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Research Article

THE INTERSECTION OF DUE PROCESS AND CAPITAL PUNISHMENT: A LEGAL COMPARISON IN NIGERIA

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Abstract

Capital punishment remains a contentious global issue, sparking debates and varying perspectives worldwide. This article delves into the diverse attitudes of nations towards capital punishment, emphasizing that different countries maintain distinctive lists of crimes that warrant the ultimate penalty. The absence of a universal standard for classifying capital offenses further underscores the nuanced approach adopted by retentionist states. Capital punishment represents the most severe sanction imposed on individuals found guilty of capital crimes by competent judicial bodies. Grounded in penological theories like deterrence, retribution, and elimination, this method seeks to address the societal security threat posed by certain offenses. Nevertheless, the perception of what constitutes a threat varies among different societies, leading to a complex and multifaceted global landscape concerning capital punishment.

Keywords: Capital punishment, global issue, retentionist countries, capital offenses, penological theories, societal security.

1. Introduction

Capital punishment is currently a global issue which has generated much controversy over the years. Different groups and persons have viewed the subject from various perspectives. Thus, the attitudes of nations vary from one to the other. This variance is confirmed by the fact that crimes that attract the capital punishment in the retentionist countries differ from jurisdiction to jurisdiction. This position is buttressed by the fact that in some countries, the list is short, while in others, the list is long. Hence, there is no universal yardstick to classify which crime will attract capital punishment and which will not.

Capital punishment is the supreme sacrifice paid by an offender who has been adjudged guilty of a capital offence by a court of competent jurisdiction. It is a non-institutional disposition method of treating a capital offender, principally premised on the penological theories of deterrence[3], retribution[4] and elimination.

Most offences are capitalized because of the security threat which they pose to the society and what constitutes a threat varies from one society to another.

Under the Criminal Code, offences of murder, treason, treachery, instigating invasion of Nigeria and directing, controlling or presiding at unlawful trial by ordeal resulting in death, attract capital punishment. Under the Penal Code, the death penalty is the mandatory punishment for the offences of culpable homicide, abetment of the

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suicide of a child or insane person, presiding over a trial by ordeal which results in the death of another,[14] giving or fabricating false evidence which results in the conviction and execution of an innocent person and treason. Capital punishment is also prescribed for the offence of armed robbery under the Robbery and Firearms (Special Provisions) Act, which has now been incorporated into the Criminal Code. Most of the eastern states in Nigeria and Lagos state have also capitalized the offence of kidnapping, which results in the death of the victim.

With the official adoption of Shariah Penal Code by some northern states of Nigeria on the 27th January 2002, the pre-existing scope of capital offences in Nigeria has been widened and certain sexual offences like adultery, lesbianism and sodomy, which are punishable with flogging under the Penal Code, became capitalized. It is on record that Safiyyatu Husseini was sentenced to death by stoning for adultery under the Sokoto State Shariah Penal Code by the Upper Shariah Court, Gwadabawa, Sokoto in 2001. Also, Amina Lawal was sentenced to death by stoning by the Bakori Lower Shariah Court in 2002 under the Katsina Shariah Penal Code for adultery. The Shariah Penal Code also capitalized the offence of rape and hirabah (high way robbery).

The protagonists of capital punishment hold the view that certain needs of the society which cannot be achieved by other methods are met by the execution of the criminal. They appear to assume that capital punishment attunes with proportionality in relation to the heinous offences, and their beliefs might have been premised on the utilitarian or hedonistic principle of felicitic calculus in the promotion of common will and the „greatest happiness of the highest number."

However, as fascinating as this opinion seems to be, capital punishment has been globally discredited, due to so many flaws that are associated with it. Several militating factors, like infraction of right to life, freedom from torture, inhuman or degrading treatment, irreversibility of death, judicial errors, death row phenomenon, and barbaric mode of execution, inter alia, have been identified as the albatross of capital punishment. Hence, the concerted global call for its abolition. E. O. Akingbehin, „Capitalization of Offences in Nigeria: An Appraisal of the International Law Restrictions" [2017] 8 (2) Nnamdi Azikiwe Journal of Law and Jurisprudence, 73.

The Nigerian Criminal Justice Administration is regulated by the Constitution and various statutes. These statutes include the Administration of Criminal Justice Act 2015, the Criminal Code, the Penal Code and the Shariah Penal Code, which is operative in Zamfara and eleven other northern states in Nigeria, as well as the relevant regional and international instruments to which Nigeria is a party. These instruments make provisions for various safeguards aimed at protecting citizens" rights, ensuring due process in criminal trials and post-trial procedures, including the execution of death sentences.

Chapter IV of the Nigerian Constitution recognizes the right to life as a fundamental right. However, the same Constitution derogates from the said right, by authorizing capital punishment for those who commit capital offences. Capital punishment is therefore, by necessary implication, constitutional and does not, in any way, violate a capital offender"s right to life.

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However, a great concern has been raised about the practice of the death penalty in Nigeria, which arose from impositions after trials, that do not conform to international and normal fair trials standards. In other words, many capital trials in Nigeria fall short of standards of fair trial. The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution has reiterated that: proceedings leading to the imposition of capital punishment must conform to the highest standard of independence, competence, objectivity and impartiality of judges and juries, in accordance with the specified international legal instrument. All defendants facing the imposition of capital punishment must benefit from the services of a competent defence counsel at every stage of the proceedings. Defendants must be presumed innocent until their guilts have been proved beyond a reasonable doubt, in strict application of the highest standards for the gathering and assessment of evidence. In addition, all mitigating factors must be taken into account.

Also, the U.N. ECOSOC has encouraged UN member states in which the death penalty has not yet been abolished to ensure that a defendant facing a possible death sentence is given all guarantees to ensure a fair trial. It is therefore, instructive to note that compliance with due process standards in capital offence trials is very imperative, as failure to respect fair trial standards in capital offence trials, increases the likelihood of innocent defendants being sentenced to death and subsequently executed. It can also lead to the abuse of the whole trial process.

A fair trial is a basic element of the notion of the rule of law and the principle of due process and the rule of law are fundamental to the protection of human rights. At the centre of any legal system, there must be a medium by which legal rights are ensured and breaches remedied through the process of a fair trial in court, as the law becomes useless without effective remedy, in consonance with the maxim ubi jus, ibi remedium. Hence, the fairness of the legal process is the foundation stone for the substantive protection against state powers.

