

DEATH ROW PHENOMENON AND METHODS OF EXECUTION: A REPUGNANT VIOLATION OF THE DIGNITY OF MANKIND

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Nobody heard him, the dead man
But still he lay moaning
I was further out than you thought
And not waving but drowning.¹

Abstract

This article discusses the emerging doctrine of death row phenomenon and methods of execution which are inevitable consequences of the imposition of sentence of death. It is a doctrine which the abolitionists of death penalty device as an alternative means of questioning the legitimacy of sentence of death. The basic argument is that a prolonged delay under the harsh condition of death row constitutes torture, cruel and inhuman treatment in violation of the inmates' fundamental human rights. The author identifies two approaches for establishing death row phenomenon-the conservative and the progressive approaches and argues that there is an urgent need to reconcile the two in order to have a clear meaning of torture, cruel, degrading and inhuman treatment. Using doctrinal research methodology, the article finds that the doctrine has explicitly been recognised in some international judicial system as an egregious violation of fundamental human rights of the death row inmates. The article therefore recommends that it is imperative that the doctrine be given legal protection in domestic and international legal order in the interest of dignity, integrity and decency of mankind.

Keywords: Death Row, Execution, Repugnant, Dignity, Mankind.

1. Introduction

Both domestic and core international human rights instruments guarantee all persons the right to dignity which is the main reason for the prohibition of torture, cruel, inhuman and degrading treatment. Indeed, it is a peremptory norm of international law (*jus cogens*) that nations should accord human beings a deserving degree of decency, integrity and dignity hence, death penalty is regarded as incompatible with this peremptory norm. This is because of its inherent capacity to inflict pain and suffering. Some of the inevitable consequences of imposition of death penalty are detention in death row section of the prison and the subsequent execution of the condemned prisoners. The death row is close to the gallows, yet, dreaded by fellow inmates. It has been described as a living hell where death daily feeds on their fear and eats at their inside². It is a

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¹ Stevie Smith "Not Waving but Drowning" 1983 quoted from Army Smith, in Collected Poems "Not 'Waving 'But Drowning": The Anatomy of Death Row Syndrome and Volunteering for Execution" <<https://www.bu.edu/pdf/file/2015.>>

² Oladele Ol'tunji 'Life on Death Row' 2019<<https://www.thenation.ng>> accessed 12th August, 2020.

place where condemned prisoners are confined to small cells for up to twenty-three hours a day with gruesome consequences. The various methods of execution are no less dastardly. It dramatises the egregiousness with which human life is violated pursuant to judicial ordered execution. The right to dignity is the underlying principle of the most fundamental human rights charters, basic law and constitutions of most nations. Since the twentieth century, it has become a cornerstone of international and domestic law. There is no doubt therefore, that human dignity is an indispensable compass in our continuing journey to promote the rights and freedom of the individual³. According to Mohammed Watab “...we may not always know where it will take us, but the fundamental value of human dignity will always remind us where we are coming from”⁴. Since the constitutionality of death penalty has been affirmed by the Supreme Court of Nigeria in plethora of cases as will be shown *anon*, what this paper seeks to interrogate in the main is whether the post-sentence process experienced by the inmates on death row awaiting execution amounts to torture, degrading and inhuman treatment, and if it does, will it be in violation of the right to dignity of the inmates which questions the subsequent execution of the inmates? In other words, can prolonged detention on death row and or its extremely harsh conditions trigger death row phenomenon, and if it can, will it be strong and sufficient enough to extenuate or completely obliterate the sentence of death? Available evidence unequivocally shows that psychological anguish is inherent on death row and therefore, it is impossible to be in solitary confinement without breaching the norm prohibiting cruelty, torture or inhuman treatment⁵.

To achieve its aims, the paper is divided into five segments. The second segment discusses the doctrine and its underlying logic. Under this segment, we shall argue that there are two approaches which scholars say can trigger the death row phenomenon⁶. This makes its precise meaning and scope ambiguous and when it becomes unlawful uncertain. We shall examine the decisions of some selected domestic and international courts/tribunals which includes United Kingdom, Nigeria, Zimbabwe and Jamaica to illustrate the divergent approaches that signpost the time when the phenomenon reaches the necessary threshold of torture, cruel, degrading and inhuman treatment. In the third segment, various methods of execution are analysed. The fourth segment looks at the recognition or acceptance of the doctrine by the international communities as a veritable means of undermining the legitimacy of death penalty in order not to perpetuate delay on death row as part of the jurisprudence of both domestic and international legal order. The fifth which is the last section concludes on the note that the international communities should recognise the phenomenon as a human rights concern in order to save humanity from the horrors of indignity and double jeopardy which the inmates are subjected to. This preceding introductory segment which is the first is now concluded with the examination of the legal framework/constitutional basis for the sanctity and sacredness of life and protection of the inherent decency and dignity of mankind.

³ Mohammed S. Watab “Revisiting *Plessy v. Brown* – ‘Dignity’ A Recipe for Humiliation: Why Separate but Equal Cannot be equal? A Theory of Legal Thinking” *Indian Journal of International Law* (2007) 47 No. 2 .177.

