Privileged Communication and Fair Hearing Under The 2011 Evidence Act: Are They Still At Logger Head?

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ABSTRACT

Under the Nigeria Law of Evidence (NLE), there are several evidential exclusionary rules of great antiquity. Aside "without prejudice" and "subject to contract" privileged communications which is an evidential principle that makes relevant evidence of the state and certain individuals under certain circumstances inadmissible; is another. Prior to the enactment of the 2011 Evidence Act (EA), there had been arguments that privileged communication particularly state privilege existed conflicting against fair hearing due to its absoluteness. This paper through doctrinal method, discusses the fair hearing and privileged communication under the Nigerian NLE; it investigates whether or not these doctrines are still at loggerheads under the 2011 EA. It found that unlike the 1942 EA, the 2011 EA, in a commendable manner; has taken into consideration the danger of emasculating fair hearing through privileged communication and in all instances, the judge is made the final arbiter where the objection of state privilege is raised. It concludes that the proviso introduced by the 2011 EA is a welcomed development.

Keywords: Evidence Act, Justice, Fair Hearing, Privilege Communication, State Privilege, Judge

1. INTRODUCTION

The Nigerian law of evidence is generally concerned with the question of which facts are legally admissible and the legal means by which they may be proved.[1] To do this, recourse must be had to the relevance of such a fact.[2] The rationale is that evidence can only be legally admitted of facts in issues or facts relevant to facts in issue.[3] However, under certain circumstance, a piece of evidence could be relevant to a fact in issue but nevertheless is inadmissible.[4] This is so where such evidence is affected by the exclusionary rule of evidence.[5] Section 1 (b) of the 2011 EA, 2011

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1Dada, J. A., *The Law of Evidence in Nigeria,* 2nd Ed. (Calabar, University of Calabar Press, 2011) 83.

2 *Ibid.*

3 Section 1 Evidence Act, 2011.

4 *Joe Iga & Ors. v Ezekiel Amakiri & Ors.* [1976] 11 SC 1; *Jadesimi v Egbe* [2003] 10 NWLR (Pt. 827) 1.

5 Eyongndi, D. T. and Akwarandu, A., "Non-Application of the Evidence Act in Arbitral Proceedings in Nigeria: Whither "Without Prejudice" Rule"? (2017) 1(1) *Bowen Law Journal*, 237.

prevents a person to prove a fact which is in issue or related to a fact in issue which he/she is disentitled from proving by virtue of a law in force for the time being. Where a person is a competent and even a compellable witness and has been compelled to testify or tender a document in a proceeding, he/she may object to testifying or tendering the document by virtue of a law conferring such a right on him from doing so or another person subject to the beneficiary waiving it if waivable. One of such instances where a witness may validly refuse to disclose certain facts while testifying or refuse tendering a particular document is on the ground of privileged. Where the witness is represented by counsel either he or his counsel can claim the privilege and where not represented, the judge is duty bound to protect the privileged person. Privilege can be raised at any time during the proceedings and once raised, the court is duty bound to settle it one way or the other.[6]

According to Hon,[7] a testimonial privilege is a right not to testify based on a claim of privilege, which privilege overrides a witness's duty to disclose matters within his knowledge, whether at trail or by deposition. In his lucid exposition on the subject of privilege, Nwandialo[8] posits that "the subject of privilege in the law of evidence is concerned with cases where a witness has a right or duty to refuse to disclose a relevant fact by answering a question or to produce a relevant document." An assertion and upholding of a privilege is a permissible incursion on the right to fair hearing enshrined in section 36(1) of the 1999 Constitution of the Federal Republic of Nigeria (1999 CFRN). Under the repealed 2004 Evidence Act (i.e. 1942), privilege was an untrammelled right with the effect that the Act made a claim of it not subject to the scrutiny of the court in its phraseology. Once asserted by any beneficiary, the court cannot inquire into its merits, it must hand off.

However, the Courts through activist disposition whittled down the rather arrogant and irritant disposition of the Act. The 1942 Evidence Act had engendered a conflict between these two vital doctrines, keeping them at loggerheads notwithstanding their distinct utilitarian values in the process of administration of justice. However, the advent of the Evidence Act, 2011 heralded several innovations and the doctrine of privilege did not escape this innovation. The issue then is, what is now the relationship between the exclusionary rule of privilege communication and fair hearing under the 2011 Evidence Act? Has the hitherto conflict experienced under its predecessor been settled or not and what is it effect on the administration of justice in Nigeria? This issue forms the crux of this paper.