It has been observed that the phrase „due process“ is not used in any statute in Nigeria, unlike in the United States of America. However, there is no doubt that its underlying values give essence to the Nigerian criminal process. Inasmuch as there are certain restrictions on the rights of a capital offender against the wider interest of the state, the constitutional due process and elementary justice require that the judicial functions of the trial and sentencing be conducted with fundamental fairness, especially, where the irreversible sanction of the death penalty is involved.

The cause of discomfiture for the writer is that section 33 of the Constitution merely authorizes a deprivation of life in the execution of the sentence of a court in respect of criminal offence for which such person has been found guilty. However, many capital trials in Nigeria have fallen short of international standards of fair trial. A lot of abuses have been observed in the bid of the state to carry out the provisions of this section. Capital offenders are kept too long in detention without arraignment, and in some cases, defendants have no access to legal assistance during trials. Also, capital offenders have been executed while their appeals were still pending.

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Sequel to the foregoing, this paper aims at analysing the extent of compliance or otherwise by the various stakeholders, with the international due process requirements in the legal processing of a capital offender at the trial stage, which runs from arraignment to sentencing in Nigeria. The pre-trial stage runs from the periods of arrest up to arraignment, whilst the post-trial stage runs from sentencing to execution. The paper is divided into six parts. The first part introduces the paper whilst the second part analyses the right to fair hearing and trial within a reasonable time in the public before a court or tribunal. In the third part, the writer appraises the capital offender‟s right to presumption of innocence, while the paper discusses the right to adequate time and facility to prepare for defence in part four. The writer examined the capital offender‟s right to mandatory legal representation in the fifth part and concludes in part six thereby proffering recommendations.

2. Fair Hearing/Trial within A Reasonable Time In The Public Before A Court Or Tribunal

This part of the paper shall be broken down into four sub-headings viz: (i) fair hearing rights; (ii) trial within a reasonable time; (iii) trial in the public ; (iv) trial before a court or tribunal.

(i) Fair Hearing Right:

Fair hearing is not only a constitutional issue; it is also a principle of English law, as well as customary law. Fair hearing is fundamental to any kind of adjudication, whether under English or customary law. The right to fair hearing is in fact an indispensable part of the process of adjudication in any civilized society which all decision makers must comply with in order to improve administrative standard. Fair trial on the other hand helps to clarify fairness at four different levels viz (i) fairness and equality, (ii) fairness and morality, (iii) fairness and objectivity, and (iv) fairness and impartiality. Fairness, therefore, is the idea of doing what is best. It may not be perfect but it is the good and decent thing to do.

It requires being level-headed, uniform and regular where all around you is prejudice, corruption and the desire of an angry mob to see justice done. The right to fair trial can therefore be described as a fundamental safeguard to ensure that individuals are protected from the unlawful and arbitrary deprivation from their human rights and freedoms. It has also been described as the cornerstone of a democratic society.

The distinction between fair hearing and fair trial was succinctly made by Adeyemi, when he said: while trial is all encompassing, that is, from arraignment to the conclusion of the trial, culminating in the announcement of decision of the court or tribunal, hearing, on the other hand, entails merely from arraignment to the putting up of the case for defence.

Hence, fair hearing is embedded in fair trial, and as such, fair trial is a genre of which fair hearing is a specie. The test of fairness in a trial process has been prescribed by the Supreme Court in Nigeria, in the case of Effiom v. The State, where the essential elements of fair hearing were listed as: easy access to the court, right to be heard,

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the impartiality of the adjudicating process, the principle of nemo judex in causa sua and whether there is inordinate delay in delivering judgment.

Section 36 of the Constitution makes elaborate provisions aimed at safeguarding, not only the fair hearing/trial, but also a right to be tried within a reasonable time in criminal trials. Consequently, a person charged with a capital offence is entitled to a fair hearing in the public within a reasonable time by a court or tribunal. Since the conviction for a capital offence and the imposition of a sentence pertain exclusively to the judicial organ of government, it is only a court that is qualified under section 6 of the Constitution, to exercise judicial power to convict and sentence for a capital offence.

In the case of Orioge v. A. G. Ondo State, it was stated that the twin principles of natural justice are inherent in the provision for fair hearing, but that the provision goes beyond the rule of natural justice. The distinction had earlier been aptly made by Lord Denning in Breen v. A. E. U,[1] thus:

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

The rule of natural justice is anchored on two pillars viz; (1) a man may not be a judge in his own cause, and (2) let the other side be heard.[2] In expressing the foundation for the second pillar stated above, Fortescue in Breen v. A. E. U[3] said:

"I remember to have heard it observed by a very learned man upon such occasion, that even God himself did not pass sentence on Adam before he was called upon to make his defence. For God said Adam, why have thou eaten of the fruit whereof I command you thou shall not eat?"

The development of the modern law on the rule against interest and bias is also based on the principle of law enunciated by Lord Hewart C. J in R. v. Sussex J. J. Exp McCarthy[4] where the learned Chief Justice said:

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

This arm of natural justice requires that a person should not be a judge in a case in which he is interested. Hence, any pecuniary interest, no matter how small, is sufficient to disqualify a judge from adjudicating in a matter, even

[1] [1971] 2 QB 175, 191.

[2] Usually expressed in the Latin maxims (*nemo judex in causa sua* and *Audi alteram partem* respectively). See R. v. Chancellor, University of Cambridge (Dr. Bentley" s case) [1923] 1 Str 557. However, a court of law can convict an accused person who chooses to say nothing in his defence. See section 358 (1) ACJA 2015.

[3] Supra (n.54).

[4] [1924] KB 256. See also M. K. O. Abiola v. The Federal Republic of Nigeria [1995] 7 NWLR (Pt. 405), 1.

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if he was not influenced by the interest.[5] A judge, like Caesar‟s wife, must therefore, be above suspicion. The same disqualification is also applicable if the judge has any form of bias or likelihood of same. The test, therefore, is whether there is a reasonable suspicion of bias, to be looked at from the objective standpoint of an aggrieved party.[6]

2.2 Reasonable Time

The fair hearing envisaged by section 36 (4) of the Constitution is that a criminal trial must be commenced and concluded within a reasonable time by a court or tribunal and that the question,whether a trial is concluded within a reasonable time, depends on the circumstances of each particular case. According to Ogundare JSC:

"...the word „reasonable‟ in its ordinary meaning connotes moderate, tolerable or not excessive. What is reasonable in relation to the question whether an accused has a fair trial within a reasonable time depends on the circumstances of each particular case…"

Quite unfortunately, the provision of section 36 (4) of the Constitution did not offer the definition of „reasonable time‟ unlike the provision of section 35 (4) of the Constitution which guarantees the right of a suspect to be charged to court within a reasonable time and spelt out that a reasonable time connotes 24 hours or 48 hours, as the case may be. In view of the non-existence of specified definition of the scope of the phrase „within a reasonable time,‟ in section 36 (4), it has been construed that the presence of undue delay in the trial of an accused person constitutes a breach of his right. It is therefore doubtful, if a trial that lasts for more than four years can be said to be „within a reasonable time‟.

