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Decolonizing the Concept of Penal Sanction Under the Nigerian Criminal Law

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ABSTRACT

The conscientious pursuit of crime prevention is a worthy objective of every criminal law and criminal justice system as a whole, and many evidences prove that law and order would break down in the absence of the criminal justice system. With much emphasis on punishment, however, victims of criminal offences more often become alienated and end up getting immersed in a complex physical and psychological trauma under a criminal proceeding that does not include them as a formal party. This paper presents a debate on whether the state is a better agent to pursue breaches of individual rights such as murder, rape, burglary, and theft, which are tagged as criminal offences. Or is the individual victim better equipped to decide on taking on the case for justice through either retribution or compensation? The paper examines the concept of punitive sanction through the postcolonial theory lens and argues for the decolonization of the colonially inherited criminal law and a shift towards a system in which the victim is capable of being empowered by invoking processes that place him within proximity to criminal proceedings. This perspective questions the foundational assumption of the state ordered punishment as intrinsic to the functions of the criminal justice system. There is a wide array of potential methodologies for studies of this nature, but this paper adopts a basic historical survey through secondary sources. The findings of the paper reveal that the pursuit of justice in all its nuanced forms will be much better served under a justice system that promotes the victim's right to apply for compensation, damages and restitution in criminal cases through personal remedies.

INTRODUCTION

The Criminal Justice System in Nigeria remains one of the visible remnants of colonial institutions rooted in the English common law. Inherited from the colonial system, the Criminal Justice system empowers the colonialist, and now the State, to unilaterally arrest, prosecute and punish criminal offenders (Otu, 1999). The victims of criminal offences' role, at best, is one of supplying the prosecutors with material evidence, after which lies the prosecutor's responsibility to prove the case beyond a reasonable doubt. Often, at the end of a lengthy and quite daunting criminal proceeding, the victims are left no closer to their original social, economic and psychological state, and the convicts are sent to detention centres only to add up to the overcrowded detention centres. This results in victims of criminal offences ending up getting immersed in the complexities of physical injury and psychological trauma under a justice system that does not include them as a formal party. This seemingly flawed justice system represents the English colonial justice system that continued to be revered under the Nigerian criminal justice system and viewed as a necessary and universal system for equitable social control without which society would inevitably erupt into chaos and a self-combustive crime scene. Despite being a colonial instrument of legal sanctioning of violence which works as a means to subdue colonized people into accepting colonialist domination, criminal law is now erroneously assumed to be derived from people's collective moral standard (Otu, 1999).

The present-day criminal justice system in Nigeria was

derived from the King's mandate which forms an integral part of the British colonial heritage in Nigeria (Chukkol, 2010). The inherited common law rules of procedure have shown an excessive veneration for the strictly regulated punitive justice that put vengeance over liability to repair the damage, therefore, leaving the victims as well as courts exercising limited power to provide for restitution or compensation in matters designed as criminal offences. The concept of punitive justice was given impetus in postcolonial Nigeria through assumptions that the law is objective, and a product of collective public conscience rooted in morality. However, a victim or their relatives who are deprived materially because of the incapacitation resulting from a crime, for example, will find it preposterous and a complete disappointment to be left with nothing and be informed that the State assumes the unilateral jurisdiction over the prosecution and punishment of the offender (Chukkol, 2010). This may only compound their agony and deprive them of their right to vindicate and hold accountable the perpetrator of the crime. While many victims continue to suffer from this alien punitive justice administered in Nigeria, other legal systems around the world continue to redefine the concept of criminal justice and the personal right of individuals to sue and be sued against.