This paper is divided into six parts. Part one contains the general introduction, part two discusses the meaning and justification of privilege communication as an exclusionary rule of evidence, part three examines types and instances of privilege under the Nigerian Law of Evidence. Part four discusses the place of fair hearing in the process of administration of justice; part five makes a comparison of state privilege under the 1942 and 2011 Evidence Acts while part six contains the conclusion.

6Amupitan, O. J., *Evidence Law: Theory and Practice in Nigeria,* (Lagos, Innovative Communications, 2013) 548.
7 Hon, S. T., *Law of Evidence in Nigeria,* 2nd ed., (Port-Harcourt, Pearls Publishers, 2012) 1363.
8 Nwandialo, F., *Modern Nigerian Law of Evidence,* 2nd ed. (Lagos, University of Lagos Press, 1999) 100.

2. MEANING AND JUSTIFICATION OF PRIVILEGE COMMUNICATION

It is incontestable that a court of law in administering justice endeavours to get at the truth of the matter before it on the basis of evidence produce by the parties involved.[9] It does so by evaluating all relevant pieces of evidence adduced by the parties to the proceedings. In this regard Adedeji posits that "it is a fundamental principle in the administration of justice that parties to litigation have a right to bring before the court all evidence relevant to their case and to call on others to produce such evidence as they may have."[10] This principle which may be termed the principle of unimpeded access to evidence is of great constitutional significance and bears a close relationship to the general constitutional right of unimpeded access to the courts.[11] The germane nature of freedom of access to evidence and court comes to the fore under an adversarial system of justice delivery such as Nigeria where a party must succeed on the strength of his case base on the evidence he finds and present to the court and not on the weakness of the other party's case. In achieving this onerous end of justice delivery, the court relies on all relevant evidence presented by the parties hence; it becomes necessary for relevant evidence to be made available for the court's consideration without any hindrance whatsoever from any quarters on any grounds howsoever.

However, this lofty aspiration of the law is circumvented by the operation of privilege communication. The question then is bearing in mind the importance of making available relevant evidence in court proceedings towards aiding the administration of justice, what is the justification for excluding the tendering and admission of certain evidence which are relevant to the fact in issue?

However, before this is examined, meaning and historical development of privilege is germane to enable precision in presentation and understanding. This section of the paper examines these issues. It is apposite to warn that this article is not intended to x-ray the jurisprudential nitty-gritty of the concept of privilege as such exercise is beyond the scope of this article. Therefore, a skeletal amplification would suffice.

From the outset, it should be noted that the word "privilege" in law does not bear it grammatical meaning but its usage particularly in the law of evidence is special. Oraegbunam in pontification of the meaning of privilege asserted that:

> The word privilege derives from the Latin word *privilegium* meaning a right or favour that is granted by law though contrary to the usual rule. Privilege as a term is adorned with various shades of meaning in law. Under Roman law, privilege is a special right especially one given priority to a creditor. Privilege can also refer to an affirmative defence by which a defendant acknowledges at least part of the conduct complained of but asserts that the defendant's conduct was authorized or sanctioned by law… privilege designates a special

9. Boade, B. O., "Privilege" in Babalola, A., *Law and Practice of Evidence in Nigeria,* (Ibadan, Sibon Books Ltd., 2001) 163.
10. Adedeji, A. A. "Privilege" in Akintola A. L. and Adedeji, A. A., (Eds.) *Nigerian Law of Evidence A Book of Readings in Honour of Oluwarotimi O. Akeredolu,* (Ibadan, University Press, 2006) 117.
11.*Ibid.*

> right, exemption, or immunity granted to a person or class of persons exempting him specially from a duty. [12]

Adedeji[13] opined that the notion of privilege denotes a liberty to withhold or prevent the answer to a question or the production of documents or physical objects. It is concerned almost exclusively with the situation in which a person or body of persons can refuse to disclose information or documents and sometimes prevent others from disclosing such evidence even though the evidence in question is reliable and clearly relevant to the issues in a particular case.[14] Nokes[15] view it as a right or duty to refuse to disclose a fact and it is also a right to keep things secret.[16] In the same vein, another writer asserts that privilege is generally in law understood to mean:

> A legal advantage, allowance or permission" such as a benefit or exemption. This benefit or exemption is conferred by law on a class of persons as a result of which such class of persons, are exempted from a duty or burden or liability to which others are subject. Such class of persons may also by the privilege enjoy benefits that others are denied.[17]

In further attempt to explicate, what a privilege is, Ogunde[18] quoted Hohfeld distinction between right and privilege thus "as indicated in the above scheme of jural relations, a privilege is the opposite of a duty, and the correlative of a "no right". In the example last put, whereas X has a right or claim that Y, the other man, should stay off the land, he himself has the privilege of entering on the land; or in the equivalent words, X does not have a duty to stay off. The privilege of entering is the negation of a duty to stay off"[19] A common thread that runs through these postulations are that a privilege grants a no duty on the beneficiary. A privilege places the beneficiary in a position that he/she is entitled to certain benefits which others may not enjoy.