⁴ *Ibid*, p. 177

⁵ Patrick Hudson, ‘Does the Death Row Phenomenon Violate a Prisoner’s Human Rights under International Law?’ <<https://www.ejil.org>> accessed 20th October 2021

⁶ Kealeboga N. Bojosi, ‘The Death Row Phenomenon and the Prohibition against Torture and Inhuman Cruel, or Degrading Treatment’, *African Human Rights Law Journal*, (2004) vol. 4no.2, 303-333.

2. Legal Framework/Constitutional Basis

The Legal framework for this discourse is predicated on respect for life, dignity of mankind, prohibition of torture and inhuman treatment both in municipal and international law. This, without doubt makes the issue of death row phenomenon a human rights concern. Human rights have become a recurring issue and has continued to elicit domestic and international interest all over the world.⁷ Its observance has become a condition precedent for financial aid, debt write-offs, moratorium or sales of armament to other nations⁸. Honorable Justice Chukwudifu Oputa (JSC) describes a “right” as either the liberty of acting or abstaining from acting in a certain manner or the power of compelling a specific person to do or abstain from doing a particular thing⁹. A legal right is thus the capacity residing in one man of controlling with the assent and assistance of the state the actions of others. It follows then that every right involves a person invested with the right, or the person entitled; a person or persons on whom that right imposes a correlative duty or obligation¹⁰. They were considered to be natural not only because they were derived from nature, but also, they were considered inherent, imprescriptible and could not be legally alienated by any ruler¹¹. However, not all human rights are fundamental. Fundamental human rights are of greater character which must stand above the ordinary laws of the land. This is echoed by the Nigerian Supreme Court in the case of *Olufunmilayo Ransome Kuti & Ors v. A-G (Federation)*¹² in the following instructive words:

...but what is the nature of fundamental human rights? It is a right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to a civilised existence and what has been done to our constitution is to have the rights enshrined in the constitution so that the right could be immutable to the extent of the non-immutability of the constitution itself¹³.

It is therefore not surprising that the Constitution of the Federal Republic of Nigeria 1999 (as amended) (CFRN) provides in section 33(1) as follows:

Every person has a right to life and no one shall intentionally be deprived of his life save in execution of sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.

The provision of section 33(1) has a direct bearing on the applicability of death penalty in Nigeria and which has been severally affirmed by the Supreme Court in plethora of landmark cases such as *Onuoha Kalu v The State*¹⁴ *Ogugu v The State*¹⁵ and *the State v Peter Nemi*.¹⁶ As a result, death penalty cannot be legally described as unconstitutional in Nigeria.

⁷ Abila Syvalnus, ‘Constitutional Democracy, Security and Human Rights under President Muhammadu Buhari’s Dispensation’ *African Journal of Law and Human Rights*, (2018) vol. 1 p.111

⁸ MVC Ozioko and Ikenga K. Oraegbunam, ‘Foreign Investment Human Rights and National Development: Jurisprudential approach’, *African Journal of Law and Human Rights* (2019) vol. 3 No.2 p.7.

⁹ C Oputa, ‘Human Rights in the Political and Legal Culture of Nigeria’, Being a Lecture delivered at the 2nd Idigbe Memorial Lecture 1989 *Nigerian Law Publication Ltd.* Lagos pp.38-39.

¹⁰ Oputa, *Ibid.*

¹¹ UO Umzurike, ‘The Present State of Human Rights in Africa,’ *The Calabar Law Journal* (1986) vol.1 no.1, p. 63.

¹² (1985) 2 NWLR (pt 6) p. 211

¹³ *Ibid.* per Kayode Eso (JSC) at p. 229-230

¹⁴ [1998] 12 S. C. N. J. 1

However, section 34 of the CFRN protects right to dignity of human person even after the imposition of sentence of death. The section provides as follows;

Every individual is entitled to respect for the dignity of his person, and accordingly- (a) no person shall be subjected to torture or to inhuman or degrading treatment.

It is along the same trajectory that the Nigerian Anti-Torture Act 2017 criminalises the act of torture and other cruel, inhuman and degrading treatment. For the purpose of the Act, torture includes

Mental or psychological torture which is understood as referring to such cruel, inhuman and degrading treatment calculated to affect or confuse the mind or undermine a person's dignity or morale...¹⁷.

The net effect of the conjunctive reading of sections 33(1) and 34 (1) of the CFRN is that even though death penalty is constitutional in Nigeria, it places a legal duty on Nigerian state to ensure that after sentencing, the post-conviction process and methods of execution is not such that will debase and desecrate the very essence of humanity. At the international level, Article 4 of the African Charter on Human and People's Rights (1981) states that "human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. This means that no one may be arbitrarily deprived of his rights"¹⁸. The Universal Declaration of Human Rights, 1948¹⁹ and the United Nations Charter 1945²⁰ guarantee the right to human dignity. The International Covenant on Civil and Political Rights 1966. (ICCPR) in Articles 7 and 10 provide against torture, cruel and inhuman treatment. Article 7 provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" while Article 10 (!) provides that "A person deprived of his liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Article 3 of the European Convention on Human Rights addresses the prohibition of torture and provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". The ICCPR acknowledges the use of death penalty²¹ and the constitutionality of it in some retentionist countries, it enjoins the states that retains its use to do so sparingly and for the most serious offences. In view of the above discussion, especially section 34(1) of the 1999 CFRN and the provision of Anti-Torture Act 2017, the prevailing question is whether the combined effects of prolonged stay in solitude on death row, with its harsh conditions, and the method of execution, all being inevitable consequences of death penalty, constitute a violation of the fundamental right of the prisoners to human dignity, non-torture, degrading and inhuman treatment? The question can be better answered after a detailed examination of the scope of death row phenomenon.