In recent legislation on Criminal Justice System in Nigeria, there has been a notable innovation with the introduction of The Administrative of Criminal Justice Act 2015 (ACJA). The legislation aims to promote efficient management of Criminal Justice and victims' compensation. The ACJA, in Section 319 provided that

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the court may order the defendant or convict to pay a sum of money as compensation to any person injured by the offence, regardless of any fine or punishment imposed on the convict. In addition to any other penalty, the ACJA, in section 321, also gives the court the power to order restitution to give or return the property to the designated owner. These and other sections have brought relief to victims of crimes and have presented an opportunity to entrench some forms of restorative justice standards and principles into the Nigerian criminal justice system. Despite this effort, however, the power to determine and pursue compensatory relief is still not within the victim's control and the entrenched idea of punitive sanction remains the number one target in all criminal proceedings. This does not represent justice to the victims of criminal offences and therefore seems to be anachronistic and becoming more and more out of touch with the reality of contemporary Nigerian society.

METHODOLOGY

There is a wide array of potential methodologies for research of this nature, but this paper adopts a qualitative research methodology which entails a review of existing data related to the research topic. The aim is to explore and analyse the concept of punitive justice and its colonial root in the Nigerian criminal law. The qualitative methodological approach serves the essential aim of identifying and collecting secondary data from different historical and legal sources to be used in constructing meanings and interpretations of the changing roles of the criminal justice in Nigeria and its application. Secondary sources used in the research include books, journals, and other relevant publications primarily available in libraries and online. These sources are used to evaluate the existing debates, commentaries, and controversies surrounding the research topic.

LITERATURE REVIEW

The Colonial Root of Criminal Law and the Myth of Collective Public Moral Standard

Before the development of what today is strictly called criminal law, primitive societies maintain public interests and societal norms in a number of ways. When a wrong is done, primitive society demands that someone be hurt as the infliction of death and other forms of vengeance were seen as a realization of justice (Pound, 1921). However, with the evolution of human civilization, men demanded a more civilized means of attaining justice that involved putting down brute instincts (ibid). More reasoning was found in the religious doctrines that the evil man whose impiety was offensive to the gods must be put away as a sacrifice to the offended god who might else inflict his wrath upon the whole community (ibid). The newfound means of religious devotion shaped the conditions in which the formative criminal law arises and thus determine in no small degree its subsequent evolution. Religious devotion was later replaced, and cases became administered by the sovereign authority through the

magisterial power. The magisterial power to punish may be thought of as deriving from the conception that the king is the father of his country, and has jurisdiction over the individual members of the community as the head of a patriarchal household over a dependent member of that household (ibid). As the magisterial power and body of law attain sufficient development, the immediate securing of societal interests as such becomes the task of criminal law (ibid).

The existing criminal justice system in Nigeria was derived from the English common law which forms an integral part of the British colonial heritage in Nigeria. The primary goal of the British colonial justice system in Nigeria was to facilitate colonial trade and civilization and therefore criminal justice largely exists to establish mandated societal norms and behaviours (Chukkol, 2010). Any person who deviates from those norms must face the consequence both as a punishment and an example to make sure people behave in the way colonizers deem proper (Saleh-Hanna, 2008). This is not to suggest that the criminal justice system does not address social morality, however, it became a 'visible symbol' of colonial repression and behavioural guidepost. Instead of meeting pain with a truly reparative system that seeks the holistic restoration of the community, the criminal justice was preoccupied with censoring code-breakers and disregarding the process of restoring damaged and repairing broken social bonds (ibid). Not attempting to reinforce normative moral conducts and in some cases only made to operate side by side with the colonial system of justice subject to the colonialist test of natural justice, equity and good conscience, is a testament against the collective moral foundation of the colonial justice system. In short, the bulk of the inherited colonial Criminal justice system was not a product of Nigeria's people's collective public conscience. By adopting those rules, the postcolonial society only reaffirms and makes concrete diffuse ideas about colonial standards and through such action, the idea of criminal law as the "collective moral standard" was created and promoted as shared obligations (Smith & Natalier, 2005).

