ABUAD Law Journal (ALJ)
Vol. 10, No. 1, 2022, Pages 1-25 https://doi.org/10.53982/alj.2022.1001.01-j

Published by College of Law, Afe Babalola University Law Journal,
College of Law, Afe Babalola University, Km 8.5, Afe Babalola Way,
P.M.B. 5454, Ado Ekiti, Ekiti State, Nigeria ISSN: *2971-7027*
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Jurisprudential Examination of the Constituent Kernels of Fair Hearing

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Abstract

The importance of fair hearing in the administration of justice can never be underestimated in the existence of mankind. Fair hearing is ordained by God and that is why God gave Adam and Eve the opportunity of being heard before giving them punishment, ditto to Cain. The right to fair hearing requires that an individual shall not be penalised by a decision affecting his rights or legitimate expectations unless he has been given prior notice of the case against him, a fair opportunity to answer it and the opportunity to present his own case against. It also requires that the person hearing the matter be an unbiased person and should not have a likelihood of bias. It is founded on the twin pillars of justice expressed in Latin maxim *Audi alteram partem* and *Nemo judex in causa sua.* This article examines the principles of fair hearing andits constituent elements in our adversarial jurisprudence. It achieves this through doctrinal method of research using primary sources; Constitution,statutes,conventionsand case laws and secondary sources materials; books, journal articles and online materials as the methodology of this research.The paper finds that in every adjudicatory proceedings, all parties must be placed on an equal platform and given an opportunity to testify before a balanced and an impartial judge acceptable to all as fair and just. The paperrecommends that Judges and those sitting over disputes must ensure fair hearing principles is observed and eschew bias or likelihood of bias or sentiments which will put a stumbling block to the adjudicatory wheel of fair trial.

Keywords: Jurisprudential, Examination, Constituent, Fair-hearing.

1.0 INTRODUCTION

Fair trial is an indispensable component of the rule of law and the principles of due process. These rules are crucial for the protection against human rights abuses. The right to fair hearing entails that all persons are equal before the law and by implication have the unfettered right to judicial fairness.[1] If there is one single right which has been so constantly, so frequently, and so vigorously agitated in our courts, it is the right to fair hearing.[2]

The right to a fair hearing requires that an individual shall not be penalised by a decision affecting his rights or legitimate expectations unless he has been given prior notice of the case against him, a fair opportunity to answer it and the opportunity to present his own case. It also requires that the person hearing the matter must be an unbiased person and should not have a likelihood of bias.[3]

The rule of fair hearing, strictly speaking, requires that in all controversy between two or more parties, judgement should not be based on a one-sided testimony. All parties must be placed on an equal platform and given an opportunity to testify before a balanced and an impartial judge acceptable to all as fair and just.[4] Fair hearing means giving equal opportunity to be heard to the parties in litigation before the Court. Fair hearing means that an individual will have an opportunity to present evidence to support his or her case and to discover what evidence exists against him or her. Put clearly, fair hearing presupposes that the court shall hear both sides not only in the case but also on all material issues in the case before reaching a decision which may be prejudicial to any party in the case; that the court or tribunal shall give equal treatment, opportunity and consideration to all concerned; that the proceedings shall be held in public and

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[1] YinkaOlomojobi, *Human Rights and Civil Liberties in Nigeria: Discussions, Analyses and Explanations* (Second Edition: Princeton & Associates Publishing Co. Ltd 2018) 115

[2] Oputa C A, *Human Rights in the Political and Legal Culture of Nigeria* (2nd Idigbe Memorial Lectures: Lagos, Nigerian Law Publications 1989) 99

[3] Fabian Ajogwu, *Fair Hearing* (Second Edition, CLDS Publishing 2020) 5

[4] Ibid

all concerned shall have access to and be informed of such a place of public hearing; and that having regard to all the circumstances, in every material decision in the case, justice must not only be done but must manifestly and undoubtedly be seen to have been done.[5] Where parties are given the opportunity to be heard, they cannot complain of a breach of their right to fair hearing. If one of the parties is refused a hearing or is not given an opportunity to be heard, the hearing cannot qualify as fair hearing; and party cannot be said to have heard or given an opportunity to be heard.[6]

Without fair hearing, the principles of natural justice and the concept of rule of law cannot be established and grown in the Nigerian Society.[7] This rule is basically the same in the content as the principles of natural justice which underlines the importance of procedural requirements in every process of adjudication. The rule of fair hearing has been said to be an omnibus provision whose compliance will automatically mean compliance with the rules of natural justice.[8] The importance of fair hearing in our adjudicatory jurisprudence cannot be over-emphasised; it pervades the entire existence and humanity. Failure to abide by the rule of fair hearing renders both the proceeding and its outcome meaningless. This work therefore examines the constituent elements of fair hearing as it affects various facets of life.

2.0 FAIR HEARING AND NATURAL JUSTICE

Fair hearing encompasses the plenitude of natural justice in the narrow technical sense of the twin pillars of justice expressed by the use of Latin expressions, namely: *Audi alteram partem* (which literally means hear the other side) and *Nemo judex in causa sua* (No one should be judge in his own cause).[9] Whereas the first of the expressions means that parties must be given adequate notice and opportunity to be heard, the second means that an adjudicator should be disinterested and unbiased. These two maxims have been aptly described as the 'twin pillars of natural justice.'[10] Fair hearing is synonymous but not coterminous with the natural justice.[11]The two principles of natural justice are inherent in the provision for fair hearing but the provision

[5]*Kotoye v CBN &Ors* (1989) 1 NWLR (Pt. 98) 419 per Nnaemeka-Agu JSC
[6] Ibid at 6
[7]*S . C Eng. Nig v Nwosu*(2008) 3 NWLR (Pt. 1074) particularly at page 306-307 Paras H-B
[8]*Aiyetan vNifor*(1987) 3 NWLR (Pt. 59) 48
[9]Ajogwu (n 3) at 9
[10]*Aiyetan v Nifor* (Ibid)
[11]Osita Nnamani Ogbu, *Human Rights Law and Practice in Nigeria* ((2nd Revised Edition: Enugu Snap Press Ltd 2013)240

goes beyond the rules of natural justice.[12] Underscoring the distinction between fair hearing and natural justice, the oracle of Common Law- Lord Denning, in an English case of *Been v A. E. U.*[13], succinctly but lucidly held thus:

> It will be seen that they are analogous to those required by natural justice but not necessarily identical. In particular a procedure may be fair although there has not been a hearing of the kind normally required by natural justice. Conversely, fairness may sometimes impose a higher standard than that required by natural justice. Thus, the giving of reason for decisions is probably not required by natural justice, but, it has been said, may be required by fairness because "the giving of reasons is one of the fundamentals of good administration

The point being made here is that the foundations of a fair hearing should best be located in those twin principles of natural justice usually expressed in the Latin maxims quoted above: *Nemo judex in causa sua*(No man shall be a judge in his own cause) and *audi alteram partem* (hear the other side). Fair hearing is ambidextrous and both limbs often operate in tandem with synchronic nimbleness. But the Nigerian constitution, as we shall see, goes beyond these hackneyed principles and furnishes additional criteria to ensure genuine fairness, and then expands the contexts in which fair hearing would be required or demanded.[14]

