LEX VISION

Contemporary Issues in the Nigerian Legal Landscape.

A Compendium in Honour of
Prince Lateef Fagbemi, SAN

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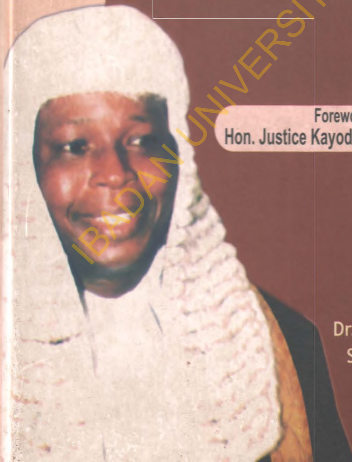

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CHAPTER SIXTEEN

THE EVIDENTIAL VALUE OF THE DOCTRINE OF FAIR HEARING IN THE ADMINISTRATION OF JUSTICE: A GENERAL EXAMINATION WITH SPECIFIC FOCUS ON THE NIGERIAN STATE.

S. A. Fagbemi*

ABSTRACT

The principle of fair hearing is an important concept in our inquisitorial justice system. The principle cuts across several field of laws namely Constitutional Law, Administrative Law, Law of Tort etc, and above all, the observation of the concept is better felt in the Law of Evidence as regard any adjudicatory proceedings, be it judicial or administrative, hence, where the principle of fair hearing has been violated and or trampled upon during adjudicatory processes, the proceedings would be declared null, void and of no effect whatsoever.

Due to the importance of the principle of fair hearing, it has been observed that many a time, litigants cry wolf were there is none by knowingly or unknowingly raise the issue of fair hearing even where an adjudicatory body had followed due process in the proceeding that affect their interest thinking that the mere invocation of the concept is a magic wand that will render the proceedings before such body to be set aside without more and thereby escape the wrath of law. Because of this apparent misconception on the part of litigants and their counsel, the focus of this paper is to examine in minute detail the evidential value of the principle of fair hearing. In doing this, references will be made to decided cases to expose the import of the concept and thereby educate litigants on what constitute breach of fair hearing in legal proceedings so as to prevent the invocation of the principle on frivolous grounds.

1. INTRODUCTION

Prior to the establishment of British courts in Nigeria, the judicial system consisted mainly of the customary courts system with unwritten rules of practice and procedure, and evidence.[1] There were of course Islamic courts in some parts of the country, with the rules of practice and procedure and evidence based on the Quran written in

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Arabic and known only by Imams and Alkalis. All these courts have now suffered considerable changes and have largely been put on statutory bases with laid down rules governing practice, and procedure, and evidence.[2] The courts established by the British administration and subsequently developed by the Nigeria Legislators are the Supreme Court of Nigeria, the Court of Appeal, the High Court and other inferior and superior courts of records[3].

As at the time of passing the Evidence Act in 1943[4], Nigeria had a unitary form of government. The application of the Act was therefore country-wide. This universal application of the Evidence Act continued also after the introduction of the Federalism in Nigeria and was brought about in this ways: First, the Evidence Act, though in existence before the 1960 Constitution of the Federal Republic of Nigeria, is deemed to have been made under the Constitution by virtue of Section 3 of the 1960 Constitution. In the 1960 and 1963 Constitutions, there were two Legislative Lists namely: the Exclusive Legislative List and Concurrent Legislative List. The Federal Legislature, then called Parliament could legislate for the whole country over any matter in the Exclusive Legislature List and its power in this respect also extend to matters of evidence which were incidental to the subject. Under the List, in the case of subjects in the Concurrent Legislative List, the Parliament, for the whole country, or the state legislature for the state, could legislate on them. Either of these legislative houses is also empowered to legislate on matter of evidence incidental or supplementary to that subject. Where, however, there was a conflict between enactments by the two legislative houses, on a matter of evidence or any matter whatsoever, that of the Federal Legislative prevails while the State law is null and void on the ground of such inconsistency.

In the case of *Nuhu v. Ogele*[5] where the appellant placed reliance on section 29 of the Kwara State Area Court, Edict of 1967 and contended that Section 33 (3) of the 1979 Constitution, then still in vogue and extant, was not absolute and that its construction should respect the nature of the particular Courts Rules, the Supreme Court, per **Pats Acholonu** JSC stated thus:

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"To suggest that the provision of the constitution should be constructed subject to the prescription of an inferior statute is a legal apostasy. Nothing could be further from the truth, the provision of the Constitution is all embracing in its operationality and has general application and any law inconsistent with such provisions would have done violence to the spirit of the organic and primary law and therefore to the extent of such inconsistency is null and void and of no effect – see section 1.(3) of the Constitutions"[6]

The above position is further reinforced by the 1979 and 1999 Constitutions of the Federal Republic of Nigeria. The universal application of the provisions of the Evidence Act in Nigeria is further consolidated by the inclusion of Evidence in the Exclusive Legislative List.[7] However, some states have re-enacted the Evidence Act as the states laws dropping only those provisions that deal with matters purely Federal in nature. For example, service of witness summons outside the state of issue.[8] Similarly in the North, Panel Code was substituted with Criminal Code, where Criminal Code was referred to in the Evidence Act. The purpose of the foregoing is to make for the constitutional validity of the Evidence Act. It should however be noted that the provision of the Constitution which has important bearing upon the Law of Evidence amongst others is the provision of section 36 of the 1999 Constitution.

In view of the above, the focus of this paper is to discuss the evidential value of the doctrine of fundamental human right to fair hearing as enshrined in section 36 of the 1999 Constitution. It is observed that most Litigants think that once they raise or argue that their fundamental human right to fair hearing have been violated by an adjudicatory body – whether judicial or administrative-, they have struck a goldmine rendering the proceeding of such adjudicatory

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body *strict sensus* null, void and without effect whatsoever, while this may be true, in some instances, it may not be so in others.

This paper will therefore bring into fore the procedural application of the principle of fair hearing in order to throw light on various areas usually overlooked by the litigant and their solicitors when invoking the doctrine. In doing this, the paper will discuss in minute detail each subsection of section 36 of the 1999 Constitution. The evidential value inherent therein, the paper will also examine decided cases of the superior Courts of record for proper understanding of the entire section 36 of the 1999 Constitution.

2. DOCTRINE OF FAIR HEARING

Tthe Nigeria Constitution is a statutory form of the Common Law Principle of Natural Justice. In this connection, section 36 (1) of the Constitution of the Federal Republic of Nigeria, 1999[9] provides thus:

"*In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality.*

Subsection (4) of Section 36 of the 1979 constitution p provides thus.

"*Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a Court or tribunal...*"

The combine effect of the above provisions, is to ensure that every Nigerian citizen and indeed everyone appearing before any court of law including Native and Customary Courts as a party to either civil or criminal proceedings is given fair hearing within a reasonable time

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by a Court or other tribunal established by Law and constituted in such manner as to secure its independence and impartiality.

