THE DETENTION RIGHTS OF SUSPECTS AND ACCUSED PERSONS IN ENGLAND (AND WALES) AND NIGERIA:

RIGHTS DEVELOPMENT AS A WORK IN PROGRESS

A thesis submitted for the award of the degree of Doctor of Philosophy at Brunel University, London.

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ABSTRACT

This thesis presents a comparative analysis of the pre-trial process and detention practices in England and Wales, and Nigeria, and the rights therein available to arrested persons, detainees and suspects at the custodial stage of proceedings.

The thesis also attempts to understand how rights are effectively translated from theory to practice. To achieve this, this study begins, against the backdrop of the generally-accepted tripartite form of regulation, by examining the legal and institutional framework governing the detention stage and the entire pre-trial system in both jurisdictions from a theoretical perspective, before analysing the delivery and protection of the rights in practice, as well as the mechanisms in existence to facilitate a realignment or ensure a smoother delivery of the rights in practice, where a lacuna exists between the existence of the rights in theory and their protection in practice.

The study finds that rights development is a work in progress and finds that, on the theoretical level, the rights sought to be protected in both jurisdictions are essentially the same. However, there are differences in the nature of the rights as they exist and, as a result of a number of inherent shortcomings of the different frameworks and a number of attitudinal factors in both jurisdictions, the rights are not always thoroughly or effectively protected in practice. The study also finds that the clarity of the provisions which establish the rights to be protected, or the lack thereof, are of great importance in the protection of the rights in practice.

The thesis concludes by analysing the realignment mechanisms in place in both jurisdictions, including the external influence of the respective regional rights systems, and contends that the most important means of achieving the best rights' practice begins with a clear statement of the goal and a clearly delineated framework; and that despite the presence of external factors to facilitate development and realignment in an increasingly converging criminal justice world, the strongest and most efficient way to bridge the gap between theory and practice is by a strong political will and a clearly delineated internal legal and institutional framework.

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ABBREVIATIONS

ACHPR	African Charter of Human and Peoples' Rights
ACJA	Administration of Criminal Justice Act 2015
ACJL	Administration of Criminal Justice Law of Lagos State
AIJCL	American International Journal of Contemporary Research
All NLR	All Nigeria Law Reports
AU	The African Union
Banjul Charter	African Charter of Human and Peoples' Rights
Brit. J. C.	British Journal of Criminology
Cap	Chapter
CDS Direct	Criminal Defence Service Direct
CEDAW	UN Convention for the Elimination of Discrimination Against Women
CFRN	Constitution of the Federal Republic of Nigeria 1999
CLJUK	Cambridge Law Journal
CJA	Criminal Justice Act 2003
CPA	Criminal Procedure Act of the Federal Republic of Nigeria 2004
CPC	Criminal Procedure Code of the Federal Republic of Nigeria 2004
CPS	Crown Prosecution Service
Crim. L. Q.	Criminal Law Quarterly
Crim. L. R.	Criminal Law Review
DPP	Director of Public Prosecutions
DSCC	Defence Solicitor Call Centre
E&P	International Journal of Evidence and Proof
ECOWAS	The Economic Community of West African States
ECJ	The European Court of Justice
ECCJ	The ECOWAS Community Court of Justice

ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EHRLR	European Human Rights Law Review
EHRR	European Human Rights Reports
EJCCLCJ	European Journal of Crime, Criminal Law and Criminal Justice
ERA Forum	Journal of the Academy of European Law
EU	The European Union
EuCLR	European Criminal Law Review
EWCA	England and Wales Court of Appeal
FCT	Federal Capital Territory of Nigeria, Abuja
HMICFRS	Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services
IALS	Institute of Advanced Legal Studies
ICCPR	International Covenant on Civil and Political Rights
ICJR	International Criminal Justice Review
ICLQ	International & Comparative Law Quarterly
ICPS	International Centre for Prison Studies
IJLCS	International Journal of Law and Contemporary Studies
IOPC	Independent Office for Police Conduct
IPCC	Independent Police Crimes Commission
JAL	Journal of African Law
JC	Justiciary Cases
JICJ	Journal of International Criminal Justice
JPIA	Journal of Public and International Affairs
LFN	Laws of the Federation of Nigeria
MLR	Modern Law Review
MoJ	Ministry of Justice

NASS	The National Assembly of Nigeria, comprising the Federal House of Representatives and the Senate
NCR	Nigerian Criminal Cases Report
NIALS	Nigerian Institute of Advanced Legal Studies
NILQ	Northern Ireland Legal Quarterly
NPF	Nigeria Police Force
NRPSI	National Register of Public Sector Interpreters
NSCC	Nigerian Supreme Court Cases
NWLR	Nigerian Weekly Law Reports
OJLS	Oxford Journal of Legal Studies
P	Page
PACE	Police and Criminal Evidence Act 1984
POA	Prosecution of Offences Act 1985
Pol. J.	Police Journal
Pp	Pages
Pt	Part
Q	Question
RCCP	Royal Commission on Criminal Procedure
SAN	Senior Advocate of Nigeria
SC	Supreme Court of Nigeria Reports
UDHR	United Nations' Universal Declaration of Human Rights
UJLJ	University of Jos Law Journal
UKSC	Supreme Court of the United Kingdom
UN	United Nations
UNILAG	University of Lagos

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CHAPTER ONE

INTRODUCTION

1.0 PREAMBLE

This thesis conducts a comparative analysis of the detention practices in England and Wales[1] and Nigeria, and the rights available to arrested persons, detainees and suspects at the custodial stage of the criminal process. As may be common knowledge, both jurisdictions are generally recognised as common law jurisdictions, and practice an adversarial system of adjudication. To the uninitiated, and to non-comparative law academics, there is perhaps a general misconception that comparative studies or analyses are usually only conducted between two or more jurisdictions which are considered to be from different legal families.

In attempting to justify the need to compare the law and practice of two legal systems in the same broad legal family, however, the following excerpt should perhaps be considered:

> *"Comparative methodology barely calls for extended justification in an era of globalisation and increasingly cosmopolitan law…. In the field of criminal justice, self-consciously 'comparative' perspectives typically compare and contrast common law adversarial systems with their 'inquisitorial' counterparts in western European jurisdictions…. Even if legal systems within and beyond the common law family are increasingly being shaped by a global law of human rights, each*

[1] Any reference hereinafter to England, in this chapter, and indeed the entire thesis, implies a reference to both England and Wales.

> *jurisdiction will continue to make its own juridical accommodations between the demands of universal legal standards and local procedural traditions."*[2]

It derives from the above that a comparative analysis of aspects of any national legal framework need not necessarily occur between two jurisdictions that are considered to be members of the two separate legal traditions or families within which most legal systems are usually grouped: the adversarial and inquisitorial traditions,[3] as the lines differentiating between the systems are found to be increasingly more blurry as time progresses, as a result of cosmopolitanism and a global convergence of procedural elements in practice;[4] an effect which is often attributable, as shall subsequently be discussed within this thesis, to the emergence, in the mid-twentieth (20th) century, of a global quest to protect human rights, and the subsequent establishment of the different regional rights systems that presently exist.[5]

This blurring of the lines of division between the systems is to the effect that, in modern times, it is not impossible to discover jurisdictions generally considered to be within the same legal families with divergent practices or provisions relating to the same issue, and jurisdictions from separate legal

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[2] Paul Roberts and Jill Hunter, "Introduction – The Human Rights Revolution in Criminal Evidence and Procedure" in Paul Roberts and Jill Hunter (Eds.), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart, 2012), pp 4-5.

[3] See, generally, Richard Vogler, *A World View of Criminal Justice* (Ashgate, 2005)

[4] This claim has also been made by John Jackson and Sarah Summers, who argue that a common set of criminal procedure and evidence values are emerging in today's jurisprudence, beyond the typical adversarial/inquisitorial divide. See John D. Jackson and Sarah J. Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge, 2012)

[5] The United Nations, for example, was established in 1948, as was the European Human Rights System in 1959, and the African System, in its first incarnation in 1963.

families with convergent views and practices.[6] Thus, it is opined, that a comparison of specific legal provisions or practices between two or more jurisdictions within the same broad legal family is as equally justifiable as a comparison between jurisdictions from different legal traditions.

The foregoing notwithstanding, the comparison attempted across the length of this thesis ought not to be dismissed as merely a straightforward comparison of the detention practices in two jurisdictions with little or no academic value. As detailed in Chapter 1.2, below, the choice to conduct a comparative analysis was borne from the colonial relationship which existed between England and Nigeria, the developmental stages of the different regional human rights systems that both jurisdictions belong to, and the nature of the relationship between both jurisdictions and their respective regional rights systems.

[6] The power of the courts in England to draw adverse inferences from silence, for example, is provided for by Sections 34 – 37 of the Criminal Justice and Public Order Act 1994. This practice in England is convergent with the practice in Germany, which practices what is considered an inquisitorial legal tradition, but not on all fours with the practice in the United States of America, another common law jurisdiction. See, generally, John Jackson, "Re-conceptualizing the right of silence as an effective fair trial standard" (2009) ICLQ 835. Similarly, the concept of plea bargaining, previously foreign to the inquisitorial legal tradition, is now practiced in Germany. See Thomas Weigend, "The Decay of the Inquisitorial Ideal: Plea Bargaining Invades German Criminal Procedure, in John Jackson, Máximo Langer and Peter Tillers (Eds), *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška* (Hart, 2008). Dr Dimitrios Giannoulopoulos has also, in his research into the use of improperly obtained evidence in court, identified convergent practices in France and England (who have non-automatic exclusionary rules) and Greece and the United States (who have automatic exclusionary rules), despite both England and France, and Greece and the United States belonging to different legal traditions. See, generally, Dimitrios Giannoulopoulos, "L' exclusion de preuves pénales déloyales : une étude comparée des droits américain, anglais, français et hellénique" (PhD Thesis, Université Panthéon-Sorbonne (Paris I), 2009). The findings of his research have been subsumed, and form an integral part of his forthcoming monograph on improperly-obtained evidence (Dimitrios Giannoulopoulos, *Improperly Obtained Evidence in Anglo-American and Continental Law* (Hart, 2020))

In assessing the colonial relationship that existed between England and Nigeria, and in light of the fact that the criminal justice system in the latter was birthed from the system in the former, it was hypothesised that the solution or changes in policy required to address the issues and challenges faced by the latter might be found by looking at the history of the former, and how some of these challenges were addressed. Put more simply, it was hypothesised that, by studying how England addressed some of its challenges and issues with the protection of rights at the detention stage, more light might be shed on how best Nigeria might address similar challenges and issues, in light of the fact that the criminal justice system as it exists in Nigeria was birthed from the English criminal justice system.[7]

It was also discovered very early on in the research process that the legislative and statutory instruments that provided and/or established the pre-trial and detention rights in Nigeria were very frequently sparsely-worded and ambiguous, to the extent that there was no clear minimum standard for the delivery of these rights in practice, in contrast to the provisions in the legislative and statutory instruments of England, which were well-worded, clear and unambiguous. This prompted a slight adjustment of the theoretical analysis to include an assessment of the effect, or lack thereof, of the clarity of statutory provisions on the protection and delivery in practice of the rights established therein.

[7] This hypothesis proved to have merit as, as argued in chapter 3.2.2.3 below for example, the power of the police in Nigeria to prosecute offences has posed, and continues to pose, a major challenge in the protection of custodial rights in practice. This had previously been the case in England, prior to the establishment of the Crown Prosecution Service, and the subsequent removal of the powers of prosecution from the police in England.

Essentially, the comparative study conducted in this thesis was not a merely straightforward comparison between two jurisdictions within the same legal family, but sought to determine if there were any lessons to be learned from the experiences of its colonial power, by a state emerging from independence; and whether there was any effect of a lack of clarity in the statutory provisions establishing rights on the delivery and protection in practice of the said rights sought to be protected.

1.1 THE ADVERSARIAL SYSTEM AND THE NEED TO PROTECT FAIR TRIAL RIGHTS

The comparative analysis that this thesis conducts, as previously highlighted, is conducted between two jurisdictions that are members of the same broad legal family: the adversarial system and, as a precursor to the analysis, the importance of the need to protect fair trial rights in the adversarial legal tradition ought to be emphasised.

Without embarking on a full-scale historiography of the common law or tracing the origins of the adversarial trial as far as the practices which originated in the Star Chamber in the thirteenth (13) century, it is perhaps suffice to state that there is a seemingly common acceptance that England is the birthplace of the adversarial criminal process.[8]

[8] For more on the origins of the adversarial system, see, generally, Delmas-Marty, M. and Spencer, J. R. (Eds.), *European Criminal Procedures* (Cambridge, 2002), Radzinowicz, L., *A History of English Criminal Law and its Administration from 1750* (Stevens, London, 1948 – 1986); and Richard Vogler, n 3.

In its present incarnation, within the extent of the understanding of this researcher, the adversarial criminal process adopts a 'trial-centred' approach to the determination of the guilt or innocence of an accused. To practitioners of the adversarial process, the most important stage of the entire process is the trial stage, which is also where the legal tradition derives its name. The trial is held before a neutral adjudicator, usually a judge and jury,[9] and is conducted by lawyers representing both the prosecution and the defence presenting their version of the facts of the immediate case before the aforementioned adjudicator, whose role it is to determine the questions of fact and law raised by counsel on either side. Thus, the representatives of both the prosecution and the defendant are viewed as adversaries before the adjudicator.

In approaching the trial process from the adversarial perspective, and in a bid to emphasise the need for fair trial rights, there is perhaps a necessity to refer to the trial, or indeed the entire criminal process, using the metaphor of the art of pugilism. In the sport, skilled boxers of different sizes and skill sets abound, but most, if not all, competitive fights are held only between fighters within the same weight division. This is usually in a bid to ensure that fights are deemed to have been fair, and between two contestants of similar weight and strength.

[9] Mirjan Damaška has written in great detail about the significance of the division of the tribunal into judge and jury, and the concentrated character of trials in the adversarial system or, as he termed it, "day-in-court" justice. See Mirjan Damaška, *Evidence Law Adrift* (Yale, 1997). It should also be noted, however, that there are a number of jurisdictions that are considered common law jurisdictions, which do not have a mode of trial which employs a jury. After independence from England, a number of former colonies, including Ghana and Nigeria, abandoned the jury, possibly because of its association with an oppressive imperial regime. See Hans, Valerie P., "Jury Systems Around the World" (2008). Cornell Law Faculty Publications. Paper 305. http://scholarship.law.cornell.edu/facpub/305, last accessed on 15-08-2018.

By extension, therefore, for an adversarial trial to be deemed fair, the parties to the trial ought to be seemingly equal in their weight and strength, or should be allowed the same opportunity to present the weight and strength of their respective cases in equal measure. To wit, both the prosecution and defence should arguably be allowed the same time to prepare their cases, and be subject to the same freedom to conduct their case, as well as face the same restrictions to the nature and type of evidence they are able to tender before the courts. Ultimately, there must be a balance of powers and limitations available to both prosecution and defence.

The need for this balance, it is contended, is the birthplace of fair trial rights. As Vogler notes,[10] and as indeed is common knowledge, the vesting of the responsibility of prosecution of offences in the Crown or the state creates an imbalance of powers and resources available to both parties to conduct their respective cases. Thus, the restrictions placed on the prosecution, and the rights and freedoms vested in the defendant were established to further promote the quest for a balance or fairness of proceedings. As a result, the right to a fair trial is generally seen as crucial to the delivery of justice.

In the latter part of the twentieth (20^{th}) century, this right to a fair trial has been seen as extending beyond the commencement of the trial stage, to the investigative and custodial stages of proceedings or the pre-trial stage, generally. This, as has been argued several times by different authors, and before a number of courts, is essential to maintain the fairness of

[10] Richard Vogler, n 3, at p 132

proceedings,[11] In the adversarial system, as Bradley highlights, the pre-trial stage begins with an investigation stage that is "openly non-neutral but rather, at least after it has focused on a suspect, is aimed at collecting evidence that will prove his guilt."[12] Having already established that the point at which an accused person's guilt or innocence should be determined is at the conclusion of the trial, and at no point before, it therefore stands to reason that all necessary steps should be taken to preserve the accused's presumption of innocence, despite the investigative stage within the adversarial system seemingly already established in a manner that has the potential to defeat this presumption.[13]

It is important to note that a violation of the rights available at the pre-trial stage of proceedings, or a failure to provide same might not axiomatically nullify the validity or fairness of the entire criminal process, provided that redress and/or the opportunity to rectify any imbalance that might occur as a result of the accused being denied his custodial rights is sought during trial.[14]

1.2 RESEARCH JUSTIFICATION

The *raison d'être* for commencing the research for this thesis, speaking succinctly, was borne from a desire to examine the rights available to accused

[11] This has also been held in a number of cases before the English national courts and the European Court of Human rights including, most notably, in *Salduz v Turkey [2008] 49 EHRR 421*

[12] Craig M. Bradley, "Overview", in Craig M. Bradley (Ed), *Criminal Procedure: A Worldwide Study* (2nd Edition, Carolina Academic Press, 2007), xvii

[13] As shall be discussed in the next chapter, the primary investigative body in both jurisdictions under review is the police, which is a state-funded institution, which axiomatically implies an imbalance of resources

[14] In the next chapter, the effect(s) of a violation of the custodial rights available in both jurisdictions on the trial process will be considered when analyzing the individual rights.

persons and suspects at the pre-trial stage, and the extent to which the said rights were protected, primarily in Nigeria. It is commonly known amongst academics and practitioners, and the general Nigerian Public that the criminal justice system is in a general state of disrepair.[15] One of the ways this disrepair is manifested is in the slow throughput of cases through the entire process, and this, as shall be discussed subsequently, is attributable to a number of factors, including long pre-trial detention periods and long trial periods, the combined effect of which is a clear violation of the reasonable time requirement of the right to a fair trial as established by a few international treaties and conventions, including the UN Universal Declaration of Human Rights and the African Charter of Human and Peoples' Rights,[16] both of which Nigeria has ratified. The research topic was therefore borne out of a decision to discover the full extent of the effect of the rights framework and the custodial regime as a contributory factor in the general state of affairs of the criminal process in Nigeria.

The decision to make it a comparative study was greatly influenced by the general view held by several eminent comparative scholars of the importance of legal comparativism and of its effect on globalisation and the convergence of procedural elements across different jurisdictions.[17] The choice to base the comparison of the custodial regime in Nigeria with the custodial regime in England was, in addition to the obvious need to place a restriction on the

[15] Editorial, "Criminal Justice Sector: Canvassing for a Change", *Nigerian Law Times* (July 2011)

[16] Articles 10 and 7 of the UDHR and ACHR, respectively, provide for the right to a fair trial.

[17] See, for example, John D. Jackson and Sarah J. Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge, 2012), pp 3 – 29. See also, Aude Dorange and Stewart Field, "Reforming Defence Rights in French Police Custody: A Coming Together in Europe?", (2012) 16 E&P 153

scope of the research, based on two reasons: the relationship between the two jurisdictions, and the relationship between the European Human Rights System and its member states, including England.

In respect of the former, Nigeria derived its legal system from England, by virtue of its colonial past, and is viewed as the progeny of the adversarial system established and practiced therein.[18] It was thus envisioned that the research, by comparing the custodial regimes and the practices therein, would serve to illustrate how far the version of adversarialism practiced in Nigeria, albeit limited to the pre-trial stage, had departed from the English version in the fifty-eight (58) years since it gained its independence.[19] The work done is nevertheless comparative in nature, and is based on the hypothesis that rights development is a work in progress and that the legal system of Nigeria, having been greatly influenced by the colonial rule of the United Kingdom, would inevitably tread the same path as England in terms of developmental stages encountered in striving to achieve the best rights' practices. In other words, it is the hypothesis of this researcher that the steps taken, and problems encountered by Nigeria, a state emerging from independence in its quest to protect fair trial rights would be remarkably similar to those previously encountered by its former colonial power, England. It was also hypothesized, as stated earlier, that the solution to some of the issues and challenges currently being faced in protecting custodial rights in Nigeria might be found by analyzing the issues and challenges previously faced in England.

[18] See, generally, T. O. Elias, *Nigeria: The Development of its Laws and Constitution* (Stevens & Sons Ltd, 1967)

[19] Nigeria gained its independence from the United Kingdom on October 1st, 1960.

The second reason for selecting England as the base of comparison was based on the need to test the hypotheses that there is an effect of the clarity, or lack thereof, of the statutory provisions establishing rights, and that there is a significant effect of the regional rights systems on local rights practices. In respect of the first hypothesis, as stated earlier, it was discovered that the statutory provisions in Nigeria are sparsely worded, whilst the provisions in England are detailed, clear and unambiguous. In respect of the second, England's relationship with the European Human Rights System and the latter's effect on local practices, not restricted to the custodial regime, has been frequently documented and examined. Additionally, the European System is generally viewed as the most proactive regional rights system,[20] and has placed the greatest pressures for convergence of practice on its member states. By contrast, the African Human Rights System is viewed as the least developed regional system,[21] so the comparative analysis of the custodial regimes is extended to the effect of the development and proactivity of the respective regional rights systems on the local practices of both jurisdictions, taking into account the reputations of the strengths of the European and African Systems of Human Rights and their respective relationships with their member states, not limited to the jurisdictions primarily considered herein.

To summarise therefore, by way of a conclusion, the research contained and presented herein constitutes a theoretical analysis of the hypotheses that a clear and unambiguous statement of the rights available to an accused person would be delivered into practice quicker than a sparsely worded statutory

[20] Steiner, H. J.; Alston P. and Goodman, R., *International Human Rights In Context: Law, Politics, Morals* (3rd Edition, Oxford, 2007), pp 933 – 1019.
[21] *Ibid*

provision, fraught with ambiguities; and that a state emerging from independence would face the same challenges previously encountered by its former colonial ruler, and stands to draw from the experiences of the colonial state. It also seeks to assess the role and the effect of regional rights mechanisms in achieving the best detention practices within their member states.

1.3 RESEARCH QUESTIONS

In light of the aforementioned *raison d'être* behind the commencement of the immediate research, this thesis attempts to answer the following specific questions:

i. What rights do suspects have in England and Nigeria during detention before a formal charge and detention pending the determination of the case brought against them?

ii. How well are these rights observed in practice? Is there a disparity between the theoretical existence and the practical observance of these rights, and what are the factors responsible for this disparity, if any?

iii. In bridging the gap between the theoretical existence and practical observance of these rights, what is the effect of detailed and clearly stated legislative instruments in attempting to improve compliance with due process?

iv. What is the role of the regional human rights framework in achieving the best rights' practice at the custodial stage of proceedings?

v. In striving to achieve the best rights' practice, are there any lessons to be learned by a state emerging from independence from the developmental challenges faced by its former colonial ruler?

1.4 METHODOLOGY

The methodology employed in the research for this thesis was primarily doctrinal. It was not envisioned at the onset of the comparative study that analysing the relevant laws and statutory instruments that established the respective legal and institutional frameworks in both jurisdictions, as well as the available literature dealing with the subject would pose any great difficulty in answering any of the aforementioned research questions, including what rights were available to accused persons and whether any lessons could be learned from the developmental challenges of a former colonial ruler. The works of renowned experts in the fields of criminal procedure and comparative criminal law in both jurisdictions including, Cape, Jackson, Hodgson, Giannoulopoulos, Spronken, Adeyemi, Elias, Osamor, Ajomo, Okagbue, Aguda and Doherty, to mention a few, were considered.

Perhaps the research question that was envisioned as posing the toughest challenge, at the onset, of answering through a purely doctrinal study was the second question, relating to translating the rights from theory to practice, and observing the delivery of the rights to practice. Quite simply, the question was asked, can the law in practice be examined largely from a literature review? Fortunately, however, during the course of researching the topic, given the extensive literature available on the law in practice, as well as the practical

challenges stemming from protection of custodial rights in England,[22] it was the opinion and assumption of the researcher that embarking on a large-scale empirical study of the detention practices of the jurisdictions under consideration would neither be necessary nor cost-effective.

However, following the discovery of a dearth of relevant literature and other secondary sources dealing with the subject in Nigeria readily available online, two separate trips to the *locus* were required, from December 2011 to February 2012, and again from December 2012 to January 2013, in order to enable the researcher visit libraries in Nigeria in search of relevant literature. Additionally, the researcher also conducted a severely limited empirical study in January 2013. The study was intended primarily to be illusory, and shed light on some relevant information not readily available via the limited academic literature and other secondary sources considered. The methodology employed in the empirical study is explained in detail in Chapter 3.4, below.

In analysing the detention practices, the theoretical model that was employed also necessitated a study of the respective regional rights systems to which both jurisdictions belonged. Beginning with the hypothesis that rights development was a work in progress, and was usually in response to a

[22] See generally, for example, Layla Skinns, “"I'm a detainee; get me out of here": predictors of access to custodial legal advice in public and privatized police custody areas in England and Wales” (2009) Brit. J. C. 399; Layla Skinns, “The Right to Legal Advice in the Police Station: Past, Present and Future” (2011) Crim. L. R. 19; Vicky Kemp, “”No Time for a Solicitor”: Implications for Delays on the Take-Up of Legal Advice” (2013) Crim. L. R. 184; Vicky Kemp, “PACE, Performance Targets and Legal Protections” (2014) Crim. L. R. 278; Kemp, V., Balmer, N. J. and Pleasance, P., “Whose Time is it Anyway? Factors Associated with Duration in Police Custody” (2012) Crim. L. R. 736; Layla Skinns, *Police Custody: Governance, Legitimacy and Reform in the Criminal Justice Process* (Routledge, 2011); and Sue Easton, *Silence and Confessions: The Suspect as the Source of Evidence* (Palgrave Macmillan, 2014)

miscarriage of justice of some sort,[23] the first step was an analysis of how far the rights in practice had departed from the provisions of the statutory instruments which brought the said rights into existence. Following on from this, the steps taken in reforming the rights practices were also taken into consideration. To further test the hypothesis, the roles of the respective regional rights systems in rights development were also analysed. This analysis was not restricted to the direct relationship between the two jurisdictions and their respective rights systems, but was extended to the role played in the rights development of their member states more generally.

At this juncture, it is imperative to note that despite the existence of a Shari'a criminal system in Nigeria,[24] the study of the custodial regime therein contains very little reference to or any in-depth consideration of the Shari'a criminal procedure. This is as a result of a two main reasons, namely:

First, following the discovery of the dearth of literature on the subject, and in light of the insecurity and violence which has plagued Northern Nigeria for the better part of the last decade,[25] the researcher, in the interests of personal safety and security could not make a visit to the *locus* to consult the local libraries. During the empirical study, however, responses from a few Northern states were nevertheless obtained.

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[23] See Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th Edition, Oxford, 2010), p. 9

[24] Following its return to democratic rule in 1999, twelve (12) of the nineteen (19) Northern states of Nigeria enacted a Shari'a penal code for the adjudication of criminal matters within their borders. See, generally, Ruud Peters, *Islamic Criminal Law in Nigeria* (Spectrum Books, 2003) and Gunner J. Weimann, *Islamic Criminal Law in Northern Nigeria: Politics, Religion, Judicial Practice* (Amsterdam University Press, 2010)

[25] Chothia, F., "Who are Nigeria's Boko Haram Islamists?" (BBC Africa, May 2015), available at http://www.bbc.co.uk/news/world-africa-13809501, last accessed 23-09-2015

Secondly, Peters and Weimann raise several criticisms about the nature in which the Shari'a codes were drafted and implemented that called their constitutionality into question;[26] a fact which satisfied the researcher that, in addition to the fact that the Shari'a regime introduced in Nigeria focused more on the trial of offences, which falls outside the ambit of this thesis, and the fact that the pre-trial or custodial regime in the Shari'a context is still within the purvey of the Nigeria Police Force, the rights provisions contained in the Constitution of the Federal Republic of Nigeria 1999 had supremacy over any inconsistencies that might exist in the Shari'a penal codes, especially in light of the provision of Section 1(3) of said Constitution, which establishes its supremacy as the *grund norm* and invalidates any provision found to be inconsistent with the provisions thereto.[27] The foregoing notwithstanding, the current practice of Shari'a in Nigeria is highlighted briefly in the next chapter.

1.5 CHAPTER BREAKDOWN

The thesis is structured as follows:

Having introduced the nature of the research contained in this thesis in the current chapter, in the next chapter, Chapter Two, the legal and institutional framework of both jurisdictions is examined in a bid to determine, and answer the first research question on a purely theoretical basis, and ascertain what the rights sought to be protected in both jurisdictions are, and the framework

[26] Peters, n 24, pp 37 – 42; and Weimann, n 24, pp 129 – 131

[27] This was also decided upon in *Uzodinma v Commissioner of Police* [1982] (1) NCR 27, which challenged the legality of a provision that denied accused persons the right to representation by legal practitioner in Nigeria before an Upper Area Court.

established by the statutory instruments with a view to implementing the rights in practice.

Chapter Three attempts to answer the second, third and fifth research questions, by analysing the protection of the rights in practice, and attempting to ascertain the intrinsic shortcomings of the legislative instruments which hinder a smooth delivery of the rights in practice, as well as attitudinal factors attributable to the parties involved at this stage of proceedings, and the effect of same on the delivery of the rights in practice.

In Chapter Four, having established the lacunae between the rights sought to be protected in theory and the actual protection of the rights in practice, the mechanisms available in both jurisdictions for bridging the gap or realigning towards the best rights' practices are assessed, including internal and external realignment mechanisms, which also extend to the role of the regional rights mechanisms and their effect on the local protection of rights within the jurisdictions being compared, in a bid to answer the fourth research question.

Chapter Five is the concluding chapter, which summarises the arguments and findings expressed across the length and breadth of the thesis, and concludes the thesis by proposing recommendations for even better protection of the pre-trial rights of accused persons in both jurisdictions.

1.6 RESEARCH LIMITATIONS

There were two significant limitations to the research undertaken. The first of these was encountered by the discovery of the dearth of relevant literature and

other secondary sources on the custodial regime of Nigeria, which may have had the unwittingly unfortunate effect of creating the impression within this thesis of a research bias towards England, and a lot of arguments and contentions relating to Nigeria appear to be based purely on conjecture.

The resolution to this problem was the conducting of the severely limited empirical study, which birthed its own limitations which served as the second significant limitation to the research conducted herein. The limitations to the study and the resolutions thereto are reported in detail in Chapter 3.4, below.

CHAPTER TWO

THE LEGAL AND INSTITUTIONAL FRAMEWORK

2.0 INTRODUCTION

Since the turn of the 20th century, essentially, the protection and enforcement of fundamental human rights has been deemed as a very important element in the administration of government, and indeed every sphere of human interaction. This is evidenced by the numerous international documents dealing with the protection of rights, as well as provisions contained in different local legislative instruments enacted by states.[1] This quest to protect and enforce rights manifests itself in different areas of law, including the Criminal Justice sector, extending as far as the pre-trial stage.[2] As an introduction to, and before embarking on the analysis of the central idea of this thesis, i.e., comparing the detention practices of England and Wales[3] and Nigeria, and the rights available to suspects[4] therein; it would hitherto seem essential to establish the context and the scope of the comparison. Thus, this chapter shall identify, examine and compare the rights available to suspects and accused persons in both England and Nigeria, but as a precursor, examine the legal and institutional framework governing the pre-trial stages of both

[1] The United Nations Universal Declaration of Human Rights 1948; the European Convention of Human Rights 1953; the Human Rights Act 1998; and Chapter IV (Fundamental Rights) of the Constitution of the Federal Republic of Nigeria 1999; are a few examples of such international documents and local legislative instruments which provide for the protection of rights.

[2] For a discussion of this, see Section 2.3, below.

[3] Any reference to England hereinafter shall include both England and Wales.

[4] As a result of these rights being made available to persons at all stages of the criminal process, and as a result of the different terms used in the different statutory instruments, the terms "suspect", "accused person" and "detainee" are used interchangeably throughout this thesis to refer to a person who is being subjected or on the precipice of being subjected to the criminal process.

jurisdictions, specifically the police station process and the custodial stage, by giving a brief historiography before progressing to an analysis of the current legal and institutional frameworks in both jurisdictions, albeit only from a theoretical perspective.[5] It should be noted that this chapter begins on the assumption that it is trite knowledge to all that the key parties involved in the pre-trial stage of proceedings in the adversarial system, which both jurisdictions practice, are the police, the suspect and the prosecution.[6]

2.1 THE PRE-TRIAL STAGE

2.1.1 Historiography

In discussing succinctly the historiography of the pre-trial process in England, the intention is not to delve as far back as the Norman Conquest and, coupled with the knowledge that this information is readily available in a plethora of other sources,[7] only the following remarks concerning the historical development of the pre-trial stage in England might be necessary.

The entirety of the criminal process in England developed in true common law fashion. The police forces in England, in the modern form that we are familiar with and that today's police forces have developed from, were first

[5] A comparison of the jurisdictions from a practical perspective shall be made in the next chapter.

[6] Of course, there are other parties to the entire criminal process, such as witnesses and victims, but any discussions relevant to these other parties fall outside the pre-trial stage, and thus, outside the purview of this thesis.

[7] See, for example, L. Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (Stevens, London, 1948 – 1986), and David Bentley, *English Criminal Justice in the Nineteenth Century* (Hambledon, 1998)

established in the early to mid-nineteenth century.[8] Prior to the enactment and eventual coming into force of the Police and Criminal Evidence Act 1984 (PACE), whose main effect was "authorising and regulating"[9] policing practices, and regularising the legal framework of the pre-trial stage, the pre-trial process was different, albeit not drastically so. The police had a few additional powers than in current times: in addition to the powers of stop and search, arrest and investigation, prior to PACE, the police also had the power to prosecute certain offences, with the majority of prosecution at the magistrates' courts being presented by police officers.[10] This power of prosecution was very often abused, and misused, which led to the setting up of the Royal Commission on Criminal Procedure (RCCP) to look into Police Powers and the prosecution process, and it is the recommendations contained in the report of this commission, published in 1981,[11] that led to the promulgation and subsequent coming into force of the Police and Criminal Evidence Act 1984,[12] and the Prosecution of Offences Act 1985, which changed the terrain of the pre-trial process in England, or at the very least, caused the spark that brought about the change to said terrain: as shall be seen

[8] The Metropolitan Police Act 1829 created the Metropolitan Police force,and created a model on which subsequent police forces were set up to resemble. For an in-depth discussion on the history and development of the police in England, see Malcolm Davies, Hazel Croall and Jane Tyrer, *Criminal Justice* (4th Edition, Pearson, 2010) pp 161 – 165; and, generally, L. Radzinowicz, *A History of English Criminal Law, vol 3: Cross-Currents in the Movement for the Reform of the Police* (Stevens, London, 1956)

[9] A phrase coined by David Dixon, in reference to the legislative policy behind the enactment of the Police and Criminal Evidence Act 1984 in David Dixon, "Authorise and Regulate: A Comparative Perspective on the Rise and Fall of a Regulatory Strategy" in Ed Cape and Richard Young (Eds.), *Regulating Policing: The Police and Criminal Evidence Act 1984 Past, Present and Future* (Oxford, 2008)

[10] John Long, "Keeping PACE? Some Front Line Policing Perspectives" in Cape and Young (Eds.), *supra*, p 93

[11] Report of the Royal Commission on Criminal Procedure, 1981, Cmnd 8092 (Philips Commission)

[12] Hereinafter "PACE"

in the next section, there are other legislative instruments which govern various aspects of the pre-trial stage; but the current pre-trial regime as it exists is merely an updated version of the regime introduced by both Acts.

The entire legal system in Nigeria, not just the criminal process or the pre-trial process strictly speaking, was birthed as a result of the United Kingdom's colonial rule over it. Speaking matter-of-factly, the nation recognised as Nigeria did not exist until the amalgamation of the Protectorates of Southern and Northern Nigeria in January 1914.[13]

Prior to the arrival of the colonial masters, there were numerous indigenous systems of dispute resolution and systems of justice amongst the numerous indigenous tribes occupying the terrain that is now known as Nigeria. Some of these dispute resolution processes still remain, and are a part of the legal framework, albeit in the realm of civil law and procedure. Essentially, criminal adjudication has shifted from the indigenous practices to the adversarial practices established by colonialism. It should be noted that this shift to the adversarial process of adjudication does not mean that no crimes exist in Nigeria that have originated from its pre-colonial days, it is only the mode of adjudication that has made a complete departure from what existed in the years before colonisation.[14]

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[13] For more on the history of Nigeria and its legal system, see M. Ayo Ajomo and I. E. Okagbue (Eds.), *Human Rights and the Administration of Criminal Justice in Nigeria* (NIALS Research Series No 1, 1991), pp 18 – 34. Also see, generally, B. O. Nwabueze, *A Constitutional History of Nigeria* (Hurst, 1982) and C. O. Okonkwo and M. E. Naish, *Criminal Law in Nigeria* (2nd Edition, Sweet and Maxwell, 1980)

[14] E. O. Oloyede, "The Present Scope of the Nigerian Criminal Law", in T. O. Elias (Ed.), *Law and Social Change in Nigeria* (University of Lagos and Evans, 1972) pp 183 – 186, and Ajomo and Okagbue, *ibid*, pp24 – 27. Also see, generally, T. O. Elias, *Nigeria: The Development of its Laws and Constitution* (Stevens & Sons Ltd, 1967)

The growth and development of the pre-trial system in Nigeria, the entire legal system in actuality, has also been largely hampered by long periods of military rule and governance.[15] Each military government would, in turn, suspend the constitution of the day and put in place its own decrees. Since 1999, fortunately, there has been consistency of government, and democratic rule has prevailed without any further intervention from the military. Nigeria now operates as a federation, with the National Assembly enacting laws that operate on the federal level, with each state also possessing the power to legislate on its own criminal laws and procedure.[16] The effect of this, as will be discussed later,[17] is yet to fully manifest itself as there is no significant difference between the federal and state laws concerning criminal procedure,[18] and the pre-trial process has remained virtually unchanged and is, in essence, the same process that was introduced by the colonial masters.

In exercise of their power to legislate on their own criminal laws and procedure, in 2000 and 2001, twelve (12) of the nineteen Northern, mainly-Islamic states in Nigeria, enacted Shari'a penal codes.[19] The introduction of

[15] The military overthrew the new (at the time) civilian government by a coup d'état in 1966, and save for a brief return to democracy from 1979 to 1983, Nigeria was ruled by several military rulers with power changing hands by virtue of further coups and counter coups. Democratic rule was reinstated in 1999, with the election of a civilian president, Gen. Olusegun Obasanjo (rtd.).

[16] See Section 4 of the Constitution of the Federal Republic of Nigeria, 1999.

[17] See Section 2.2.2.1, below

[18] A fact that made a study of the Nigerian system, or an analysis of the pre-trial stage rather straightforward, regardless of the federal system of government, which includes a hierarchy of federal and state courts. With the return to democracy in 1999, the steps taken by the different State Houses of Assembly in respect of legislating on Crime and Criminal Procedure was merely to localise the relevant Federal Act and declare it in force within the state.

[19] Zamfara State enacted the first Shari'a penal code on the 27th of January, 2000, followed by Niger, Jigawa, Kano, Kebbi, Sokoto, Katsina, Yobe, Bauchi, Borno, Gombe, and Kaduna States. See Ruud Peters, *Islamic Criminal Law in Nigeria* (Spectrum Books, 2003), pp 13 – 17, and Gunner J. Weimann, *Islamic Criminal Law in Northern Nigeria: Politics, Religion, Judicial Practice* (Amsterdam University Press, 2010), p. 15.

the Shari'a penal codes, it is submitted, has had no significant effect on the scope of this thesis, i.e., the detention rights of suspects and accused persons. The Shari'a penal codes are silent on procedural steps, and focus strictly on the creation of offences and the trial stage, which both fall outside the ambit of this thesis, which is the pre-trial stage. Additionally, the Shari'a penal codes contain no rights-related provisions. As it were, it is herein assumed that the intendment of the drafters of the respective Shari'a penal codes only sought to introduce new offences, and not a wholesale reupholstering of the criminal procedure within the respective states.

Additionally, as Peters reports, notwithstanding the introduction of the Shari'a penal codes, there is a problem with enforcement, owing to the fact that the police in Nigeria is a federal institution who still remain in charge of the pre-trial stage, and have not been trained to enforce the Shari'a codes.[20] Further, as stated in the previous chapter, Peters and Weimann have raised several criticisms about the nature in which the Shari'a codes were drafted and implemented that called their constitutionality into question.[21] As it were, the effects of the introduction of the Shari'a penal codes on the detention rights of accused persons following Nigeria's return to democratic rule, or the lack thereof, are not in issue, and are not considered within this thesis.

2.1.2 Current Pre-Trial Practices

As already highlighted, the main parties to the pre-trial process in both jurisdictions are the police, the suspect and the prosecution. In the next section we shall examine in greater detail the legislative instruments that govern the

[20] Peters, *Ibid*, p 29.
[21] Peters, n 19, pp 37 – 42; and Weimann, n 19, pp 129 – 131

terrain and how the different institutions operate and interact with one another; but, as a precursor to that, this section highlights the current pre-trial practices in England and Nigeria, in a bid to illustrate and also establish the similarities, in both jurisdictions, of the terrain within which the custodial rights regimes operate.

The role of the police in the entire criminal process cannot and should not be underestimated. They are the gateway to the criminal justice system, as it is their response to a purported criminal act, usually the arrest of a suspected offender, which commences the process of criminal adjudication, which culminates in the conviction or acquittal of the suspect by a court of competent jurisdiction.[22] According to Ofori-Amankwah, the success or failure of any system of criminal justice depends to a large extent on the police service and their level of intelligence, efficiency, humanism and sensitivity to the values of the society.[23] Or as Gibson and Cavadino put it, the criminal process "begins when a crime comes to the notice of the authorities…"[24] Quirk goes further to state that the police occupy an anomalous position in the criminal justice process, as they are accorded an inquisitorial, investigative role in an adversarial system, yet they continue to be perceived, by both themselves and

[22] For a detailed look at the entire adversarial criminal process, see generally, Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th Edition, Oxford, 2010); Penny Darbyshire, *Darbyshire on the English Legal System* (10th Edition, Sweet & Maxwell, 2011); Gary Slapper and David Kelly, *The English Legal System* (14th Edition, Routledge, 2013); Oluwatoyin Doherty, *Criminal Procedure in Nigeria: Law and* Practice(Blackstone, 1990); J. A. Yakubu and A. T. Oyewo, *Criminal Law and Procedure in Nigeria* (Malthouse, 2000); Delmas-Marty, M. and Spencer, J. R. (Eds.), *European Criminal Procedures* (Cambridge, 2002) pp 142 – 217; Richard Vogler, *A World View of Criminal Justice* (Ashgate, 2005); and Craig M. Bradley (Ed.), *Criminal Procedure: A Worldwide Study* (2nd Edition, Carolina Academic Press, 2007), *etc.*

[23] E. H. Ofori-Amankwah, *Selected Essays in Criminal Justice* (KNUST-UPP, 2005), p49

[24] Bryan Gibson and Paul Cavadino, *Introduction to the Criminal Justice Process* (2nd Edition, Waterside Press, 2002), p54

the public, as agents of the prosecution.[25] The powers of arrest are wide-ranging, and are conferred on the police in England by virtue of Part III (Sections 24 – 33, inclusive) of PACE, as amended by Section 110 of the Serious Organised Crime and Police Act 2005; and in Nigeria by Sections 24 and 25 of the Police Act 2004,[26] Part 2 (Sections 3 – 29) of the Administration of Criminal Justice Act 2015, Part 2 (Sections 3 – 10) of the Criminal Procedure Act 2004[27] and Chapter IV (Sections 26 – 46) of the Criminal Procedure Code 2004.[28]

Generally, the powers of arrest conferred on the police in England and Nigeria are remarkably similar, and the police, by virtue of the aforementioned statutory provisions, may arrest, with or without a warrant, persons who are suspected of committing an offence, or persons who have been caught in the course of committing an offence. Persons who have been arrested are to be taken to the nearest police station as soon as possible and without unnecessary delay.

