A COMPARATIVE ANALYSIS OF DOUBLE JEOPARDY PARDON AND CONDONATION UNDER THE NIGERIAN LAW: A REFLECTION OF THEIR APPLICATION IN THE NIGERIAN ARMED FORCES

By

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ABSTRACT

The article, "A Comparative Analysis of Double Jeopardy Pardon and Condonation under the Nigerian Law: A Reflection of their application in the Nigerian Armed Forces", explores the nuanced principles of justice under the Armed Forces Act (AFA) and the Constitution of the Federal Republic of Nigeria (CFRN), 1999. The issue distilled in the Article is the fact that the procedure of condonation under the AFA is not the same with the concept of Pardon under the CFRN however, the Supreme Court mistakenly conflated the two concepts in the case of Nigerian army vs Brigadier General Aminu Kano. The Article examines the distinctions and intersections of double jeopardy, pardon, and condonation, especially within military law. While double jeopardy and pardon are constitutionally grounded, condonation is unique to the AFA, reflecting procedural and jurisdictional differences. Using cases such as *Nigerian Army vs Brigadier General Aminu Kano,* the paper critiques judicial misinterpretations that conflate these doctrines. The objective of this Article is to clearly distinguish the concepts of double jeopardy, pardon and condonation as applicable under CFRN and the AFA. The Article brings to the fore the process of each concept under the AFA and the CFRN respectively. Materials used for this Article were basically law reports, textbooks, statues, other legal instruments and related literature on the subject. The methodology used is doctrinal. It was found that the Commanding Officers of the Armed Forces of Nigeria (AFN) are not constitutionally empowered to grant a pardon as such right is only reserved to the President or a Governor of a State. It was also observed that under the AFA, a Commanding Officer is not empowered to withdraw charges from a court-martial during trial as in Aminu Kano (Supra). Such right is only limited to the Convening Officer who convened the court. It is therefore recommended that the Supreme Court should revisit its judgment when confronted with similar circumstances in due course.

Keywords: ***Double Jeopardy, pardon, condonation, Nigerian Army***

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1.1 INTRODUCTION

This paper "A Comparative Analysis of Double Jeopardy, Pardon, and Condonation" explores the constitutional and legal rights of accused persons that are typically exercised during arraignment before Courts of law in Nigeria including Court-Martial. It is pertinent to highlight that while the concepts of double jeopardy and pardon are spelt out in the Constitution of the Federal Republic of Nigeria (CFRN), 1999, (as amended), condonation is a concept specifically associated with the Armed Forces Act (AFA).[1] It is important to note that while all the concepts share similar principles, they differ significantly in their procedures. This Article intends to expose the similarities and dissimilarities between these concepts with particular reference to a judicial error in the case of *Nigerian Army vs Brig Gen Aminun Kano*,[2] where the Supreme Court mistakenly conflated double jeopardy, pardon and condonation.

The procedure for condonation under the AFA is not the same as the concept of pardon under the CFRN, 1999. The difference shall be briefly explained before delving into the details of the subject. Sometimes, the word "condonation" (particularly in civil parlance) simply connotes "a victim's express or implied forgiveness for an offence".[3] In this sense, condonation is not a valid defence to a crime,[4] except a statute provides otherwise.[5] It is pertinent to highlight that the AFA is a statute enacted by the National Assembly to regulate the Armed Forces of Nigeria (AFN).[6] Condonation under the AFA seems to have similar connotations with the principles of 'double jeopardy'[7] and 'pardon'[8] as enshrined in the CFRN, 1999. However, in the case of pardon, the only similarity is that both concepts are defences in bar of trial but their procedures are different in the sense that in condonation under the AFA, the Commanding Officer can condone without consultation[9], while

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[1] Cap A20 CFN, 2004.
[2] (2010) 5 NWLR (PT. 1188) 429.
[3] Garner, B.A., (2019) Black's Law Dictionary. Thompson Reuters, USA, 11th Edition, P. 369.
[4] Ibid, p. 369
[5] *Igbinedion v. FRN (2014) (1) LPELR P-22766 (CA), Per Ogunwimiju JCA* (as he then was).
[6] Pursuant to Section 315 of the CFRN, 1999.
[7] Section 36 (9), Ibid.
[8] Section 36 (10), Ibid.
[9] Sections 124 (5) (d) and 171 of the AFA.

