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A Critique of the Limitation of the Right of Fair Hearing by the Exclusion of Hearsay Evidence

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Abstracts

Judicial proceedings under the Nigerian judicial system are adversarial in nature. In this system, the parties either in prosecuting or defending their cases must present sufficient evidence to be entitled to judgment as per the allegation(s) contained in their pleadings or information. Meanwhile, the judge under this system sits as an independent umpire to examine the evidence presented for and/or against the claim or defence by the parties. The Court is to be guided by the law and rules of evidence as to who has the burden and standard of proof required as well as what evidence to admit or exclude. The law of evidence, being a matter under the exclusive Legislative List, is enacted by the National Assembly and regulates the rules on proceedings relating to evidence in most Nigerian Courts in addition to judicial decisions as well as other recognized Laws, Charters, or Protocols. The Nigerian Constitution guarantees as fundamental to her citizens, the rights to fair hearing, right to have their causes heard within a reasonable time and to defend themselves in person or by legal practitioners of their choice. Would it not therefore amount to unconstitutionality, when the law of evidence which is largely adjectival that should not be found contrary to the provisions of the Constitution, patently excludes from admissibility, evidence which are categorized as hearsay? This paper, using the doctrinal research methodology, answers this question in the affirmative and offers some recommendations for improvements in this area of law and practice.

Keywords: Fair-Hearing; Hearsay Evidence; Exclusion of Hearsay Evidence; Burden of Proof

1. Introduction

Under the Nigerian judicial system, judicial proceeding is adversarial in nature. It is incumbent on parties to present sufficient proof of evidence to the standard prescribed by law, to be entitled to judgment[1]. The Court, presided over by a judge, sits as an independent umpire to examine the evidence presented by the parties. The matter of evidence in Nigeria, being under the exclusive powers of the Federal Government, is mandatorily placed as one of the matters to be enacted by

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[1] See Generally, SS.131, 132, 134 and 135 of the Evidence Act, 2011 Cap E.14 hereinafter abbreviated as ("The Evidence Act") on who has the general burden of proof, on who the burden of proof lies in civil proceedings, the standard of proof in civil proceedings; and who has the burden of proof and to what standard in criminal proceedings respectively.

the National Assembly[2]. The Evidence Act therefore governs the law of evidence in all judicial proceedings before all courts of law established in Nigeria except before courts in which it is excluded[3]. In addition to the application of the law of evidence before these courts, judicial decisions as well as other recognized Laws or Charters[4] are applicable aside from the constitution, being the *grundnorm*.

While the Nigerian Constitution guarantees a right of fair hearing[5] as a fundamental right to all her citizens, the African Charter on Human and Peoples Rights, to which Nigeria is signatory, also confers a right to have one's causes heard and determined[6]. The Nigerian Constitution provides that other Laws must be consistent with it otherwise, they will be declared null and void to the extent of their inconsistency[7]. The Evidence Act however, which is largely adjectival that deals with law to prove allegations of facts made by the parties, copiously excludes from admissibility, evidence categorized as hearsay[8]. The main research question in this paper is whether the exclusion of evidence which would otherwise have been admissible, would not amount to an unconstitutional violation of the citizens' rights of fair hearing and right to have one's case heard under the Constitution and African Charter of Human and Peoples' Rights respectively? This paper, using the doctrinal methodology, explores the relevant principles of law and capturing, some evidential issues in both civil and criminal trials, and asserts that the rights to fair hearing and to have one's cause, heard are unconstitutionally violated by the exclusion of hearsay evidence from admissibility.

2. Meaning of Evidence

Evidence could in the narrow sense means the facts necessary to establish the truth or otherwise of an allegation usually contained in the pleading or charge with the proof of evidence of the parties. In a wider sense however, evidence refers to the body of rules which regulate how evidence is presented in a judicial proceeding. It is in this latter sense that evidence regulates what may be proved, what is not allowed to be proved, who has the burden to prove and to what standard required.

