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Death For Rape In Nigeria: A Closer Look At The New Kaduna State Penal Law

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Abstract

In June of 2020, all 36 State governors in Nigeria declared a state of emergency over rape and other gender-based violence against women and children in the country. This came after a national outcry following the rape and murder of two young girls. In November 2020, the UN reported that at least 3,600 cases of rape were recorded during the nationwide lockdown occasioned by Covid-19. These figures are indeed very alarming, and a firm collective response as a society is necessary. Several groups have called for the death penalty and/or castration of convicted rapists. In fact, Kaduna State has amended its laws to prescribe both punishments. There is worry especially on the international scene, on the efficacy of such a law. This article examines the effectiveness of harsher penalty to deter crime as regards rape. The existing judicial system in Nigeria was also examined against the background of implementation. There is no sufficient evidence for a compelling case as regards the effectiveness of stiffer penalties to deter crime. Sensational measures such as death and castration may momentarily satiate the public thirst for blood but will ultimately fail to have any meaningful impact on solving this problem. However, criminal justice reforms such as the VAPP Act gives good ground to protect victims and ensure justice. But the amendment of laws and partial adoption of reforms only constitute the foundation of lasting solution. A sustainable solution will require even more systemic reforms starting from a uniform ratification of the VAPP Act across Nigeria. This article explores some suggested reforms for a more robust response to the menace of rape.

Keywords: Rape, Death Penalty, Capital Punishment, sexual violence

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Introduction

The debate over rape in Nigeria, as well as all over the world, is always fraught with emotions. The word alone conjures up horrible images in the mind of any reasonable person. The United States Supreme Court in Coker v Georgia (1977) described it as "a violent crime, which short of homicide, is the ultimate violation of self". Similarly, in Onoyiwa v State (2018), The Court of Appeal of Nigeria described the crime of rape as "undoubtedly a wicked and callous violation of the person of the victim".

The debate on capital punishment is arguably even more controversial. Among all the issues that criminal punishment raises, none has been the subject of greater public controversy as the death penalty (Duru, 2012). Over the years, academic writers, jurists, philosophers and the public have expressed diverse views and opinions on the issue. The attitudes of nations vary from one to the other; and this is shown in the fact that crimes that attract capital punishment in the retentionist countries differ from jurisdiction to jurisdiction. Some countries consider a long list of crimes while others consider only a handful. Furthermore, there is no universal yardstick to classify which crime will attract capital punishment, and which one will not (Akingbehin, 2012). The line of questioning that justifies the different positions is similar. Does the death penalty deter crime? If not, is it necessary to satisfy society's desire for retribution against those who commit unspeakably violent crimes? Is it worth the cost? Are murderers capable of redemption? Should States take the lives of their own citizens? Are current methods of execution humane? Is there too great a risk of executing the innocent?

In Nigeria, there has been an increased call for the capitalization of the offence of rape, particularly in the last decade, both by the general populace and some top government officials. In 2013, the then minister of women affairs was quoted by BBC saying "Rape has reached an alarming level, with seven to 10 cases reported weekly in Nigeria. It is also trying to make the police set up a gender desk in every police station to handle such cases so that serious punishment, perhaps death sentence would be handed to culprits" (Ewokor, 2013). In 2019, Nigerian lawmakers called for the death penalty for the offence rape, weeks after allegations of sexual assault against senior religious clerics sparked nationwide uproar (Iroanusi, 2019). A year after that, in September 2020, Governor

Nasir Ahmad el-Rufai of Kaduna state signed off on an amended penal law prescribing the death penalty and surgical castration for any convicted rapist in the state. Section 258 of the Kaduna State Penal Code (Amendment) Law, 2020 now provides thus:

> *(1) Whoever commits rape of a child below the age of fourteen (14) years shall on conviction, be punished with surgical castration and death.*
>
> *(2) Whoever has sexual intercourse with a male child below the age of fourteen (14) years shall be punished with surgical castration and death.*
>
> *(3) Where a female adult is convicted for the offence of rape of a child, the court shall punish the accused with Bilateral Salpingectomy and death.*
>
> *(4) Where the victim is above fourteen (14) years, the court shall, on conviction, sentence the accused with the punishment of surgical castration and life imprisonment.*
>
> *(5) Where the convict is a child, the court shall order as appropriate under the Children and Young Persons Law Cap 26 Laws of Kaduna State,1991.*
>
> *(6) Where the victim is a child, the court shall, in addition to the conviction under subsections 1 and 2, order that the convict is listed in the Sex Offenders Register to be published in the media by the Attorney General.*
>
> *(7) Where the court is trying the offence of rape involving a child below the age of fourteen (14) years, corroboration of the medical report shall be necessary.*

