



# **The Validity or Constitutionality of Death Penalty as a Capital Punishment in the Nigerian Judicial System: An Appraisal**

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## **ABSTRACT**

Human rights abuse including child molestation, women trafficking, police brutality, unlawful imprisonment, death sentence inter alia have been reoccurring phenomena in the society today. In Nigeria, the peak of these abuses dated back to the year 1995 when a military tribunal under the then dictatorial regime of the late General Sanni Abacha, the then military Head of State of the Federal Republic of Nigeria sentenced Ken Saro Wiwa and his Ogoni brothers to death by hanging. Over the years, both at the local and international spheres, issues bothering on human rights abuses have severally been reported especially by Amnesty International -a globally acclaimed humanitarian organization and cases, both favorably and otherwise have been decided on the subject matter. This study seeks to examine the validity or otherwise of death sentence as a punishment for convicted criminals. The study cited several decided local, foreign and internationally cases to ascertain if death penalty as a capital punishment for criminals, in the face of human rights, is valid or constitutional. The study weighed both the arguments put upon by these experts either in support or against the subject matter and concluded that death sentence and of course capital punishment in its entirety should be condemned and out rightly abolished as it infringes on the fundamental right to life of the convicted criminal. The study made worthwhile recommendations at the end among which is the call for a legislation to legalize its abolition in Nigeria.

**Keywords:** Death Sentence, Validity, Convicted Criminals, Constitutionality, Supreme Court, Amnesty International, Capital Punishment

## **INTRODUCTION**

The thrust of this paper is to examine the validity or constitutionality of the death sentence as against the background of the ever increasing call for a world where human rights are not just obeyed, but implemented to the later. By definition, Death Penalty or Sentence is the pre-meditated and cold-blooded killing of a human being by the State<sup>1</sup>. The controversy surrounding this type of punishment has often times, revolved around the argument that death sentence and its manner of execution is an utter abuse of the human person as a natural entity.

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<sup>1</sup> Amnesty International, When the State kills – The death penalty V. Human Rights, 1989, P.I. cited in Okoroafor and Mgbeke, “Examining the validity or otherwise of the call for universal Abolition of capital punishment in criminal jurisprudence vis-a-vis the human rights to life” (unpublished) LL.M. Seminar paper, Nov 1998 ABSU. Subsequent to Okoroafor and mgbeke’s paper, the Supreme Court came up with a detailed decision on death penalty Onuoha Kalu’s case [(1998) 64 LRCN

Death penalty as a form of punishment given to convicted criminals came to the fore in Nigeria in 1995, during the despotic regime of late General Sanni Abacha when the celebrated writer and human rights activist, Ken Saro-Wiwa was executed by hanging, few days after conviction by a military tribunal<sup>2</sup>.

In a criminal trial, the possibility of punishment, according to Professor Okonkwo is only the distinguishing mark but is probably the most important one<sup>3</sup>. This viewpoint of Okonkwo is in line with the maxim of Lord Atkin in the case of **Proprietary Articles Trade Association V. Attorney General for Canada**<sup>4</sup>, that:

*“The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one-It is the act prohibited by penal consequences?”*

All over the world, the most acknowledged punishments for criminals are fines, imprisonment and death. In Nigeria, as in many other jurisdictions, death is the usual sentence for murder, armed robbery and treason. Death sentence, which in most case, is usually irreversible once it is carried out, may be said to fail within the deterrence policy of punishment, which is believed to be the proper end of penal sanctions. According to the Roman Philosopher, Seneca<sup>5</sup>,

*“No reasonable man punishes because there has been a wrong doing, but in order that there should be no wrong done (Nemo Prudeus Punct quia peccatum est, sed ne percedetur)”*.

Deterrence, according to Walker<sup>6</sup>, *“is the deliberate threat which if it is to be credible has to be carried out”*.

The principle of deterrence which according to its advocates is the most potent principle of punishment used to deter the particular accused from offending again or it may be imposed with the more general view of deterring the public from doing what the accused did. Philip T. Ahire<sup>7</sup> is of the view that the deterrence justification has the merit of assigning the individual the capability for natural action and choice and satisfies the angels of vengeance who campaign for stiff penalties on offenders.