2.1 Some Common Terms Associated with the Law of Evidence: These are terms intricately associated with the law of evidence:

(i). Facts:- The Evidence Act states that facts includes anything, state of things or relation of things capable of being perceived by the senses[9]. This means that anything that can be thought of or perceived by the five senses i.e. seen, heard, touched, perceived as a smell or taste is a fact. Fact as state of things means for example whether water is liquid or solid when at a low temperature in

[2] See Item 23 on the Exclusive Legislative List of the Constitution of the Federal Republic of Nigeria 1999, (As Amended) hereinafter abbreviated as ("The FRN 1999").
[3] Evidence Act, s 256.
[4] *ANPP v IGP* (2007) (18) NWLR (Pt. 1066) at 457. See also Article VII(1) of the African Charter on Human and Peoples' Rights hereinafter abbreviated as ("The ACHPR").
[5] S36(1) of the CFRN 1999.
[6] Article VII (1) of the ACHPR.
[7] S 1(3) of the CFRN 1999.
[8] Evidence Act, ss 37, 38 and 126.
[9] Ibid, s 258.

the form of ice or is hot when boiled etc. is a fact. Relation of things means how two or more things are related to each other. The same section of the Act further states that a fact includes any mental condition of which any person is conscious of. Therefore, anything that can be perceived by any of the senses is a fact and it is a unit or object of proof of the element by which evidence is measured.

(ii). **Proof:** This is required when allegations of the existence or otherwise of a fact is made in a trial to establish that the thing alleged in fact exists or does not exist. Thus, the process of use of evidence to establish allegations is referred to as proof and there must be this proof except in the cases of admissions, where facts may be judicially noticed or presumed. The proof must also be to the standard required by law. In civil trials, a fact is taken as proved or disproved, if it is shown that the probability of its existence or non-existence is higher. It is proved,[10] when the court either believes the fact to exist or considers the existence of the fact so probable. It is disproved[11], when the court believes that the fact does not exist or considers the non-existence so probable. Not proved[12], when a fact is neither proved nor disproved.

(iii). Relevance and Admissibility:- In the proof of allegations, only evidence related to a facts in issue and relevant facts and of no other, are allowed. Thus, relevance in relation to two or more facts, refers to the situation where according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders probable, the past, present or future existence or non-existence of the other[13]. What is relevant fact may be in any of the ways referred to in Sections 4 – 13 and other provisions of the Evidence Act.

Admissibility on the other hand, refers to the quality of a piece of evidence which makes it receivable in court. Thus, the basis of admissibility is relevance. Therefore, once evidence is relevant and neither too remote nor excluded by any rule of law, it is then admissible.[14]

(iv). Weight of Evidence:- The weight of evidence is the premium to be attached to a piece of evidence, whether oral, documentary or real. This relates to the quality of a piece of evidence. The credibility and reliability of a piece of evidence affects the weight or premium to be attached to the evidence. The custody or the due execution of a piece of documentary evidence could determine the weight to be attached to it. An evaluation of all relevant and admissible evidence is therefore necessary in order to determine the weight to be attached to a piece of evidence.

Where the probative value of a piece of evidence is high, then the weight to be attached to it is high and has the probability of affecting the decision of a court. The findings of a court are usually contingent on the evaluation of a fact based on the weight of evidence. An appeal court rarely disturbs the findings of a lower court being the court that has the duty to do evaluation of the evidence before it given the fact that it has the opportunity to see the demeanor etc. of the witnesses.

[10]Evidence Act, S 121 (a).
[11]Ibid, s 121(b).
[12]Ibid, s 121(c).
[13]See generally JF Stephen, *Digest of Law of Evidence* (12th ed., London, 1948), Art. 1 cited in OO Orimogunje, *Law of Evidence in Nigeria* (Chenglo Limited, 2009) P29
[14]PA Bobai & DU Dewan, *A Practical Approach to Civil Litigation in Nigeria* (1st edn., Jos University Press Ltd.) jos, Plateau State, 2020 PP. 299 – 332 .

Findings by the lower court are usually disturbed by an appeal court where the findings are perverse.[15]

3. The Scope of the Law of Evidence

What constitutes the scope of the law of evidence and the understanding of the basic principles of the working of which, for the purpose of this paper, will form the subject of our brief discourse in this part of this paper. The scope of the law of evidence deals broadly with the following matters:

(i) What facts may be proved.

(ii) What facts need not be proved.

(iii) What facts are excluded or inadmissible.

(iv) Means of proof.

