

SUPREME COURT OF NIGERIA
18TH DECEMBER, 1998. SC. 24/1996
CORAM:- M. L. UWAISS CJN, S. M. A. BELGORE, A. B. WALL,
I. L. KUTIGI, M. E. OGUNDARE, E. O. OGWUEGBU,
A. I. IGUH, JJSC.

ONUOHA KALU	APPELLANT
V.		
THE STATE	RESPONDENT

CONSTITUTIONAL LAW - Constitutional issue - Like the question of jurisdiction is fundamental - And must be disposed of as soon as it is raised - To ensure that the proceedings is not rendered nugatory.

CONSTITUTIONAL LAW - Interpretation - Of the constitution - The fundamental principles that govern it.

CONSTITUTIONAL LAW - Death penalty - S. 30 (1) of the 1979 Constitution - The provision thereof - Has not proscribed the death penalty.

CONSTITUTIONAL LAW - Inconsistency - Provisions of ss. 30 (1), 213 (2) (d) and 220 (1) (e) - By their combined effect on the death sentence - Are not inconsistent with any provision of the Constitution.

CONSTITUTIONAL LAW - Interpretation - Ambiguity - The provisions of s. 30 (1) of the 1979 constitution - Is free from ambiguity - It protects the right to life - And permits life to be taken in execution of the sentence of a court.

CONSTITUTIONAL LAW - Constitutional rights - Enforcement procedure - By s. 42 of the Constitution original jurisdiction to entertain the matter is conferred on the High Court - And not the Supreme Court.

CONSTITUTIONAL LAW - Interpretation - Right recognized under s.

30 (1) of the Constitution - If the legislature had intended to take away the right by s. 31 (1) (a) of the same document - It would have done this by clear terms.

COURTS - Legislation - Revocation of the law providing for death penalty - Is not a matter for the Law Courts - But is within the exclusive jurisdiction of the legislature.

CRIMINAL PROCEDURE - Arraignment - Provisions of s. 215 Criminal Procedure Law - Must be strictly complied with - For there to be a valid arraignment.

CRIMINAL PROCEDURE - Arraignment - Validity - The necessary procedure was complied with in the present case.

MAXIMS - *Omnia praesumuntur rite esse acta* - Arraignment - Carried out in a manner which was substantially regular - The maxim applies in the matter of the validity.

FACTS

The appellant was arraigned before the High Court of Justice, Lagos State charged with the offence of murder punishable under section 319 (1) of the Criminal Code, Cap. 31, Laws of Lagos State of Nigeria, 1973. The appellant pleaded not guilty to the charge and the prosecution called six witnesses at the trial. On or about the 24th day of August, 1981 the appellant unlawfully stabbed one Agbai Ezikpe, the deceased, to death using a broken bottle. The appellant tried to run away but was pursued and apprehended by P.W 1. The defence of the appellant was a total denial of the charge. He gave evidence in his own defence. He returned from a tour on the 23rd August, 1981 to learn that the deceased had raped the appellant's sister in his room. The appellant reported the incident to the brother of the deceased. On the 24th August, 1981, the appellant with his comrades were discussing how to handle the alleged criminal conduct of the deceased when they heard some shouting

outside. They rushed out only to see the deceased lying down in a pool of blood. He denied stabbing the deceased.

At the conclusion of hearing, the learned trial judge after a thorough review of the evidence on the 30th day of July, 1985, found the appellant guilty as charged. He was accordingly sentenced to death. Dissatisfied the appellant unsuccessfully appealed to against his conviction and sentence to the Court of Appeal, Lagos Division. He has further appealed to the Supreme Court raising two issues. Pursuant to the leave granted by that court the appellant has now raised for the first time, the issue of the constitutionality of the death penalty as punishment for the capital offence of murder in Nigeria.

ISSUES FOR DETERMINATION

"1. Was the Court of Appeal right in holding that the Appellant was properly arraigned in accordance with the rule in Kajubo's case and, if not, should the Appellant be retried or discharged and acquitted.

2. "Whether Section 319 (1) of the Criminal Code of Lagos State, Cap. 31, Laws of Lagos State of Nigeria, 1973 is inconsistent with Section 31 (1) (a) of the Constitution of the Federal Republic of Nigeria, 1979 and, therefore, null and void and, if so, whether the affirmation of the death sentence passed on the appellant by the Court of Appeal was consequently erroneous on point of law".

HELD (Unanimously dismissing the appeal per lead judgment of **IGUH JSC**)

Constitutional law - Constitutional issue

1. A constitutional issue, like the question of jurisdiction, is not only fundamental but must be disposed of by the court as soon as it is raised to ensure that the proceedings in which it is raised is not rendered nugatory and null and void and that the Constitution which is the supreme law of the land is not breached. See Alhaji Rufai Agbaje and others v. Mrs. W. A. Adelekan and others (1990) 7 N.W.L.R. (part 164) 595 at 614. (p. 2766 G)

Interpretation - Of the Constitution

2. I think I ought to state at this stage that, generally, the fundamental principles that govern the interpretation of our Constitution are:-

(i) That such interpretation as would serve the interest of the Constitution, best carry out its object and purpose and give effect to the intention of the framers thereof should be preferred;

(ii) In the above regard, all the relevant provisions of the Constitution must be read together and not disjointly. See Ojokolobo v. Alamu (1987) 1 N.W.L.R. (part 61) 377; etc (p. 2769 A)

Constitutional law - Death penalty

3. Under Section 30 (1) of the Constitution, therefore, the right to life, although fully guaranteed is nevertheless subject to the execution of a death sentence of a court of law in respect of a criminal offence of which one has been found guilty in Nigeria. The qualifying word, save, used in Section 30 (1) seems to me to be the unmistakable key to the construction of that provision. In my view it is plain that the 1979 Constitution can by no stretch of the imagination be said to have proscribed or outlawed the death penalty. On the contrary, Section 30 (1) of the Constitution permits it in the clearest possible terms, so long as it is inflicted pursuant to the sentence of a court of law in Nigeria in a criminal offence. (p. 2770 D)

Constitutional law - Inconsistency

4. It is plain to me that apart from the provisions of Section 30 (1), there are also provisions of Sections 213 (2) (d) and 220 (1) (e) of the Constitution which, again, in no mistakable terms, recognize the death penalty as a form of sentence. I have also taken great care to go through the entire 1979 Constitution and have been unable to find any single section thereof which abolished or outlawed the death penalty. And I ask myself, having regard to the combined effect of the provisions of Sections 30 (1), 213 (2) (d) and 220 (1) (e) of the Constitution, whether it can be seriously argued, as the appellant now appears to do, that Section 319 (1) of the Criminal Code of Lagos State which prescribes the death sentence

is inconsistent with Section 31 (1) (a) or, indeed, with any other Section of the Constitution. I think not. To argue otherwise, if I may say with respect, will tantamount or embarking on an exercise aimed at defeating the clear provisions of the Constitution. (p. 2771 F)

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Interpretation - Right recognized under s. 30 (1) of the Constitution

5. It is also the rule of interpretation that to take away a right given by common law or statute, the legislature should do that in clear terms devoid of any ambiguity. Accordingly if the legislature had intended to take away the right it recognized under Section 30 (1) of the Constitution by Section 31 (1) (a) of the same document, it seems to me that it would have done this by clear terms and not by implication as learned counsel for the appellant appears to suggest. Besides, the right to life prescribed under the said Section 30 (1) of the Constitution is clearly a qualified right. It is not an unqualified right. It is also not in dispute that the imposition or execution of the death sentence in Nigeria is not subjected to any form of arbitrary, discriminatory or selective exercise of discretion on the part of any court or any other quarters whatever. I therefore entertain no doubt that the death penalty in Nigeria can by no stretch of the imagination be said to be invalid or unconstitutional. (p. 2779 D)

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Constitutional law - Interpretation - Ambiguity

6. It seems to me that whereas Section 41 of the Constitution lays down a saving clause, a proviso or a qualification with regard to Sections 34, 35, 36 as amended, 37 and 38 thereof, the framers of the Constitution made an in-built saving clause, proviso or qualification in Section 30 (1) of the Constitution whereby the first part of the said Section 30 (1) is a general statement as to the right of every person to life, which right is qualified by the subsequent part that permits death penalty in execution of the sentence of a court in respect of a criminal offence in Nigeria. It appears to me that section 30(1) of the Constitution is crystal clear and free from any ambiguity whatever. It cannot be derogated from. In my view, failure to give the section its obvious and plain meaning, will simply tantamount to embarking on an exercise aimed at defeating the clear

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provision of the Constitution and sacrificing such plain meaning on the alter of sheer technicality. By the first part of that section, the Constitution, in plain language, recognizes and protects the right to life. By its subsequent part, however, which may be described as the "proviso" or "qualifying clause" to the first part, that same section, in clear terms, permits life to be taken in execution of the sentence of a court in respect of a criminal offence of which the accused person has been found guilty. This seems to me the plain meaning of Section 30 (1) of the Constitution of the Federal Republic of Nigeria, 1979. (p. 2780 D)

Constitutional law - Constitutional rights

7. In the circumstance, it seems to me that the question of whether or not the execution of the appellant would infringe his constitutional rights not to be subjected to torture or to inhuman or degrading treatment pursuant to the provisions of Section 31 (1) (a) of the Constitution is a matter for determination by the High Court in a separate action or proceeding instituted by the appellant for that purpose. Such is the only court upon which Section 42 of the Constitution confers original jurisdiction to entertain the matter in issue and it will be unconstitutional for this court to assume jurisdiction and decide the question in the present appeal. ² (p. 2784 C)

Courts - Legislation

8. Now, to conclude, there can be no doubt that the central question before this court is whether or not the death penalty in Nigerian should be abolished. Although the arguments against capital punishment may be proper basis for legislative abolition of the death penalty, the authority for any action abolishing the death penalty is clearly not a matter for the law courts. Nor have I found myself able to hold that this court is entitled to repeal or revoke laws ostensibly based upon notions of public policy or sanction simply because such law, for one reason or the other, are said to

² In Nemi v. The State (1994) 13 KLR 200 a similar issue also arose for determination by the Supreme Court.

be unacceptable to a group of persons or a section of society. Such repeal or revocation is within the exclusive jurisdiction of the Legislature except, of course, such laws are attacked by due process of law on grounds such as unconstitutionality, illegality or the like. (p. 2785 E)

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Arraignment - Provisions of s. 215 Criminal Procedure Law

9. A close study of Section 215 of the Criminal Procedure Law, Cap. 32, Laws of Lagos State, 1973 clearly discloses, and this is borne out by a long line of decided cases of this court, that for a valid and proper arraignment of an accused person, the following three conditions must be satisfied namely:-

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(i) The accused person must be placed before the court unfettered unless the court shall see cause otherwise to order;

(ii) The charge or information shall be read over and explained to him to the satisfaction of the court by the Registrar or other officer of the court; and

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(iii) The accused shall then be called upon to plead instantly thereto (unless, of course, there exists any valid reason to do otherwise such as objection to want of service where the accused is entitled by law to service of a copy of the information and that court is satisfied that he has in fact not been duly served therewith).

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The above provisions of Section 215 of the Criminal Procedure Law are clearly mandatory and not directory and must, therefore, be strictly complied with as without a valid arraignment of an accused person, no trial would have commenced and, no matter the strength of the evidence, the trial and subsequent judgment will be null and void. The three requirements must co-exist. See generally Sunday Kajubo v. The State (1988) 1 N.W.L.R. (part 73) 731 at 732, Eyorokoromo v. The State (1979) 6 - 9 S.C. 3. (p. 2787 C)

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Arraignment - Validity

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10. I have closely studied the record of proceedings in respect of the arraignment of the appellant reproduced above and must confess, with profound respect to the learned Senior Advocate, that I find it extremely

difficult to accept his attacks on the arraignment of the appellant as well founded. In the first place, there is abundant evidence on record that the appellant was present before the court on the date of his arraignment and that the charge or information was read over and explained to him in the English Language whereupon he pleaded not guilty thereto. The central issue that seems to me of vital importance in the matter of a valid arraignment is that the charge or information shall be read over and explained to an accused person, naturally in the language he understands, to the satisfaction of the court, before he may be required to enter his plea thereto. This was clearly complied with in the present case. (p. 2789 G)

Maxims - Omnia praesumuntur rite esse acta

11. It is my view that the arraignment of the appellant before the trial court was entirely valid and in accordance with the law.

I ought in this connection to draw attention to Section 150 (1) of the Evidence Act which provides thus:-

"When any judicial or official act is shown to have been done in a manner Substantially regular, it is presumed that formal requisites for its validity were complied with". (Underlining supplied for emphasis)

The arraignment of the appellant was both a judicial and an official act. It was also carried out in a manner which was substantially regular. In my view, the maxim Omnia praesumuntur rite esse acta comes into play and becomes applicable in the matter of the validity of the arraignment in issue. (p. 2791 C)

NOTABLE POINTS OF INTEREST

IGUH JSC

1. Death penalty - Validity of in foreign jurisdiction

Upon a careful perusal of the various foreign authorities to which our attention was drawn by the appellant, the opinion that the death penalty per se amounts to torture, inhuman and degrading treatment and, therefore, intrinsically unconstitutional seems to me a minority view. Indeed, a close study of those decisions reveals that the foreign jurisdictions that have similar provisions in their Constitutions as ours have repeatedly pro-

nounced the death penalty to be constitutionally valid. The decisions tended to turn on the crucial question of whether the right to life therein contained is qualified or unqualified. If qualified the death penalty was, in the main, held to be constitutional. If unqualified, however, the death penalty was, rightly in my view, declared to be unconstitutional. B

(p. 2772 C)

2. *Breach of fundamental right in the course of trial*

However, constitutional issues which pertain only to the breach of a fundamental right in the course of trial or hearing before the lower courts may be raised in an appeal to the Supreme Court. Such issues are those that relate mainly to breach of the right to fair hearing and the right to personal liberty under Sections 32 and 33 of the Constitution. Other rights such as right to life and those to private and family life, peaceful assembly and association and freedom of the press can only be enforced through a substantive action in the appropriate High Court and cannot be raised in an appellate court, including the Supreme Court, as being incidental to the proceedings in the lower courts. The appellate courts, inclusive of the Supreme Court, have no original jurisdiction to entertain, determine or pronounce on questions relating to an alleged breach of fundamental rights, especially where the issue involved or the redress invoked is not directly relevant or intrinsic to the determination, on the merit, of the appeal before them. (p. 2782 E) C D E F

3. *The death row phenomenon*

With profound respect to learned counsel, however, I cannot see the relevance, in this appeal, of whatever process that is employed in the execution of a condemned prisoner. Without doubt, the foreign decisions cited on the point would appear academic and truly interesting. However, in all those cases pertaining to the death row phenomenon and/or the alleged barbarity or otherwise of execution by hanging, it was not the constitutionality of the death penalty as a form of punishment that was being challenged as in the present appeal. The questions revolved around the undue delay in the execution of the death sentence, the de- G H

plorable conditions under which the prisoners awaiting execution were confined which gave rise to inhuman and degrading treatment and the mode or manner of execution. These issues do not directly arise for decision in this appeal. (p. 2785 A)

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BELGORE.JSC

4. Validity of an arraignment - The test required

In the instant case the record clearly indicates the charge was read and explained to the accused and his plea was taken. The test required in cases like these, on the rationale of whether the accused understood the charge read and explained to him, is the objective test of what can reasonably be inferred after the charge was read and explained before the plea was taken. Certainly the accused pleaded to what he understood. Where a charge was amended, it must be read and explained to the accused so that the court is satisfied he understands the charge before his plea is taken. Once the charge is read and explained it is to be presumed that the accused understood the same before he pleaded. "Understanding" is the state of the mind of the accused which he only knows with the court merely presuming he understood after explaining the charge read to him. This case has satisfied all the requirements of S. 215 of Criminal Procedure Law (supra) (p. 2797 D)

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KUTIGI.JSC

5. Death penalty is not synonymous with death sentence under s. 319 (1) Criminal Code

It is pertinent to state here that section 319 (1) of the Criminal Code above, under which the Appellant was tried and convicted only provided for the death penalty for the offence charged and not the sentence. Penalty in this case is not synonymous with sentence and the two must not be confused as counsel for the appellant appeared to have done here. The Death or Capital sentence is prescribed under section 367(1) & (2) of the Criminal Procedure Law. The section reads -

"367 (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*

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"The sentence of the court upon you is that you be hanged by the neck until you be dead and may the Lord have mercy on your soul."

Because we were not addressed on, nor any reference made to, section 367(1) & (2) of the Criminal Procedure Law above, I will say nothing more on it. (p. 2809 G)

REPRESENTATION

Mr. Olisa Agbakoba S.A.N., with N. I. Quakers and S. Amadi for the appellant

Mrs. Wonu Folami, Hon. Attorney-General of Lagos State, with F. Arthur-Worrey, D.P.P. Lagos State for the respondent

CASES REFERRED TO

Agbaje v. Mrs. Adelekan (1990) 7 N.W.L.R. (part 164) 595 at 614.

Ojokolobo v. Alamu (1987) 1 N.W.L.R. (part 61) 377

Kajubo v. The State (1988) 1 N.W.L.R. (part 73) 731 at 732

Eyorokoromo v. The State (1979) 6 - 9 S.C. 3.

Erekanure v. The State (1993) 5 N.W.L.R. (part 294) 392

Mbushuu v. The Republic (Criminal Appeal No. 142 of 1994

Weems v. United States 217 U.S. 349

Furman v. State of Georgia 408 U.S. 238 at 263 - 264

The State v. Makwanyane (1995) (6) B C L R 665 (C C)

Guerra v. Cipriani Baptiste (1996) 1 A.C. 397 (P. C.)

Earl Pratt v. Attorney-General for Jamaica (1994) 2 A. C. 1

Noel Riley v. Attorney-General of Jamaica (1983) A. C. 719 (P. C.)

The People v. Robert Anderson 493 P. 2d 880.

STATUTES & RULES REFERRED TO

Criminal Code, cap. 31, Laws of Lagos State of Nigeria, 1973, ss. 319 H (1)

Constitution of the Federal Republic of Nigeria, 1979, ss. 30 (c), 31 (4)

(a) 32, 33 (6) (a), 34, 35, 36, 37, 38, 41, 42, 213 (2) and 220 (1) (e)

Criminal Procedure Law, Cap. 32, Laws of Lagos State of Nigeria, 1973, ss. 215, 367 (1)

Evidence Act, Cap. 112 Laws of the Federation of Nigeria, 1990, s.150 (1).

B Tanzania Constitution, Article 30 (2)

Zimbabwean Constitution, s. 15 (1)

South African Constitution, ss. (11) (2), and 9

Indian Constitution, Article 21

Jamaican Constitution ss. 14 (1) and 17

C Constitution of the Republic of Hungary, s. 54

LEAD JUDGMENT BY IGUH JSC

D Two vital issues of considerable importance arise for determination in this appeal.

The first issue relates to the validity or constitutionality of the death penalty as a form of punishment in relation to the capital offence of murder as prescribed under Section 319 (1) of the Criminal Code, Cap. 31, Laws of Lagos State of Nigeria, 1973. The question is whether the provisions of the said section 319. The question is whether the provisions of the said Section 319 (1) of the Criminal Code of Lagos State which prescribe the death penalty in relation to the offence of murder are not contrary to and inconsistent with Section 31(1) (a) of the Constitution of the Federal Republic of Nigeria, 1979, Cap. 62, Laws of the Federation of Nigeria, 1990 and therefore unconstitutional, invalid, null and void and of no effect. The issue, therefore, questions the constitutional validity of the death penalty as the mandatory punishment for the offence of murder in Nigeria

G The second issue concerns the validity or otherwise of the arraignment of the appellant before the trial court for the offence of murder for which he was tried. The question is whether the appellant was properly arraigned before the trial court in accordance with the provisions of Section 215 of the Criminal Procedure Law, Cap. 32, Laws of Lagos State of Nigeria, 1973 and, if not, whether an order of retrial or that of an acquittal and discharge ought to be entered by this court in favour of the

appellant.

The appellant, Onuoha Kalu, was on the 6th day of March, 1981 arraigned before the High Court of Justice, Lagos State, charged with the offence of murder punishable under Section 319 (1) of the Criminal Code, Cap. 31, Laws of Lagos State of Nigeria, 1973. The particulars of the offence charged are as follows:-

"Onuoha Kalu (m) on or about the 24th day of August, 1981 at Yaba, in the Lagos Judicial Division, murdered Agbai Ezikpe".

