

PRE-TRIAL DETENTION IN THE NIGERIAN CRIMINAL JUSTICE SYSTEM: A CALL FOR REFORM*

Abstract

The Nigerian Criminal justice system is under severe strain. This strain has been occasioned by the sheer intractable weight of the pre-trial persons or Awaiting Trial Persons (ATPs) in custody. As of June 2013 the number of pre-trial persons in prison custody was 36,983¹ out of a total prison population of 53,841. In effect, 65.9 percent of the prison inmates were ATPs. This situation is not only a time bomb but a severe blight on the criminal justice system. Efforts made by government over the years to bring a solution has proved ineffective. This paper investigates the causes for this state of affairs and proffers recommendations on how to best tackle the menace.

Introduction

Awaiting Trial Persons constitute 65.9% of the Nigerian prison population. As if this was not sufficiently terrible, the period of their stay in prison is said to be between two and fifteen years.² In effect, ATPs are the “victims” of our inefficient justice system. It is even alleged that the very high number of the detainees make it difficult for the prison system to adequately address the rehabilitation of the real inmates i.e. the convicts.³ The issue acquires significance in view of the prevailing condition in the nation’s prisons. The living conditions in our prisons are appalling and damaging to physical and mental wellbeing of the inmates. Inmates live with poor sanitation, lack of food; lack of medication; overcrowding; poor clothing and sleep 2 or 3 on the bed or bare cold floor.⁴ Our prisons have also been described as “human cages” with no facilities for correction, reformation and vocational training.⁵

*Gloria Daboita Shajobi, Lecturer, University of Abuja, Nigeria.

¹. Breakdown of Nigerian prison population, <http://www.prison.gov.ng> Last accessed 17/07/2013.

². Aduba, J.N. & Alemika, E.I. Bail & Criminal Justice Administration in Nigeria. <http://dspace.unijos.edu.ng/handle/10485/1906>, pg 1 Last accessed 02/02/2013.

³. Orakwe, I. W, “Reform and Rehabilitation of Prisoners: Achievements and Challenges”. A Paper presented at the National Summit on Penal Reform and Prison Decongestion, 2010, pg 16.

⁴. Alabi, T, & Alabi, S.O, Pains of Imprisonment: A Sociological analysis of Experience of Inmates in Ilorin and Kirikiri Prisons, *Journal of Research in Peace, Gender and Development*, eptember, 2011, Vol. 1, pg 238.

⁵. Alemika, E “The Smokescreen, Rhetorics and Reality of Penal Incarceration in Nigeria, *International Journal of Comparative and Applied Criminal Justice*, 1983, Vol 7 pg 147-149.

International Comparison

There are close to three million people held in pre-trial detention and other forms of remand imprisonment throughout the world.⁶ The total number of pre-trial/remand prisoners includes some 480,000 in the United States; 255,000 in India; 250,000 in China; 195,000 in Brazil; 116,000 in Russia; 107,000 in Mexico; 70,000 in Philippines; 66,000 in Thailand; 50,000 in both Indonesia and Pakistan; 48,000 in Turkey; 47,000 in Bangladesh; 44,000 in South Africa; and 35,000 in Venezuela. Nigeria and Peru have about the same figures-37,000. There are 35,000 in Venezuela; 32,000 in Morocco; and 31,000 in Argentina. In a majority of countries (56%) the proportion of the total prison population who are in pre-trial/remand imprisonment is between 10% and 40%. However, pre-trial/remand prisoners constitute more than 40% of the prison population in about half of the countries of Africa and the Americas and in South Central and Western Asia. The countries with the highest proportion of the total prison population in pre-trial /remand imprisonment are as follows:⁷

1. Comorros-92%
2. Libya-87%
3. Bolivia-83%
4. Democratic Republic of Congo-82%
5. Benin, Congo & Lebanon-75%
6. Monaco-73%
7. Paraguay-72.5%
8. Haiti-71%
9. Cameroon & Yemen-70%
10. Nigeria-69%
11. Bangladesh-68%
12. Philippines, Uruguay and Venezuela—67%
13. India & Pakistan-66%

International standards require the sparing use of pre-trial/remand detention but these figures reveal, country by country, region by region, disappointing evidence in increasing trends and high numbers.

