A Legal and Constitutional Blueprint on Functionalising 'Time Frames' in Some Civil and Political Rights—A Study of Chapter IV of the Constitution of the Federal Republic of Nigeria 1999

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Abstract

The time stipulations in the constitutional and other statutory provisions relating to the right to personal liberty in Nigeria are vague and consequently incalculable such that several aspects of the right and other allied rights are essentially rendered nugatory. Lack of respect for, amongst others, the rights to the dignity of the human person and fair hearing are both by-products of the abuse of these time stipulations. Given the significance of these rights, the right to personal liberty, if improperly managed, can be the eye sore of a nation's human rights profile and be responsible for the low esteem in which prospects for the realization of rights are held in any jurisdiction. Regrettably, the issue of vague time stipulations, partly due to a deficit in the political will to act, is an age-old problem that also spans numerous jurisdictions. The problem is particularly intractable in the countries of the developing world in view of the weak systemic and attitudinal disposition towards these rights. The imperative is to refine and, where necessary, redefine the jurisprudence relating to time stipulations as an aid both to practitioners and the subjects of these stipulations by strengthening their legal and constitutional base. The article is designed as a blueprint for the adoption of jurisdictions that are confronted with the problem.

'The only possible measure for the legitimacy of the state is provided by the *positivised human rights*'.

- HJ Sandkuhler[1]

1. Introduction

Human rights are sometimes seen as effective indices for determining the citizen's faith in the State.[2] One may posit further that an effective gauge of the state of rights would appear to be evident

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[1] 'Pluralism and the Universality of Laws'. Available at http://www.bu.edu/wcp/MainLaw.htm. Last accessed 9 March 2010.

[2] Section 7 of the Constitution of the Republic of South Africa considers human rights to be 'a cornerstone of democracy in South Africa'.

in the performance of the civil and political rights to life, human dignity, personal liberty, fair hearing, privacy, free expression, free movement, peaceful assembly and association. These are the rights that regulate the relationship between the citizen and the State's law enforcement agencies, and they particularly encompass the scope of police powers and the authority of the judicial process. In turn, abuses of these rights are the most graphic and, when substantial in nature, invariably give enduring and unalterable first impressions of a state's inclination to protect human rights.

The aspects of civil and political rights discussed in this article, including certain aspects of the rights to human dignity and personal liberty, amongst others, raise the issue of the arbitrariness of police powers. They have a direct, substantial impact on the general human rights portrait of an area of jurisdiction. To aid understanding of the subject, it is discussed in a Nigerian context, and this analysis begins in Section 2 with an explanation of the levels of human rights abuses in Nigeria. Section 3 offers perspectives on the problems that perpetuate human rights abuses, especially regarding those rights focused on in this article, to foster a greater understanding of the peculiar problems that arise in a jurisdiction such as Nigeria. Section 4 is an examination of the inadequacies of the constitutional provisions that enable a substantial portion of these abuses, while remedial recommendations aimed at making these rights functional are made and analysed in sections 5-10. This article concludes that the problems discussed herein are not limited to Nigeria, though their relevance outside of Nigeria is rarely discussed.[3] These recommendations are therefore designed to be of help to such jurisdictions.

2. The State of the Relevant Civil and Political Rights in Nigeria

In the Preamble to an article published in *The Guardian*,[4] Fred Agbaje, a lawyer and human rights activist, cites former military President General Ibrahim Babangida statement telling 122 senior police officers in June 1989 that 'We want to evolve a new police force that could match the new social order. We have given them the task to evolve a strategy which will benefit our society at large.' Regrettably, this goal has gone no further than painting new slogans such as 'To Serve With Honour and Dignity' on old slogans like 'Operation Fire For Fire' which themselves were in turn painted on other slogans like 'Rapid Response' on any moving police vehicle.

The long-held view that the general human rights situation is appalling in Nigeria[5] is not an isolated one. These abuses are not restricted to those perpetrated by the police force. However, there is a consensus that the actions of the police have contributed the most to making the Nigerian situation a near-helpless one. One of the most notorious breaches by the police was the shooting at a checkpoint of the bespectacled and gifted quarter miler, Dele Udoh, more than two decades ago. Another

[3] G. Griffith, 'Police Powers of Detention after Arrest', Briefing Paper No 8/97, NSW Parliamentary Library Research Service (1997). Available at www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/.../08-97.pdf. Last accessed 21 February 2010.

[4] F. Agbaje, 'Curbing Police Misuse of Power', *The Guardian* (Lagos) 21 June 1989, p.11.

[5] J.O. Baiyeshea, 'A Critical Appraisal of Fundamental Human Rights In Nigeria', (1998) Seminar on Jurisprudence delivered on 8 October 1998 at the Faculty of Law, Obafemi Awolowo University, Ile-Ife, pp.11–12, for instance notes, 'De facto therefore, the human rights precepts, principles, objectives, and ideals have been observed in Nigeria since independence more in disobedience than obedience'.

prominent illustration is the killing of 'the Dawodu Brothers'[6] on November 17, 1987 by a police constable, which formed the basis of several suits pursued by their dependants' lawyer, the late Chief Gani Fawehinmi. Nothing was ever heard of the constable. The crux of the murder charge against the policeman accused in *Solomon Adekunle v. the State*[7] was that he rashly shot three men and a girl at a checkpoint, which resulted in the girl's death. A random examination of a few newspapers in the month of August 2005 reveal headlines such as 'Police kills mate over beer',[8] 'Cop kills cop...over bail money',[9] and 'Police kill 70-year-old man, 2 sons',[10] amongst others. A recent example of abuse was the 'Apo Six Killings'. In that case, a policeman killed a student of the College of Agriculture in Kabba, Kogi State, in early 2005 after pushing her off the motorcycle public transport system (known as okada), which resulted in her being run over by a car. The incident occurred following an argument between the okada rider and the policeman over the policeman's demand for 20 naira (the Nigerian equivalent of 14 US cents).[11] Recently, it seems that several policemen murdered a man and a police sergeant because of an awkwardly parked vehicle.[12] In the story, 'Nigeria a wicked country',[13] by the widow of a late nationalist who passed away on July 23, 2005, she laments the loss of her unborn twins after being kicked in the belly by a policeman in 1943, a year after their wedding.

Abuses are not restricted to police institutions; other institutions such as the Navy, the Army, and the prison authorities are also culpable. Headlines such as 'Killer officer to face the law–Navel chief'[14] are also far from unusual. Prison authorities are also just as culpable. In the same publication that contained a report of the police killing of a businessman and a fellow cop, there is a report of five of eight suspects in a murder trial dying in prison custody.[15] In the report, 'Senate begins hearing on prison conditions',[16] the Chairman of the Senate Committee on Prisons, Senator Abubakar Sodangi, said that most prisons in the country had structures that were built in the early 19th century by the colonial masters, and that prison yards designed for 40 inmates were currently holding 500–600 inmates. This is not a new problem and it was highlighted at least 23 years earlier.[17]

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[6] 'The Dawodu Brothers, Case and Legal Development in Nigeria', (1987) 4, *Peoples Law Journal* pp.29–35.

[7] (2006) 4 N.W.L.R. (Pt. 1000) 717.

[8] *The Punch* (Lagos) 10 August 2005.

[9] *Daily Sun* (Lagos) 10 August 2005. The publication alleged that the killing arose out of sharing 'bail money' extorted from parties. But the police authorities told Daily Sun that the policemen had been fighting over a cup of tea.

[10] *Sunday Sun* (Lagos) 21 August 2005.

[11] NTA Newsline, a news programme that runs on the Nigerian Television Authority Network Service every Sunday between 9pm and 10.30p.m. monitored sometime in 2005 (date unavailable).

[12] 'Another "Apo Six": How Policemen Brutally Murdered Furniture Firm Boss, Sergeant', *Sunday Sun*, 25 October 2009.

[13] *The Sun* (Lagos) (date unavailable).

[14] *Daily Sun* (Lagos) 9 August 2005.

[15] 'Rewane's "Go-Slow" Murder Trial: Five Suspects Die in Kirikiri', *Sunday Sun*, 25 October 2009.

[16] *The Herald* (Ilorin, Nigeria) 27 July 2005. He added, 'There is no justification, for example, why Kaduna Prisons should have 377 inmates over and above its capacity'.

[17] 'Concord Opinion: Over-flowing Jail Houses', *National Concord*, December 3 1982, p.4.

Another similarly intractable problem is what is done with persons awaiting trial. It has been confirmed that approximately 75% of inmates are victims of the longstanding problem of 'persons-awaiting-trial'[18] and that the state of Nigerian prisons is appalling.[19] In one instance,[20] the execution of an armed robbery convict was ordered by the Governor of Oyo State and promptly carried out, while his appeal was pending before the Court of Appeal. This drew very adverse comments by the Supreme Court against the Government of Oyo State. The Nigerian prison system is so vulnerable to manipulation that it now appears, from the report of a Committee,[21] that there is a cartel that releases convicted drug barons and couriers before they are delivered to prison and has released 197 such offenders between 2005 and 2006.[22]

The previous examples relate to the general human rights situation. However, they also indicate that if life is regarded as so inconsequential, then no other right is considered sacred. Regarding specific abuses that relate to the rights discussed herein (the type that mostly occur when a suspect has been detained by the police), sufficient illustrations abound that one expert[23] justifiably identifies 'the most disturbing of the police powers' vulnerable to abuse is *arrest with or without warrant*. The powers of the police cannot be understated. The Constitution[24] provides for such powers and duties for the members of the police force as the law may confer upon them. Fittingly, the law has proceeded to adequately empower the police force. Subject to the powers of the Attorney General of the Federation or a state to institute, undertake, continue, or discontinue criminal proceedings, any police officer may conduct in person all prosecutions before any court, whether or not the complaint is laid in his name.[25] In addition to the powers of arrest already granted by the Police Act, the Criminal Procedure Act[26] and the Criminal Procedure Code[27] also grant several.[28] The rather wide

[18] 'Concord Opinion: Over-flowing Jail Houses', see fn.17, observes, 'Speedy trials and imaginative sentencing should be encouraged by our courts. It is revolting that a man can be made to await trial for nine years. Such cases make a mockery of our judiciary which could lead to the erosion of public confidence in the system'.

[19] 'LAC Tackles Pre-Trial Detention Problem', *The Herald* (Ilorin, Nigeria) July 27 2005, quoting Mrs. Uju A. Hassan-Baba, the Director-General of the Legal Aid Council of Nigeria on the occasion of State Inter-Agency Consultation on Legal Aid and Pre-Trial Detention in Nigeria held in Sokoto where she added, '[m]ore worrisome is the scandalous number of years some of them had spent behind bar [sic] over minor offences, which on conviction, would have attracted less penalty'. This is not a new problem. Agbaje, see fn.4, writes, 'Some of the present occupants of various police custodies/prison yards awaiting trial are not supposed to be there and where they (suspects) are supposed to be in custody, the offence committed if thoroughly investigated is not the type that would have ordinarily warranted detention. Bail is not granted for simple offences which require police bail with the consequential over-crowding of penal homes'.