The appellant pleaded not guilty to the charge and the prosecution called six witnesses at the trial. The appellant also testified on oath in his own defence but called no witnesses.

The substance of the case as presented by the prosecution, found established by the learned trial Judge and affirmed by the Court of Appeal was that on or about the 24th day of August, 1981, between the hours of 7.00 and 8.00 post meridiem, the appellant unlawfully stabbed one Agbai Ezikpe, the deceased, to death with the broken end of a star lager beer bottle in the neck. The incident took place before eye witnesses who duly testified before the court. After this stabbing, blood gushed out profusely from the neck of the deceased who immediately fell down. The appellant, at this stage, tried to run away but was pursued by P.W. 1 who apprehended him. The deceased was rushed to the General Hospital, Lagos where he died a few minutes later from his stab injuries.

The defence of the appellant was a total denial of the charge. He returned from a tour on the 23rd August, 1981 to learn that the deceased had raped the appellant's sister in his room. The appellant reported the incident to the brother of the deceased. On the 24th August, 1981, the appellant, with his comrades were discussing how to handle the alleged criminal conduct of the deceased when they heard some shouting outside. They rushed out only to see the deceased lying down in a pool of blood. He denied stabbing the deceased.

At the conclusion of hearing, the learned trial Judge, Omotoso, H. J. as she then was, after a thorough review of the evidence on the 30th day of July, 1985, found the appellant guilty as charged. He was accordingly sentenced to death pursuant to the mandatory death penalty pre-

scribed by Section 319 (1) of the Criminal Code of Lagos State for the offence of murder.

Dissatisfied with this decision of the trial court, the appellant lodged an appeal against his conviction and sentence to the Court of Appeal, Lagos Division. The Court of Appeal, in a unanimous judgment, on the 7th day of June, 1995, dismissed the appeal and the conviction and sentence passed on the appellant were affirmed. It is against this judgment of the court below that the appellant has now appealed to this court on a four point amended grounds of appeal. It is pursuant to the leave granted by this court to the appellant for the amendment of his original three grounds of appeal that he now raised, for the first time, the issue of the constitutionality of the death penalty as punishment for the capital offence of murder in Nigeria.

Both the appellant and the respondent filed and exchanged their respective written briefs of argument. In the appellant's brief, the under mentioned issues were formulated for the determination of this court, namely:-

"1. Was the Court of Appeal right in holding that the Appellant was properly arraigned in accordance with the rule in Kajubo's case and, if not, should the Appellant be retried or discharged and acquitted.

2. Whether Section 319 (1) of the Criminal Code is not inconsistent with Section 31 (1) (a) of the Constitution of Federal Republic of Nigeria and therefore null and void and, if so, whether the affirmation of death sentence by the Court of Appeal was correct."

I think I ought to observe, with due respect to learned leading counsel for the appellant, that it would appear there is a misconception in the manner the second issue was couched. With the double negative, "not inconsistent" appearing in line two thereof, the inescapable grammatical position would be to convert the first arm of the question posed to whether Section 319 (1) of the Criminal Code is consistent with Section 31 (1) (a) of the 1979 Constitution. Clearly, if that is the position, the next arm of the issue, as framed, which poses the question whether the said Section 319 (1) of the Criminal Code is therefore null and void because of the alleged consistency would be rendered illogical and a non

sequitur. Section 319 (1) of the Criminal Code cannot be null and void because of its consistency with Section 31 (1) (a) of the Constitution. It can only be null and void because of its inconsistency with the said Section 31 (1) (a) of the 1979 Constitution. It therefore seems to me clear that there is, with respect, an apparent error in the way issue two is framed in the appellant's brief of argument. I entertain no doubt that the inclusion of the word "not" before "inconsistent" in the formulation of the appellant's second issue is an apparent error, perhaps a typographical error, otherwise the entire arguments and submissions of appellant's learned counsel on the issue would hardly fall in alignment with the clear question for determination before the court. I would accordingly amend the appellant's issue two to fall in line with the arguments advanced in his brief of argument as follows:-

"Whether Section 319 (1) of the Criminal Code of Lagos State, Cap. 31, Laws of Lagos State of Nigeria, 1973 is inconsistent with Section 31 (1) (a) of the Constitution of the Federal Republic of Nigeria, 1979 and, therefore, null and void and, if so, whether the affirmation of the death sentence passed on the appellant by the Court of Appeal was consequently erroneous on point of law".

It is only by so doing that the legal question canvassed before this court by learned counsel for the parties on this all important issue would be meaningfully considered and appropriately determined.

The respondent, for its own part, identified the under mentioned three issues in its brief of argument for the determination of this court. These are as follows:-

"1. Whether the appellant was properly arraigned before the trial court.

2. Whether the Supreme Court has original jurisdiction to entertain an enquiry into the constitutionality of the death sentence as provided in Section 319 (1) of the Criminal Code.

3. What is the proper interpretation of the provisions of Section 319 (1) of the Criminal Code?"

I have carefully studied the three issues raised by the respondent in its brief of argument and they seem to me adequately covered by the

two issues, as amended, raised on behalf of the appellant. I shall, therefore, adopt the two issues, as amended, formulated on behalf of the appellant as being more relevant for the determination of this appeal.

B In view of the constitutional importance of the question posed under issue 2 in this appeal and the far reaching effect the decision of this court thereupon would have in our criminal jurisprudence throughout the entire country, a number of senior and eminent learned counsel were invited by this court as amici curiae to address the court on the question raised. Following this invitation, Alhaji Abdullahi Ibrahim, S.A.N. and C learned Attorney-General of the Federation, C.O. Akpangbo, Esq. S.A.N., Dr. Ilochi A. Okafor, S.A.N., Chief F. O. Akinrele, S.A.N. and A. B. Mahmoud Esq. of learned counsel filed very useful and thought provoking briefs of argument.

D I think I should at this stage express profound gratitude to these learned gentlemen of both the inner and Outer bar for the scholarly presentation of both their briefs of argument and oral submissions before this court as Amici curiae. Their respective briefs were comprehensive, E stimulating and clearly impressive. They reflected, in very clear terms, the apparent industry with which they were prepared and I must take this opportunity to express my profound thanks to learned counsel for professional assignments well executed.

F Learned counsel for the appellant, Olisa Agbakoba Esq., S.A.N. in his arguments in the appellant's brief in respect of the first issue submitted that the arraignment of the appellant before the trial court did not meet the mandatory conditions stipulated in Section 215 of the Criminal Procedure Law, Cap. 32, Laws of Lagos State, 1973 and Section 33 (6) G (a) of the Constitution of the Federal Republic of Nigeria, 1979. Relying on the decisions of this court in Sunday Kajubo v. The State, (1988) 1 N.W.L.R. (Part 73) 721 and Samuel Erekanure v. The State, (1993) 5 N.W.L.R. (part 294) 392, learned Senior Advocate contended that it was H not recorded by the trial court that the appellant understood the charge that was read to him to the satisfaction of the court. He considered this Omission as serious and fatal to the arraignment of the appellant. He concluded by submitting that the entire proceedings in the trial court are

therefore null and void by reason of the failure by that court to comply with the mandatory provisions of Section 215 of the Criminal Procedure Law of Lagos State. He urged the court to allow this appeal on this issue.

On the second issue, learned Senior Advocate pointed out that there is no reported local decision of any of our superior courts of record in which the validity of Section 319 (1) of the Criminal Code was either raised or canvassed. He however submitted that this court is entitled to seek guidance from the decisions of the courts of other common law jurisdictions on such or similar matters. He argued that where a constitutional or statutory provision in respect of fundamental human rights leaves scope for judicial interpretation, the courts traditionally have recourse to international human rights norms and to widely accepted sources of moral standards as aids to such interpretation. Learned counsel placed reliance on the jurisprudence of other countries, notably, South Africa, Tanzania, Canada, Hungary and the United States of America and those of some other international judicial tribunals which, he claimed, articulated what he considered acceptable views on the constitutionality of the death penalty as a mode of punishment. He contended that by contemporary human rights standards and values, the death penalty as provided for in Section 319 (1) of the Criminal Code of Lagos State is inconsistent with the provisions of Section 31 (1) (a) of the Constitution of the Federal Republic of Nigeria, 1979 which expressly prohibit all forms of punishment that amount to torture, inhuman or degrading treatment. He therefore argued that this court, under the circumstance, is entitled in the present proceedings, to declare Section 319 (1) of the Criminal Code void in consequence of its inconsistency with Section 31 (1) (a) of the Constitution of the Federal Republic of Nigeria, 1979.

Learned Senior Advocate next drew the attention of the court to the provisions in Sections 30 (1), 213 (2) (d) and 220 (1) (e) of the 1979 Constitution which expressly would appear to recognize the death penalty. He also referred to the decision of the Tanzanian Court of Appeal in Mbushuu and Another v. The Republic (Criminal Appeal No. 142 of 1994, delivered on the 30th January, 1995). He pointed out that that case, on the basis of the general derogation provision provided under Article 30

(2) of the Tanzania Constitution, ruled that although the death sentence is a form of "cruel, inhuman and degrading treatment", it is nevertheless a valid constitutional punishment. He however distinguished this decision from the Nigerian circumstance in respect of which, he contended, the right not to be subjected to torture, inhuman or degrading treatment protected under Section 31 (1) (a) of the 1979 Constitution is a non-derogable right, that is to say, it is not one of the rights that may be derogated from by legislation. He argued that the specific rights in respect of which the 1979 Constitution permits derogation by legislation are set out in Section 41 (1) and (2) of the Constitution and only relate to Sections 30, 32, 34, 35, 36, 37 and 38 of the 1979 Constitution. He stressed that once a decision is reached that the prescription of the death penalty for the offence of murder in Nigeria amounts to "torture, inhuman and degrading treatment", the irresistible conclusion must be a finding that Section 319 (1) of the Criminal Code is unconstitutional.

Learned counsel waded into a mass of authorities and decisions from various other jurisdictions, particularly, the Supreme Courts of the United States of America, Zimbabwe, Namibia and Her Majesty's Privy Council in the United Kingdom in respect of appeals from the Courts of Appeal of Trinidad and Tobago, Jamaica and the Commonwealth of the Bahamas. In these decisions, the constitutionality of the death penalty as a form of sentence for the capital offence of murder came directly into question, having regard to the various constitutional provisions in issue in the countries concerned. The most relevant of the cases cited, to mention only but a few, are those of Weems v. United States 217 U.S. 349, William Henry Furman v. State of Georgia 408 U.S. 238 at 263 - 264, Catholic Commission for Justice and Peace, Zimbabwe v. Attorney-General of Zimbabwe and others (1993) (4) S.A. 239 (Z S C), The State v. Makwanyane and Another (1995) (6) B C L R 665 (C C), Lincoln Anthony Guerra v. Cipriani Baptiste and others (1996) 1 A.C. 397 (P. C.), Earl Pratt and Another v. Attorney-General for Jamaica (1994) 2 A. C. 1, Fisher v. Minister of Public Safety and Immigration and others (1998) 3 W.L.R. 201 (P. C.) Noel Riley and others v. Attorney-General of Jamaica (1983) A. C. 719 (P. C.) and The People v. Robert Anderson 493 P. 2d

880. It was his submission that the consensus of judicial opinion in all these cases is that the substantive contents of specific human rights guarantees must be left "open-ended" to enable them accommodate evolving standards of civilization. He claimed that it is as a result of this "evolving and dynamic" process that the 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. B

Launching further attacks on the imposition of the death penalty for murder, learned counsel described it as a cruel, inhuman and degrading punishment, inconsistent with the right to life as entrenched in the 1979 Constitution. It is also incapable of correction in the event of an error and negated the essential content of the right to life. He contended that elements of arbitrariness are also involved in the imposition and execution of the death penalty and that its consequences are irredeemable. D He referred to the inevitable long wait between the imposition of the death sentence and the actual infliction of death, usually referred to as the "death row phenomenon" and described this as a crucial factor in the characterization of the death penalty as a "cruel, inhuman and degrading" E treatment. He called in aid the decision in the U.S. case of District Attorney for the Suffolk District v. Watson and others (1980) 381 Mass. 648 at 664 and 665 where the learned Chief Judge, Hennesey, C.J. observed thus:-

"The death penalty is unacceptable 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 tortures, is impermissibly cruel when judge by contemporary standards of decency". F G

He contended that the "death row phenomenon" is a reality within the context of the Nigerian legal system. He argued that although there is no reported Nigerian case in which the issue of the incompatibility of the "death row phenomenon" with Section 31(1) of the 1979 Constitution was decided, the mental agony associated with the "death row phenomenon" amounts to "torture, inhuman and degrading treatment" within the H

context of section 31 (1) (a) of the 1979 Constitution.

B Concluding, learned Senior Advocate pointed out that in Nigeria, the punishment of death for the offence of murder is inflicted by hanging the offender by the neck till he be dead pursuant to the provisions of Section 367 (1) of the Criminal Procedure Law, Cap. 32, Laws of Lagos State, 1973. He described this process as sordid and destructive of human dignity. He invited the court to hold that Section 319 (1) of the Criminal Code of Lagos State is unconstitutional and null and void by virtue of its inconsistency with Section 31 (1) (a) of the 1979 Constitution and to allow this appeal and quash the conviction and sentence of the appellant.

D Learned leading counsel for the respondent, Mrs. W. Folami, Attorney-General of Lagos State, in the respondent's brief submitted with regards to issue one that the arraignment of the appellant in the present case meets not only the standard set out under Section 215 of the Criminal Procedure Law of Lagos State but that it also satisfied the conditions laid down in the case of Sunday Kajubo v. The State (1988) 1 N.W.L.R. (part 73) 721. It was argued that the appellant not only entered his plea in the English language after the charge was read and explained to him but that he testified before the trial court in the English language. She submitted that there is nothing on record to suggest that English is a language not understood by the appellant or that the trial court was not satisfied that the charge was properly read and explained to him. Reference was made to Section 150 (1) of the Evidence Act and it was submitted that the arraignment of the appellant was a judicial act, shown from the record of proceedings to have been done in a manner substantially regular and that there is, therefore, a presumption that the formal requisites for its validity were complied with.

H On issue two, it is the respondent's submission that having regard to the provisions of Section 30 (1) of the 1979 Constitution, the validity of the death penalty for the capital offence of murder in Nigeria cannot be called into question. Learned Attorney-General pointed out that the method or mode of execution of such sentence which, under Section 367 (1) of the Criminal Procedure Law, Cap. 32, Laws of Lagos

State, 1973 is by hanging, must be distinguished from the death penalty itself. She contended that the mode of execution of the death sentence, if it requires any modification, must be a matter for the Legislature for an amendment of the relevant provision of the law. Learned counsel argued that there is nothing in Section 319 (1) of the Criminal Code which is inconsistent with any Section of the 1979 Constitution. She, therefore, urged the court to resolve the issue in question against the appellant and to dismiss this appeal.

Learned Attorney-General of the Federation and Senior Advocate of Nigeria, Abdullahi Ibrahim, Esq. in his own brief, as amicus curiae, noted that it is on record that the charge was read and explained to the appellant in English language before he pleaded thereto. He pointed out that the appellant testified in his own defence in the English language and that there is no question of any suggestion that he did not understand the English language. He contended that the trial was in strict conformity with the provisions of Section 215 of the Criminal Code Law of Lagos State, 1973 and Section 33 (6) of the Constitution of the Federal Republic of Nigeria, 1979 and fully complied with the conditions laid down by this court in the case of Sunday Kajubo v. The State, (supra). In the circumstance, he argued that there is no basis for any order of retrial applied for by the appellant.

On issue 2 learned Attorney-General observed that although learned appellant's counsel relied on a good number of obiter dicta from various countries of the world to buttress his arguments that the death penalty under Section 319 (1) of the Criminal code is invalid and unconstitutional, it is only our own Constitution, the 1979 Nigerian Constitution, that is relevant for interpretation in the present case. He pointed out that whereas Section 30 (1) of the 1979 Constitution make a qualified provision in respect of the "Right to Life". Section 31 (1) deals with "Right to Dignity of human person". He regarded these as two distinct rights and submitted that by no stretch of the imagination can any one suggest that the death penalty, expressly provided for in Section 30 (1) is what the legislature immediately withdrew or repealed in the very next Section 31 (1) of the same Constitution. He submitted that the death

penalty having been recognized by Section 30 (1) of the Constitution of the Federal Republic of Nigeria, 1979 ought not be blown away by a sidewind unless repealed by the due process of law. He contended that the death penalty is a necessary and acceptable form of punishment and that it is neither cruel, inhuman nor degrading within the meaning of Section 319 (1) of the Criminal Code of Lagos State. Learned Federal Attorney-General urged the court to dismiss the appeal.

Learned Senior Advocate of Nigeria, C. O. Akpamgbo Esq. in his own brief, also, as amicus curiae drew attention to the decisions of this court in Sunday Kajubo v. The State, (supra), Edet Effiom v. The State (1995) 1 N.W.L.R. (part 373) 507 at 556 and Samuel Erekanure v. The State, (supra) and the conditions therein proscribed for a valid and proper arraignment of an accused person before the court. He contended that two of these conditions were not complied with. The two conditions, he submitted, that were not complied with are:-

- (i) that the charge must be read over to the accused in the language he understands;
- (ii) that the charge should be explained to the accused to the satisfaction of the court.

He argued that it must not be presumed that an accused person understands the English language. This is why it is necessary, if an accused does not understand the English language, to engage the services of a sworn interpreter to explain the charge to him. He submitted that this infringement of both Section 215 of the Criminal Procedure Law of Lagos State and Section 33 of the Constitution is not a mere matter of technicality but an issue of substance that went to the root of the trial. He urged the court to declare the trial and conviction of the appellant a nullity.

On the 2nd issue, it is the contention of the learned Senior Advocate that the provisions of the 1979 Constitution must be read as a whole for a correct interpretation as to whether Section 319 (1) of the Criminal Code of Lagos State, 1973 is unconstitutional and therefore null and void. He submitted that Section 30 (1) of the Constitution makes a qualified provision in respect of the right to life. He argued that the death penalty

under Section 319 (1) of the Criminal code of Lagos State having been recognized by Section 30 (1) of the Constitution cannot be said to be unconstitutional nor does it amount to "torture, inhuman or degrading" treatment. He stressed that the appellant appeared to be complaining of the manner of execution of the death sentence by hanging and not the death penalty *per se*. He argued that Section 31 (1) (a) of the 1979 Constitution which the learned counsel for the appellant claimed is inconsistent with Section 319 (1) of the Criminal Code has infact nothing to do with Section 30 (1) of the said Constitution. Shorn of procedural abuses, the death penalty, he insisted, helps to preserve equilibrium in the Nigerian society by providing a measured and appropriate response to heinous and barbarous criminal acts that threaten the moral foundation of the Nigerian society. He added that even in the United States of America with all its claims to moral sophistication, the U.S. Supreme Court has repeatedly ruled that the death penalty is not intrinsically unconstitutional. In this regard, he relied on the decisions in Gregg v. Georgia 428 U.S. 135 176-87 (1976), District Attorney for the suffolk District v. James Watson (1980) 381 Mass. 648, Proffitt v. Florida 428 U.S. 242 (1976). He stressed that whether a particular form of punishment goes beyond standard of decency must be answered strictly in the context and particular circumstances of Nigeria. He urged this court to resist the suggestion by the appellant to transplant foreign notions of decency into a country like Nigeria with diametrically opposite cultural assumptions. He stated that [N]igerians through their elected representatives passed the laws that permitted the death penalty. In his view, to invite this court to invalidate the will of the people may be an impermissible, even an illegitimate exercise of judicial powers.

On whether the death penalty is tantamount to torture or to inhuman or degrading treatment, learned counsel submitted that the question one must ask is whether the death sentence is inhuman, degrading or shocks the moral conscience of the Nigerian community, not that of the people of the U.S.A., Canada, U.K. or South Africa. He was of the view that torture, inhuman and degrading treatment which accompany the death penalty do not come within the ambit of Section 31 (1) (a) of the Consti-

tution. He concluded by stressing that it would be wrong to resolve the issue under consideration against the background of the interest of the appellant only. According to the learned counsel, the interest of the victim of the murder, his family and that of society at large must equally be considered.

