



## Appraising the rights to a fair trial in Nigeria: Making it a culture

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### Abstract

The right to a fair trial is a fundamental safeguard to ensure that individuals are protected from unlawful or arbitrary deprivation of their human rights, such as the right to freedom, liberty and security of persons relating to the administration of justice in both civil and criminal proceedings. This paper examined the jurisprudential issues involved in the concept of a fair trial. This was achieved by adopting the doctrinal method of research. This work found that due to lack of universally acceptable definition, this has made it difficult for courts, legal practitioners and litigants to enforce the right.

**Keywords:** Fair trial, Right, fair hearing, defendant, constitution, concept, Section

### Introduction

The right to a fair trial emerged with the contemporary human rights. However, the framework for its operation in the municipal laws precedes the international human rights system. It has existed in diverse legal systems predating the International Order and the United Nations.

The roots of the basic principles of the right to a fair trial can be traced all the way back to the Lex Douodecim Tabularum- the law of the twelve tables – which was the first written Code of laws in the Roman Republic around 455 B.C. [1] These laws contained the right to have all parties present at the hearing, the principle of equality amongst citizens and the prohibition of bribery for judicial official.

The paper strongly submits that these principles in modern times refers to the right to be heard and to defend oneself, the right to be subjected to the rule of law, and the right to have one's case adjudicated by an independent and impartial tribunal.

### Historical Evolution

From ancient times, individual principles underlying fair trial in criminal processes were outlined in a number of Holy Texts including the Code of Hammurabi, the Holy Bible and Holy Quran among other documents [2].

The Magna Carta also contained a historical development of the right to fair trial. The Magna Carta proclaims that, no freeman shall be taken, or imprisoned or disseized, or outlawed, or exiled, or in any way harmed nor will we go upon or send upon him save by lawful judgment of his peers or by the law of the land [3]. The treaty of Arbroath of 1320 [4] articulates the notions of equality for all, a principle that was later replicable in other developing democracies, such as France and the twelve American colonies of the British Empire. My Lord, Hon. Justice Robinson contends that the United States Declaration of Independence is connected to the Treaty of Arbroath. The notion of equality for all citizens in terms of fair trial rights has been interpreted to mean both the general prohibition of discrimination and the promise of equality between the parties in the modern jurisprudence [5].

In 1791, the United States 6<sup>th</sup> Amendment to the United States Constitution which provides that every person the

right to a speedy and public trial by an impartial jury, to be informed of the nature and cause of the accusation against him or her; to be confronted with the witnesses against one, to have compulsory process for obtaining witnesses in one's favour; and to have the assistance of counsel for one's defence.

The French Revolution played a great role in the historical development of the right to fair. Articles 6 through 9 of the French Declaration of the Rights of Man, adopted in 1789, requires a presumption of innocence and prohibit detention unless determined by law.

The philosophical foundations of the modern right to fair trial can be traced during the Age of Enlightenment in Europe and its rationalistic doctrine of natural law which recognizes individual human beings as subjects endowed with rights against the society and placed them at the centre of legal and social systems [6]. During this period, the political focus of government began to shift from an all powerful sovereign and towards the will of the power, and the limits of governmental power began to be restructured accordingly.

The term 'Human rights' was rarely used before the Second World War until the United Nations Declared in its United Nations Character preamble its determination to reaffirm faith in fundamental human rights [7]. After the Second World War, the right to fair trial was codified. The 1948 United Nations Universal Declaration Of Human Rights adopted by the United Nations General Assembly in December provides in Article 10 that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his or her rights and obligations and of any criminal charge against him or her [8].

In 1966, the International Covenant on Civil and Political Rights was adopted and entered into force in 1976 [9]. Article 14 of the Covenant stipulates for the right to a fair trial and affords the minimum right of the Defendant. Article 8 of the American Convention on the Human Rights, adopted in 1969 provides the full spectrum of rights to a criminally accused person, comparable to the European convention. Article 7 of the African Charter on Human and Peoples' Rights, contains many of the rights included in

other human rights instruments such as the right to an appeal, presumption of innocence, and the right to be tried within a reasonable time period by an impartial court or tribunal. Weissbrodt argues that the right to fair trial has received universal recognition in National Constitution and its values seemingly unquestionable and non-derogable <sup>[10]</sup>.