The crucial question about the right to be tried within a reasonable time is the determination of when a trial commences. Thus, in the case of Godspower Asakitipi v. The State,[62] where the appellant was tried and convicted for armed robbery by the Bendel State (now Edo) High Court, the Supreme Court held that trial, in a criminal case commences with arraignment, which in turn consists of the charging of the accused, or reading over the charge to the accused person and taking his plea thereon. The appellant was purportedly arraigned on the 8th of February 1982 for an offence allegedly committed on the 6th of July 1981, when he was arrested. The charge was not read to him and no plea taken. The case was adjourned for 18 times between February 1982 and 8th March 1983 before he was properly arraigned before a High Court on the 10th of March, 1983 and judgement delivered on 31st March 1983. On appeal, the appellant contended that he was not tried within a reasonable time. While the

[5] Deduwa v. Okorodudu [1976] 9/10 S. E. 329.

[6] See Nnamdi Azikiwe University v. Nwafor [1999] 1 NWLR (Pts. 584 – 588), 116, where the Court of Appeal held, in an examination malpractice case, that the members of the examination committee who saw the alleged acts of malpractice committed by the respondents acted as judges in their own cause by also participating actively in the deliberation of the Senate that suspended the respondent. The dictum of Lord Nolan in Re-Pinochet is also very instructive, where His Lordship held: where partiality of a judge is in question, the appearance of the matter is just as important as the reality [2000] 1 AC 119 – 147, 1 LR; 135. See also Isiyaku Mohammed v. Kano Native Authority [1968] 1 All NLR 424.

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Supreme Court deprecated the delay from 6th July 1981 to 10th March 1983, it held, however, that irrespective of the fact that the accused was brought to court 18 times before his plea was taken, trial in the case did not commence until the 10th of March 1983. Consequently, the whole trial process lasted for only 20 days, which cannot be said to be unreasonable in the circumstance of the case.

The rationale for prescribing speedy trial has always been that delay in trials impairs the ability of the accused person to defend himself, due to the fact that a vital witness may have died in the interval or that the recollection of the facts by other witnesses may have become blurred. There is also the further danger of the trial judge losing his impression of the demeanour of the witnesses after the lapse of time, during which he has also to watch the demeanour of the witnesses in a variety of other cases. The courts have, therefore, always felt that undue delay in criminal trials is fraught with the danger of miscarriage of justice.

The reasonable time for the consideration and delivery of judgement by the court depends on the time an active, healthy and mentally alert judge takes to read and consider the evidence and write his judgement with full and complete consciousness of all impressions of witnesses at the trial. Hence, the Supreme Court has held that reasonable time must mean the period of time which, in the search for justice , does not wear out the parties and their interests, and which is required to ensure that justice is not only done but appears to reasonable persons, to heave been done.[7] Thus, a period of time which dims or leads to loss of the memory of the judge about his impression of the case and that of the witnesses, is certainly too long and unreasonable. However, a party who occasioned the delay should be estopped from relying on his own tardiness to the prejudice of the other party. Aileru, in deprecating the tardiness of accused persons in criminal trials, contended that the attitudes of lawyers representing accused persons in filing frivolous applications and objections in court is one major factor which inhibit the conduct of a criminal trial within a reasonable time.

The situation in Nigeria is such that delay in criminal matters, especially for trials of capital offences, may be caused by many factors. Olawoye has identified some factors that militate against speedy trials in criminal cases. These include the delay from the Ministry of Justice in filing information and proofs of evidence, police request for adjournment to enable completion of investigation or for production of witnesses, shortage of judges and supporting staff, indifference and laziness of lawyers, indisposition of judges and magistrates, persistent absence of counsel in court, personnel transfer, corruption and inadequate or obsolete facilities.

However, deficiencies in the criminal justice system cannot be used to justify violations of rights when the human rights of individuals are at stake. Thus, the UN Human Rights Committee‟s decision in Lubuto v. Zambi a is to the effect that a state cannot use its economic situation to justify violations of minimum human rights standards,

[7] See Egbo v. Agbara (supra) (n.63)

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including violations of fair trial rights. The Nigerian judiciary can be said to have failed woefully in the aspect of trial within a reasonable time. This is because judicial dispensation of disputes takes such a long time that in some cases, both the witnesses and the litigants die before a case is finally determined. Today, instances abound of court proceedings commenced more than fifteen years back which are yet to reach the trial stage. In many cases, favourable judgements obtained after a protracted trial, through the hierarchy of courts end up being set aside on the ground of inordinate delay.

The Supreme Court of Nigeria has identified four factors and the effect they may have on a trial in order to determine „reasonable time" in relation to a criminal trial. These are: the length of delay, the reasons given by the prosecution for the delay, the responsibility of the accused for asserting his right and the prejudice to which the accused may be exposed.[8] Thus, in Ozulonye & 11 Ors v. State,[9] the trial took four years to conclude and there were more than ten accused persons. The trial judge went on transfer to another judicial division and was later transferred back, to find that the case remained where he had left it. He then concluded it. It was held, on appeal that the trial judge could not possibly recollect the evidence given at the trial due to effluxion of time. The court held further that the trial judge lost track of the facts of the case and concluded that the accused was not given a fair trial within a reasonable time.

However, in the case of Okeke v. The State,[74] the trial of the accused person took six years to conclude, although the main exhibits at the trial was the accused person"s voluntary statement. On appeal against conviction, the Supreme Court held that, though the main exhibit at the trial was the accused person"s voluntary statement, all the evidence given at the trial could be recollected by the trial judge by re-reading the record of proceedings and that the trial judge did not lose track of the fact due to effluxion of time.

It can be seen from the above two cases that it is not really the length of time of the delay in the trial process that can warrant a setting aside of the lower court"s judgement by the appellate courts, but a consideration of the combination of factors enumerated in Effiom's Case. The appellate courts have also been reluctant in a lot of instances to set aside the judgement if the delay does not occasion any injustice to the accused.

