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# Interrogating the Justification of the Continued Retention of Death Penalty as a Punishment in the Nigerian Criminal Justice System

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## ABSTRACT

*A Death Penalty is a form of punishment known all over the world as punishment for certain categories of offences. It is used as punishment for the most heinous crimes against humanity or the State. The Nigerian Criminal Justice system recognises 'Death Sentence' as a form of punishment. The Criminal Code and Penal Code Laws of the various States in Nigeria prescribe the sentence of death for crimes such as Murder and other grave offences. Incidentally, of late, there has been sustained campaign all over the world and Nigeria for the abolition of the death penalty on the basis of its inhuman nature. The question this work seeks to answer is whether the death penalty is lawful in Nigeria and whether there is still the need to retain the death penalty in Nigeria as punishment considering the fact that this practice has been abolished in many jurisdictions and more particularly that death row inmates are rarely executed in Nigeria.*

## I. INTRODUCTION

There has been a spirited campaign by Civil Society Organisations, agitating for the abolition of the death penalty as a form of punishment in Nigeria<sup>3</sup>. Kronenwetter (2001) states that the term *capital* originates from the Latin word *capitalis* or *caput*, which means literally "regarding the head" (referring to execution by beheading)<sup>4</sup>. The agitators have questioned the constitutionality of the death penalty in our criminal code, considering the provisions of chapter 4 of the 1999 Constitution as amended, and have argued that it be expunged from our criminal statutes to conform with International Best Practices as seen in the Western Criminal Justice

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<sup>3</sup> Lawrence Njoku, Enugu, Amnesty International opposes death penalty in Nigeria's constitution, available at: <https://guardian.ng/news/amnesty-international-opposes-death-penalty-in-nigerias-constitution/> (accessed Sept. 13, 2021, 2:23 pm).

<sup>4</sup> Kronenwetter, Michael, *Capital Punishment: A Reference Handbook* (2 ed.) 202 (2001). ABC-CLIO. ISBN 978-1-57607-432-9.

system. In this work, we will interrogate whether the death penalty is constitutional in Nigeria; what is obtainable in other jurisdictions; the purpose of punishment, and the justification for its continued retention in our laws as a form of punishment, even when inmates on death row are rarely executed. The second to last execution in Nigeria was as far back as June 24 2013 in Edo State<sup>5</sup> while the final execution till date was on 23<sup>rd</sup> December 2016.

## II. KEYWORDS: SENTENCE; SENTENCING; PUNISHMENT; DEATH SENTENCE

### (A) Sentence

Sentence is the imposition on the Convict by the court of the punishment prescribed by law for the offence for which the Defendant has been convicted. According to Black's Law Dictionary,<sup>6</sup> it is defined as:

*“The judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer”.*

### (B) Sentencing

This refers to the post-conviction stage of the criminal justice process in which the defendant is brought before the court for the imposition of a penalty or punishment for the crime committed for which he has been convicted. The Black's law dictionary refers to it as the judicial determination of the penalty for a crime<sup>7</sup>.

### (C) Punishment

Punishment otherwise known as Sentence is defined by Black's Law Dictionary<sup>8</sup> as

“A sanction - such as a fine, penalty, confinement, or loss of property, right, or privilege-assessed against a person who has violated the law”.

It is submitted that the adequacy or otherwise of a sentence and or punishment imposed on a criminal convict is largely dependent on the theory of punishment believed or practised by the people of the State. Nigeria operates a criminal justice system that is both retributive and restorative in imposing punishment<sup>9</sup>.

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<sup>5</sup> Nigeria hangs four prisoners, available at: <https://www.theguardian.com/world/2013/jun/25/nigeria-prisoners-hanged-benin-city> (accessed Sept. 28 2021, 9:52 am); Innocent Anaba, Edo executes 3, as Aregbesola grants amnesty to 4 death-row inmates, available at: <https://www.vanguardngr.com/2016/12/edo-executes-3-aregbesola-grants-amnesty-4-death-row-inmates/> (accessed Sept. 28 2021, 9:52 pm).

<sup>6</sup> Bryan .A Garner, *Black's Law Dictionary*, 9th ed. Dallas Texas: West Publishing Co., (2009) 1485; See also *Yalekhue v Omoregbe* (1991) 3 NWLR (Pt.177) 94.

<sup>7</sup> Ibid Page 1486.

<sup>8</sup> Ibid Page 1353.

<sup>9</sup> See section 401-468 of Administration of Criminal Justice Act 2015; Section 301-348, Administration of Criminal Justice Law of Lagos State, 2015.

### **(D) Death Sentence**

This is the punishment reserved for the most heinous crimes. It involves the legal termination of the life of a person convicted and sentenced to death by a court of competent jurisdiction. It has been described as the judgment of blood<sup>10</sup>.

## **III. THEORIES OF PUNISHMENT**

There are basically four major approaches to punishment which ultimately metamorphoses into the imposition of a particular sentence by the court on a criminal wrongdoer. These approaches are Preventive theory, Reformatory theory, Retributive theory, and Deterrent theory<sup>11</sup>. The writers will subsume these theories into Reformatory theory and Retributive theory for aptness, especially as it applies to the Nigerian Criminal Justice System.

### **(A) Retributive Approach to Punishment:**

This is the traditional approach to punishment which emphasizes that an offender who commits a crime must be punished for what he has done<sup>12</sup>. This approach also preaches that the punishment for a crime must be proportional to the crime committed in order to give the victim and social justice. A clear example of the retributive approach to the sentence was captured in the Holy Bible, in the book of Exodus 21:22-25<sup>13</sup>

<sup>22</sup>“If people are fighting and hit a pregnant woman and she gives birth prematurely<sup>1a</sup> but there is no serious injury, the offender must be fined whatever the woman’s husband demands and the court allows. <sup>23</sup> But if there is serious injury, you are to take life for life, <sup>24</sup> eyes for an eye, tooth for tooth, hand for hand, foot for foot, <sup>25</sup> burns for burn, wound for wound, bruise for bruise.”

