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Review Article

Admissibility of Illegally and Improperly Obtained Evidence in Nigeria - A Lesson from the United State of America and the U. K

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Abstract

By the provision of Section 36(1)(5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), every accused is entitled to the right to fair hearing and to the presumption of innocence until proven guilty in accordance with procedure permitted by law. In a complementary manner to the Constitution, the administration of criminal justice Act, 2015 of the Country, provides for host of procedures which shall be complied with by the police in criminal investigation. One such provision is Section 6, 15(3) and 17(2) of the Act which provides suspect with the right to silence until after consultation with a legal practitioner of his choice, members of the Legal Aid Council, and members of a Civil Society or other persons of his choice. The Act requires further that statement when volunteered, shall be video or audio recorded and shall be recorded in the presence of a counsel for the suspect or other persons of his choice without providing consequences for non-compliance. Instead, the evidence Act of the Country, 2011 provides for the admissibility of evidence improperly obtained where the same is relevant. In this paper, the writer using the doctrinal research method explores the question whether the legal regime on the admissibility of improperly obtained evidence under the Act, is inconsistent with the international standard on the right to fair hearing enshrined in the Constitution. In the final analysis, the writer makes recommendations for reform.

Keywords: law, evidence, criminal justice Act, administration.

1.1 INTRODUCTION

In the administration of criminal justice system in Nigeria, the duty of the police comprise of the duty for the prevention and detection of crime, investigation of crime, arrest and prosecution of criminal offenders [1]. In the course of discharging the mentioned duties, the police may on occasion search for evidence, and seize items such as guns and drugs from suspects. The police may also question suspects, victims, witnesses, and any other person from whom useful information may be received for the successful prosecution of offenders. Hence, conflict with individual right to personal liberty, to fair hearing and others, cannot be overruled in the course of or in the process of discharging the police duties.

In order to forestall any unnecessary intrusion on the liberty of the suspect, the rules of criminal procedure in Nigeria and the Constitution of the Country, 1999 (as amended), provides for certain rules of practice and procedure which must be complied with by the police in the course of discharging their duties save in circumstances provided by the law. One such rule is the provision of Section 36(5) and Section 34 of the Constitution which provides for the individual right to presumption of innocence and the right to freedom from inhuman and degrading treatment in the cause of a criminal investigation [2]. In a complementary manner to the Constitution, the Administration of Criminal Justice Act, 2015 of the Country, provides that every person arrested for an offence shall be entitled to a humane and equitable treatment and must not be subjected to any form of torture, cruel, inhuman or degrading treatment [3]. The person shall not be forced to make statement and shall have a right to remain silent

[1] Section 4, *Police Act*, 2020

[2] Section 34, 35(2), 36(5), *Constitution of the Federal Republic of Nigeria*, 1999 (as anebded)

[3] Section 8(1)(a & b), *Administration of Criminal Justice Act*, 2015

and avoid answering any question from the police until after consultation with a legal practitioner or any other person of his choice [4]. Where however, the suspect volunteers to make a statement, the Act further requires that the statement shall be recorded in writing and electronically in a retrievable video compact disc or such other audio visual means or in the absence of video recording, the interview shall be conducted in the presence of the suspect's counsel or any other person chosen by him [5].

In a situation where investigation requires that a search of a person or premises for evidence should be conducted, the Act provides for certain other restrictions. One such other restriction is the requirement of the Act that the search of a person where relevant, shall be conducted decently by the person of the same sex as the suspect, unless the urgency of the situation or the interest of the administration of justice makes it impracticable for the search to be carried out by the person of the same sex [6]. Where the subject matter of the search is premises, the Act requires further that the search shall be conducted only with a valid search warrant obtained from the court or a justice of the peace or a police officer authorized to issue it under the Police Act [7]. Any search of premises conducted without compliance with this requirement is unlawful. This si because doing so, will amount to the breach of the suspect's right to privacy under the Constitution. In the words of the Constitution of the Country, "the privacy of citizens, their homes, correspondence, telephone conversation and telegraphic communications is guaranteed and protected" [8]. Thus, except where the court or justice of peace otherwise directs, the execution of a search warrant at the premises of a person, shall be conducted in the presence of witnessess. Where the execution of the search warrant is to be carried out in a premises occupied by a woman who by custom or religion, does not ordinarily appears in public, the woman shall, except where she is the subject of the search, be allowed to excuse herself before the officer executing the search warrant shall enter into the premises for the purpose of the search [9].

Apart from the foregoing examples, host of other restrictions were provided by the law in Nigeria for the purpose of guiding the police in the discharge of their duties so that the liberty of the innocent should not be enterfered with without any lawful justification. Troubling however, is the failure of the law in the Country to provide for consequences to any evidence recovered against a suspect without complience with the legal procedures. Instead, the law provides for the admissibility of any evidence illegality and or improperly recovered against a suspect where relevant to a case against him. In return, the situation exposes the suspect to the danger of brutalization in the hand of the police; and threatenes the accused right to fair trial in the course of criminal proceedings.