Judicial independence and equality before the law are two aspects of the right to fair hearing.[10] Both of them are safeguarded and guaranteed by the Constitution and subsumed in the rules of substantive and procedure laws to ensure fair trial.[11] Thus, prompt and speedy trial is a first condition of fair trial. The question is: Does this mean that only the trial has to be promptly initiated or does it also require an expeditious disposition of the case?[12] If the latter, it is irregular to reserve judgments indefinitely, similarly, joint trials which may unduly prolong a hearing ought to be avoided. On the other hand, an unduly hasty trial is likely to produce unjust results.[13]

Interpreting the doctrine of fair hearing, **Sir Adetokunbo Ademola** C.J. N (as he then was) in the case of *Isiyaku Mohammed v. Kano Native Authority*[14] said as follows:

> *"A "fair hearing" has been held to involve "a fair trial; and a fair trial of a case consist of the whole hearing. We therefore see no difference between the two, the true test of a fair hearing - - - is the impression of a reasonable person who was present at the trial whether from his observation, justice has been done in the case".*

The Nigerian Courts have applied and subsumed the doctrine of fair hearing under the narrow technical sense of the twin pillars of justice – *audi alteram partem and nemo judex in causa sua*. Thus, in the case of *Kotoye v. CBN.*[15] The Supreme Court of Nigeria reiterating the nature of the right guaranteed under Section 33 (1) of the 1979[16] stated as follows:

> *"Clearly, whenever the need arises for the determination of the civil rights and obligations of every Nigerian, its provision guarantees to such a person, a fair hearing within a reasonable time. Fair hearing has been interplayed by the courts to be synonyms with fair trial and as implying that every*

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reasonable and fair-minded observer who watches the proceedings should be able to come to the conclusion that the court or other tribunal has been fair to all the parties concerned - - - thus, fair hearing in the context of section 33 (1) of the Constitution of 1979 encompasses the plenitude of natural justice in the narrow technical sense of the twin pillars of justice – audi alteram partem and nemo judex in causa sua – as well as in the broad sense of what is not only right and fair to all concerned but also seen to be so"[17]

These Latin maxims simply mean that a person cannot be a judge in his own cause and that a person must not be condemned unheard. The importance of these Latin maxims has been recognized from time immemorial. In the English case of *R. v. Sussex Justices Ex parte McCarthy*[18]. **Lord Hewart C.J** said thus:

"It is of fundamental importance that justice should not only be done it should manifestly and undoubtedly be seen to be done"[19]

In practice, the observance of the *audi Alteram partem* principle presupposes that any person who appears before a Court or Tribunal or any similar body, has the fundamental right to be given an opportunity to state his own side of the case or story and where necessary, he must be given an opportunity to assemble his witnesses for the purpose of defending himself. The practical application of this maxim was aptly captured in the English case of *R. v. Chancellor of the University of Cambridge (Dr. Bentley Case)*.[20] In that case, the Court of King's Bench restored to Bentley his Degree of Doctor of Divinity which had been improperly suspended by the Court of the Vice-Chancellor of Cambridge in a proceeding in which Bentley was not given an opportunity to defend himself. For the above reason. **Fortesque J,** said *inter alia:*

"God himself did not pass sentence upon Adam before he was called upon to make his

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defence.[21]

The defect in the definition of the doctrine of fair hearing as stated by **Adetokunbo Ademola CJN** (as he then was) in the case of *Isiyaku Mohammed V. Kano N.A.*[22] lie in the expansiveness of the definition of "a reasonable person".[23] And for this purpose "Fair hearing" implies that the judicial officer is not in any way biased in so far as the suit is concerned. Bias is not founded only on monetary favour, but will include having a fore-knowledge, or a previous knowledge of the facts of the case[24]. The test of bias is not a question of whether the trial tribunal has arrived at a fair result, but whether the trial tribunal has dealt fairly and equally with the parties before it in arriving at the result.[25] In the case of *Elom Onwe Oke & others v. Eze Ogbunya & Other.*[26] In that case, the Defendants/Appellants contended that the Court of Appeal by ignoring their brief and the arguments proffered therein, they were denied fair hearing by the said court. The grouse of the Appellants and which constitute issue No. 1 raised by them was that there was no proper evaluation of the traditional history or acts of possession and that on the balance, the case they put for forward is better than that of the Respondents which if considered would had made the Court of Appeal to give judgment in their favour. The Supreme Court per **Ogundere JSC** upheld this argument and said as follows:

> *"- - - it is implicit in section 33 (1) of the Constitution of the Federal Republic of Nigeria, 1979, which provided for the right to fair-hearing that a trial court ought to hear and consider the evidence on all the issues joined before it. - - - In the same vein an appellate court ought to hear and consider the arguments on all the issues raised before it"*[27]

The Supreme Court had earlier held in the case of *Chief Orisakwe v. Governor of Imo State and other*[28] that:

> *"If the right to fair hearing under section 33 (1) of the Constitution and under the rules of natural justice is be any real right, it must*

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carry with it a corresponding and equal right in the person accused of any misconduct to know the case which is made against him. He must know the evidence in support, not merely bare and unsupported allegations, and then he must be given the opportunity to contradict such adverse or incriminating evidence. This is the right to fair hearing and nothing short of it will suffice"

It is strongly submitted that, the right to fair hearing is fundamental to any judicial and or quasi-judicial proceedings and that where it is breached; the trial is rendered null and void. Invariably, the court has a duty to ask an accused person if he has witnesses he wishes to call in support of his defence. It is also desirable that the relevant question and answer should be recorded.[29] However, it cannot be said that an accused person was denied this opportunity only because he has not been specifically told that he has a right to call witnesses or been asked if he wishes to call witnesses.[30] Thus, in the case of *Okon Udofe and others v. Akpan Aquissiua and other,*[31] the Supreme Court said *inter alia:*

"It is - - - one of the rules of natural justice that a tribunal unless it is otherwise empowered to do so, must base its decision on evidence of some probative value - - - Therefore, where there is absolutely no evidence, judgment given by an inferior tribunal will be a nullity; but if there is evidence, even though there is lack of essential or material evidence a decision given after such evidence had been addressed would not be void but would be voidable only".

One could safely say that there cannot be 'fair hearing' as decreed by the Nigerian Constitution unless the Latin maxims mentioned above are rigorously applied and enforced by Courts. In determining

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whether parties have been given fair hearing in the course of adjudicatory processes, the following issues must be observed strictly.

2.1. PUBLICITY OF TRIAL

Section 36 (3) of the 1999 Constitution provides thus:

> *"The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection (1) of this section (including the announcement of the decisions of the court or tribunal) shall be held in public".*

By virtue of the above provision, the proceedings of court or tribunal whether in civil or criminal cases shall be held in the open court. Section 36 (4) is equally *impari material* with the above provision; the subsection also advocate, the holding of judicial proceeding in public. The purpose of these subsections is to satisfy the requirements that *"justice must not only be done, but it must be seen to be done"*[32] In *Alhaji Gaji v. The State*[33]. The appellant, was convicted in the High Court of Kaduna State of culpable homicide punishable with death; at the trial he gave no evidence and did not call any witness; his counsel's application, for the statement of the prosecution witnesses to be produced were turned down. It was held that:

> *The test of fair trial must rest on the fair view of a dispassionate visitor to the court who had watched the entire proceeding, and it is not possible to say in this case that such a visitor could or would have taken the view that the trial of the suspect was anything but fair.*

The Supreme Court, recently in the case of *Nuhu v. Ogele*[34] examined the intendment of the provision of Section 33 (3) of the 1979 Constitution analogous to Section 36 (3) of the 1999 Constitution and said as follows:

> *"The spirit of Section 33 (3) of the 1979 Constitution postulated and invariably*

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dictated when it held sway that all proceedings of the courts without exception. Save where there was a Constitutional provision to the contrary, (and that is inclusive of rendition of judgment, ruling and orders) should be in open Court - - - -. I hold that no excuse should be advanced in any form to give the impression that the court could sit in camera, and be cabined, confined and cribbed.