This measure taken by the government of the state has been met with mixed reaction. While the general populace seems to welcome the development, largely due to the belief that the threat of death will deter rapists and ultimately lead to a decrease in number of cases, the international community has described the law as barbaric and draconian. The UN High commissioner for human rights, Michelle Bachelet, stressed that the death penalty, and other penalties like surgical castration or removal of the fallopian tube, will not resolve any of the myriad barriers to accessing justice, nor will it serve a preventive role (UN News, 2020).

Indeed, the amended Kaduna state law has generated a lot of controversy. There is legitimate concern on the effectiveness of this law in deterring criminals. Is our criminal justice system functional enough? Will judges be willing to condemn an accused person to death? What mechanisms are in place to protect a poor victim and other witnesses? Will stiffer penalties really

act as deterrents? Have similar measures in the past been effective? Or is there a more robust and sustainable approach?

The point of this article is not to provide an argument for or against the death penalty. It is rather an attempt to show that a sustainable solution to the rising cases of rape and other sexual violence lies not in prescribing stiffer penalties, but in reforming the entire criminal justice structure of the country.

Meaning And Nature Of Rape And Death Penalty

Under Nigerian law, rape is defined as the unlawful carnal knowledge of a woman or girl without her consent or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of harm, or by means of false and fraudulent representation as to the nature of the act. according to Section 1 of Violence Against Persons (Prohibition) Act (2015), a person commits the offence of rape if-

a. *he or she intentionally penetrates the vagina, anus or mouth of another person with any other part of his or her body or anything else;*
b. *the other person does not consent to the penetration; or*
c. *the consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or additive capable of taking away the will of such person or in the case of a married person by impersonating his or her spouse.*

The most notable and commendable development of this Act is its expansion of the meaning and scope of rape. Hitherto, existing laws of rape were constrained to rapes of females in relation to vaginal penetration without consent. By virtue of the Act, rape now covers penetration of the vagina, anus or mouth of any person (male or female) with any part of the body or with anything else. This expansion is pivotal because penetration is the key ingredient in establishing the offence of rape.

On the other hand, death penalty or capital punishment is that type of punishment for a crime that ends in the untimely termination of a person's life after conviction (Igwenyi, Igwe, & Ben-Igwenyi, 2019). Simply put, death penalty or capital punishment is the legal termination of a

convict's life according to the order of a competent authority. The termination may take any form such as by hanging, execution by firing squad, crucifixion, stoning, lethal injection etc. as may be prescribed in the enabling statute.

Brief History Of The Death Penalty And Its Evolution in Nigeria

Capital punishment is a well-known, controversial and universal concept. Capital punishment or death penalty is as old as society itself (Duru, 2012). Schabas (2002) posited that capital punishment has been with mankind since antiquity. Chenwi (2007) also stated that capital punishment dates to 18th century B.C as part of the Code of King Hammurabi of Babylon. The origin of capital punishment is also sometimes traced to the religious books of the Bible and Qur'an, which both prescribe death for the offence of murder. These suggest that death penalty has been used from earlier times and by different civilizations as a means of punishing various types of proscribed conducts and behaviors.

According to Akingbehin (2012), in the African traditional criminal justice system, including Nigeria, death penalty was rarely used. Its use was restricted to circumstances in which the society hardly had any rational solution to a particular prevalent crime. According to Adeyemi (1991), instances of the death penalty in African societies included repetitive commission of highly socially disruptive acts by means of witchcraft and cases of habitual and incorrigible offenders. He notes that the society had preferred banishment of the offender as an alternative to capital punishment. Aja (1997), aligning with Adeyemi's position, also stated that in the Igbo society, in the case of willful murder, the murderer could be sent to exile. Upon his return after a stipulated period, after having performed the stipulated sacrifices and having made prescribed restitutions, he would be integrated into the community. According to Elias (1956, p. 260), the penalty for sorcery or witchcraft, willful murder, treason and certain types of political offences was death by shooting, spearing, hanging, drowning or the impalement of the convicted person. However, Ellis (1966, p. 190) was of the view that death was imposed when the offender was caught in the act. In some cases, the infliction of death was a consequence of practices such as trial by ordeal, a medium used to ascertain guilt.