¹⁵ (1994) 9 N W L R pt. (41) p.249

¹⁶ [1994] 10 S. C. N. J. 1

¹⁷ Section 2(2) (b) of the Act.

¹⁸ Aloy Ojilere, 'Human Dignity and The Rights to Work, Seeking Protection for Commercial Sex Workers' *African Journal of Law and Human Rights*, 2020 vol 4 no. 1, p.12.

¹⁹ Article 5 UNDHR 1948

²⁰ The Preambles to the U.N. Charter 1945

²¹ Article 6 of the ICCPR 1966.

3. The Scope and Meaning of Death Row phenomenon

The Special Rapporteur on torture, conditions of detention on death row defines it as “a combination of circumstances, including the lengthy and anxiety ridden wait for uncertain outcome, isolation, drastically reduced human contact and even the physical conditions in which some inmates are held”²². It is described as the inhuman treatment resulting from special conditions in death row and often prolonged wait in solitary confinement for execution or where the execution is carried out in a way that inflicts gratuitous suffering. The situation on death row globally is characterised by emphasis on high security, isolation and austere conditions. This sad situation dramatises the difficult situation associated with death penalty.

The death row is further described as a stop-over, a transit camp on the journey of death where the inmates weep away their life. It is a fate worse than death. The simple fact is that, it is inevitable as it is a consequence of imposition of death penalty for those who are found guilty of capital crimes as defined by law²³. Some former inmates of death row who got reprieved by way of commutation of death sentence²⁴, or pardon through the exercise of prerogative of mercy²⁵ described it as a “morgue” and “tomblike” yet, it is where they had lived. It is through an effort to conceptualise the combination of the circumstances and experience on death row that the legal term “death row phenomenon” came into consciousness²⁶. Indeed, the effects of prolonged delay under a difficult death row conditions has been recognised internationally. It may not be due to delay alone or a product of harsh conditions on death row, rather it may be due to unimaginable deadly combination of the two²⁷. It questions the propriety of death penalty by establishing that execution after a prolonged delay under the harsh conditions of death row constitutes cruel, degrading and inhuman treatment. Further, it describes the experience of living under the shadow of death for an indeterminable period of time²⁸. In his article on the life of the prisoners on death row, Oladele Olatunji said;

The death row is a labyrinth of torment where inmates weep away their life, and live for the next second. Living on death row is akin to death by installment. The prisoners fear to tread into the gallows, it is the long wait that kill the inmates. Daily, death feeds on their fear and eats at their insides, living them a band of breathing corpses. They die many times before their death comes calling... and the manner of their death is very cruel²⁹.

In its own perspective, Patrick Hudson instructively said that death row is a place where;

Prisoners are usually confined to small cells for up to twenty-three hours a day...contact with others is severely restricted. The prisoner’s mind has little to

²² Capital Punishment Justice Project: ‘The Death Penalty and the Prohibition of Torture and Cruel, Inhuman or Degrading Treatment or Punishment’ <<https://www.fiacat.org/attachment/article>> accessed 15th January 2022

²³ See section 319 of the Criminal Code, Cap C38 LFN2004 and section 221 of the Penal Code Cap P3 LFN 2004.

²⁴ In pursuance of section 12 (2c) of the Nigerian Correctional Services Act 2019.

²⁵ In pursuance of section 275 of the 1999 CFRN.

²⁶ Olga Hempel ‘Death Row Phenomenon. A Fate Worse Than Death’ <<https://www.repositry.gchumanrights.org>>

²⁷ Living Conditions on Death Row (Detailed Facts Sheet) Amnesty International’s 2017 16th World Day against the Death Penalty. <<https://www.amnesty.org/download/documents>> accessed 12th August 2020.

²⁸ Smith (n1)

²⁹ Olatunji(n2).

contemplate except the crimes which have been committed, the impending execution and the chances of a successful appeal³⁰.

These conditions, no doubt, can lead to psychological trauma which can reduce the condemned prisoner to little more than the living dead. An Indian judge describes the prisoners on death row as more of a vegetable than human being and hanging a vegetable is not a death penalty³¹. It is therefore the humble opinion of this writer that whatever may be the justification, prolonged solitude is a punishment that is detrimental to the psychology of death row inmates. It also negates the international treaties, declarations and other documents that establish the scope of prisoners 'rights to which Nigeria is a signatory³². It is therefore submitted with respect that if such a prisoner is executed, it will not only be double jeopardy, it will also be contrary to the provisions of section 34(1) (a) of the 1999 CFRN³³ which is inconsistent with the purpose of death penalty as the prescribed punishment is death and not torture and inhuman treatment followed by death.