In that case the appellant was the plaintiff who instituted an action in Ilorin Upper Area Court claiming a parcel of land from the defendant now the respondent. After hearing the parties, that Court gave judgment in favour of plaintiff i.e. appellant. The respondent appealed to the High Court and framed grounds of Appeal. At the date the matter was set down for hearing, he sought the leave of the court to file an additional ground of appeal making it up to 9 grounds. On that same date, the respondent decided to argue only ground 9. The point in contention and adumbrated in the 9th ground was that the Upper Area Court gave its judgment in Chamber and not in open court and therefore such a procedure did violence to the Constitution. The High Court dismissed the appeal, and made no comment on the other 8 grounds. The respondent then appealed to the Court of Appeal. The Court of Appeal in a reserved judgment allowed the appeal stating in unmistakable terms that the trial in the Upper Area Court was obviously a nullity, having found that the judgment was in chambers. The appellant appeal to the Supreme Court was dismissed on that ground **Honourable Justice Pats Acholonu** of the Supreme Court observed *inter alia* that:

"In the administration of justice it is important to note that justice though intangible was nevertheless worshipped by the Romans as goddess. The symbol of woman holding the Scale of Balance represents justice and in order to get through justice, it is only fair and in accordance with the end of justice that its administration should not be seen as in

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a cloak which the light cannot penetrate".

By virtue of section 36 (4) of the 1999 Constitution, whenever any person is charged with a criminal offence, he shall unless, the charge is withdrawn, be entitled to a fair hearing *in the public within a* reasonable times by a court or tribunal. In determining what is a reasonable time for the trial of a criminal case, having regard to the nature and circumstance of the case, the Supreme Court had in the case of *Okeke v. The State.*[35] Identified four factors as a guide to wit:

> *"the length of the delay, the reasons given by the prosecution for the delay, the responsibility of the accused for asserting his rights and the prejudice to which the accused may be exposed."*[36]

In that case, the appellant was arraigned on 26/5/98 on a charge of murder of one Kenneth Ojukwu, the appellant, the deceased and some other persons living at Onitsha traded in foreign monies. The trader contributed foreign monies, the accused also contributed for the deceased to take to Lagos in the course of some businesses in foreign exchange. He was to travel by road from Onitsha, but as the bridge linking the town to the Western bank of River Niger at Asaba was blocked by an accident, he decided to go to Enugu to travel to Lagos by air. The appellant offered the deceased a lift to Enugu in his Car. The appellant borrowed a Volkswagen Car from his sister and headed towards Enugu, but after a few kilometers, somewhere between Umunya and Akwa, the appellant took out the motor jack inside the Car, which was in motion, with him at the wheel, and hit the deceased on the head. There was a struggle between the deceased and the appellant whereby the appellant used Penknife to stab the deceased at the neck. All along, the appellant knew the deceased carried foreign currency, including the appellant own contribution. The appellant made three voluntary statements in each of which he admitted attacking the deceased with the motor jack, and a knife. However, during the trial, the appellant denied ever making the first two statements voluntarily to the police, but after trial within trial, learned trial judge ruled that they were voluntarily made. The third statement to the police was not challenged and it was also admitted in evidence.

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At the trial, the sum total of the appellant defence was that, he in fact hit the deceased on the head with a heavy motor jack and stabbed him with a knife in the neck, but he did not want to kill him. He only wanted to create a scene so that he would have police trouble whereby his father would allow him to marry certain girl the father objected to. He further claimed to have smoke cocaine, at the end of the trial, the learned trial judge found that the defence of intoxication did not avail the appellant because if the appellant had any impairment of the brain, it was self induced as he deliberately took cocaine. He therefore found the appellant guilty of murder. The appellant appeal to the Court of Appeal was dismissed. Thus, he further appealed to the Supreme Court. At the Supreme Court, the appellant departed entirely from the issues canvassed in the two lower Courts and contended among others that there was no fair hearing at trail court because of the delay of about seven years in contravention of Section 33 (4) of the Constitution of Federal Republic of Nigeria 1979 (Now Section 36 (4) of 1999 Constitution) and that the Court of Appeal erred to affirm conviction based on that trial. The appellant relied on the case of *Effiom v. the State,*[37] and argued that in considering whether an accused person is tried within a reasonable time the crucial period begins with the arraignment and ends with the judgments and that in the instant case, the trial lasted over 6 years. Rejecting this argument, the Supreme Court said as follows:

> *"Applying these factors to the facts of this case, it cannot be denied that a period of 6 years for the trial of a murder case is rather too long. But other factors must be considered. I have examined the record for the reasons for delay I share the view of learned counsel for the respondent that the delay, were beyond the control of the trial court. Indeed the delay could not be laid at the door of the prosecution or the trial court. There were trials within trial to determine whether extra judicial statements made by the appellant were made voluntarily as he challenged the voluntariness of the making of those statements. That was an assertion of his right.*

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At a stage his counsel absconded and a new counsel was arranged for him. The appellant rejected the new counsel and had to be given time to brief a counsel of his choice, Again, this is another assertion of his right. In the course of the trial, the trial Judge was transferred to another Division. To avoid what would have caused an excessive delay by a trial de novo before the new judge posted to the Division, where the trial was going on, it was thought prudent to apply to the Chief Judge of the state to issue a warrant to enable the Judge trying the case to continue. All these took time. The reasons for the delays in this case were not like the reasons for the delays in Effiom. I can see no prejudice done to the appellant in this case - - -"

The requirement of public trial in Section 36 (3) and (4) is meant for the use of everyone without discrimination. Thus every aspect of criminal proceedings right from arraignment to the time ofdelivery of judgment must be conducted in public for the proceedings to be valid. In *Edibo v. The State*[38], where the plea of the appellant and other accused persons was taken in the Judge's Chambers. The Supreme Court per **Tabai JSC** declaring this procedure null and void said as follows:

"- - - *The proceeding of the 13th of January 1998 where* the plea of *the Appellant and others were taken in the judge's chambers was not only irregular; it was fundamentally defective rendering the entire proceedings null and void. I hold in the circumstances that this appeal succeeds on that issue. The appeal is accordingly allowed and the judgment of*

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the court below set aside. The entire proceedings of the learned trial judge including the conviction and sentence of the appellant and others tried along with him contravened the provisions of section 33 (3) of the 1979 constitution and same is hereby declared null and void and is set aside".[39]

It should be noted that the power of the Supreme Court, under its Rules[40] to sit in chambers to dismiss an appeal is limited to non-contentious applications and was held in two cases of *Chime v. Ude*[41] and *Oyeyipo v. Oyinloye*[42] not to be unconstitutional, the said Rules having been made pursuant to Section 216 of the 1979 Constitution[43] and indeed made to achieve the very fair hearing guaranteed in Section 33 of the 1979 Constitution. It therefore means that, once the order sought to be made is contested, the matter must be taken in the open court. In spite of the foregoing, the requirement that every judicial proceedings must be held in public still admit few exceptions, thus, where a case involve an infant, or where the court room is small and cannot take large number of people, the court may be decongested. Similarly, the court may order production of official documents in cameral on the ground of public interest. In *Olalere Adebayo v. Concord Press of Nigeria Ltd and others.*[44] The plaintiff who was a Commissioner in the Executive Council of Oyo State sued for libel and the defendant pleaded justification and relied on the minutes of the Executive Council of the State. The state Attorney-General filed a Certificate in Court claiming privilege over the minutes, on the grounds of public interest. The court overruled the claim, ordered its production and tendering in private instead of in public. It was held that:

"(a) When in a proceeding before the court, a party's case is based on cabinet's minutes, it will not be in the interest of such litigant's fundamental right under section 33 (1) of the 1979 constitution if such minutes cannot be produce and tendered in Court but its production and tendering in evidence may be

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made in private. (b) when a proceeding is conducted in private under Section 33 (3) of 1979 Constitution, only parties, their lawyers and court officers may be allowed in the court. Others like the newspapers, other media, non-parties and legal practitioners not acting for the parties will be excluded from the proceeding".

To avoid controversy, the phrase "public trial" was defined in the case of *Edibo v. The State*[45] to mean:

> *"for the use of everyone without discrimination. Anything, gathering or audience which is not private but public"*[46].