in pardon, the President or the Governor must consult the Council of State or the Advisory Council of State as the case may be.[10] The concept of condonation and the right against double jeopardy are similar to the French bar plea of *autre fois convict or autre fois acquit*. This right is largely a plea. The right is to be raised as soon as the charge is read to the accused person in any court of law or court-martial before he pleads guilty or not guilty.[11]

The objective of this Article therefore is to clearly distinguish the concepts of double jeopardy, pardon and condonation as applicable under the CFRN, 1999 and the AFA with a view to highlighting some peculiarities applicable under the AFA. The Article shall incorporate definitions of some key terms, discuss the right against double jeopardy, showcase pardon as distinguished from condonation, present the similarities of condonation under the AFA and the rule against double jeopardy. It shall also identify the dissimilarities of condonation under the AFA and the rule against double jeopardy and finally appraise the circumstance of non-jurisdictional condonation. Each of these concepts shall be discussed separately below.

1.2 CONCEPTUAL CLARIFICATION OF TERMS

a. **Condonation, Pardon and Double Jeopardy**

The word 'condonation' in civil parlance simply implies forgiveness which may not be a defence to a crime, but when stipulated in an enactment, such a forgiveness could be a valid defence to a crime unless provided otherwise.[12] In a simpler term, condonation involves a deliberate act of forgiveness by a Commanding Officer with full knowledge of the offence and an express intention not to prosecute. The word 'pardon' on the other hand, has been defined as "the act or an instance of officially nullifying punishment or other legal consequences of a crime".[13] In other words, under the Nigerian legal context, a pardon refers to an act of clemency where the President or Governor forgives an individual for a crime, hence effectively nullifying the legal consequences of the offence.[14]

[10] Sections 175 and 212 of the CFRN, 1999.
[11] Rule 38 Rules of Procedure (Army), 1972 (RPA).
[12] Garner, B.A., (2019), op cit, P. 369.
[13] Garner, B.A., (2019), op cit, P. 1339.
[14] Sections 175 and 212 of the CFRN, 1999.

In its ordinary usage, double jeopardy connotes the unlawful procedure of subjecting a person to a trial on two separate occasions for the same offence arising from the same set of facts. In law also, it connotes the act of being prosecuted or tried twice for substantially the same offence.[15]

b. **Jurisdiction**

Jurisdiction in relation to a commanding officer under the AFA simply connotes the powers, rights and privileges which a commanding officer is only empowered to exercise by law.[16]

c. **Commanding Officer and Convening Officer**

A Commanding Officer in relation to a person, means the Officer Commanding the unit to which the person belongs or is attached.[17] On the other hand, a Convening Officer in relation to Court-Martial, means the officer convening a Court-Martial.[18]

d. **Court-Martial**

A Court-Martial is a court convened to try an offence against members of the Armed Forces. It is a court constituted under the AFA.[19]

1.3 THE RIGHT AGAINST DOUBLE JEOPARDY

As earlier highlighted, the concept of double jeopardy is rooted in the common law pleas of *autre fois acquit or autre fois convict*. The principles behind these common law pleas are replicated in Section 36(9) of the CFRN, 1999. The provision states:

> No person who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a

[15] *Nigerian Army v. Aminun Kano (2010) 5 NWLR (PT. 1188) 429, Per Muhammed J.S.C. at Pages 461-462*.
[16] AFA and Rules of Procedure (Army) 1972 (RPA).
[17] See Section 291 of the AFA.
[18] Chapter III Paragraph 20-22, PP. 38-39, Manual of Military Law.
[19] See Section 291 of the AFA.

