CONSTITUTIONAL LAW II

COURSE CODE: PUL 202.2

COURSE LECTURER: F.D. BIIRAGBARA, ESQ

TOPIC: RIGHT TO FAIR HEARING

INTRODUCTION

The right to fair hearing is certainly one of the most intrinsic and indispensable human rights. It is the root of the administration of both criminal and civil justice. The rules of natural justice stress the importance of procedural requirementS in the process of adjudication involving the determination of questions affecting the rights and obligations of individuals. Justice demands that laws should not only be reasonable, fair and liberal in contents, but that they should be interpreted, applied and enforced fairly and liberally.

WHAT IS FAIR HEARING?

The concept 'fair hearing' is formed from two constituent words – 'fair' and 'hearing'. The **Black's Law Dictionary edited by B.A. Garner, 11th edn, at P. 788 defines** hearing as as, ***"[A] judicial session … open to the public, held for the purpose of deciding issues of fact or of law, sometimes with witnesses testifying …. Any setting in which an affected person presents arguments to a decision-maker…"*** At **P. 789**, the Black's Law Dictionary defines 'fair hearing' as, ***"[A] judicial or administrative hearing conducted in accordance with due process."***

In **Ariori & Ors v. Elemo & Ors (1983) LPELR 552 (SC),** Obaseki JSC asserted that, **"Fair hearing therefore, must mean a trial conducted according to all the legal rules formulated to ensure that justice is done to the parties to the cause".** Similarly, in **INEC v. Musa (2003) LPELR 24927 (SC)** said, **"Fair hearing in essence, means giving equal opportunity to the parties to be heard in the litigation before the Court. Where parties are given opportunity to be heard, they cannot complain of breach of the fair hearing principles". Justice Jackson** of the US Supreme Court once declared that, **"Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied."**

According to **Wade,** in his book, **Administrative Law:**

> **The rules of natural justice cannot be taken for granted in the administration of justice in courts of law. They should equally apply to the decisions of statutory tribunals. Finally, they should apply to all Administrative acts in so far as the nature of the case admits. For all power ought to be exercised fairly, both in appearance and reality.**

RIGHT TO FAIR HEARING UNDER REGIONAL AND INTERNATIONAL HUMAN RIGHTS LAW

The right to fair hearing is recognised both under regional and international human rights law. Under African regional human rights law, the right to fair hearing is stipulated in **Article 7 of the African Charter on Human and Peoples' Rights 1981.** In relation to international human rights law, the right to fair hearing is provided for in **Article 10 of the Universal Declaration of Human Rights, 1948 and Article 14 of the International Covenant on Civil and Political Rights, 1966.**

It is important to state that the right to fair hearing is a jurisprudential offshoot of the right to natural justice. Natural justice has been used to refer to two important, but narrow principles namely:

1) Audi alterem partem – Hear from both sides.

2) Nemo judex in causa sua – Let no man be a judge in his own case.

These two principles are referred to as the pillars of natural justice. These two pillars of natural justice are encapsulated in the opinion of Viscount Maldane, LC, in **Local Government Board v. Arlidge (1915) AC 120, 133** where he observed as follows:

> **My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made...**

Furthermore, fair hearing rule has also been traced by an 18th century judge to the events that transpired in the Garden of Eden shortly after the creation of man. In **R v. Chancellor Of University of Cambridge (1723) 1 Str 557 at 567,** the Court of the King's Bench declared a decision of the University of Cambridge to be a nullity because in depriving Dr. Bentley of his degrees, the University had not first given him an opportunity of appearing before them and stating his case. Delivering the judgement of the Court, Fortescue J**,** declared that:

> **The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself dis not pass sentence upon Adam before he was called upon to make his defence. 'Adam' said God, 'Where art thou? Hast thou eaten of the tree which I commanded thee that thou shouldest not eat?' And the same question was put to Eve also.**

RIGHT TO FAIR HEARING UNDER THE NIGERIAN CONSTITUTION

In Nigeria, the right to fair hearing is provided for in **Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as Amended) [CFRN],** which provides as follows:

> **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.**

The implications of **S. 36(1) of the CFRN)** are as follows:

i. That every person whose right, obligation or liability is the subject matter of a judicial determination, must be accorded a fair hearing. This fair hearing involves giving the parties before the court or tribunal the opportunity and facilites to present their respective cases, and to confront the evidence or witness(es) produced by the adversary by way of cross-examination.
ii. The fair hearing which a person must be accorded must be done within a reasonable time and what is a reasonable time is a question of fact to be determined on a case-by-case basis.
iii. A court or tribunal whose duty it is to determine the rights, obligations or liability of a person, must be constituted or composed in such a manner as to guarantee its independence and impartiality.