The death row phenomenon grew into prominence in the case of *Soering v. United Kingdom*³⁴ where the European Court of Human Rights (ECHR) held that the possibility of enduring death row conditions coupled with anguish and mounting tension of living in the ever-present shadow of death was a violation of the prohibition of torture. The Court found a breach of Article 3 of the European Convention on Human Rights (ECHR) and stated that Soering's extradition to the United States would expose him to real risk of treatment exceeding the threshold set by Article 3 of the Convention. The doctrine was further developed in the Jamaican case of *Pratt & Morgan v. A-G Jamaica*.³⁵ The Judicial Committee of the Privy Council held that the execution of the convicts who were on death row for over fifteen years while exercising the right of appeals violated the Jamaican constitution and Article 7 of ICCPR. In *Catholic Commission for Justice and Peace in Zimbabwe v. A-G Zimbabwe*³⁶, the Supreme Court of Zimbabwe held that based on judicial consensus on death row phenomenon, the prolonged delay and the harsh death row conditions were a violation of the prohibition of torture and inhuman and degrading punishment. In the Nigerian case of *Onuoha v. the state*³⁷, the appellants contended that because of his prolonged delay on death row, the court should commute the sentence of death to life imprisonment as the Privy Council did in *Pratt's case*. The Supreme Court of Nigeria refused to pronounce on it on procedural grounds but nevertheless made the following pertinent *obiter dictum*;

³⁰ Hudson (n5).

³¹ Living Conditions (n27)

³² "Handling Death Row Inmates" (2022), <<https://www.thisdaylive.com>> 9th March, 2021.) A clear reference is the United Nations adopted Standard Rules of 1955 that recognises solitary confinement and prolonged segregation as appropriate only in exceptional circumstances.

³³ It is also contrary to the provisions of Articles 7 and 10 of the ICCPR 1966. Article 5 of the Universal Declaration of Human Rights 1948, Article 5 of the African Charter on Human and People's Rights 1981 and Article 5 of the American Convention on Human Rights.

³⁴ 4 All E. R. 769 (1993) Soering's case remains the *locus classicus* for providing the basis for other courts to recognise death row phenomenon.

³⁵ [1994] 2 A. C.1 (Privy Council)

³⁶ [1993] (4) S. A.239

³⁷ (n14).

At any rate, if after the death sentence has been passed and the accused is in the prison custody, if anything arises outside the normal custody that amounts to torture, or inhuman or degrading treatment” that will be a cause of action under fundamental rights but not militating against the sentence of death. In such a case, death sentence stands, but.... “inhuman or degrading treatment” outside the inevitable confinement on death row will not make illegal the death sentence’ rather it only gives ground for an enforceable right under the constitution³⁸.

In spite of the capacity of the death row phenomenon to diminish and question the credibility of sentence of death, its precise meaning and scope is still mired in controversy. A general discussion of the death row identifies three components that make the phenomenon i.e. the temporal, the physical and the experiential³⁹. The temporal component looks at the extreme delay subjected upon death row inmates while awaiting judicial appeal procedures or execution. This factor of delay seriously diminishes public support for death penalty which in most cases stem from individual instinct to survive⁴⁰. The physical component discusses harsh death row, detention cell conditions, including solitary confinement and austere resources. A study carried out by environmental psychologists has shown that prison conditions such as overcrowding and isolation impact inmates’ psychological well-being and behaviour in negative ways⁴¹. The grave psychological harm caused resulting from the condition of solitary confinement has been speculated to cause “confinement psychosis” manifesting in hallucination and delusions⁴². Experiential as the third component of death row phenomenon focuses on the psychological implications of living with impending execution and the impacts of extended death row detention. It is the presence of the risk that the execution will be implemented together with the torment created by the first two components, delay and prison conditions are regarded in some jurisdictions as death row phenomenon

There is no doubt that apart from unending expectation of death, death row inmates are condemned to a kind of existential limbo, existing as entities in cold storage rather than living as a human being. This amounts to a violation of the fundamental right of the prisoners to dignity, non-degrading and inhuman treatment which is something outside the normal prison custody. The harrowing spell condemned prisoners go through daily in solitary cells, humbled by the force of an impending death that seems to be an eternity is better imagined than experienced. It is therefore humbly submitted that unreasonable delay under the harsh death row conditions should not be established as part of the experience of death row inmates. A condemned prisoner has the right to be put out of his misery without inordinate delay, the burden of which is on the retentionist states to discharge⁴³. Lord Griffiths aptly points this out in *Pratt’s case* when he says that;

³⁸ Per Belgore (JSC), at p. 53.

³⁹ ‘Death Row Phenomenon Violates Human Rights’ *Human Rights Advocates*. < <https://www.humanrightsadvocates.org>>

⁴⁰ Hudson (n5)

⁴¹ Smith (n1)

⁴² Karen Harrison. and Anoush Tamony, ‘Death Row Phenomenon, Death row Syndrome and Their Effect on Capital Cases in the U.S’, *Internet Journal of Criminology*, <<https://www.internetjournalofcriminology.com>>

⁴³ AA Oba, ‘Capital Punishment, The death Row Phenomenon and the Supreme Court of Nigeria: *Onioha Kalu v. The State* [1998]12 S C N J. *The Zimbabwe Law Review*, (1999)vol. 16 p. 15

In their Lordship's view, a state that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve... If the appellate procedure enables the prisoner to prolong the appellant hearing over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes the advantage of it. The appellate procedures that echoes down the years are not compatible with capital punishment. The death row phenomenon must not become established as part of our jurisprudence⁴⁴.