It should be noted, and as pointed out by Michael Zander, that the police have a wide discretion in deciding how and when to respond to a crime,[29] and, indeed, not every arrest will result in a person being put through the entire criminal justice process. It should also be noted that, as further indication of the weight and effect of the police discretion in the administration of criminal justice, not every arrest made results in the trial of the arrested person.

[25] Hannah Quirk, "The Significance of Culture in Criminal Procedure Reform: Why the Revised Disclosure Scheme Cannot Work" (2006) 10 E&P 42, at p 48.
[26] Police Act, Cap P19, LFN 2004
[27] Hereinafter "CPA"
[28] Hereinafter "CPC"
[29] Michael Zander, *Cases and Materials on the English Legal System* (10th Edition, Cambridge, 2007) pp 241-242

Occasionally, especially in cases involving minor offences or misdemeanours, arrested persons are merely cautioned and released without having to answer to a formal charge.[30]

An arrest is usually preceded by a period of investigation, although it is possible for investigation to commence or continue after arrests have been made. Investigation is performed by the police,[31] and could be performed in different ways including, but not limited to, the interrogation of suspects and eyewitnesses, as well as forensic examination of evidentiary samples obtained from the *locus in quo*.

If a suspect is arrested before the conclusion of the investigation, there are provisions for a maximum time he may be detained before being arraigned before a court. In both jurisdictions, this period is ordinarily thirty-six (36) or forty-eight (48) hours, respectively, although this detention period can be extended in special circumstances.[32]

After the conclusion of investigation by the police, if there is sufficient evidence gathered which would, on a balance of probabilities, suggest the involvement of the suspect in the crime committed, the file is usually passed on to the prosecution, and a charge proffered against the suspect. The Crown Prosecution Service, established in 1985, is the body responsible for the prosecution of all criminal offences in England;[33] whilst in Nigeria, prosecution of offences is performed by the Attorney-General of the

[30] See *Davies, Croall and Tyrer*, n8, pp 187 – 199.
[31] As conferred on them in England and Nigeria by Part V of PACE, Part V of the CPC and Part IV of the Police Act 2004, respectively.
[32] For a detailed analysis of these provisions, see Sections 2.3, below.
[33] Section 1, Prosecution of Offences Act 1985

Federation and the Attorneys-General of the thirty-six (36) states.[34] Additionally, the police in Nigeria also have the power to prosecute certain offences. Usually, they may prosecute misdemeanours and minor offences; prosecution of felonies usually falling within the purview of the Office of the Attorneys-General of the Federation and States.[35]

The most important party in the pre-trial stage is the suspect. Indeed, the criminal justice system as a concept exists for the determination of the guilt, or innocence, of a person where a criminal act has occurred and there is a need for redress.[36] The adversarial system is built on the presumption of a suspect's innocence until his guilt is established; thus, there are several safeguards that exist to ensure, at least on a theoretical level, that the suspect is treated as though he were innocent. These rights include the right to be informed of the reasons for his arrest, and the right to reasonable time to prepare his defence; which segues into the suspect defending himself, in person or with the assistance of a legal practitioner. Current issues that arise from these rights are issues relating to how legal assistance is provided for at the police station, including time and frequency of consultation with counsel at the police station and presence, or lack thereof, of counsel during interrogation.[37]

In brief, the current pre-trial practice in both jurisdictions is that the police are responsible for the investigation of offences and the arrest of suspects. After arrests have been made, and investigations concluded, the evidence gathered is

[34] Sections 174 and 211, Constitution of the Federal Republic of Nigeria, 1999. It should be noted that both sections are identically-worded, the difference being that the former provides for the powers of the Attorney-General of the Federation, and the latter the powers of the Attorney-General of a State

[35] See Section 2.2.2.1 below for a detailed discussion.

[36] Andrew Ashworth and Mike Redmayne, n 22, p 2

[37] See Section 2.3 below for an analysis of these rights and issues arising therefrom.

passed on to the relevant prosecuting body, and a charge proffered against the suspect. The suspect is then given, or is expected to be given, time within which to prepare his defence. These elements of the pre-trial stage shall be examined in greater detail subsequently, but perhaps the only notable distinction between the pre-trial practices in both jurisdictions is that in Nigeria, the police have the power to prosecute offences, and the role of investigator and prosecution is occasionally played by the same party. This, as one would imagine, and as shall be discussed later on in the chapter,[38] could create potential for abuse.

From the foregoing, it becomes apparent that, with the exception of the power of prosecution being vested in the Nigeria Police Force, the parties to the pre-trial process in both jurisdictions are essentially the same, and these parties are vested with the same powers and responsibilities. Thus, it is hypothesised that the rights available at the custodial stage ought to be remarkably similar, even if only on a purely theoretical level.

The next section takes a detailed look at the provisions of the relevant statutory instruments establishing the custodial rights regime, in a bid to test this hypothesis.

[38] Section 2.2.2.1, below

2.2 CURRENT LEGAL AND INSTITUTIONAL FRAMEWORK

2.2.1 England

There are numerous international treaties and conventions, as well as some local legislative instruments and cases (local and international), which form part of the legal framework of the pre-trial stage in England; and the provisions contained in some of these legislative instruments establish the institutions which constitute the institutional framework of the pre-trial stage. The current legislative instruments governing the pre-trial stage in England, include, in varying degrees, PACE, the Prosecution of Offences Act 1985, the Criminal Justice and Public Order Act 1994, the Human Rights Act 1998, the Police Act 1996, the Police and Justice Act 2006, the Serious Organised Crime and Police Act 2005, the Access to Justice Act 1999, the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the European Convention on Human Rights, the International Covenant on Civil and Political Rights; and the United Nations Universal Declaration on Human Rights. Two recent cases that have had an impact on the legal framework in England are *Salduz v Turkey*[39] and *Cadder*[40]. This is by no means an exhaustive list of statutory instruments or cases, but the aforementioned are the most commonly cited statutory instruments and cases in any current discussion of the legal framework of England. In such discussions also, PACE is usually considered the primary legislative instrument, and even the most cursory of glances on related provisions in a few of these instruments would show a lot of similarities in the nature of rights provided. The adversarial system is hinged

[39] *Salduz v Turkey [2008] 49 EHRR 421*

[40] *Cadder v HM Advocate* [2010] UKSC 43

on procedural fairness, which struggles to find a balance between granting the police sufficient powers in performing their duties of thoroughly investigating offences and making arrests where necessary, and the need to preserve the presumption of a suspect's innocence until his guilt is ascertained; and the laws governing the pre-trial process are reflective of this. For example, on the one hand, Part III of PACE grants wide powers of arrest with or without a warrant, but also places a duty on the arresting officer to inform the person of the reasons for his arrest;[41] and a failure to do so could result in the arrest being declared unlawful.[42]

The analysis of the current legal and institutional framework in this section, bearing in mind the nature of the adversarial system, shall be done by considering the legislative instruments and institutions on either side of the balance, *i.e.*, by looking at the legal framework and institutions relating to police powers and prosecution together, before delving into those relating to the suspect and the preparation of his defence.

2.2.1.1 The Police and Prosecution – Powers, Policies and Practices

The Police, as is trite knowledge, are the primary institution at the pre-trial stage, on this side of the adversarial coin. The current institutional set-up of the police is federal in nature. The Police in England is established by the Police Act 1996, and is made up of forty-three (43) different autonomous territorial police forces, with each police force responsible for one of the corresponding forty-three (43) police areas; each area comprising one or more

[41] Section 28, PACE
[42] Section 28(3)

of the local government areas or counties in England.[43] Each of these police forces is independent, with the Chief Constable of each force (the chief police officer in the Metropolitan and City of London police forces is called "Commissioner", not "Chief Constable") seised with powers of operational control over the relevant force in the relevant area. He is responsible for determining the style of policing and the priorities for their area within their budget and according to national and local policing plans.[44]

The police in England have a wide range of powers, and arguably need to have such wide-ranging powers to perform their duties amicably. Whether they pursue the performance of their duties under the ambit of the "due process" or "crime control" models,[45] the police need to be granted wide-ranging powers. These powers ordinarily include the powers of stop and search; entry, search and seizure; arrest; interrogation; and detention. As highlighted above, they also exercise a wide discretion in the performance of their duties.[46] In the face of these wide-ranging powers of the police, coupled with an equally wide-ranging discretion in the exercise of their powers, there is the need to regulate these powers in a bid to prevent abuse, and to maintain the adversarial balance.

[43] For a full list of the 43 different police forces and a delineation of the geographical terrain of England into the different respective areas, see "List of UK Police Forces", available at http://www.police.uk/forces/, last accessed on 29-08-14
[44] Davies, *et al*, n8, p 188
[45] Herbert L. Packer's models for evaluating the criminal process. See Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford, 1968), pp 149 – 173.
[46] Zander, n 29, pp 241 – 242

Regulation has been defined as "*any activity, legal, political, social, economic or psychological, the purpose of which is to steer the flow of events.*"[47] Owers is of the opinion that efficiency in the Criminal Justice System needs always to be set against fairness, due process and human rights, and speaks generally of the importance of having a regulatory ombudsman on ground to assess the effectiveness and efficiency of the Criminal Justice System.[48] There is a general acceptance by several academics that any regulation or regulatory instrument should have three elements:

> *"the goal (the rule or standard against which behaviour is to be assessed); monitoring (to evaluate what happens in reality); and realignment (through mechanisms for enforcing rules or promoting adherence to standards where monitoring shows significant deviation from them)*"[49]

In expanding on this, Sanders distinguishes between 'regulation' and 'control'. He defines 'control' as:

> *"a situation where powers can only be exercised on the basis of a command or permission; where any abuse of, or deviation from the scope of the power would be apparent to some form of higher or*

[47] Peter Grabosky, "On the interface of criminal justice and regulation", in Hannah Quirk, Toby Seddon and Graham Smith (Eds.), *Regulation and Criminal Justice: Innovations in Policy and Research* (Cambridge, 2010), p 73

[48] See, generally, Anne Owers, "The regulation of criminal justice: inspectorates, ombudsmen and inquiries", in Quirk, Seddon and Smith (Eds.), n 47, pp 237 – 260.

[49] Ed Cape and Richard Young, in *Cape and Young*, n 9, p 2, citing Sanders, in the same publication, at p 50.

supervisory authority; and where that abuse or deviation would be the subject of some form of reprimand or discipline."[50]

Relying heavily on Crawford's argument using the metaphor of the difference between 'steering' and 'rowing',[51] Sanders argues comprehensively that in a regulatory state, the notion of 'control' as the main regulatory mechanism ought to be rejected, as this would involve the state 'rowing' all aspects of a societal boat. He supports Crawford's contention that, given the "complexity of the modern state", it would be unrealistic in most respects for the state to 'row'; thus the state ought to seek to 'steer', by adopting the tripartite form of regulation.[52]

In achieving the first element, it becomes glaringly obvious that there must be a law, or legislative instrument, which creates the standard against which to assess behaviour. This is the goal, and is provided for in England by PACE and a host of other legislative instruments.

As previously highlighted, PACE is the primary legislative instrument in England, with respect to the pre-trial stage in England, with particular focus on the powers of the police; powers which include stop and search, arrest, investigation of offences, *etc.*,[53] and it was enacted to regularise the previously fragmented legal framework of the pre-trial process in England. By enacting

[50] Sanders, *Ibid*

[51] Adam Crawford, "Networked Governance and the Post-Regulatory State? Steering, Rowing and Anchoring the Provision of Policing and Security" (2006) 10 Theoretical Criminology 449; although Sanders notes that the analogies of 'rowing' and 'steering' were first coined by David Osborne and Ted Gaebler, in Osborne and Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (Plume, 1993)

[52] Sanders, *op cit*

[53] In a bid not to go beyond the scope of this thesis, only the sections dealing with police powers of arrest, detention and interrogation are considered.

PACE, Parliament intended to increase the powers of the police, but deal with the dilemma of balancing a wide scope of powers needed for the police to function effectively whilst ensuring, at least theoretically, that the infringement of civil liberties were kept to a minimum.[54]

In respect of the three main powers of the police in England that this thesis is concerned, namely arrest, detention and interrogation, there are provisions contained in the Act and in the different Codes of Practice, which impose duties on the police which purport to find the balance between powers and civil liberties. Upon arrest, a person must be informed of his arrest and the reasons for his arrest as soon as practicable;[55] and a person who is detained at the station has rights and liberties to maintain the adversarial balance for the period he is detained, including at the point of interrogation. These rights are dealt with in greater detail in subsequent sections of this chapter, but an innovation of PACE that directly affected the institutional framework of policing in England was the creation of the role of the custody officer and the creation of the custody suite.[56]

The role of custody officer is a monitoring one, and entrusts in a constable of the rank of no less than Sergeant the duty to ensure that all arrests are made legitimately, that the detainee is informed as soon as practicable of the reasons for his arrest and detention, and that all officers involved in the interrogation, detention and general treatment of an accused person do so in accordance with

[54] Ozin, P., Norton, H., & Spivey, P., *PACE: A Practical Guide to the Police and Criminal Evidence Act 1984.* (Oxford, 2006), cited in Benz, S., "The Police and Criminal Evidence Act 1984: balancing civil liberties and public security", (2012) Diffusion:UCLAN, Vol.5, Issue 2, available at http://atp.uclan.ac.uk/buddypress/diffusion/?p=1255, last accessed on 25-07-2014.
[55] Section 28 of PACE.
[56] Section 36 of PACE

Code C of the Codes of Practice.[57] The custody officer's role is also to keep a detailed custody report for every detainee at the police station and, at regular intervals, to make a decision about the continued detention of a detainee *vis-à-vis* releasing him on police bail. By this establishment of the role of custody officer, the Act, in addition to providing the rules and the goal of regulation, also provided a mechanism to monitor the compliance of the police with the provisions contained therein.

In addition to the custody officer, the Police Act also established Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) whose primary function is to assess and report on the effectiveness and efficiency of the Police forces in England.[58] There is also the Independent Office for Police Conduct (IOPC), formerly the Independent Police Crimes Commission (IPCC),[59] whose primary function is to oversee the police complaints system and investigate the most serious incidents and complaints involving the police, which although arguably a part of the monitoring stage, do not primarily deal with the monitoring of the delivery of the rights in practice at the custodial or pre-trial stage, and are therefore not engaged or analysed within this thesis.

The third element of regulation – realignment – appears to be the purview of Parliament and, the obvious means by which this occurs is by amendment of statutes as and when necessary. Parliament has continued to amend the Act, particularly the Codes of Practice, in an attempt to correct deviation from the

[57] Sections 36 – 38 of PACE

[58] See the official website of the HMICFRS, available at https://www.justiceinspectorates.gov.uk/hmicfrs/, last accessed on 16-08-2018.

[59] See the official website of the IOPC, available at https://www.policeconduct.gov.uk/, last accessed on 16-08-2018.

goal, and PACE has continued to evolve over the years to the point where, according to Cape and Young, it has become "a complex piece of legislation which, for those who are unfamiliar with its intricacies, is hard to understand".[60] The fact that Parliament has continued to amend the Codes of Practice, it would appear, is an indication of a strong political will which, similar to the tripartite forms of regulation, is an essential tool in rights development.

At this juncture, it might be imperative to digress and attempt a working definition of the term "political will". As with several jurisprudential and theoretical concepts, there is probably no universally accepted definition of the concept, nor does this researcher make any attempt to lay claim to being well-versed in the concept of political will. However, in this thesis, it is argued as a factor that contributes to the effectiveness, or lack thereof, of the realignment mechanisms. Thus, it is important to define the term within the context as shall be employed across the length and breadth of this thesis.

As Brinkerhoff argues, the term "political will", or the lack thereof, has been frequently identified as the culprit for poor anti-corruption measures, reform practices and political failings generally, despite remaining under-defined and poorly understood as a concept.[61] There appears to be a consensus amongst political observers and academics alike of the difficulty in pinpointing an accurate definition of the term "political will".[62] Post, *et al*, conducted an

[60] Cape and Young, n 9, p 1.

[61] D. W. Brinkerhoff, "Unpacking the Concept of Political Will to Confront Corruption", 2010, available at http://www.u4.no/publications/unpacking-the-concept-of-political-will-to-confront-corruption/, last accessed on 14-09-2015

[62] A publication by the Department for International Development points out that despite a lack of clarity as to what the term really means, it is commonly used "as a catch-all concept,

intensive study of the concept and carefully considered previous attempts at defining the concept, before attempting to define political will as "*the extent of committed support among key decision makers for a particular policy solution to a particular problem*",[63] and it is this definition of political will that is herein adopted throughout this thesis in reference to the concept.[64] As the authors explain in detail across the entirety of their article, this definition is subdivided into four components, namely:

(i) *"a sufficient set of decision makers;*

(ii) *with a common understanding of a particular problem on the formal agenda;*

(iii) *is committed to supporting;*

(iv) *commonly perceived, potentially effective policy solution.*[65]

In juxtaposing this definition of political will against the tripartite form of regulation that has been considered earlier in this chapter, and is referenced

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the meaning of which is so vague that it does little to enrich our understanding of the political and policy processes". See "Understanding 'Political Will'", available at http://r4d.dfid.gov.uk/PDF/Outputs/Mis_SPC/R8236Appendix3.pdf, last accessed on 14-09-2015. Also, Post, *et al*, have noted the proliferation of the use of the term without proper definition. As they report, An online search for the term "political will" generates millions of hits, and have been used by a plethora of persons, from President Obama of the United States to the United Nations in a range of contexts, ranging from climate change to health-care reform to more efficient energy use. See L. A. Post, A. N. W. Raile and E. D. Raile, "Defining Political Will", (2010) *Politics & Policy*, Volume 38, No. 4, 653, at 654

[63] *Ibid*, at 659.

[64] For more on the concept of political will, see generally, and in addition to the aforementioned; Craig Charney, "Political Will: What is it? How is it Measured?", available at http://www.charneyresearch.com/resources/political-will-what-is-it-how-is-it-measured/, last accessed on 14-09-2015; Sina Odugbemi, "Whose Will Constitutes 'Political Will'?", June 2009, available at http://blogs.worldbank.org/publicsphere/whose-will-constitutes-political-will, last accessed on 14-09-2015; D. W. Brinkerhoff, "Assessing Political Will For Anti-Corruption Efforts: An Analytic Framework", (2000) 20 Public Admin. Dev. 239; Lawrence Woocher, "Deconstructing "Political Will": Explaining the Failure to Prevent Deadly Conflict and Mass Atrocities", (2001) 12 JPIA 179; and Abdul-Gafaru Abdulai, "Political Will in Combating Corruption in Developing and Transition Economies: A Comparative Study of Singapore, Hong Kong and Ghana" (2009) 16 Journal of Financial Crime (4) 387

[65] Post, *et al*, *op cit.*, p 659

across the length and breadth of this thesis, the first component of this definition is a reference to the parties directly responsible for realignment towards the goal, namely the legislative arm of government in both jurisdictions and the superior courts of record vested with the powers of judicial interpretation. The second component of this definition, it is opined, can only be achieved via effective monitoring of the operation of the goal in practice, and the fourth is essentially the aim of realignment. As a result, it is contended that the third component of political will – the commitment to supporting the realignment aims – becomes a key factor upon which the success, or failure, of realignment is hinged.

It would appear that the regulatory framework of the police in England, spearheaded by PACE, is a good example of the tripartite form that is generally accepted. However, as is typical of any academic discussion, PACE has divided opinion. Some academics have lauded the arrival of PACE, whilst others have criticised its arrival for a number of reasons. It would appear that the bulk of the debate surrounding PACE and its provisions tend to revolve around the adversarial balance. Academics such as Zander, Dixon and Cape, for example, have argued that the enactment of coming into force of PACE tilted the balance of procedural fairness in favour of the police by granting them such wide-ranging powers.[66]

Other commentators were of the opinion that the increased protection of liberties and rights in PACE would result in an increase in paperwork, especially when taking into consideration the detailed nature of the custody

[66] Zander, *op. cit.*; Cape and Young, *op. cit.*; and David Dixon, *Law in Policing: Legal Regulation and Police Practices* (Clarendon, 1997)

report, as well as an overall reduction in police efficiency.[67] Sanders was also critical of the fact that the police was self-regulated, and expressed his doubts over the ability of the attempt by PACE to regulate coercive powers.[68]

In the face of these criticisms over the wide-ranging nature of the powers of the police, it should be pointed out that, as noted by Davies *et al*, these powers are not limitless, and an infringement thereof may result in civil or criminal proceedings and/or disciplinary action being instituted against the offending officer.[69] Davies *et al* state that despite the initial fears by parties on either side of the adversarial scale – fears that the enactment of PACE would result in an increase in police powers at the expense of civil liberties on the one hand, and fears that it would result in reduced efficiency of the police on the other – research since the passing of the Act give no indication that any of these concerns or fears have been borne into existence.[70]

It would appear that the divergent opinions concerning what direction the scales of the adversarial balance are tipped might be related to the conceptions of the relationship between legal rules and policing, as pointed out by Dixon. Dixon suggests that there are three main approaches in understanding the relationship between law and policing: the legalistic-bureaucratic approach, the culturalist approach and the structural approach.[71] The legalistic-bureaucratic approach, simply speaking, is based on the belief that "law is the major determinant of police activity and that police institutions conform to an

[67] See eg John Long, n 10
[68] Andrew Sanders, "Can Coercive Powers be Effectively Controlled or Regulated?: The Case for Anchored Pluralism" in Cape and Young, n 9, p 69
[69] Davies *et al*, n 8, p 178
[70] *Ibid*, p 181
[71] Dixon, n 67, pp 1 – 48

efficient bureaucratic model, in which senior officers are able to direct the activities of their subordinates by means of training, policy statements, and internal regulation…. in order to understand policing, we need only or primarily to look at the laws governing it."[72] The culturalist approach is based on the assumption that procedural rules on their own are ineffective in controlling police behaviour; choosing instead to see the policeman as "a craftsman rather than as a legal actor… a skilled worker rather than as a civil servant obliged to subscribe to the rule of law."[73] Thus, a culturalist would focus more on the sociological nature of police culture rather than the rules creating and governing police powers. Reiner, for example, replaces the assumption of the legalistic-bureaucratic model that law enforcement is the sole function of policing with a 'realisation' that the priority of police work is service-provision and order-maintenance, and that these are usually achieved by methods other than law enforcement."[74] The structural approach is an apparent 'middle of the road' approach, which takes on the assumption that controlling the police should take into consideration both legal rules and situational factors.[75]

Having examined the three approaches highlighted by Dixon, it is opined that one's approach or conception of the relationship between law and policing determines one's view concerning the tipping of the adversarial scales of balance with particular regard, for the purposes of this thesis, to the balance between powers of the police *vis a vis* the rights of accused persons. It is contended that regardless of one's view of the present scope of PACE or any

[72] *Ibid*
[73] *Ibid*
[74] *Ibid*
[75] *Ibid*

of the other legislative instruments regulating the police, the recognition of the tripartite form of regulation ensures that laws would be amended to keep in trend with the changing needs of society.

In spite of the criticisms of PACE, the Act has arguably achieved the first requirement of the tripartite form – there is a clear statement of the goals it sets out to achieve. The provisions contained therein are remarkably detailed and prescribe a regulatory framework for the exercise of power by the police while laying down provisions to also prevent the infringement of the accused person's rights and liberties.

In addition to the provisions of PACE, there are eight (8) Codes of Practice, which set out the minimum standards for the exercise of police powers. For purposes of this thesis, however, we are only concerned with four of these codes: Codes C, E, F and G.

In chronological order (in the order in which they become relevant if one were to create a timeline of the criminal process), Code G of PACE is the Code of Practice primarily concerned with the exercise of the statutory power of arrest, whilst Code C is primarily concerned with detention and detention practices of the police. Codes E and F are concerned with the audio and visual recording of interviews of accused persons, respectively.

Of these, Code C is the most detailed, and arguably the most important. It establishes policy by stating in clear, categorical terms the minimum requirements for the detention, questioning and general treatment of persons in police custody. The Code of Practice is subject to regular review, with the most recent version being published by the Home Office in July 2018. The

Code of Practice is a public document, to be made readily available for use and consultation by police officers, police staff, detained persons and members of the public.[76]

Paragraph 2 of the Code of Practice C prescribes the need for a separate custody record to be created for every person detained at the station. Paragraph 3 prescribes concisely, the procedure that everyone who is detained at the police station is to be subjected to; including those who have attended the station voluntarily, and not been brought there after arrest. It provides detailed provisions for the interrogation and overall treatment of all persons, including 'normal' detainees,[77] juveniles and other persons requiring the presence of an appropriate adult,[78] persons who require an interpreter,[79] and detainees who are of foreign nationality, etc.[80] The prescriptions for detention as provided by Code of Practice C extend as far as providing minimum standards for the physical conditions of detention, i.e., the physical nature of the detention cells in the police stations, and the number of detainees per cell.[81] Also, Code of Practice C provides the caution to be issued to a detainee, and has detailed provisions describing the rights available to the accused, which shall be dealt with in Section 2.3, below. It should be noted, that a failure to act within the provisions of Code of Practice C does not make a police officer criminally liable, but any evidence gathered outside the

[76] Paragraph 1.2, PACE Code C
[77] Paragraph 3(a), PACE Code of Practice C
[78] Paragraph 1.5
[79] Paragraph 13
[80] *Ibid*
[81] Paragraph 8

constraints of the provisions contained therein may be declared inadmissible, thereby weakening the prosecution's case at trial.[82]

As far as the legal and institutional framework for the prosecution at the pre-trial stage is concerned, the Prosecution of Offences Act 1985, which is the primary statutory instrument in England *vis-à-vis* prosecution, established the Crown Prosecution Service (CPS), which is the body responsible for the prosecution of offences. The responsibilities of the CPS, working through the various barristers and solicitors under its employ, are making charging decisions, i.e., deciding whether or not to charge a person for an alleged offence; and the conduct of prosecutions in both the Magistrate and the Crown Court. The decision to prosecute is usually made in accordance with the guidelines contained in the Code for Crown Prosecutors, issued by the Director of Public Prosecutions (DPP), in accordance with Section 10 of the Prosecution of Offences Act; the most recent version of this Code was published in January 2013.[83]

As a result of the need for the police and the CPS to liaise at such a crucial stage of pre-trial proceedings, the CPS is structured, or was structured at a point in time, in a similar pattern to the police forces in England. From 1999, until the recent spending review by HM Treasury in 2010, the CPS area of operation was divided into forty-two (42) different areas, mirroring the delineation of the operational areas of the police forces in England, with each

[82] See "Confessions, Unlawfully Obtained Evidence and Breaches of PACE", available at http://www.cps.gov.uk/legal/a_to_c/confession_and_breaches_of_police_and_criminal_evidence_act/, last accessed on 20-09-2014

[83] See Section 3 of CPS Code for Crown Prosecutors, available at https://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf, last accessed on 20-09-2014

CPS area responsible for performing its responsibilities in relation to a particular police area. The only exception to this was London, where CPS London covered the operational area of both the Metropolitan Police and the City of London Police. However, after the spending review, the operational areas of the CPS were reduced to thirteen (13),[84] but the current thirteen (13) geographical areas are still responsible for the forty-two (42) police areas, with each CPS area covering a clearly delineated number of police areas,[85] and their primary functions continue to be making charging decisions and conducting prosecutions.[86]

As the power to conduct prosecutions is a power that is exercised in an altogether different stage of proceedings, *i.e.*, the trial, only the power of the CPS to make charging decisions is considered here. According to Section 4 of the Code (for Crown Prosecutors), the decision to prosecute must be made by subjecting the facts before the Crown Prosecutor to two tests: the evidentiary test and the public interest test,[87] and every prospective case must be subjected to these tests. Generally speaking, if the facts surrounding any case for which a person is detained or under investigation were to pass these two tests, the CPS would normally prepare documents to have the detainee arraigned at the appropriate court of first instance; thereby moving the matter beyond the pre-

[84] See "Area Restructure", a press release by the CPS, available at http://www.cps.gov.uk/wessex/cps_wessex_news/press_release_on_area_restructure__dorset_/, last accessed on 20-09-2014. See also, "Crown Prosecution Service Restructure", available at http://www.theyworkforyou.com/wms/?id=2011-01-31a.25WS.1, last accessed on 21-09-2014

[85] For a map of these CPS areas and the police areas delineated within, see "Your Local CPS", available at http://cps.gov.uk/your_cps/our_organisation/the_cps_areas.html, last accessed on 20-09-14

[86] See "Facts About the CPS", available at http://www.cps.gov.uk/about/facts.html, last accessed on 20-09-2014

[87] For more on what these tests entail, see Section 4, Code for Crown Prosecutors, n 84

trial stage, and into the next stage of the process: the trial. However, if the set of facts before the crown prosecutor fails either or both tests, then he is usually encouraged to refrain from any further action, and the detainee is usually released, often without charge.

Given the crucial nature of the role of the CPS in making charging decisions as well as the need to make this decision within the prescribed detention limits, the CPS, in addition to the 13 existing areas, introduced a telephone advisory service in every police station known as CPS Direct.[88] CPS Direct exists, quite simply, to offer charging and prosecution advice to the police around the clock, every day of the year. The introduction of CPS Direct offered an opportunity for the police to, theoretically at least, consult with the prosecution at all hours of the day, and transfer information on a suspect and/or results of an interrogation electronically and via the telephone, to ensure that charging decisions were made as soon as possible, in line with the detention limits prescribed by PACE.

It should be noted that, as mentioned previously, PACE and the Prosecution of Offences Act are not the only legislative instruments dealing with the pre-trial stage and the powers available to the police and prosecution. There are other numerous statutory instruments that have amended some of the provisions and powers established by both Acts, such as the Criminal Justice and Public Order Act (CJPOA), which has had deleterious effects on the Right to Silence.[89]

[88] CPS Direct. http://www.cps.gov.uk/direct/about/, last accessed on 24-09-2014
[89] These deleterious effects are considered in detail in Chapter 2.3.3 below.

Additionally, the courts also play a role in the development of the legal framework. It should come as no surprise that the decisions of the courts in England, and in most common law countries, are one of the sources of law, and have the effect of changing the legal landscape. The decisions of judges in England in criminal matters have affected the legal and institutional framework in recent years by increasing the scope of application of human rights, thereby altering the adversarial scales of balance. Also, as England signed and ratified the European Convention of Human Rights, the European Court of Human Rights in Strasbourg forms part of the court structure and hierarchy of England, and its decisions also have an effect on the legal framework of the pre-trial stage.[90]

2.2.1.2 The Suspect and Preparing His Defence

The statutory provisions which make up the framework of the final puzzle piece of the pre-trial system, the defence, are found in sections of PACE, and additional legislative instruments such as the Access to Justice Act 1999 and the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

In balancing the adversarial scale, the legal framework concerning the suspect and preparing his defence has, at its core, the provision of rights to the suspect to protect his liberties and uphold the presumption of his innocence. These rights include the right to legal advice, the right to silence, and a few other rights, which are discussed in great detail in Chapter 2.3, below. In analysing

[90] Notable cases include *Cadder v HM Advocate*, for example, and *Ambrose v Harris* [2011] UKSC 43; wherein the UK Supreme Court applied the ruling in *Salduz* to English and Scottish law

the institutional framework, however, the Legal Aid Scheme and the process of providing interpreters to detainees and suspects should be seen as essential.

The Legal Aid Scheme provides legal assistance and support to indigent persons,[91] or persons who are otherwise unable to procure the services of a solicitor to assist in preparing their defence. The body primarily tasked with the provision of legal aid in England is the Legal Services Commission, comprising the Criminal Defence Service (CDS), established by Section 1 of the Access to Justice Act 1999, which is responsible for the provision of legal assistance to persons involved in criminal matters and the Community Legal Service. Again, for purposes of this thesis, we are only concerned with the former and the provision of services in criminal and related matters.

According to Section 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the provision of Legal Aid is one of the functions of the Lord Chancellor. He is charged with the responsibility of ensuring that Legal aid is made available in accordance with the provisions of the Act and the appointment of a Director of Legal Aid Casework. Also, a juxtaposition of the provisions of Section 12(2) of the Access to Justice Act 1999 and Section 1 of the 3rd Schedule thereto indicates that any person, charged with any criminal offence before any court in England is entitled to legal advice and legal representation. This entitlement to legal assistance also extends, and may be provisionally granted where "… the individual is involved in an investigation which may result in criminal proceedings, and the right is so granted for the

[91] In England, the inability to afford legal assistance, as a condition to be eligible to Legal aid, is only applicable in relation to civil matters. Every person arrested on suspicion of committing a criminal offence in England is entitled to free legal assistance at the police station. (see: https://www.gov.uk/legal-aid/eligibility, last accessed on 23-02-2018). This is not the case in Nigeria, however, as Legal Aid is only available to persons earning below the minimum wage, regardless of the nature of the action. See section 10, Legal Aid Act 2011.

purposes of criminal proceedings that may result from the investigation."[92] This is also echoed by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which, in Section 13 thereto, provides that the provision of legal aid in criminal matters extends to the advice and assistance of persons in police custody.

In 2005, the Legal Services Commission introduced two pilot schemes to streamline the provision of legal advice to detainees, namely CDS Direct and the Defence Solicitor Call Centre (DSCC). The aim of these schemes was to provide further regulation to the already existing 'phone-in' systems for obtaining legal advice from solicitors by detained persons. Prior to the introduction of these schemes, there were already schemes in place to provide for the dispensing of legal advice via telephone; in certain classes of offences, as a matter of fact, legal advice could only be obtained by telephone.[93]

After the establishment of these schemes, any request for legal advice made at the police station is typically followed by a phone call to the DSCC who, after considering the facts, determine whether to send a solicitor in person, or to forward the call to CDS Direct. This process applies even when the detainee nominates his own solicitor: the request is passed through the DSCC and CDS Direct. There are criticisms which have been raised against the concept of 'phone-in' legal advice at the police station, and whilst these criticisms shall be considered in detail in the next chapter; it is worth noting that while the schemes were introduced to improve access to legal advice, particularly when persons were arrested in remote areas and also to provide around the clock

[92] Section 1A, 3rd Schedule, Access to Justice Act 1999
[93] General Criminal Contract 2004

assistance, the need to pass all requests for legal advice through the lengthy process arguably defeats the very purpose for which these schemes were introduced.[94]

The other important aspect of the institutional framework on this side of the adversarial scale is that which relates to the provision of interpreters and the translation of documents. As shall be discussed below,[95] one of the rights which accused persons in England have is the right to be informed of the reason for their arrest and to be informed in a language that they understand.[96] When it has been determined that an accused person requires the services of an interpreter, it is the responsibility of the Chief Constable of the force area, acting through the custody officer, to procure the services of an interpreter.[97] In August 2011, the Ministry of Justice entered into a framework agreement (FWA) for the provision of interpretation services. This agreement came into force on the 30th of January 2012. Prior to the coming into force of this agreement, when the need for an interpreter arose, one would usually be selected from the National Register of Public Sector Interpreters (NRPSI) and, occasionally, other local arrangements were made for the procurement of interpreters. However, as a result of these multiple arrangements, there would frequently be a failure to successfully provide interpretation services, or on occasion, an interpreter might be appointed without his credentials being accredited;[98] so it became necessary to regularise the vetting and accreditation

[94] This is further discussed in Section 2.3.2 of this chapter, as well as Section 3.2.1.2 of Chapter 3, *Infra*
[95] Section 2.3.1, below
[96] See Article 6 of the ECHR and Section 28 of PACE, as well as Paragraph 13 of PACE Code C
[97] Paragraph 13.1 of PACE Code C
[98] Para 1.4, Ministry of Justice FWA

policies of the Ministry of Justice, according to an internal report submitted by the Office of Criminal Justice Reform (OCJR). Following on from this, the Ministry of Justice began the procurement process that resulted in the coming into force of the Framework Agreement.

The new framework agreement is not without its shortcomings, which shall be discussed in the next chapter; however, it must be noted that as with the other elements of the legal and institutional framework for pre-trial processes in England, the provision of interpreters is subject to the same tripartite regulatory mechanism; i.e., a clear statement of the goal, a scheme to monitor the adherence to the objectives stated in the goal, and an attempt to realign the realities in practice to the goal. It is opined, briefly, that the frequent legislative activity, as well as the introduction of new schemes across the entirety of the pre-trial process speaks volumes of a desire to successfully regulate the framework; and while societal growth and development will always create the need for change in legislation and practice, applying the tripartite regulatory method might seem like the best way to stay abreast of the changing demands of society.

2.2.2 Nigeria

In Nigeria, just as in England, there are numerous statutory instruments, local and international, which form the legal framework of the pre-trial stage, and also establish the institutions that are parties to the process. These instruments

include the Constitution,[99] the CPA, the CPC, the Police Act 2004,[100] the Administration of Criminal Justice Law of Lagos State 2007, the United Nations Declaration of Human Rights, the International Covenant on Civil and Political Rights and the African Charter on Human and People's Rights.

On the 28th of May 2015, the outgoing president of Nigeria, Goodluck Jonathan signed into law the Administration of Criminal Justice Act, which by virtue of Section 493 thereto, seeks to repeal the CPA and CPC and unify the criminal procedure across the length and breadth of Nigeria. However, to be enforceable across every state of the federation, the different state Houses of Assembly shall enact a law establishing the jurisdiction of the Act within the respective state. At the time of writing this thesis, this had not yet occurred, and the provisions of the Administration of Criminal Justice Act had also not been applied in any case before any court. As a result, the relevant provisions of the new Act shall, in this chapter, be highlighted where relevant. Nevertheless, the provisions of the CPA and CPC shall be discussed as remaining prevalent and un-repealed. In Section 2.3.6 of this chapter, however, the nuances introduced by this new legislation shall be examined, and the prospects for change and the potential impact to be made on the legal and institutional framework of Nigeria taken into account.

As in the previous section, these instruments and the parties that make up the institutional framework shall be examined by looking at them from either end of the adversarial balance, within the context of the pre-trial stage.

[99] Constitution of the Federal Republic of Nigeria 1999. Cap C23, LFN 2004 Hereinafter "CFRN 1999"
[100] Cap P19, LFN 2004

2.2.2.1 The Police and Prosecution – Powers, Policies and Practices

The Police in Nigeria is established by Section 214 of CFRN 1999, which establishes a single police force known as the Nigeria Police Force. The Police Act 2004, as well as the relevant provisions of the Criminal Procedure Act and Criminal Procedure Code 2004, in accordance with the provisions of Section 214(2) of the CFRN 1999, governs the operational powers of the Nigeria Police Force.[101] According to Section 215(2) of the CFRN 1999, the head of the Nigeria Police Force is the Inspector-General of Police; officers stationed in each of the thirty-six (36) states and the Federal Capital Territory (FCT) are under the authority of the Commissioner of Police of that state; the Commissioner in turn subject to the authority of the Inspector-General. Police officers stationed in a given state form part of that state's command, with the thirty-seven (37) state commands further divided into twelve (12) Zonal commands.[102]

Section 4 of the Police Act 2004 provides for the general duties of the police which include "…the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws and regulations with which they are directly charged…."[103] In the pursuit of the fulfilment of its duties, the police

[101] The Nigeria Police Force has actually operated in its current incarnation since 1945. The reference to the 1999 CFRN and the Police Act 2004 as the establishment provisions are merely because these are the extant laws, which repealed the previous laws upon their entering into force. A cursory look at the now-repealed laws will reveal that the Constitutional provisions and the provisions of the preceding versions of the Police Act are identical. In essence, the Nigeria Police Force has operated in its current structure since 1945, before Nigeria obtained its independence.

[102] For more on the structure of the Nigeria Police Force see Section 5 of the Police Act 2004 and, generally, "The Structure of the Nigeria Police", available at http://www.npf.gov.ng/force-structure/, last accessed on 27-10-2014

[103] Section 4, Police Act 2004

are granted several wide-ranging powers including the powers of stop and search; entry, search and seizure; arrest; interrogation; and detention of accused persons, and, by virtue of Section 23 of the Police Act, the power to prosecute offenders. This power is not absolute, and is subject to Sections 174 and 211 of the CFRN 1999, which confer the power of prosecution on the Attorneys-General of the Federation and the thirty-six (36) states, respectively. Also, this power to prosecute is limited. The police may only institute proceedings at the Magistrate Court, in misdemeanour or minor offences.[104] There has been debate about whether the police may conduct prosecutions in the High Courts and other superior courts, as some laws provide for this,[105] and others fail so to do.[106] In *Osahon v Federal Republic of Nigeria* the Court of Appeal held that this was dependent on jurisdiction.[107] In practice, however, the police are restricted to instituting and conducting criminal proceedings in the Magistrate Court alone; the prosecution at the High Court is the exclusive and constitutionally-sanctioned responsibility of the Attorney-General of the Federation and the Attorneys-General of the States.[108]

As is the case in England, and in a bid to maintain the adversarial balance upon which the criminal justice system was built, there are safeguards to

[104] Section 78, CPA

[105] Section 98(1) of the High Court of Abuja (FCT) 1990 lists "Police Officer" as one of the persons who may conduct a prosecution before it on behalf of the Federal Republic of Nigeria.

[106] Section 56(1) of the Federal High Court Act 1990, in listing those who may prosecute a matter before it does not include a police officer.

[107] *Osahon v Federal Republic of Nigeria* [2003] 16 NWLR (pt 845) 89, pp 124-125. Subsequently, the Supreme Court of Nigeria has ruled that police officers may institute proceedings in any court in Nigeria, provided the prosecuting officers are qualified legal practitioners duly enrolled at the Supreme Court. See *FRN v Osahon* [2006] 5 NWLR (pt 973) 361.

[108] Sections 174 and 211 of the CFRN 1999. For a detailed discussion on the power to institute and conduct proceedings in Nigeria, see Bob Osamor, *Fundamentals of Criminal Procedure Law in Nigeria* (Dee-Sage, 2004), pp 110 – 132.

prevent the abuse of the wide-ranging powers of the police in Nigeria, at least on paper. A detailed discussion of these rights and safeguards occurs in Section 2.3, below, but it ought to be noted that even the legal framework providing for these rights and safeguards in Nigeria, even on a purely theoretical level, tilts the balance in favour of the police and the prosecution. The constitutional and statutory provisions empowering the police to make arrests, conduct searches, etc., are more detailed than those providing for the rights of the accused.

The other body primarily responsible for the prosecution of offences in Nigeria, as has been mentioned several times in previous sections of this chapter, is the Attorney-General, either of the Federation or of the State. The Attorney-General, acting personally or through an officer of his department, is in actuality the primary prosecuting body in Nigeria. There are other prosecuting bodies in Nigeria, which exist to prosecute special offences.[109] In theory, the police as the primary investigative body, are supposed to conduct investigations, build a case file, and upon determination that an offence has been committed which is beyond the scope of its prosecution, i.e., a felony, not a misdemeanour, remit the said file to the office of the Attorney-General for advice and subsequent prosecution of the offence, where necessary. However, in practice, there is room for gross violations of these provisions.

