



## AN APPRAISAL OF THE NEW POSITION OF ADMINISTRATION OF CRIMINAL JUSTICE ACT 2015 ON HOLDING CHARGE IN NIGERIA CRIMINAL JURISPRUDENCE

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### ABSTRACT

*The right of suspect is protected before arrest, during arrest and after arrest. These rights are constitutionally and statutorily guaranteed in order to maintain the presumption of innocence of the suspect until proved guilty by a court of competent jurisdiction. The National Assembly, through the Administration of Criminal Justice Act 2015 seems to have given a nod to the holding charge practice. The primary objective of this article is to espouse the concept of holding charge vis a viz the Administration of Criminal Justice Act 2015 as it operates in Nigeria criminal justice system. The article makes reference to statutes, law reports, and law text books. The finding of this article is that the Administration of Criminal Justice Act 2015 had tactically approved holding charge to the detriment of the right of a suspect. The article recommends an urgent amendment of the relevant sections of the statute for speedy dispensation of justice to avoid any chance of the incarceration of suspect whom the constitution presumes innocent until proved guilty.*

### INTRODUCTION

The constitution of the Federal Republic of Nigeria, under Chapter IV,<sup>1</sup> has clear provisions on the rights of a suspect before arrest, during arrest and after his arrest. The relevant sections protecting the suspect include sections 35 and 36. Such protection includes that the suspect enjoys the right to be informed promptly of the offence at the point of arrest in the language that he understands and in details. He enjoys the right not to be subjected to unnecessary restraint; right not be arrested by use of excessive force; right to notification of cause of arrest; right to be brought before a court within a reasonable time. The suspect also enjoys the right to defend himself in person or by a legal practitioner of his own choice, meaning that nobody should impose a legal practitioner on a suspect. He enjoys the right to be given adequate time and facilities to prepare his defence. The suspect is also presumed innocent

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<sup>1</sup> 1999 of the Federal Republic of Nigeria.



until he is proved guilty of the charge. The suspect has the right to remain silent at the police station until he has consulted his lawyer and even in court throughout the proceedings. The suspect enjoys the right to be assisted with an interpreter without payment if he does not have sufficient understanding of the language used in the court proceedings in Nigeria and so on. All these rights are statutorily provided to protect a suspect in the administration of criminal justice in Nigeria, so that justice is not only done but seen to have been done. The primary objective of this article is to espouse the concept of holding charge *vis a viz* the Administration of Criminal Justice Act 2015 as it operates in Nigerian criminal justice system.

## CONCEPTUAL CLARIFICATION

### Who is a Suspect?

The word suspect means to have an idea that something is likely true or probably about to happen but without having definite proof thereof. In criminal law, a person who is suspected or thought to be involved in a crime is called a suspect.<sup>2</sup> The fact that a person is suspected of committing an alleged offence does not make him guilty of the offense. In the absence of concrete proof, no matter how grave, a suspicion cannot ground a conviction or take the place of legal proof. Our laws deliberately made it so to avoid the irredeemable injustice of erroneously holding a person liable just because the police officer feels suspicious whereas in fact the person suspected did not commit the crime.<sup>3</sup> Until a person is arrested or detained in connection with the commission of an alleged offence, he is charged to court to stand trial of the offence complained of; he remains a suspect in law.

### Who is an accused person or Defendant?

An accused person or defendant in a criminal matter is someone who has been formally arraigned or charged before a court of competent jurisdiction, to answer charges preferred against him by the state. The State prosecutes an accused person via the office of the Director of Public Prosecution (D.P.P.), Attorney General or the Commissioner of Police or any other person having authority to prosecute on behalf of the state.

A person initially known as suspect becomes an accused or defendant once a charge is preferred against him and he is arraigned upon the charge or information. At the arraignment stage, his freedom is restrained until the court grants him bail and he perfects the bail; that is

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<sup>2</sup> Frank Agbedo, *Right of suspects and accused person under the Nigerian Criminal Law* (1<sup>st</sup> Edn Crown press 2009) 35.

<sup>3</sup> *ibid.*



if he meets the bail conditions. Both suspect and accused person are presumed innocent until proved guilty by a court if the prosecution is able to prove its case beyond reasonable doubt.

### **Meaning of Constitutional right**

A right is defined as power, privilege, or immunity guaranteed under the constitution, statutes or claimed as a result of long usage.<sup>4</sup> Viewed from the generic sense, right means justice, ethical correctness, and or consonance with the rules of law or the principles of morals, which approximates in essence, to the notion of the law itself.<sup>5</sup>

Some rights are called constitutional because the constitution created and recognised them. These include equality before the law, right to vote and be voted for, right to own and dispose off property. We also have human rights which a person enjoys because of being a human being, such as the right to life, freedom of movement and association.

