

THE DISPROPORTIONATE EFFECT OF THE DEATH PENALTY ON WOMEN IN NIGERIA¹

Abstract

Death Penalty still occupies a pride of place in the statute books of Nigeria, and the Constitution of the Federal Republic of Nigeria 1999 (as amended) does not prohibit its application. It however seems that there has been an extension to the application of the death sentence to include acts that ordinarily should be issues of morality. Some cultural and traditional practices also constitute in themselves extrajudicial death sentences. This paper seeks to identify, and x-ray the disproportionate effect of the death sentence on women in Nigeria, and proffer necessary recommendations.

Key words: *Disproportionate effect, Death Penalty, Women, Nigeria*

1. Introduction

Men and women alike involve in crimes, and can also be victims of different forms of crimes and offences. In all the countries of the world, women get arrested, prosecuted and sentenced for being in conflict with the laws of their land. Criminal Justice system oversees these processes and justice system differs from one country to the other. The underlying similarities however, are that women are prone to some peculiar offences and are more likely than men to be stigmatized, and to receive bitter societal condemnation for being in conflict with the law. Nigeria is a federal state with a population of about 150 million and women are likely to make up more than half of this population. Nigeria also has a tripartite system of criminal law and justice administration. The Criminal Code Act (based on English Law and legal practice); the Penal Code (based on Maliki law and Muslim System of law and justice) and customary law (based on the customs and traditions of the people)². The 1999 Constitution of the Federal Republic of Nigeria (as amended) guarantees freedom of religion and separation of church and state. Zamfara State in 1999 adopted a Sharia Penal Code and since then eleven states from the North (Moslem states) have also declared sharia law as their state laws. Under the sharia law, women have a different code from men³. Nigeria is a tradition bound society and highly patriarchal.

The multiplicity of ethnic groups and consequently religious and cultural acceptances have over the years seen women as the ‘weaker sex’ and discriminatory practices in the communities, the society and the state (especially by men) are condoned. Sentencing is an important aspect of the criminal justice system. Despite this fact, *sentencers* rarely pay much attention to it. When a criminal trial is well and meticulously conducted, it forms part of the best aspect of our law, but when the sentencing aspect is pronounced, it becomes obvious that a man’s fate could be summarily discharged in a very short while. There are myriads of sentences varying from death penalty to suspended sentences with intermediate sentences such as imprisonment, fine, Orders and caning between them. This paper will look at the death penalty in relation to women.

2. The Provision for the Death Penalty in Nigeria

Ever since Independence in 1960, Nigeria’s criminal justice system has adopted the death penalty as a sentencing option for peculiar and severe crimes requiring capital punishment. Section 33 of the 1999 Constitution of Nigeria guarantees everybody the right to life thus;

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² Chioma Daisy Ebeniro, “The Problems of Administration of Justice on female offenders in Nigeria” *African Journal of Criminology and Justice Studies* (AJCJS) Vol 4 No. 2 April 2011.

³ *Ibid.*

- 1) 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.
- 2) A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary.
 - a) For the defence of any person from unlawful violence or for the defence of property;
 - b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
 - c) For the purpose of suppressing a riot, insurrection or mutiny.

The import of this provision is that the Constitution of the land accommodates death penalty under given situations. Under those situations the right to life that the Constitution guarantees everybody, shall be derogated from. Under the Criminal Code Act⁴, kinds of punishment which may be inflicted were listed as death, imprisonment, caning, fine and forfeiture⁵. It is of interest that death is the first on the list even if they chose to go from the highest to the least. It could also have been the other way round, but they chose the option that will place death first. The Penal Code and the Criminal Code Act both contain provisions for death sentence. Section 319 (1) of the Criminal Code prescribes the punishment for murder thus: “Subject to the provisions of this section of this code, any person who commits the offence of murder shall be sentenced to death”.

Judicially, the constitutionality of the death sentence was confirmed in *Kalu v State* (1998)⁶. The Supreme Court from 1998 affirmed the death penalty when used as a sentence for a criminal offence for which the subject has been found guilty according to a Court of law. The Criminal Code and the Penal Code contain similar rules regarding the application of the death penalty. They prescribe death by hanging, or firing squad, as the sentence for a category of serious criminal acts such as murder in S. 319 of the Criminal Code, and culpable homicide in section 221 of the Penal Code⁷.