The historical development of the principle of privilege related mainly to state privilege otherwise known as crown privilege.[20] The principle upon which the doctrine was anchored was that the disclosure of some official information would be injurious to the interest of the crown.[21] The turning point in the development of the principle of privilege as an exclusionary rule of evidence under the common law crystallized in the House of Lords decision in *Duncan v Camel Laird & Co.*[22] The widows of two men who had perished in the disaster of a submarine during the World War II brought an action in negligence against the constructors and others. They claimed that the constructors were negligent in the construction of the submarine which led to its destruction and

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12Oraegbunam, I. K. E., "A Case for Priest-Penitent Privilege under Nigerian Jurisprudence" (2015) (2) 1, *International Journal of Research,* 454. Available online at https://www.academia.edu/26386909/A_Case_for_Priest-Penitent_Privilege_in_Nigerian_Jurisprudence (accessed 8 August 2018).

13 Adedeji, A. A. (n 10) *Op. cit.* P. 118.

14 *Evidence and Casework Skills* (London, Blackstone Press Ltd, 1993) 173.

15 Nokes, G. D., *Introduction to Evidence,* 4th ed., (London, Sweet & Maxwell, 1967) 184.

16 See the dictum of Lord Denning MR in *National Society for the Prevention of Cruelty to Children* (1978) AC 171 at 190.

17Ogunde, O. A. R., *Public Interest and the Privilege between Lawyer and Client.* Available online at www.wemimoogundeandco.com/.../1-articles-case-reviews?...privilege-in...lawyers (accessed 8 August 2018).

[18] *Ibid.*

19 *Ibid.*

20 Vasdev, K., *The Law of Evidence in the Sudan,* (London, Butterworth, 1981) 180.

21 Nokes, G. D., (n 15) *Op. cit.* P. 185.

22 (1942) AC 910.

the death of their husbands. The Defendants were directed by the Board of Admiralty to object to the production of numerous documents in their possession as government contractors relating to the production of the submarine. The first Lord of the Admiralty deposed to an affidavit in opposition to the disclosure of documents relating to the construction of the submarine. The validity of the affidavit was upheld by the House of Lords on the grounds that its production could be withheld on the ground of public interest or public policy.

This case led to the formulation of the rules governing state privilege under common law to the effect that a Minister's certificate in due form claiming privilege in respect of certain documents that their disclosure would be injurious to the interest of the public was conclusively binding on the court of law. Thus, it is not upon to the Court to inquire into the veracity of the claim.[23] Thus, the Minister was honourably expected to plead privilege only in deserving cases which is where the interest of the public or public policy would be jeopardized and not in an arbitrary manner calculated to arm twist the court from adjudication.[24] The finality of the Minister's plea of privilege in England trailed the decision as in *Wednesbury Corporation v Ministers of Housing and Local Government*[25] and *Re Grosvenor Hotel London (No. 1).*[26] It was in *Conway v Rimmer*[27] that the absoluteness of the Minister's plea was successfully challenged to the effect that a Minister's certificate objecting to the production of a document or disclosure of information of the state was no longer conclusive.[28] The House of Lords held that while the Minister's objection must be carefully examined and given full weight, the court reserves the right to nonetheless, inspect the document and order its production where its desirability outweighs its undesirability guided by public interest. The Courts has an onerous duty to weigh and balance the public interest of withholding such a document and its disclosure and not treat the Minister's objection as final and sacrosanct.[29] The Minister now has the duty of demonstrating that the disclosure of the information is injurious to the interest of the state for the court to adjudge that the duty on parties to disclose the whole truth and nothing but the truth is sequestrated to the extent that the court is robbed of the benefit of such document or information. What would amount to public interest which disclosure would be prejudicial to the state is not exhaustive, but each situation would be determined according to its peculiarity. However, such interest must be of a government, quasi-governmental.[30] Matters bothering on state security,[31] efficient functioning of the public service[32] detection and prevention of crime,[33] confidentiality[34] and international relations[35] have held as matters of public interest.

