5 Bail and Criminal Justice Administration in Nigeria

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ABSTRACT

One of the fundamental rules that guide decisions during criminal justice processes in common law countries is the presumption that a suspect is innocent until his or her guilt has been established by a court or tribunal of competent jurisdiction. This presumption is enshrined in the constitutions of many countries as a fundamental right or as a requirement of due process. Consequently, the rights of suspects remain largely protected during the process of criminal justice administration, from arrest to conviction. This chapter examines the jurisprudence, and constitutional, statutory and judicial significance of bail in criminal justice administration in democratic societies. It also analyses the factors that influence bail decisions and the socioeconomic obstacles to effective and just administration of bail in African societies, with emphasis on Nigeria.

INTRODUCTION

In this chapter the key terms 'bail' and 'criminal justice administration' are defined. This is followed by an examination of the laws providing for bail, their administration, their shortcomings, the effect of pre-trial detention, its features, observations and recommendations for bail reform, and, lastly, conclusions.

In Nigeria there are two broad jurisdictions with four main sets of statutes for the administration of the criminal justice system. The first two sets of statutes – the Penal Code and the Criminal Procedure Code – are applicable in northern Nigeria, which consists of nineteen states, including the Federal Capital Territory, which is the home of Abuja, the capital of Nigeria. The Criminal Code and the Criminal Procedure Act are applicable in the southern part, which consists of seventeen states. This duality occurred as part of the colonial administration which, until the amalgamation of the north and south in 1914, administered northern and southern Nigeria as relatively distinct entities. Even afterwards, the two parallel jurisdictions have been maintained. The two sets of statutes contain similar provisions.

The hierarchies of courts are similar across the country. However, at state level, customary courts and a customary court of appeal in the south operate under customary law, while area courts and a Sharia court of appeal in the north apply the Islamic Code with a mixture of customary rules. Magistrates and high courts also cut across the country, with distinctive applicable laws (above).

At federal level, there are federal high courts and courts of appeal, the Supreme Court being the apex of all the courts in the country. Nigeria also operates a federal policing system with jurisdiction over all parts of the country. However, each state has an area-command headquarters, and zonal and divisional offices for effective and efficient operation of police functions across the nation.

DEFINITION OF BAIL

'Bail' refers to the release of a suspect from detention after arrest, pending the completion of the investigation and the trial. It is aimed at securing a balance between two competing interests. First, the state seeks to bring offenders to trial and to dispense justice. Second, the protection of the rights of citizens and the presumption of innocence dictate that no one, without justification, should be deprived of personal liberty, especially freedom of movement and association. Bail ensures that suspects are relieved of or released from detention after extracting guarantees from them (and their sureties) that they will not interfere with the criminal investigation and will be available for investigation and trial. Therefore bail plays a critical role in the dispensation of criminal justice and the protection of human rights.

Black's law dictionary (2004) defines bail as

> a security such as cash or a bond, especially security required by a court for the release of a prisoner who must appear at a future time. To obtain the release of [oneself or another] by providing security for future appearance.

Other authors have defined bail in similar terms. For instance, Senna and Siegel (1981) define bail as 'representing money or some other security provided to the court to ensure the appearance of the defendant at every subsequent stage of the criminal justice processes'. Alubo (2007) defines bail as 'setting at liberty a person arrested or imprisoned on security being taken for his appearance on a day, and a place certain'. He also states that: 'Bail is a written undertaking by an accused person and his surety or sureties, if any, conditional upon the appearance at a specified time and place to answer a criminal charge.' Doherty (1999) defines bail as 'the procedure by which a person arrested for an offence is released on security being taken for his appearance on a day and place certain'.

Although there is concurrence on the definitions on bail, its application in Africa varies a great deal within a country as well as across countries. Though bail is enshrined in the Nigerian constitution, different interpretations by the various levels of the judiciary system and deliberate manipulations – owing to unethical conduct – as well as resource constraints, affect its application.

PURPOSE OF BAIL

Although the main objective of bail is ensuring the suspect's subsequent appearance at the place and time agreed on, it serves as protection against wrongful detention while investigation and trial are on course. Okagbue (1996:5) emphasises that

> Bail serves to give life to the abstract concept of the right to liberty by acting as a reconciling mechanism whereby the defendant's interest in pre-trial liberty and security's interest in the defendant's presence at

> trial are both accommodated. Bail also serves to give substance to the presumption of innocence under which every person who is charged with a criminal offence is presumed innocent until he is proved guilty.

The effect of this presumption is that persons should not be punished until they have been found guilty by due process of law.

Oshodi (1973) connects the question of bail with the liberty of the subject, and cautions that 'if nothing is done to improve the law and practice on bail, one of the basic principles of criminal justice, the presumption of innocence, will be defeated'. The Lord Chancellor of England (1971, cited in Oshodi 1973:197) also observed that,

> It [bail] is important because it affects the liberty of the subject. It is the only example in peacetime where a man can be kept in confinement for an appreciable period of time without a proper sentence following conviction after a proper trial.[1]

WHAT IS CRIMINAL JUSTICE?