(v) Who is competent to give evidence? And

(vi) Who has the burden of proof and to what standard?

(i). What facts may be proved:- Section 1 of the Evidence Act states the allowable facts to be proved or that the evidence of which may be given in any suit or proceedings to be: (a) Facts in issue and (b) Relevant facts.

(i)(a). Facts in Issue refer to the core facts in a case which constitute the cause of action. It is defined to include any fact which either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceedings necessarily follows[16].

The facts in issue are facts which make up the cause of action. In an allegation of negligence for instance, the facts in issue would be; existence of duty of care, breach of duty of care and resultant damages[17].

(i)(b). Relevant Facts on the other hand are those facts related to and which make the facts in issue probable or improbable. Facts would be generally relevant if they are connected to facts in issue in any of the following three ways:

(i)(b)(1). Relevant Facts under Sections 4–13 of the Evidence Act. Such facts include facts forming part of the same transaction with the fact in issue; facts showing the cause, occasion or effect of facts in issue etc.[18]

[15]*Abba Satomi Saleh v Bank of the North*(2006) 2 SCNJ 407; *Odubeko v Fowler*(1993) 9 SCNJ 183
[16] S 258 of the Evidence Act.
[17]*Hedley Byne & Co. Ltd v Heller Partners Ltd* (1964) AC 465; *African Petroleum Plc. V. Soyemi*(2008) All FWLR (Pt. 397) 117; *Agura Hotel & Ord. v Diambaya*(2015) LPELR – 41696 (CA); *Mobnil Oil Nig. Plc. v Bardedas Cars Ltd*(2019) All FWLR (Pt. 988) 947 at 954 – 965.
[18] See Generally, SS. 4 – 13 of the Evidence Act.

(i)(b)(2). Facts relevant on special grounds. Example here is where evidence of possession may be relevant in cases of claim of ownership over a land[19], oral evidence of family or communal tradition where title or interest in family or communal land is contested[20].

(i)(b)(3). Facts relevant on grounds of credibility. This is evidence of facts that may be called in aid to test the accuracy, veracity or credibility of a witness, generally allowed in cross-examination[21].

(ii). What facts need not be proved?
These are facts which though are relevant, but which the law of evidence made need not be proved because they may be generally clear and uncontested. This is premised on the need to save time and cost in litigation. Such facts include:

(ii)(a). Formal Admissions[22] These are admissions made in a formal as opposed to in formal admissions. Example of such formal admissions are those made in pleadings, admissions by counsel, answers to interrogatories, answers to notices to admit or by agreement of parties.

(ii)(b). Judicial Notices[23] The courts are enjoined by the Evidence Act to take judicial notice of some facts or take them as established either on grounds of notoriety or have become settled from previous proof or rather on account of desirability of consistency of decisions of courts. Such facts fall into two categories of: must[24] be judicially noticed facts and the may[25] be judicially noticed facts.

(ii)(c). Presumption[26] Presumptions are inferences or conclusions which a court has a discretion or duty to draw upon showing that a fact or set of facts exist. Where presumptions exist, they tilt the burden of proof of relieving a party of the burden of proof of facts where the inference or conclusion is made in his favour. The court has discretion to make presumption of facts but must make a presumption of law where the necessary facts exist.

Presumptions are broadly categorized into three as follows:

(i) Presumption of fact (which is rebuttable)

(ii) Rebuttable presumption of law[27]

(iii) Irrebuttable presumption of law[28]

[19] Evidence Act,s 35.
[20] Ibid, s 66(a).
[21] Ibid, s 223(a).
[22] Ibid, s 123.
[23] Ibid, s 122.
[24]Ibid, s 122(2)(a) for instance all Laws/Enactments, offices of government, seals of courts etc.
[25]Ibid,s 122(3) & (4)
[26]Ibid, s 145
[27]See for instance S.36(5) CFRN 1999 on presumption of innocence, SS. 165 & 168(1) of the Evidence Act on presumption of legitimacy and regularity respectively which are all rebuttable.
[28] For instance that a child under 12 years and 7 years is incapable of having carnal knowledge and incapable of committing crime. See S. 7 of the Criminal Code which are irrebuttable presumption of law.

(iii). What facts are excluded or inadmissible?

