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# The Administration of Criminal Justice Act, 2015 as a harbinger for the elimination of unlawful detention in Nigeria

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**Summary:** Sections 34, 35 and 41 of the 1999 Constitution of the Federal Republic of Nigeria (1999 CFRN) guarantee the rights to dignity of the person, personal liberty and freedom of movement. These rights connote that no one shall be arbitrarily arrested; anyone arrested shall be brought before a court of competent jurisdiction within a reasonable time, otherwise such detention is unlawful; where a person is lawfully detained, it shall be under humane conditions. Despite these constitutional safeguards, people continue to be detained in detention centres beyond the permissible periods without an order of court and in inhumane conditions. Thus, unlawful detention is one of the challenges confronting the administration of the criminal justice sector in Nigeria. In 2015 the National Assembly, in a bid to address the challenges in the sector, particularly unlawful and inhumane detention, enacted the Administration of Criminal Justice Act (ACJA) which is generally perceived as revolutionary legislation owing to provisions such as sections 29, 33 and 34 thereof. These sections require the chief judges of the various High Courts to appoint a judge or magistrate to visit detention centres at least once in a month to review cases of unlawful

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*detention and awaiting trial detainees. This article adopts a doctrinal research methodology in examining the impact of these provisions in overcoming the menace of unlawful detention in Nigeria. It examines the challenges that may confront the implementation of these sections of the Act, such as administrative bottlenecks and unscrupulous attitudes of the personnel of the various detention centres. The article makes vital recommendations on how to overcome the challenges of taming the negative tides of unlawful detention in Nigeria.*

**Key words:** Constitution; criminal justice system; detention centres; magistrate; Nigeria

## 1 Introduction

Domestic and international legal frameworks recognise the fundamental rights of freedom of movement, personal liberty and dignity of the person.<sup>1</sup> These rights, like others,<sup>2</sup> are inherent and inviolable inuring to every human being whose humanity is not in question and, therefore, ought to be respected by all and sundry.<sup>3</sup> Their creation or existence is not accredited to any human institution or person but bequeathed by nature.<sup>4</sup> Their existence is merely recognised by their inclusion in the various statutes, which makes them immutable to the extent of the immutability of the statute, particularly the Constitution.<sup>5</sup> The enjoyment of these rights is not

1 Eg, both the 1999 CFRN in secs 34, 35 and 41, the Universal Declaration of Human Rights in arts 4, 5 and 9 as well as the African Charter on Human and Peoples' Rights in arts 5, 6 and 12 recognise the rights of freedom of movement, liberty and dignity of the person of all individuals.

2 Other rights are the rights to life, to freedom from discrimination, to freedom of expression, to freedom of religion and to own property.

3 MO Imasogie 'Human rights, women's rights: So long a journey' 2-3 *Bowen University Inaugural Lecture Series* 3, presented on 30 November 2017, Chris Alabi Lecture Theatre, Iwo, Nigeria.

4 AO Bamidele *Human rights, and the new world order: Universality, acceptability and human diversity* (1997) 7.

5 *Ransome Kuti v AG Federation* (1988) 2 NWLR (pt 6) 211, where Kayode Eso JSC (as he then was), elaborating on the meaning of human rights, states that '[h]uman rights are rights that stand above the ordinary laws of the land; and which in fact are an antecedent of political society itself. It is a primary condition to civilised existence, and what has been done by the Constitution since independence is to have these rights enshrined in the Constitution so that the right could be 'immutable' to the extent of the non-immutability of the Constitution itself. The very specificity of the concept of 'human rights' is that they belong to the individual in his quality as a human being, who cannot be deprived of his substance in any circumstances. Human rights are thus intrinsic to the human condition. Human rights refer to the concept or belief that every member of the human race irrespective of age, sex, tribe, colour, religion, nationality, creed or any human distinguishing factor has a set of basic claims by virtue of his humanness. The almighty single qualification to the enjoyment or entitlement to human rights is being human or humanness.'

absolute, sacrosanct or untrammelled as under limited permissible circumstances, their exploitation may be sequestered.<sup>6</sup> The freedom of movement and right to dignity of the person requires that, where a person is apprehended for allegedly having committed an offence, the person, pending an appearance before a court of competent jurisdiction, is not subjected to inhuman and degrading treatment.<sup>7</sup> No one may be incarcerated beyond the latitude provided for in section 35 of the 1999 Constitution of the Federal Republic of Nigeria, which is either 24 or 48 hours.<sup>8</sup>

Despite this, the law enforcement agencies, particularly the Nigerian police, in exercising their power of arrest have detained persons arrested for longer periods without bringing them before court.<sup>9</sup> This has led to the unwholesome phenomenon of 'awaiting-trial inmates', some of whom have remained incarcerated for longer than the period for which, if found guilty, they would have been incarcerated.<sup>10</sup> In fact, studies<sup>11</sup> have shown that at least three-quarters of Nigeria's total prison population are inmates serving time without being sentenced. Data released by the Nigerian Correctional Service (NCS) shows that 51 983 inmates are awaiting trial out of the prison's total population of 73 726 inmates.<sup>12</sup> This is about 70 per cent of the total number. Hence, only 22 773 inmates are actual convicts serving their terms of imprisonment.<sup>13</sup> Ideally, arrest ought to be effectuated only after the conclusion of the investigation to facilitate speedier trials except in a few instances.<sup>14</sup> In fact, it is not uncommon to have the police effect 'weekend or holiday arrests' of suspects with an intention other than suspicion of a crime but as

<sup>6</sup> Eg, the right to life guaranteed under sec 33(1) of the 1999 Constitution of the Federal Republic of Nigeria can be derogated from by secs 33(2) and 45 thereof.

<sup>7</sup> *Emeka v Okoroafor & Another* (2017) LPCLR-41738 (SC); *Bassey v Akpan & Others* (2018) LPELR-44341 (CA); *Adamu v Commissioner of Police Kaduna Command & Another* (2018) LPELR-494556 (CA).

<sup>8</sup> Sec 35 of the 1999 Constitution of the Federal Republic of Nigeria Cap C28 LFN 2004.

<sup>9</sup> CT Orjiakor 'Waiting for trial can be worse than facing the sentence: A study in Nigerian prisons', <https://www.google.com/amp/s/theconversation.com/amp/waiting-trail.can.be.worse-than-facing-the-sentence-a-study-in-nigerian-prisons-145480> (accessed 4 March 2020).

<sup>10</sup> AA Sanda *Prison congestion: Our responsibility* (2007) 5-7.

<sup>11</sup> N Gbadamosi 'The all-women law firm helping prisoners get justice in Nigeria', <https://www.google.com/amp/s/www.aljazeera.com/amp/features/2020/6/24/the-all-women-law-firm-helping-prisoners-get-justice-in-nigeria> (accessed 4 December 2020).

<sup>12</sup> Nigeria: 70% of Nigerian Prisoners held without Trial <https://www.prison-insider.com/en/articles/nigeria-70-of-nigerian-prisoner-held-without-trial> (accessed 4 December 2020).

<sup>13</sup> JK Ukwai & JT Okpa 'Critical assessment of Nigeria criminal justice system and the perennial problem of awaiting trial in Port Harcourt maximum prison, River State' (2017) 16 *Global Journal of Social Sciences* 34-48.

<sup>14</sup> Eg, where the suspect is caught red-handed while committing an offence, or running away immediately after its commission it is desirable to effect arrest immediately.

bait for bail.<sup>15</sup> This situation has become endemic and is a clog in the wheels of the administration of criminal justice in Nigeria as it leads to the congestion of cells in these agencies.<sup>16</sup> This state of affairs requires urgent attention to ensure that the rights guaranteed by the Constitution are not violated with impunity.

Thus, in 2015, in a bid to address the various challenges confronting the administration of criminal justice in Nigeria, the National Assembly enacted the Administration of Criminal Justice Act, 2015 (ACJA). Since its enactment, several states<sup>17</sup> have domesticated the ACJA with minimal amendments to suit their local circumstances, while a few others are yet to do so.<sup>18</sup> However, before the enactment of the ACJA in 2015 by the federal government there had been some pathfinder efforts by some states. Thus, Lagos and Ekiti states have enacted their laws, which had been repealed in 2011, in 2007<sup>19</sup> and 2014<sup>20</sup> respectively, which one may rightly say inspired or strengthened the resolve of the federal government to enact the ACJA. For instance, section 4 of the Lagos State Administration of Criminal Justice Law (Repeal and Re-enactment) Law prohibits the practice of arrest in lieu which is contained in section 7 of the ACJA.<sup>21</sup> Section 17 permits an officer in charge to release on bail on self-recognition any person arrested for an offence not punishable by death.<sup>22</sup> According to section 18, where a person taken into custody is not released on bail, a magistrate upon application can release the detainee. In this instance the application for bail does not need to be in writing.<sup>23</sup> According to section 19 of the law, where a person is taken into custody for any offence not punishable by death, at the close of investigation, if the officer in charge is satisfied that the

15 PA Akhihiero 'Arrest, remand and awaiting trial syndrome in criminal justice: Fixing the jigsaw to end prison congestion', <http://edojudiciary.gov.ng/wp-content/uploads/2018/08/ARREST-REMAND-AND-AWAITING-TRIAL.pdf> (accessed 10 March 2020).

