquitted in 1996 by the Court of Appeal after a total of 16 years in prison. He had been sentenced to death by a High Court for murder, after he reported, finding a dead body near his premises to the police. The Court of Appeal regretted that he would "leave custody amazed at the way the law has been used to work such extreme injustice and hardship on him and his family" and that he would go home "broken..... With regret that he played the good citizen to his (own) doing".³³ In the celebrated case of *Aliu Bello v the Governor of Oyo State*³⁴ a convict was executed while his appeal was pending. The convict was an Armed Robbery and Fire Arms Tribunal of Oyo State and filed an appeal to the Federal Court of Appeal. Shortly before that appeal was heard, he was executed on the basis against which he had appealed. His family sued the then Oyo State Government and claimed N100, 000 for the wrongful killing of the breadwinner of the family. The Supreme Court found the execution to be wrongful. Whatever compensation that is paid to the family can never satisfy such execution which was definitely an irreversible process.

X. CONCLUSION-THE WAY FORWARD- ABOLITIONISM

Death penalty can never be and has been the solution to any crime or criminal behaviour. In 1996 a Nigerian newspaper wrote that "Despite these executions, crime wave, most especially armed robbery, has continued to be on the increase. Between 1991 and 1993, there were 7538 reported cases of armed robbery". The paper also mentioned that between September and October 1995, over 1,200 armed robbery suspects died in gun battles with the security operatives in Lagos State alone while no fewer than 15,000 are in various detention camps in Lagos.³⁵ When all judicial appeals have been exhausted, a death sentence may still be postponed or set aside through the exercise of clemency. This usually takes the form of a decision to commute the death sentence to a lesser punishment such as life imprisonment. These are present in the Constitution of most countries. Deriving from an ancient prerogative of monarchs who had the power of life and death over their subjects, clemency is usually exercised by the Chief Executive of the Country of the jurisdictions in which the death penalty is used. The last hope for a prisoner sentenced to death, clemency can be used to correct possible errors, to

mitigate the punishment and to compensate for the rigidity of the criminal law by taking into account factors relevant to an individual case for which the law by makes no allowance.

The right of anyone sentenced to death to seek clemency is well established in international human rights instruments.³⁶ In deciding whether or not to grant clemency the authority may seek the advice of an appointed commission, review medical and prison reports and judicial records, and interview or receive submissions from people connected with the case, including the prisoner's relatives and friends.

Recently the execution of twenty five prisoners of the genocide wars in Kigali brought sharp reactions worldwide. The whole world is moving towards abolishing the death penalty. A Tanzanian High Court said "the effect upon the public of death sentence is to brutalize rather than humanize. If we insist on killing murderers we are descending to the same levels as the murderers and this debases societythe state is a teacher and when it kills, it teaches vengeance and hatred. Murderers are not to be loved nor may they be disregarded. But in allowing them to live, society is saying that sanctity of life is all important".³⁷ When the State kills it sets standards which encourages violence in society. States wishing to change attitudes towards respect for human life human life should try to achieve this by their exemplary treatment of those accused of violating life. What the Constitutional Court said in the case of South Africa could be applied to many African countries.

"The State must set example by demonstrating the priceless value it places on the lives of all its subjects, even the worst."³⁸

During the era of President ShehuShagari, an attempt was made by this gentleman to get death penalty out of our law books. This golden opportunity was rebuffed by Nigerians. We could have joined our neighbours

- Togo and Ivory Coast who are abolitionists of death penalty in practice.

Former Gambia President was reported as saying that the "Death penalty can never be a solution, violence only asks for more violence".³⁹ Death penalty is a diversionary method from the need to improve law enforcement system and to address the underlying cause of crime. With orchestrated thievery perpetuated

³² Ibid, p. 15

³³ Ibid, p. 16

³⁴ Tempo Magazine 30 October 1996, vol. 7 No. 16 p. 13.

³⁵ Tempo Magazine 30 October 1996, Vol. 7 No. 16 p. 13.

³⁶ Article 6 of the ICCPR: "Anyone sentenced to death shall have the right to seek pardon or communication of the sentenced. Amnesty, pardon or communication of the sentence of death may be granted in all cases". Similar provision appear in American Convention on Human Rights death penalty adopted by ECOSOC.

³⁷ Nwalusanya J. in the Republic V Mbushuu Dominic Mnyaroje and Criminal Sessions Case No. 44 of 1991.

³⁸ Justice Didcott, South African Constitutional Court Judgment paragraph 190.

³⁹ Excerpt from Correspondence to Rie van Zallam, WACG in 1987.

by each succeeding military kleptocracy and without concrete efforts to solve mass youth unemployment... the death penalty is a weapon being used to deal with a restless and disenchanted populace in Nigeria. For Nigeria to be catapulted into greatness in the coming millennium – this barbaric practice should be removed from our statute books.





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