Criminal justice is a field of study that deals with the nature of crime in society, and analyses the formal processes and social agencies that have been established for crime control (Senna and Siegel 1981). The criminal justice system encompasses several institutions and actors within the executive, legislative and judicial arms of government as well as private legal practitioners. However, the legislative, police courts and prisons are the core institutions of criminal justice administration in modern states' (Alemika & Alemika 2005:5). The authors argue that:

> The Nigerian criminal justice system cannot be properly classified as a system. On the contrary it is more of an assemblage of uncoordinated institutions. Thus, the various institutions of criminal justice in the country are oriented towards the punishment of the offender and the control of the citizens. Consequently, there is minimal concern for the rights of the accused person at all levels of the system from the legislative to the prisons.

They conclude that the manifestations of the primitive philosophy in the system include the provision of harsh punishments (even for minor crimes), wide police powers, inhuman conditions of police and prison cells that were neither designed nor maintained with regard for human dignity and privacy (Alemika & Alemika 2005:197).

In the administration of the criminal justice system in Nigeria, bail arises at three points: a suspect may be granted bail by the police; the accused may be granted bail by the court; and a convict may be granted bail while awaiting his or her appeal.

BAIL BY POLICE

The Criminal Procedure Act (South), section 17, provides that whenever a person is taken into police custody without a warrant for an offence other than one that is punishable by death, any officer in charge of a police station may bring such a person before a magistrate or justice of the peace who has jurisdiction over the offence charged, within twenty-four hours of being taken into custody. Unless the offence appears to be of a serious nature, the suspect may be discharged upon entering into a self-recognition, with or without sureties, for a reasonable amount, to appear before a court at a time and place to be agreed upon. But section 484 of this act provides that where such a person is retained in custody, he or she shall be brought before a court or justice of the peace who has jurisdiction over the offence or is empowered to deal with such persons as soon as practicable, whether or not the police inquiries have been completed.

These provisions presuppose that there should be no undue detention of suspects in police custody that would constitute a miscarriage of justice while undergoing investigation.

Under sections 35(3) and (4) of the 1999 constitution, provisions for the issuance of bail are stipulated:

- Any person who is arrested or detained shall be informed in writing within twenty-four hours (and in a language that he understands) of the facts and grounds for his arrest or detention
- 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:

- 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
- three months from the date of his arrest or detention in the case of a person who has been released on bail
- he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date[2]

'Reasonable time' is defined as follows: where there is a court of competent jurisdiction within a radius of forty kilometres, a period of one day is sufficient. However, for a more distant court of competent jurisdiction, a period of two days is allocated or such longer period as may be considered by the court to be reasonable.

Many accused persons are kept in custody without bail by the police, and in many instances they are not brought before a court within the constitutionally prescribed limit of 24 or 48 hours. A study by the Nigerian Institute of Advanced Legal Studies (NIALS)[3] revealed that, out of a respondent sample of 845 accused persons, only 11.5 per cent had been released from police custody within 24 hours of their arrest. The majority (55.5 per cent) spent longer periods in police custody, ranging from a few days to one month. Almost 9 per cent of the respondents were kept in police custody without bail for more than one month. It is difficult to understand why this should be so.

The usual explanation is that it is difficult to complete investigations within the 24-hour time limit. But the law requires that when investigations cannot be completed, the suspect should be released on bail or brought before a court that may authorise continued detention or a conditional release (Okagbue 1996).

In Nigeria an arrest apparently marks the beginning of an investigation, instead of the culmination.

The study attributed this to several reasons. First, there is a lack of modern techniques and facilities for the detection and investigation of crime. Second, members of the police force are inadequately trained. As a result, arrests are often based on unsubstantiated accusations, suspicions or hunches, and the police then rely on interrogation and intimidation of the suspect and witnesses to try to elicit confessions. Because of this approach, the torture of suspects in police custody has been reported with increasing frequency.

Third, the police lack resources to perform their duties efficiently. More than 30 per cent of the police stations surveyed in the study stated that they had no transportation facilities. Even where vehicles were available, they were often broken down and in a state of disrepair. Often police officers had to pay for the servicing and repair of these vehicles from their own resources. It was not uncommon for a court to be informed by the prosecution that a scheduled arraignment cannot take place because there was no police vehicle with which to bring the suspect to the court premises (Ajomo & Okagbue 1991).

Lastly, corruption plays a large role in the denial of bail by the police. Although a notice that 'Bail is not for sale, it is your right' is conspicuously displayed in most police stations, accused persons fail to regard bail as a right. Worst still, in a country where the average adult literacy rate is 43 per cent, many accused persons cannot read this notice. Often they are told that the sum of money they are asked to pay the police is the bail required by law. They do not realise that they are paying a bribe (Ajomo & Okagbue 1991).

In addition, the police, in the guise of performing their duty, have devised a novel means of keeping suspects in custody beyond the constitutional reasonable time of one or two days. This notion, which has yet to be recognised by our criminal justice system, is called a 'holding charge'. Neither the constitution nor criminal law legislation provides for such a charge (Amadi 2000). It is brought about when the police are investigating a capital or other serious offence. In this situation the police are always faced with the constitutional provision of 'reasonable time within which to charge the matter to court' as well as their legal incapacity to grant bail to suspects when they could not be brought to court within the stipulated time. But since the police are intent on keeping suspects in detention pending investigation, the so-called holding charge is an apparent lawful response to a legal dilemma.

As a result, the police bring the suspect before a court of law, as required by the constitution. But the police tend to flock to the court of summary jurisdiction, that is, a magistrate's court, which in law is not competent to handle a capital crime. This approach has the dual function of removing suspects from police custody and putting them in prison through the instrumentality of a court of law, albeit a court of incompetent jurisdiction. By so doing, the police perceive that they are not violating the law.