2.2. PRESUMPTION OF INNOCENCE

By virtue of Section 36 (5) of the 1999 Constitution, every person who is charged with criminal offence shall be presumed to be innocent until he is proved guilty. Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts. The proviso to section 36 (5) of the 1999 Constitution is *impari material* with section 139 of the Evidence Act.[47] which provide inter alia that the burden of proof as to any particular facts lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particulars person, but the burden may in the course of a case be shifted between parties. Thus, where an accused person raise the defences of intoxication, insanity, self-help, provocation or alibi etc, the burden of proofing such defences lies on him and the defences will be treated as particular facts to which he alone has the prerequisite knowledge.

In the case of *John Peter v. the State.*[48] Appellant was arraigned before High Court of River State on a charge of murder. It was alleged that the appellant shot one Solomon Nwokocha over a disputed land between his family and that of the deceased family and that he had severally in the past issued a death threat to the deceased and his

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family over the disputed bush, two witnesses testified at the trial that on the fateful day, they heard a gun shot close to their farm and heard the voice of the deceased shouting in agony that the appellant had killed him and that when they moved towards the scene where the shout was coming from, they saw the appellant standing with a gun which he was pointing at the deceased. The appellant denied the charge and pleaded alibi. He claimed to have been in his house throughout the eventful day and did not go to the bush. The plea was rejected by the trial Court and the Court of Appeal, his further appeal to the Supreme Court was dismissed, the Court held that:

> *"The onus is on the accused person to establish on the balance of probabilities, the plea of alibi, raised by him".*

It should be noted that where an accused person set up a defence of alibi and any other defences, the prosecution has the duty to investigate such defence. In the case of *Patrick Ikemson v. The State*[49] the Supreme Court of Nigeria having held in ratio 14 that the defence of alibi implies that the accused person was elsewhere at the time when the offence charged was alleged to have been committed in a particular place, went further to hold in ratio 15 as follows:

> *"Once the defence of alibi is raised by an accused person ,it is incumbent on the prosecution to investigate the alibi in order to find out if it is true that the accused person was not at the scene of the crime when it was committed, or to rebut the alibi if it was false"*[50]

Thus, in the case of the *State v. Onyeatoelu*[51] where it was found that the accused person had no any relationship or nexus with the deceased child having been found that the prosecution witnesses gave copious and incriminating evidence against one Benjamin Enoragbon and his elder sister and that the D.P.P for inexplicable reason charge only the accused person for conspiracy to murder and murder, **Edokpayi j**, held that:

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"In fact, the existence of a probability that someone else might have killed the deceased in itself exculpate the accused by virtue of Section 138 (3) of the Evidence Act for having only burden of proving the reasonable. doubt which provides that: 'If the prosecution prove the commission of a crime beyond reasonable doubt the burden of proving reasonable doubt is shifted to the accused".

To displace the presumption of innocence on the part of the accused person, the prosecution must prove the offence alleged beyond reasonable doubt. Prove beyond reasonable in this instances, it is submitted, does not mean absolute certainty, since this may be very difficult to attain in any human adventure, however, the term entail high degree of cogency consistent with an equally high degree of probability. Hence, the stake is very high. In *Ahmed v. State.*[52] **Anthony Iguh JSC** said as follows:

"Proof beyond reasonable doubt stems out of a compelling presumption of innocence inherent in our adversary system of criminal justice. To displace this presumption, the evidence of the prosecution must prove beyond reasonable doubt, not beyond the shadow of any event, that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure including the administration of criminal justice. Proof beyond reasonable doubt means what it says, it does not admit of plausible and fanciful possibilities but it does admit of a high degree of cogency, consistent with an equally high degree of probability".

Thus, save the above proposition that an accused person bears the burden of proving any particular facts within his knowledge, the burden of proving the guilt of the accused person beyond reasonable

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doubt still lies absolute on the prosecution which burden never shift.

2.3. SECTION 36 (6) OF THE 1999 CONSTITUTION

Section 36(6) is central to the doctrine of fair hearing, this is because, the subsection contain several sub-paragraphs, which had important bearing on the principle of fair hearing, the breach of which will render any judicial proceeding null and void irrespective of how well conducted the proceeding, may appears to be.

These sub-paragraphs will now be considered in turn in order to show their evidential value: Section 36 (6) provides thus:

> "*Every person who is charged with a criminal offence shall be entitled to:*

A. Be informed promptly in the language that he understands and in detail the nature of the offence against him.

Section 36 (6) (a) is *verbissima verbis* with Section 215 of the Criminal Procedural Act[53] considered in several cases of the Superior Courts of record.[54] It provides for the arraignment of an accused person before a court on a criminal charge. There are two limbs for the requirement of arraignment of an accused in court thus:

(i) that the charge or information shall be read over to the accused person and

(ii) that the charge or information shall be explained to him in the Language he understands to the satisfaction of the court.

An arraignment is not a matter of mere technicality; it is a very important initial step in the trial of a person on a criminal charge. All the authorities recognize that where there is no proper arraignment, there is no trial. "Failure to comply with any of these conditions will render the whole trial a nullity.[55] However, the controversy surrounding the provision of Section 36 (6) (a) is whether the provision is applicable to the arraignment of the accused in court or to charge by the police.

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There are conflicting decisions of the Supreme Court on this point. For instance, in the case of *Amala v. The State*[56] Where the appellant attacked his arraignments in
court on the ground that the record of proceedings does not indicate that the charge apart from being read over to the appellant was also explained to him to the satisfaction of the court and that there was nothing in the printed record to show that the mandatory provisions of Section 215 and the Criminal Procedures Law, Cap 31, Laws of Eastern Nigeria applicable in Imo State and section 33 (6) of the 1979 constitution where strictly complied with. The Supreme Court in rejecting this argument said as follows:

> *"I have had cause in the past to state that Section 33 1(6) (5) (of the 1979 Constitution essentially concerns the entitlement of a person to be informed promptly in the language that he understands and in detail of the nature of the criminal offence with which he is being charged and he has nothing to do with the arraignment or plea of an accused person before a trial court which is fully covered by section 215 of the Criminal Procedure Act. The police at the conclusion of their investigation of a criminal offence arrest the suspect where a prima facie case is established against him. The stage at which a suspect is formally "charged" with a criminal offence by the police after he has been arrested at the conclusion of the investigation of the offence leveled against him must be distinguished from the stage of which he is "arraigned" and his plea taken before the trial court. I think, Section* 33 (6) (a) of the 1979 *Constitution concerns the first stage at which time an accused is charged by the police and not the stage at which he is arraigned and his plea taken before the trial court. In may view, all reference by learned*

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appellant's counsel to Section 33 (6) (a) of the 1979 Constitution in connection with the validity or otherwise of the arraignment or plea of the appellant before the trial court are, with respect, misconceived".

The same Court had earlier on this, point in the case of *Adeniyi v. The State*[57] held that: *"By the combined effect of these provisions a valid arraignment of an accused person must satisfy the following requirement: 1.The accused shall be placed before the court unfettered unless the court shall see cause to the contrary or otherwise order. 2. The charge or information shall be read over and explained to him in the language he understands to the satisfaction of the court by the Registrar or other officer. 3. he shall then be called upon to plead instantly thereto".*

It is submitted that a calm view of the provision of Section 36 (6) (a) support the decision of the Supreme Court in the case of *Adeniji v State*[58]. This is because; it will be absurd to reason that the provision of the sub-paragraph should be observed at the level of the arrest of a suspect by the Police. As a matter of fact, to suggest that Police should observe this provision when it is not yet certain whether the suspect will eventually be arraigned in court would work injustice to a suspect. It is the view of this writer that the provision of section 36 (6) (a) is not intended to be observed by the Police. The duty of the Police must stop at only informing the accused person of the nature of the offence against him and no more, while the process of reading and explanation of the charge to the accused person and taken his plea should be left to when he is properly arraigned in court.