On the other hand, it has been argued that deterrent punishment does not necessarily deter offenders. Professor Adeyemi<sup>8</sup> has argued, and this presenter is in agreement with him, that there is no support on the efficacy of the death penalty as a deterrence for murder and armed robbery in Nigeria. He is however of the view that the death penalty should not be abolished immediately in so far as it is still acceptable to the Nigerian populace for their social and confidence in the criminal justice system.

Apart from the deterrent principle, it has been argued that incapacitation is another basis for death penalty. It is necessary to kill the prisoner in order to ensure that he or she never repeats the crime.<sup>9</sup>

Retribution is another argument usually put forward in this regard. Thus, the offender must be killed not necessarily to prevent crime but because of the demands of justice<sup>10</sup>.

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<sup>2</sup> The Tribunal was set up under the Civil disturbances (Special tribunal) Decree No. 2 of 1987. Another incidence that shocked the conscience of the Nation was execution by firing squad of three drug peddlers in 1984 under the Special Tribunal (Miscellaneous Offences) Decree 1984

<sup>3</sup> **Okonkwo and Naish (1980) Criminal Law in Nigeria**, (2<sup>nd</sup> Ed.) London, Sweet and Maxwell, 1980, P. 19

<sup>4</sup> (1931) AC 310 at 324

<sup>5</sup> See Ross, Alf; *On Guilt, Responsibility and Punishment*, London, Stevens and Sons Ltd. (1975) P.

<sup>6</sup> Walker N.; *Punishment, Danger and Stigma: The Morality of Criminal Justice*, Oxford, Basil Blackwell, 1980, p

<sup>7</sup> Ahire, P. T., “Penological policies of the Nigerian Criminal Justice System” in **Compensation and Remedies for Victims of Crime in Nigeria**, Federal Ministry of Justice series, Vol. 5, Adetiba Ed., 1990, P. 331.

<sup>8</sup> See **Perspectives on Human Rights**, Awa Kalu and Osibanjo, Ed., 1992, Federal Ministry of Justice, P. 129

<sup>9</sup> Okoroafor and Mgbekwe, Op.Cit., P. 8

<sup>10</sup> *Ibid*

The recent case of **Onuoha Kalu V. State**<sup>11</sup> provided an opportunity for both the supporters of the death penalty and the abolitionists to put forward their case before the Supreme Court. The contentions of the prosecuting counsel and most of the lawyers who appeared as amici curiae showed little or no sympathy with the call for abolition of death penalty. This opposition was in fact upheld by the Supreme Court, which pronounced unanimously and in no unmistakable term that the death sentence is not unconstitutional. But the apex court refused to be drawn into the controversy as to whether death sentence is generally anti-human rights. The decision of their lordships was confined to the constitutionality or otherwise of the sentence which indirectly is a human right issue granted that the relevant provisions of the Constitution which were called into play, namely **Section 30 of 31 of the 1979 Constitution**<sup>12</sup> deal respectively with the rights to life and protection from torture, inhuman and degrading treatment. It is settled law that in countries operating a written constitution, such as Nigeria, the Constitution is the Supreme Law and is binding on all persons and authorities. If therefore, the Constitution recognizes and approves of death penalty, it is difficult and indeed futile to contest the validity or constitutionality of such sentence in Nigeria. To this extent, it is easy to agree with the decision of the Supreme Court in Kalu's case.

Be that as it may, this study concurs with the view that apart from the major issue of death sentence as handed down by the court, other ancillary issues usually arise in practice. Such issue relates to the constitutionality or the validity of the mode/method/manner of executing the sentence, the prolonged delay in carrying out the execution with the attendant psychological trauma (the death row phenomenon) and the deplorable conditions of detention of condemned prisoners. Moreover, the fact that the Constitution has recognized the death sentence does not necessarily imply its validity in human rights jurisprudence. This paper intends to examine the position of the Nigeria Supreme Court on death penalty, the treatment of death penalty in International Law and other foreign jurisdictions as well as some other human rights problems arising from death penalty.

