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Articles

i. Tackling Climate Change through Promotion of Transfer of Technology to Developing Countries: The TRIPS Agreement Option
A. A. Adedeji

ii. Rules of Engagement in Tax Audits and Investigations under the Nigerian Personal Income Tax Act of 2004
M. T. Abdulrazaq

iii. Relevance of Plea Bargaining in the Administration of Justice System in Nigeria
Oluseyi Olayanju

iv. Guarding the Seas against Invasive Aquatic Species: Responses of the Law of the Sea Convention
Bose Lawal

v. Transparency and Accountability in the Supervision of the Nigerian Insurance Industry: A Review of Statutory Provisions
Yeside Abiodun Oyetayo

vi. Lawful and Ethical Use of the Media: A Veritable Tool [illegible] in Nigeria
Maurice O. Izunwa

vii. Introducing the Tort of Wrongful Birth/Life into Nig[illegible] Section 17(1) of Child Rights Act 2003 on Reproduc[illegible]
F. A. R. Adeleke

viii. Remand Proceedings and the Right to Personal Lib[illegible] Supreme Court Decision in Lufadeju's Case
A. O. Yekini

ix. The Law for the Establishment of the Committee for Blood Transfusion and Other Incidental Matters in Lagos State: A Critique
Lateef Ogboye

x. Intestate Succession under Customary Law in Nigeria: Whither Women Empowerment?
Adetokunbo Animasaun

xi. An appraisal of the 2008 Ogun State High Court (Civil Procedure) Rules
Olusesan Oliyide & Taiwo Odumosu

xii. Are Shareholders' Claims Always Subordinated in Corporate Insolvency?
H. Y. Bhadmus

xiii. An Overview of the Practice of Sharia and its Procedure in Nigeria Courts
Iysa Ade Bello & Lateef Kelani

xiv. The Right to Health in Nigeria: Turning Policy to Reality
Omowamiwa Kolawole

xv. Carnal Knowledge in Sexual Offenses: The Criminal Liability of a Female Procurer
Okey Onunkwo & Ikenga Oraegbunam

xvi. Forced Incarceration of Children with Convicted Mothers: Africa in Focus
Gbadebo Olagunju & Kevin Mandopi

xvii. Reading Culture of Nigerian Law School Students: A Model for University Students
Harriet 'Seun Dapo–Asaju

xviii. Legal Application of *Musharakah* Mode of Finance in Islamic Banking
Olatoye Kareem Adebayo

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VIII.

Remand Proceedings and the Right to Personal Liberty in Nigeria: Revisiting Supreme Court Decision in Lufadeju's Case

A. O. Yekini[1]

Ours is an adversarial system of criminal justice which seeks to insure, through a variety of procedures, that a person's guilt or innocence will be decided fairly and openly in a judicial proceeding. But the finest procedures in the world would be meaningless if a person could be arrested in the middle of the night on vague charges and held incommunicado indefinitely.[2]

I Introduction

IT IS COMMON KNOWLEDGE THAT PERSONS alleged to have committed serious offenses are usually brought before magistrates courts, where they would be remanded in custody by an order of a magistrate pending formal charges being preferred against them.[3] Such persons could remain in custody for many years without being formally charged to court of competent jurisdiction, as could be seen in the two recent cases that came up in December 2011, where the High Court of Lagos in two separate decisions had brought to bear the urgent need to reconsider the current law and practice of "pre-charge detentions"[4] or what some refer to as "holding charge" in Nigeria.

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2 Gora J. M., *Due Process of Law* (Chicago: National Textbook Co., 1977), 35.

3 "Reform of the Holding Charge Practice in Nigeria," Nigerian Bar Association Advocacy paper (2008), www.nbaprograms.org/papers.htm.

4 I have decided to use the term "pre-charge detention," which I have found more appropriate to the subject matter, than "holding charge." It is our submission that holding charge presupposes that there is a charge

These cases involved two persons who had been in detention for a period of 1 and 12 years, respectively, without any formal criminal charge preferred against them. The court in two separate judgments had no difficulty in holding their long incarceration without trial to be a flagrant violation of their fundamental human right to personal liberty. The two decisions,[5] to say the least, have resuscitated the appetite for the clamor or against pre-charge detentions, which seemed to have been whittled down due to the Supreme Court's decision in *Lufadeju v. Johnson*[6]

In *Lufadeju's* case, one Bayo Johnson and some other persons were alleged to have committed treasonable offenses. They were brought before a Chief Magistrate's Court in Lagos for remand. They sought a judicial review of the remand order on the grounds that the remand order was a violation of their right to personal liberty. The High Court dismissed their application. Being dissatisfied with the decision, they appealed. The Court of Appeal held that, by a combined reading of s.7 (1) (b) and other relevant articles of the African Charter and corresponding provisions regarding the right to presumption of innocence, and right to be promptly charged as enshrined in the Constitution, such remand proceedings and orders were a gross violation of the appellants' constitutional right to personal liberty. On a further appeal to the Supreme Court, the apex court could not agree with the Court of Appeal. The decision of the lower court was eventually set aside.