In a bid to bring absolute end to the excessive and unreasonable delays in the criminal proceedings, individual states have taken steps to accelerate the trial systems in their respective jurisdictions.[10] The federal government also enacted the Administration of Criminal Justice Act in 2015.[11] Section 396 (1) provides that all preliminary objections are to be raised after the taking of the plea of the accused and this used to serve as a ground for stay of

[8] See Effiom v. State (Supra) (n.49).
[9] [1983] 4 NCLR, 204. [74]
Supra (n.60)
[10] See the Administration of Criminal Justice Law of Lagos State 2011, as an example.
[11] Administration of Criminal Justice Act, 2015.

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proceedings. Section 396 (2) also provides that arguments on a preliminary objection are to be taken with substantive issues and the ruling thereon to be taken at the time of delivering the final judgement. The import of the above provision is that it has the effect of speeding up trial processes because any appeal on the ruling on preliminary objection will be taken together with whatever appealable issues that may come up from the substantive issues considered at the trial.

However, albeit a fair trial requires that the proceedings should be reasonably speedy; it equally prohibits such trial from being unreasonably speedy, as a litigant should be allowed sufficient time in court to put forward his case.

2.3 Publicity of the Trial:

This right is the entitlement of not only the accused person but also of the members of the public. It refers to the right of a capital offender to be entitled to a public hearing or rather a fair hearing where members of the public are allowed access to the proceeding. In Macpherson v. Macpherson, it was held that the actual presence of the public is not necessary as a trial is sufficiently public if members of the public may have access to where it is taking place. The requirement of publicity of trial can be said to have its basis embedded in the maxim „justice must not only be done but must be seen to be done". Justice can therefore, be hardly said to be done where a capital offender is not tried publicly.

Section 36 (4) of the Constitution stipulates that the trial, which must be conducted within a reasonable time, should be in public. The publicity of a trial is one of the hallmarks of fairness. Members of the public are, therefore, not prohibited from attending criminal trials, even when they are not parties to the proceedings. Osipitan has rightly asserted that the requirement of open trial and public glare remains a cornerstone of the adversarial trial system. The provision for public trial ensures that the judge himself, while trying a case, will be on trial. Also, the citizen is safeguarded from the risk of being convicted unduly in a secret trial, and that the executive does not employ hide and seek measures to manipulate or coerce the courts into convicting innocent persons. Hence, the court or tribunal must be open and accessible to the members of the public, as far as it can conveniently accommodate them.

In the case of Iwuoha v. Okoroike,[12] it was stated that one of the attributes of fair hearing is that the proceeding shall be held in the public and all concerned shall have access to and be informed of such a place. However, in the case of Biffo v. R.,[86] it was held that this requirement is satisfied if the public have access to the trial, even if the proceedings were not held in the regular court room. A trial, to which the public had no access, is therefore, a nullity.

[12] [1996] 2 NWLR (Pt. 7) 231 at 235. [86] [1960] E. A. 965.

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The right to publicity of trials is not absolute. Not all human beings are allowed access to a hearing. Infants, which refer to persons below the age of seven years,[13] are excluded from attending criminal proceedings. Section 262 of the ACJA provides that an infant, other than an infant in the arms of the parent or guardian, or child,[14] shall not be permitted to be present in court during the trial of a defendant charged with an offence or during any proceeding preliminary to the trial except: (i) he is charged with the alleged offence or (ii) his presence is required as a witness or otherwise for the purposes of justice, in which event, he may remain for as long as his presence is necessary. Statutes have also restricted the public from being in attendance in certain circumstances. Section 36 (4) (a) of the Constitution provides that a court or tribunal may exclude from its proceedings, persons other than the parties thereto or their legal practitioners in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of eighteen, the protection of private lives of the parties or to such extent as it may consider necessary by reason of special circumstances in which publicity would be contrary to the interest of justice.

In addition to the above constitutional provision, section 36 (4) (b) is to the effect that if a minister of the government of the federation or a commissioner of the government of a state, in any proceeding before the court or tribunal, satisfies the court or tribunal that it would not be in public interest for any matter to be publicly disclosed, the court or tribunal shall make arrangement for evidence relating to that matter to be heard in private and shall take such other action as may be necessary or expedient to prevent the disclosure of the matter. Section 232(4) of the ACJA also enumerate specific offences in which trial may not be held in open court, if the court so determines. The offences include rape, defilement, incest, unnatural and indecent offences against a person, offences relating to economic and financial crimes, trafficking in persons or related offences and any other offence in respect of which an Act of the National Assembly permits the use of such protective measures or as a judge may consider appropriate in the circumstances.

Section 259 (2) also provides that a judge or magistrate presiding over a trial may, in his discretion and subject to the provision of section 260, which relates to infants, exclude the public at any stage of the hearing on the grounds of public policy, decency or expenditure.

The right to public trial of citizens was usually violated during the military regimes, especially military tribunals. These tribunals can be said to be everything but independent or fair. For example, the trials of persons allegedly connected with the April 22 1990 coup were conducted by military tribunals in utmost secrecy. Journalists, human rights groups and other independent bodies were shut out from the proceedings. In the end, 42 persons were executed by firing squad. The trial of Major General Zamani Lekwot and six others in connection with the Zango

[13] Section 494 of the ACJA, 2015.

[14] By virtue of the Child Rights Act 2003, a child is defined as a person below the age of 18 years. See section 277 CRA 2003.

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Kataf disturbances is another example. The defence counsel, Chief G. O. K. Ajayi had to withdraw from the case due to lack of fair hearing. At the end, Lekwot and four others were sentenced to death.

It is hereby submitted that in order to foster confidence in the administration of criminal justice and to ensure a fair hearing with transparency, especially in trials that involve the supreme sacrifice of death, proceedings should be open to the general public, unless there is compelling reason for the exclusion of the public.

2.4 Impartiality of the Court/Tribunal

The independence and impartiality of courts are required to be co-existent and to complement each other for the proper dispensation of justice. It must however be underscored that the independence and impartiality of courts do not mean the same thing. Independence of a court or a tribunal connotes a state whereby the court which represents the judicial arm of government, is to a practicable extent, free from the influence of and interference from the executive and legislative arms of government.

To this end, there should be no influence from the executive or the legislative arms, as the courts must dispense justice without fear or favour and most importantly, based on merit. Impartiality of the courts on the other hand, paints a picture of a scenario where decisions are not made pre-emptively and where the court is obliged not to sit where there is the slightest likelihood of bias, as a man cannot be a judge in his own cause.