16 As above.

17 The following states have domesticated the ACJA/L: Anambra, 2010; Lagos, 2007 and repealed in 2011; Ekiti, 2014; Federal Capital Territory, Abuja, 2015; Ondo, 2015; Rivers 2016; Oyo, 2017; Enugu, 2017; Akwa Ibom 2017; Cross River, 2017; Kaduna, 2017; Delta, 2017; Kogi, 2017; Abia, 2017; Edo, 2018; Ogun 2018; Plateau 2018; Osun 2018; Kwara, 2018; Adamawa, 2018; Bayelsa, 2019; Kano, 2019; Nasarawa, 2019; Benue, 2018; Ebonyi, 2019; Bauchi, 2018; Sokoto, 2019; Kastina 2020; Imo, 2020.

18 See eg Oyo State Administration of Criminal Justice Law, 2016, Cross River State Administration of Criminal Justice Law, 2016, and Edo State Administration of Criminal Justice Law, 2016.

19 Administration of Criminal Justice Law (Repeal and Re-enactment) Law 32 of 2011, formerly Administration of Criminal Justice Law 10 of 2007.

20 Administration of Criminal Justice Law 2 of 2014.

21 Sec 9 of the Administration of Criminal Justice Law, Oyo State, 2016 contains an equivalent provision.

22 Sec 31 Administration of Criminal Justice Law, Oyo State, 2016 (n 21).

23 Sec 18(3) Administration of Criminal Justice Law (Repeal and Re-enactment) Law 32 of 2011.

suspect has not committed the alleged offence, the person is to be released forthwith. Under section 20(1), an officer in charge of a police station shall report to the nearest magistrate within three days of arrest a record of the cases of all persons arrested without warrant. The magistrate shall forward the record of the arrested persons to the attorney-general for immediate necessary action. All these provisions are aimed at curbing the menace of unlawful detention within Lagos state.

The ACJA has been described as a revolutionary procedural criminal legislation<sup>24</sup> due to the several innovations it has introduced in the administration of criminal justice in Nigeria.<sup>25</sup> Sections 29, 33 and 34 contain provisions for the chief judge of the federal capital territory<sup>26</sup> to designate judges and magistrates who are to visit detention centres to attend to cases of unlawful detention, and place the responsibility on the detaining agency to account for the detainee. This practice, if judiciously implemented, can resolve the quagmire of unlawful detention in Nigeria. Despite the prospects of these innovative provisions of the ACJA, several challenges, such as administrative bottlenecks, a lack of or poor funding, threaten their viability.<sup>27</sup> What role can the Nigerian Bar Association (NBA) and other non-governmental organisations (NGOs) play in the realisation of the intentment of the legislature? This article addresses these issues.

The article is divided into five parts. Part 1 is a general introduction. Part 2 is an exposé on the right to personal liberty and dignity of the person. Part 3 examines the quagmire of unlawful detention in Nigeria with an emphasis on the infamous practice of holding charge which is one of the practices that have been abolished by the ACJA. Part 4 examines pathfinder provisions of the ACJA that seek to eliminate unlawful detention in Nigeria by highlighting the roles to be played by human liberty stakeholders such as the NBA and other NGOs. Part 5 contains the conclusion and recommendations.

24 BFM Nyako 'The Administration of Criminal Justice Act 2015: Issues arising' paper presented at the Federal High Court Legal Year Ceremony and Annual Judges Conference, 12-15 September 2017, Abuja.

25 CJ Dakas 'Beyond legal shenanigans: Towards engendering a symbiotic relationship between law and justice in Nigeria' keynote address delivered at the 52nd Nigerian Association of Law Teachers Conference, 2018, Nigerian Law School, Abuja, published in proceedings of the 52nd Nigerian Association of Law Teachers Conference (2018) 23.

26 Its states equivalent empowers the chief judges of the various states to appoint or designate a magistrate to visit, at least once every month, police stations or detention centres to review cases of persons being detained.

27 Y Akinseye-George ACJA – *Emerging issues and challenges* (2017) 3-5.

## 2 Exposé on the right to personal liberty and dignity of the person

This part examines the nuances of the rights to freedom of movement, liberty and dignity of the person enshrined in the 1999 CFRN and some international legal instruments to which Nigeria is a signatory. The rights to the dignity of the person, personal liberty and freedom of movement are guaranteed under the 1999 Constitution of the Federal Republic of Nigeria as well under certain international legal frameworks. Sections 34, 35 and 41 of the 1999 Constitution of the Federal Republic of Nigeria<sup>28</sup> recognises these rights in clear and unambiguous terms.

Section 34(1) provides that '[e]very individual is entitled to respect for the dignity of his person, and accordingly no person shall be subjected to torture or to inhuman or degrading treatment; no person shall be held in slavery or servitude and no one shall be required to perform forced labour'. According to this provision, the dignity of the person of every individual is preserved. Accordingly, it is an infraction of this right to expose any person to any treatment or deprivation that affects the dignity of their person. The right to dignity of the person is sacrosanct, untrammelled and inviolable under any conditions. For instance, it would be an infraction of the dignity of the person for the police or any security agency to stop commuters at a checkpoint and order them to sit on the bare floor or slap anyone of them as a result of a provocative action or omission. In fact, a person who has committed an offence and has been prosecuted and convicted shall not be subjected to inhumane treatment that detracts from the dignity of their person as conviction does not sequester this right.<sup>29</sup> For instance, where a convict is

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28 Secs 34, 35 and 41 of the 1999 Constitution of the Federal Republic of Nigeria Cap C28 LFN 2004.

29 Secs 1, 2, and 3 of the Anti-Torture Act, 2017 prohibits all forms of torture. According to sec 3 thereof, torture is committed when an act by which pain or suffering, whether physical or mental, is intentionally inflicted on a person to obtain information or a confession from him or a third party; punish him for an act he or a third party has committed or is suspected of having committed; or intimidate or coerce him or a third party person for any reason based on discrimination of any kind. When such torture is inflicted by or at the instigation of or with the consent of or acquiescence of a public official or other person acting in an official capacity provided that it does not include pain or suffering in compliance with lawful sanction. For the purpose of the Act, subsec 2 provides that torture includes physical torture, which refers to such cruel, inhumane or degrading treatment which causes pain, exhaustion, disability or dysfunction of one or more parts of the body, such as systemic beatings, head-bangings, punching, kicking, striking with rifle butts and jumping on the stomach, food deprivation or forcible feeding with spoiled food, animal or human excreta or other food not normally eaten; cigarette burning, burning by electrically heated rods, hot oil, acid, by the rubbing of pepper or other chemical substances on mucous membranes, or acids or spices directly on the wounds; the submersion

sentenced to hard labour, it will be wrong to subject him to torture as such does not amount to labour but is inhuman treatment.<sup>30</sup> This right avails all persons irrespective of their criminal status and is detractable only to the extent recognised by the Constitution. In fact, where an accused person has been tried and found guilty and sentenced to imprisonment, the requirement of the dignity of his person is not terminated by virtue of imprisonment. Such a convict must serve his jail term in prison conditions under humane conditions, except in respect of labour where 'hard labour' is included as part of the punishment during imprisonment.<sup>31</sup> As such, the prisoner is entitled to wholesome feeding, decent accommodation, health care, clothing, and so forth.<sup>32</sup> Thus, depriving prisoners of nutritious and wholesome food (which is the norm in Nigerian correctional centres), potable drinking water, health care, good accommodation, clothing and bedding and a means of ensuring personal hygiene constitutes an affront to their dignity.<sup>33</sup> The fact that a person is serving a jail term does not mean that he or she is stripped of human rights to the extent that incarceration has not been sequestered and, hence, it is not a licence to their violation.<sup>34</sup>

Section 35(1) provides that '[e]very 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'. Intrinsic to the right to personal liberty is the freedom of movement contained in section 41 of the 1999 CFRN. These provisions connote that every citizen is free to move within Nigeria and shall therefore not be arbitrarily restrained or arrested. Every person is born free and his or her freedom of movement and

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of the head in water or water polluted with excrement, urine, vomit or blood; being tied or forced to assume fixed and stressful bodily positions; rape and sexual abuse, including the insertion of foreign bodies into the sex organs or rectum or electrical torture of the genitals, other forms of sexual abuse; mutilation, such as amputation of the essential parts of the body such as the genitalia, ears or tongue and any other part of the body; dental torture or the forced extraction of the teeth; harmful exposure to the elements such as sunlight and extreme cold, the use of plastic bags and other materials placed over the head to the point of asphyxiation, and so forth.