> criminal offence having the same ingredients as that offence save upon the order of a superior court.[20]

The above provision is part of the fundamental provisions of the CFRN, 1999 and it is the primary basis for the principle of double jeopardy. The provision simply connotes that when an accused person is arraigned before a court of law, for an offence which he has records that he has been tried on the same case with the same subject matter, same issues and the same set of facts, and a judgement of acquittal or conviction arrived at, such a person cannot be tried again subsequently.[21] A critical examination of this provision distills some conditions for its application. These include the fact that:

a. The accused person must have been tried by any court of competent jurisdiction or tribunal for a criminal offence.[22]

b. The accused person must have been previously acquitted or convicted by a court of competent jurisdiction for the same offence both in fact and in law.[23]

It is pertinent at this juncture to examine the judicial reasoning with respect to the above distilled conditions. Looking at the first condition, there are two issues involved, namely;

i. The trial must have been made for a criminal offence and not an offence which the law does not recognize.[24]

For the plea of double jeopardy to avail an accused person, he must show that the offence for which he was previously tried was a breach of a statute and not a mere code of conduct.[25] A mere code of conduct or unit tradition pamphlet which carries sanctions would not qualify as a criminal offence. For instance, in *R. v. Jinadu,*[26] the accused person was a police officer who was tried in a

[20] See also Section 181 (1) (a) and 221 (1) of the Criminal Procedure Act (CPA), Section 223 (1) of the Criminal Procedure Code (CPC) and Section 238 (1) of the Administration of Criminal Justice Act, 2015 (ACJA)
[21]*Mohammed Abacha v Federal Republic of Nigeria, (2014) LPELR, P – 17.*
[22] Ibid. See also *Nigerian Army v. Aminu Kano (2010) 5 NWLR (Pt.1188) 429, FRN v. Ifekwu (2003) 15 NWLR (Pt.842) 113, Ibori v. FRN (2009) and FRN v. Igbinedion and Ord (2014) LPELR-22760 (CA).*
[23]*FRN v Igbinidion (Supra)*
[24] See Section 36 (12) of the CFRN, 1999 and the case of *Asake v Nigerian Army Council (2017) 1 NWLR (pt. 1019) 408*
[25] Ibid, and see also the case of *R. v. Jinadu (1948) 12 WACA 368*.
[26] (Supra).

police orderly room for the use of violence on persons in his custody. He was acquitted of the offence but ordered to be downgraded in rank. Subsequently, he was tried for assault under the Criminal Code based on the same set of facts. His plea of *autre fois acquit* was refused on the ground that the trial in the orderly room was for indiscipline and not a criminal charge. administrative actions or disciplinary proceedings are different from criminal proceedings.[27]

ii. The accused must have been tried by a court of competent jurisdiction

This can simply be illustrated by Summary Trial under the AFA.[28] The Act specifically bars Commanding Officers from the trial of certain offences.[29] This invariably means that any trial of such offences by Commanding Officers would be a trial without competent jurisdiction. Similarly, in *Umeze v. State*,[30] the conviction of the appellant was set aside by the Supreme Court when it was shown that the Magistrate who conducted the committal proceedings was not competent to do so hence, in such a circumstance, a plea of *autre fois acquit* was not available. The situation is similar where a state High Court gives a decision on a case which falls within the jurisdiction of the Federal High Court.[31] A decision given by a court or tribunal without jurisdiction is a nullity.[32] The second condition equally embodies two vital issues. The first, being that the accused must show that the earlier trial claimed by him ended in a conviction or in an acquittal. The claim here, must simply be interpreted to mean: "I have been tried before for this offence(s) and I have been convicted and served my sentence". This is synonymous to the plea of *autre fois convict*. On the other hand, it may mean: "I have been tried before now for this offence and acquitted". This is synonymous with the plea of *autre fois acquit*. This invariably means that a mere arraignment of an accused person in Court-Martial trial without due compliance to the provisions of the AFA and the Rules of Procedure (RPA) regarding other processes after arraignment to the conclusion of the case,[33] would certainly prevent the plea of *autre fois convict or acquit*.

[27] *Musa v F.M.T.N.O (2013) NWLR Pt. 1363; Denloye v. Medical and Dental Practitioners Disciplinary Tribunal (1968) 1 All NLR 306 and Gbenoba v. Legal Practitioners Disciplinary Committee (2021) 6 NWLR (Pt.1773) 499.*
[28] Op cit.
[29] Section 124 (6) of the AFA.
[30] (1973) 6 Sec 221
[31] *Chief of Air Staff v Iyen (2005) All FWLR (pt. 252) per Tobi JSC* (as he was then)
[32] Ibid.
[33] See Sections 137 – 141 AFA and Rules 35 – 76 of RPA..