For a while, the retributive approach to punishment was quite effective by ensuring public protection through the removal of criminals from civil society by imprisonment or custody. This approach ensures that for every infraction of the law, there is a price to be paid. This served as a form of deterrence to potential offenders and helped in the sanitization of society. Ultimately, this approach preached the custodial sentence.

### **(B) Challenges of the Retributive Approach**

It was observed, and rightly so, that over time, the retributive approach to punishment created

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<sup>10</sup> BRYAN, *supra* note 4, at 1485.

<sup>11</sup> THE INDIAN PENAL CODE. ACT NO. 45 OF 1860

<sup>12</sup> See H.L.A Hart ‘Punishment and Responsibility: Essays in the philosophy of law’ (2008), 2<sup>nd</sup> Edn. (Oxford University Press) 113.

<sup>13</sup> The Holy Bible (New International Version).

certain challenges. One of the major challenges of the retributive custodial form of sentencing is the unwitting *creation of career criminals*<sup>14</sup>. Most people who go through the prison system return to civil society losing the ability to reintegrate into society and return to normalcy as law-abiding citizens. This group of persons have been totally sold to crime and accordingly, un-reformable. The reformation programs in the Custodial Centers are such that they are not tailored to the specific need suitable for each convict, but are rather general programs developed to manage the reformation of the group of convicts. The general programs will certainly work for convicts whose systems have not been fully criminalized, but will not work for career criminals.

There is also the problem of **very high costs** incurred by the government in the maintenance of Custodial Centers and feeding of inmates. There are about 68, 556 (Sixty Eight thousand, Five Hundred and Fifty-Six) total inmates population in Nigeria, out of which 67, 255 (Sixty Seven Thousand, Two Hundred and Fifty-Five) are males while 1, 301 (One Thousand, Three Hundred and One) are females<sup>15</sup>. It is submitted that out of the above total number, only 17, 951 (Seventeen Thousand, Nine Hundred and Fifty-One) are convicted inmates, of which 17, 639 (Seventeen Thousand, Six Hundred and Thirty-Nine) are male convicts while 312 (Three Hundred and Twelve) are female convicts<sup>16</sup>. It is also a fact that a total of 50, 605 (Fifty Thousand, Six Hundred and Five) are awaiting trial prisoners of which 49, 616 (Forty-Nine Thousand, Six Hundred and Sixteen) are males while 989 (Nine Hundred and Eighty-Nine) are females<sup>17</sup>. The above number of inmates are housed in a total number of 253 (Two Hundred and Fifty-Three) Correctional Centres across Nigeria<sup>18</sup>. Consequently, the cost of feeding 68, 556 (Sixty Eight thousand, Five Hundred and Fifty-Six) total inmates three times daily and also the maintenance and management of 253 (Two Hundred and Fifty-Three) Correctional Centres across Nigeria gives rise to unbearable cost.

The problem of **over-crowding** of Correctional centres in Nigeria and inadequate facilities for the rehabilitation of inmates are other insurmountable challenges. For instance, the Ikoyi Correctional Center, Lagos was originally built in 1955 and designed to accommodate 800

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<sup>14</sup> Raymond. Paternoster, *Career Criminals and Criminological Theory*. In: Bruinsma G., Weisburd D. (eds) Encyclopedia of Criminology and Criminal Justice. Springer, New York, NY (2014). [https://doi.org/10.1007/978-1-4614-5690-2\\_89](https://doi.org/10.1007/978-1-4614-5690-2_89);

<sup>15</sup> CORRECTIONS INFORMATION MANAGEMENT SYSTEM Open Out Recording System , <http://www.corrections.gov.ng/statistics> (accessed Aug. 30, 2021, 9:00 pm) which refers to statistics conducted by the Nigerian Correctional Service as at Aug. 9 2021.

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> CORRECTIONS INFORMATION MANAGEMENT SYSTEM Open Out Recording System , <http://www.corrections.gov.ng/statistics> (accessed Aug. 30, 2021, 10:40 pm).

inmates, but now accommodates more than 3,000 inmates. Also, the Kirikiri Maximum Correctional Center was originally built to accommodate 1,056 inmates but now accommodate 1,830 inmates<sup>19</sup>. The fact of the upsurge in the number of inmates at these Correctional Centers in Lagos, not to mention other States is a testament that the retributive approach seems to have failed.

The **deterrent** effect of the retributive approach to punishment has become questionable. It is believed that if the retributive approach to punishment were effective, the upsurge in the number of incarcerated inmates would reduce rather than increase, which has led to overcrowding of the Centers.

### **(C) The Restorative Justice Approach:**

The attempt to address the above-identified challenges of the custodial system of criminal justice gave rise to a new sentencing approach- **the restorative justice approach** which is the philosophy behind the **non-custodial sentences**. The restorative justice approach of sentencing emphasizes remedying the adverse effects of crime in a manner that addresses the needs of all parties involved, the offender, victim, and society. According to Black's Law Dictionary,<sup>20</sup> the restorative approach is defined as:

“An alternative delinquency sanction focused on repairing the harm done, meeting the victim's needs, and holding the offender responsible for his or her actions”.

This is the incursion of civil dispute resolution mechanism to solving criminal disputes, rather than incarcerating the offender and thereby creating career criminals. Restorative justice includes direct mediation and conflict resolution between the offender, the victims, their families, and the community. It holds the offender accountable to the other parties, while also providing the offender with learning experiences that offer law-abiding lifestyles as realistic alternatives to criminality<sup>21</sup>. The Administration of Criminal Justice Act, 2015 and the Administration of Criminal Justice Law of Lagos State, 2015 and indeed, other State laws recognize the concepts of retributive and restorative justice. In section 401 (2) (a-g)<sup>22</sup> the law provides that the court in determining a sentence shall have the following objectives in mind; Prevention; Restraint; Rehabilitation; Deterrence; Education of the public; Retribution; Restitution.

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<sup>19</sup> Qosim Suleiman, ASUU strike to continue another two months, available at: <https://www.premiumtimesng.com> (accessed Sept. 2, 2021, 2:39 pm).

<sup>20</sup> BRYAN, *Supra* note 4, at 1428.

<sup>21</sup> Debra Heath-Thornton, restorative justice, available at: <https://www.britannica.com/topic/restorative-justice> (accessed Sept. 6, 2021, 12:10 pm).