A good example is the decision in the case of *Eda v the Commissioner of Police (1982),*[4] which led to changes in the administration of bail in Nigeria. In this case, the justices of the court of appeal laid down the principles for the detention of suspects:

First, when a person is arrested or detained by the police on reasonable suspicion of a crime and they are actively pursuing investigation of the matter, the duty of the police is to offer bail to the suspect and bring him to court within one or two days, as the case may be, irrespective of the sections of the Criminal Procedure Act or Police Act that the police may purport to be acting on.

Second, whether a person under arrest/detention is granted bail or not, it is the duty of police to bring any such person in their custody before a court within one or two days, as the case may be, in compliance with the relevant constitutional provisions.

Third, once the police have offered bail to an arrested or detained person, any further stay in custody by that person until he satisfies the conditions for the bail and is taken out by someone on bail cannot properly be regarded as unlawful detention under the constitution. Again, in an appropriate case, the constitutional duty of the police ends when they offer bail to a person held in custody in connection with an allegation of a criminal offence. It is not part of the duty of the police to provide the suspect with a surety to enable him realise or effectuate the bail granted him. It is equally not their duty to join or assist the suspect to perfect conditions stipulated for the bail offered him.

Finally, the police may detain the suspect until the conditions for the bail are fulfilled. They have a legal obligation to retain that person until he procures a surety or satisfies the conditions prescribed by court for his bail (Amadi 2000).

Bail by courts

Doherty (1999) states that the power of a court to admit an accused to bail depends on two factors: the court before which the accused is being charged; and the nature of the offence levelled against the accused.

Section 118 of the Criminal Procedure Act states that a person charged with any offence punishable by death shall not be admitted to bail except by a judge of the high court. Where a person is charged with a felony other than one that is punishable by death, the court may, if it thinks fit, admit him or her to bail. When a person is charged with any offence other than those referred to in the preceding subsections, the court shall admit him or her to bail, unless it sees good reason to the contrary.

The first provision stipulates the court that is to grant bail to a person accused of a capital offence. When the police arrest a suspect in this regard, they have a duty, within one or two days as the case may be, to charge him or her in the high court, which is a court of competent jurisdiction. But for inexplicable reasons, the police sometimes charge an accused in a magistrate's court. This is illegal, and if the magistrate deals with the matter, he does so without jurisdiction (Amadi 2000) (see box 1).

The Criminal Procedure Act does not expressly state the factors that must be considered by a court in granting bail. Section 118, which deals with granting bail to an accused, is silent on the issues governing admission to bail. Nonetheless, the courts in the southern states consider certain aspects in deciding whether to grant or withhold bail.[8] The first is the nature of the offence and the punishment prescribed for it. If the offence is a serious one, and carries a heavy penalty (for example a homicide case), the court may not exercise its discretion in favour of granting bail to the accused. Second, an accused person is presumed innocent until proved guilty.[9] Therefore, he or she should not be punished by being denied bail in the absence of cogent or compelling reasons.

Third, the criminal record of the accused must be taken into account. If the accused can show that he or she is a person of good character and has never been convicted of a criminal offence, the court ought to exercise its discretion in favour of the accused and admit him or her to bail.

Box 1 Selected cases and allegations of corruption

Thus, in *Wabali & Others v Commissioner of Police (1985)*,[5] on 23 October 1980 the applicants were suspected of murder. The police arrested them and put them in custody until 11 December 1980. That day the applicants were formally charged before a senior magistrate's court. The magistrate ordered that the accused be detained in prison custody. In an action challenging the jurisdiction of the magistrate to entertain a charge of murder and the legality of the detention, it was held that the court was not competent to hear the charge and that the detention was unlawful.

In *Dogo v Commissioner of Police (1980)*[6] it was held that bail should not be denied as a form of punishment. Okadigbo J stated that: 'It has been well established that bail is not to be withheld merely as punishment, and furthermore that the requirements as to bail are primarily to secure the attendance of the accused person at the trial.'

In *Eyu v The State (1988)*,[7] after enumerating other factors in deciding to grant or withhold bail, Oguntade JCA stated: 'Another important factor to be borne in mind is the criminal record of the accused and the likelihood of the repetition of the offence.'

Fourth, the possibility of the accused committing further offences while on bail must be considered. If an accused is unlikely to commit further offences while on bail, the court should exercise its discretion and admit the accused to bail. In the case of *R v Jamal*,[10] Butler Lloyd, the acting chief justice, stated this principle:

> I find that this offence is alleged to have been committed while he [the suspect] was on bail on another equally serious charge. I think that I am not putting it too strongly in saying that I should not be exercising my discretion judicially if I made an order, the effect of which would be to restore the accused for a second time to that liberty which, according to the depositions now before me, he has already abused so seriously.[11]

The fifth consideration is the possibility of interfering with the investigation of the offence. If the accused is likely to obstruct the investigation, bail will be refused. But if there is no evidence that the accused will hamper the investigation of the case, bail ought to be granted.[12]

Under the Criminal Procedure Code that applies in the northern states, the factors to be taken into consideration in deciding whether to grant or withhold bail are expressly stated in section 341(2), which provides that a court may release a person on bail if it considers that:

- By reason of granting bail, the proper investigation of the offence would not be prejudiced
- No serious risk of the accused escaping from justice would be occasioned
- No grounds exist for believing that the accused, if released, would commit an offence[13] (see box 2)

The magistrate must exercise his discretion in favour of the accused if he or she satisfies the conditions in section 341(2) of the Criminal Procedure Code. In some cases, these conditions are met because they are stated on oath before the magistrate. They are then repeated in the applicant's affidavit, which supports his or her application for bail in the high court. If the prosecution did not file a counter-affidavit, they are deemed uncontroversial. The courts should adopt a liberal approach in considering applications for bail in order not to frustrate the spirit of the constitution.