The second issue under the second condition is that the accused must show that the offence for which he is now charged is the same offence for which he was tried previously or that the present offence has the same ingredients as the previous one. This invariably means that if Corporal (Cpl) Musa John was charged with insubordinate behaviour (under the AFA) for using threatening language and he was acquitted, he cannot in a subsequent trial be charged with insubordinate behaviour for using insubordinate language provided the facts and ingredients of the offence are same.

In view of the above analysis, it is submitted that the above two conditions for the application of the right against double jeopardy invariably means that an accused person who has not been tried for a criminal offence lacks the competency to invoke this right. It also means that even where the accused person was tried but he was tried by a court or tribunal that lacks competent jurisdiction, he (the accused) may also lack the competency to invoke this right.

1.4 PARDON AS DISTINGUISHED FROM CONDONATION UNDER THE AFA

The word 'pardon' has been defined as "the act or an instance of officially nullifying punishment or other legal consequences of a crime".[34] A pardon is usually granted by the chief executive of a government.[35] Under the CFRN, 1999 it is granted by either the President or a Governor of a State.[36] A pardon is not an acquittal but, once it is granted it signifies that the convict has had his sentence remitted by the authority that has the power or privilege to grant pardon. It is in this regard that Section 36 (10) of the CFRN, 1999 makes a plea in bar of trial a right for anyone who was pardoned and subsequently standing trial for the same offence. The Section provides thus "No person who shows that he has been pardoned for a criminal offence shall again be tried for the offence". In line with the above Section, the CFRN, 1999 further makes provisions[37] which state as follows:

> (1) The President may –

[34] Garner, B.A., (2019), Black's Law Dictionary. Thompson Reuters, USA, 11th Edition, p. 1339.
[35] Ibid.
[36] Sections 175 (1) (a) and 212 (1) (a) of the CFRN, 1999. See also *Lemu v. The State (2014) 2 NWLR (Pt.1391) 1; Chief Clement David Ebri v. The State (1997) NWLR (Pt.506) 519 and FRN v. Achida & Anor (2018) LPELR – 46065 (CA).*
[37] Section 175 (1) (a) & (2) and Section 212 (1) (a) and (2) of the CFRN, 1999.

> (a) Grant any person concerned with or convicted of any offence created by an Act of the National Assembly a pardon, either free or subject to lawful conditions;
>
> (2) The powers of the President under subsection (1) of this section shall be exercised by him after consultation with the council of state.
>
> 212 (1) The Governor may –
>
> (a) Grant any person concerned with or convicted of any offence created by any law of a state a pardon, wither free or subject to lawful conditions;
>
> (2) The power of the Governor under subsection (1) of this section shall be exercise by him after consultation with such advisory council of the state on prerogative of mercy as may be established by the law of the state.

Having seen the provision of Section 36 (10) above, it's pertinent to highlight that this provision actually confers a right to a convict who has been granted such privilege of being pardoned. This right may be exercised in any Court as a 'plea of pardon' once such a person is subsequently arraigned on charges similar to those for which he was earlier convicted upon. The burden of proving pardon lies on such accused/convicted person. It is important to note that the Section presupposes a trial, a conviction, and subsequently, a pardon. The burden of proving these is better discharged by the production of certificates.[38] It is observed with great decency and respect that the judgment of the Supreme Court in the case of *Nigerian Army v. Aminun Kano*,[39] invoking pardon as condonation was wrong in law since the respondent in that case (Brigadier General Aminun Kano) was never convicted and granted a pardon by the President or Governor of a State.[40] A Commanding Officer cannot grant a pardon by law rather he can condone an offence without consultation with any council.[41] While condonation may be made without conditions, a grant of

[38] *Okongwu v. State (1986) 5 NWLF (pt. 44) 721*
[39] (2010) 5 NWLR (PT. 1188) 429
[40] Sections 175 and 212 of the CFRN. See also the case of *F.R.N. v. Ifekwu (2003) 15 NWLR (PT 842) 113.*
[41] Section 124 (5) (d) of the AFA.

pardon may be made conditionally or unconditionally.[42] In *Falae v. Obasanjo* (No. 2),[43] the Court observed that a pardon is an act of grace by the appropriate authority which mitigates or obliterates the punishment that attaches to the offence for which the person was convicted.