*2.*1 *Audi Alteram Partem*

This literally means, hear the other side; hear both sides. It is a cardinal principle of natural justice that whoever has to decide any case must hear both sides. It is not for nothing that Almighty God gave human beings two ears and eyes to hear and see both sides.[15] In fact, he who shall decide anything without the other side having been heard, though he may have said what is right, but he could not have done what is right.[16]

The gravamen of this maxim is that a party to a dispute must be passionately heard no matter the frivolity of his case before a decision is taken either against him or in his favour.[17]

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[12]*Ori-Ogev A. G. Ondo State*(1982) 3 NCLR 743
[13] (1971) 2 QB 175, 191
[14] Chinua Asuzu, *Fair Hearing in Nigeria* (Lagos, Malthous Press Limited 2010) 2
[15] OkparaOkpara, 'Right To Fair Hearing (Section 36 of the 199 Constitution)' in OkparaOkpara (Ed) *HumanRightsLaw& Practice in Nigeria* (Vol. 1: Enugu, Chenglo Limited 2005) 181
[16]*Adedeji* v *Public ServiceCommission* (1968) NMLR 102/106
[17] Ben O Igwenyi, *Modern Constitutional Law in Nigeria* (Abakiliki, Nwamazi Printing & Publication Co. Ltd 2006) 371

For any judgment to be legally valid, it should be passed after giving both the parties the right to defend themselves and put forward their side of the story. In accordance with the principle of natural justice, the maxim *Audi alteram partem* is divided into two facets; the first being notice followed by hearing. All the affected parties must be given a notice before the proceedings take place. The notice is given to make the parties become aware of the facts and issue in the case that is going to be adjudicated.[18] This is done in order to give the parties sufficient amount of time in order to prepare for their defence. It is a *sinequanon* of the right to fair hearing.[19] The second facet of*audi alteram* partem is the rule of hearing. The parties should be allowed to represent themselves and state the facts in accordance to their understanding. They should be heard by the court of law.[20]

This rule is said to be as old as the world itself. That no man is to be judged unheard was a precept known to the Greeks,[21] enshrined in the scriptures[22] and traced by an eighteenth-century judge, Fortescue J, to the events in the garden of Eden in *R v Chancellor, University of Cambridge*[23]where he said

> The laws of God and man both give the party an opportunity to make his defence, if he has any…even God did not pass sentence upon Adam before he was called upon to make his defence. 'Adam' (says God) 'where art thou? Hast thou eaten of the tree whereof I commanded thee that thou shouldst not eat?' And the same question was put the Eve also.[24]

The above English authority is a re-affirmation that the right to fair hearing is God ordained. Before God, the omniscient and omnipotent condemned Adam to hard labour, the latter was made to defend himself. The Good Book recorded the drama at the trial of Adam.[25] God also

[18]Ajogwu(n 3) at 18
[19] Ibid
[20] Ibid
[21]De Smith S A, *Judicial Review of Administrative Action* (4thedn: JN Evans 1980) 135
[22] John5:57
[23] (1723) 1 Str. 557, 567-per Fortescue
[24] Per Fortesque J, *R. v Chancellor, University of Cambridge.* In the instant case, the University of Cambridge deprived one Dr. Bentley of his degree without giving him an opportunity to defend himself. The Court held the action of the University authorities to be void because it violated the fundamental principles of natural *justice-the audi alteram partem* rule
[25] Genesis 3:9-12

recognised and ordained the rule of fair hearing and doctrine of justice in the case of Eve[26] God did not rush into punishing Eve on the evidence of Adam.[27]

Similarly, the Bible truly recorded that Cain was offered the opportunity to defend himself. When the Lord asked Cain, "where is Abel thy brother?" Cain replied, I know not: Am I my brother's keeper?"[28] Thus, this recorded the first cross-examination in the history of mankind because Cain was given the opportunity to answer to the serious allegation of murder of Abel.[29]

Admirably, acknowledging fair hearing as God's ordained rights, the Supreme Court of Nigeria in the case of *Garba v University of Maiduguri,*[30] Oputa, JSC, explained this rule thus: "God has given you two ears, hear both sides."

Therefore, from decided cases the following propositions could be inferred as the implication of the *Audi alteram partem* rule:

1. Every party appearing before a tribunal must be given equal opportunity to state his case. He must be given the name of the accuser, and be informed of the accusation against him. It is not enough to invite the person as a witness.[31]
2. A tribunal must base it's decision on evidence of some probative value. It must not take evidence in the absence of the parties.[32]
3. An accused person must be accorded reasonable opportunity to call his witnesses and for them to be accorded hearing
4. It is wrong for an adjudicating body to withhold from an accused the nature of the evidence which had been given against him before purporting to impose punishment on him. He must be given a fair opportunity to correct or contradict evidence given against him.[33]
5. A person who is liable to be affected by any decision, acts or proceedings (whether administrative, judicial or quasi judicial) must be given adequate notice of what is proposed so that he may be in a position to make representation by himself or through someone else on his behalf or appear at the hearing or inquiry, and to answer the case he has to meet.

[26] Ibid
[27] God addressed Eve Thus: "What is this thou hast done? The woman said, the serpent beguiled me, and I did eat." This drama shows that Eve was given the right to defend herself.
[28] Genesis 4:3-12
[29]OkparaOkpara(n 15) at 184
[30] (1986) 1 NWLR (Pt. 18) 550. See also the case of *Council of Federal Polytechnic, Mubi v TLM Yusuf &*Anor (1998) 1 NWLR (Pt 533) 343 SC
[31]*Deduwa v Okororddudu*(1976) 9/10 SC. 329
[32]*Queen v Lt. Governor, Eastern Region* (1975) 2 FSC 46, 489
[33]*Wilson v A. G. Bendel* (1985) 1 NWLR (Pt. 4 572

6. The discretion to grant an adjournment must be exercised judiciously. Where it is exercised capriciously and unreasonably it may amount to a denial of fair hearing.[34]

2.2 *JudexInCausa sua*

This maxim literally means: no one can be a judge in his own case, for if one should be a judge and a prosecutor or a party in a given case, he is bound to be biased. This is a second principle of natural justice which savours on rule against bias or likelihood of bias. This second limb of natural justice doctrine is expressed as the opinion or feeling in favour of one side in a dispute or argument resulting in the likelihood that the judge so influenced will be unable to hold an even scale, the judge or administrator was disqualified.[35] At common law, a court, tribunal or administrative body before making a decision affecting the rights of any individual must be duly constituted in a manner that will endure its impartiality and independence.[36] The rule against bias found judicial anchorage in the most often quoted dictum of Lord Hewart in the case of *R v Sussex JusticesExparte McCarthy*[37] that:

> It is not merely of importance but it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done.