#### **DECISION OF THE SUPREME COURT ON DEATH PENALTY**

The issue of whether death sentence is constitutionally acceptable or not in Nigeria is a singular constitutional right of the Supreme Court as in the case of **Onuoha Kalu V. State**. In the said case, the appellant was convicted of murder by the High Court of Lagos State and sentenced to death pursuant to the mandatory death penalty prescribed by **Section 319 (1)** of the Criminal Code of Lagos State. The Court of Appeal upheld the conviction and sentence. On further appeal to the Supreme Court, Olisa Agbakoba, a Senior Advocate of Nigeria (SAN) and Counsel to the Appellant argued strongly that **Section 319 (1)** of the Criminal Code aforesaid is inconsistent with **Section 31 (1) (a)** of the 1979 Constitution and as such, set aside death sentence. Relying on numerous foreign authorities, Agbakoba submitted further that the consensus of judicial opinion in all those cases is that the substantive content of specific human rights guarantees must be left "Open-ended" to enable them accommodate evolving standards of civilization. According to him, it is as a result of this evolving and dynamic process that death penalty has come to be regarded in contemporary human rights jurisprudence as a violation of the right not to be subjected to torture, inhuman and degrading punishment, the prohibition of which is replaced in International Human Rights Instruments. Agbakoba also described the penalty as cruel, inhuman and degrading and a negation of the essential content of the right to life under the 1979 Constitution. He contended further that elements of arbitrariness are involved in the imposition and execution of the penalty and that its consequence is irredeemable. He described the death row phenomenon as a crucial factor in the characterization of death penalty as cruel, inhuman and degrading. In answer to the above submissions, the Attorney General of Lagos State and the five amici curiae submitted that **section 213 (2) AND 220 (1)** make provisions for appeal from death sentences, thereby recognizing the validity of the penalty. They submitted that the **section 319 (1)** of the Criminal Code is not inconsistent with **Section 31** of the Constitution. In particular, C. O. Akpamgbo, a former Attorney General of the Federation and a Senior Advocate of Nigeria, urged the Court to resist the suggestion by

<sup>11</sup> Supra See also **Okoro V. State** (1998) 64 LRCN 5214

<sup>12</sup> Now Sections 33 and 34 of the 1999 constitution

the Appellant to transplant foreign notions decency into a country like Nigeria with diametrically opposite cultural assumptions. Akpamgbo submitted further that the question is whether the death sentence is inhuman, degrading or shocks the moral conscience of the Nigerian Community not that of the people of U.S.A., Canada, U.K. or South Africa.

In its judgment, the Supreme Court upheld the submission of the Respondent and the amici curiae that death penalty is not unconstitutional. The apex court in so doing, distinguished between death sentence per se and the manner of execution and held that the latter is not in issue before it and accordingly refused to pronounce on it. It also refused to go into the issue of death row phenomenon and the conditions of detention between the sentence and actual execution. The basis of this refusal is that the Supreme Court is not a Court of original jurisdiction for the enforcement of human rights. Accordingly, all such complaints must be brought before a High Court in accordance with **Section 42** of the Constitution<sup>13</sup>. The implication therefore, in this study, is that the Court went on to say that its jurisdiction in respect will only arise on appeal after both the High Court and the Court of Appeal have considered and adjudicated on the matter. According to Iguh, JSC (who read the lead judgment), this is exactly the procedure adopted in the foreign cases cited by Learned counsel for the Appellant, to wit: **Earl Pratt & Anor. V. Attorney General of Jamaica**<sup>14</sup>, **Catholic Commission for Justice and Peace in Zimbabwe V. Attorney General of Jamaica & Ors**<sup>15</sup>, **Fisher V. Ministry of Public Safety and Immigration and Ors**<sup>16</sup>; **Lincoln Anthony Guerra V. Cipriani Baptiste & Ors**<sup>17</sup>; and **Noel Riley & Ors. V. Attorney General of Jamaica**<sup>18</sup>.

