

COVID-19 and the Shut Down of Courts in Nigeria; Any Hope for the Awaiting Trial Detainees?

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Abstract

The outrageous number of Awaiting Trial Inmates is one of the know fallouts of the weak criminal justice system of Nigeria. This phenomenon was egregiously exposed during the Covid-19 Pandemic. In the face of the lockdown and consequent shut down of courts, the fate of these inmates is largely uncertain. This article considers the fairness of this treatment by considering the pre-trial rights of defendants under the Nigerian Constitution. It recommends the issuance of Bondsmen Regulation to ease the process of perfecting bail in Nigeria. The article concludes by advocating for a complete overhaul of the Nigerian Bail System.

Keywords: criminal justice, Nigerian Bail System, lockdown, (AWT detainees).

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1.0. INTRODUCTION

It is no longer news that the Nigerian prison population is majorly composed of Awaiting Trial (AWT) detainees. In plain terms, the population is made up of detainees yet to be convicted of any offence, and whom the Constitution of the Federal Republic of Nigeria deems innocent [1]. Quite rightly, one wonders the justification for detaining this category of inmates in prison during the current shut down of courts when their cases cannot be heard.

With an impending lockdown occasioned by the Covid-19 Pandemic, the Nigerian government was urged by many to decongest the Nigerian Correctional Centers [2]. This call for the most part went unheeded. Admittedly, countries like Iran, Saudi Arabia, Tunisia, and others released a number of convicted inmates [3].

Many commentators therefore saw the government's inaction as a wistful refusal to do justice to awaiting trial detainees. But; this inaction on careful observation appears inadvertent. In the Nigerian case, the target was always (AWT detainees), which effectively made the circumstances different, and more arduous. Under what platform should the Awaiting trial detainees have been released? What would happen to their pending trial when the courts resumes and the released defendants absconds? Would justice be served to the society? This article makes to address this conundrum.

The ongoing lockdown has reawakened age long question asked of the Nigerian criminal justice system. Why are Nigerian prisons congested? Why are there so many Awaiting Trial detainees in our correctional institutions? Why have the situation inured despite the several efforts to effect change?

You must be tired of seeing the ugly statistics on prison population in Nigeria. The prisons are obviously overcrowded. Prisons with an official capacity of 50 153 inmates now accommodates more than 70, 000 inmates. Interestingly, the mix of prison congestion and the number of AWT detainees is often

¹ Section 36(5) of the 1999 Constitution of the Federal Republic of Nigeria

² Maxwell Adeleye "Tackling COVID-19 quagmire in Nigeria: Appeal to decongest correctional centers" (Vanguard News)

<https://www.vanguardngr.com/2020/04/tackling-covid-19-quagmire-in-nigeria-appeal-to-decongest-correctional-centres/> accessed on 28 August 2020

³ Afeez Hanali, "COVID-19: US, Nigeria, Iran, others release detainees, prisoners" Punch News <

<https://punchng.com/covid-19-us-nigeria-iran-others-release-detainees-prisoners/> accessed on 28 August 2020

misinterpreted. Overall, with 35 inmates per 100, 000 of national population, Nigeria has a good prisoner to national population ratio compared to several countries. Meaning that Nigerian prisons are not necessarily congested but wrongly composed by AWT detainees. If things were right, the AWT detainees should be ordinarily be detained in separate custodial centres and should not constitute the regular prison population [4].

Rule 11 of the Mandela Rules dealing with separation of categories provides thus:

The different categories of prisoners shall be kept in separate institutions or parts of institutions, taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment; thus:

(b) Untried prisoners shall be kept separate from convicted prisoners;

Nonetheless, the AWT detainees presently constitute the bulk of the prison population. According to the head of the Nigerian Correctional Service Ja'afaru Ahmed, as of 2020, there are 51, 983 AWT detainees in Nigerian prisons. They make up for a whopping 70% of the total prison population of 73, 726. This statistics paints a graphical picture of Nigerians being forcefully corrected for offences they are deemed innocent of. You remember when you were corporally punished for an offence you knew nothing of in school? This is worse.