[20] *Bello & Ors v. Attorney-General of Oyo State* (1986) 5 NWLR (Pt. 45) 828.

[21] The National Committee for the Reform of the National Drug Law Enforcement Agency.

[22] 'The Jail Evasion Scandal in NDLEA', *Daily Sun*, 3 June 2009.

[23] Agbaje. See fn.4.

[24] Section 214(2)(b).

[25] Section 23.

[26] Cap. C41 *Laws of the Federation of Nigeria 2004*.

[27] Cap. 30 *Laws of Northern Nigeria 1963*.

[28] Section 24(1).

scope of these powers and the strategic position of the police in the hierarchy of criminal justice[29] suggest that the powers are intended to be used responsibly.

Restraint, however, has not been the strong point of the Nigerian Police Force. Torture is routinely used by the police as well as the intelligence agencies, and some of the gory methods used include inserting needles in penises and pistol butts in vaginas, exploding canisters of tear gas in the faces of suspects in airtight enclosures, and framing people for crimes by forcing suspects to handle guns (so as to 'trap' their finger prints for purposes of charging them with murder or robbery.[30] Other methods are used, such as advertising suspects with swollen faces (often addressed as criminals) on the police-television programme 'Crime Fighters' instead of charging them promptly in court, a step which prejudices the presumption of innocence in favour of the suspects, potentially prejudices the fair-mindedness of the prospective judge (who is probably a viewer) and violates the right of the suspects to silence. This last point is emphasised in spite of the rather moribund notice at the end of the programme that the suspects are presumed innocent, given that it is the reasonable appearance of fairness that counts. It would appear that the police *think* that the Constitution exempts persons charged with capital offences from the benefit of trial within three months. The fact that the Constitution *appears* to exempt that class of offenders would seem not to be a legal or reasonable excuse for advertising them. The list of abuses is endless. Supposedly, captured robbery suspects are shot at point-blank range without charge or trial.[31] The latest example of an alleged extra-judicial killing occurred recently during the *Boko Haram* uprising; the religious sect leader, Mohammed Yusuf, was captured alive on 30 July 2009, and handed over to the police, according to the military officer who led the operation against the sect. The Borno State Police Commissioner also confirmed this development. Shortly thereafter, the police displayed his bullet-riddled corpse and announced that he had died during a shootout with security men.[32] Incidentally, each of the leaders of previous religious uprisings (for instance Marwa and Isa Makaniki) were killed by security forces.

Independent human rights observers have also corroborated these facts. For instance, in a 76-page report by Human Rights Watch entitled 'Rest in Pieces', the internationally acclaimed human rights group emphasised that the Nigerian Police violate the rights of detainees in their custody through the

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[29] E. H. Sutherland et al., *Criminology*, 8th ed., (Philadelphia/New York/Toronto: J.B. Lippincott Company, 1970), p.375 note, 'In almost all instances, however, contact with the police system precedes contact with any subsequent agency or agencies. For this reason, and because in many cases contact with the police system is terminal, the police are in a strategic position with reference to the subsequent behavior of apprehended offenders. Any punitive reaction has important effects on the success of subsequent attempts at treatment. Even if treatment methods are not used later, either because they are not available or because the guilty person does not encounter them, the methods used by the police in performing their functions affect the probabilities for reformation or recidivism. In some instances, police methods cause offenders to identify themselves with criminals, and in other instances they cause them to abandon such criminal identifications as they may possess at the time of apprehension'.

[30] These writers were almost victim of this after a traffic accident with a policeman in mufti who was driving a taxi cab in the early 1990s in Ilorin, Kwara State.

[31] A report monitored on BBC Network Africa in November 2009 alleges the Chief Medical Director of the University of Nigeria Teaching Hospital complained that the hospital's mortuary was over-congested due to extra-judicial killings by the police leading it to embark on a mass burial of over seventy five corpses deposited by the State Police Command while many more were coming in.

[32] 'Boko Haram Leader Killed', *Daily Trust*, 31 July 2009.

use of torture tactics to extract confessional statements from them.[33] The executive director of the African division of the organisation, Peter Takirambudde, observed that across the country 'both senior and low-level police officers routinely commit or order the torture and maltreatment of criminal suspects.'[34] The report documented the forms of torture as tying of arms and legs behind the body, suspension by hands and legs from the ceiling, severe beating with metal or wooden objects, spraying of tear gas in the eyes, shooting in the foot or leg, raping female detainees, and using pliers or electric shocks on the penis.[35] It reported dozens of deaths as a result of injuries sustained during the torture sessions, while others were summarily executed in police custody.[36] And though the federal government made a lukewarm denial through its then–Minister of Information and National Orientation, Frank Nweke Jr, he could only 'say without fear of contradiction that torture is not routinely practiced in Nigeria',[37] though the Government was 'very much aware of the problems within the criminal justice administration in the country including the Police Force'. One can only conclude that the evidence of routine abuse is overwhelming.

This is not to say, however, that the police do not sometimes feel justifiable frustration. Interminable delays by our courts sometimes results in freedom being allowed to dangerous suspects. The same corruption that sometimes influences the thoughts of judges to inappropriately release suspects is also responsible for prison authorities arbitrarily (and sometimes in collusion with other judicial and legal personnel) letting convicts loose.[38] This is particularly easy as record keeping is poor. These problems point to a failure of the system and are an indictment of both the courts and the prison system. Acknowledging the existence of police frustration, however, should not be an apology for such grandiose abuses.

For very long, the country has trusted the Police Force to reform and redeem itself - without success. In response to the Apo Six Killings, for instance, all that the then–Acting Inspector General of Police, Sunday Ehindero (himself a lawyer), could propose was a two-day workshop on human rights violation and extra-judicial killings by officers and men of the police, after which they would launch a reference book on human rights violations.[39] However, no officials ever provided an answer for what was to happen afterward. As of today, five years after the incident, the murder suspects are still on trial before an Abuja High Court sitting in Maitama, Abuja.[40] This situation has raised questions as to whether justice will ever be done.

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[33] 'How Police Violate Detainees Rights', *This Day Newspaper* (Lagos) 28 July 2005.

[34] 'How Police Violate Detainees Rights'. See fn.33.

[35] This is supported with anecdotal evidence. To the best of these writers' knowledge, one policeman had demanded to have sexual intercourse with the girlfriend of a detained suspect as consideration for granting the detainee bail.

[36] These authors have seen a suspect shot in the groin area and left to bleed to death at a police station because, according to the police officers at the station, he was a notorious 'robbery suspect'.

[37] 'How Police Violate Detainees Rights'. See fn.33.

[38] 'The Jail Evasion Scandal in NDLEA'. See fn.22.

[39] 'Apo Killings: Ehindero Promises Re-organisation of Police Force', *The Herald* (Ilorin) 27 July 2005.

[40] 'Will Nigeria's "Apo Six" Ever Get Justice?' Available at http://news.bbc.co.uk/2/hi/africa/8025260.stm. Last accessed 22 October 2009.

The insensitivity from police officials may be understood from one perspective; that crass ignorance on the part of the state and law enforcement agencies as to the origins of these rights is greatly responsible for Nigeria's dismal human rights record. The State and its agencies perceive from the act of positivisation of these rights in the Nigerian Constitution as evidence that they are favours from the State. This could not be farther from the truth, as Sandkuhler[41] notes that 'the human rights are the articulation of political freedom, which the people grant each other. They are not a gift from the state'.

3. Perspectives to the Problem of Rights Abuse

A lack of proper appreciation of the nature of human rights is merely one factor to which these abuses are attributable. However, additional widely held views about abuse factors include the influence of illiteracy, ignorance, and poverty. One of those to hold this view is Justice Oputa,[42] who compares the relevance of law in Western countries with that of developing countries, such as Nigeria. He also lists factors such as lack of institutionalised legal traditions and lack of assimilation of a foreign legal civilisation.

Justice Oputa's findings are similar to Jega's[43] diagnosis, which categorises the problems, obstacles, and challenges into four areas: systemic, constitutional/legal, institutional, and attitudinal. Systemic problems include breaches and violations of human rights by the state, through its functionaries who have been entrusted with the responsibility to protect these rights. He enumerates extra-judicial killings, torture, denial of due process to accused persons in courts, police stations, prisons, et cetera, illegal detention for long periods, extortion of citizens (for example on highways by law enforcement agents with guns), environmental degradation, gender-based discrimination in the public sector, amongst others, as some of the systemic problems. Constitutional and legal problems involve inadequacies of the constitution and other existing legal instruments due to vagueness of provisions or lack of them, which imposes severe restrictions on the promotion and protection of rights. Institutional problems relate to inherent weaknesses in existing institutions, which have the statutory responsibility for the promotion and protection of rights. These problems are usually a result of the lack of relative independence and autonomy, inadequacy of funding and personnel, and institutional constraints imposed by the laws of the Nigerian Human Rights Commission, the prisons service, the police force, and the judiciary, amongst others. Finally, the attitudinal problems relate to

[41] 'Pluralism and the Universality of Laws'. See fn.1.

[42] C. Oputa, 'The Nigerian Lawyer and the New Challenges', (1989) Paper presented at the 1989 *Biennial Law Week of the Nigerian Bar Association*, Kwara State Branch on 3 February 1989, p.7. He submits, 'In developing countries the people know their rights and will readily challenge anybody who exceeds the limits the law allows. In developing countries like Nigeria, the law is not indigenous. It is rather a product of western civilization implanted here (by our erstwhile colonial masters) upon an existing native culture and civilization. This marriage has not been entirely smooth and uneventful. Also the Western type of legal institutions in our country are comparatively young and are novelties to a majority of Nigerians. The appreciation of, and regard for, the law, as well as the benefits deriving therefrom, have yet to be felt in all the strata of our society—in our rural communities and even urban communities. *There is thus a sense of helplessness, (induced by this ignorance), amongst our people especially the poor and rural people, of what the law can do for them'* (emphasis added).

[43] A. Jega, 'Human Rights Problems in Nigeria', *Weekly Trust* (Kaduna) 3 January, 2002.

the attitudes, perceptions, and value orientations of Nigerians, which negatively affect those striving to promote and protect human rights. Jega lists the attitude of public officials and law enforcement agents in the discharge of their official responsibilities, the attitude of citizens with regard to their rights, responsibilities and obligations (particularly in drawing a fine line between rights and privileges), and the inadequacy of public understanding of their rights.