In all these cases, according to His Lordship, fresh proceedings by way of application for the enforcement of fundamental human rights were initiated at the courts of first instance, seeking to prevent execution on the ground of breach of fundamental human rights. In Zimbabwe, the Supreme Court of Zimbabwe eventually ordered that the death sentence imposed on the four convicts be vacated<sup>19</sup>. The position of the Supreme Court is reversing to pronounce on the validity of the above issues (other than on the death sentence itself) provides an opportunity for the appellant to return to the high court to seek the enforcement of his right against the undue delay and the deplorable conditions of detention, if he so desires. But it is doubtful whether the success of such application will have any positive impact on his fight against the death sentence per se.

The basis of the Supreme Court's refusal to nullify the death penalty is rooted in SECTION 30 of the constitution which qualifies the right to life guaranteed therein by providing that,

“...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” (Emphasis is mine)

### **Death Penalty in Foreign Jurisdiction**

Referring to a host of foreign authorities the Supreme Court was on the fact that the crucial question is whether the right to life contained in any Constitution is qualified and unqualified. If qualified, as is the case with Nigeria, the death penalty is constitutional. The court then reviewed the Tanzanian case of **Mbushuu & Anor. V. The Republic**<sup>20</sup>, where the Tanzanian court of Appeal held that although, the death penalty is a form of cruel, inhuman and degrading treatment, it was constitutional, having regard to the qualified nature of the right to life contained in the Tanzanian Constitution. In the Zimbabwean case aforesaid, the Supreme Court of Zimbabwe unanimously upheld the constitutionality of the death penalty also on the ground that the right to life under the constitution was qualified.

<sup>13</sup> Now section 46 of the 1999 constitution are also **Ogugu V. State** (1994) 9 NWLR (PT.366) P.I.

<sup>14</sup> (1994) AC 1.

<sup>15</sup> (1999) (4) S. A. 239, (Z.S.C.)

<sup>16</sup> (1998)3 W.L.R,201 (P.C)

<sup>17</sup> (1996)AC397,(P.C)

<sup>18</sup> (1988) AC 719 (P. C.)

<sup>19</sup> See Onouha Kalu's case nat page 5507

<sup>20</sup> Criminal Appeal No. 142 of 1994, delivered on 30<sup>th</sup> January, 1995.

The position is the same in India. In *Bacan Singh V. State of Punjab*<sup>21</sup>, the Supreme Court of India upheld the validity of death sentence because the Tanzanian court however, the Indian Supreme Court held that, “By no stretch of the imagination can it be said that the death penalty either per se or because of its execution by hanging constitute an unreasonable, cruel or unusual punishment prohibited by the Constitution.

In further support of the constitution that death penalty per se is not unconstitutional, if the right of life entrenched in the constitution is qualified, reference was also made to the United States of America whose Constitution, by the fourteenth amendment, obliges the state not to deprive any person of life, liberty or property “without the due process of law”.

Thus, in *Gregg V. Georgia*<sup>22</sup> the U.S Supreme Court ruled that death penalty is not intrinsically unconstitutional; the same decision was reached in *District Attorney For Suffolk V. James Watson & Ors*<sup>23</sup> and *Woodson V. North Carolina*<sup>24</sup>.

Finally, on this issue, the Nigerian Supreme Court referred to the position in Jamaica **section 14(1)** of the Jamaican Constitution is in pari material with **section 30(1)** of the Nigerian constitution. Accordingly, the Privy Council has held with regard to the qualified right to life under the Jamaican Constitution that death penalty in Jamaica is not unconstitutional<sup>25</sup>.

But the position in South Africa and Hungary is different. In *State V. Makwanyane & Anor*<sup>26</sup>, the constitutional court of South Africa held that the death penalty violated the protection of freedom from cruel, inhuman and degrading treatment under **Section 11(2)** of the South Africa Constitution and is therefore null and void. Moreover, the arbitrary, discriminator and selective nature of the exercise of the sentence at all material time in the history of South Africa immensely influenced the position of the South African Court on the issue.