It has also been contended in several cases that in order to put into effect the provision of Section 36 (6) (a), the trial judge must record that the provision was observed to the satisfaction of the court and that failure to add that caveat vitiate the proceedings and

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render the pleas defective, null and void."[59] It is submitted that, it will be stretching the provisions of Section 36 (6) (a) to a point of unreasonable absurdity by reading into it that the trial Judge must, or indeed, shall expressly record that the charge was explained to the accused to his satisfaction before taking his plea. This is because, no Judge will proceed to take the plea of an accused person arraigned before him if he is not satisfied that the charge was read over and explained to the accused person and that he understood the contents thereof before entering his plead. In this connection, reference may be made to the provision of Section 150 (1) of the Evidence Acts[60], which state as follows:-

> *"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"*

It should be noted that: The arraignment of an accused person, before a trial court is both a judicial and on official act, thus, the legal maxim *omnia praesumuntur rite et solemnizer esse acta donec probitur in contrarium* - a legal presumption that judicial and official acts have been done rights and regularly until the contrary is proved – is fully appreciable here. Hence, once the record of the court contain the essential part that the charge was read over and explained to the accused person before he enters his plea, the mere fact that the judge did not record verbatim that the charge had been read over and explained to the accused to his satisfaction will not render the proceedings null and void.[61]

B. Be given adequate time and facilities for the preparation of his defence.

The right to be given adequate time and facilities for the preparation of his defence presupposes that an accused person must be given enough time to look for and assemble material witnesses and documentary evidence with which to prepare his defence. In the case of *Olawoyin v. Commissioner of Police*[62]. There was nothing on the

record of the case to show that an opportunity was given to the appellants to give their evidence on oath. It was agreed that the above quoted provision of the constitution entitled each appellant to give his own evidence on oath and that, having not been given such an opportunity, they were not given a fair hearing within the meaning of Section 22 (2). It was held, however, that the question whether there has been a fair hearing is one of substance, not of form, and must always be decided in the light of the realities of any particular case. In this case, the appellants had failed to establish any prejudice against them from the omission to give them an opportunity to give evidence on oath. They had therefore failed to show that in fact the hearing was unfair. As to the requirements that an accused person shall be entitled to obtain the attendance of witnesses to testify on his behalf before the court, this can mean no more than that the court must take all reasonable steps to ensure that the defence witnesses attend the court to give evidence.[63] Thus, if an accused person intends to call witnesses, he must take timeous steps to have them at his trial ready to give evidence at the stage the defence open, which means he must summon them in advance. He cannot complain if, seeing that he has not summoned them, the trial court refuses to grant him an adjournment for the purpose of summoning witnesses when he is called upon for his defence[64] However, if full opportunity, is not given to call defence witnesses, and there is some reasons to suppose that defence witness would have given materials evidence for the defence, an appeal court may well hold that there has been a failure of justice.[65]

C Defend Himself in Person or by Legal Practitioner of His Own Choice.

The right of the accused to the legal practitioner of his own choice under Section 36 (6) (c) is to ensure maximum compliance with the principle of fair hearing. Therefore, where an accused person is denied this fundamental requirement, the decision of the court will be held null and void. In *Peter Uzodima v. Commissioner of Police*[66] where the appellant was accused, tried and convicted of stealing by an Area Court which refused to allow his counsel to represent him at the trial because section 390 of the Criminal Procedure Code denies a

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right of audience to lawyer. He alleged a breach of his fundamental right under Section 33 (6) (c). On appeal, it was held that Section 33 (6) (c) of the constitution was intended to do away with any law or rules which denied representation by counsel in criminal prosecution. Consequently, Section 390 of the Criminal Procedure Code which is in conflict with section 33 (6) (c) of the constitution is null and void.[67]

The truth about the Constitutional provision to give right of audience to parties 'counsel is for the poor as well as the rich and this is an indispensable safeguard of freedom and justice.[68]

The constitution expects that even the guilty as well as the innocent should be entitled to a fair trial irrespective of whether or not he is tried in an Area Court.[69]

In *Gwonto & others v. The State.*[70] The principles were clearly noted by the Court of Appeal thus: (a). that the provisions of section 33 (6) (c) are mandatory, the word "shall" having been used. (b). the record of proceedings at the court must show compliance with the provisions of Section 33 (6) (c) otherwise there will be inference that they have not been complied with and such proceedings will be set aside. (c). Section 33 (b) (c) cannot be waived by counsel for an accused as the right is not that of counsel but the accused. (d). non-compliance by the court with section 33 (b) (c) is a fundamental defect amounting to on illegality and not a mere irregularity and (e). where any fundamental right enshrined in the Constitution has been denied or withheld no provision of any other enactment can save the illegality created by its non-compliance.

The Supreme Court in the recent case of *Comptroller MPS and ors v. Adekanye & 25 Others*[71] opined that:

> "It is manifest that the 2nd respondent had manifested his intention by virtue of Exhibit A, that he would prefer Mr. Femi Falana to represent his interest in this appeal, it is unfortunate that his wish in this regard appears not to have been respected. Be that as

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> it may, bearing in mind that it is a cardinal principle in the administration of justice that a party to a suit ought to have the right to have a legal practitioner of his choice to defend his interest in any cause or matter, leave was granted to the applicant as prayed".

In that case, the applicant had filed a motion on notice wherein he prayed the court for the following order amongst others "an order permitting Femi Falana Esq of Falana and Falana Chambers to represent the 2nd Respondent herein". The applicant attached to the said motion a letter he wrote to his former counsel one Mr. Osuala wherein he expressed the intention to have Mr. Femi Falana to represent his interest in the case. The letter was market exhibit A. In spite of this letter, the former counsel filed the brief on behalf of all the respondents including the applicant, hence, the applications to have Mr. Femi Falana as his legal representative.

The problem with the right to legal representation is not only whether or not an accused is able to afford legal representation but also how far he should be able to insist on a particular legal practitioner to defend him.[72] In *Obafemi Awolowo v. Minister of Internal Affairs.*[73] It was held that the right to a legal practitioner of one's choice protected by the Constitution contemplates the instruction of the legal practitioner "not under a disability of any kind".

The condition that the legal practitioners of one's choice "must not be under a disability of any kind was duly interpreted in the Awolowo's case to mean that if the practitioner is outside Nigeria he must be one who can enter the country as of right and he must be one who is enrolled to practice in the country.[74]

D. Right to Examine in Person or by His Legal Representative Witnesses call in the Case Under paragraph (d) of Section 36 (6), an accused person is entitled to examine, in person or by his legal practitioners the witnesses called by the prosecution before any court or tribunal and obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court or tribunal on the

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same conditions as those applying to the witnesses called by the prosecution.

Failure to observe this provision will render the proceeding of such court or tribunal null and void. In practice, a witness given evidence in the court by answering a series of question put to him by his counsel or by the counsel to the other parties to the proceedings.[75] This act of putting questions to witnesses with a view to obtaining evidence from him is called the examination of the witness.[76] When it is done at the time the witness begins to give evidence, that is called examination-in-chief, and when thereafter the witness is examined by the opposing counsel, that is cross-examination. If after the cross-examination, the party who called the witness wishes to clear some ambiguities arising therefrom, he is free again to examine the witness. This last process is called re-examination .[77] The purpose of the examination of witnesses at the various stages of examination mentioned above is to obtain evidence from witness in proof of the fact in issue and facts relevant to the fact in issue[78], hence, it behooves on the accused person to take timeous steps to ensure that his witness attend court and give evidence in his defence, failing which, he cannot be heard to complain. In *Alhaji Ladan v. Commissioner of Police,*[79] The appellant was charged for receiving money from the first prosecution witness and promised to repay it. This he fails to do. At the trial, after the prosecution had closed its case, counsel for the appellant told the court that he would call the appellant and three others as defence witnesses. Only the appellant gave his evidence, adjournment were given to allow appellant to call other witnesses to no avail. The court refused subsequent adjournment, the appellant appealed. It was held *inter alia* that by virtue of Section 22 (5) (a) of 1963 Constitution, the Court must take all reasonable step to ensure that defence witnesses attend to give evidence, but since the appellants counsel make no reasonable attempt to summon his witnesses, the court was right to refuse adjournment.[80]

E. Right to Free Interpretation of the Court Proceedings

Section 36 (6) (e) of the 1999 Constitution provides thus:

> *"Every person who is charged with a criminal offence shall be entitled to have without*

payment, the assistance of an interpreter if he cannot understand the language used at the trial of the offence:

The language of court is English language, but majority of parties to cases in Nigeria are illiterate, hence, the purpose of the above provision is to allow an accused person to follow court proceedings. The requirement of interpreter becomes necessary only where a person charged with a criminal offence does not understand the language used at the trial.