Box 2 Case evidence

In *Obekpa v Commissioner of Police (1980)*[14] the accused was charged before a magistrate's court with the offence of theft. He made an oral application for bail, and stated on oath that he would cooperate with the police and would not commit any further offences if admitted to bail, and would provide surety for his bail. On an application to the high court to be admitted to bail, the high court held that the offence committed by the accused was bail-able at the discretion of the magistrate, since it was punishable by five years' imprisonment. The applicant having met the conditions stipulated in section 341(2) of the Criminal Procedure Code, the application for bail was granted.

GRANTING OF BAIL PENDING APPEAL

In the southern states, the provisions for granting bail pending appeal are contained in the magistrate's and high court laws. For example, in Lagos State, section 58(2)(a) of the magistrate's court law of the state reads:

> Where an appellant has been sentenced to imprisonment or sent to a Borstal institution [for young offenders who are not old enough to be sent to adult prison], the magistrate shall release him or her on bail from custody on self-recognition with or without sureties and in such reasonable sum as the magistrate thinks fit, or on such other conditions for the appearance of appellants for the hearing of the appeal. However, if the appellant has previously served a sentence of not less than six months imprisonment; or if there is evidence that the appellant has been convicted previously for any offence which may have been recorded against him, the magistrate may reasonably presume that if released from custody, the appellant is likely to commit a further offence, or evade or attempt to evade justice by absconding or otherwise disappearing.

Thus, the magistrate has discretion to release the appellant from custody or not.[15]

Section 342(2) of the Criminal Procedure Code (applicable in the northern parts of the country) states:

> When a person is convicted of an offence in a court and an appeal from such court moves to the High Court; the High Court or a single judge

thereof may refer to section 341 and direct that such a person be granted bail.[16] However, persons accused of an offence punishable with death shall not be released on bail. And persons accused of an offence punishable with imprisonment for a term exceeding three years shall not ordinarily be released on bail. Nevertheless, the court may upon application release on bail a person accused as aforesaid if it considers that:

- Through granting bail the proper investigation of the offence would not be prejudiced
- There is no serious risk of the accused escaping from justice
- No grounds exist for believing that the accused, if released, would commit an offence

Despite these provisions, if it appears to the court that there are no reasonable grounds for believing that the accused person has committed the offence, and there are sufficient grounds for further inquiry, that person may be released on bail pending such an inquiry. An equivalent practice is provided for in the criminal code of the southern parts of the country.

In bail pending an appeal, an applicant must not have been convicted. Once convicted, bail is no longer a right (see box 3).

Apart from the statutory provisions guiding the conditions for granting bail pending appeal, the principles are to be gleaned from decisions by the courts.[20]

Box 3 Case evidence

In *COP v Alamu (1986)*[17] the court said that the accused was now a convict and so the presumption of innocence as provided under section 36(5) of the constitution was no longer available to him. A similar decision was reached in *Said Jamal v the State* (1996).[18] The accused had to prove special circumstances before he could be granted bail.

In *Kuti v Police (1958)*[19] the accused was convicted by a magistrate and sentenced to a term of imprisonment. He appealed against this conviction and applied for bail, pending the hearing of the appeal. The magistrate refused bail. On appeal against the order refusing bail, the appellate court held that since there was no evidence on record that the appellant fell within the provisos to section 58(2)(a) of the magistrate's court law, he was entitled to bail. Thus, the appeal was allowed, and bail was granted on a recognisance of N500 and one surety in the same sum.

The courts require that there should be clear evidence and that special circumstances warrant an appeal before they can grant application for bail on the subsisting appeal. In other words, proof must be submitted that a proper appeal has been filed, and not merely a notice of appeal. The applicant may be requested to prove that a proceeding record fee has been paid, grounds of appeal have been filed, and a filing fee has been remunerated.

The special circumstances that may warrant the granting of bail depend on the facts of each case. Bail pending appeal is granted for the ill health of the convict; the likelihood of the applicant serving a prison sentence; the prospects of the appeal succeeding; and the likelihood of the applicant serving a greater proportion of his or her term before the appeal is held. These constitute unusual circumstances in bail pending appeal. Courts also consider other situations, such as the length of sentence (Bwala 2004); the possibility of the applicant absconding, medical grounds; the applicant's conduct; and mistrial.[21]

REASONS FOR COURTS REFUSING BAIL

In a study conducted by the Institute of Advanced Legal Studies, 40 per cent of the sample of judicial officers (police and other law enforcement agencies) stated that they refuse bail because of the nature and gravity of the offence. Another 31.3 per cent said that refusal is based on the likelihood of the accused jumping bail. About 7 per cent linked refusal to the fear that the accused might tamper with investigations. About 18 per cent refuse bail when there is no surety or if they find the surety unacceptable, while 2.2 per cent said that they refuse bail because of the risk that the suspect might commit other offences. The nature and gravity of the offence are meant to be only two of the factors that are relevant to the issue of whether the accused is likely to appear to stand trial.