The requirement of trial within a reasonable time in a court or tribunal in section 36 (4) of the Constitution envisages courts or tribunal of competent jurisdiction, where the impartiality, independence and neutrality of the judges are guaranteed.[15] The competence of a court or tribunal refers to the appropriate personnel, subject matter, and the territorial and temporal jurisdiction of a court in a given case. The reference to the tribunal"s establishment by law presupposes that the court has been established by the normal law-making body of the legal system in question.

The issues of independence and impartiality of courts have been recognized in the Constitution of Nigeria. Section 17 (1) provides expressly that the independence, impartiality and integrity of the courts of law and easy accessibility thereto shall be secured and maintained.[16] Aside from the disability of the Chapter II of the Constitution, the Constitution goes further to provide for grounds and instances of interference from other arms of government. This is visible in the procedure for the appointment of judges which is basically by the executive, subject to the confirmation of the legislature, dismissal of judges, funding and the general conditions of service of judicial officers, etc.

[15] For courts of competent jurisdiction, see section 6 (CFRN 1999). See also the case of Madukolu v. Nkemdilim [1962] All NLR 1, on when a court can be said to be of competent jurisdiction.

[16] It is observed that the provision as contained in Chapter II of the Constitution is unenforceable due to the non-justiciability of its breach.

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The United Nations Human Rights Commission had noted in many countries, including Nigeria that the military or special courts do try civilians and it is of the view that this could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. The concern here stemmed from the fact that such courts are established to enable exceptional procedures to be applied, which do not comply with normal standard of justice. It is however doubtful, if a tribunal that convicted a person without due process of criminal procedure, can be said to have satisfied this requirement.[17] It is quite perturbing, that the presiding judge in Ken Saro Wiwa's case, in a sheer display of flagrant disregard for due process said:

"…the Criminal Procedure Acts are designed to afford an accused defendant safeguards… It is not clearly the intention of the framers of the Decrees (military) to provide the accused with such escape route to freedom."[102]

Decrying partiality, the Supreme Court also held in Akinfe v. State,[18] on the quality of a judge, that a judge should be:

"…impartial unto dismissal, and even unto death, be objective in his thought and his action, be experienced, not just in the law, but also, and more importantly, in the affairs of life, be uncompromisingly independent and fearless..."

It is submitted from the foregoing, that a court, especially for the purpose of trials in capital offence cases, should accord the accused person a fair hearing in the public, within a reasonable time and that such court should be impartial. Our judges, like Caesar"s wife, should be above suspicion.

Lord Nolan asserted in Pinochet's case thus: „where the impartiality of a judge is in question, the appearance of the matter is just as important as the reality."[19] Chief Afe Babalola has also cautioned that:

"....when the appointment of men and women to the bench is premised on extraneous considerations, such as godfatherism, political connections, religious leanings, federal character (without any regard for merit and competence), and monetary inducements, the ultimate victim is JUSTICE. The society is bound to suffer and bear the brunt of the consequences of having incompetent judges on the bench."[20]

3. Right to Presumption of Innocence

A presumption is a product of a rule according to which upon the proof of one fact, the judge or jury may or must find that some other facts exist. A presumption may either be rebuttable or irrebuttable. When a presumption is

[17] On the 6 of February 1995, Ken Saro Wiwa and fourteen others were charged before a Special Military Tribunal headed by Justice Ibrahim Auta, with the murder of four Ogoni chiefs. See the Civil Disturbances (Special Tribunal) Decree 2 of 1987. [102] See T. Mbeke-Ekanem, *Beyond the Execution, Understanding the Ethnic and Military Politics in Nigeria* (CSS Press, 2000), 147.

[18] [1988] 3 NWLR (Pt. 85) 729. For other cases on the impartiality of the courts, see State v. Aibangbee [1983] 3 NWLR (Pt. 84) 548, Garba v. University of Maiduguri [1986] 1 NWLR (Pt.18) 550 and LPDC v. Gani Fawehinmi [1985] 2 NWLR (Pt. 7) 307.

[19] Re-Pinochet [2000] 1 AC 119 – 147, ILR, 135.

[20] Chief Afe Babalola, „The Role of the Judiciary in the Sustenance of Democracy in Nigeria" , A lecture delivered and cited by Oliver Ona, in a paper titled, „Judiciary in the 18 Years of Nigeria" s Democracy: Legal Angle" , *Nigerian Chronicle*, 1 June, 2017.

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irrebuttable, no evidence can be adduced to contradict the presumed fact.[21] Presumption of innocence has, therefore, been said to mean that an accused is to be presumed innocent of the offence for which he is standing trial, his notoriety, criminal antecedents and gravity of the offence which he is accused of, being irrelevant.[22] By this presumption, the burden of proving guilt is invariably on the prosecution as it was stated by Viscount Sankey LC in Woolmington v. Director of Public Prosecutions[23] that, while the prosecution must prove the guilt of the prisoner, no burden lay on the prisoner to prove his innocence and it was sufficient for him to raise a doubt to his guilt.[24] This is the feature of our adversarial criminal justice system.

The Nigerian Constitution provides: „Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty.‟ This provision places the burden generally on the prosecution to prove the guilt of the accused person, and this must be beyond reasonable doubt. A court, therefore, has to conduct the trial without forming an opinion on the guilt or innocence of the accused person in advance.[25]

Consequently, a disregard of the procedural constitutional guarantee of the presumption of innocence in criminal trials was displayed by the Head of State during the Zango Kataf crisis, when he said: “this moment can be described as the darkest chapter in the nation‟s history … all the accused persons would be considered guilty until they are proved otherwise.”[26]

An offshoot of the constitutional guarantee of the presumption of innocence is the right to bail pending the trial of an accused offender. It is therefore, clear that the continued detention of an accused person, pending the conclusion of a fairly long trial negates the right to the presumption of innocence, especially, where the accused person is eventually adjudged to be innocent of the charge by the trial judge.[27] In Nigeria, the position on the grant of bail generally is as contained in the Administration of Criminal justice Act 2015, which provides:

(a) A person charged with any offence punishable with death shall not be admitted to bail except by a judge of the High Court;

(b) Where a person is charged with any felony other than that punishable with death, the Court may, if it thinks fit, admit him to bail;

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[21] T. Aguda, *The Law of Evidence in Nigeria*. 2nd ed. (Sweet & Maxwell, 1974). 216.

[22] J. A. Dada & E. A. Opara, „Application of Presumption of Innocence in Nigeria: Bedrock of Justice or Refuge of Felons?" [2014] 28, *Journal of Law, Policy and Globalisation*, 68.