The apex Court stressing the principle of fair hearing as a derivation of natural justice and fundamental to the administration of justice, held in *Okanlawon v State*,[38] per Ariwoola, JSC, thus:

> The principle of fair hearing as constitutionally guaranteed in Section 36 of the 1999 Constitution, no doubt is derived from the principle of Natural Justice with it's twin pillars of "*audi alteram partem"* and "*nemo judex in causa sua*". This principle of fair is no doubt fundamental to the administration of justice. The court is required to conduct trial or hearing of a case with all fairness to both parties to the suit and without bias or partiality in favour of or against either party. It is noteworthy that complaint of breach of fair hearing is usually against the court or tribunal; whether the parties before the court were afforded equal opportunity to fully ventilate their grievances.[39]

The rule against bias ensures that no one becomes a judge in his own case or a matter which he has any form of interest in. The judge must remain an impartial arbiter and umpire between the

[34] *Udo v The State* (1988) 3 NWLR (Pt. 82) 316
[35] Kehinde M Mowoe, *Constitutional Law in Nigeria* (Malthouse Press Ltd 2008) 361
[36] Ibid
[37] (1924) K. B. 256 or (1923 All E. R
[38] (2015) LPELR-24838 (SC)
[39] Ibid at Pp – 52-54, Paras F-G 141

two parties before him, holding the scale of justice in a disinterested manner. Hence, where there is anything that will bring suspicion[40] that justice has not been done in the eye of a reasonable man must be removed.[41] The rule against bias has been held to operate in cases where for instance the judge has pecuniary interest, expresses an opinion on the case that adversely affects the case of other party, supports the prosecutor or the plaintiff or has any business or other interests in the matter before him.[42]

Hence, where a judge has pecuniary (monetary) interest in a cause, his decision cannot be allowed to stand on the ground of the principle of *nemo judex in causa sua*. This informed the Supreme Court's decision in *Garba*v *University of Maiduguri*[43], where the court quashed the decision of an administrative panel set up by the 1st Respondent which was headed by the Deputy Vice Chancellor. There had been riot in the school whereof many property were touched including that of the Deputy Vice Chancellor. The applicant was among those found liable by the DVC's panel. The Supreme Court *coram*Oputa JSC setting aside the panel's findings stated thus:

> It has to be a super human to be able to obliterate from his mind his personal plight to be able to approach their assignments with impartiality, objectivity and fairness required of those acting in a judicial or quasi judicial capacity.

Similarly, in *University of Calabar v Esiaga*[44], the court established that bias may arise from the following situations, namely' pecuniary interest in the litigation, blood filial or other form of personal relationship with any of the parties and natural aversion to the facts of the case will lead to the inability of the judge to naturally suppress his instinctive tendencies with regard to the case.

In the same vein, where the adjudicator has interest in the outcome of a case, this rule is normally applied to quash the decision of such adjudicatory body. This is the rule against bias in whatever form and which can be gathered from the circumstances of the particular case.[45] This rule applies equally to adjudications by judicial and administrative bodies.[46] The test for bias is not whether there was actual bias, but whether there is likelihood of bias which can be gleaned from available

[40] Such factors may be proprietary or pecuniary interest, blood relationship or bias against any of the parties.
[41]Olomojobi, (n 1) at 145
[42]KehindeMowoe(n 35) 361
[43] (1986) 1 NWLR (Pt 18) 550
[44] (1997) 4 NWLR (Pt. 5020) 719 at 745. In the case of *AdegboyeIbikunle v The State* (2007) 1 S. C. (Pt. II) 32
[45]Igwenyi(n 17) at 373
[46]*Okorie v Igbokwe* (2000) 14 NWLR (Pt. 688) 498

facts and circumstances of the particular case.[47] Thus, in *Alakija v Medical Practitioners Disciplinary Committee*,[48] the plaintiff whose name was ordered by the defendant to be removed from the Medical Register for misconduct for period of two (2) yearshad his name restored by the Supreme Court because the Registrar of the Medical and Dental Council, who was the prosecutor (accuser), took part in all the trial proceedings of the Committee which found the appellant liable. The Registrar was thus a prosecutor and judge in his own case.[49] Also, in the case of *Nnamdi Azikiwe University* v *Nwafor*,[50] the disciplinary action against the respondent for examination malpractice was quashed by the Court of Appeal because the members of the Examination Committee who allegedly caught the respondent took part in the meeting of the University Senate which met and ratified the disciplinary action. The members of the Committee acted as judges and complainants which is against *Nemo judex rule.*

It has, therefore, been severally held that blood relationship; business or commercial ties; professional relationship, personal friendship; hostility in the course of trial etc are some of the indices for establishing bias and which can disqualify a judge or a person from acting in a judicial or quasi-judicial capacity.[51]

Implicit in this principle, is also judicial independence and impartiality which also form the cornerstone of the right to fair hearing.[52] An adjudicator must be fair to all parties before him because he has no financial or proprietary gain to make out of the case. Fairness requires the adoption of a clear procedure devoid of partiality.[53]

2.3 **The Basic Exceptions to *Nemo Judex In Causa Sua* Rule**

[47]OsitaOgbu (n 11) at 245. See the case of *Metropolitan Properties v Lannan* (1968) 3 All E. R. 304
[48] (1959) 4 F.S.C. 38
[49] Ibid. The suspicion of bias, once based on reasonable and not fanciful ground is enough to quash a trial, see the case of *Ikomi v State* (1986) 3 NWLR (28) 340 S.C.
[50] (1999) 1 NWLR (Pts 584-588) 116
[51]*LPDC v Fawehinmi*(1985) NWLR 300
[52]*Adio v A. G., Oyo State (*1990) 7 NWLR (Pt. 163) 448 C A
[53]OkparaOkpara (n 15) at185

The Natural Justice principle of *Nemo Judex In Causa Sua* is a principle with some recognizable exceptions. Learned writers have classified with approval, but with variations in their methods of analysis, the exceptions to the *nemo judex* rule.[54]

According to a learned writer in India, Mr. Singh, in his book titled: "The Supreme Court of India as an Instrument of Social Justice**",** he classified the exceptions to be:

i. Necessity;
ii. Contempt;
iii. Waiver; and
iv. Purely Administrative Duty.[55]

Another writer by name Mr. Craig,[56] in his book on Administrative Law, narrowed the exceptions to the first three listed above, while exempting the last one.

The last exception stated by Mr. Singh that is, *purely administrative duty* would be discarded as being of doubtful validity, as all authorities including administrative panels are by law, required to conform with the natural justice rule.[57]

2.3.1 **Doctrine of Necessity**

The doctrine of necessity operates within various situational context, howbeit in times of exigencies, which can however, be colligated in the terse statement of Law that states thus: *"what is not lawful becomes otherwise lawful by necessity."*[58]

Conversely stated, the doctrine of necessity can operate to:

1. Validate actions or acts which are *ipsofacto* unlawful, to be lawful;

[54] Balogun SofiyulahiO, Exceptions to Natural Justice: Nemo Judex In Causa Sua, available online at: https://dnllegalandstyle.com.2017>appraisal-exceptions-natural-justice-nemo-judex-causa-sua-balogun-sofiyulahi-o/.
[55]B Singh, *The Supreme Court of India as an Instrument of Social Justice* (Sterling Publishers PVT Ltd1976)
[56] PP Craig, *AdministrativeLaw* (Sweet & Maxwell 1983)
[57]*Iyeghe* v. *Ahmadu Bello University, Zaria* (2016) All FWLR (pt.851) @ 1377 (CA)
[58]The Governor-General (of Pakistan),PLD (1955) F.C 435

2. In order to streamline and complement the Law, when no other thing can do in the circumstance;
3. Serve as an implied mandate of a lawful sovereign to a rebel government;
4. Waive compliance with due process in times of emergency or exigency; and
5. Place the welfare of citizens over and above the Law of the land, in the face of looming ruination of the societal fabric.