These violations shall be discussed and analysed in the next chapter, but it would appear that some of these violations are due in part to the institutional structures of the police and the prosecution. There is, as mentioned earlier, one

[109] For example, the Economic and Financial Crimes Commission Establishment Act, Cap E1, LFN 2004, establishes the Economic and Financial Crimes Commission (EFCC), which has the power to investigate and prosecute economic and financial crimes.

police force serving across all of Nigeria, operating on a federal level; while the different legislative instruments and the offices of the Attorneys-General are operate on a state structure. With a crucial working relationship existing between the two bodies, i.e., the transfer of case files, and no provision clearly regulating the relationship between the two, there could potentially be a breakdown of communication between the two. Hypothetically, a police officer charged with investigating an offence could be transferred to a different state command before completion of his investigation or before the file is passed on to the relevant prosecuting body.

Also, in respect of the different legislative instruments and the territorial limits to their scope of application, the multiplicity of laws means that a police officer in the south of Nigeria, for example, is trained and learns to perform his duties within the ambit of the CPA, whilst one stationed in the North is trained under the provisions of the CPC. This could potentially pose a problem, albeit one that is not insurmountable, when an officer from a CPA state is transferred to another state where the CPC is in operation.

If the regulatory framework of Nigeria were to be juxtaposed with the English framework, and with the tripartite form that has been agreed to as ideal, then Nigeria has arguably failed to provide a good regulatory framework.

In respect of the first element, i.e., the goal, although this becomes more apparent when discussing the rights available to accused persons below, even the most cursory reading of the provisions of the different statutory instruments shows that the law is not always clearly stated. For example, Section 9 of the CPA, which provides that a person who is arrested "… with or

without a warrant, shall be taken with all reasonable dispatch to a police station, or other place for the reception of arrested persons…"[110], but does not go further to describe the conditions of detention such as those prescribed in Section 8 of Code of Practice C of PACE. Without a clear set of guidelines or minimum standards, this could leave room open for interpretation of the rules or the provision of facilities in a variety of ways. As a result, the station, or other place for receiving arrested persons could be set up in a different manner in each of the different police stations, in each of the police areas, in each of the different states across the country.

To buttress this point, it might be important to note the following comment by John Coppen:

> *"The police service of England and Wales is very good at taking national strategies and directives and turning them into 43 different versions of that one thing. Anything that is not codified strictly in law can be subject to local misinterpretation and subsequent misuse. This is important to grasp if you are to understand how police detention operated prior to PACE. There was no one way of dealing with people who had been arrested. Each police force had its own Force Orders which dictated how and where a suspect would be detained, but these Orders were largely concerned with the physical practicalities of the task rather than strict compliance with legal obligation."*[111]

[110] Section 9, CPA

[111] John Coppen, "PACE: A View from the Custody Suite", in Cape and Young, *Regulating Policing*, n 9, p 75, at 76.

Coppen's assertion, when interpreted in the Nigerian situation, gives credence to the hypothesis made that the provisions of the laws in Nigeria are open to misinterpretation. If a provision is open to interpretation in several ways, then surely the second aspect of the tripartite regulatory form, i.e., monitoring is also set to fail.

If there is no minimum standard for interpretation of the law or provision of facilities, then certainly, there would be no easy way to monitor the operation of the law and to determine its success, or lack thereof, in practice. Consequent to this, then the third aspect, i.e., realignment shall fail also.

This is evident in Nigeria when one considers the age of the statutory instruments. Admittedly, there may be other factors responsible for this, such as the long periods of military rule, for example; but a situation wherein a law is not reviewed and/or amended is also indicative of an absence of realignment methods.

On this point, one may be misled by the dates of the relevant laws: the current Constitution was adopted in 1999, and the CPA, CPC and Police Act are all barely a decade old. However, a look at previous versions of the different laws would reveal that, for instance, the provisions of the previous Constitutions that were in operation are *in pari materia* with the provisions of the 1999 CFRN, with no substantial amendments thereto. In addition, the other three key instruments have maintained the same form and content of provisions

since the introduction of their predecessors around the time of the first republic in 1960.[112]

On the one hand, this is arguably down to gross legislative inactivity, which may be due to the absence of any reports by a monitoring agency, which is in turn a result of the openness of the provisions to a multiplicity of interpretations. On the other hand, one might be tempted to excuse the age of the provisions as an effect of the long periods of military rule. Every military government that seized power in Nigeria would, via the promulgation of a Basic Constitution (Suspension and Modification) Decree,[113] suspend the provisions of the Constitution and some other crucial statutory instruments. Upon a subsequent return to civilian or democratic rule, the new legislature would reinstate the previously suspended laws. This is why one might tend to argue that the military had its role to play in the age or non-amendment of the statutory provisions relating to the regulatory framework of the pre-trial stage in Nigeria.

In any event, the failure to amend a provision of law would most certainly pose a difficulty as the needs of a society undoubtedly change often. Whatever the case though, it is obvious that the regulatory framework governing the police and the prosecution in Nigeria fails to conform to the tripartite form of regulation.

[112] Comfort Ani also buttresses this fact of the age of the legislative instruments in Nigeria, Comfort Chinyere Ani, "Reforms in the Nigerian Criminal Procedure Laws" (2011) NIALS Journal on Criminal Law and Justice (Vol 1) 52, at 52-53

[113] This Decree was passed by the military regimes which overthrew the civilian governments in 1966 and 1984.

As a disclaimer, it is herein submitted that the foregoing argument does not suggest that laws must be amended frequently, or that a law not being reviewed is a sign of failure, simply speaking. The foregoing is an argument which envisions and supports the scenario described by Ashworth and Redmayne.[114] As they contend, although it would be wrong to suggest that there is a simple causal process whereby a failing in the system leads to reform, procedural reform often occurs in response to particular problems in the criminal process, or to a miscarriage of justice of some sort. In extending this argument, it is common knowledge to Nigerians and to anyone who has studied the Nigerian criminal justice system that the system is in a general state of disrepair, and has so been for a number of years.[115] Nevertheless, there is no attempt at monitoring or realignment. There is also arguably no goal, as the provisions of the statutory instruments that constitute the legislative framework are not clearly or succinctly stated. It is contended that in situations where the legislative framework or "the goal" is clearly stated, is monitored and found to be working and addressing the relevant issues, and there was no viable need for realignment found, it would not be viewed as a failed attempt to regulate using the tripartite form.

2.2.2.2 The Suspect and Preparing His Defence

Again, in a bid to avoid any repetition in looking at the framework governing the suspect and preparing his defence, a detailed analysis of the legal framework of this side of the adversarial balance is reserved for the following section, 2.3, below. However, for comparative purposes, there is the need to

[114] Andrew Ashworth and Mike Redmayne, *The Criminal Process*, n 22, pp 9 and 17.
[115] Editorial, "Criminal Justice Sector: Canvassing for a Change", *Nigerian Law Times* (July 2011)

compare the two main elements of the institutional framework on this end of the scale, i.e., the provision of Legal Aid and the provision of interpreters.

The current statutory instrument governing the provision of Legal Aid in Nigeria is the Legal Aid Act 2011, which establishes the Legal Aid Council of Nigeria. A combined reading of Section 8(2) and the second schedule to the Act establishes a Criminal Defence Service for the purpose of assisting indigent persons involved in criminal investigations or proceedings, albeit only in cases or charges dealing with only nine (9) different offences, namely: Murder,[116] Manslaughter,[117] Maliciously or wilfully grievous hurt,[118] Assault occasioning actual bodily harm,[119] Common assault, Affray, Stealing, Rape and Armed Robbery.[120] Also, Section 10(1) states that Legal Aid shall only be granted to persons whose income does not exceed the national minimum wage.[121]

There is a dearth of literature to confirm or deny this, but it has often been asserted amongst practitioners and academics in Nigeria that the Legal Aid Council of Nigeria is grossly understaffed, and as such, lacks the manpower

[116] The offence defined as Murder in the Criminal Code, which is applicable to Southern Nigeria is also defined as Culpable Homicide punishable with Death in the Penal Code, which is applicable in Northern Nigeria. Persons charged under the relevant provisions of the Penal Code are also entitled to legal aid in Nigeria.

[117] Defined as "Culpable Homicide not punishable with Death" in the Penal Code.

[118] Defined as "Wounding or inflicting grievous Bodily Harm" in the Penal Code.

[119] Defined as "Criminal Force occasioning actual Bodily harm" in the Penal Code.

[120] Legal Aid is also provided for in cases involving inchoate offences relating to the nine (9) that are expressly stated in the Act.

[121] The current minimum wage in Nigeria stands at 18,000 NGN (approx. 38 GBP as at August, 2018) per calendar month. There are exceptions to this rule, as provided for by Sections 10 (2) and (3), but these are considered exceptional circumstances and require the approval of the governing board.

required to provide the services it has been tasked to provide.[122] Also, in subjecting the Legal Aid Act to the test that is tripartite form of regulation; it, like the other Nigerian statutory instruments, fails the test of realignment. The only nuance introduced by the 2011 Act is the provision of Legal aid for proceedings involving armed robbery charges. Previous versions of the Act contain identical provisions, save for the inclusion of this provision in the second schedule to the Act.

The other piece in the institutional framework for the suspect and the preparation of his defence is the provision of interpreters. As any anthropological study of Nigeria would probably reveal, Nigeria is home to a diverse variety of tribes and cultures, and a combination of these different tribes and cultures gives rise to the existence of over five hundred (500) different languages.[123] Despite the fact that the *lingua franca* of the country is English,[124] it ought to come as no surprise that there would be persons arrested and detained who cannot communicate fluently in English. The law, recognising this, provides in the various applicable provisions, for a person who is arrested, interrogated or arraigned, to be informed of the reasons for

[122] There is a general acceptance of the Legal Aid Council's understaffing, but there is no official figure to suggest how many lawyers are actually under the employ of the Council, although Ayorinde estimates this number to be about two hundred and eighty (280). See "Legal Aid Council Grapples with Challenges of Logistics, Poor Funding – Ayorinde", available at http://www.legalaidcouncil.gov.ng/index.php?option=com_content&view=article&id=141:legal-aid-council-grapples-with-challenges-of-logistics-poor-funding-ayorinde&catid=43:latest-news, last accessed on 31-01-2015

[123] Ethnologue page on Nigeria, available at http://www.ethnologue.com/country/NG, last accessed 21-10-2014. See also, BBC News: "Nigeria: Local Languages Fight for Survival", available at http://www.bbc.co.uk/news/blogs-news-from-elsewhere-26432933, last accessed 21-10-2014

[124] *Ibid*

said arrest or arraignment, and to have his interrogation conducted in a language he understands.[125]

Despite these provisions, and the multiplicity of languages in existence within the geographical terrain of Nigeria, there is no formal scheme that exists for the provision of interpreters and translation services. This, in alluding to Coppen's statement above, leaves the provisions of the laws open to interpretation in various ways; and very often, it is assumed, open to instances of non-observance.

2.2.3 Observations

In both England and Nigeria, there have been commendable attempts to uphold the adversarial balance in the provisions of the various statutory instruments and in the establishment of the institutional bodies who play a role in the pre-trial stage of both jurisdictions. However, if both were subjected to the test of the tripartite regulatory form, the legal and institutional framework of Nigeria is found wanting. This is not to suggest that the framework in England is not without its shortcomings, as shall be elucidated in the next section, but as opined earlier, it is indicative that the monitoring and realignment mechanisms of the English regulatory framework are designed to strive towards maintaining the adversarial balance in the best possible way.

There is the need for Nigeria to improve on its frameworks, as there is the need to always maintain the adversarial balance, and the best way to do this, it

[125] Sections 5, 38 and 6 of the CPA, CPC and Administration of Justice Act 2015 all provide that a person should be informed of the reasons of for his arrest, despite failing to expressly require that this be done in a language that the accused understands. This is however a requirement in Section 35(3) of the 1999 CFRN, as a result of which it is an established requirement in Nigerian law.

is opined, is by clearly stating the goal, by way of clear and unambiguous statutory provisions which delineate the powers of the police and the prosecution, and also provide minimum standards of interpretation, as obtains in England by virtue of PACE and its Codes of Practice; this would almost certainly prevent a misinterpretation of the law or, as contended by extending Coppen's assertion towards the Nigerian position,[126] the possibility of the provisions of the relevant statutory instruments being interpreted in a plethora of ways across the different police stations across the length and breadth of Nigeria.

2.3 RIGHTS AVAILABLE TO AN ARRESTED PERSON

As highlighted in the previous section, there are provisions which exist to provide certain liberties to accused persons and to provide safeguards against the abuse of powers by actors of the state involved in pre-trial proceedings, particularly the police and the prosecution. The rights, which prevail at this stage of the criminal process in England and Nigeria, are:

2.3.1 Right to be Informed of Reasons for Arrest

In any general study of human rights, one of the fundamental rights afforded to a person is the right to freedom of liberty and the right against unlawful detention.[127] The power of arrest by the police is one exception generally accepted in respect of this right. However, in both jurisdictions under

[126] n 89(?)

[127] This right is provided for in the UN Declaration of Human Rights, the European Convention on Human Rights and the African Charter on Human and People's Rights, for example.

consideration, any person who is arrested has the right to be informed of the reason for his arrest. This is provided for by Section 28(1) of PACE, Paragraph 3.1 (b) of PACE Code C, Section 35 (3) of the CFRN 1999, Section 5 of the CPA and Section 38 of the CPC, respectively, as well as Section 6 of the Administration of Criminal Justice Act 2015. The aforementioned provisions essentially all provide that a person who has been arrested is to be informed, in a language that he understands, and as soon as is practicable, of the reasons of his arrest. Under the PACE regime, the right to be informed is required regardless of whether the fact of the arrest is obvious,[128] and must be included in the custody report;[129] although this is not a requirement in Nigeria if the accused is arrested whilst committing the offence.[130] Also, there is a further requirement in Nigeria, according to the provisions of Sections 35(3) and 36(6)(a) of the CFRN 1999, that the accused is to be informed in writing.

Failure by the police (or other arresting body) to inform the accused of the reasons for his arrest would ordinarily render the arrest unlawful. This information, according to Cape and Hodgson, need only provide an indication of the offence and when and where it is committed, and the police are not required to disclose the basis for their suspicion.[131]

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[128] Section 28(2), PACE

[129] Section 3.4, PACE Code C

[130] Sections 5 and 38 of the CPA and CPC, respectively. However, the provisions of the Administration of Justice Act 2015, particularly Section 6 thereto, make it a requirement that a person be informed of the reasons for his arrest, even when he is arrested in the cause of committing an offence.

[131] Ed Cape and Jacqueline Hodgson, "The Investigative Stage of the Criminal Process in England and Wales", in Ed Cape, Jacqueline Hodgson, Ties Prakken and Taru Spronken (Eds.), *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union* (Intersentia Antwerpen – Oxford, 2007) 59, 71

There are, as expected, a number of exceptions to this rule. Section 28(5) of PACE provides that where it is not possible to inform the accused as soon as is practicable, as a result of the accused escaping, that a non-information of this right does not render the arrest unlawful. Also, Osamor contends that, in Nigeria, informing the accused of the reasons of arrest at any time after arrest and before arraignment is lawful.[132] Further, it has been held on more than one occassion, in cases such as *Christie v Leachinsky* [1947] AC 573, *Adler v Crown Prosecution Service* [2014] Crim. L. R. 224 and *State v Osler* [1991] 6 NWLR (Part 199) 576, that in the interest of justice, it would usually suffice that the accused was informed that he was under arrest, even if the reasons for said arrest are not made known at the time of arrest.

The different provisions dealing with a detainee's right to be informed of the reasons for, in both all prescribe that he be informed in a language that he understands. Thus it would seem that in order to comply with this requirement, and for effective communication during interrogation, the need for an interpreter is an essential one.

As highlighted above, there is a Framework agreement entered into by the Ministry of Justice for the purpose of providing interpretation and translation services in England. Curiously, despite the requirement that a person be informed of the reasons for his arrest in a language that he understands in Nigeria, there is no mechanism for the delivery of this right. It therefore begs the question, one to which an answer shall be attempted in the next chapter, how is this right to be to be exercised? How is an accused person to be informed in a language he understands in Nigeria?

[132] Osamor, n 99, p 236

Generally, the right to be informed of the reasons for the arrest, unlike the right to legal assistance and the right to silence, is not usually the subject of much academic debate. As such, there is a dearth of substantive literature debating the merits of this right.

2.3.2 Right to Legal Assistance

In attempting to maintain the adversarial balance, the right to effective legal assistance cannot be understated or overemphasised. Given that the police are the primary investigatory body in the adversarial system, and given the weight that is usually attached to a confessional statement, an arrested person who is being interrogated may unwittingly offset the adversarial balance without realising the implications of his actions. It is as a result of the need to maintain this balance, and protect the detainee from making a confessional statement unwittingly or against his will that the right to legal assistance at the police station is viewed as a fundamental right of an arrested person.

Prior to the coming into force of PACE, the Judges' Rules provided for the need for suspects to be informed of their right to legal advice.[133] However, as Skinns pointed out, the discretionary nature of the Judges' Rules meant that a few suspects were informed of their right to legal advice, and the police would often use this to delay or prevent access to custodial legal advice.[134] As she further noted,[135] this situation was criticised by the Royal Commission on Criminal Procedure 1981 (RCCP) as being disadvantageous to suspects, stating that it was insufficient to merely inform suspects of the right if there

[133] *Practice Note (Judge's Rules)* [1964] 1 WLR 152
[134] Layla Skinns, "The Right to Legal Advice in the Police Station: Past, Present and Future", (2011) Crim L R 19, 19
[135] *Ibid*

was no one to act on subsequent requests for legal advice. Subsequent to this, the RCCP put forward the recommendations, which resulted in the provisions contained in Section 58 of PACE and Paragraph 6 of Code C of PACE.

The right to legal advice in England is available to every person arrested and detained on suspicion of committing an offence, whether or not the accused is a British national.[136] The legal advice is to be provided at no cost to the accused, however it is not an absolute right, as it may be waived.[137] Generally speaking, every person who has been arrested should be informed of his right to legal assistance, and may make a request for advice from a solicitor of his choosing, in writing, in person, or over the telephone. The consultation with the solicitor is to be private and confidential, and there is to be no limit to the frequency or duration of the consultation with his solicitor.

Recent decisions in *Salduz* and *Cadder*[138] have recognised the importance of this right to the preservation of the adversarial balance and the overall presumption of innocence. Both cases established that the accused person must be informed of his right to legal advice as soon as possible after arrest, and that the solicitor could be present at all times, including during the interrogation of the accused. As was noted in *Salduz*;

> *"... as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the*

[136] Cape and Hodgson, n 121, 71.
[137] Section 58, PACE
[138] n 38 and n 39, *Ibid*, respectively

light of the particular circumstances of each case that there are compelling reasons to restrict this right."[139]

As mentioned in the section 2.2.1.2 above, the provision of legal assistance is a service performed by the Legal Services Commission. After the establishment of the CDS Direct and the DSCC, as well as the coming into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, all requests for legal assistance must be directed to the DSCC, even where the accused opts for his own solicitor. After a person requests legal advice, all interviews are suspended until he has had the opportunity to consult with his solicitor. This consultation may take place in person or over the telephone. Guidance Note 6B of Code C of PACE and the General Criminal Contract 2004 stipulate that in certain offences, the advice to be given is to be given by telephone only.

As stated earlier, this right to custodial legal advice may be waived. According to the provisions of Section 6.6(d) of PACE Code of Practice C, this waiver must be clearly made, and the fact that the detainee has waived his right should be included in the custody record. In *Saunders v R*,[140] it was held that for a waiver to be valid, it ought to be informed, voluntary and unequivocal.

An issue which becomes apparent from an analysis of the various provisions dealing with the right to legal assistance is that the right to legal assistance, going by a literal interpretation of the words in the provision, is only available to persons who have been arrested and detained. As van de Laar and de Graaff

[139] *Salduz v Turkey*, n 38, at para 55
[140] *Saunders v R* [2012] EWCA Crim 1380

ask, what happens to persons who have merely been invited to the station for questioning, but have not actually been placed under arrest or detained?[141]

In contrast to the detailed nature of the sections providing for this right in England, the right to legal advice in Nigeria is provided for by Sections 35(2) and 36(6)(c) of the 1999 CFRN, which simply state that "any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice"[142] and that "every person who is charged with a criminal offence shall be entitled to… defend himself in person or by legal practitioners of his own choice."[143] There is nothing in either section, or indeed in any other provision under Nigerian law requiring that the accused be informed of this right, nor are there any provisions which stipulate the frequency of consultation and whether the legal practitioner is permitted to be present during the interrogation of the accused, nor whether the right may be waived;[144] issues which have been debated in ECHR jurisprudence and which could affect the quality of legal assistance given to an accused person.[145] Also, the right to legal assistance in Nigeria is not one given at no cost to the

[141] T.A.H.M. van de Laar and R. L. de Graaff, "Salduz and Miranda: Is the US Supreme Court Pointing the Way?" (2011) EHRLR 304. This issue, and other issues that affect the exercise of the right in practice shall be addressed in the next chapter.

[142] Section 35(2), 1999 CFRN

[143] Section 36(6)(c), 1999 CFRN

[144] It is important to note that despite the apparent silence of the law on the ability of an accused to waive his right to legal assistance in Nigeria, by virtue of Sections 352 and 186 of the CPA and CPC, respectively; as well as the ruling in *Josiah v The State* [1985] 1 SC 406, that legal representation in court is mandatory for a person charged with the commission of a capital offence.

[145] See, for example, *Pischalnikov v Russia*, ECtHR judgment of 24 September, 2009 (unreported)

accused, unless he is indigent, or earns less than the national minimum wage.[146]

In light of the paucity of the provisions of Section 35(2) and Section 36(6)(c) of the 1999 CFRN, it is opined that merely stating that a person is entitled to legal assistance, without necessarily stating the conditions and requirements for the provision of this right equates to the provision of the right without any minimum standard for its provision. This, in light of Coppen's assertion above,[147] leaves the right to subject to diverse applications across the different force commands in Nigeria. The failure to provide a minimum standard potentially leaves the right open to gross abuse. Hypothetically speaking, an accused could be allowed to see his lawyer for five (5) minutes before his interrogation, in the presence of police officers and other third parties, and be refused the opportunity to consult with him after this. Could the accused person in this hypothesis claim to have exercised his right to legal assistance?[148]

In the absence of any academic opinion on this issue, one might expect to find answers in decisions of the courts. As is the case in England, judicial decisions in Nigeria are subject to the principle of judicial precedent, and form part of the sources of law. However, the courts have failed to address this issue effectively.

[146] Section 10, Legal Aid Act 2011

[147] Coppen, n 113

[148] While it is conceded that Section 211 (2) of the CPA allows a defendant in custody or on remand access to his legal practitioner "at all reasonable" times, it should be noted that the provision refers to a person whose trial has commenced, and there is an absence of literature or jurisprudence to suggest that this right may apply before he is arraigned.

As a disclaimer, it ought to be noted that the assertion is not to be misconstrued as suggesting that the courts in Nigeria have yet to rule on the existence of the right to legal advice; it merely suggests that, as evidenced by an extensive search of several reported cases, the courts seem satisfied to declare the right as being in existence, without actually ruling on any of the issues which arise such as frequency of consultation or whether the consultation ought to be in private; issues which if addressed might help to establish a minimum standard for the application of the right.

For example, in *Amanchukwu v Federal Republic of Nigeria,*[149] Udom-Azogu, JCA merely stated that "[o]n the issue of counsel of accused choice… where he is denied bail and access to counsel of his choice, therefore making it difficult for him to prepare for his defence, it constitutes a complete violation of his right of fair hearing…"[150]

2.3.3 Right to Silence

Also important to maintaining the adversarial balance is the right to silence. Often misconstrued as the right against self-incrimination, both terms are used interchangeably, and are to the general effect that a person is not to be compelled to make any statements or divulge any information that may serve to incriminate him or establish his guilt in the alleged offence for which he has been charged. As Lord Mustill once stated about the right to silence:

> *"In truth it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence*

[149] [2007] 6 NWLR (part 1029) 1
[150] *Ibid*, at p 18

and importance, and also as to the extent to which they have already been encroached upon by statute. Amongst these may be identified:

(1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.

(2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.

(3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.

(4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.

(5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.

(6) A specific immunity (at least in certain circumstances . . .), possessed by accused persons undergoing trial, from having

adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial."[151]

The right was first codified in English Law by virtue of the Judges' Rules 1912, and is currently provided for by Code of Practice C of PACE, which instructs police officers to inform the accused of his right to silence when administering the caution prior to his interrogation.[152] It should be noted, that the European Convention of Human Rights does not expressly provide for the right to silence, but its existence has been recognised in a few notable judgments of the European Court of Human Rights.[153]

The right to silence is not an absolute right. A suspect is not obliged to answer any questions during his interrogation, but in English law, adverse inferences may be drawn from his silence. According to Section 34 of the Criminal Justice and Public Order Act 1994, adverse inferences may be drawn from an accused's decision to remain silent where he fails to mention any fact which he later relies upon and which in the circumstances at the time the accused could reasonably be expected to mention; fails to give evidence at trial or answer any question; fails to account on arrest for objects, substances or marks on his person, clothing or footwear, in his possession, or in the place where he is arrested; or fails to account on arrest for his presence at a place.[154] It should

[151] Lord Mustill, *R v Director of Serious Fraud Office, ex parte Smith* [1993] AC 1 (HL) 30–31, cited in Andrew L-T Choo, *The Privilege Against Self-incrimination and Criminal Justice* (Hart, 2013), 11. For a more detailed analysis and examination of the right to silence, see, generally, Pat McInerney, "The Privilege Against Self-Incrimination from Early Origins to Judges' Rules: Challenging the "Orthodox View"", (2014) E & P, 18(2), 101

[152] Paragraph 3.1, PACE Code C

[153] For example, *Funke v France* (A/256-A) [1993] 1 C.M.L.R. 897 (ECHR) and *Saunders v United Kingdom* (19187/91) [1997] B.C.C. 872 (ECHR)

[154] The curtailing of the right to silence by the coming into force of Section 34 of the Criminal Justice and Public Order Act 1994 was a very significant change in the rights terrain in

be noted, however, that it is impossible to convict a suspect wholly on his decision to remain silent.[155]

In Nigeria, Section 35(2) of the 1999 CFRN states that a person who has been arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice. This is the only section in the CFRN, and indeed in any other legislative instrument, which provides for the right to silence at the pre-trial stage.[156]

The choice of words used in the drafting of the provision of Section 35(2) of the CFRN 1999 is a curious one. A literal interpretation seems to suggest that the right to remain silent expires after consultation with a legal practitioner or other chosen person. Could an accused person possibly be compelled to answer questions posed to him after he has consulted with a legal practitioner? If he consults with a person of his choice, not a legal practitioner, but insists on speaking to a legal practitioner afterwards, does he continue to enjoy the right to silence pending consultation with his legal practitioner? Also, the provision is silent about whether adverse inferences may be drawn from the silence of the accused.

England. Quirk has written extensively on this. See Hannah Quirk, "Twenty years on, the right of silence and legal advice: the spiralling costs of an unfair exchange" (2013) 64(4) NILQ 465.

[155] As basic rules of evidence suggest, the burden of proof in criminal trials lies on the prosecution. As a result, they must build a case beyond reasonable doubt. In a situation where a case is only built on a balance of probabilities, it would be impossible to convict an accused wholly on his decision to remain silent.

[156] Section 236 of the CPC recognizes the right to silence during his trial, but does not provide for the right to silence before trial commences.

The courts have not done much to offer redress of the issues. Admittedly, the Supreme Court of Nigeria has frequently upheld the right to silence, and have also declared that adverse inferences may be drawn from the defendant's exercise of his right. Perhaps the most notable decision in this area is the case of *Daniel Sugh v The State.*[157] In this case, the court held that by virtue of Section 33(11) of the 1979 Constitution of the Federal Republic of Nigeria,[158] the accused was under no compulsion to make a statement in defence of any allegations raised by the complainant or the police, thereby upholding the existence of the right to silence. The Supreme Court also went further to state that Section 33(11) of the 1979 Constitution did not prohibit a trial judge from drawing any unfavourable inference against an accused having regard to the evidence adduced in the case. As the presiding judge, Obaseki, JSC expressed:

> *"It is natural and in the ordinary course of events for a person accused of a serious offence, spontaneously and instinctively to deny the accusation and give such explanation as was capable of exonerating or consistent with innocence, than to remain silent and wait for such a time as a rational explanation of evidence offers itself. The court confronted with such a predicament… may draw such inferences from the reaction of the person so accused consistent with the ordinary reaction of human beings in such situations."*[159]

This power of the courts to draw adverse inferences from the defendant's exercise of his right to silence has been upheld in subsequent cases such as

[157] *Daniel Sugh v The State* [1988] 2 NWLR (Part 77) 475

[158] Hereinafter referred to as the "1979 Constitution". This provision is now Section 35(2) of the 1999 CFRN

[159] *Daniel Sugh v State,* n 159, at 494

Utteh v State,[160] *Ubanatu v Commissioner of Police*,[161] and *Mbele v State*.[162] However, in *Gira v State*,[163] the presiding judge, Adio, JSC, in upholding the power of trial courts to make adverse inferences, went on to state that a failure to make a statement by an accused amounted to an "admission of guilt by conduct." As he put it:

> *"A person who is accused of committing a crime is, by virtue of the provisions of the Constitution of the Federal Republic of Nigeria, 1979,*[164] *entitled to remain silent either during investigation or when he is being tried in court. However, there is, in law, a legal principle commonly referred to as admission by conduct. The law is that when a clear and direct accusation is made against a person, in his presence, in circumstances which should warrant instant denial, refutation, or protest from him and he does not deny, refute or protest against the making of the accusation, evidence of such could be given against him as evidence of admission by conduct."*[165]

This position, it is submitted, might need to be revisited, as it seemingly vitiates the right to silence, and indeed the tenets of the adversarial system, which establish the presumption of innocence and also the evidentiary rule which places the burden of proof on the person who makes an allegation.[166]

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[160] [1992] 2 NWLR (Part 223) 257
[161] [1999] 7 NWLR (Part 611) 512
[162] [1990] 4 NWLR (Part 145) 484
[163] [1996] 4 NWLR (Part 443) 375
[164] These provisions now appear in the 1999 CFRN
[165] *Ibid*, at p 386
[166] Section 131, Evidence Act (Nigeria), 2011

Most interestingly, a Nigerian academic, A. A. Adeyemi, has argued that the right to silence is "contra-cultural" to African societies, especially within the Nigerian context.[167] Adeyemi also seems to support the notion that the right to silence only exists, or ought to exist up to the point of consultation with a legal practitioner, after which said right must expire.[168] At the time of writing, the courts in Nigeria are yet to rule on whether the right to silence should expire, or may subsist beyond the initial consultation of the accused with his legal practitioner.

It is opined, however, that the recognition of the right to silence, and the right to refuse to testify in court by the Supreme Court in the aforementioned cases establishes the existence of this right beyond the police station, and by extension, beyond the initial consultation with the legal practitioner. Also, it is humbly submitted that Adeyemi's position about the contra-cultural nature of the right to silence in the Nigerian context is an erroneous one. Admittedly, the argument in itself may be true and would stand if one were to argue same in the context of the different customary methods of adjudication that existed in pre-colonial Nigeria. However, as is trite knowledge, Nigeria has, since independence, adopted the adversarial system of justice; and the right to be presumed innocent, extending to the freedom from self-incrimination, is as a matter of fact, an integral part of the adversarial "culture". As a result, it might be contraindicative to assess a right against a cultural system which is no longer the relevant mode of adjudication for criminal offences.

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[167] A. A. Adeyemi, "Criminal Justice Administration in Nigeria in the Context of the African Charter on Human and Peoples' Rights", in A. Kalu and Y. Osinbajo (Eds.), *Perspectives on Human Rights* (Federal Ministry of Justice, 192), 121, at 122

[168] *Ibid*, at 123

2.3.4 Right to Speedy Arraignment

The right to speedy arraignment is perhaps better recognised as a freedom from undue and unnecessary detention. As mentioned earlier, in Section 2.3.1 above, the power of arrest is one which contravenes a person's right to liberty, albeit in a manner recognised by law. In a bid to preserve the adversarial balance, all arrested persons have the right to be arraigned before a court of competent jurisdiction within a specific time or released on bail. Alternatively, if upon the collation of the relevant evidence, there is no offence, on a balance of probabilities, which the arrested person could be charged with committing, he is to be released without charge.

In England, by virtue of Section 40(3) of PACE, and Section 15 of Code C thereto, a person is not to be detained for more than six (6) hours, although this may be extended by further nine (9) hour increments up to a maximum of thirty-six (36) hours, upon review of the detention by the custody officer.[169] Any reasons for granting an extension to the detention of an accused are to be included in the custody report.[170]

Essentially, the right to speedy arraignment exists as a safeguard to prevent the undue exercise of the power of arrest by the police, and to protect an accused person's right to liberty. The provisions of PACE in this regard are clear, and are not usually an issue of contention in England. In Nigeria, however, the right to speedy arraignment or a freedom from unnecessary detention is one that is subject to immense academic scrutiny.

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[169] Section 42(9), PACE. This is in respect of 'regular' offences. The maximum period of detention in terrorism and terror-related offences is twenty-eight (28) days, by virtue of Schedule 8 of the Terrorism Act 2000.

[170] Section 42(9)(iii), PACE

Sections 35(4) of the 1999 CFRN, 17 of the CPA, 129 of the CPC and 27 of the Police Act, all deal with this right, and all three provide that a person who has been detained cannot remain in detention for a period exceeding twenty-four (24) or forty-eight (48) hours without being arraigned or being released on bail, except in matters relating to capital offences. For a plethora of reasons however, which shall be analysed in the next chapter, this right is routinely violated; with the resultant effect being the creation of a category offenders known colloquially as "Awaiting Trial Inmates" or (ATMs).[171] These are persons who are being detained or have been detained for extremely long periods of time without formally being charged before a court of competent jurisdiction.[172]

The creation of the ATM category, or the increased frequency of persons detained for long periods of time without charge is due to the proliferation of a remand application colloquially known as the "holding charge". The holding charge is an application brought before a court, usually one lacking the jurisdiction to try the substantive offence for which the application is based, purportedly for the purpose of obtaining a remand order pending the completion of investigation and/or obtaining advice from the office of the Attorney-General, either of the Federation or of a State. If the application succeeds, the police are permitted to detain the accused for a period longer than the forty-eight (48) hours that are constitutionally provided.

[171] A term used frequently by various academics, with no credit for coining same attributed to any specific source. See, for example, Frank Agbedo, *Rights of Suspects and Accused Persons Under Nigerian Criminal Law* (Crown Law Publications, 2009), where the term is used repeatedly.
[172] *Ibid*

The Supreme Court has ruled on more than one occasion, that the phenomenon known as the holding charge is unconstitutional,[173] yet it continues to be proliferated, and sometimes, upon a successful application, the accused can be detained without actually being tried for months, and even years.

Even though, it is conceded, and as shall be discussed in the next chapter, that the holding charge could arguably be deemed a necessary evil, its continued use exposes the ineptitude of the Nigeria Police Force,[174] and is a clear flouting of the provisions of the 1999 CFRN, and a total disregard to an arrested person's right to liberty.

2.3.5 Other Rights

There are other rights available to a person in detention that are not directly connected with the adversarial balance or the presumption of innocence which nevertheless are important and have an overall effect on proceedings. These rights include:

2.3.5.1 The Right to be Informed of the Rights Available during Detention

Paragraph 3 of PACE Code of Practice C states clearly that any person who is arrested and brought to the station should be informed clearly of all the rights available to them during their detention. This is a fairly straightforward provision, which is not the subject of any academic debate. It is however important to note that this provision is missing from Nigerian law. Despite the

[173] Cases where the holding charge has been deemed unconstitutional include *Olawoye v COP* [2006] 2 NWLR (part 965) 427, *Enwere v COP* [1993] 6 NWLR (part 299) 333 and *Anaekwe v COP* [1996] 3 NWLR (part 436) 330

[174] See Dele Peters, "The Place of the Holding Charge in Nigeria's Criminal Jurisprudence", *5 Nigerian Current Legal Problems* (1996-98) p. 252, at 257

number of rights available to an accused, the police are not bound by any rule or legal provision to inform an accused of his rights.

It is hypothesised that given the absence of this right in Nigeria, there is no redress for any police officer that fails to inform the accused of his rights, willingly or by omission. Thus there is room for gross violation of a detainee's rights as, essentially, only persons who might have prior knowledge of the rights available to them might be able to seek the application of said rights.

2.3.5.2 Right to Have Someone Informed of a Detainee's Arrest

This right is provided for in both jurisdictions, by virtue of Section 56 of PACE and Section 35(2) of the 1999 CFRN. This right, it is opined, is related to the right to be given adequate time and facilities to prepare his defence, which is also an attempt to maintain the adversarial balance.

2.3.5.3 Conditions of Detention

Paragraph 8 of PACE Code of Practice C contains detailed provisions relating to the conditions of detention, including the contents of the cell, the provision of toilets and washing facilities, etc. There are, however, no such provisions that specify the conditions of the detention cells in Nigeria.

The provisions regulating the conditions of detention are not related to the presumption of innocence as much as they relate to the right to dignity. Although not expressly provided for by the laws of either jurisdiction, Article 1 of the UN Universal Declaration of Human Rights, which both England and Nigeria have ratified, recognises that all men are born equal in dignity and rights.

2.3.6 Observations

On a purely theoretical level, one might be tempted to conclude that the legal frameworks of England and Nigeria are identical, particularly in the realm of protection of human rights, especially because, at face value, they seem to provide for the same rights for arrested persons.

This is not the case, however. A common theme across the rights analysed in this section is the lack of detail in the rights available to an accused person in Nigeria. The different statutory instruments, particularly the 1999 CFRN outline what the rights available are, but fail to create a minimum standard for their delivery and protection. Failing to create a minimum standard would suggest ambiguities and a certain level of uncertainty as to what the law seeks to provide.

As was referenced early in the chapter, it is a commonly accepted view that regulation ideally takes a tripartite form: the goal, monitoring and alignment. The fact that the rights provisions are open to interpretation in a variety of ways across the different states of Nigeria, in the different police commands is a clear indication that the first part of the regulatory framework, i.e., the goal, is not clearly or expressly stated. This begs the question; if the goal is not clearly or expressly stated, how does one effectively monitor and evaluate what happens in reality?

If one were to revisit some of the themes and concepts of jurisprudence, it is often taught that for a society to survive under the rule of law, there must be an element of certainty about the laws of the land. As Veitch, Christodoulidis and Farmer put it:

> *"Where the rule of law is observed, people can have reasonable certainty, in advance, concerning the rules and standards by which their conduct will be judged, and the requirements they must satisfy to give legal validity to their transactions…. This is possible, it is often said, provided there is a legal system composed principally of quite clearly enunciated rules that normally operate only in a prospective manner, that are expressed in terms of general categories, not particular, indexical, commands to individuals or small groups singled out for special attention. The rules should set realistically achievable requirements for conduct, and should form overall some coherent pattern, not a chaos of arbitrarily conflicting demands."*[175]

It is contended, that by virtue of the lack of a clear goal or minimum standard established by the legal framework in Nigeria, that the rights are not properly provided for, which leaves them open to the possibility of gross violations in practice.

The signing into force of the Administration of Criminal Justice Act, while it can be said to have taken some commendable steps towards better protection of custodial rights of accused persons, has still failed to provide a minimum standard, or improve the framework for delivery of the rights in practice. The nuances introduced by the Act are:

Perhaps the most important development introduced by the new Act is the inclusion of the requirement to inform an accused of the rights available

[175] S. Veitch, E. Christodoulidis and L. Farmer, *Jurisprudence: Themes and Concepts* (Routledge-Cavendish, 2007), pp 18 - 19

during detention. To wit, section 6(2) of the Administration of Criminal Justice Act provides that:

> *"The police officer or the person making the arrest or the police officer in charge of a police station shall inform the suspect of his rights to:*
>
> *(a) remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice;*
> *(b) consult a legal practitioner of his choice before making, endorsing or writing any statement or answering any question put to him after arrest; and*
> *(c) free legal representation by the Legal Aid Council of Nigeria where applicable"*

In respect of the specific right to silence, the new Act does not address the ambiguity created by the provisions of Section 35(2) of the 1999 CFRN: does the right to silence expire after consultation? It is conceded that Section 17(1), in providing for the recording of the accused's statement, provides that the statement shall be taken "if he so wishes to make a statement."[176]

The Administration of Criminal Justice Act changes the terrain of custodial legal assistance both in a slightly favourable, and equally problematic fashion. On the one hand, Section 17(2) seemingly improves on the nature of the right to custodial legal assistance, as it provides that the statement of the accused may be taken in the presence of a legal practitioner of his choice, or other

[176] Section 17(1), Administration of Criminal Justice Act

qualified person, although it contains a proviso which would suggest that the role of the legal practitioner is intended to be passive: "Provided that the Legal Practitioner or any other person mentioned in this subsection *shall not interfere while the suspect is making his statement*, except for the purpose of discharging his role as a legal practitioner." (Emphasis added)

On the other side of the coin, Section 14(2) and (3) place a requirement on the arresting officer to afford the suspect with the necessary facilities to obtain legal advice after he has been arrested, although it curiously stipulates that "any such communication or legal advice shall be done in the presence of an officer who has custody of the arrested suspect."[177] This is a clear contravention of the requirement of confidentiality or privileged communication as stipulated by Rules 8 and 22 of the UN Basic Principles on the Role of Lawyers,[178] and Section 192 of the Evidence Act 2011.

Another important development initiated by the Administration of Criminal Justice Act is the provision, in Section 17(3) that where a suspect does not understand, speak or write English, that he is to be entitled to the assistance of an interpreter in recording his statement. Curiously, however, the provision fails to state on whom the burden of providing the interpreter lies, the suspect or the police. This absence of an express provision to that effect, it is contended, only serves to lend further ambiguities regarding the provision of rights at the custodial stage of proceedings.

[177] Section 14(3), Administration of Criminal Justice Act 2015

[178] UN Basic Principles on the Role of Lawyers 1990, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx, last accessed on 24-10-2014

The enactment of the Administration of Criminal Justice Act appears to have taken favourable steps towards a better protection of custodial rights in Nigeria, but it might also have created the possibilities for further imbroglio with two notable provisions contained therein.

The first of these is found in the provisions of Part 30 (sections 293 to 299), which deals with detention time limits. This is discussed in detail in the next chapter,[179] but the combined interpretation of the provisions therein is to the effect that under this new Act, suspects and accused persons could potentially be held in detention, without being formally charged, for a period of up to fifty-eight (58) days. This is a severe departure from the CPA and CPC regime that required a person be arraigned within a maximum of forty-eight (48) hours.[180] It is conceded, however, that this might ultimately be in a bid to curb the scourge of the Awaiting-Trial inmate.[181] For the moment, however, in the absence of any jurisprudence from the courts, it remains a speculative concern.