[23] [1935] A.C 462.

[24] See Zwunglee Arli v. State [1954] SC 15.

[25] This right was blatantly violated by the Nigerian Government in the case of International Pen & Others (on behalf of Saro Wiwa) v. Nigeria. Communication 137/94, 154/96 and 161/97 12th Activity Report: 1998 – 1999, Add 113, 1 Nov. 1999, para 18.

[26] See *The Newswatch Magazine* of 8 March, 1993, 10.

[27] See Article 7 (1) (b) of the African Charter on Human and Peoples Rights, to be read together with Article 9 (3) of the ICCPR. It must be noted that the African Commission has recognised the right to bail in the Principles and Guidelines on the Right to a Fair Trial and Legal Aid in Africa. [113] See ACJA 2015, Sections 161-163.

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(c) Where a person is charged with any offence other than those referred to in the last preceding sub-sections, the Court shall admit him to bail, unless it sees good reason(s) to the contrary.[113]

Hence, the combined effect of the above provisions is that, in non-felonious offences, bail is to be granted as a matter of course. In non-capital felonies, bail may be granted within the discretion of the court while in capital offences, only the High Courts have the original jurisdiction, and such may be granted sparingly.[28]

The position of the Nigerian courts on bail in capital cases is that it is very unusual, though not impossible, for a capital offender to be admitted to bail during trial. This was aptly expressed by the Supreme Court in the leading case of Oladele v. State[29] and a number of other cases.[30] However, the problem with the Nigerian courts is the lack of uniformity in the exercise of discretion by the various courts. Hence, from the line of cases decided by the Nigerian courts so far on bail in capital offences, there have been obvious inconsistencies in their approaches. In Mohammed Abacha v. State,[31]a case of murder and conspiracy to commit murder, where the applicant adduced a modicum of evidence of ill health to support his application, bail was refused. However, in Iyiola Omisore v. State,[32] where the applicant did not adduce any stronger evidence of ill health, the application was granted.[33] It is therefore an infraction of a capital offender"s right to presumption of innocence to be refused bail simply because bail pending trial in capital offence cases is not to be granted ex debito justitiae.[34]

In capital offence bail consideration, the courts have placed much emphasis on the cogency of the facts against the applicant.[35] Hence in C.O.P v. Akinpelu & 10 Ors,[36] bail was granted in murder case which was punishable with death on the ground that the prosecution failed to disprove the applicant"s alibi. Johnson J, therefore, held that the prosecution"s evidence against the applicant was not cogent. The onus is on the party who opposes the application for bail in capital trials to provide some prima facie evidence to show that the case against the applicant is likely to succeed and that the accused or prisoner is not likely to appear to face his trial, if admitted to bail.[37]

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[28] Note that section 35 (7) CFRN 1999, also exempts those detained for commission of capital offences from the right to pretrial bail and speedy arraignment. See also Francis Fashein v. COP [1995] 7 NWLR (Pt. 410) at 755 and Okpe & Anor v. The State [1994] 5 NWLR (Pt. 345), 490.

[29] [1999] 1 NWLR (Pt. 209) 294.

[30] See Mohammed Abacha v. State [2002] 32 WRN 1, 336, Omisore v. State [2008] NCC 60.

[31] Supra

[32] Supra

[33] The exercise of discretion in Omisore" s case should be distinguished from the discretion exercised in granting bail in the case of Fawehinmi v. State [1990] 5 ENLR (Pt.112) 336. The medical evidence adduced in the latter case, though not a capital offence matter, could be said to constitute exceptional circumstances.

[34] See also Omodara v. State [2004] 1 NWLR (Pt. 853) 80.

[35] See State v. Okafor & 14 Ors (1964) ENLR 96.

[36] [1972] 2 U.I.L.R. Part III, 330 at 335.

[37] A.A.Adeyemi, „The Place of Bail in our Criminal Justice Process" op cit (n.48), 239 – 241.

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It has been observed that in the few examined cases on bail application in capital trials, some applications have been unjustly refused by the respective trial courts only to be granted by appellate courts.[38] Consequently, it is suggested that, regardless of whether the offence is capital or not, an accused person should be admitted to bail after satisfying the conditions laid down by the courts, and that will be the only way of complying with the international fair trial safeguard entrenched for the protection of the right to presumption of innocence.

4. Right to Adequate Time and Facility To Prepare For Defence

The Constitution[39] further provides: „Every person who is charged with a criminal offence shall be given adequate time and facilities for the preparation of his defence."

The above provision implies that a capital offender should be afforded sufficient time to prepare for his defence. However, what constitutes adequate time depends on the circumstances of each case. Hence, an accused person should not be refused an adjournment where such an adjournment is necessary. Thus, a refusal of an application by the accused person for adjournment to arrange for a council will amount to a breach of section 36 (6) (b) of the Constitution.[40] It is therefore submitted that, where a request for adjournment is not based on reasonable grounds, and if granting such will lead to protracted trial that may make the judge to lose his impression of the case and the witnesses, and to deprive him of the advantage of hearing and seeing the witnesses, such request for adjournment ought not to be granted.[127]

On the issue of adequate facility for the preparation of defence, it implies that an accused person should have access to materials that are necessary for the preparation of his defence.[41] The facilities include access to documents and other evidence that the accused person requires to prepare for his case, as well as the opportunity to engage and communicate with counsel.[42] The Supreme Court has held that a person accused of capital offence has a right to have his defence conducted by a legal practitioner assigned by the court, if he cannot procure the service of one.[43] However, this has not been the case in Nigeria, as there have been reported instances of prosecution"s reluctance to share information with the defence lawyers. In some cases, allegations of the prosecution suppressing information that are favourable to the accused person also abound.[44]

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[38] Enwere v. COP [1993] 6 NWLR (Pt. 299) 333. See also Ani v. State [2002] 10 NWLR (Pt. 776) 644. SC.

[39] Section 36 (6) (b) CFRN 1999, op. cit (n.27).

[40] O.N.Ogbu, *Human Rights Law and Practice in Nigeria: An Introduction*. (Cidjap Press, 1999)162. [127] See Ariori v. Elemo [1983] 1 SCNLR 1.

[41] CCPR, General Comment No. 13, para. 9.

[42] See Guideline N (3) of the African Commission" s Principles and Guidelines.

[43] Josiah v. State [1985] 1 NWLR (Pt. 1) 125.