Examining each of these classifications reveals that the problem of adhering to constitutional time frames (on which this article mainly focuses) cuts across them. The problem is systemic, in that it is a denial of due process by state officials. Constitutional and legal aspects are also involved, given the inadequacies of the provisions of the Constitution and relevant statutes. Institutional problems that involve a likelihood of unfairness on the part of the police (who act as both investigator and prosecutor) arise, as well as problems with the attitudes of police officers, lawyers, and accused persons about the abuse of constitutional time frames.

One of the implications of these multifaceted problems is that Nigerian statute books (particularly the Constitution) must be critically scrutinised in order to catch these breaches that have resulted in victimisation of citizens.

Erudite legal minds have long commented upon the apparent shortcomings of the Constitution's human rights provisions. The view that the Constitution of the Federal Republic of Nigeria tends to give rights with one hand and take them back with the other is a popular one.[44] A closer examination of the Constitution, however, would tend to raise doubts as to whether this indeed is the truth, as, in offering the minimum of political rights that are available in most other jurisdictions, it could be said that the situation could be no worse. That is the case in more ways than one, and this article will highlight some of these provisions and discuss what they portend for rights in practical terms.

It must be added, though, that the opinion that there are loopholes in the Constitution is not unanimous. One acclaimed legal practitioner[45] interestingly (given his earlier view of the lacunae in the Constitution's human rights provisions)[46] posits that *de jure* Nigeria appears well armed in the area of fundamental human rights, given the Natural Law Principles of Natural Rights, the American Bill of Rights, the Preamble to United Nations Charter, 1945, the Universal Declaration of Human Rights 1948, the fundamental rights provisions in various Nigerian constitutions of 1960, 1963 and 1979 (not to mention 1989 and 1999), and the African Charter on Human and Peoples' Rights, amongst others. Nonetheless, he added, 'What is lacking however is the will of those in authority to respect, obey, observe and enforce the laws available on fundamental human rights of Nigerian citizens.'[47] With respect, that view is only half the truth, as is the view that loopholes in the constitution are *per se* responsible for the state of affairs. The whole truth consists of a combination of these two halves. The absence of the will to respect or enforce fundamental rights is already well documented here and elsewhere. There is a need, as a means of remedying this abysmal state of

[44] Baiyeshea, p.10. See fn.5.
[45] Baiyeshea, pp.12–13. See fn.5.
[46] Baiyeshea. See fn.45 and 5.
[47] Baiyeshea, fn.45 above.

respect for rights, to look at the various lacunae and complications, that the state often takes advantage of while consigning human rights to the dust bin in Nigeria.

4. The Absence of Compliance-Guarantee Mechanisms

Perhaps the most significant implications for improved human rights prospects in Nigeria are the 'shortcomings', some of which come in the form of lacunae, contained in the constitutional provisions relating to the rights to the dignity of the human person,[48] personal liberty,[49] and fair hearing.[50] This is given the fact that the constitution makers opted for detailed provisions relating to human rights. This latter factor ironically accentuates the absence of compliance verification standards.

Chapter IV of the Constitution admonishes that a person detained and awaiting trial shall not continue to be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence.[51] It further provides that any person who is arrested or detained shall have the right to remain silent until after consultation with a legal practitioner or any other person of his own choice[52] and shall be informed in writing within 24 hours (and in a language that he understands) of the facts and grounds for his arrest or detention.[53] Section 35(4) states that a person charged with a criminal offence shall be tried within a 'reasonable time' while subsection 5[54] defines 'reasonable time' in that context as a period of one day, in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of forty kilometres. In any other case, 'reasonable time' means 'a period of two days or such longer period as in the circumstances may be considered by the court to be reasonable'.[55] Capital offenders are, however, excluded from the benefit of these definitions of reasonable time.[56]

Perhaps even more significantly, an accused person, having been brought before a court of law, shall be tried 'within a period of 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 in the case of a person who has been released

[48] Particularly Section 34(1)(a) relating to protection against torture or inhuman or degrading treatment.

[49] Section 35.

[50] Section 36.

[51] Proviso to Section 35(1).

[52] Section 35(2).

[53] Section 35(3).

[54] The Constitution of Ghana (see section 14(4)) is almost identical with the Nigerian equivalent while the Constitution of the Republic of South Africa (see section 35(1)(d)) makes similar provisions for a suspect to be brought before a court 'as soon as reasonably possible' but not later than forty-eight hours *after arrest*.

[55] Section 35 (5).

[56] Section 35(7). The Supreme Court decision in *Lufadeju & Anor. v. Johnson* (2007) 3 NILR 303 (available at www.nigeria-law.org/LawReporting2007.htm. *Last accessed 10 March, 2010)* in which the suspect was arrested on 12 January 1997 and was arraigned on 12 March 1997 before the Magistrate who refused bail, a period of two months and one day, thus appears to be within the constitutional provisions given that the accused was charged with treason, a capital offence.

on bail, 'three months from the date of his arrest or detention',[57] not from the date of his arraignment in both cases. Thus, to determine whether the case of an accused person comes within this provision, it is imperative to determine the date of his arrest. Under the subsection, if this is not accomplished, such a person is to be released 'unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date'.[58]

These latter provisions necessitate some observations. First, they suggest that, except in capital offences, no person undergoing trial for a criminal offence in Nigeria may be kept or remanded in prison custody for a period longer than three months from the date of his arrest. Second, it would appear that while the provision would prefer all trials, save in trials for capital offences, to be concluded within three months, it recognises that circumstances exist that may stretch some trials beyond these deadlines. Third, the word 'tried', given the context in which it is used in the subsection, must and can only mean the entirety of a criminal proceeding from charge through evidence to judgment. Context, in this sense, may be taken from the fact that the subsection makes a clear distinction between bringing a suspect before a court of law within a reasonable time on the one hand and trying him within two or three months as the case may be. This position would appear to be more logical given the Supreme Court's decision in *Akoh & Ors. v. Abuh*,[59] in which it defined the word 'hearing' as meaning 'to hear and determine' a matter and that hearing does not terminate until the whole matter is disposed of. Thus the preference of the provision is that judgments are ordinarily expected to be given in appropriate cases within two to three months.

In passing, it's worth noting that although the Constitution is often assailed for giving rights with one hand and taking them with the other, these rights reside on the pages of the Constitution, and yet it is a rarity to hear a legal practitioner raise them for the benefit of his client in Nigerian courts. There would appear to be very few cases indeed in Nigeria in which a lawyer has queried why his client is, for instance, still remanded in prison custody 15 months after arraignment, not even counting the period of time from the client's arrest.

It is clear that certain operative factors are prominent in these undoubtedly laudable provisions highlighted above. They include time of arrest, time of charge, written information to the suspect of the charge, time when such written information was given to the suspect, information to the suspect in a language that he understands and, arguably, duration of trial, amongst others. Regarding the portions of Sections 34 and 35 referred to above, the most predominant commonality is the requirement for certain steps to be taken by the executive within an allotted period of time.[60] Regrettably, the Constitution does not provide for these critical benchmarks.

The origins of these inadequate specifications perhaps lie in the drafting style employed by the constitution makers. Prior to the introduction of the Human Rights Chapter into the 1979

[57] Section 35(5)(a) and (b).
[58] Ibid.
[59] (1988) 7 S.C.N.J. 355.
[60] Particularly Sections 35(3), 35(4) and 35(5). Griffith, p.10, see fn.3, commenting on similar requirements in section 352 of the *Crimes Act 1900* (New South Wales, Australia) observes, 'Timing is all-important to the question of compliance by the police…'

Constitution, there was intense debate regarding which drafting style, whether detailed or vague, the rights enshrined therein were to assume. The Sub-Committee on Citizenship, Fundamental Rights, Social Security, Political Parties, and The Electoral System was, according to it, faced with two alternatives:

> (i) to examine the Rights contained in Chapter III[61] and recommend amendments as may be necessary under the existing circumstances; or
>
> (ii) simply to state those rights in their baldest possible form without any provisos whatsoever—and leave it to the courts to determine, by case law and precedent, the limitations to those Rights.[62]

The Sub-Committee observed, in accordance with statements by U.S. Chief Justice John Marshall[63] that the latter option 'is the practice adopted in the United States'[64] and, in a seeming endorsement of the Judiciary, implied that it trusted that the Judiciary would not 'leave the citizen to the tender mercies of the State' (an apparent indictment of the Nigerian State), were it to recommend the option. The Sub-Committee, however, opted for a more detailed chapter.[65] Thus, while ignoring the admonition of Justice Marshall that option (i) 'would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind' and that 'it would probably never be understood by the public',[66] the Sub-Committee gave no reason for rejecting option (ii) and recommending option (i), other than that the latter method was the one adopted by a number of new states. Explicit, detailed, and aptly defined statements of the rights and provisos would ensure that the State would only impinge upon the rights of a largely ignorant and/or docile citizenry as a last resort, rather than as a first option, but it could have been improper for the Sub-Committee to justify its actions on that logical basis, given the penchant of those in power in Nigeria (where not even the Judges' Rules

[61] Of the Republican Constitution of 1963.

[62] Sub-Committee On Citizenship, Fundamental Rights, Social Security, Political Parties and The Electoral System, 'Report of the Constitution Drafting Committee Volume II', 1976, Lagos, Federal Ministry of Information, p.173.

[63] Mr. Chief Justice John Marshall (see *McCulloch v. Maryland* 4 Wheat 316, 4 L. Ed. 579 (1819)) observed of the American Constitution *generally*, 'A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language…'.

[64] Sub-committee on citizenship. See fn.62.

[65] See fn.62. The Sub-Committee argued that, '[…] were (ii) to be followed in Nigeria, the Courts would not leave the citizen to the tender mercies of the State (cf. D.O. Aihe Fundamental Rights and the Military Regime: What did the Courts say? *Journal of African Law* 15 (2, 1971): 213-224). On the other hand, (i) is the practice adopted by a number of new states. The Committee preferred (i). In our recommendations therefore, we have followed the statement of rights in Chapter III of the 1963 Constitution'.

[66] See *McCulloch v. Maryland* at fn.63 above.

have solved this problem of rights abuse).[67] This is grounded in the peculiarity of most developing states, and consequently on the logic from the local proverb that the hoes, shovels, and diggers are out (a decidedly extreme measure) because the rat (in this case the enormity of the rights abuse) has escaped into the hole.

However, the complication is that, having opted for the 'prolixity of a legal code', the provisions do not appear to go far enough. As such, it would appear that they do not contain a mechanism, much less an independent mechanism, for determining the level of compliance with these requirements over time. The absence of such a gauge has made these provisions largely self-effacing. It raises, *inter alia*, the following questions: how can the right to remain silent until after consultation with a legal practitioner or a person of his choice be ensured? How can it be guaranteed that any person who is arrested or detained is informed in writing within 24 hours of such arrest in a language he understands? How can it be ensured that such a person is conveyed to a court of law or tried within the time stipulations enacted? We have met no detainees in Nigeria that have ever been informed in writing of the details of the offence for which they were being detained; similarly and much more importantly, we know of no legal practitioner in Nigeria has taken the time to query the lapse.