It is surprising that the Supreme Court appeared to have approved of a system whereby suspects could be kept in detention or custody without any formal charge or limitation as to when they could remain in such custody before they are formally arraigned. Again, one wonders why the lower courts arrived at decisions that are contrary to the position of the Supreme Court in *Lufadeju's* case. The lower courts had ruled

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pending against the accused. This is what Nwadialo refers to as "provisional charge." See Nwadialo F. "Alternative to the Practice of Holding Charge in the Criminal Justice System," in *Administration of Criminal Justice and Human Rights in Nigeria*, Mohammed T. (Ed), (Abuja, National Human Rights Commission publication, 1998) 16; Ijeoma O. A., "Holding Charge vis-à-vis the Right to Liberty: Issues, Challenges And Options" (unpublished), National Workshop for Magistrates at Abuja (October 13–17, 2008). We are of the opinion that the term has been wrongly used over the years. In fact, more often than not, there is usually no charge before the court as the court does not have jurisdiction to try such cases. At best one may say the court is only informed of the alleged offense and the need to remand the suspect. This position is further supported by s.264 of Administration of Criminal Justice (Repeal and Re-enactment) Law of Lagos State 2011, where what is presented before the court is called "a request form." In essence, one may take the argument further that there is nothing like holding charge in law. But then, the term has been accepted somehow and this is what the practice is called in Nigeria. I would prefer to use "pre-charge detentions," also known as "preventive detention," as these are the terms that are globally used. Wherever these terms appear in this paper they should be understood as "holding charge." For a detailed discussion on the terminologies used to describe what we call holding charge in Nigeria, see Stella B. E. "Rethinking 'Preventive Detention' from A Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects," *Columbia Human Rights Law Review* [41:99], *2009*.

5 The decisions were given by Abiru J. in *Keita v. COP & Anor.*, suit no. LD/766m/2011 (unreported) and Akinlade J. in *Sanni v. COP and Anor.*, suit no. LD/688m/2011 (unreported). In *Keita's* case, the applicant, a Nigerien was in Lagos sometime in 2000 to sell rams. He was disposed of his valuable by some rogues and in the process of defending himself, one of the rogues was reported dead. He was arrested and taken to the Magistrate Court Yaba, where he was remanded in prison custody. He was alleged to have committed manslaughter. In 2011 he filed a fundamental right application wherein he prayed, *inter alia*, for a declaration that his continued detention for a period of 10 years without a charge before a competent court is unconstitutional and for an unconditional release. The court granted all the reliefs of the applicant and awarded the sum of N7 million as damages. In *Sanni's* case, it was a similar scenario with that of Keita's case, except that he was remanded by a Magistrate Court Yaba in December 1998. The court held that his detention for a period of 12 years without charge before a competent court is a violation of his right to personal liberty and consequently awarded a sum of N1 million against the respondents.

6 (2007) 8 NWLR (pt. 1037) 535.

that the "holding charge" as currently being practiced is a flagrant violation of an accused person's fundamental right to personal liberty, no matter the gravity of the offense. To many lawyers and human rights activists, the Court's decision in *Lufadeju* does not reflect current practice in civilized jurisdictions, where an accused person must be charged within a stipulated time, no matter the gravity of the offense. What is more, the decision is seen as being contrary to what is obtainable as international standard.[7]

II Pre-Charge Detention

Pre-charge detention can be defined as the period of time that an individual is detained prior to being charged with an offense. In the words of Agbakoba, it is "a system of bringing an accused before an inferior court that lacks jurisdiction to try him or her for the primary purpose of securing a remand order and thereafter abandon him or her in prison under the pretense of awaiting trial."[8] The detention could be in a police cell or prison upon remand order by a court. This could be differentiated from pre-trial detention. Although pre-trial detention could be used loosely to refer to pre-charge detention, technically a pre-trial detention is the time an accused person is detained in custody pending when his trial would commence. It supposes that an accused has been charged (arraigned) and perhaps is refused bail.[9]

The position of the law is that any person arrested or detained on a reasonable suspicion of having committed a criminal offense shall be brought before a competent court of law for trial within a reasonable time. This provision is a fundamental right[10] that every citizen is entitled to. It is a universal norm[11] that is supposed to be binding on every country. It is one of the basic guaranteed rights both at the national and international spheres.