23See the dictum of Lord Viscount Simon in *Duncan v Camel Laird & Co.* (1942) AC 910 at 635-636.
24*Glasgow Corporation v Central Land Board* (1956) SL [HL] 1.
25(1965) 1 WLR 261.
26(1965) Ch. 1210.
27(1968) AC 910.
28Adedeji, A. A. (n 10) *Op. cit.* P. 121.
29*Science Research Council v Nasse Leyland Cars (B.L. Cars Ltd.)* (1980) AC 1028; *Alfred Crompton Amusement Machine Ltd. v Customs and Excise Commissioner (No. 2)* (1974) AC 405.
30 Carter, B. P., *Cases and Statutes on Evidence* (London, Sweet & Maxwell, 1981) 180.
31 *Duncan v Camel Laird & Co.* (1942) AC 910..
32 *D V National Society for the Prevention of Cruelty to Children* (1978) AC 177.
33 *R v Rankine* (1986) 2 All ER 566.
34 *BSC v Granada T.V* (1981) ac 96..
35 *Butt Gas v Hammer (No. 3)* (1981) 1 QB 223.

This exclusionary rule has been justified on the ground of public policy.[36] Dada quoting Cross and Wilkins, opined that "relevant evidence must be excluded if its reception would be contrary to a public interest held to be of greater importance than the public interest in the adoption of all relevant evidence in the course of the administration of justice"[37] Other writers have equally justified privilege on the ground of public policy/safety.[38] The question then is what is public policy? The Supreme Court in *Okonkwo v Okagbue*[39] held that that "the phrase public policy appears to mean the ideals which for the time being prevail in any community as the conditions necessary to ensure its welfare, so that anything is treated as against public policy if it is generally injurious to the public interest. It is the community common sense and common conscience, extends and applied throughout the state to matters of public morals, health, safety, welfare and the like." This position has been re-echoed by the Court of Appeal in *Total (Nig.) Plc. v Ajayi*[40] that its aim is to protect public interest.

It is worthy to note that the non-disclosure of such relevant evidence is predicated on the fact that their disclosure would expose the state to security risk or the good administration of public affairs and not merely on the guise that the information is brandished as official and confidential *per se.* Presently, Nigeria is facing serious security challenges ranging from Boko Haram (BH), Niger Delta Militancy to Fulani herdsmen menace. Where in a proceeding, a party is seeking to give evidence on the weaponry fortification of the Nigerian military or its numerical strength, where such evidence comes into the hands of the "enemy" it is conclusive that such poses a serious security threat. For instance, the Nigerian armed force as well as its counterparts all over the world, adopts quotes in order to keep confidential its numerical strength, where such evidence becomes a matter of public knowledge as court proceedings are public, its injurious propensity to the safety of Nigeria is very high. Thus, where a fact in issue is sought to be proved and relevant evidence relating to the maters are available; it would be safe to exclude them.

3. TYPES AND INSTANCES OF PRIVILEGES UNDER NIGERIA LAW OF EVIDENCE

Under the Nigerian law of evidence, there are basically two types of privileges. They are State privilege and private privilege. State privilege is also known as official communications and records of state matters while private privilege is also known as private communications between private persons.[41] Before we elaborate on these privileges, some preliminary remarks are considered germane. It is worthy to note that where an adverse party is in possession of a document independent of the person to whom it belongs and it is privileged, it can be tendered and admitted, hence, a document that enjoys private privilege cease to be privileged once it gets into the possession of the adverse party.[42] However, this is not applicable to state privilege.[43] Further, a private privilege can be waived by the person to whom it inures or with his/her consent. A state privilege as a matter of public policy or security cannot be waived, however, it certain permissible

36 Hon, S. T., (n 7) *Op. cit.* P. 1365.
37 Dada, J. A., (n 1) *Op. cit.* P. 101.
38 Nwandialo, F., (n 8) *Op. cit.* P. 41, Boade, B. O., (n 9) *Op. cit.* P. 163.
39 [1994] 9 NWLR (Pt. 368) 301.
40 [2004] 3 NWLR (Pt. 860) 270.
41 Dada, J. A., (n 1) *Op. cit.* P. 101.
42 *Calcraft v Guest* (1898) 1 QB 759.
43Aguda, T. A., *Law and Practice Relating to Evidence in Nigeria,* 2nd ed., (Lagos, MIJ Professional Publishers Ltd., 1998) 442.