However, it will be recalled that in the cause of our introduction, it was pointed out that the *nemo judex rule* was not observed by God in dealing with Adam, despite Him being: *the complainant, the witness, the prosecutor and the judge.* All of which are antithesis to the *nemo judex rule*.[59] The reason was based on necessity because God was the only Supreme Being capable of adjudicating at the time and no other person could have done except Him. Do you see necessity in action, even before the orderly society we live in today?

Craig's postulation is aptly stated that:

"The normal rule against bias will be displaced in circumstances where the individual whose impartiality is called in question is the only person empowered to act."

An offshoot of the doctrine of necessity as an exception to the *nemo judex rule* is: Statutory Authority.

'The Acts of Parliament', said Mr. Singh, 'however, can override the principles of natural justice'. It is submitted that this view is valid in law and of considerable acceptance. In other words, where the legislatures enact a law, making it mandatory therein that a person must sit over a matter, irrespective of his partiality, then the *nemo judex rule* shall take a second place because it has been displaced by statutory authority and as such, necessity takes precedence.

The Supreme Court of Nigeria utilized the necessity doctrine to displace *nemo judex rule* in the case of: *Ex ParteOlakunrin*[60]because by statutory authorities, the person empowered by law to

[59]Balogun Sofiyulahi O, (n 54)
[60] (1985) NWLR (PT. 4) 652; (1985) LPELR-SC 98; (1985) 5 S.C 161

exercise disciplinary control over the appellants (was alleged to be biased) was mandated to sit and adjudicate.Justice Nnamani JSC (as he then was) held:

> Besides, it is also settled that a person who is prima facie disqualified for interest or bias may be held on grounds of necessity, competent and obliged to adjudicate if no other duly qualified tribunal can be constituted.

Similarly, Justice Bello JSC hit the nail on the head in a more forcible and captivating matter, in the following words thus:

> …the rule of natural justice must give way to the rule of necessity…The rule of necessity permits an adjudicator to be a judge in his cause if his participation is absolutely necessary to arrive at a decision.

The Supreme Court of U.S in the celebrated case of *United States v. Will*[61]affirmed the *necessity doctrine* to the effect that '*it prevails over the disqualification standard'.*

It is pertinent to note and must be stressed, that this necessity rule does not operate to truncate or obliterate the *nemo judex rule* at will because it only operates parallel and impliedly to the law in exceptional circumstance(s), when no other thing can do.[62] It is submitted that in the application of this exception to the *nemo judex* rule, the "*audialterempatem* rule" must be observed because that is the essence of the provision of subsection 2 of section 36 of the 1999 Constitution.[63]

However, despite the widespread acceptance of the rule of necessity in state administrative law, there is general recognition of its unfairness, and the inherent tension between it and the right to an impartial decision maker. Application of the rule of necessity has been called a "regretful circumstance" and a "choice between two evils".[64]

2.3.2**Contempt of Court**

[61]499 U.S 200 (1980). See also the Supreme Court of India cases of : *Ashok Kumar Yadav* v. *State of Haryana*(1985) 4 SCC 417; Tata Cellular v. UOI (1994) 6 SCC 651 and the Court of Appeal of Tennessee case of : *Gay* v. *City of Somerville* 878 S.W.2d 124 (1994), the latter case adopting *United States* v. *Will*(supra).
[62] Balogun Sofiyulahi O, (n 54)
[63] Ibid
[64]ArnorldRochvarg, Is the Rule of Necessity Necessary in State Administrative Law: The Central Panel Solution, 19 J.Nat'lAss'n Admin.L Judges (1999) available at http://digitalcommons.pepperdine.edu/naalj/vol 19/iss2/3

'Contempt of Court', said Mr. Jackson, 'has a long history with periods when it little public interest…The subject is complicated because several different conceptions are brought under the same heading of contempt of court'.[65]However, contempt of court is the act of putting into disrepute, disdain or denigrating the integrity of the court either directly or constructively which may be civil or criminal.

Justice Agbaje JSC (as he then was)while examining contempt polarized the concept into two and posits thus:

> Contempts are of two kinds, direct or constructive. When the contempt are direct i.e committed in the immediate view And presence of the court or so near the presence of the court as to obstruct or interrupt the due and orderly course of proceedings they are said to be contempt committed in curiae facie i.e contempt in the face of the court. On the other hand, those contempt which arise from matters not occurring in or near the presence of the court, said to be constructive or indirect contempt, are referred to as contempt committed ex facie curiae.[66]

It is submitted that the notorious classifications of contempt as civil and criminal can be competently brought under the two heads of direct and indirect or constructive contempt of court respectively.[67]

Broadly speaking, not all these types of contempt operate as an exception to the *nemo judex rule* except: direct or *in facie curiae* contempt, committed in the presence of the court. This constitutes an exception for various purposes and reasons, for instance, an accused person scandalizing the court can be swiftly punished for denigrating the integrity of the temple of justice.[68] This is based on the policy of law that: '*the honesty and integrity of a judge cannot be questioned but his decision may be impugned for error of law or fact'* but this is not to conclude that a judge cannot be justifiably be required to disqualify himself on valid and reasonable ground(s).*[69]*

[65]R M Jackson, *The Machinery of Justice in England*, (Cambridge University Press 1940) 317
[66]Justice Agbaje JSC (as he then was) in 1990 Judicial Lectures: Continuing Education for the Judiciary, MIJ Publishers, titled "Contempt of Court and Discourtesy"
[67]Balogun Sofiyulahi O, (n 54)
[68]Ibid
[69] Ibid

Besides, this paper must at once point out the various provisions that empower the court to deal with, or punish for civil and criminal contemptuous acts in Nigeria, although not concentrated in a single statute or provision. **These are: 1999 Constitution of Nigeria; Criminal Code Act CAP. C38 LFN 2004 and Sheriffs and Civil Process Act.**

The provisions are: sections 17(2)(e), 6(6)(a) and 39(3)(a) of the 1999 Constitution; sections 6 and 133 of the Criminal Code; sections 66 and 72 of Sheriffs and Civil Process Act. For clarity sake, section 6 provides:

> Nothing in this Act or in the code shall affect the authority of courts of record to punish a person summarily for the offence commonly known as contempt of court; but so that a person cannot be so punished and also punished under the provisions of the code for the same act or omission.