These questions, and by extension the constitutionality of the steps, are respectively answered or determined by being able to calculate, so to say, with mathematical precision the time of arrest in the first place. If this enforcement or, more aptly, the standard for making them effectual, is non-existent, then the purported right becomes extinct and therein lies the problem with the constitutional provisions. There are neither mechanisms nor competent and independent authorities to discharge this largely 'time-keeping' responsibility and to guarantee compliance with the other entitlements.

The absence of these compliance-enforcing provisions reduces the efficacy of the right to personal liberty; in most cases, regarding what should be an uncomplicated issue, such as the time of the arrest of a suspect, the matter would boil down to the word of the suspect against the word of the police. This not a problem that is peculiar to Nigeria, and the Beninois case of *Chitou v. Chef de la brigade de gendarmerie d'Ifangni*[68] illustrates that, for a judge, it is an exceedingly onerous choice to make. In that particular case, it was impossible for the Court to come to a decision on the point. From this rather simple issue, other fundamental issues arise; if it cannot be determined from independent, objective procedures, standards, and arbitrators when a citizen was arrested, how can it be determined how much time he has, in fact, spent in detention, or how much time it took to charge him before a court? How can it be determined that a person has been kept in detention for a period longer than the maximum period of imprisonment prescribed for the offence for which he is charged or that a suspect was informed in writing of the nature of the offence for which he is charged (and in a language that he understands, within 24 hours of his arrest)? Additionally, it presents a legal practitioner with no alternative recourse, knowing that proof of allegations of abuse would be nearly impossible, if not completely so. This state of affairs accounts for the dehumanisation that helpless

[67] The Report of Committee 6 on Fundamental Rights, Report of the Constituent Assembly 1988-1989, Volume II, Reports and Recommendations of the Working Committees, p.144 applied the same logic regarding derogations from the right to life on account of the shoot-at-sight principle.

[68] (2005) AHRLR 83 (Constitutional Court, Benin 2005).

lawyers encounter around the nation's police stations, where they are mostly to be found in undignified locations such as lingering under trees and prostrating themselves before police officers as they literally beg (which may include bribery) for bail for their clients.

The denial of the rights of the citizen arrested, detained, or charged is the culmination of the absence of these mechanisms. Instead of mechanisms that have the purpose of frustrating the denial of these rights, the Constitution rather inclines toward rectifying mistakes after it is too late. It abuses the supposed right of the citizen to question these breaches in court in order to ignore the need to rectify the perpetration and perpetuation of these breaches. The pertinent question is whether the ambiguity-riddled provisions of the Constitution encourage review. In one illustrative instance, under Section 35(5)(b), a citizen who is detained shall be conveyed to court in any case where there is no competent court of jurisdiction within a forty-kilometre radius within two days or within 'such longer period as in the circumstances may be considered by the court to be reasonable'. The first question that occurs is which court that should be. The one before whom the citizen is eventually charged? It is regrettable that this derogatory provision appears in the Constitution after all these decades, and that there is a place in this country that for any reason, even in the river areas, a person cannot be brought to court within 24 hours.

There will be a failure to appreciate the human cost of the aforementioned lapses, if the fundamental nature of these aspects of rights and the consequence of their breaches are not illustrated. In *Mallory v. United States*,[69] a defendant was arrested, detained, and subsequently tried for rape, convicted, and sentenced to death. It then emerged that he had been detained from early afternoon until the next morning at police headquarters without being taken before a magistrate, even though magistrates were available nearby. He was not informed of his right to remain silent, to have counsel, or to be arraigned before a magistrate. By the time he was arraigned, he had made a confession, upon which evidence he was convicted. Evidence of force or inducement was entirely non-existent. Regardless, the United States Supreme Court reversed the conviction on the ground that only the courts had the power to deprive a person of his liberty and that an illegal detention for the purpose of investigation invalidates an otherwise legal confession.

In a similar case,[70] the lower court had admitted a confession as evidence in a rape charge but the defendant had not been informed of his constitutional right to remain silent and to have legal counsel. The United States Supreme Court reversed the conviction on the ground that he should have been informed. In *Mapp v. Ohio*[71] the defendant was convicted of possession of lewd and lascivious pictures and books. Because he had refused to admit the police into his home, they had entered forcibly without a search warrant and seized the illegal material. Reversing the conviction, the United States Supreme Court held that all evidence obtained by searches and seizures in violation of the Constitution is, by the same authority, inadmissible in a state court. In this regard, the decision in *Ohimieokpu v. Commissioner of Police*[72] is worth consideration. In that case, someone who should have been arrested by an arrest warrant was apprehended without it. He was

[69] 354 U.S. 449 (1957).

[70] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[71] 367 U.S. 643 (1961).

[72] (1959) N.R.N.L.R. 1, 2.

then subjected to a medical examination, and a medical report based upon it was procured and sought to be tendered. He contended that the entire trial was vitiated by the fact of his unlawful arrest. The Court held, on account of a provision in the Criminal Procedure Act[73], that the trial had not been vitiated. The Court nevertheless allowed the appeal on the ground that the medical report was inadmissible given that the procedure for procuring it without the consent of the Appellant was not in accordance with to the Evidence Act.[74]

Clearly, the part of the judgment admonishing caution when subjecting a suspect to medical examinations is in accordance with the American decisions relating to evidence obtained during unlawful searches and seizures.[75] Using Section 101 of the Criminal Procedure Act as guidance, however, raises a different question. Though the reasoning of the Court appeared to be backed by Nigerian pre-Independence law—a period when the imported doctrine of parliamentary supremacy was still very influential—it raises the question of whether such unlawful conduct does not now, under the 1999 Constitution, vitiate the entire trial. Section 101 would appear now to be unconstitutional on the ground of inconsistency for the reasons discussed in the remainder of this section, on the strength of Section 35(1)(c).

It is indisputable that any act contrary to the constitutional provisions is null and void to the extent of that inconsistency.[76] The inconsistency in this instance would, however, become apparent only upon a detailed examination of the wording of Section 35(1)(c). The section provides that every person shall be entitled to his personal liberty and that no person shall be deprived of such liberty save in accordance with a procedure permitted by law and, amongst others, upon reasonable suspicion of such a person having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence. What, then, is the purport of the words 'in accordance with *a procedure permitted by law*'? The question is important because Section 101 would otherwise override the constitutional provisions subjecting a deprivation of the right to personal liberty only to procedures permitted by law.

Section 101 is not an enactment of procedure(s) and is therefore outside the contemplation of Section 35(1)(c). What the section states, based on the use of the words 'the preliminary inquiry or trial may be held notwithstanding…', is the *effect* of a failure to comply with procedures stated in other provisions in the Act such as issuing, service, or execution of warrants and summons in the apprehension of persons with or without warrant.[77] While these are items are procedural, the consequence (that is, proceeding with the preliminary inquiry or trial notwithstanding), is a

[73] Section 101 thereof, which provides, 'When any accused person is before a magistrate whether voluntarily, or upon summons, or after being apprehended with or without warrant, or while in custody for the same or any other offence, the preliminary inquiry or trial may be held notwithstanding any irregularity, illegality, defect, or error in the summons or warrant, or the issuing, service, or execution of the same, and notwithstanding the want of any complaint upon oath, and notwithstanding any defect in the complaint, or any irregularity or illegality in the arrest or custody of the accused person'. The section is retained as section 101 of the Criminal Procedure Act Cap. *C41 Laws of the Federation of Nigeria 2004*.

[74] Evidence Act Cap. *E14 Laws of the Federation of Nigeria 2004*.

[75] *Mapp v. Ohio* for instance.

[76] Section 1(3).

[77] Part 2 of Chapter 1 of the Criminal Procedure Act.

substantive matter rather than a procedural matter, a distinction, that is the logical inference from the eloquent statement of law made by the Supreme Court in *Attorney–General, Abia State & Ors. v. Attorney –General, Federation.*[78] In that case, the Court held that, though Section 7(1) of the Constitution empowers the State Government to provide for the *establishment, structure, composition, finance and functions* of local government councils in the State, it is silent on the tenure of elective officials in these councils. It further held that Item 11 on the Exclusive Legislative List (reserved for the federal legislature), by contrast, limits the federal legislative power to making provisions for the *procedure* for local government elections and nothing more. According to the Supreme Court, the tenure of elective officials of the local governments, council dissolution and election dates could not be part of the procedure for an election and that though they must necessarily *precede* the holding of an election, they 'are necessarily matters of substantive law'.[79]

If the analogy in that judgment is applied regarding matters necessarily preceding procedural matters, it is clear that the legal effect of a failure to comply with procedure is a matter that necessarily follows the procedural matters and is therefore not a procedural matter. The reasoning in this decision helps make the point that, while the Constitution was careful in acknowledging that deprivation of liberty must be accomplished only in accordance with procedures permitted by law (expressly adopting these procedures), it does not enact that breaches of these procedures, which are unconstitutional in light of the mandatory nature of the provisions in Chapter IV,[80] may be condoned and/or that trials may proceed in spite of breaches. In other words, the Constitution subjects the State's right to deprive the citizen of his liberty to compliance with *procedures* permitted by the Criminal Procedure Act. However, it does not allow the inferior Act to dictate the legal effect of failure to comply with these procedures. This is not only logical but it dovetails with the provisions of the Constitution, which has already dictated the legal effect of failure to comply with the Constitution (that is, such other inconsistent legislation is void).[81] If the Constitution's provision had been otherwise and contemplated provisions beyond *procedure*, the effect would have been to deviate from, if not entirely nullify, the mandatory nature of Chapter IV (particularly Section 35[1][c]). There would appear to be a certain illogicality in the thesis that a party can benefit from his unconstitutional act.

Furthermore, the argument cannot be dismissed by reference to the name of the statute Criminal *Procedure* Act given that, in the construction of statutes, there should be no reference to extraneous considerations where the words are unambiguous.[82] The Supreme Court has held that the object of a title is to identify and not to describe the document and that the title does not control the contents of the statute.[83] The fact that the procedures permitted by law may also be found in other statutes such

[78] (2002) 9 N.S.C.Q.R. 670.

[79] *Attorney General v. Attorney General*. At 745–746. See fn.78.

[80] The word 'shall' employed by the Chapter and particularly section 35 has been interpreted by the Supreme Court in *Bamaiyi v. A-G, Federation & Ors.* (2001) 7 NSCQR. 598, 617, amongst others, as connoting a mandatory order. See also section 46(1) which permits an approach to the high courts where the provisions of the chapter have been violated.