Interestingly, under the pre-colonial African traditional criminal justice system, there was much reliance on compensation of the victims of offences by offenders. Accordingly, the death penalty existed as an exception not the norm (Akingbehin, 2012). According to Elias (1956), African courts were prepared to promote reconciliation and order payment of compensation to victims of crimes.

With the introduction of British colonial rule in some parts of Africa, including Nigeria, customary law was only recognized by the colonial authorities if it was not repugnant to natural justice, equity and good conscience, and not inconsistent with the written law (Coldham, 2000). Thus, with the consequent abolition of customary criminal and penal codes, capital crimes were reduced to include murder, treachery, treason and participating in a trial resulting in death.

The military government in power from 1966 to 1979 added several crimes punishable by death. These additions include armed robbery, setting fire to public buildings, ships or aircraft, dealing in Indian hemp and sabotaging the production and distribution of petroleum products, importing and exporting mineral oil without authority, dealing with cocaine and counterfeiting bank notes or coins (Ojo, 1987).

Today, under Nigerian criminal law various offences are punishable by death across the Federation including murder, treason and treachery, conspiracy to commit treason, directing and controlling or presiding at an unlawful trial by ordeal which results in death etc.

The Question Of Deterrence

The argument in support of prescribing the strictest penalty (i.e. Death and/or castration) for heinous crimes such rape, is largely based on the deterrence theory of punishment.

The classical, neo-classical and the utilitarian theorists agree that the penological objective of punishment is deterrence. They argue that the imposition of death penalty, will not only prevent the offender from committing the offence again, but will also deter potential offenders from doing so. The belief of these schools of thought is that the more severe a punishment is for an offence, the greater its deterrent effect on the accused and other potential offenders. While it is obvious that

death penalty effectively puts the offender away and perpetually prevents him from committing the dastardly act in the future, it is, however, doubtful if the death penalty has a general deterrent effect. Akingbehin (2012) submits that empirical studies in support of the deterrent effect of capital punishment are scanty, though, hardly convincing. Several studies, including Sellin (1980), Lampert (1983), Adeyemi (1991), Donohue & Wolfers (2006) and Hood & Hoyle (2008) have all concluded that it is hardly possible to prove with empirical evidence that capital punishment has any significant deterrent effect. In other words, when one considers all the empirical evidence in support of the proposition that the death penalty deters, they are at best weak and inconclusive.

In Nigeria, there is particularly a paucity of empirical studies on the deterrent effect of capital punishment. However, a study published by Adeyemi (1991), which was described by Hood & Hoyle (2008, p. 328) as the only relatively recent inquiry into the deterrent effect of capital punishment outside the United States, examined the impact of death penalty on the commission of the offences of murder and armed robbery between 1967 and 1986. He found no consistent pattern in the relationship between the average number of executions carried out and the incidence of either murder or armed robbery. In some periods, an increase in executions was matched by an increase in crime, in other periods a decline. He also contended that the introduction of the death penalty for armed robbery in 1970 was followed by an increase rather than decrease in armed robberies. Furthermore, Akingbehin (2012) found that from 1999 to 2009 there have been 53,986 number of capital cases (i.e. murder and armed robbery) but only 8 executions. That represents less than 1% execution rate. After 2006, when 7 executions were carried out (one for culpable homicide in Jos, on the 14th January 2006, two for armed robbery in Kaduna, on 30th May 2006, and four for armed robbery in Enugu on the 12th July 2006), no executions took place until June 2013, when four prisoners on death row were hanged, although about a thousand other condemned prisoners were awaiting execution at the time (Hirsch, 2013). From the foregoing, it is submitted that, although the reliance on the deterrent justification may appear self-evident – that to be threatened with death will provoke more fear and therefore be a greater deterrent than to be threatened with imprisonment. However, this view is still largely a product of belief, not evidence.