Section 39(3)(a) provides :

> (3) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society –
>
> (a) for the purpose of preventing the disclosure, of information received in confidence, maintaining the authority and independence of courts…

An accused person who commits contempt in the face of the court can be punished by committal to prison instantly by the judge manning the court without the process of formal trial because the punishment is meant to preserve and protect the integrity and utmost authority of the court, but not the judge in person.[70] This instant punishment clearly violates the *nemo judex rule* because the judge is 'the complainant', 'the witness', 'the prosecutor' and at the same time, 'the judge'.

The Supreme Court in *Atake* v. *A.G Federation*[71] held that:

> In proceedings *instanter* or trial *brevimanu* (i.e. punishment instantly for contempt in the face of the court), the judge before whom is the contemnor, is the prosecutor, witness and judge.

[70]See Lord Widgery CJ in *A.G*. v. *Times Newspaper Ltd* (1972) 3 All E.R.
[71](1982) 11 SC 153;(1982) LPELR-SC 5

Contrast the above principle with the general one stated in *LPDC*vFawehinmi[72] thus :

> And so, we arrived at the situation in which the Attorney General of the Federation…drafted the charges as the prosecutor and got himself to sit as a judge …such a proceeding would obviously have been null and void on that score as being an infringement of the principle *nemojudexincausasua.*

Judges have however been cautioned by Stephen L.J in *Bologh* **v.** *St. Albans Crown*Court[73] that:

> The punishment must never be invoked unless the ends of justice really require such drastic means; it appears to be a rough justice, it is contrary to natural justice; and it can only be justified if nothing else will do.

Finally, it is hoped that despite the justification of judges punishing the contemnor instantly for contempt in facie curiae, which has been discussed in this paper as a valid exception to the *nemojudex* rule, caution and judicial restraint will always be exercised. [74]

2.3.3**The Doctrine of Waiver**

Waiver means, according to the English Mini Dictionary the act of waiving, or not insisting on, some right, claim or privilege. The idea of 'waiver' being an exception to the *nemojudex* rule is founded on the logical And legal premise that *he who does not complain is deemed to have consented, irrespective of whether or not irregularity exist against him*.
Therefore, Craig stated it correctly when he said:

"The premise behind the ability to waive is that it is only the individual who is concerned; and thus if that person "chooses" to ignore the fact that the adjudicator is an interested party then so much the worse for the applicant."

It is finally submitted that this doctrine can only constitute as an exception to the *nemojudex* rule, if and only if the affected person neglects to assert his civil and constitutional right, if he chooses otherwise, then the doctrine of waiver is displaced.

3.0 CONSTITUENTSOF FAIR HEARING UNDER THE CONSTITUTION

[72](1985)LPELR -SC.177/1984
[73]1975) 1 QBD 73 @ 90
[74]Balogun Sofiyulahi O, (n 54)

Fair hearing as contained in the constitution means the trial of a case or the conduct of the proceedings therein in accordance with the relevant laws, rules of court and natural justice.[75] Fair hearing must involve the observance of natural justice, but that notwithstanding, other stipulations have been added to the principles of natural justice, in the constitution and these we may refer to as the essentials of a fair hearing.[76]

3.1**Hearing within a Reasonable Time**

It has been said that a trial within a reasonable time implies a speedy trial.[77] What is reasonable depends on each circumstances. Section 36 of the 1999 Constitution[78]provides for not only fair hearing but hearing within a reasonable time, as justice delayed, is justice denied. The pertinent question that boggles minds is whether trial or hearing in our court are concluded within a reasonable time? It is stated that this is an area where the Nigerian judiciary has failed us woefully.[79] Judicial determination of disputes take such a long time that in some cases both the witnesses and the litigants die before a case is finally determined.[80] Today, instances abound of court proceedings commenced more than fifteen years back which are yet to reach the trial stage. In many cases, favourable judgements obtained after a long and sometimes protracted trial through the hierarchy of courts tend to lose their flavour, principally because the *res* has in the process undergone some irreversible and unproductive changes.[81]

What then is the legal effect of a prolonged and inordinate delay in the hearing and determination of a case?, Whether or not it vitiates the trial? It has been held that the legal effect depends on the circumstances of each particular case. For example, the trial will be vitiated if the learned trial Judge is no longer in a position to properly review or articulate the evidence adduced before him and make full use of his advantage in having seen and observed the demeanor and credibility of witnesses who testified before him. If that is the case, then the prolonged or undue delay is

[75]Ajogwu (n 3) at 42
[76] Ibid. In *Kotoye v CBN* (1989) 1 NWLR (Pt. 98) at 426, the Supreme Court per Nnamani JSC stated the essential or constituents of a fair hearing as: trial within a reasonable time; trial by a Court or Tribunal established by law; prior notice (adequate time and facilities); opportunity to be heard; entitlement to legal representation; right to examine witnesses; assistance of an interpreter and proceedings to be held in public.
[77]*Ariori v Elomo* (1983) S. C. 13
[78] African Charter on Human and People's Right (Ratification and Enforcement) Act), Article 7 of the African Charter
[79]Nnamani Ogbu (n 11) at263
[80] Ibid
[81]Jegede M I,*What's wrong with the Law?* (Lagos: Nigerian Institute of Advanced Legal Studies 1993) 41

capable of occasioning a miscarriage of justice and will vitiate the trial.[82]It will be otherwise if the memory of the learned Judge has not blurred or in any way been adversely affected and no credibility of the witnesses was involved.

A reasonable time is a time justified by reason. Reasonable time in its nebulous content cannot be determined *in vacuo* but in relation to the facts of each case. This is because what constitutes a reasonable time in one case may not necessarily constitute a reasonable time in another case.[83]

It can be submitted that reasonable time is the period of time which in the search for justice, does not wear out the parties and their witnesses and which is required to ensure that justice is not only done but appears to a reasonable person to be done.[84]

3.2 Trial by a Court or Tribunal Established by Law

Under the Constitution,[85] 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. Implicit in this subsection are the notion of right to have one's cause heard by a neutral adjudicating body. It is not enough to lift up the phrase "fair hearing" from the content of section 36(1) and seek it's protection against an act or acts of the government without giving thought to the total import and amplitude of its provisions. There seems to beconfusion and befuddlement of thought or what one may call convoluted reasoning when reliance is placed under section 36 (1) of the Constitution.[86]

The fair hearing which is guaranteed to the individual is that which will be in court or other tribunal established by law and constituted in "such a manner as to secure its independence and impartiality." In other words, the bedrock of fair hearing is the securing of "independence and impartiality of the court or other tribunal established by law."[87]

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[82]*Awoniyi& Sons v Igbalaiye&Ors*. (1965) All NLR 163
[83]*Pam v Mohammed* (2008) 16 NWLR (Pt. 112) at 17. In *Danladi v Dangiri*&Ors (2014) LPELR-24020 (SC), the Supreme Court, per Ngwuta JSC, stated that the phrase "within a reasonable time, implies that the time for the determination of the matter should not be too short or too long, depending on the nature and facts of the case.'
[84]*Ariori v Elemo,* Ibid
[85] Constitution of the Federal Republic of Nigeria, 1999 section 36(1)
[86]Ajogwu (n 3) at 50
[87]*Oko v Governor, Benue State* (1983) 4 NCLR 606 at 609. In *Onuoha v Okafor* (1985) 6 NCLR 503, the term, 'court' or 'judicial tribunal' in the Constitution is liberally used to indicate a person or body of person exercising judicial functions by common law, State, patent charter, custom, etc.

