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# **The inefficiency of the death penalty for rape in Nigeria**

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## THE INEFFICIENCY OF THE DEATH PENALTY FOR RAPE IN NIGERIA

The year 2020 has proven to be one that put the menace of rape in the spotlight in Nigeria. Rape has been subject to social scrutiny having been the subject of intense agitation and debates in the country. A considerable part of the debates have been concerned with how to make sustainable socio-legal changes that will curb the crime of rape in Nigeria, and a foremost topic of debate has been the suitability or otherwise of the death penalty for punishing the crime of rape. The topic of the death penalty is addressed in this paper with arguments aimed at creating further exposure to the component issues in the suitability or unsuitability of capital punishment for rape in Nigeria.

According to Amnesty International, rape is endemic in Nigeria.<sup>1</sup> This is despite that indigenous cultures, traditions and customs of Nigeria generally forbid the crime of rape. Such a tradition that evince indigenous anti-rape disposition is that of Ago Akingboye, a village in Ondo State, where it is forbidden for anyone to have sexual intercourse with a woman with her back touching the ground.<sup>2</sup> In contemporary law and society, punishment for rape varies among countries of the world. For example, rape is punishable by death or castration in China, by beheading in Saudi Arabia, death by firing squad in North Korea, by three to twenty years imprisonment in Russia, by imprisonment of four to fifteen years in Norway.<sup>3</sup> In Nigeria, the most severe punishment for rape is imprisonment for life upon conviction (see s. 358 Criminal Code, s. 283 Penal Code, s. 31(1) & (2) CRA 2003, s.1 VAPPA 2015).<sup>4</sup> However, there is a growing call from the society that the crime of rape in Nigeria should attract a more severe punishment which is the death penalty. This call has gained traction in the light of anti-rape agitations that have increased social sensitivity to the growing menace of rape in Nigeria.

The proposal of the death penalty for rape is informed by the desire to deter future offenders and to adequately punish rape convicts for their acts. The arguments in this paper raise points of concern about the inefficiency of the death penalty for the punishment of rape in Nigeria. Author's opinion is that there is no sanction too severe to punish the crime of rape, albeit the death penalty will not efficiently curb the menace of rape in Nigeria. The death penalty for rape has the potential to affect the anti-rape campaign retrogressively mainly because the death penalty influences the criminal behaviour in ways that may be negative for society. Two other reasons for the inadequacy and inefficiency of the death penalty for rape in Nigeria are also subject of discussion here. They are the problem of the lax enforcement of punishment for rape in Nigeria and the abolishment of the death penalty around the globe.

Philosopher Jeremy Bentham wrote that 'the profit of crime is the force which urges man to delinquency: the pain of the punishment is the greater force employed to restrain him from it. If the first of these forces be the greater, the crime will be committed; if the second, the crime

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<sup>1</sup> Retrieved from <https://www.icirnigeria.org/omozuwa-amnesty-international-says-govt-response-to-rape-cases-woefully-inadequate/> on Nov. 24 2020.

<sup>2</sup> Retrieved from <https://punchng.com/ondo-woman-loses-pregnancy-after-rape-by-motorcyclist/?amp=1> on Nov. 24 2020.

<sup>33</sup> Retrieved from <https://www.scoopwhoop.com/amp/inothernews/punishing-rape-globally/> on Oct. 10 2020.

<sup>4</sup> Child's Right Act 2003 LFN ; Violence Against Persons (Prohibition) Act, 2015.

will not be committed.”<sup>5</sup> Generally, the punishment and sanction for illegal acts can be used to attain four purposes which are, to punish the criminals for their crimes, to reform the criminals, to protect public safety by incapacitating criminals, and to deter people from committing the crimes.