[81] Section 1(3).

[82] *Imah & Anor. v. Okogbe & Anor*. (1993) 12 S.C.N.J. 57, 71. See also *Obomhense v. Erhahon* (1993) 7 S.C.N.J. 479.

[83] *Ogbonna v. A-G, Imo State* (1992) 2 S.C.N.J. 26-45.

as the Evidence Act,[84] which makes procedure regarding the admissibility of evidence further strengthens the argument that the name of the statute counts for little in the argument.

Given the introduction of the provisions in Chapter IV and the above postulations on it and given the dethronement of parliamentary supremacy by the Constitution,[85] it is logical to argue that the decision in *Ohimieokpu v. Commissioner of Police*,[86] would appear to now hold no efficacy to the extent that it validated the trial regardless of the absence of an arrest warrant. In sum, reasoning along these lines should align this area of Nigerian law with the decision in *Mallory v. United States*,[87] from which it may be implied that all these procedural irregularities should vitiate a trial.

The next question that arises is how mechanisms can be fashioned to achieve truly and indisputably fundamental civil and political rights, so that rights abuses cease.

5. The Vital Third Party 'Watchdog' Principle

There have been several discussions on the human rights problems in Nigeria. Though Jega[88] talks about 'inadequacies of the constitution, either due to vagueness of provisions or lack of them …' and 'vagueness in or inadequacies of other existing legal instruments', he is not detailed as to what these are or how the problems may be remedied. Baiyeshea[89] holds the view that the Constitution tends to give rights with one hand and then takes them back with the other. However, he does not specify which rights are the victims of this 'deception'. Many solutions have been offered but they have rarely touched on the fundamental crux of the problem—the constitutional basis. This is particularly the case with regard to the right to personal liberty. The many textbooks on constitutional law and the few on human rights law tend merely to state the law as it is.[90] One of the few experts to render a suggestion is Agbaje,[91] who wrote with some urgency:

> I will suggest that the various Chief Judges in company of their respective Attorneys-General and the state Commissioners of Police do pay weekly not monthly or yearly visits to the various police stations in their states as well as the prison yards so as to ensure total compliance and or obedience to the rule of law else we shall only succeed in breeding hardened criminals who in the first instance are not supposed to spend a day in custody just because of the police misapplication and or misinterpretation of the law.

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[84] Evidence Act Cap. *E14 Laws of the Federation of Nigeria 2004*.

[85] Section 1(1) of the Constitution.

[86] See fn.72 above.

[87] See fn.72 above.

[88] Jega, See fn.43.

[89] Baiyeshea, p.10. See fn.6.

[90] See, for instance, H. Chand, *Nigerian Constitutional Law*, 1st ed. (Modinagar: Santosh Publishing House, 1981); J.O. Akande, *Introduction to the Nigerian Constitution* (London: Sweet & Maxwell, 1982), and G. Ezejiofor, *Protection of Human Rights under the Law* (London: Butterworths, 1964).

[91] Agbaje. See fn.4.

This commendable suggestion appears, however, to be merely scratching the surface. Nigerian officials have a sublime talent for turning a blind eye. In October 2003, in a report monitored on the BBC Africa network, news and current affairs programme, the Executive Secretary of Nigeria's National Human Rights Commission noted that the Commission had found cases of suspects in several prisons awaiting trial for 15 years. Yet the Chief Judges of these states undertake regular tours to the prisons in order to thwart this same problem. This state of affairs alone is illustrative why the suggestion, even when executed every week, is limited.

There are even fewer dedicated works on the right to personal liberty. Okosa's writing[92] is confined to issues of bail. Perhaps the closest to suggesting legislative rather than constitutional reform regarding the right to personal liberty are Alemika and Chukwuka,[93] who propose three legislative initiatives in far-reaching recommendations, none of which touch upon the time frames in section 35 of the Constitution. Indeed, far from finding any lacunae in the Constitution, they propose that 'the Police Act, including Police Regulations should be reviewed to bring it in conformity with … *the nation's constitutional provisions on human rights*…' (emphasis added).

What is mainly required is an alteration of the constitutional and legislative format in a way that gives the courts supervision and close scrutiny at all stages of the administration of criminal justice. Currently, the courts have power of review but what they also need is the power of control and supervision. It would appear to be the most effective weapon against the problems of ascertaining when time from police detention begins to run and other related problems discussed herein (Section 4).

The improvised supervisory role suggested for the courts is that they have the capacity to additionally hold pre-trial hearings in order to determine cases that should not be in court in the first place. For instance, in Nigeria,[94] contractual disputes are always reported at police stations by the aggrieved party. This simple act may spiral into detention that is invariably illegal by the very fact of the contractual nature of the dispute. From this may emerge torture and procured confessions, not to mention harassment of spouses and other relations of the 'suspect', and other such abuses. The case of *Umar v. Abdulsalam & Ors.*[95] is illustrative, given that the detention in that case arose from a contractual dispute. This problem is not confined to Nigeria and is a problem in other developing countries.[96] Indeed the Federal High Court, Kano Division in Nigeria queried in *Umar v. Abdulsalam & Ors.*[97] why the police had not, upon determining that it was a case of a civil rather than a criminal nature, turned it down and advised the parties accordingly. A pre-trial hearing of the

[92] Chike Okosa, 'Accused's Right to Bail under the Constitution'. *Daily Independent* (Lagos) 21 May 2009. Available at http://allafrica.com/nigeria/. Last accessed 15 June 2010.

[93] Etannibi E.O. Alemika et al, *Police-Community Violence in Nigeria* (Lagos: Centre for Law Enforcement Education and Abuja: National Human Rights Commission, 2000) pp.70-71.

[94] See, for instance, *Umar v. Abdulsalam & Ors.* (2001) 1 C.H.R. 413, 420.

[95] Ibid.

[96] See for instance the Benin Republic case of *Chitou v. Chef de la brigade de gendarmerie d'Ifangni* (2005) AHRLR 83 (BeCC 2005).

[97] See fn.94 above.

kind proposed should sort the cases in a way that a court would indicate to the police the fact of the unsustainability of the case and consequently prevent abuses before their perpetuation.

On first impression, increased supervision would appear to result in more work for the courts. In truth, however, what would be achieved is a redistribution of its work. It is not illogical to conclude that an increase in the courts' power of supervision and control will result in a corresponding decrease in its review functions. This is significant in at least two ways: first, this does not mean that the court's review powers are taken away but merely that a more active role in supervision should result in less activity in its review functions. The decrease in its review functions does not necessarily mean a decrease in its powers as the third arm of government. Second, it should help avoid the waste of resources, time, energy, and trauma of a full trial before an eventual finding that the accused is not culpable perhaps on account of a failure in the arrest procedure or the evidence gathering process. Exacerbation of this waste may come in the form of civil litigation for unlawful detention, assault, torture et cetera.

Supervision is not alien to Nigerian statute books. The Criminal Procedure Code,[98] for instance, requires an officer in charge of a police station to report every case of arrest without warrant within his district as soon as reasonably possible to the appropriate native authority or local authority or superior police officer. These provisions, however, would appear to be inadequate for several principal reasons: first, no one can vow to have seen an officer in charge of a police station report an arrest to the Local Government unless the arrest was made at the instance of the Local Government Council. In any event, it is hardly logical in this provision, given that the Nigerian Police Force is constitutionally subjugated to the control of the President of the Federal Republic in a three-tier administrative structure, in which the Local Government would appear to wield the least authority.

Secondly, the section is complicit in ensuring that there is no third-party supervision and that the system of checks and balances that ought to ensure the transparency that the section so half-heartedly puts in place is destroyed by the in-house alternative that enables the report to be made instead to a superior police officer. Thus the police can arrest and supervise such arrests in-house. Neither the rule of law nor the principle of checks and balances is evident in this self-emasculation of the law intended for regulation. Third, the requirement for the officer to report *as soon as is reasonably possible* confers rather wide discretionary powers that are subject to abuse. Fourth, restricting the procedure to arrests without warrant will merely make the procedure ineffectual. The requirement is predicated on the fact that a magistrate would have examined the merits of the request before issuing the warrant. What, however, happens to the suspect after the arrest with a warrant?

Regarding this question, the relevant provisions also do not offer watertight safeguards against abuse. The Criminal Procedure Act provision appears couched in more liberal terms, in that it

[98] Section 43. The Criminal Procedure Act equivalent is to be found in Section 20, which places a duty on officers in charge of police stations to report to the nearest magistrate all cases of arrests without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or not. The requirement of reasonable speed is omitted. No one has seen this in practice or heard any jurisdiction in Nigeria insist on this practice.

provides that[99] officers in charge of police stations shall report to the nearest magistrate the cases of all persons arrested without warrant within the limits of their respective stations, whether such persons have been admitted to bail or not. However, persons arrested on warrants shall, subject to bail provisions to which the courts shall adhere, be brought before the court which issued the warrant as soon as is practicable after he is so arrested.[100] This latter is not dissimilar to the Criminal Procedure Code provision which directs 'the person executing a warrant of arrest', subject to bail security provisions to which the courts shall adhere, to 'without unnecessary delay bring the person arrested before the court specified in the warrant'.[101] These provisions are on a par with the constitutional provisions regarding time in terms of vagueness, and as such do not help facilitate the spirit of the constitutional requirements.

The absence of defined requirements regarding time only highlights the need strengthen the legal aspect of police procedure by legislative innovation. This is given the imperative for the arresting officer nevertheless to go back to the magistrate who issued the warrant and report, preferably directly after accomplishing the arrest to facilitate the computation of time. It must have some implication for the rights of the suspect that the warrant was enforced immediately or sometime later and in what circumstances there was delay in arraignment. The procedure for bringing the suspect to court for the purpose of documenting these details and requirements may be harmonised procedures without an arrest warrant as well as with one.

It is obvious however that the courts are not perpetually open. Should magistrates then be dragged out of bed in the small hours of the night to answer to the needs of arrested persons? Griffiths[102] notes that the decisions in the New South Wales cases of *Burns*[103] and *R. v. Zorad*[104] made it clear that the courts will not require the police to seek out the services of a judicial officer after office hours. In those decisions it was held that where a suspect was arrested after close of work, the police could lawfully interrogate him throughout the night until the early morning and then take him before a court at the beginning of the court's work hours. This has obvious consequences in the approach of the police in Nigeria as well as elsewhere.[105] In Nigeria, the police have the practice, when a suspect is targeted or when police personnel have been 'facilitated' by a complainant, of arresting a suspect on a Friday evening so that the investigating police officer, the divisional crime officer, and the divisional police officer can be unreachable. It is thus until Monday before bail can be considered. Similarly, it is always likely that police could take advantage of the situation and effect arrests 'after hours' or on Friday evenings to afford it the opportunity of interrogating the suspect before bringing him to court.