If the court or tribunal is not from the word go established by law and so constitute, the constitution does not recognize it as being in a position to discharge the obligation of fair hearing.[88] Where a court or tribunal is not properly constituted, it raises jurisdictional issues.

3.3 Proceedings to be Held in Public.

Pursuant to section 36 (3) of the Constitution,[89] proceedings of a court or tribunal in matters relating to civil rights, obligations and criminal offences (including the announcement of the decisions), shall be held in public. The Supreme Court in *Kotoye*v *CBN*[90] held that the proceedings of a court shall in accordance with section 33 (3) of the 1979 Constitution[91] be held in public and all concerned shall have access to and be informed of such a place of public hearing. Sitting in chambers to deliver judgement is wrong.[92] It has been held that ruling in chambers even if it be done with the consent of both parties is null and void because the provision of section 36 (3) is mandatory.[93]This is because the judge's chambers is not an open court. It is not one of the regular courtrooms where the public have right of ingress and egress as of right.[94]

However, the proceedings of the court may hold in camera. This means that it may exclude persons other than the parties thereto or their legal representatives in the interest of defence, public safety, public order, public morality and the welfare of persons who have not attained the age of 18 years.[95] It could also hold in camera in order to protect the private lives of the parties or to do away with publicity which would be contrary to the interest of justice.[96]

3.4 Fair Hearing in Public and Within Reasonable Time

Section 36 (4) provides that: "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." This provision vests on accused persons the right to have their trial

[88] Ibid
[89] Constitution of the Federal Republic of Nigeria 1999 (as amended)
[90] Ibid
[91] Same as section 36(3) of the 1999 Constitution (as amended)
[92]*Abarshi v COP* (2005) INCC
[93]*Salawu v Adza*(1997) 11 NWLR (Pt. 527) 36 CA. See also *Nuhu v Ogele* (2004) FWLR (Pt. 193) 362
[94]*Nigeria Arab Bank v Barr Engineering (Nig) Ltd* (1995) 8 NWLR (Pt. 413) 257 at page 290
[95] 1999 Constitution (as amended) section 36 (4) (a) (b)
[96]OkparaOkpara (n 15) at 199

conducted in open court, within reasonable time and by regular courts. It must be noted that only regular courts created under section 6 of the Constitution has the power to try criminal offences and impose sentence.[97]The determinant of whether a trial was held in public does not pertain to the venue but whether the public had access to the trial. In the case of *Mkailu v The State*[98] the Court of Appeal held that the submission of written address by Counsel, which were not later, canvassed in open court offended against the subsection in question.[99]

It is pertinent to note that while section 36 (3) deals with civil matters, section 36 (4) deals with criminal matters.

3.5Presumption of Innocence

According to section 35 (5) of the 1999 Constitution "every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty.[100] This is an offshoot of the accusatorial criminal justice system where the prosecution has the burden of proving the guilt of the accused person.[101] By presumption of innocence, every accused person appearing before a court is presumed to be innocent of the charge. Accordingly, no matter the nature or gravity of the offence or notoriety of the accused, this presumption must be drawn in favour of the accused person.[102] The effect of this presumption, therefore, is to place the burden of proof of the guilt of the accused on the prosecution. In other words, by this, it is not the duty of the accused to prove his own innocence. Rather it is the duty of the accuser to prove the guilt of the accused.[103] The burden placed on the prosecution is however not to prove the guilt of the accused person beyond all iota of doubt.[104]

3.6 The Five Cornerstones of Fair Trial in Section 36 (6)

[97]Nwabueze B O, *Presidential Constitution of* Nigeria Hurst & Co. 1982) 431. See also *Garba v University of Maiduguri* (ibid)
[98] (2001) 8 NWLR (Pt. 715) 469 CA.
[99] In this case reasonable time was interpreted and the Court of Appeal held that seven months period after final addresses, before judgement was delivered was unreasonable and amounted to breached of subsection 4.
[100]Constitution, Section 36 (5) See also *Onuoha v The State* (1991) 4 NWLR (Pt. 185)322 at 357
[101]*Nwodo*v *The State* (1996) 4 NWLR (Pt. 185) 341 at 355; see also *Ogbunjo v The* State (1996) 6 NWLR (Pt 4520 at 98
[102] Jacob Abiodun Dada, *The Law of Evidence in Nigeria* (Second Edition, University of Calabar Press 2015) 52
[103]*Anthony Isibor v State* (2001) FWLR (Pt. 78) 1077 CA
[104]*Okoroji v The State* (2002) 5 NWLR (Pt. 759) 21 at 53

Section 36 (6) provides for the "five cornerstones" of "fair trial". These cornerstones are:(i) the requirement of the accused being promptly told in the language he understands and in details, the nature of his offence; (ii) time for the accused to prepare for his defence; (iii) to defend himself in person or by a legal practitioner of his own choice; (iv) opportunity to put in his own witnesses and cross-examine those for the prosecution and (iv) the right to have an interpreter without payment if he cannot understand the language of the court of trial.[105]

The import of section 36(6)(a) is that an accused person charged with criminal offence must be promptly informed in the language he understands, the reason for the charge and the detail of the case against him. Failure to do this will be fatal to the case on appeal. Hence, in *Kajubo v State,*[106] the Supreme Court held that where the charges were neither read nor explained to the accused person, the whole proceedings was a nullity.[107]

The import of section 36 (6) (b) being that the court should in nowhere stand on the way of the accused person in the process of preparing for his defence. Thus, where an accused person asks for an adjournment on the first day of the case to enable him get a counsel and such is refused, it will be a breach of section 36 (6) (b) of the constitution and would obviously invalidate the proceedings on appeal.[108] But if the application for adjournment is based on frivolous grounds and the trial Court may lose trend of the case etc, such application ought not be granted.[109]

The Supreme Court had held that where an accused person is facing trial for capital offence (involving death penalty) he should be provided with a counsel by the court where he is unable to get one.[110]Where such representation of an accused is conducted half-heartedly, improperly or

[105]Igwenyi (17) at 375-376
[106] (1988)1 NWLR (Pt 73) 721
[107] In the case of *Erakunre v* State (1993) 6 SCNJ (Pt 1) 73, the Supreme Court quashed a conviction whose record of proceeding indicated thus: "M IEdokpayi S. C. for the State, J. E. Sharkarho for the accused. Charge read to the accused. He pleads not guilty to the law Court. Prosecution opens its case". The Supreme Court's reason for quashing the conviction being that the charge was not fully read as there was no evidence of the language used and who did the interpretation.
[108] In *Gokpa v IGP* (1962) 1All NLR 432, the High Court quashed the conviction registered at the Magistrate's Court on the ground that the appellant was not given adequate time to prepare for his defence. It however ordered a retrial of the matter.
[109]*Shemfe v. COP* (1962) N.N.L. R. 87
[110]*Josiah v The State* (1985) 1 NWLR (pt1) 125

ineffectively by inexperienced legal practitioners, the Supreme Court had held that it amounted to denial of right to fair hearing.[111]