The admissibility of some facts is excluded by the law of evidence either because of their prejudicial nature or on grounds of public policy or because it is only the court that has the responsibility to draw such conclusions. These are the general exclusionary rules of evidence. The categories of evidence that fall into this excluded evidence are estoppel evidence[29], similar facts evidence[30] as well as hearsay evidence[31] which are excluded on grounds of their prejudicial nature. Opinion evidence[32] also is excluded because it is only the court that has the power to draw opinions.

Suffices to say that estoppels, similar facts, hearsay and opinion evidence which have been identified as falling under the exclusionary rules of evidence respectively have their exception. We shall now briefly discuss each of the above.

4. The Exclusion of Hearsay Evidence

It has been stated already in this paper that a fact is anything that can be perceived by any of the senses. Section 26 of the Evidence Act also provides that facts or evidence must be direct in order to be admissible in court. By this provision therefore, evidence must proceed directly from the witness who perceived the fact he is testifying about by his eyes, ears, nose, body etc. By implication therefore, hearsay evidence is evidence from a person other than the party who actually saw, heard, perceived or felt the fact, the subject matter of his testimony. The Evidence Act therefore describes hearsay as '*Statement, oral or written, made otherwise than by a witness in a proceeding which is tendered in evidence for the purpose of proving the truth of the matter stated in It'*[33].

Hearsay evidence as indirect evidence is generally excluded and inadmissible[34]. Its exclusion is based on its low probative value, remoteness and lack of opportunity to test the veracity of the evidence from the original maker. The opportunity for fraud from repetition and substitution of strong evidence with a very weak one is therefore very high.

The rule against hearsay evidence however has common law basis, having been birthed in the *locus classicus* case of *Subramaniam V. Public Prosecutor*[35]. This case established the principle that not all hearsay statement repeated by a third party constitutes inadmissible hearsay evidence. If the statement is made for the purpose of establishing its truth, then it is inadmissible hearsay. Where however it is made for the purpose of only proving that the statements were made, it is then admissible hearsay. Of importance to note is that the hearsay rule also applies to documentary evidence.

[29] See s169 Evidence Act for remoteness.
[30] Ibid, s 1(a) for exclusion of similar facts evidence on ground of remoteness. See also *Akariwo v Nsirim* (2008) All NWLR 610.
[31] Ibid, ss 37 – 38 and 126 which exclude hearsay evidence on ground of their prejudicial nature.
[32] Ibid, ss 67 – 71 on exclusion of opinion evidence on ground of subjectivity and usurpation of court's power.
[33] Evidence Act, s 37.
[34] Ibid, s 38.
[35] (1956) WLR 965.

The exceptions to the hearsay rule include the following:

Evidence admissible under Section 83(i)(b) of the Evidence Act where the maker is dead or unfit by reason of bodily or mental condition or outside or if reasonable effort to secure the maker has been fruitless, Affidavit evidence[36], Admissions by privies[37], Evidence in previous court proceedings[38], Statements made in public documents[39], Evidence of traditional history[40], Evidence of the statement of the dead who could not be called to give evidence[41]; and Evidence admitted on the principle of corporate personality[42].

4.1 The Means of Proof: This refers to the oral, real, and documentary as the three ways by which evidence or facts are presented before a court.

4.2 Oral Evidence

This is the testimony or statement given orally by a witness in the course of any proceedings for the purpose that the court may act or not on the truth or otherwise of the assertions contained therein[43]. This is the commonest means of proof. It has been modified with the advent of frontloading system into a written statement on oaths which is simply adopted by the witness, but this is still while giving oral testimony.

Oral testimony is given in three stages: examination-in-chief, cross-examination, and re-examination. Oral evidence which is required to be direct and not hearsay[44], can only be given by a witness who understands the question put to him and can give rational answers to the questions[45]. The reliability of oral evidence is guaranteed on the requirement of it been given on oaths with some exemption[46], cross examination[47] and observation of the demeanor of the witness in court by a judge.