[99] Section 20(1).

[100] Section 20(4).

[101] Section 62.

[102] Griffith. See fn.3.

[103] (Unreported, NSW CCA, 19 August 1988) cited in Griffith. See fn.3.

[104] (1990) 19 NSWLR 91.

[105] Griffith, p.11.See fn.3, makes the same point of police tactics in New South Wales, Australia, to deliberately arrest suspects at particular times to afford themselves more interrogation hours before turning the suspects over to the courts.

To forestall the likelihood of premeditated arrest taking place after business hours, however, and given the special needs and peculiarities of the Nigerian criminal justice system and the heightened abuse of rights by law enforcement agencies, we suggest that the safest course to pursue is to formulate standards by which the police may come to the conclusion that a case has compelling need for interrogation. One possible standard is that the police may only interrogate without first bringing the suspect before a court where the offence with which he is charged is an indictable offence and there is the need to apprehend a named or specified accomplice or intercept a specified item which facts are reasonably expected to be within the knowledge of the suspect. Where there is such a case established, a magistrate, where one is available, must be roused to take the case in order to enable the police to proceed with their questioning of the suspect. Alternatively, the police may interrogate, provided that the courts must reject as inadmissible any evidence procured in violation of these requirements. In other cases, though the suspect may remain in police custody, he is not to be questioned until the following morning after appearing before a judge. There may also be a need to designate particular magistrates to work weekends to resolve this recurring problem. This latter proposal is not as onerous or alien as it would appear, and in the State of Rio de Janeiro in Brazil, there is an operational system of night shifts and weekend shifts during which judges, prosecutors, and public defenders literally sleep in the court building to enable them receive communication of arrests as soon as they are made. In the pursuit of personal liberty, no expense should be spared.

6. The Judiciary As 'Watchdog' Justified

The question of who to trust with these control and supervisory powers has already been answered. Justification for that position may, however, be necessary. It is here that the interlinked principles of separation of powers, checks and balances and the rule of law become most fundamental.[106] The guardian of the rule of law is the court. The judiciary has the onerous duty of giving life and meaning to the concepts and values eloquently set out in Nigeria's fundamental law. Thus, the court is designed to superintend the rule of law, regarding which a learned scholar has observed:

> The Rule of Law is here referred to in its narrow sense, as imposing those procedural guarantees which have been found necessary to ensure what in American constitutional practice is known as "due process of law". This involves all such matters as ensuring the independence of the judiciary; providing for the speedy and fair trial of accused persons and for adequate judicial control over police and police methods of securing confessions from accused persons; providing adequate safeguards regarding arrest and detention pending trial …[107]

There are two main senses, however, in which the judiciary may be ill-qualified in Nigeria for the supervisory role. First, any legal practitioner who has appeared in Nigeria's magistrate courts would confess that a rather substantial number of them are complicit with court registrars, clerks, prosecutors, and investigating police officers, in a syndicated extortion racket at the expense of

[106] *McNabb v. US* 318 US 332, 343-344.

[107] D. Lloyd, *The Idea of Law* (London: Penguin Books, 1964), p.161.

suspects and accused persons appearing before the courts. This is particularly evident during bail procedures.

The second sense is in the competence, perhaps even willingness, of judicial personnel to perform their constitutional function. One respected jurist noted of the judicial function:

> Such a function … requires an enormous intellectual exercise in logic and learning, in which an appeal to history and to that uncommon attribute called common sense are essential. The task confronting the judiciary is thus enormous, onerous, difficult and delicate.[108]

A deficiency in this kind of enlightenment may negatively affect the delivery of the civil and political rights discussed. This may be illustrated in two of many ways. The first was when a court held that Chapter IV does not regulate the constitutional relationship between one individual and another.[109] It was a strange ruling,[110] given the facts that Chapter IV does not enact this restriction and that section 6(6) is unambiguous as to the jurisdiction of the courts regarding disputes of the nature of civil rights and obligations between 'persons'[111] that left scholars wondering if the decision revolved around the personalities involved rather than constitutional laws.

The second illustration arises from a case that came before a magistrate several years ago, in which the accused was charged with being found in possession of a standing fan for which he could not account, contrary to the Penal Code Law.[112] The plea before the Magistrate by counsel to the accused that an invitation to a pedestrian to show proof of ownership of the standing fan found in his possession, in the absence of *reasonable* suspicion that it had been stolen (a necessary precondition for the offence),[113] did not meet the requirements of the offence[114] fell on deaf ears. He convicted

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[108] Oputa, p.10. See fn.43.

[109] *Inspector Henry Ale v. Gen Olusegun Obasanjo* (M/T/1/89) discussed fully in Kunle Sanyaolu, 'When Fundamental Rights Cannot Be Enforced', *The Guardian* (Lagos) August 9 1989.

[110] Sanyaolu, Above, fn.109, states that there was 'a curious element' in the case.

[111] In *Abdulhamid v. Akar* (2006) 5 S.C. (Pt. 1) 44, 59, the Supreme Court correctly stated the position of the Constitution by holding that where the violation of rights is perpetrated by non-state agencies, such as individuals, the victim would have a right to proceed against the perpetrator, as he would have had against the state. See also *Onwo v. Oko & Ors* (1996) 6 N.W.L.R. (Pt. 456) 584, 603 and *Ogugu v. The State* (1994) 9 N.W.L.R. (Pt. 366) 1.

[112] Under section 319A of the Penal Code Law of Northern Nigeria Cap. 89 *Laws of Northern Nigeria* 1963, which provides, 'Whoever knowingly has in his possession or under his control *anything which is reasonably suspected of having been stolen or unlawfully obtained* and who does not give an account to the satisfaction of a court of justice as to how he came by the same shall be punished with imprisonment which may extend to two years or with fine or with both' (emphasis added).

[113] Section 35(1)(c) of the Constitution further substantiates this position in providing that no person is to be deprived of his liberty except upon reasonable suspicion of his having committed a criminal offence.

[114] S.S. Richardson, *Notes on the Penal Code Law, Cap. 89, Laws of Northern Nigeria 1963*, 3rd ed. (Zaria: Gaskiya Corporation Ltd, 1967), pp.210-211. This notes 'the possession is only required to show that it is reasonably suspected that something in the possession is stolen property for the burden of proof to shift to the defense to show that he came by the thing honestly. The prosecution is not required to prove that the property was stolen or unlawfully acquired by the accused but *the High Court have interpreted the requirement of reasonable suspicion strictly and there must be evidence sufficiently strong to form a suspicion that the goods were stolen*'. In *Dunbell v. Roberts* (1944) 1 ALL E.R. 326, 329 and 348 (C.A.), Scott, L.J. observed, 'The power possessed by constables to arrest without warrant, whether at common

the accused person despite statements to the contrary from several authorities of different jurisdictions. In 1968, for instance, the United States Supreme Court[115] addressed the issue of mandatory procedures with which the police must comply when stopping citizens and held that 'the police have a right to halt, frisk, and question persons they believe may be involved in a crime, so long as their suspicion is reasonable and based on more than a hunch'. Justice Byron R. White, though he spoke *in obiter*, clarified that a suspect need not answer a policeman's question, and cannot be arrested merely for remaining silent. It has been ingeniously observed that in circumstances where the police have no reasonable suspicion and a person opts to remain silent, it would raise 'a paradox' in that it means that 'remaining silent can lead to arrest; once arrested, of course, everyone has the right to remain silent'.[116]

The idea that a person may be arrested, and even questioned, without reasonable suspicion cannot be simplistically validated on the basis of section 35(1) of the Constitution, which states:

> Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law
>
> (a) by reason of his failure to comply with the order of a court or *in order to secure the fulfilment of any obligation imposed upon him by law*' (emphasis added).

This stems from the legal fact that there is no obligation imposed by law on the citizen to answer questions when there is no reasonable suspicion that he has committed an offence or is about to commit one. The rather generic justification in the provision that every police officer has a responsibility to prevent crime to the best of his ability[117] is often relied upon by the police to intrude upon personal freedoms. However, that cannot be justified, given that it must be read hand in

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law for suspicion of felony or under statute for suspicion of various misdemeanours, provided always that they have reasonable grounds for their suspicion is a valuable protection to the community; but the power may easily be abused and become a danger to the community instead of a protection. The protection of the public is safeguarded by the requirement, alike of the common law and so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion …'. He then pronounced the duty of making a prima facie inquiry into every suspicion before arrest for the reason that 'their prima facie suspicion may be ill-founded'. In the United States, a police officer may only arrest without a warrant if they have *probable cause* to believe that the suspect has committed a felony or a misdemeanour in their presence (see *United States v. Watson* 432 U.S. 411[1976]). The requirement of probable cause must be satisfied by conditions existing before the police officer accosted the suspect and not what is found after his apprehension because the latter merely serves to establish probable cause retrospectively (see *Henry v. United States* 361 U.S. 98 [1959]; *Johnson v. United States* 333 U.S. 10, 16-17 [1948]; *Sibron v. New York* 392 U.S. 40, 62-63 [1968] amongst others). In *Mallory v. United States* (Above at 454. See fn 68), the U.S. Supreme Court also held that mere suspicion would not satisfy the requirement of 'probable cause'. The same kind of logic was employed by the Court in *In the Matter of Revenue Task Force* (1987) 2 O.D.S.M.L.R. 13, 35 relying on *Agoro v. Anebunwa* (1966) N.R.N.L.R. 87, 92 and *Atenze v. Momoh* (1958) N.R.N.L.R. 127 where it was held that an invitation for questioning, not being predicated by any unlawful act, amounts to unlawful restraint of liberty contrary to Section 32(1) of the Constitution.

[115] *Terry v. Ohio* 392 US 1 (1968).

[116] 'The California Walkman', *Newsweek*, 19 July 1982, p.49.

[117] Section 53(1) of the Criminal Procedure Act. See fn.25.

hand with the provision[118] which empowers a police officer, without a warrant, to arrest any person whom he suspects upon *reasonable grounds* of having committed an indictable offence, any person in whose possession anything is found which may reasonably be suspected to be stolen property or who may reasonably be suspected of having committed an offence with reference to such thing, any person whom he suspects upon reasonable grounds of being a deserter from any of the armed forces of Nigeria, any person whom he suspects upon reasonable grounds of having been concerned in any act committed at any place out of Nigeria which, if committed in Nigeria, would have been punishable as an offence, any person for whom he has reasonable cause to believe a warrant of arrest has been issued by a court of competent jurisdiction in the State, or any person found in the State taking precautions to conceal his presence in circumstances which afford reason to believe that he is taking such precautions with the intent of committing a felony or misdemeanour.