The Constitution provides thus:

> Any person who is arrested or detained in accordance with subsection (1) (c) of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of—
>
> a. two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or
> b. three months from the date of his arrest or detention in the case of a person who has been released on bail, he shall (without prejudice to any further proceedings that may be brought against him) be

7 See note 42 *infra*.

8 Agbakoba O., "Criminal Justice Reform and Challenge of Holding Charge" (n.d.), www.nigerianbar.org/a/publications/articles/oa/list_of_articles.doc.

9 This is common in very serious cases like murder, armed robbery and other offenses that carry life imprisonment or death penalty. In such cases generally, an accused person is (relatively speaking) not entitled to bail. See Doherty O., *Criminal Procedure in Nigeria: Law and Practice* (London: Blackstone Press, 1990), 127–128.

10 Fundamental rights have been defined as basic moral guarantees that people in all countries and cultures allegedly have simply because they are human beings. They are the rights without which neither liberty nor justice would exist. They are freedoms essential to the concept of ordered liberty: inherent in human nature and consequently inalienable. They are rights that belong, without presumption or cost of privilege, to all human beings. See Abiru, J. in *Keita's* case above cited, 3.

11 The idea of fundamental human rights as being universal norm is entrenched in the Universal Declaration of Rights 1948 and all countries are expected to enact laws that would enforce the provisions of the declarations.

> released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.[12]

The Constitution has not left us in doubt as to what a reasonable time is. It goes ahead to define "reasonable time" as:

> a. in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of 40 kilometers, a period of one day; and
>
> b. in any other case, a period of two days or such longer period as in the circumstances may be considered by the court to be reasonable.[13]

Similarly, the African Charter on Human and Peoples' Rights provides that:

> Every individual shall have 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 detained.[14]

The International Covenant on Civil and Political Rights (ICCRR) offers the same standard:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.[15]

From the provisions of the Constitution, it is crystal clear that what the law envisages is that a suspect shall be given fair and prompt trial. However, the situation is not the same in respect of the daily practice in our magistrates court. The magistrates court generally have jurisdiction to try virtually all offenses except those that attract the death penalty.[16] In other words, most criminal matters are instituted in this court. The High Court, needless to say has unlimited criminal jurisdiction.[17]

Generally, pre-charge detention is a product of remand proceedings in magistrates court. A remand proceeding is a process whereby a suspect is brought before a magistrate for an order to remand such suspect in detention pending when a formal charge is preferred against him.[18] In some instances, it could be pending police investi-

12 See s.35(4), 1999 Constitution (as amended).

13 *Ibid.* s.35(5).

14 See Article 6 of the Charter. The Charter has been ratified by Nigeria and re-enacted as African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, CAP A9, LFN 2004.

15 See Article 9 of the Covenant; UNTS, Vol. 999, 171, of December 16, 1966, entered into force March 23, 1976, 167 States Parties as of January 2012. Nigeria ratified the ICCRR as at 1993.

16 Magistrates' courts have jurisdiction to try both indictable and non-indictable offenses depending on the grade of the magistrate. However, a magistrate cannot try a capital offense. See for instance s.18 (3), Magistrates Court Law of Lagos State, 2009. A capital offense is one that attracts a death penalty. Examples include: Murder, see s.319(1), Criminal Code Act, CAP 38, LFN, 2004; Armed Robbery, see s.1(2)(b), Robbery and Firearms (Special Provisions) Act CAP R11, LFN. 2004; Treason, see s.37(1), Criminal Code Act, *supra*. Treachery, see s.49A, Criminal Code Act, *supra*.

17 See s.272, 1999 Constitution.

18 See *Lufadeju v. Johnson* [2002] 8 NWLR (pt. 768) 192 @ 215 (CA).

gation[19] or advice of the DPP [director of public prosecution]. Once the prosecutor has presented this information to the court, the magistrate having considered the offense and the fact that it has no jurisdiction to try the said offense, will order that the suspect be kept in custody.