In the case of *Anyanwu v. The State.*[81] The Appellant was charged along with 2 others for murder. They each pleaded not guilty after the charge had been read and explained to them in Ibo language. At the end of the trial, the appellant was found guilty while the two others were discharged and acquitted. Appellant unsuccessfully appealed to the Court of Appeal and contended that his fundamental right to fair hearing under Section 33 (6) of the 1979 Constitution (Now Section 36 (6) (e) of the 1999 Constitution) was breached in that when the appellant and others were arraigned in court, the charge was read over and explained to them in Ibo language, which presupposes that the appellant understood only the Ibo language. It was however, found on the court's record that the Appellant was civil servant and in fact gave his evidence in English language. It was held that:

> *"The use of an interpreter only becomes mandatory where a person charged with a criminal offence does not understand the language used at the trial. In the instant case, the trial of the appellant was conducted in English language. From all indications available at the trial and as demonstrated by exhibits C and D, the appellant understand that language. The fact that the learned trial judge caused the charge to be explained to the respondents in Ibo language before their plea was taken is not sufficient to conclude that the Appellant did not understand the English language...."*

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It should be noted that the interpreter envisage under Section 36 (6) (e) of the 1999 Constitution could be anybody. For example, the Court Clerk or Registrar. However, such interpreter must be fluent in the language understand by the accused person. In *Ajayi v. Zaira Native Authority.*[82] The proceeding at the trial of the appellants in the Native Court were conducted in the Hausa language which the appellants neither spoke nor understood. They were Yoruba speakers by birth and understood English, but not perfectly. The proceedings were interpreted by five different interpreters at successive stages. On appeal, the appellants argued that the ability of these interpreters to interpret satisfactorily was in doubt. It was held that there was a failure of justice within the meaning of Section 382 of the Criminal Procedure Code (the section is *impari material* with Section 21 (5) (e) of the 1963 Constitution which is now Section 36 (6) (e) of the 1999 Constitution.

The burden of showing that an interpretation is incorrect

> as contemplate rests on the accused, thus, where an accused person have problem to understand the language of the court, he must complain early enough either personally or through his Counsel.[83] In the case of *Anyanwu v. The State.*[84] It was held that:
>
> "*The appellant and the co-accused were represented by a counsel throughout the trial. If the appellant and the co-accussed were not being told in Ibo language what was going on their counsel would have raised an alarm. If he failed to do so he cannot complain afterwards*".

F. DUTY OF COURT TO KEEP RECORD OF PROCEEDING

Subsection (7) of Section 36 of the 1999 Constitution provides that when a person is tried for any criminal offence, the court shall keep a record of the proceedings and the accused person shall be entitled to obtain copies of the judgment in the case.

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In the case of *Anyanwu v. The State.*[85] It was contended that the trial judge breached Section 33 (7) of 1979 Constitution in that hefailed to record that an interpreter was provided to interpret the evidence of the prosecution witnesses given in Ibo language into English language in which the learned judge recorded the proceedings. The court observed as follows:

"The provision of Section 33 (7) of the Constitution requires that a court trying any criminal offence shall keep a record of proceedings. It is therefore absolutely important for courts involve in the trial of such offences to scrupulously keep the record of the proceeding in accordance with the demands of the Constitution. Failure so to do may vitiate the trial as a nullity".

The court did not however see anything wrong in the proceeding of the trial Court in *Anyanwu's* case as there was nothing on record to show that the appellant had suffered any miscarriage of justice due to the failure of the court to record that an interpreter was provided to interpret the evidence of the prosecution witnesses. The Court further observed that on the day the appellant and others were arraigned in court, the Clerk of the Court was the person who read the charge and explained same to the appellant and it was assumed that the Court's Clerk was the person who subsequently acted as interpreter in this case.

It is submitted that the attitude of the Supreme Court in this case is speculative and amount in principle to working on mere conjecture without any legal basis. The Court's attitude, it is further submitted, run contrary to the intendment of the provisions of Section 36 (7) of the 1999 Constitution on the following grounds. Firstly, a close examination of the wording of the provision of Section 36 (7) shows that the operative word in that subsection is the word "shall". It has

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been severely held by the courts that the word "shall" in an enactment is predatory rather than a mere directive, compliance is therefore binding and not left to the discretion of the person to whom the enactment imposes the duty.[86] It is equally a fundamental principle of law that a court of law is not entitled to make a speculation to reach a finding.[87] Another fundamental stipulation of section 36 (7) is the requirement that the accused shall be entitled to obtain copies of the judgment in the case within seven days of the conclusion of the case. The likely problem with this part of the provision as rightly observed by the Learned Writer, P.A. Oluyede in his book titled **Nigerian Administrative Law** [88] is, who pays for the copies which should be made available to the accused and how many copies is he entitled to? It is assumed that the state is expected to pay for the copies of the judgment if this view is correct. It is submitted that this is most unfair to the victim(s) of the crime and the taxpayers especially if the accused is acquitted on a mere technical ground.[89] In conclusion, the Learned Writer argued that the concept of fair hearing must be considered not only from the angle of the accused but also from the angle of the society at large and the victim of the crime [90] and suggested that the subsection should be expunged from Section 36 of the Constitution.

This Writer shared the Learned Author's opinion that the subsection gives undue leverage to an accused person. However, I disagree with the outright expurgation of the subsection. It is my opinion that the subsection should be amended to impose on the accused person the burden of paying for the copies of the judgment if he so wishes in the interest of fair play.

G. THE PROVISION AGAINST RETROSPECTIVE AND RETROACTIVE CRIMINAL LEGISLATION

Section 36 (8) of the 1999 Constitution provides that: *"No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed."*

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A similarly provision is contained in Section 36 (12) of the 1999 Constitution which provides as follows:

> *"Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law-,- - "*

The rationale for the above constitutional provision is to guide against retrospective or retroactive criminal legislation, in the case of *Godwin Ikpasa v. Bendel State.*[91] The Supreme Court in this case explained the reason for the entrenchment of Section 22 (7) of the 1963 Constitution which is the same as section 36 (8) of the 1999 Constitution . **Sir Udoma JSC** (as he then was) giving the reasons for the provision said *inter alia*:

> *"The provision had sought to protect a person from being prosecuted and punished for an act or omission which when it occurred did not constitute an offence. The reason for the entrenchment of such provisions in the Constitution as a fundamental right would appear to have been two-told. In the first place, the provisions were intended to prevent retrospective legislation in the field of criminal law whereby an innocent act or omission or a non-criminal act when it took place might not over night be converted into a criminal act or omission punishable under the law.... In the second place, the provisions were intended to prevent the imposition of a heavier punishment, for an offence which at the time of its commission could only attract a light punishment; for instance, converting by legislation a simple offence like misdemeanour into a felony which would attract a heavier punishment on conviction".*

In the case of *Ojukwu v. Obasanjo.*[92] The

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Supreme Court considering the provision of Section 37 (1) (6) which stipulates that a person shall not be qualified for election to the office of president if he has been elected to such office on any two previous elections held as follows:

"A Constitution like other statutes operates prospectively and not retrospectively unless it is expressly provided to be otherwise, such legislation affects only rights which come into existence after it had been passed".