### Conceptualization

The term fair trial is a legal and ethical concept used to describe the procedural rules of a court and the treatment of those accused of a crime <sup>[11]</sup>. It connotes that a Defendant's rights during trial must be protected by the court of law in order to promote Justice. The right to a fair trial is a norm of International Human Rights Law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person <sup>[12]</sup>. This is very important in law, because when a Defendant stands trial on criminal charges, he or she is confronted with the machinery of state.

The definition of the right to fair trial becomes difficult due to the differences in criminal law and civil law in various states. There is no standard definition of the right to fair trial that applies to all the states. Every state has its own definition in accordance

the domestic legislation and application of International Law and Customary International Law.

In Nigeria, for instance, fair hearing is the same the same thing as right to a fair trial as defined by the court of competent jurisdiction. The right to a fair trial in line with the interpretation given by the European Court of Human Rights in the case of *Bonisch v. Austria* <sup>[13]</sup> is a basic principle of the rule of law in a democratic society and aims to secure the right to a proper administration of justice. In that said case, the European Court of Human Rights held that there was no equality of arms which resulted in unfair hearing. The Court further held that, the principle of equality of arms inherent in the concept of a fair trial required equal treatment as between hearing the parties.

The principle of equality of arms is a larger element of the right to fair trial. Equality of arms involves giving each party the reasonable possibility to present its cause, in those conditions that will not put a party in disadvantage against his or her opponent <sup>[14]</sup>.

The right to a fair trial is linked with the concept of fairness that lacks a standard definition that can be applied internationally. Understanding the concept of fairness is key in understanding the rationale of the right to fair trial. Judge Shahabuddeen in the case of *Prosecutor v. Slobodan Milosevic* <sup>[15]</sup> held that the fairness of a trial need not require perfection in every detail, the essential question is whether the Defendant has had a fair chance of dealing with the allegations against him or her.

Central to the concept of fairness is the power exercised by the Honourable court towards the individuals. The standards upon which a trial is to be assessed in terms of fairness are numerous, complex and involving. In order to determine the fairness of a trial, the Honourable Court should adopt the laws of the country in which the trial is being held, the human rights treaties to which that country is a party, and norms of customary international law.

According to Judge Robinson of the International Criminal Tribunal for the former Yugoslavia in the case of *Prosecutor v. Kanyabashi* <sup>[16]</sup> held that one of the objects, if

not the fundamental object of statute and Rules of the adhoc tribunals is achieving a fair and expeditions trial. Trial chambers have on occasion highlighted the achievement of a fair and expeditions trial as the fundamental purpose of the statute and rules <sup>[17]</sup>.

### Protected Legal Rights

The Constitution of the federal Republic of Nigeria 1999 (as amended) prescribes the conditions upon which the state may deprive a person of his or her liberty. The Constitution states that every person shall be entitled to his or her personal liberty and no person shall be deprived of such liberty except if such deprivation is in accordance with the procedure permitted by law <sup>[18]</sup>. Section 35 (4) of the Constitution expressly stipulates that any person arrested or detained in line with subsection (1)(c) of this section shall be charged before a court of competent Jurisdiction within a reasonable time, and if he or she is not tried within a period of two months from the date of his or her arrest or detention / or in the case of a person who is in custody or three months from the date of his arrest or detention, and in the case of a person who has been released on bail, he or she shall be immediately without prejudice to any further proceedings that may be brought against him or her be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he or she appears for a trial at a later date <sup>[19]</sup>.

In the same vein, every person has the right to his or her personal liberty. Thus, an arrest must not be arbitrary. An arrest or detention can only be executed by persons authorizable by law to do so, and also the arrest or detention must be carried in accordance with the law. The general rule of jurisprudence is that a person arrested or charged with a criminal offence should not be held in detention pending trial for a period of time beyond what is permissible under the law <sup>[20]</sup>.

At the International Human Rights levels, international standards have also prescribed norms to be followed in the course of deprivation of a person's personal liberty. The legal issue is that no person shall be arbitrarily detained <sup>[21]</sup>. It is the humble view of the paper that the said Article applies to every person whether arrested or in detention for reasons of criminal charges, political activities, mental illness or immigration control.