[44] J. Ilo, „Report of the National Coordinator of Nigeria on the Application of Death Penalty," presented at the First International Conference on the Application of Death Penalty in Commonwealth Africa in Entebbe, Uganda, from 10 – 11 May, 2004.

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The fact that an accused person should be tried within a reasonable time does not mean that the accused person should not be given adequate time to prepare his defence nor does it preclude the carrying out of full scale investigation on his case. It was reported in Uganda in 2002 that two soldiers were executed after an emergency field court martial, which lasted for two hours and 36 minutes. The court martial failed to allow for full investigation of their case and thereafter pronounced death sentences on them.[45] Consequently, it is submitted, that this particular fair trial safeguard should be observed at all times, especially, because of the severity of capital punishment to be imposed on a capital offender, otherwise, the trial will not attune with the due process prescription.

5. Right To Mandatory Legal Representation

One of the pillars of natural justice is predicated on the Latin maxim Audi alteram partem, which connotes that both sides must be heard. Hence, the right of the accused person to defend himself can be seen to be an offshoot of this pillar of natural justice,[46] as it is regarded as an aspect of the wider right to fair hearing.[47] Hence, a man must not be condemned without being heard, especially where such condemnation may lead to death sentence.[48] The Constitution provides: „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."[49]

The above provision implies that a capital offender is afforded the right to engage a counsel of his choice, while facing a criminal trial. This right is very important because it is the fundamental pillar of the administration of justice.[50] The right guarantees an accused person three rights, namely; to defend himself in person,[51] to defend himself through legal practitioner of his choice,[52] and in certain circumstances, to be given free legal assistance. Free legal assistance is dependent on the concept of justice and the insufficiency of means to procure the services of a counsel.

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[45] See Amnesty International, „Amnesty International Report" [2003] 258.

[46] M. Olong, J. A. Agbonika & J. M. Agbonika, „Balancing the Concept of Fair Hearing and Ex parte Injunction under the Nigerian Legal System: An Imperative" [2012] 12 (1), *African Journal of Law and Criminology*, 27.

[47] Oriege v. Governor of Ondo State [1982] 3 NWLR (Pt. 349) 361.

[48] E. G. Onyema, „The Accused and the Right to Counsel: An Appraisal" [1991] 2 (2), *Justice*, A Journal of Contemporary Legal Problems, 13.

[49] Section 36 (6) (c) CFRN 1999. Thus, the Supreme Court has declared unconstitutional section 18 of the Area Court Edict 1967, which prohibits the appearance of legal practitioner for an accused person before the Area Court. See R. v. Uzodinma [1982] 1 NCR 27.

[50] M. Finkelstein, *The Right to Counsel* (Butterworths, 1988), 1.

[51] In Atake v. Afejuku [1994] 9 NWLR (Pt. 368), the Supreme Court held that by virtue of Section 256 (2) of the 1979 Constitution, a retired judicial officer cannot appear in or act as legal practitioner again in Nigeria, but can appear in person when he is a party to a litigation. See also Fawehinmi v. The Legal Practitioners Disciplinary Committee [1985] 2 NWLR (Pt. 7) 300.

[52] It has been held that such a legal practitioner must be one who is not under a disability of whatever nature under the existing law, rules and regulations of the government. See Awolowo v. Minister of Internal Affairs [1960] 1 ANLR, 178.

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The right is further guaranteed by virtue of the provision of section 267 (1) of the Administration of Criminal Justice Act, 2015 which provides thus:

"The complainant and the defendant (accused) shall be entitled to conduct their cases by a legal practitioner or in person except in a trial for a capital offence or an offence punishable with life imprisonment".

As regards the representation by the accused himself, it has been established that an accused person may decide not to be represented in his defence by a legal practitioner but by himself. This discretion of an accused person is further recognised in section 349 (6) of the ACJA 2015 where it stipulates:

"Where the defendant chooses to represent himself, the court shall inform him of all his rights under the Constitution of the Federal Republic of Nigeria 1999 and under this Act."[53]

However, by virtue of section 349 (6) (b) of the Act, an accused person charged with a capital offence or an offence punishable with life imprisonment shall not be allowed to represent and defend himself in person.

On the right to legal practitioner of one"s choice, it depicts a situation where the accused person engages the service of a legal practitioner to conduct his defence for him professionally. Stressing the importance of legal practitioner in a criminal trial, Justice Sutherland clearly stated in Powell v. Alabama[54] thus:

"…the right to be heard would be in many cases, of little avail, if it did not comprehend the right to be heard by counsel. Even the intelligent educated layman has small and sometimes, no skill in the science of law. If charged with crime, he is incapable, generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge and convicted upon incompetent evidence or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence. Even though he has a perfect one, he requires the guiding hand of a counsel at every step in the proceedings against him. Without it, though he is not guilty, he faces the danger of conviction because he does not know how to establish his innocence".

In the same vein, Idoko J., admirably puts it in the case of Uzodinma v. C. O. P.[55] thus:

"… the need to have a counsel to defend one in a criminal prosecution stems from a number of factors: the accused may be incapable of adequately making his own defence because of ignorance, illiteracy, feeblemindedness, anxiety or fear or just for the simple logic that the doctor who has the sickness may not be the best healer for himself".

The right of a capital offender to mandatory legal representation is also entrenched in section 395 of the ACJA which is to the effect that, where a defendant is accused of a capital offence or an offence punishable with life

[53] In Shemfe v. C.O.P. [1961] 1 All NLR (Pt. 11) 423, where the accused person attempted the exercise of this right by defending and representing himself in non-capital offence trial, he was allowed by the court. See Section 349 (6) ACJA 2015.

[54] [1932] 287 US 45.

[55] Supra (n.136).

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imprisonment and where the defendant is not defended by a legal practitioner, the court shall assign a legal practitioner for his defence. Similarly, section 8 (2) of the Legal Aid Act[56] provides that the Legal Aid Council shall establish, maintain and develop a service known as criminal defence system for the purpose of assisting the indigent persons who are undergoing criminal prosecution. Prior to the 2011 Act, the 1976 Act provided that the Council will only provide legal representation for a poor person whose gross income is not more than five thousand naira.[57] The income rate was considered to be too low and the 2011 Act[58] increased the income level to those whose income are below eighteen thousand Naira. It is submitted that the reviewed ₦18,000.00 is still too low and that may deprive a lot of Nigerians the eligibility[59] to benefit from the scheme.