30 Sec 3 of the Anti-Torture Act, 2017 provides that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any public emergency, may be invoked as a justification for torture. Secret detention places, solitary confinement, incommunicado or other similar forms of detention, where torture may be carried out are prohibited. Any confession, admission or statement obtained as a result of torture shall not be invoked as evidence in a proceeding, except against a person accused of torture as evidence that the confession, admission or statement was made.

31 M Uwakornudi 'The law and prisoners' human rights in Nigeria' (2018) 7 *Port Harcourt Law Journal* 163-164.

32 TO Ifaturoti 'Nigerian prisons and the human rights campaign: Some challenges' (1994) *Nigerian Current Law Review* 79.

33 Uwakornudi (n 31) 163.

34 OO Subrina 'The plight of prison inmates in Nigeria: An issue of human rights violation' (2018) 2 *University of Jos Journal of Private Law* 153-157.

liberty must be assured at all times by every individual and institution exercising powers over the person unless it is otherwise justifiable. Where the personal liberty and freedom of movement of any person is temporarily withdrawn due to an allegation of the commission of a crime and subsequent arrest, the person arrested is expected to be brought before a court of competent jurisdiction within one day if the court is situated within the radius of 40 kilometres and, in other cases, within two days or a longer period as the court may consider reasonable.<sup>35</sup> Any period of incarceration other than this is regarded as unlawful and therefore an infraction of the person's right to liberty and freedom of movement.

Any person who is unlawfully arrested or detained contrary to what these sections contemplate is entitled to compensation and a public apology from the appropriate authority or person.<sup>36</sup> These remedies are mutually inclusive once it has been established that a person's detention is unlawful. In such an event, even if no specific amount is claimed as compensation for the unlawful arrest or detention, the court is duty-bound to award commensurate compensation, as was held in *Jim-Jaja v Commissioner of Police, Rivers State*.<sup>37</sup> The right to personal liberty and freedom of movement has been judicially approved and affirmed by both the Court of Appeal and the Supreme Court.<sup>38</sup>

In *Okafor v Lagos State Government*,<sup>39</sup> where the appellant was arrested pursuant to the order of the governor of Lagos state directing all Lagosians to stay indoors from 09:00 to 10:00 am every last Saturday of the month for environmental sanitation and transported in a Black Maria, the Court of Appeal held that the act by the respondent of transporting the appellant in a Black Maria car, which is caged and meant for dangerous and hardened criminals, amounted to degrading and inhuman treatment and an infraction of her right to liberty and freedom of movement. The Court held that this act of the respondent violated section 34(1)(a) of the 1999 CFRN which guarantees the appellant's right to dignity of her person, which is inviolable.<sup>40</sup> Where these rights have been, are being or are likely to be infringed, the cause of action accrues entitling the affected person to commence proceedings to seek a remedy.<sup>41</sup>

35 Secs 35(5)(a) & (b) 1999 CFRN.

36 Sec 35(6) 1999 CFRN.

37 [2013] 6 NWLR (Pt. 1350) 225.

38 *First Bank of Nigeria Plc v Attorney-General of the Federation* [2018] 7 NWLR (Pt 1617) 121.

39 [2017] 4 NWLR (Pt 1556) 404.

40 As above.

41 *Economic and Financial Crimes Commission v Diamond Bank Plc* [2018] 8 NWLR (Pt 1620) 107 80G-H.

On the international plane, these rights are well recognised. Thus, articles 4, 5 and 9 of the Universal Declaration of Human Rights<sup>42</sup> (Universal Declaration) in recognition of these rights provide that 'no one shall be held in slavery or servitude; slavery and slave trade shall be prohibited in all their forms. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No one shall be subjected to arbitrary arrest, detention or exile.' These articles of the Universal Declaration clearly recognise every individual's right to personal liberty, movement and dignity of person and enjoin all civilised states to give effect to the articles. Also, articles 5, 6 and 12 of the African Charter on Human and Peoples' Rights (African Charter),<sup>43</sup> in recognising these rights, provides that '[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status, all forms of exploitation and the degradation particularly slavery, slave trade, torture, cruel, inhuman punishment and treatment shall be prohibited'. Further, 'every individual has the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or defamed.'<sup>44</sup>

It is worth noting that the African Charter, which is enforceable domestically in Nigeria,<sup>45</sup> has been domesticated in Nigeria pursuant to section 12 of Nigeria's Constitution and, therefore, is part and parcel of Nigeria's *corpus juris*.<sup>46</sup> Article 5 of the African Charter makes it clear that the dignity of the person is an inherent right of every human being; it is not bequeathed by any statute or government but is the gift of nature and, therefore, is as old as man's existence. The Court of Appeal has given judicial impetus to the aforementioned provisions of the African Charter in *Eze v Inspector General of Police*,<sup>47</sup> where it held that the provisions of article 5 of the African Charter accords to every individual the right to respect of the dignity inherent in his human being and to the recognition of his human status.<sup>48</sup>

In every police station it is conspicuously displayed that 'bail is free'. However, in practice this is far from the truth. Accused persons or their relatives part with large sums of money to regain their freedom from police stations and other detention centres, particularly the

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<sup>42</sup> Arts 4, 5 and 9 Universal Declaration of Human Rights 1948.

<sup>43</sup> Arts 5 and 6 African Charter.

<sup>44</sup> Art 12 African Charter.

<sup>45</sup> *Gani Fawehinmi v Abacha* [2000] 6 NWLR (Pt 660) 247.

<sup>46</sup> African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983, Cap A10 LFN 2004.

<sup>47</sup> [2017] 4 NWLR (Pt 1554) 44.

<sup>48</sup> As above.

notorious Special Anti-Robbery Squad (SARS).<sup>49</sup> Should a suspect or his relations insist on being released without payment, such a person runs the risk of spending more time in custody than is necessary as dilatory tactics may be deployed to frustrate his or her release.<sup>50</sup> This unfortunate practice is a major drawback in Nigeria's criminal justice administration system with its inimical effects. It is an affront to the right of movement and liberty.

It is apposite to note that an action to enforce the violation of these rights, like other rights, can be maintained against a private citizen other than someone acting for and on behalf of the government where the circumstances of the violation so warrant, as held in *Akwa Savings and Loans Ltd v Udooumana*.<sup>51</sup> Thus, it is not the case that fundamental rights enforcement proceedings can be commenced only against the government or its agencies or agents, as was held in *Peterside v IMB (Nig) Ltd*.<sup>52</sup> In fact, the tenor of section 46(1) of the 1999 CFRN, which empowers anyone whose right is being threatened or has been breached to apply to a High Court for redress, does not discriminate between juristic persons whether it is a private citizen or government or its agency.

It is apposite to note that although these rights are conspicuously omitted from the derogation provisions of the Constitution, namely, section 45, this does not mean that they cannot be derogated from. With the exception of the right to freedom of expression contained in section 36 of the 1999 CFRN, all other rights are not absolute. While the rights to personal liberty and freedom of movement are subject to permissible exceptions, when detracting from these rights, it must be in 'accordance with a procedure permitted by law' and not arbitrary.<sup>53</sup> Where the detraction is arbitrary, it will amount to a violation of the right.

### 3 The anatomy of unlawful detention in Nigeria

This part examines the anatomy of the quagmire of unlawful detention, albeit succinctly. Unlawful detention may be regarded as any detention, irrespective of its duration, which is contrary to what is expected by the law, that is, detention that does not accord with the dictates of the law. From the preceding part it has been established

49 Akhihiero (n 15) 10.

50 Akhihiero 13.

51 (2009) LPELR-98861.

52 [1993] 2 NWLR (Pt 278) 712.