4.3 Real Evidence

Real evidence is any material means of proof other than oral or documentary evidence which is examined by the court as means of proof of fact[48]. This evidence may be moveable or immoveable material object, the production and/or inspection by the court may be material to the determination of the case[49]. While the moveable real evidence may be brought to the court for inspection, the court may either adjourn to continue its proceedings at where the material real evidence is situated

[36] S107 Evidence Act.
[37] Ibid, s 21.
[38]Evidence Act, s 45.
[39]Ibid, ss 105 & 106 .
[40]Ibid, ss 66 & 70 .
[41]Ibid, s 39 .
[42]*Kate Enterprises Ltd v Daewo Co. Ltd.* **(**1985) All NLR 265.
[43]Orimogunje, (n 13) p196.
[44] See Evidence Act, s 126.
[45] Ibid, s 175.
[46] Ibid, s 208 & 209.
[47] Ibid, s 214 (2).
[48]Ibid, s 258.
[49]Ibid, s 127(a) & (b).

or rather just visit the *locus in quo* and return to the court for the continuation of its proceedings to confirm or not everything that was observed at the *locus in quo*.[50]

4.4 Documentary Evidence

Documentary evidence, as a means of proof is a reliance on information contained in a document to establish the fact contained or recorded therein. Where direct oral evidence of a fact would be admissible, any statement made by a person in a document which seems to establish that fact shall, on production of the original document, be admissible as evidence of that fact….[51] Where therefore matters have been reduced into writing, no evidence maybe given of such document or of its terms except, the document itself or its secondary evidence where applicable[52].

A document is a matter or substance on which an inscription is made by means of letters, figures or marks or by more than one of these means and intended to be used to record that matter[53]. The 2011 Evidence Act has also accommodated electronically generated documents by means of which information is recorded, stored, and retrieved, including computer output[54]. The Supreme Court in the case of *Okonji v Njonkama*[55] enunciated three criterions for reliance to be placed on admissibility of documentary evidence especially in civil cases to be that: the document must have been pleaded, relevant to the facts in issue in the case and in an admissible form. While documentary evidence could be broadly classified into public[56] and private documents, the proof of contents of documents could either be by primary or secondary evidence[57].

5. Who is Competent and Compellable to give Evidence?

The first threshold a witness must cross to be able to testify is that he must be competent. The competence of a witness is premised on satisfying two conditions. These conditions are that; he must have the ability to understand questions put to him and have the capacity to give rational answers to the questions[58]. The competency tests stated herein may be impeded by tender years, extreme old age, disease of the mind or body or oath/affirmation taking or not[59].

Compellability on the other hand borders on the obligations to testify or the question of whether a person can be compelled or not to testify. The Evidence Act and other laws have provisions on the conditions for being a competent witness or whether a compellable witness. While all compellable witnesses are competent, not all competent witnesses are compellable. Thus, the following persons are by law, not compellable to testify:

(a) The President and Vice President, Governor and Deputy Governor[60].

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[50]*Seismograph Services ltd v Omokpasa*(1972) 1 All NLR (pt. 1) 343, *Seismograph Services ltd v Akpororo*(1974) 6 SC 119 &*Seismograph Services ltd v Ogbeni*(1976) All NLR 163
[51]Evidence Act, s 83(1).
[52]Ibid, s 128.
[53]Ibid, s258.
[54]Ibid, para. (d).
[55] (1999) 12 SCNJ 259.
[56]Evidence Act, s 102.
[57] See generally Ibid at SS. 85 – 88.
[58]Evidence Act, s 175.
[59]Ibid, ss 205 – 209.
[60]See s 308, CFRN 1999.

(b) Diplomats, Members of their staff, family and their domestic staff[61].

(c) Spouses of a valid statutory marriage cannot divulge some communications made during the subsistence of their marriage[62].

(d) Judges and Magistrates not compellable to testify as to matters they came across in the discharge of their functions as such[63].

(e) Bankers are not compellable to testify or produce their banker's book in matters not involving their banks unless upon order of court under Section 177 of the Evidence Act.

(f) A public officer Is not compellable to disclose the affairs of state especially on security[64].

(g) Lawyer and client's communication are privileged except to prevent commission of crime[65].

5.1 The Burden of Proof

Generally, the burden of proof in civil and criminal matters, rests on whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, to prove that those facts exists[66]. Where this burden bearer therefore fails to give evidence at all, and/or fails to give further evidence as maybe required of him where the burden subsequently shifts on him as in the case of civil matters, this party is bound to fail[67]. It does become clearer from this last assertion that there are two (2) types of burden of proof in civil matters which are the general burden and the evidential burden.