instances, the appropriate public officer or head of department may permit privileged document/information to be given in evidence.[44] Being an important rule of evidence, privilege can be raised at any time during trail; and once raised, the trial judge is duty bound to suspend further proceedings and determine whether it avails the party raising it or not. In doing this, the court has the discretion of entertaining oral or documentary evidence.[45]

Sections 190, 191 and 243 of the EA specify certain information which are regarded as State matters and therefore privileged. Section 190 provides that subject to the discretion of the President, in any particular case, or of the Governor where the records are in the custody of a state, no one shall be permitted to reproduce any unpublished official records relating to affairs of state, or to give any evidence from such record except with the permission of the officer at the head of the Department or Agency concerned, who shall give or withhold such permission as he thinks fit. This section is *in pari materia* with section 167 of the repealed Evidence Act. As to what an unpublished document connotes, Dada posits that "a document is regarded as "unpublished" in this regard if it is a document which has a restricted publication. Thus, the mere fact that some other person other than the author has notice of what it contains or has received it in his official capacity will not make the document, a published document."Aguda[46] ascertaining what is considered as records relating to affairs of the state, emphatically stated that "records relating to affairs of the state, must mean the record of the matters the publication of which may affect the public interest and or public security, defence or international relations."

The equivalent of Section 190 under the repealed Act had been declared by the Courts as an infringement on fair hearing. Its effect was that once raised, the court has an obligation to uphold the objection without having the opportunity to examine the document. Being aware of the posture of the judiciary on the said section, the 2011 Act added a proviso. It provides that the head of the Ministry, Department or Agency concerned shall, on the order of the court, produce to the judge the official record in question or, as the case may be, permit evidence derived from it to be given to the judge alone in chambers; and if the judge after careful consideration shall decide that the record or the oral evidence, as the case may be, should be received as evidence in the proceeding, he shall order this to be done in private as provided in Section 36(4) of the Constitution.

Under the umbrella of state privilege is that of judicial officer contained in section 188 of the 2011 Evidence Act. It insulates a judge from being compelled to answer any question as to his conduct in his capacity as a judicial officer. Information as to the commission of offence is another category of privilege which is provided for in section 189 of the Evidence Act. It bars any police officer or magistrate prosecuting an offence from being compelled to disclose the source of his information. It also protects any public officer employed in or about the business of any branch of the public revenue from being compelled to disclose the source of an information with relation to commission of offence against public revenue.

The second type of privilege is private privilege. It includes privilege relating to professional communication between legal practitioner and his client as contained in section 192 of the Evidence Act. He is precluded from disclosing any communication between him and his client as well as the contents or condition of any document which he became acquainted with in the course

44 *Campbell v Tameside Metropolitan Borough Council* (1982) QB 1065.
45 *Birmingham, etc. Co. v L & Ry* (1913) KB 850.
46 Aguda, T. A., (n 20) *Op. cit.* P.318-319.

of his employment or capacity as a legal practitioner. However, communication relating to the commission of an offence or fraud or in furtherance of illegal purpose is not privileged.[47] This privilege is that of the client and can be waived only by him and not the legal practitioner and it subsists after the cessation of the lawyer-client relations and extends to interpreters, clerks and agents of the legal practitioner.[48] By section 195 where a client offers himself as a witness he can be compelled to disclose confidential communication between him and a legal practitioner. Where a party gives evidence in a suit he shall not be deemed to have consented to disclose privilege communication between him and a legal practitioner by virtue of section 194 thereof.

Privilege against self-incrimination is another form of private privilege contained in section 183 of the Act. By it, no witness is bound to answer any question which in the opinion of the court would incriminate him/her or the spouse. The judge has a duty to direct a witness not to answer any question that can incriminate him/her. However, by section 183 (a) a person charged with an offence and being a witness pursuant to section 180 may be asked in cross-examination any incriminating question as far as the offence charged is concerned and no other and is bound to answer. By section 183(b) any question that tends to establish that a person owes a debt if asked must be answered.[49] Another is statement made without prejudice as contained in section 196 of the Act. This relates to communication honestly made between parties in an attempt to settle a dispute where litigation is contemplated.[50] Matrimonial communications is another form of private privilege as contained in section 187. Thus, spouse of statutory or customary marriage cannot be compelled to disclose communication between them except in proceedings instituted by one of the spouse against the other or proceedings in which either of them is standing trial for the offences mentioned under section 182(1) of the Act. Another is privilege attaching to title deeds and other document. By section 184 a witness who is not a party to a suit cannot be compelled to produce his title deed to any property or any document by which he holds pledge or mortgage. He cannot also be compelled to produce any document which if he does would incriminate him. It can waive by a written undertaking to that effect. Where a person who is entitled to a privilege gives his document to another, that person cannot be compelled to produce that document by virtue of section 185 of the Act.