53 Secs 35(1) & 45 1999 Constitution of the Federal Republic of Nigeria Cap. C28 LFN 2004.

that where a person is arrested on allegation of having committed an offence, where there is a court situated within a 40 kilometre radius, he or she must be brought before a court of competent jurisdiction within 24 or 48 hours, as the case may be. Any detention contrary to this stipulation is wrong and unlawful.<sup>54</sup> Unlawful detention denotes the restraint of a person in a bounded area without any justification. The infringement may arise from restraint by a private citizen as well as detention by agencies of the government, such as false arrests by the police. The person so restrained is said to be a 'prisoner,' so long as he has no liberty to freely go at any time (however short) to any place he wishes without bail or otherwise.<sup>55</sup>

Several factors contribute to unlawful detention in Nigeria. The inability of an accused person to secure the service of a lawyer could be a reason for prolonging pre-trial incarceration. Emeka et al,<sup>56</sup> who undertook a study on the correlation between awaiting-trials and a lack of legal representation in three major prisons (Afokang, Ikom and Ogoja) in Cross River state, came to the following conclusion:

Arguably there exists a positive link between the inability of indigent accused persons to access legal practitioners and prolonged pre-trial detention. Put differently, lack of legal representation for the accused persons delays timely pre-trial ... as many pre-trial detainees' trials were pending in several criminal courts due to the poor financial status of the detainees which disables them from paying for legal services.

Ajomo<sup>57</sup> opined that more than 64 per cent of awaiting-trial persons were yet to be charged as they were unable to hire the services of a lawyer. Hence, in his submission the absence of legal representation for the indigent accused person delays their trial. In the same vein, while agreeing with the inability of indigent accused persons to access the services of a lawyer as a reason for prolonged awaiting trial in Nigeria, Osinbajo stated:<sup>58</sup>

54 Ukwayi & Okpa (n 13) 19.

55 O Okoye 'Victims of unlawful detention have right to compensation', <https://www.sunnewsonline.com/victims-of-unlawful-detention-have-right-to-compensation/> (accessed 10 February 2020).

56 JO Emeka et al 'Awaiting trial among suspected criminal persons and lack of legal representation in Cross River State, Nigeria' (2016) 2 *International Journal of Sociology and Anthropology Research* 2, <http://www.eajournals.org/wp-content/uploads/Awaiting-Trial-among-Suspected-Criminal-Persons-and-Lack-of-Legal-Representation-in-Cross-River-State-Nigeria.pdf> (accessed 10 March 2020).

57 Al Ajomo *Human rights and the administration of criminal justice in Nigeria* (1991) 24.

58 Y Osinbajo 'Reform of criminal law' paper presented at the 20th international conference of the International Society on the Reform of Criminal Law, Brisbane, Australia (2006) 12.

The major reason for prolonged pre-trial detention in many third world countries is the absence of lawyers to represent the majority of the accused persons in detention; though several legal practitioners do render free legal services (*pro bono*) to indigent accused persons, insignificant to assuage for the backlog; the number of persons awaiting trial was still very high.

Osinbajo observed that while the legal aid scheme was set up to assist poor persons who could not afford to hire lawyers to defend them, the services of the scheme amounted to nothing considering the number of lawyers currently in the scheme and the percentage of indigents in detention who require their services.

The above undesirable situation subsists despite the fact that the Constitution enjoins the state to provide everyone charged with an offence but who cannot afford the services of a lawyer with a lawyer at no expense to the accused person. A former Comptroller-General of Nigerian prisons, Mr Olusola Ogundipe, in July 2010 disclosed that, while the population of prisoners stood at 47 628, with 13 300 or 23 per cent being convicted persons, 77 per cent were 'awaiting-trial' inmates.<sup>59</sup> Based on statistics released by Nigeria's National Bureau of Statistics (NBS) from 2011 to 2015, 72 per cent of inmates in Nigerian prisons are awaiting trial.<sup>60</sup> Meanwhile, statistics from the Nigeria Correctional Services as at 13 January 2020 shows that, out of a total inmate population of 72 627, the total number of convicted prisoners is 21 890 (30 per cent) while those awaiting trial is 50 737 (30 per cent).<sup>61</sup>

The infamous holding charge practice has been one of the roguish means that detaining authorities have used to 'unlawfully' detain suspects. This practice involves that where an offence is alleged to have been committed which a magistrate's court has no jurisdiction to adjudicate, the arresting authorities charge the accused person before the magistrate and obtain a remand order to detain him or her pending formal charges being preferred at the High Court.<sup>62</sup> This practice is a clear violation of an accused person's right to liberty as the liberty of a person may be restricted only pursuant to the order

<sup>59</sup> Okoye (n 55) 10.

<sup>60</sup> Y Kazeem 'Up to three-quarters of Nigeria's prison population is serving time without being sentenced', <https://www.google.com/africa/892498/up-to-three-quarters-of-nigerias-prison-population--s-serving-time-without-being-sentenced/amp/> (accessed 4 March 2021).

<sup>61</sup> Al Agbator 'Non-custodial sentence as a means of prison decongestion in Nigeria', <https://www.google.com/amp/s/thefirmaadvisoty.com/news-blog/2020/1/17/non-custodial-sentences-as-a-means-of-prison-decongestion-in-nigeria%3fformat=amp> (accessed 4 March 2021).

<sup>62</sup> *Lufadeju v Johnson* [2007] All FWLR (Pt 371) 1532.

of a court of competent jurisdiction.<sup>63</sup> This procedure persists despite the settled principle of law that where a court lacks the requisite jurisdiction over a matter before it, the court is duty bound to make an order striking out the suit in order for the same to be instituted before a court that has jurisdiction to be seized of the matter.<sup>64</sup> The Court of Appeal in *Agundi v COP*<sup>65</sup> held that it is unconstitutional for a magistrate's court to take cognisance of an offence, to remand a suspect into prison custody and to make binding orders when the court lacks the requisite jurisdiction to entertain such a matter. It is clear that the practice of holding charge is an aberration. In *Bola Kale v The State* the Court of Appeal held:<sup>66</sup>

It is an aberration and an abuse of judicial process for an accused person to be arraigned before a magistrate for an offence over which it has no jurisdiction only for the accused person to be remanded in prison custody and not tried or properly charged before a competent court for trial. It will be an infraction on the rights to fair hearing and liberty of the accused person.

Unfortunately, section 293(1)<sup>67</sup> of the ACJA has tacitly given statutory impetus to this practice by providing that 'a suspect arrested for an offence which a magistrate court has no jurisdiction to try shall, within a reasonable time of arrest, be brought before a magistrate court for remand'. This is possible once the magistrate is satisfied that there is a 'probable cause' to remand the suspect pending the receipt of a copy of the legal advice from the Attorney-General before the arraignment of the suspect before the appropriate court. Although the timeline within which the Attorney-General has to issue legal advice is 14 days, a remand by a court that lacks jurisdiction is strengthening the arms of impunity and brutality against the accused person's liberty, which ought not to be. Disturbing is the fact

63 *Ahmed v COP Bauchi State* (2012) 9 NWLR (Pt 1304) 104. The Court of Appeal held: 'It is both a notorious fact and established law, that allegation of culpable homicide shall be triable in the High Court of the state concerned. In this regard, where jurisdiction to try alleged offenders is vested by law in the High Court, the taking to or arraignment of an alleged offender before a chief magistrate court is tantamount to 'holding charge' which has been strongly and soundly condemned and described as illegal and unconstitutional ... in the instant case, the chief magistrate had no jurisdiction to try the case, the chief magistrate had no jurisdiction to try the case of culpable homicide punishable with death. Additionally, no such charge has been placed or filed before the High Court at the time the application for bail was made, considered and refused by the lower court.'

64 *UBA Trustees Ltd v Niger Ceramic Ltd* [1987] 3 NWLR (Pt 62) 6000 per Nnaemeka-Agu JSC (as he then was) where it was held that 'in our hierarchical system of court, the law is in the final analysis of what the Supreme Court says it is; once they have decided a point of law, their decision as by the doctrine of *stare decisis* is binding on all other courts in the country. The farthest to which any court can go is to criticise but apply it.'

65 [2013] All FWLR (Pt 660) 1243.

66 [2006] 1 NWLR ((Pt 962) 507 765.