5.2 The General Legal Burden of Proof

This is otherwise referred to as the legal burden or the ultimate burden, being the obligation to prove the entire case. This burden traditionally rests on the claimant in civil matters and on the prosecution in criminal matters[68]. In civil matters, this general burden is determined by the state of pleadings and presumptions[69]. A presumption on a fact in favour of a claimant will shift the burden of proof on the defendant.[70]

5.3 The Evidential Burden of Proof

While the general evidential burden means the burden of establishing the whole case, the evidential burden on the other hand is the burden of proving particular facts. This burden shifts from one party to the other successively until a matter in both civil as well as in criminal matters and if the

[61] See SS.1(i), 3 & 4, Diplomatic Immunity & Privileges Act, 1962**;** *Ishola v British High Commission*(1980) 8 – 11 SC 100; and *Zabusky v Isreal Air Craft Industries*(2007) All FWLR (325 – 1758).
[62] See SS. 186 & 187 Evidence Act.
[63]Evidence Act, s188 and 189.
[64]Ibid, s 191.
[65]Ibid, s 192.
[66]Ibid, s 131.
[67]Ibid, s 132(2).
[68]Ibid, s 131, 132 & 135(2).
[69] See *Igbokwe v UCH Board of Management*(1961) WNLR 173.
[70] Ibid.

party on whom the burden shifts fails to adduce evidence, he will fail in respect of the particular facts[71].

5.4 The Standard of Proof

The standard of proof refers to how much proof or quality of proof is required in order to establish a case. In civil matters, the standard is on the balance of probability[72] except where crime is alleged which will require such allegation alone to be on proof beyond reasonable doubt[73]. Proof on the balance of probability means to establish a fact to a point where there is a high probability of the existence of that fact. The duty of a court in determining whether the standard has been met or not, is to weigh the evidence on both sides of an imaginary scale based on quality or probative value of the evidence and preferring whichever is heavier or more probable, no matter how slight.

6. The Right of Fair Hearing and Exclusionary Rules of Hearsay Evidence

This is one of the fundamental rights contained in Chapter IV of the Constitution which provides:

> *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 manner as to secure its independence and impartiality[74].*

The right to fair hearing is a cardinal principle of natural justice, which the Nigerian constitution jealously seeks to preserve although it has its origin in the common law. The rules of natural justice are procedural safeguards against arbitrary trials. They are enshrined in two latin maxims of *audi alteram causa* (hear the other side/both sides and *nemo judex in causa sua*(no man should be a judge in his own cause)[75]. While the first maxim means that a person or the two parties to a dispute must be given or afforded an opportunity of a hearing in a matter affecting his or their rights before a judge arrives at a decision. If this rule is not complied with, the judgment of the court will on application, to an appellate court be set aside[76]. The second maxim means that a person cannot be a judge in his own cause. This means that if a judge is interested in a case or has a pecuniary and/or proprietary interest in the subject matter of the dispute, he shall be disqualified from taking part in the proceedings[77].

6.1 The Right to have one's cause heard

The African Charter on Human and Peoples Rights asserts that every individual shall have the right to have his cause heard[78] especially in respect of criminal offences however, the Constitution provides that:

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[71]SS 133(2) & 139 Evidence Act, *Nigerian Maritime Service Ltd v Alh. Bello*Afolabi (1978) 2 SC 79 &*Magaji v Bello*(1978) 4 SC 91.
[72]Ibid, s 134.
[73]Ibid, s 135(1).
[74]S 36(i) of the CFRN 1999.
[75]*Shitta – Bey v Fed. Pub. Service Comm.* (1981) 1 SC 40.
[76]*Olatunbosun v NISSERC*(1988) 3 NWLR (pt. 80) p.123.
[77]*Ekperokun v University of Lagos*(1986) 3 NWLR (pt. 34) p. 162, *Garba v University of Maiduguri* (1986) 1 NWLR (pt. 18) 550, *Dr. Alakija v MDC*(1959) 4 FSC 38.
[78] See Art VII(1) of the ACHPR (ft. 6 supra).