The second possibility for a greater imbroglio is found in the provisions of Section 106 of the Act, which relates to powers of prosecution. According to the Act, the only persons who can institute criminal proceedings in any court are:

> "(a) the Attorney-General of the Federation or a Law Officer in his Ministry or Department;
>
> (b) a legal practitioner authorised by the Attorney-General of the Federation; or

[179] See Section 3.2.2.1, Chapter 3, *Infra*
[180] See Section 2.3.4, *Supra*
[181] *Ibid*

(c) a legal practitioner authorised to prosecute by this Act or any other Act of the National Assembly"

The Attorney-General of the State and the Police are conspicuously absent from this list. It is opined that by virtue of the supremacy of the 1999 CFRN over this Act, the provisions of Section 106 do not nullify the powers of the Attorney-General of a State, or members of his department to prosecute offences, as conferred on him by Section 211 of the 1999 CFRN. Also it is further contended that, when the Administration of Criminal Justice Act is adopted at state levels, it would probably then confer the powers of prosecution on the Attorneys-General of the thirty-six (36) states.

The more controversial omission is perhaps the removal of the power of prosecution from the police. It is opined that, in light of the provisions of Section 23 of the Police Act and the ruling in *FRN v Osahon* [2006][182], which confers the power of prosecution on the police, there is an inconsistency that would require interpretation by the courts. It is submitted that the removal of powers of prosecution would be a welcome development, as it would further serve to better balance the adversarial scales.[183] However, it remains presently undetermined whether Section 23 of the Police Act is repealed by virtue Section 106 of the Administration of Criminal Justice Act, or whether the former nullifies the latter. The attempt to remove the powers of prosecution from the police is not, it is herein contended, done in a wholesale, or a truly unambiguous manner. Despite omitting the police from the list of persons who

[182] n 109

[183] The issues emanating from the power of the police to prosecute is discussed in detail in Chapter 3.2.2.3, *Infra*

may institute criminal proceedings, the ACJA goes on to state, in Section 268(2), that:

> *"where proceedings in respect of an offence are instituted by a police officer, it shall be in the name of the Inspector-General of Police or Commissioner of Police, as the case may be."*[184]

As a result, the controversial nature of the provisions of Section 106 of the Act is, at best, only speculative, and only time, and interpretation by the courts, may resolve the potential controversy created by the provisions thereof.

2.4 CONCLUSION

This chapter concludes, by way of a summary, by restating the importance of human rights, particularly those pertaining to and available to persons detained in custody, as a key element in maintaining the adversarial balance. In this chapter, we have been able to answer successfully the first research question that this thesis sought to answer, i.e., What rights do suspects have in England and Nigeria during detention before a formal charge and detention pending the determination of the case brought against them? The third research question is also answered in part, to wit, what is the effect of detailed and clearly stated legislative instruments in attempting to improve compliance with due process? In answering these questions, it would appear as though the rights sought to be protected in both jurisdictions are similar. However, the failure, in Nigeria, to provide for a minimum standard of protecting these rights, or of any attempt to remove the ambiguities which abound have resulted in a poor machinery for

[184] Section 268(2), ACJA

the delivery of these rights in practice, which is arguably tantamount to a non-protection of rights within the jurisdiction.

In the next chapter, we shall proceed to attempt to answer the second and third research questions, which relate to understanding the reason for, and bridging, the gap between the protection of the rights in theory and their delivery in practice.

CHAPTER THREE

THE PROTECTION OF THE RIGHTS IN PRACTICE

3.0 INTRODUCTION

Even the most liberal definition of law or the concept of laws recognises that a law or set of rules exist to regulate a society's conduct. Society exists, not just on a theoretical level, but also in reality. There is therefore the need for any law to exist on a theoretical, as well as a practical level. Laws, as studies of jurisprudence have taught us, need to be clearly stated and easily understood, and should therefore be written.[1] However, it would not suffice for laws merely to exist in theory, and there should be mechanisms that ought to exist to assist in the effective delivery of laws from a merely theoretical or written platform to the practical realm of society. This is where the creation of a functional institutional framework becomes necessary.

In the previous chapter, we analysed the legal and institutional frameworks that exist in England and Nigeria,[2] and how they attempt to protect the detention rights of accused persons in both jurisdictions. However, the analysis and subsequent comparison was done on a purely theoretical basis, and only analysed the content of the legislative instruments that created and provided for these rights, as well as the instruments that established the institutional mechanisms for the delivery of these rights in practice. It is

[1] See, for example, Scott Veitch, Emilios Christodoulidis and Lindsay Farmer, *Jurisprudence: Themes and* Concepts (2nd Edition, Routledge, 2012), p20, and Juha Raitio, *The Principle of Certainty in EC* Law (Kluwer, 2010), pp125 - 132. In both publications, it is generally accepted that written, clearly enunciated laws form part of the legal framework of any society or jurisdiction.

[2] As in the previous chapter, any reference to "England" includes both England and Wales.

therefore imperative that the next step becomes a comparison of these rights and the framework for their delivery in practice.

In addition to the foregoing, and as highlighted in the previous chapter, it is important to note that the second part of the generally accepted tripartite form of regulation is the monitoring stage;[3] i.e., analysing the effectiveness of any law or regulation as it operates in practice. Thus, having looked at the legal and institutional framework of both jurisdictions, i.e., the goal, in the previous chapter, the next step, logically, would be an assessment of the 'monitoring' devices available in the said jurisdictions.

3.1 THE CURRENT STATE OF THE RIGHTS IN PRACTICE

In assessing the rights framework in the previous chapter, and having looked at the tripartite form of regulation, it became apparent that the goal needed to be clearly stated. It is opined that even the mere application of basic logic would suggest that if there is to be the need to monitor the goal and evaluate what happens in reality, there must first be a clear understanding of what the rule or standard is; i.e., the rights must be clearly stated, and a clear appreciation of what the minimum standard is, or ought to be, for the protection of the rights of the accused.

In England, as we have discovered, considerable success has been achieved in this regard. The provisions in the relevant sections of PACE, primarily, as well as the paragraphs of the different Codes of Practice thereto are well written

[3] For more on the tripartite form of regulation see, generally, Ed Cape and Richard Young (eds), *Regulating Policing: The Police and Criminal Evidence Act 1984 Past, Present and Future* (Oxford, 2008)

and clearly delineated, thereby giving rise to a clear appreciation of what the rights available to accused persons are at the police station, as well as a clear appreciation of the minimum standard for the provision and protection of these rights.

In Nigeria, however, there is a different story to be told. On the one hand, the different provisions of the relevant legislative instruments provide rights for persons who have been detained.[4] However, the paucity of said provisions cause the unfortunate absence of a minimum standard for the provision of the rights which create an avenue for a multiplicity of interpretation across the jurisdiction or, as we shall subsequently discover,[5] the eventual non-protection of rights in practice.

It is perhaps conventional knowledge that in every aspect of societal life and interaction, there would be an apparent impossibility to completely transition a theory to practical application one hundred per cent of the time. The detention rights of accused persons, as an aspect of societal life and interaction, are no different. There is a discrepancy between the rights as they exist in theory and as they operate in practice. In both jurisdictions, even in England with a clearly delineated minimum standard, there is a difficulty in transitioning the rights from theory to practice, and the rights are not always observed or protected. It is thus hypothesised that the discrepancy between the rights in theory and practice could only stand to be amplified if there is no clearly

[4] As discussed in the previous chapter, the provisions of the Constitution of the Federal Republic of Nigeria, the Criminal Procedure Act, the Criminal Procedure Code, the Administration of Criminal Justice Law (Lagos) and the Administration of Criminal Justice Act, all attempt to provide rights for the protection of accused persons at the pre-trial stage in Nigeria.

[5] See the findings of an empirical study conducted by the researcher, in Section 3.4, below.

delineated minimum standard or in a developing country, such as what obtains in Nigeria.

3.1.1 Rates of Observation

In England, there have been several empirical studies carried out to monitor the application of the detention rights of accused persons at the police station, in a bid to ascertain the scope of their application in practice. Some of these empirical studies were conducted pre-PACE, but the majority have been conducted in the PACE era, although there was a period of twelve (12) years within which no large-scale studies were conducted.[6] After the study by Bucke and Brown in 1997, there were no studies of the rights at the police station until the study by Skinns in 2009.[7]

Of the different studies that have been conducted, however, the two most recent studies, one conducted by Skinns and the other by Kemp, Balmer and Pleasance, have arguably been the most in-depth and detailed studies of police station activities.[8]

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[6] See Table 1, "Access to Legal Advice 1978 – 2007" in Layla Skinns, ""The Right to Legal Advice in the Police Station: Past, Present and Future" (2011) Crim. L. R. 19, at 22, and Table 1, "Main Studies indicating Advice Request Rates and Solicitor Consultations, by Date" in Pascoe Pleasance, Vicky Kemp and Nigel J. Balmer, "The Justice Lottery? Police Station Advice 25 Years on from PACE" (2011) Crim. L. R. 3, at 5

[7] Skinns conducted a study of two (2) police stations in two (2) different police areas, which have formed the basis of several articles and publications, but first documented in Layla Skinns, ""I'm a detainee; get me out of here": predictors of access to custodial legal advice in public and privatized police custody areas in England and Wales" (2009) Brit. J. C. 399

[8] Skinns, *Ibid*. The study by Pleasance, Kemp and Balmer is one of the largest-scale studies of legal advice at the Police Station to be conducted in England, examining more than thirty thousand (30,000) custody records in forty-four (44) police stations in four (4) police areas. This study has also formed the basis of several articles and publications, but was first documented in the first instance in Pleasance, Kemp and Balmer, "The Justice Lottery?", n 6, and V. Kemp, P. Pleasance and N. J. Balmer, "Children, Young People and Requests for Police Station Legal Advice: 25 Years on from PACE", (2011) 11(1) Youth Justice 28

It must be noted that both of these studies focused primarily on the take up of legal advice whilst in custody and the factors which affected it; however, as the methodology in both studies required the examination and analysis of custody records, which ordinarily contains information about detention periods, interview records, and essentially all relevant information pertaining to a suspect's time in custody,[9] it also shed light on the provision and protection of rights in practice.

Both studies, and previous studies as a matter of fact, established the apparent impossibility of transitioning the rights from theory to practice at a one hundred per cent (100%) rate.[10] Both studies did however establish that the request rates had risen, and were on a steady incline, since the coming into force of PACE. The fact however remains that there is yet to be a study or a police station which, upon consultation of its custody records, would yield a 100% application of the rights in practice.

In Nigeria, there is a dearth of any literature that documents the transition of the detention rights from theory to practice. In addition to this, there has been only one empirical study of note that was conducted to examine the protection of rights in practice, and this was reported in 1991, over twenty-five (25) ago. This study was conducted by Ajomo and Okagbue,[11] and was a thorough study

[9] See Paragraph 2 of PACE Code of Practice C, which deals extensively with custody records, and the contents thereof.

[10] Skinns in her study, for instance, discovered that the right to legal advice, for instance, was requested for by 60% of all detainees, with only 80% of these requests being met. Kemp, et al, in their study, found that the request rate was 44.9%, with 81.3% of these being met.

[11] M. Ayo Ajomo and Isabella Okagbue (Eds.), *Human Rights and the Administration of Criminal Justice in Nigeria* (NIALS Research Series No. 1, NIALS, 1991), pp99 - 132. Their study involved the interviewing of three hundred and sixty-three (363) policemen and women and eight hundred and ninety-seven (897) accused persons, suspects and detainees, in thirty-nine (39) police stations in rural, semi-urban and urban areas of seven (7) states in Nigeria.

of urban and rural police stations in a number of locations across Nigeria, and established that for a number of reasons, including some infrastructure-related factors and some attitudinal factors,[12] the rates of observance were exceptionally low and, in some stations, there was in actuality a gross failure to protect any of an accused person's rights in practice.

This, unfortunately, was the last empirical study of note on police practices and human rights in Nigeria. Although the findings of Ajomo and Okagbue's study are revelatory and have remained prevalent until today, there has been no follow-up to this study, by the authors or any other researcher; and it becomes increasingly difficult to rely on a nearly thirty (30) year old study. Thus, in a bid to further understand the process that facilitates the practical application of detention rights within the Nigerian jurisdiction, and to determine the continued relevancy or otherwise of the study, this researcher conducted an empirical study on the subject in January 2013. The results of this empirical study are discussed below, in Section 3.4.

It would appear, from the examination of the different empirical studies that have been conducted in both jurisdictions, that the basic, indisputable fact is that it is impossible to transition the rights entirely from theory to practice. There is an inevitable chasm between the rights as they exist in theory, i.e., as provided for by the relevant laws and statutory instruments; and as they exist in practice. The rates of observation as shown in the various studies conducted would suggest that the rights are seemingly better protected in England than they are in Nigeria.

[12] These factors shall be identified and discussed in the relevant sections below.

Having examined the rates of observation of detention rights in practice, and determined that the rights are better observed in practice in England, it would not be sufficient to merely rest on metaphorical oars and declare an impossibility to completely transition the protection of rights from theory to practice in both jurisdictions. A closer examination of the practices in both jurisdictions seems to suggest that there are several factors that affect the take-up of rights at police stations. Some of these factors are axiomatic and intrinsic as a result of the operations within the legislative and institutional frameworks, whilst some are attitudinal factors, which are as a result of the attitudes of the different parties to the criminal process who are involved in the pre-trial stage. These factors are analysed in the following sections, in a bid to better understand the reasons for the chasm between theory and practice and, perhaps rather ambitiously, suggest recommendations for bridging the gap between theory and practice which are not based on abstract legal theories, but on a thorough understanding of the different affecting factors.

3.2 SHORTCOMINGS OF THE LEGAL AND INSTITUTIONAL FRAMEWORK IN PRACTICE

As stated, some of the factors affecting the observation rates of the detention rights in both jurisdictions are intrinsic, and are directly related to the structure of the legal and institutional frameworks. Some of the criticisms by certain academics and professionals, which have been raised against certain aspects of the different frameworks in both jurisdictions, seem to suggest that by their very nature, these elements pose a difficulty in the smooth transition from

theory to practice. These criticisms, and the alleged shortcomings of the framework are considered in this section.

3.2.1 England

As was argued in the previous chapter,[13] despite some of the criticisms raised against it in the initial period following its coming into force, PACE has managed to create a clear and well-stated minimum standard of rights. The rights available to arrested persons are clearly stated and easily understandable. The law is dynamic and subject to change, but England, acting through the legislative functions of Parliament, has demonstrated its willingness and ability to stay abreast of the change in the dynamics of the law; as evidenced by its frequent and necessary amendments of the provisions of the Codes of Practice of PACE.[14]

There are three shortcomings of the institutional framework in England that should be mentioned, which have the potential to affect the delivery of the rights in practice. These shortcomings, admittedly, are not necessarily detrimental to the delivery and protection of the rights in practice; however, they have shown to have an effect on the smooth transition from theory to practice.

3.2.1.1 Self-Regulation

The first of these shortcomings is the role of the custody officer, and its apparent reliance on self-regulation. One of the duties of the custody officer, as required by PACE, is the regular periodic review of detention times of

[13] See Section 2.2.1.1, in Chapter 2, *infra*.
[14] Code of Practice C, for example, was most recently amended in July 2018.

arrested persons,[15] to ensure that a person is not detained longer than necessary. However, as reported by Sanders, this function of the custody officer is a perfunctory one, as they rarely deny the requests for continued detention.[16] In addition to the study cited by Sanders, there have been other studies which suggest that detention reviews by custody officers have been found to be tokenistic and routinized.[17] As Skinns describes it, "The review system is conducted in a way which provides records apparently complying with the letter of PACE, but that its spirit is largely dissipated."[18] She also revealed that, in her study of two police areas, the reviewing officer went through the motions, merely rubber-stamping the decision to prolong detention.[19]

This elucidates the difference between the legalistic-bureaucratic and the culturalist approaches to law-making in policing, which were highlighted in the previous chapter.[20] If it were possible to effectively regulate the activities of the custody officers via the legalistic-bureaucratic approach, then it is hypothesised that the review of detention would perhaps be a function performed a little more pro-actively. However, as seen from Dixon's argument, the legalistic-bureaucratic approach suggests a limited view of

[15] See Sections 36-38 of PACE for the establishment and description of the duties of the custody officer.
[16] Andrew Sanders, "Can Coercive Powers be Effectively Controlled or Regulated? The Case for Anchored Pluralism", in Cape and Young, *Regulating Policing*, n3, pp 53 - 54
[17] See David Dixon, *Law in Policing: Legal Regulation and Police Practices* (Clarendon, 1997), p, and Layla Skinns *Police Custody: Governance, Legitimacy and Reform in the Criminal Justice Process* (Routledge, 2011), p 124. See also, generally, Emmanouela Mylonaki and Tim Burton, "A Critique of the Deficiencies in the Regulation of Contemporary Police Powers of Detention and Questioning in England and Wales" (2010) 83(1) Pol. J. 61
[18] Skinns, *Ibid*, at p 125
[19] *Ibid*, at 126
[20] See Section 2.2.1.1, Chapter 2, *Supra*

regulatory practices amongst the police, and is not an absolute form of regulation.[21]

As already stated, this is not wholly detrimental to the transition of the rights from theory to practice. As a matter of fact, the only effect of this shortcoming borne out of the reliance on self-regulation by the police working through the custody officer is that the review of detention periods becomes a purely academic exercise. There is no evidence to suggest anything to the contrary; so, on pure conjecture alone, it is not apparent that there is any violation of the maximum detention period, despite any evidence to suggest that the role of the custody officer has effect in reality of keeping detention periods down to a minimum.

3.2.1.2 Legal Advice by Telephone

Another resultant shortcoming of the institutional framework for the protection of rights at the pre-trial stage is made manifest in the provision of legal assistance, particularly through the Criminal Defence Service Direct (CDS Direct) scheme.

Bridges and Cape were vociferous critics of the introduction of the CDS Direct and Defence Solicitor Call Centre (DSCC) schemes.[22] The authors have levied several criticisms against the introduction of these schemes, and its overall effect on the provision of legal assistance for detainees at the police station. The first criticism levied against the schemes calls into question the removal of the power to initiate contact with the suspect's solicitor of choice

[21] David Dixon, n 17, pp 1 – 8.
[22] Lee Bridges and Ed Cape, "CDS Direct: Flying in the Face of the Evidence", (2008) Centre for Crime and Justice Studies

from the suspect, and indeed the police, and vesting same in the DSCC.[23] Though not expressly stated by the authors, their arguments against vesting the responsibility of making contact with the DSCC seem to suggest that it is an arguably unnecessary extra step that extends the amount of time that elapses before a suspect can consult with his solicitor.

They also criticised the overreliance of the DSCC on telephone-only advice. The provisions of PACE Code C recommend that consultation with the solicitor should be by telephone only in a number of offences, mainly minor, non-indictable offences. Bridges and Cape are vociferous in their criticism of this provision and suggest that the high-reliance on telephone-only advice has a negative impact on the provision of legal advice. This is because, as studies have revealed, telephones at the police station are not always answered.[24] The effect of this being that even when the request for legal advice has been properly routed to the duty solicitor via CDS Direct, the solicitor is unable to make contact with the suspect as a result of something ordinarily insignificant as an unanswered telephone.

Also highlighted by Bridges and Cape, there was a Home Office study which found that the offer of Telephone-only custodial advice would usually result in abandonment of request by suspect.[25] Needless to say, that is an obvious effect on the right to legal advice borne out of a shortcoming of the framework.

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[23] *Ibid,* at pp 25 – 26

[24] *Ibid,* at p29

[25] Brown, D., Ellis, T. and Larcombe, K., *Changing the Code: Police Detention under the Revised PACE Codes of Practice* (Home Office Research Study 129, London: Home Office, 1992) , cited in Bridges and Cape, *Ibid*

By far the greatest criticism raised against the DSCC scheme by Bridges and Cape, however, is the fact that the scheme was not properly evaluated before it was launched nationwide.[26] As they report, if the scheme had been properly evaluated, then the evidence that has since come to light of the scheme causing long communication lines and delay, and the occasional breakdown of communication, in the process of obtaining custodial advice could have been avoided. Instead, as they point out, the evaluation was not properly conducted, with focus on the amount of time it took CDS Direct to respond to phone calls, for example, rather than the time it took to deliver legal advice.[27]

An additional criticism that may be raised revolves around the protection of the confidentiality of communication between solicitor and suspect. Section 58 of PACE provides the right to legal advice to a suspect, and the provision categorically states that the consultation between solicitor and client is to be private. Indeed, in studying the right to legal advice generally, it is commonly regarded as privileged communication, which is deemed confidential. Bridges and Cape referred to a study conducted in 1998, which established the insufficiency of facilities to ensure that the right to legal advice was delivered privately.[28] They suggested that that had continued to be the case, and that there were still a number of stations with insufficient facilities to guarantee privacy and confidentiality of consultation between solicitor and suspect. Pattenden and Skinns also found that in many police stations, the telephones

[26] Bridges and Cape, n 22, at p19
[27] *Ibid*, at p3
[28] Phillips, C. and Brown, D., *Entry into the Criminal Justice System: A Survey of Police Arrests and their Outcomes*, (1998) Home Office Research Study 185, London: Home Office, cited in Bridges and Cape, *Ibid*.

are usually located in the custody area, resulting in many phone calls not being made in private, thus violating the confidentiality requirement.[29]

In light of the foregoing criticisms, it is perhaps safe to say that the right to legal assistance is not being delivered smoothly as a result of the shortcomings of the DSCC and CDS Direct schemes, as highlighted; however, it is contended that the right is being delivered nonetheless and, from a comparative perspective, the situation is better than what pertains in Nigeria, as we shall examine in Section 3.2.2, below.

3.2.1.3 Interpreters' Framework

Interpretation and translation services pose another challenge to the effective implementation of suspects' rights, especially from the viewpoint of the right to be informed of the reasons for arrest in a language which the detainee understands, as provided for by Articles 5 and 6 of the ECHR.

The Ministry of Justice (MoJ), in 2011, entered into a four-year framework agreement with CapitaTI for the provision of interpretation and translation services, which entered into force in January 2012.[30] Prior to the establishment of this framework agreement, any request for interpretation or translation was made through the National Register of Public Sector Interpreters (NRPSI), which maintains a list of all the different interpreter associations and bodies, and a register of accredited members of these associations and bodies.[31] These

[29] R. Pattenden and L. Skinns, "Choice, Privacy and Publicly-Funded Legal Advice at the Police Station" (2010) 73 M.L.R. 349, cited in Layla Skinns, n 6, at p 20

[30] The original framework agreement was entered into with ALS, which was subsequently purchased by Capita.

[31] NRPSI – National Register of Public Service Interpreters. "About Us", available at http://www.nrpsi.org.uk/about-us.html, last accessed 27-03-2015

requests were usually made by the court or police station with the need for interpretation, and were made direct to the relevant interpreter. The negotiations to enter into the framework were necessitated by the MoJ's desire to streamline the request process as well as the delivery of services.

The framework agreement, however, has been implemented rather unsuccessfully. Relevant studies have shown a general dissatisfaction with it.[32]

These studies demonstrated that, despite the establishment of the Framework Agreement, a huge number of interpretation requests continued to be made to the interpreters directly, or via the NRPSI, rather than through Capita.[33] Furthermore, a number of interpreters expressed their displeasure at working under the new framework agreement, citing displeasure with issues relating to remuneration,[34] the booking process,[35] and the working conditions[36] among other reasons.[37]

Despite an express desire to terminate their working relationship with Capita,[38] some interpreters, including NRPSI and Capita-accredited

[32] See, for example, National Audit Office, "The Ministry of Justice's Language Services Contract: Progress Update", January 2014, available at https://www.nao.org.uk/wp-content/uploads/2015/01/The-Ministry-of-Justices-language-services-contract-Progress-update.pdf, last accessed 13-05-2015; and Professional Interpreters for Justice, "The Ministry of Justice Framework for Language Services… One Year On", available at http://www.unitetheunion.org/uploaded/documents/mojframeworkagreement4languageservices1yearon11-10956.pdf, last accessed 13-05-2015

[33] According to the report by the Professional Interpreters for Justice (*Ibid)*, for example, four in five interpreters reportedly refused to sign up for the framework agreement, and bookings were inevitably made directly to as many as 87% interpreters.

[34] *Ibid*

[35] *Ibid*

[36] *Ibid*

[37] *Ibid*

[38] *Ibid*

interpreters, remained willing to continue to provide their services in the interests of justice.[39]

Similarly problematic is the probability that the same interpreter might be used at various stages of the criminal process, for the same matter; for example, the same interpreter might be used both during consultation with the solicitor and also during interrogation by the police, although, this issue is one based on conjecture, as there is no evidence to suggest that this is a matter of frequent occurrence, or indeed any great concern. Serious questions around impartiality and confidentiality could be raised here, and the confidentiality of communications could be put in doubt if there is an interpreter present, and if the same interpreter is present in the subsequent interrogation of the suspect. One may reasonably argue that there is a risk that the interpreter may be influenced by information he might have been privy to during consultation with the solicitor.

Despite the various failings of the current framework agreement, it is apparent that the original intent, from the structure of the framework agreement, is to ensure a smooth delivery of interpretation services. It would seem to be in the interest of this to establish a central booking system via which any and every need for interpretation can be dealt with by the different parties to the criminal process, at every stage; offer a unified accreditation process for every person desirous of offering interpretation services, and maintain a current register of all accredited interpreters, and the languages they interpret.

[39] *Ibid,* p 16

It is suggested that the NRPSI might be a sufficient framework for the provision of interpretation services, as evidenced by its continued usage by the police and courts as and when the need for interpretation arises. As a result, it is contended that, in the event that the framework agreement with Capita is not renewed, steps be taken to streamline the NRPSI and its services, for optimised interpretation and translation services.

The three shortcomings analysed above are problematic, but not overly detrimental to the process or the transition of the rights from theory to practice. They affect the smooth delivery of the rights from theory to practice, or in the case of the self-regulation of the police, reduce a safeguard against an abuse of an accused person's rights to a mere academic activity. However, it is contended that the legislative and institutional framework in England is not as severely plagued with the sort of intrinsic shortcomings that negatively affect their transition to practice, or overly so, as the case may be. However, as shall be discussed in subsequent sections, there are other factors, mostly attitudinal factors, which also pose difficulties with regards to the smooth transition of the rights from theory to practice. Additionally, and as we shall discuss in the next chapter, the third part of the tripartite form of regulation, the realignment, is the mechanism via which a smoother transition of rights from theory to practice may be achieved.

3.2.2 Nigeria

There are six (6) major intrinsic shortcomings of the legal and institutional framework in Nigeria which negatively affect the delivery of rights in practice, which are considered below.

3.2.2.1 The Laws Establishing the Framework

The first obvious shortcoming of the framework in Nigeria revolves primarily around the laws themselves that establish the legal and institutional framework, particularly, as highlighted in the previous chapter,[40] the brevity of the laws creating the different frameworks, including the rights framework, and the resultant lack of clarity therefrom.

The laws, as previously discussed, are only surface-level statements establishing the rights available, but no serious efforts have been made to remove any ambiguities regarding their interpretation, even with the subsequent enactment of the Administration of Criminal Justice Act 2015,[41] thus leaving them open to the possibility of a multiplicity of interpretation across the length and breadth of the federation. This would create an imbroglio in terms of understanding what exactly the mechanisms for delivering the rights in practice are.

To add to this imbroglio, there is a multiplicity of laws dealing with the provision of rights. There are several statutory instruments which provide the rights and/or limit the powers of the parties across Nigeria, some with limited

[40] Section 2.2.2, Chapter 2, *Supra*.
[41] Hereinafter, "ACJA"

jurisdiction.[42] This is not an assertion that a multiplicity of legislation necessarily creates an imbroglio when it comes to establishing a rights framework, especially in a federation, like Nigeria is; however, it is suggested that in cases where none of these laws are detailed enough as to eliminate ambiguities, it can only cause further confusion.

Also, as considered in greater detail below, when assessed in combination with the current structure of the Nigeria Police Force, it might be detrimental to have a multiplicity of legislation governing the same rights framework. There is only one police force serving the entirety of Nigeria, operating under a centralised organisational structure. Again, the argument used is essentially based on conjecture, but in a situation where there is one police force, with officers susceptible to being transferred between state commands that operate under different legislation,[43] it would seem that that would complicate training of the officers, and would also create a lack of certainty amongst the officers of what their powers are, as well as the rights available to persons detained in their custody.

At this juncture, it is further conceded that there is not a huge difference between the substantive rights provided for in the different legislative instruments that operate across Nigeria, so perhaps the shortcoming potentially posed by the multiplicity of legislation is yet to fully manifest itself. As such, the only real concern at present is whether this amounts to an act of over-legislation, despite the laws themselves being clouded with ambiguities.

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[42] The Criminal Procedure Act and Criminal Procedure Code, for example, are applicable only in the Southern and Northern states of Nigeria, respectively, and the of the Administration of Criminal Justice Law of Lagos is only applicable in Lagos State.

[43] See Section 3.2.2.2, *Infra*

Fortunately, with the subsequent enactment of the ACJA, the issue of multiplicity of legislation has been partly resolved.[44] However, there is still some notable brevity in the provisions of the ACJA, which still leaves room for the negative effects that stem from a multiplicity of interpretation as a result of ambiguities.[45]

3.2.2.2 Structure of the Nigeria Police Force

The Nigeria Police Force is established by Section 214 of the Constitution of the Federal Republic of Nigeria 1999,[46] and by Section 3 of the Police Act 1945, both of which provide that there shall be only one police force in operation in Nigeria.

As highlighted in the previous chapter, the command structure of the Nigeria Police Force is centralised, and is under the control of the Inspector-General of Police.[47]

In considering the structure of the Nigeria Police Force as a shortcoming in the transition of rights from theory to practice, it ought to be pointed out that the structure of the force has remained relatively unchanged since it was established in 1945.[48] In the years since then, other factions of government,

[44] See generally, Section 2.3.6, Chapter 2, *Supra*, for a detailed discussion of the ACJA and its effect on the legislative framework of Nigeria.
[45] See Section 2.3.6, Chapter 2, *Supra*
[46] Hereinafter "CFRN"
[47] See Section 2.2.2.1, Chapter 2, *Supra*
[48] For a detailed discussion of the history of the police in Nigeria, see, generally, T. N. Tamuno, *The Police in Modern Nigeria 1861 – 1965* (Ibadan, 1970); T. O. Elias, *Nigeria: The Development of its Laws and Constitution* (Stevens & Sons Ltd, 1967); D. F. Atidoga "The Nigeria Police, Human Right Violation and Corruption: The Need for Re-Orientation" (2009) Vol. 8 (2), UJLJ, 130; and O. C. Arisukwu, "Policing Trends in Nigeria since Independence (1960-2012)" (2012) Pol. J. 151

indeed, the entire nation, has been restructured and Nigeria now operates a federal system of government.

Looking specifically at the parties to the criminal process in Nigeria, including the courts system and the Ministries of Justice, there is a federal system in place: the courts in Nigeria are divided into state courts and federal courts, and there is a clearly delineated hierarchy and working relationship between the different state and federal courts. There is also a clearly delineated hierarchy and working relationship between the Ministries of Justice of the thirty-six states and the Federal Ministry of Justice. Also, with the exception of the criminal offences specifically listed under Section 251(3) of the 1999 CFRN, as falling under the exclusive jurisdiction of the Federal High Court, an overwhelming majority of cases involving criminal matters are instituted and adjudicated upon at the different State High Courts.

The only party to the criminal process in Nigeria that continues to operate under a centralised or unitary system is the police. Indeed, a cursory comparison with other notable, well-known, federations across the world would seem to suggest that Nigeria is the only federation which currently exists with one centralised police force in operation;[49] a point buttressed severally by Sekoni, Ekweremadu and Ogbodo.[50]

[49] Well known federations such as India, the United States of America, Germany, Australia, Brazil, the United Arab Emirates, for example, all have more than one police force operating within their jurisdiction.

[50] Ropo Sekoni, "Unitary Police System: Beyond First-Line Charge", available at http://thenationonlineng.net/unitary-police-system-beyond-first-line-charge/, last accessed 20-05-2015; Senator Ike Ekweremadu, "Policing and National Security in Nigeria: the Choices Available Before Us", available at http://www.thisdaylive.com/articles/policing-and-national-security-in-nigeria-the-choices-before-us/143666, last accessed 20-05-2015; and Dele Ogbodo, "Arguments against State Police Absurd", available at

It is not herewith suggested that the operation of a federal police structure, or multiple police forces is axiomatic within federal states. On the contrary, it is only humbly submitted that, regardless of the command structure of the police, the only thing required for effective governance and crime control, is a properly delineated working relationship with the other arms of government and parties to the criminal process. However, this has not been found to be the case in Nigeria. The relevant provisions of the CFRN and the Police Act clearly state the command structure of the Nigeria Police Force, but there are no provisions governing the relationship of the NPF with any of the other parties involved in the criminal justice sector. Additionally, there have been other problems and shortcomings that have arisen out of the attempt to operate a unitary, centralised police force within a federal state. As Dambazau notes, in its current organisation, the Nigeria Police Force is "over-centralized."[51] He explains the use of the term by explaining, *"There is too much control of resources at the centre without adequate system of distribution. This is why no matter the amount of money spent on the acquisition of resources that would enable the organisation function effectively, not much is felt at the level of the Divisional Headquarters."*[52]

Perhaps the greatest shortcoming of operating a single, centralised police force that directly affects the pre-trial stage of proceedings and the smooth transition of rights to practice is the probability of an officer being transferred from one state command to another, an occurrence with a very high incidence rate in

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http://www.thisdaylive.com/articles/arguments-against-state-police-absurd/123602/, last accessed on 20-05-2015

[51] A. B. Dambazau, *Law and Criminality in Nigeria: An Analytical Discourse* (University Press, 1994), pp 155 - 156

[52] *Ibid*

Nigeria.[53] Usually, when an officer is transferred from one command to another, the cases being investigated by this officer are transferred to another officer who may not be familiar with the case; occasionally too, the case may be abandoned, and this usually results in an accused person being detained well beyond the constitutionally-sanctioned maximum detention period, as a result of the Nigeria Police Force's oft-reliance on an arrest-first policy when investigating crimes.[54] This is an automatic violation of the right to liberty and a freedom from unlawful detention, as provided for by Section 35 of the 1999 CFRN, because contrary to the provisions thereto, persons are very often arrested without being informed of the reasons for their arrest, as was also reported by Ajomo and Okagbue.[55]

3.2.2.3 Power of the Nigeria Police Force to Prosecute Offences

As highlighted in the previous chapter, Section 23 of the Police Act gives the Nigeria Police Force (hereinafter "NPF") the power to prosecute offences, subject to the constitutional provisions in Sections 174 and 211 of the 1999 CFRN, which enshrine the power of prosecution generally in the Attorneys-General of the Federation and of the thirty-six (36) states, and members of their office.

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[53] A point raised by Frank Agbedo in Frank Agbedo, *Rights of Suspects and Accused Persons under Nigerian Criminal Law* (Crown Law Publications, 2009), p215. See also, the findings of the empirical study conducted by the researcher, in Section 3.4, below.

[54] Amnesty International has reported this arrest-first mentality in two country reports on Nigeria. See Amnesty International, "Nigeria: Prisoners' Rights Systematically Flouted" (2008) AFR 44/001/2008, p7; and Amnesty International, "'Welcome to Hell Fire': Torture and other Ill-Treatment in Nigeria" (2014) AFR 44/011/2014, p7. Also, for more on the arrest-first mentality adopted by the NPF, see Section 3.3.4.1 below

[55] Ajomo and Okagbue, n11, p 106. According to the findings of their study, suspects were very rarely informed of the reasons of their arrest at the appropriate time stipulated by law.

This provision has been subject to judicial debate, and while the power to institute or continue already-instituted proceedings at the High Court is seemingly dependent on jurisdiction, in practice, the NPF are responsible for the institution and prosecution of the majority of criminal proceedings at the magistrate court.[56]

The first intrinsic shortcoming of this provision is one which has the potential to upset the balance of the trial-centred approach of adversarialism and thwart the need for of fairness and equality in the presentation of their respective cases by opposing parties, which is the bedrock of the adversarial system. Vesting the power to prosecute in the police creates an unfortunate situation wherein the power to investigate offences and gather evidence is vested in the same body that has the power to prosecute the majority of offences.

This is an argument that, in the absence of any data coming out of Nigeria to corroborate same, but by juxtaposing the devolution of the role of review of the custody officer in England to a merely academic role, and extrapolating same to the Nigerian situation, the vesting of both the powers of investigation and prosecution in the same body would most likely result in a situation wherein the police would fail to thoroughly investigate an offence on the merits, and would only strive to generate only enough evidence to secure a conviction.[57] It is difficult for this writer to see a situation where an investigating officer would not want to be viewed as playing on the same side as his fellow officer who has been tasked with prosecuting the offence.

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[56] See Section 2.2.2.1, Chapter 2, *Supra*.

[57] Nmerole very briefly highlights this possibility, but does not evaluate the argument thoroughly. See Celestine I. Nmerole, *Police Interrogation in Criminal Investigation (Historical, Legal & Comparative Analysis)* (Halygraph, 2008), pp 32 - 34

Again, there are possibilities for the accused's rights to be infringed upon by the transfer of an officer from one state command to another, before the conclusion of prosecution. In light of the frequency of transfer of officers from one state command to another, it is contended that a transfer of an officer before the conclusion of prosecution results in the continued and prolonged detention of an accused person who has not yet been convicted of the offence he is alleged to have committed, especially as the case would be required to commence *de novo*.

The majority of prosecution-related issues, it is conceded, admittedly fall outside the ambit of this thesis, by basis of the fact that it concerns the next stage of the criminal process, the trial, and not the pre-trial stage.

There is, however, a shortcoming that stems from the power of the police to prosecute offences that affects the delivery of rights from theory to practice at the pre-trial stage, and this is a phenomenon colloquially referred to in Nigerian jurisprudence as the "holding charge". Although not specifically defined in the Constitution or any statutory instrument, it refers to an application, similar to a remand order, brought by the police before the magistrates' court alleging that, although the court may lack the jurisdiction to entertain the substantive suit for the offence the accused is alleged to have committed, in the event that it is an indictable offence, that they (the police) have yet to conclude their investigation, and are therefore seeking an order to remand the accused person in continued detention until such a time as they are able to conclude their investigation, and transfer the file to the Director of Public Prosecutions, or a member of the Attorney-General's office. Alternatively, the police would arraign a person frivolously, it is opined,

before the magistrate's court on suspicion of having committed an indictable offence, which would result in the court *suo motu* declaring that it lacked jurisdiction to deliberate on the matter, but would consequently order the accused to remain in detention until he can be arraigned before a court of competent jurisdiction.

Although this phenomenon of the holding charge is not expressly provided for by any statutory instrument in Nigeria, and has been the subject of judicial debate, albeit an inconclusive one,[58] the use of the application has continued to be proliferated.[59] Interestingly enough, oftentimes when the holding charge is granted to the police, there is no review of the detention period, and the accused person could wind up being detained for unconscionably long periods of time, sometimes even longer than the maximum detention period if they would have been convicted of having committed the offence in the substantive suit.

As pointed out in a report by Amnesty International, this proliferated use of the holding charge tends to be abused, and has resulted in a situation where the police, desirous of being seen as doing their job of controlling crime, would opt for what is seemingly the 'easier' route of gathering only enough evidence to make an application for the holding charge and abandon a suspect in custody indefinitely, rather than to properly investigate and gather enough evidence as to have the case tried on its merits and potentially have an accused acquitted.[60] It is contended that if prosecution and the interest in securing a

[58] Dele Peters, "The Place of The Holding Charge in Nigeria's Criminal Jurisprudence", (2004) Nigerian Current Legal Problems, vol. 4 & 5, p. 252
[59] *Ibid*
[60] Amnesty International, "Nigeria: Prisoners' Rights Systematically Flouted", n54, p 8

conviction were not vested in the police, there would be a separation of interests, and the police could potentially approach investigation of offences from a more impartial standpoint.

This point seems to be buttressed by an examination of the phenomenon of police prosecution as once obtained in England. A brief historical jaunt would reveal that four decades ago, in England, the issue of separating the powers of prosecution and investigation was the subject of academic debate. Prior to the coming into force of the Prosecution of Offences Act 1985, and the subsequent establishment of the Crown Prosecution Service, the Police were responsible for the prosecution of offences in England; police officers would appear by themselves in Magistrates courts, and would employ barristers and solicitors to represent them at the Crown court.

In its report *The Prosecution Process in England and Wales* (1970), JUSTICE recommended that the powers of investigation and prosecution be separated, and called for the establishment of an independent prosecution body. It was the recommendations contained in this 1970 report that ultimately led to the promulgation of the Prosecution of Offences Act. The main reasons for the Committee's recommendations were as follows:

(a) *The honest, zealous and conscientious police officer who has satisfied himself that the suspect is guilty becomes psychologically committed to prosecution and thus to successful prosecution.*

(b) *The decision to prosecute does not and should not always fall to be determined solely by the likelihood of a conviction. Public policy and individual circumstances are rightly to be taken into account.*

(c) *The English system is the only one in Europe where the interrogation of suspects, the interviewing of witnesses, the gathering and testing of scientific evidence, the selection of evidence to be laid before the court, the decision as to what charges shall be brought and the conduct of the prosecution are in the majority of cases effectively under the control of the police.*

(d) *The question of whether to prosecute partakes of the nature of a judicial decision, since, although the accused may eventually be acquitted, the bringing of a charge on insufficient evidence can have disastrous consequences on a man's domestic life and career, particularly if he is held in custody pending trial. It is difficult for investigators to achieve the necessary detachment and unfair to expect them to do so*

(e) *Once a prosecution is commenced the extent of police involvement – in terms of prestige, fear of public criticism, particularly if there is a risk of an award of costs against the prosecution, and the possibility of an action for malicious prosecution – may, perhaps unconsciously, influence the decision as to whether the prosecution ought to be dropped.*

(f) *The dominance of the police in the prosecution process exposes them to temptation. They make* [sic] *seek or be prepared to bargain with a suspect, promising to refrain from prosecuting: or to "let him down lightly" or to "put in a good word with the court": or to grant him bail*

(or not to oppose it) or not to prosecute his wife. The risk of abuse, however well-intentioned the motive, is manifest in such a situation.

(g) Cases do occur in which pressure is brought on counsel to take a hard line against his better judgment.

(h) Sometimes the police do not disclose relevant information which may on occasion be of material assistance to the accused. The possibility of deliberate non-disclosure to try and ensure a conviction cannot be ignored. We would refer in this connection to the JUSTICE report, "The availability of Prosecution Evidence to the Defence".

(i) It is impossible for the police to be adequately trained as lawyers and advocates, nor should the attempt be made, especially as there is a grave shortage of police for proper police duties. Lawyers, by reason of their training and experience, are much better qualified for these tasks.[61]

These recommendations were met with some initial criticism,[62] but ultimately, the powers of investigation and prosecution were separated, and the CPS was established to oversee prosecutions in England. It is thus reiterated that if the powers of prosecution and investigation were separated in Nigeria, there would be a less blatant denial of an accused's rights to a fair trial, particularly those that exist at the detention stage.

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[61] These reasons were reiterated in the 1979 JUSTICE report, *Pre-Trial Criminal Procedure: Police Powers and the Prosecution Process*, paragraph 65.

[62] See, for example, the arguments raised in White, R. "A Public Prosecution Service for England and Wales" and West, R. "Police Superintendents and the Prosecution of Offences" in Benyon, J. and Bourn, C. (Eds.), *The Police: Powers, Procedures and Proprieties*, Pergamon Press, 1986, pp. 196 – 210 and 224 – 229.

The recent enactment of the ACJA has offered the debate on the power of the police to prosecute no favours, as it has now, by virtue of the provisions of Sections 293 to 299 thereto, seemingly legitimised the phenomenon of the holding charge in Nigerian law.