⁶ Roy Walmsley, World Pre-trial/Remand List(WPTRL), www.prisonstudies.org, June 2014, Last accessed 21st August 2014

⁷. *ibid*

The United Nations top investigator into torture and punishment, Prof Manfred Nowak submits that detainees are the world's 'forgotten.'⁸ In his report to the UN Human Rights Council, March 2014, he reiterated his call for a convention to protect them. This is because where other forms of discrimination, by creed, conviction, gender or class are being strongly countered by global social movements, the rights of those considered "criminal" tend to generate less interest and certainly less popular sympathy.⁹ We are in firm agreement with this view. Baker noted that:

"This attitude seem to have encouraged standards to slip despite the commitment of 192 states to uphold the Universal Declaration of Human Rights and its two binding covenants, much of which covers conditions of detention. As noted by the High Commissioner for Human Rights Navi Pillay in 2007," some rights are necessarily restricted by detention. But regardless of the reasons why they have been deprived of their liberty, individuals in detention are more vulnerable to human rights violations... Governments have the obligation to respect, protect and fulfill(these) rights".¹⁰

The 71 page report released by Professor Nowak and his team cited instances in Nepal and Sri-Lanka where cells were so crowded that prisoners could not lie down to sleep at the same time, and on a mission in Uruguay he found conditions were inhumane both for guards and inmates. In the Philippines, the question of detainees right to health was highlighted in 2008 and 2009 by the deaths of two remanded labor rights activists from tuberculosis "Melvic Lupe, aged 29 and Leo Paro, aged 25 had been fit two years prior to their remand in Cainta City Jail, after leading a strike against Karnation Industries and Export Inc, a home décor company. Their families accused the prison authorities of criminal neglect, and had been unable to find out whether the men had been medically treated, or obtain a copy of their medical report.

⁸. Baker, J, "Detainees, the world's forgotten", Asian Human Right Commission, <http://www.humanrights.asia/resources/journals-magazines/eia/eiav4/> Last accessed 24th July 2014, pg 1

⁹. Ibid

¹⁰. ibid

¹¹. ibid

Like many in their situation, the men had been essentially sealed away, though they had not even been convicted. “By tolerating seclusion of remand detainees in prisons and the secrecy in their operation, society allows them to become gateways to all kinds of other human rights violations, from extreme corruption to torture and extra-judicial execution.”¹²

Examples only tend to surface in the media sporadically from the US led-abuses in Guantanamo Bay. It took sexually explicit photographs, and in France infamous for its shabby prisons, a significant increase in suicides to draw attention to the detainees plight. Efforts by prisoners in Bogambara prison in Kandy, Sri Lanka over Christmas, 2009 were less successful: five days of fasting on the prison roof to demand either trial or bail saw no constructive response from the prison authorities and prompted more hunger strikes. A large proportion of Sri-Lankan inmates are on remand and can wait for a trial for years, many held under the draconian- and with the war over, arguably redundant-Prevention Against Terrorism Act¹³ Therefore, it is clear this is a world- wide phenomenon and so concerted efforts should be made by each nation to address the issue.

Causes Of Pre-trial Detention In Nigeria

1. Difficult Bail Conditions

Bail can be defined as sureties taken by a person duly authorized, for the appearance of an accused person at a certain day and place, to answer and be justified by law¹⁴ It is a procedure by which a person arrested for an offence is released on security being taken for his appearance on a day and place certain.¹⁵ It has also been described as ‘the process by which a person awaiting trial or sentence or the hearing of an appeal is released from custody on entering, with or without a surety or sureties, into a bail bond(recognizance) for a sum or sums of money, conditioned for his appearance at the time and place required.’¹⁶ A walk into any police station in Nigeria will show large posters with the bold inscription “Bail is free”. In reality, access to bail by offenders is difficult. The new Code of Conduct for police officers of the Nigeria Police Force (NPF) states that police officers shall not knowingly restrict the freedom of individuals, whether by arrest or

¹². Baker, J, *Op cit* pg 1-2

¹³. *ibid*

¹⁴. Aguda, T. A ,*Criminal Law and Procedure of the Southern States of Nigeria*, London, Sweet & Maxwell, 3rd ed, 1982, para 253

¹⁵. Doherty, O. *Criminal Procedure In Nigeria*, London, Blackstone Press, 1990,pg 125.