In Hungary, **Section 54(1) of the Constitution** state that:-

*“everyone has the inherent right to life and human dignity and no one shall arbitrarily be deprived of this right”.*

This provision is clearly unqualified. And accordingly, it was held in *Jones V. Wittenberg*<sup>27</sup> that death penalty was unconditional, being inconsistent with the right to life and human dignity under **Section 54** aforesaid.

From the forgoing; it is clear that the question of whether death penalty is constitutional or otherwise depends on whether the right to life as guaranteed by the constitution is absolute or qualified. Thus, the basis of the Supreme Court’s verdict upholding the constitutionality of death penalty in *Kalu’s* case is that the right to life under the Nigerian Constitution is qualified and derogable. The apex court therefore advised the abolitionists to direct their campaign to the legislature rather than seeking to persuade the court to commit what would amount to an error of judicial legislation.

### **Death Penalty Under International Law**

It has been the practice among the international treaties to pronounce expressly on the death penalty. Thus, the attack on the validity of the death penalty was mainly hinged on its supposed inconsistency with the provision against torture, inhuman and degrading punishment. Moreover, the right to life is usually provided for in a qualified and derogatory manner. **Article 2** of the European Convention is a typical example.

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<sup>21</sup> (1983) 2 SCL 583

<sup>22</sup> 428 U.S. 135,176-187 (1976)

<sup>23</sup> (1980)381 Mass 648 at 664

<sup>24</sup> 428 U.S.242 (1976)

<sup>25</sup> *Kalu’s Case*, P. 5444

<sup>26</sup> (1995)6 BCLR 665 (CC)

<sup>27</sup> 33 F. Supp. 707

It provides that “no one shall be deprived of his life internationally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”. Subsequently, however, **protocol 6** specially outlawed the death penalty. Prior to this, the European Court of Human Rights had held that the United Kingdom would violate **Article 3** of the European Convention which prohibits torture, inhuman and degrading punishment were it to extradite the applicant to Virginia where he would be subjected to the death penalty<sup>28</sup>. **Protocol 6** now provides a more cogent basis for refusing such extradition than placing reliance on **Article 3**.

**Article 4** of the African Charter on Human and Peoples rights<sup>29</sup> (now part of my municipal law by virtue of **Cap 10 LFN, 1990**) provides that:

*“Human beings are inviolable. Every human being shall be entitled to respect for his life and integrity of his person. No one may be arbitrarily deprived of his life.*

This provision which is similar to **Section 54** of the Hungarian Constitution guarantees the right to life in a clearly unqualified and non-derogable manner. Going by the Supreme Court’s decision in Kalu’s case, this provision is an authority for saying that death penalty is prohibited. The implication of such interpretation will appear to rest on the question of superiority and/or hierarchy as between the African Charter and the Constitution.

We do not intend to re-open that controversy in this paper for want of time and space. Suffice it however to say that this provision a sufficient reason for the legislature to take urgent steps to clarify the situation by legislative action. In human rights jurisprudence, the municipal court is enjoined to draw inspiration and guidance from international norms of human rights in event of ambiguity or uncertainty or where the provisions of the law are not clear<sup>30</sup>. But where the provisions of a statute is clear but are in conflict with international instruments, the position in common law countries is that municipal law prevails<sup>31</sup>. But the court is obliged to draw the attention of the legislature to such inconsistency with a view to correcting the anomaly through legislative action; more so as the state in question is still under an obligation to carry out the provisions of the treaty if it has ratified or adopted same<sup>32</sup>.