According to the provisions of the ACJA, an application may be brought before a magistrate court seeking the continued remand of a person, pending legal advice from the office of the Attorney-General, or requisite prosecution body,[63] even if the substantive offence for which the suspect is alleged to have committed is *ultra vires* the jurisdiction of the magistrate court.[64] This application is to be made *ex parte*,[65] and if successful, may be remanded for a period not exceeding fourteen (14) days,[66] although this remand period is renewable for a second period also not exceeding fourteen (14) days.[67] At the expiration of this remand period, where the suspect has still not been charged at the appropriate court, the magistrate court shall issue a hearing notice on the Inspector-General of Police or the Attorney-General of the Federation so as to inquire as to the position of the case, and also to "show cause why the suspect remanded should not be unconditionally released", and thereafter adjourn the matter for a subsequent period not exceeding fourteen (14) days, with the accused remaining in detention.[68]

[63] Section 294, ACJA
[64] Section 293(1), ACJA
[65] Section 293(2). This is arguably an axiomatic violation of the principle of equality of arms, as the accused's counsel, assuming he has one, cannot protest the continued detention of his client.
[66] Section 296(1), ACJA
[67] Section 296(2), ACJA
[68] Section 296(4)

Where good cause is shown, the magistrate court may extend the remand period for a final period not exceeding fourteen (14) days to allow for the arraignment of the accused before the appropriate court vested with competent jurisdiction to try the suspect.[69] At the end of this final period, where the trial of the accused has still not commenced, the magistrate court shall discharge the suspect and order him to be released immediately from custody.[70] The overall effect of the provisions of the ACJA highlighted hitherto is that failing to arraign a person in court within the constitutionally sanctioned period of forty-eight (48) hours, it is now possible, by law, to detain a person in Nigeria for an additional fifty-six (56) days without filing a formal charge against the person, which means that it is possible to detain a person for a maximum of fifty-eight (58) days without formally charging him with the commission of an offence.

Without launching into a tirade on a subject which is probably well understood by any person who has studied human rights and liberties, even on a perfunctory level, it is suggested that a detention period of fifty-eight (58) days without charge is most certainly a violation of an accused person's right to liberty. At present, there is no data to suggest how this provision of the ACJA will be delivered in practice, but it seems that, even on a purely theoretical basis, it does not make for adequate protection of the right to liberty as guaranteed by Section 35 of the 1999 CFRN, although it is conceded that if managed effectively, this provision might serve to decongest the

[69] Section 296(5)(a), ACJA
[70] Section 296(6), ACJA

prisons, because it vests in the magistrate court the power to review the remand order.

Previously, before the enactment of the ACJA, when a remand order was issued on a successful application of the holding charge, the suspect is in a limbo of sorts, because no court is properly seised of his matter, and there was no statutory obligation to have the order reviewed.[71]

Thus, as it stands, although the provisions of the ACJA concerning remand orders poses a threat to the right to liberty, it might very well prove, in time, to be a necessary evil with greater potential to improve the system than bring it to deterioration.

3.2.2.4 Infrastructural Insufficiencies

There are several other intrinsic shortcomings of the Nigerian framework that are not directly related to the legal framework, but are shortcomings of the infrastructural insufficiencies of the institutional framework which affect the delivery of the rights in practice.

In their study, Ajomo and Okagbue found, for example, that there were a series of infrastructural shortcomings which prevented the police from effectively performing their duties and responsibilities.[72] Of the thirty-nine (39) stations in the study, for example, only 60.5 per cent of police respondents claimed that their stations were fitted with telephones, and only 67.6 per cent had the requisite transportation services to enable them perform

[71] Open Society Justice Initiative, "Lawyer at the Police Station Door: How REPLACE Provides Legal Aid in Nigeria" (2015), available at https://www.opensocietyfoundations.org/briefing-papers/lawyer-police-station-door-how-replace-provides-legal-aid-nigeria, last accessed on 04-08-2015

[72] Ajomo and Okagbue, n11, *Supra*

adequately perform their duties.[73] These figures, according to the authors, were viewed as exaggerated figures upon observation, with the realities being a lot worse.[74] Admittedly, this study is over twenty-five (25) years old, and as such becomes ever more unreliable in terms of painting an accurate picture of the infrastructural shortcomings, but there is a general consensus that there are several infrastructural insufficiencies which plague the police stations across Nigeria and affect the smooth delivery of rights in practice.[75]

The most significant shortcoming, which occurs as a result of the infrastructural insufficiencies of the institutional framework in Nigeria, is an apparent over-reliance on confessional statements by the police in order to secure a conviction. This is due mostly to the fact that the Nigeria Police Force are not equipped with the proper technological tools and skills to gather the relevant evidence. This might be due in part to the general understaffing of the police force,[76] and also as a result of the fact that there is only one forensic laboratory on record as belonging to the Nigeria Police across the length and breadth of the nation; another side-effect of the centralised nature of the Nigeria Police Force.[77] This fact, quite simply, means that there is a lot of time lost between collecting physical and/or ballistic samples, transporting same to and from the forensic laboratory, and testing said samples to arrive at a conclusion. It is also assumed that, with one forensic laboratory providing its

[73] *Ibid*, at pp 101 - 102

[74] *Ibid*

[75] See Mark Amaza, "The Unending State Police Debate", available at http://nigerianstalk.org/2012/11/27/the-unending-state-police-debate-mark-amaza/, last accessed on 20-05-2015. Also see the discussions by Sekoni, Ekweremadu and Ogbodo, n 50, *Supra*

[76] *Ibid*

[77] A. B. Dambazau, *Law and Criminality in Nigeria*, n 51. The fact that there is only one forensic laboratory belonging to the NPF was also ascertained during the empirical study conducted by the researcher.

services to the police force, there must be a backlog of samples waiting to be tested which, for time-sensitive materials, might affect the veracity of the findings; and also carry the implication that suspects spend protracted periods of time in detention awaiting the conclusion of testing, especially in light of the arrest-first mentality displayed by the Nigeria Police Force, as shall be discussed below.[78]

Further to this, there was the mode of recording statements of suspects, and the issues surrounding this action. Prior to the passing of the ACJA 2015 into law, and with no express provisions to the contrary in the CPA and the CPC, the general practice was for all statements of accused persons to be recorded in writing, in English language. This is partly attributable to the fact that, prior to the amendment of the Evidence Act in Nigeria, in 2011, audio and video recordings were not admissible in court.[79] In situations where the accused can neither speak nor write in English language, his statement is to be taken by an interpreter, translated and written down in English language, and the statement form signed by the accused person and countersigned by the interpreter.

There are some obvious risks to recording interrogations and interviews in writing only, or relying solely on confessional statements. As Shepherd contends: *"…a written statement is a heavily, selectively edited version of*

[78] See Section 3.3.4.1, *Infra*

[79] Section 84 of the Evidence Act stipulates that electronic evidence is admissible, and this was defined as including video evidence in *Prince Edward Eweka & Ors v. Asonmwonriri Rawson (alias AAU Eweka) & Ors* [2000] 10 NWLR (pt. 722) 723

what the witness [or accused] *said, expressed in the formal language of written text….''*[80]

He goes further to highlight that, in the absence of a recording, it is impossible to know

- *whether the officer interviewed inappropriately, influenced, shaped or contaminated the witness's account;*
- *whether the interview was an exercise in confirmation rather than being truly investigative;*
- *whether the officer failed to register, or dismissed potentially relevant detail;*
- *whether there were anomalies in what the witness said, or didn't say;*
- *whether the officer's compression of detail into a written statement has omitted detail that now or later could prove vital to the investigation*[81]

Also, rather interestingly, in the absence of any formal requirement for arrested persons to be informed of their rights verbally in Nigeria, the standard form for recording confessional statements is supposed to contain a cautionary statement reminding and advising accused persons that they are not under any obligation to make any statements, but are only to do so voluntarily. However,

[80] Eric Shepherd, *Investigative Interviewing: The Conversation Management Approach* (Oxford, 2007), p13.

[81] *Ibid*. For more on interviewing methods, and the associated advantages and disadvantages also see, generally, Don Rabon, *Investigative Discourse Analysis* (Carolina 1994); Don Rabon and Tanya Chapman, *Interviewing and Interrogation* (2nd Edition, Carolina, 2009); and Stan B. Walters, *The Truth About Lying: How to Spot a Lie and Protect Yourself from Deception* (Sourcebooks, 2000)

in practice, the words forming the caution statement are very often inconsistent from form to form, even within the same police station.[82]

In contrast with the current practice in Nigeria, interviews in England are recorded with the use of audio, and where necessary, audio-visual recording devices, and the procedure for the recording of interviews is clearly delineated in Codes C, E and F of PACE,[83] which stipulates that interviews are generally to be conducted following the cautioning of the suspect, and provides a detailed recording procedure, which leaves very little room for ambiguities. As it were, this appears to buttress the importance of a clearly delineated and detailed framework.

In extending the comparison beyond the current practices and analysing the pre-PACE era, it would appear that there are lessons to be learned from the developmental process from Nigeria.

As is common knowledge, before the coming into force of PACE, the rights of accused persons and suspects, as well as the rules regulating the questioning of suspects, were provided for by the Judges' Rules, which were laid down by judges, not Parliament, and as such lacked the force of law. The Judges' Rules were generally ineffective in protecting suspects' rights, and there was a proliferation of corruption which manifested itself in the development of

[82] Appendices 5 and 6 to this thesis, at pp 242 – 245, *Infra*, are sample confessional statement forms obtained at the same police station. The cautionary statement on the more detailed form in Appendix 5 can hardly be said to constitute a valid act of informing an accused of his rights, but is very often the most information a person might receive before his interrogation commences. It poses the yet unanswered question as to what happens to a person who cannot read or understand English language. How does he understand the words of the caution printed at the top of the page?

[83] See paragraphs 10 – 12 (inclusive) of PACE Code C.

unscrupulous or inadequate interviewing practices, which resulted in the reduction of public confidence in the police as a result of these bad practices.

Following the establishment of the Royal Commission on Criminal Procedure (RCCP), the starting point of the RCCP's discussion was the concept of a fundamental balance in society between the "interests of the community in bringing offenders to justice and the rights and liberties of persons suspected or accused of crime."[84] The RCCP believed it was "essential that the public should have confidence in the way the police go about the process of investigation so that ordinary citizens will continue to co-operate in the process."[85]

The extant laws in the pre-PACE era held that any statement made by a suspect had to be voluntary, but the research studies for the RCCP had shown that custody was inherently coercive and that legal and psychological concepts of voluntariness did not match.

The following were the seven main proposals expressed by the RCCP for regulating custodial questioning:

i. All aspects of treatment of a suspect in custody, including the conduct of interviews, should be regulated by statute, to update and extend the scope of the current provisions;
ii. There would be no alteration to the suspect's right to remain silent;
iii. Steps were to be taken to improve the note-taking skills of officers and in addition they recommended the gradual introduction of tape recording;

[84] Report of the RCCP, p 4
[85] Report of the RCCP, p 20, para 2.18

iv. The right of access to legal advice should be made effective through the introduction of duty solicitor schemes;

v. All suspects should have the right to have someone notified of their arrest;

vi. Juveniles and other special groups such as the mentally handicapped would be interviewed only in the presence of an appropriate adult; and

vii. A Code of Practice for the regulation of interviews should be included in the statute regulating the treatment of suspects in custody.[86]

The foregoing proposals of the RCCP were subsumed into the provisions of PACE, but it is noteworthy that both the CPA and CPC are conspicuously bereft of any provisions relating to the proposals above, and corruption continues to thrive at the custodial stage in Nigeria.[87]

Fortunately, with the enactment of the ACJA 2015, the risks involved with reducing a confessional statement to writing have been dispensed with, as Section 15(4) thereto now requires that all interviews and interrogations of arrested persons at the police station must be recorded with the aid of audio-visual equipment. This would indeed be a welcome development in not just the quest to better protect the rights of accused persons at the pre-trial stage, but the entire criminal justice system in Nigeria. However, given the fact that

[86] For more on the foregoing, see "The Psychological and Legal Principles of Investigative Interviewing: A History – Unethical behaviour by Interrogators: Judges' Rules and the Development of PACE", available at http://compass.port.ac.uk/UoP/file/523ed20e-e5f7-4eef-b813-b70374334711/1/The%20Psychological%20and%20Legal%20Principles%20of%20Investigative%20Interviewing%20A%20History_IMSLRN.zip/page_02.htm, last accessed on 16-08-2018

[87] See Chapter 3.3.4.2 below

the age of the act, and the lack of the required audio-visual equipment in every police station across the state, coupled with a scepticism borne out of the bureaucracy and red tape present in operating a centralised police force, a sentiment shared by Dambazau and Adediji,[88] it is opined that this new provision is perhaps a long way away from full implementation. It may take a few years to have every police station, in every nook and cranny, of every state command in Nigeria, outfitted with the necessary equipment to properly record interviews and interrogations in the proper manner, as stipulated by Section 15(4) of the ACJA 2015.

To further compound the situation, another intrinsic shortcoming is the absence of a properly delineated framework for the provision of interpretation and translation services. As has been made abundantly clear in this thesis, all the relevant legislation and statutory instruments governing the pre-trial stage and the rights accruing to an accused person in Nigeria all expressly provide that the entire process to determine a person's innocence or guilt be performed in a language that he understands. At all stages of the criminal process, particularly at the pre-trial stage, for the purposes of this thesis, no attempt is made to deny the existence of an accused person's right to interpretation. It is therefore shocking that there is no framework for the provision of these interpretation services in Nigeria.

In England, there is a framework agreement in operation for the provision of interpretation services, albeit a much maligned one that has its shortcomings. In Nigeria, on the other hand, there is no register of accredited interpreters or a

[88] A. B. Dambazau, n 51, *Supra*; and Banji Oyeniran Adedeji, "Management Paradox of Nigeria's Diversities: Oscillation Between Centralization and Decentralization", in B. O. Adedeji (Ed.), *Deeper Insight into Nigeria's Public Administration* (AuthorHouse, 2013)

recognised body that provides interpretation services for that matter. This negatively affects not just the delivery of an accused person's rights in practice, but indeed the overall fairness of the criminal process. Issues arise in relation to the availability of interpreters and whether they are as adept in reading and writing as they are in communicating verbally as well as in relation to having the ability to verify the authenticity of the language being interpreted or translated?

The last intrinsic infrastructural insufficiency that poses a shortcoming to the delivery of the rights in practice is in relation to detention conditions of arrested persons. Prior to the enactment of the ACJA, there were no express provisions concerning the conditions of detention, although Section 34 of the 1999 CFRN establishes the right of every man to be treated with dignity. The subsequent enactment of the ACJA still fails to expressly provide for conditions of detention, although Section 8 thereto provides that a person who is arrested on suspicion of committing an offence should be accorded humane treatment. However, a direct consequence of the proliferation of the Holding Charge is an overcrowding of the detention cells in the police stations.[89] Occasionally, in applying for the holding charge, the police officers may apply that the accused be remanded in prison custody, in an attempt to create space in the detention cells at the prison.[90] With the enactment of the ACJA, and the apparent legitimisation of the holding charge therein, it is now a stipulation of the law that all persons who are remanded under a holding charge order be

[89] See Dele Peters, n58, *Supra*; and E. I. Alemika, "Pre-Trial Detention and Prison Congestion in Nigeria" (1986-1990) Vol. 3 UJLJ, 120

[90] See Section 3.4.4 and Appendix 2 to this thesis, for a detailed discussion of this.

remanded in prison custody.[91] Prisons in Nigeria are already overcrowded and heavily congested as a result of this,[92] with the conditions of detention being anything but humane;[93] in this environment the ability of suspects to exercise their rights in an effective way becomes highly dubious.

It derives from the above that the exercise of suspects' rights in Nigeria is fraught with complexity, particularly as a result of the police force being vested with a significant level of discretion as a result of the lack of precision concerning most rights, and as a result of the lack of appropriate mechanisms to ensure police accountability.

3.2.2.5 Legal Aid Scheme

Perhaps the most important shortcoming to the framework is the limited nature of the legal aid scheme. As was mentioned in the previous chapter, the current framework establishing the legal aid scheme axiomatically creates a right that is not generally acceptable to all persons. According to the provisions of the Legal Aid Act 2011, legal aid in Nigeria is only available to persons who earn less than the minimum wage,[94] and legal representation is only available to a suspect in cases where he is alleged to have committed any of a mere nine (9)

[91] Sections 294(1) and 299, ACJA

[92] According to the International Centre for Prison Studies, there are a total number of 57,121 inmates in Nigerian prisons, which, according to official population capacity figures (as at 31-10-2014), is 113.9% of the prisons. Of these, 69.3% are pre-trial/remand inmates who have yet to be tried, let alone convicted of any offence. See, "ICPS: Nigeria", available at http://www.prisonstudies.org/country/nigeria, last accessed on 13-06-2015

[93] United Nations Economic and Social Council, "Civil and Political Rights, Including the Question of Disappearances and Summary Executions: Extrajudicial, Summary or Arbitrary Executions", Report of the Special Rapporteur, Mr. Philip Alston, Mission to Nigeria. (2006) E/CN.4/2006/53/Add.4, pp. 18-19, 23. See also, the Amnesty International reports on Nigeria, n54, *Supra*

[94] Section 10(1), Legal Aid Act 2011

offences.[95] Thus, in situations where the suspect is arrested for the alleged commission of an offence which is not among those listed in the Legal Aid Act as falling under the purvey of the Legal Aid Council, or where a person earns above the minimum wage, he cannot seek free legal representation from the Legal Aid Council.

Even where it is deemed that a person is eligible for assistance from the Legal Aid Council, the Legal Aid Council of Nigeria has been grossly underfunded and understaffed since its inception. There are currently only six (6) Local Government offices, thirty-seven (37) State offices (including the FCT) and the Head Office.[96] In a report published by the Human Rights Watch in 2004, it was reported that there was only one legal aid officer per state office.[97] This number has since increased, but as of 2013, there are only two hundred and eighty (280) lawyers under the employ of the Legal Aid Council.[98] From a purely logistical standpoint, it seems highly unfeasible that 280 lawyers would be able to adequately traverse the length and breadth of the expansive geographical terrain that is Nigeria.

In a bid to combat the effects of such gross understaffing on the provision of legal representation to the indigent, the Legal Aid Council, in conjunction with

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[95] Second Schedule to the Legal Aid Act 2011. Inchoate offences in respect of the nine substantive offences listed are also entitled to legal aid.

[96] See "Legal Aid Council of Nigeria: Organisation Structure", available at http://www.legalaidcouncil.gov.ng/index.php?option=com_content&view=article&id=54&Itemid=141, last accessed on 18-10-2014

[97] http://www.hrw.org/reports/2004/nigeria0904/6.htm, last accesed on 22-03-2015

[98] See "Legal Aid Council Grapples with Challenges of Logistics, Poor Funding – Ayorinde", available at http://www.legalaidcouncil.gov.ng/index.php?option=com_content&view=article&id=141:legal-aid-council-grapples-with-challenges-of-logistics-poor-funding-ayorinde&catid=43:latest-news, last accessed on 31-01-2015; and "Legal Aid Council seeks 1,000 Lawyers from SURE-P", available at http://nationalmirroronline.net/new/legal-aid-council-seeks-1000-lawyers-from-sure-p/. last accessed on 30-09-2014

the Nigerian Bar Association, encourages legal practitioners in private practice to regularly take up cases *pro bono*. Additionally, members of the National Youth Service Corps (NYSC) who have trained and qualified as legal practitioners are often required to assist the Legal Aid Council in the provision of *pro bono* services as part of their one-year long mandatory national service.[99] Despite these commendable steps being taken, the provision of legal representation remains at an unsatisfactory level; especially because, with regards to NYSC members on mandatory national service, the average throughput of criminal matters in Nigeria, from arraignment to judgment, often takes a lot longer than a year. Additionally, the operation of the Legal Aid Council at the pre-trial stage is greatly hampered by the absence of a duty solicitor scheme, or its equivalent, as is the case in England.

In 2004, the Legal Aid Council, in partnership with a handful of non-governmental organisations (NGOs), created a framework for a schematic rolling-out of a public defender/duty solicitor scheme, involving four (4) lawyers per state on national service to provide legal advice to detained persons at the police stations.[100] The initial arrangement sought to roll this duty solicitor scheme out in four (4) initial states at the time, but was recently expanded, in 2010, to six (6) states. Whilst the scheme has been mostly successful, and has secured the release and discharge of over ten thousand (10,000) persons from police and prison custody,[101] it is again subject to the same logistical issues and problems that the Legal Aid Council itself faces: a

[99] David McQuoid-Mason, "Legal Aid in Nigeria: Using National Youth Service Corps Public Defenders to Expand the Services of the Legal Aid Council", (2003) 47(1) JAL 107
[100] Open Society Justice Initiative, "Lawyer at the Police Station Door: How REPLACE Provides Legal Aid in Nigeria" (2015), n 71, *Supra*
[101] *Ibid*

total of four legal practitioners per state is anything but adequate to effectively offer legal advice at the police station.

This state of affairs severely hampers the delivery of rights in practice. The legal and institutional framework in England is not sacrosanct, and has its own shortcomings, but they are not enough as to stifle the delivery of rights in practice.

There are other factors which affect the transition of the detention rights from theory to practice in both jurisdictions, and these are factors which are related to the attitudes and cultures of the different parties to the pre-trial process.

3.3 ATTITUDINAL FACTORS AFFECTING THE PROTECTION OF RIGHTS IN PRACTICE

In light of the foregoing sections, it is important to begin this section by noting that the attitudes of the parties to the pre-trial process has the greatest effect on the proceedings and the transition of rights from theory to practice.

As a result of laws being subject to interpretation, and the fact that the different frameworks exist to regulate interaction between the different parties to the process, it is perhaps an axiomatic assumption that the attitudes of the different parties involved would have an effect on the provision of the rights in practice. It is hypothesised that whether or not the frameworks are plagued with shortcomings, in a utopic world, if the parties involved in the process are determined to deliver the rights in practice, then the rights shall be delivered in

practice. However, as this is no utopia, and as has been discovered,[102] there are a few attitudinal factors which also affect the transition of the pre-trial rights in both jurisdictions from theory to practice, in addition to the shortcomings of the framework themselves, as identified above.

Before proceeding to assess these attitudinal factors, it is important to note that, in all the available literature on this issue, essentially, the attitudinal factors considered are done so primarily in relation to the provision of, or access to legal advice at the police station. It is however contended that these attitudinal factors can be juxtaposed against the other rights, to similar effect. Without belabouring this point much further, these attitudinal factors are:

3.3.1 Ploys Employed to Ensure the Non-Observance of Rights

Despite PACE, and Code of Practice C, prohibiting police officers from doing or saying anything to dissuade a person from seeking to uphold their rights, particularly the right to legal advice,[103] empirical research undertaken in England has demonstrated that the police continue to seek to overcome the relevant prohibitions, particularly through persuading suspects to waive their rights and through the use of other ploys.

One such ploy, as highlighted by Kemp, Balmer and Pleasance, involves the reading of their rights incompletely and/or incomprehensibly.[104] Another ploy

[102] See Dixon's Culturalist theory of law in policing, in David Dixon, *Law in Policing*, n17, pp 9 – 20. The culturalist theory, as discussed in Chapter 2 above, is based on the assumption that procedural rules on their own are ineffective in controlling police behaviour; choosing instead to see the policeman as "a craftsman rather than as a legal actor… a skilled worker rather than as a civil servant obliged to subscribe to the rule of law."

[103] See Paragraphs 3.26 and 6.4 of PACE Code of Practice C

[104] Vicky Kemp, Nigel J. Balmer, and Pascoe Pleasance, "Whose Time is it Anyway? Factors Associated with Duration in Police Custody" (2012) Crim. L. R. 736, at 746; and Vicky

that is sometimes employed, as pointed out by Skinns, is the police attempting to convince the detainee, via informal conversations, that given the severity of the alleged offence they were arrested for, the time spent waiting to receive legal advice, for example, might be unnecessary, and would only prolong the amount of time spent in detention, in a bid to stir up impatience at having their liberty withheld, and possibly waive their rights in an attempt to "get it over with".[105]

There have been recent developments, however, which are viewed as welcome steps towards discouraging police officers from engaging in such ploys, such as installing CCTV cameras and microphones within custody suites to monitor the activities therein.[106] This requirement for activity to be monitored ought to dissuade officers and custody sergeants from the incomplete and incomprehensible reading of the detainee's rights, and also to be impartial in their information of a detainee's rights.[107]

The study by Kemp also suggests that the arrangements for providing legal advice in the police station also had an effect on the take up of legal advice by detainees.[108] In some of the stations, as Kemp discovered, lawyers were not allowed into the custody suite which, as she noted, meant that they were not visible to suspects whilst they were being booked, thereby reinforcing the perception or belief that waiting for the solicitors to arrive would pose a further delay, thereby prolonging their detention. Additionally, in some

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Kemp, ""No Time for a Solicitor": Implications for Delays on the Take-Up of Legal Advice" (2013) Crim. L. R. 184, at 192

[105] Layla Skinns, n 6, at 24. See Also, Layla Skinns, n17, p116

[106] Vicky Kemp, n104, p192

[107] *Ibid*

[108] *Ibid*, pp195 – 196

stations, the custody sergeant would occasionally fail to inform the detainee that he could obtain legal advice over the telephone, which would also have the effect of reducing the rates of requests for legal advice.[109] Some other ploys that are employed by the police include minimising the seriousness of the offence; manipulating the suspect's self-esteem; pretending to be in possession of more evidence than they actually have; pointing out the futility of denial; and telling the suspect that it was in his/her best interest to confess.[110]

Despite the observance of these ploys in practice, it has frequently been conceded that given the existence of other factors and the cumulative effect on the take-up of legal advice, it is currently impossible to calculate the exact effect of the ploys employed by police officers in isolation from the other factors.[111] However, it remains noteworthy that these ploys have the potential to affect the rates of request for legal advice, and indeed the provision of every other pre-trial right in practice.

The attitudinal factors attributable to the police in Nigeria, by comparison, are potentially a lot worse than what obtains in England. The available literature on Nigeria makes no reference to, or contains any information that sheds light on, the use of ploys or lack thereof by the Nigeria Police Force. However, in a plethora of literature, ranging from reports from UN Special Rapporteurs and Amnesty International, to academic work and news publications, the Nigeria Police Force have allegedly shown utter disregard for human rights, and

[109] *Ibid*. See also, Layla Skinns, *Police Custody*, n 17, pp114-115
[110] See "The Psychological and Legal Principles of Investigative Interviewing: A History – Unethical behaviour by Interrogators: Judges' Rules and the Development of PACE", n 86.
[111] Kemp, n 104

display a culture of widespread corruption and impunity.[112] There have been reports of extra-judicial killings, acts of torture performed in a bid to extract confessions, and reports of people being detained in less than favourable conditions, and a host of other unspeakable acts.

The implication of these different reports of these deplorable acts by the police are arguably attributable to a host of factors including, in addition to the infrastructural insufficiencies considered in previous sections, issues of the training process and training policies, corruption, and a general culture of disrespect and disregard for human rights. These are all factors which are indicative of attitudinal issues, and which coagulate to cause a breakdown of rights from theory to practice, and shall be discussed in Section 3.4, below.

3.3.2 Suspects' Attitudes

In addition to the ploys employed by the police, there are attitudinal factors which affect the delivery of rights in practice which are attributable to the suspects themselves.

[112] See, generally, for example, Amnesty International reports, n54; United Nations Economic and Social Council, "Civil and Political Rights, Including the Question of Disappearances and Summary Executions: Extrajudicial, Summary or Arbitrary Executions", n93; United Nations Human Rights Council, "Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development", Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Nigeria. (2007) A/HRC/7/3/Add.4; "Law Enforcement and Human Rights in Nigeria", Proceedings of a Workshop for Investigating Police Officers in Nigeria, Organised by the Civil Liberties Organisation in Conjunction with the Nigeria Police Force (Innocent, C. and Ibidapo-Obe, A. (Eds.), Civil Liberties Organisation, 1994); Editorial, "Criminal Justice Sector: Canvassing for a Change", *Nigerian Law Times* (July 2011); "The Nigerian Police Force: A Culture of Impunity", a report by Lawyers Committee for Human Rights, 1992; and Atidoga, D. F., "The Nigeria Police, Human Right Violation and Corruption: The Need for Re-Orientation" (2009) Vol. 8 (2), UJLJ, 130

Skinns has written extensively on this subject,[113] although, as highlighted earlier, her work centred on the take-up of legal advice at the station, and did not include the other pre-trial rights. However, as she pointed out, there are several suspect-related factors that could affect the take up of advice. Not all factors were deemed to be attitudinal, as certain socio-demographic factors such as age, sex and ethnicity were found to have an effect on the rates of request, albeit not significant effects.[114]

There are a few other suspect-related factors with effect on the take-up of legal advice such as, for example, whether the suspects are intoxicated;[115] however, there are four (4) major factors attributable to suspects' attitudes that have an effect on the rate of request.

The first of these attitudinal factors concerns the suspects' perception of the severity of the offence they are alleged of committing. Skinns reports from her study that suspects arraigned on suspicion of committing misdemeanours were less likely to request, and receive legal advice.[116]

Another factor was the suspects' belief that requesting legal advice would amount to a silent confirmation of their guilt. Thus, in a bid to 'maintain their innocence', a lot of detainees would prefer to refrain from requesting legal advice. According to Skinns, it also worked the other way around.[117] Some detainees, knowing they were guilty, would prefer to confess their wrongdoing; rather than cause 'delay' by requesting legal advice.

[113] See Skinns, n7 and n17
[114] *Ibid*
[115] *Ibid*
[116] *Ibid*
[117] *Ibid*

Additionally, prior custodial experience of suspects has been shown to have a significant effect on a suspect's take-up of his right to a solicitor. The effect, however is complex in nature. Perhaps conflictingly, Skinns reports that suspects with prior experience of custody and/or previous convictions generally express a belief that they know enough to get by without a solicitor, and are thus less likely to request advice.[118] Phillips and Brown, on the other hand, found that those with prior custodial experience were in fact one and a half (1.5) times more likely to request pre-trial legal advice than those without.[119] Skinns also suggests that inexperienced suspects, in terms of previous detention, would often request legal advice because they were scared.

The fourth attitudinal factor is impatience and a desire to be released from detention. Several studies have found that suspects would occasionally refuse to request legal advice if they perceived that doing so would prolong their detention. Skinns refers to this factor as the "Let's get it over with" mentality.[120] The findings of her study seem to suggest that this impatience to wait for a solicitor to arrive is displayed by suspects regardless of prior custodial experience. Her findings also suggest that this mentality arises "…in part, because the police tell suspects that it takes longer if they have a legal adviser", thereby establishing that some of the ploys employed by the police have some effect on the take up of legal advice by suspects.

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[118] *Ibid*

[119] C. Phillips and D. Brown, *Entry into the Criminal Justice System: A Survey of Police Arrests and their Outcomes* (London: HMSO, 1998), cited in Layla Skinns, "The Right to Legal Advice in the Police Station: Past, Present and Future", n6

[120] Skinns, n7. This term is coined from the words of one suspect under observation during her study, in response to being informed of his right to legal advice.

In light of these attitudinal factors, it ought to be noted that, even though the right to a fair trial, and by extension, the rights and safeguards available at the police station, is in itself an absolute right, it is possible for a suspect to waive his rights or to refrain from seeking to enforce them. The requirement for a valid waiver of one's rights under ECHR jurisprudence is that it must be made voluntarily, and must constitute "a knowing and intelligent relinquishment of a right".[121] As a result, if suspects refrain from exercising their rights for any of the reasons highlighted above, but in the absence of any external influence or as a result of any ploys employed by the police, then it is deemed to be a valid waiver of the rights. However, whether or not the right is being waived in a valid way, a waiver of one's rights has an effect on the overall transition of these rights from theory to practice.

As hitherto mentioned above, there is a dearth of literature exploring the delivery of rights in practice in Nigeria, as a result of which it is impossible to compare the effect of the attitude of arrested persons in Nigeria and its effect on the delivery of the rights in practice.

3.3.3 Relationships of the parties

As has been expressed frequently throughout this thesis, the pre-trial process, and indeed the entire criminal justice system in both jurisdictions is of an adversarial nature. Naturally, this would mean that the different parties to the process on either side of the adversarial scale are prone to antagonising the parties on the other side.

[121] *Pischalnikov v Russia*, ECtHR judgment of 24 September, 2009 (unreported)

The relationship between parties on either side of the adversarial scale as a hindering factor in the delivery of rights in practice is perhaps not as pervasive in England as it is in Nigeria.

There is little evidence to suggest that the relationship between the parties is of any effect in England. However, in Nigeria, there are widespread reports of open discord and distrust between the police and legal practitioners seeking to offer their services to detainees and arrested persons.[122] Lawyers are frequently banned from the interrogation room, or denied time to consult in private with their clients. Generally, this is because the police and legal practitioners in Nigeria tend to view the other party as antithetical to the performance of their functions in the criminal process, as opposed to operating under a well-delineated adversarial system intent on uncovering the truth.[123]

The relationship between the parties is not one that is expressly covered by any statutory provision, but it is argued that a clearly stated provision which does not expressly forbid lawyers from gaining access to the interrogation room, or being a part of the interrogation process would guarantee that an accused person could have his lawyer present, and therefore not axiomatically deny him access to his solicitor. In Nigeria, prior to the enactment of the ACJA, there was no express statutory provision permitting a lawyer to be present in the interrogation room, and legal practitioners could not successfully argue against being barred from the interrogation process. However, Section 17(2) of the ACJA now provides for the presence of a legal practitioner during interrogation.

[122] See Section 3.4, *Infra*
[123] *Ibid*

The provisions of Section 17(2), it is opined, are not sacrosanct, because despite providing and permitting for lawyers to be present during interrogation, the section, and indeed the entire Act, fail to establish a framework for the provision of the services of the legal practitioner. The provision, for example, fails to state on whom the onus to contact the lawyer rests. Despite this shortcoming, it is hoped that, in time, the provisions of Section 17(2) might be properly implemented.

3.3.4 Other Attitudinal Factors

There are two other attitudinal factors that have an effect on the delivery of the rights in practice in Nigeria. These factors are considered "other" factors because, it is contended that, although these factors affect the delivery of an accused's rights in practice, these factors are not directly attributable to the parties involved in the process or the current legislative framework; there are other elements in play which are merely being manifested in the pre-trial stage and have an effect on the delivery of the rights in practice. It is perhaps worthy of note that there is no similar or comparable attitudinal factor in existence in England, and these factors are unique to the Nigerian pre-trial process.

3.3.4.1 Arrest-first mentality

The arrest-first mentality often displayed by the Nigeria Police Force presents additional challenges for the exercise of suspects' rights in practice, particularly through a practice of making arrests without concluding investigations. In fact, arrests sometimes occur before any investigation has commenced; a simple complaint by a member of the public triggers the arrest. Persons may thus be arrested on account of breaching their civil duties, not for

committing an offence.[124] Of equal concern is the practice of arresting a relative or close contact of the alleged offender, in lieu of the offender, where the police are unable to ascertain the whereabouts of the latter.

Additionally, rather controversially, persons may be arrested without an offence having occurred, by virtue of a controversial provision in the CPA and CPC. Section 10(1)(i) and Section 26(g) of the CPA and CPC, respectively, give the police the power to arrest "any person who has no ostensible means of subsistence and who cannot give a satisfactory account of himself." Thus, it is possible for the police to arrest persons without any reasonable belief of an offence being committed, simply because the arresting officer has made a determination that a person cannot give a satisfactory account of himself.

The deleterious effects of this arrest-first mentality are manifold. The overcrowding of the already-limited detention cells at the police stations is an inevitable consequence. An additional implication is that the police are allowing themselves a maximum of forty-eight (48) hours to conduct and conclude investigations without running foul of the constitutionally sanctioned right to liberty.[125] Save for the simplest of offences, it seems herculean to assume that it would be possible to thoroughly investigate the commission of an offence and gather enough evidence to arraign a person in court; or in the case of indictable offences, conduct investigations and transfer the file to the office of the Attorney-General of the relevant state to enable them to make a charging decision and arraign the suspect before a court of competent jurisdiction, all within the space of forty-eight (48) hours.

[124] Amnesty International report, n 54, p 8
[125] Section 35 of the 1999 CFRN

This exercise becomes further complicated where there is the need for forensic or ballistic testing, especially in view of the fact that there is only one forensic laboratory which serves the entire Nigeria Police Force.[126]

Of course, it must be said that the ACJA has taken positive steps towards curbing this arrest-first mentality. It has repealed the power to arrest on the grounds of Section 10(1)(i) and 26(g) of the CPA and CPC, respectively, by omitting that provision from Sections 3, 4 and 18, which are the relevant provisions dealing with powers of arrest. Additionally, Section 7 of the ACJA expressly prohibits the arrest of a person in lieu of another. However, given that the ACJA has only recently been enacted, it is not yet determinable whether these provisions have had, or will have an effect on the arrest-first mentality displayed by police officers.

So far, the reliance on this arrest-first mentality has only been attributed to shortcomings ordinarily contained in the legal and institutional framework, but there is an additional factor at play. Although this mentality leads to congestion of detention cells and prisons, as well as a violation of the requirement that all persons be arraigned within the constitutionally sanctioned period, it is claimed by the Nigeria Police Force that this is as a result of the absence, in Nigeria, of the relevant technology and information databases to maintain awareness of a person's location at all times.[127] It is contended that, if a person is arrested and detained, and released before he is

[126] See Section 3.2.2.4, *Supra*
[127] See Section 3.4, *Infra*

arraigned, it is very possible for the person to abscond if released on bail.[128] Thus, the arrest-first mentality is, allegedly, a policy borne out of necessity.

Very often, admittedly, in most states in Nigeria, there is no properly delineated address system outside of the urban areas and/or capital cities. There is a high propensity of discovering unnamed streets and houses with no numbers. Essentially, if one is unfamiliar with the locality, it is a challenging task to pinpoint a location, let alone a person. This non-CJS infrastructural insufficiency, it is conceded, gives credence to the claim that if a person were to be released on bail, he would abscond.

Hypothetically speaking, if an officer who has been transferred to an unfamiliar region or state, and makes an arrest of a person caught in the act; despite the requirements of the law that the name and address of every arrested person be in the record of arrest,[129] upon release, if the suspect does not report back to the station, it becomes a herculean task for the police officer who is unfamiliar with the terrain to track the person down in the absence of any discernible street demarcations and house numbers. Indeed, there is no means of verifying that the address given is the actual address of the suspect.

It is however contended, that despite the difficulties the lack of a properly delineated address system pose, it does not validate the proliferation of the arrest-first mentality. On the contrary, it potentially buttresses the argument

[128] This is especially because in practice, and according to Sections 17 and 45 of the CPA and CPC, respectively, bail at the police station, theoretically, is to be granted for free, and without the need to furnish sureties.

[129] See Section 10(1) of the ACJA, Section 11 of the CPA, and Section 27 of the CPC which all place a requirement for an arresting police officer to ascertain the name and address of every suspect he places under arrest.

for a decentralised police force or community policing.[130] Unfortunately, however, the arrest-first mentality continues to thrive, and is a factor which hinders the delivery of rights, particularly the rights to liberty, prompt arraignment, and dignified treatment during detention.[131]

3.3.4.2 Corruption

The second "other" attitudinal factor that affects delivery of rights in practice is corruption. It is perhaps common knowledge that Nigeria is generally viewed as a corrupt country. There are well-documented instances of corrupt acts and a culture of corruption affecting many elements of government, and indeed life in general, across the length and breadth of the nation.[132]

This culture of corruption, unsurprisingly, has permeated the criminal justice system, down to the police station and manifests in the daily operations of officers, at nearly every stage of the process.

First, there are widespread reports of the police going out and making frivolous arrests on trumped-up charges, or relying on the provisions of Sections 10(1)(i) and 29(g) of the CPA and CPC, respectively.[133] This is an extortion mechanism: the surest way to secure one's freedom or release from custody would be to offer a bribe.[134]

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[130] See Section 3.5, *Infra*, and Chapter 5.2.2.1 for a detailed argument in support of community policing and decentralized police forces.

[131] As provided for by the relevant aforementioned statutory provisions.

[132] These were highlighted in the reports by the UN Special Rapporteurs mentioned in n 93, *Infra*

[133] *Ibid.* The provisions of the CPA and CPC are to the effect that the police may arrest a person "who has no ostensible means of subsistence and who cannot give a satisfactory account of himself"

[134] UN Reports, n 93

After arrests have been made, a detainee, especially one deemed to be economically well off, may offer bribes to the police to ensure decent detention conditions. Also, if considered well off, a detainee's family or relatives are, upon paying the requisite bribes, are allowed to provide for the detainee's feeding and/or clothing.[135] The effect of this being, more often than not, that the budget for feeding and taking care of detained persons is usually embezzled, and those who are unable to offer the requisite bribes are left to fend for themselves, in less than favourable conditions.[136]

Furthermore, offering bribes can speed up case disposal, as the more well-off detainees are able to pay to have their files transferred to the relevant charging authority, and there are even documented instances of arrested persons paying to transport themselves and the police officers to the court premises for their arraignment hearings.

For a country with a widespread culture of corruption, it is perhaps no surprise that corruption has permeated the criminal justice system, particularly, for purposes of this thesis, the pre-trial system and the police stations. It is further contended, that this factor is exacerbated by the ambiguities that are present in the legal framework. As there is no prescribed detention condition,[137] for example, it gives room for those who can afford it to offer bribes to ensure decent detention conditions.

Further, the provisions of Sections 10(1)(i) and 29(g) of the CPA and CPC create a loophole for the police to make frivolous arrests, and make same in a

[135] See B. A. Cole, "An Experience In A Nigerian Police Station", (1990) 63 Police J. 312
[136] *Ibid*
[137] By contrast, Paragraph 8 of PACE Code of Conduct C stipulates the conditions of detention for arrested persons in England.

bid to extort the populace, and create a window of opportunity to be offered bribes.

Fortunately, the enactment of the ACJA, as mentioned in the previous section, has repealed this provision in the CPA and CPC, but it has not yet been recorded just how effectively it would be in combatting corruption, particularly frivolous arrests, at the police station. As a result, at present, corruption remains a factor, which affects the activities of the police, and poses a threat to the effective delivery of the rights in practice.

3.4 DETENTION RIGHTS OF ACCUSED PERSONS IN NIGERIA: AN EMPIRICAL STUDY

3.4.1 Background

Following the discovery of the dearth of readily-available secondary sources of information and literature, and in light of the age of the most recent empirical study of note into the administration of criminal justice and the protection of human rights in Nigeria,[138] questions were formulated for the conduct of a limited qualitative empirical study, to be conducted by the researcher working alone.

The intent behind which questions were formulated was to have the study be informational, illustrative and exploratory, and also to attempt to evaluate the working knowledge of the parties involved in the pre-trial criminal process in Nigeria. Questions ranged from the more general such as getting respondents to describe in their own words and understanding, the entire pre-trial process from arrest to arraignment; to the slightly more specific questions intended to illuminate the relationships between the parties involved in the process. The questionnaires and samples of actual responses received are appended to this thesis.[139]

The study was conducted in January 2013.

[138] Ajomo and Okagbue, n11

[139] See Appendices 1-4, *Infra*, pp 219 – 241.