4. FAIR HEARING AND ADMINISTRATION OF JUSTICE IN NIGERIA

It could be safely argued that fair hearing is the bedrock of any judicial or quasi-judicial process. [51] Without it, justice cannot be said to have been done.[52] It is intrinsic to the process of justice

47Section 192 (1) (a) and (b) Evidence Act 2011.

48Sections 192 (3) and 193 Evidence Act 2011.

49By section 183(c) no privilege can be claimed by a witness giving evidence on an inquiry directed by the Attorney General.

50 The rationale for this was stated in *UBA Ltd. v IAS & Co. Ltd.* [2001] FWLR (Pt. 75) 578.

[51]Malemi, E., *Administrative Law,* 4th Ed., (Lagos, Princeton Publishing Co., 2012) 276. He defined fair hearing thus "fair hearing is the hearing, consideration, and decision of a matter according to all the rules of justice, fairness, and due process of law enshrined in the constitution and in the laws of the land to ensure justice and prevent a miscarriage or failure of justice."

[52]Oyewo, O., *Modern Administrative Law and Practice in Nigeria,* (Lagos, Unilag Press and Bookshop Ltd., 2016) 244. For there to be said that there has been fair hearing, the test for ascertaining same is objective as opposed to subjective. Fair hearing is rooted in natural justice which is anchored on two principles. It presupposes the observance of *nemo judex in causa sua* and *audi alterem partem.* It is now settled that where a person's right to fair hearing is eroded or curtailed, then the whole proceedings of a tribunal or administrative adjudication in any matter, no matter the quantum of brilliance and diligence invested in it, would be a nullity. The, litmus test of observance of

delivery and it is the only means through which justice in its just form can be administered. It is not just a common law principle, but it has been enshrined in the 1999 Constitution of Nigeria[53] . The Court of Appeal in *Adebayo & Ors. v Governing, Board, Rufus Giwa Polytechnic, Ondo State & Anor.*[54] stated that "fair hearing is a judicial or administrative hearing conducted in accordance with due process."[55] In *Atejioye v Ayeni*[56] the same court also defined fair hearing thus "fair hearing means a trail conducted according to all the legal rules formulated to ensure that justice is done to the parties in the case"[57]

The constitutional principle of fair hearing is for both parties in the litigation and not a one-way traffic but rather a two-way traffic that is accommodative of both parties before the court. Courts are admonished not to invoke the principle in favour of a party and to the detriment of the other.[58] In *Nigerian-Arab Bank Ltd. v Comex Ltd.*[59] the Court of Appeal warned that "it is a highly esteemed principle of law and enshrined in the Nigerian Constitution that in the administration of justice, parties to a legal duel must each be accorded every opportunity of canvassing its case to the best of its ability within the rules regulating the procedure to achieve the end of justice." Fair hearing is the lubricant that lubricates the wheels of administration of justice thereby preventing friction to set in which can ultimately lead to wear and tear of justice. Thus, such a situation is undesirable.

Fair hearing or trail has been adjudged to have certain attributes. Fairness of a trial is demonstrated by the attitudinal behaviour of the presiding judge in the course of trial towards a party. It is characterized by lack of prejudice or bias and open ended in such a way that any common man present in court will easily attest to the fairness of the procedures. When, therefore, the represented parties are not heard or given an opportunity of being heard, the hearing by the court cannot come within the category of fair hearing.[60] A hearing can only be fair when all parties to the dispute are given a hearing or an opportunity of a hearing. If one of the parties is refused a hearing or not given an opportunity to be heard, the hearing cannot qualify as fair hearing. When, therefore, the represented parties are not heard or given an opportunity of being heard, the hearing by the court cannot come within the category of fair hearing. Without fair hearing, the principles of natural justice are abandoned and without the principles of natural justice the concept of the rule of law cannot be established and grow in the society.[61]

Constitutionally, all the rights guaranteed under Chapter 4 of the 1999 CFRN, are generally regarded as not being absolute, sacrosanct or untrammelled. In fact, section 45 of the Constitution makes provisions for derogation from some of the rights listed there such as the ones contained in sections 37, 38, 39, 40 and 41. However, it is worthy to note that section 36 which makes provision

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fair hearing is that a fair-minded or reasonable person who watched the proceedings should conclude that the administrative adjudication body or tribunal was fair and just to all the parties.