AUDI ALTEREM PARTEM

The import of this rule is that the court must necessarily hear from both sides in a matter before pronouncing judgment or determining the case. Thus, in resolving any dispute submitted before a court or tribunal, or before determining any matter involving or relating to a person, or whenever a person will be adversely affected by the judgment or decision of any court, tribunal, body, or authority, the person to be so affected must be afforded an opportunity to be heard so that he can state his own side of the case.

In **Garba v. University of Maiduguri (1986) 1 NWLR (Pt. 18) 550,** Oputa, JSC, remarked that, **"God has given you two ears, hear both sides."** In the instant case, the appellants were students of the University of Maiduguri. They were expelled from the institution sequel to the riotous behaviour of about 500 students which amounted to wilful destruction, arson, looting and assaults. The students were not accorded the constitutional right to fair hearing. The Supreme Court held that by the provisions of **S. 33 of the 1979 Constitution (presently S. 36 of the 1999 CFRN),** there is necessity for compliance with all the rules of natural justice.

In **Izevbuwa v. N.B.A (2022) 5 NWLR (Pt. 1823) at 244**, the 1st respondent filed a three-count complaint against the appellant for fabricating a Business Finance Agreement, acted as a guarantor

as well as acted for the money lender. The appellant was not found liable on counts 1 and 3, but was found liable in respect of count 2. Nevertheless, the L.P.D.C suspended the appellant for two (2) years. Aggrieved by the LPDC's decision, the appellant appealed. The Supreme Court held that deciding without hearing is an aspect of denial of fair hearing. It further stated that fair hearing is a *sine qua non* for a fair trail. A decision founded on the denial of fair hearing of the person to be adversely affected is a nullity.

However, it is to be noted that a person whose right, obligation or liability is to be determined by a court, tribunal or administrative body cannot hold such court, tribunal or administrative body to ransom by refusing to appear when invited, or to refuse to avail himself of the opportunity presented for the exercise of his right to fair hearing. Thus, where he fails to avail himself of the opportunity to be heard, the court, tribunal or administrative body concerned can go ahead and determine the rights, obligations or liabilities of the recalcitrant person and hand down a valid judgment or decision. Such recalcitrant person will not be heard to complain that his right to fair hearing was breached. In **N.B.A v. Akintokin (2006) ALL FWLR (Pt. 333) 1720**, the respondent, a legal practitioner was tried by the Legal Practitioners Disciplinary Committee (LPDC) for various professional misconducts committed against his client. The LPDC issued and served him several hearing notices inviting him to its sittings, but he refused to appear. The LPDC thereafter also took out some newspaper adverts inviting him but, again, the respondent refused to appear. The respondent was then tried in absentia and found guilty of the alleged misconducts and his name was accordingly ordered to be struck off the roll of legal practitioners in Nigeria. It was held that the *audi alterem partem* rule was not breached against the respondent since he was given adequate opportunity to appear and present his case but he on his own volition declined to do so.

NEMO JUDEX IN CAUSA SUA

This second rule of natural justice prohibits a person from being a judge in his own case. In **Fawehinmi v. N.B.A (1989) 2 NWLR (Pt. 105) 558,** the Federal Attorney-General who was the Chairman of the Statutory Committee set up to discipline the appellant was also the same person prosecuting him through officers of his ministry. It was held by the Supreme Court that the federal Attorney-General was simply being a judge in his own case since he was a judge and the accuser at the same time.