67 Sec 293(1) ACJA 2015.

that agencies that are charged with the responsibility of detecting, preventing and prosecuting crimes in Nigeria find it easier to arrest before investigating. This practice must be aggressively discouraged particularly when there is no *prima facie* case. A court that cannot try a matter should not be permitted to grant a remand order in the matter or any order at all save to decline jurisdiction.<sup>68</sup>

In light of sections 35(1) and 41 of the 1999 CFRN and articles 5, 6 and 12 of the African Charter it is contended that this practice is not only illogical but illegal. The aforementioned section of the ACJA is subservient to the provisions of section 35 of the 1999 CFRN by virtue of section 1(3) thereof and the various articles of the African Charter (being a statute that deals with matters in chapter IV) and, therefore, null and void to the extent of its inconsistency. It is suggested that the court should espouse the provisions of the above-mentioned relevant provisions of the 1999 Constitution and the African Charter to declare ineffective the offensive provision of the ACJA (section 293) that impedes on the right to freedom of movement and liberty.

While this article focuses on the provisions of the ACJA, some reference is also made to selected legislation in Nigeria that deals with the quagmire of unlawful detention. On 8 May 2020 President Mohammadu Buhari signed into law the Correctional Services Act, which repealed the Prison Act Cap P LFN 2004. The Act changed the Nigerian Prison Service to Nigeria Correction Services (NCS). Correctional service consists of custodial and non-custodial services.<sup>69</sup> The objectives of the Act are to ensure compliance with international human rights standards and good correctional practices; provide an enabling platform for the implementation of non-custodial measures; enhance the focus on corrections and the promotion of the reformation, rehabilitation and reintegration of offenders; and establish institutional, systemic and sustainable mechanisms to address the high number of persons awaiting trial.<sup>70</sup> To ensure the dignity of the person of inmates, section 15 provides that inmates shall not be held in servitude, and labour carried out by inmates shall be neither of an afflictive nature nor for the personal benefit of any correctional officer. This is recognition of the fact that being in custody does not erode the dignity of the inmate so as to subject him or her to inhumane or degrading treatment and same cannot be used for the aggrandisement of any officer of the correctional services.

68 Sec 291 of the Administration of Criminal Justice Law of Oyo State, 2016 contains provisions similar to that in ACJA.

69 Secs 1(2)(a) & (b) Nigerian Correctional Services Act, 2019.

70 Sec 2(1) Nigerian Correctional Services Act, 2019.

Through certification by a medical officer, an inmate sentenced to labour may be excused from such or made to undertake light labour, as the aim of custodial sentence is not to inflict pain but to enable the offender to realise the wrong, to rehabilitate and reintegrate him or her back into society as a responsible member of society. By virtue of section 16 of the Act, through an order of court issued to the correctional service authority, an inmate shall be brought before court whenever same is required. Thus, where a person is kept as awaiting trial, this provision could be used to require his or her production before a court having competent jurisdiction over the allegedly committed offence. This would help to stop the tide of unlawful imprisonment. Section 18 deals with the quagmire of awaiting trial. According to section 18(1) the NCS, in compliance with efficient criminal justice administration, should liaise with the heads of the justice institution and other stakeholders to review and eradicate causes of the high numbers of pre-trial detainees and develop effective mechanisms to enhance speedy trials and the resolution of such cases. The NCS should supply information to the relevant bodies regarding persons awaiting trial in their facilities, and should notify the relevant bodies and authorities such as the judiciary, the prerogative of mercy committee, the ACJMC, and so forth, when facilities are exceeding their capacity with regard to the custody of inmates for necessary action to be taken. These provisions are to ensure that persons that are arrested and taken into custody for allegedly having committed offences are not made to remain in custody but are accorded the opportunity to have their cases heard speedily or to be administratively released. After an inmate is released from custody, it is in the interests of the public to reintegrate him or her back into society to avoid recidivism. The NCS has the duty of assisting inmates in their reintegration process.<sup>71</sup>

#### **4 ACJA as a panacea to unlawful detention in Nigeria**

This part examines salient provisions of the ACJA that have addressed the quagmire of unlawful detention in Nigeria and explores means through which these provisions may be effectuated towards the eradication of the menace. However, it is worth noting the purpose of the ACJA as provided in section 1 thereof, which is to ensure that the system of administration of criminal justice promotes the efficient management of criminal justice institutions; the speedy dispensation of justice; the protection of society from crime; and the protection

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71 Sec 19 Nigerian Correctional Services Act, 2019.

of the rights and interests of the suspect, the defendant and the victim. It enjoins the courts, law enforcement agencies and other authorities or persons involved in criminal justice administration to ensure compliance with the provisions of the Act so as to realise the above-mentioned purposes. It is clear that the ACJA is a piece of legislation that is geared to effective, efficient, humane and inclusively beneficial criminal justice administration. The Act protects the interests of the accused as well as the state (society) which is the object of criminal wrongs. It does not prejudice the interests of either of the parties but is crafted in manner which, if same is rigorously implemented, will create a balance between all the contending interests in the criminal justice administration sector. It is geared towards establishing restorative justice<sup>72</sup> which is a way of responding to criminal behaviour by balancing the needs of the community, the victim and the offender.<sup>73</sup>

### Section 33(1) of the ACJA provides:

An officer in charge of a police station or an official in charge of an agency authorised to make arrest shall, on the last working day of every month, report to the nearest magistrate the cases of all suspects arrested without a warrant within the limits of their respective station or agency whether the suspects have been admitted to bail or not. The report shall contain all the particulars of the suspects arrested as prescribed in section 15 of this Act. The magistrate shall on receipt of the reports, forward them to the criminal justice monitoring committee which shall analyse the reports and advise the Attorney General of the Federation as to the trends of arrests, bail and related matters. The Attorney General of the Federation shall, upon request by the National Human Rights Commission, the Legal Aid Council of Nigeria or a non-governmental organisation, make the report available to them.

### Section 34 provides:<sup>74</sup>

The Chief Magistrate, or where there is no Chief Magistrate within the police division, any Magistrate designated by the Chief Judge for that purpose, shall, at least every month, conduct an inspection of police stations or other places of detention within his territorial jurisdiction other than the prison. During the visit, the Magistrate may: call for, and inspect, the record of arrests, direct the arraignment of a

72 Y Akinseye-George *Administration of Criminal Justice Act, (ACJA) 2015 with explanatory notes and cases* (2017) 3-4.

73 See the *dictum* of Oputa JSC in *Josiah v State* [1985] 1 NWLR (Pt 1) 125 141. The learned Law Lord held: 'Justice is not a one-way traffic. It is not justice for the appellant only. Justice is not even a two-way traffic. It is really a three-way traffic, justice for the appellant accused of a heinous crime of murder, justice for the victim, the murdered man, the deceased whose blood is crying to heaven for vengeance and finally, justice for the society at large – the society whose social norms and values had been desecrated and broken by the criminal act complained of.'

74 Sec 34 Administration of Criminal Justice Act, 2015.

suspect; where bail has been refused, grant bail to any suspect where appropriate if the offence for which the suspect is held is within the jurisdiction of the Magistrate. An officer in charge of a police station or official in charge of an agency authorised to make arrest shall make available to the visiting Magistrate or designated Magistrate exercising his power under subsection (1) of this section: the full record of arrest and record of bail; applications and decisions on bail made within the period; and any other facility the Magistrate requires to exercise his powers under that subsection.

Besides the above section of the ACJA, other sections are geared towards taming the tides of unlawful detention in Nigeria. Section 7 prohibits the anachronistic and obnoxious practice of surrogate arrest,<sup>75</sup> which was declared unlawful by the Court of Appeal per Niki Tobi JCA (as he then was) in *ACB v Okonkwo*.<sup>76</sup> Section 31(1) empowers the officer in charge of a station where a person has been taken into custody and where it appears that an inquiry into the matter cannot be finalised forthwith, to release the suspect on bail on self-recognition with or without surety to report at the station as may be specified. Under section 32, where a person is taken into custody in respect of a non-capital offence and is not released within 24 hours, an application for bail may be filed in a court having jurisdiction over the offence. The application in this case need not be in writing.<sup>77</sup> Similarly, section 33 requires the police or any agency that has the power to arrest, to report to a magistrate, on the last working day of the month, cases of all persons arrested without warrant. The magistrate, in turn, must forward the report to the Criminal Justice Monitoring Committee, which must transmit it to the Attorney-General (of the federation as well as the state) for the necessary action. These three stakeholders work symbiotically to ensure that suspects are not unjustly and wrongfully detained beyond the permitted time frame as contained in section 36 of the 1999 CFRN. These provisions are aimed at preventing unlawful detention in Nigeria.

The above provisions of the ACJA with their equivalent in some states' Administration of Criminal Justice Law<sup>78</sup> are geared towards stemming the tide of unlawful detention in Nigeria. In fact, the majority of the cases awaiting trial are based on non-capital offences in which arrests were made without warrant, in which circumstances

<sup>75</sup> Akinseye-George (n 72) 61.