That the international community is gradually moving away from death penalty is amply demonstrated by contemporary international humanitarian law, otherwise known as laws of armed conflicts. Recently, the Security Council of the United Nations set up two international tribunals for the trial of persons alleged to have committed grave-breaches of the laws of armed conflicts and genocide in particular, Rwanda and the Former Yugoslavia<sup>33</sup>. The international Criminal Tribunal for Rwanda (ICTR) and the international Criminal Tribunal for Yugoslavia (ICTY) were set up and empowered to try war criminals who took part in the massacre of innocent and defenseless civilians in these conflict areas. But notwithstanding that enormity and the gravity of the offences involved, the tribunals were not given any power to inflict death sentence. The maximum punishment which they are empowered to inflict is life imprisonment. It is noteworthy that the Rwanda Government is opposed to ICTR because of its lack of jurisdiction to inflict

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<sup>28</sup> See **Soering V. United Kingdom** (1989)11 EHRR 439. See generally Stenhardt, “**Recent Development in the Soering Litigation**”,(1999)11 Human Rights L.J. 452

<sup>29</sup> See **Abacha V. Fawehinmi** (2000) 6 NWLR (Pt. 660) 228 on the relationship between the Africa Charter and other municipal laws. Provisions of other international instruments in the right to life are not uniform. See UDHR, Art.3

<sup>30</sup> See **Minister of Home Affairs V. Fisher** (1979)2 E.R. 21 and **R v. Chief Immigration Officer Ex.P. Salamat Bibi** (1976)1 WLR 979

<sup>31</sup> See generally, Jan Brownlie, **Principles of Public International Law**, 3<sup>rd</sup> Ed., P. 45. Inter alia.

<sup>32</sup> This Approach was strongly recommended at the Bangalore Judicial Colloquium of eminent Commonwealth Judges 1989; Banjul, Gambia 1990, Abuja, Nigeria 1991, and Balliol, Oxford.

<sup>33</sup> See the United National Security Council Resolution No.955 of 1994 and No.823 of 1993 respectively. These Resolutions also adopted the Statutes of ICTR and ICTY respectively.

death penalty. The government prefers to try suspects in her Municipal Court, which has the power to pronounce a death sentence by firing squad<sup>34</sup>.

### **Other Human Rights Problems Associated With Death Penalty**

As has been noted, the Supreme Court in Kalu's case refused to adjudicate on the validity of the method used in carrying out the execution of death penalty, the prolonged delay in carrying out the execution and the deplorable condition of detention prior to execution on the ground that those issues were not properly before them.

If the appellant choose to initiate fresh proceedings at High Court as advised by the Supreme Court, the issues stay eventually come up before the same apex court once more, thereby providing their Lordships with fresh opportunity to take decisions on their constitutionality or otherwise and the proper remedies that may be available in the circumstances.

In the present case, the Supreme Court made it clear that death sentence per se is not unconstitutional, but that death sentence must be clearly distinguished from the method of execution, which from all indications is the major complaint of the appellant, but which unfortunately was not properly before the court. The method of execution death sentence is contained in **Section 367(1) and (2)** of the Criminal Procedure Law, which provides as follows:-

1. "The Punishment of death is inflicted by hanging the offender by neck till he be dead.
2. Sentence of death shall be pronounced in the following form:- "The sentence of the court upon you be hanged by neck until you are dead and may the Lord have mercy on your soul"

This provision, in practice, produces a cruel and sordid result. In his submission before the Supreme Court, Agbakoba, SAN, described hanging by reference to an Article by one professor Chris Barnard which was quoted with approval by the South African Constitution Court in **State V. Makwanyane** (supra) in the following words:

*"The man's spinal cord will rupture at the point where it enter the skull, electro chemical discharges will send his limbs flailing in a grotesque dance, eyes and tongue will start from facial apertures under the assault of the rape and his bowels and bladder may simultaneously void themselves to soil the legs and drip on the floor<sup>35</sup>"*

In the words, Hennesey, C.J. on the U.S. case **District Attorney for the Suffolk V. Watson and Ors** (supra) observed that:

*"the frank description of the execution process leaves little doubt that it is one which is destructive of human dignity.....<sup>36</sup>*

No wonder, Hennesey, C.J. in the U.S. case of **District Attorney for the Suffolk V. Watson and Ors** (supra) observed that:-

*"The death penalty is unaccepted under contemporary standards of decency in its unique and inherent capacity to inflict pain. The mental agony is simply beyond question a horror. We conclude that the death penalty with its full panoply of concomitant physical and mental torture is impermissible cruel.... when judged by contemporary standards of decency<sup>37</sup>.*