The magistrate derives the power to do this by virtue of s.236 of the Criminal Procedure Act,[20] which provides thus:

> If during any proceedings before a court it becomes necessary to adjourn the hearing of same, the court may from time to time adjourn such proceedings after or without hearing the evidence, if it thinks fit, to a certain time and place, to be then appointed in the hearing of the parties or the legal practitioners representing them and if the defendant is in custody the court may admit him to bail, as in this Law provided, or by its warrant remand him to prison or other suitable place of security for any time not normally exceeding eight days, but if necessary for such longer period as the court may consider advisable, and if such remand shall not be for longer than three clear days the court may order the person in whose custody the person remanded is, or any other fit officer or person, to continue to keep the accused in his custody, and to bring him again before the court at the time appointed for continuance of the case.

In practice, more often than not, suspects are usually left in prison and in some cases some of them may never come back to court, especially where such suspects have no relatives to see to their cases. The cases of *Keita v. COP & Anor.*[21] and *Sanni v. COP &Anor.*[22] are perfect examples of such practices. This practice has led to an overcrowding of Nigerian prisons as it has been observed that the majority of inmates fall into this category.[23]

III State of the Law before *Lufadeju*

The courts, being the bastion of justice for the common man, have emphatically frowned at the practice of pre-charge detentions over the years. They have consistently declared that remand proceeding and "holding charge" syndrome are a clear violation of the

19 Generally, the police have the constitutional and statutory duty to investigate any allegation of offense and to prosecute such offenders where investigations reveal that he has a case to answer. See ss.4 and 27 of the Police Act, CAP P19, LFN 2004; *Agbi v. Ogbeh* (2005) 8 NWLR (pt. 926) 40; *Christlieb v. Majekodunmi* (2008) 16 NWLR (pt. 1113) 324; *Onah v. Okenwa* (2010) 7 NWLR (pt. 1194) 512. However, it is common practice, especially for serious offenses, for the police to rush to court to remand a suspect while investigation has *not* commenced. This practice has been judicially noticed, as seen in the case of *Onagoruwa v. State*, *infra*.

20 CAP C41, LFN 2004. The CPA's provision is *in pari materia* with the Criminal Procedure Laws of the Southern states. However, states like Lagos and Akwa Ibom have varied the application of this provision. In Lagos, a magistrate has a maximum of 60 days to remand a suspect while in Akwa Ibom it is 28 days. See s.264, Administration of Criminal Justice (Repeal and Re-enactment) Law of Lagos State 2011 and section 1 of the Criminal Procedure (Amendment) Law 2011of Akwa Ibom, respectively. Although the laws still give the magistrates power to continuously remand in any considered circumstance. Meanwhile, Yobe has been reported to have abolished the practice. See: "Yobe Abolishes 'Holding Charge,' " *Leadership Newspaper*, Sept. 14, 2009.

21 *Supra*.

22 *Supra*.

23 See Agbakoba O. and Ibe S., Travesty of Justice: An Advocacy Manual Against the Holding Charge (2004), www.nigerianbar.org/a/publications/articles/oa/travesty_of_justice.doc. For instance, on a personal visit to the Kirikiri Maximum Prison, it is discovered from the available records that there were 131 inmates that had spent between four to 11 years without any attendance in court.

fundamental rights of suspects. In *Okafor v. Inspector General of Police & Ors.*, Olotu J. held that: "Our Constitution or any other law for that matter, in force in this country does not provide for a 'holding charge' to be held like a sword of Damocles over a person."[24] Also in *Enwerem v. COP*, Onu, JCA, reiterated that "as the Constitution of the Federal Republic of Nigeria 1979 or any other existing law in force in this country does not provide for a 'holding charge,' an accused ought to be released on bail within reasonable time before trial."[25]

In the same vein, Niki Tobi, JCA (as he then was) in *Onagoruwa v. State*,[26] restated that:

> It is elementary but most vital requirement of our adjectival law that before the prosecution takes the decision to prosecute, which is a forerunner or precursor to the charge decision, it must have at its disposal all the evidence to support the charge. In a good number of cases, the police in this country rush to court on what they generally refer to as a holding charge, ever before they conduct investigations, although there is nothing known in law as a "holding charge."[27]

In *Anaekwe v. COP*,[28] Tobi, JCA, further amplified the position in *Onagoruwa* by declaring that:

> I have said it before and I will say it again that the uniquely police phraseology of a "holding charge" is not known to our criminal law and jurisprudence. It is either a charge or not. There is nothing like a "holding charge."[29]

In other words, it could be said without any iota of doubt that any form of pre-charge detention under any guise is unconstitutional and in fact the Court of Appeal was believed to have rested the whole issue in the same *Lufadeju* case when it held that:

> Before an accused is brought before the court it should be assumed that the case is ripe for hearing, not for further investigation. He must not be there on mere suspicion, which cannot be regarded as reasonable suspicion under Section 35 of the Constitution. If there can be no sensible and prima facie inferences that can be drawn that an offense has been committed, then the accused cannot be deprived of his liberty even for a second. There cannot be a "holding charge" hanging over an accused in court pending the completion of investigations into the case against him.[30]

The African Commission on Human Rights has had cause to look into pre-charge detentions as it operates in Nigeria. The court did not mince words when it held that "right to be tried within a reasonable time by an impartial court or tribunal" as guaran-

24 Suit No: FHC/L/CS/388/2002 (unreported).
25 (1993) 6 NWLR (pt. 299) 333.
26 (1993) 7 NWLR (pt. 303) 49.
27 *Ibid.* @ 107.
28 (1996) 3 NWLR (pt. 436) 320.
29 *Ibid.* @332.
30 The Court of Appeal decision was reported in (2002) 8 NWLR (pt. 768) 192.

teed by Article 7(1) (d) of the African Charter is reinforced by its resolution on fair trial, according to which persons "arrested or detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within reasonable time or to be released."[31] Furthermore, it was the position of the court that "it constitutes an arbitrary deprivation of liberty within the meaning of Article 6 of the African Charter to detain people without charges and without the possibility of bail; in this particular case against Nigeria, the victims had been held in these conditions for over three years following elections."

IV Supreme Court in *Lufadeju v. Johnson*: An Appraisal

The applicants with some other persons were arrested and detained at the Police Criminal Investigation Department, CID, Alagbon Lagos on Jan. 12, 1997 for the offense of treasonable felony. They were arraigned before the Chief Magistrate's Court in Yaba. The applicants' sought bail, but the magistrate/appellant said she had no jurisdiction to entertain the application for bail, and remanded the respondents in custody. As a result of this refusal of bail and the remand in custody, the applicants sought a judicial review in the High Court by filing a motion on notice pursuant to Order 1, Rule 2 and 6, and Order 3 of the Fundamental Rights (Enforcement Procedure) Rules 1979. The learned judge ruled that by virtue of Section 236 (3) of the Criminal Procedure Law, the magistrate was authorized to remand persons who may have been arrested for indictable offenses. Dissatisfied with the decision, the applicants went to the Court of Appeal, which in turn allowed the appeal. The respondents then appealed to the Supreme Court, having been aggrieved by the decision of the Court of Appeal.

Two issues were formulated before the court. The first was whether the proceedings before the Chief Magistrate was a remand proceeding or an arraignment and the second was whether or not Section 236 (3) of the Criminal Procedure Law is in direct conflict with Section 32 of the 1979 Constitution (now Section 35 of the 1999 Constitution). The Supreme Court held that the proceeding before the Chief Magistrate was not an arraignment as the plea of the accused person was not taken and that the section in question is not in conflict with the Constitution.

The decision of the court was the greatest shocker of the decade for human rights lawyers in Nigeria.[32] While everyone was expecting the Supreme Court would have the opportunity of putting an end to pre-charge detentions by considering the constitutionality or otherwise of the practice, the Court dashed hopes by rather holding that remand proceeding is not a violation of the Constitution.

Possible justification for this decision of the Apex Court?

It is the view of this writer that perhaps the apex court arrived at the decision which obviously appears as a judicial heresy due to some circumstantial factors surrounding the

31 See: ACHPR, *International Pen and Others v. Nigeria*, Communications Nos. 137/94, 139/94, 154/96 and 161/97, decision adopted on Oct. 31, 1998, paras. 83–84 of the text as published at http://www1.umn.edu/humanrts/africa/comcases/137-94_139-94_154-96_161-97.html accessed Dec. 23, 2011.

32 Nigerian Bar Association Advocacy Paper titled "Reform of Holding Charge Practice in Nigeria," 2008, www.nigerianbar.org/a/publications/articles/oa/list_of_articles.doc.

said case which made it peculiar and strange in nature. Such peculiarities are highlighted below:

Firstly, it must be observed that the applicants at the lower court have created some kind of confusion by combining judicial review and fundamental human right procedures. In other words, one cannot satisfactorily say whether the applicants (respondent) were seeking judicial review of their denial of bail or enforcing their fundamental human rights. The implication could be seen all through the appeals as the appellate courts have proceeded and concluded the case on the basis of what transpired before the magistrate court (judicial review), whether same was a remand or an arraignment.