Learned Senior Advocate of Nigeria, Dr. Ilochi A. Okafor, in his own brief dealt only with the second issue. He gave a brief history of the death penalty, nothing that although some countries of the world have abolished it, many still retain it in cases of murder and treason. He submitted that the real question before this court is whether there is any conflict or inconsistency between the provision of Section 30 (1) of the 1979 Constitution which authorizes the death penalty and Section 31 (1) (a) which guarantees freedom torture, inhuman or degrading treatment. In this regard, he submitted that such interpretation as would serve the interest of the Constitution and would best carry out its object and purpose should be preferred. To achieve this, learned counsel called in aid the decisions of this court in Rabiu v. The State (1980) 8-11 S.C. 130 and Attorney-General of Ogun State v. Attorney-General of the Federation (1982) 2 S.C. 13, and stressed that all the relevant provisions of the Constitution must be read together and not disjointly and that where the words are clear and unambiguous, they must be given their ordinary meaning. In his view, the provisions of Sections 30 (1) and 31 (1) (a) of the 1979 Constitution are crystal clear. By Section 30 (1) of the Constitution, the death penalty is clearly permissible so long as it is in execution of the sentence of a court of law in respect of a criminal offence of which the convicted person has been found guilty in Nigeria. Under Section 31 (1) (a) of the same 1979 Constitution, however, "torture, inhuman and degrading treatment" is prohibited. He therefore contended, relying on the definition of "torture" in the International Instrument, the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 1984, Article 1 (1) to the effect that "torture, inhuman and degrading treatment" do not include "pain or suffering arising only from, inherent in or incidental to lawful sanctions."

Learned Senior Advocate closely examined a number of Interna-

tional Human Rights decisions from various foreign jurisdictions, particularly those of Tyrer v. United Kingdom (1978) Eu Ct. of H. R. Rep. Series A. No. 28, Soering v. United Kingdom (1989) Eu. Ct. of H. R. Series A. Vol. 161 reprinted in (1989) 11 EHRR 439, Ng. v. Canada (1994) 12 IHRR 161, and Cox v. Canada (1995) 2 IHRR 307 and submitted that what international human rights jurisprudence finds objectionable and violative of the guarantee against torture contained in international instruments is not so much the imposition of the death penalty per se the manner of its execution, including the attendant agony upon the delay in waiting on the death row before execution. He saw no inconsistency between the provisions in Sections 30 (1) and 31 (1) (a) of the 1979 Constitution.

There was next the brief of argument of learned amicus curiae, Chief F. O. Akinrele, S. A. N. in which, on issue 1, he contended that there is no indication on the printed record that Section 215 of the Criminal Procedure Law of Lagos State was fully complied with. He pointed out, for instance, that there is no evidence that the charge or information was explained to the appellant to the satisfaction of the court and that following the decision of this court in Samuel Erekanure v. The State, (supra), this rendered the trial null and void. On the proper order that this court should consequently make, learned Senior Advocate reviewed the decisions in Abodunde and others v. The Queen (1959) 4 F.S.C. 70, Ankwa v. The State (1969) 1 All N.L.R. 133 at 137, Sunday Kajubo v. The State, (supra) and Erekanure v. The State, (supra) and, having regard to the surrounding circumstances of this case, he urged the court to lean against making an order of a retrial of the appellant.

On the second issue, learned Senior Advocate contended that on a careful perusal of the various foreign authorities referred to by the appellant, the view that the death penalty per se is cruel, inhuman and degrading and thus unconstitutional is, generally speaking, a minority view. Indeed, he submitted that in foreign jurisdictions that have similar constitutional provisions as ours, the death penalty has always been held to be constitutionally valid. He stressed that the decisions tended to turn on whether the right to life is qualified or unqualified. In the former, the

death penalty has, in the main, been held to be constitutional whilst, in the latter, it was held to be unconstitutional. He then proceeded to examine a mass of case law from foreign jurisdictions covering a greater part of the globe, inclusive of countries like Tanzania, Zimbabwe, South Africa, India, Canada, Hungary, the United Kingdom and the United States of America. Prominent among these decisions are those of Mbushuu v. The State (Criminal Appeal No. 142 of 1994 delivered on 30th January, 1995), Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General for Zimbabwe (1993) (4) SA 239, Makwanyane v. The State (1995) (6) BCLR 665 (C.C.), Bacan Singh v. State of Punjab (1983) (2) SCR 583, Kindler v. Canada (1992) 6 CRR (2 ND) 193 (SSC), Furman v. Georgia (1972) 408 U.S. 238, 33 L. ED 2d 346, 92 S ct. 2726, Riley v. Attorney-General for Jamaica (1983) A. C. 719 (P.C.) etc. He further analyzed a few decisions of the Human Rights Committee of the United Nations and the case of Soering v. United Kingdom (1989) 11 EHRR 439 on the European Convention on Human Rights. Learned Senior Advocate finally waded into the arena of the death row phenomenon, comparing and contrasting decisions of various foreign jurisdictions on the subject. He arrived at the conclusion that a state that 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 appeal and consideration of reprieve by the executive. He considered that in the present case, the complaint of the appellant is that they were subjected to cruel, inhuman and degrading treatment by virtue of having been kept in the death row for over 13 years. He regarded this as a complaint of torture, inhuman and degrading treatment which, he submitted, arises wholly and exclusively from the present proceeding and is intrinsic and incidental thereto. He was of the view that in all the circumstances of this case, the death sentence passed on the appellant should now be commuted to life imprisonment.

There is finally the brief of argument of A. B. Mahmoud Esq. of learned counsel, wherein he submitted in respect of the first issue that the defects in the plea of the accused persons in the cases of Sunday Kajubo v. The State and Samuel Erekanure v. The State (supra) do not

exist in the present case. He argued that in the present case the information was read over and explained in the English language to the appellant who understood and spoke the same language and he pleaded not guilty thereto. He argued that this is full compliance with the provisions of Section 215 of the Criminal Procedure Law of Lagos State as well as Section 33 of the Constitution of the Federal Republic of Nigeria and that the arraignment of the appellant was consequently proper. On the question of the order of retrial against which the appellant's learned counsel argued, Mr. Mahmoud submitted that the view the courts have generally held is that a retrial would not be ordered if there were special circumstances as would render it oppressive to put the appellant on trial a second time. He contended that no such circumstances exist in the present case. The issue, however, he stated, does not arise for determination in this appeal in view of his submission that the arraignment of the appellant was perfectly in compliance with the law. B C D

Dealing with the second issue, learned counsel pointed out that the simple question that arises for consideration is the constitutional validity or otherwise of the death penalty in Nigeria. This is because if Section 319 (1) of the Criminal Code of Lagos State, which prescribes the death penalty is found to be inconsistent with Section 31 (1) (a) of the 1979 Constitution, then, of course, it must be pronounced unconstitutional and therefore null and void. He dealt with the cardinal principles enunciated by this court in the case of Nafiu Rabi v. The State (1980) 8-11 S.C. 130 on the interpretation of the Constitution and submitted that words should be given their plain and ordinary meaning. Learned counsel closely examined Section 30 (1) and 31 (1) (a) of the Constitution of Nigeria and submitted that there is no apparent inconsistency in their provisions. He pointed out that Section 30 (1), along with Sections 213 (2) (d) and 220 (1) (e) of the 1979 Constitution, clearly recognizes the death penalty in Nigeria as prescribed by Section 319 of the Criminal Code. He argued that whether the death penalty involves torture or constitutes inhuman or degrading treatment, it is beyond doubt that the 1979 Constitution has recognized it. And even if it must be abrogated, that duty cannot be that of the courts but the responsibility of the Legislature. E F G H

Learned counsel finally dealt with the death row phenomenon. He, too, examined the decisions of her Majesty's Privy Council in Earl Pratt and Another v. The Attorney-General of Jamaica, (supra), Abbot v. Attorney-General of Trinidad and Tobago (1979) 1 W.L.R. 1342, Riley and others v. The Attorney-General of Jamaica (1983) 1 A.C. 719, Madhu Mehta v. Union of India (1989) 3 SCR 775 and the decision of the Supreme Court of Zimbabwe in Catholic Commission for Justice and Peace in Zimbabwe v. The Attorney-General for Zimbabwe (supra). In view, however, of what will become apparent later in this judgment, I do not propose at this stage to devote more attention to the death row phenomenon as an issue. Learned counsel concluded by submitting that in the light of Section 30 (1) of our Constitution, it is the Legislature that needs to carry out amendments, if, indeed, this is found desirable with regard to the constitutionality of the death penalty in Nigeria. He concluded thus:-

"The ideological, intellectual as well as the empirical evidence against the death penalty, valid as they may be, against the backdrop of the clear provision in Section 30 of our Constitution are really arguments for the legislature or other law making organ of the state".

At the hearing of the appeal on the 24th day of September, 1998, the learned Attorney-General of the Federation, Abdullahi Ibrahim Esq., S.A.N. was unavoidably absent but was ably represented by M. I. N. Duru Esq., Director of Public Prosecutions of the Federation. Similarly, Chief F. O. Akinrele S.A.N. was also unavoidably absent. He was however ably represented by Mr. A. Akinrele. Both learned counsel for the parties together with the learned amici curiae adopted their respective briefs of argument and made impressive and stimulating oral submissions in amplification thereof.

It is crystal clear that the question involved in issue 2 for the determination of this court is entirely constitutional. **A constitutional issue, like the question of jurisdiction, is not only fundamental but must be disposed of by the court as soon as it is raised to ensure that the proceedings in which it is raised is not rendered nugatory and null and void and that the Constitution which is the supreme**

law of the land is not breached. See Alhaji Rufai Agbaje and others v. Mrs. W. A. Adelekan and others (1990) 7 N.W.L.R. (part 164) 595 at 614. It is in the interest of the best administration of justice that where the issue of jurisdiction or a constitutional issue is raised in any proceedings before any court, it should be dealt with at the earliest opportunity and before a consideration of any other issues raised in the proceedings as anything purportedly done without or in excess of jurisdiction or in breach of the Constitution, which is the supreme law of the land, by any court established under the said Constitution is a nullity and of no effect whatever. See Onyema and others v. Oputa and others (1987) 2 N.S.C.C. 900, Attorney-General of the Federation and others v. Sade and other (1990) 1 N.S.C.C. 271, Tukur v. Government of Gongola State (1987) 4 N.W.L.R. (part 117) 517 at 545 etc. Accordingly, I will proceed firstly to examine issue 2 which raises a grave constitutional question in this appeal.

Upon a careful consideration of all the submissions of learned counsel, it is plain to me that the crucial question for consideration under issue 2 is the validity or constitutionality of the death penalty in Nigeria. The main theme of the arguments of learned counsel for the appellant is that the death penalty, as a form of punishment as prescribed under Section 319 (1) of the Criminal Code, is inconsistent with Section 31 (1) (a) of the 1979 Constitution and, therefore, invalid, and null and void. He submitted that the death penalty is a form of "cruel, inhuman and degrading" treatment, that it is a negation of the dignity and humanity of both the convict and the society at large and that it must, therefore, be outlawed or pronounced unconstitutional. I think it will be necessary for ease of reference to reproduce issue 2 once again.

The question posed under issue 2 runs thus:-

"Whether Section 319 (1) of the Criminal Code of Lagos State, Cap. 31, Laws of Lagos State of the Federal Republic of Nigeria, 1973 is inconsistent with Section 31 (1) (a) of the Constitution of the Federal Republic of Nigeria, 1979 and, therefore, null and void and, if so, whether the affirmation of the death sentenced passed on the appellant by the Court of Appeal was consequently erroneous on point of law".

Copious arguments and legal discourse were advanced by learned counsel on the issue in question. I have already expressed my deep appreciation to them for professional assignments well executed. with the greatest respect, however, it seems to me that the real issue for decision under issue 2 is not as diversified and extensive as it appears from the most interesting treatments given to it in the majority of briefs of argument filed by learned counsel in this appeal. I propose, in this judgment, to confine myself as strictly as possible to the question posed. I think I should start with a reproduction of the relevant Sections of the 1979 Constitution and the other Laws directly in issue.

Section 319 (1) of the Criminal Code, Cap. 31, Laws of Lagos State of the Federal Republic of Nigeria, 1973, hereinafter also referred to as the Criminal Code, provides as follows:-

"319 (1) Subject to the provisions of this Section, any person who commits the offence of murder shall be sentenced to death".

It is thus the above section of the Criminal Code which prescribes the death penalty in the Lagos State and, indeed, in 16 other States of the Federal Republic of Nigeria.

There is then Section 31 (1) (a) of the Constitution of the Federal Republic of Nigeria, otherwise hereinafter simply referred to as the Constitution, the provisions of which the appellant contends are breached by the said Section 319 (1) of the Criminal Code. This Section of the Constitution provides thus:-

"31 (1) 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 therefore protects the right to individual dignity of a person. It also guarantees the freedom from torture, inhuman and degrading treatment.

In resolving whether Section 319 (1) of the Criminal Code of Lagos State is inconsistent with Section 31 (1) (a) of the Constitution, learned counsel for the appellant sought the aid of contemporary foreign jurisprudence in the interpretation of our Constitution. He was of the view that in interpreting the Constitution, Nigerian courts should seek

guidance from the decisions of other foreign jurisdictions, particularly in respect of issues concerning the fundamental human rights which, he submitted, are now universally accepted as regulating general moral standards of any civilized society.

I think I ought to state at this stage that, generally, the fundamental principles that govern the interpretation of our Constitution are:-

(i) That such interpretation as would serve the interest of the Constitution, best carry out its object and purpose and give effect to the intention of the framers thereof should be preferred;

(ii) In the above regard, all the relevant provisions of the Constitution must be read together and not disjointly. See Ojokolobo v. Alamu (1987) 1 N.W.L.R. (part 61) 377;

(iii) Where the words of any section are clear and unambiguous, they must be given their ordinary meaning unless this would lead to absurdity or be in conflict with some other provisions of the Constitution and effect must be given to those provisions without any recourse to any other consideration;

(iv) So, too, where the provisions of the Constitution are capable of two meanings, the court must choose the meaning that would give force and effect to the Constitution read together as a whole and promote its object and purpose. See Nafiu Rabiu v. The State (1980) 8 - 11 S.C. 130, Attorney-General of Ogun State v. Attorney-General of the Federation (1982) 2 S.C 13, Chief Demonic Ifezue v. Livinus Mbadugha and Another (1984) 5 S.C. 79 at 100 - 101;

(v) Although our courts may in appropriate cases given due regard to international jurisprudence and seek guidance, as persuasive authorities only, from the decisions of the courts of other common law jurisdictions on the interpretation and construction of similar provisions of their Constitutions which are in pari materia with the relevant provisions of our Constitution, the court will nevertheless accord due weight to our peculiar circumstances, the generally held norms of society and our values, aspirations and local conditions. See too Nafiu Rabiu v. The State, (supra), Senator Adesanya v. President of the Federal Republic of

Nigeria (1981) 5 S.C. 112, Attorney-General of Bendel State v. Attorney-General of the Federation (1981) 10 S.C. 1, Ade Ogugu and others v. The State (1994) 9 W.N.L.R. (part 366) 1 at 22 - 28 etc.

In view, therefore, of the fact that in order to determine correctly whether the death penalty is a constitutionally valid and recognizes form of punishment in Nigeria under Section 319 (1) of the Criminal Code, having regard to the provisions of Section 31 (1) (a) of the Constitution, it will be necessary to set out other relevant provisions of the Constitution with a view to reading them together as a whole and thus determine whether the alleged inconsistency infact exists. I will start with Section 30 (1) of the Constitution which provides as follows:-

"30 (1) Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria." (Underlining supplied for emphasis)

Under Section 30 (1) of the Constitution, therefore, the right to life, although fully guaranteed is nevertheless subject to the execution of a death sentence of a court of law in respect of a criminal offence of which one has been found guilty in Nigeria. The qualifying word, save, used in Section 30 (1) seems to me to be the unmistakable key to the construction of that provision. In my view it is plain that the 1979 Constitution can by no stretch of the imagination be said to have proscribed or outlawed the death penalty. On the contrary, Section 30 (1) of the Constitution permits it in the clearest possible terms, so long as it is inflicted pursuant to the sentence of a court of law in Nigeria in a criminal offence. In other words, Section 30 (1) of the Constitution recognizes the death penalty as a form of punishment but only on the condition that it is in execution of the sentence of a court of law in a criminal offence of which an accused person has been found guilty in Nigeria. The plain meaning of this section of the Constitution cannot be derogated from in the absence of any ambiguity whatsoever. It simply guarantees and protects the right to life. But it also recognizes deprivation of life so long as it is pursuant to the execution of the sentence of a court in a criminal offence of which the

accused has been found guilty in Nigeria.

In this regard, and bearing in mind that fact that the relevant provisions of the Constitution must be read together and not disjointly, reference may be made to Sections 213 (2) (d) and 220 (1) (e) of the same Constitution. Section 213 (2) (d) provides as follows:-

"213 (2) An appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in the following cases -

(a)

(b)

(c)

(d) decisions in any criminal proceedings in which any person has been sentenced to death by the Court of Appeal or in which the Court of Appeal has affirmed a sentence of death imposed by any other court;"

(Underlining supplied for emphasis)

There is next Section 220 (1) (e) of the Constitution which stipulates thus:-

"220 (1) An appeal shall lie from decisions of a High Court to the Court of Appeal as of right in the following cases:-

(a)

(b)

(c)

(d)

(e) decisions in any criminal proceedings in which the High Court has imposed a sentence of death". (Underlining supplied)

It is plain to me that apart from the provisions of Section 30 (1), there are also provisions of Sections 213 (2) (d) and 220 (1) (e) of the Constitution which, again, in no mistakable terms, recognize the death penalty as a form of sentence. I have also taken great care to go through the entire 1979 Constitution and have been unable to find any single section thereof which abolished or outlawed the death penalty. And I ask myself, having regard to the combined effect of the provisions of Sections 30 (1), 213 (2) (d) and 220 (1) (e) of the Constitution, whether it can be seriously argued, as the appellants now appears to do, that Section 319 (1) of the Crimi-

nal Code of Lagos State which prescribes the death sentence is inconsistent with Section 31 (1) (a) or, indeed, with any other Section of the Constitution. I think not. To argue otherwise, if I may say with respect, will tantamount or embarking on an exercise aimed at defeating the clear provisions of the Constitution.

The appellant next argued that the death penalty necessarily inflicts both physical and mental pain on the victim and that this, per se, amounts to torture, inhuman and aggrading treatment. He described the right not to be subjected to torture, inhuman and degrading treatment under Section 31 (1) (a) of the Constitution as a non-derogable right and that the death penalty which inescapably amounts to torture, inhuman and degrading treatment must, ipso facto, be unconstitutional.

Upon a careful perusal of the various foreign authorities to which our attention was drawn by the appellant, the opinion that the death penalty per se amounts to torture, inhuman and degrading treatment and, therefore, intrinsically unconstitutional seems to me a minority view. Indeed, a close study of those decisions reveals that the foreign jurisdictions that have similar provisions in their Constitutions as ours have repeatedly pronounced the death penalty to be constitutionally valid. The decisions tended to turn on the crucial question of whether the right to life therein contained is qualified or unqualified. If qualified the death penalty was, in the main, held to be constitutional. If unqualified, however, the death penalty was, rightly in my view, declared to be unconstitutional. I think it is convenient at this stage to review a few of the relevant authorities on the point.

In Mbushuu and another v. The Republic (Criminal Appeal No. 142 of 1994; 30th January, 1995), the Tanzanian Court of Appeal held that although the death penalty is a form of "cruel, inhuman and degrading treatment", it affirmed that it was nonetheless constitutionally permissible, having regard to the qualified nature of the right to life as entrenched in the Tanzanian Constitution. The right to life in their Constitution was neither absolute nor unqualified. It was, as in Section 30 (1) of our Constitution, qualified. Thus were the right to life under the Constitution is subject to qualification, as is the case with our 1979 Constitu-

tion, the death penalty under such circumstance is constitutionally permissible and valid. It can thus be stated that the real issue is not whether the death penalty amounts to torture, inhuman and degrading treatment in the ordinary meaning of those words but whether it amounts to torture, inhuman and degrading treatment within the meaning of the 1979 Constitution. B

There is next the Zimbabwean Supreme Court case of Catholic commission for Justice and Peace, in Zimbabwe v. Attorney-General, Zimbabwe and other (1993) (4) SA 239 in which Gubbay, C.J. delivering the judgment of the court with which Mc Nally, Korsah, Ebrahim and Muchechetere JJ.A were in full agreement impliedly adopted the position that the right to life under their Constitution was qualified and thus upheld the constitutional validity of the death penalty in Zimbabwe. Said the learned Chief Justice:- C D

"It was not sought, nor could it reasonably be, to overturn the death sentences on the ground that they were unlawfully imposed. The judgments of this court dismissing the appeals of the condemned prisoners cannot be disturbed. They are final. And the constitutionality of the death penalty, per se, as well as the mode of its execution by hanging, are also not susceptible of attack". E

It ought to be emphasized here that the right to life under the zimbabwean Constitution is qualified. Consequently, the Supreme Court F had no difficulty in upholding the death penalty as constitutional. However, on the crucial issue of whether even though the death sentences had been properly passed, supervening events had not been established to constitute the execution of the convicts inhuman or degrading treatment, in violation of Section 15 (1) of the Zimbabwean Constitution on account of prolonged and excessive delay, the court, on the peculiar G facts of the case resolved the same in favour of the convicts. I will have cause to return to this case later in this judgment.