¹⁶. Adams, F.B. *Criminal law and Practice in New Zealand*, Sweet & Maxwell, Wellington, 2nd ed. 1971 para 2535

detention, in violation of the Constitution and laws of the Federal Republic of Nigeria.¹⁷ The code is silent on sanctions applicable for a breach of the principles. This is unlike the Police Act which has provisions for what it termed offences against discipline¹⁸ However, the Act failed to make a categorical statement on the rights of suspects and the responsibility of the police officer in that regard.

A situation where a suspect is denied access to bail is an unwarranted restriction of his personal liberty and it is also a violation of Article 3 of the Universal Declaration of Human Rights.¹⁹ The grant of bail is taken at three stages in the enforcement of the Nigerian criminal process. These are police bail, bail by the trial court and bail by the appellate court. Three categories of persons qualify for bail. These are – a suspect, an accused and the convict. A suspect is a person suspected of having committed an offence, but not yet charged to court; an accused is a person charged to court who is yet to be convicted or acquitted; whilst a convict is one who the court of competent jurisdiction in a trial has adjudged guilty²⁰ The common factor for the three stages is the availability of the suspect, accused or convict as the case may be.²¹

In Nigeria, there is heavy reliance on monetary bail and sureties are required to be persons who are wealthy, influential, or traditional rulers and who possess certificate of occupancy of government land. This means the accused person must have capacity to pay or find a surety with the financial muscles to so do. In essence, such a system offers the right to bail to the wealthy and the well heeled members of society alone. However, the 1999 constitution as Amended claims all citizens enjoy equal protection of the law. This is stated in the Fundamental objectives and Directive Principles of State Policy, an inherent discrimination.

¹⁷. Principle One, Code of Conduct for Officers and Men of the Nigeria Police Force, September, 2012. pg. 7

¹⁸. First Schedule, Regulations 370, Police Act, Cap.319. The offences range from absence from duty, breach of confidence, discreditable conduct, corrupt practice, damage to clothing or other articles etc.

¹⁹. The Universal Declaration of Human Rights, adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948 states that ‘everyone has the right to life, liberty and security of person.

²⁰. Amadi, G.O.S, Police Powers In Nigeria, Nsukka, Afro-Orbis Publications, 2000, pg 195

²¹. State v Okafor & Others(1964) ENLR 96

Section 17(2) (a) states that every citizen shall have equality of rights, obligations and opportunities before the law. Though this is non-justiciable, the workings of bail system in Nigeria justice system is clearly not in consonance with the thought and intent of this section. In fact for not making it non-justiciable, it exposes the economic and class bias of the drafters of the Constitution who by so doing showed ‘singular indifference to the plight of the marginalized and the oppressed’.²² 19% of ATPs are in prison because they cannot post their bail.²³ The efficient use of bail in Australia, Canada, the United States and England and Wales likely contributes to the low number of people held on trial.²⁴ Germany has a bail system but uses it infrequently. Finland does not have a system of bail at all.²⁵ The United States is the only nation besides the Philippines that permits commercial bail, or the practice of paying a third party to post bail on your behalf. This practice allows the third party, usually a corporation to inherently make decisions in the bail process, and because they make decisions based on a profit motive, public and individual well being plays no role in deciding for whom they post bail.²⁶

Conflict between Penal Statutes and Constitutional Provision

Every person that is suspected or accused of a crime may be admitted to bail, with or without conditions. Aduba & Alemika tie access to bail to a constitutional imperative.²⁷ Learned authors submit that this is due to the fact that the right to presumption of innocence is a constitutional right, and denial of bail denies an offender opportunity to exercise this right.

²². Okagbue, I. Bail Reform In Nigeria, N.I.A.L.S.Law Series, No 6,1996, pg. 3-4.