[53] Section 36 Constitution of the Federal Republic of Nigeria 1999

54[2017] 4 NWLR (Pt. 1555) 264 at 287, Para. A.

55*Okafor v A. G, Anambra State* [1991] 6 NWLR (Pt. 200) 659.

56[1998] 6 NWLR (Pt. 552) 132.

57*Ariori v Elemo* [1983] 1 SCNLR 1.

58*Obi v Ngige* [2012] 1 NWLR (Pt. 1280) 1 at 37, Para. B; *Newswatch Communications Ltd. v Attah* [2005] 12 NWLR (Pt. 993) 144.

59[1999] 6 NWLR (Pt. 608) 648.

60 *Ntukidem v Oko* [1986] 5 NWLR (Pt. 45) 909.

61 *Otapo v Sunmonu* [1987] 2 NWLR (Pt. 58) 587; *Adigun v A. G. Oyo State* [1987] 1 NWLR (Pt. 53) 678.

for right to fair hearing, for all times and purpose, is absolute and sacrosanct. No circumstance would warrant derogation from it. The reason for its absoluteness is not far-fetched. In fact, the Court of Appeal in *Nigerian-Arab Bank Ltd. v Comex Ltd.*[62] in describing the nature of the right to fair hearing held that "the right to fair hearing is much more than a personal right of the subject. Public policy demands that every subject is entitled to a fair trial and every trail in a court must conform with settled principles of justice."[63] The opportunity to be heard is the hallmark of the fundamental right to fair hearing which hosts the avowed twin principles of natural justice namely; *audi alterem partem* (which means hear the other side) and *nemo judex in causa sua* (which means no one should be a judge in his own cause).[64]

5. COMPARISON OF STATE PRIVILEGE AND FAIR HEARING UNDER THE 1942 AND 2011 EVIDENCE ACTS

This section succinctly examines the provisions relating to privilege communication under the 1942 and 2011 Evidence Acts. Sections 167, 168, 219 and 220 of the 2004 Evidence Act makes provision for privilege. These sections of the 1942 Evidence Act form the basis of state privileges and their effect is that they make the decision of the public officer concerned, or Minister or Governor, as the case may be, final on a document or information they consider privileged.[65] The absolute nature of the provisions of the 1942 Evidence Act had generated serious constitutional crisis even before the independence of Nigeria.[66] In *Moronu v Benson & Ors.*[67] the court ruled on the distinction between sections 168 and 220 of the 2004 Evidence Act and held that by virtue of section 168 thereof, documents relating to the conduct of an election could not be produced in court.

In *Maja v UAC Nig. Ltd.*[68] Odesanya J, tested the constitutionality of section 220 of the 1942 Evidence Act vis-a-vix section 22(1) of the 1963 Constitution and held that its absolute nature violates the right of fair hearing. The court held that the production of certificate or affidavit referred to in the section cannot validly sequestrate the court's power to examine the document concerned as the court has the right to weigh whether the public interest concerned outweighs the person's right to fair hearing. In *Hameed Apampa & Anor. v Yusuf Aminu*[69] that Aguda J of the Western State High Court held against Section 220 (1) of the Evidence Act. He held that Section 220 (1) of the 1942 Evidence Act violates Section 22 (1) of the 1963 Constitution to the extent that

62 [1999] 6 NWLR (Pt. 608) 648 at 666, Para. F.

63 In *Chief Nimi Barigha-Amange v Hon. Justice M. A. A. Adumein & Anor.* [2016] 13 NWLR (Pt. 1530) 349 at 388, Paras. C-H., on the requirements of fair hearing the Court of Appeal held as follows "in a judicial or quasi-judicial body, a hearing in order to be fair must include the right of the person to be affected to be represented all through the proceedings and hear all the evidence against him; to cross-examine or otherwise contradict all the witnesses that testify against him, to have read before him all the documents tendered in evidence at the hearing; to have disclosed to him the nature of all relevant material evidence including and real evidence; to know the case that he has to meet at the hearing and have adequate opportunity to prepare for his defence; and to give evidence by himself, call witnesses if he likes and make oral submissions either personally or through counsel of his own choice. The concept of fair hearing is not one that allows a staggered process within which a party may be given fair hearing on certain days, while evidence is taken behind his back on other days and back to being put in the picture subsequently."