As against the above two cases, is the decision of the Constitutional Court of south Africa in The State v. Makwanyane and Another (1995) (6) BCLR 665 (CC), (1995) BCLR SA CLR LEXIS 218 H Where it was held that the death penalty violated the constitutional protection of

freedom from cruel, inhuman and degrading treatment under Section 11(2) of the South African Constitution and was, in consequence, invalid and unconstitutional. In that case, however, the right to life as prescribed under Section 9 of the South African Constitution was clearly unqualified hence the Constitutional Court was able to arrive at the decision, quite rightly in my view, that it reached. Said the court at pages 49 - 50 of the report:-

"The unqualified right to life vested in every person by Section 9 of our constitution is another factor crucially relevant to the question whether the death sentence is cruel, inhuman or degrading punishment within the meaning of Section 11 (2) of our Constitution. In this respect our Constitution differs materially from the Constitutions of the United States and India. It also differs materially from the European Convention and the International Covenant".

There is however a second and an equally vital reason why the death penalty was declared unconstitutional in the Makwanyane Case. This is on account of the arbitrary, discriminatory and selective nature of its exercise at all material times in South Africa. In this regard, the court explained:-

"..... These differences still exist, which means that the law governing the imposition of the death sentence in South Africa is not uniform. The greatest disparity is in the Eastern Cape Province. A person who commits murder and is brought to trial in that part of the province which was formerly Ciskei, cannot be sentenced to death, whilst a person who commits murder and is brought to trial in another part of the same province, can be sentenced to death. There is no rational reason for this distinction, which is the result of history, and we asked for argument to be addressed to us on the question of whether this difference has a bearing on the constitutionality of Section 277 (1) (a) of the Criminal Procedure Act".

It seems to me beyond argument that the fundamental basis upon which the South African constitutional Court, rightly in my view, pronounced the death penalty unconstitutional is, firstly, on account of the vital fact that the right to life in the relevant Constitution was unqualified and,

secondly, because of the arbitrary, selective and discriminatory nature of its exercise at all material times in South Africa.

There is next the position in India. Article 21 of the Indian Constitution provides as follows:-

"No person shall be deprived of his life or personal liberty except in accordance to procedure established by law". B

In Bacan Singh v. State of Punjab (1983) (2) SCR 583, the constitutionality of Article 21 of the Indian Constitution came into question before the Supreme Court of India. In a well considered judgment, that court ruled, and quite rightly in my view, that the right to life entrenched in their Constitution was qualified and that in the circumstance, the death penalty was constitutionally valid. In conclusion, the court observed:- C

"By no stretch of the imagination can it be said that the death penalty either per se or because of its execution by hanging constitutes an unreasonable, cruel or unusual punishment prohibited by the Constitution". D

In the same vein, the Fifth Amendment to the United States Constitution refers in specific terms to capital punishment and thereby impliedly recognizes its validity. The Fourteenth Amendment obliges the States not to deprive any person of life, liberty or property without the due process of law and this impliedly recognizes the right of States to make laws for such purpose. It seems to me plain that the right to life in the Constitution of the United States of America is qualified and accordingly the U.S. supreme Court has repeatedly ruled that the death penalty is not intrinsically unconstitutional. See Georgia v. Georgia 428 U.S.C 153, 176 - 187 (1976), District Attorney for Suffolk District v. James Watson and others (1980) 381 Mass. 648, Jurek v. Texas 428 U.S. (1976), Woodson v. North Carolina 428 U.S. 242 (1976) etc. F G

I think it can be said that the central focus in the jurisprudence of the United States of America with regard to the death penalty is to mount substantive and procedural safeguards against arbitrariness and discrimination in the imposition or withholding of the death penalty. It can also be stressed that the Federal constitutionality of the death sentence for murder as a legitimate form of punishment in the United States H

of America is now well settled, having regard to the qualified nature of the fundamental right to life, in its Federal Constitution. Accordingly in Gregg v. Georgia, (supra) which represents the current view of the Supreme Court of the United States of America on the constitutionality of the death penalty, it was succinctly expressed as follows:-

"We address initially the basic contention that the punishment of death for the crime of murder is, under all circumstances, "cruel and unusual" in violation of the Eighth and Fourteenth Amendments of the Constitution. In part IV of this opinion, we will consider the sentence of death imposed under the Georgia statutes in issue in this case.

The court on a number of occasions has both assumed and asserted the constitutionality of capital punishment. In several cases, that assumption provided a necessary foundation for the decision, as the court was asked to decide whether a particular method of carrying out a capital sentence would be allowed to stand under the Eighth Amendment. But until Furman v. Georgia 408 U.S. 238 (1972), the court never confronted squarely the fundamental claim that the punishment of death always, regardless of the enormity of the offense or the procedure followed in imposing the sentence, is cruel and unusual punishment in violation of the Constitution.

Although this issue was presented and addressed in Furman, it was not resolved by the court. Four Justices would have held that capital punishment is not unconstitutional per se; two Justices would have reached the opposite conclusion; and three Justices, while agreeing that the statutes then before the court were invalid as applied left open the question whether such punishment may ever be imposed.

We now hold that the punishment of death does not invariably violate the Constitution" (Underlining supplied for emphasis)

I need, perhaps, concluded by pointing out that in Furman v. Georgia (1972) 408 U.S. 238 which was referred to in Gregg's Case, (supra), the U.S. Supreme Court held that the imposition of the death sentence under Georgia (and Texas) statutes constituted cruel and unusual punishment in violation of the Eighth and the Fourteenth Amendments. This was because under these statutes, the juries had untram-

meled and irreconcilable discretion to impose or withhold the death penalty at will. Furman's Case was, therefore, decided on grounds of the arbitrary, selective and discriminatory nature of the power to impose or withhold the death penalty under the particular statutes. The position in the U. S., therefore, is that capital punishment or the death penalty is not per se unconstitutional although in certain circumstances where its application is arbitrary, selective or discriminatory it cannot but be declared unconstitutional.

As against the position in the United States of America is the provision of Section 54 (1) of the Constitution of the Republic of Hungary which states that "every one has the inherent right to life and to human dignity and no one shall arbitrarily be deprived of this right". Under this provision, the death penalty, in Hungary, is considered an arbitrary deprivation of life. Consequently, the right to life in the context of the death penalty is unqualified under the Constitution of the Republic of Hungary. So, in the Hungarian case of Jones v. Wittenberg 33 F SUPP. 707, it was held that the death penalty was unconstitutional on the ground that it is inconsistent with the right to life and to human dignity under Section 54 of their Constitution.

There is finally Section 14 (1) of the Constitution of Jamaica which provides as follows:-

"No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted".

Section 14 (1) of the Jamaican Constitution is in pari materia with Section 30 (1) of the Constitution of the Federal Republic of Nigeria, 1979 which provides thus:-

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

There is also Section 17 of the Jamaican Constitution which provides as follows:-

"17 (1) No person shall be subjected to torture or to inhuman or

degrading punishment or other treatment.

(2) *Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed date".*

A close study of the provisions of Section 17 of the Constitution of Jamaica clearly reveals that they are in pari materia with those of Section 31 (1) (a) of the Nigerian Constitution which, for ease of reference, run thus:-

"31 (1) 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".

In Noel Riley and others v. Attorney-General for Jamaica and Another (1983) A.C. 719 (P.C.) at page 726, Lord Bridge of Harwich, delivering the judgment of Her Majesty's Privy Council in the United Kingdom with regard to the constitutionality of the death sentence in Jamaica had this to say, namely:-

"Quite aside from Section 17 of the Constitution, validity of the death sentence is put beyond all doubt by the provision of Section 14 (1)".

So, too, in Earl Pratt and Another v. Attorney-General for Jamaica and Another (1994) 2 A.C. 1 (P.C.) at Pages 28 and 29, Lord Griffiths, again delivering the judgment of the Privy Council, observed as follows:-

"The purpose of Section 17 (2) is to preserve all descriptions of punishment lawful immediately before independence and to prevent them from being attacked under Section 17 (1) as inhuman or degrading forms of punishment or treatment. Thus, as hanging was the description of punishment for murder provided by Jamaican law immediately before independence, the death sentence for murder cannot be held to be an inhuman description of punishment for murder".

The combined effect of Her Majesty's Privy Council decisions in the

Noel Riley and Earl Pratt cases illustrates the constitutional validity of the death penalty in Jamaica on the ground that the right to life as entrenched in the Jamaican Constitution is a qualified and not an unqualified right.

I think it is necessary to stress at this stage that in the face of the fact that Sections 14 (1), 17 (1) and 17 (2) of the Jamaican Constitution are clearly in pari materia with Sections 30 (1) and 31 (1) (a) of the Constitution of the Federal Republic of Nigeria 1979, the qualified nature of the right to life in both Constitutions and the ratio decidendi in the Noel Riley and Earl Pratt cases which, with respect, I totally endorse, it is plain to me that the death penalty prescribed by Section 319 (1) of the Lagos State Criminal Code cannot be said to be inconsistent with the Constitution of the Federal Republic of Nigeria, 1979. The death penalty as per Sections 30 (1), 213 (2) (d) and 220 (1) (e) of the Constitution of the Federal Republic of Nigeria, 1979 is expressly recognized by the said Constitution. **It is also the rule of interpretation that to take away a right given by common law or statute, the legislature should do that in clear terms devoid of any ambiguity. Accordingly if the legislature had intended to take away the right it recognized under Section 30 (1) of the Constitution by Section 31 (1) (a) of the same document, it seems to me that it would have done this by clear terms and not by implication as learned counsel for the appellant appears to suggest. Besides, the right to life prescribed under the said Section 30 (1) of the Constitution is clearly a qualified right. It is not an unqualified right. It is also not in dispute that the imposition or execution of the death sentence in Nigeria is not subjected to any form of arbitrary, discriminatory or selective exercise of discretion on the part of any court or any other quarters whatever. I therefore entertain no doubt that the death penalty in Nigeria can by no stretch of the imagination be said to be invalid or unconstitutional.**

Learned counsel for the appellant, however, submitted that the right not to be subjected to torture, inhuman or degrading treatment protected under Section 31 (1) (a) of the 1979 Constitution is a non-derogable right, that is to say, one of the rights that may not be derogated from by

legislation. It was contended that the specific rights in respect of which the Constitution permits derogation by legislation are set out in Section 41 (1) and (2) of the Constitution.

Section 41 (1) and (2) of the Constitution provides as follows:-

B *"41 (1) Nothing in Sections 43, 35, 36 as amended, 37 and 38 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society -*

(a) *in the interest of defence, public safety, public order, public morality or public health; or*

C *(b) for the purpose of protecting the rights and freedoms of other persons;*

(2) *An Act of the National Assembly or a Decree shall not be invalidated by reason only that it provides for the taking, during periods*
D *of emergency, or measures that derogate from the provisions of Section 30 or 32 of this Constitution*".

It seems to me that whereas Section 41 of the Constitution lays down a saving clause, a proviso or a qualification with regard to
E Sections 34, 35, 36 as amended, 37 and 38 thereof, the framers of the Constitution made an in-built saving clause, proviso or qualifi-
F cation in Section 30 (1) of the Constitution whereby the first part of the said Section 30 (1) is a general statement as to the right of every person to life, which right is qualified by the subsequent part
G that permits death penalty in execution of the sentence of a court in respect of a criminal offence in Nigeria. It appears to me that section 30(1) of the Constitution is crystal clear and free from any ambiguity whatever. It cannot be derogated from. In my view,
H failure to give the section its obvious and plain meaning, will simply tantamount to embarking on an exercise aimed at defeating the clear provision of the Constitution and sacrificing such plain meaning on the alter of sheer technicality. By the first part of that
section, the Constitution, in plain language, recognizes and protects the right to life. By its subsequent part, however, which may be described as the "proviso" or "qualifying clause" to the first part, that same section, in clear terms, permits life to be taken in

execution of the sentence of a court in respect of a criminal offence of which the accused person has been found guilty. This seems to me the plain meaning of Section 30 (1) of the Constitution of the Federal Republic of Nigeria, 1979. But, as I have earlier on mentioned, if the framers of the Constitution had wanted to abolish the death penalty, B they would have done so expressly. At all events, abolition or retention of the death penalty is a matter for the legislature to decide and not for this court to wade into judicial legislation. I will have cause to say more on this latter issue later in this judgment.

Learned counsel for the appellant next attached the inevitable but C unreasonably long wait between the imposition of the death sentence and the actual infliction of death, commonly known as the "death row phenomenon". He argued that this has been a crucial factor in the characterization of the death penalty as a "cruel, inhuman and degrading" treatment. D He drew the attention of the court to a number of decisions of the Privy Council in respect of appeals from some foreign jurisdictions and stressed that the appellant in the present appeal has been on the death row for 13 years. He described this as a violation of the protection from E torture, inhuman and degrading treatment entrenched under Section 31 (1) (a) of the Constitution. He also attacked the process of execution of a convicted murderer by "hanging" and submitted that this is barbarous and cruel and deprives the convict of all vestiges of human dignity. F

Turning, firstly, the question of the death row phenomenon, it seems to me, with the greatest respect to the learned Senior Advocate, that the many foreign decisions cited before us in this regard are hardly relevant in the present proceedings. In the first place, there is a procedure G prescribed in Section 42 of the 1979 constitution for seeking a redress in respect of a breach of fundamental rights, including such as those provided under Section 31 (1) (a) of the Constitution. Where such statutory or constitutional provision is made for the filing of a claim, the procedure so laid down ought to be followed in making the claim and no H other one. See Gbadamosi Lahan v. Attorney-General of /western Nigeria (1963) 1 All N.L.R. 226.

Section 42 (1) and (2) of the said Constitution provides thus:-

42. (1) *Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that State for redress.*

(2) *Subject to the provisions of the Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this Section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that state of any rights to which the person who makes the application may be entitled under this chapter".*

It is thus clear that the jurisdiction to entertain any suit which seeks to enforce the observance of a fundamental right under chapter 4 of the Constitution, including the right of any person not to be subjected to torture, inhuman or degrading treatment guaranteed under Section 31(1) (a), of the 1979 Constitution, lies only with the High Court of a State or a Federal High Court in the exercise of its original jurisdiction. The jurisdiction of the Supreme Court is appellate and not original. See Attorney-General of Anambra State and others v. Attorney-General of the Federation and others (1993) 6 N.W.L.R. (part 302) 692. However, constitutional issues which pertain only to the breach of a fundamental right in the course of trial or hearing before the lower courts may be raised in an appeal to the supreme Court. Such issues are those that relate mainly to breach of the right to fair hearing and the right to personal liberty under Sections 32 and 33 of the Constitution. Other rights such as right to life and those to private and family life, peaceful assembly and association and freedom of the press can only be enforced through a substantive action in the appropriate High Court and cannot be raised in an appellate court, including the Supreme Court, as being incidental to the proceedings in the lower courts. The appellate courts, inclusive of the Supreme Court, have no original jurisdiction to entertain, determine or pronounce on questions relating to an alleged breach of fundamental rights, especially where the issue involved or the redress invoked is not directly relevant or intrinsic to the determination, on the merit, of the appeal before them.

The death row phenomenon was only raised obliquely and clearly extrinsically by the appellant in this appeal. The issue raised is whether the appellant's confinement under sentence of death for an alleged unnecessarily prolonged length of time from the date of his conviction amounts to cruel, inhuman and degrading treatment contrary to Section B 31 (1) (a) of the constitution thereby warranting the quashing of his death sentence and substituting the same with life imprisonment. This issue, in my view, is not properly before this court. The jurisdiction of this court to entertain and determine such constitutional question will only arise on appeal after both the High Court and the Court of Appeal have considered and adjudicated on the issue. This is exactly the procedure adopted in the foreign cases that were cited before us. C

In Earl Pratt and Another v. Attorney-General of Jamaica, (supra) the applicants were convicted for murder in January, 1979 and sentenced to death. At the conclusion of their appellate remedies, their convictions and sentence were affirmed. Thereupon they filed a fresh application in the Supreme Court of Jamaica claiming breach of their fundamental human right for having been subjected to inhuman and degrading treatment following the prolonged delay between their sentence and the proposed date of their execution. The point to be noted here is that the proceedings in issue were commenced in the Supreme Court of Jamaica, a court of first instance. The fundamental right issue was not raised or determined in a court of appellate jurisdiction. It was initiated and determined by a court of original jurisdiction, although it was prosecuted up to the highest appellate court, the Judicial Committee of the Privy Council, in the United Kingdom. D E F

The above procedure was also followed in the case of Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General, Zimbabwe and others, (supra). In that case, the prisoners had been tried and convicted for murder and sentenced to death. Having unsuccessfully exhausted their appellate remedies, fresh proceedings by way of application were filed on their behalf seeking for an order to prevent their execution. The central issue for resolution was whether supervening events by way of prolonged delay between their conviction and the pro- G H

posed date of their execution, viewed in conjunction with the harsh and degrading conditions under which they had been confined had rendered their proposed execution cruel, inhuman and degrading in contravention of Section 15 (1) of the Constitution of Zimbabwe and, therefore, unconstitutional. There are also the cases of Fisher v. Minister of Public Safety and Immigration and others (1998) 3 W.L.R. 208 (P. C.) from the commonwealth of the Bahamas, Lincoln Anthony Guerra v. Cipriani Baptiste and others (1996) 1 A.C. 397 (P. C.) From the High Court of the Republic of Trinidad and Tobago and Noel Riley and others v. Attorney-General of Jamaica (1983) A.C. 719 (P.C.) from the Supreme Court of Jamaica, all of which were initiated in separate proceedings before their respective courts of first instance.

In the circumstance, it seems to me that the question of whether or not the execution of the appellant would infringe his constitutional rights not to be subjected to torture or to inhuman or degrading treatment pursuant to the provisions of Section 31 (1) (a) of the Constitution is a matter for determination by the High Court in a separate action or proceeding instituted by the appellant for that purpose. Such is the only court upon which Section 42 of the Constitution confers original jurisdiction to entertain the matter in issue and it will be unconstitutional for this court to assume jurisdiction and decide the question in the present appeal.

Learned Senior Advocate also launched a vehement attack on the process of execution of the death sentence in Nigeria. He described this process as sordid. He made reference to an article written by Professor Christ Barnard in the Rand Daily Mail of June 12, 1978 and quoted by the South African Constitutional Court in the case of The State v. Makwanyane, (supra) in the following terms:-

"The man's spinal cord will rupture at the point where it enters the skull, electrochemical discharges will send his limbs flailing in a grotesque dance, eyes and tongue will start from the facial apertures under the assault of the rope and his bowels and bladder may simultaneously void themselves to soil the legs and drip on the floor".

Learned counsel further referred to the observation of O'Regan, J., of

the South African Constitutional Court where he commented on the above description as follows:-

"This frank description of the execution process leaves little doubt that it is one which is destructive of human dignity"

The above may very well be the case. With profound respect to B
learned counsel, however, I cannot see the relevance, in this appeal, of
whatever process that is employed in the execution of a condemned pris-
oner. Without doubt, the foreign decisions cited on the point would ap-
pear academic and truly interesting. However, in all those cases pertain- C
ing to the death row phenomenon and/or the alleged barbarity or other-
wise of execution by hanging, it was not the constitutionality of the death
penalty as a form of punishment that was being challenged as in the
present appeal. The questions revolved around the undue delay in the
execution of the death sentence, the deplorable conditions under which D
the prisoners awaiting execution were confined which gave rise to inhu-
man and degrading treatment and the mode or manner of execution. These
issues do not directly arise for decision in this appeal.