Beyond the rhetoric of collective public moral standards that seek to establish a sound foundation for a durable social order, a look at the history of most of the Nigerian people's culture and traditions reveals a different story. Social control in most traditional Nigerian societies was exercised by the community and the family, not by the state (Saleh-Hanna, 2008). Reparation was always at the centre and not punishment. Any family member who violated social was in danger of being ostracized by the community until reparations and remedies were undertaken by the family. In this way, the extended family kept a close watch over the activities of its members to ensure good behaviour and compliance with societal norms, so as not to drag the name of the family into the mud and conflict (Saleh-Hanna, 2008). Contrary to the colonial punitive law, thus, at the heart of the traditional justice system, it is the

restoration and reparation of the victim, as well as the chances of reintegration of offenders. The restoration takes many forms, such as compensation or reparation which characterizes the early religious law concept that recognizes monetary payment as honourable and a better option to a blood feud, or the resort to vengeance. It provides the victim with a personal cause of retribution and offers offenders redemption where money could be offered as compensation to avoid the mayhem of the blood feud and other punitive sanctions.

The collective moral standard found in criminal justice is nothing but legal constructs which only express the legislative orders that serve as the moribund and bureaucratic strategies of political and economic control under the law rather than morality and social cohesion (Findlay 2000). Nothing has been said about criminal law protecting the shared societal obligations and sentiments, which is not to a large part applicable to non-criminal law. All offences affect the individual, and also affect the community (Hall, 1943), the difference is simply that a crime is anything which is called a crime, and a criminal penalty is simply the penalty provided for doing anything which has been given that name (Hart, 1958). In a proceeding concerning criminal offences against property such as stealing, there is hardly any special intrinsic characteristic of criminal conduct distinguishing it from non-criminal conduct (Okonkwo & Naish, 1980). Sentencing a woman to five years imprisonment for stealing two packages of disposable diapers from a supermarket may sound unreasonable and unjustifiable even by moral standards, for it poses little danger or financial loss to the public but to the supermarket owner (Ashworth, 2010). The law of torts, the law of contracts, and almost every other branch of private law that can be mentioned operate, too, with general directions prohibiting or requiring described types of conduct, that are injurious to individuals and the general social order in the society (Okonkwo & Naish, 1980). To maintain social order and its moral standards, society is interested also in the due fulfilment of contracts and most other civil activities.

Criminal Justice and the notion of Public Social Order in the Postcolonial State

The conscientious pursuit of crime prevention is a worthy objective of every criminal law and criminal justice system as a whole, and there are many evidences that prove that law and order would break down in the absence of the criminal justice system (Ashworth, 2010). But is the state a better agent to pursue breaches of individual's rights such as burglary, theft and murder, which are tagged as criminal offences? Or is the individual victim better equipped to decide on taking on the case for justice through either retribution or compensation? Justifications for assigning the central role to the state are often derived from the nebulous social contract theory, the essence of which is that citizens give up their natural right to use force against those who attack their interests and hand it over to the state, in return for the

state's promise to protect them by maintaining law and order. This theory is regurgitated in the postcolonial state without careful assessment of the legitimacy of those colonial concepts and standards that never considered the victims and their families, or victims and communities as stakeholders in the administration of justice. With the decline of the sovereign State and the increasing devolution of state responsibility to private sectors, the social contract theory is increasingly becoming less relevant and therefore rubbing the assumption that the state, like the king, reserves the right to prosecute and punish all social vices. This changing pattern of societies has led many states, some in advanced countries such as the Netherlands, to change the role of the victims and their families in criminal proceedings (Elder *et al.*, 2022). The introduction of the victims' remedies in Nigeria, under the ACJL 2015, demonstrates a slow, albeit, an essential paradigm shift towards a modern justice system in which the victim is capable of being empowered by invoking processes that place them within proximity to the criminal justice process. The criminal justice system is beginning to evolve and embrace the place for personal remedy in criminally related offences. Punitive Justice, which is largely focused on punishing the offender and the power of the state to control criminal prosecutions, is becoming obsolete for its undesirable effect on victims' right to participation in criminal justice. The introduction of victims' remedies in the Nigerian criminal justice system so far suggests an evolving role of restorative justice which opens the doors to personal remedies that could help victims (Solomon & Nwankwoala, 2004). This evolution indicates a systemic response to the difficult challenge faced by victims of criminal offences in colonial criminal justice. To recognize and empower victims to receive monetary and other compensatory damages for more personal property offences, such as theft, assault, battery, burglary, housebreaking, and homicide, denotes the shifting values from a colonial structure to a justice system that involves the use of private settlement where money or blood is exchanged for the infringement of a right. As a formidable alternative to punitive justice in Nigeria, a personal remedy for a criminal offence is becoming increasingly relevant in holding offenders accountable and empowering the victims in the reconciliation process.