3.4.2 Selection of Respondents

The intended respondents to this study were members of the Nigeria Police Force, and members of the Legal Aid Council of Nigeria.

As highlighted in the previous chapter,[140] the Nigeria Police Force is divided into thirty-six (36) state commands and the FCT Command,[141] and the thirty-seven (37) state commands are grouped further into twelve (12) different zonal commands.[142] In each state command, there is a Criminal Investigation Department (CID), which is the arm directly responsible for, *inter alia*, the investigation and prosecution of offences. There is, also, within every state CID, a legal department staffed by police officers that are also trained legal practitioners, who are primarily responsible for the prosecution of offences on behalf of the Nigeria Police Force. Given the limited resources and the severity of logistics that might have been necessary to conduct a thorough study of this nature on a grander scale, within a short time, the decision was made to interview the police officers in charge of the legal department (colloquially referred to as "OC Legal") in one State CID in each zonal command, and in states governed by the CPA and CPC. The selection of particular states within each zonal command was done randomly, with no specific fact taken into consideration in selection.

In a bid to balance the adversarial scale, and also to verify some of the claims made by the OCs Legal, answers to the same questions were sought from the

[140] Section 2.2.2.1, Chapter 2
[141] Federal Capital Territory, Abuja
[142] "The Structure of the Nigeria Police", available at http://www.npf.gov.ng/force-structure/, last accessed on 27-10-2014

state coordinators of the Legal Aid Council in the corresponding states where the OCs Legal had been interviewed.

There are, it is conceded, three (3) notable weaknesses in the methodology that could potentially affect the weight upon which the results can be relied:

The first of these weaknesses is borne out of a lack of observation. In conducting a qualitative study, it is usually ideal to observe the day-to-day activities of the actors in the environment, in addition to obtaining responses from the actors alone.

The step taken to combat this weakness was by including responses from parties on the other side of the adversarial scale to balance out the quality of information being disseminated. However, that poses another methodological weakness in and of itself: again, logistical issues meant that the respondents to the study were heads of their respective departments. Without casting aspersions on the authenticity of the information actually received, it was initially hypothesised that the responses from the police and the Legal Aid coordinators would be subjected to the usual public relations-inspired finishing coat that one has come to expect when speaking to persons in administrative positions. However, it was determined by the researcher that by pitting the responses of one party against the responses from the party on the other side of the adversarial scale would only serve to better illuminate the nature of the relationship between the parties.

The third methodological weakness can be attributed to the method of data collection. For a study with a very limited number of respondents, it was first hypothesised that allowing for the data to be collected in one of three different

methods might affect the consistency of the information revealed. Ultimately, however, there was not found to be any overall difference in the quality of information obtained from the responses.

3.4.3 Collation of Responses

Responses to the questions were obtained under condition of anonymity and, for logistical reasons, responses were obtained in one of three ways: face to face interviews, on the spot or with time to prepare; or they were given the option of sending their responses back via email. The respondents were contacted, and after the debriefing and obtaining their signed consent, were allowed to have their responses collated in one of the three options deemed most convenient to them.

A total of twenty (20) responses were collated from the twelve (12) zonal commands, comprising of fourteen (14) OCs Legal, and six state coordinators of the Legal Aid Council. There were fourteen (14) responses from the police because, rather anecdotally, in the month spent conducting the study, the OCs Legal in two different states were transferred, and their replacements appointed.[143] Fortunately, in both states where this occurred, both the outgoing and incoming OCs Legal were willing to provide responses to the questions.

Responses from the Legal Aid Council were not as forthcoming. Of the attempts made to contact the Council in the twelve corresponding states, only

[143] Especially in light of the fact that one of the criticisms levied against the centralized structure of the Nigeria Police Force, albeit one based on conjecture, was the high risk of officers being transferred from one command to another. See Section 3.2.2.2, *Supra*. The outgoing OCs Legal were transferred to other state commands, and their replacements appointed from within so, fortunately, they already had a working knowledge of the state being examined.

phone calls to the publicly-listed telephone numbers of ten (10) State Coordinators' offices were answered.[144] Of these, only eight (8) agreed to provide responses; however, two (2) State Coordinators failed to send back their responses, despite agreeing to do so, and after several reminders had been sent out. As a result, only half the intended number of responses from the Legal Aid Council with which to contrast with the responses from the Nigeria Police Force was actually obtained. It is submitted, however, that owing to the congruence in the answers obtained from the Legal Aid Coordinators who provided responses, that the lack of responses from the Legal Aid Coordinators in six states has no significant effect on the findings of the study, as detailed in the next section.

3.4.4 Findings

Despite the limited number of responses from the Legal Aid Council, the responses to the study achieved its initial aim. Additionally, given the small sample pool, and the total number of responses obtained, the data obtained was computed manually, without the use of any data analysis software. The results of the study are discussed under three main groupings, which are intended to reflect on the difficulties in translating the custodial rights in practice:

3.4.4.1 Institutional Insufficiencies

The first major revelation of the study was the corroboration by all the respondents of a breakdown of the constitutionally sanctioned right to be

[144] The relevant information is available at "State Offices" http://www.legalaidcouncil.gov.ng/index.php?option=com_content&view=article&id=48&Itemid=92, last accessed on 14-05-2015.

arraigned within forty-eight (48) hours of arrest. This was attributable to a number of factors:

All respondents alluded to the proliferation of the arrest-first mentality. In response to Q2 on the questionnaire, which asked respondents to describe the process from arrest to arraignment, every respondent (on both sides) indicated that investigation into the alleged offence commenced after arrest.

In addition to this, a number of infrastructural and institutional insufficiencies were highlighted as exacerbating the effect of the arrest-first mentality, including understaffing and a shortage of investigating officers;[145] the need to seek medical intervention for the suspect following an "aggressive arrest";[146] as well as improper training policies, resulting in poor evidence-gathering abilities. As pointed out by six (6) OCs Legal,[147] there was only one forensics laboratory belonging to the Nigeria Police Force, and that as a result of the distance involved, it took more than forty-eight hours merely just to transport the evidence to the laboratory, without factoring in the time it required to subject the evidentiary samples to the relevant testing and returning same to the police station. Additionally, five (5) of the police respondents who responded also attributed the delay in arraigning suspects in court to the practice of recording statements of accused persons in writing. The contention is that having to record statements in writing makes the process tedious, as opposed to the possibility of recording the statements of the accused with audio-visual equipment.

[145] This point was highlighted by five (5) of the fourteen (14) OCs Legal and two (2) Legal Aid coordinators

[146] A point raised by two (2) Legal Aid coordinators.

[147] Hereinafter referred to as "police respondents"

When asked how long it took on average to complete investigation and arraign a person after arrest, in Q3 there seemed to be a consensus among nearly all the respondents on both sides that the time needed to complete investigation varied from a few days to arraign on charges for the alleged commission of simple offences or misdemeanours, to anywhere from a few weeks to a few months for charges involving more complex offences.[148] As highlighted in the previous section, arrested persons are usually not granted bail after arrest in Nigeria, for a plethora of reasons.[149] Thus, the expectation, or the harsh reality of the situation is that arrested persons are detained for days or weeks before being arraigned, in spite of the provisions of the law.

The population of such persons being detained without charge was alarmingly high in all the states under consideration: the responses indicated that, on average, eighty per cent (80%) of all detainees in the different states were being held without being formally arraigned on a formal charge. In the states where responses were obtained from the Legal Aid Coordinator as well, there was not found to be any great discrepancy in the estimates given by either side.[150]

3.4.4.2 Poor Delivery of the Rights in Practice

The respondents to the interview were asked specific questions about an accused's right to silence and to legal advice and whether they were informed

[148] With the exception of one Legal Aid coordinator who alleged that an accused could be detained for as long as one year without being arraigned, and one police respondent, who argued that arraignments within their jurisdiction did not usually exceed forty-eight (48) hours.

[149] Section 3.3.4, *Supra*

[150] For example, in one state, the OC Legal alleged that 80% of detainees were Awaiting Trial inmates. In contrast, the Legal Aid coordinator placed that figure at 75%

of these rights before proceeding to ask, in Q19, what other rights arrested persons were entitled to whilst in custody.

All respondents confirmed the existence of the rights to silence and to legal assistance, although two (2) of the police respondents and three (3) of the Legal Aid coordinators admitted that these rights only existed theoretically in their respective jurisdictions, stating that although they were aware that detainees were entitled to these rights, they were not usually afforded the rights in practice. When asked if they were informed of these rights, five (5) of the six (6) Legal Aid coordinators responded in the negative. Ten (10) of the police respondents said that they were informed, usually by the cautionary statement at the top of the confessional statement form, although four (4) claimed that additional steps were taken to ensure that they were informed verbally as well; although one officer stated categorically that arrested persons were not informed of their rights. The most common reason stated for the failure to inform arrested persons of their rights was a lack of knowledge on the part of the police officers of the rights available to the accused persons. Essentially, the police officers themselves were unaware that the arrested persons had these rights, so could not inform them. As one OC Legal remarked, "I joined the force as a graduate and we were trained for 18 months. But somebody who joins the force as a high school leaver is trained for just 6 months. It is not enough. He cannot grasp all the rudiments of what he is supposed to do as a police officer within 6 months."

Arguably, the reliance on the cautionary statement might amount to a non-information of rights. The words of the cautionary statement read as follows:

"…having been duly cautioned in English Language that I am not obliged to say anything in answer to the charge unless I wish to do so, but whatever I say will be taken down in writing and may be given in evidence, voluntarily elect to state as follows:"[151]

These words make no express reference to any rights, and imply prior verbal information of, essentially, the right to silence alone. Further, the words of the cautionary statement are not always consistent. Appended to this thesis are two versions of Nigeria Police Form P19, obtained from the same police station, and containing two different forms of cautionary statements,[152] the latter containing only the words "I voluntarily elect to state as follows:"[153] Without an additional verbal statement of clarification, this can hardly be considered a valid information of rights, even with the most liberal interpretation of these statements.

The inclusion of the provision that the caution be administered in the English language also brings up the issue of interpretation. What happens when an arrested person cannot read or write in the English language? This question was posed in Q12, and all twenty (20) respondents on either side noted that there was no specific procedure in place for the provision of an interpreter or interpretation services. The general practice, as pointed out by twelve (12) of the fourteen (14) police respondents and all six (6) Legal Aid respondents, is for the police to look in and around the police station for someone who can understand the language being spoken by the accused. The other two (2) police respondents who had a different response placed the onus of looking for

[151] Nigeria Police Force form P19. See Appendix 5 to this thesis, p 242, *Infra*
[152] Appendices 5 and 6, at pp 242 to 245
[153] Appendix 6, at p 244

an interpreter on the arrested person. As one of them retorted, "What is the business of the police in getting an interpreter for an accused person? If he or she cannot speak English, they should bring somebody who can speak it for them."

There are manifold issues with the lack of a formal procedure for providing interpreters, and the general reliance on the police for the provision of interpretation services. It should be noted that all twenty (20) respondents stated, in response to Q10 and Q20, respectively, that confessional statements are usually recorded in writing, and that the only persons generally present during interrogation are the suspect and the investigating police officer (IPO).[154] In such a situation, where only an IPO and a suspect, and an interpreter appointed by the police and probably sourced from within the station, it becomes difficult to verify the original statement of the accused, or indeed the veracity and authenticity of the interpreted statement; and it also becomes difficult to separate the investigation process from potential allegations of bias, particularly as there is the potential to present a doctored and/or false confessional statement under the guise of having been interpreted to English language.

As noted in the previous chapter, there were questions surrounding the provision of Section 35(5) of the CFRN, which establishes the right to remain silent pending consultation with a lawyer, including questions relating to the frequency of consultation, and whether the lawyer was permitted to be present

[154] Two of the Police respondents claimed that even though they recognized the right to have a lawyer present during interrogation, they tended to exclude them from interrogation proceedings as they were usually disruptive to the process.

during the interrogation; questions which had not been answered in any provision of the law or by any ruling of any court within the jurisdiction.

Specific questions were asked concerning the right to silence and to legal advice, including what would happen if an accused insisted on exercising his rights, whether lawyers were permitted to be present during interrogation, and specific instances where lawyers were denied access to their clients.

In the first instance, where an arrested person insists on exercising his rights, and not speak until given the opportunity to consult with a lawyer, only three (3) police respondents claimed that he was allowed to exercise his right outright. Nine (9) others claimed that he was entitled to exercise the right, but would be required to write down in clear terms that he was refusing to speak. One additional police respondent said that at this point, he would be taken before a magistrate and arraigned, as this would be viewed as an admission of guilt, and the final police respondent said that where he was arrested on suspicion of committing a capital offence, he would be forced to give a statement. Conversely, all the Legal aid coordinators who responded argued that if a person insisted on exercising his right, he would either be beaten (2 of the 6 respondents), forced or persuaded to talk or, according to two (2) respondents, tortured until he made a statement.

In determining the points during which detention where consultation was permitted, two (2) police respondents claimed that, in their jurisdictions, lawyers were permitted at any time. Five (5) stated that lawyers were entitled access to their clients any time except during interrogation. An additional five (5) said that they would permit counsel to be present during interrogation,

provided they were not disruptive and merely played the role of an observer. The last two (2) police respondents stated categorically that lawyers were prohibited from interrogation; one of them quipping: "We are not interrogating lawyers, we are interrogating suspects and accused persons." The other stated that, as a matter of fact, lawyers in his state were not permitted to see their clients until after they had been interrogated, and they were especially not allowed into the interrogation room because "their present [*sic*] can prevent the accused from saying or speaking the truth." This is an obvious violation of Section 35(2) of the CFRN, which even in the absence of a proper delineation of the extent of legal advice guarantees, at the very minimum, access to a lawyer or legal practitioner before he proceeds to answer any questions or make any statements.

The responses from the Legal Aid coordinators, predictably, painted a different picture. Only one (1) of the six (6) coordinators claimed that lawyers were permitted to be present during interrogation, or could consult with their clients at any time. Of the remaining five (5), two admitted that they had the right to be present during interrogation, but qualified this right with the contention that this probably only existed on a theoretical plane, as they very often excluded from consulting with suspects until after interrogation, and that consultations were also usually kept brief.

Further, in assessing the conditions of consultation in the seemingly rare situations where arrested persons were allowed to consult with a legal practitioner; and in responding to Q27 and Q28, dealing with provisions for consultation with solicitors at the police station, all six (6) Legal Aid coordinators and thirteen (13) of the fourteen (14) police respondents said that

there were no special provisions for ensuring that the accused person consulted with his lawyer in private: consultations are usually held in the office of the police officers, and in the presence of a police officer. Five (5) police respondents stated further that they tend to insist, during the consultation, that the accused and his lawyer communicate in a language understood by the police officer present. The one police respondent who gave a different response stated that although there were no special measures in place to ensure privacy, they would permit the accused and his lawyer to consult out of earshot of any officer, provided they were within eyesight of the investigating police officer. Additionally, all six (6) Legal Aid coordinators said that there were usually no special measures in place to ensure that consultations between accused persons and their legal practitioners were held in private.

Finally, on the point of legal advice in the police station, from the responses given, eleven (11) of the fourteen (14) police respondents claimed that, in situations where an accused was unable to afford the services of counsel, that they were duly informed that the Legal Aid Council could provide free legal assistance; although it was stressed by all fourteen (14) respondents that the onus to contact the Legal Aid Council lay on the accused, acting personally or through his family. All six (6) Legal Aid Coordinators corroborated this point.

In response to Q19, which asked respondents to state the other rights available to accused persons detained within their jurisdiction. There was a consensus amongst all respondents that parties had the right to be treated with dignity, right to be informed of the reason for their arrest, right to bail, and a right to prompt arraignment. It is however contended, that in light of the

infrastructural insufficiencies discovered, these rights are also not being delivered effectively in practice

3.4.4.3 Relationship of the Parties

From the study, the relationship of the parties to the pre-trial process was also found to be a factor that affected the delivery of rights in practice. As has been mentioned frequently throughout this thesis, the Nigeria Police Force and the Legal Aid Council are on opposite sides of the adversarial scale.[155] Naturally, the assumption is that there would be some sort of adversarial relationship between both parties. As alluded to in Section 3.4.2 above, by obtaining responses from both parties, the extent of this adversarial relationship was highlighted.

Of the twenty responses collated, six (6) OCs Legal and two (2) Legal Aid Coordinators offered to give their responses in person. In responding to questions when discussing the other side, it seemed as though the relationship was more than just adversarial in nature, but showed traces of discord.

Additionally, in responding to Q25, which dealt with reasons why lawyers were excluded from the interrogation room, four (4) of the police respondents claimed that lawyers who attend the interrogation tend to be disruptive and interrupt the entire process. One police respondent even went as far as accusing the lawyers of being overeducated and attempting to flaunt their education whilst making the police out to be ignorant. On the other hand, one

[155] Although the Police is not part of the adversarial scale, strictly speaking, this reference is used in the context that, particularly in Nigeria, it would appear that while the Legal Aid Council strives to defend an accused person or a suspect, the primary focus of the NPF appears to be striving to secure a conviction, thereby pitting both of them on either side of the adversarial balance.

of the Legal Aid coordinators accused the police of being corrupt, whilst another alleged that the reason for their exclusion from the interrogation room was to ensure secrecy, and prevent lawyers from bearing witness to any untoward interrogation methods or other activity. This creates the impression, in the opinion of the researcher, that the relationship between the parties is moving beyond the terrain of 'mere' adversarialism to a relationship that is antagonistic in nature; and this affects the delivery of rights into practice because, rather than approach the pre-trial and interrogation process with a mutual respect for the detainee's rights at the fore, these rights have been relegated to the background, and the interaction between both parties is fuelled by conflict.

3.4.5 Discussion

The overall findings of this study give credence to the hypothesis that there is a huge lacuna between the rights as they exist in theory and as they operate in practice. It also, despite the limited weight that might be attached to it, seems to suggest that in the years following the study by Ajomo and Okagbue,[156] there has been little improvement in the protection of rights at the police station.

The large number of infrastructural shortcomings that plague the system, coupled with the proliferation of the arrest-first mentality, continue to affect the pre-trial process, and are wont to suggest that it is a near-impossibility to properly arraign a person within the constitutionally sanctioned forty-eight (48) hour window within which to do so.

[156] n 11, *Supra*

Of particular, worrying note is the failure and blatant refusal to provide legal assistance at the police station. In Nigeria, as in England, lawyer-client communication, by law, ought to be treated as privileged communication.[157] Given the findings of the study, the right to legal advice can hardly be said to be provided for unequivocally, in its true, privileged form, if arrested persons are unable to meet with their solicitors in private, out of sight and out of hearing of the police.

As stated earlier, this study was conducted in January 2013 and, fortunately, the enactment of the ACJA has brought forth a few favourable developments to address some of the issues unearthed by the study. Now, by virtue of Section 17(2) of the ACJA, any suspect desirous of making a statement is entitled to make same in the presence of a legal practitioner of his choice, or in the presence of an officer of the Legal Aid Council, or any other person of his choice.

The ACJA does not, however, address all the relevant issues. Section 17(3) of the ACJA, for example, reaffirms the right of an accused person to an interpreter, but fails, as previous statutory instruments also failed, to establish a framework for the provision of interpretation services. At the very least, it also fails to place the burden or onus of procuring interpretation services on either party to the process; a situation which, as we have discovered, could result in the onus being placed on the police, as well as on the suspect.

[157] Section 192, Evidence Act (Nigeria) 2011

3.5 OBSERVATIONS AND SUMMARY

Attitudinal factors plague smooth transition of the rights from theory to practice in both jurisdictions. However, a clear statement of the law combined with a clearly delineated institutional framework increases the chances of a smoother transition to practice in England.

Perhaps if Nigeria were to resolve the lacunae created in its frameworks as a resultant effect of the shoddy statement of the provisions in the numerous statutory instruments, this would be the first step in addressing the intrinsic shortcomings of its frameworks, and would potentially leave it better suited to deal with the attitudinal problems and the resultant negative effects on transition arising therefrom.

However, in light of the findings of the present study by the researcher, and in light of the continued relevance of some of the issues unearthed in the study by Ajomo and Okagbue conducted more than twenty-five (25) years ago; it is suggested that the monitoring and realignment mechanisms in Nigeria have yet to yield as much success as has been the case in England.

The enactment of the ACJA, as has been highlighted repeatedly throughout the thesis, is a welcome development, and a step towards an alignment towards the goal. However, the new Act is not without its shortcomings, and there are other shortcomings of the framework that do not come under the ambit of the ACJA such as, for example, the structure of the Nigeria Police Force, which perhaps might be better operating under a decentralised structure.[158]

[158] The issue of decentralized policing shall be considered in detail in Chapter 5, *infra*

Fixing attitudinal factors might not be as straightforward as rectifying shortcomings in the framework. Again, the arguments shall be considered in detail in Chapter 5, but one way to bridge the lacuna might be by widening the scope of the law and reducing self-regulation and the opportunity for discretion, or in the case of Nigeria, removing ambiguities from the statutory instruments which could give rise to a multiplicity of interpretation; a step that, in bringing the observation full circle, involves a clearer statement of the goal.

Thus, it seems, that in the presence of attitudinal factors affecting delivery of the rights in practice, a clearer statement of the law as well as detailed written rules and statutory provisions might provide a greater chance of ensuring compliance with due process.

3.6 CONCLUSION

In this chapter, we have been able to answer the second, third and fifth research questions which the thesis has sought to answer, namely:

i. How well are the detention rights observed in practice? Is there a disparity between the theoretical existence and the practical observance of these rights, and what are the factors responsible for this disparity, if any;

ii. In bridging the gap between the theoretical existence and practical observance of these rights, what is the effect of detailed and clearly

stated legislative instruments in attempting to improve compliance with due process; and

iii. In striving to achieve the best rights' practice, are there any lessons to be learned by a state emerging from independence from the developmental challenges faced by its former colonial ruler?

The answer to the second research question is that the detention rights are observed better in England than in Nigeria, and that this is for a number of factors which are prevalent in both jurisdictions. Some of the factors are intrinsic, and are as a result of the current setup of the legal and institutional frameworks available in both jurisdictions, whilst others are as a result of the attitudes of the parties involved in the pre-trial or custodial stage, including the relationship between the police and legal practitioners involved in the defence of the accused persons. There are also two factors peculiar to Nigeria that create a lacuna between the law in theory and practice that are not necessarily as a result of the legal and institutional framework, but are as a result of the Nigerian culture and society, generally speaking – the arrest-first mentality displayed by the Nigeria Police Force and Corruption.

With regards to the third research question, it is vehemently contended, from the findings herein, that the effect of detailed and clearly stated legislative instruments in attempting to improve compliance with due process and bridge the gap between the delivery of custodial rights from theory to practice can neither be overstated or underestimated.

As Dixon's Culturalist theory suggests, procedural rules on their own are ineffective in controlling police behaviour, as there are certain occupational

cultures that must be taken into consideration.[159] It is however contended, in light of Coppen's assertion that the failure to delineate a minimum standard will create room for a multiplicity of interpretation,[160] and ultimately, a non-protection of the pre-trial rights in practice, that there is the need to provide a clearly delineated legislative instrument which establishes a clear minimum standard for the balancing of the powers of the police at the pre-trial stage and the rights and liberties of suspects and accused persons available at this stage.

Furthermore, in respect of the fifth research question, it has been discovered that Nigeria, a state emerging from independence, stands to learn from the developmental challenges faced by England, its former colonial ruler. With particular reference to the power of the police to prosecute offences, as well as the mode of recording interviews, it appears as though present-day Nigeria is at par developmentally with pre-PACE England. The recommendations of JUSTICE and the RCCP which have hitherto been considered can quite easily be juxtaposed in the Nigerian custodial stage. It therefore is the opinion of the researcher that rights development is a work in progress, and that the starting point of any post-independence state in addressing policy issues might be the taking into account of any developmental challenges faced by its former colonial master, provided that the post-independence state is still operating a similar criminal justice system introduced during the colonial era.

[159] See Dixon, n17, pp 9 – 20. Hannah Quirk also discusses this in her article "The Significance of Culture in Criminal Procedure Reform: Why the Revised Disclosure Scheme Cannot Work" (2006) 10 E&P 42

[160] John Coppen, "PACE: A View from the Custody Suite", in Ed Cape and Richard Young (Eds.), *Regulating Policing: The Police and Criminal Evidence Act 1984 Past, Present and Future* (Oxford, 2008), p 75, at 76

At this juncture, having examined the rights in practice in this chapter, and having evaluated the delivery of the rights in practice, which is the second part of the generally accepted tripartite form of regulation, we shall proceed, in the next chapter, to assess realignment mechanisms in both jurisdictions, and, it is hoped, provide an answer to the fourth research question, which is "What is the role of the regional human rights framework in achieving the best rights' practice at the custodial stage of proceedings?"

By virtue of the regional rights systems to which both jurisdictions are party to, and their respective operations and functions, there are, in addition to the internal realignment mechanisms, external factors and pressures to seek to achieve the best rights' practice. Both the internal and external factors shall be considered in detail in the next chapter.

CHAPTER FOUR

ACHIEVING THE BEST RIGHTS' PRACTICE

4.0 INTRODUCTION

To paraphrase Prof Yemi Osinbajo, SAN, as he then was,[1] an effective criminal justice system, because it addresses behavioural issues, must be dynamic and proactive.[2] To remain proactive, then, in every jurisdiction, there needs to be effective realignment mechanisms.

To recall the central theme that has shaped the structure of this thesis, effective regulation must possess a tripartite form: a clearly stated goal, monitoring mechanisms, and effective realignment. Having juxtaposed the examination of the pre-trial and custodial rights of accused persons in both jurisdictions against the backdrop of the first two aspects of this tripartite form in the previous chapters, this chapter shall assess the realignment mechanisms, internal and external, available in both jurisdictions.

Realignment, as highlighted by Cape and Young,[3] becomes necessary where, having monitored the implementation of the goal in practice, there is found to be a lacuna, or lacunae, between the goal which was set out to be achieved and the delivery in practice. Having examined the legal and institutional frameworks governing pre-trial and custodial rights in England and Nigeria, and assessed the delivery of the rights in practice, there is incontrovertible evidence of lacunae between the provision of the rights in theory and the

[1] His Excellency, Prof Yemi Osinbajo, SAN, is the current Vice-President of Nigeria.

[2] Yemi Osinbajo, *Proposals for the Reform of the Criminal Procedure Laws of Lagos State of Nigeria*, (Lagos: Lagos State Ministry of Justice, 2004), Foreword

[3] See, generally, Ed Cape and Richard Young, (eds), *Regulating Policing: The Police and Criminal Evidence Act 1984 Past, Present and Future* (Oxford, 2008), pp 1 - 21

subsequent implementation in practice in both jurisdictions. There is therefore a need to examine the mechanisms in place for realigning the operation of the rights in practice with the originally stated goals, in both jurisdictions.

4.1 REALIGNING TOWARDS THE GOAL INTERNALLY

The most effective, albeit not the only, means of realigning towards the goal internally, is through the making of necessary amendments to the legal and institutional framework. In both jurisdictions, this could be through legislative review or enactment, or as a result of judicial review and interpretation by the superior courts.

Legislative enactment is the sole responsibility of the respective legislative arms, Parliament in England, and the National and State Houses of Assembly in Nigeria.[4] Additionally, the powers of legislative review, although primarily falling under the scope of powers of the legislative arm of government, also arguably come under the ambit of the judicial arm, by virtue of the concepts of delegated legislation and judicial precedent, or *stare decisis*.[5] From a purely theoretical perspective, following the monitoring of the goal in practice and

[4] Sections 4, 47 and 90 of the 1999 CFRN establish the Federal and State Houses of Assembly in Nigeria. See also, Gary Slapper and David Kelly, *The English Legal System* (15th Edition, Routledge, 2014), ch 3.

[5] For more on the principles of judicial precedent and *stare decisis*, see Obilade, *The Nigerian Legal System* (Sweet & Maxwell, 1979), pp 23 – 34. See also, generally, Cross and Harris, *Precedent in English Law* (4th Edition, Clarendon); Manchester, Salter and Moodie, *Exploring the Law: The Dynamics of Precedent and Statutory Interpretation* (2nd Edition, Sweet & Maxwell, 2000); J. David Murphy and Robert Rueter, *Stare Decisis in Commonwealth Appellate Courts* (Butterworths, 1981); E. A. Ikegbu, S. A. Duru and E. U. Dafe, "The Rationality of Judicial Precedent in Nigeria's Jurisprudence" (2014) 4 AIJCR (No. 5) 149; and Leesi Ebenezer Mitee, "Nigerian Judicial Precedents as a Source of Nigerian Law" (Nigerian Law Resources, 2012), available at http://nigerianlawresources.com/2013/08/14/nigerian-judicial-precedents-as-a-source-of-nigerian-law/, last accessed on 10-10-2015

the discovery of lacunae between the theoretical rights and their delivery in practice, the legislative arms of government ought to enact new legislation, or amend already-existing laws, to attempt to bridge the gap between theory and practice or, in other words, realign towards the ideal. As a caveat, it should however be noted that, as Ashworth and Redmayne advise, although criminal procedure reform usually occurs in response to a miscarriage of justice or to a particular problem, it would be wrong to suggest that there is a simple causal process whereby a failing in the system leads to reform.[6]

In England, the enactment of PACE itself can be seen as an attempt at realignment. Prior to the coming into force of PACE, the right to legal assistance at the police station and notification of the right to silence, for example, were provided for by the Judges' Rules.[7] The Judges' Rules were only guidelines, and therefore not enforceable, meaning that there were no remedies available to an accused person if these rights were not made available to him. As a result of this, and following the recommendations of the Phillips-led Royal Commission on Criminal Procedure, PACE and the Prosecution of Offences Act 1985 were subsequently enacted, and the provisions of the Judges' Rules were subsumed by PACE Code of Practice C.[8]

In the thirty-two (32) years since the coming into force of PACE, the Codes of Practice have been the subject of frequent amendment, particularly, in

[6] Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th Edition, Oxford, 2010), 9 and 17.

[7] *Practice Note (Judge's Rules)* [1964] 1 WLR 152

[8] PACE Code of Practice C, published by the Home Office, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/729842/pace-code-c-2018.pdf, last accessed on 15-08-2018

attempting to remain within the ambit of this thesis, code C.[9] There have been three joint reviews of the Codes of Practice since 2002,[10] and there have been four different versions of Code C published in the last decade, with the most recent version being published in July 2018.[11] Additionally, other legislative instruments such as the Criminal Justice and Prosecution of Offences Act and the Access to Justice Act, for example, have been enacted, and subsequently entered into force, which have amended and repealed sections of PACE, and ultimately changed the criminal justice terrain in England.

The frequent legislative activity displayed in England is indicative of a strong political will, as defined in Chapter 2.2. in direct response to the recommendations of the Royal Commission on Criminal Procedure, as well as joint academic research projects, and the resultant thoughts, opinions and recommendations emanating therefrom. On the face of it, it would appear that in England, there is the constant quest to remain contemporaneous in the protection of rights.

In addition to the legislative activity discussed above, the courts in England have played their role in the internal realignment of the rights framework towards the goal. As even a perfunctory study of the common law or adversarial systems of justice would reveal, by virtue of the concept of *stare*

[9] PACE Code of Practice C deals primarily with the custodial regime in England.

[10] There were joint reviews of the Codes of Practice in 2002, 2010 and 2012, with the changed provisions entering into force in 2004, 2011 and 2014, respectively.

[11] Updated versions of PACE Code C were published in 2008, 2012, 2013 and 2014. The previous versions are available at https://www.gov.uk/guidance/police-and-criminal-evidence-act-1984-pace-codes-of-practice#previous-versions, last accessed 24-09-2015. The 2014 amendment was necessitated by the need to include a more detailed provision, in paragraph 3.2, of the notification of the right of the accused to be informed of the rights available to him at the detention stage, in accordance with EU Directive 2012/13 on the right to information in criminal proceedings, which is discussed in greater detail in Section 4.2.1.1, below.

decisis or judicial precedent, decisions of the superior courts in the common law jurisdictions, of which England and Nigeria are a part of, form case law which usually becomes binding on lower courts and ultimately becomes a source of law within the jurisdiction.[12]

There have been several landmark cases in the recent years which have amended the terrain of pre-trial rights protection in England, including *Whitley v DPP*,[13] which, for example, prompted a ruling in respect of legal advice in cases involving a breath procedure; *Saunders v R*,[14] and *R. v Grant (Edward)*.[15]

In Nigeria, a different story is told, and the internal mechanisms for realignment are found to be wanting. There is gross, visible, legislative inactivity, which, as has been highlighted, seems to derive from a lack of political will.

On face value, one might be tempted to assume that the legislative instruments establishing the rights framework in Nigeria have been subject to recent review, particularly as the Administration of Criminal Justice Act (ACJA) was passed in 2015, and the recently repealed CPA and CPC were both enacted in 2004. However, upon closer inspection, this assumption is found to be a flawed one. As Comfort Chinyere Ani points out, the CPA, CPC and Police Act are "vestiges of… British colonization" which were essentially 'rubber

[12] Not all precedent is binding. Some judgments are merely persuasive, and the principles of *stare decisis* vary from jurisdiction to jurisdiction. For more on the principles of judicial precedent and *stare decisis*, see the various sources mentioned in n 5, *Supra*

[13] [2003] EWHC 2512

[14] [2012] EWCA Crim 1380

[15] [2005] EWCA Crim 1089. Other cases which have had an effect on the pre-trial terrain of England, particularly the right to legal assistance include: *R v Samuel* [1988] QB 615, *R v Walsh* (1990) 91 Cr App R 161, and *R v Alladice* (1988) 87 Cr App R 380

stamped' under the guise of amendment, and effectively retained their original content from their initial promulgation in 1945, 1960 and 1943, respectively.[16] The other key instruments in the criminal justice sector, including the CFRN, the Legal Aid Act and the Evidence Act, have themselves been subjected to infrequent amendment masked by frequent 'rubber stamping'.[17]

As a result of this, the rights framework in Nigeria has been the subject of severe stagnation, as evidenced by the fact established in the previous chapter, for example, that the same issues which were found to be plaguing and hindering the delivery of rights in practice by Ajomo and Okagbue were found to still be in issue when the limited empirical study was conducted by this researcher nearly twenty-five (25) years later.[18]

Perhaps curiously, in recalling the tripartite form of regulation, there have been fairly frequent monitoring exercises conducted. In addition to the study by Ajomo and Okagbue, there have been Law Reform Commissions, which were set up by some of the states in the federation, and even at the Federal

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[16] Comfort Chinyere Ani, "Reforms in the Nigerian Criminal Procedure Laws" (2011) NIALS Journal on Criminal Law and Justice (Vol 1) 52, at 52 – 53. A former Chief Justice of Nigeria has also stated on record that the laws that regulate criminal justice administration in Nigeria are "relics of colonial legislations that ought to have been reformed long time ago". See, Justice Aloma Mukhtar, "Reforming the Criminal Justice System", available at http://www.thisdaylive.com/articles/reforming-the-criminal-justice-system/146972/, last accessed on 12-08-2015. Peter Ocheme even goes as far as contending that the CPA was first enacted as an Order-in-Council in 1916, although this claim is as yet unverified. See Peter Ocheme, "The Lagos Administration of Criminal Justice Law (ACJL) 2007: Legislative Rascality or a Legal Menu for Access to Justice?" (2011) NIALS Journal on Criminal Law and Justice (Vol 1) 131, at 132

[17] The Evidence Act, for instance, since the time of its original promulgation in 1945, has maintained its original provisions despite being "amended" in 1960, 1990 and 2004, with no significant amendment thereto for over sixty (60) years until the provisions were amended, in 2011, to allow for the tendering of audio and video recordings, and other forms of computer generated evidence, during trial proceedings.

[18] Ajomo, M. A. and Okagbue, I. E. (Eds.), *Human Rights and the Administration of Criminal Justice in Nigeria* (NIALS Research Series No. 1, NIALS, 1991). See Section 3.4, Chapter 3, *Infra*

level, but with seemingly little or no effect on the provisions.[19] Also, there has been academic work conducted in the area of administration of criminal justice, not just restricted to the pre-trial process or the protection of rights at the police station or during detention, albeit infrequent work, and work which is limited in scope.[20] However, none of the said academic work, or the several recommendations, thoughts and opinions expressed therein have had any noticeable effect, as very little or close to nothing has been done by the National Assembly of Nigeria, comprising the Federal House of Representatives and the Senate (NASS), in a bid to realign towards the goal internally.

On the one hand, the gross legislative inactivity might suggest the absence of a strong political will, as evidenced by the constant rehashing of the laws and statutory instruments, not just those pertaining to the administration of criminal justice, but the entirety of the laws within the jurisdiction. However, it is herein argued that the limited scope of the previous academic thought, and the monitoring mechanisms more generally, might also pose a factor responsible for the ineffective internal realignment in Nigeria.

As determined earlier on in this thesis, in Chapter 2, there is a poor statement of the goal in Nigeria: the provisions establishing the rights available to accused persons are only surface-level statements confirming the existence of the rights within the jurisdiction, but with no express provisions to dictate the

[19] The last two law reforms of note at the federal level resulted in the publishing of a compendium of the Laws of the Federation of Nigeria, in 1990 and 2004. In both, there are no revisions of note of any laws, let alone any of the specific statutory instruments which govern the administration of criminal justice.

[20] As has been highlighted at multiple points throughout this thesis, the dearth of academic work in Nigeria is one factor which was actually considered a limitation to the research undertaken by the researcher.

implementation of these rights in practice or, at the very least, a minimum standard for their delivery. As was subsequently discovered in Chapter 3, this has led to the creation of a number of ambiguities surrounding the delivery of the rights in practice, as well as a multiplicity of the nature of the rights and varied levels of actual implementation of said rights in practice. There are other factors which affect the implementation of rights in Nigeria, it is conceded, and as were also noted in the previous chapter. The problems surrounding implementation have been in existence within the jurisdiction for decades, and have been identified in several academic publications considered within this thesis, and yet very little has been done to attempt to address the issues in a timely manner.

The enactment of the ACJA is seen as a welcome development towards better rights protection in Nigeria,[21] but the background of the Act serves as further indictment of the lack of a political will. As noted by Ani, reform of criminal procedure has been an issue that has engaged the attention of practitioners and academics alike.[22] The ACJA itself was drafted by the Presidential Committee on the Reform of the Administration of Justice in Nigeria and submitted to NASS as the Administration of Criminal Justice Bill 2005.[23] Thus, essentially, it has taken ten years for the Bill to move through the houses of NASS, before it was subsequently enacted and assented by the outgoing President of Nigeria, Goodluck Jonathan on the 28th of May, 2015. Hearkening back to Osinbajo's assertion of what an effective criminal justice system must be, it is stated that, quite simply, it neither a sign of dynamism nor proactivity that it takes ten

[21] The Administration of Criminal Justice Act was signed into law on the 28th of May 2015.
[22] Ani, n 21
[23] *Ibid*

years for a Bill to be passed into law in a bid to address problems that have plagued the criminal justice system in Nigeria for a lot longer.[24]

Furthermore, as noted in Chapter 2, although it is contended that the Act is generally a welcome development, and has the potential to improve the terrain of pre-trial rights protection in Nigeria, it is not without its shortcomings. It also does not resolve the issue which is argued by this researcher as being the genesis of the failed delivery of rights in practice: the lack of a clearly stated goal. Perhaps interestingly, none of the works considered concerning Nigeria have attempted to show a link between the paucity of the words of the provisions establishing the rights to legal assistance and the right to silence, for example, and the inherent ambiguities arising therefrom as a result of the absence of a minimum standard for the protection of these rights.[25]

It is however reiterated, for emphasis, that it is the contention of this researcher, that a mere statement of the rights available, with no expressly provided method of implementation, or at the very least, an establishment of a minimum standard of application, is tantamount to a non-protection of the rights within the jurisdiction.

Nigeria is a federation, with legislative arms of government present at the state level.[26] The state Houses of Assembly also have the power to enact or amend

[24] Ani, *op cit*. Also, see generally, Justice Aloma Mukhtar, "Reforming the Criminal Justice System", available at http://www.thisdaylive.com/articles/reforming-the-criminal-justice-system/146972/, last accessed on 12-08-2015

[25] Sections 6(2)(b), 6(2)(c) and 17(2) of the ACJA, the combined provisions of which establish the right to legal assistance, and which provide for the presence of the legal practitioner during interrogation, for example, do not categorically state the party on whom the onus lies to make contact with the legal practitioner, a provision contained in Paragraph 3.23 of PACE Code C, by comparison.

[26] Section 90, 1999 CFRN

laws in a bid to realign with the goal.[27] However, as has previously been noted in this thesis, only the Lagos State House of Assembly has taken any steps towards exercising this power of legislative enactment beyond the rubber-stamp action of adopting provisions the CPA and CPC at state level with the enactment of the Administration of Criminal Justice Law of Lagos 2007, which was subsequently replaced by the Administration of Criminal Justice Law of Lagos 2009. This law is also not without its shortcomings,[28] and, as at the date of the submission of this thesis, no attempt has been made by the Lagos State House of Assembly to address these shortcomings. The slow reaction of the Lagos State House of Assembly to attempt to address these shortcomings is perhaps further indication of a lack of political will across the length and breadth of Nigeria.

The courts in Nigeria have also failed to effectively play their role towards the realignment towards the goal or towards better rights protection. As is the case in England, the courts ordinarily have the power to alter the terrain of the legal framework by virtue of the principle of judicial precedent. However, the courts have failed to address this issue effectively, by choosing to merely establish the existence of the right in the CFRN, without any comment or opinion as to how best to implement the right in practice.[29]

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[27] *Ibid*

[28] Ani, n 21, pp 57 – 63.

[29] See Chapter 2.3.2, *Supra.* See, for example, *Amanchukwu v Federal Republic of Nigeria*, [2007] 6 NWLR (part 1029) 1, where Udom-Azogu, JCA, in delivering the lead judgment merely stated the following on the issue of the right to legal assistance: "On the issue of counsel of accused choice… where he is denied bail and access to counsel of his choice, therefore making it difficult for him to prepare for his defence, it constitutes a complete violation of his right of fair hearing…"

4.2 EXTERNAL REALIGNMENT MECHANISMS

In light of the revelation that a strong political will is a critical element in realigning the framework internally, in a quest for the best rights' practice, and following from the discovery that there is a lack of political will in Nigeria, as evidenced by gross legislative inactivity and wholly insignificant contributions in the form of judicial interpretation by the courts, it becomes imperative to assess what external mechanisms exist for the purposes of realigning towards better protection of custodial rights. The different roles of the different regional rights systems to which both England and Nigeria belong are therefore considered in this section. Additionally, other concepts, which contribute to external pressures and external realignment, such as global convergence and cosmopolitanism, are herein analysed.

4.2.1 The Role of The Regional Human Rights Systems

Both England and Nigeria are treaty members of not just international human rights systems, most notably the United Nations,[30] but belong to regional rights systems, which, by virtue of their constituent treaties and documents, as well as enforcement mechanisms, provide external pressures in a bid to ensure the protection of rights. Prior to work commencing on this chapter, it was hypothesised that, as has been the case in previous elements which have been assessed from a comparative perspective in this thesis, the role of the European system of Human Rights would have a greater effect as a realignment mechanism in England and/or its other member states than the African system would have on Nigeria and/or its other member states.

[30] Both states have ratified the UNDHR and the ICCPR, which, in sections 10 and 14, respectively, provide for fair trial rights.