In a plea of pardon, all that the accused person is saying is: "I have been tried for this particular offence. I have been convicted and sentenced. But I have been pardoned by the President or Governor of a State (as the case may be)". While in a plea of condonation, the accused person implies that: "I have either been tried by my Commanding Officer and punished or condoned by warning or advising me to desist from further commission of similar offence".

1.5 THE SIMILARITIES BETWEEN CONDONATION UNDER THE AFA AND THE RULE AGAINST DOUBLE JEOPARDY

Literarily, the word condonation connotes an express or implied forgiveness of an offence.[44] However, under the AFA, when Section 171 (1) (a-c) of the AFA is read in conjunction with Section 124 (5) (a-d) of the AFA, condonation is beyond a mere forgiveness. For clarity, it is important to outline the provisions below. Section 171 (1) (a-c) provides:

> (a) Where a person subject to service law under this Act –
>
> *(a)* has been tried for an offence by a competent civil court or a court-martial under service law; or
>
> *(b)* has been charged with an offence under service law and has had the charge dismissed, or has been found guilty on the charge on summary trial under this Act; or
>
> *(c)* has had an offence condoned by his commanding officer; he shall not be liable in respect

[42] Section 175 and 212 of the CFRN, 1999.
[43] (1999) 4 NWLR (pt 599) 476. See also *Ojukwu v. Obasanjo (2004) FWLR, (Pt 222) 1666, FRN v. Ifekwu (2003) 15 NWLR (PT. 842) 113.*
[44] Garner, B.A. (2019), op. Cit.

> of that offence to be tried by a court-martial or to have the case dealt with summarily under this Act.

While Section 124 (5) (a-d) provides:

> References in this Act to dealing summarily with a charge are references to the taking by the appropriate superior authority or the commanding officer of the accused, as the case may require, of the following action, this is –
>
> *(a)* dismissing the charge; or
>
> *(b)* determining whether the accused is guilty; or
>
> *(c)* where the accused is guilty, recording a finding and awarding punishment; or
>
> *(d)* condoning the offence in accordance with the provisions of this Act.

Having seen the above provisions, it is safe to conclude that condonation under the AFA connotes the following:

a. Forgiveness in respect of an offence which is criminal in nature.

b. Forgiveness which emanates after an investigation of a case or during trial.

c. Forgiveness in consequence of a previous trial.

Based on the above provisions, condonation under the AFA is similar to the concept of the right against double jeopardy in the following sense:

a. Trial**:** For a plea of condonation under Section 171 (1) to succeed under the AFA, the accused must have been tried in line with Section 124 (5) of the AFA. This principle is similar to the concept of the right against double jeopardy under the CFRN, 1999.

b. Punishment**:** The recording of guilty and awarding punishment as envisaged under Paragraph (c) of Section 124 (5) of AFA is synonymous with convicting and sentencing an accused in a civil court.

c. Competent Jurisdiction**:** Jurisdiction is a precursor to the competency of Courts including Summary trials and Court-Martial trials under the AFA. The competency of a court's jurisdiction matters in the plea of double jeopardy. The previous trial must have been made by a court of competent jurisdiction.

d. Criminal Offence: For a plea of double jeopardy to succeed in a civil court, the offence must be a criminal offence in line with Section 36 (12) of CFRN, 1999. This is the same in the Armed Forces as all the offences under the AFA are criminal in nature.

e. Acquittal: The accused, in a plea of double jeopardy, may also claim the fact that he has been previously tried and acquitted. The circumstance in Paragraph (a) of Section 124 (5) (a) of the AFA is similar to trial and acquittal.

1.6 THE DISSIMILARITIES BETWEEN CONDONATION UNDER THE AFA AND THE RULE AGAINST DOUBLE JEOPARDY

It is pertinent to highlight that the AFA stipulates two circumstances of condonation. The first circumstance aligns with the principles of double jeopardy as judicially canvassed by the various Appellate Courts in Nigeria while the second represents a unique circumstance.