In this paper therefore, the writer asks the question whether the legal regime on the admissibility of illegally and improperly obtained evidence in Nigeria, does not conflicts with the accused right to fair hearing/trial under the Constituution of the Country, 1999 (as amended) and the international standard exemplified by the position of the law at America and the United Kingdom. In particular, the writer explore the question whehter the legal recognition of the admissibility of illegally and improperly obtained evidence in Nigeria does not conflicts with the accused right to fair trial as set out by international standard and the Constitution of the Country. In the finall analysis, the writer makes recommendations for reform.

1.2 The Legal Regime on the Admissibility of Illegally and Improperly Obtained Evidence in Nigeria

As highlighted above, the law on the admissibility of illegally and improperly obtained evidence in Nigeria provides that when a piece of evidence is relevant and admissible in law, any illegality or impropriety in the process of obtaining it, does not affect its admissibility [10]. Exeception to this rule, lies only in the involuntary confession as explained in the case of *Ali vs The State* [11]. In that case, the accused who was tortured and thrown into a river by villagers, confessed to the villagers that he was responsible for the murder of the deceased in the case. However, upon been taken to the police station, he denied the offence claiming that he owned up to the killing of the deceased for the purpose of saving his life from the hand of the villagers who arrested him. He said that the villagers would have killed him if he had not admitted the commission of the offence. Despite this denial, the police forced the accused to thumb print a statement which implicated him for the offence. The statement was also tendered and admitted as exhibit R. against the accused at the trial court despite the objection of his counsel that the same was not made voluntarily. The accused was eventually convicted and sentenced to death by hanging based on the same statement. On appeal to the Court of Appeal, the Court held:

[4] Section 6(2)(a&b), Ibid.
[5] Section 15(4) & 17(2), Ibid.; Section 3(2) of the *Administration of Criminal Justice Law of Lagos State*, 2011.
[6] Section 9(3), *Administration of Criminal Justice Act*, 2015.
[7] Section 144(1), Ibid.
[8] Section 37, *Constitution of the Federal Republic of Nigeria*, 1999 (as amended).
[9] Section 149(4)(6), *Administration of Criminal Justice Act*, 2015.
[10] Section 1 & 2, *Evidence Act*, 2011
[11] (2019) 14 N.W.L.R. (Part 1692) p. 314 at 325 Ratio 12

By Section 29 of the Evidence Act, a confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficent, in the opinion of the court, to give the accused person ground which would appear to him reasonable for supposing that by making it, he would gain any advantage or avoid any evil of temporary nature. Thus an accused person may attack the admissibility of a confessional statement on the basis of voluntariness. The rational of Section 29 of the Evidence Act is that notwithstanding the fact that an accused made the statement even if it were true and implicated him in the offence, it must have been voluntarily made. Where it is not voluntarily made, it is inadmissible because by Section 35(2) of the Constitution a person cannot be forced to implicate himself in respect of a criminal charge.

The above exeception notwithstanding a confessional statement made by a suspect, does not become inadmissible in evidence merely because it was made as a result of promise of secrecy or as a result of a deception practiced on him or her for the purpose of obtaining it or because it was made while a suspect was drunked, or in consequence of a question which he ought not to have answered [12]. Similarly, as explained earlier, an evidence obtained improperly or in contravention of the law; is admissible unless the court is of the opinion that the desirability of admitting the evidence is out-weighted by the undesirability of the admission of the evidence [13].

In all cases where illegally or improperly obtained evidence is admissible, the law requires the court to in the exercise of its discretion whether to admit or to exclude the evidence, takes in to account the probative value of the evidence, the importance of the evidence in the proceeding, the nature of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding, the gravity of the impropriety or contravention, whether the impropriety or contravention was deliberate or reckless, whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and the difficulty if any of obtaining the evidence without the impropriety of contravention of the law [14].

1.3 Critique of the Legal Regime and Lesson from the United State of America and the United Kingdom

In this segment of the paper, readers should be reminded that in the view of the writer, the above explained position of the law as regards the admissibility of illegally and improperly obtained evidence in Nigeria, accounts for the prevalent cases of abuse of human right occasioned by the police in the course of criminal investigation in the Country. This view is premised on the conviction that the position of the law as regards illegally and improperly obtained evidence in Nigeria, is at varience with the very objective of its Constitution, 1999 (as amended) when it adopts the adversary system of administration of criminal justice and provides for the accused right to silence, to the presumption of innocence and other rights for the pupose of ensuring fair trial in hisfavour [15].

In the wisdom of the Constitution, when the state claims the commission of an offence against a person, the state shall bear the responsibility of proving the person guilty of the offence in a fair manner before he could be punished or made to suffer any form of indignity for the offence. By the provisions of the Constitution, an accused has no duty to prove his innocence or help the state with evidence for the purpose of proving him guilty of an offence. Thus, by this adversarial arrangement, the Constittion places the lonely force of the accused against the almighty force of the state in a tug of war in an adversarial process. Hence, the provision of certain safeguards by the Constituion to protect the accused weaker party in the process for the purpose of ensuring fair hearing and fair trial in his favour. These safeguards include the provision of the accused right to presumption of innocence, to silence, to the legal practitioner of his own choice, and host of other fair hearing rights [16].