Well, this statistics has become a quick reference point for commentators on the nadir state of the Nigerian Criminal Justice System. Just recently when the trial of the former governor of Abia State (Senator Orji Uzor) was voided by the Supreme Court, the former governor again threw jabs at the system [5]. He bemoaned the state of the system that had AWT detainees as the majority of its prison population. These numbers makes it extremely difficult to comply with the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), The Mandela Rules mandates that AWT detainees are given a preferential treatment to convicted inmates since they are deemed innocent.

The Scope of this work

This article applies to the whole of Nigeria. The bail system of the states in Nigeria are very similar because of the influence of the now repealed Criminal Procedure Act and the Criminal Procedure Code. These statutes defined the criminal procedure and the bail system in the states before they were repealed by the

ACJA. In the current dispensation, the provisions of the Administration of Criminal Justice Laws of the various states in Nigeria are similar to that of the ACJA on the subject of bail.

The author suggests that African countries with similar criminal justice systems may explore the solutions proposed in this work and implement them.

2.0. THE NIGERIAN AWAITING TRIAL CONUNDRUM

If you have been merely disgruntled with the situation, now is the time to be angry with the injustice of the situation.

An awaiting trial detainee is a defendant in a criminal charge who has been remanded in custody pending his trial in court. There are about three legal instances where this can happen. First a defendant who is arraigned in court and granted bail, will be remanded in prison pending when he perfects his bail. Secondly, a defendant who is denied bail can be remanded in prison custody pending his trial. Lastly, a defendant subjected to a statutory remand proceedings may be detained in the prison custody pending a proper arraignment. Wondering what a remand proceeding is? It is a situation where a suspect is brought before a court without the opportunity to apply for bail. In my view, this statutory remand proceedings is only a legalized form of the illegal practice of holding charge. What is holding charge? It is the case where a suspect is brought before a court that has no jurisdiction (authority) to try him. Considering the three instances, a reasonable deduction is that all awaiting trial inmates are in prison custody as a consequence of the bail system.

Unfortunately, attempts to address the Awaiting trial detainee conundrum have largely ignored the contribution of the bail system to the malaise. The Nigerian bail system is without identity and clear cut objectives. The aim of a regular bail system is threefold; to release as many defendants as possible before trial to ensure that there is no infliction of punishment prior to conviction; to minimize pre-trial flight; and to protect the community from danger. These appears to be the objectives of the Nigerian bail system. Balancing these compositing objectives in individual cases has never been easy. The system has attempted to do this by balkanizing offences into three major categories viz capital offences, felonies other than capital offences, misdemeanors and simple offences. Plainly speaking capital offences are offences punishable with death, felonies incur a prison term exceeding three years, misdemeanors incur a prison term exceeding six months but not more than three years, and simple offences are offences other than felonies or misdemeanors.

For each of these categories the system lays down certain rules to determine; if and when to grant bail; and the bail conditions if bail is granted. For instance the law is trite that capital offences are not

⁴ See the Mandela Rules

⁵ Halimah Yahaya, "Orji Kalu speaks after release from prison" Premium Times <<https://www.premiumtimesng.com/news/top-news/391967-orji-kalu-speaks-after-release-from-prison.html>> accessed on 28 August 2020

bailable except under exceptional circumstance, whereas bail in “felonies other than capital offences” is as of right except certain grounds for denial exists. This shows the attempt to balance the right of the defendant to his liberty, the safety of the community and the likelihood that the defendant would abscond.

This methodology of balancing competing interest by categorization of offences is fraught with challenges. First it is relatively easy to arrest suspects in Nigeria and tag them with serious offences. These suspects will inevitably be subject to the rules of bail for that category of offence [6]. Also, the relegation of the actual evidence against a defendant and the “likelihood of conviction” as determining factors for if/when to grant bail is worrisome. It does not appear a fair balance of the three objectives of a bail system.