There is no statute that compels the President or the Governors to sign death warrants of those on death row. They only hesitate to sign it because of political or religious reason. It is not a weakness on their part but more of a certain sublime regard for the sanctity of human life. It is conceded that there are difficulties involved, it needs to be emphasised that the responsibility is a solemn one. Where a Governor is unable to sign a death warrant, he should exercise a prerogative of mercy pursuant to the provisions of section 12(2) (c) of the Nigerian Correctional Service Act 2019. The condemned prisoner can also be granted state pardon⁴⁵ thereby putting an end to the matter. It is our considered view that to act in neither way is not only tantamount to shirking a serious responsibility, it is also morally reprehensible to leave the inmates perpetually on death row especially those who have exhausted the appellate procedures. Unfortunately, many of this category of inmates abound in Nigerian correctional centres, hence the recent appeal by the Minister of Interior, Rauf Aregbesola to the state Governors to sign the death warrants of those on death row in order to decongest the correctional centres.⁴⁶

4. The Threshold of Torture and Inhuman Treatment

Having identified the judicial origin and scope of death row phenomenon, the ensuing question at this stage is; at what point does it violate the prohibition of torture, degrading and inhuman treatment provisions in both domestic and international instruments? In other words, when does death row phenomenon exceed the threshold of torture, degrading and inhuman treatment? There is no consensus yet in the jurisprudence of various courts on the issue. However, there are two dominant approaches. These are the progressive and the conservative approaches⁴⁷. The former sees prolonged detention on death row on its own as a sufficient supervening factor which may render the carrying out of the death penalty illegal, unfair and unjust⁴⁸. The latter on the other hand, posits that over and above prolonged detention, there must be established the existence of other circumstances such as the death row conditions and that the delay is not attributable to the prisoner⁴⁹. In the epochal case of *Soering v. the U. K.*,⁵⁰ earlier referred to, the ECHR adopted the conservative approach and held that prolonged delay on death row in conjunction with harsh agonising conditions on death row and under mounting anguish of execution is a breach of

⁴⁴ Ibid, at p.786

⁴⁵ Pursuant to section 175 of the 1999 CFRN

⁴⁶ Aregbesola Rauf, 'Sign Death Warrants to Decongest Prisons- Aregbesola Urges Governors' (The Punch Newspaper, Nigeria) <<https://www.punch.com/sign--death-warrants-to-decongest-prisons.>> accessed 20th November, 2021.

⁴⁷ Bojosi (n6).

⁴⁸ Ibid.

⁴⁹ Smith. (n1). A delay caused by unduly long process of appeal is not normally attributable to the appellant

⁵⁰ (n34)

Article 3 of the European Convention on Human Rights. Similar approach was adopted in *Catholic Commission for Peace and Justice of Zimbabwe v. A-G Zimbabwe*⁵¹ where the death sentence passed on the appellants were commuted to life imprisonment because of prolonged delay and harsh conditions on death row⁵². In the Jamaican case of *Pratt v Morgan*⁵³, the Privy Council adopted the progressive approach of prolonged delay alone to find death row phenomenon i.e. a time-based approach. Even though the doctrine has not been accepted as part of the jurisprudence of the U.S, Justice Breyer dissenting in *Knight v. Florida*⁵⁴ spoke of “the astonishingly long delay” in capital cases, an opinion in which he found it “difficult to deny the suffering inherent in a prolonged wait for execution”⁵⁵. The time-based approach has however been described as progressive and compassionate⁵⁶, most probably because in our view, it is driven by a strong opposition to the application of death penalty. Hence, many abolitionists’ countries such as South Africa, Australia, Belgium, United Kingdom, France and only recently Serial Leone have adopted the progressive approach in establishing the death row phenomenon in their domestic courts⁵⁷.

In Nigeria, the issue of what constitutes death row phenomenon also arose in the ubiquitous case of *Kalu Onuoha*.⁵⁸ From the observations of the Supreme Court in its earlier quoted *obiter dictum* in the case and apart from procedural errors, it is not likely that the court would have accepted long delay as constituting death row phenomenon for it to commute the sentence of death to life imprisonment. This is because of the novelty and lack of acceptance of the doctrine in Nigeria’s judicial system. However, a careful scrutiny of the above analysis reveals that there is a divergence between the two approaches. The non- unanimity of approach as to when the threshold of cruel, torture and inhuman treatment is exceeded has created confusion. This has thrown open the debate on death row phenomenon to speculations and by extension, it has made the position of the law uncertain and unpredictable. In this state of affairs, the law cannot be easily accessed and enforced by the “consumers of justice”. As a result, the application of the law becomes a matter of discretion or conjecture. According to Lord Bingham in his celebrated book ‘The Rule of Law’ “the law must be accessible and so far as possible intelligible, clear and predictable”⁵⁹. He further said;

Questions of legal rights and liability should be ordinarily be resolved by the application of the law and not the exercise of discretion⁶⁰.

⁵¹ (1993)4 SA 239

⁵² The judgment led to the commutation of sentence of death of twenty other condemned prisoners to life imprisonment. The Government of Zimbabwe however responded by passing the Constitution of Zimbabwe Amendment (No 12) Act 1993 which provides that delay in execution and conditions under which the prisoners are held will not lead to alteration of the sentence.

⁵³ {1993} UK PC 1.

⁵⁴ 120 S Cr 459. 461 (1995)

⁵⁵ Ibid

⁵⁶ This is by the former Chief Justice of the Supreme Court of Zimbabwe, Anthony Gubbay in *Catholic Commission for Justice and Peace in Zimbabwe v. A-G, Zimbabwe*.