Other criminal acts apart from murder, culpable homicide and *Zina* which will attract the death sentence in Nigeria are armed robbery⁸, treason or instigating an invasion of Nigeria⁹, fabricating false evidence that leads to the conviction of death of an innocent person,¹⁰ aiding suicide of a child or lunatic,¹¹ and trial by ordeal where death results.¹² It would seem that while many countries of the world are abolishing the death sentence, it continues to be well seated in the statute books of Nigeria.

3. Women and the Death Penalty under the Penal System and the Disproportionate Effect

In 2003, there was unprecedented level of national and international interests and agitations over the death penalty in Nigeria. The extension of the death penalty to areas of private concern in parts

⁴ C38 LFN.

⁵ S. 17

⁶ (1998) 13 NWLR (pt 583) 531.

⁷ The Death Penalty and Women in Nigeria; Amnesty International 2004.

⁸ Armed Robbery and Firearms Decree N0 5 of 1984.

⁹ SS 37 and 38 of the Criminal Code; SS 410 and 411 of the Penal Code.

¹⁰ S. 159 (2) of the Penal Code.

¹¹ S. 227 of the Penal Code.

¹² S. 208 of the Criminal Code, 214 of the Penal Code.

of Nigeria roused the arguments as to the appropriateness of the death penalty in general, and the impetus in the use of the criminal justice system to control sexual behavior. The death penalty in its application in Nigeria violates the human rights of women and has a discriminatory effect on women in certain cases and for certain crimes. The death penalty has been introduced for offences such as *Zina*¹³, (adultery), rape and incest¹⁴. The relevant section defines the commission of *zina* thus;

Whoever being a man or woman fully responsible, has sexual intercourse through the genital of whom he has no sexual rights and in circumstances in which no doubt exists the illegality of the act.

Zina is punishable by flogging under the Penal Code, but the states that have introduced Sharia Penal laws now extend the death sentence to married people who commit *zina*, while the punishment of hundred lashes is reserved for unmarried people who commit *zina*.¹⁵ It is worthy of note that the charge of *zina* and the punishment prescribed in the law applies only to Muslims. The agitating issue is that by applying the death penalty under this circumstance, some rights are violated such as the right not to be discriminated against, the right to freedom of expression and association and the right to privacy. *Zina* as an offence, if applied to only Muslims, negates the principle of equality before the law, and equal protection of all citizens by the law, which is guaranteed by the Constitution of Nigeria.¹⁶ It would seem that under the introduced Sharia Penal Codes¹⁷, which not only establish Sharia Courts but also provide for the adoption of Islamic penal systems for the states, the behavior of men and women of the Muslim faith is now regulated, controlled and governed by legislation. There are several conditions related to the person who commits *zina* (adultery) that must be met. First of all, the punishment cannot be enforced unless there is confession of the person, or four male eye witnesses who each saw simultaneously, the private organ of the man inside the vulva of the woman.¹⁸ All these must be proved in the open court.

For the woman however, pregnancy outside marriage is evidence of adultery (*zina*), while the man can only be convicted if he confesses or four male witnesses testify against him. A woman who is raped must also produce four male witnesses or eight females, since in Islam, the evidence of two females is equated to that of one male. This is just to prove that she was actually raped and did not commit *zina*. The four witnesses issue comes from the Quran and was stipulated by Muhammed when allegations of adultery were leveled against his wife Aisha. In response, he said: “Why did they not produce four witnesses? Since they produce not witnesses they verily are liars in the sight of Allah”.¹⁹

Whether adultery or rape, the burden lies on the woman to produce four witnesses to testify to the rape, and also to prove consensual sexual intercourse in the case of *zina*. This is ultimately even to give a father to her child, in the event that she gets pregnant. The rationale behind this is difficult to fathom, since every sane mind would know that nobody invites four witnesses to watch him or her commit *zina*. It would be very difficult to find a man guilty on this, but for the woman, the fact of pregnancy is enough to prove *zina* against her. This state of affairs will also make it very

¹³ For example, SS 125 and 127 of the Sharia Penal Code of Zamfara State.