²³. Ladan,M. T. “Penal Reform And the Introduction of Non-Custodial Sentencing To Achieve A Fairer Criminal Justice System in Nigeria.” A Paper presented at National Summit On Penal Reform And Decongestion of Prisons, December, 2010,Abuja, Nigeria, pg.16

²⁴. Crime and Society: a Comparative Criminology Tour of the World,“Detention” United Kingdom, www-rohan.sdsu.edu/faculty/rwinslow/europe/great_britian.html., Crime and Society: a comparative criminology tour of the world, “Detention,” Germany, www-rohan.sdsu.edu/faculty/rwinslow/europe/germany.html., Crime and Society: a comparative criminology tour of the world, “Criminal Codes,” Canada, www-rohan.sdsu.edu/faculty/rwinslow/namerica/canada.html. Last accessed 31st July,2014.

²⁵. Crime and Society: a comparative criminology tour of the world, “Criminal Codes,”Finland, www-rohan.sdsu.edu/faculty/rwinslow/europe/finland.html Last accessed 31st July 2014.

²⁶. Adam Liptak, “Illegal Globally, Bail for profit Remains in U.S.,” New York Times, January 29, 2008. www.nytimes.com/2008/01/29/us/29bail.html?pagewanted=all. Last accessed 28th July,2014

²⁷. Aduba & Alemika, 1996 *Op cit*

It is also contended that the right to bail is an adjunct of certain constitutional rights guaranteed Nigerian citizens.²⁸ These are; Right to liberty guaranteed under section 35(1); Right to movement under section 41; and the Right to Presumption of innocence under section 36(5). Therefore, grant of bail is not solely an exercise of the courts inherent jurisdiction. Thus, section 35(4) of the Constitution provides that any person who is arrested or detained for the purpose of bringing him before a court, or upon reasonable suspicion that he had committed an offence, or to prevent him from committing a crime, shall be brought before a court of law within a reasonable time. If he is not tried within a period of: (a) two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or (b) three months from the date of his arrest or detention in the case of a person who has been released on bail: he shall (without prejudice to any further proceedings that may be brought against him) be released either conditionally or upon such conditions as are reasonably necessary to ensure that he appears for his trial at a later date.

Section 35(5) further provides that the expression “a reasonable time” in sub-section (4) means: (a) in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of forty kilometers, a period of one day; and (b) in any other case, a period of two days or such longer period as in the circumstances may be considered by the court to be reasonable. Reasonable time was defined “as the period of time which, in the search of justice, does not wear out the parties and their witnesses and which is required to ensure that justice is not only done but appears to a reasonable person to be done”.²⁹ This is important as pre-trial detention of offenders for periods even longer than the terms of imprisonments of the alleged offences is rampant in our criminal justice system. However, section 17 of the Criminal Procedure Act³⁰ is *in pari materia* with section 23 of the Police Act 1967.³¹ Both provisos empower the Police to charge suspects to court as soon as practicable, and not within a reasonable time as used by the constitution. However, it has been held by the Supreme Court that in the event that both of these provisos are in conflict with the constitutional proviso they are to that extent null and void.

²⁸. Agaba, *Op cit* pg 246

²⁹. *R Ariori & others v Muraino B.O. Elemo & Others*, 1983, 1 S.C. 13 at 24, Obaseki JSC

³⁰. Cap C41, LFN 2004

³¹. Cap P19, LFN 2004

Nevertheless, the Police continue to remand suspects endlessly in custody citing both of these provisos. Unjust detention of accused persons using the provisos of the Police Act and the Criminal Procedure Act should no longer be tolerated in the Nigerian criminal justice system. The Nigerian Police is beset with several other problems which contribute to the circumstances that keep building up the number of pre-trial persons. Aside from bail issues are; Lack of basic investigative skills which leads to early closure of case files; Incessant transfer of Investigating Police Officers(IPO); Corruption;³² Lack of adequate working tools such that police officers demand money for items like a pen to record crime; and transportation fare from complainants, poor remuneration, and poor funding.

Lack of legal Representation

The issue of ATPs has not been adequately addressed. It has been subsumed under efforts by successive governments on prison decongestion. Notable was the large scale prison decongestion exercise by the General Abdusalam Administration as a result of which about 14,000 inmates were released in 1998. Of course, the prisons soon got filled up again as the underlying causes were not addressed. Hence, the need for a multi-sectoral approach to prison reforms led to the establishment of the National Working Group on Prison Reforms and Decongestion by the Obasanjo Administration on the 10th February 2004.³³ Part of the mandate of the group was to audit the prisons. Part of the key findings were that:

- a) Only about 26.4% of Awaiting Trial Persons (ATPs) have legal representation from the Legal Aid Council and non-governmental bodies offering pro-bono services. Almost 80% of convicts who have appeals have no legal representation. Only 20.5% convicts and 15% ATPs in the prisons have legal representation.
- b) 32.5% of convicted prisoners cannot pay their fines.