Regrettably, in the case involving the stolen fan, it was impossible for the Magistrate to see the long-term and far-reaching negative effects on human rights by this decision and the blank cheque it affords the State for arbitrariness.

On account of the deficiencies discussed above regarding some judges' attitudes, the courts have always been blamed for the seemingly irremediable congestion in Nigeria's prisons. For instance, one editorial[119] gave this damning verdict:

> The heaviest responsibility for our over-flowing jail houses must be laid squarely on our judicial system. Our judges apparently lack imagination on the matter. In spite of the numerous literature on the issue, it is shocking that our judges still send first and minor offenders to jail, or impose such prohibitive fines which such convicts cannot pay. And when such people go to jail, they are lumped together with hardened criminals.

In order to adequately protect rights, construction of rights by the courts must be innovative and, perhaps more importantly, legitimate. A praiseworthy instance was the case in which Justice Oguntade[120] (as he then was) considered whether Section 32(7)[121] of the 1979 Constitution, usually relied upon by the police for indefinite detention of murder suspects, limited the meaning and impact of Section 32(4)[122] which provides for speedy trial. Contrary to the norm where, perhaps, a

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[118] Section 10(1).

[119] 'Concord Opinion: Overflowing Jail Houses'. See fn.17.

[120] Hon. Justice G.A. Oguntade (see: 'Police Must Be Checked', *Daily Sketch* (Ibadan) 21 October, 1983).

[121] Section 35(7) of the 1999 Constitution. The section states, '*Nothing in this section shall be construed—(a) in relation to subsection (4) of this section, as applying in the case of a person arrested or detained upon reasonable suspicion of having committed a capital offence*; and (b) as invalidating any law by reason only that it authorises the detention for a period not exceeding three months of a member of the armed forces of the federation or a member of the Nigeria Police Force in execution of a sentence imposed by an officer of the armed forces of the Federation or of the Nigeria Police Force, in respect of an offence punishable by such detention of which he has been found guilty' (emphasis added).

[122] Section 35(4) of the 1999 Constitution. The section states, 'Any person who is arrested or detained in accordance with subsection (1)(c) of this section shall be brought before a court of law within a reasonable time, and 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

court would have literally construed the former section, Justice Oguntade, in our view, aptly construed the section literally but in the context of other provisions such as section 32(4), to give justice to the applicant, a murder suspect who had been detained for ten months without trial. Following an application for the enforcement of his fundamental rights, Justice Oguntade ordered his immediate release but not before restating this fear:

> If we permit law enforcement agencies to arrest and detain Nigerians at will, without due regard to the fundamental right guaranteed in the Constitution, there is no way of predicting who the next victim will be […] The situation [in the country] therefore called for a resolute support from all Nigerians, high or low, rich or poor, in assuring that these fundamental rights all guaranteed in the Constitution are at all times held sacred and inviolate […] The law enforcement agents of today may be the victims of tomorrow.[123]

It was a lawful and constitutional exercise of his power. But, in the view of this article, even if he had construed section 32(7) in isolation and arrived at this same result, it would have been a legitimate exercise of his power, given the rather grave circumstances and the need to liberally construe constitutional provisions. In the latter sense, it would have been an application of something akin to the golden canon of construction.[124]

We conclude our recommendation for closer supervision by the courts by restating that the abuses, which usually result from violations of the rights discussed in this article proceed from barbarism. Regrettably, barbarism is all too often excused on the basis of differentiated stages of development as well as local circumstances, the levels of illiteracy, the levels of corruption, the levels of poverty, and the levels of willingness to not question authority, amongst others. While there is common sense in that, there can and must be only one implication of the fact: more must be done to attribute to the courts proper control over police methods. The courts must provide the ethical backdrop for human rights in Nigeria and listen to Cicero's admonition:

> For as the laws govern the magistrate, so the magistrate governs the people, and it can truly be said that the magistrate is a speaking law, and the law a silent magistrate.[125]

7. Relieving the Police of the Burden of Prosecution

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either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date'.

[123] 'Oguntade. See fn.120. Justice Oguntade's foresight proved rather accurate in view of the violence that was to happen, twenty-two years on, to the former Inspector General of Police, Mr. Tafa Balogun at the hands of his erstwhile subordinates during his corruption trial in Abuja in 2005.

[124] The Golden Canon, or rule of statutory construction, is in wide use in Commonwealth jurisdictions. It means that when a literal construction of a statutory provision will result in an absurdity, ambiguity or repugnance to public policy, that provision must be interpreted to avoid the absurdity.

[125] Cicero, *Laws, III, 1, 2* in GH Sabine, *A History of Political Theory*, 3rd ed. (London: Harrap & Co. Ltd., 1963) p.166.

As an ancillary and complimentary measure, there may be a need to remove the burden of prosecution from the police and locate it elsewhere. A more specialised and, even more importantly, disinterested body will be less disposed to strong-arm tactics, free from the pressure of justifying their methods and obtaining convictions. In this regard, it is suggested that all prosecutions are conducted by the Ministry of Justice and that Justice officials in regional offices of States may, in addition to their existing responsibilities, assume this task. The theoretical orientation given to practitioners of the law that it is better to set free ten guilty persons than to convict one innocent man frees a lawyer from the pressure to convict by any means necessary.

Solving one problem begets another; a by-product of this recommendation rests in its budgetary implications. There is little doubt that it is a step that may involve the expansion of justice departments and consequently the employment of more lawyers and administrative staff. Increased expenditure in the pursuit of human rights and justice, however, is a *sine qua non* if indeed the positivised, or more importantly the implemented, human rights are 'the only possible measure for the legitimacy of the state'. It is a lesson that the developed Western societies have thoroughly assimilated.

8. The Lawyer as the Judges' Helper

Creative logic ought not, however, to be restricted only to judges and the need for lawyers to exhibit the same levels of industry cannot be overemphasised given that judges usually derive their decisions from the arguments of counsels appearing before them. The standard of reasoning advocated herein transcends the everyday submissions made daily in our courts. For the purpose of illustrating the point but also given that the following illustration discusses certain aspects of the also relevant right to remain silent as enacted by the Constitution, it is useful to make a passing reference to the erudite Justice Oputa.[126] He has observed, in discussing the disadvantages of the right to remain silent:

> Also under the system we inherited and still operate, an accused person has a right to keep silent, throughout, *from arrest to sentence*, and such silence (where he should have naturally proclaimed his innocence) is never held against him.[127]

However, it would appear that the opinion is slightly misleading, unless the interpreter opts for either the Mischief[128] or the Golden Canon in construing the relevant constitutional provisions. If the

[126] Oputa. See fn.43.

[127] Oputa, p16. See fn.43. Incidentally, his assertion that silence of the accused is *never* held against him is quite against the grain of the constitutional provisions the Supreme Court held in *Sugh v. The State* (1988) 5 S.C.N.J. 58, 68—69, that Section 236(1)(a) of the Criminal Procedure Code, prohibiting the prosecution from making any comment on an accused person's refusal to give evidence, is not contrary to the provisions of Section 33(11) of the 1979 Constitution (Section 36(11) of the 1999 Constitution) since its role is to prevent the prosecution from polluting the mind of the court, and, that Section 33(11) does not prohibit the court from drawing any unfavourable inference against the accused having regard to the evidence adduced in the case.

[128] The Mischief Canon counsels construction of a statutory provision by reference to the defect in the previous law and the remedy provided by the new law for the purpose of rectifying the defect.

relevant provisions are interpreted literally, we fear, they will not lead to the above-quoted sweeping statement of the right. The 'right to remain silent or avoid answering any question' extends to, but not beyond, the moment of consultation with a legal practitioner *or* any other person of his own choice. It is a singular chance; the suspect is allowed consultation with *either* a legal practitioner *or* any other person of his choice. The right is exercisable with one individual and not more than one. It is a continuing, live right until determined by consultation with any one of the prescribed persons. More significantly, the operative words are '*until after* consultation with'. It is clear that the right terminates with consultation with one of the prescribed persons and from that point forward the citizen might have lost the right to remain silent or avoid answering any question. The right does not reactivate until the point at which he shall not be compelled to give evidence at the trial.[129] Therefore, in the time between the consultation with a legal practitioner of his choice and his trial where he cannot be compelled to give evidence, the right to remain silent is not available and he has no right to not answer any question. The exception, however, is that the regular harassment by the police may not be permissible.[130]

While it remains to be seen how the questioner may elicit an answer from an intransigent and recalcitrant citizen who persists in invoking his rights, there may be one other consequence, given the decision in *Sugh v. The State*[131] where it was held that a court may draw an unfavourable inference against the accused from the fact that he did not make a statement denying the offence at the earliest opportunity. Given that the intermission between the statement to a person of his choice and the trial in court would appear to be unprotected by the Constitution, would that entitle the prosecution to adversely comment upon the fact that an accused person opted not to answer questions during that intermission? It is therefore arguable that 'an accused person has a right to keep silent, *throughout, from arrest to sentence*'. A court considering the purpose of the legislation and the absurdities (not to mention violence) that may be unleashed by a literal interpretation may be persuaded to come to the opinion of the learned jurist. The lacunae highlighted here is deserving of a second look.

9. The Imperative for Constitutional and/or Legislative Reform

What the previous items mention mean is that control and supervision must be placed in the hands of an independent, uninterested party. To achieve this, one of two things must be done. The first is to amend the Constitution to include these details, since the Constitution makers have already adopted the style of a detailed Constitution. The alternative is the introduction of an enabling legislation.

The first measure, constitutional amendment, in turn raises another issue: precisely how may an amendment of this nature be accomplished without interfering with some salient constitutional principles? The first of those principles that arises is whether legislation of this kind would not interfere with the constitutional principle of legislative lists, given that an examination of the

[129] Section 36(11).
[130] The Judges' Rules.
[131] See fn.127 above.

Exclusive[132] and Concurrent[133] Legislative Lists respectively would show 'fundamental human rights' not to be an item listed under Federal or State legislative authority. Indeed, this measure turns out to be one protective factor out of an abundance of caution arising from the need to protect the sanctity of fundamental human rights provisions. Thus, the motive comes to light in the special requirements for amending the fundamental rights provisions of the Constitution. The procedure requires a four-fifths majority of each chamber of the National Assembly and the approval by a resolution of two-thirds of all the state legislatures in the Federation.[134] It is more stringent than amending other parts of the Constitution,[135] and is on par only with the requirements for amending Section 8 (relating to the creation of new states and boundary adjustments)[136] and for amending Section 9 itself, which deals with the mode of altering provisions of the Constitution. The abundance of caution has, however, had a double-edged consequence. The procedure appears to have been designed to forestall arbitrary derogation from the rights to which a citizen is entitled. Now, however, it also appears to make it impossible to facilitate its accomplishment. The prospects of the efforts to refine the constitutional rights provisions are bleak as is evident from the still stalled Freedom of Information Bill before the National Assembly.