By distinguishing between the nature and gravity of the offence and the likelihood of the accused jumping bail, the courts have in practice elevated the former consideration to one of primary importance on its own merits. In other words, the nature and gravity of the offence are often determinants in granting bail, no matter what other factors might preclude the likelihood of flight. It is also disturbing that bail is refused in the absence of a surety or where the surety is not considered suitable.

According to the suspects who were sampled in detention, other reasons for their non-release from custody included the magistrate being on leave at the time of their arraignment and failure to request bail. Legal representation also seems to be an important factor in granting bail.

It is not correct to refuse to release an accused person or suspects on bail simply because the magistrate is on leave or there is no legal representation. After all, bail in some instances is a constitutional right. Also, legal representation is essential. Hence an accused person must be provided with legal representation by the state if he or she cannot afford it.[22] Therefore, the release on bail of an accused person should not be treated trivially.

Many defendants do not know what bail is, much less how to apply for it. Even when defendants do know, they are not familiar with the factors that the court takes into account in bail determination. They are ignorant of the arguments to use to convince the court to exercise its discretion in their favour. Indeed, many defendants are so intimidated by the court proceedings that they can barely open their mouths to take their plea.

Even when granting bail, many courts require that a formal recommendation of a 'fit and proper person' who may act as surety should be prepared and signed by a lawyer, although this is not required by law. Thus in the words of Ibidapo-Obe and Nwankwo (1992:page reference?), 'it is only suspects who use the services of lawyers … that are able to "perfect" the conditions of bail, who can secure their release'.

Section 33(6)(c) of the 1979 constitution guarantees the right of every person who is charged with a criminal offence to defend him- or herself in person or to be defended by a legal practitioner of own choice. But few criminal defendants have access to legal representation. A total of 34.5 per cent of the accused persons surveyed in the study were not aware of this constitutional right. Another 65.3 per cent did not obtain the services of a lawyer before their first appearance in court, and of those whose cases had gone to trial, 67.9 per cent were not represented by a lawyer at the trial. Various reasons were offered for this lack of representation, but the most important was the financial inability of the defendant to pay for legal services. A rather high proportion, 25.6 per cent of the respondent sample, did not obtain legal representation before their first appearance for this reason. At the trial stage, when the cost of legal services is even higher, the proportion rose to 59.1 per cent. Lack of legal representation is probably the reason that it is rare for an action to be brought for the vindication of the constitutional rights of suspects, despite the many infringements that occur (Ajomo & Okagbue 1991).

CONDITIONS OF BAIL

Bail is granted as a right in some instances. However, in some cases when a suspect is granted bail, he or she is not released because he or she is unable to comply with the conditions of bail. In the study, 20 per cent of the accused persons were granted bail by the courts, but were not released from custody for this reason (Ajomo & Okagbue 1991:68). In another study, conducted by the Constitutional Rights Project,[23] it was found that between 20 and 25 per cent of the populations in certain prisons had been granted bail, but were still being held in custody (Ibidapo-Obe & Nwankwo 1992).

The usual condition for bail is that the accused person must produce a surety or sureties who will execute a bond for the sum of money that the court or police think fit. The surety must be acceptable to the court or police. In considering the acceptability of sureties, the police and courts attach almost equal importance to the gender, age, and social standing of the proposed surety, as well as the relationship with the accused and financial standing.

Preference is almost exclusively for male sureties, although there is nothing in the law that states that a woman cannot act as a surety. Various explanations have been offered for this phenomenon. Police spokespersons have indicated that the apparent prejudice against female sureties is merely a reflection of the fact that traditionally women rarely own property, which is often required as evidence of financial standing. However, in many cases, a female surety is turned down before any inquiry is made as to whether she has property.

The police and courts are also reluctant to allow women to risk the consequences of a forfeited bond, which may include imprisonment. This paternalistic approach is unwelcome and unconstitutional. Although the inspector-general of police and the chief justice have publicly affirmed the right of women to act as sureties, the practice of denying them the chance to do so by the rank and file continues.[24]

The amount of the bail bond is also a factor in the ability of the accused to achieve release on the granting of bail. In the study conducted by the Constitutional Rights Project, it was observed that in 27 out of 30 felony cases handled in a particular magistrate's court, the average bail was set at ₦50 000 (naira) bonds for each surety. In non-felonious cases (that is, offences punishable by less than three years' imprisonment) bail was set at an average of ₦5 000 bonds for each surety.[25]

In *Eyu v State* (1988),[26] where the trial court set bail at ₦400 000, the Court of Appeal emphasised that excessive bail breaches the right to liberty contained in section 32(1) of the 1979 constitution. While ₦400 000 was clearly disproportionate in this case, the courts have not had an opportunity to lay down clear guidelines about excessive bail, since many defendants do not go on appeal. In the absence of determination by appellate courts on the proper setting of bail amounts, 'self-restraint and personal ethics' are apparently the only real controls over the improper use of bail.

The circumstances of the arrest, coupled with inadequate communication facilities, militate against the immediate release of the accused on bail. Often the suspect is picked up in the streets by the police. In many cases his or her friends or relatives know nothing of the person's plight, and the accused is unable to contact them because most of police stations and court buildings lack working telephones. Unless the accused can find someone who will physically convey a message of his or her whereabouts, he or she is likely to be arraigned without contacting anybody who might be willing to stand surety. The problem is more acute for new arrivals in town. Even when an accused person knows of sureties who would be acceptable to the court, he or she may spend several days in custody while trying to contact them (Okagbue 1996:72). However, the introduction of cellphone technology has minimised this problem.