A constitutional right is defined as the right guaranteed by the constitution.<sup>6</sup> It is a supreme document to which every member of the state pledges allegiance. It determines the rights and duties of the state, the citizens and regulates the general operation of the government of any given state. The constitution may be written or unwritten. Every member of the state, including the leaders, is subject to it. Hence, we say that the constitution is supreme and nobody is above it.

### **RIGHTS OF A SUSPECT BEFORE AND AFTER ARREST<sup>7</sup>**

We shall discuss this broad right under the following subheadings:

#### **Rights of a suspect during stop and search by the Police**

The freedom of movement of citizens of Nigeria is guaranteed by the constitution, and nobody is permitted to negate your right to liberty unless upon reasonable suspicion of commission of crime statutorily enacted.<sup>8</sup> A Police officer has a right to stop a citizen if the conduct of the fellow shows that he must have committed an offence and is avoiding being noticed. The citizen so intercepted by the Police has the right to demand the identity of the police officer before he could surrender himself for searching or questioning.<sup>9</sup> The police officer must identify himself properly by mentioning his full name, rank and the police station he is attached to. For example, 'I am sergeant Moses Oladele attached to area E police station, Festac Lagos. May I know who you are and what you do for a living and where you

<sup>4</sup> The Bill of Rights Acts of 1689.

<sup>5</sup> Frank Agbede (n2) 37.

<sup>6</sup> Black's Law Dictionary, Edited by Bryan A Garner (9th Revised edn, Thomson Reuters publishers 2004) 394.

<sup>7</sup> CFRN, 1999, s352.

<sup>8</sup> ibid ss 41 and 34

<sup>9</sup> Frank Agbede (n2) 38.



are coming from this late hour of the day?’ Having so clearly identified himself and evidenced by his service identification card, the person so accosted must give attention to the police officer. The suspect will surrender himself to be searched but may decline to say anything if the questions put to him may make him incriminate himself, and the suspect may request to consult a lawyer of his choice. Should the purported police officer fail, refuse or neglect to identify himself sufficiently, the accosted citizen has the right to refuse to surrender for any search or answer any question. The Police officer's refusal to identify himself could suggest a fake police officer or dubious one.

There is a constitutional backing not to answer a question even during stop and search but to remain silent until one consults a lawyer of one's choice. The relevant section provides that ‘Any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice.’<sup>10</sup>

There are situations where some overzealous, inexperienced, or poorly trained police officers have compelled suspects to answer questions when the suspect would have preferred to keep quiet during interrogation. It is worthy of note that where a statement is obtained by compelling a suspect to make a statement during interrogation, such statement is inadmissible in evidence and, even if admitted, carries no legal weight against the suspect. This constitutional provision was judicially affirmed in *Saidu v the State*,<sup>11</sup> where the Supreme Court held that forcefully extracted statements by law enforcement agents are not admissible. Only voluntarily made statements are admissible in evidence. The understanding here is that the suspect must enjoy his right to dignity of the human person, which implies that the police officers must not maltreat a suspect or beat him in order to extract a statement from him. The suspect must not be subjected to inhuman and degrading treatment during stop and search patrol. For a police officer to even stop and search a suspect, the officer must identify himself to the suspect by stating his name, the police station where he is attached, and also show a search warrant where applicable. Where a law enforcement agent fails to comply with these regulations, then a suspect may refuse to yield to a search move by a police officer during a stop and search operation.

### **Rights of suspects during arrest by Police officers**

The constitution protects the right to liberty of citizens. Every citizen has the right to freedom of movement, and no law enforcement agent could deprive one of this vital right except in

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<sup>10</sup> (n7) s 35.

<sup>11</sup> (1982) 4 SC 41 (266).



accordance with the constitution.<sup>12</sup> The power to arrest and detain or restrict movement must be done in accordance with the law. The right to liberty also requires that there should not be unnecessary restraints on the suspect except in a situation where it is reasonably believed that the suspect may be violent or may attempt to escape or is in a condition where the restraint is in the interest and safety of the suspect or defendant. It is a truth that the Police officer has the power of arrest against any person reasonably suspected to have committed or about to commit a crime. Still, such power must be exercised judiciously because the constitution recognizes the person's rights. The criminal justice administration system law recognises the following rights of a citizen during arrest and after arrest, and these are:

a. Right not to be subjected to unnecessary restraint

A policeman making an arrest is not encouraged to use a handcuff or chain or in any way bind the suspect unless the suspect shows signs of violence or escape or where it is in the best interest of the suspect or for his safety.<sup>13</sup> We could safely add that the practice by Police investigating officer (I.P.O.) ordering the suspect to take off his shirt so that he would not run away unnoticed is also wrong. Putting a handcuff on a suspect can alternatively be done with the court's order.