Arbitrary arrest or detention exists when the arrest is against the law, because there is no objective reasonable suspicion that the person committed an offence. Such an arrest is not justified by law and has the elements of arbitrariness. In the case of *Annelle Pagnouille v Camerous* 458/19911 <sup>[22]</sup>, the African Commission held that detention beyond the expiration of the sentence is arbitrary and that the mass arrest of workers for reasons of their labour activities is also arbitrary. Also, under the 1999 Constitution of the Federal Republic of Nigeria, detention of suspects for longer periods than the maximum term of imprisonment for the alleged offence is arbitrary <sup>[23]</sup>. Arbitrary arrest or detention can be evidenced from corrupt use of power. In this circumstance, arrests and detentions can only be executed by persons or authorities permissible by law to do so. In Nigeria, Police, National Drug Law Enforcement Agency, Customs, Immigration or similar bodies are permitted by the enabling laws to effect arrests. Most unfortunately, other agencies at state or local government levels for instance, local government Revenue Task Forces or Traffic Controllers that

are not permitted by law to carry out arrest but do so and minding that law enforcement is clearly in the exclusive legislature list of the Nigeria Constitution <sup>[24]</sup>.

Another issue of the ground of arrests and detentions is on "reasonable suspicion" of having committed an offence. Thus, reasonable suspicion justifying an arrest exists when there are facts which would satisfy an objective observer that the person concerned may have committed the offence <sup>[25]</sup>.

Again, administrative or prevent detention is another issue which must be strictly carried out in accordance with the laid down rules, and this in all circumstances shall be subject to judicial review. The principle of law is that no one shall be arrested without recourse to judicial review <sup>[26]</sup>.

Important issue is the presumption of innocence of persons standing criminal trials. The general rule is that persons awaiting trial should be released unconditionally. Also, persons charged with criminal offences are presumed innocent until their guilt proved. However, the security authorities may deny the release of the person provided they act within the law and in line with the international standards and domestic laws <sup>[27]</sup>.

Also, information about the charge is the first and important facility a Defendant needs to prepare for his or her defence. Any person arrested or detained has the right to be promptly informed of any charges against him or her.

The Article 5 (2) of the European Convention On Human Rights 1950, requires that every person arrested shall be informed sufficiently about the facts and evidence which are proposed to be the foundation of a decision to detain him or her. In particular, he or she shall be enabled to state whether he or she admits or denies the alleged offence. The International Covenant on Civil and Political Rights 1966 <sup>[28]</sup>, and the Resolution of the African Commission on the Rights to Recourse Procedure and Fair Trial, 1992 <sup>[29]</sup> contained similar provision.

One of the issues in a fair trial is the provision of the facilities by the prosecution to enable the Defendant get legal representation. The law is that every Defendant has a right to counsel of his or her choice. The Supreme Court of Nigeria held that the right to counsel of one's choice also meant the right to counsel who is available and qualified within jurisdiction <sup>[30]</sup>.

Another important facility of the preparation of defence is the proof of evidence that the prosecution intends to use in the trial. The Defendant is entitled to access the evidence of the prosecution including statement of the witnesses, the list of witnesses, the exhibits, statements of the witnesses and Defendant and any other report, document or material prosecution intends to rely on at the trial, and the prosecution with the leave of the court may file and serve any additional document <sup>[31]</sup>. This statutory duty placed on the prosecution shall be carried out at the time of filing the charge or not less than seven days before the arraignment of the Defendant <sup>[32]</sup> or not less than seven day before the commencement of the trial <sup>[33]</sup>. The prosecution is not allowed by law to spring any surprise on the Defendant. The Defendant requires adequate time for preparation of his or her defence. In this circumstance, the court should grant adjournment to the Defendant either to obtain the services of counsel or to call a witness or to obtaining a piece of evidence that will be relevant to the case. Where the counsel or material witness is absent, the court should allow adjournment <sup>[34]</sup>.

However, where the Defendant had ample opportunities for adequate preparation of his or her defence, the court may refuse the application for adjournment that is calculated to occasion delay of the trial. Thus, where adjournment is requested to call a witness, the court requires that the Defendant should show that the witness intended to be called is material to the case and that the failure of the witness to attend trial was not as a result of an unjustifiable fault of the Defendant. But, where the Defendant's counsel was absent without any explanation for his absence, the court may refuse adjournment <sup>[35]</sup>.

Again, the fair trial rules that demand the Defendant should follow and understand the proceeding and that if the proceeding is conducted in a language the Defendant does not understand, the court of law should provide a "competent interpreter at no cost to the Defendant.

In *Ajayi v. Zaria Native Authority* <sup>[36]</sup>, where the Supreme Court of Nigeria investigated the competence of an interpreter and the court found that the interpreter used by the lower court was incompetent. The Supreme Court annulled the trial conducted by the lower court. The implication of the annulment of the trial conducted at the lower court is that the Defendant had not been provided with adequate facility for his defence to a competent interpreter.