¹⁴ SS. 130 and 131 – Zamfara, SS. 132 and 133 Sokoto, S. 126 Kaduna SS, 126 and 127. Kano.

¹⁵ Quran 24:2.

¹⁶ S. 13.

¹⁷ The Law to make Provision for the Establishment of Sharia Courts and related Matters Law No 5 2000 and the Law to provide the adoption of Islamic Penal System for the State Law No 6 of 2000 for Sokoto.

¹⁸ F A Anyogu, *Access to Justice in Nigeria: A Gender Perspective* 2nd Edition, Enugu Ebenezer Productions 2013.

¹⁹ *Ibid.*

easy for rapists to get away with the crime, as rape is committed in closed doors or secluded environment. The woman needs to know that she would be raped for her to mount four unimpeachable witnesses to testify in her favour. When they are raped, it is very difficult to prove rape against the culprit, and even when they commit adultery, the fact of pregnancy is enough to rope them in and stone them to death while their male partners go free for want of four eye witnesses. This law is nothing short of a trap to disproportionately stone women to death while men live on.

4. Violation of Women's Right under the Death Sentence

While the world is trying to abolish the death sentence or at least limit its application to very serious offences²⁰ as the writer would advocate, some legislation in Nigeria have increased the number of crimes carrying the death penalty²¹. The offence of *zina* (adultery) is punishable by flogging (which contravenes the constitutional provision²² of right to dignity of the human person), under the Penal Code. The advent of the Sharia Penal Code has made it an offence punishable by death (by stoning) for married people and 100 lashes for unmarried ones.

It should be noted that the death penalty when applied in this manner violates other rights guaranteed by the 1999 Constitution of the Federal Republic of Nigeria²³. These rights include non-discrimination²⁴, freedom of expression and association²⁵ and the right to privacy²⁶. *Zina* as an offence erodes the principle of equality before the law²⁷ promised all Nigerians by the Constitution. *Zina* as a criminal offence, not only enables the states where it operates to disproportionately sentence women to death, but it also criminalizes the act of sexual intercourse between two consenting adults, derogating from the right to freedom of association and privacy respectively. Some abortion related offences do not carry death sentence under both the Criminal Code and the Penal Code²⁸. In spite of this some women involved in abortion-related offences as above have instead been charged with culpable homicide which carries death sentence. A report by Amnesty International during an interview on a Mission to Nigeria with women detained at the Katsina Prison, Katsina State, succinctly narrated the violation of the human rights of women under the death sentence. They found that one of the inmates had been convicted of culpable homicide and sentenced to death by hanging for having an abortion. Of the women awaiting trial, three have been charged with offences of culpable homicide. The Amnesty International then noted the antecedents of the accused persons whose names have been truncated in the report to protect their image.

RM – 23 years was charged with culpable homicide under the Penal Code. She was married and was illiterate. She was charged with killing her baby who according to her, she delivered after aches. She developed cold after delivery and was taken to hospital. She was still in the hospital when she was told that the baby had died. Apparently, her husband allegedly informed the police who subsequently arrested her and at the time of the interview, she had been in detention for a year.

²⁰ Article 6 ICCPR for example.

²¹ SS 126, 127 Sharia Penal Code Laws Zamfara State; S. 129 SPC Laws Sokoto State, SS 121, 122 SPC Laws Kaduna State.

²² S. 34.

²³ C23 LFN 2004.

²⁴ S. 42 *Ibid*.

²⁵ SS 39, 40 *Ibid*.

²⁶ S. 37 *Ibid*.

²⁷ S. 17 (2) (a).

²⁸ E.g. Penal Code imposes 14 years' imprisonment for causing miscarriage while the Criminal Code Act imposes a penalty of up to 7 years on any person who aborts or procures an abortion.

HI, 25 years has been charged with culpable homicide and concealment of birth under the Penal Code. She had a baby after she was divorced from her husband. According to her she asked a woman for help and she was advised to have an abortion. HI had an abortion. She visited a doctor who gave her medication, which she did not take. She started bleeding. The woman advised her to go to hospital and went with her, but someone reported her to the police. The police themselves wrote confessional statement of having terminated a pregnancy. HI is illiterate and was reportedly forced to put her thumbprint on the statement as she could neither read nor write. Her confession was allegedly fabricated by the police. She has been in detention since arrest and as of March 2003 she was awaiting trial in Katsina and no progress has been reported in her case up to (27/4/2007) at the time of report.