b. Suspect should not be arrested by the application of excessive force

What action required of a police officer or any law enforcement agent when making arrest is clearly provided for under the Administration of criminal justice Act.<sup>14</sup> The officer making the arrest could inform the suspect that he is under arrest, and if the suspect quietly yields himself, there should be no need for any show of power by the law enforcement agent. In a situation where the suspect resists arrest and refuses to yield himself voluntarily, then the officer making the arrest may apply force as is reasonable in the circumstances and never arbitrary use of force,<sup>15</sup> inflicting injuries on the suspect who, as we all know, is presumed innocent until proved guilty by the court after due trial.<sup>16</sup>

c. Right of the suspect to be informed promptly of the offence he is being arrested.

It is the constitutional right of a suspect to be informed within 24 hours of his arrest, the reason for his arrest in the language the suspect understands.<sup>17</sup> This constitutional provision

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<sup>12</sup> (n7) s 41 (1).

<sup>13</sup> ACJA, s 5.

<sup>14</sup> Ibid s 4.

<sup>15</sup> CC, s.298.

<sup>16</sup> (n7) S.36 (5).

<sup>17</sup> (n7) S.35 (3).



was given judicial recognition in the case of *Timothy v F.R.N.*<sup>18</sup> Promptly informing the suspect of the offence he is being arrested for is a preliminary step that must be complied with even before the suspect is taken to the court for arraignment. Similarly, the defendant must be informed in the court of the nature of charge against him in the language he understands if he cannot understand the language of the court, which is the English language in the Nigerian courts. The defendant must be given a free interpreter and be given opportunity to plead guilty or not guilty. If this mandatory constitutional provision is overlooked by a judge, then any trial conducted in such circumstances will be a nullity.<sup>19</sup> The court is entitled and must mandatorily also understand what the defendant had said in his native language if it is different from the court's language, which is English.<sup>20</sup>

d. The Suspect has the right to be brought before a court within a reasonable time.

The purpose of arresting a suspect is to interrogate him as to his involvement in a stated offence. This is called investigation in legal parlance, and where the Police or any authority who makes an arrest has reasonable ground or suspicion against the suspect, the suspect is taken to the station and asked to make statements as to his involvement in the crime. He is also admonished as to his right to remain silent and his right to consult a legal practitioner of his choice.<sup>21</sup> After the conclusion of an investigation, if there is a *prima facie* case established against the suspect, charges are preferred against the suspect, and he is made to appear before a court having jurisdiction to entertain the charges. All these processes are expected to be concluded within twenty four hours where the location of the court is within a radius of 40 kilometres and in any other case, not more than 48 hours, that is, two days at most.

e. Suspect has the right to bail at the police station or any other authority pending prosecution

The Constitution of the Federal Republic of Nigeria, 1999, Section 35 (4) and (5) made bail a suspect's constitutional right at any given police station. It is not a favour that the Police granted bail to a suspect before prosecuting him. Bail is also free because the constitution did not prescribe any payment before bail can be granted at the police station or the court levels. Not only the constitution, the Administration of Criminal Justice Act<sup>22</sup> empowers the Police to release the suspect on bail upon entering into recognisance with or without a surety for a reasonable amount of money so that the suspect would report to a named police station at a

<sup>18</sup> (2008) All FWLR (pt 402) 1138 and 1139.

<sup>19</sup> (n7) s36 (6) (a).

<sup>20</sup> *Bayo v. FRN* (2008) All FWLR (pt428) 304 and 305.

<sup>21</sup> (n7) S.36 (5) (c ).

<sup>22</sup> 2015.



particular time and place. A surety is not compulsory at all times. The essence of bail is to ensure that the suspect reports at the station for further questioning and possibly is charged to court if the investigation is concluded and there appears to be credible facts to support the prosecution of case. In *Eda v Commissioner of Police*<sup>23</sup> the court stated that the Police has to offer bail to a suspect where an investigation is ongoing or else charge him to an appropriate court.

Bail is so important that a suspect should not be refused bail as a punishment. In *Uwazurike v. Attorney General of the Federation*,<sup>24</sup> the court mentioned some criteria for granting bail to an accused person among which are: that the accused will not jump bail; that he would not interfere with proceedings; that he would not commit a further offence; the weight of charge against the an accused person.