⁵⁷ Bojosi (n6)

⁵⁸ (n14)

⁵⁹ Tom Binrham (2011) “The Rule of Law” Penguin U. K. Books. <<https://www.amazon.com/rule-Law-om>>

⁶⁰ Ibid

Certainty, no doubt, is the hallmark of law affecting a particular conduct of human beings. Consequently, in order to ensure certainty and predictability in what actually constitutes death row phenomenon, it is submitted here that the two approaches would be easier to reconcile if the various law-making bodies in various jurisdictions clearly offer a global definition of torture, and cruel, inhuman and degrading treatment. However, whether long period of delay is sufficient to trigger death row phenomenon or it requires further evidence of attenuating circumstances, this writer respectfully submits that long period of delay in the unbearable harsh conditions of death row *per se* should be sufficient to trigger death row phenomenon in accordance with the progressive approach. This view is based on no other reason than the conditions in the death row itself which has been earlier described. The testimony of a former prisoner on death row in the U.S at a congressional hearing on solitary confinement aptly captures the horrific conditions of solitude. The prisoner said;

I saw guys who dropped their appeals because of the intolerable conditions. Before his execution, one inmate told me he would rather die than continuing existing under this inhumane conditions... One guy... smearing feces, lying naked in the recreation yard and urinating on himself⁶¹.

With this gruesome scenario, a rhetorical question is: have we lost the inherent decency and dignity bestowed on us by our creator? What else do we require for this condemnable absurdity to exceed the threshold of debasement of humanity? Are we saying that our highly cherished imprescriptible dignity of man is just an ideal and therefore illusory? There is no doubt that the experience of the above inmates rendered nugatory the provisions of the various domestic and international legislations on human dignity and inhuman treatment. It is therefore submitted that for the realisation of the lofty objectives of the human rights legislations especially those on dignity of mankind, the comity of nations cannot afford to ignore the daily treatment imposed by the retentionist countries on prisoners kept on death row. After all, the Supreme Court of Nigeria has delivered a policy judgment that a death row inmate still has cognisable right in law⁶². The only viable alternative to the inhuman treatment of the death row prisoners, in our view, is for the entire international community to intensify its efforts for the global abolition of death penalty from the bodies of our laws in line with the objectives of the United Nations in order to save humanity from the horrors inherent on death row and the obscenity that accompanies the subsequent execution of the inmates⁶³. After all, the death penalty, in recognition of the possibility of bias, error of facts and law in its administration, has been described as a retributory justice of deterrence of a bygone era⁶⁴.

5. Methods of Execution

Death row phenomenon is not only the inevitable consequence of death penalty, various methods of execution of the prisoners are also a corollary. The execution of the inmates has been described as the ultimate egregious violation of the convict's fundamental right to dignity. The

⁶¹ "Living Conditions (n27).

⁶² *Peter Nemi v. The State* (n16).

⁶³ Some of the countries that have abolished death penalty are Australia, Belgium, Denmark, and United Kingdom. Others are Germany, France and South Africa.

⁶⁴ M. A. Owoade, 'Capital Punishment: Philosophical Issues and Contemporary Problems in Nigeria' *Second Order. An African Journal of Philosophy*(1988) vol. 1 no.1p.57

methods of execution vary from place to place. They are by hanging, firing squad, and electrocution. Others are gas chamber, lethal injection stoning and beheading. The most commonly used are briefly discussed hereunder.

5.1 Hanging

Hanging⁶⁵ was the primary method of execution especially in the United States up till 1890⁶⁶. It is still in use in many other countries. At its inception, it requires no central facility and it allowed for public punishment in front of the community affected by the crime. This is to impart a moral message along with its death sentence⁶⁷. The public nature of hanging was also its drawback as the spectacle called “human drama” do not always produce the desired result. For execution by this method, the prisoner may be weighed the day before and the gallows area trap door and release mechanisms are inspected for proper operations. The rope which is about 30 feet in length is soaked and then stretched while drying to eliminate the possibility of any spring or tendency to coil⁶⁸. The end of the rope which does not contain the noose, is tied to a grommet in the ceiling and is tied off to a metal T-shaped bracket, which take the force delivered by prisoner’s drop. Olisa Agbakoba describes the process of hanging by reference to an article written by Professor Christ Bernard which was quoted by the South African Constitutional Court in *State v. Makwanyane*⁶⁹. He said as follows:

The man’s spinal cord will rupture at the point where it enters the skull, electro-chemical discharges will send his limbs falling in a grotesque dance, eyes and tongue will start from facial apertures under the assault of the rope and his bowels and bladder may simultaneously void themselves to soil the legs and drops on the floor⁷⁰.

One prison official who witnessed execution in Nigeria is of the view that “the whole process is not good”. According to him,

Taking someone’s life after you have subjected him to so much trauma in the prison, you now hang him by the neck until he dies. It is barbaric. Since God forgives men, we should also learn to forgive ourselves...⁷¹.

5.2 Firing Squad

Execution by this method usually involves the prisoner being bound to a chair or a pole with a black hood pulled over his head. The chair or pole is surrounded by sandbags to absorb the blood of the prisoner. Up to 20feet away, the shooters, usually not less than five of them aim for the prisoner’s heart. Udo Jude Ilo and Oluwaseye Ajayi succinctly describe execution by firing squad if the prisoner is seated as follows:

⁶⁵ The methods of execution of death sentence by hanging is provided for in section 402 (2) of the Administration of Criminal Justice Act 2015.