The total number of AWT detainees in Nigeria is largely made up of defendants charged under the last two categories of offences (felonies other than capital offences, and misdemeanor and simple offences). Theoretically, under the offences balkanization methodology, majority of these defendants should get bail. It is a safe conclusion therefore that they are indeed on bail. So why do they make up the bulk of the AWT detainees in Nigerian prisons?

Perfecting bail is one major reason for the high number of AWT detainees in Nigeria. Perfecting bail is the process of meeting the conditions of bail set by a court to the satisfaction of that court. Bail is granted in Nigeria based on certain conditions. A defendant may be asked to meet those conditions himself (self-recognizance) or he could be asked to provide sureties. In most cases a defendant is asked to present sureties to meet certain conditions in addition to personally meeting similar conditions. The defendant and his sureties must meet these conditions to the satisfaction of the courts before his release on bail.

Research shows that meeting bail conditions is usually an uphill task for both the defendant and his sureties [7]. The usual conditions imposed by the courts are the opening of a bail bond by the defendant and his surety. As for the surety, he must be a tax paying relative of the defendant, usually a civil servant of a very senior cadre, or with reasonable means of income or gainful employment. In most cases, the surety must

own a landed property within the court’s jurisdiction. Lastly, the home address of the surety will be verified. It is thought that the goal of these qualifications for a surety, is to ensure that the surety can be relied on to produce the defendant if he is absent from his trial.

By a cursory observation, one is sure to notice that not many defendants can meet these conditions. Even more doubtful where they are asked to produce more than one surety as is usually the case. The singular condition that sureties must be relatives of defendants is a daunting one. Typically, intrepid relatives of defendants suddenly develop cold feet for participating in the bail system, and for good reasons. Experience shows that the harassments faced by sureties when defendants absconds, is ugly. Another challenge to using relatives as sureties, is the fact that there are several AWT detainees in prison who are not in touch with their relatives. One reason for this is the zigzag and haphazard method of arresting suspects in Nigeria. Another reason is the continuous immigration of Nigerians to cities without adequate plan or destination. These two scenarios makes it difficult in some cases, to have relatives around during trial or arraignment as potential sureties.

3.0. INJUSTICE OF THE NIGERIAN BAIL SYSTEM

By now you must be wondering if there is a way out. For the difficulty in finding reliable and suitable sureties, the usual way out, is to procure the services of professional sureties for a fee. Even this seemingly pleasant solution has its challenges. First, their services are expensive. Secondly, the courts have increasingly frowned on their use for good reasons. The courts will disqualify a surety whom it deems a professional.

So you have a lot of defendants granted bail but without sureties

Even when sureties are available, the entire perfection of bail is an unnecessarily complex process. For the most part it is unregulated. It involves the interview of the defendant and his sureties by the court to ensure that they meet with the bail terms. Where they qualify, their addresses must be verified, and finally when the release warrant is signed, the warrant must be taken to the prison officials. So much time and money is spent on these processes. Unfortunately, the absence of clear rules for perfection further complicates the process. It leaves the defendants and their sureties open to exploitation.

Any hope for AWT Detainees?

Why certain maladies in the system may have been allowable before the Covid-19 pandemic, they are no longer permissible. The reason is obvious. Before the courts were shut down, awaiting trial inmates could look forward to their day in court. Their day in court meant that their trial could commence, and their

⁶ S. T. James and Justus Imafidon, A Review of the Nigerian Bail System and the Provisions of the Administration of Criminal Justice Act 2015, [2019] 1 LNS(A) vi

⁷ Damilola Banjo “Justice for Sale (II) : Extortion, Injustice prevail in Lagos State Courts” International Centre for Investigative Reporting < <https://www.icirnigeria.org/justice-for-sale-ii-extortion-injustice-prevails-in-lagos-state-courts/> > accessed on 28 August 2020

possible end in custody was foreseeable. It also meant that they stood a chance of release if their stalling charges were graciously struck out. But all those hopes have been dashed. Simply put, they don't know when next they will be in court.