In the view of the framers of the Constitution, the above mentioned safeguards and others, must necessarily be accorded to the suspect/accused to guard against corruption and mistakes that may occasion the wrongful conviction of the accused for an offence of which he may be innocent. The framers of the Constitution views the conviction of the innocent for an offence as a greater legal and moral wrong than the discharge of a guilty person. This belief was expressed by the Court of Appeal of the Country in the case of *State vs. Aibangbee* [17] when it held that:

There is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former, a mere preponderance of probability, due regard been had to the burden of proof, is a sufficient basis of decision; but in the later, especially when the offence charged amount to treason or felony, a much higher degree of assurance is required. The serious

[12] Section 31 *Evidence Act*, 2011
[13] Section 14, Ibid.
[14] Section 15, *Evidence Act*, 2015.
[15] Section 36(1-12) & 34(1), *Constitution of the Federal Republic of Nigeria*, 1999 (as amended).
[16] Section 35 & 36, *Constitution of the Federal Republic of Nigeria*, 1999 (as amended)
[17] (2007) 2 NCC. p. 648 at 661 para. C-E.

consequences of an erroneous condemnation both to the accused and the society, the immeasurable greater evil which flows from it than from an erroneous acquittal, have induced the laws of every wise and civilized nation to lay dawn the principle, though often lost sight of in practice, that the persuasion of guilt ought to amount to a moral certainty; or as an eminent judge expressed it, such a moral certainty as convinces the mind of the tribunal; as reasonable men beyond all reasonable doubt.

The adversary system of administration of criminal justice adopted by the Nigerian Constitution, requires an accused to be brought before an impartial court for trial and be accorded fair hearing before been punished for any particular offence. In the course of the hearing of a case before the court, this system does not confer any priority on the state over the accused as regards the right to justice but, places the state and the accused person on equal opposition before the court.[18] The greatest concern of the system is the pursuit of justice through the provision of fair hearing and fair and equitable treatment to an accused [[19]]. Hence the decision of the system to confer an accused with a variety of rights mentioned above and others. Commenting on this wisdom of the adversary system of administration of Criminal Justice adopted by the Constitution, Asuzu C. said:

Our adversarial system of jurisprudence places parties opposite one another in the process of adjudication. Neither side is required or expected to assists the other prosecute its case. This is perhaps a legal recognition of the human instinct on self-preservation. A man should not have to make a case against himself. Thus forensic jousting is an essential module of the search for truth in the judicial system of the common law world. This legal opposition of parties to one another applies in civil as well as in criminal justice, and enhances fairness. In criminal cases of course, a lot more is at stake; in most cases the freedom or even life of a party is in issue; in some jurisdictions, for example, under Islamic Penal Code, even the limb of the defendant is at stake. Thus the need is even greater for the one side to be required to perform its tasks without help from the other. A man cannot be expected or required to provide the ropes for his own hanging [[20]].

The right of an accused to remain silent and to refuse to make an incriminating statement against him, guaranteed under the adversary system, is an aspect of the fundamental right of an accused to fair trial upon which the full realization of justice in a criminal context is hinged. Its observation in any society indicates that the foundation of such society is rooted in justice and fair play. What the Constitution requires by the provision of this right is that an accused right to the presumption of innocence and fair trial should be respected not only in the course of criminal trial before the court, but the course of pre-trial investigation of a suspect for an offence. The right is expected to continue to be guaranteed until the dispute between an accused and his accusers is conclusively resolved by the court.

Commenting further on the accused right to presumption of innocence, the right to silence and the right of an accused to a counsel in the administration of criminal justice in Nigeria, Asuzu said:

Some of the Constitutional safeguards in criminal law are erected to secure a foundation for a meaningful trial even before the prosecution is launched. The privilege against self-incrimination, the right to silence, and the right to legal counsel are rights which can be asserted before prosecution, for example, at the police station. If these rights are compromised at the pre-trial phase, for instance, if a confession is extracted from the suspect (which violates his rights to silence and the privilege against self-incrimination} or if he is denied access to his lawyer, while in detention or at the police station, then what ever apparent fairness the subsequent trial might possess might be a façade. The case would effectively have been rigged.

If the right to counsel where limited to court proceedings, it would lose much of its meaning and value for the defendant where, as often happens, the most crucial phase of the proceedings has already taken place, to wit, pre-trial interrogation at which the defendant's fate might have been so tightly sealed that the ensuing trial is a charade, irrespective of the best intention and sincere exertion of the trial judge, who never had any control over the pre-trial witchcraft. The rational for securing the right to legal counsel ever before arraignment in court, is to ensure that the defendant will not be forced to incriminate himself.

The requirement that government establish the guilt of the accused beyond a reasonable doubt and without compelling him to produce the incriminating evidence himself, is the foundation of the adversary system if premise on the fundamental value in our society in protecting integrity of the individual. That fundamental value is violated when the law enforcement officers coursed the defendant into making incriminating statement or signing a confession [[21]].

From the foregoing quotation, it is clear that the right of the accused to the presumption of innocence, to silence in the face of criminal accusation,

[18] *Metuh vs. F.R.N.* (2018) 3 N.W.L.R. (Part 1605) p.1 at 34 Ratio 44.