Holding Charge

The NPF also use “Holding Charge” as a basis for holding suspects indefinitely while they claim investigations are on-going. Under section 18 of the Criminal Procedure Act, the Police cannot legally keep an arrested

³². Olateru-Olagbegi, O.A. “Delay And Congestion In the Administration of Criminal Justice”, *Akinigba Law Journal*, Vol 1, No3, 2009, pg 358.

³³. Ladan, December, 2010 *Op cit* pg 14-16

person in custody for more than twenty four hours without granting bail or obtaining a warrant for his remand. The practice is that while some offences are to be charged to court directly by the Police upon completion of investigations, serious crimes such as capital offences are referred to the Director of Public Prosecutions(DPP) for legal advice before the accused is charged. The Office of the DPP in the Federal Ministry of Justice will peruse, advise and file an information at the High Court (if necessary). This takes time but meanwhile, police continue investigations. In the interim, the suspect is taken to a Magistrate Court on a “holding charge”. Lacking jurisdiction, the Magistrate orders the remand of the accused person in prison custody pending arraignment in a proper court i.e. the high court. So the police invented the “holding charge” a uniquely police phraseology unknown to Nigerian criminal law and jurisprudence.³⁴

This is in spite of the fact that the superior courts including the Supreme Court have shouted to the rooftop that holding charge is not known to the Nigerian Justice system.³⁵ Olong takes the view that “holding charge” which the police also use to circumvent sections 35(4) of the Constitution only arises because the police make arrest and detention of suspects the starting point of criminal investigations.³⁶ The views of Olong which is in tandem with the position of the law shows that the problem of the offenders are deeply rooted in the illegal connivance of Magistrates and Police. The tragedy is that at least forty percent of ATPs are held on holding charges.³⁷

Condition of Detention Centers

Agaba submits that a suspect in police/prison custody is not yet a convict and his rights should not be infringed. Therefore, such a person is entitled to be kept in decent human condition.³⁸ A situation where in most police detention centers in Nigeria detainees sleep on the bare floor with buckets of urine and feces is most inhuman and amounts to violations of the constitutional right to respect of human dignity.

³⁴ Olong M.A. “Holding Charge as a Disturbing Trend under the Nigerian Judicial System. ” Kogi State University Law Journal, Vol 1, No 1, 2007, pg.19. See also Tobi JCA in *Ozo V COP* (1996) 3 NWLR pt 103 at 320

³⁵ *Shagari v COP* (2005) All FWLR Pt 262 at pg 457. See also *Jimoh v COP* (1973) 6 NWLR at pg 342

³⁶ *ibid* pg. 32

³⁷ Ladan, M.T. “Possible Reform in the Criminal Justice(Release From Custody)(Special Provisions) Act,CAP C40,2004, Being A Paper presented at the One Day National Seminar On Nigeria At 50: Sentencing and Prison Decongestion Reforms, Abuja, October, 2010.pg 4

³⁸ Agaba, *Op cit*, pg 45

He argues further that such neglect, in addition to poor feeding, is a violation of the right to life as it clearly threatens the very existence of the suspect. Nevertheless, even if the conditions were overnight made extremely pleasant, the fact remains that detention of a suspect without trial for long periods of time is a violation of his human rights. This also has adverse effects on the suspect's family and his ability to discharge his duty as a spouse or parent or child. Releasing more people from pre-trial detention would not only potentially reduce the number of people going to prison, it would also prevent people from losing connections to work, family and community while being held on pre-trial detention³⁹ A senior officer of the Probation service in England and Wales said as follows:

“When a person is remanded in custody, they can lose their accommodation, their job, be locked away for 23 hours each day, and endure the pressures, hazards and indignities of prison life. Remand prisoners have inadequate access to legal representation, their prison conditions whilst on remand are poorer than their sentenced counterparts and the suicide rates amongst remandees is very high. Such defendants suffer regular invasions of privacy each time they are searched and often fear danger from those incarcerated with them”⁴⁰

Recommendations

There should be a strict limit on the length of pre-trial detention.⁴¹ The practice of holding charge contributes to high number of ATP's. Though illegal, it continues to flourish in our justice system.