Every person who is charged with a criminal offence shall be entitled:

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

(b) To be given adequate time and facilities for the preparation of his defence;

(c) Defend himself in person or by a legal practitioner of his own choice;

(d) …….; and

(e) …….[79]

In the case of *Gokpa v Inspector Gen. of Police*[80], an appeal against the learned Magistrate's judgment was upheld by the High Court on the ground that an appeal cannot stand where there has been a refusal to adjourn a case in which the appellant is entitled to be heard by counsel who was unable without any default on his part to reach the court in time to conduct the appeal. The right to be afforded opportunity of defence, includes being afforded the right to present his defence using any means of proof whether oral, real, or documentary evidence. To the extent therefore that the rule against hearsay has the effect of excluding the evidence of a party, it prevents that party from proving or at least trying to prove his case as he deems fit. The rule of exclusion of hearsay evidence therefore simply denies a party of that prerogative[81].

7. The Nature and Scope of Human Rights

The right of fair hearing as one of the constitutionally guaranteed fundamental human rights, enshrined in Section 36 of Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999, stands above every other ordinary law[82]. The nature of this right was defined by a re-known Nigerian jurist as follows:

> *A fundamental right is a right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to a civilized existence, and what has been done by our constitution since the independence constitution, that is, the Nigerian constitution (Order in Council) 1960 up to the present constitution, that is the constitution of the Federal Republic of Nigeria…. is to have rights enshrined in the constitution so that the rights could be "Immutable" to the extent of "non-Immutability of the constitution itself*[83].

Professor M.A. Ajomo, another eminent authority, has stated that:

> *Simply put, human rights are rights inherent in man; they arise from the very nature of man as a social animal. They are those rights which human beings enjoy by*

[79] See S. 36(6)(a) – (e) CFRN 1999 particularly para. C thereof.
[80] See *Adigun v A.G Oyo State*(1987) 18 NSCC (pt. 346) 34.
[81]Ibid, p.415.
[82] See *Beko Ransome Kuti & ors.v A.G.F* (1985) 2 NWLR (pt.6) 211.
[83]Ibid, pp. 229 – 230 per Kayode Esho JSC (As he then was).

> *virtue of their humanity, whether black, white, yellow, Malay or red, the deprivation of which would constitute a great affront to one's natural sense of justice.e*[84]

Human rights are therefore regarded as indispensable and indisputable rights which every society must recognize as they form the basis for human existence. They are rights which existed prior to any human society or legal system. Any human society or legal system which therefore fails to recognize them is patently unjust and unsustainable[85]. It is common to categorize or classify these rights into three as follows; Civil and Political Rights; Economic, Social and Cultural Rights, and Solidarity Rights.

So important are human rights, that these rights of the individual are now recognized under international law, although in most cases, there is no international machinery for their enforcement. However, the obligation to protect and promote human rights is contained in various provisions of the United Nations Charter, the Declaration of Human Rights (1948 and several other United Nations (UN) Covenants on Human Rights. Happily, we now have an Organization of African Union (OAU) Convention entitled African Charter on Human and Peoples Right ("The ACHPR")[86]. The urge to consolidate Nigerian constitutional and fundamental rights resulted in the National Assembly promulgating in 1983, the ACHPR (Ratification and Enforcement) Act[87] which has become an integral part of Nigerian domestic laws enforceable by the Nigerian courts.

8. A Critique of the Limitation of the Right of Fair Hearing by the Exclusion of Hearsay Evidence

The rule against hearsay evidence and the right of fair hearing are two familiar legal principles to both lawyers and non-lawyers alike. This is because both principles feature prominently in counsel's final address and notices of appeal especially in criminal cases. Evidence given by a witness about a statement made to him by a person who is not himself called as a witness is by rule of evidence, inadmissible hearsay if the witness reporting it intends thereby to establish its truth, but it is not hearsay and admissible if it is intended merely to show that it was made[88]. To the extent therefore that the hearsay rule excludes evidence which, but for the rule, would have been admissible, the rule amounts to an unconstitutional abridgement of the right of a person to prove his case by whatever means available to him. Does, the rule of exclusion of hearsay evidence amounts to an unconstitutional impeachment or restriction on the fundamental right of litigants to fair hearing under Section 36(1) of the 1999 Constitution[89] or to have their cause heard under Article VII(1) of the African Charter on Human and Peoples Rights?