[19] Section 36(1,5 & 6), *Constitution of the Federal Republic of Nigeria*, 1999 (as amended)

[20] Asuzu C., (2010), *fair hearing in Nigeria*, Malthouse Press Ltd., Lagos, pp. 255 – 246.

[21] Ibid.

to the freedom from self-incrimination, and the right to counsel are the foundation upon which the adversary system of the administration of criminal justice maintained by the Constitution is based. Those rights were granted to an accused to safeguard not only his right to personal dignity but also the public in general. Therefore, any law which derogates from the purpose of the Constitution in that regard, including the provisions of Section 14 and that of Section 31 of the Nigerian Evidence Act, 2011, which allow for the admissibility of illegally obtained evidence in the Country, will be inconsistent with the Constitution of Nigeria, 1999 (as amended) and therefore, void [22]. This is because by the provisions of Section 1(3) of the Constitutionon "if any law is inconsistent with the provisions of the Constitution, the Constitution shall prevail and that other law shall to the exetent of the inconsistency be void. This provisions of the Constitution holds not withstanding that that other law is an existing law under Section 315(3) of the Constitution [23].

Internationally in the history of man kind, the declaration of the right of an accused to silence and to his freedom from self incrimination, is the first attempt of man to be civilised on earth. It is a declaration of the societal resentment to the government's acts of torture in the course of criminal investigation for the purpose of obtaining evidence of a crime. The right to silence serves to protect human dignity and human liberty which is more important than the need of the government for the punishment of criminal offenders. In this regard, Henry M.W. at America wrote that:

The right to silence has long been with us. It stands for human dignity and self respect. It prevents the government from probing the secrets of our conversations, or our inner most thoughts. Former Supreme Court Justice William O. Doughlas once observed that'the crucial point is that the constitution places the right of silence beyond the reach of government' [24].

Therefore, when Section 31 of the Nigeria's Evidence Act, 2011 allows for the admissibility of a confessional statement obtained as a result of a deception, promise of secrecy, and a confessional statement made in answer to a question to which an accused ought not to have responded, it has in the view of this paper, contravens the right of an accused to presumtion of innocence, the very objective of the Constitution of the Country in conferring the right to silence and freedom from self incrimination to an accused person. This is so because these rights where, as mentioned earlier, granted to an accused for the purpose of not only preventing a situation where he will be forced to make a statement or incriminate himself for an offence but also a situation where a person will be unfairly convicted for an offence. The aim is to make sure that what ever evidence sought to be used against an accused for a particular crime, must have been obtained through forensic jousting rather than any improper or illegal procedure adopted using the might of the state. Section 31 of the Nigeria's Evidence Act, 2011 under reference provides:

If a confession is otherwise relevant, it does not becomes irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practiced on the defendant for the purpose of obtaining it, or when he was drunk, or because it was made in answer to question which he needs not to have answered, what ever may have been the form of these questions, or because he was not warned that he was not bound to make such statement and that evidence of it might be given.

Commenting on the effect of the provisions of Section 31 of the repealed Nigeria's Evidence Act, [25] which is similar to Section 31 of the Evidence Act, 2011 quoted above, Nwadialo F., said:

Confession is not necessarily rendered inadmissible because of promise of secrecy, lack of caution *etcetera*. The Act states that a confession, otherwise relevant, does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practiced on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not to have answered, whatever may have been the form of those question, or because he was not warned that he was not bound to make such statement and that the evidence of it might be given. What is required is that a confession should be voluntary. This condition can be fulfilled even though a confession is made under any of the circumstances enumerated in the provision [26].

However, upon careful perusal of the above quoted comment, one wonders what could be voluntary about the statement of a suspect made under deception, promise of secrecy or in response to a question he ought not to have answered. By the view of this paper, the whole essence of the privilege against self-incrimination lies in allowing free will to a person to decide whether to make statement in the defense of

[22] *Daniel Kekong vs. The State* (2017) 18 N.W.L.R. (Part 1596) p. 108 at 118 Ratio 5.

[23] *Onagoruwa vs I.G.P*. (1991) 5 N.W.L.R. (Part 193) p. 593 at p. 641 para f-g.

[24] Henry M.W., (1987), *Introduction to Law Enforcement and Criminal Justice*, 2nd ed., West Publishing Company, New York, U.S.A. pp. 349 – 350.

[25] Cap. 112, *Laws of the Federation of Nigeria,* 1990

[26] Nwadialo F., (1999), *Modern Nigerian Law of Evidence*, 2nd ed., University of Lagos Press, Akoka Lagos, p. 288.

himself against a criminal allegation that may be labeled against him by the police or to remain silent. Therefore, if any statement is to be acceptable against an accused, the statement must be proved to have been made voluntarily by him. In the context of the privilege against self- incrimination, free will refers to the person's natural inclination/unforced choice or the ability to choose ones action, or determine what reasons is acceptable motivation for actions without predestination, fate *etcetera*. This freedom of action cannot rightly be said to be available to a person deceived or not forewarned of the consequence of his speech before making an incriminating statement against himself.