Furthermore, the constitutional provisions for a fair trial within reasonable time stipulates trial within reasonable time. The Nigerian constitution guarantees speedy trial and any person detained on a criminal charge is entitled to be tried within a reasonable time or to release pending trial <sup>[37]</sup>.

Thus, where the Defendant is detained for a period longer than the period he or she would have been sentenced if convicted then the Defendant must be released unconditionally <sup>[38]</sup>. This is because the Defendant in criminal cases would continue to bear the heavy burden of criminal charge if the trial is unduly delayed.

furthermore, the veracity of evidence and memory of witnesses tend to wear out after a long time giving rise to a tendency for miscarriage of justice. The supreme court of Nigeria in the case of *Ariori v. Elemo* <sup>[39]</sup> held that the right to speedy trial is an important and necessary component of fair trial and that fair trial must be involved a fair hearing.

Where the circumstances of the case suggest that the prosecution can no longer prosecute the Defendant effectively as a result of the long delay awaiting trials, the court shall release the Defendant unconditionally <sup>[40]</sup>.

The constitution of the federal Republic of Nigeria 1999, the International Covenant on Civil and Political Rights, 1966, the Statute of the International Criminal Court (the Rome Statute 2002) and The Resolution of the African Commission on the Rights to Resource Procedure and fair Trial 1992 contained similar provisions wherein if a person is in detention and he or she is not brought to trial within a reasonable time, he or she has the right to be released from the detention pending trial.

### **Detrimental factors Affecting the Doctrine of Fair Trial**

One of the factors which contribute to violation of the right to a fair trial without unreasonable delay is ignorance. Many litigants, especially Defendants accused of committing crimes in Nigeria are not aware of the existence of the right and hence can not seek to enforce it. The paper hereby urge that the government, through the Department of Justice, should embark on conducting public awareness campaigns

to educate the public of the right to a fair trial especially the right to have a trial without unreasonable delay. This will inform the general public of their legal rights and enable them to demand strict enforcement of same.

Another challenge to issues in a fair trial is lack of strict enforcement of the right fair trial without unreasonable delay by court of law. Many international human rights instruments and domestic frameworks or statutes clearly contain various provisions which seek to eliminate undue delay and ensure that trials are conducted expeditiously.

However, this has not addressed the challenges of delay of cases, partly due to lack of strict enforcement of right. Courts still shy from awarding appropriate remedies, such as damages, declaratory order, where a violation has occurred instead of opting to focus on whether the delay has occasioned miscarriage of justice to the Defendant. This has led to perpetuation of the culture of tardiness and impunity which encourages violation of the rights since the people responsible know they will not be held accountable.

It is submitted that strict enforcement of the right through award of appropriate remedies will help all concerned in the administration of justice alert and alive to the law since any transgression will be lead to repercussions. Issuance of legal guidelines through practice direction is one of the key challenges facing judiciary in interpreting and enforcing this right in determining the reasonable time.

This is compounded by a lack of clear guidelines on what factors are to be considered while dealing with this issue. This can be resolved through issuance of appropriate practice directions by the Chief Justice respecting to federal Legislations or State Chief Judge in the case of State Laws. Practice directions are highly recommended as an immediate and achievable measure to address this gap since they do not require legislation and are issued by the Chief Justice or Chief Judge as guidance to judicial officers, legal practitioners and litigants.

Another problem confronting this right is non-provision of a standard statutory definition of the right to a fair trial without unreasonable delay. It appears this has not been properly defined either under the Nigerian or National legislation. This mean that its meaning and scope have been left to interpretation by courts. This has made it difficult for both litigants and courts to enforce the right since it requires research and analysis of various court decisions in order to find their meaning. It is contended that parliament should consider defining the scope of this right in legislation in line with the generally accepted guidelines deduced from judicial precedents. This will provide an appropriate-guidelines and set legal parameters within which this right is to be interpreted and applied.

### Prescriptions

The right to a fair trial is a norm of international human rights designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms. It entails the various safeguards as guaranteed in the international and domestic framework that promotes a fair and public hearing before an independent and impartial court of law or tribunal established by law. Its aimed at advancing justice in both civil and criminal proceedings by setting out minimum standards which must be respected and observed by a court of law or other tribunal established by law while adjudicating over disputes. It is considered to be a

key pillar in every democratic State which respects human rights and the rule of law.

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