At the magistrate court, the accused is only required to enter into a recognisance in the sum fixed by the court; it is not a requirement of the law that he should deposit money before bail is perfected. Bail is free and must be seen to be free in all practical terms. Where a magistrate to whom an application for bail has been made refused or neglected to grant bail, the application could be made to a judge of High Court who shall have the power to grant such bail. Once a court has refused to grant bail, an application for bail should be filed at the higher court, not in any court of the same co-ordinate jurisdiction.<sup>25</sup> An application for bail refused at a magistrate court cannot be applied afresh at another magistrate court; it must be made to a High court.

f. Right of the suspect to remain silent at the police station

By virtue of Section 36 (11) Constitution of the Federal Republic of Nigeria 1999, a suspect is not bound to say anything during police questioning at the preliminary stage before being charged to court. This is why it is imperative for the Police to caution the suspect by reminding him of his right to remain silent or that whatever he says may be used against him at the court of law. Even at the court in any criminal trial, the accused has the right to remain silent throughout the proceeding till judgment is pronounced.

g. The suspect / accused has a right to be given adequate time and facilities for the preparation of his defence.

<sup>23</sup> (1982) 6 NCLR 223.

<sup>24</sup> (2009) All FWLR (pt 489) 549,553.

<sup>25</sup> (2008) All FWLR (pt428) 304, 305





The right of an accused to be given adequate time and facilities to prepare his defence is germane in the rule of fair hearing in Nigeria criminal jurisprudence. The case *Udo v The State*<sup>26</sup> confirms this position. In *Ogoli v. Federal Republic of Nigeria*,<sup>27</sup> the Supreme court held that, under Section 36(6)(b-c) of the constitution, every person charged with a criminal offence is entitled not only to be given adequate time and facility for the preparation of his offence, but he is also entitled to defend himself in person or by a legal practitioner of his choice. The question now is, where a defendant or accused is kept in prison custody under a holding charge for 28 days or 40 days, assuming such an accused is a legal practitioner who desires to defend himself in person, how will he have access to proper facility and time to prepare his defence. It is not only a layman that may be charged to a magistrate court for an offence. A lawyer could also be a victim and maybe handicapped in perfecting the bail condition. This is why it is essential that the magistrate should be empowered to make an order forwarding the case immediately to a High Court for prosecution of the case, rather than the magistrate making a remand order of 14 days and further 14 days pending the arrival of the legal advice of the Attorney general of the Federation.

### **THE PRACTICE OF HOLDING CHARGE BEFORE THE ENACTMENT OF THE ADMINISTRATION OF CRIMINAL JUSTICE ACT, 2015**

Holding charge is the practice by a court in Nigeria in keeping a suspect in prison or correctional custody until the suspect will be formally prosecuted in a court having the jurisdiction to try the suspect. The advocates of holding charge justify it on the ground of necessity and expediency, not considering the life and welfare of the suspect. The suspect's constitutional right is also overlooked while keeping him in custody on the ground of a holding charge. To keep a suspect incarcerated in prison custody without trial amounts to trading off justice for expediency. Justice is the life wire of the principle of Rule of Law; so to sacrifice justice in pursuit of holding charge is like protecting the outer skin of a human being but in another way snuffing life out of the person.<sup>28</sup>

The prisoners languishing are so many in prisons, causing overcrowding and prison congestion and leading to occasional jailbreaks recorded across the country. A justice system where the Nigeria police force, with the aid of the magistrate court system, keeps a suspect for unduly longer than is constitutionally allowed, on the ground that investigation is

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<sup>26</sup> (1981) 6-7 SC 157.

<sup>27</sup> (2002)10 NSCQR( pt1) 498.

<sup>28</sup> Frank Agbede (n5) 37.





ongoing, amounts to denial of justice, breach of the right to fair hearing and breach of the right to freedom of movement. The court system cannot be used by the prosecuting authority to shield its inefficiency and laziness in conducting investigations and prosecuting the suspect at the proper court having jurisdiction to try the suspect. On this ugly trend of holding charge, Fagbohunda and Obiagwu had this to say: ‘A majority of awaiting trial detainees in our prison is held under the holding charge and may have spent up to ten years waiting to be tried. These are issues of justice if unconvicted prisoners are held for long periods of time.’<sup>29</sup>

Before the Administration of Criminal Justice Act 2015, there were no statutory bases for a suspect to be kept in custody under the holding charge. It runs foul to the rule of natural justice, equity and good conscience and should therefore be abolished. Justice delayed is justice denied. There are no case laws sustaining the practice of holding charge in Nigeria. It is submitted that rather than keeping a suspect who the constitution presumes innocent in prison under the holding charge concept, it is better to release the accused and discharge him until the prosecution is ready for their case.