In **UNIZIK v. Nwafor (1999) 1 NWLR (Pt. 584) 116,** the Court of Appeal quashed the disciplinary action against the respondent for exam malpractice because the members of the examination malpractice Committee who allegedly caught the respondent, also took part in the meeting of the Senate which ratified the disciplinary action. The Court of Appeal held that members of the committee acted both as judges and complainants at the same time which is against the *nemo judex* rule.

In **Garba v. University of Maiduguri (supra),** one of the reasons given by the Supreme Court for nullifying the decision of the University Disciplinary Board that expelled the students was that

the chairman and members of the board were the Deputy Vice Chancellor and senior members of staff of the University whose properties were allegedly looted and destroyed by the students during the riot. Hence, they sat as judges over their own case.

It should be noted that the right to fair hearing has two aspects: (1) A reasonable notice of the charges, allegations or adverse reflections made against a person in the language he understands and in sufficient details to enable him prepare his defence or explanation of his conduct; and (2) An opportunity must be given to the person to present his own side of the story. In this respect, the party must be informed or given notice of the date and place for hearing his case if the hearing will be oral. If the hearing will not be conducted orally, such a person should be given sufficient number of days within which to prepare his memorandum and submit same.

These requirements were stated in the case of **Board of Education v. Rice (1911) AC 179,** where the court stated that, **"Tribunals charged with the responsibility of deciding issues of law and fact must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything."** Fair hearing has been held to mean a hearing in which both sides or parties to a suit are given equal opportunity to present their respective cases, to tender documents in support of their cases, to call witnesses, to cross-examine witnesses called by the other party and to be given ample time and facility to present their cases.

In **Emeka Offor v. Commissioner of Police, Rivers State Command & Anor (2022) 9 NWLR (Pt. 1835) 241,** the appellant together with the 2nd and 3rd respondents as well as one Agada stood trial at the Chief Magistrate's Court, Port Harcourt, Rivers State. On 12th July 2004, the matter was listed for hearing but the Chief Magistrate was not in court. The respective counsel agreed for an adjournment off record and left the court. But the appellant, 2nd respondent, prosecutor and counsel to the 2nd respondent lingered in court. Afterward, the Chief Magistrate arrived, ignored the adjournment and proceeded to hear the matter. Dissatisfied with the hearing of the matter in the absence of his counsel, the appellant and Agada applied to the High Court for an order of *certiorari* to quash the proceedings of 12th July 2004. The application was dismissed. On further appeal to the Supreme Court, the Court held that where the principles of natural justice are violated in any decision, as in the instant case, it is immaterial that the same decision would have been arrived at in the absence of the departure from the principles of natural justice. Also, the Supreme Court held that by virtue of **Section 36(6)(c) of the CFRN,** every person who is charged with a criminal offence shall be entitled to defend himself in person or by legal practitioner of his own choice.

In **Boye Ind. Ltd v. Sowenimo (2022) 3 NWLR (Pt. 195) 215,** the court stated that, on the basis of the principle of fair hearing, particularly, *audi alterem partem*, the judex is not permitted to decide without hearing. In the instant case, it was held that the Lagos State Government whose action in Exhibit 1 the Court of Appeal was invalidating on grounds of it being illegal, was not made a party before the court. Hence, the Lagos State Government ought not to be condemned unheard.

In **Julius Berger Nig. Ltd v. A.P.I (2018) LPELR-44382,** the Government of Akwa Ibom State awarded to the appellant a contract for construction of Uyo Master Plan drainage system. The appellant thereafter sub-contracted the Environmental Impact Assessment component of the contract to the respondent. The respondent alleged that despite completing the job, the appellant refused to pay the contract sum, whereupon the respondent sued. In response, the appellant filed a notice of intention to defend. The High Court rejected the appellant's notice of intention to defend and entered judgement in favour of the respondent. Aggrieved, the appellant appealed to the Court of Appeal which upheld the decision of the trial court. Further aggrieved, the appellant appealed to the Supreme Court. The Supreme Court held that the essence of *audi alterem partem* in fair hearing and adjudication generally, is that no party in litigation shall employ an element of surprise on the adversary**.**