<sup>22</sup> Administration of Criminal Justice Act, 2015.

#### IV. CATEGORIZATION OF OFFENCES IN THE NIGERIAN CRIMINAL JUSTICE ADMINISTRATION

##### (A) Classification of Offences:

Offences in the Nigerian Criminal Justice Administration are classified into three major categories<sup>23</sup>, viz;

- i. Felonies;
- ii. Misdemeanour; and
- iii. Simple offences.

**Felonies** are offences for which punishment are not below three years imprisonment or more. The Criminal Law of Lagos State<sup>24</sup> defines it as;

*“Any offence which is declared by law to be a felony, or is punishable, without proof of previous conviction, with death or with imprisonment for three years or more”.*

This research work is primarily focused on the categories of offences subsumed under felonies. These are the highest categories of offences in Nigeria, some of which give birth to the imposition of the death sentence.

**Misdemeanours** are categories of offences for which punishment is not less than six months but less than three years. It is defined as;

*“Any offence which is declared by law to be a misdemeanour, or is punishable by imprisonment for not less than six months, but less than three years”<sup>25</sup>.*

**Simple offences** are offences punishable with less than six months imprisonment. The law defines a Simple offence as follows;

*“All offences, other than felonies and misdemeanours, are simple offences”<sup>26</sup>.*

#### V. CATEGORIES OF OFFENCES IN THE NIGERIAN CRIMINAL JUSTICE ADMINISTRATION FOR WHICH THE DEATH PENALTY IS A PUNISHMENT

There are offences in Nigeria for which the punishment upon conviction is a death sentence. Primarily, these offences are;

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<sup>23</sup> Cyprian .O Okonkwo “Okonkwo & Naish: *Criminal Law in Nigeria*” 2<sup>nd</sup> edn. Spectrum Law Publishing; (1996) 64; Section 5 (1) Criminal Law of Lagos State, 2015.

<sup>24</sup> Section 5 (2) Criminal Law of Lagos State, 2015; Section 494, Administration of Criminal Justice Act, 2015.

<sup>25</sup> Section 5 (3) Criminal Law of Lagos State 2015; ; Section 494 Administration of Criminal Justice Act 2015.

<sup>26</sup> Section 5 (4) Criminal Law of Lagos State 2015.

- a. Treason and Conspiracy to commit Treason<sup>27</sup>;
- b. Instigating invasion of Nigeria<sup>28</sup>;
- c. Murder<sup>29</sup> or culpable homicide punishable with death<sup>30</sup>;
- d. Terrorism related offences where death is involved<sup>31</sup>;
- e. Armed robbery;<sup>32</sup>
- f. Military offence of mutiny<sup>33</sup>;
- g. Military offence of Aiding the enemy<sup>34</sup>;
- h. Military offence of Communication with the enemy<sup>35</sup>;
- i. Military offence of Cowardly behaviour<sup>36</sup>;
- j. Military offence of Malingering<sup>37</sup>;
- k. Treachery<sup>38</sup>;
- l. Under the Sharia Penal Laws applicable in the North, the following offences carry the death penalty; Adultery (Zina)<sup>39</sup>; Rape<sup>40</sup>; Sodomy<sup>41</sup>; Incest<sup>42</sup>; Witchcraft, Juju offences and blasphemy<sup>43</sup>;

Recently, in Nigeria, the offence of *kidnapping* has been designated a capital offence by some State Houses of Assembly with death as a penalty on conviction. This is because of the prevalence and upsurge in the commission of the offence. Lagos State recently prescribed the

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<sup>27</sup> Section 37 Criminal Code Act.

<sup>28</sup> Section 38 Criminal Code Act.

<sup>29</sup> Section 319 Criminal Code Act; Section 223 Criminal Law of Lagos State 2015.

<sup>30</sup> Section 221 Penal Code Act.

<sup>31</sup> Section 2 (2) (h) Terrorism (Prevention) (Amendment) Act, 2013.

<sup>32</sup> Section 1 (2) (a & b) Robbery & Fire Arms (Special Provisions) Act 1984; Section 297 (2) Criminal Law Ch. C17 Vol. 3 Laws of Lagos State, 2015.

<sup>33</sup> Section 52 (1) (b) Armed Forces Act CAP A20 Laws of the Federation of Nigeria 2004.

<sup>34</sup> Section 45 Armed Forces Act CAP A20 Laws of the Federation of Nigeria 2004. Here the Court Martial has discretion to impose any other punishment provided in the Act aside death penalty.

<sup>35</sup> Section 46 (a) Armed Forces Act CAP A20 Laws of the Federation of Nigeria 2004. Here the Court Martial has discretion to impose any other punishment provided in the Act aside death penalty.

<sup>36</sup> Section 47 (3) Armed Forces Act, CAP A20, Laws of the Federation of Nigeria, 2004. Here the Court Martial has discretion to impose any other punishment provided in the Act aside death penalty.

<sup>37</sup> Section 63 (2) (a) Armed Forces Act, CAP A20, Laws of the Federation of Nigeria, 2004.

<sup>38</sup> Section 49A Criminal Code Act.

<sup>39</sup> Section 126-127 Jigawa State Sharia Penal Code 2000.

<sup>40</sup> Section 128-129 Jigawa State Sharia Penal Code 2000.

<sup>41</sup> Section 130-131 Jigawa State Sharia Penal Code 2000.

<sup>42</sup> Section 132-133 Jigawa State Sharia Penal Code 2000.

<sup>43</sup> Recently an Upper Sharia Court in Kano State sentenced a musician Sharif-Aminu to death for blasphemy. See <https://www.thecable.ng/ganduje-i-wont-waste-time-in-signing-warrant-to-execute-blasphemer> (accessed Sept. 22, 2021, 5:40 am).

death penalty for the offence of kidnapping resulting in death<sup>44</sup>. The other States include; Abia, Bayelsa, Akwa-Ibom, Anambra, Ebonyi, Enugu, Imo, and Edo.<sup>45</sup>

## VI. DEATH SENTENCE IN NIGERIA

This is the sentence that confirms the death penalty and execution of the convict. It has been described as “the judgment of blood”<sup>46</sup>. It is further described as “Punishment by execution”<sup>47</sup>. It is the highest form of punishment that demands the taking of human life for the most heinous crimes affecting the blood. It is as old as creation itself and is also recognised in the holy bible<sup>48</sup>.