IJ, 35 conceived a baby out of wedlock after she had been divorced by her husband. According to her testimony, she had a still born baby. A villager reported her to the traditional leader who reported it to the police. IJ says she was alone at the delivery. She neither had legal representation at the police station nor at the trial. Police allegedly withheld medical evidence corroborating still birth. She was convicted of culpable homicide under the Penal Code in 1993 and sentenced to death by hanging two years later. She had been in detention and prison for ten years. Her family has abandoned her and the warders in the detention center have prejudicial attitudes towards her because of the offence she had been convicted of. No further progress had been reported in her case at the time of report.

A very common characteristic in these three reports is that the women in issue were from low-income background. Most of them had also conceived outside of functional marriage as they were either unmarried, separated or divorced at the time of their arrest. Third parties including village heads reported them all. Several of these women had no legal representation and medical evidence that could have exonerated any of them were either suppressed or eliminated entirely in order to secure conviction. From the foregoing, it would seem that the application of the death sentence is disproportionately affecting some of the poorest group (women) in the nation. This is an illustration of the systematic abuse of women's rights which affects particularly the poor, illiterate rural women, who do not conform to social norms and have had a pregnancy outside marriage²⁹

5. Potential Extra-Judicial Killing of Women under Customs and Traditions

Customary observations and traditions create hardship for women, and sometimes subjugate them onto death. Nigerian women are subject to cultural pressures that are inconsistent with human rights, and face untold pressures, hardships and injustices when they become widows. In some cultures, the woman must go into seclusion immediately the death of her husband is announced. In some cultures, the woman is forced to neglect her body. Some sit on the bare floor, and are forced to wail intermittently to signal mourning mood and respect for the dead husband.

In some cultures, the widow has to sleep with the chief priest of a deity to separate herself from the spirit of the dead husband. The same chief priest separates the spirit of all the dead men in the community from their wives. What a short and fast conduit for contraction of HIV/AIDS which would have led to the death of many when anti-retroviral drugs had not been discovered. These things are perpetrated on lowly rural women who are not likely to check their HIV/AIDS status; so even today they stand a high risk of dying from HIV/AIDS. Where a woman is accused of complicity in her husband's death, some cultures lock her up in a room with the corpse of her husband. If she already has a weak heart, this is like a death sentence on her. Other cultures coerce

²⁹ Amnesty International Report on the Death Penalty and women under Nigerian Penal system at <http://www.amnesty.org/library/index/engfr430012004> accessed 10/12/12.

her into drinking the water used in washing the corpse. With all the chemicals used in embalming and preserving a corpse, this is like feeding someone with poison. For them if she survives, then she had no hand in her husband's death, but if she dies (certainly from the poisoned water) then she killed her husband. Some other cultures also put a piece of kola nut on the dead body and ask the wife to pick it up with her mouth.

It should be noted that sometimes greedy relatives who are after her husband's property, really poison the kola nuts in addition to the already poisoned water. Female genital mutilation could also cause massive bleeding leading to death. It should be noted that men are not expected to observe any of the mourning rites in respect of their dead wives, and a whole lot of the human rights of the widow such as right to life, right to reproductive health, right to dignity of the human person and others are violated. It is humbly submitted that while the very dangerous mourning rites do not have judicial backing or authority, they also in a special way constitute death sentence *albeit* extra judicially.

6. Nigeria's Human Rights Obligation

The general trend in the international community is towards the abolition of the death penalty³⁰ but 32 African States still retain the death penalty including Nigeria. International human rights norm requires that where death penalty exists, it should be reserved for the most serious crimes³¹. Nigeria is always among the first nations to sign and ratify International Instruments and has ratified the International Covenant on Civil and Political Rights (ICCPR)³² and Convention on the Rights of the Child³³. All these instruments guaranteed the right to life and the right not to be arbitrarily denied right to life. These Conventions also regulate the areas of crime where the death penalty can be applied and to whom. The ICCPR maintains that in countries where it is retained, its use should be limited to serious crimes³⁴. As stated in the United Nations Commission of Rights resolution³⁵ it should be used as an exceptional measure, but not going beyond 'intentional lethal or extremely grave consequences'. The Convention on the Elimination of all forms of Discrimination Against Women³⁶ equally mandates State parties to 'establish legal protection of the right of women on equal basis with men, and to ensure through competent national tribunals and public institutions, the effective protection of women against any act of discrimination, which denies women access to justice, and the right to fair trial in capital offences on the same footing with men'.