As the courts prepare to reopen, innovative solutions must be proffered to address the injustice of this situation. Indeed the rush and the chaos that may follow as the courts reopen, may further hamper attempts to help their case. With the expected congestion of the various court's docket, getting new dates may be complicated. While it will take so much to address the court dates for prison inmates, one fast and innovative way is to compile the data of AWT detainees who have been in prison for more than the maximum term stipulated for their charge. It is hoped that this will assist the judiciary to bear their conscience of the issue, and immediately release the detainees who fall in this category. Even when this is done, the lessons of this period, and the lacunas made obvious by this period must not be ignored. The underlying issues of the Bail system must be addressed. You can see two principal issues right? Obviously, the bail system lacks affordable, available, qualified and reliable sureties; and bail perfection is laborious and ambivalent.

4. RECOMMENDATIONS

The way forward

Addressing these issues in the short term requires the immediate implementation of the provisions of the Administration of Criminal Justice Act, on Bondsmen. Section 187 of the ACJA allows the Chief Judge of the High Courts to issue a Regulation to regulate the setting up and use of Bondsmen. The section provides thus:

The Chief Judge of the Federal High Court or of the High Court of the Federal Capital Territory, Abuja may make regulations for the registration and licensing of corporate bodies or persons to act as Bondspersons within the jurisdiction of the court in which they are registered.

Section 187(5) of the ACJA provides further that; *A Bondsperson registered under section (1) of this section may undertake recognizance, act as surety or guarantee the deposit of money as required by the bail conditions of a defendant granted bail by the court within the division or district in which the bondsman is registered.*

Implementing these provisions will address fundamental challenges in the Nigerian bail system. The actual cost and process for perfecting bail will become more transparent, making it possible for eager relatives,

philanthropist and well-meaning individuals to help deserving AWT detainees. Evidently, this is the missing platform that inhibited the government from decongesting the prisons during this lockdown. They had no one to release the AWT detainees to even for a fee. Setting up Bondsmen entities will make the entire process of bail perfection faster and efficient.

It is hoped that this article draws attention to the ills of the Nigerian bail system and its adverse implications for the criminal justice system. Fixing the issues in Nigerian Bail System in the long term will ultimately require the enactment of a Bail Reforms Act, with clear cut provisions on the objectives for bail and the methodology to determine if and when to grant bail, and the terms of bail. However, until this happens, the policy makers must look towards existing provisions and explore them. The need to issue a Regulation on Bondsmen has never been more urgent.

Undeniably there are genuine fears and challenges with setting up these entities. Top of these fears and challenges are; the fear of turning justice delivery into a commercial business, the method of determining a good price for a social service such as bonds services, and creating tracing system for absconding defendants. These fears are genuine, nevertheless they should not deter the government or judiciary. They can easily be addressed by research and data analysis. A thorough research will develop an effective business model for these companies to run with. There is yet hope for the Nigerian Criminal Justice System.

Undeniably, the solutions proffered herein do not completely address the problem of prison congestion or the overall Nigerian criminal justice system. It addresses a major challenge of having AWT detainees who should be on bail as the bulk of the AWT detainees population. Employing these solutions should drastically reduce these number, and the prisons will be decongested.

It is also recommended that the Nigerian Criminal Justice System begins to utilize technology tools. In contemporary times certain surveillance and monitoring mobile applications have been developed to assist with the enforcement of bail terms, parole practices and non-custodial sentences. The author acknowledges the deontological and humane issues fraught with the use of these mobile applications. Nonetheless, he advocates for a gradual introduction and utilization of these solutions. He submits that there is a need to adapt these solutions to our local situation.