As regards the constitutional status of Article VII(1) of the ACHPR on the right to have one's cause heard, being limited or excluded by the rules of hearsay evidence, it is our submission that this is also unconstitutional in the face of the constitutional guaranteed right of fair hearing and to

[84]M A Ajomo, M.A, (1993) The Dev. of Individual Rights in Nigerian's Constitutional History; In Ajomo and Owasanoye, (Eds.) Individual Rights under the 1989 Constitution, (Nigerian Institute of Advanced Legal Studies) p.1.
[85]Y Akinseye – George, Y, (2011) Improving Judicial Protection of Human Rights in Nigeria, (Centre for Social – Legal Studies, Abuja) pp. 1 – 2
[86]See fn. 6 (supra).
[87] Cap 10 LFN 1990 (Now Cap 2014).
[88]*Utteh v The State* (1992) 2 SCNJ (pt. 1) p. 183.
[89]*Adigun v A.G of Oyo State*(1987) 18 NSCC (pt. 1) 346 at 415.

defend himself under the provisions of Section 36(1) & (6)(c) of the 1999 Constitution. While Article VII (1) of the ACHPR confers the right to have one's cause heard, Section 36(6)(c) of the 1999 Constitution on the other hand confers on every person charged with a criminal offense, the right to defend himself in person or by a legal practitioner of his choice. It is important to know that the ACHPR is part of Nigeria's municipal laws and as such superior to all laws except the Constitution itself[90].

The Supreme Court has at any rate held that a constitutional power cannot be used by way of condition to attain unconstitutional result[91]. This means that the power given by the constitution to the National Assembly to enact rules of evidence should not be exercised to impose such conditions for the admissibility of evidence as would qualify/abridge the constitutional right of litigations to fair hearing. To the extent therefore that the right of fair hearing is entrenched in the constitution, it overrides all contrary provisions in any law of the land and be they substantive or adjectival[92].

9. Conclusion and Recommendations

The conclusion to be drawn from this paper is that the right to fair hearing cannot be displaced by any legislation, however unambiguously worded[93]. That to the extent that the hearsay rule under Sections 37, 38 and 26 of the Evidence Act are made pursuant to some provisions of the Constitutional Schedules is *ultra vires* the National Assembly, invalid, null and void. The supremacy of the constitution would mean nothing if all other laws are not made subordinated to the constitution. Any law made by the National Assembly having the effect of circumscribing, abridging, limiting or out-rightly robbing the citizens of their fundamental right of fair hearing through denying litigants of the right to present their cases as they deem fit in their defence, will certainly be *ultra vires*.

The paper offers the following as recommendations for improvement in this area of law and practice:

(1) There is the need to amend both the Constitution and the Evidence Act dropping the powers of the Legislative to exclude hearsay evidence from being made admissible. In the amendment proposed, all evidence should be made admissible subject however to the inherent jurisdiction of the court preserved in the constitution[94].

(2) The power of the court to admit or not, hearsay evidence should be subject only to the discretion of the court as to the weight to be attached to evidence in any given case. Like all judicial discretion, this discretion should however be exercised both judicially and judiciously.

(3) The value of continuing legal education for both the legal practitioners and judicial officers cannot be overemphasized. This is particularly more important in the area of the principles and practice of evidence as is applicable to litigation. A sound knowledge and continuing training of practitioners and the judges will no doubt equip them with sound and improved knowledge for their practice. The training should include attending lectures, trainings,

[90] See *ANPP v IGP*(2007) 18 NWLR (pt. 1066) 457 at 500C.
[91] See *A.G Bendel State v AGF*(1981) 12 NSCC 314.
[92] See *Kotoye v CBN*(1989) 1 NWLR (pt. 98) 419.
[93] *L.P.D.C v Fawehinmi*(1985) 2 NWLR (pt. 7) 300 at 370.
[94] See S 6(6) (a) CFRN 1999; *Onyenucheya v Military Administrator. of Imo State* (1997) 1 NWLR (pt. 482) 429.

workshops, seminars, and conferences approved by the Nigerian Bar Association and relevant judicial institutes.