At the risk of repetition, it shouId be noted that the Constitution of the Federal Republic of Nigeria, 1999 (as amended) has granted the right of an accused to silence, to freedom from self incrimination and to freedom from torture, inhuman and degrading treatment. The central goal of the Constitution here, is to ensure a fair treatment to an accused person in the administration of criminal justice process and to discourage impunity by the law enforcement agencies while handling a suspect. The Constitution recognises the inherent right of every person to refuse to make any statement or answer any question from the law enforcement agencies if the same will incriminate him in the commission of any particular offence what so ever. It also places responsibility on any person or authority, who claims that a person has committed an offence, to prove the allegation through evidence obtained without the infringement of the liberty of the accused for the purpose of obtaining it, To that effect, Section 35(2) of the Consitution (as amended) provides that "any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice." This right persists even when a case goes to trial before a court of law [27]. In the light of that Section, Section 6(2) of the Country's Administration of Criminal Justice Act, 2015 further provides that "the police officer or the person making the arrest, or the police officer in charge of a police station shall inform the suspect of his right to: (a) Remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice; (b) Consult a legal practitioner of his choice before making, endorsing or writing any statement or answering any question put to him after arrest; and (c}Free Legal representation by the legal Aid Council of Nigeria where applicable."

In order to give further stem to the right of the accused to silence in the face of a criminal allegation and for the purpose of ensuring that no person is subjected to any form of torture in human and degregading treatment for the purpose of obtaining a statement from him, both the Constitution under the provision of Section 34(1)(a), and the Administration of Criminal Justice Act, 2015 under Section 8(1)(a&b), provides for additional safeguards. Section 8(1) of the Administration of Criminal Justice Act, 2015 provides that "a suspect shall be accorded humane treatment, having regard to his right to the dignity of his person; and not be subjected to any form of torture, cruel, inhuman or degrading treatment".

In the context of the law, the word inhuman, is the opposite of the word human. An inhuman treatment, is a barbarous, uncourth and cruel treatment which has no human feeling, on the part of the person inflicting the barbarity or cruelty [[28]]. The word torture etymologically means to put a person to some form of pain which could be extreme. It also means to put a person to some form of anguish or excessive pain. Further more, torture could be a physical brutalization of the human person or a mental torture in the sense of mental agony or mental worry. It covers a situation where the person's mental orientation is very much disturbed that he cannot think and do things rationally, as the rational human being that he is [[29]].

By recognizing the admissibility of a fact discovered as a result of an inadmissible information received from a suspect, it is the view of the writer that Section 30 of the Evidence Act, 2011 of Nigeria has rendered nugatory the provisions of Section 34 of the Constition of the Country explained above. The Section provides:

Where information is received from a person who is accused of an offence, whether such person is in custody or not, and as a consequence of such information, any fact is discovered, the discovery of that fact together with evidence that such discovery was made in consequence of the information received from the defendant may be given in evidence where such information itself will not be admissible in evidence.

In the view of the writer, the above quoted Section of the Evidence Act, 2011 provides a clear incentive to the law enforcement agencies in Nigeria, to brutalize suspects and obtain evidence from them for the purpose of securing cheap conviction against them contrary to the overall purpose of the Constitution when it provides for the right to presumption of inocence in favour of an accused.

Although Section 6(2) of the Administration of Criminal Justice Act, 2015 of Nigeria expressely requires a police officer or a person making an arrest, or the police officer in charge of a police station to inform

[27] *Olasola Oyagbemi & Ors. Vs A.G. Federation & Ors*. (1982) 3 NCLR. p. 895.

[28] *Uzoukwu vs. Ezeonu II* (1991) 6 N.W.L.R. (Part 200) p. 708 at 725 Ratio 14.

[29] Ibid. at p. 725 Ratio 13,

the suspect of his right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice before making, writing or endorsing any statement; Section 31 of the Evidence Act, 2011 above, has diminished the purpose of the said Section of the Administration of Criminal Justice Act, 2015. In the context of the Section, statement of an accused made without caution or made in answer to any question he ought not to have answered is admissible. This is so because, the special provisions of the Section on the subject, supercedes the provisions of Section 6(2) of the Administration of Criminal Justice Act, 2015 on the same subject [30]. It should be noted here that in the interpretation of statute, it is an acceptable canon of interpretation in Nigeris that where there are two statutory provisions one special and the other general covering the same subject matter, a case falling within the words of the special provision must be governed thereby, and not by the term of the general provision. This rule applies where the general and the special provisions are contained in the same legislation [31]. Therefore, as the Evidence Act, 2011 is the law specially made by the legislatures for the purpose of evidence in Nigeria, where there is a conflict between it and any other law on the subject, the provision of the Act shall prevail [32]. For that reason, notwithstandng the provisions of Section 6(2) of the Administration of Criminal Justice Act, 2015, the position of the law remains in Nigeria, that a confession obtained without conplience with the requirement of Section 6(2) of the Administration of Criminal Justice, Act, 2015 is admissible based on the provisions of Section 31 of the Evidence Act, 2011 [33].