### (A) Mode of Execution of Death Sentence in Nigeria:

Execution of sentence of death in Nigeria, according to the Administration of Criminal Justice Act,<sup>49</sup> could be by hanging or lethal injection. This Act brought an interesting innovation into the mode of execution of death row inmates in Nigeria to conform with recent trends globally, especially in countries where the death sentence is still viable. Hitherto, it was principally by hanging. The Act provides;

*“Punishment of death is inflicted by hanging the convict by the neck till he is dead or by, lethal injection”.*

In the North, where Sharia law is practised, execution of sentence of death could be by stoning<sup>50</sup>.

Also, execution of death sentence could be by firing squad<sup>51</sup> where the convict is convicted of armed robbery under the Robbery and Firearms Act.

### (B) Exemption from a death sentence in Nigeria

Under the Nigerian Criminal Justice Administration, certain categories of persons are exempted from the death sentence, even if they are convicted of an offence for which punishment ought ordinarily to be the death sentence. These persons include;

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<sup>44</sup> Lagos State of Nigeria Kidnapping Prohibition Law, 2017.

<sup>45</sup> Nzeribe E. Abangwu & Adekunbi, *Death Penalty In Nigeria: To Be Or Not To Be: The Controversy Continues*, Arabian Journal of Business and Management Review (2013), (OMAN Chapter) Vol. 3, No.3; Oct. 2013.

<sup>46</sup> Bryan .A Garner, *Black's Law Dictionary*, 9th ed. (Dallas Texas: West Publishing Co, 2009) 1485.

<sup>47</sup> Catherine Soanes & Stevenson Angus, *Concise Oxford English Dictionary*, 11th ed. (New York: Oxford University Press, 2004) 369.

<sup>48</sup> Genesis 9:6, Exodus 21:12-17, Deuteronomy 19:11-12. The same is provided in the *Holy Koran*: Chapter 5:36.

<sup>49</sup> Section 402 (1) Administration of Criminal Justice Act, 2015; Section 301 (1) Administration of Criminal Justice Law, Lagos State, 2015; Section 3, Kidnapping Prohibition Law of Lagos State, 2017; Section 400 Administration of Criminal Justice Law, 2017 Abia State.

<sup>50</sup> Section 126-127 Jigawa State Sharia Penal Code 2000.

<sup>51</sup> Section 1 (2) (a),(b) of Robbery & Fire Arms (Special Provisions) Act ,1984.

### i. Pregnant Women:

A pregnant woman, if convicted of a capital offence in some jurisdictions in Nigeria, may not be sentenced to death. The relevant status of the pregnant woman is her status at the time of conviction and not at the time of the commission of the offence. The implication is that the woman convict may not be pregnant at the time of the commission of the offence, but is found to be pregnant at the time of conviction. Under the **Administration of Criminal Justice Law**<sup>52</sup>, if she is found guilty of a capital offence she shall be sentenced to life imprisonment.

However, under the regime of the **Administration of Criminal Justice Act**<sup>53</sup>, if a pregnant woman is convicted of a capital offence, she shall be sentenced to death. The law went further to provide that before execution of the sentence, the baby must be delivered and weaned. It is noteworthy to mention that under the **Child's Right Act**<sup>54</sup>, a pregnant woman shall not be sentenced to death. Under this law, the courts are encouraged to consider a non-institutional sentence<sup>55</sup> and she should be kept at a Special Mother's Centre<sup>56</sup> rather than be sent to Correctional Centre/prison for a period not exceeding six years<sup>57</sup>.

### ii. Young Persons:

A young person is a person who has attained the age of 14 years but has not attained 17 years<sup>58</sup>. The relevant time for the determination of the age of a young person convicted of a capital offence is at the time of the commission of the offence, and not at the time of conviction. In **Modupe v State**<sup>59</sup>, the Supreme Court held as follows:

*"If at the time the offence was committed, an accused charged with a capital offence has not attained the age of 17 years, it will be wrong for any court not only to sentence him to death but also to even pronounce or record such sentence".*

The implication is that where at the time of the commission of the offence, the young person has not attained the age of majority, but during the course of trial and before conviction, he attains the age of 17, a sentence of death shall not be pronounced or recorded but rather, the

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<sup>52</sup> Section 302 (2), Administration of Criminal Justice Law Lagos State, 2015; Sections 270, 271, and 300 of Criminal Procedure Code Law applicable in some of the Northern States yet to domesticate the Administration of Criminal Justice Act.

<sup>53</sup> Section 404 and 415 (4) Administration of Criminal Justice Act, 2015; Section 402, Administration of Criminal Justice Law, Abia State, 2017.

<sup>54</sup> Section 221 (2) Child's Right Act, CAP C50, Laws of the Federation of Nigeria, 2004.

<sup>55</sup> Section 221 (3) Child's Right Act CAP C50 Laws of the Federation of Nigeria 2004.

<sup>56</sup> Section 221 (4) Child's Right Act CAP C50 Laws of the Federation of Nigeria 2004.

<sup>57</sup> Section 221 (5) Child's Right Act CAP C50 Laws of the Federation of Nigeria 2004.

<sup>58</sup> Section 494 Administration of Criminal Justice Act 2015; Section 479 Administration of Criminal Justice Law, Abia State 2017.

<sup>59</sup> (1988) 4 NWLR (Pt. 87) 130; (1988) 9 SC.1.

court shall order that such person be detained at the pleasure of the Governor<sup>60</sup>. Other Administration of Criminal Justice Laws provides that such a young person convict shall be sentenced to life imprisonment or to other terms the court may decide<sup>61</sup>.