A Sustainable Approach: Criminal Justice Reform

Ejiofor (2020) reported that findings from the 2014 National Survey on Violence Against Children reveal that six out of every ten children in Nigeria have suffered one or more forms of physical, sexual or emotional violence before they reached 18, and that one in four girls and one in ten boys have experienced sexual violence. Recently, Nigeria has seen a sharp rise in the number of cases relating to sexual violence. The United Nations stated that Nigeria recorded over 3,600 rape cases nationwide during the lockdown occasioned by the COVID-19 pandemic (Elumoye, 2020). In June 2020, the Inspector-General of Police, Mohammed Adamu, said the Nigerian police recorded 717 rape cases between January and May (Premium Times, 2020). These figures are indeed quite alarming. As earlier stated, this author strongly believes that severe measures will only serve to satiate the public's thirst for blood as many researches have shown, with a considerable level of conclusion, that severe measures do not necessarily deter crime. We must seek to proffer a sustainable and more effective measure, no matter how painful and tedious the process might be. A nationwide call for reforms in rape laws is a positive sign. However, it must be understood that easy and quick solutions will not answer the complex questions posed above. It is pertinent that our answers go beyond retributive justice measures such as death penalty, public hanging, castration, or instant 'justice'. In view of this, the following measures are hereby suggested.

First, the existing laws on rape and other crimes of sexual violence must be expanded to reflect the realities of the 21st century. Most countries around the world have updated their laws on rape and other sexual offence in line with the changing dynamics of our time. The current provisions relating to the law of rape under Nigerian law are inadequate and archaic and need to be changed to meet up with the various situations in today's society, which may constitute rape (Ashiru & Oriofowomo, 2015). The rape laws applicable to most states in Nigeria are not gender neutral and are based on the concept that only a woman can be raped. Further, the laws only contemplate penile penetration only. Thus, in instances where some other part of the body is used in penetration, or where an object is used, the courts become helpless. Further, it is not uncommon to find cases of oral penetration, and although most of the victims of rape in Nigeria are women and children, there have been instances where the victim is a male. Thus, there is an urgent need for all states to amend and expand their laws to this effect. It is suggested that the Violence Against Persons (Prohibition)

Act of 2015 should be adopted throughout the federation with minor modifications to suit local purposes. Furthermore, the issue of sexual harassment has been on the rise especially in tertiary institutions. In October 2019, a BBC Documentary titled "Sex for grades: Undercover in West African universities" reported that students have increasingly been facing allegations of sexual harassment by lecturers (BBC News, 2019). Thus, in addition to VAPP Act, there is also a need for a sexual harassment law to cover cases of unwelcome or inappropriate promise of rewards in exchange for sexual favours and which should cover a range of actions from verbal transgressions to sexual abuse or assault.

Second, the government and all stakeholders, including traditional and religious leaders must embark on an aggressive sensitization campaign with the aim of changing the perception of the society towards victims of rape and other sexual violence. The reality today is that the trauma of rape and the stigma caused by it usually forces poor families to change residences to protect their wards who are victims. Furthermore, it is very common for families to "settle" the issue even without reporting it to the authorities for fear of stigmatization. In other instances, the cases are "settled" with the active intervention of the police. Also, the average Nigerian lacks confidence in the machinery of justice so much so that they would rather "settle" such cases than go through the painfully slow process of a trial, only for the perpetrator to be let off on a technicality. Thus, we must change the narrative, and victims of rape should be treated with respect and dignity for the heroes they are. The perpetrators are the ones the society must turn their backs on. All media outlets (radio, TV, newspapers, billboards) must spread this message. Religious and traditional must ensure that all their subjects are not hidden from the law. The government through the appropriate agencies (e.g. National Orientation Agency (NOA), National Agency for Prohibition of Trafficking in Persons (NAPTIP) etc.) must sensitize and re-orient the public on the need to expose these dangerous elements and pluck them out of society. There are various NGOs that will be very willing to partner with the government for this purpose.