Applying this principle to the provision of section 5 of the Failed Banks (Recovery of Debts) and Financial Malpractices in Bank[93] in the case of *Federal Republic of Nigeria v. Ifegwu*[94] where the respondent and five others were arraigned and tried before the Failed Bank Tribunal, Lagos for the offence of conspiracy to commit felony to wit: Fraudulently granting credit facilities to Dubic Industries Limited without lawful authority and in contravention of the rules and regulations of the Alpha Merchant Bank Plc and the regulatory authorities, that is, Section 5 of the Decree No 18 of 1994. The Court of Appeal per **Aderemi JCA** (as he then was) said amongst other that: *"there is no crime known to Nigerian law as fraudulently granting credit facilities"*

On further appeal to the Supreme Court, it was held that:

"Section 33 (8) of the 1979 Constitution which was unsuspended and was then applicable, also forbade retroactivity of criminality as follows - - - It follows that Decree No 18 of 1994 and Section 33 (8) of the 1979 Constitution were in harmony, there was no conflict. That circumstance clearly upheld a fundamental principle of constitutional liberty based on the notion that a person is not to be punished for an act which was not a crime at the time it was done: See Aoko V

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Fagbemi (1961)1 All NLR 400. See also Ogbomor v. The State (1985) I NWLR (Pt. 2) 223 at 233 where this court said that there is immunity from trial and conviction of a person with respect to an act or omission which at the time of its commission or omission did not constitute any offence under the law, no person can be tried and convicted on it".

It follows that a Judge cannot, under the above provision fashion offence for an accused person[95]

H. RULE AGAINST DOUBLE JEOPARTY

Section 36 (9) of the 1999 Constitution provide *inter alia* that no person who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or any offence having the same ingredients as of the previous offence. The above provision is known as **rule against double jeopardy**. The rule against double jeopardy has been recognized under the American Constitution as the **Due Process Clause** and the Supreme Court in that country has used this to strike down not only legislation but also act which on the opinion of the court were unreasonable arbitrary, or unnecessary and arbitrary interference with the right of the individual to his personal liberty.[96] An accused may be retried if he requests the judge to set aside the original conviction as if he seeks a reversal by appealing to a higher court.[97] If a new trial is granted, however, the due process and double jeopardy clauses prevent a judge from imposing a more severe punishment than the punishment imposed by the judge of the first trial.[98] There is no Constitutional restrain on the imposition of a greater punishment if an accused exercises the option of having the verdict of a minor court completely set aside and elects a *de novo* trial – a new trial as if the first trial had never taken place – by a court of general criminal jurisdiction.[99] Unlike an appeal, a *de novo* trial is a completely fresh determination of guilt of innocence. In any event. an accused must be given credit for any part of a sentence already

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served.[100] A single act may be contrary to several different laws and constitute several different offence. Prosecution of each offence is not double jeopardy. Double jeopardy forbids any prosecution twice for the same offence and by the same government.[101] The test of whether an offence is the same is whether the same evidence is required to sustain conviction. Hence, for the rule of double jeopardy to succeed, the following conditions must be fulfilled: (i) that the accused had been tried by a court of competent jurisdiction, (ii) that he was either convicted or acquitted (iii) that he was tried for the same offence or offence having the same or similar ingredients. The defences available to the accused person under this rule is expressed in the latin maxim of *autre vois acquit or autré vois convict*. These defences is similar to the defence of *estoppel per rem judicata* in civil matter.[102]

It should be noted specifically that there is no double jeopardy in trying a person both for a substantive offence and for conspiring to commit the same offence. Similarly, double jeopardy will not prevent both civil and criminal proceedings against a person for the same offence. In other words, a person may be sued to court after he has been acquitted of criminal charge by the court or sued simultaneously for the offence while the criminal trial is on. Similarly an appeal from a court of first instance to a higher court does not constitute a second trial for the invocation of the rule against double jeopardy.[103]

I. A PERSON PARDON FOR A CRIMINAL OFFENCE SHALL NOT BE TRIED FOR THAT OFFENCE AGAIN.

Section 36(10) which provide that no person who shows that he has been pardon for a criminal offence shall again be tried for that offence is a constitutional safeguard for an accused person who has received state pardon from being tried for the same thereafter.

The power to pardon an accused person or person awaiting criminal trial is a Constitutional provision vested in the President of the country or the state Governor.[104] The power is known as **prerogative of mercy** or **amnesty** and once granted, an accused person cannot be tried for the same offence. The power of the executive under this heading shall be exercised after consultation with the appropriate

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Advisory Council of a State. Hence, the Attorney-General cannot revoke and or inquire into why the decision to pardon an accused person is arrived at. In the case of *State v. Ike.*[105] The question which fell to be considered is whether Federal Attorney-General is the proper authority to revoke a state pardon granted by the president on ground of perceived mistake. The High Court of Justice, Benin Divisions per **Aiwerioghene J**. said as follows

> *"The pardon was granted by the President and one may wonder from where does even the Federal Attorneys-General derive his authority to countermand an order of the President of the Federal Republic of Nigeria?"*

J. RIGHT NOT TO BE COMPELLED TO GIVE EVIDENCE IN ONE TRIAL.

By Section 36 (11) of the 1999 Constitution, which provides that no person who is tried for a criminal offence shall be compelled to give evidence at the trial, an accused may remain silent at his trial. The purpose of this provision is to permit the accused to have a fair trial, and most importantly, to protect an accused person from assisting the prosecution which has failed to prove every material ingredients in the case against him by giving them the opportunity of extracting it in the witness box under cross-examination.

It should be noted that where an accused person elects to remain silent at the close of the case for the prosecution, it means that he has rest his case on the prosecution, where he does so, he cannot be cross-examined by the prosecution and the prosecution is not entitled to pass any comment on such silence. Thus in the case of *Tulu v Bauchi Native Authority*[106] It was held that there cannot be an inquisition of an accused with the object of making him admit guilt or explain his motives. However, it may not be wise to do so where the prosecution has rendered damaging evidence[107] since the court will be justified to draw any inference from the available evidence without more.

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In the case of *Olufemi Babalola v. The State*[108]. The appellants were charged for the offence of intent to defraud contrary to Section 339 of the Criminal Code, Laws of Western Nigeria, 1959 and with fraudulently obtaining 8 rolls of carpet from Carpet Royal (Nigeria) Ltd. Ibadan. At the trial, the prosecution called six witnesses in proves of the charge, at the close of the case for the prosecution, none of the accused persons testified on his defence. At the conclusion of the hearing, the trial judge carefully analyzed all the evidence and convicted the accused persons to various prison terms. Their appeal to the Court of Appeal was dismissed, on further appeal to the Supreme Court, **Honourable Justice Nnaemeka – Agu JSC** (as the then was) who delivered the lead judgment observed as follows:

> *"- - - in spite of the massive evidence against the first appellant in the trial court, he elected not to give evidence. He was, of course, within his Constitutional right: See Section 33 (11) of the Constitution of the Federal Republic of Nigeria, 1979. But there is nothing in that sub-Section to preclude the trial court from drawing any inference, which the quantum and quality of evidence called against such an accused person warrant. Hence, whereas prudence dictates that an accused person should not assist the prosecution which has failed to prove every material ingredients in the case against him by giving them the opportunity, of extracting it in the witness box under the fire of cross-examination, it is reckless hazard to insists on the exercise of that right when the prosecution has made out a prima facie case which calls for the accused person's explanation but as did the appellants in this case, he elects not to offer any evidence in explanation"*

Finally, it must be noted that where there is credible weighty and sufficient extraneous evidence in support of a conviction, such a conviction will not be quashed on appeal merely because of the

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breach of the provision of Section 36 (11).[109]

3. CONCLUSION

As could be seeing above, Section 36 of the 1999 Constitution makes elaborates provisions to guarantee fair hearing. Inherent in the provision is the concept of natural justice. Under our inquisitorial system of justice, every litigant before any court or tribunal is entitled to a "meaningful day in court". This phrase according to the Learned Author J.O. Oluyede in his book titled Nigerian Administrative Law[110] has two meanings. In the first place, it suggests that everyone who has a grievance, real or imaginary, should not be denied access to court and once in Court, it should be seen that justice is done in his case. And secondly, any person who alleges that his right has been or is about to be infringed by the Executive must have a right of access to the court. These two postulations is the whole essence of the doctrine of fair hearing.