This has no doubt affected the outcome of the case. It is noteworthy to state that in an application for judicial review, particularly as it affects the main procedure employed by the applicants, the court is only bound to look at the records to see if the trial court has acted according to law. Certiorari is one of the prerogative writs which main function is to ensure that inferior courts or anybody entrusted with the performance of judicial or quasi-judicial functions keeps within the limits of the jurisdictions conferred upon them by the statutes which create them.[33] Hence, the Supreme Court may not be blamed really for its decision as all it had done was to merely confirm the power of the magistrate to remand according to the provisions of the enabling statute. This is evident from the Court's admonition to the respondent that a proper course would have been to appeal against the decision of the magistrate or apply to the High Court for bail. The Court, per Akintan, JSC (as he then was), opined thus:

> The judicial process open to the respondent was to apply to the High Court for bail and present a good case in support of his request before the High Court. The respondent did not avail himself of the opportunity open to him by law to apply to a High Court for bail. Rather, he chose to challenge the legality of the entire system which he now termed as "holding charge" or any other name.[34]

Again, the court rightly, in my opinion frowned at the action of the applicants in suing the magistrate personally. This writer agrees with the opinion of the Court that a magistrate could be wrong in the interpretation of the enabling laws, but that should not give rise to an action in damages. Should this trend be allowed, it would be an impediment to the efficient and effective administration of justice. Nevertheless, without prejudice to the above submission, one would have expected the Supreme Court to have treated the case differently as it implicated the citizen's fundamental human right. More so when the applicants at the trial court had come under the Fundamental Enforcement Procedure Rules and had sought, *inter alia*, to challenge the constitutionality of the remand order. The constitutionality of the enabling statute[35] has been put in issue as evidenced from the second issue for determination before the apex court. As a result, the case ought to have been heard by a panel of seven rather than five justices.[36] This appears to be a fundamental error.

33 *Lagos State Judicial Service Commission v. Kaffo* [2008] 17 NWLR [pt. 1117] 525.

34 *Lufadeju v. Johnson*, *supra* @ 566.

35 That is, s.236 of the Criminal Procedure Law of Lagos State.

36 See s.234 of the Constitution, supra. The following are the justices that constituted the panel: Aloma Mariam

Without even going into the merit or otherwise of the decision, one would have expected the Court to have given a robust decision with an extensive analysis of the issues raised in the case and the authorities that have previously nullified such proceedings.[37] It is a matter that sought to test the constitutionality of a state law, and in no less a matter bordering on fundamental human right of the citizens. Rather, with due respect to their lordships, the court merely dismissed the issue with "a wave of the hand," as it were. The reasoning of the court was given per Mukhtar, JSC thus:

> I do not see that there is conflict between the provision of Section 236 (2) of the criminal law *supra* and the provisions of section 32 of the Constitution *supra*. The fact is, there was strong suspicion that the respondent and some others have committed an indictable offense—to wit, treason. After their arrest by the police, there was the need to properly and lawfully keep them in custody, and the only way to do this was to take them to a magistrate court, who would in turn remand them in custody. They couldn't possibly continue to remain in police custody without the order of a court. Police investigations sometimes take time, and sometimes there is the fear of a likelihood of continued committal of the same or other offenses. There is also a likelihood of interference with investigations. Whilst this process continues or is concluded, the legal advice of the Ministry of Justice is sought.[38]

It is submitted with due respect to their lordships that this attitude of the court was not encouraging to issues of importance as the constitutionality of a remand proceeding. Aside from this, one would have expected the revered Hon. Justice Niki Tobi, JSC (as he then was), with all respect, to have developed on his dictum in *Onagoruwa*[39] and *Anaekwe*,[40] where he condemned remand proceedings in strong terms. His lordship abandoned this lofty idea and voted in support of the constitutionality of remand proceeding.

While it is admitted that there are some challenges being faced by the prosecutors,[41] especially the police, in the performance of their duty, particularly as it relates to serious crimes, it is submitted that this cannot be the basis for allowing them to keep suspects *ad infinitum*. Therefore, the reasons given by the apex court do not sound convincing enough. The Court ought to have taken cognizance of the injustices usually occasioned by the practice and arrived at a pragmatic solution, rather than allowing pre-charge detentions because of the lapses of the state. It is trite that justice is not a one-way traffic. It is for the state, the accused person and, of course, the society.

There is no doubt that the *Lufadeju* decision is not a good one for our democracy. It does not take cognizance of the obligations of the government under international law through the ratification of the African Charter on Human and Peoples' Rights and other international soft laws guaranteeing the fact that a suspect must not be arbitrarily

Mukhtar, Idris Legbo Kutigi, CJN, Niki Tobi, Sunday Akinola Akintan, and Walter Samuel Nkanu Onnoghen.