However, despite the above highlighted statutory safeguards, capital offence trials have been conducted in Nigeria, in circumstances where the accused had no legal representation, was refused legal representation or was provided with incompetent counsel.[60] Yet, in the case of Josiah v. The State,[148] the Supreme Court held that failure of the court to assign a counsel to an indigent person that was charged with capital offence was clearly a breach of the right to fair hearing.

It is indubitable that capital trials are very expensive, and that most people charged with capital offences cannot afford the fees of experienced counsel. Consequently, they are assigned counsel, who are later found to be inexperienced and who are not versed in issues of capital trials. Hatchard & Coldham have therefore contended that without effective representation, an accused person cannot be said to have had a fair trial.

The most remarkable instance of ineffective legal representation in America was in the case of Burdine v. Johnson,[61] where Burdine was convicted of capital murder in Texas after a trial lasting three days. It was established that Burdine"s defence counsel had slept during part of thirteen hours that the trial had taken place. Yet, the Federal Court of Appeal for the 5th circuit held by a majority, that although counsel had slept, the appellant failed to prove that the lawyer had slept during the consequential parts of the trial.

[56] Legal Aid Act Cap L 9, Laws of Federation of Nigeria, 2004.

[57] Decree No. 56 of 1976.

[58] Section 10 (1) Legal Aid Act 2011.

[59] It is cheering to note that with the recent increment in minimum wage to ₦33,000.00, the annual income for eligibility will also be raised, thereby opening the door for more Nigerians to access the scheme.

[60] L. Chenwi, *Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective*, op cit (n.36) 180. [148] [1985] 1 NWLR (Pt. 1) 125.

[61] [2000] 231 F. 3d 950 (5th Cir. Texas). Also in Republic v. Mbushuu & Anor [1994] 2 LRC 335, the court stated that most poor persons in Tanzania do not obtain good legal representation, as lawyers on dock briefs, who are paid very little, defend them. Hence, as a result of poor remuneration, the defence counsel may not exert enough effort in such cases.

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In the Nigerian case of Udofia v. State,[62] the Supreme Court held that fair hearing was denied when an accused person facing capital trial, was represented improperly, ineffectively and half-heartedly. Oputa JSC said: "…counsel who shoulders the very heavy burden of defending an accused person charged with murder, the greatest of all charges, an accused person on trial for his life, should devote himself completely to his task, whatever he himself may think of the charge. He should lay aside every other duty so that he completely and the better, watch the interest of the accused. He should take infinite pains to be properly and thoroughly prepared by acquainting himself fully with the facts and circumstances of his client"s case."[63]

It is submitted that the right to have one"s case or defence conducted by a legal practitioner, inevitably imposes an obligation on that legal practitioner, otherwise, the right becomes illusory, hollow and meaningless.[64]

6. Conclusion and Recommendations

This paper has examined the level of observance or otherwise of the due process rights by the courts in capital offence trials in Nigeria against the international law prescriptions. The paper interrogated the purport of the right to fair hearing within a reasonable time in the public, before a court or tribunal. The writer also appraised the right to presumption of innocence, especially as it relates to capital offence trials in Nigeria. We also endeavoured in this work to beam a searchlight on the rights to adequate time and facility to prepare for defence and the guarantee of mandatory legal assistance for capital offenders. There is no doubt from our findings that Nigeria has failed tremendously to comply with the international standards of due process guarantees.

The writer was able to identify a lot of flaws in the course of this research work. For example, it was found that there has been a problem of the purport of trial within a „reasonable time." The various instruments on the guarantee of this due process right did not define what constitutes a „reasonable time" unlike the provision of section 35 (5) of the Constitution as it relates to pre-trial rights. We also found that the right to presumption of innocence is illusory, as it relates to capital offenders, because there is hardly any chance of a capital offender being granted bail. This is a violation of the right to presumption of innocence, which is for the accused person to enjoy the benefit of doubt pending the conclusion of the trial. It is rather appalling and worrisome that a capital offender who stands trial for up to seven to ten years without bail and eventually gets acquitted has already served seven to ten years jail term for his innocence. The provision of the ACJA[154] that vests only the high court with

[62] [1983] 3 NWLR (Pt. 84) 533. A counsel attached to the Legal Aid Council was assigned to defend the capital offender in the case. He was absent on most of the adjournment dates. Another counsel assigned, was also present on very few occasions and while present he failed to cross-examine the prosecutor" s witnesses during the trial. At a stage in the matter, a youth corps member attempted to appear for the accused person but was disallowed by the court.

[63] These sentiments are echoed and re-echoed by Rules 7 & 8 of the Professional Conduct in the Legal Profession made pursuant to the Legal Practitioners" Act 1975.

[64] Another variant of the violation of a capital offender" s right to due process is the denial of access to interpreter (where necessary) See Section 36 (6) (e) CFRN 1999. See also Gwonto v. The State [1983] 1 NCLR 1402, Sunday Udosen v. The State [2007] 4 NWLR (Pt. 1023) 125 and Nwachukwu v. State [2002] 2 NWLR (Pt. 782) 543. [154] ACJA 2015. Section 161.

jurisdiction to grant bail to capital offenders is nebulous and vague as the judges have been inconsistent in their interpretations, by wrongly granting or refusing bail applications.

We also observed, through findings, that even when there is a guarantee for mandatory legal assistance for capital offenders, especially the indigent ones, the court‟s appointed counsel or the Legal Aid Council‟s counsel are usually inexperienced, incompetent and as such, ineffective. It has been contended that ineffective legal representation is tantamount to no legal representation.[65]

Sequel to the foregoing, the writer hereby proffer the following recommendations:

(i) The Nigerian penal statutes should be amended to specify the maximum time limit within which the trial of a capital offender can be commenced and concluded.

(ii) The right to presumption of innocence should be made realizable, especially to the capital offenders. The legislature should amend the penal statutes to expand the scope of the instances where the court can grant bail to capital offenders. For now, the right to presumption of innocence for capital offenders, is a chimera.

(iii) The Nigerian government should inject more funds into the judiciary and the Legal Aid Council, so that they can attract experienced counsel into the scheme of legal assistance. This will go a long way in actualizing the effectiveness of the guarantee of mandatory legal representation, for the indigent capital offenders.

(iv) Finally, there should be a requirement mandating the senior counsel in private practice to undertake a minimum number of pro bono cases in a year as one of the conditions for the renewal of their practice licences, especially in defence of capital offenders. This is what obtains in the advanced jurisdictions.[66]

[65] See Hatchard & Coldham, op cit (n.149)

[66] This is the practice in the U.K, U.S.A and Canada.