Subsection 6 (c) of section 36 is to the effect that every accused person facing trial has right of self-defense or by a legal practitioner of his choice. It has however been held that such a counsel must not be one with disability of any sort with regard to right of entrance and exit from Nigeria. He must be a Nigerian Citizen.[112] It has been held in *Uzodinma*v*Commissioner of Police*[113] that where an accused is denied a right of legal representation by any law or regulation such a trial shall be quashed.[114]

Subsection (6) (d) of section 36 grants the accused right to examine by himself or through his lawyer the witnesses called by the prosecution before any court and to obtain the attendance and carry out the examination of the witnesses to testify on his behalf before the court on the same conditions as those applying to the witnesses by the prosecution. Hence, he has right to call his own witnesses and has right to cross-examine witnesses called by the prosecution.[115]

The import of subsection (6) (e) of the 36 of the Constitution is that an interpreter for the accused person must be that who he will not be asked to pay any money on account of such service. This request for an interpreter must be made by the accused before the court of trial.[116] Where an accused person fails to invoke this right and goes on with trial as if everything is normal, he cannot be heard later to complain of a breach of his right to have an interpreter. An interpreter must interpret sentence by sentence and not just by mere summary interpretation of the whole hearing.[117]

3.7 Right to be given record of proceedings.

[111]*Udofia v The State* (1988) 3 NWLR (pt. 84) 533
[112] This informed the decision of the court in Awolowo v Minister of Internal Affairs (1966) 1 ALL NLR 178. In this case, Chief Awolowo had hired an English lawyer to defend him and his lieutenants during the treasonable offence trials but the Minister did not grant the lawyer visa into Nigeria. Chief Awolowo contended that the refusal was a breach of his constitutional right to have a lawyer of his choice but it was held that the Minister's action was constitutional and a legal practitioner of one's choice must be one who has right to come in and go out of Nigeria.
[113] (1982) 3 NLR 323 or (1982) 1 NCR 27
[114] In this case, the appellant was tried at an Area Court where he was not allowed a counsel because of section 390 of the Criminal Procedure Code and section 28 of Area Court Edict of 1967 (Northern State.
[115]Igwenyi (n 17) at 377
[116]*Gwonto v The State* (1983)SC 69; see also *Uwaekweghinya v The State* (2005) 9 NWLR (Pt. 930)227
[117]*Ajayi&Jakande Jos v Zaria Native Authority* (1964) NMLR 61

The accused person is entitled to be given the record of the trial. When any person is tried for any criminal offence, the court or tribunal shall keep a record of the proceedings and the accused person or any persons authorised by him in that behalf shall be entitled to obtain certified true copies of the record of proceedings. He is also entitled to a copy of the judgement in the case within seven days of the conclusion of the case.[118]

The promptitude of preparation and production of record of proceedings is hardly achieved because of a variety of factors such as incompetent and inadequacy of staff in the secretarial section of the judiciary, inadequate energy supply and scarcity of funds.[119] This provision is just for window-dressing as it only serves to give the accused impetus to legitimately ask for the record of proceedings, which is often obtained after weeks.[120]

What then is the legal effect of refusal to make available the record of proceedings and or judgement to the accused within seven days as guaranteed by the constitution?A learned scholar,[121] is of the firm view that a refusal to make this available (not necessarily within 7 days) will be viewed as a denial of this right under subsection 7. Perhaps, his view must have been informed by the aforementioned factors. With unalloyed respect to the above view, the word ‘shall' used in that subsection conveys a peremptory obligation that must be obeyed. It is our submission that the seven days period of time must be complied with.

3.8 **Absence of Retrospective Legislation (*ExPostFactoLaws*)**

Legislations are deemed to be retrospective when they are to come into force at a date earlier than when the law was enacted.[122] Subsection 8 of section 36 is to the effect that there should be no retroactive legislation in criminal law and procedure. The subsection 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, an no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed.[123]

[118] Constitution of the Federal Republic of Nigeria (as amended) section 36 (7)
[119]Igwenyi, (17) at 378
[120] Ibid
[121] ibid.
[122]Olomojobi, (n 1) at 157
[123] Constitution, section 36 (8)

In criminal law, the constitution prohibits any construction that will give a statute retrospective effect.[124] Retrospective criminal laws are a feature of military rule. The constitutional provision that is against retrospective legislation is always part of the Constitutional provisions suspended by the military once they assume power.[125]

3.9 **Rule Against Double Jeopardy**

The constitution prohibits subjecting a person to trial twice for an offence that has the same elements with the earlier one he has been tried for. It provides 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 for a criminal offence having the same ingredients as that offence save upon the order of a superior court.[126]

The provision is often referred to as the "rule against double Jeopardy" and is a re-enactment or codification of the Common Law principles of "*autrefois acquit*" (meaning he has been tried before and acquitted) and "*autrefois convict"* (meaning he has be tried before and convicted before).[127] What determines whether a person should plead "*autrefois acquit*" or "*autrefois convict"* is whether the same evidence is required to sustain conviction of the victim in the latter charge [128]

For one to successfully plead any of the above "rules against double Jeopardy": there must have been a prosecution or trial; the trial must be before a competent court; the accused must have been convicted or acquitted of the first offence, mere dismissal of a complaint or discharge of an accused person is not an acquittal for this purpose and the second trial must be in respect of the same offence, as the first or both offence must have the same ingredients.[129]

[124]*Afolabi v Governor of Oyo State* (1985) 2 NWLR (Pt. 9 768 at
[125] Ibid
[126] Constitution, section 36 (9)
[127]Igwenyi (n17) at 379
[128]*Ashe* v *Swenson* 399 US 436 (1970) where a second trial was quashed on this ground by the US Supreme Court.
[129]AnozieM C,*Notes on Nigeria Constitutional Law* (Revised Edition, Enugu: Pymonak Printing & Publishing Co. 2000) 223. See also the case of *Chief of Staff v Iyen*(2005) 6 NWLR (Pt. 922) 496

It is pertinent to that where on grounds of appeal, the case is ordered to be retried before another court or merely there is an appeal by the prosecution over an acquittal or conviction with light sentence, the accused person cannot plead any of these rules.[130]

3.10Enjoyment of Pardon

Section 36 (10) of the Constitution of Federal Republic of Nigeria (as amended) bars trial of any person who shows that he has been pardoned for a criminal offence. Thus, where a person commits an offence and he is pardoned by the Governor or the President depending on whether it is State or Federal, he cannot thereafter be brought before a court or tribunal for trial again for the same offence. This means that here, the accused was not acquitted or convicted but pardoned outrightly before trial.[131]

A person granted pardon can prove this in court by tendering duly signed copy of the instrument of pardon and not mere sheet of paper which is unsigned containing names of some people allegedly pardoned by the President or Governor[132] or he can prove same by tendering a gazette containing the instrument of pardon. On the effect of pardon, the Court of Appeal held in *Falae*v *Obasanjo,*[133] that it creates a new person on who is pardoned and clears him of all disadvantages that would have followed him on account of the offence in question. It restores the rights of the person pardoned with regard to the offence.[134]

3.11 **Right Against Self-incrimination**

A person under trial cannot be compelled to testify against himself at his trial. Section 36 (11) provides that no person who is tried for a criminal offence shall be compelled to give evidence at the trial. This right is available to the accused person alone. This is because other witnesses, particularly those called by the prosecution may be made to give evidence even when ordinarily they are not willing. This provision is aimed at avoiding Self-incrimination.