<sup>76</sup> [1997] 1 NWLR (Pt 480) 195 (CA).

<sup>77</sup> Sec 32(3) ACJA 2015.

<sup>78</sup> Eg secs 33 and 34 of the Oyo State Administration of Criminal Justice Law, 2016 contains the same provisions.

bail ought to be granted without delay.<sup>79</sup> Although bail is said to be free, nothing is further from the truth, as onerous bail conditions are imposed for administrative or police bail, which conditions mostly are not met by suspects. Where the official report of cases of arrest without a warrant is forwarded on a monthly basis to the designated magistrate together with the bail conditions, it enables the magistrate to evaluate the conditions of the arrested suspects whether or not he or she has been granted bail. This report, once forwarded to the Administration of Criminal Justice Committee,<sup>80</sup> must accordingly advise the Attorney-General as to bail and other ancillary matters. This report could be requested by human liberty organisations such as the National Human Rights Commission, the Legal Aid Council of Nigeria and non-governmental organisations so as to secure bail for detained suspects who might not be able to secure the services of a lawyer. The importance of this reporting mechanism towards curbing the menace of unlawful continuous detention cannot be overemphasised. It is a step in the right direction.

Once a magistrate or a judge is designated by the chief judge to visit a detention centre other than the correctional centres,<sup>81</sup> it is mandatory for the visit to be made at least once a month, and during the visit the magistrate is empowered to grant bail to persons who are being detained unlawfully.<sup>82</sup> The magistrate has the power to review the previous bail application made with a view to granting the application.<sup>83</sup> In the case of default by an officer in charge of a police station or in charge of an agency authorised to make an arrest to comply with the provisions of the section requiring the making available the record of arrest and record of bail, applications and decisions on bail made within the period, and any other facility that may facilitate the discharge of the duties placed on the magistrate, the default is to be treated as misconduct and should be dealt with in accordance with the relevant police regulation under the Police Act, or pursuant to any other disciplinary procedure prescribed by any provision regulating the conduct of the officer or official of the

79 RO Ugbe, AU Agi & JB Ugbe 'Nigeria's Administration of Criminal Justice Act (ACJA) 2015: Innovations relating to women and children' (2019) 3 *Obafemi Awolowo University Law Journal* 131-133.

80 Also known as the Administration of Criminal Justice Monitoring Committee (ACJMC).

81 While it is believed that the prison houses persons who have been tried and sentenced and, as such, aside from the usual visit by the Chief Judge, it would be unnecessary to have a magistrate inspect the prison. The reality, however, is that there are inmates in prisons that are awaiting trial pending the advice of the Director of Public Prosecution and would therefore qualify for protection under secs 33 and 34 of the ACJA.

82 Unlawful detention means any detention done contrary to what is prescribed in sec 35(1) of the 1999 CFRN, eg, where a person is imprisoned beyond the permissible period of time (awaiting trial).

83 Sec 34(3)(b) ACJA 2015.

agency.<sup>84</sup> A police officer or official of any agency authorised to arrest who obstructs the magistrate from discharging his responsibility outlined by the aforementioned section stands the risk of being sanctioned.

Sections 8(1)(a) and (b) of the ACJA provides that a suspect shall be accorded humane treatment, having regard to his right to the dignity of his person, and not be subjected to any form of torture, cruel, inhuman or degrading treatment. Sub-section 3 provides that a suspect shall be brought before court as prescribed by this Act or any other written law or otherwise released conditionally or unconditionally. Section 14(2) provides that 'a person who has the custody of an arrested suspect shall give the suspect reasonable facilities for obtaining legal advice, access to communication for taking steps to furnish bail, and otherwise making arrangements for his defence or release'. The tenor of these provisions is the total abhorrence of unlawful detention, particularly of an inhumane nature, which usually is the case in all unlawful detentions, especially of those less powerful. The Act further makes provision for the rendering of quarterly reports of arrest to the Attorney-General of the federation. It provides:<sup>85</sup>

The Inspector General of Police and the head of every agency authorised by law to make arrests shall remit quarterly to the Attorney-General of the Federation a record of all arrests made with or without a warrant in relation to federal offences within Nigeria. The Commissioner of Police in a state and head of every agency authorised by law to make arrests within a state shall remit quarterly to the Attorney-General of that state a record of all arrests made with or without a warrant in relation to state offences or arrests within the state.

The report to be remitted shall contain all the particulars of the suspects as prescribed by section 15 of the Act.<sup>86</sup> A register of arrests containing the particulars prescribed in section 15 of the Act shall be kept in the prescribed form at every police station or agency authorised by law to make arrests, and every arrest, whether with or without a warrant, within the local limits of the police station or agency, or within the federal capital territory, Abuja, shall be entered accordingly by the officer in charge of the police station or official in charge of the agency as soon as the arrested suspect is brought to the station or agency.<sup>87</sup> The Attorney-General of the federation shall

84 Sec 34(5) ACJA 2015.

85 Secs 29(1)(2) & (3) ACJA 2015.

86 As above.

87 Secs 29(4) & (5) ACJA 2015.

establish an electronic and manual database of all records of arrests at the federal and state levels.<sup>88</sup>

The ACJA has paved the way for a liberal regime of bail in Nigeria. In the case of offences of a capital nature where bail may not be granted on self-recognition, such cases must be referred to the Attorney-General for legal advice which must be issued within 14 days of the reference.<sup>89</sup> Thus, where a suspect has been taken into police custody without a warrant for an offence other than an offence punishable with death, an officer in charge of a police station must inquire into the case and release the suspect on bail on his entering a recognition with or without surety for a reasonable amount of money to appear before the court or at the police station at the time and place named in the recognition. This is to be done once it is evident that it is impracticable to bring the suspect before a court having jurisdiction with respect to the alleged offence within 24 hours or other period as provided after the arrest.<sup>90</sup>

The implementation of this reporting and monthly visitation of detention centres is capable of curbing the menace of unlawful detention.<sup>91</sup> However, as in the case of every other law, unless implemented the benefits remain untapped. Several states have domesticated the ACJA with minor modifications that have not altered the content of the Act. However, in Lagos (noted for being in the fore of positive innovations in Nigeria), the federal capital territory, Ekiti, Kano and Oyo states, the chief judges are yet to comply with the requirement of appointing or designating magistrates to visit, on a monthly basis, detention centres with a view to effectuating the Act. It therefore is imperative for the various chief judges to do the necessary, and where it is being delayed unnecessarily, an order of mandamus should be sought to compel the appointment. The shenanigans of the police and personnel of agencies authorised to arrest, due to their unwillingness to grant bail to suspects, cannot be overlooked as they can go to reprehensible ends to frustrate the release of persons in their custody. The civil society and human liberty organisations have a role to play in preventing malfeasance from the police and their counterparts.<sup>92</sup>

<sup>88</sup> As above.

<sup>89</sup> Sec 30(3) ACJA 2015.

<sup>90</sup> As above.

<sup>91</sup> YDU Hambali et al 'Administration of criminal justice review in Nigeria: A mere review or revolution in Nigeria' in IH Chiroma & YY Dadem (eds) *Proceedings of the 51st Nigerian Association of Law Teachers Conference* (2018) 46.

<sup>92</sup> A Otunlana 'Implementation strategies for the Administration of Criminal Justice Act 2015' presentation at the Stakeholders Workshop on the Implementation Strategy of the Administration of Criminal Justice Act 2015, cited in RO Ugbe, AU Agi & JB Ugbe 'A critique of the Nigerian Administration of Criminal Justice

Human liberty NGOs and the Nigerian Bar Association (NBA) are better suited to see that the intentions of the legislature encapsulated in the aforementioned sections of the ACJA are realised. Each branch of the NBA<sup>93</sup> should set up a committee on the implementation of the monthly visits, which will always accompany the judge or magistrate on such visits to the police stations or detention centres.<sup>94</sup> By so doing, they can bring to the attention of the magistrate detainees who have been detained beyond the constitutionally-prescribed timeframe and bring an application for their bail. Their vigilance will ensure that shadiness does not truncate the exercise.