**Now, to conclude, there can be no doubt that the central E
question before this court is whether or not the death penalty in
Nigerian should be abolished. Although the arguments against capital
punishment may be proper basis for legislative abolition of the death
penalty, the authority for any action abolishing the death penalty is F
clearly not a matter for the law courts. Nor have I found myself
able to hold that this court is entitled to repeal or revoke laws os-
tensibly based upon notions of public policy or sanction simply be-
cause such law, for one reason or the other, are said to be unaccept- G
able to a group of persons or a section of society. Such repeal or
revocation is within the exclusive jurisdiction of the Legislature
except, of course, such laws are attacked by due process of law on
grounds such as unconstitutionality, illegality or the like.**

The conclusion I therefore reach is that there is nothing in the H
Constitution of the Federal Republic of Nigeria, 1979 that renders the
death penalty under Section 319 (1) of the Criminal Code of Lagos State
unconstitutional. On the contrary, there are Sections of that Constitu-

tion, such as Sections 30 (1), 213 (2) (d) and 220 (1) (e) which, in no mistaken terms, recognize the death penalty. Most of the foreign cases cited before us by learned counsel death with the death row phenomenon, mode of execution by hanging and the deplorable conditions under which prisoners awaiting execution were confined. With these, we are not concerned in this appeal. I therefore resolve the first part of issue 2 against the appellant. Section 319 (1) of the Criminal Code of Lagos State, Cap. 31, Laws of Lagos State, 1973 is not inconsistent with Section 31 (1) (a) of the 1979 Constitution and is not, therefore, null and void.

The second part of issue 2 poses the question whether assuming the said Section 319 (1) of the Criminal Code of Lagos State is null and void, the affirmation of the death sentence passed on the appellant by the Court of Appeal was not consequently erroneous on point of law. In view of the decision I have reached in respect of the first part of that issue, the second part is non-sequitur and does not now arise. It is enough to state that having regard to the overwhelming evidence tendered against the appellant, accepted by the trial court and affirmed by the Court of Appeal, the affirmation of the death sentence passed on the appellant by the Court of Appeal cannot be faulted. I will now pass on to the first issue.

The first issue for determination concerns the validity of the appellant's plea before the trial court. The appellant's contention is that his arraignment before the trial court was invalid and that the same was not in compliance with the mandatory provisions of Section 215 of the Criminal Procedure Law, Cap. 32, Laws of Lagos State of Nigeria, 1973 and the constitutional protection contained in Section 33 (6) (a) of the Constitution of the Federal Republic of Nigeria, 1979.

Section 215 of the Criminal Procedure Law, Cap. 32, Laws of Lagos State provides as follows:-

"The person to be trial upon any charge or information shall be placed before the court unfettered unless the court shall see cause otherwise to order, and the charge or information shall be read over and explained to him to the satisfaction of the court by the Registrar or other

officer of the court and such person shall be called upon to plead instantly thereto, unless where the person is entitled to service of a copy of the information, he objects to the want of such service and the court finds that he has not been duly served therewith".

There is also the provision of Section 33 (6) (a) of the 1979 Constitution which provides thus:-

"33 (b) Every person who is charged with a criminal offence shall be entitled -

(a) to be informed promptly in the language that he understands and in detail of the nature of the offence".

A close study of Section 215 of the Criminal Procedure Law, Cap. 32, Laws of Lagos State, 1973 clearly discloses, and this is borne out by a long line of decided cases of this court, that for a valid and proper arraignment of an accused person, the following three conditions must be satisfied namely:-

(i) The accused person must be placed before the court unfettered unless the court shall see cause otherwise to order;

(ii) The charge or information shall be read over and explained to him to the satisfaction of the court by the Registrar or other officer of the court; and

(iii) The accused shall then be called upon to plead instantly thereto (unless, of course, there exists any valid reason to do otherwise such as objection to want of service where the accused is entitled by law to service of a copy of the information and that court is satisfied that he has infact not been duly served therewith).

The above provisions of Section 215 of the Criminal Procedure Law are clearly mandatory and not directory and must, therefore, be strictly complied with as without a valid arraignment of an accused person, no trial would have commenced and, no matter the strength of the evidence, the trial and subsequent judgment will be null and void. The three requirements must co-exist. See generally Sunday Kajubo v. The State (1988) 1 N.W.L.R. (part 73) 731 at 732, Eyorokoromo v. The State (1979) 6 - 9 S.C. 3, Godwin Josiah v.

The State (1985) 1 S.C. 406 at 416, Ogbodo Ebem v. The State (1990) 7 N.W.L.R. (part 160) 113, Sanmubo v. The State (1967) N.M.L.R. 314, Akpiri Ewe v. The State (1992) 6 N.W.L.R. (part 246) 144, Okon v. The State (1991) 8 N.W.L.R. (part 310) 424 etc.

B It is plain to me that the said mandatory requirements laid down for a valid plea together with the provisions of Section 33 (6) (a) of the 1979 Constitution have been provided mainly to guarantee the fair trial of an accused person and thus safeguard his interest at such a trial. I will now examine the appellant's arraignment which is under attack in the present proceedings.

The appellant was arraigned on the 6th day of March, 1984 before Omotosho, J., as she then was, as follows:-

"Accused person present. Arthur-Worrey for the State. Oyesiku D for the accused

court - The accused shall be arraigned.

Arraignment - Charge is read and explained to the accused in English.

Plea - Not guilty".

E The question for determination is whether or not the appellant's arraignment before the trial court as above reproduced was defective and null and void or otherwise valid and in full compliance with the Law.

The submission of learned counsel for the appellant is that the conditions set out in the case of Sunday Kajubo v. The State (supra) and Samuel Erekanure v. The State (1993) 5 N.W.L.R. (Part 294) 385 which are in line with the three requirements under Section 215 of the Criminal Procedure Law which I have already set out were not satisfied.

G In Samuel Erekanure v. The State (supra), Olatawura, J.S.C. who delivered the leading judgment of this court noted, with approval, the statutory conditions (and they are three) for a valid arraignment laid down in the Sunday Kajubo case. Said Olatawura, J.S.C:-

"These requirements (for a valid arraignment) although familiar, were not followed by the court. These requirements which have been spelt out in Sunday Kajubo v. The State (1988) 1 N.W.L.R. (part 73) 721 at 731 and 737 are:

1. The accused must be present in court unfettered, unless there

is a compelling reason to the contrary;

2. The charge must be read over to the accused in the language that he understands;

3. The charge should be explained to the accused to the satisfaction of the court;

4. In the course of the explanation technical language must be avoided;

5. After requirements 1-4 have been satisfied, the accused will then be called upon to plead instantly to the changed". (Words in brackets and underlings supplied for emphasis)

I think it ought to be noted that although the requirements set out in the Samuel Erekanure case are five in number, a close study of these conditions or requirements shows that the 2nd, 3rd and 4th thereof jointly constitute the 2nd requirement in the Sunday Kajubo case which prescribes that the charge shall be read over and explained to the accused to the satisfaction of the court by the Registrar or other officer of the court. I make this observation as there is hardly any difference between the three requirements prescribed in the Sunday Kajubo case and the five set out in the case Samuel Erekanure.

The argument of learned counsel for the appellant is that although the 1st and 3rd requirements in the Sunday Kajubo case were complied with by the learned trial Judge, it is his submission that the second requirement was not met in that:-

(i) There was no evidence on record that the charge was explained to the appellant avoiding, as much as possible, the use of technical expressions;

(ii) The trial Judge merely presumed and did not record that the appellant understood the charge to the satisfaction of the court.

I have closely studied the record of proceedings in respect of the arraignment of the appellant reproduced above and must confess, with profound respect to the learned Senior Advocate, that I find it extremely difficult to accept his attacks on the arraignment of the appellant as well founded. In the first place, there is abundant evidence on record that the appellant was present before

the court on the date of his arraignment and that the charge or information was read over and explained to him in the English Language whereupon he pleaded not guilty thereto. The central issue that seems to me of vital importance in the matter of a valid arraignment is that the charge or information shall be read over and explained to an accused person, naturally in the language he understands, to the satisfaction of the court, before he may be required to enter his plea thereto. This was clearly complied with in the present case.

The learned trial Judge was accused of "presuming" that the appellant understood the English language hence the information was explained to the said appellant in the English language before he entered his plea of not guilty. Again, with respect to learned counsel, I cannot see how the issue of the court's alleged presumption that the appellant understood the English language arises in this appeal. From the record of proceedings, the appellant, from day one of his trial communicated with the trial court in perfect English language. He made his reasonably long written and signed statements to the police at pages 26 and 27, and 28 and 29 of the record of proceedings in perfect English language. Similarly, in the court proceedings of the 24th October, 1983, 17th November, 1983, 7th day of February, 1984 and the 6th day of March 1984 at pages 31, 32, 35 and 36 of the record of proceedings, there is clear evidence that the appellant on all those occasions communicated with the trial court in the English language. There is also the protracted evidence of the appellant in his defence before the trial court on the 15th day of April 1985. This evidence which covered several pages of the record of proceedings was also given by him in the English language. The learned trial Judge who has always impressed me as meticulous in the manner she kept her records clearly indicated at the beginning of the evidence of the appellant thus:-

"Defence:- The accused himself. Sworn on the Bible, States in English. My name is Onuoha Kalu"

I entertain no doubt that the appellant wrote, spoke and understood the English language perfectly well, that the information was explained to

him in the English language and that he entered his plea of "Not Guilty" thereto in the English language.

I think I need to state that the decisions in the Sunday Kajubo and Samuel Erekanure cases are easily distinguishable from the facts of the present case. In those two cases, the record of proceedings did not indicate that the basic ingredient of a valid arraignment to the effect that the charge or information was read over and explained to the accused person was complied with. The situation in the present case is entirely different and did not involve any violations of the principles laid down in the Sunday Kajubo and Samuel Erekanure cases. **It is my view that the arraignment of the appellant before the trial court was entirely valid and in accordance with the law.**

I ought in this connection to draw attention to Section 150 (1) of the Evidence Act which provides thus:-

"When any judicial or official act is shown to have been done in a manner Substantially regular, it is presumed that formal requisites for its validity were complied with". (Underlining supplied for emphasis)

The arraignment of the appellant was both a judicial and an official act. It was also carried out in a manner which was substantially regular. In my view, the maxim Omnia praesumuntur rite esse acta comes into play and becomes applicable in the matter of the validity of the arraignment in issue. Accordingly issue 1 is hereby resolved against the appellant.

In the final result, this appeal fails and it is hereby dismissed. The conviction and sentence passed on the appellant by the Court of Appeal are hereby further affirmed.

UWAIS CJN

I have had the advantage of reading in draft the judgment read by my learned brother Iguh, J.S.C I entirely agree with him.

However, I wish to add the following merely by way of emphasis, the facts of the case having been fully stated by my learned brother

Iguh, JSC. The first of the two issues for determination challenges the finding of the Court of Appeal (Uwaifo, Ayoola, JJ.C.A. as they were then, and Pats-Acholonu, J.C.A.) that the appellant was properly arraigned before the trial court (Omotoso, J. as she then was) in accordance with the provisions of Section 215 of the Criminal Procedure Law, Cap. 32 of the Laws of Lagos State, 1973 and the decision of this Court in Kajubo v. The State, (1988) 1 N.W.L.R. (Part 73) 721. In his submission, learned counsel to the Appellant, Mr. Agbakoba, SAN also cited the case of Erekanure v. The State, (1993) 5 N.W.L.R. (part 294) 392, another decision of this Court which followed the decision in kajubo's case.

Now section 215 of the Criminal Procedure Law, Cap. 32 comes under part 24 of the Law, which is headed "Recording of Plea". The Section provides -

"215. The person to be tried upon any charge or information shall be placed before the court unfettered unless the court shall see cause otherwise to order, and the charge or information shall be read over and explained to him to the satisfaction of the court by the registrar or other officer of the court, and such person shall be called upon to plead instantly thereto, unless where the person is entitled to service of a copy of the information he objects to the want of such service and the court finds that he has not been duly served therewith."

These provisions were read in conjunction with those of section 33 subsection (6) of the 1979 Constitution, which deals with the fundamental right to fair hearing. It reads, as relevant, as follows:-

"(6) Every person who is charge with a criminal offence shall be entitled -

(a) to be informed promptly in the language that he understands and in detail of the nature of the offence;

(b)

(c)

(d)

(e) to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence."

It was found in both Kajubo's case and Erekanure's case that

these provisions were not, in the circumstances of the two cases, satisfied.

In Kajubo's case the record of proceedings read thus:-

"Court: Registrar take the plea of the accused on the amended charge.

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Accused: 1st Count: Pleads Not Guilty

2ns Count: Pleads Not Guilty"

In Erekanure's case the record of proceedings read:-

"M. I. Edokpayi, Senior Counsel for the State. J. E. Sharkarho for the accused. He pleads not guilty to the law court (sic). Prosecution opens its case."

C

While in the present case the record of proceedings shows the procedure followed in the trial court to be as follows:-

"Accused person present Arthur-Worrey for the State. Oyesiku for the accused.

D

COURT: The Accused shall be arraigned.

ARRAIGNMENT: Charge is read and explained to the Accused in English.

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PLEA: Not guilty."

It is quite clear from the foregoing that the procedure followed in the present case cannot be said to be on all fours with that followed in the cases of Kajubo and Erekanure (supra). However, learned counsel for the Appellant argued that there was no evidence on record to show that the charge was explained to the Accused, avoiding as much as possible, the use of technical expressions and that the learned trial judge merely presumed and did not record that the Accused understood the charge to the satisfaction of the Court. The record shows that the Appellant spoke English, the language of the court was English, Appellant was represented by Counsel throughout the trial and no complaint was made to the learned trial judge that the charge was not explained. The record of proceedings quoted above shows that the charge was in fact read and explained to the Accused. If the Appellant were challenging the accuracy of the record of proceedings, there is a special procedure for doing so and the procedure has not been followed. Therefore, the con-

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tention of the Appellant that the charge was not explained is contrary to what the record of proceedings indicates. It is as such untenable.

With regard to the learned trial judge failing to record that the appellant understood the charge to her satisfaction and that she merely presumed he did, I think the test here is objective and not subjective. If the learned trial judge was not satisfied that the Appellant understood the charge she would have ordered that the charge be further explained to him. The presumption of regularity will not accommodate the conjecture made by learned counsel for the Appellant. The learned Attorney-General of Lagos State was right when she made reference to the provisions of Section 150 subsection (1) of the Evidence Act, Cap. 112 of the Laws of the Federation, 1990 which accords the presumption of regularity to a judicial act. The subsection provides -

"150 (1) When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with."

I now turn to the Appellant's second issue for determination, which is the constitutional issue that necessiated the invitation of learned counsel as amici curiae (friends of court). The question posed by the second issue is whether section 319 subsection (1) of the Criminal Code of Lagos State, Cap. 31 of the Laws of Lagos State 1973, is inconsistent with Section 31 of the Constitution of the Federal Republic of Nigeria, 1979 and for that reason is null and void, contrary to the affirmation by the Court of Appeal of the sentence of death passed on the Appellant by the trial court.

Section 319 subsection (1) of the Criminal Code, simply provides:-

"319. (1) Subject to the provisions of this section any person who commits the offence of murder shall be sentenced to death."

While section 30 subsection (1) of the 1979 Constitution states:-

"30 - (1) Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria."

In is clear that the proviso to section 30 subsection (1) of the 1979 Constitution which states - "save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria." - applies to the present case. The Appellant was tried and convicted in Nigeria by a competent Nigerian court. He was charged with the criminal offence of murder. His contention is that not only is the sentence passed on him inconsistent with section 30 subsection (1) of the Constitution but is also inconsistent with the provisions of section 31 subsection (1) (a) which state -

"31 - (1) 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;"

The question is: can the passing of a sentence of death recognised by the Constitution in section 30 subsection (1) thereof be equated to torture and degrading treatment? The contention of the Appellant is that a sentence of death is degrading and inhuman and therefore it is inconsistent with the provisions of Section 31 subsection (1) (a) of the Constitution. In his effort to substantiate the contention, learned counsel for the Appellant cited a number of cases decided in other jurisdictions of the world. Useful as those decisions might be as persuasive authorities, with respect, I do not find them applicable to the present case.

The position in Nigeria is very clear. Death sentence is a reality. It is provided for by our criminal laws including section 319 subsection (1) of the Criminal Code of Lagos State. Our Constitution also recognises the death sentence - see in particular sections 31(1), 213 (1) (d) and 220 (1) (e) thereof. Therefore, the sentence of death in itself cannot be degrading and inhuman as envisaged by Section 31 subsection (1) (a) of the Constitution. The Constitution is not intended to approbate and reprobate. Were it to be so, we are to interpret it in such a manner that its objects and purposes should not be defeated - Nafiu Rabi v the State, (1980) N.S.C.C. 291.

The manner of carrying out the sentence of death could perhaps invoke the provisions of section 31 (1) (a) of the Constitution, as it did in

Zimbabwe in the case of Catholic Commission for Justice and Peace, Zimbabwe v. A-G of Zimbabwe & Ors. (1993) (4) S.A. 239 (Z.S.C.), but it must be cautioned here that in this case we are not concerned with the manner of carrying out the sentence of death (which is by hanging) but the sentence itself. In other words, anything else beyond the passing of the sentence is not the subject of this appeal.

On the whole I see no merit in this appeal and I too hereby dismiss it in toto and affirm the decision of the Court of Appeal.

Finally, I wish to put on record our profound gratitude to all learned counsel that appeared in this case and in particular the amici curiae who willingly accepted our invitations for them to appear in the case as friends of court. Not only that, they filed erudite briefs of argument and in addition appeared in court at their own expense either in person or through their juniors to expatiate the points in their briefs of argument. We found their submissions very helpful in assisting us to unravel the intricacies of this appeal. We could not have asked for more.

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BELGORE JSC

Section 215 Criminal Procedure Law (Cap 32, Laws of Lagos State) States.

"The person to be tried upon any charge or information should be placed before the court unfettered unless the court shall see cause otherwise to order; and the charge or information shall be read over and explained to him to the satisfaction of the court by the registrar or other officer of the court, and such person shall be called upon to plead instantly thereto, unless where the person is entitled to service of a copy of the information he objects to the want of such service and the court finds that he not been duly served therewith".

By the foregoing section the person accused must be present in court and the charge must be read to him to explained to him by the Court registrar or any other officer of court. The charge so read and explained must be understood by the accused person to the satisfaction of the court. This presupposes that the charge is thus read and explained

to the accused in the language he understands so that he is fully aware of the case against him. It is after this that he is asked to plead. The record of court therefore must show that the accused is in court and the charge is read and explained to him before he pleads to that charge. Once these conditions are ware contions are satsfied the arraignment cannot be B vitated. The trial that follows the plea is not vitiated once it is shown that the charge read and explained is that one the accused has pleaded to. The reading and explaining of the charge are crucial matters on the face of the record. It is then presumed he understands the case he is facing in court C even though the record does not say that he "understands or seems" to understand the charge. What will indicate that he understands the charge read and explained to him will be discerned from the totality of the following proceedings. Kajubo v. he State (1988) NWLR (pt.73) 721 and Erekanure v. The State (1993) NWLR (pt.294) 392 are cases not on all D fours with this case. In Kajubo's case there was nothing on the face of the record that the charge was read much less explained to the accused. In the instant case the record clearly indicates the charge was read and explained to the accused and his plea was taken. The test required in E cases like these, on the rationale of whether the accused understood the charge read and explained to him, is the objective test of what can reasonably be inferred after the charge was read and explained before the plea was taken. Certainly the accused pleaded to what he understood. F Where a charge was amended, it must be read and explained to the accused so that the court is satisfied he understands the charge before his plea is taken. Once the charge is read and explained it is to be presumed that the accused understood the same before he pleaded. "Understanding" G is the state of the mind of the accused which he only knows with the court merely presuming he understood after explaining the charge read to him. This case has satisfied all the requirements of S. 215 of Criminal Procedure Law (supra)

The second issue raised is that of whether death sentence is H against the constitution. The Criminal Code Law of Lagos State in S.319 thereof provides.

"319(1) subject to the provisions of this section any person who

commits the offence of murder shall be sentenced to death"

This is just one aspect in criminal law of this country that death is prescribed. Death sentence is also prescribed for levying war against the state (S.37) (1) (supra) or conspiring to levy war against the state (S.37)(2), instigating any foreigner by force of arms, to invade Nigeria (S.38) (supra). The issue of death sentence is predicated on the possible failure of the first issue based on procedural failure. Thus if this court finds that the appellant was properly arraigned and tried in the trial court, was he constitutionally sentenced? Put in another way: Having found the appellant guilty of murder, was the death justified under the constitution? Then I ask myself; Apart from taking the life of the convict is it the procedure of carrying out the sentence that offends the constitution or pronouncement of death sentence by itself? Or is it the complaint about the anxiety of the convict in waiting for the execution that is complained against?