The second circumstance is divided into various scenarios that may be challenged in a court of law pursuant to Section 1 (3) of CFRN, 1999 on the premises that they are contrary to Section 36 (9) of the Constitution. This second segment is provided in Section 171 (2) of the AFA as follows:

> (2) For the purposes of this section –
>
> *(a)* a person shall not be deemed to have been tried by a court-martial if confirmation is withheld of a finding by the court-martial that he is guilty of the offence or of a finding by a court-martial that he is not guilty of the offence by reason of insanity;
>
> *(b)* a case shall be deemed to have been dealt with summarily notwithstanding that the finding of the officer who summarily tried the charge has been quashed or varied on review thereof;
>
> *(c)* an offence shall be deemed to have been condoned by the commanding officer of a person alleged to have committed the offence if, and only if, that officer or any officer authorized by him to act in relation to the alleged offence has, with knowledge of all circumstance, informed him that he will not be charged with the offence;

Each of the above provisions shall be subsequently analyze in relation to its dissimilarity with the provision of the CFRN, 1999. The first provision provides:

> (a) a person shall not be deemed to have been tried by a court-martial if confirmation is withheld of a finding by the court-martial that he is guilty of the offence or of a finding by a court-martial that he is not guilty of the offence by reason of insanity;

The above provision invariably connotes that once a decision of a Court-Martial is withheld by the Confirming Authority, a person who was tried by a Court-Martial will be presumed or taken as a person who has not been tried. The bottom line here is that where the case is not statute-barred and an Appropriate Superior Authority (ASA) decides to prosecute such a person in another court, what will be the fate of such a person considering the fact that he was tried by an earlier court? In other words, will he be barred from his right to plead double jeopardy simply because confirmation of the decision of the earlier court was withheld? Affirmatively, going by the above provision, he may not be entitled for the plea since according to the provision "he shall not be deemed to have been tried if confirmation is withheld". In my view, this provision is not in conformity with Section 36 (9) of the CFRN, 1999. By the provision of the Constitution, once an accused can show that he has been tried, he can plead double jeopardy in any subsequent trial with similar facts notwithstanding any withholding of confirmation since the judgment of courts is final determination of matters in Nigeria.[45] This is in parallel with the situation under the AFA which makes the finding of guilt and sentence of Courts-Martial inchoate until confirmed.[46] The second provision provides:

> (b) A case shall be deemed to have been dealt with summarily notwithstanding that the finding of the officer who summarily tried the charge has been quashed or varied on review thereof;

[45] Section 318 of the CFRN, 1999.
[46] Section 148 (3) of the AFA.

A notable distinction regarding the above provision arises when the quashing or varying of a summary trial pertains to jurisdiction. A summary trial ought not to be deemed to have been resolved if the issue in question involves jurisdictional matters. The provision deviates from the Supreme Court's position in the case of ***Umeze v. State***[47] where it was held that any decision rendered by a court or tribunal without jurisdiction is a nullity.[48] The third provision states:

> (c) an offence shall be deemed to have been condoned by the commanding officer of a person alleged to have committed the offence if, and only if, that officer or any officer authorized by him to act in relation to the alleged offence has, with knowledge of all circumstance, informed him that he will not be charged with the offence;

In my humble opinion, this provision appears to be inconsistent with Section 36 (9) of the Constitution. The provision is valid only to the extent permissible by law.[49] Condoning offences are made in accordance with the provisions of the AFA.[50] Where there is an allegation of crime, the AFA requires a Commanding Officer to investigate,[51] after which the necessary procedures follow as may be determined by the Commanding Officers.[52] By Section 123 of the AFA, a Commanding Officer ought to determine a charge after investigation and not before the investigation of charges. The determination of a charge before an investigation could be interpreted as an action without jurisdiction. It is essential to highlight that any act done in excess of the jurisdiction of the Commanding Officer is nullity and such an act may not bar the proceedings of Summary or Court-Martial on the grounds of condonation.[53]

47 (Supra) See also Chief of Air Staff v. Iyen (Supra).