37 See notes 15–21.

38 *Lufadeju v. Johnson*, 559.

39 *Supra*.

40 *Supra*.

41 Most of which have been enumerated by Mukhtar in part of the decision quoted above.

detained but must be given a prompt trial.[42] This is also at variance with the practice in civilized democracies.[43]

The implication of the decision is that a suspect could be detained/remanded indefinitely.[44] The intendment of the framers of the Constitution is that anyone who is not charged appropriately before a court of competent jurisdiction after two months of his/her arrest, or three months in the case of one who is on bail, must be released. The Constitution has clearly set a "dead time" for the prosecution to charge an accused person appropriately. In most jurisdictions, this must be done at an average of 48 hours after an arrest, just as we have it in s.35 (5). The essence of the two- or three-month extension is to cater for police investigation and ancillary matters, if any. It is our humble submission that *Lufadeju* ought not to have been decided in disregard of this constitutional limitation. It is unthinkable that the Constitution that gives a right on one hand will withdraw same right on the other hand. A further implication of such a blanket rule could already be seen in *Keita* and *Sanni's* cases, where the suspects were remanded without any formal charge for a period of 10 and 12, years respectively.[45]

We are not unmindful of the provision of s.35 (7) of the Constitution, which excludes the application of s.35 (4) in cases of capital offense. The literal interpretation of this section, admittedly, is to the effect that anyone reasonably suspected or detained to have committed a capital offense may be detained for a longer period beyond the two or three months provided under s.35(4). However, to use the words of Dr. Hari Chand, "It

42 The government has an obligation under these conventions to give all accused persons prompt trial. No accused person must be arbitrarily detained as it has been held by the African Human Right Commission's Court. Remand without a charge is arbitrary. Although it may be argued that the Charter is subordinate to our Constitution since same had been domesticated. This position is very doubtful under international law as State parties cannot plead a municipal law to breach an international obligation. See Article 27 of the Vienna Convention on the Law of Treaties, 1969. This position was strengthened by the ICJ in *Cameroun v. Nigeria*. where Nigeria sought to invalidate the Maroua Declaration of 1975 because same had not been ratified by Nigeria as provided in the Constitution. See M. N. Shaw, *International Law*, 5th ed. (Cambridge University Press, 2003), 125. This writer is not saying the provisions of the municipal law (especially the Constitution) is not relevant; however, the Supreme Court ought to have taken cognizance of the obligations of the Government of Nigeria under various Charters and Declarations in deciding *Lufadeju*'s case. Even in the U.K., where the doctrine of parliamentary sovereignty (which is similar to our own concept of constitutional supremacy) is practiced, same has now been somehow underplayed especially in human rights cases.

43 For instance, in the U.K. the maximum period of pre-charge detention (even for the most serious offense of (terrorism cases) is 28 days. This is a temporary extension, renewed annually by statutory instrument, on the fixed statutory limit of 14 days. In the United States, under federal law (Fourth Amendment), the maximum is 14 is 48 hours, as seen in County of Riverside v. McLaughlin, 500 U.S. 44 (1991). In Australia, the maximum is 4 days. In New Zealand persons arrested must be charged "promptly." There is no fixed definition of "prompt." but case law on this question in the country indicates that pre-charge detention of more than 48 hours would not be considered "prompt." In R. V. Rogers (1993) 1 HRNZ 282 (CA), five hours' detention after arrest and prior to charge was found to be a breach of the appellant's right to be charged promptly. In France the maximum period of pre-charge detention in cases is six days; in Germany it is 48 hrs; in Italy it is four days; in Spain the closest equivalent to pre-charge detention is preventative arrest. In relation to suspected terrorist offenses, the maximum period for which a person can be detained before being released or handed over to the judicial authorities, is five days in Denmark it is three days. For a detailed analysis on pre-charge detentions in these countries and other European nations as well, see the National Council for Civil Liberties (Liberty, U.K.) Policy Paper, "Terrorism Pre-Charge Detention Comparative Law Study," July 2010, online at http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml.