³⁹. Amanda Petteruti and Nastassia Walsh, *Jailing Communities: The impact of jail expansion and Public Safety Strategies*, Washington DC: Justice Policy Institute, 2008 www.justicepolicy.org/images/upload/08-04_REP_Jailing_Communities_AC.pdf cited in Factsheet: Pre-Trial Detention and Remand in Custody, April 2011, Issued by Justice Policy, www.justicepolicy.org/uploads/justicepolicy/documents/pretrial_detention_and_remand_to_custody.pdf. last accessed 24/07/14.

⁴⁰. Schoetein, M. “ The Scale and Consequences of Pre Trial Detention” In *Justice Initiatives*, www.opensocietyfoundations.org/sites/default/files/justice_pdf last accessed Nov 2013,pg 18. Last Accessed, 31st August, 2014.

⁴¹. Ladan, December 2010,pg 11.

It may very well be that the best way forward is to legitimize it such that checks and balance will now be introduced to check the abuse and impunity being perpetrated such that⁴²:

- i. Senior police officers of at least the rank of Commissioner of Police should be designated to review evidence before a decision to seek a remand order is requested.
- ii. Magistrates should be presented with evidence to support reasonable suspicion by police for the arrest of the accused before a remand order is made and the accused should be given a hearing.
- iii. There should be automatic periodic review of remand orders by Magistrate to evaluate the progress of the case within the stipulated constitutional limit. At present there is no feedback mechanism by the police once remand order is granted.
- iv. Extension of remand orders should apply only where absolutely necessary.

There should be separate detention centers for suspects awaiting trial. These should be equipped with adequate facilities which reflect their status as mere suspects and not convicts.⁴³ The workings of the bail system in Nigeria requires serious overhaul. 19 percent of ATP's are in prison because they cannot post bail.⁴⁴ It is suggested that the deposit bail model be introduced. Only one percent in actual financial terms will be spent by the accused. Thus indigent persons would be well served and it would also have an added advantage of raising revenue for the courts.⁴⁵

The abysmal condition of pretrial detainees in the prison and police cells is dehumanizing. It is a contravention of the right to dignity of the detainees a right protected by the 1999 constitution as amended same as Article 5 of the Universal Declaration of Human Right.⁴⁶ The African Charter on Human and Peoples Right also provides a general framework for the protection of fundamental rights of Awaiting Trial Persons.

⁴². Ladan, M.T. "Enhancing Access to Justice In Criminal Matters:-Possible Areas For Reform In Nigeria, January 2010, pg 15-16

⁴³. Alemika, *Op cit at pg 127*

⁴⁴. Ladan, October 2010, *Op cit pg 4*

⁴⁵. Shajobi-Ibikunle, G "Bail Is A Right! Fact or Fiction In the Nigerian Criminal Justice System", *Abuja Journal of Public And International Law*, Vol 2, & 3, August, 2011 and 2012. pg 514

⁴⁶. Article 5 of the Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly Resolution 217A(11) of 10th December 1948, states thus-No one shall be subjected to torture or to cruel, inhuman or degrading treatment

Unlawful detention is not usually challenged by citizens except those who can afford the high cost of legal fees but civil society groups are now getting more involved in being the voice of the many hapless Nigerians stuck in prison custody still awaiting trial years after the arrest. At the very least the constitutional remedies of compensation and public apology by an appropriate authority or person should be done.⁴⁷ It is also advocated that a convention for the rights of detainees would make States more answerable to the expectations of their peers. Signatories would be legally bound into a communication channel with experts on the issue, and would be held regularly and more comprehensively to account. For states that do not sign, the process would still encourage a measure of self-reflection, while generating much needed, globally – powered light into those places where millions of our most vulnerable are left waiting in the dark.⁴⁸

⁴⁷. Section 35(6) CAP C23. In *Eda v COP*, the court held that the IGP and COP each state are created by the constitution and are ‘appropriate authority or person’.

⁴⁸. Baker, *Op cit* pg 3