Though believers of the crime control model of criminal justice may argue that the adversary system of criminal justice adopted by the Constitution of Nigeria and in particular, the right to silence and to freedom from self- incrimination granted an accused under the system, provides an unjustified obstruction to the efficient prosecution and conviction of guilty persons; the argument could be countered with the view that the adversary system of criminal justice is anchored on the belief that the preservation of democratic ideals and the protection of the fundamental liberty of individual in a democratic society, takes precedence over the need for the punishment of a guilty person [34]. Therefore, the Constitutional rights accorded to an accused under the system are meant to secure the foundation for a meaningful trial of the accused even before his prosecution is launched. In the view of the proponents of adversary system, the right of an accused to silence and his right to freedom from self-incrimination, are essential components of fair hearing and provides protection to the right of an accused to presumption of innocence. These rights prevent the abuse of state powers in the overall interest of the society [35]. In this regard, Creamer, an American jurist, while commenting on the significance of the right to silence and the right to freedom from self-incrimination under the 5th Amendment to the American Constitution, wrote:

The public sees the Fifth Amendment invoked by people they don't like and who they presumed is dishonest – or worse. People perceived that crime by government officials and other white-collar types is a serious problem, and they assume that too many such criminals are hiding behind the Fifth Amendment. The rising use of the Fifth Amendment has brought with it a rising outcry that the Fifth's isn't worth the trouble it causes. This shallow notion is appealing on the surface, but in substance, it is a dangerous idea much like setting fire to one's home in order to rid the home of termites.

No principle of law is more misunderstood by Americans than those which encompass the Fifth Amendment. From the old Red-baiting days through the Post war anti-racketeering era and the Anti-war dissent period and the Watergate age, the myth has grown that justice and virtue have been continually frustrated by public enemies hiding behind the Fifth.

To the contrary, the History of the Fifth Amendment is the history of humankind's attempt to become civilized. In its origins, it was a rejection of the government's torture as a means of solving government's problems. Today, it is all that stands between a citizen and our government's unlimited right to ask questions and demand answers.

The Fifth Amendment serves as a declaration of our centuries-old America's distrust of public officials. That this distrust has been well founded is especially evident now when we are still recovering from overzealous governmental assault on war protesters, black militants and political dissidents coupled with government sponsored burglaries, illegal wiretaps, and illegal mind control experiments, all committed in the name of law and order. The right to silence has long been with us. It stands for human dignity and self-respect. It prevents the government from probing the secrets of our conversation or our innermost thoughts…. The crucial point is that the

[30] *Ajiboye v. F.R.N.* (2019) ALL F.W.L.R. (Part 987) p. 848
[31] *A.G. Lagos State v. A.G. Federation & Ors.* (2014) 4 SCM. P.1
[32] *Ajiboye v. F.R.N.* (2019) ALL F.W.L.R. (Part 987) p. 848
[33] Ibid
[34] Dennis I.H., (2002), *The Law of Evidence, 2nd ed.*, Sweet & Maxwell, London, pp.165 – 168.
[35] Ibid.

Constitution places the right of silence beyond the reach of government [36].

Arising from the above remark of Creamer on the significance and history of the right to silence at America, is the manifestation of the fact that the right to silence and indeed other rights that supports it, like the right to presumption of innocence, to freedom from torture, inhuman and degrading treatment, are rights aimed at ensuring human dignity and protecting the public against the arbitrary exercise of power in the course of criminal investigation for the purpose of obtaining evidence. This wisdom is the very reason why this paper agrees with the supporters of the Fifth Amendment at America that any law which is antithetical to this lofty purpose of the Fifth Amendment and by extension the Constitution of the Federal Republic of Nigeria, 1999 (as amended), is retrogressive, null and void to the extent of its inconsistency with the purpose of the Constitution of the Federal Republic of Nigeria, 1999 as expressed in Section 35(2) thereof.

1.3.1 Position of the Law on the Admissibility of Illegally Obtained Evidence at the United States of America

At the United States of America the position of the law as regards the admissiblity of illegally and improperly obtained evidence is that any evidence obtained in breach of the procedure laid down by law in obtaining it, is in admissible. The only exception is as regards the evidence obtained in cases of emergencies for the purpose of ensuring public safety. It does not matter whether the evidence is a confession or any other evidence what so ever. Thus an evidence received from a suspect without been informed of his right to silence, his right to consult with a legal practititioner before making a statement was declared inadmissible by the U.S. Supreme Court [37].

As is the case in Nigeria, the position of the law at America in the middle of the nineteenth cenruty was that evidecne obtained by unreasonable searches and seizure was admissible at the States and Federal Courts in criminal trials. The only cretaria for admissibility in those days was whether the evidence was incriminating and whether it will assist the judge or jury in reaching a verdict. However, in the year, 1914, the U.S. Supreme Court establsihed what is known as 'the exclusionary rule' in the case of *Weeks v. United States* where it ruled that evidence obtained by unreasonable search and seizure must be excluded in a Federal criminal trial.

In the year, 1961 however, the Supreme Court of America developed the exclusionary rule and makes it applicable to State courts in the landmark case of *Mapp v. Ohio*. In that case, the Court ruled that henceforth, evidence obtained by a procedure which violated fourth amendment standards will no longer be admissible in the American courts. Now at America, the only exception to the rule of the exclusion of illegally obtained evidence as pointed above, applies where the prosecution can prove that the illegally obtained evidence would have inevitably been discovered by lawful means in the circumstance of a particular case without the illegality; or it was obtained in cases of emergency for the purpose of ensuring or protecting public safety [38].