4.2.1.1 The European Human Rights System

Following the end of the Second World War, many of the European states were of the opinion that the time had come for the unification of Europe. The Council of Europe was founded in 1949, primarily to promote democracy, the rule of law, and greater unity amongst the European nations. The Council of Europe immediately, in 1950, signed the European Convention on Human Rights. This was done as an act of revulsion at the abuse of state power by member nations in the inter-war and war periods.[31] It should be pointed out that even though other continental associations and bodies such as the European Union (EU) and the Organization for Security and Co-operation in Europe (OSCE) have made significant measures to enforce the protection of human rights, the term "European System of Human Rights" is more commonly used to refer to the system created within, and operated by, the Council of Europe.[32]

The main human rights enforcement institution in Europe is the European Court of Human Rights.[33] The EU Parliament has also recently been proactive in the quest for better protection of rights, as evidenced by the enactment of several EU Directives pertaining to the pre-trial process and the criminal process more generally.

[31] Richard S. Kay, 'The European Human rights as a System of Law', (2000) 6 Colum. J. Eur. L. 55, at 56.

[32] Peter Leuprecht, 'Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?' (1998) 8 Transnat'l L. & Contemp. Probs. 313

[33] hereinafter, "ECtHR" or "the Strasbourg Court"

The European Court was established by Article 19 of the ECHR, as amended by Protocol 11 to the ECHR.[34] The jurisdiction of the court extends to all matters relating to the interpretation and application of the ECHR, as prescribed by Article 32, which also gives the Court the power to determine its own jurisdiction.[35] The procedure of the European Court is adversarial in nature, and its judgments are final, and are binding. Contracting states, non-governmental organizations (NGOs) and individuals are all vested with the power to bring applications before the ECtHR. The provision allowing individuals to bring applications before it was an innovation, one that has been touted as a positive step in the enforcement of human rights.[36]

In the context of custodial rights available to accused persons in Europe, there have been a few celebrated cases in Strasbourg jurisprudence, which have sparked amendments to the legislative framework of member states; with *Salduz v Turkey* arguably being the most celebrated of these.[37]

In *Salduz*, the defendant had been arrested for taking part in an unlawful demonstration. He was reminded of his right to silence, and then he allegedly confessed. When brought before a judge the next day, he retracted the confession and alleged that it was the product of duress. The judge remanded him in custody, and only then was he allowed access to a lawyer. The defendant was subsequently convicted at trial and sentenced to two-and-a-half (2½) years' imprisonment.

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[34] For a detailed look at the jurisdiction, composition, appointment of judges and procedure, etc., of the European court, see Articles 19 – 51 of the ECHR; see also, Steiner, H. J.; Alston P. and Goodman, R., *International Human Rights In Context: Law, Politics, Morals* (3rd Edition, Oxford, 2007), pp 933 – 1018

[35] Article 32(2)

[36] See Kay, *op. cit.*

[37] *Salduz v Turkey* [2008] 49 EHRR 421.

The accused eventually brought an application to Strasbourg, arguing that his article 6(3)(c) right, and the general right to a fair trial, had been violated by the delay in allowing access to legal advice, and that this right had been further breached by the failure to communicate the public prosecutor's opinion. The Chamber found no violation on the first ground, but found a breach on the second ground. The case was then referred to the Grand Chamber.

Ultimately, the Grand Chamber unanimously found that there was a violation of Article 6 on both grounds: that the safeguards of article 6 apply, not merely to the criminal trial, but also to pre-trial procedures that have a bearing on the trial. In particular, "early access to a lawyer is part of the procedural safeguards" stemming from the privilege against self-incrimination.[38] The precise statement of the Grand Chamber was that:

> "... an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex ... In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task is, among other things, to help to ensure respect for the right of an accused not to incriminate himself."
>
> "... as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are

[38] *Salduz v Turkey*, n 42, paragraph 54

> compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction--whatever its justification--must not unduly prejudice the rights of the accused under art.6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for conviction."[39]

As Ashworth contends, the decision is a continuation of the jurisprudence of the ECtHR which is developing the right to access to legal advice,[40] beginning with *Murray v United Kingdom*,[41] through *Magee v United Kingdom;*[42] to *Brennan v United Kingdom*,[43] and beyond.

There are other decisions of the Strasbourg Court that have also sparked amendments to the legislative framework of member states. *Funke v France*,[44] for example, sparked amendments to the provisions of the right to silence and the freedom from self-incrimination, as did *Saunders v United Kingdom.*[45]

As briefly mentioned above, the EU Parliament has also recently made noteworthy contributions to the protection of pre-trial rights with the drafting of several directives, which can be seen as legislative action based on the Strasbourg jurisprudence, beginning with the European Commission's Proposal for a Framework Decision on Certain Procedural Rights which was

[39] *Ibid*, paras 54 – 55
[40] Andrew J. Ashworth, "Case Comment: Salduz v Turkey – Human Rights – Article 6 – Right to Fair Trial" (2010) CLR 419
[41] (1996) 22 E.H.R.R. 29 ECtHR
[42] (2001) 31 E.H.R.R. 35 ECtHR
[43] (2002) 34 E.H.R.R. 18 ECtHR
[44] (A/256-A) [1993] 1 C.M.L.R. 897 (ECHR)
[45] (19187/91) [1997] B.C.C. 872 (ECHR)

issued in 2004.[46] This initial proposed framework was never adopted, as its need as well as its legal basis was disputed by a few member states of the EU.[47]

Following the abandonment of the Proposed Directive in 2007, a new proposed EU Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings was adopted in 2009, which introduced six (6) measures and proposed directives to ensure better protection of procedural safeguards of accused persons.[48] Presently, three (3) of the six (6) amended directives have been adopted: the Directive on the Right to Interpretation and Translation,[49] the Directive on the Right to Information,[50] and the Directive on the Right of Access to a Lawyer have been adopted.[51] Curiously, England have presently opted out of the EU Directives, although as considered below, this might be due, in part, to the phenomenon of local resistance.[52]

Additionally, England have previously run afoul of the provisions of the ECHR, in respect of pre-trial and custodial protections, and have had

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[46] Proposal for a 'Council Framework Decision on certain Procedural rights in Criminal Proceedings throughout the European Union', Brussels, 28 April 2004, COM (2004) 328 final, 2004/0113 (CNS)

[47] Ilias Anagnostopoulos, "The Right of Access to a Lawyer in Europe: A Long Road Ahead?" (2014) 4 EuCRL 3, at 7

[48] Roadmap For Strengthening Procedural Rights Of Suspected Or Accused Persons In Criminal Proceedings (2009/C 295/01)

[49] Available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32010L0064, last accessed on 13-08-2015

[50] Available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32012L0013, last accessed on 13-08-2015

[51] Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:294:0001:0012:EN:PDF, last accessed on 13-08-2015

[52] See Section 4.2.3, *Infra*

judgments entered against them in Strasbourg on a number of occasions.[53] The rulings of the ECtHR have nevertheless been subsumed into the jurisprudence of rights in England, and have enabled realignment towards the goal. However, as a result of the aforementioned strength of its internal realignment mechanisms, England is very often viewed as one of the frontrunners in the protection of pre-trial rights of accused persons. Additionally, in the study by Spronken and Attinger following the proclamation of the EC Framework proposals,[54] England was generally found to already be in tune with the goals articulated by the different EC Directives, save for a few exceptions. Thus, even though the external influence of the ECtHR and the EC Directives has fulfilled some external realignment purposes in the local protection of pre-trial rights in England, the full extent of its influence, especially in recent years, might not be overly significant in value.

As a result, it is hereby contended that, in order to fully appreciate the influence of the ECtHR and the EU Directives as an external realignment mechanism, there is the need to step a little bit outside the ambit of this thesis and assess their effect on other jurisdictions which are treaty members of the European System, but have hitherto not been critically analysed in this thesis. As has already been established, England has always been abreast of the goal and the quest to achieve the best rights' practice, and have not had to implement too many drastic changes, or indeed changes of much severity, to keep in line with the EU directives. There have, however, been a few member states of the EU that have had to make notable amendments to their legislative

[53] For example, in the cases mentioned by Ashworth, in n 45, *Supra*

[54] Taru Spronken and Marelle Attinger, *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union* (European Commission, 2005)

framework to better realign with the position in Europe. Notable amongst these are France, Scotland, The Netherlands, Belgium and the Republic of Ireland.

As Giannoulopoulos has discussed in a number of publications, the decision in *Salduz* sparked, although not immediately, a reform of the regime of custodial stage in France, including reforms to the right to legal advice and the right to information.[55] Following the decision in *Salduz*, a chain of events commenced in France, with a view to reforming its custodial regime, which culminated in the enactment of the law of 14 April 2011, which gave accused persons greater access to legal assistance.[56] Additionally, the decision in *Salduz* has been applied in several decisions of the UK Supreme Court, beginning with the decision in *Cadder v HM Advocate*,[57] which has impacted on the pre-trial regime in Scotland. Likewise, the *Salduz* decision has sparked favourable reform in the custodial regimes of Belgium and the Netherlands.[58]

As an external realignment mechanism, the European System has impacted heavily on its members, and there is an increasing convergence in the custodial practices across all of Europe. The decisions of the Strasbourg Court have impacted on not only the local practices, but have also influenced the debates surrounding the proposed EU Frameworks that have yet to be

[55] See Dr Dimitrios Giannoulopoulos, "'North of the Border and Across the Channel': Custodial Legal Assistance Reforms in Scotland and France" (2013) CLR 369 and Dr Dimitrios Giannoulopoulos, "Custodial Legal Assistance and Notification of the Right of Silence in France: Legal Cosmopolitanism and Local Resistance (2012) 24(3) *Criminal Law Forum* 291 for a detailed discussion of the reform in France and Scotland following the *Salduz* decision.

[56] *Ibid*

[57] [2010] UKSC 43

[58] See, generally, Dimitrios Giannouloupolous, "Strasbourg Jurisprudence, Law Reform and Comparative Law: A Tale of the Right to Custodial Legal Assistance in Five Countries", Human Rights Law Review (forthcoming)

adopted.[59] Its effect cannot be underestimated, but there are nevertheless a few divergent views.

As far as England is concerned, we do observe that in recent times some limitations have been imposed to accessing legal advice, such as where restrictions are placed on face-to-face custodial advice for certain offences,[60] and these can actually be viewed as a step back for England, but this does not detract from the fact that the European System has played a very important role as a key external realignment mechanism. As Markesinis argues, England's position in the EU cannot be understated, because by remaining in Europe, it is in a position to teach and learn simultaneously from Europe.[61]

To summarise the points raised in in this section, the European System is an effective external realignment mechanism, despite not posing any significant challenge to the custodial regime in England in recent times, due in large part to the strength of its internal realignment mechanisms. However, as displayed by the reforms in other jurisdictions in order to remain in alignment with the position in Europe, the importance of the ECtHR and the EU Directives should not be ignored. Hypothetically, and in agreeing with Markesinis' claim, the current tide places England in arguably a position to teach, but that does not preclude the possibility of England once again, some day in the future, finding itself in a position to learn from Europe.

[59] *Ibid*

[60] See, generally, Lee Bridges and Ed Cape, "CDS Direct: Flying in the Face of the Evidence" (2008), Centre for Crime and Justice Studies

[61]

4.2.1.2 The African Human Rights System

During the late 1950s and early 1960s, many of the African states gained independence, and in 1963, the Organization of African Unity (hereinafter called "OAU") was formed. The OAU, it must be mentioned, did not have the protection of human rights as one of its core objectives; rather it placed it on the back burner[62]. The primary objective of the OAU was for the removal of all forms of colonial domination, the abolition of apartheid and the promotion of unity amongst the African states[63]. The OAU was eventually transformed, in 2002, to the African Union (hereinafter called "AU"), and Nigeria is a treaty member of the African Union. It was with this transformation that the protection of human rights became the focus of the regional body.[64]

The key instruments in the African human rights system, for purposes of the context of this thesis, are the African Charter on Human and Peoples' Rights,[65] which in Article 7 thereto, provides for the right to a fair trial, and the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights,[66] which establishes the African Court of Human Rights.

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[62] The Charter of the OAU only made a passing reference, in its preamble, to the adherence to the provisions of the Universal Declaration of Human rights. See Christof Heyns, 'The African Regional Human rights System: The African Charter' (2003 – 2004) 108 Penn St. L. Rev. 679, at 681.

[63] *Ibid*.

[64] *Ibid*. Heyns however contends that because the OAU Charter sought to abolish colonialism and apartheid, it (the Charter) is also seen as a Human rights document.

[65] OAU/CAB/LEG/67/3/Rev.5. Signed in 1981, and entered into force in 1986. Hereinafter referred to as "The African Charter"

[66] Adopted in 1998, entered into force 2004.

The two main institutions in Africa set up to enforce the rights sought to be protected by the Banjul Charter are the African Commission on Human and Peoples' Rights;[67] and the African Court on Human and Peoples' Rights.[68]

The African Commission seeks to "promote human and peoples' rights and ensure their protection in Africa"[69]. Applications may be brought before the Commission by state parties to the African Charter, individuals and NGOs.[70] However, the African Commission has been the subject of a lot of criticisms; it has even been labelled a "toothless bulldog".[71] Some of the criticisms which have been raised include: the lack of effective access to the Commission by individuals;[72] the lack of actual enforcement power: in the event that a case is brought before the Commission, its findings are 'reported' back to the AU, it does not give judgments, rather it makes recommendations, and these recommendations are not binding: they cannot award damages, or make orders;[73] and finally, the lack of independence of the Commission: the staff of the Commission are employed by the AU, and its investigative processes are heavily dependent on the Heads of States and other Heads of Government, the same persons they are meant to be investigating. These criticisms, and other weaknesses of the Commission, it has been suggested, is why the Protocol establishing the African Court of Human and Peoples' rights was signed in 1998, in a bid to give 'bite' to the already-existing 'bark' of the Commission.

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[67] See established by the African Charter Article 30 of the African Charter.

[68] established by the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court

[69] See Article 30. The functions of the commission are listed out in detail in Article 45

[70] See Articles 47 – 56.

[71] See generally, *U. O. Umozurike, "The African Charter on Human and Peoples' Rights: Suggestions for More Effectiveness", (2007) 13 Ann. Surv. Int'l & Comp. L. 179*

[72]

[73] See Udombana, "Toward the African Court on Human and Peoples' Rights: Better Late than Never" (2000) 3 Yale Hum. Rts. & Dev. L.J. 45

The African Court was established by the Protocol to the African Charter on the Establishment of a Court on Human and Peoples' Rights. The African Court was set up to give teeth to the toothless bulldog that is the African Commission; however, this has yet to happen. The Protocol establishing the African court came into force in 2004, but not much has been done to accomplish this task. It took years to appoint the judges of the court and years for the Court to establish its rules of procedure.[74] At present, the court has handed out only three (3) judgments and, rather unfortunately, none of the reliefs sought were in relation to custodial interrogation and the rights thereto.[75] Also, a Protocol was signed by the AU in 2008, which seeks to merge the African Court of Human Rights and the African Court of Justice to create a single African Court of Justice and Human Rights.[76] This, according to Christof Heyns,[77] would mean that the African Court, which has been struggling to find its feet and has not even so much as adopted rules of procedure would have to start all over.

The unfortunate position of the African System of Human Rights is that, at present, there is no external pressure from the regional body on Nigeria, or indeed any other African state, which could spark a move of realignment towards a better rights regime. Thus, in seeking the best rights practice, greater

[74] The court only became fully operational in 2009. See International Federation for Human Rights, Practical Guide, "The African Court of Human and Peoples' Rights: Towards the African Court of Justice and Human Rights" (2010), available at https://www.fidh.org/IMG/pdf/african_court_guide.pdf, last accessed 16-10-2015

[75] George Mukundi Wachira, "African Court on Human and Peoples' Rights: Ten years on and still no justice", (2008), being a report of Minority Groups Rights International, available at http://www.unhcr.org/refworld/pdfid/48e4763c2.pdf, last accessed on 30th January, 2010.

[76] This protocol was adopted in 2008, but is not yet in force. International Federation for Human Rights, n 79.

[77] n 67.

emphasis is again placed on internal realignment, which, as noted above, has been debilitated by a lack of political will in Nigeria.

4.2.1.2.1 The ECOWAS Court

In addition to being a treaty member of the African Union, Nigeria is also a member of the Economic Community of West African States (ECOWAS), which also has its own court, the ECOWAS Community Court of Justice (ECCJ), with jurisdiction on matters relating to the protection, or lack thereof, of human rights by its member states.

The original ECOWAS Treaty of 1975 intended to establish a tribunal for enforcing the observance of law and justice in the interpretation of the provisions thereto, and to settle such disputes as may be referred to it by the member states. However, such a tribunal was never established until a Community Protocol created the court in 1991, and the amended ECOWAS Treaty of 1993 subsequently established the ECCJ, although the first crop of judges to sit at the court were not appointed, nor the court fully functional until 2002.

Curiously, in the initial period following its establishment, it was only Member States that could bring applications before the court, which also resulted in stagnation, and an unfortunate situation wherein nationals of a Member State had no redress before the court.

The jurisdiction of the court was further amended in an additional Protocol, and following the decision in *Olajide v Nigeria*,[78] was extended to cases involving the breach of fundamental rights of nationals of Member States,

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who, following the expansion of the jurisdiction of the court, could bring individual applications before the court.[79]

In a brief, cursory study of the different enforcement mechanisms in the different regional human rights regimes across the world, including the European and American Systems, the ECCJ possesses two significant traits that are perhaps unique to it, and perhaps raise questions about its suitability as an external realignment mechanism: its wide berth of rights jurisdiction, and the absence of a clearly delineated relationship between the ECCJ and the national courts of Member states of the ECOWAS.

In regard to the first unique trait of the ECOWAS Court, even the most cursory of excursions into the historiography of ECOWAS would reveal that, as a regional body, the Community was established to streamline economic activities and provide some sort of economic regulation amongst member states.[80] The establishment of ECOWAS was motivated by 'the overriding need to accelerate, foster and encourage the economic and social development of their states in order to improve the standard of living of their peoples'. Accordingly, the aim of the Community was 'to promote cooperation and development in all fields of industry, transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial questions

[79] The decision in *Olajide* denied individuals (nationals of ECOWAS) the power to initiate proceedings before the ECCJ, but was the springboard that launched the arguments and campaigns, which resulted in the extension of power of institution of proceedings to individual nationals of ECOWAS member states, although the significance of these campaigns in expanding the access of the courts have also been the subject of some academic debate.

[80] The preamble to the ECOWAS Treaty 1975

and in social and cultural matters for the purpose of raising the standard of living of its peoples, of increasing and maintaining economic stability'.[81]

Human rights protections were arguably introduced as an afterthought,[82] as a result of which, the Community did not establish its own rights treaty or other similar document. Even Article 3 of the Supplementary Protocol on the court, which amends Article 9(4) of the Revised ECOWAS Treaty and vests the ECCJ with jurisdiction over human rights issues does not make provisions to a specific treaty, choosing instead to simply state: "The Court has jurisdiction to determine case of violation of human rights that occur in any Member State."[83] This presumably raises the question of legitimacy and curiosity concerning what clearly stated rights regime the ECCJ seeks to protect.

The jurisprudence of the court sheds some light on this, as applications that are brought before the court seeking remedies of human rights violations tend to cite provisions of, separately or collectively, and to varying degrees, the UDHR, ICCPR, CEDAW, the Banjul Charter, et cetera.[84] However, and as Ebobrah has also argued,[85] this raises questions about the legitimacy of the ECCJ's mandate to determine questions of human rights violations when it assumes jurisdiction over a rights terrain established by a separate regional

[81] *Ibid*

[82] Karen J. Alter, Laurence R. Helfer, and Jacqueline R. McAllister, "A New International Human Rights Court For West Africa: The ECOWAS Community Court Of Justice" (2013) 107 AJIL 737

[83] Article 3, Supplementary Protocol to the ECOWAS Court

[84] See *Ugokwe v Nigeria*

[85] Solomon T. Ebobrah, "Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice", (2010) JAL 1, at

instrument with its own enforcement mechanisms, however limited,[86] and by seeking to enforce rights provisions which are not ordinarily enforceable.[87] At present, however, the ECCJ continues to assume jurisdiction over applications relating to alleged human rights violations by Member states.

The second unique, albeit potentially problematic, feature of the ECOWAS Court is found in its relationship with national courts, particularly in the absence of a clearly delineated hierarchical structure. The ECCJ, in its establishment protocol, and in the supplementary protocols thereto, contain no express provision requiring that aggrieved persons seeking redress before it exhaust all possible local remedies before filing an application, a position in stark contrast with the norm in other international courts and tribunals;[88] and the court itself has ruled that it was not established to serve as an appellate court in respect of judgments from the national courts of its member states.[89]

Additionally, the Court has held in a number of cases that where the same matter has been instituted before a national court, or before another international court, it (the ECCJ) lacks jurisdiction to adjudicate upon the matter, to eliminate the possibility of *res judicata* or double jeopardy.[90] The

[86] The African Court of Human Rights, despite its shortcomings and relative activity, is the body vested with jurisdiction to determine questions of rights violation under the Banjul Charter

[87] The UDHR, ICCPR, *et al*, are all part of the UN Rights Regime, and these treaties and international documents were not conceived as enforceable legislation, but were rather intended to serve as guidelines. See … for more on this.

[88] Enabulele, A. O., "Sailing Against the Tide: Exhaustion of Domestic Remedies and the ECOWAS Community Court of Justice", (2012) JAL 268

[89] *Ibid*. See, also, S. T. Ebobrah, "The role of the ECOWAS Community Court of Justice in the integration of West Africa: Small strides in the wrong direction?" (2015) iCourts Working Paper Series, No. 27

[90] This was the ruling of the court in *Aliyu Tasheku v Federal Republic of Nigeria* [2011] ECW/CCJ/APP/13/11 and Sa'adatu Umar v Federal Republic of Nigeria [2012] ECW/CCJ/APP/12/11

ECCJ also has no appellate division, meaning that it is at the same time, a court of first instance, and the highest court within the enforcement framework.

The overall impact of the unique traits of the ECCJ place the court in an awkward position when viewed through the lens through which other international courts and tribunals are viewed. On the one hand, the court creates an unfortunate position for itself wherein it is placed in an indirect position of competition for jurisdiction with the national courts. As has been previously highlighted, where an application for has been brought before the ECCJ on a matter already pending before a national court, the court would usually decline jurisdiction. Also, in the absence of a specific ECOWAS rights instrument, the ECCJ can be criticised for attempting to overstretch its jurisdiction and creating an opportunity for potential forum shopping by would-be applicants.[91]

Further, as Ebobrah argues, rather creatively, in the specific issue of fair trial rights, the absence of an appellate jurisdiction from national courts coupled with the absence of an appeal route within the ECOWAS framework results in the situation where, whether a party chooses to seek local remedies or chooses the ECCJ as the court of first instance; in the event where one or both parties is dissatisfied with the decisions of the court, or alleges that the trial was conducted unfairly, in violation of the right to a fair trial,[92] there is no avenue available for a review of the trial process; thus, the right to a fair trial is

[91] See Ebobrah, n 94

[92] Including, and extending to the pre-trial or custodial stage.

axiomatically hindered.[93] Perhaps coincidentally, there are, at present, no decisions of the ECCJ relating to custodial rights, or the right to a fair trial in general.

Despite these unique and problematic traits of the ECCJ, the Court is generally viewed as a welcome development,[94] which would suggest that there is the potential for it (the ECCJ) to make crucial contributions to the protection of rights (including fair trial and custodial rights) as an enforcement mechanism within the ECOWAS regime; provided that the requisite steps are taken to resolve the problematic issues identified with its mandate and jurisdiction.

At present, it appears as though, as far as Nigeria is concerned, the external realignment mechanisms available via the regional rights systems to which it belongs are either in purported stages of infancy (the African Court of Human Rights), or plagued with problematic issues (the ECCJ). As a result, the regional systems currently place no pressure whatsoever on Nigeria in a bid to realign towards the best rights' practice.

Fortunately, there are other avenues via which external pressures for realignment might present themselves, as shall be analysed in the next two sections.

4.2.2 The "Tipping Point" Analysis

In the absence of any significant realignment pressures coming from the regional organisations, there are possibilities for external realignment via legal comparativism. This can occur in a variety of ways including through the

[93] Ebobrah, n 94
[94] *Ibid*

phenomenon known as the "tipping point" analysis, a phrase coined by Christine Boyle and Emma Cunliffe.[95]

The theory of the "tipping point" analysis was borne from the analysis of the Canadian legal landscape and the decision in *R v Sinclair*.[96] In *Sinclair,* the defendant, after arrest, was advised of his right to counsel, and managed to speak with a lawyer of his choice via telephone, twice. After speaking with his lawyer, he was subsequently interviewed by the police for several hours. During the interview, the defendant stated several times that he did not wish to continue with the interrogation, and requested to speak with his lawyer again. His request was denied, the interview continued, and subsequently, statements were made which implicated the defendant and he was subsequently convicted of manslaughter.

On appeal, he sought a declaration that the refusal to stop the interview constituted a violation of his right to counsel, as provided for by Section 10(b) of the Canadian Charter of Rights and Freedoms. The Canadian Supreme Court held that there was no violation of his Section 10 right to legal advice. Thus, as Boyle and Cunliffe deduce from the decision in *Sinclair*,[97] detained persons in Canada have a right to counsel at the point of arrest, but the on-going right to counsel is limited in nature, more so than is the case in England, the United States, and a handful of other common law jurisdictions.

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[95] Christine Boyle and Emma Cunliffe, "Right to Counsel During Custodial Interrogation in Canada: Not Keeping Up with the Common Law Joneses", in Paul Roberts and Jill Hunter (Eds.), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart, 2012), pp 79 - 102

[96] *R v Sinclair* [2010] SCC 35

[97] Boyle and Cunliffe, n 100, at pp 81 – 82

In analysing the Canadian legal landscape, the authors contend that there is an international dimension to the landscape, as the Supreme Court of Canada has often, upon the discovery of an absence of an express statement or legislative provision, turned to the provisions of Customary international law and the provisions of other common law jurisdictions to aid in its decision-making.[98]

Not content with the use of this comparative international dimension, Boyle and Cunliffe postulate that the Canadian Supreme Court should include a "tipping point" principle in its role of constitutional interpretation. They define the "tipping point" as:

> *"a call for remedial action where analysis of other common law jurisdictions and international aspirations shows that Canada has fallen behind in the protection of human rights."*[99]

In applying the argument for a "tipping point" to the context of this thesis, it is suggested that it might perhaps be a positive step to apply legal comparativism to judicial interpretation and use same as an external realignment mechanism, and this is possible for the superior courts in any jurisdiction so to do. As Giannoulopoulos points out, legal comparativism formed a significant basis of the decision-making process of the Irish Supreme Court in *DPP v Gormley*.[100] The Irish Supreme Court, in its ruling on the defendant's right to custodial

[98] A few cases such as *R v Hape [2007] SCC 26* and *US v Burns [2001] SCC 7*, for example, were cited by the authors as instances where the Canadian Supreme Court had demonstrated its international dimension. See Boyle and Cunliffe, p100

[99] Boyle and Cunliffe, n 100, at p81

[100] *DPP v Gormley and DPP v White* [2014] IESC 17. See Dr Dimitrios Giannouloupolous, "Strasbourg Jurisprudence, Law Reform and Comparative Law: A Tale of the Right to Custodial Legal Assistance in Five Countries", Human Rights Law Review (forthcoming), where he discusses in great detail the arguments considered in the decision of the Irish Supreme Court, and also discusses the extent and effect of not just Strasbourg jurisprudence, but also legal comparativivism on the decision of the Court.

legal assistance, relied on not just the *Salduz* and post-*Salduz* decisions of the ECtHR, but also employed legal comparitivism in its decision-making; as evidenced by its citing notable cases from a few common law jurisdictions, including the United States, Canada, Australia and New Zealand.

However, it is suggested, albeit purely on conjecture, that an increased reliance on trying to keep up with the Common Law Joneses, as Boyle and Cunliffe describe the phenomenon, might also call into question the purported sovereignty and supremacy of the courts of the relevant jurisdiction.

4.2.3 Cosmopolitanism and Global Convergence

The logic behind the "tipping point" theory is, it is herein opined, remarkably similar and closely linked to the ideas of cosmopolitanism and global convergence. Admittedly, the concepts are distinct from one another, but their effectiveness as external realignment mechanisms are, for purposes of this chapter, considered together.

As comparative scholars have argued for years, there has been significant convergence of procedural traditions in recent times. This convergence, according to Jackson and Summers, for example, is attributable to a myriad of factors, including "National legal systems plagued by common problems of rising crime, concern for victims and the growing cost and delay in processing cases",[101] which creates a "willingness to seek 'foreign' solutions to similar problems."[102]

[101] Jackson, J. D. and Summers, S. J., *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge, 2012), p3
[102] *Ibid*

As Jackson and Summers also note, there exists external pressures on states to find common transnational solutions to deal with problems of organised crime and drug trafficking.[103] Without limiting the external pressures to merely the need to combat the aforementioned criminal activities, it is perhaps sacrosanct that external pressures exist to find similar solutions to common problems faced by states.

As already identified, the regional rights systems, particularly the European system, create external pressures on its member states to reform their local procedural mechanisms to the point where there is convergence.

Similar to realignment mechanisms, there are, as Giannoulopoulos suggests, internal and external cosmopolitan attitudes.[104] A good example of noteworthy internal cosmopolitan attitudes is perhaps the attitude displayed by the Irish Supreme Court in *Gormley.*

It is perhaps unfortunate, then, that the African Rights System is as underdeveloped as it is, and has had little to no influence or caused no attempt at converging the procedural practices of its member states.

4.3 OBSERVATIONS AND CONCLUSION

The relationship between internal and external realignment mechanisms was examined by Giannoulopoulos. Local resistance and cosmopolitanism is the relationship between internal and external mechanisms. External mechansims in Africa are either in shambles or in infancy, local resistance being a very

[103] *Ibid*

[104] Giannoulopoulos, "Legal Cosmopolitanism and Local Resistance", n 60

important factor in the ultimate reduction of external influences to local situation. An apparent lack of anything more than a metaphorical slap on the wrists for failure to implement results in an unwillingness of African states, including Nigeria, to conform to the external pressures presented via these external realignment mechanisms. Counter this with Giannoulopoulos' assertion that France, for example, were wary of the prospect of continued judgments against it, and so decided to realign. Thus it would seem that ultimately, speculatively, especially in Africa, local resistance would be the most important factor to take into consideration. Thus, even though urgent reform is being clamoured for in Africa and Nigeria, perhaps internal realignment should be the focus, and as theories revolving around convergence, cosmopolitanism and the like, Nigeria should not be afraid to look beyond the regional influence and extend its scope to other common law countries, as Canada and Ireland did.[105] The only problem with attempting to do this is that looking beyond the regional influence to other jurisdictions requires a strong political will which, as has previously been determined in this chapter, is glaringly absent in Nigeria, and indeed, Africa.

Even the willingness to respond to the pressures of the regional external realignment mechanism requires a strong political will. Strasbourg's influence on its member states, for example, is undeniable and also laudable, as evidenced by the relatively swift reaction by Scotland, France, Belgium, et al, even within a few months of one another.[106] The Netherlands, as Giannoulopoulos mentions, have not made conclusive amendments to their

[105] Canada did it, as discussed by Boyle and Cunnilife, n 103, and Ireland did it as reported by Giannoulopoulos, n 60.

[106] Starting with Scotland in August 2010, France in June 2011, and Belgium in August 2011, as highlighted by Giannoulopoulos in n 63

custodial regime, but the fact that debates to do so have been set in motion is arguably further influence of the external pressure of the ECtHR. Presently, neither the African Court of Human Rights nor the ECOWAS Court have made any potentially ground-breaking decisions on pre-trial rights. Indeed, both regional systems are yet to provide any significant pressure on Nigeria, or any of their member states, for the reasons established herein. However, the link between external pressures and internal realignment mechanisms cannot be understated. If, as is the case in Nigeria, a bill takes years to move through the legislative houses before subsequent enactment[107] in any of the countries which have responded to the *Salduz* decision, would the amendments thereto still have been considered timely? Ultimately, it is opined, the political will required for efficient internal realignment plays a role in the reception of external pressures from the external realignment mechanisms.

In answering the fourth research question, it is perhaps suffice to simply state that, from the findings within this chapter, that the regional rights systems have a role to play in the quest to achieve the best rights' practice, and this role ought not to be overlooked or merely glanced over.

[107] Or as long as ten (10) years, in the case of the ACJA, as previously mentioned in Section 4.1, *supra*.

CHAPTER FIVE

CONCLUSION

5.1 SUMMARY OF FINDINGS

As a call back to the central idea of this thesis, the findings are herein summarized in answer to the five research questions conceived at the beginning of the research process.[1]

In answer to the first research question, "What rights do suspects have in England and Nigeria during detention before a formal charge and detention pending the determination of the case brought against them?", it was discovered that suspects in both jurisdictions were essentially vested with the same rights at the custodial stage, namely: the right to information pertaining to the reasons for their arrest, and of the rights available therein; the right to legal assistance; the right to silence; and the right to a speedy arraignment, or a right not to be held in detention indefinitely. The significant difference between the two jurisdictions, one that has proven to be detrimental to the protection of rights in Nigeria, is that the statutory provisions are sparsely worded. As a result of this, ambiguities abound, and the provisions of the law are open to a multiplicity of interpretation which, very often, amounts to a non-protection of rights in practice.[2]

In answering the second research question, "How well are these rights observed in practice? Is there a disparity between the theoretical existence and the practical observance of these rights, and what are the factors responsible

[1] See Chapter 1.3, *Supra*
[2] See Chapter 2

for this disparity, if any?", it was first discovered that, albeit common-sensical, there is naturally a chasm between the rights as they existed in theory and their operation in practice. The factors responsible for this chasm, in answer to the third research question, was discovered to be attributable to a number of intrinsic institutional shortcomings and some attitudinal factors which beleaguered the institutions that operate within the pre-trial regime in both jurisdictions.

In answering the third question, "In bridging the gap between the theoretical existence and practical observance of these rights, what is the effect of detailed and clearly stated legislative instruments in attempting to improve compliance with due process?", the importance of a clearly delineated legal framework and clearly stated statutory provisions is established in Chapter 3, and it was established that the absence of this in Nigeria was the genesis of a number of issues plaguing the institutional frameworks therein.

In answering the fourth question, "What is the role of the regional human rights framework in achieving the best rights' practice at the custodial stage of proceedings?", the answer was, for the most part, a simple one: realignment. In addition to the available internal realignment mechanisms that exist, the role of the regional rights' systems as external realignment mechanisms were considered.

Finally, in answering the fifth question, it has been discovered that Nigeria, a state emerging from independence, stands to learn from the developmental challenges faced by England, its former colonial ruler, and it is the opinion of the researcher that rights development is a work in progress, and that the

starting point of any post-independence state in addressing policy issues might be the taking into account of any developmental challenges faced by its former colonial ruler.

Speaking succinctly, the two most important findings were that, as hypothesised, a clearly stated and detailed legislative framework was essential in ensuring compliance with due process at the custodial stage, and that rights development is indeed a work in progress, the regulation of which takes the generally-accepted tripartite form.

With respect to the findings in respect of the effect of a clearly delineated legal and institutional framework, it is conceded that this finding is not sacrosanct because, as Dixon's Culturalist theory suggests, procedural rules on their own are ineffective in controlling police behaviour, as there are certain occupational cultures that must be taken into consideration.[3] It is however contended, in light of Coppen's assertion that the failure to delineate a minimum standard will create room for a multiplicity of interpretation,[4] and ultimately, a non-protection of the pre-trial rights in practice, that there is the need to provide a clearly delineated legislative instrument which establishes a clear minimum standard for the balancing of the powers of the police at the pre-trial stage and the rights and liberties of suspects and accused persons available at this stage. It might perhaps be an area where the creation of knowledge remains a possibility, as it might be worthwhile for further research

[3] See David Dixon, *Law in Policing: Legal Regulation and Police Practices* (Clarendon, 1997), pp 9 – 20. Hannah Quirk also discusses this in her article "The Significance of Culture in Criminal Procedure Reform: Why the Revised Disclosure Scheme Cannot Work" (2006) 10 E&P 42

[4] John Coppen, "PACE: A View from the Custody Suite", in Ed Cape and Richard Young (Eds.), *Regulating Policing: The Police and Criminal Evidence Act 1984 Past, Present and Future* (Oxford, 2008), p 75, at 76

into the relationship between the legalistic-bureaucratic and culturalist theories propounded by Dixon.[5]

Following on from the findings unearthed during this study, it behoves this researcher to, in concluding the aim of this thesis, propose recommendations for better realignment towards the goal of effective custodial rights protection in both jurisdictions. These recommendations, it should be noted, are not to be taken as purely policy recommendations, but are intended to highlight possible areas of further research.

5.2 RECOMMENDATIONS

Following on from the separation of realignment mechanisms into internal and external groupings, the recommendations herein proposed are also grouped into internal and external recommendations.[6]

5.2.1 England

5.2.1.1 Recommendations for Internal Realignment

As highlighted in Chapter 2, the regulatory framework of the pre-trial stage in England is a good example of the tripartite form of regulation, and only three (3) intrinsic institutional shortcomings were identified; namely: self-regulation by the police; heavy reliance on the duty-solicitor scheme; and the framework for the provision of interpreters.

[5] See David Dixon, n 3
[6] See Chapter 4.

In the opinion of this researcher, there is no concrete recommendation for internal realignment. As was earlier discussed, the intrinsic institutional shortcomings identified in England have had no overwhelmingly adverse effect on the provision and protection of the custodial rights available at the pre-trial stage.[7] Additionally, as was discussed in Chapter 4, England appears to possess a strong political will, within the parameters of the definition employed within this thesis,[8] which is arguably the most important ingredient which ensures effective internal realignment. As such, it is the further opinion that, by possessing a strong political will, and by operating a good example of the tripartite form that any regulatory framework must possess, England is capable of effective internal realignment if the regulatory framework were left, as it were, to develop organically.

As a result of the foregoing, the recommendations for internal realignment are two-fold. First, in echoing the arguments put forward by Bridges and Cape,[9] it is herein submitted that a proper review of the Duty Solicitor Telephone scheme, and the requirement for the provision of telephone-only legal advice be conducted, in a bid to ensure that effective, confidential legal advice is available, at all relevant times, for suspects and arrested persons in detention.

The second recommendation for internal realignment in England is in respect of the framework for the provision of interpretation and translation services. As was discussed earlier,[10] the current Framework agreement between the MoJ and CapitaTI for the provision of interpretation and translation services

[7] See Chapter 3.2.1
[8] See Chapter 4.1
[9] Lee Bridges and Ed Cape, "CDS Direct: Flying in the Face of the Evidence", (2008) Centre for Crime and Justice Studies, p19.
[10] See Chapter 3.2.1.3

was met with dissatisfaction by a number of professional interpreters. As the framework agreement is set to expire in 2016, it is herein recommended that the appropriate steps be taken, in a bid to optimise the interpretation and translation services available in England, and to streamline same with the provisions of the EU Parliament Directive on the Right to Interpretation In Criminal Proceedings.[11]

5.2.1.2 Recommendations for External Realignment

5.2.1.2.1 England in Europe

As has hitherto been established, the European Human Rights System, in its present form, is arguably the most efficient and effective Regional Rights System in existence today. As a result, there is little doubt of its effectiveness as an external realignment mechanism.

The recommendation for external realignment in England is a relatively straightforward and simple one, but is seemingly made more important by recent political events: To achieve the best rights practice, England ought to remain a member of the European Human Rights System.

Following the re-election of the Conservative Party in the 2015 General Elections, Prime Minister David Cameron announced plans to scrap the Human Rights Act and introduce a British Bill of Rights which would, *inter*

[11] Directive 2010/64/EU of 20th October, 2010.

alia, give the Courts in England the power to depart from decisions of the ECtHR in situations where it does not agree with the position of the Court.[12]

It is the humble contention of this researcher that this would constitute an ill-advised move. Despite the claims that the proposed Bill of Rights would mirror the provisions of the ECHR, it is contended that the removal of the external pressure posed by the ECtHR, and the EU Parliament, would be a step in the wrong direction.

It is not the suggestion of this researcher that a departure from Europe would suddenly bring about anarchy or a non-protection of rights, but it is submitted that, as established in Chapter 4, the best rights practices cannot be achieved without a well-struck balance between internal and external realignment mechanisms, similar to two hands washing the other. As a result, it is suggested, again, that the recommendation for external alignment for England is that it remains a member of the European Human Rights System.

5.2.2 Nigeria

5.2.2.1 Recommendations for Internal Realignment

As established throughout the thesis, the custodial rights regime in Nigeria is fraught with a number of shortcomings. The following are the recommendations for the internal realignment towards achieving the best rights practice in Nigeria.

[12] Mark Leftly, "British Bill of Rights to be fast-tracked into law by next summer", available at http://www.independent.co.uk/news/uk/politics/british-bill-of-rights-to-be-fast-tracked-into-law-by-next-summer-a6698261.html, last accessed on 20-10-2015.

5.2.2.1.1 Gross Amendments of the Legal and Institutional Framework

As expressed in Chapters 2 and 3 herein, the custodial rights regime in Nigeria, when assessed *vis a vis* the tripartite form of regulation, fails at the first hurdle. As has been established, there is no clearly established goal. The provisions of the relevant statutory instruments are sparsely worded, and thus present many ambiguities when it comes to the subsequent interpretation thereof. Additionally, there is a multiplicity of legislation which all provide for the same rights and for different elements of the custodial rights regime.

The recommendation in this regard is a relatively straightforward one. There needs to be a gross amendment of the legal framework in Nigeria. The overlapping laws need to be repealed, and more detail injected into the provisions of the statutory instruments.

The Administration of Criminal Justice Act (ACJA) has taken a few steps in the right direction by repealing the CPA and the CPC, and offering clarification on a few ambiguities which had hitherto existed.[13] However, there is still a lot of room for improvement within the custodial rights regime proposed by the ACJA. There is still the need to provide better information to suspects, and there are still ambiguities that abound within the provisions of the ACJA which require clarification.

As stated earlier in this thesis, the clear statement of the goal is perhaps the most important part of the tripartite form of regulation, for if the goal is not clearly stated, there can neither be effective monitoring, nor any proper attempt at realignment. Thus, for the custodial rights regime to attain any

[13] See Chapter 2.3.6

significant improvement, there must be gross improvements to the legislative framework.

The institutional framework is also in need of realignment. As is the case in England, and as was discussed in Chapter 3, there is no clearly delineated framework in place for the provision of interpretation services. Additionally, the Legal Aid Council is grossly understaffed,[14] and as a result, the provision of custodial legal advice is grossly hindered.

The foregoing, in addition to the infrastructural insufficiencies discussed in Chapter 3,[15] are issues which ought to be addressed, and would ensure effective realignment towards the effective and efficient protection of suspects' rights at the custodial stage in Nigeria.

5.2.2.1.2 Revamping the Nigeria Police Force

As highlighted in Chapter 2, the police force, generally speaking, serve as the point of entry into the Criminal Justice System, and as such, are arguably the most important party at the pre-trial or custodial stage.[16] It therefore stands to reason that any problems beleaguering the police force in any jurisdiction would have a great effect on the protection of rights at the custodial stage.