The importance of the fair-hearing in the administration of justice has been accorded International recognition in two International Charters. For instance, Article 10 of the United Nations" Universal Declaration of Human Rights.[111] provided thus:

> *"Everyone is entitled to full equality to a fair and public hearing by an independent and important tribunal in the determination of his rights and obligations and of any criminal charge against him."*

Similarly, Article 6 of the European Convention of Human Rights and Fundamental Freedom[112] provides in almost identical language, as Section 36 of the 1999 Constitution is to make for fair and public hearing and within a reasonable time of criminal offences by an independent and impartial tribunal established by law.
It is important to note that Article 6 of the European Convention was derived from the United Nations, Universal Declaration of Human Rights, but in the form of a binding treaty as opposed to the purely moral value of the Universal Declaration of Human Rights.[113] Nigeria is a signatory to the United Nation Declaration, as such, the

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fashioning of Section 36 of our Constitution after Article 10 of the Declaration is to make for full observation of the doctrine of fair hearing in Nigeria and this could be seeing in several lines of cases decided by Nigerian Courts in this paper.

However, the limit to which an accused person can invoke any of the provision of session 36 of the Constitution as equally highlighted in various decided cases in this paper is to prevent abuse of the provision and absurdity inherent in overstretching these Constitutional provisions.

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[2]. Ibid.

[3]. See Section 6 (5) of the 1999 Constitution of the Federal Republic of Nigeria. Also by virtue of Section 6 (5), the Nigerian legislature are given power to establish such courts as may be necessary from time to time.

[4]. The 1943 Evidence Act did not become operative until 1945. Its provision was taken mainly from Digest of Law of Evidence of Sir James Fitzgerald Stephen. The Evidence Act presently in operation in Nigeria is the Evidence Act, Cap E 14, Laws of Federation of Nigeria, 2004.

5. (2003) 12 S.C (Pt.1) 32, or (2003) 12 SCM 209 at 220-221.

6. See further the case of Fasakin Food Nig. Ltd v Oshosanya (2006) 7 SCM 79 at 92, A. G Ondo state v. A. G. Ekiti State 8 NSQLR 45 at 108

5. (2003) 12 S.C (Pt.1) 32, or (2003) 12 SCM 209 at 220-221.

6. See further the case of Fasakin Food Nig. Ltd v Oshosanya (2006) 7 SCM 79 at 92, A. G Ondo state v. A. G. Ekiti State 8 NSQLR 45 at 108

7. See Item 23 of the Second Schedule to the 1999 Constitution.

[8] Sections 229 and 230 of *the Evidence Act,* Cap. E14, Laws of the Federation of Nigeria, 2004.

[9] Hereinafter referred to as the 1999 Constitution

[10] Akande J.O. *The Constitution of the Federal Republic of Nigeria,* 1982, Sweet and Maxwell, London, p. 33.

[11] Ibid.

[12] Ibid.

[13] Ibid.

[14] (1968) 1 ALL NLR 424 at 426.

[15] (1988) 11 NWLR (Pt. 98) 419 of 444. The case was reported as Locus Classicus in (2004) 9-12 SCM 222 at 248.

16. See section 33 (1) of the 1979 Constitution, now section 36 of the 1999 Constitution, the case could have been similarly decided under 36 (1) Of the 1999 Constitution.

[17] See also the case of *Federal Civil Service Commission v. Laoye (1989) 4 S C (Pt. 11) 1 at 85/86.*

[18] (1924) 1 KB. 256

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[19] See further Nigerian cases of *Awobokun v. Toun Adeyemi* (1968) N M L R at P. 289. *Garba & Others v. University of Maiduguri (1986) 2 Sc 208.*
[20] (172) 1 Stra. 557
[21] See further *Denloye v. Medical Practitioner Disciplinary Tribunal* (unreported) suit No S C. 91/ 1968 of 22nd Novemebr, 1968.
[22] (Supra)
[23] Aguda T.A. op. cit. P. 6
[24] Ibid. See also the case of *Jeremiah Akoh and others v. Ameh Abuh* (1988) 3 NWLR 696.
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[26] (2001) 5 NSCQR 93 at 117-118.
[27] See further the case of *Denloye v. Medical and Dental Disciplinary Committee (supra); Mallam Sadau of Kunya v. Abudul Kadir of Fagge* (1956)1 FSC 39 at 41.
[28] (1982) 3 N C LR 743.
[29] See *Danjuma Dan Auzinawa v. Kano N.A.* (1956) 1 F.S.C. 27.
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[31] (1973) I S C. 119.
[32] See *R. V Sussex Justice Ex parte McCarthy* (Supra).
[33] (1975) NMLR 96.
[34] (Supra) at 221-222
[35] (2003) 5 SCM 131 at 167.
36. See further the case of *Barker v. Wingo* 407, U.S 514; *Bell v. D.P.P* (1985) A C 937 PC; *Falade v.*
Attorney- General, Lagos State (1981) 2 NCLR 771.
37.(1995) 1 NWLR 507.
38.(2007) 10 SCM 1
39. See further the case of *Nigeria-Arab Bank Limited v. Barri Engineering Nig. Ltd* (1995) 8 NWLR (Pt. 413) 257.
40. Order 6, Rules 3 and 9.
41. (1996) 7 NWLR (Pt. 461) 379.
42. (1987) 1 NWLR (Pt. 50) 56.
43. Now section 236 of the 1999 Constitution.
44. (1982) 3 NCLR 434.
45. (Supra) at P.16.
46. See also the case of Oviasu v. Oviasu (1973) 11 SC 187.
47. Cap E 14 Laws of the Federation of Nigeria, 1999.
48. (1998) 1 LRCNCC 135 at 148.
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48. (1998) 1 LRCNCC 135 at 148.
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50. See also *Adio v. The State* (1986) 3 NWLR (Pt. 31) 714; *Onafowokan v. The State* (1987)3 NWLR (Pt. 53); *The State v. Okelezo* (1998) 1 LRCNCC 12 at 29.
51. (2002) 3 LRCNCC 238 at 268
52. (2002) 1 SCM 33 at 56
53. Cap C41, Laws of the Federation of Nigeria, 2004.
54. See *Eyisi v. The State* (2000) 12 SCNJ 104 at 117; *Erakanure v. The State* (1993) 5 NWLR (Pt. 295) 385; *Okeke The State* (2003) 5 SCM 131 at 157.
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56. (2004) 6 SCM 55 at 88/89.
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58. (Supra).
59. See *Ogunye v. The State* (1999) 5 NWLR (Pt. 604) 548; *Eyisi v. The State* (Supra); and *Idemudia v. The State* (1999) 7 NWLR (Pt. 610) 202.
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80. See also Omega v. The State (Supra).

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