Discussion and Analysis

Decolonization and Reform Objective of Criminal Law: Reparation over Vengeance

The conventional wisdom in the assigned role of criminal law as maintained in the deterrence theories is that criminal liability is the strongest formal condemnation that society can inflict, and by inflicting pain and strong condemnation, society expects other people seeking to engage in similar offences shall be deterred (Cremona & Herring, 1998). To be ordered by a court to pay damages following a criminal offence, according to the deterrence notion, does not carry with it the same kind of stigma and

moral lesson that it would be if you had been found guilty of a criminal offence and punished (ibid). Hence, the fear of public stigma stands as the most effective tool that helps to strengthen the social order. However, a close analysis will reveal victims' remedies in criminal proceedings can be more effective than punitive sanctions in many different ways (Cheh, 1998). Victims' reparation offers a variety of actions and damages for various types of loss suffered where the victim occupies a central position in the final verdict of the case (LaPorte, *et al.*, 2003). It offers a panoply of remedies including, compensatory damages, punitive damages, restitution, specific performance, injunctive relief, constructive trusts, abatement of nuisances, and forfeitures (Cheh, 1990). This collection of remedies provides the victim with an opportunity to vindicate his rights and, in so doing, empower the victim who is more concerned with the reparation of his loss rather than determining blame (ibid). Given that the offender caused damage to the victim's life or property, remedies empower the victim and provide more relief for the victim of criminal offence and in many cases effectively aid the rehabilitation of offenders.

Although punitive sanctions play an important role in deterring people from engaging in actions that harm others or society, victims' reparation plays an even more important role in the moral judgments regarding justice, which, in the usual expression, signifies who should be compensated and who ought to bear losses (Hall, 1943). Compensatory damages are indeed very logical and conform to the deep-rooted African perception of what justice is all about. In traditional African values, the victim or his family in the case of murder, deserve damages and compensation for the loss of life and property. Relatives of victims deprived materially because of the incapacitation of the victim, often express surprise and disappointment at how they could be left with nothing by the mere jailing of the convict (Chukkol, 1988). A victim's remedy can reduce the agony and empower the victim and his family. In cases involving injury, death, loss or damage, the court's duty will be to consider making a compensation order in favour of the victim or, in the case of death, the victim's family. This forms part of the increasing recognition of the needs, wishes and rights of the victims of crime which does more than restitution found in the criminal justice system.

Rather than the criminal actions solely intended to punish offenders by pointing to penal laws, persons injured by the criminal conduct of others may seek remedy in the criminal proceeding (Cheh, 1998). In such situations, as in any other form of a civil action, the victim pleads with the court and the judgment obtained in such action is enforced at the discretion of the party whose right has been violated; therefore, it gives more room for settlement or adequate compensation (ibid). Despite the common fear that the offenders could have no assets from which to collect judgments, however, compensation can be distinguished just as the respective punishments were themselves differentiated in terms of moral

culpability. Individuals may bring many kinds of "civil" enforcement of judgement—such as an injunction or order for detention of the defendant by the court. The same kinds of unpleasant consequences, objectively considered, can be imposed upon the offender. The victim decides whether or not to undertake action against a perpetrator. Remedies, in many cases, are convenient and can provide the victim with an injunction compelling the victim to perform a certain action (Cheh, 1990).