⁶⁶ Udo Jude Ilo and O. Ajayi, On the Gallows, *The Human Rights Law Service* (2005) p.12.

⁶⁷ Richard C. Dieter, ‘Methods of Execution and Their Effect on the Use of the Death Penalty in the United States’. *Fordham Urban Law Journal*. (2008) vol.35 no.4.

⁶⁸ Ilo and Ajayi (n66) p.12

⁶⁹ (1995) BCLR 665 (cc)

⁷⁰ Ibid

⁷¹ Nigeria ‘Waiting For the Hangman (Amnesty International Publication, 2008). <<https://www.amnesty.org/document.>>

The offender is placed in a specially designed chair, which has a pan beneath it to catch and conceal blood and other fluid. Restraints are applied to the offender's arms, legs, chest and head. A head restraint is applied loosely around the offender's neck to hold his neck and head in an upright position. The offender is dressed in a dark blue outfit with a white cloth circle attached to the area over the offender's heart⁷².

The prisoner dies as a result of blood loss caused by a rupture of the heart or tearing of the lungs⁷³. Although, the U. S Supreme Court approved execution by firing squad, the method drew the ire of members of the public. The method has been described as “a brutal exhibitions of inquisitorial torture”⁷⁴. The method has also been described as the fastest way of execution and as not causing severe pain and suffering. However, those executions conducted in public often expose the convicts to an undignified and shameful display of contempt and hatred⁷⁵.

6. Death Row Phenomenon in Global Perspective

After providing an understanding of the concept of death row phenomenon, and its potential devastating effects on the inmates. This segment examines whether the jurisprudence of death row phenomenon has occupied the judicial systems of both domestic and international courts/tribunals. The doctrine has been well incorporated into the jurisprudence of the ECHR in the watershed case of *Soering v. the United Kingdom*⁷⁶ among others, in accordance with its peculiar laid down criteria. Similarly, the United Nations Human Rights Committee has also accepted the doctrine of death row phenomenon. The Privy Council in *Pratt and Morgan's case*⁷⁷ also incorporated the doctrine into its jurisprudence of Jamaica when the court accepted the argument that long period of delay in death row amounted to torture degrading and inhuman treatment. Even though the constitution of India does not proscribe torture, degrading and inhuman treatment, the Supreme Court of India has since filled the vacuum by interpreting Article 21 of Indian constitution which guarantees the right to live with basic human dignity as embodying the right not to be subjected to torture, inhuman or degrading treatment⁷⁸. This was the decision of the Supreme Court of India in the case of *Vatheeswaran v. State of Tamil Nadu*⁷⁹ which provided the impetus for considering the question of inordinate delay before carrying out execution of convicts. The court found that to take the appellants lives after a delay of eight years would be a gross violation of the fundamental right guaranteed by Article 21 of the Indian constitution. The appeal was allowed and the death sentences were set side and substituted by life imprisonment A review of the above cases leaves no further doubt that the jurisprudence of

⁷² Ilo and Ajayi (n66) p. 1

⁷³ Capital Punishment Justice Project. “The Death Penalty and The Prohibition of Torture and Cruel, Inhuman or Degrading Treatment” <<https://www.fiacat.org>> accessed 12th December, 2021.

⁷⁴ Richard C Dieter, ‘Methods of Execution and Their Effect on the Use of Death Penalty in the United States’ <<https://www.amnesty.org.au/death-penalty-methods-of-execution-us>> 21st June 2020.

⁷⁵ Capital Punishment Justice Project (n73).

⁷⁶ (n14).

⁷⁷ (n35).

⁷⁸ Bojosi (n6)

⁷⁹ *Air 1983 361*

death row phenomenon has been established up to the highest judicial echelon of those countries mentioned above and it has affected the implementation of the death penalty to the delight of the abolitionist countries. The position of the doctrine in other places like Africa and the United States is in diametrical opposition to those countries already mentioned ostensibly because of cultural and religious factors that form a considerable influence on the issue of death penalty⁸⁰. It is therefore not surprising that the Supreme Court of Zimbabwe rejected the argument of the appellants in the case of *Dhonini & ors v. Carter*⁸¹ that the delay between the imposition of their sentences and their confirmation was so inordinate as to constitute inhuman or degrading treatment in violation of Article 60 (1) of the then constitution of the former Rhodesia. In rejecting this argument, the court said, that “once a lawful sentence has been meted out, it could not be rendered unlawful by subsequent events that may be termed inhuman or degrading⁸². In what seemed to be a change in judicial altitude, the Supreme Court of Zimbabwe, made *volte face* in the case of *Catholic Commission for Justice and Peace in Zimbabwe v. A.G. & others*⁸³ where the court upheld the argument that a lawfully imposed sentence, including the death penalty, could be set aside by reason of subsequent events”⁸⁴. This is after the appellants had suffered prolonged delay coupled with harsh conditions on death row. The court finally held that in the circumstances of the case, the death sentence, if carried out would amount to inhuman or degrading treatment⁸⁵ thereby importing the doctrine of death row into the jurisprudence of Zimbabwe⁸⁶. The acceptance of the doctrine into the jurisprudence of South Africa seems to be uncertain. The South African constitutional court dealt with the issue of death penalty in the case of *S. v. Makwanyane*⁸⁷. In that case, the accused had been convicted of murder. Their appeal was dismissed at the appellate division. Because of the constitutionality of death penalty, the case was referred to the constitutional court. Although, the court referred to the death row phenomenon, it did not directly deal with it. Nevertheless, the court said “if long delays are not considered in themselves, cruel, inhuman and degrading punishment, then this would entail gratuitous suffering which is inevitable in any system which retains the death penalty⁸⁸. What appears clear from this case, in our opinion, is that the constitutional court of South Africa has endorsed the doctrine of death row phenomenon in its legal system to the effect that inordinate delay constitutes cruel inhuman or degrading treatment. The acceptance of the doctrine into the Nigerian legal system follows the same trajectory as that of South Africa. The issue has been raised twice before the Supreme Court of Nigeria without definite pronouncement⁸⁹. However, from the pronouncement and attitude of the court, the argument of prolonged delay on death row will be in favour of the victims but the remedy may be a different matter. For instance, inspite of the refusal of the Supreme Court of Nigeria to adjudicate on the alleged violation of human rights in *Onuoha’s case*⁹⁰ for reason of long delay on death row, there is useful *obiter dictum*