1.3.2 Position of the Law at the United Kingdom

Careful perusal of the position of the Nigerian law on the admissibility of illegally obtained evidence seems to have been derived from the position of the Common law of England which does not concerned itself with how a litigant obtained evidence in deciding its admissibility. At Common Law, the basic rule was and remains unambiguous that the means by which an evidence is obtained does not affects its admissibility.as a matter of law. Provided evidence is relevant, it is admissible in evidence under the Common Law. The illegality or unfairness in the process of obtaining evidence, does not affect its admissibility. This orthodox position of the Common Law to the admissibility of illegally obtained evidence, was made clear by the expression of Lord Crompton J. in *Leatham* [39] when he remarked that "it matters not how you get it; if you steal it even, it will be admissible in evidence" [40].

Unlike the case of Nigeria however, the inspiration for the above explained position of the Common Law of England, was derived largely from the civil cases; where the Common Law Court conceived its role as that of doing justice between the parties based on the evidence the parties choose to present before it. Because of that conception, the courts considered any unlawfulness in the process of obtaining evidence as a matter that can be left to an injured party to be persued as an independent grievance for which the party can be granted a remedy available under the law. Further more, in the days when the above explained Common law position was articulated, the regular police force as we know it today, does not exists at England. In those days, the prosecution of criminal cases was usually carried out by private individuals who had no greater power of law enforcement than any other citizen. Therefore, as no risk of human right abuse existed in the process of obtaining evidence of crime at the time, the application

[36] Henry M.W., & Karen M.H., (1986), Introduction to Law Enforcement and Criminal Justice, West Publishing Company, New York, p. 349

[37] *Rochin vs Califonia* (1952)

[38] *Nix v Williams*

[39] (1861) 8 Cox. C.C. 498, 501.

[40] Dennis L.H., (2002), *The Law of Evidence 2nd ed.*, Sweet & Maxwell, London, p. 251.

of the rule to criminal cases then made sense in the procedural context. This is so because, the prosecutor was viewed as a private citizen in police uniform who did not have any special power of law enforcement as the police have in the present contemporary world. Buttressing the historical reason for the admissibility of illegally obtained evidence at Common Law, Dennis said:

The inspiration for the common law position came largely from civil cases where the court has traditionally conceived its function as that of doing justice between the parties according to the evidence the parties choose to present. From this stand point, it is immaterial how the parties come by their evidence. Any unlawfulness in obtaining the evidence can be left to the injured party as an independent grievance for which the party can persue whatever legal remedy available. The application of this rule to the prosecutor in criminal cases made sense in a procedural context where historically the prosecutor was usually a private individual. This was the situation prior to the emergence of regular police forces in the middle decades of the ninteenths century. However, the development of the police was not considered to call for a change in the basic rule. The othodox theory was that a police officer, although holding the office of constable under the crown, was an independent agent who derived his authority and powers from the common law. At this stage in their develoment, it was not clear that the police had powers that were greater than that of the ordinary citizen. Stephen for example writing in the 1880s noted that the police had no greater powers of questioning or evidence gathering than were available to private persons. Well into the twentieth century, the Royal Commission on police powers and procedure maintained 'the police … have never been recognized either in law or in tradition, as a force distinct from the general body of citizen… (The) principle remains that a police man… is only a person paid to perform, as a matter of duty, acts which if he were so minded he might have done voluntarily. Indeed a police man possesses few powers not enjoyed by the ordinary citizen and public opinion, expressed in parliarment and else where has shown great jeolosy of any attempts to give increased authority to the police' [41].

Therefore, as the police were investigating and prosecuting crimes, in the same way as private citizens and had no coercive powers of government as the present police in the administrator of criminal justice. the courts then at England, could distance themselves from the method employed by them in the investigation of evidence. But when towards the end of the nineteenth cenruty and at the beginning of the twentieth century, the police become official state prosecutors with statutory powers of arrest, investigation and prosecution of criminal offences in conjunction with the Crown Prosecution Service, the courts of England could not continue to distance themselves from the manner in which evidence was obtained by the prosecution. In contrast to the earlier stand of the law, the courts developed the concept of judicial discretion to exclude evidence unfairly obtained by the police. This idea of excluding evidence for reason of fairness to the accused, was first mentioned in the case of *Kuruma vs. R* [42].

In that case, the accused was found in possession of ammunition after an unlawful search and the admissibility of the ammunition in evidence was challenged at the trial. The Privy Council ruled that the ammunition was admissible in evidence on the ground that it was relevant. However, in the course of the judgement, Lord Godard C.J. expressed the view as follows:

No doubt in a criminal case, the judge always has a discretion to disallow evidence if the strict rule of admissibility would operate unfairly against the accused. This was emphasized in the case before this Board of Noor Mohammed vs R., and in the recent case in the House of Lords of Harris v. Director of Public Prosecution. If for example, some admission of some piece of evidence, e.g. a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out.