Remedies have also proved to be highly effective and frequently used as alternatives to criminal prosecution through a variety of statutory regimes that prescribe or prohibit certain conduct. Many public-related offences are increasingly dealt with through imposing monetary penalties or fines for violations. Examples include environmental and tax regulations. There are many reasons why governmental officials are embracing greater use of remedies to respond to criminal or antisocial behaviour, which refutes the notion of punitive sanction as the only civilizing force available to States. Law enforcement personnel long have recognized that the arrest and prosecution of individuals, even on a massive scale, is often not enough to end organized crime or the operation of illicit businesses (Cheh, 1990). Victims' civil remedies are easier to use, more efficient, and less costly than criminal prosecutions. Remedies are a means to impose strict liability for offences and to identify behaviour as antisocial without invoking the full procedural and moral artillery of a criminal case. In some misdemeanour cases, monetary penalties may seem more appropriate than a prosecution, including the case of motor vehicle parking and other minor traffic offences, presents for example. These and other regulated conduct which may never have been deemed criminal but always has been considered sufficiently undesirable to warrant some form of deterrence can efficiently be addressed through remedies.

The development of new and innovative crime control policies in third-party civil suits also renders credibility to the assertion of why victim reparations are more desirable and more efficient than punitive action (Martha, 1998). A victim reparation can involve a negligent third party, and thus, help promote enhanced safety practices and encourage the exercise of widespread concern over crime prevention and the implementation of standard security measures such as the employment of more security guards on premises, thereby reducing the occurrence of crime (ibid). The third-party civil actions tended not to characterize the offender as the sole site of crime control but rather began to utilize the third party to help reduce crime by providing adequate premises security (ibid). This will revolutionize the legal system from one largely designed to respond to crimes and social conflicts, to one proactively working to avert criminal activities and conflicts.

Nowhere is a victim reparation against a third party more pertinent than in sexual offences, if victims of sexual offences have the option of pleading a personal remedy against the criminal offender. Because criminal

prosecution for rape and other sexual offences is one of the most complex legal battles often fraught with uncertainties, the technical and definitional complexity involved in a criminal prosecution can ruin a rather good case even when there is obvious physical and emotional harm caused. A remedy against the perpetrator of sexual offences can result in different kinds of damages being awarded to the victim and can strengthen the control against the offence in society. Again, in addition to the heavy damages awarded against the perpetrator of the sexual offence, a third party could be held liable for reason of negligence or failure to provide adequate security and protection for victims. The Roman Catholic Church, for example, had, on several incidences forced to settle allegations of sexual abuse of children by clergymen with hundreds of dollars being paid as settlement. A victim remedy against offenders and relevant third parties will empower the victims and ensure more protection.

CONCLUSION

From the foregoing discussion, an overview of this paper is that the dominant role played by the State in regulating the course of criminal justice has its root in the colonial system of justice which created undesirable outcomes for the victims of criminal offences. The departure from the concept of the King or State being the assigned guardian of the community where it provides and safeguards the welfare of its citizenry makes the State no longer considered the sole guardian of individuals, therefore, not deserve the prerogative to unilaterally serve as an agent to vindicate individual member's rights. The retributive nature of criminal proceedings controlled by the state, which are more liable to sanction over and above compensation, has only limited usefulness to the victims, especially those offences against property, which enforced compensation in most cases is a sufficient sanction against an accused. The integration of victim reparation into criminal proceedings is more likely to get people out of the challenges in our current Criminal Justice System. Thus, the colonial concept of punitive sanction in criminal offences taken to be the chief end to control the community's sense of right and wrong has proved anachronistic in our contemporary reality. In addition to the apparent inefficiency of punitive sanctions as deterrence in many cases, the real pains of imprisonment include separation from family and friends, the loss of jobs and weakened homes. The paradigm shift proposed in this paper stresses repairing the damage caused by crime through victim reparation that entails a panoply of remedies including compensatory damages, punitive damages, restitution, specific performance, injunctive relief, constructive trusts, abatement of nuisances, and forfeitures. The remedy provides the victim with an

opportunity to vindicate his or her right and, in so doing, it provides empowerment.

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