The constitution of the Federal Republic of Nigeria provides:-

"30(1) Every person has a right to life and no one shall be deprived intentionally of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria."

Therefore it is clear that much as the victim of a murderous assault was entitled to life, so also is the murderer liable to death for his deed. The constitution recognises death sentence and that manifests in the provision "save in execution of the sentence of a court" in S. 30(1) (supra). The sentence of death is fully recognised and approved by the constitution and this could be found in the provisions of sections 213(2) (d) 220(1) (e) . Nigeria is not peculiar in its constitution and provisions of death sentence therein and in other statutes. Not up to ten per cent of the sovereign nations of the world abolished death sentence. Abolition of death sentence is not an indication of civilisation, rather in some cases it is based on historical circumstances of some countries. At any rate in this country, due to our constitution, it is not the function of courts of law to abolish the sentence of death, the responsibility is on the legislative body.

The fact that the same Constitution provides:

"31 (1) Every individual is entitled to respect for the dignity of his person, and accordingly -

(a) no person shall be subjected to any form of torture or to inhuman or degrading treatment"

does not mean a violation of the Constitution follows a death sentence passed lawfully by a court of competent jurisdiction. In the instant case before us nobody has alluded to any treatment that amounts to "torture or inhuman or degrading treatment". Certainly when a person is sentenced to death the question of bail for him pending execution is unknown; he must be kept in custody for the final day. At any rate, if after death sentence has been passed and the accused is in 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 no militating against the sentence of death. In such a case the death sentence stands, but a new cause of action has arisen and can be separately enforced and remedied. "inhuman and degrading treatment" outside the inevitable confinement in death row will not make illegal the death sentence; rather it only gives ground for an enforceable right under the Constitution. In that case the venue is not this Court but the High Court. See s. 42(1) and (2) of the Constitution, chapter iv. (Ogugu vs. The State (1994) 9 NWLR (pt. 366) 1, Effiom vs. The State (1995) 1 NWLR (pt. 373) 507. The forum for original jurisdiction on Fundamental Rights proceedings is not in this Court but in the High Court.

For the foregoing reasons and fuller reasons in the judgment of Iguh, JSC I find no substance in this appeal and I dismiss it. I affirm the decision of the Court of Appeal which upheld the verdict of the trial Court.

WALI JSC

I have read before now the lead judgment of my learned brother Iguh, JSC with which I entirely agree. I wish however to comment by way of emphasis on -

1. Unconstitutionality of death sentence imposed on the appellants; and

2. Impropriety of the arraignment of the appellant before the trial court in the alleged contravention of section 215 of the Criminal Procedure Law Cap. 32, Laws of Lagos State.

I shall begin with the question of the allegation of improper arraignment.

The facts of this case have been satisfactorily stated in the lead judgment of my learned brother Iguh, JSC and requires no further recapitulation by me in this concurring judgment. It was the argument by Mr. Agbakoba SAN, learned counsel for the appellant that the account of the appellant's arraignment clearly shows that section 215 of the Criminal Procedure Law of Lagos State [cap 32] has not been complied with, as the learned trial Judge never asked the appellant if he had understood the charge, and as a result he was not tried in accordance with the statutory provision of section 33(6) (a) of the 1979 Constitution. He urged the court to hold that the trial is null and void and to over-rule the consequential order of retrial made by it in Sunday Kajubo . The State (1988) 1 NWLR (pt. 73) 721.

For a valid arraignment, the following three preconditions as stipulated in section 255 of the Criminal Procedure Law must be satisfied

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1. The accused person must be accused before the court unfettered unless the court shall see cause otherwise to order;

2. The charge or information shall be read over and explained to him to the satisfaction of the court by the Registrar or other officer of the court; and

3. The accused shall then be called upon to plead instantly thereto (unless, of course, there exists any valid reason to do otherwise such as objection to want of service where the accused is entitled by law to service of a copy of the information and the court is satisfied that he has infact not been duly served therewith).

The record of the trial court shows as follows:-

"Accused person present. Arthur Worrey for the State. Oyesiku

for the Accused.

Court - *The accused shall be arraigned.*

Arraignment - *Charge is read and explained to the accused in English.*

Plea: *Not guilty."*

B

Learned counsel made heavy weather as regards five conditions set out in Samuel Erekanure v. The State (1993) 5 NWLR (pt. 294) 385 as a pre-condition to a valid arraignment as opposed to the 3 conditions stated in Kajubo v. The State (supra).

The five conditons in Erekanure's case are to my understanding the same as the 3 conditons in Kajubo's case.

C

It is evident from the record of proceddings in this case that the appellant understands English language. He made his extra-judicial statement in English and also testified in his own defence in English language.

D

It is clear from the record of proceedings quoted supra that the appellant was brought before the learned trial judge and the charge was therefore read and explained to him in English language. It was after that the appellant was asked to plead and he pleaded not guilty to the charge. This was recorded by the learned trial judge. It is intrinsic from what transpired that the learned trial judge was satisfied that the appellant understood the charge to whih he pleaded not guilty. It would be wrong to assume otherwise as that would amount to challenging the accuracy and genuiness of the trial court's record of proceedings, the proof of which would then have rested on the appellant.

F

In my view, it is not necessary, in order to meet the requirements of section 215 of the Criminal Procedure Law of Lagos State that the presiding judge must put down in writing words to the effect that he is satisfied the accused understand the charge to his satisfaction. It is sufficient if the arraignment is as recorded in this case where there is substantial compliance with procedural provision supra.

G

On issue 2 the appellant's compliant is not so much against the constitutionality of the death sentence per se but against the constitutionality of the mode of its execution. Section 319 (1) of the Criminal Code of Lagos State is neither inconsistent with section 31(1) of the 1979

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Constitution nor does it contradict the provision of the said section. Even the U.S. Supreme Court had pronounced in several of its decisions that the death penalty is not unconstitutional in that country. See for example Gregg v. Georgia 428 U.S. 153 96 SC CT 1976 US and DISTRICT ATTORNEY for the Suffolk District v. James Watson (1980) 381 MASS. In similar tone, the Supreme Court of India held in Singh v. State of Punjab (1983) (2) SCR 583 that death penalty and its mode of execution by hanging are not unconstitutional. Also the Supreme Court of Zimbabwe took a similar decision in Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General Zimbabwe (1993) (4) SA 239 where it was held that -

"And the constitutionality of the death sentence per se as well as the mode of its execution by hanging are also not susceptible of attack."

Section 30(1) of the 1979 makes a qualified provision to life whereas Section 31(1) of the same Constitution deals with "Right to Dignity of human person." These are two distinct rights created by the same Constitution. The appellant's complaint is against the Constitutionality of death penalty and not against the manner the death penalty is executed as stipulated in section 367 (1) (2) of the Criminal Code of Lagos State. This much was conceded to by learned Senior Advocate for the appellant.

The crucial question to be answered having regard to both local decisions and those from other foreign jurisdictions is whether the right to life as prescribed in section 30(1) of the 1979 Constitution is qualified or unqualified. The section provides thus -

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

The provision above clearly shows that the right to life in Nigeria is qualified as such right has been subjected to

"execution of the sentence of a court in respect of a Criminal Offence of which he has been found guilty in Nigeria."

The purport of section 30(1) supra is that death penalty is constitution-

ally recognised in the way and manner prescribed by law.

It is not the function of the court to apply the canon of interpretation to invalidate a valid and legal legislation for the only reason that such a legislation is not in line with its social thinking or is not liked by a fractional section of the Nigerian people.

Both Issues 1 and 2 are resolved against the appellant. The appeal is accordingly dismissed.

I have to put on record this court's profound thanks and gratitude for the well researched and articulated briefs filed by Mr. Agbakoba SAN on behalf of the appellant, Mrs. Folami the learned Attorney-General of Lagos State for the Respondent, aND m. i. n. Duru, Federal D. P.P., C. O. Akpamgbo SAN, Dr. I. A. Okafor SAN, Chief F. O. Akinrele, SAN and A. B. Mahmoud as Amici Curiae. They have proved themselves true and worthy friends of this court.

KUTIGIJSC

The Appellant was at the Lagos High Court charged and convicted of the offence of murder contrary to section 319(1) of the Criminal Code.

The case of the prosecution was that on or about the 24th day of August 1981, one Agbai Ezikpe was allegedly stabbed to death by the appellant using a broken bottle. The prosecution called six witnesses, two of whom (P.W S 1 & 5) were eye witnesses.

The Appellant who denied the charge gave evidence in his own defence. His defence was one of total denial of the charge.

The learned trial judge reviewed the evidence. She believed the prosecution witnesses and rejected the evidence of the appellant. She also considered the defence of provocation which she found did not avail the appellant. He was found guilty as charged and sentenced to death.

Dissatisfied with the judgment of the trial Court, the Appellant H appealed to the Court of Appeal holden at Lagos. Issues touching on provocation, Police Investigation, Medical Report, statement of the appellant to the Police and arraignment of the appellant in the High Court

were raised before the Court of Appeal. In a unanimous judgment the Court of Appeal held that the trial of the Appellant was proper and the appeal was dismissed.

B Aggrieved by the decision of the Court of Appeal, the Appellant has further appealed to this Court. The parties filed and exchanged briefs of argument. In addition because of the constitutional importance of one of the issues to be resolved, the court invited a number of counsel to participate as friends of the court (*amici curiae*). They are -

- C
1. The Director of Public Prosecution of the Federation;
 2. Mr. C. O. Akpamgbo, SAN;
 3. Dr. Ilochi A. Okafor, SAN;
 4. Mr. Ademola Akinrele;
 5. Mr. A. B. Mahmoud.

D They all filed their respective briefs in response to the invitation. The Court expresses its gratitude to Counsel for the industry, research and resourcefulness.

E Mr. Olisa Agbakoba, SAN., learned counsel for the Appellant has in his brief submitted the following issues for consideration -

- "1. Was the Court of Appeal right in holding that the Appellant was properly arraigned in accordance with the rule in KAJUBO'S case, and if not should the appellant be retried or discharged and acquitted?"
- F 2. Whether section 319 (1) of the Criminal Code is not inconsistent with Section 31(1) (a) of the Constitution of the Federal Republic of Nigeria and therefore null and void and if so whether the affirmation of death sentence by the Court of Appeal is correct."

Issue (1).

G It was contended that the arraignment of the Appellant in the High Court did not meet the mandatory requirements of Section 215 of the Criminal Procedure Act, Cap. 32 Laws of Lagos State of Nigeria, as well as the Constitutional protection contained in section 33 (6) (a) of the H 1979 Constitution (as amended). That in KAJUBO VS THE STATE (1988) NWLR (PT. 73) 721 and EREKANURE VS THE STATE (1993)5 NWLR (pt. 294) 392, this Court had set out the conditions of proper arraignment thus -

"(a) The accused must be present in Court.

(b) The charge or information should be first read over to the accused in the language he understands.

(c) The charge should be explained to the accused avoiding as much as possible the use of technical expressions.

(d) The trial judge should satisfy himself that the explanation of the offence charged was adequate and that the accused understands what he is standing trial for."

Reference was then made to page 36 of the record which showed the manner of arraignment in this case as follows:-

Accused person present.

Arthur-Worrey for the State.

Court: The accused shall be arraigned

Arraignment: Charge is read and explained to the accused in English.

Plea: Not guilty."

It was therefore submitted that only conditions (a) and (b) of KAJUBO above, were followed and that conditions (c) and (d) were not complied with. That the High Court presumed that the Appellant spoke English without verifying this from the Appellant before reading the charge and before his plea was taken. In addition, it was not recorded by the Court that the Appellant understood the charge to the satisfaction of the court itself. The issue should therefore be resolved in Appellant's favour.

Mrs. Folami, Hon. Attorney-General of Lagos State for the Respondent, submitted that the arraignment met the standard set by the interpretation of the law set out above and that there is nothing on record to indicate that the trial court was not satisfied that the charge had been properly explained to the Appellant. She further submitted that the provisions of section 215 of the Criminal Procedure Act are designed to ensure that an accused person understands and appreciates the nature of the allegation made against him. And that it is enough if there is sufficient evidence on the record showing or from which it can be inferred that the charge was read and explained to the accused in the language he understood. A number of cases were cited including OYEDIRAN VS THE

REPUBLIC (1967) NWLR 122, EFFIOM VS THE STATE (1995) 1 NWLR (pt. 373) 507 OGBA VS THE STATE (1992) NWLR (pt. 122) 164.

It was further submitted that the position in KAJUBO VS THE STATE (supra) is clearly different from the position here. That in the former there was nothing to show that the charges were read to the accused by the Registrar as directed by the trial judge, much less to talk of explaining the same to him in a language he understood. That the same cannot be said of the record in the instant appeal which clearly shows that the charge was read and explained to the Appellant in English language which he understood before he pleaded to the charge. She referred to section 150 (1) of the Evidence Act and said that all the pre-requisites for the validity of proceedings as they relate to the procedure for the taking of a plea are in place and the mere omission by the trial judge to state that she was satisfied that the accused person understood the charge as interpreted to him in English before he pleaded to it thereto, cannot derogate from the validity of the entire proceedings. The arraignment of the appellant herein was properly done and the requirements of the law fulfilled. The court was urged to dismiss the issue.

Mr. Duru learned Director of Public Prosecutions of the Federation as a friend of court, said the record shows that the charge was read and explained to the Appellant in English because he understood English as he gave his evidence in Court in English. It was submitted that the fact that the charge was read and explained to the accused in English and he perfectly understood same before giving his plea, is evidence that the court carried out the verification. He said failure to record the verification occasioned no miscarriage of justice and neither was it prejudicial to the accused. It was further submitted that the test as to whether or not the court was satisfied that the accused understood the charge to its satisfaction is subjective and the court needed not to record its satisfaction. That the fact that the trial went on to conclusion is evidence of court's satisfaction that the appellant understood the charge. He said in KAJUBO VS. THE STATE (supra) it was not recorded that the amended charge was read and explained to the accused before his plea was taken

which was held to amount to non-compliance with the mandatory provisions of section 215 which rendered the trial a nullity. The situation here is different. We were urged to uphold the judgment of the Court of Appeal on the issue.

Mr. Mahmoud who also addressed the court as a friend of the court, was also clearly of the view that the situation in the present appeal is quite different from the situations in KAJUBO and EREKANURE cases, as it did not involve the violations that were clearly present in the former cases. He said we should hold that the Court of Appeal was right in holding that the appellant was properly arraigned.

On the other hand both Mr. Akpamgbo, SAN and Mr. Ademola Akinrele also as friends of court contended that the record shows that there was no full compliance with section 215 of the Criminal Procedure Law as settled in KAJUBO VS. THE STATE (supra) and EREKANURE VS. THE STATE (supra). The trial is therefore a nullity.

Dr. Okafor, SAN, another friend of court preferred not to address us on this first issue.

I think I am in complete agreement with the submissions of the learned Attorney-General of Lagos State for the Respondent, the Director of Public Prosecution of the Federation and Mr. Mahmoud above that the Appellant herein was properly and validly arraigned before the trial High Court. In KAJUBO VS. THE STATE (supra), the record reads:-

"Court: Registrar, take the plea of the accused to the amended charge.

Accused: 1st Count: Pleads not guilty

2nd Count: Pleads not guilty."

This record does not show that the Registrar in fact read or explained the charge to the accused nor in what language this was done. No inference could therefore have been drawn that the court was satisfied that the accused understood what was going on, nor could the record be protected by the application of the principle of presumption of regularity.

The following passage from page 36 of the record shows how the plea of the appellant was taken in this case -

"Court: The accused shall be arraigned.

Arraignment: Charge is read and explained to the accused in English.

Plea: Not guilty."

B I endorse the view that the question of the "explanation being to the satisfaction of the Court." is to be construed objectively. There is nothing on record to show that the learned trial judge was not satisfied that the Appellant understood the charge before he proceeded with the trial. And applying the provisions of section 149 (1) of the Evidence Act
C which provide that -

"149 (1) When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with."

D to page 36 above, all the pre-requisiites for the validity of the procedure for taking of a plea were in place and the omission by the trial judge to state that he was satisfied that the Appellant understood the charge cannot derogate from the validity of that exercise. To me, there was sufficient compliance with the requirements of section 215 of the Criminal
E Procedure Law and of the conditions laid down in KAJUBO VS. THE STATE (supra). The Court of Appeal was therefore right in holding that the Appellant was properly arraigned before the trial High Court. Having
F agreed that the Appellant was properly arraigned, the question of whether or not he ought to be retried does not arise for consideration. Issue (1) therefore fails completely.

Issue (2)

G Undoubtedly, this is to do with the constitutionality of the death penalty in Nigeria. I am of the view that the issue is largely academic having regard to the fact that the 1979 Constitution which is the grund-norm expressly recognises or endorses death sentence in this country . The relevant sections of the Constitution read thus -

H 30 (1) *Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.*"

"213 (2) An appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in the following cases -

(d) decisions in any criminal proceedings in which any person has been sentenced to death by the Court of Appeal or in which the Court of Appeal has affirmed a sentence of death imposed by any other court." B
"220(1) An appeal shall be from decisions of a High Court to the Court of Appeal as of right in the following cases -

(e) decisions in criminal proceedings in which the High Court has imposed a sentence of death."

While section 31(1) (a) of the 1979 Constitution reads as follows - C

"31(1) Every individual is entitled to respect for the dignity of his person, and accordingly -

(a) no person shall be subjected to any form of torture or to inhuman or degrading treatment."

It is clear from the above provisions that death penalty per se which is prescribed by section 319 (1) of the Criminal Code cannot under any circumstance amount to torture or inhuman or degrading treatment which is what is prohibited under section 31(1) (a) of the Constitution. What may amount to torture or inhuman or degrading treatment will be the method or procedure or manner or way in which a condemned prisoner is kept or executed as demonstrated by the foreign cases F
relied upon by learned counsel for the Appellant. It is regrettable that there is no iota of evidence before us about the way or manner in which the Appellant is being or was treated by prison authorities. I believe the omission has fatal consequences which the case must suffer.

It is pertinent to state here that section 319 (1) of the Criminal Code above, under which the Appellant was tried and convicted only provided for the death penalty for the offence charged and not the sentence. G
Penalty in this case is not synonymous with sentence and the two must not be confused as counsel for the appellant appeared to have done H
here. The Death or Capital sentence is prescribed under section 367(1) & (2) of the Criminal Procedure Law. The section reads -

"367 (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 is that you be hanged by the neck until you be dead and may the Lord have mercy on your soul."

Because we were not addressed on, nor any reference made to, section 367(1) & (2) of the Criminal Procedure Law above, I will say nothing more on it.

It is also pertinent to mention that the two sections 30(1) & 31(1) (a) of the 1979 Constitution heavily relied upon by the counsel for the Appellant all fall under Chapter IV - Fundamental Rights - Provisions, wherein it is provided under section 42(1) & (2) (ibid) that only a High Court has original jurisdiction where any of the provisions of Chapter IV has been, is being or likely to be contravened as contended in this case. This court clearly therefore has no original jurisdiction in the matters alleged (see for example OGUGU VS. THE STATE (1994) 9 NWLR (Pt. 366) 1, EFFIOM VS. THE STATE (1995) 1 NWLR (pt. 373) 507, TUKUR VS. GONGOLA STATE (1989) 4 NWLR (pt. 117) 517. This court is bound by its own decisions and we have not been requested to depart from any of the above authorities. Issue (2) must therefore fail.

It is also noteworthy that all the learned counsel, amici curiae, as well as the Attorney-General of Lagos State who appeared for the Respondent answered issue (2) above simply and clearly that section 319(1) of the Criminal Law of Lagos State above is not inconsistent with section 31(1) of the 1979 Constitution. I agree with them entirely.

It is for the above reasons and others contained in the lead judgment of my learned brother Iguh JSC, which I read before now, that I also dismiss the appeal.

H OGUNDARE JSC

The Appellant herein was convicted of murder by the High Court of Lagos State and was sentenced to death by hanging. He appealed unsuccessfully to the Court of Appeal and has now further appealed to

this Court upon four Grounds of appeal contained in his amended notice of appeal dated 16th October 1997 and was filed with leave of this Court. In the Appellant's brief, however, Olisa Agbakoba Esqr. SAN, learned leading counsel for the Appellant formulated two questions for determination in this appeal. They are:

"1. Was the Court of Appeal right in holding that the Appellant was properly arraigned in accordance with the rule in Kajubo's case and if not should the Appellant be retried or discharged and acquitted.