An opportune moment for the proposed constitutional amendments should present itself in the contemplated constitutional reforms being discussed by the National Assembly provided that the two arms of the legislature can resolve the egotistical dispute as to which chamber is superior and should therefore lead the exercise.

If constitutional amendments prove unattainable however, as it appears they should, reform of human rights procedures may still be accomplished by for appropriate legislation, a sort of Criminal Justice (Mandatory Procedure) Act introducing the proposed measures. This appears to be the infinitely wiser step, given that it avoids the need to obtain the approval of the State legislatures. That alternative recommendation is proposed with a full consideration of the rule of law that the courts will strike down a law that is 'in identical terms with what has already been enacted by another legislature whose enactments have superior legislative force'.[137] Assuming this case falls within this rule, the superior legislature would be the constitution makers, as was the case in *Attorney–General, Abia State & Ors. v. Attorney–General, Federation*.[138] However, this would not appear to be the case. In the first place, the legislation suggested is not proposed to be enacted in duplication of the constitutional provisions, but instead to facilitate them. Thus its designated role is to create an independent supervisor over the enforcement of these rights and also ensure their implementation. Given these functions, the provisions would specifically establish the courts as the institution before which every suspect must be brought in order to document the details prerequisite to the enforcement of the rights. They will not state for instance that a suspect should be charged to

[132] Part I of the Second Schedule.

[133] Part II of the Second Schedule.

[134] Section 9(3).

[135] See Section 9(2).

[136] Section 9(3).

[137] *Attorney-General, Abia State & Ors. v. Attorney–General, Federation* (2002) 9 N.S.C.Q.R. 670, 697. See also *Attorney-General, Ogun State v. Attorney-General, Federation* (1982) 13 NSCC 1, 11.

[138] Attorney General v. Attorney General. See fn.135.

court within 24 hours. They will instead state, amongst other things, that an arrested suspect should at once be taken to a court to document the time of arrest. The connection is that from the latter the former may be easily determinable.

Second, the decision in *Attorney–General, Ondo State v. Attorney–General, Federation & 35 Ors.*[139] appears to establish further constitutional validity for legislation of the kind proposed, in that it was held that a combined reading of Section 4,[140] Items 60,[141] 67,[142] and 68[143] of the Exclusive Legislative List empowered the National Assembly to enact law to enforce Section 15(5)[144] of the Constitution, though that section ordinarily relates to the unenforceable Fundamental Objectives and Directive Principles of State Policy contained in Chapter II and though corrupt practices are not expressly mentioned in the Exclusive or Concurrent Legislative List. By the same token, the Fundamental Objectives and Directive Principles exhort the State to 'abolish all … abuse of power'.[145] It would appear unarguable that the rights violations already articulated in section 2 of this article are classifiable as abuse of power. The Chapter also refers to the recognition of the sanctity of the human person and the maintenance and enhancement of the citizen's human dignity.[146] Indeed, the dignity of the human person outlaws 'torture' or 'inhuman or degrading treatment',[147] under which the violations under discussion may be classified. Furthermore, the Chapter directs that easy accessibility to the courts of law shall be secured and maintained.[148] It cannot be disputed that a provision that ensures that suspects are charged before a court of law within the time stipulated by the Constitution facilitates easy access to the courts. Thus, a combined reading of Section 4 and the aforementioned relevant provisions of Chapters II and IV vest the National Assembly with authority to enact the proposed legislation. That is, however, merely an aspect of the legitimacy of such an enactment.

Such an enactment may also be legitimised on the ground that the Constitution grants express authority to the National Assembly to make laws regarding the police and other government security services established by law[149] and prisons.[150] The decision in *Attorney–General, Ondo State v.*

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[139] (2002) 10 N.S.C.Q.R. 1034, 1113–1114. See also *Federal Republic of Nigeria v. Anache* (2004) 17 N.S.C.Q.R. 140, 197–204 per Niki Tobi J.S.C.

[140] The section establishes the exclusive law making power of the National Assembly over matters contained in the Exclusive Legislative List, and, to the extent prescribed in Part II of the Second Schedule, any matter in the Concurrent Legislative List.

[141] Item 60(a) relates to the power of the National Assembly to establish authorities for the Federation, or any part thereof, and regulate them for the purpose of promoting and enforcing the observance of the Fundamental Objectives and Directive Principles contained in this Constitution.

[142] An omnibus clause relating to any other matter with respect to which the National Assembly has power to make laws under the Constitution.

[143]An omnibus clause, investing the National Assembly with legislative power, over any matter incidental or supplementary, to any items mentioned elsewhere in the Exclusive Legislative List.

[144] It provides, 'The State shall abolish all corrupt practices and abuse of power'.

[145] Section 15(5).

[146] Section 17(2)(b).

[147] Section 34(1)(a).

[148] Section 17(2)(e).

[149] Item 45.

Attorney–General, Federation & 35 Ors.[151] also appears to permit a combined reading of these legislative subject matters with Item 68, which confers power to make legislation that are incidental or supplementary to the subject matters in the aforementioned Items 45 and 48. It would appear indisputable that the proposed legislation, which would make the police more efficient in their crime control role and also facilitate prison decongestion, is *intra vires* the Constitution. Third, it may also be legitimated on the premise that conferring supervision and control on the Judiciary would bring it within the purview of Item 60, which empowers the Federal legislature to establish and regulate authorities for the promotion and enforcement of the observance of the Fundamental Objectives and Directive Principles of State Policy.[152] Thus, conferring these powers on the courts would establish and regulate the courts as the authority.

10. Enhancing the Prestige Status of Human Rights

Some of the problems and recommendations discussed herein appear to be a culmination of two main factors: the low regard in which the idea of human rights is held and ignorance. Concerning the first, the esteem levels of human rights may be gauged from the volume of damages often awarded in rights cases by Nigerian courts. In one case,[153] for instance, a legal practitioner had been beaten up by three policemen without reasonable justification. He sued *appropriately*, amongst other claims, for one million naira[154] as aggravated damages. The word 'appropriately' is used to denote that the applicant understood the need for the damages to serve as a deterrent, not in approval of the sum claimed. The Federal High Court, Benin held that though it considered the status of the applicant as a lawyer and the fact that he was deprived of his dignity and exposed to disgrace, ridicule, dishonour and contempt, it also had to consider the means (regarding which there was no evidence before him) of the respondents[155] and awarded the 'moderate amount' of one hundred thousand naira[156] as damages. Given that the three policemen were sued along with the State Commissioner of Police, the sum would appear to be a ridiculously low sum to award even, considering that the means of the respondents.

In a second case,[157] the Applicant was arrested by the police on what was essentially a contractual dispute and, along with his car, was detained for eight hours. The Applicant belittled the matter by claiming the sums of two hundred thousand naira[158] as exemplary damages and fifty thousand naira[159] as special damages. The Court correctly dismissed the claim for special damages as it was

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[150] Item 48.

[151] Attorney General v. Attorney General. See fn.135.

[152] The relevant provisions may be found in sections 17(2)(a), (b) and (e).

[153] *Isenalumhe v. Amadin & Ors*. (2001) 1 C.H.R. 458, 466-469.

[154] Approximately US $6,666.

[155] The Court relied on the authority of *Odogwu v. A-G, Federation* (1996) Vol. 40/41LRCN 1454, 1462.

[156] Approximately US $666.

[157] *Umar v. Abdulsalam & Ors.* see fn.94.

[158] Approximately US $1,333.

[159] Approximately US $333.

not particularised but awarded the rather paltry sum of twenty thousand naira[160] as exemplary damages against the second respondent (the policeman who unlawfully detained him) who was served along with the third respondent, but neither appeared nor was represented by counsel.

Human rights are worth much more than the negligible sums being claimed and awarded in Nigerian courts and where the conduct of the law enforcement agent or agency deserves it, the damages awarded must be as punitive as possible to sufficiently deter a reoccurrence. Thus the principle espoused by the Court of Appeal[161] is commendable holding that the primary object of damages is to compensate, while the secondary object is to punish the defendant for his conduct in inflicting harm on the plaintiff. According to the Court, punishment can be achieved by awarding in addition to normal compensatory damages, exemplary, punitive, vindictive or retribution-based damages fixed high enough to be not only compensatory but also punitive, and that it may be awarded whenever the defendant's conduct is sufficiently outrageous to merit punishment such as where it discloses malice, fraud, cruelty, insolence, flagrant disregard to the law, and the like. Indeed, the Court further held specifically that exemplary damages would be awarded, if claimed, where there has been oppressive, arbitrary, or unconstitutional action by civil servants, including the police.

The recent award by a Lagos State High Court sitting at Igbosere of 100 million naira[162] against a Rear Admiral of the Nigerian Navy and four naval ratings, after the ratings brutalised and stripped a woman for allegedly delaying them in traffic somewhere in Lagos,[163] would, however, appear to be a step in the proper direction if the courts can sustain the deterrence motive. Another reported award of 15 million naira[164] against the Nigerian Navy for a similar infraction[165] should soon compel the Federal Government to inquire of the Navy why it is that such a huge chunk of its budget, sourced from taxpayer funds, is going to settle civil claims against it regarding rights infractions by some of its lawless personnel.

11. Conclusion

The problem of the aspects of human rights breaches discussed herein is not only limited to Nigeria. Police arrests of persons who have contractual disputes are rife in a number of jurisdictions. The rights, amongst others, to be promptly informed of the reasons or charge for which a 'suspect' is arrested[166] or to have access to counsel[167] are often flouted. As such, our recommendations are designed to serve as a blueprint for the exploration of jurisdictions that encounter these problems.

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[160] Approximately US $133.

[161] See *Eliochin Nig. Ltd v. Mbadiwe* (1986) 1 NWLR (Pt. 14) 47, 61-62.

[162] Approximately US $666,666.67.

[163] 'Navy To Pay Assault Victims N100m, Court Rules', *The Nation*, Lagos, 28 January 2010.

[164] Approximately US $100,000.

[165] News Report on the Nigeria Television Authority Network News sometime in the first week of March 2010.

[166] *Marques de Morais v. Angola* (2004) AHRLR 3, 15 (African Human Rights Court 2005). See also *Ilombe &Anor v. Democratic Republic of the Congo* (2006) AHRLR 50 (African Human Rights Court 2006).

[167] *Marques de Morais v. Angola* (Above).

The prescriptions contained here will not put an end to, for example, shootings and harassments at check points, but should ensure that once they are implemented in the police force, the supervisory jurisdiction of the courts should in turn ensure that guaranteed rights are truly observed.