Third, the government must ensure, above all else, that there is a certainty of punishment for offenders. It is believed that this is what will actually deter the crime of rape and other sexual offences. This will also restore the confidence of the public in the criminal justice system. Unfortunately, the reality is that the system is deeply flawed, which adversely affects a victim from the time of report of the incident to the time of trial. All stakeholders: the police, the medical

officers who examine the victim, the public prosecutors who are meant to defend her/him, the defence lawyers who are out to tarnish her/his reputation and the presiding judge who is supposed to be the neutral arbiter are plagued with the fear of “false complaint” and constantly look for evidence of falsity on the part of the victim. If this is the present reality, one can just imagine what will happen if the punishment is raised to a minimum of life imprisonment and maximum of death penalty. Then even the few convictions which the judges award today will not take place, and every accused will be given the "benefit of doubt” (Agnes, 2013). Thus, we need to fix the system, no matter how painful and tedious that might be. The following measures are suggested:

a. Each state of the federation should have a joint task force under the Ministries of Justice comprising of security agents and civilians from the local communities that will have as their mandate the detection, investigation and prevention of gender related violence.
b. Rape and other sexual violence cases must be prioritised. Rape laws of various states must contain provisions providing for the speedy trial of reported cases. As the legal maxims goes, justice delayed is justice denied. Thus, all cases of rape and sexual violence should be tried within 6 months. This will further entrench the idea of certainty of punishment within the minds of the society. In addition, punishment must be swift and must be seen to be done.
c. State should enact laws mandating all hospitals within the state to provide free medical examination for reported cases of suspected rape. This is especially important as medical evidence is key to the successful prosecution of a rape case. Further, as most victims of rape are too poor to afford medical facilities, this measure will afford them access to medical treatment and therapy.
d. State Attorneys General should be encouraged to issue out fiat to private legal practitioners who are willing to volunteer their services for the prosecution of such cases. This will lessen the burden on the already overstretched government prosecution team and will lead to a more diligent prosecution of cases.
e. There must be better training for police officers (or members of the joint task force suggested in (a) above) on the investigation and gathering of evidence in such cases.

Conclusion

The issue of rape and other sexual violence has become endemic in Nigeria. There has been a global increase in gender-based violence since the outbreak of the novel coronavirus. According to the United Nations, Argentina, Canada, China, France, Germany, Spain, Britain and the United States, among other countries, have observed a higher number of domestic violence cases (UN Women, 2020). Prior to the coronavirus pandemic, Nigeria already had reported an alarming prevalence of sexual violence. Data on the number of reported cases is limited, but a national survey on violence against children in Nigeria, conducted in 2014, found that one in four women had experienced sexual violence in childhood, with approximately 70% reporting more than one incident. Only 5% sought help, and only 3.5% received any services (National Population Commission of Nigeria, UNICEF Nigeria, & U.S. Centre for Disease Control and Prevention, 2016). Nigeria's Minister of Women Affairs and Social Development, during the launch of the national sex offenders register in November 2019, estimated that every year two million women and girls are sexually assaulted in the country (Jimoh & John-Mensah, 2019). However, only few are reported. And even when they are reported, too many cases of rape or femicide go unpunished, and perpetrators often escape justice or are not prosecuted. Reporting to police, access to health care, legal aid or counseling are still extremely difficult for rape and other sexual violence victims in many states in Nigeria.

Sensational measures such as death penalty or castration which may momentarily satiate the public thirst for blood will not, ultimately, have any significant deterrent impact at the ground level. It is submitted that the solution lies in a meticulous and deliberate reform of the entire justice. All stakeholders must, as a matter of urgency, make a firm stand against rape in Nigeria. Some key suggestions were made by the author and it is believed that their implementation will go a long way in this war against rape. The ratification of the VAPP Act across Nigeria is a key first step to reforming the framework of protecting victims of rape. If we can ensure that justice is served in these cases, we could begin to imagine a future where rape and other sexual violence are no longer accepted. Other suggestions highlight the interplay of actors within the socio-political structure of the country and underscore factors that are peculiar to the context of Nigeria. Ultimately, we must ensure that the legal system is designed in such a way that victims are protected while preserving

the doctrine of presumption of innocence. The society at large has a responsibility of creating a nurturing environment devoid of victim shaming mentality and make a conscious effort to protect victims. Rape and other acts of sexual violence are heinous crimes that need to be urgently and thoroughly dealt with. But there are no shortcuts; the road to reform and developing sustainable solutions requires deliberate social engineering and we must painstakingly ensure that the right steps are taken for justice to thrive.

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