Although, the Constitution grants right to an accused to keep quiet, yet when a clear and direct accusation is made against a person, in his presence, in circumstances which should warrant

[130]*NafiuTabiu v State* (1980) 8-11 SC 130 at 164-166
[131] Ibid
[132]*Obidike v State* (2001) 17 NWLR (Pt. 743) 601
[133] No. 2 (1999) 4 NWLR (Pt. 599) 476 CA
[134] The Court, in that case, refused to accept the petitioner's contention that after pardon that conviction remained unreserved and served to disqualify the respondent for the office of President.

instant denial, refutation or protest from him and he does not deny, refute or protest against the accusation, evidence of such could be given against him as evidence of admission by conduct.[135]This view should be taken as a proof of or example of admission by conduct and not that an accused person who chooses not to give evidence loses this constitutional protection of remaining silent during trial.[136]

A presiding Judge should not make strong comment on the refusal of an accused person to give evidence. This is because such strong comment may be taken as evidence of bias against the accused and may constitute a ground for reversal of the judgement of such court on appeal.[137] In other words, a court's comment on the refusal of the accused to give evidence should be mild and not damning because it is inconsistent with the presumption of Innocence which is a cardinal principle of fair hearing.[138]

3.12 Offence and Penaltymust be contained in a Written Law

Section 36 (12) provides that 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 constitution goes further to state that written law means an Act of the National Assembly or a Law of a State House of Assembly or other rules emanating from delegated legislation. The cardinal requirement is that such offence must be a creation of a law made by parliament either directly or through subsidiary means. Thus, all rules of Customary law or sharia law, which are not codified, cannot be used to try and either convict or acquit a citizen of this Country. No wonder, in *Aokov Fagbemi* ,[139] the applicant was convicted of committing adultery by living with another man without judicial separation in the Customary Court. On appeal to the High Court it was held that the applicant had violated no law that is written and her conviction was contrary to section 21 (10) of the 1960 Constitution (now section 36 (12)) and cannot stand. To be noted that under the Criminal Code (operating in Southern States of Nigeria) adultery is not an offence. Again the inherent powers of the court granted under section 6(6) (a) of the 1999 Constitution, allow them

[135]*Dapere Gira v The State* (1996) 4 NWLR 375 SC
[136] Ibid
[137]*Garba v State* (1997) 3 NWLR (Pt. 492) 144 SC
[138]Igwenyi (17) at 380
[139] (1961) 1 ALL NLR 400

to punish for the common law crime of "contempt of court" which is not written down any where as a criminal offence.[140]

4.0EFFECT OF THE BREACH OF A RIGHT TO FAIR HEARING

Where an accused person in the case of a criminal proceeding or a party to a civil proceedings is denied one of the essentials of a fair hearing as provided in the constitution, there has been a breach of fair hearing. A breach of the provision of section 36 of the Constitution of the Federal Republic of Nigeria 1999 will be reviewed by means of the prerogative orders of *certiorari,* prohibition and *mandamus; the* prerogative writ of *habeas corpus* or may be enforced under the Fundamental Rights (Enforcement Procedure) Rules, 2009 made pursuant 'to the powers conferred on the Chief Justice of Nigeria.[141] In the case of *Otapo v Sunmonu*[142] the court stated that any breach of this principle, (principles of natural justice and principles of fair hearing), results in the nullity of the proceedings. In that case, Obaseki JSC went on to say that:

> "the absence of fair hearing or rather the denial of fair hearing to the appellant…is fatal to the judgement of the Court of Appeal"

In other cases, such as cases of dismissal (from the public service) of a public officer, the effect of a breach of the provisions for fair hearing as in the cases of *Olaniyan* v *University of Lagos*[143] was the declaration that the dismissal was invalid and so the public officer was entitled to continue to be employed. It should be noted that a breach of the rule does *not per se* give rise to a cause of action for damages. The aggrieved party must show that the impugned act constituted a breach of contract, statutory duty, fundamental human rights or any other recognised civil wrong.

In *Idris Rabiu v State,*[144] the Court of Appeal held that the right to fair hearing is an extreme fundamental right in the Constitution and a breach thereof has its implication on the proceedings. It is very clear from our Constitution that every person charged with a criminal offence is entitled to be given adequate time and facilities for the preparation of his defence. Thus, the right to be heard is fundamental and indispensable requirement of any judicial decision. To this effect, the

[140]Igwenyi, ibid at 381
[141] Section 46 of the 1999 Constitution
[142] (1961) 3 WLR 1405 at 1409
[143] (1987) 2 NWLR (Pt 68(587 SC
[144] (2005) 1 NCC 578

Supreme Court observed in the case of *State* v *Onagoruwa*,[145] among other things that fair hearing is in the procedure followed in the determination of the case, not in the correctness of the decision. Neglect or failure to abide by the rule of fair hearing renders both the proceeding and its outcome meaningless.

5.0 CONCLUSION OR CONCLUDING REMARKS

The importance of fair hearing in our adjudicatory jurisprudence cannot be over-emphasised, it pervades the entire existence and humanity.Fair hearing is founded on the twin pillars of Natural Justice expressed in the maxims *Audi alterampartem* and *Nemo judex in causa sua.* In every trial, civil or criminal or quasi-judicial, where decision is to be taken against a person, fair hearing principles must be observed. The right to a fair hearing requires that an individual shall not be penalised by a decision affecting his rights or legitimate expectations unless he has been given prior notice of the case against him, a fair opportunity to answer it and the opportunity to present his own case. It also requires that the person hearing the matter be an unbiased person and should not have a likelihood of bias. Where the basic attributes of a fair trial or safeguards constitutionally guaranteed for fair hearing are breached in any trial, the decision reached is null and void.

The question as to whether any trial is fair depends not in the correctness of the proceedings but whether the procedural requirements for fair hearing has been followed and party entitled to the right has been given opportunity to enjoy and exercise the right. But where a party fails to avail himself of the opportunity of fair hearing accorded him, he cannot be heard to complain that he was denied fair hearing. He would be deemed to have waivedsame.

Therefore, Judges and those sitting over disputes mustbe pro-active byensuring that fair hearing principles areobserved and eschewbias or likelihood of bias or sentiments which will put a stumbling block to the adjudicatory wheel of fair trial. Parties to litigations in courts, tribunals or any other body or bodies sitting in quasi-judicial capacity, at all time, must be afforded the opportunity of fair hearing as failure to accord or breach of fair hearing renders the entire trial or hearing meaningless.

[145] (1992) 2 NWLR (pt 221) 33