### **(C) The legality of death sentence in Nigeria**

The starting point for the discourse on the legality or otherwise of death sentence in Nigeria is the Constitution. The Constitution is the grundnum and the fundamental law of the land. This means that the Constitution is Supreme. In **Attorney General of Abia State & 35 Ors. v Attorney General of the Federation**<sup>62</sup>, on the supremacy of the Constitution, the Supreme Court held;

*“By virtue of section (1) (1) of the 1999 Constitution, the provisions of the Constitution are superior to every provision made in any Act or Law and are binding on and must be observed and respected by all persons and authorities in Nigeria. The National Assembly must also observe full compliance with the provisions of the section”.*

Accordingly, **section 33 (1) of the Constitution**<sup>63</sup> provides;

*“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 supremacy and validity of the above provision validating the death sentence in Nigeria have received judicial recognition by the Supreme Court in the case of **Onuoha Kalu v State**<sup>64</sup> where the law lords expressly affirmed the legality of the death sentence in Nigeria in the

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<sup>60</sup> Section 302 (3) Administration of Criminal Justice Law, Lagos State 2015; Section 368 (3) Criminal Procedure Law applicable in the Southern States yet to domesticate the Administration of Criminal Justice Act 2015; *Guobadia v State* (2004) All FWLR (Pt. 188) 1065.

<sup>61</sup> Section 405, Administration of Criminal Justice Act, 2015; Section 403, Administration of Criminal Justice Law, Abia State, 2017; Section 392, Imo State Administration of Criminal Justice Law, 2020.

<sup>62</sup> (2002) 6 NWLR (Pt. 763) 264.

<sup>63</sup> 1999 Constitution of the Federal Republic of Nigeria as amended.

<sup>64</sup> (1998) 13 NWLR (Pt. 583) 531 SC; (1998) LPELR-1655 (SC).

clearest terms pursuant to the provisions of the constitution. In this case, the court jettisoned the argument that the death penalty amounts to torture, inhuman, and degrading treatment, relying on the reasoning that section 33 (1) of the Constitution is qualified.

## VII. LEGALITY OF DEATH SENTENCE IN OTHER JURISDICTIONS

### (A) Tanzania

In the African country of **Tanzania**, there are two offences that carry the death penalty as punishment. The offences are; Murder and Treason. Section 39, 40, and 197 of the Code provides for a death sentence upon conviction for the above offences<sup>65</sup>. The above sections exempt pregnant women from a death sentence, but rather they are to be sentenced to life imprisonment. Persons under 18 years are also exempted from the death penalty but are to be kept at the pleasure of the President under the supervision of the Minister for Legal Affairs<sup>66</sup>. It is worrisome whether the age at the commission or at sentence is the relevant age<sup>67</sup>. This worrisome position was further affirmed by the Tanzanian Court of Appeal in *Mbushuu & Anor. v. Republic*<sup>68</sup>.

### (B) Zimbabwe

Zimbabwe is referred to as de facto abolitionist; an African country that retains the death penalty but in the last 14 years has not carried out any execution<sup>69</sup>. Since 2005 there has been no execution in Zimbabwe, especially after the retirement of the country's hangman. The Supreme Court of Zimbabwe in *Catholic Commission for Justice & Peace in Zimbabwe v Attorney General of Zimbabwe & others*<sup>70</sup> affirmed the legality of death sentence in Zimbabwe.

The new Zimbabwean Constitution of 2013 recognises the imposition of the death penalty only on a person convicted of murder committed in aggravated circumstances<sup>71</sup>. In Zimbabwe, a sentence of death cannot be imposed on a person who was less than 21 years of age at the time of committing the offence<sup>72</sup>. Also, the sentence of death must not be imposed on a person who

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<sup>65</sup> Tanzanian Penal Code.

<sup>66</sup> Section 26 Tanzanian Penal Code.

<sup>67</sup> R.v. Lubasha Maderenya and Tegai Lebasha, High Court (Mwanza) Criminal Sessions Case No. 143 of 1977; Appeal No. 32 of 1979. See also Chris Maina Peter Human Rights in Tanzania (Rudiger Koppe Verlag Kohn 1997) 30.

<sup>68</sup> Criminal Appeal No. 142 of 1994, 30<sup>th</sup> Jan., 1995.

<sup>69</sup> 12 years without an execution: Is Zimbabwe ready to abolish the death penalty?, <https://theconversation.com/12-years-without-an-execution-is-zimbabwe-ready-to-abolish-the-death-penalty-96954> (accessed Sept. 29, 2021, 6:96 am).

<sup>70</sup> (1993) (4) SA 239 per Gubbay CJ.

<sup>71</sup> Section 48 (2) Constitution of Zimbabwe 2013.

<sup>72</sup> Section 48 (2) (c) (i) Constitution of Zimbabwe 2013.

is more than 70 years old<sup>73</sup>. Most importantly, the Constitution provides that sentence of death must not be imposed on a woman or carried out on a woman<sup>74</sup>.

### **(C) Ghana**

Ghana a West African Country retains the death penalty in her penal laws<sup>75</sup>. The Constitution just as in Nigeria recognised the death penalty and empowers the State in deserving circumstances to take the life of a citizen who has been sentenced to death by the Court. Even though the death penalty still remains on the statute books, there is a de facto moratorium on executions. The last execution of a death row inmate in Ghana was in July 1993<sup>76</sup>. A report by Amnesty International states that by the end of 2020, there were about 160 persons on death row in Ghana among whom are five women<sup>77</sup>.

### **(D) India**

In **India**, the Supreme Court held in the case of **Bacan Singh v State of Punjab**<sup>78</sup> whilst interpreting **Article 21 of the Indian Constitution**, that the right to life under the Indian Constitution is qualified, and accordingly, the death penalty as enshrined in the constitution is valid. Consequently, India has carried out eight executions since 2000, the last having been in 2020. On March 20, 2020, death row convicts, Mukesh, Akshay Kumar Singh, Vinay Sharma and Pawan Kumar were executed for the December 2012 gang rape and murder of Jyoti Singh. Executions prior to this were Yakub Memon in July 2015, Afzal Guru in February 2013, Ajmal Kasab in November 2012 and Dhananjay Chatterjee in August 2004<sup>79</sup>.