The call for the death penalty for rape is aimed at achieving the purposes of adequately punishing rapists for their acts, safeguarding public safety by killing rapists, and to deter potential rapists by using the most severe punishment there is. However, I must state that an increment in the severity of punishment is not a panacea to crime. Legislators must anticipate human, societal, and criminal behaviour response to new laws.<sup>6</sup> The behavioural response of the criminals to laws is well captured by criminal behavioural sciences and economic theories. Simply, a rational criminal will evaluate the punishment/costs and benefits of a crime before engaging in it, and when the punishment/costs are higher than the benefits, the criminal will desist from that crime.<sup>7</sup> Hence, the presumptions that increment of punishment for rape to the death penalty will make rapists desist from committing the crime. This presumption is true yet rebuttable because criminals are not always rational beings, as they are subject to influences and biases outside of rational thinking such as prevalent social norms, personal beliefs, risk tolerance, optimism, misinformation etc.<sup>8</sup> Impliedly, one must be wary of the fact that capital punishment for rape portends some negative effects on rape in Nigeria. This is because of existent conceptual gaps that affect how legislations perform in the reality and context of society. Consequently, I will explore these conceptual gaps that will impact the performance of legislative intent for the death penalty for rape in Nigerian society.

A conceptual gap is a presumption that the death penalty will deter rapists from committing the crime of rape. It is expected that severe punishment will achieve a reasonable amount of deterrence; however, one must understand that the death penalty alone cannot achieve complete deterrence of any crime. That a crime is punishable by death does not ensure that people will desist from committing that crime. Drug trafficking is punishable by death in conservative countries yet criminal elements continue to commit the crime and the same can be said for the crime of armed robbery which is a capital offence in Nigeria. As stated, criminals are subject to influences and biases outside of rational thinking. Rape is a crime that easily falls outside the bounds of rational thinking. The irrational nature of rape was pointed out by the Supreme Court in *Edwin Ezigbo v. The State*<sup>9</sup> when it said that “the facts revealed in this appeal are sordid and can lead to a conclusion that a man can turn into a barbaric animal”. The abundance of irrationality in rape comes to fore when one considers the cases of infant rape, biastophilia, and rape committed for fetish and ritualistic reasons in Nigeria. It is also clear that rape is not confined by race, level of education, social status, income levels etc.

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<sup>5</sup> Bentham, J. 1789. An introduction to the principles of morals and legislation.

<sup>6</sup> Luca, D. 2017. Behavioural research and corruption: a new promise for governments? *European Law Journal*. 24.6: 510-523.

<sup>7</sup> Becker, G.S. 1968. Crime and punishment: an economic approach. *The Journal of Political Economy*. 169 -217.

<sup>8</sup> Luca, *supra* note 6.

<sup>9</sup> (2012) 16 NWLR Pt. 1326.

The foregoing averts the mind to the reality that rape will not be completely deterred by the death penalty, thereby making it pertinent to envisage the response of the rapist to the death penalty. The ensuing problem is that the death penalty is a catalyst for the sophistication of crime when it is unable to achieve total deterrence. Crimes punishable by death do possess elements of sophistication; they become difficult to detect, difficult to prosecute, and difficult to convict. An example is the sophistication of grand corruption in China where it is punishable by death.<sup>10</sup> This sophistication of capital offences is a direct result of the criminal behavioural response to severe punishment which comes in the shape of efforts directed at the elimination of the certainty of punishment. Criminals reduce the certainty of punishment by eliminating the possibility of detection or by obstructing prosecution to avoid a conviction with the ultimate aim of avoiding the incidence of punishment. The incentive of criminals to eliminate the certainty of punishment becomes predictably higher when the punishment is a severe one. The high incentive of rapists to eliminate the severe punishment of the death penalty has serious implications for the efficient performance of death penalty laws for rape in Nigeria.

As stated above, the death penalty cannot deter rape completely and when rape occurs, the rapist is incentivised to avoid the punishment of death penalty at all costs by avoiding detection or by stifling prosecution and conviction. Since rape is a discreet crime which is usually reported by the victim, the easiest way by which the rapist will avoid detection and prosecution is by silencing the victim who is usually the first reporter. This puts the victim in line to bear the incidence of the costs of punishment which the criminal is trying to avoid. The reality is that the death penalty may constrain rapists to the murder the victim or coerce them by some means to avoid bearing incidence of the death penalty. Foreseeably, one should expect a rise in the murder of rape victims as rapists attempt to insure themselves against the death penalty. The crime of rape will then become a zero-sum game for the criminal to the detriment of the victim. Summarily, the rape victims may end up bearing the incidence of the death penalty as rapists try to avoid its costs. Moreover, the death of rape victims will make the prosecution and conviction of rape harder in Nigeria, where direct evidence of the victim may be crucial to a successful prosecution.