Owing to the difficulties in quickly securing acceptable sureties, so-called charge and bail lawyers tend to hang around the court premises. For a fee they offer to stand in surety for the accused person.

When the surety requires ownership of property in the form of land, these 'professional sureties' frequently produce forged documents of title to land. This only works with the collusion of the court staff, who take gratifications for the approval of sureties, and of the lawyers who recommend them as 'fit and proper persons' to act as sureties. Should the accused person abscond, the professional surety can no longer be found and is made to forfeit the bonded sum (Okagbue 1996).

In the study, roughly 65 per cent of the judicial officers stated that professional sureties are dishonest, mislead the court, and have an adverse effect on the course of justice.

The courts rarely dispense with the requirement of sureties in order to release the suspect on self-recognition. In the study only 2.6 per cent of the sample had enjoyed this privilege and only 13.5 per cent of the lawyer respondents had ever had clients released on their own recognisance (Ibidapo-Obe & Nwanko).

The Constitutional Rights Project study found a link between the status of the prisoner and release on recognisance. Only 6 per cent of a sample of 37 judicial officers stated that they would ordinarily grant bail on self-recognition for a non-felonious offence. However, 86 per cent would do so if the suspect was a prominent citizen. Social status thus determines access to bail.

The ordinary defendant, once arrested, therefore finds it extremely difficult to secure his or her release pending trial. More significantly, an impoverished defendant is seriously disadvantaged in the quest for pre-trial release. Corruption, ignorance, misapplication of the law, lack of legal aid and the conditions surrounding the granting of bail combine to ensure that the road to pre-trial release is arduous and ill defined, and is usually trodden successfully by the well-off, the well-informed and the well- connected. It would seem that the 'law grinds the poor and rich men rule the law' (Oshodi 1973:197).

THE EFFECT OF PRE-TRIAL INCARCERATION

The National Working Group on Prison Reforms and Decongestion (2005) reported that an accused person who is not granted bail is possibly remanded in prison for months or years. Sixty four per cent of the inmates of the audited prisons were awaiting trial. Some had been waiting for between 2 and 15 years. They had been remanded for various reasons: 19 per cent of inmates awaiting trial were in prison because they could not post their bail. A small number, 3.7 per cent of awaiting-trial inmates, were there because their case files could not be found. Another 17.1 per cent were there because the investigation of their cases had supposedly not been completed. And 40 per cent were on a 'holding charge', a terminology which cannot be found in the constitution or the criminal or penal codes in Nigeria.

Inmates awaiting trial not only waste away in the prisons, but constitute the greater part of prison congestion in Nigeria. They are locked up at the expense of the government, which must maintain and sustain them while in prison.

During this period of incarceration, the accused person is supposedly not being punished. Punishment implies moral condemnation. It is an expression of society's disapproval for wrongdoing, as a result of which a person is made to undergo some form of loss of liberty or rights. However, pre-trial detainees are merely being restrained to ensure their appearance at trial. They have not yet been found guilty of wrongdoing. 'But while the purpose of this incarceration may not be punishment, the consequences to the individual may be indistinguishable from the consequences of imprisonment' (Okagbue 1996:87). As an American Supreme Court judge noted, 'Imprisonment awaiting determination of whether that imprisonment is justifiable has precisely the same evil consequences to an individual whatever legalistic label is used to describe his plight' (Okagbue 1996:88). The judge summed up the consequences of pre-trial incarceration in America:

> The imprisonment of an accused prior to trial is a rather awesome thing: it costs the taxpayers a tremendous amount of money; it deprives the affected individual of his most precious freedom, liberty; it deprives him of his ability to support himself and his family; it quite possibly costs him his job; it restricts his ability to participate in his own defense; it subjects him to the dehumanisation of prison and without a trial, it casts over him an aura of criminality and guilt (Okagbue 1996:75).

In Nigeria things are even worse. The reality of incarceration is daunting. Nigerian prisons are severely overcrowded. In a recent report the key findings were that:

- Sixty one per cent of the prisons in Nigeria were built before 1950. These buildings were made of mud blocks, and the structures are old and dilapidated. The sanitary facilities have broken down owing to the lack of renovation. The infrastructural facilities are poor, and fall below the minimum standards under international law
- Most Nigerian prisons lack basic recreational and transport facilities. Vocational and educational facilities, where they exist, are not optimally utilised, owing to the shortage of adequate and trained personnel
- Medical facilities are generally available, but inmates bear the cost of referrals or unavailable drugs through the assistance of prison officials or their relatives
- Although the quantity of food available to prison inmates is generally fair, its quality is below the minimum standard to meet their nutritional requirements
- Most of the inmates have incomplete bedding or none at all. Most inmates wear their own clothes because of inadequate uniforms
- Inmates are not separated according to offence, health or age
- Though most of the prisons in the cities are heavily overcrowded, the rest of the prisons are not so congested[27]

In these conditions, diseases such as tuberculosis, scabies, respiratory infections, malaria, typhoid, dysentery and severe malnutrition affect the inmates (Okagbue 1996:78). The 1985 Official Prison Report acknowledged an 'astronomical rise' in the death rate, which was attributed to congestion, poor sanitation, malnutrition and the lack of decent facilities.