### **(E) Sierra Leone**

Recently, the parliament of **Sierra Leone**, a West African country, on July 23<sup>rd</sup> 2021, voted unanimously to abolish the death penalty in their laws<sup>80</sup>. They consequently became the 23<sup>rd</sup> African country and the 110<sup>th</sup> in the world to abolish the death penalty<sup>81</sup>. Hitherto, the 1991

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<sup>73</sup> Section 48 (2) (c) (ii) Constitution of Zimbabwe 2013.

<sup>74</sup> Section 48 (2) (d) Constitution of Zimbabwe 2013.

<sup>75</sup> Article 13(1) 1992 Constitution of Ghana.

<sup>76</sup> Ghana and the Death Penalty, <https://www.pgaction.org/ilhr/adp/gha.html> (accessed Oct. 19, 2021, 1:12 pm).

<sup>77</sup> Jonas Nyabor, 136 persons sentenced to death in Ghana since 2010 – Amnesty International, available at: <https://citinewsroom.com/2021/04/136-persons-sentenced-to-death-in-ghana-since-2010-amnesty-international/> (accessed Oct. 19, 2021, 1:21 pm).

<sup>78</sup> (1983) (2) SCR 583.

<sup>79</sup> Nidhi Jacob, Factchecker.in, 404 prisoners are on death row in India, with Uttar Pradesh leading the list, available at: <https://scroll.in/article/985918/404-prisoners-are-on-death-row-in-india-with-uttar-pradesh-leading-the-list> (accessed Oct. 18, 2021, 04:56 am).

<sup>80</sup> See previously Section 121 of the Criminal Procedure Act 1965.

<sup>81</sup> Sierra Leone Becomes 23rd African Country to Abolish the Death Penalty, <https://deathpenaltyinfo.org/news/sierra-leone-becomes-23rd-african-country-to-abolish-the-death-penalty> (accessed Sept. 10, 2021, 12:35 pm).

Constitution of Sierra Leone<sup>82</sup> endorsed the death penalty for the heinous crime of treason<sup>83</sup>, aggravated robbery<sup>84</sup>, murder, and mutiny<sup>85</sup>. The last execution in Sierra Leone was done in 1998, which was the execution of 24 military officers convicted of the coup attempts<sup>86</sup>.

### (F) Canada

In **Canada**, Capital punishment otherwise called the death sentence was officially enacted in 1859. In 1976, capital punishment was abolished under the Canadian Civil law by the parliament<sup>87</sup>, but retained under the Defence Act<sup>88</sup> for offences relating to cowardice, desertion, unlawful surrender, or spying for the enemy for members of the Armed Forces<sup>89</sup>. In 1998, the Canadian National Defence Act was amended, and the death penalty was totally removed and replaced with life imprisonment, with no eligibility for parole for 25 years<sup>90</sup>, thus becoming a fully abolitionist country.

In 2001, in the case of *United States v Burns*<sup>91</sup> two 18-year-old men were accused of brutally murdering three family members (which included their parents and a physically challenged sister). The murders happened in the State of Washington, United States of America, and both accused persons quickly fled to British Columbia in Canada. In an extradition hearing, the Canadian Supreme Court held that **extradition of individuals to countries where they may face the death penalty** is a breach of fundamental justice under the Canadian Charter of Rights and Freedoms<sup>92</sup>, which guarantees the right to life and refused their extradition. Within one month after the judgment, the prosecutor gave an undertaking that if extradited, he will not seek the death penalty for them. They were accordingly extradited. At their trial, they were convicted for three counts of aggravated murder and sentenced to three consecutive life sentences<sup>93</sup>.

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<sup>82</sup> See Article 16 (1) 1991 Constitution of Sierra Leone.

<sup>83</sup> Treason and other related offences under the Treason and State Offences Act 1963.

<sup>84</sup> Constituted under the Criminal Procedure (Amendment) Act 1973.

<sup>85</sup> Mutiny constituted under the Sierra Leone Military Forces Act 1961; See [https://www.biicl.org/files/2301\\_country\\_report\\_sierra\\_leone\\_tejan\\_cole.pdf](https://www.biicl.org/files/2301_country_report_sierra_leone_tejan_cole.pdf) (accessed Sept. 10, 2021, 12:55 pm).

<sup>86</sup>Id. 81 (accessed Sept. 10, 2021, 1:03 pm).

<sup>87</sup> Bill C-84 was enacted abolishing capital punishment.

<sup>88</sup> National Defence Act 1950 now 1985; <https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-n-5/latest/rsc-1985-c-n-5.html> (accessed Sept 10, 2021, 2:16 pm).

<sup>89</sup> Paul Gendreau, Wayne Renke, Capital Punishment in Canada , available at: <https://www.thecanadianencyclopedia.ca/en/article/capital-punishment> (accessed Sept.10, 2021, 2:12 pm).

<sup>90</sup> Munroe, Susan. "History of Capital Punishment in Canada." ThoughtCo, Aug. 25, 2020, [thoughtco.com/history-of-capital-punishment-in-canada-508141](https://www.thoughtco.com/history-of-capital-punishment-in-canada-508141/); <https://www.thoughtco.com/history-of-capital-punishment-in-canada-508141> (accessed Sept. 10, 2021, 2:19 pm).

<sup>91</sup> [2001] 1 S.C.R. 283, 2001 SCC 7.

<sup>92</sup> Section 7 Canadian Charter of Rights and Freedoms.

<sup>93</sup> PETER BOWAL AND PREET SAINI, Whatever Happened To...U.S. v. Burns: Extradition and the Death Penalty, available at: <https://www.lawnow.org/whatever-happened-us-v-burns-extradition-death-penalty/> (accessed Sept.10, 2021, 3:10 pm).

### **(G)United States of America**

In the **United States of America**, the death sentence is recognised under the American criminal justice system. It is authorized in 27 states in the USA. The Federal Government and the US Military recognise it. Recently, the State of Colorado in 2020 and Virginia in 2021, have legislatively abolished the death penalty, replacing it with a sentence of life imprisonment with no possibility for parole whatsoever<sup>94</sup>. The last execution by the Federal Government in the US was on 16<sup>th</sup> January 2021, being President Donald Trump's administration's thirteenth execution<sup>95</sup>. In these executions, Lisa Montgomery, a woman, was executed for strangling a pregnant woman to death in Missouri and with a kitchen knife, removed her 8-month old foetus from her womb.