Besides the reactive interaction between the death penalty, the rapist and the victim, another important conceptual gap is the enforcement of the death penalty for rape in society. Laws exist in a vacuum without societal enforcement. According to Amnesty International, rape is endemic in Nigeria, and the governmental and societal response has remained alarmingly low. The Nigerian society has a tolerant culture of rape, a culture of silence, victim-blaming, assigned societal gender roles, and lax prosecution of rape cases. Commonly, victims and their families are manipulated by the tolerant culture of rape to hinder the prosecution of rape cases. These hindrances to prosecution largely occur along societal lines of institutional deficiencies, kinship ties, familial and community ties, romantic ties, friendships, and other degrees of affinity which has resulted in many rape cases being 'swept under the carpet' at the community and institutional levels. The possibility exists that the Nigerian society will

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<sup>10</sup> Zhu, J. 2012. Do severe penalties deter corruption? A game-theoretic analysis of the Chinese case. *China Review*. 12.2: 1-32

become further recalcitrant in reporting and prosecuting rape if it becomes a capital punishment. The severe nature of the death penalty will invite more pressure on the victims, their family, and relevant institutions to relax the enforcement of punishment for rape. To avoid putting the cart before the horse, existing societal and institutional hurdles for enforcement of current rape punishment must be addressed; otherwise, the death penalty will cause a decline in the reporting and prosecution of rape when death becomes the end game for rape. This portends that more rape cases will be ‘swept under the carpet’ due to existent social and institutional lapses.

Finally, the death penalty has become obnoxious in the world today as states are moving away from being recognised as killing states.<sup>11</sup> One germane reason for this is that human life is sacrosanct and persons should be protected from being deprived of it on the account of judicial error. The courts are not perfect and this is why the courts maintain that ‘it is better to let ten guilty persons go free than to punish one innocent person’. Convicts should be imprisoned for life instead of being put to death. This approach has yielded commendable results in other jurisdictions where convicts were later exonerated after conviction for sexual crimes (see the exoneration cases of Archie Williams and Rafael Ruiz in the U.S.). It would have amounted to irredeemable mistakes on the part of the justice system if these ex-convicts had been put to death before their exoneration. Thus it is diligent that a rape convict should be removed from the society for life by imprisonment rather than to be killed using the death penalty.

In conclusion, the more efficient way of using punishment to control the culture of rape in our society is by raising the certainty of existing punishment and not by increasing its severity. An increase in certainty of punishment is more tasking however more effective than enacting legislation that increases the severity of punishment for rape to the death penalty. The need for institutional and legal reforms that will enhance the reporting, prosecution, and attainment of conviction for rape now becomes more pressing. Socio-cultural re-orientation by the government and the civil society to change social attitudes that hinder the punishment of rape is also needed.

The NOA for instance is a well-positioned government agency to lead this change in societal attitude towards rape. The Agency has a governing board comprising of stakeholder representatives such as National Council of Women Societies, the Nigerian Universities, the Religious Councils, the Ministry of Education, the Nigerian Institute of Cultural Orientation, to mention a few. These are stakeholders that can effectively pursue agendas that will lead to an increment in the certainty of punishment for rape to achieve the aim of deterrence and certain punishment for offenders in the society. The local governments who are close to the grassroots should have specialised rape centres to bolster the gaps in the Nigerian socio-sphere to attain higher certainty of punishment for rapists. These suggestions are a token out of numerous steps that can take towards ensuring the certainty of punishment for the crime of rape.

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<sup>11</sup> Hood, R and Hoyle, C. 2009. Abolishing the death penalty worldwide: The impact of a “new dynamic”. *Crime and Justice*. 38.1:1-63.

The gamut of the article remains that when the criminal knows that the certainty of punishment for rape is high they will certainly desist from committing the crime. However, if only the severity of punishment is increased to the death penalty, the victims will end up bearing the costs of increment due to victim murder, victim coercion, and possible societal aversion to the enforcement of the death penalty for rape.