There are case laws whereby a Magistrate had refused bail application for a singular reason that the Police had not completed investigation, adding that granting the suspects bail may cause the suspects to interfere with police's ongoing investigation. In *Ogor & Ors v His Worship, Kolawole & C.O.P.*,<sup>30</sup> the trial magistrate refused bail and held as follows: ‘I will refuse bail to the accused to afford the police time to conduct investigations without interference. The accused are to be remanded in prison custody.’ On further appeal to the High Court for the same bail application, the High court held that:

The reason given by the first respondent suggests that the Police had not completed investigations on the offence supposed to have been committed by the applicants before they were brought to the court. If that was the situation, it was definitely wrong of the Police to charge a person to court until they are settled in their mind of the offence committed by him and the charges to be brought against him are settled. The provision of section 32(1)(c) of 1979 constitution is clear on this. That section makes it clear that there must be a reasonable suspicion that a person has committed an offence before he is charged to court. Reasonable suspicion cannot have any other meaning than a situation where there can be reasonable inference on the part of the Police that an offence has been committed by the person that is being charged to court.

On the strength of this sound judgment, the court ordered the release of the suspects, who were then students. The court further ordered the Oyo state Commissioner of Police to tender

<sup>29</sup> Fagbohunda and Obiagwu, *Unconstitutionality of Holding charge* (the Prosecutor 2001)13.

<sup>30</sup> 1985 6 NCLR 534.



a public apology to the applicants for wrongful arrest and detention. Consequential damages were also awarded in favour of the unlawfully detained students. There are still plethora of authorities condemning holding charge and declaring it unconstitutional. Among such authorities is the case of *Adamu AKhokai v C.O.P*<sup>31</sup> wherein the court declared unconstitutional the practice of holding charge against an accused person pending the completion of police investigation.

## CONCLUSION

There is no doubt that the provisions of the Administration of Criminal Justice Act (ACJA) 2015 have made significant improvement on the rights and welfare of an accused person. However, section 293 (1) and section 296(1) & (2) that were provisions geared towards making life easier for the accused person, are in another way counterproductive, such as having an extension of remand period of a presumed innocent accused person for fourteen days twice consecutively. If the pursuit of justice is the goal of the ACJA 2015, the interest and the constitutional presumption of innocence of the accused person and speedy dispensation of justice should be and remain the prime goal of justice dispensation.

## RECOMMENDATION FOR THE AMENDMENT OF THE NEW POSITION OF ADMINISTRATION OF CRIMINAL JUSTICE ACT 2015 ON HOLDING CHARGE

Section 293 (1) is very instructive here. It provides 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.’ As if the above Section 293 (1) was not enough, surprisingly under sections 296 (1) & (2),<sup>32</sup> a magistrate is further empowered to remand and grant an extension of remand of a suspect for 14 days in three successions while waiting for the legal advice of the Attorney General of the Federation. By this provision, the suspect, who the law presumes innocent, would have been denied his right to liberty for whooping forty two (42) days. In as much as section 295<sup>33</sup> empowers the court hearing application for remand to grant bail, the problem remains that if the accused is unable to meet the bail conditions, he will remain in custody for up to forty-two (42) days, yet this suspect is

<sup>31</sup> The prosecutor. No. 1, April, 2001, 13 -14.

<sup>32</sup> Administration of Criminal Justice Act (ACJA) 2015.

<sup>33</sup> ACJA (n. 24).



presumed innocent.<sup>34</sup> We submit that the reasonable thing in law should be that, the magistrate makes an order of transfer of the case to the High Court.

In the magistrate court of Lagos state, Nigeria, several accused persons are still kept in various prison or correctional centres. Holding charge, though it appears to have received the blessing of the National Assembly by reason of section 293 (1) and section 296(1) & (2),<sup>35</sup> we suggest and recommend that the Administration of Criminal Justice Act (ACJA), 2015 sections 293 (1) and 296(1) & (2) be amended to the extent that the magistrate who lacks jurisdiction should make an order that the Police or prosecuting authority should immediately transfer the case file to the High Court or any other court having jurisdiction to try the suspect. If the Defendant/ Accused is unable to perfect his bail at the High Court, trial will proceed and he will know his fate soon. This recommendation, if accepted, is better and faster for speedy administration of justice than remanding the innocent suspect for fourteen (14) days and an extension of 14days twice while waiting for the legal advice of the Attorney General of the Federation. This extension is further delay of Justice. Justice delayed is justice denied.

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<sup>34</sup> (n.7) S.36 (5).

<sup>35</sup> ACJA (n. 24).