After the above remark by Lord Godard C.J., Lord Parker who succeeded him repeated the substance of Lord Godard's ruling above and expanded the scope of the judicial discretion in the case of *Callis vs Gunn* [43]. The case concerned finger prints which the police obtained from the accused without informing him that he could refuse to supply them or that they mighgt be used in evidence against him. There was no legal requirement to give this information to the accused and therefore, the court allowed the admissibility of the finger print in evidence. In the course of the judgement, the learned law Lord remarked that "the discretion, as I understand it, would certainly be execercised by excluding the evidence if there was any suggestion of it having been obtained oppressibly, by false representation, by a trick, by threats, by bribes, anything of that nature".

Since the commencement of the change in the attitude of the British courts explained above, cetain exceptions to the rule on the admissibility of illegally and improperly obtained evidence were developed. For example, at Common law, as is the case in Nigeria, before a confessional statement becomes admissible, the prosecution must prove that a confession made to a person in authority, has been made voluntarily and not

[41] Dennis L.H., (2002), *The Law of Evidence 2nd ed.*, Sweet & Maxwell, London, p. 252.

[42] (1955) A.C. p. 197 at 204

[43] (1064) 1 Q.B. 495 at 502 DC.

in consequence of inducemen or oppression [44]. This Common Law exception has however, been replaced by Section 76 of the Police and Criminal Evidence Act, 1984 which imposes a duty on the prosecution to prove that a confession was not made in consequence of oppression or of any thing said or done likely to render it unreasonable before it could be admissible [45]. Unless therefore, the prosecution can discharge this burden of proving beyond reasonable doubt that the confession was not obtained in either of the prohibited ways, it will not be admissible [46].

The second exception applicable to both civil and criminal cases, concerns a party's privilage document which the party brings into court. If an opposing party uses trickery to obtain the document, he or she will not be allowed to rely on the document or adduce copies of them in evidence [47]. Two reasons were provided for this second exception. The first reason was that the use of deception to obtain a document in this circumstance is probably a contempt of court. The court should not therefore, condone such an abuse by admitting the evidence. The second reason was that the public interest in truthfinding in litigation is outwieghted by the public interest in ensuring that parties who bring documents into court should not be at risk of having them filched and used by their oponent [48].

The third exception, which is a development on the Nigerian position, is the exclusion of any evidence obtained in breach of procedures established by law, evidence that is subject to protection by legal privilage; and any evidence obtained through torture, inhuman or degrading treatment as held in the case of *A. vs The Secretary for the Home Department* [49]. In this case, the House of Lords held that "as a matter of constittional principle, any evidence procured by torture is not admissible in British courts regardless of the location where the torture took place, who inflicted the torture or who authorised its imfliction" [50].

1.4 SUMMARY/CONCLUSION

In conclusion, it should be noted that in every civilised system of the administration of criminal justice in the world, the esseence of providing for the accused right to presumption of innocence, right to silence and other fair hearing rights aimed at ensuring justice to the accused lies in the desire of the law to protect the innocent from the danger of wrongful conviction for an offence. By proviidng an accused with those rights, the law is not unmindful of the danger and the possibility of discharging a guilty person of an offence in the process. But, the law views the conviction of the innocent for an offence as a greater evil to the society than the discharge of a guilty person. Hence, the adage of the law that it is always better for ten guilty to escape punishment for an offence than the punishment of the innocent. This position of the law, is aimed at protecting human dignity and the protection of the society from the danger of arbitrary exercise of power by those in authority in the best interest of the society rather than those accused of a crime. It is based on this conception that the paper found as follows:

1. That Section 31 and 32 of the Evidence Act of Nigeria, 2011 which provides for the admissibility of illegally and improperly obtained evidence in the Country, derived from the inquisitorial system of administration of criminal justice rather than the accusatorial system adopted by the Constitution of the Country, 1999 (as amended).
2. That the legal acceptance of the admissibility of illegally and improperly obtained evidence in Nigeria is retrogressive, and is inconsistent with the purpose of the accused right to the presumption of innocence enshrined in the Constitution of the Country, 1999 (as amended).
3. That the provisions of Section 6, 15(4) and 17(2) of the Administration of Criminal Justice Act of Nigeria, 2015, enacted for the purpose of protecting the accused right to fair hearing amounts to a mere cosmetic provision with the subsistence of the provisios of Section 31 and 32 of the Evidence Act, 2011.

Based on the foregoing findings, the paper recommends as follows:

1. That the provisios of Section 31 and 32 of the Evidence Act, 2011 should be abrogated for the purpose of ensuring the full realization of the accused right to presumption of innocence and fair hearing enshrined in the Constituuion of the Country, 1999 (as amended).
2. That in place of the provisions of Section 31 and 32 of the Evidence Act above mentioned, provisions which allow for the admissibility of improperly obtaied evidence in cases only where the same was inocently obtained; and in cases of emergency, should be provided to discourage police impunity in the course of criminal investigation.

[44] Dennis L.H., (2002), *The Law of Evidence 2nd ed.*, Sweet & Maxwell, London, p. 254.
[45] Ibid.
[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] (2006) 2 A.C. 221.
[50] Mathew R,. (2014), Cyber *Crime Law and Practice,* Wildly Simmonds & Hill Publishing , London p. 195