In chapter 3, the shortcomings and challenges of the Nigeria Police Force and its effect on the transition of rights from a theoretical plane to a practical one were analysed, and the major issues attributable to the police force were

[14] See Chapter 3.2.2.5
[15] Chapter 3.2.2.4
[16] Chapter 2.1.2. See, also, Bryan Gibson and Paul Cavadino, *Introduction to the Criminal Justice Process* (2nd Edition, Waterside Press, 2002), p54

problems stemming from its centralised nature,[17] the Nigeria Police Force being vested with the power to prosecute offences,[18] and the poor training regimes available within the force.

In proposing recommendations for realignment and/or better rights' protection, the Nigeria Police Force might be the most challenging party at the pre-trial stage. The first recommendation calls for the provision of better, improved training regimes. This is perhaps the most straightforward recommendation concerning the police, but is potentially thwarted by the centralised nature of the Nigeria Police Force.

As Dambazau contends, the "over-centralised" nature of the Nigeria Police Force has resulted in a situation where there is too much control of resources at the centre without an adequate distribution system, with the result that regardless of what is spent at the Force Headquarters, not much effect is felt at the local police stations.[19] This contention by Dambazau is extended to the recommendation of this researcher that better training regimes be employed by the police. If better training regimes are implemented, then while there might be improved rights protection within the urban areas, what hope lies in store for police officers stationed in the most remote parts of the country?

This recommendation segues easily into the second recommendation put forward for the best rights' protection in Nigeria – a decentralised police force. With the different issues and challenges emanating from the Nigeria Police

[17] Chapter 3.2.2.2
[18] Chapter 3.2.2.3
[19] A. B. Dambazau, *Law and Criminality in Nigeria: An Analytical Discourse* (University Press, 1994), pp 155 - 156

Force operating under a centralised structure in mind,[20] it perhaps ought to a straightforward recommendation that Nigeria decentralise its police force, and establish multiple police forces across the Nation, in a bid to prevent the frequent and incessant transfer of police officers from one state command to the other, in a bit to realign to the best rights practice.

This recommendation is by no means original, and there have been previous calls for the decentralisation of the Nigeria Police Force. However, as welcome as the recommendation might seem, achieving this aim might be immensely difficult. The Nigeria Police Force, as previously noted,[21] is established by Section 214 of the 1999 CFRN, which expressly states that there is to be only one police force in Nigeria. Thus to amend the structure of the Nigeria Police Force, there would be the need to amend the provisions of Section 214 of the 1999 CFRN, which is arguably an insurmountable task.[22]

As a result, rather than wholly adopt previous recommendations for the decentralisation of the Nigeria Police Force, it is suggested that the organisational and administrative structure of the Nigeria Police Force be altered, particularly as relates to transfers of officers within the force. It is contended that if more stringent provisions relating to the transfer of officers

[20] See Chapter 3.2.2.2

[21] See Chapter 2.2.2.1

[22] Section 9 of the 1999 CFRN, which provides the mode of altering provisions of the Constitution expressly stipulates that an Act of the National Assembly for the alteration of the 1999 CFRN shall not be passed in either House of the National Assembly (the Senate or House of Representatives) unless the proposal is supported by not less than two-thirds majority of all the members of that House, and is also supported by a resolution of the Houses of Assembly of not less than two-thirds of all the States of the Federation. It is the humble submission of the researcher, and also a common belief held by a number of Nigerian academics, that the amendment provisions are an act of subterfuge – the conditions for amendment of the Constitution are so stringent as to make amendments nearly impossible, yet it cannot be argued that there are no provisions within the 1999 CFRN which allow for amendment of its provisions.

were in place, for example, placing restrictions on frequency of transfers, or placing geographical limits on how far across the federation an officer might be transferred, the attendant risks and issues highlighted in Chapter 3 might be avoided.

The final recommendation put forward in respect of the Nigeria Police Force is the removal of its powers of prosecution. As the criminal justice system in England is the progenitor of the system in Nigeria, it ought to serve as the first port of call, when making comparisons and seeking to realign towards the best rights practice. To this end, recourse is made to the reasons put forward by JUSTICE in their 1970 report, *The Prosecution Process in England and Wales* (1970), wherein they recommended the separation of the powers of prosecution from the police.[23] The reasons put forward by the Commission are as relevant in Nigeria today as they were in England more than forty (40) years ago, and this researcher adopts same as the reasons for the removal of the powers of prosecution from the Nigeria Police Force.

The obvious challenge with the implementation of this recommendation is the existence of the decision of the Supreme Court in *FRN v. Osahon*,[24] which grants police officers with the power to prosecute. As it were, the only way to implement this recommendation would be via an Act of the National Assembly.

It ought to be noted that, if this recommendation were to be adopted, that the statutory instrument removing the power to prosecute offences ought to be

[23] See Chapter 3.2.2.3
[24] *FRN v Osahon* [2006] 5 NWLR (pt 973) 361.

carefully drafted. The recently enacted ACJA does the position of the law in Nigeria no favours in this regard. Section 106 of the ACJA seems to have removed the powers of prosecution from the police by omitting police officers from the list of persons vested with the power to undertake the prosecution of offences in court. However, Section 268(2) of the same Act states that "where proceedings in respect of an offence are instituted by a police officer, it shall be in the name of the Inspector-General of Police or Commissioner of Police, as the case may be." It is therefore unclear whether the ACJA truly intends to remove the power of prosecution from the police.

As it were, it is recommended that any statutory instrument seeking to remove the powers of prosecution should clearly and categorically repeal the powers of prosecution vested in the police – clear, unambiguous legislation being one recommendation already put forward in a bid to realign Nigeria to the best rights practice.

5.2.2.1.3 Improving Political Will

The third recommendation put forward is one for which the means of implementing is admittedly unknown to this researcher. The recommendation itself is only predicated upon the discovery, in Chapter 4, that a strong political will is necessary for effective internal realignment, and the argument therein that Nigeria suffered from a lack of political will.

The recommendation is thus an axiomatic one borne out of the belief that an improved political will would result in more effective internal realignment. This, it is humbly submitted, is perhaps a potential topic for further research: how does a state improve its political will?

5.2.1.2 Recommendations for External Realignment

5.2.1.2.1 Streamlining the Human Rights Jurisdiction of the ECOWAS Court

As discussed in Chapter 4, the African Court of Human Rights has not delivered any judgments in the area of custodial rights, so at present, it is unclear how effective an external realignment mechanism it might be. However, from a purely theoretical position, the framework in place is one that holds promise.

Thus, the only recommendation for external realignment for Nigeria is the streamlining of the Human Rights Jurisdiction of the ECOWAS Court. As noted in Chapter 4,[25] the ECOWAS Court, unlike the African Court of Human Rights, or indeed the ECtHR, has a wide berth of jurisdiction, as it was not set up to enforce a specific Human Rights treaty, and as such, can pick and choose the rights instruments to deliberate upon. Additionally, there is no clearly delineated relationship and/or hierarchy between the local courts of ECOWAS Member States and the ECOWAS Court. This, as was discussed, poses a number of issues which limit its role as a potential external realignment mechanism.

The recommendation in this regard is a straightforward one: the Community need to regularise its position by establishing its own Human Rights Treaty for the Court to deliberate upon, and the relationship between the Court and the local courts of Member States needs to be expressly, and clearly delineated.

[25] Chapter 4.2.1.2.1

5.3 CONCLUDING REMARKS

In concluding this thesis as succinctly as possible, it is reiterated that, as suggested by Cape and Young,[26] any effective regulation must take up a tripartite form: the goal, the monitoring stage, and realignment towards the goal.

Of these three elements, it is the contention of this researcher that the goal is the most important, and there is the need for the goal to be very clearly stated, and free from ambiguities, for it is only where a clearly stated goal exists that it becomes possible to monitor its transition into practice effectively and efficiently, and where there is a shift from the ideal, realign towards the said goal.

[26] Ed Cape and Richard Young (Eds.), *Regulating Policing: The Police and Criminal Evidence Act 1984 Past, Present and Future* (Oxford, 2008), p2

APPENDIX 1

INTERVIEW QUESTIONS FOR NIGERIAN POLICE OFFICERS

1. Please describe the nature of your job/ your role in the Nigerian Police Force
2. Could you please give an overview/ brief description of what happens from the point of arrest to the point where the detainee is arraigned in Court?
3. Even though the Constitution and both the Criminal Procedure Act and Criminal Procedure Code stipulate, in the relevant provisions, that a person should be arraigned within 48 hours of arrest, I have read that this is not always the case. In your experience, what factor(s) contribute to creating a difficulty in keeping to this time frame?
4. How long, on average, would you say it takes to arraign a person after he has been arrested?
5. Is this time affected by the gender and/or age of the accused person?
6. Where are persons who have been arrested, but refused Police bail detained?
7. Where are persons who have been charged with an offence detained pending the determination of their case?
8. What percentage of persons detained in the state are awaiting a formal charge?
9. What percentage of detained persons are on awaiting trial status?
10. During the interrogation of suspects, how are statements usually recorded? Is it done in writing or with the use of audio visual equipment?
11. Where are suspects interrogated? Are they interrogated in the detention cell, or is there a specific room in the station for interrogation?
12. If required, what is the procedure for providing interpreters?
13. Do arrested persons have the right to remain silent?
14. Do they have a right to consult with a lawyer?
15. If yes, are they informed of their rights?

16. If yes, how soon after arrest are they informed?
17. How are they informed of their rights? Verbally or in writing?
18. If no, why are they not informed of their rights?
19. What other rights do accused persons have whilst they are in custody?
20. Generally, what parties are present during interrogation?
21. If, at the point of interrogation, an accused person refuses to answer any questions or states that he is exercising his right to silence, what happens next?
22. If he states that he wishes to remain silent pending consultation with his lawyer, what happens then?
23. Are lawyers permitted to be present during interrogation?
24. If yes, what roles do the lawyers play during interrogation?
25. If no, what are the reasons for their exclusion from the interrogation?
26. At what stage whilst a person is in Police custody are lawyers permitted? Is there any stage where the lawyer is denied access to his client?
27. Where does the lawyer-client consultation usually take place? Is there a specific room provided for consultation?
28. Are any special measures taken to ensure that the arrested person consults with his lawyer in private?
29. Is there any limit to the length or frequency of the consultation?
30. If a person is desirous of having a lawyer present, but claims to be unable to contact one or afford one; what remedies are available?
31. Finally, what, in your opinion are some of the problematic areas of the Nigerian Pre-Trial Process, and the Criminal Justice System generally, that need to be addressed, and what solutions would you proffer?

APPENDIX 2

TRANSCRIPT OF INTERVIEW WITH OFFICER IN CHARGE OF LEGAL AND PROSECUTION ("OC LEGAL"), [REDACTED] STATE, NIGERIA

Please describe the nature of your job/ your role in the Nigerian Police Force

"I am a general duties Police officer. I am also an attorney. So my major role right now is that of an officer in charge of the prosecution and the legal section of the Nigerian Police. But that is also combined with the investigation of cases where necessary and we also have other activities like the supervision of our subordinates. Sometimes we are given special duties like going to conduct elections and other ad hoc duties. That is basically what we do. You know what the Police job is all about: enforcement of law and order, protection of life and property and other duties that are given to us in the Constitution. That is what I do now, as an Officer in charge of Legal and Prosecution. We have like 10 lawyers in my department, but mostly we defend cases that are brought against police officers like the Inspector General of Police, the State Commissioner of Police and other officers. We cannot take external briefs because we are still in salaried employment so mostly our duties as attorneys are just within the Force."

Could you please give an overview/ brief description of what happens from the point of arrest to the point where the detainee is arraigned in Court?

"When a suspect is arrested, his statement is recorded. If he cannot write, the Investigating Police Officer writes down the statement for him. Whatever he says is recorded in writing by the Investigating Police Officer, called the IPO. Thereafter, the IPO reads it back to the suspect. If the suspect says that that is what he said, he is then asked to sign or make a thumbprint to authenticate the statement. After the statement is recorded you now interrogate based on the allegations that were made. You start asking the suspect questions relating to what was alleged against him. If the statements recorded did not cover most of the areas that were alleged, you now put questions to the suspect. Also, his answers are recorded: as you are interrogating him, you are recording the answers. Thereafter, you now go out with the information you've gathered from him to find out if he was actually the person who committed that offence; that is the investigation aspect now. When you find out that what was alleged is not true, the suspect is allowed to go unconditionally. But where you still have a lot of work to do, like maybe travel out of station, or whatever, the suspect is now kept in detention to allow you time to gather all the evidence you might need with which to prosecute him. When that is done, if you now have concrete or vital evidence or you have found out you have gotten to the end of your investigation, you put up your investigation report then you now proffer a charge and then take the suspect to court. So what happens is that after arrest, there is interrogation; after the interrogation you go into an in-depth investigation. Thereafter, if you are satisfied that there is a *prima facie* case or that an offence has been committed you now arraign the suspect in court."

Even though the Constitution and the Criminal Procedure Act both stipulate that a person should be arraigned within 48 hours of arrest, I have read that this is not always the case. In your experience, what factor(s) contribute to creating a difficulty in keeping to this time frame?

"There are many things. Sometimes because of a lack of manpower, one IPO is investigating about five criminal matters. There is no way to divide yourself into five places. Sometimes for a suspect that is arrested here you may have to go to [REDACTED],[1] he might have mentioned two or three other areas or other people that are either his accomplices or other suspects; you need to arrest all those other people to get all the information you will need to conclude your investigation. And we have a very slow pace of working. We're not into the IT thing: the computer thing, for now. Most of our things are still analogue: you have to record statements in writing; it's just now we're trying to build a database of criminals that you frequently see: we have fingerprints and photographs; so that somebody who is a habitual criminal, if he is arrested and if we had that data, you would just go into the records and pick up and it reduces all the other work you have to do. But most times a suspect can be in detention for 3 to 5 days, instead of the 48 hours. Whereas if we had the manpower we need, you do not need more than 48 hours, and a minor offence like stealing could be wrapped up in 2 days and the person arraigned. Also, there is only one forensic laboratory belonging to the Nigerian Police Force. It is in Oshodi, Lagos and is supposed to serve the entire force; sometimes it takes more than 48 hours just for a sample to get to the lab, so before it gets tested and is returned to the station, the suspect has already been in detention

[1] A city in a different state, approximately 630km away

for days. Sometimes too, the personnel that we work with are not very grounded educationally: they are trained, but I would require that they improve on the basic training they give to our subordinates. I joined the force as a graduate and we were trained for 18 months. But somebody who joins the force as a high school leaver is trained for just 6 months. It is not enough. He cannot grasp all the rudiments of what he is supposed to do as a police officer within 6 months. So training and re-training could help to give them speed. If you go to the scene of a crime and you know that you should cordon off the area, you know the people to ask questions to get all your information speedily. Somebody who just finished high school may not know that if you train him for just 6 months and most times they are the foot soldiers; we just supervise. I have seen that in most cases where you do not supervise closely, they make so many mistakes and end up messing up the matter. So when you are investigating a matter, the officer has to be up and doing. There are many times I have had to turn complainants into suspects. Sometimes they come and tell you lies and if you do not listen to both parties first, the lower policeman would just, after recording his statement, put the suspect in the cell. That is not right. You should first of all investigate and go in-depth into the allegation that was made. You could find out that it was just trivial, flimsy, out of malice and then you throw somebody in detention when he is not supposed to be there. So most times when we say "Get me the complainant, let me hear the petition he made to the Commissioner of Police" you hear frivolous things and thereafter, sometimes we have had to charge such complainants for giving false information to the police and it deters them from coming. So the reason why we do not charge people to court within 48 hours is because we have a lot of

limitations: we do not have equipment to work with, we cannot go as fast as we can, and sometimes the IPO that is handling a particular accused person is transferred. Most times, even when we get to court, for the IPO to come and give evidence, you hear he is not in the station anymore, he has to come from [REDACTED][2] to come and give evidence, his salary is so small that he does not have transportation to come from there. I learnt that before I joined the Force, they used to have money for witnesses, and it was the judiciary that used to give it. Once you come to give evidence, your transportation allowance and everything is paid to you. Now it is not there, so if I want a constable to come from [REDACTED],[3] I have to give him his transport. If he is not given, he cannot afford it. So that slows down a lot of things. That is basically all. The difficulties that we have are that the younger ones who are the foot soldiers are not properly trained, they have too many things on their hands, and then we are not well-funded and all the things that should be in place for an investigation to go freely are not there, because of the system."

How long, on average, would you say it takes to arraign a person after he has been arrested?

"One week. But it depends on the nature of the case too. Like if it's a matter like illegal bunkering and vandalisation of oil pipelines and such matters that require that sometimes we have to go to the scene, some of them offshore, to get samples and take them to the lab, it takes like one week, or at most two weeks. Then for murder cases and all those capital offences like armed

[2] A city in a different State, approximately 1,286km away.
[3] *Ibid*

robbery you have to be very sure so it takes time to go through. But for minor offences like assault, stealing, all those simple offences, 2 – 3 days."

Could you please give a rough estimate of how long it takes to arraign persons suspected of committing Capital Offences?

"Two weeks at the most; because right now, because of the democratic regime, people know their rights, so once a suspect is being kept for longer than necessary, their lawyers go to get a Fundamental Human Rights Order for us to either produce the person in court or restrain us from further detaining them. So we try as much as possible to arraign them within two weeks. Sometimes even within a week if it's not in a difficult terrain for us to get samples of the necessary evidence/exhibits to go to the lab."

Is this time taken to arraign a person affected by their gender and/or age?

"The time taken to arraign a suspect is not affected by gender or age, a crime is a crime. Once it is committed all suspects are treated the same way."

Where are persons who have been arrested, but refused Police bail detained?

"In every Police station we have a cell where detainees are kept. They are kept in this cell."

Where are persons who have been charged with an offence detained pending the determination of their case?

"If it is a capital offence, and most times because we do not want to keep them in police cell, we arraign them in the magistrate court; and the magistrate court

has no jurisdiction, so the magistrate would now decline jurisdiction, remand them in prison custody and remit the file to the DPP for advice."

Is this what is known as the "Holding Charge"?

"That is what is called the "Holding Charge"; but they are saying the Holding Charge is illegal. The last time we had the conference of prosecutors, they were saying that it is not illegal *per se*, but that it is just a way of decongesting the Police cell, and since they say a person should be arraigned within 24 or 48 hours, and within 48 hours you have not been able to get the information to file an Information at the High Court. And you know the police only prosecute in the Magistrate court; although now as attorneys in the Police, we file charges directly in the Federal High Court and the State High Court. Before now, it was only the Ministry of Justice, so before you finish your investigation for the State Counsel to file Information, the person would have been in the Police Cell for like 2-3 weeks, so the best thing is to take the person to court, and let the State Counsel give advice on if the person has a case to answer or not and then file their Information. So, when they are taken to court, if it is a capital offence, and the person was not arraigned in the high court, the Magistrate will now remand him in Prison Custody until they file a charge and start his prosecution; but if it is a minor or simple offence which is bailable, the magistrate just grants him bail and the prosecution continues."

What percentage of persons detained in the state are awaiting a formal charge or are on awaiting trial status?

"Let us take [REDACTED] prisons as an example. It is like 80 per cent. The [REDACTED] prison was built for a capacity of 800 persons. Right now, each

time we go there, they have about 2,300 inmates or thereabout. Out of these, 200 are convicted criminals serving their sentence. The rest are awaiting trial inmates. It is horrible. I have gone with the Chief Judge of the State several times when they go for 'gaol delivery' and it is usually horrible. The awaiting trial inmates, because they don't have proper accommodation, they are just in one hall; if you see how many are sick with different diseases: HIV, tuberculosis, etc. Oh, it is terrible. Some of them, their case files are missing. Between the Police and the Director of Public Prosecutions, they do not have any case files anymore, they do not know anything about their cases, and they have stayed for like 6 years; probably for an offence that he would have served 2 years, he has already spent 6 years just awaiting trial, and the trial is not going on. So most times when we go with the Chief Judge and we look at the cases as they are, if you were supposed to serve a sentence of 5 years or 3 years, as the case may be, they will just discharge you. You have already finished serving the sentence, so why should they continue trial? But for those that their trials are on-going, they are not considered for the gaol delivery. So the percentage is very high, let us say 80 per cent."

During the interrogation of suspects, how are statements usually recorded? Is it done in writing or with the use of audio visual equipment?

"Statements are recorded in writing, and now the amended Evidence Act is saying that if an accused person is going to make a confession it should be captured with audio visual equipment, because the courts are tired of doing trial within trial; accused persons coming to say they did not confess. If there is no recording device, the lawyer, or if the accused has no lawyer, a relation of the accused person should be with the accused person and the police when

you are taking the accused's confessional statement; so that he does not go to court and say "I did not confess." So, the statements are recorded in writing and now it has been added that if a confession is to be made, it should be captured with audio visual equipment. Sometimes when we have big cases, like robbers are arrested; like there was one robber, he claimed to be a medical student. His victims were usually women. In the evenings, at about 7 or 8pm, he would pick up these victims as a drop (*car hire*) and then take you and make a detour with you to a lonely place and there he would rob them, sometimes even rape them. When he was finally arrested, we would now record with audio recording. In fact that particular man, he was flashed in the media."

Where are suspects interrogated? Are they interrogated in the detention cell, or is there a specific room in the station for interrogation?

"Every Police formation with an investigative outfit has an interrogation room. That is the specific room where interrogations are done."

If required, what is the procedure for providing interpreters?

"There is no laid down procedure but when an interpreter is required he is sought for by the IPO and after the interpretation he counter signs the statement as having interpreted."

Do they have the right to remain silent?

"Well, normally if an arrested person says "I do not want to say anything until I see my lawyer", he is asked to put it down in writing. Does that mean they

have the right to remain silent? Because the first thing we want is to record your statement."

After he has written that down, is he still required to give a statement before his lawyer arrives?

"No."

Then I guess we can say he has the right to Silence. Do arrested persons have a right to consult with a lawyer?

"Yes. They do."

Are they informed of their rights?

"Well, it is not like the way they are supposed to as we see in other more-developed countries. Here it is called a cautionary statement, but that is typed in our statement form, at the beginning. You read this to him (the accused) and inform him that what he says will be reduced in writing and will be used as evidence against him. So they are informed of their rights."

How soon after arrest are they informed?

"As soon as possible."

How are they informed of their rights? Verbally or in writing?

"The suspects are informed of their rights verbally and at the top of the statement form the caution is boldly printed and this is also read to the suspect who accept they understand before they proceed to make their statement which means they are informed in writing too."

What other rights do accused persons have whilst they are in custody?

"The right to be treated with dignity, the right to be fed, right to visits from family, right to know his offence, and the right to be arraigned within time stipulated by law."

Generally, what parties are present during interrogation?

"The only parties during interrogation are the suspect and the IPO. Only in the case where the suspect is about to make a confessional statement the law requires that his counsel or relative be present as a witness where there is no sure person the confession is to be recorded on video."

If, at the point of interrogation, an accused person refuses to answer any questions or states that he is exercising his right to silence, what happens next?

"He is asked to reduce that intention to remain silent into writing and sign."

If he states that he wishes to remain silent pending consultation with his lawyer, what happens then?

"He is equally expected to put it in writing that he intends to wait for his counsel before saying anything."

Are lawyers permitted to be present during interrogation?

"Not really, because it is their right, but our lawyers, they want to sit with the accused when he is making his statement and they would be saying "No, do not say this. No do not say that." They start to tell you what to say and what not to say, so we do not allow them to sit with him. Instead we say to you "Let

him make his statement. After that you can now help him with whatever else you want to help him." We are not enlightened enough to the level where you just sit with him, and without guiding him, let him say exactly what happened; but they would say "No. Do not say it like that." "You do not have to answer that question, we are not in court." thereby interrupting and rubbishing the entire process of interrogation. So we do not usually permit lawyers to sit with their clients during interrogation, but you can see your client thereafter."

What are the reasons for their exclusion from the interrogation?

"The reason is that if the counsel is present he begins to interject and tutor the suspect on what to respond to questions put to him in order to make his work in court easy."

At what stage whilst a person is in Police custody are lawyers permitted? Is there any stage where the lawyer is denied access to his client?

"The only time where lawyers, and even family, are denied access was when we used to have the issue of kidnapping, and when the suspects are arrested in the act; we don't allow them see anybody until the investigation is wrapped up. Hardened criminals, those involved in armed robbery, particularly where police officers are killed, or people generally are killed, their lawyers are not allowed to see them. Those are the only extreme cases, but at any stage after we have recorded their statements, lawyers can see their clients."

Are they allowed to see their clients before the statements are recorded?

"No. We do not allow that."

Where does the lawyer-client consultation usually take place? Is there a specific room provided for consultation?

"There is no specific room. They meet in any room provided by the IPO and these meetings are supervised so that the suspect is not given any harmful thing to take into the cell. The IPO may not be close to where he can hear them but must be where he can see them very well."

So there are no special measures taken to ensure that the arrested person consults with his lawyer in private?

"The only measure is that he consults with his counsel within the view of the IPO."

Is there any limit to the length or frequency of the consultation?

"There is no limit to length or frequency of their consultation."

If a person is desirous of having a lawyer present, but claims to be unable to contact one or afford one; what remedies are available?

"There is this Memorandum of Understanding that the police have with Legal Aid for them to be providing duty solicitors in target police stations so that where an accused person does not have access to a lawyer, he could help, give advice, and all that. Then the last time we had a seminar together to work out modalities, it was argued that if you are bringing lawyers to the station who would be defending these people, then we are not working on the same level: we are prosecuting them and you are defending them. It is good that those who do not have lawyers should have, but not at the point where they have not begun recording statements you begin to administer legal aid. No, you should

wait until when we have finished with them before you can now go and defend them in court; those who do not have legal aid. It is just in the process. We do not have those remedies in place yet, but we are in the process of making it so that someone who is an indigent person who cannot afford legal representation, these lawyers from the Legal Aid Council can represent them; and I think it is only now they are amending the law to include capital offences. Before they were only representing those accused of committing simple offences, not like murder or armed robbery."

Finally, what, in your opinion are some of the problematic areas of the Nigerian Criminal Justice System that need to be addressed, and what solutions would you proffer?

"The problems are many. Lack of enlightenment: we do not know our rights. We believe that it is only the complainant that has rights; the accused person does not have rights. But the accused person has rights too. He should be treated well, not tortured, until such a time as the courts say he is guilty. But the prosecutor should be biased to get him convicted. The person who is arrested does not know his rights. Even though we know he has rights, those rights are dimmed by the fact that as a prosecutor you are already biased, and I do not really know if that affects the criminal justice system, that is just my personal opinion. Again, like we said, the speed with which we investigate is so slow. We are still moving at a snail's pace and I think there should be a reorientation whereby you do not detain a suspect until you know that letting him go will jeopardize your investigation. Ask basic questions first because the allegations could be false. Sometimes too, immediately after you have detained somebody your superior comes in and says you have to go to Aba on

another matter, and then that person is forgotten. You now go to do those other things and you keep the person in the cell for so long. It is not right. Also, if there was a situation where we could work with State Counsel, immediately we know that a person has committed an offence, they can file a charge directly to the High Court without taking him first to the Magistrate Court, especially as we have 48 hours to arraign him. Before now, we also had the issue of remitting files from the police station to the Ministry of Justice. When I got to the State CID as "OC Legal", we did not have any facilities like photocopying machines to duplicate case files and send as they come. So sometimes I use my own money to do it because if you get to the prisons, except you are a witch, you would feel sorry, and will want to do everything within your power to ensure that these files go. But now, we have devised a means: the Chief Judge gave a practice direction where the files that go to the Magistrate Court go in duplicate. So the original case files, if the magistrate is going to order for it to go to the DPP it is left with the court clerk and the police come back with the duplicate; so the issue of files not going fast is not there anymore. From there it goes to the Chief Registrar of the State Judiciary and the Chief Registrar will send it to the Ministry of Justice. The Ministry of Justice have also devised a means of bringing advice out speedily. If people will be educated and we all become IT compliant it will make it faster. The Attorney-General the other day was saying they have devised a means where all the cases will be computerized so that they can track them, even the ones on trial and make sure that they are dispensed with. Sometimes too, there are politically-motivated cases, the government is interested, and you cannot

release the person because your hands are tied. He who pays the piper dictates the tune.”

APPENDIX 3

INTERVIEW QUESTIONS FOR MEMBERS OF THE LEGAL AID COUNCIL OF NIGERIA

1. Please describe the nature of your job/ your role in the Legal Aid Council
2. Could you please give an overview/ brief description of what happens from the point of arrest to the point where the detainee is arraigned in Court?
3. Even though the Constitution and both the Criminal Procedure Act and Criminal Procedure Code stipulate, in the relevant provisions, that a person should be arraigned within 48 hours of arrest, I have read that this is not always the case. In your experience, what factor(s) contribute to creating a difficulty in keeping to this time frame?
4. How long, on average, would you say it takes to arraign a person after he has been arrested?
5. Is this time affected by the gender and/or age of the accused person?
6. Where are persons who have been arrested, but refused Police bail detained?
7. Where are persons who have been charged with an offence detained pending the determination of their case?
8. What percentage of persons detained in the state are awaiting a formal charge?
9. What percentage of detained persons are on awaiting trial status?
10. During the interrogation of suspects, how are statements usually recorded? Is it done in writing or with the use of audio visual equipment?
11. Where are suspects interrogated? Are they interrogated in the detention cell, or is there a specific room in the station for interrogation?
12. If required, what is the procedure for providing interpreters?
13. Do arrested persons have the right to remain silent?
14. Do they have a right to consult with a lawyer?

15. If yes, are they informed of their rights?
16. If yes, how soon after arrest are they informed?
17. How are they informed of their rights? Verbally or in writing?
18. If no, why are they not informed of their rights?
19. What other rights do accused persons have whilst they are in custody?
20. Generally, what parties are present during interrogation?
21. If, at the point of interrogation, an accused person refuses to answer any questions or states that he is exercising his right to silence, what happens next?
22. If he states that he wishes to remain silent pending consultation with his lawyer, what happens then?
23. Are lawyers permitted to be present during interrogation?
24. If yes, what roles do the lawyers play during interrogation?
25. If no, what are the reasons for their exclusion from the interrogation?
26. At what stage whilst a person is in Police custody are lawyers permitted? Is there any stage where the lawyer is denied access to his client?
27. Where does the lawyer-client consultation usually take place? Is there a specific room provided for consultation?
28. Are any special measures taken to ensure that the arrested person consults with his lawyer in private?
29. Is there any limit to the length or frequency of the consultation?
30. If a person is desirous of having a lawyer present, but claims to be unable to contact one or afford one; what remedies are available?
31. What, in your experience, are some of the problems or problematic factors which prevent the Legal Aid Council, and lawyers in Nigeria generally, from providing effective legal assistance to accused persons throughout the criminal process?
32. Finally, what, in your opinion are some of the problematic areas of the Nigerian Pre-Trial Process, and the Criminal Justice System generally, that need to be addressed, and what solutions would you proffer?

APPENDIX 4

LEGAL AID COUNCIL OF NIGERIA

RESPONSE TO INTERVIEW QUESTIONS FOR PHD RESEARCH ON DETENTION RIGHTS OF ACCUSED PERSONS IN ENGLAND AND NIGERIA

1. The nature of my job involves providing legal services both criminal and civil to the indigent in Nigeria, particularly in [REDACTED] State where I am presently stationed.
2. After an arrest is made, the suspect is taken to the relevant police station where he/she is interrogated/interviewed. The suspect may be allowed to contact family members before getting to the police station or at the police station. Following investigation of the offence and where necessary, the suspect is arraigned in court.
3. There are a number of factors which include but are not limited to the following:
    a. Investigation could involve a cumbersome process of several witnesses, unavailable data and an unwilling suspect
    b. Administrative delays
    c. Suspect may need medical attention following aggressive arrest
    d. Point of arrest may be far from relevant police station and could take a while to connect
    e. Complainant or family members may not facilitate a speedy investigation
4. Subject to the offence for which he is suspected to have committed and other intervening factors, graver offences may take about a week or more but simple offences could be overnight or a day
5. Not necessarily, but men are usually detained longer
6. In police cells, if they were arrested by the police.
7. In the federal prisons found in every state of the federation

8. One cannot be certain but taking a wild guess, I would say about 10% of detainees
9. Still uncertain but in my humble opinion about 80% of detainees
10. Interrogations are usually recorded in writing
11. To the best of my knowledge, interrogations take place outside the cells. Some police stations have special rooms, others undertake the exercise in the Investigating Police Officer's office space
12. In practice, the police usually ask persons in or around the police station to volunteer interpreters.
13. Theoretically – yes. In practice – NO!
14. Theoretically – yes. In practice – not usually encouraged
15. I am not aware of the police having informed anyone of their rights
16. –
17. –
18. The suspect may become uncooperative
19. They may have restricted visits, meet with their lawyers and can be bailed at the police station following investigations
20. The suspect and the investigating officer
21. He/she will be persuaded to talk
22. He/she will be advised to talk to the police then to his/her lawyer
23. Only on very, very rare cases with the Legal Aid Council lawyers
24. Where the Legal Aid Council lawyers are allowed in at interrogations, they serve as checks to police excesses even not allowed in most cases to "protect" the suspect where he/she is being badgered
25. –
26. The lawyer may see his client after the suspect's personal interrogation. The lawyers are usually not allowed to see clients before the initial crucial interrogation except when invited
27. No, not usually. Most lawyers are left to interview suspects through the cell bars or in the very attentive presence of the Investigating Police Officers
28. No
29. Consultations are usually kept very brief

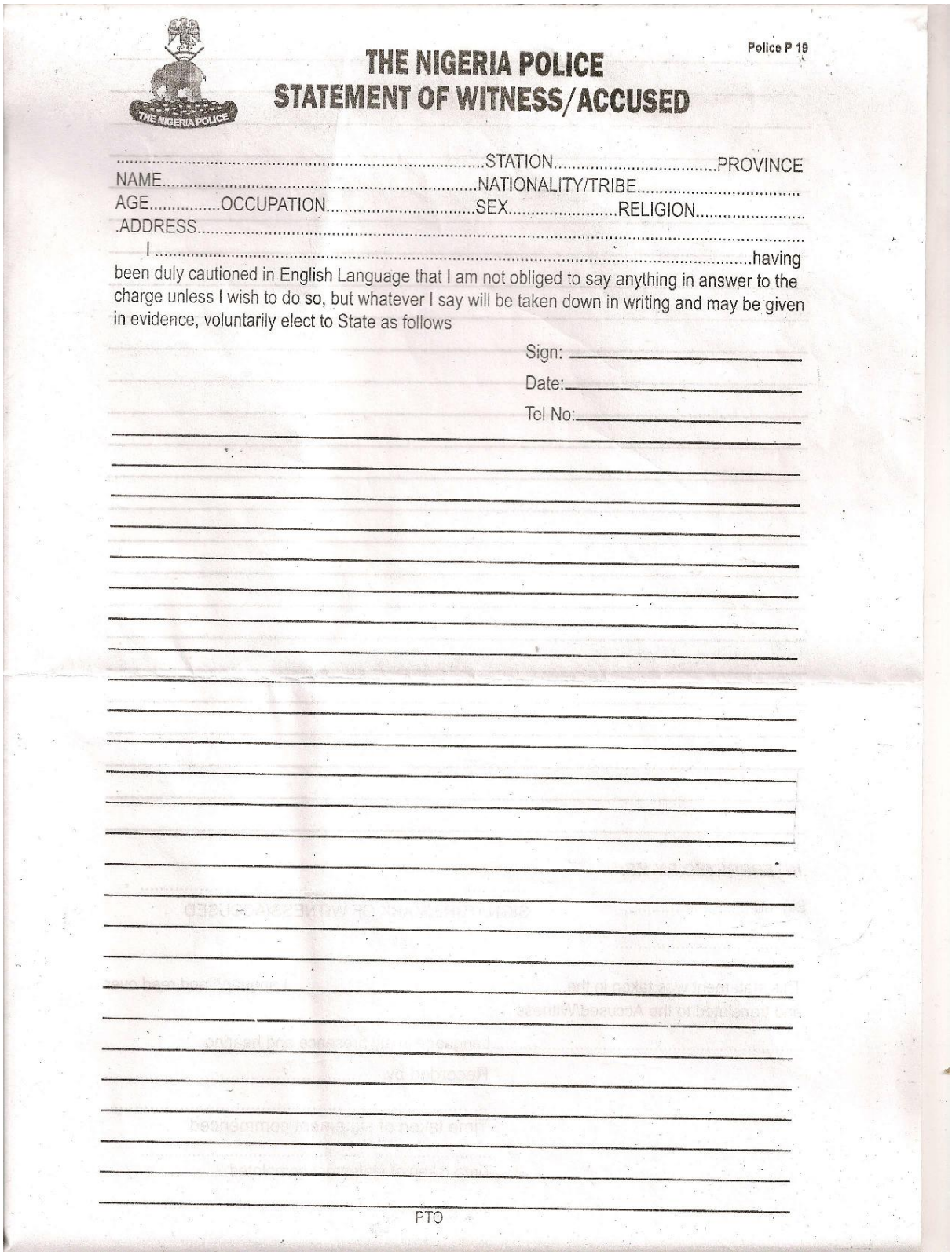
30. The Legal Aid Council has entered into a formal agreement with the police where suspects are to be informed of the ready services of the Council lawyers for free which is styled the "POLICE DUTY SOLICITOR SCHEME". Sometimes the suspect or other family members contact the Legal Aid Council offices for assistance
31. Some problems of effective legal assistance by the Legal Aid Council include but are not limited to:
    a. Slow judicial process
    b. Corruption
    c. Lack of adequate funding
    d. Fibbing clients
    e. Uncooperative police officers
32. The most problematic area of the pre-trial process and the criminal justice system involves cases where the first court of arraignment is the Magistrates courts which have no jurisdiction to entertain certain suits charged before it but is absurdly armed with the authority to remand in the same cases!

    I proffer the solution that matters that cannot be ordinarily entertained at the Magistrates courts should be filed directly to the High courts that are vested with the jurisdiction to try such matters!

APPENDIX 5

NIGERIA POLICE FORCE FORM P19: STATEMENT FORM

SAMPLE A



Police P 19

THE NIGERIA POLICE
STATEMENT OF WITNESS/ACCUSED

.....STATION.....PROVINCE

NAME.....NATIONALITY/TRIBE.....

AGE.....OCCUPATION.....SEX.....RELIGION.....

.ADDRESS.....

I .....having been duly cautioned in English Language that I am not obliged to say anything in answer to the charge unless I wish to do so, but whatever I say will be taken down in writing and may be given in evidence, voluntarily elect to State as follows

Sign: _____

Date: _____

Tel No: _____

PTO

INTERPRETED BY ME:

Signed:.....

.....

.....

SIGNATURE/MARK OF WITNESS/ACCUSED

This statement was taken in the.....Language and read over and translated to the Accused/Witness

.....Language in my presence and hearing

Recorded by.....

.....

Time taken of statement commenced

.....

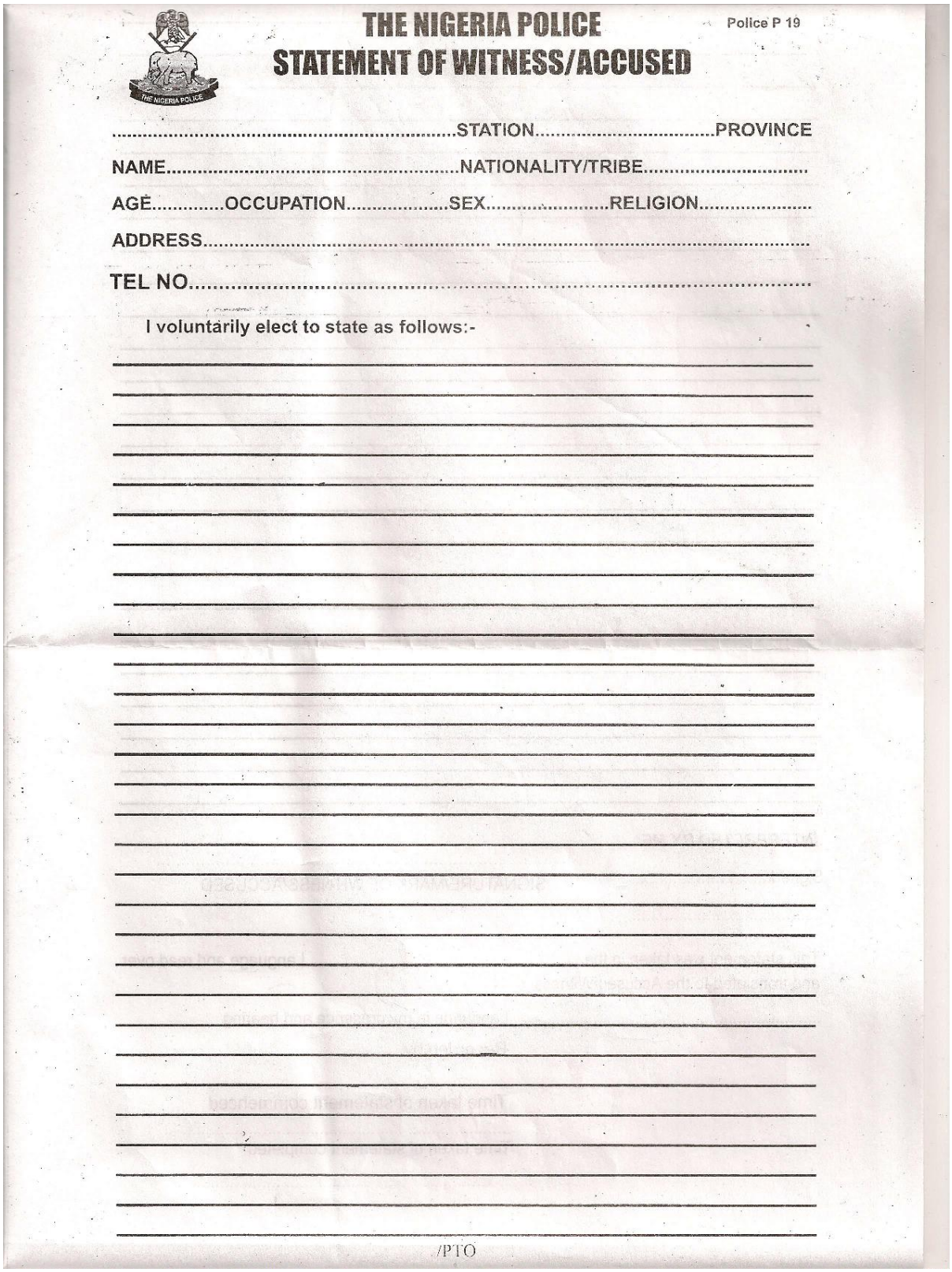
Time taken of statement completed

.....

APPENDIX 6

NIGERIA POLICE FORCE FORM P19: STATEMENT FORM

SAMPLE B



THE NIGERIA POLICE

Police P 19

STATEMENT OF WITNESS/ACCUSED

.....STATION.....PROVINCE

NAME.....NATIONALITY/TRIBE.....

AGE.....OCCUPATION.....SEX.....RELIGION.....

ADDRESS.....

TEL NO.....

I voluntarily elect to state as follows:-

/PTO

INTERPRETED BY ME:

Signed:.....

.....

.....

SIGNATURE/MARK OF WITNESS/ACCUSED

This statement was taken in the.....Language and read over and translated to the Accused/Witness

.....Language in my presence and hearing

Recorded by.....

.....

Time taken of statement commenced

.....

Time taken of statement completed

.....

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