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<sup>34</sup> Several persons were tried in Municipal Courts convicted and executed by firing squad in Rwanda for their roles in the Massacre of the Tutsi ethnic minority tribe in 1994. See Newsweek Magazine of Sept. 27, 1999 and the Guardian Newspaper of May 18, 1999

<sup>35</sup> See Kalu's Case at P. 5451

<sup>36</sup> Ibid

<sup>37</sup> Ibid., at Page 5421

His Lordship in the case, with respect, would appear to mix the issue of death penalty per se and the method of carrying out the execution. Be that as it may, this presenter has no difficulty in concurring with the view that the execution of the death penalty by hanging is unquestionable cruel, inhuman and degrading. Advocate of retributive justice may argue that since the victim of the prisoner was made to undergo a similar horrible experience in the hands of the prisoner with the same coin. Going by this argument, the method of execution might as well depend on the method used by the prisoner in committing the offence. Nevertheless, a humane, decent and less painful method is preferable. Medical experts should be engaged to assist in devising a more civilized method of execution.

While the conditions of detention of condemned prisoners can easily be improved, and we suggest that everything possible should be done to alleviate their sufferings, the prolonged delay in execution and its attendant mental and psychological agony presents a difficult situation.

In Kalu's case, Chief F. O. Akerele, SAN, appearing as amicus curiae suggested that a state which wishes to retain capital punishment, must accept the responsibility to ensure that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appealing and consideration of reprieve by the executive. But it is doubtful, whether this suggestion is in the interest of the convict. Experience has shown that the longer the condemned prisoner stays in custody, the more he attracts both executive and judicial sympathy. In the case under consideration, the appellant had been on the death row for thirteen years. The learned SAN himself was of the view that all the circumstances of the case, the death sentence passed on the appellant should now be committed to life imprisonment. Giving the nature survival instinct in man, it is unrealistic to expect a condemned prisoner to complain that his execution is being delayed, his mental and psychological distress notwithstanding.

## CONCLUSION

The International Human Rights Non-governmental Organization, Amnesty International is at the forefront of the campaign for the abolition of death penalty, which it right of life. The organization maintains that there can never be a justification for death penalty, the cruelty of which is self-evident<sup>38</sup>.

While it is admitted that there are judicial authorities to the effect the death penalty is not cruel, inhuman or degrading, the majority of analysts are of the view that the penalty and the method of its execution are inherently cruel. We share this view accordingly call upon the various state legislatures to review the statutory provisions on the subject. Many judicial authorities favour the call for abolitions of death penalty. In **Common Wealth V. O'Neal**<sup>39</sup>, it was held that death penalty was a cruel and unusual punishment contrary to **Article 26** of the Massachusetts Constitution. Similarly, the Californian Supreme Court once declared it cruel and unusual punishment as it contrary to **Article 1 of the Californian Constitution**<sup>40</sup>. In Nigeria, notable jurists and authors have also called for its abolition on the ground that it has no unique capacity to deter others from committing particular crimes<sup>41</sup>. Consequently, this study concludes that death penalty should be repealed in its entirety.

## RECOMMENDATIONS

Apart from calling on the legislature to take the necessary legislative actions in putting an end to it, the study recommends the following:

- i. The judiciary should take bold steps to pronounce the present method of execution by hanging unconstitutional.
- ii. Likewise, the deplorable conditions under which condemned prisoners are held. On these two issues we are of the firm conviction that a condemned prisoner can successfully move the court to enforce his fundamental rights while he is still living.

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<sup>38</sup> "When the State Kills....." op. Cit. P. 2

<sup>39</sup> Mass, 339 N.E. 2<sup>nd</sup> 676

<sup>40</sup> See people V. Anderson, 439 P. 2<sup>nd</sup> 880

<sup>41</sup> Prof. A. A. Adeyemi and Olisa Agbakoba (SAN) See Okoroafor and Mgbeke, op. Cit. P. 5

- iii. A proper judicial attitude will be to stay execution pending the determination of the application for the enforcement of the said fundamental rights. Otherwise the state may hasten his execution thereby scuttling the application.

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