48 Per Tobi JSC (as he then was) in the case of Chief of Air staff v. Iyen (S$_{u}$pra).

49 Section 124(5)(d) of the AFA.

50 Ibid

51 Section 123 of the AFA.

52 Section 124 of the AFA.

53 Section 171(4) of the AFA.

1.7 NON-JURISDICTIONAL CONDONATION

This segment seeks to explain the consequences and implications of exercising powers beyond the requirements of the law. The AFA has established processes and procedures on how charges are to be dealt with by Commanding Officers.[54] It is important to note that any action not contemplated by these processes or procedures is an exercise in futility. For instance, going by Section 123 of the AFA, where there is an allegation, a Commanding Officer ought to investigate the charge before condonation. This invariably means that any condonation done before an investigation is not known to AFA and therefore it is an exercise in futility. This was the case in *NA v. Maj Essang and 18 others,*[55] where the Court overruled the plea of condonation on the ground that the Commanding Officer acted in excess of his jurisdiction by condoning before he had the power to do so.

Secondly, it is important to note that even after investigation, condonation ought to be carried out within the purview of the Commanding Officer. For instance, after an investigation, the Commanding Officer is empowered to deal with the charge summarily or remand the charge for trial by a Court-Martial (as the case may be). In this sense, the jurisdiction of the Commanding Officer to condone an offence is where he decides to deal with the charge summarily in which case he may exercise any of the options listed or available in the provision[56] which include condonation. It is my humble submission that any condonation not discharged after an investigation or during a Summary trial will be tantamount to an act not known to AFA. This was the case in *Nigerian Army v. Aminun Kano,*[57] where Exhibit P45 which was a letter written by the Commanding Officer of the respondent (Aminun Kano) during a Court-Martial trial and captioned, "Withdrawal of Charges Preferred against Col M Aminun Kano (N/6422) and Substituted with a Final Warning Letter" was wrongly considered as condonation contrary to the provisions of the AFA and the Rules of Procedure (Army), 1972 which is applicable by virtue of Section 181 of the AFA. By these laws, at the stage of Court-Martial, a Commanding Officer has no business with the withdrawal of charges, in other words, he has no jurisdiction to do so. The power to withdraw a

[54] Section 123 and 124 of the AFA.
[55] AHQ Gar Court-Martial dated 27 Nov 24, unreported.
[56] Section 124(5)(a-d) of the AFA.
[57] (Supra)

charge during a Court-Martial is bestowed on the Convening Officer.[58] It is hoped that the Supreme Court will revisit its judgment when confronted with similar circumstances in due course.

1.8 CONCLUSION

Having seen the analysis of each of the concepts above, it is safe to conclude that the right against double jeopardy being a fundamental right enshrined in the Constitution of the Federal Republic of Nigeria is synonymous with the right of accused personnel as stipulated under Section 171 (1) (a) and (b) of the Armed Forces Act. However, there are also special circumstances of condonation provided under the Act. It was also seen that the concept of pardon as enshrined in the CFRN, 1999 cannot be claimed by an accused standing trial in Court-Martial unless such pardon was made by the President or Governor of a state. A Commanding Officer cannot grant a pardon under the CFRN, 1999. Condonation under the AFA is made after an investigation, or during a Summary trial. Such a trial must be criminal in nature. A plea in bar of trial would not be available where the punishment so claimed was a mere disciplinary measure and not a criminal proceeding.

An accused person who has not been tried for a criminal offence lacks the competency to invoke the plea of *autre fois convict* or *acquit*. The accused may also lack the competency to invoke this plea where the trial so claimed was made by a court of incompetent jurisdiction. A plea of pardon may be exercised in any court once a person is subsequently arraigned on charges similar to those for which he was earlier convicted upon provided such pardon was made by the President or a Governor of a state. Condonation under the AFA is not a mere forgiveness. It is an action with a legal consequence. It is a right to be exercised by an accused person during arraignment or trial in any court of law. However, condonation under the AFA must be exercised by Commanding Officers within the limit stipulated by the law. This Article found that under the CFRN, the right to grant pardon is bestowed on either the President or a Governor of a State and not Commanding Officers of the Armed Forces. It also observed that the power of Commanding Officers under the AFA does not extend to the withdrawal of charges from a court-martial during trial in the name of condonation. The Article therefore recommended that the Supreme Court should revisit its

[58] Rule 82 RPA

judgment in the case of Aminu-Kano (Supra) when confronted with similar circumstances in due course.