The State of Texas in the year 1982, carried out the first execution by lethal injection in the world, and thereafter, lethal injection metamorphosed into the preferred method of execution in the United States, displacing the electric chair.<sup>96</sup>

### **(H)Indonesia**

Capital punishment is recognised in Indonesia and it is mostly applied in grave offences. The first execution in Indonesia was in 1973<sup>97</sup>. In 2007 the Indonesian Constitutional Court (Mahkamah Konstitusi Republik Indonesia) in a vote of 6 to 3 upheld the constitutionality of death sentence in relation to extreme drug-related offences<sup>98</sup>. In this case, the court held that a 2000 Constitutional amendment upholding the right to life did not apply to Capital punishment; and that the right to life must be balanced against the rights of victims of drug trafficking. Indonesia also applies the death penalty to other offences contained in the Indonesian Criminal Code<sup>99</sup>. The last execution in Indonesia was in 2013 when four death row inmates convicted and sentenced for varying degrees of drug-related offences were executed despite international outcry<sup>100</sup>. Due to the Covid-19 Pandemic which has restricted gatherings in public places, the

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<sup>94</sup> States and Capital Punishment, available at: <https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx> (accessed Sept. 10, 2021, 5:20 pm).

<sup>95</sup> Trump administration carries out 13th, final federal execution, available at: <https://www.aljazeera.com/news/2021/1/16/trump-administration-carries-out-13th-final-federal-execution> (accessed Sept. 13, 2021, 5:04 pm).

<sup>96</sup> Life and Death Row: How the lethal injection kills: The lethal injection has been the primary means of executing condemned Americans for decades - but its use remains controversial." Bryant, Ben, *The BBC* (March 5, 2018). <https://www.bbc.co.uk/bbcthree/article/cd49a818-5645-4a94-832e-d22860804779> (accessed Sept. 10, 2021, 5:05 pm).

<sup>97</sup> Hood, Roger (2003). *The Death Penalty: A Worldwide Perspective*. New York: Oxford University Press. 48. ISBN 978-0199251292.

<sup>98</sup> Decision No. 2-3/PUU-V/2007 [2007]; <http://www.austlii.edu.au/au/journals/AUIntLawJl/2007/15.pdf> (accessed Nov.17, 2021, 05:47 am).

<sup>99</sup> Indonesia Criminal Code (Indonesian: *Kitab Undang-Undang Hukum Pidana*) is Law No. 1/1946, and amended several times of which the latest amendment is Law No. 27/1999.

<sup>100</sup> Indonesia kills four prisoners in first executions in a year, available at: <https://www.theguardian.com/world/>

courts in Indonesia has adopted the online meeting platform 'Zoom' to conduct proceedings and has sentenced several convicts to death<sup>101</sup>.

### VIII. EXECUTION OF DEATH ROW INMATES IN NIGERIA

The second to the last execution in Nigeria of death row inmates were in **Edo State on 24<sup>th</sup> June 2013**, where 4 (four) death row inmates were executed<sup>102</sup>. The execution warrant of Daniel Nsofor, Osarerenmwenda Aigbonkhan was signed by the then Governor of the State, Comrade Adams Oshiomhole on 26<sup>th</sup> September 2012. On this same day, he granted pardon to two other inmates on death row<sup>103</sup> pursuant to section 212 of the Constitution. The other warrants were signed by former Governor Lucky Igbinedion for the execution of Chima Ejiofor and Richard Igagu. One of them (Daniel Nsofor) robbed a family, raped the wife and inserted a bottle inside her private part until she bleed to death. Osarerenmwenda killed his victim, dismembered his body and buried the parts in different places to avoid detection.

It would have been unconscionable and an injustice to the society, the victim's family and the spirit of the deceased to allow these convicts to escape the hangman's noose. The final execution of death row inmates recorded in Nigeria to date was again the execution of three prisoners in Edo State on **December 23, 2016**,<sup>104</sup> pursuant to the signing of their death warrants by His Excellence Godwin Obaseki<sup>105</sup>. By the publication of Punch Newspaper of August 5, 2021, the Public Relations Officer of the Nigerian Correctional Service, Mr Francis Enobore was reported to have asserted that there are about **3,008 death row inmates in Nigerian Correctional Service**<sup>106</sup>. Out of these numbers, 2,952 are males while 56 are females<sup>107</sup>. It is no longer secret that the State Governors and indeed the President of the Federal Republic of Nigeria are reluctant to sign execution warrants for these inmates, especially those whose right of appeal have been exhausted. However, by Section 308 of the Administration of Criminal

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2016/jul/28/indonesia-mass-execution-prisoners (accessed Nov. 17, 2021, 08:33 pm).

<sup>101</sup> COVID-hit Indonesia orders executions via Zoom, video apps, available at :<https://www.aljazeera.com/news/2021/4/23/virus-hit-indonesia-orders-executions-online> (accessed Nov.17, 2021, 08:42 pm).

<sup>102</sup> Chima Ejiofor, Daniel Nsofor, Osarerenmwenda Aigbonkhan and Richard Igagu; <https://www.theguardian.com/world/2013/jun/25/nigeria-prisoners-hanged-benin-city> accessed Sept. 28, 2021, 9:52 am).

<sup>103</sup> Monday Odu and Calistus Ikem.

<sup>104</sup> Innocent Anaba, Edo executes 3, as Aregbesola grants amnesty to 4 death-row inmates, available at : <https://www.vanguardngr.com/2016/12/edo-executes-3-aregbesola-grants-amnesty-4-death-row-inmates/> (accessed Sept. 28, 2021, 9:52 pm).

<sup>105</sup> Those executed are Ogbomoro Omoregie, Apostle Igene and Mark Omosowhota; <https://www.vanguardngr.com/2016/12/edo-executes-3-aregbesola-grants-amnesty-4-death-row-inmates/> (accessed Sept. 29, 2021, 1:50 pm).

<sup>106</sup> Maritha Ebolusue, Not all death row inmates are to be executed, available at: <https://punchng.com/not-all-death-row-inmates-are-to-be-executed/> (accessed Sept.11, 2021, 12:10 pm).