2. Whether Section 319(1) of the Criminal Code is (not) inconsistent with Section 31(1) (a) of the Constitution of Federal Republic of Nigeria and therefore null and void and if so whether the affirmation of death sentence by the Court of Appeal was correct."

He has thereby abandoned the grounds of appeal challenging findings of fact made by the learned trial Judge.

The Respondent, on the other hand, formulated three questions in the Respondent's brief. These are:

"1. Whether the appellant was properly arraigned before the trial court.

2. Whether the Supreme Court has original jurisdiction to entertain an enquiry into the constitutionality of the death sentence as provided in section 319 (1) of the Criminal Code.

3. What is the proper interpretation of the provisions of section 319 (1) of the Criminal Code?"

As questions 2 and 3 are subsumed in Appellant's Question 2, I shall adopt, for the determination of this appeal, the question formulated by the Appellant which amend by the deletion of "not" in line 2 thereof.

QUESTION (1)

The Appellant was arraigned on 6th March 1984 on a charge of murder. The record for the day reads, in part;

THE STATE COMPLAINANT

AND

ONUOHA KALU ACCUSED

Accused person present. Arthur-Worrey for the State. Oyesiku for the Accused.

COURT: The Accused shall be arraigned

ARRAIGNMENT: Charge is read and explained to the Accused in English.

PLEA: Not guilty."

B It is the submission of learned leading counsel for the Appellant in his brief of argument that the arraignment of the Appellant did not meet the mandatory requirements of section 215 of the Criminal Procedure Law, Cap 32 Laws of Lagos 197 State as well as section 33(6) of the Constitution of the Federal Republic of Nigeria, 1979 (hereinafter is referred to as the Constitution). It is argued that the requirements of a proper arraignment as laid down in Sunday Kajubo v. The State (1988) 1 NWLR 721 at 731 & 737 and Erekanure v. The State (1993) 4 NWLR 385, 393 were not complied with. We are urged to declare the trial a nullity and, D applying Abodunde v. The Queen 4 FSC 70, not to order a retrial but to discharge the Appellant.

For the Respondent, it is submitted in the Respondent's brief that the arraignment of the Appellant met the standard set by the interpretation of the provisions of the law. Reliance is placed on Oyediran v. The Republic (1967) NMLR 122; Alake v. The State (1991) 7 NWLR 567 and section 150(1) of the Evidence Act, Cap. 112.

The learned Attorney-General of the Federation, who filed a brief, F as amicus curiae, submitted in that brief that there was compliance with section 215 and that the failure to record the verification that the Appellant understood the charge against him occasioned no miscarriage of justice nor was that failure prejudicial to him. That there was compliance with section 215 is the view also held by Mr. mahmoud, learned amicus G curiae.

Chief F. O. Akinrele, SAN and Mr. Akpamgbo SAN who also filed briefs as amici curiae, are of contrary view. They argued in their respective briefs that there is merit in the argument of Appellant's counsel that there was non-compliance with section 215 and that the arraignment of the Appellant being bad in law, his trial was a nullity. H

Section 215 of the Criminal Procedure Law of Lagos State provides:

"215. The person to be tried upon any charge or information shall be placed before the court unfettered unless the court shall see cause otherwise to order; and the charge or information shall be read over and explained to him to the satisfaction of the court by the registrar or other officer of the court, and such person shall be called upon to plead instantly thereto, unless where the person is entitled to service of a copy of the information he objects to the want of such service and the court finds that he has not been duly served therewith." B

Section 33(6) (a) of the Constitution also provides:

"33(6) Every person who is charged with a Criminal offence shall be entitled - C

(a) to be informed promptly in the language that he understands and in detail of the nature of the offence;"

In Oyediran v. The Republic (supra) this court held that D

"The arraignment of an accused person consists of charging the accused or reading the charge to him and taking his plea thereon."

In Kajubo v. The State (supra) Wali, JSC delivering the lead judgment of this court laid down the requirements of a proper arraignment. He said at E page 731:

For: a valid and proper arraignment of an accused person, the following conditions are contained in the section mentioned (supra), must be satisfied:

"1. He shall be placed before the court unfettered unless the court shall see cause to otherwise order; F

2. The charge or Information shall be read over and explained to him to the satisfaction of the court by the registrar or other officer of the court; and G

3. He shall then be called upon to plead instantly thereto (unless there are valid reasons to do otherwise as provided in section 100 of the Criminal Procedure Law).

Failure to comply with any of these conditions will render the H whole trial a nullity. See: Eyorokoromo v. The State (1979) 6 - 9 SC. 3" Oputa, JSC in his own contribution at page 737 reiterated the requirements when he said:

"..... for there to be a proper arraignment:-

(i) *The accused person shall be present in Court.*

(ii) *The charge or information shall be read over to him in a language he understands.*

B (iii) *The charge or information after being read over in such language should then be explained to him avoiding as much as possible the use of technical expressions. This explanation should acquaint the accused with the essential ingredients of the offence charged and with the factual situation resulting in and giving rise to the offence charged.*

C (iv) *To make assurance doubly sure the trial judge should also satisfy himself that the explanation of the offence charged was adequate and that the accused understands what he is standing trial for.*

D *It is good practice for trial courts to specifically record that "the charge was read and fully explained to the accused to the satisfaction of the court " before then recording his plea thereto."*

In Erekanure v. The State (supra) Olatawura JSC emphasised at page 393 of the report that

E *"The five requirements must be satisfied.They are mandatory."*

I think it is carrying the law to absurdity to suggest that the trial Judge must record that he was satisfied of the explanation of the charge to the accused. The arraignment in KAJUBO'S case (supra) was, ex facie, not

F in compliance with section 215. It is not surprising, therefore, that the trial therein was declared a nullity. It is on record in this case that after the explanation of the charge to the Appellant, he pleaded to it. Surely, if the Judge was not satisfied he would not proceed to take the plea of the Appellant. By his taking the plea, therefore, it must be presumed that he

G was satisfied that the charge was properly explained to the Appellant and the latter understood same. After all the maxim is : Omnia praesumuntur rite et sollemniter esse acta. That is to say: All acts are presumed to have been done rightly and regularly. In Derby v. Bury Imp Commors L.R. 4

H Ex 222 at p. 226 it was held that in the absence of proof to the contrary, credit should be given to public officers who have acted, prima facie, within the limits of their authority, for having done so with honesty and discretion.

The maxim apart, there is section 150(1) of the Evidence Act which provides:

"150 (1) When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with."

B

This presumption of regularity avails in this case.

The provisions of section 215 and section 33(6) (a) of the Constitution are designed to ensure that an accused person not only understands but equally appreciates the nature of the charge against him before his plea thereto is taken. See: Effiom v. The State (supra). I am satisfied that there is in this case substantial compliance with the above provisions and I hold that the arraignment of the Appellant was valid. With this conclusion, the issue of whether or not a retrial should be ordered does not arise. I resolve Question (1) against the Appellant.

C

D

QUESTION (2):

This question relates to the constitutionality of the death penalty. Once again, as I shall show later in this judgment, Mr. Agbakoba has sought to use the opportunity of an appeal against conviction for murder to have this court declare the death penalty unconstitutional. He has argued strenuously both in his brief, reply brief and oral arguments that the death penalty was inconsistent with section 31(1) (a) of the constitution. He concedes it, though, that section 30(1) of the said constitution which preserves the right to life is qualified. The main thrust of his argument is that the death penalty is cruel, inhuman and degrading and therefore, violates the right given in section 31(1) (a) of the constitution. He refers to Uzoukwu v. Ezeonu (1991) 6 NWLR 708 as to what is inhuman and degrading. Learned Senior Advocate also relies on a number of authorities of other jurisdictions, which I shall touch upon later in this judgment, in submitting that the death penalty is in violation of the right given by section 31(1) (a). He argues that section 31(1) (a) is unqualified. He urges us to set aside the sentence of death imposed on the Appellant. He draws attention to the length of time the Appellant has been under sentence of death to support his contention that the Appellant has been subjected to cruel, inhuman and degrading treatment.

F

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H

Mrs. Folami, learned Attorney-General of Lagos State, argues, both in Respondent's brief and in oral submissions, that the death penalty is not a torture so long as it is carried out under sentence of a court. It is further argued that its execution by hanging or otherwise, is an after-effect which does not affect the sentence itself. She submits that section 30(1) is not inconsistent with section 31(1) (a) of the constitution. It is argued, on behalf of the Respondent, that this Court lacks is not inconsistent with section 31(1) (a) of the constitution. It is argued, on behalf of the Respondent, that this court lacks original jurisdiction to entertain a complaint of breach of section 31(1) (a) and that the proper forum for this is the High Court. Reliance is placed on section 42(1) of the constitution and Effiom v. The State (supra) and Turkur v. Governor of Gongola State (1989) 4 NWLR (pt.117) p. 517. The learned Attorney-General submits that the death penalty is valid having regard to section 30(1) of the constitution. She urges us to dismiss the appeal.

Mr. Duru, Federal Director of Public Prosecutions, both in the brief filed by him on behalf of the Attorney-General of the Federation and in his oral submissions, submits that section 319(1) of the Criminal Code of Lagos State is not inconsistent with section 30(1) of the constitution as the latter section approves the death penalty. He argues that the right to life given in section 30(1) is different from the right to human dignity given in section 31(1) (a) of the constitution. He submits that the legislator cannot give the same right twice in one Act. Learned Federal D.P.P. also submits that section 319 (1) of the Lagos State Criminal Code which provides for the sentence of death by hanging is not inconsistent with section 31(1)(a) of the Constitution either.

Chief F. O. Akinrele, SAN in his own brief and in the able oral address of Ademola Akinrele Esqr., who represented him, commends the observation of the Supreme Court of South Africa in State v. Makwanyane (1995) (6) BCLR 665 (CC) to the effect that:

The question is not, however, whether the death sentence is a cruel, inhuman or degrading punishment in the ordinary meaning of these words but whether it is a cruel, inhuman or degrading punishment within the meaning of section 11(2) of the Constitution."

and goes on to submit:

"..... that on this approach, the decision in foreign jurisdictions would be apposite where the provisions of their Constitutions are similar to ours in this regard. On a careful perusal of the various foreign authorities referred to by the appellant the view that the death penalty per se is cruel, inhuman and degrading and thus unconstitutional is generally speaking, a minority view.

Indeed, in jurisdictions that have similar provisions as ours the death penalty has specifically been held to be constitutionally valid. The decisions tend to turn on whether the right to life is qualified or unqualified. In the former, the death penalty has in the main been held to be Constitutionally valid. In the latter, it has been held to be unconstitutional."

The learned Senior Advocate examines the position in Tanzania Zimbabwe, South Africa, India, Canada, Hungary, the United States and the Caribbean countries. He draws attention to the stand of the Human Rights Committee of the United Nations in Kindler v. Canada and that of the European Convention on Human Rights in Soering v. United Kingdom (1989) 11 EHRR 439. The sum total of learned Senior Advocate's research is to the effect that where the constitutional right to life is unqualified, as in South Africa and Hungary, the death penalty would be unconstitutional. But where the right is qualified as in Tanzania, Zimbabwe, India, United States and the Caribbean countries, it is not unconstitutional. He submits that as the right to life given in section 30(1) of the Constitution is qualified, the death penalty is not unconstitutional in Nigeria. Learned Senior Advocate, however, argues further on what he calls the principle of the "death row phenomenon." He states the principle thus:

"The principle simply stated is that an accused person having been kept in death row for a prolonged period of time after the sentence of death for murder by a trial court would have gone through such mental anguish and torment in the intervening period such as to have exposed him to torture, inhuman and degrading treatment and thus warrant the commutation of his sentence from death to life imprisonment."

After citing numerous authorities from various jurisdictions, including Nigeria, learned Senior Advocate urges it on us to exercise our power under section 22 of the Supreme Court Act and commute the sentence of death passed on the Appellant to life imprisonment. He urges us to over-
 B rule our decision in Ogugu v. The State (1994) 9 NWLR 1. C.O. Akpamgbo Esqr., SAN in his brief and oral submissions, submits that the death penalty for murder prescribed by section 319 of the Criminal Code of Lagos State is not inconsistent with section 30(1) of the constitution and that it does not amount to "torture, inhuman or degrading treatment"
 C and does not, therefore, violate section 31(1) (a) of the Constitution.

Dr. I.A. Okafor, SAN in his brief, begins by examines sections 30(1) and 31(1) (a) of the constitution and submits that the death penalty is constitutional and does not per se amount to "torture, inhuman or
 D degrading treatment" prohibited by section 31(1) (a) of the constitution. He argues further:

*"It is only where the method of execution is so brutal or abhor-
 E rent or involves exorbitant or excessive pain that it can constitute tor-
 E ture, inhuman or degrading treatment. Hanging per se which is applied in Nigeria has not been shown to fit this qualification.*

*The abolition of the death penalty is a very weight matter in-
 F volving policy where decision should be a function of conscious and
 F deliberate act of the highest policy formulating and law-making orgn of the State involving, where feasible, the opinion of the people in a refer-
 F endum. The eventuality of self-help and revenge-killing in the wake of dismay and dissillusion at the abolition of the death penalty should not be under-estimated.*

*Abolition of the death penalty by whatever canon of interpreta-
 G tion, inspired by whatever humanitarian considerations, would be a fla-
 G grant incursion by the judiciary into the domain of the legislature and would stretch judicial creativity beyond bounds."*

H A.B. Mahmoud Esqr for his part, examines sections 30(1) and 31(1) (a) of the constitution and submits that section 319(1) of the Criminal Code of Lagos State is not inconsistent with either of these sections of the constitution. He too carries us through a number of authorities of other

jurisdictions on the subject and concludes:

"The ideological, intellectual as well as the emperical evidence against the death penalty, valid as they may be, against the backdrop of the clear provision in section 30 of our constitution are really arguments for the legislature or other law making organ of the state."

Before I proceed further I like to express my deep appreciation to all learned counsel that appear in this case for the great assistance rendered by them. I have found the authorities they cited in their briefs and oral submissions very useful and illuminating. I thank them all.

I shall now set out the constitutional and statutory provisions relevant to the determination of the Question under consideration. They are:

CONSTITUTION

Section 30(1):

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

Section 31(1) (a):

Every individual is entitled to respect for the dignity of his persons, and accordingly -

(a) no person shall be subjected to torture or to inhuman or degrading treatment;"

Section 42(1):

"Any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress."

Section 213 (2) (d)

"An appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in the following cases-

(d) decisions in any criminal proceedings in which any person has been sentenced to death by the Court of Appeal or in which the Court of Appeal has affirmed a sentence of death imposed by any other court;"

Section 220(1) (e):

"An appeal shall lie from decisions of a High Court to the Court of Appeal as of right in the following cases-

(e) decisions in any criminal proceedings in which the High Court has imposed a sentence of death;"

B CRIMINAL CODE OF LAGOS STATE

Section 319(1):

"Subject to the provisions of this section any person who commits the offence of murder shall be sentenced to death."

C It is generally agreed by all learned counsel that sections 30(1), 213(2) (d), and 220(1) (e) of the constitution taken together recognise the existence of the death penalty and impliedly approve of it. Mr. Agbakoba, in his brief, after citing the above provisions, argues:

D *"The 'immediate' impression created by the wordings of the above provisions (and particularly the underlined portions) is that they confer constitutional validity on all death penalty legislation (including Section 319) (1) of the Criminal Code of Lagos State),"*

E I agree with them. As Mr. Agbakoba conceded at the oral hearing, section 30(1) which prescribes the right to life is qualified in that it exempts from the right given the "execution of the sentence of a Court in respect of a criminal offence of which he has been found guilty in Nigeria." This is a derogation from the right to life. If the constitution does not approve of the death penalty, it would not have provided for a right of
F appeal against it to the Court of Appeal and the Supreme Court.

In South Africa where section 9 of the transitional constitution of that country provides:-

G *"Every person shall have the right to life."*
the constitutional court held in State v. Makwanyane & Anor (1995) (6) BCLR 665; 1995 SACLR LEXIS 218 that the sentence of death is inconsistent with the constitution and invalid. This is also the position taken by the court in Hungary where section 54(1) of that country's constitution
H provides-

"Every one has the inherent right to life and to human dignity and no one shall be arbitrary deprived of this right."

In Jones v. Wittenberg, it was held that the death penalty is inconsistent

with the right to life and dignity under section 54 and therefore unconstitutional and invalid. In both these countries, the right to life as prescribed in their respective constitutions is unqualified.

I now turn to countries where the right to life prescribed in their constitutions is qualified as in our own constitution. Art. 21 of the Indian constitution provides:

"No person shall be deprived of his life or personal liberty except in accordance to procedure established by law."

The constitutionality of the death penalty was questioned in Becan Singh v. State of Punjab (1983) (2) SCR 583. 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 constitutes an unreasonable cruel or unusual punishment prohibited by the constitution."

The same position was taken by the Supreme Court of Zimbabwe in Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General Zimbabwe (1993) (4) SA 239, Gubbay CJ observed:

"It was not sought, nor could it reasonably be, to overturn the death sentences on the ground that they were unlawfully imposed. The judgments of this court dismissing the appeals of the condemned prisoners cannot be disturbed. They are final. And the constitutionality of the death penalty per se, as well as the mode of its execution by hanging, are also not susceptible of attack."

The Court had earlier dismissed the appeals of the convicts against their convictions and sentence of death. See also: Mbushuu v. State, Criminal Appeal No. 142 of 1994 - a Tanzanian case.

Article 6 of the International Convention and Article 2 of the European Convention do not seem to prohibit the death penalty.

A lot of argument is advanced by Mr. Agbakoba in his brief as to the position in the USA where the right to life is also qualified. He refers to a number of decisions of the Supreme Court of that country, particularly Furman v. Georgia 408 US 238 (1972), but these decisions must be seen in the light of their peculiar facts. The prevailing view of the U.S.

Supreme Court as expressed in Gregg v. Georgia 428 US 153 96 SC. CT 2909 1976 US is:

We address initially the basic contention that the punishment of death for the crime of murder is, under all circumstances, 'cruel and unusual' in violation of the Eight and Fourteenth Amendments of the Constitution. In part IV of this opinion, we will consider the sentence of death imposed under the Georgia statutes at issue in this case.

The Court on a number of occasions has both assumed and asserted the constitutionality of Capital punishment. In several cases that assumption provided a necessary foundation for the decision, as the Court was asked to decide whether a particular method of carrying out a capital sentence would be allowed to stand under the Eight amendment. But until Furman v. Georgia, 408 U.S. 238 (1972) the court never confronted squarely the fundamental claim that the punishment of death always, regardless of the enormity of the offence or the procedure followed in imposing the sentence, is cruel and unusual punishment in violation of the constitution.

Although this issue was presented and addressed in Furman, it was not resolved by the court. Four Justices would have held that capital punishment is not unconstitutional *per se*; two Justices would have reached the opposite conclusion; and three Justices, while agreeing that the statutes then before the court were invalid as applied left open the question whether such punishment may ever be imposed.

We now hold that punishment of death does not invariably violate the constitution."

Section 14(1) of the Jamaican constitution provides:

"No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted."

In Riley v. Attorney-General of Jamaica (1983) AC 719, the Privy Council at p. 726 declared:

"Quite aside from section 17 of the constitution the continuing constitutional validity of the death sentence is put beyond all doubt by the provision of section 14(1)

All the authorities I have just reviewed show clearly that where the right to life is qualified as in section 30(1) of our constitution, the constitutionality of the death sentence is affirmed, notwithstanding the manner of its execution. The conclusion I reach is that section 319(1) of the Criminal Code of Lagos State is not inconsistent with sections 30(1) and 31(1) (a) of the constitution. B

It has been argued, for the Appellant, that by the long delay in carrying out the death sentence imposed on him there has been a breach of his right under section 31(1) (a) of the constitution. Of course even a convict has rights - Nenmi v. Attorney-General of Lagos State (1996) 6 NWLR 42. But can this court in the present appeal grant the Appellant redress for the breach, if any, of his right under section 31(1) (a)? This Court has resolved this question in Ogugu & Ors. v. The State (supra). We held in that case that this court would have no original jurisdiction to determine such a question. Uwais JSC (as he then was) observed at pages 40-41 - C D

"The jurisdiction to entertain any suit which alleges that any fundamental right, including the right of any person not to be subjected to torture, inhuman or degrading treatment under Section 31 subsection (1) (a) of the 1979 constitution Cap. 62 of the Laws of the Federation of Nigeria 1990, can only be exercised by a High Court in accordance with the provisions of Section 42 subsections (1) and (2) of the constitution, which provides:- E F

'42 - (1) Any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that state of redress.