44 Although Akintan in *Lufadeju* is of the opinion that remand orders are not indefinite. This is clearly not in line with what is obtainable in practice, as we would have seen from the discussions in this paper

45 Again, one instance that also depicts the ridicule and abuse of remand proceeding which the court ought to have considered is the case of *Odogu v. A.G. Federation & Ors.* (1996) 6 NWLR (pt. 456) 508, where the accused was remanded on an alleged offense of armed robbery. The charge was withdrawn after three years in detention. Immediately he was released, the police re-arrested him, and after about two years' detention in prison took him to the same magistrate where he was remanded for another one year before he sought judicial review. The Supreme Court held this a flagrant abuse of right to personal liberty.

is a well-known doctrine of constitutional interpretation that a constitution should be interpreted harmoniously so that the interpretation given to any clause, section or part may not conflict with any other clause, section or part of the constitution."[46] Udo Udoma too once professed thus:

> I do not conceive it to be the duty of this Court so to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve, where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends.[47]

It is opined that s.35 (7) only exempt capital offenses and fails to state for how long the suspects could be detained before being charged to court. It is on this note we share the position of Ajileye, J., that the framers of the Constitution couldn't have intended that a person reasonably suspected to have committed a capital offense should be detained indefinitely or should not even face trial.[48] Such an interpretation will run contrary to the whole essence of the Constitution itself[49] and would definitely result in absurdity.

V Conclusion

No serious country in the world where human rights are taken seriously allows its citizen to be detained arbitrarily under any pretext, without allowing such a person to face a formal charge before a court of competent jurisdiction within a reasonable time. Even where judges are allowed to extend pre-charge detentions, there are indices that ought to be assessed by the judge before such discretion is exercised.[50] It is important to condemn the practice whereby suspects are taken first before magistrates who have no jurisdiction to try such offenses and such magistrates do remand routinely without any assessment of the situation.

While kudos must be given to some states that have modified this horrendous practice by limiting the days to which a suspect could be remanded and imposing some duties on the remanding magistrates, it is observed that there are still some lapses in the law.[51] The legislature should give full effect to the intendment of the framers of the Constitution by fixing the maximum time a suspect could spend in detention before facing a competent court. By this, every citizen can determine when the violation of his right begins and when he could approach the court for a remedy. The only inference we

46 Chand H., *Nigeria Constitutional Law* (Modinagar, Santosh publishing House, 1981), 18.

47 *Rabiu v. Kano State* (1980) 8–11 S.C 149.

48 *Oladejo v. COP*, Suit No.HOS/MISC. 22/83 (unreported).

49 See ss. 17(2)(b) & (c), 36(1) of the Constitution, *supra*.

50 Some of this indices are regarded as "probable cause" as described in s.264 (1) of the Administration of Criminal Justice (Repeal and Reenactment) Law *supra*. This includes circumstances of the individual case, nature and seriousness of the alleged offense, reasonable grounds that the person has been involved in the commission of the alleged offense, and reasonable grounds that the person shall abscond or commit further serious offense. In practice, this is not usually followed as magistrates remand routinely. Reasonable ground that the accused commits an offense can only be seen from proof of evidence, but such is never placed before the courts.

51 This is because the provision of the law; for instance s.264 (7) of Lagos law which provides thus: "The magistrate shall extend the order to remand only if satisfied that there is a good cause shown and that necessary steps have been taken to arraign the person before an appropriate court or tribunal" could still be subject to abuse as there is no maximum period that such remand may last.

could garner from *Lufadeju* is that remand proceedings in not unconstitutional because the appellant was only detained for three months.[52]

VI Recommendations

1. It is recommended that the Supreme Court should revisit the decision in *Lufadeju* whenever the opportunity arises. The Court should give effect to the spirit and letters of s.35 (5) of the Constitution by declaring that the remand proceeding cannot extend beyond the two or three months under any circumstances.
2. It is agreed that there may be need to allow the police some period for investigation, taking into consideration the complexities involved in the investigation of some serious offenses. Hence, remand proceedings may still have some usefulness. It is suggested that states that still operate the Criminal Procedure Act/Law need to amend the remand provisions in those laws to allow a feedback mechanism in the system and of course set a maximum period for the duration of such remand orders in line with the provisions of s.35. In the alternative, the law should be amended to transfer powers to remand suspects in capital cases to the High Court, which is the only competent court that can exercise jurisdiction over such offenses.
3. There is need for better coordination between the Police and the office of the DPP. It has been observed that some remand cases are never reported to the DPP for advice and loss of files in transit have been reported.
4. The office of the DPP needs to be more proactive. It is usual practice in magistrate courts to see cases being adjourned for "DPP's advice." In some cases, the advice may never come. Hence, competent hands should be made to serve the DPP's office and there should also be deadline for treating case files.
5. The DPP's office should also maintain a good relationship with the prison service. A periodic review of the situation of inmates should be carried out to monitor the number of those who have not been properly charged to court, those awaiting trials and for how long such inmates have been in custody.

52 *Supra* @ 599.