Furthermore, agencies such as the National Human Rights Commission (NHRC) and the Legal Aid Council of Nigeria and even youth corps members under the auspices of the Human Rights Protection Group, should accompany the magistrates on their visits and assist in bringing to his attention cases of persons who are being detained unlawfully. Within the National Youth Service Corps (NYSC) Scheme, servicing corps members are required to engage in community development services (CDS) groups. Lawyers are usually organised into one or another human rights/liberty CDS group such as Legal Aid, Independent and Corrupt Practices, and so forth, and often take up *pro bono* legal services, a veritable tool in the implementation of the provisions of the ACJA. There is a need to create public awareness of this mechanism. This will enable relations or colleagues of persons who are being unlawfully detained to be on the ground during such visits, and where the police or any arresting agency seeks to hide a detainee, they can bring this to the attention of the magistrate as the possibility of the police withholding information of certain detainees is not improbable.

Apart from the fact that members of the legal community accompany the designated magistrate to a detention centre to prevent foul play, such as the hiding of detainees, it will also embolden the visiting magistrate to discharge his duty courageously. The possibility of assault by the operators of the detention centre (the police, Civil Defence Corps, State Security Service, Economic

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Act 2015 and challenges in the implementation of the Act' (2019) 4 *African Journal of Criminal Law and Jurisprudence* 81.

93 The NBA Human Rights Committee at the branch level could take up this task of accompanying the magistrate to a detention centre whenever the visit is to be made.

94 ML Garba 'Administration of Criminal Justice Act 2015: Innovations, challenges, and way forward' paper presented at 2017 Lecture of the National Association of Judicial Correspondents, <https://www.lawyard.ng/administration-of-criminal-justice-act-2015-innovations-challenges-and-way-forward>, cited in RO Ugbe, AU Agi & JB Ugbe 'Nigeria's Administration of Criminal Justice Act (ACJA) 2015: Innovations relating to women and children' (2019) 3 *Obafemi Awolowo University Law Journal* 133.

and Financial Crimes Commission (EFCC) or any other agency having and exercising such powers) cannot be totally ruled out. In recent times there have been occurrences when officers of the Nigerian police force, particularly those attached to the notorious Special Anti-Robbery Squad (SARS), have assaulted lawyers who visit their stations to effect the release of their clients. If lawyers can be physically assaulted, the same treatment can be meted out to a magistrate under any disguise and it will be a matter of the particular magistrate's word against that of the relevant agency.

It is apposite to reiterate that the ACJA is only applicable in the federal capital territory, Abuja. Thus, unless and until each state domesticates the Act, this laudable initiative cannot be effectuated there.<sup>95</sup> This is one of the challenges confronting the effective implementation of these laudable provisions of the ACJA beyond the federal capital territory. It therefore is imperative for the local NBA and other groups in the various states that are yet to domesticate the ACJA to engage the various houses of assembly to ensure that the ACJA is domesticated in every state in Nigeria. The domestication of the ACJA by federating states is necessary because of the constitutional arrangement of Nigeria as a federation with different legislative capacities.<sup>96</sup>

The federal government as well as the different states have legislative power and can make laws.<sup>97</sup> While the federal government is competent to make laws on matters in both the exclusive<sup>98</sup> and concurrent legislative lists, the state government can only make laws on the concurrent and residual list.<sup>99</sup> Thus, since criminal law is not an item under the exclusive legislative competence of the federal government but falls under the concurrent legislative list, both the federal and state governments have legislative competence to enact law on it.<sup>100</sup> Hence, for the ACJA to become applicable in the various federating states in Nigeria, these states have to domesticate the ACJA for it to become applicable in criminal proceedings in these states,

95 RO Ugbe, AU Agi & JB Ugbe 'A critique of the Nigerian Administration of Criminal Justice Act 2015 and challenges in the implementation of the Act' (2019) 4 *African Journal of Criminal Law and Jurisprudence* 69.

96 See Part I and II, Second Schedule to the 1999 Constitution of the Federal Republic of Nigeria Cap C23 LFN 2004.

97 See sec 4 1999 Constitution of the Federal Republic of Nigeria Cap C23 LFN 2004.

98 Only the federal government can make law on matters enumerated under the Exclusive Legislative List.

99 J Onyekwere 'It is unconstitutional for National Assembly to legislate on residual list', <https://guardian.ng/features/law/its-unconstitutional-for-the-national-assembly-to-legislate-on-residual-list/> (accessed 29 December 2020).

100 *Attorney-General of the Federation v Attorney-General of Lagos State* (2013) LPELR-20974 (SC).

although in doing so they must bear in mind the doctrine of covering the field.<sup>101</sup> The doctrine requires that any matter on the concurrent legislative list, once the federal government has legislated on it, the state retains the power to also legislate on it. However, in doing so it must not legislate contrary to what the federal government has already legislated.<sup>102</sup>

While this generally is the law, it is safe to argue that in criminal matters, particularly those involving constitutionally-guaranteed rights, in domesticating the ACJA, despite the requirement of the doctrine of covering the field, states can positively obliterate from the provisions of ACJA without any offensive outcome. For instance, under the ACJA the legal advice of the Attorney-General is expected to be issued within 14 days, while if a state, in domesticating the ACJA, reduces the period to seven days, this will not be regarded as an offensive derogation as it affords better protection to human rights. In fact, the federating states are not bound to wholly adopt and adapt to the ACJA because criminal law, being a substantive matter over which they have legislative competence, they are legally permitted and have the liberty to enact procedural law or adopt the federal legislation with suitable modifications based on their needs.

It is apposite to note that the MacArthur Foundation is sponsoring several NGOs on various projects towards the domestication of the ACJA by the various federating states in Nigeria with significant positive outcomes as 30 states have domesticated the ACJA. Only a few states in Northern Nigeria are yet to domesticate the Act. It is hoped that, sooner than later, every state would have domesticated the law with amendments to suit its peculiarities. The strides made by organisations, both governmental and non-governmental, such as CLEEN Foundation,<sup>103</sup> the Centre for Socio-Legal Studies, the Nigerian Institute of Advanced Legal Studies (NIALS),<sup>104</sup> all with support from MacArthur Foundation, towards the implementation of the ACAJA must be duly acknowledged. The Police Duty Solicitors Scheme (PDSS) is an initiative that seeks to curb the menace of pre-trial detention, focusing on institutions that feed detention centres with detainees unlike other programmes that are focused on the prisons. The PDSS was introduced out of necessity as earlier efforts

101 *Edo State Agency for the Control of AIDS v Comrade Austin Osakue & Others* (2018) LPELR-44157 (CA).

102 *Attorney-General of Lagos State v Eko Hotels Ltd & Another* (2017) LPELR-43713(SC).

103 CLEEN Foundation 'Promoting accountability and transparency in the implementation of ACJA', <https://clean.org/promoting-accountability-and-transparency-in-the-implementation-of-acja> (accessed 4 March 2021).

104 See <https://www.nials.edu.ng/index.php/mac-arthur-project-on-iacija> (accessed 4 March 2021).

had proved inadequate in addressing the increasing number of pre-trial detentions and elongated periods of pre-trial detention.<sup>105</sup> Open Society Justice Initiative (Justice Initiative JI) and Legal Aid Council of Nigeria (LACON) commissioned a research that revealed that existing initiatives tended to focus on the receiving side of the justice system (prisons) without contemporaneously reviewing the supply side (law enforcement) with the result that ‘prison decongestion’ efforts did not decongest the prisons as long as there was a steady supply of detainees from the police stations through the rest of the criminal justice system.<sup>106</sup> PDSS was packaged by the JI and LACON to seek creative means of reducing the number of pre-trial detainees as well as reducing the time of pre-trial detention in Nigeria. It trains and deploys young lawyers under the National Youth Service Scheme in various states to police stations to provide legal aid assistance to indigent detainees within 48 hours of arrest.<sup>107</sup> In 2006 the Nigerian police force (NPF) agreed to collaborate with the initiative. It became operational in 2007 with Justice Initiative’s partner NGO, Rights Enforcement and Public Law Centre (REPLACE) as main implementing organisation.<sup>108</sup>

In Nigeria, at present politically-motivated detention without trial, particularly that of journalists and activists, is on the increase and the avenues provided for under the ACJA 2015 (as well as those contained in the various ACJLs) may be explored as a leeway to this questionable unlawful incarceration since the law in some of these states is in accordance with the ACJA.<sup>109</sup>

A lack of political will or nefarious political interest is another challenge confronting the effective implementation of this laudable initiative.<sup>110</sup> A state may ‘lack’ the political will to domesticate the ACJA, or domesticate it but neglect to set in motion the machinery for its implementation. In the period 2019 and 2020 several journalists who alleged corrupt practices against some politically-disposed persons, especially governors, were arrested and jailed without being brought before court. For instance, Agba Jalingo was arrested and jailed for months in 2019 without being charged to court despite the fact that both in Abuja and Cross River state the ACJA and ACJL

<sup>105</sup> S Ibe *Police duty solicitor scheme training manual* (2020) 10.