<sup>107</sup> Joseph Onyekwere, Prison decongestion, the politics and hypocrisy of death penalty in Nigeria, available at: <https://guardian.ng/features/prison-decongestion-the-politics-and-hypocrisy-of-death-penalty-in-nigeria/> (accessed Sept.28, 2021, 9:41 am).

Justice Law<sup>108</sup>, the Governor upon advice from the Advisory Council on Prerogative of Mercy may commute the death sentence to life imprisonment, any specific period or decide to pardon or grant a reprieve. This power is a direct offshoot of sections 212 and 175 of the Nigerian Constitution<sup>109</sup> on the powers of the Governor and President to exercise the prerogative of mercy. We are genuinely concerned by the lack of Will by the relevant State actors to comply with a duty foisted on them by the law in signing execution warrants for the execution of death row inmates in Nigeria.

**Section 12 (2) (c) of the Nigerian Correctional Services Act<sup>110</sup>** appears to offer a reprieve to a death row inmate who has exhausted all his/her right of appeal and a period of 10 years has elapsed without the execution of the sentence, the Chief Judge of the State<sup>111</sup> may commute the sentence of death to life imprisonment. This is a further pointer that some of the Nigerian legislators appear to be thinking along the line of jettisoning the death penalty, especially in circumstances where the Governors or the President lacks the Will to sign the execution warrant. The timely execution of death row inmates, whose right of appeal have been exhausted, will definitely send a signal to society that crime does not pay and will inevitably reduce the rate of crime. One of the reasons why there is the prevalence of the offences of kidnapping and armed robbery in Nigeria is the lack of Will to execute death row inmates in Nigeria. The continued retention of death sentence as a penalty in the Nigerian Criminal Justice System without periodic execution of death row inmates is a scam and an injustice to the criminal justice system.

## IX. CONCLUSION

It is submitted in **conclusion**, that there is a difference between the law as it is and the law as it ought to be. The jurisprudence in Nigeria at present is that the death penalty is legal and viable in Nigeria. Both the President and the State Governors are encouraged to perform their legal duties by signing execution warrants for the execution of death row inmates in their States, Federal Capital Territory, and for Federal prisoners. Curiously, the Kano State Governor in August 2021 vowed to sign the execution warrant of a man sentenced to death for alleged blasphemy without delay if he does not appeal at the expiration of 30 days. In his words according to Premium Times, he said; ***“I will not waste time in signing the warrant for the execution of the man who blasphemed our holy prophet of Islam.”***<sup>112</sup> This eagerness by the

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<sup>108</sup> Administration of Criminal Justice Law, Laws of Lagos State Cap A3, 2015.

<sup>109</sup> 1999 Constitution of the Federal Republic of Nigeria as amended.

<sup>110</sup> Nigerian Correctional Service Act, 2019.

<sup>111</sup> Section 46 Nigerian Correctional Service Act, 2019 on the interpretation of who is a Chief Judge.

<sup>112</sup> Nasir Ibrahim, Blasphemy: Ganduje vows to sign singer's death warrant unless... , available at:

Kano State Governor to sign the execution warrant is believed to be motivated by other factors especially as there are many convicts who have exhausted their appeals and are waiting for their execution in Kano State.

Also, in Lagos State, it is curious and worrisome that the governor has refused to sign the execution warrant for the execution of the General Overseer of the Christian Praying Assembly, Rev. Chukwuemeka Ezeugo (a.k.a Reverend King) who was convicted and sentenced to death since 11<sup>th</sup> January 2007, and whose appeal to the Supreme Court of Nigeria was dismissed on 26<sup>th</sup> February 2016. His conviction was for ordering the gruesome execution of a lady who was his church member, Ann Uzoh,<sup>113</sup> in what was described by one of the Supreme Court justices, late Hon. Justice Sylvester Ngwuta is tantamount to watching a horror movie<sup>114</sup>.

There is no moratorium on the execution of death row inmates in Nigeria. It is a lack of will and unjustified religious belief by persons in a position to sign the execution warrant. The Governor of Kano State, His Excellency Abdullahi Umar Ganduje was reported by Daily Trust to have said that the Governors are afraid of signing death warrants of convicts because they would not want to order the execution and later find out that the person did not deserve to die<sup>115</sup>. The Governor appears not to be confident in the Nigerian judicial process which is an indictment on the judiciary. However, this same Governor had hitherto vowed to sign the execution warrant of a convict sentenced to death for blasphemy by a single judge but is reluctant to sign the execution warrants of inmates on death row whose death sentence has been affirmed by 7 justices of the Supreme Court. Something does not add-up here and it is submitted that the reason cited by the Governor is not genuine but is ludicrous. It is either those with the responsibility that start performing, or the legislature amends our laws by legislating against the death penalty. Either of these actions will assist in the decongestion of our Correctional Centres.

The undeniable truth remains that consciousness of the consequences of action has a way of impacting caution to action. The argument is true that irrespective of the existence of the death penalty for certain categories of offences, it has not stopped committal of such offences, instances which include the offence of kidnapping. It is also a truism on the other hand that

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<https://www.premiumtimesng.com/news/headlines/411141-blasphemy-ganduje-vows-to-sign-singers-death-warrant.html> (accessed Sept.22, 2021, 5:50 am).

<sup>113</sup> Ifreke Inyang, Rev King may escape death by hanging, available at: <https://dailypost.ng/2018/04/19/rev-king-may-escape-death-hanging/> (accessed Sept.22, 2021, 6:08 am).

<sup>114</sup> Supreme Court affirms death sentence on 'Rev. King' , available at: <https://www.premiumtimesng.com/news/top-news/199082-supreme-court-affirms-death-sentence-rev-king.html> (accessed Sept.22, 2021, 6:25 am).

<sup>115</sup> Clement A. Oloyede, Why Governors Are Afraid Of Signing Death Warrants – Ganduje , available at: <https://dailytrust.com/why-governors-are-afraid-of-signing-death-warrants-ganduje> (accessed Sept.22, 2021, 6:35 am).

assuming death sentence is not a penalty for certain categories of offence, say, for instance, kidnapping, the number of convictions for such offences would have been uncontrollable and out of proportion in Nigeria.

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