It should be noted that instead of protecting men and women equally, Nigeria, as far as the death penalty is concerned, protects men in some offences and disproportionately passes the death sentence on women. It is not surprising therefore that an important document like CEDAW has not been domesticated in Nigeria. Nigeria put a stricture on itself in the constitution.³⁷ While she will be among the first to sign and ratify international treaties, covenants and conventions, they will not have the force of law in Nigeria, unless reenacted into Nigerian legislation and this is an uphill task. It will take inter alia consent of at least two-thirds of the Houses of Assembly for this to happen. With the multiplicity of cultures, religion and ethnic differences, this will not be an easy task. CEDAW cannot be cited authoritatively to ground a decision in Nigeria, but will only

³⁰ Article 6 (2) ICCPR and safeguards of the safeguards guaranteeing the rights of those facing the death penalty.

³¹ Ratified in 29/10/1993.

³² Nigeria has ratified the African charter and domesticated it via the (Ratification and Enforcement Act Cap 19 LFN 2004.

³³ Ratified on 19/4/99.

³⁴ Article 6.

³⁵ 2003/67.

³⁶ Article 15.

³⁷ S. 12.

act as a persuasive authority for the activist judges and Magistrates. The African Charter on Human and Peoples Right preaches equality before the law, and the Protocol on Right of Women guarantees equality before the law and access to justice³⁸. The African Charter has been domesticated in Nigeria; yet these rights still elude women. Being a signatory and ratifying these instruments, Nigeria has signified her willingness to abide by the provisions of these instruments, but from the look of things, Nigeria is failing in its human rights obligation as far as the issue in consideration is concerned.

7. Conclusion

This paper has tried to give the position of Nigeria as far as the death penalty is concerned; and has also given an insight into women and the death penalty under the Penal system. The disproportionate effect of the death penalty on Nigerian women was also outlined. Instances of the violation of women's human rights under the death sentence were also x-rayed. The paper went on to give an account of extra judicial killing of women in the name of cultural observances. It is evident from the work that Nigeria still operates the death sentence, that the manner in which the death penalty is operated, creates a disproportionate effect on women whose human rights are grossly violated under the death sentence. While Muslim women are deeply involved in the judicial quagmire under sharia laws, women in the South are not precluded from the injustice on account of customs and traditions. Unfolding events also show that Nigeria is not adhering to the implications of her being a signatory and ratifying all the international instruments that protect life, equality before the law and equal protection of the human rights of men and women. Gross violation of the human rights of women under the death penalty is deeply observed in women of low income who are also illiterate. On this account, the empowerment of women is very vital. When a woman is literate and empowered, it will not be easy for village heads and third parties to deal with her as they deem fit. She will be more able to recognize her rights, enjoy them and enforce them in the event of violation. Cultural observances also affect more, the illiterate women who are not empowered. It is therefore recommended that customs observations and traditions that are inimical to the dignity of the person of women, should be done away with. A lot of these customs have faded away in many communities, but they still persist in some others. As long as there is any woman somewhere being violated, the quest for the human rights of women shall continue to take pivotal position in human rights agenda.

Section 12 of the Constitution which debars international instruments from having the force of law in Nigeria, unless they are domesticated, should also be expunged from the constitution. In its present manner of application of the death penalty, Nigeria is not only failing to meet its obligation in international human rights treaties, but also acting contrary to the dictates of its own constitution. It is usually the NGO's who discover some of these atrocities and cry out to the entire world. It is therefore pertinent that they be accorded a conducive atmosphere to work in. Some recommendations have been made in this paper. It is hoped that if adhered to, the lot of women shall be bettered to remove them from some of the nightmares they go through in life.

³⁸ S. 8.