<sup>106</sup> As above.

<sup>107</sup> As above.

<sup>108</sup> As above.

<sup>109</sup> E Okolo ‘Issues on the Administration of Criminal Justice Act 2015 – Opinion’, <https://investadvocate.com.ng/2016/10/21/issues-on-the-administration-of-criminal-justice-act-2015-opinion/> (accessed 30 December 2020).

<sup>110</sup> I Maraizu ‘A critique of Administration of Criminal Justice Act (ACJA) 2015’, <https://www.presstrader.com/nigeria/thisday/20151006/281792807850335> (accessed 20 December 2020).

are applicable. Cross River state domesticated the ACJA in 2016<sup>111</sup> although the governor assented to it on 27 May 2017 as part of the activities lined up for the celebration of the fiftieth anniversary of the creation of the state.<sup>112</sup> It contains provisions similar to those of section 34 of the ACJA<sup>113</sup> and even prohibits the holding charge.<sup>114</sup> Despite the domestication of the law but because the allegation made by Mr Jalingo was directed at the person of the executive governor of Cross River state, he was kept in prison/correctional centre for months without being brought before court.<sup>115</sup> It took protests by domestic human liberty organisations and an international outcry for him to be charged to court when he was finally granted bail.<sup>116</sup> Such political shenanigans are capable of suffocating the initiative engendered by the ACJA, as seen in the Agba Jalingo case.

Another challenge is the unwillingness or failure of the Chief Judge to appoint the magistrate in compliance with the provisions of either the ACJA or any of its state equivalents.<sup>117</sup> The chief judge may not set out to deliberately fail or refuse to appoint a magistrate for the purpose of implementing the law, but it could be due to administrative inadvertence which cannot be overlooked. Where the chief judge has appointed a magistrate in compliance with the law, it does not automatically translate into implementation unless and until the designated magistrate performs the work.<sup>118</sup> The reluctance of the magistrate to visit detention centres may be due to a work load as it is customary for the dockets of the magistrate's courts to be over-congested, and the purpose of the law would be technically defeated. The ACJA has taken into account the need for the expeditious trial of criminal cases by providing in section 306 that trials shall be on a day-to-day basis. This provision has been upheld as valid and constitutional by the Supreme Court per Ogunbiyi JSC in *Olisa Metuh v Federal Republic of Nigeria*.<sup>119</sup>

111 The Cross River State Administration of Criminal Justice Law 16, 2016.

112 E Iyamba 'The Cross River State Administration of Criminal Justice Law No 16, 2016 and matters arising', <https://crossriverwatch.com/2017/12/the-cross-river-state-administration-of-criminal-justice-law-no-16-2016-and-matters-arising-by-eno-iyamba-esq/> (accessed 11 December 2019).

113 Secs 31, 32, 33 & 293 Cross River State Administration of Criminal Justice Law 16, 2016.

114 Secs 15, 28 & 467(2) Cross River State Administration of Criminal Justice Law 16, 2016.

115 O Kehinde 'Why Agba Jalingo is still in detention – Governor Ayade', <https://dailystar.com/why-agba-jalingo-is-still-in-detention-governor-ayade> (accessed 9 December 2020).

116 C Ukpong 'Court grants Agba Jalingo bail', <https://www.premiumtimesng.com/news/headlines/377231-just-in-court-grants-agba-jalingo-bail.html> (accessed 4 December 2020).

117 Ugbe, Agi & Ugbe (n 95) 75-78.

118 Y Akinseye-George *Introductory notes on the Administration of Criminal Justice Act 2015* (2017) 1.

119 [2017] 11 NWLR (Pt 1575) 157.

Another factor that could negatively impact on the realisation of the objectives of the ACJA, resulting in unlawful detention, is the springing of surprises on the defendant by the prosecution which could lead to a delay in the trial of an accused person. Where the prosecution springs surprises on the defence counsel, this can destabilise the defence counsel, requiring him to seek an adjournment to adequately prepare and accurately respond to the surprise. Each adjournment is an elongation of the period of the trial, resulting in the continuous incarceration of the accused person while the trial is ongoing. Fortunately, this practice, which is easily resorted to by prosecution counsel especially when they have a weak case, has been outlawed by section 379 of the ACJA which is in pari materiae with section 146 of the Administration of Criminal Justice Law of Anambra state. The validity and constitutionality was upheld in *Okoye v Commissioner of Police*<sup>120</sup> and *Nweke v State*.<sup>121</sup> It is expected that trial courts will give full force to this provision of the ACJA in order to prevent prosecution counsel from resorting to the springing of surprises on the defendant during the course of a trial in a bid to delay the trial while the accused person remains in detention while his or her culpability is yet to be determined.

It is worth noting that while the ACJA is not applicable to proceedings before the court martial, it is applicable to proceedings before quasi-judicial tribunals such as the Code of Conduct Tribunal, as was held by the Supreme Court in *Saraki v Federal Republic of Nigeria*.<sup>122</sup> Further, the ACJA has amalgamated the Criminal Procedure Act and the Criminal Procedure Code, the two procedural laws regulating criminal proceedings in Southern and Northern Nigeria, into one by repealing both by virtue of section 493 of the ACJA. Thus, from 2015 when the ACJA came into force, there is henceforth only one federal procedural criminal legislation regulating criminal proceedings in Nigerian trial courts.<sup>123</sup> The hitherto dichotomy, with its inherent difficulties, has been phased out by the ACJA and uniformity has been introduced. Apart from the difficulties arising from the dual system of procedural criminal legislation, the laws (that is, the Criminal Procedure Act and the Criminal Procedure Code) led to a steady decline in the administration of criminal justice as they had become obsolete and inadequate for the prevailing modern-day criminal realities.<sup>124</sup> Thus, the ACJA is a welcome development

120 (2015) LPELR-24675 (CA).

121 [2017] 15 NWLR (Pt 1587) 120.

122 [2016] 3 NWLR (Pt 1500) 531 578.

123 MO Imasogie, RO Adeoluwa & AO Ojekunle 'Re: Administration of criminal justice review in Nigeria: Mere revision or revolution' in Chiroma & Dadem (n 91) 334.

124 Hambali et al (n 91) 42-43.

and it is hoped that all stakeholders in the criminal justice sector will cooperate towards achieving its aims and objectives.

## 5 Conclusion and recommendations

It is clear that, even though the Constitution of Nigeria recognises the rights to freedom of movement and dignity of the person, security agencies in Nigeria more often than not violate these rights with impunity. Unlawful detention based on arrest without warrant for non-capital offences is rampant despite being bailable offences. This situation is a detraction from human decency and democratic ethos, hallmarks of a democratic society, which Nigeria claims to be. The provisions of the ACJA discussed above as well as other legislation can curb this menace if they are implemented. The Nigerian Bar Association, civil society and other human liberty groups have a role to play in ensuring the implementation of the provisions of the ACJA. Despite the laudable provisions of the ACJA, its application is limited to the federal capital territory. Therefore, it is necessary for public-spirited individuals and organisations to ensure that states that are yet to domesticate the ACJA do the necessary. Public enlightenment will help create awareness of this mechanism and even enable relations of the victims of unlawful detention to be present at the police stations or detention centres when the magistrate is conducting the monthly visit to volunteer information. This provision of the ACJA not only is innovative but a welcome panacea to the menace of continuous unlawful detention in Nigeria.

Based on the above, it is recommended that the NBA and other stakeholders in the fight for human liberty engage with the legislature of the states of the federation that are yet to domesticate the Administration of Criminal Justice Act to do so with a view to opening the channel of taking advantage of the innovation in the said Act to curb unlawful detention.

Further, in states that have domesticated the Administration of Criminal Justice Act but where the chief judge is yet to appoint a magistrate for the purpose of visiting detention centres with a view to ensuring that persons are not detained unjustly, the civil liberty stakeholders should engage the chief judge with a view to implementing the law. Where the chief judge is unwilling to perform his function, an order of mandamus should be sought and obtained compelling him to appoint a magistrate for the purpose connected with the law.

Moreover, in the locality where a magistrate has been designated to visit the detention centre, the NBA should always accompany the magistrate on all his visits in order to assist with useful information as well as to serve as an impetus for the magistrate to discharge his function without fear of intimidation or harm from the officials of the centre. There is also a need for the NBA and other human liberty organisations to sensitise the public on the availability of this right and how best to exploit it.