Currently, little has improved.[28] While these conditions apply to the prison population as a whole, the plight of pre-trial detainees in most respects is worse than that of convicted prisoners, because they are not part of the permanent population. No provision is made for them in the prison regulations. This explains why they are not classified, and are not provided with the basic needs to which convicted prisoners have access, such as uniforms.

Because pre-trial inmates spend long periods awaiting trial, their clothing often becomes so tattered and torn that they exist in a state of near nudity. It is not uncommon to see these inmates being brought to court for trial half naked, starved and emaciated.

Basic prison services such as health and exercise facilities are either not provided at all or are made available to pre-trial detainees only after the primary population, that is, convicted prisoners, have been taken care of. The only area in which pre-trial detainees have an advantage over convicted prisoners is in their right to receive visitors. This may be because prison officials depend on outside help to supplement the feeding, healthcare and clothing of pre-trial detainees. The plight of the pre-trial detainee with no nearby relatives or whose relatives are too poor to be of assistance is indeed pitiful.

EFFECT ON FAMILY AND EMPLOYMENT

No matter how frequent the contact with friends and family through prison visits, pre-trial detainees suffer another consequence of incarceration: physical separation from their families. Prison visits are restricted and supervised, and conjugal visits are not allowed. The detainee's links with the community are also restricted during incarceration. Ultimately, both community and family ties may be severely affected and may disintegrate during the period of pre-trial incarceration.

If detainees were employed before arrest, a lengthy period of incarceration may result in the loss of their jobs. If they were self-employed, their businesses may fall apart. This in turn affects their ability to support their families or to pay for legal representation. While most of the accused persons in the study were low-income workers, the total loss of earnings, no matter how small, that is resultant upon incarceration has a devastating effect on the family, especially in a country such as Nigeria, which has no welfare system. The family are left destitute unless some other family member takes on the burden of looking after them.

Effect on fair trial

Incarceration deprives accused persons of the opportunity to participate in their own defence. The problems of locating witnesses, searching for evidence, and establishing a defence cannot be handled effectively from a jail cell. While defendants are guaranteed adequate time and facilities for the preparation of their defence, their detention often makes this guarantee meaningless. Thus pre-trial detention may effectively deny the accused of their right to a fair hearing under the constitution (Okagbue 1996:81).

STIGMATISATION AND EFFECT ON PERCEPTIONS OF JUSTICE

Another consequence of pre-trial detention is the stigma attached to detention. The detainee's 'good name, reputation, honour and integrity' are all threatened by incarceration (Okagbue 1996:81). In Nigeria imprisonment carries an enormous stigma.

The 'combination of stigma and loss of liberty that is embodied in incarceration during the criminal process is viewed as being the heaviest deprivation that government can inflict on an individual' (Okagbue 1996:81). All too often this stigma and loss of liberty are part of the early stages of the criminal process before there has been an adjudication of guilt. To say that offenders are not being punished, but are merely being detained, appears to be an exercise in semantics, which is certainly not appreciated by the person who has to suffer the consequences (Okagbue 1996:83).

Effect on the presumption of innocence and the ultimate verdict

The concept of the presumption of innocence operates to ensure that punishment is not inflicted before an accurate legal determination of guilt or innocence. Yet an accused person who is denied bail suffers consequences of incarceration that are equal to, and in some respects greater than, those experienced by a convicted prisoner.

Okagbue (1996) argues that pre-trial detention, unless justified by 'overwhelming necessity', cannot realistically be viewed as other than a form of punishment. The hardships of pre-trial incarceration dictate that the operation of the presumption of innocence should play a role in the pre-trial process to the extent that the bail determination must be carefully regulated to accord both substantive and procedural due process to defendants before they are detained prior to trial.

The denial of bail may not only have the same consequences as punishment, but may also affect the ultimate question of guilt or innocence in the trial process, and the type of 'real' punishment that is imposed on the accused if they are found guilty. Studies reveal that those who are in jail prior to trial are much more likely to be convicted than those who are out on bail (Okagbue 1996:88).

In addition, many people who are denied bail are later convicted because of an inaccurate prediction during the bail process that the defendant is likely to be guilty of the offence charged and therefore to flee.

CONCLUSIONS

This paper focused on operations of bail in the Nigerian criminal justice system, its purpose, conditions for granting it, weaknesses in its operations and the consequences of the lack of it. Certain observations were made:

- The laws guiding the granting of bail are scattered in various legislations, such as the Criminal Procedure Act, Criminal Procedure Code, magistrate's court laws, high court laws, court of appeal and supreme court laws, the Police Act, the Customs and Excise Act, the Immigration Act, judicial decisions and the 1999 Constitution of Federal Republic of Nigeria. These rules need to be harmonised for the effective operation of bail
- It cannot be asserted outright that the criminal justice system uses punitive approaches (which might have been some of the reasons for the problems of bail) as opposed to corrective, measures, and restoration or rehabilitation of offenders/criminals. But the legal system as received from English Common Law appears to have elements of coercion and punitive measures. The reforms and improvements that have taken place since independence in 1960 are not effective to curb the 'perils' associated with bail