Although the right to fair hearing is to be exercised within a reasonable time, this reasonable time does not inure in perpetuity. Where a party has been given ample time and facility to present his defence to a suit and he fails to utilise such opportunity, he can not afterward allege a breach of his right to fair hearing. In **Daewoo Nig. Ltd v. Alamina (2022) LPELR 56588 SC,** originating processes were served on the appellant by the Chief Bailiff of the trial Court who deposed to an affidavit of service to that effect. The appellant refused, failed and neglected to enter appearance to defend the suit. Upon finding that the appellant was duly served with the originating processes and after hearing the plaintiff, the trial court entered judgment in his favour. The appellant did not appeal against the judgment. Upon the execution of the judgment, the appellant filed an application to set aside the judgment. The court held that the right to fair hearing is a constitutional right guaranteed by the constitution. A hearing cannot be said to be fair if any of the parties is refused or denied the opportunity to be heard or to present his case or call witnesses. The court further held that it does not however lie in the mouth of a party who disregarded the rules of court or refused to attend court to allege the denial of justice and fair hearing. A party who is in breach of the rules of court cannot complain of breach of the right to fair hearing. He who seeks equity, must do equity.

In **Ecobank Nig. Plc v. Monye (2022) 4 NWLR,** the respondent acting in the belief that the appellant had unlawfully terminated the contract of employment between them, instituted an action before the National Industrial Court. The appellant failed to file its statement of defence in response to the originating processes, nor was present either personally or through counsel on the date fixed for hearing of the suit. The trial was concluded that same day with the matter adjourned for adoption of final written address. Later, the appellant sought to file its statement of defence but the application was refused and final written address was adopted. The trial court awarded damages in favour of the respondent and against the appellant for the wrongful dismissal. Aggrieved by the decision of the National Industrial Court, the appellant appealed to the Court of Appeal. The Court held that a party who was afforded an opportunity to be heard but did not make use of the opportunity, cannot be heard to complain of a breach of his right to fair hearing. What is paramount, is that the trial court must have afforded all parties equal opportunity to present or defend their cases. Also, where the court raised an issue *suo motu*, it is expected to give the parties the

opportunity to address it on such issue. Failure to afford the parties the opportunity of addressing the court on an issue raised suo motu before decision is given thereon amounts to a breach of fair hearing. See **Unijoy Paper Products Ltd v. N.D.I.C (2022) 10 NWLR .**

In **Uzoho v. National Council on Privitization (2022) 15 NWLR (Pt. 1852) 1 SC,** the Supreme Court stated that for a question of fair hearing to apply, there must be a valid and subsisting suit, not an academic or hypothetical suit. See the following cases: **Moore v. Flour Mills of Nigeria Plc (2022) 11 NWLR; Universal Properties Ltd v. Pinnacle Commercial Bank (2022) 12 NWLR; Mbonu v. Wakama (2022); Aondoakaa v. Obot; Rotimi Amaechi v. Governor of Rivers State (2022) 17 NWLR.**

FAIR HEARING IN ADMINISTRATIVE TRIBUNALS

This is encapsulated in Section 36(2) of the CFRN, which stipulates that, **"A law shall not be invalidated by reason only that it confers on any government or authority power to determine questions arising in the administration of a law that affects or may affect the civil rights and obligations of any person."** An administrative body is a body established by law and saddled with the responsibility of administering a law, provision of public goods or services, and which in the course of discharging their duties, may cause harm or take decisions that are prejudicial or adverse to the interest of a citizen. They perform quasi-judicial functions and are mandated to comply with the rules of fair hearing. See **Izevbuwa v. N.B.A, Garba v. University of Maiduguri.**

In **Muyideen v. N.B.A (2021) LCN/5023 (SC),** the appellant was a legal practitioner. His client wrote a petition against him alleging that he breached the rules of professional conduct in managing the client's property. After hearing the evidence of the witnesses, the 2nd respondent delivered its decision. It found the appellant guilty of infamous conduct in professional sense punishable under **Section 12(1)(ii) of the Legal Practitioners Act (revised).** The 2nd respondent (LPDC), directed the Chief Registrar of the Supreme Court to strike off the name of the appellant from the roll of legal practitioners in Nigeria. It was discovered that the membership of the committee was at various times differently constituted at all material stages of the proceeding leading up to its final decision and direction. Being dissatisfied with the direction of the 2nd respondent, the appellant appealed to the Supreme Court. The Supreme Court held that the proceedings of the L.P.D.C was quasi-judicial and accordingly, absence of fair hearing vitiated its proceedings, no matter how well the decision may have been written. The same members who took the plea ought to have adjudicated over the matter to its conclusion.