64 *Bamigboye v University of Ilorin* [1999] 10 NWLR (Pt. 622) 290; *Aiyetan v NIFOR* [1987] 3NWLR (Pt. 59) 48.

65 Nwandialo, F., (No. 8) *Op. cit.* 43.

66 It is worthy to note that the 2004 Evidence Act was enacted in 1942 as a colonial legislation.

67 (1971) 1 NMLR 166.

68(1971) 1 NMLR 157.

69Unreported Suit No. 1/211/65 decided on 20/10/70.

it gave the Minister power to automatically exclude relevant evidence through production of a certificate.

In *African Press Ltd. & Oyewunmi v Attorney General Western Nigeria,*[70] the Supreme Court held that the courts should rely on the fair hearing provisions of the Constitution whenever privilege is invoked to obviate any injustice that may be occasioned. This means that the production of an affidavit or certificate by the Minister does not automatically prevent the court from inquiring into the merit of the objection.

This was the position of the law until when the 2011 Evidence Act was enacted. Section 190, 191 and 243 contains provisions relating to state privilege. Section 190 provides that:

> Subject to any discretion of the President, in any particular case, or of the Governor where the records are in the custody of a state, no one shall be permitted to reproduce any unpublished official records relating to affairs of state, or to give any evidence from such record except with the permission of the officer at the head of the Department or Agency concerned, who shall give or withhold such permission as he thinks fit. Provided that the head of the Ministry or Agency concerned shall, on the order of the court, produce to the judge the official record in question or, as the case may be, permit evidence derived from it to be given to the judge alone in chambers; and if the judge after careful consideration shall decide that the record or the oral evidence, as the case may be, should be received as evidence in the proceedings, he shall order this to be dine in private as provided in section 36 (4) of the Constitution.

The above provisions are strikingly different from those of the 1942 Evidence Act. This is seen in the addition of the proviso which makes an objection or plea of state privilege by anyone concerned subject to the decision of the court. Thus, the judge has the power to direct that a document or information said to be privilege be produced for his inspection in his chambers whereupon he will decide whether the privilege should be upheld or not. This is to ensure that the right of fair hearing contained in section 36 particularly subsection (4) thereof is not sacrificed on the altar of alleged privilege. This position is a legislative response to proactive stance of the court against the absolute nature of privilege under the 1942 Evidence Act. It is worthy to note that section 36(4) (b) is incidentally the same with the provisions of sections 33(13) and 22(3) of the 1979 and 1963 Constitutions respectively.

What the proviso to the 2011 Act has done is to cure the hitherto inconsistency of the 1942 Evidence Act vis-a-viz the relevant sections of the 1963 and 1979 Constitutions. Consequently, in all cases where objection is raised to the production of a document, the court is now empowered to order the production of the document for it to examine and determine the sustainability of the objection.[71]

70(1965) 1 All NLR 12.
71 Dada, J. A., (n 1) *Op. cit.* P. 108.

6. **CONCLUSION**

From the above, it is clear that fair hearing is an ancient principle upon which judicial and quasi-judicial process is anchored upon. The dictates of fair hearing demands that a person is not only heard but the hearing must be fair. It is a right that is absolute, sacrosanct and untrammelled. As a result, in a proceeding, a party thereto is entitled to call for and make use of all relevant evidence to establish his/her case. This is anchored on the right of unhindered access to evidence. However, under certain circumstances, one of which is privilege communication, a party to a court proceeding may be disallowed from using a relevant evidence or information. A privilege could be state or private. The later can be waived but the former is not waivable. Under the 1942 EA, the practice of privilege communication particularly state privilege had an absolute applicability once raised in any proceeding. This situation was considered as an infraction to the right of fair hearing and court had to proactively obviated this situation by causing such a document or information alleged to be privileged to be produced and examined by the court with a view to deciding the veracity or otherwise of the objection. This made the principles of fair hearing and privilege to be at loggerhead under the Act.

However, the 2011 Evidence Act took this act of judicial activism anchored on section 36 (4) (b) of the 1999 Constitution by expressly making all documents/communications purportedly privileged subject to court's scrutiny. Thus, it is no longer the case that where a certificate or an affidavit is produced precluding the tendering of a document as privileged the court is helpless as the objection is absolute. This has given legislative impetus to what had subsisted as an act of judicial activism thereby settling the controversy that had trailed the 1942 EA vis-a-viz the provisions of 1963, 1979 and 1999 Constitutions. Thus, the 2011 Evidence Act has made a balance between the demand of fair hearing and privilege communication under Nigerian *corpus juris* as they are no longer at loggerhead.