(2) Subject to the provisions of this constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that state of any rights to which the person who makes the application may be entitled under this chapter." G H

The jurisdiction of the Supreme Court is merely appellate and

not original except with regard to cases where there is a dispute between the Federation a State or between States - see Section 212 of the 1979 constitution. Cap. 62 and A.G. of Anambra State & Ors. v. A-G. of the Federation & Ors. (1993) 6 NWLR (pt.302) 692. Although in practice
 B constitutional issues are being or can be raised in an appeal to the Supreme Court, such issues pertain only to the breach of a fundamental right in the course of trial or hearing before the lower courts. Such issues relate mainly to breach of the right to fair hearing and the right to personal liberty under section 33 and 32 of the constitution. Rights like
 C those to private and family life, peacefull assembly and association and freedom of the press can only be enforced through a substantive suit and cannot be raised in this court as being incidental to the proceedings in the lower courts."

D On page 45 of the report I opined:

"As the issue of the alleged breach of the constitutional provisions as enshrined in Section 31(1) (A) of the constitution of the Federal Republic of Nigeria 1979 is not intrinsic to the proceedings leading to
 E the appeals to this court by the appellants, this court will have no jurisdiction at this state to entertain the complaints. Were the complaint intrinsic, this court would have had the jurisdiction to consider it along with other complaints raised in the appeals of the appellants. As the
 F position is now, it is for the appellants to make their complaint to the High Court as provided for in section 42 of the constitution and the Fundamental Rights (Enforcement Procedure) Rules 1979. When the matter comes back to this court in its appellate jurisdiction, it is only then that we can examine the complaint and pronounne on it."

G Bello, CJN in his lead judgment dwell at length on the jurisdiction of this court and concluded at p.30:

"Accordingly, the jurisdiction of this Court to determine the constitutional question will only arise on appeal after a High Court has
 H considered and adjudicated on the issue and the Court of Appeal confirmed or reversed the decision of the High Court. It will be unconstitutional for this court to assume jurisdiction and decide the question as contended by Mr. Agbakoba."

Chief Akinrele, in his brief, has invited us to overrule this decision. I see no reason to doubt the correctness of the decision. This is so because the burden of proof that a fundamental right has been breached lies on him who asserts it. And in relation to section 31(1) (a), the issue of whether an individual has been subjected to "torture, inhuman or degrading treatment" is essentially a matter of fact that requires some evidence to support it. This is the case in virtually all the cases in the other jurisdictions cited to us.

In Ogugu & Ors. v. The State (supra), Mr. Agbakoba made the attempt to have this court declare the death penalty unconstitutional. The attempt failed. The truth is, learned Senior Advocate is approaching the wrong forum. As Dr. Okafor SAN rightly puts it in his brief -

"7.5 Abolition of the death penalty by whatever canon of interpretation, inspired by whatever humanitarian considerations, would be a fragrant incursion by the judiciary into the domain of the legislature and would stretch judicial creativity beyond bounds."

Having held that the death penalty is not inconsistent with the constitution it is for the abolitionists of the death penalty to direct their attention to the legislature to effect the change they desire.

The conclusion I reach on Question 2 is that I answer that question in the affirmative, that is, that Section 319 (1) of the Criminal Code of Lagos State is not inconsistent with sections 30(1) and 31(1) (2) of the constitution.

It is for the reasons I have stated above and the other reasons given in the judgment of my learned brother Iguh JSC, whose judgment I had a preview of ere now, that I too dismiss this appeal and affirm the judgment of the court below.

OGWUEGBU JSC

I am in entire agreement with the judgment just delivered by my learned brother Iguh, J.S.C. of which I had a preview.

Mr. Agbakoba, S.A.N. presented two broad issues for our consideration in the appeal namely:

"(1) Was the Court of Appeal right in holding that the Appellant was properly arraigned in accordance with the rule in Jajubo's case and if not should the appellant be retried or discharged and acquitted.

(2) Whether section 319(1) of the Criminal Code is (not) inconsistent with section 31(1) (a) of the constitution of the Federal Republic of Nigeria and therefore null and void and if so whether the affirmation of death sentence by the Court of Appeal was correct."

The following issues were identified in the respondent's brief of argument:

"(1) whether the appellant was properly arraigned before the trial court;

(2) Whether the Supreme Court has original jurisdiction to entertain as (sic) enquiry into the constitutionality of the death sentence as provided in section 319(1) of the Criminal Code.

(3) What is the proper interpretation of section 319(1) of the Criminal Code?"

Mr. Agbakoba, S.A.N. argued that the arraignment of the appellant in the trial court did not meet the mandatory requirements of section 215 of the Criminal Procedure Law, Cap. 32 Laws of Lagos State as well as the constitutional protection contained in section 33(6) (a) of the constitution of the Federal Republic of Nigeria, 1979 (as amended) hereinafter referred to as the constitution. He referred the court to the cases of Sunday Kajumbo v. The State (1988) 1 N.W.L.R. (pt. 73) 721 at 731 and 737 and Erekanure v. The State (1993) 5 N.W.L.R. (pt.294)392 and submitted that the appellant was not arraigned in the manner prescribed by those two cases. We were urged to declare the trial a nullity.

It was submitted in the respondent's brief that the arraignment of the appellant met the standard set by this court in its interpretation of the provisions of section 215 of the Criminal Procedure Law and that there is nothing in the record suggesting that the appellant did not understand English language and that the trial judge was not satisfied that the charge was properly explained to the accused. We were referred to the cases of Oyediran v. The Republic (1967) N.M.L.R. 122, Alake v. The State (1991) 7 N.W.L.R (Pt.205)567, Effiom v. The State (1995) 1 N.W.L.R.

(Pt.373)507, Kajubo v. The State (supra) and Ogba v. The State (1992) 2 N.W.L.R. (Pt.222) 164.

The appellant's complaint on Issue 1 is that his arraignment was not in compliance with the mandatory provisions of section 215 of the Criminal Procedure Law of Lagos State and section 33 (6) (a) of the B constitution. It was submitted that the court presumed that the appellant understood English language when that fact was not verified before the court proceeded to take his plea. It was also argued that there was nothing on record to show that the charge was read and explained to him C to the satisfaction of the court.

On 7-2-84 when the accused appeared before the learned trial judge unrepresented. The record showed the following dialogue between the trial judge and the accused:

Court - to the Accused person. D

Where is your counsel.

Accused - My relatives have still not briefed one for my defence. They have financial difficulties. I was told that by my brother this afternoon. E

Court - I hereby order the Assistant Chief Registrar (Litigation) to brief a counsel to defend the accused person in this case."

The accused spoke very good English and this was before his arraignment on 6-3-84. The accused also made extra-judicial statement F in the English language during the investigation of the case. In addition, he gave evidence on oath and in the English language at the trial. It is on record also that the charge was read and explained to him in the English language. G

With respect to the arraignment on 6-3-84, the record showed:

"Accused person present. Arthur-Worrey for the State. Oyesiku for the accused.

Court: - *The accused shall be arraignment.*

Arraignment: - *Charge is read and explained to the Accused in H English.*

Plea: *Not guilty."*

I have no doubt that the charge was read and explained to the

accused in the English language which he understood and spoke and he pleaded "not guilty" thereto. It will be contrary to common sense to expect the trial judge to record that the charge was read and explained to the accused to the satisfaction of the court. Since the law enjoined him to be satisfied, he would not have taken the plea if he was not satisfied with the explanation

I therefore hold that the accused was validly arraigned and that the arraignment was in substantial compliance with section 215 of the Criminal Procedure Law of Lagos State and section 33(6) (a) of the constitution. In the light of the conclusion that I have reached, the question of a retrial or a discharge and acquittal does not arise.

There is this requirement that the court should be satisfied with the explanation of the charge. If the court was not satisfied with the explanation of the charge to the accused, I am sure the trial judge would not have allowed him to plead to it. It will be stretching the provisions of section 215 of the Criminal Procedure Law too far to expect a trial judge to record that he was satisfied with the explanation of the charge to the accused. If as we are

Urged in this appeal to declare the trial a nullity, it will amount to an introduction of undue technicality to the clear, unambiguous and mandatory provisions of the law. I am satisfied that the requirements set out in the case of Kajubo v. The State (supra) were substantially met in this case by the trial judge. I therefore hold that the arraignment of the appellant was valid.

On the second issue for determination which questions the constitutionality of the death penalty in Nigeria, the learned appellant's counsel, Mr. Agbkoba, S.A.N. first posed the question whether this court can inquire into the constitutionality of section 319(1) of the Criminal Code. The learned Senior Advocate referred to sections 30(1), 213(2) and 220(1) of the constitution which expressly recognised the death penalty and submitted that these provisions appear to create the impression of giving constitutional validity to all death penalty legislations including section 319(1) of the Criminal Code of Lagos State. He submitted that section 319(1) of the Criminal Code is inconsistent with section 31(1) (a) of the

constitution and therefore null and void. Being mindful of the fact that the validity of section 319(1) of the Criminal Code had not been decided by any of our superior courts, he urged us to seek the aid of contemporary foreign jurisprudence in the interpretation of our constitution.

He urged us to apply the following principles in the interpretation of the constitution:

(a) That Nigerian courts should seek guidance from constitutional jurisprudence in other countries, particularly on issues of human rights which are now accepted as universal;

(b) That universality of human rights requires national courts to interpret and apply fundamental human rights in conformity with widely accepted moral norms.

Mr. Agbakoba, S.A.N. referred us to various foreign cases where the constitutionality of the death penalty had been interpreted.

He further argued that under the international human rights jurisprudence, the death penalty provided in section 319(1) of the Criminal Code is inconsistent with the provisions of section 31(1) (a) of the constitution which prohibited torture, inhuman or degrading treatment. He cited the case of Uzokwu v. Ezeonu (1991) 6 N.W.L.R. (Pt. 200) 708 for the interpretation of "inhuman and degrading treatment." He contended that the length of time the appellant had been under the sentence of death is nothing short of cruel, inhuman and degrading treatment. He also relied on a number of foreign authorities to buttress his argument.

The learned Attorney-General of Lagos State who appeared for the respondent submitted in the respondent's brief as well as in oral argument that there is nothing in section 31(1) (a) of the constitution which derogates from the power of the legislature to enact section 319(1) of the Criminal Code, that section 30(1) is not inconsistent with section 31(1) (a) of the constitution and that the mode of execution of the death penalty by hanging as provided in section 367(1) of the Criminal Procedure Law Cap. 32, Laws of Lagos State, 1973 is outside the undoubted process of the court. It was finally submitted that the court cannot enquire into the statute prescribing death sentence for certain offences. We were urged to dismiss the appeal.

Mr. Duru, Director of Public Prosecutions represented the Honourable Attorney-General of the Federation at the hearing of the appeal as amicus curiae. He submitted that sections 30(1) and 31(1) (a) of the constitution deal with two different rights namely, right to life and right to human dignity and that the legislature cannot give the same right twice in the same Act. He contended that the right to life is different from the right to human dignity and that the death sentence which the constitution recognised in section 30(1) cannot be regarded as torture or inhuman or degrading treatment in section 31(1) (a). He finally submitted that section 319 of the Criminal Code which provides for the death sentence is not inconsistent with section 31(1)(a) of the constitution.

C.O. Akpamgbo Esq., S.A.N. in his brief and oral argument submitted that section 319 of the Criminal Code of Lagos State is not inconsistent with section 31(1)(a) of the constitution and that the death sentence or the manner of its execution does not violate sections 30(1) and 31(1)(a) of the constitution.

Chief Akinrele, S.A.N. in his brief of argument referred us to the constitutional provisions relating to the death sentence in various commonwealth countries, the United States of America and Hungary as well as the construction placed on those provisions by their courts. He contended in his brief that the death sentence is not unconstitutional per se in the context of Nigeria, that the manner of the execution of the death sentence in the circumstances of prolonged delay on death row rendered it unconstitutional. He urged that the death sentence should be commuted to life imprisonment and the decision of this court in Ogugu v. The State (1994)9 N.W.L.R (pt.366)1 be reconsidered and overruled.

Dr. I.A. Okafor, S.A.N. submitted in his brief as follows:

"The death penalty is recognised and sanctioned under our constitution. Ordinary laws of the land since the introduction of received English law as far back as even 1863 especially the Criminal and penal Codes and some decrees prescribe the death penalty for certain serious offences..... The death penalty is constitutional and does not per se amount to "torture, inhuman or degrading treatment" prohibited by section 31 of the constitution"

A.B. Mahmoud, Esq. another amicus curiae in his brief and oral argument stated that section 30(1) of the constitution must be construed as a whole, that it is plain and without any ambiguity, that it recognises and protects the right to life and also permits person's life to be taken if a court decrees so after due trial in respect of an offence for which the person is found guilty and to argue otherwise is to embark on an exercise aimed at defeating the clear provisions of the constitution. B

The learned counsel found no inconsistency between sections 30(1) and 31(1)(a) of the constitution and that sections 30(1), 213(2) (d) and 220(1) of the constitution recognise the death penalty in Nigeria which is prescribed by section 319 of the Criminal Code. He referred the court to the following decisions: C

Nafiu Rabiu v. The State (1980)8-11 S.C. 130, Attorney-General, Bendel State v. Attorney-General of the Federation & Ors. (1981)10 D S.C.1, Ogugu v. The State (1994)9 N.W.L.R. (pt.366)1 Evil Pratt & Or. v. Attorney-General of Jamaica (1994)2 A.C.1. Catholic Commission For Justice & Peace in Zimbabwe v. Attorney-General & 2 Ors. (1993)(4) 239 (ZSC), Abbot v. Attorney-General of Trinidad & Tobago (1979)1 E W.L.R. 1342 and Riley & Ors. v. Attorney-General, Jamaica (1983)1 A.C. 719.

He urged that the arguments against section 30(1) of the constitution valid as they might be, should be left to the legislature of other law making organ of the State. F

To answer the question whether section 319(1) of the Criminal Code is inconsistent with section 31(1)(a) of the constitution, it will be necessary to examine the statutory and constitutional provisions touching on the issue. These are: G

Section 319(1) of the Criminal Code of Lagos State:

Section 319(1):

"Subject to the provisions of this section any person who commits the offence of murder shall be sentenced to death." H

Sections 30(1), 31(1)(a), 213(2) (d) and 220(1)(e) of the Constitution:

Section 30(1):

"Every person has a right to life, 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."

"Section 31(1) (a):

B *"31(1) 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;"

C *Section 213 (2) (d):*

"213 (2) An appeal shall lie from decisions of the Federal Court of Appeal to the Supreme Court as of right in the following cases

.....

D *(d) decisions in any criminal proceedings in which any person has been sentenced to death by the Federal Court of Appeal or in which the Federal Court of Appeal has affirmed a sentence of death imposed by any other court;"*

Section 220 (1) (e):

E *"220(1) An appeal shall lie from the decisions of a High Court to the Federal Court of Appeal as of right in the following cases -*

(e) decisions in any criminal proceedings in which the High Court has imposed a sentence of death;"

F *(Underlinings are for emphasis).*

On the interpretation of the constitution, two cardinal principles should be borne in mind:

G *(a) The prime effort or fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent of the framers of and the people who adopted it and,*

(b) Although due regard is to be given to international jurisprudence, foreign constitutions or statutes and judicial interpretations, the court will accord due weight to our circumstances, our generally accepted norms, values, aspirations as well as our local conditions.

H *See Nafiu Rabi v. The State (1980) 8-11 S.C. 130 and Attorney-General of Bendel State v. Attorney-General of the Federation & Ors. (1981) 10 S.C.1.*

The golden rule of statutory interpretation which is applicable to constitutional interpretation is that words should be given their plain and ordinary meaning. Whether the death sentence is a valid and constitutionally recognised form of punishment is to be found in the constitutional provisions set out above. Section 319(1) of the Criminal Code prescribes the death penalty for murder but section 30(1) of the constitution as well as sections 213(2) (d) and 220 (1) (e) thereof read together recognise the existence of the death sentence. Section 30(1) of the constitution must therefore be construed as a whole. Its meaning is plain and unambiguous. It recognises and protects the right to life. It also permits the taking of a person's life in execution of the sentence of death in respect of a criminal offence of which the person has been found guilty in Nigeria. If the death sentence is not recognised by the constitution, it would not have made provisions for appeals to this court and the Court of Appeal when the death sentence is imposed by the courts. The death sentence per se cannot amount to torture or to inhuman or degrading treatment having regard to the aforementioned constitutional provisions that recognise it. The manner of its execution by hanging cannot also constitute cruel or inhuman treatment.

On whether the death sentence is a violation of the fundamental right to dignity of the human person and the right not to be subjected to torture, inhuman and degrading treatment, I will at this stage consider some of the foreign cases cited to us.

In the case of Pratt & Morgan v. Attorney-General, Jamaica (supra) the Judicial Committee of the Privy Council had to construe section 17 of the constitution of Jamaica which is similar to sections 30(1) and 31(1) (a) of our constitution. Section 17 provides:

"17(1) No person shall be subjected to torture or to inhuman or degrading treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica before the appointed

day."

Death sentence was passed on the appellants in 1979. They had been on the death row for nearly fourteen years. In allowing the appeal their Lordship of the Privy Council held that:

B "..... section 17(2) of the constitution merely authorised descriptions of punishment which could be imposed by the court and did not prevent the circumstances in which the executive intended to carry out the sentence from infringing section 17(1); the execution should follow as swiftly as practicable after sentence of death, subject to allowance of a reasonable time for appeal and consideration for a preview, for an appellate procedure that permitted prolonged delay, for taking advantage of which no fault could be attributed to a defendant, was incompatible with capital punishment;"

D The appeal was allowed because the appellants were held in custody in an agony of suspense for fourteen years.

In the case of Catholic Commission For Justice & Peace in Zimbabwe v. Attorney-General & 2 Ors. (supra), the applicant, a human rights organisation sought an order preventing the execution of four prisoners sentenced to death in February, 1987 and November, 1988 on the grounds that, by March, 1993 when it was proposed that the four be executed, their executions had been rendered unconstitutional in that the dehumanising factor of the prolonged delay between the dates of sentence and the date of the proposed execution, viewed in conjunction with the harsh and degrading conditions under which they had been confined, contravened section 15(1) of the constitution of Zimbabwe.

G The constitutionality of the death sentences which had been imposed was not in issue. What was in issue was whether, even though the death sentences had been the proper punishments to have been imposed, supervening events had established that the prisoners' execution on the appointed dates would have constituted inhuman or degrading treatment H and in violation of section 15(1). Section 15(1) of the constitution of Zimbabwe provides:

"15(1) No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment."

The Supreme Court of Zimbabwe ordered that the death sentences imposed upon the four prisoners be vacated.

In these cases the constitutionality of the death penalty as a form of punishment was not being challenged as is done in this appeal. The question in those cases was the delay in carrying out the death sentence and the conditions under which the prisoners were held which gave rise to the issue of inhuman and degrading punishment. In those cases there was evidence of harsh conditions and the agony the prisoners went through. The courts had the benefit of affidavit evidence of the actual conditions.

In those countries where the right to life is not qualified the death penalty was held to be unconstitutional but where it is qualified as in section 30(1) of our constitution, the death sentence which is provided by section 319(1) of the Criminal Code is not inconsistent with the constitution.

The well researched brief and the forceful arguments of Mr. Agbakoba, S.A.N. cannot propel this court to usurp the function of the legislature. The court cannot abolish the death penalty in this country even if there is a consensus for its abolition. To do so as has been canvassed will amount to judicial legislation. I therefore hold that section 319(1) of the Criminal Code of Lagos State is not inconsistent with section 31(1) (a) of the constitution and the death sentence or the manner of its execution does not biolate sections 30(1) and 31(1) (a) of the constitution.

The complaint of the appellant of the breach of his right under section 31(1) (a) of the constitution cannot be entertained by this court as a court of first instance. If his compalint is that as a result of the long delay in carrying out the sentence of death he was held under conditions which amounted to torture, inhuman or degrading treatment, he should have proceeded under section 42(1) of the constitution which provides:

"42(1) Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress."

This court has no original jurisdiction to entertain the compalint.

For the above reasons and the reasons so ably set out in the judgment of my learned brother Iguh, J.S.C. with which I am in entire agreement, I too would hereby dismiss the appeal.

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