RIGHT TO PUBLIC TRIAL (Section 36(3) and (4) of the 1999 CFRN)

One of the cardinal ingredients of the right to fair hearing under the CFRN is that the hearing as well as the decision of the court or tribunal must be conducted and delivered in public. In relation to the proceedings of a court, the regular courtroom which is accessible to members of the public or such other suitable venue which is accessible to members of the public will qualify as a public

place. A trial conducted and a decision given in such open court will constitute an open or public trial. In the case of a tribunal or administrative body, its proceedings must be conducted in a place in which members of the public have unrestricted access, subject to the carrying capacity of such venue of proceedings and reasonable limits that may be legally imposed for the purpose of public order, health, security or safety. In **Mohammed v. State (2015) 18 NWLR,** it was held that there was nothing in the record of the trial court to show that on the day the written addresses of counsel for the parties were adopted, the appellant was in the trial court. Also, there was no recording of the appellant's presence when the judgment of the trial court was rendered and no *allocutus* was recorded before the appellant's conviction and sentencing to death. These omissions by the trial court were held to constitute a breach of the appellant's right to fair hearing.

In **Edibo v. State,** the appellant was a police officer implicated in the killing of some passengers in a vehicle. He was tried along with some other persons and convicted of culpable homicide punishable with death and was sentenced to death by hanging. On appeal to the Court of Appeal, the appellant challenged the taking of his plea in the Chambers of the trial court and urged the court to nullify his entire trial. The Court of Appeal refused. On further appeal to the Supreme Court, the judgment of the Court of Appeal was overturned. The Supreme Court held that the arraignment and taking of the plea of accused person in Chambers by the learned trial judge was a gross violation of **Section 36(3)&(4) of the CFRN.**

RIGHT TO PRESUMPTION OF INNOCENCE (Section 36(5) of the 1999 CFRN)

A cardinal aspect of the right to fair hearing in Nigeria is the right to presumption of innocence. This presumption is the fundamental distinction between common law and civil law criminal justice systems. Under the civil law applicable in Central, Eastern and Western Europe, an accused person is presumed guilty until proven otherwise. This is not the case under our laws. See **Olanrewaju v. State (2022) 18 NWLR**

In **Saleh v. State (2024-07) Legalpedia 96376 (CA),** The Appellant was arraigned alongside four others for criminal conspiracy and armed robbery contrary to Sections 97 and 298 of the Penal Code. The prosecution called four witnesses and tendered exhibits including the Appellant's confessional statements. The trial court convicted and sentenced the Appellant to 20 years imprisonment for armed robbery and 6 months for criminal conspiracy. The Appellant challenged his conviction, arguing that the prosecution failed to prove its case beyond reasonable doubt and that the trial court erroneously relied solely on his confessional statement. The Court of Appeal, per **Mohammed Danjuma JCA,** held that Section 36(5) of the CFRN presumes an accused person innocent until he is proved guilty. Accordingly, the burden of proof placed on the prosecution is not discharged until the guilt of an accused person is properly established.

RIGHT TO PROMPT INFORMATION OF THE NATURE AND PARTICULARS OF OFFENCE, ADEQUATE TIME AND LEGAL REPRESENTATION (Section 36(6)(a)-(c) of the CFRN)

S. 36(6) of the CFRN provides**:**

> **Every person who is charged with a criminal offence shall be entitled to the following rights;**
>
> **(a) to be informed promptly and in a language he understands and in detail, the nature of the offence.**
>
> **(b) be given adequate time and facilities for the preparation of his defence.**
>
> **(c) defend himself in person or by legal practitioners of his own choice.**