- Bail is hampered by cultural and traditional practices and the discretionary nature of police powers. For example, culturally or traditionally, women are not allow to stand as sureties, even though women by nature may be more willing to offer themselves as sureties for the release of suspects or convicts in the prisons than men. This gender discrimination issue, which is unconstitutional, subtly prevails when it came to the practical applicability of bail
- The discretionary powers of police as provided in statutes and the constitution are breeding grounds for factors that affect the granting of bail. For instance, 'holding charges' and gender issues in bail constitute police discretions which do not hold ground in law
- The granting of bail is open to the exercise of a great deal of discretion by police and courts of various jurisdictions. In many cases this has resulted in abuse as a result of ignorance, corruption and misapplication of the law
- The term 'excessive bail' is not properly clarified or statutorily defined by courts or legislation to avoid the vagueness that has characterised its usage
- The length of time spent in pre-trial detention is becoming scandalous. The usage of the 'holding charge', despite its judicial condemnation, is not helpful. That as much as 40 per cent of awaiting trial inmates are held on holding charges shows our contempt for human liberty (Okagbue 1996)
- Prison conditions for pre-trial detainee and convicts are very similar, making nonsense of the concept of presumption of innocence. Nigerian prisons may currently be described as 'hell on earth', with overcrowding being rife
- Irrational use of bail conditions is currently on the increase. For example, courts ask for a certificate of occupancy (C of O) in an area where most holdings are according to customary and family ownership. Insistence on wealthy sureties in the midst of mass poverty is equally short-sighted

Recommendations

In view of these observations the authors recommend:

- There should be uniform and single legislation to deal with the granting and establishment of criteria for bail
- Men and women are equal before national and international law,[29] therefore discrimination against women in bail and other legal matters, based on

culture, tradition and gender sentiment, must be eradicated to allow for the free flow of justice

- More stringent criteria for bail and limitations of the enormous discretion currently enjoyed by the police and the courts are necessary. These imply that greater supervision of bail should routinely be granted to the police by senior police officers / the judiciary
- The term 'excessive bail' should be statutorily defined to avoid the vagueness that has characterised its usage
- Conditions of pre-trial detainees should be humane, enhance the dignity of the human being, and cater for the presumption of innocence
- There should be imaginative use of conditions for bail. Legal aid and speedy trials will go a long way towards reducing the number of pre-trial detainees
- Training and retraining of judicial and police operatives are essential

NOTES

1 Lord Chancellor of England, September 1971, in an address to the Gloucestershire Branch of the Magistrates' Association.

2 The Constitution of the Federal Republic of Nigeria (annotated) 1999, Lagos: IO Smith, Ecowatch, pp 52–56.

3 The Nigerian Institute of Advanced Legal Studies conducted a study (coordinated by M Ayo Ajomo and Isabella Okagbue in Lagos in 1988) on human rights and the administration of criminal justice. The respondents' sample was 845, drawn from various backgrounds including suspect (accused) persons in police custody/prison, legal practitioners, judges in the various courts, police, prison warders and strata of the public for citizen awareness interviews (see pp 317–364). See M Ayo Ajomo and I E Okagbue 1991, Human rights and the administration of criminal justice in Nigeria, Lagos: NIALS.

4 Nigerian Commercial Law Report (1985) (6NCLR) 424.

5 Nigerian Commercial Law Report (1985), 424.

6 Nigerian Constitutional Report (1980), 14.

7 Nigerian Weekly Law Report (pt 78) (1988), 602.

8 See the state magistrate's court law, Laws of Lagos State 1973.

9 Constitution of the Federal Republic of Nigeria, 1999, section 36(5).

10 In *R v Jamal* the accused was refused bail because he committed the offence for which he was arraigned while he was on bail for another offence.

11 Ibid, p 55.

12 In *Dantata v Police*, bail was refused because the accused offered a bribe of ₦36 000 to the police in order to retrieve evidence of commission of the offence, which was in the custody of the police.

13 See Criminal Procedure Code, chapter 42, section 341.

14 Nigerian Constitutional Report (1980), 113.

15 See magistrate's court law, Laws of Lagos State, 1973.

16 See Criminal Procedure Code, chapter 42, section 342.

17 Quarterly Law Report of Nigeria (1986), 92.

18 Nigerian Weekly Law Report (pt 472) (1996), 352, at 366.

19 Northern Region Nigerian Law Report (1958), 3.

20 Refer to case on the *State v Onwuka* (1973), 11 ECSLR 118 at 119.

21 See also A O Alubo, Modern Nigerian criminal procedure law, 2007, Makurdi: Oracle (forthcoming), pp 68–70.

22 Criminal Procedure Act, section 17; Criminal Procedure Code, section 42. Section 33(6)(c) of the 1979 (now 1999) constitution of Nigeria.

23 The Constitutional Rights Project is a non-governmental organisation that is responsible for monitoring human rights activities in Nigeria.

24 See Ajomo and Okagbue, *Human rights and the administration of criminal justice in Nigeria*, pp 69–70. The practice has not changed to date.

25 A Ibidapo-Obe and C Nwankwo, *The bail process and human rights in Nigeria*, Lagos, Constitutional Rights Process, pp 57–58.

26 Nigerian Weekly Law Report (pt 78) (1988), 602.

27 See Report of the National Working Group 2005, p 6.

28 Ibid, p 6.

29 The Nigerian Constitution 1999 (chapter IV); Declaration of Human Rights (1948); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW 1979). These and many other relevant provisions abhor discrimination.

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Republic of Nigeria Criminal Procedure Code, chapter 42.