⁸⁰ Oba (n)59.

⁸¹ (1)1968 RLR 136

⁸² Ibid. p. 155

⁸³ (n36).

⁸⁴ Bojosi (n6)

⁸⁵ Ibid

⁸⁶ However, the acceptance was short lived as the Parliament nullified the effect of the judgment of the court.

⁸⁷ 1995 3 SA, 39

⁸⁸ Bojosi (n6)

⁸⁹ In the cases of *Onuoha v. The State Supra* and *Peter Nemi v. The State supra*.

⁹⁰ (n14).

from the Justices of the court which acknowledges a violation of the prisoner's right to dignity and inhuman treatment. The most significant is that of Belgore JSC who said that

Inhuman or degrading treatment outside the inevitable confinement in the death row will not make illegal the death sentence, rather it only gives ground for an enforceable right under the constitution⁹¹.

From this, there is an overwhelming consensus that the Supreme Court will, without hesitation declared inordinate delay in solitary confinement under death sentence as a cruel and inhuman treatment. However, the issue at stake transcends legal recognition of prolonged delay as a cruel and inhuman treatment. The crux of it is the remedy available for the breach of that legal right i.e. the legitimacy of death penalty after a prolonged delay on death row. It is submitted with humility that the Supreme Court of Nigeria is not likely to adopt the decision in *Pratt's case*⁹² which commuted the sentence of death to life imprisonment. The Court, as seen in the passage of Honourable Justice Belgore (JSC) earlier quoted, was clearly of the contrary view. It is more likely that the Supreme Court will award damages for the violation of the prisoner's right to dignity and inhuman treatment as it did in *Aliu Bello v. A.G. Oyo State*⁹³ when the agent of the latter executed a prisoner on death row during the pendency of his appeal in violation of his right to life. The implication of the attitude of the Supreme Court of Nigeria to the doctrine of death row phenomenon is that even though the court may recognize it as a violation of the fundamental right of the convicted inmates, it will most likely deny it the character of a legal remedy which will extenuate the effect of death penalty to that of life imprisonment.

7. Conclusion

The decision of ECHR in the case of *Soering v. the United Kingdom*⁹⁴ gave rise to the doctrine of death row phenomenon which is a veritable tool by which the legitimacy or relevance of the death penalty can be undermined. Several international and regional courts have recognised and applied the doctrine thereby denouncing inordinate delay, and conditions of detention on death row. As a useful tool by which the legitimacy of death penalty can be seriously questioned, the non unanimity of approaches as to what constitutes torture, cruel degrading and inhuman treatment is a serious setback. It encourages speculations as it creates uncertainty as to when the threshold of torture, degrading and inhuman treatment is exceeded. It is therefore suggested that the judiciary should reconcile the progressive and the conservative approaches by clearly defining what torture, cruel, degrading and inhuman treatment means. Secondly, none of the methods of execution has been found free of pain, torture and inhuman treatment in violation of the fundamental right to dignity of the prisoners. Since death penalty is destructive and divisive and denies the possibility of rehabilitation with its associated risk of irrevocable error⁹⁵, it is humbly suggested that it is no longer fashionable in today's criminal justice system. It belongs to the era of an eye for eye.⁹⁶ A viable alternative is life imprisonment which will not only serve as a testimony that the abolitionist

⁹¹ Ibid at p.53

⁹² (n53).

⁹³ [1985] 5 N.W.L R (Pt. 45) 828

⁹⁴ (n34).

⁹⁵ Nigeria "Awaiting for the Hangman (n71).

⁹⁶ Owoade (n64) p. 42.

states are not trailing behind civilization and international trends in human rights, It will also make them stand on a higher pedestal that the depraved offender.

Finally, there is legal recognition of the doctrine at the international level. It remains undeveloped at domestic level. While some states have accepted the doctrine, other retentionist states like Nigeria, the U. S, Iraq, Iran and Saudi Arabia have refused to acknowledge that certain conditions on death row can amount to torture or other cruel, inhuman or degrading treatment. We propose that the concern of international community is to work together to prevent the death row phenomenon from happening. This can be achieved through concerted efforts in generating a greater degree of consensus among nations that death row phenomenon is a human right concern that should have universal legal protection. After all, most nations operate under a constitution that respects the rule of law and fundamental human rights.