Section 36(6)(a)-(c) provides for three distinct rights: (1) The right of an accused person to be informed promptly of the nature of his offence. The accused person is to be informed in the language he understands; (2) the right to be given adequate time and facilities for the preparation of his defence; and (3) the right to defend himself in person or by a legal practitioner of his own choice. In **John Elias v. FRN (2021) 16 NWLR,** the court held that by virtue of **S. 36(6)(a)** every person charged with a criminal offence shall be entitled to be informed promptly in the language that he understands and in details the nature of the offence. See **Igwe v. State (2022) 1 NWLR**

RIGHT TO BE GIVEN THE RECORD OF PROCEEDINGS (Section 36(7) of the 1999 CFRN)

The CFRN provides that the records of the proceedings shall be kept by the court and that the accused shall be entitled to copies of the judgment. The rationale behind this is to enable the accused exercise his right of appeal if he so desires.

PROHIBITION OF RETROACTIVE CRIMINAL LAWS (Section 36(8) of the 1999 CFRN)

This section provides that no person shall be tried or convicted of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence.

In **Atuana v. FRN (2023-07) Legalpedia 19363 (CA),** the respondent brought a charge against the appellant for alleged infractions contrary to various provisions of the ICPC Act 2000 and the Penal Code Act. The appellant filed a preliminary objection praying the court to strike out all the charges on the grounds that the charges were brought under non-existing laws and was a breach of the defendant's right to fair hearing, amongst others. The court held that it was trite law that S. 36(8) prohibits the conviction of a person under a non-existent law. However, the peculiar circumstances of this case did not support the submission of the appellant, because the ICPC Act of 2003 that purportedly repealed the ICPC Act of 2000 under which the appellant was tried was declared a nullity by the Federal High Court on 21st May, 2003.

THE RULE AGAINST DOUBLE JEOPARDY (Section 36(9)and (10) of the 1999 CFRN)

It is instructive to note that double jeopardy is a procedural defence that prevents an accused person from being tried again on same or similar charges and on the same facts. The doctrine of double jeopardy, therefore, prohibits a person from being tried or punished twice for the same offence with same set of facts. The principle of double jeopardy is enshrined as a fundamental right under Section 36(9)&(10) of the CFRN. See **Shehu v. Kano State (2024-04) Legalpedia 99480 (CA).**

In **Abdulhamid v. Kano State supra,** the court held that for the plea of *autre fois acqui*t or *autre fois convict* to succeed, the following elements must be proved to the court's satisfaction:

(1) that the accused had previously been tried on a criminal charge;

(2) the former trial must have been conducted before a court of competent jurisdiction;

(3) the trial must have ended with an acquittal or conviction;

(4) the criminal charge for which the accused was tried should be the same as the new charge against him or alternatively, the new charge should be one in respect of which the accused could have been convicted at the former trial, although not charged with it.

RIGHT OF SILENCE (Section 36(11) of the 1999 CFRN)

An accused person has the right to remain silent during his trial and is not bound to say anything to incriminate himself. This position is expressed in the latin maxim, ***accusare nemo se debit, visit coral deo*** meaning, 'no one is bound to accuse(incriminate) himself, unless before God.' Section 36(11) of the CFRN stipulates that no person who is tried for a criminal offence shall be compelled to give evidence at the trial. Thus, an accused person has the right to remain silent during his trial. He cannot be compelled to give evidence

RIGHT TO BE CONVICTED UNDER A WRITTEN CRIMINAL LAW (SECTION 36(12)

This section is to the effect that a person shall not be convicted for a criminal offence unless such an offence is defined and its penalty prescribed in a written law. This is represented in a latin maxim, ***nullum crimen sine lege,*** meaning, 'there is no crime without a law."

See Aoko v. Fabgemi (1961) ALL NLR 400

In **Nwobike v. FRN (2021-10) Legalpedia 07685 (SC),** the court succinctly stated:

"Having found that the offence is not defined, the only logical inference the trial Court was bound to make is that the aforesaid Section is inconsistent with the provisions of Section 36(12) of the Constitution and refrain from fruitless evaluation and determination of the guilt of the Appellant on a charge founded on an offence which is not defined by law." – **Per Tijjani Abubakar, JSC**