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### Legal Issues in Remand Proceedings under the Administration of Criminal Justice in Nigeria

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#### Abstract

*The Administration of Criminal Justice Laws in Nigeria that replaced the Criminal Procedure Code and the Criminal Procedure Act has brought "Remand Proceeding" as part of her innovation. This however appears in all regard as legislating and legalising the condemned "Holding Charge". This innovative provision was greeted with heated disdain, disapproval and unwelcome criticism. It is seen as unconstitutional and contrary to the policy of criminal litigation procedure. It was held to have usurp the right to personal liberty, dignity and fair hearing of an accused defendant whose remand order will be handed down based on an ex-parte application. This discourse investigates these assertions based on the principles and laws governing criminal litigation in Nigeria. The objective is to determine the significance and validity of the Remand Proceeding and its constitutionality. This piece finds that, the provisions dealing with remand proceedings are complementary to the constitution and serves the need of criminal litigation to curb the excesses of the prosecuting authorities. The significance therefore outweighs the perceived disadvantages of the procedure.*

Key words: Remand, Proceedings, Administration, Criminal Justice

## 1. Introduction

The principal law that regulates the procedure of criminal cases in the High Courts inclusive of lower courts known as the Area Court and Magistrate court, is the Administration of Criminal Justice Act (ACJA) for the Federal Capital and Federal High Courts and Administration of Criminal Justice Law (ACJL) of various states.<sup>1</sup> Historically, the pioneer criminal procedural law in Nigeria is the Criminal Procedure Ordinance of 1945,<sup>2</sup> an enactment of the colonialist that governs Criminal Procedure in the whole area now known as Nigeria.<sup>3</sup> After some decades however, it was perceived that there was a need for review, especially with the peculiar complications discovered in the northern region of the country and the discovery of the heterogeneous nature of the Nigerian society. The Criminal Code Ordinance was reviewed and two distinct Laws were birthed at the eve of independence in Nigeria. These are: the Criminal Procedure Act (CPA) of 1958<sup>4</sup> enacted in place of the Criminal Code Ordinance and the Criminal Procedure Code (CPC) made for the northern region of Nigeria in 1960.<sup>5</sup>

These two laws remain principally the laws governing the Criminal Procedures in the Nigerian Courts. Each state of the federation adopted and passed into law a replica of either law as a state law depending on the region of such state. Kwara State for example, being part of the northern region enacted Criminal Procedure Code Law of Kwara State.<sup>6</sup> The laws continue to be in operation for decades in the states and the Federal Capital territory until

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<sup>1</sup>Eyisi & Ors. V. State (2019) LPELR-1186 (SC); Wagbatsoma V. F.R.N. (2018) LPELR-4364 (CA); Ogbara V. The State (2019) LPELR-48982 (CA); Walter V. The State (2019) LPELR-49065 (CA) and Ibrahim V. The State (2021) LPELR-55743 (CA)

<sup>2</sup>Criminal Procedure Ordinance No. 42 of 1945

<sup>3</sup>Hambali YDU, *Practice and Procedure of Criminal Litigation in Nigeria* (Feat Print and Publish Ltd. Lagos, 2012) 4

<sup>4</sup>Criminal Procedure Act, Cap. 43 Laws of Federation Nigeria 1958 (later in Cap. C 41 LFN 2004)

<sup>5</sup>Criminal Procedure Code, Cap. 30 Laws of Northern Nigeria 1963 (later in Cap. C42 LFN 2004)

<sup>6</sup>The last edition of the law is contained in Chapter C23, Laws of Kwara State 2006

recently when the Administration of Criminal Justice Act<sup>7</sup> was enacted by the National Assembly which is now being adopted by states through their state legislation. Kwara State is not an exception in this regard.<sup>8</sup>

One of the principal innovations of this ACJA is Remand Proceedings contained in Sections 293 and 294 of the law. Remand proceedings is a procedure of bringing suspect before a court of Law that does not have jurisdiction, usually the magistrate court. The suspect is brought upon a criminal charge accompanied with an *ex-parte* Application requesting for the remand of the defendant, pending the time a formal charge is filed at the appropriate court that has jurisdiction to try the defendant. The court is empowered to remand the defendant after being satisfied with the reasons verified on oath as the probable cause for requesting for the remand.<sup>9</sup>

Before the enactment of the ACJA and ACJL, what is now known as ‘remand proceeding’ was equally obtainable in the lower court as a practice referred to as holding charge. Although, holding charge was described by various judicial decisions as unlawful and unconstitutional, our legislators have found the practice worthy in our criminal judicial system for some overwhelming reasons. Just as the practice of holding charge received criticism before it was finally declared unlawful by the court, the legislation of Remand Proceeding in the Criminal justice laws was also welcomed with great criticism.

This piece examines the legal issues embedded in this remand proceedings. This is done by juxtaposing the provisions with the constitutional requirements, the existing practice and the reality presented by the situation in order to determine the propriety or otherwise of the proceeding. This paper is divided into five parts. Apart from this introductory section, the background to the introduction of remand proceeding is discussed in the next section

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<sup>7</sup>The Act became Law of the 13<sup>th</sup> day of May, 2015. Although, Lagos state had taken the lead by the enactment of the Administration of Criminal Justice (Repeal and Re-enacted) Law of 2011 which starts operation since 8<sup>th</sup> of August, 2011. See Hambali Y.D.U *Practice and Procedure of Criminal Litigation in Nigeria* (Feat Print and Publish Limited, Lagos, 2012) 4-6

<sup>8</sup>The Administration of Criminal Justice Law of Kwara State is contained in Law No. 18 of 2018 Kwara State Laws.

<sup>9</sup>Y Akinseye-George, “Summary of Some of the Innovative Provisions of the Administration of Criminal Justice Act (ACJA) 2015 <<http://www.censolegs.org/publications/6.pdf>> 13-14 accessed 24 January 2023

followed by the exposition of what remand proceedings is and its constitutionality in the third and fourth section. Consideration is given to the nature of ex-parte application of the remand proceedings vis-à-vis fair hearing principles in this section alongside issues of bail in remand proceedings before concluding the piece in the last part.

## **2. Background to the enactment of Remand Proceeding**

Every Nigerian citizen has the right of personal liberty as guaranteed by the Constitution<sup>10</sup>. One of the ways in which the right is limited by the Constitution is for the purpose of arresting a person upon an order of court or upon reasonable suspicion that such person has committed an offence.<sup>11</sup> This is to prevent further commission of offence and to bring such individual to court for proper trial. To further protect the arrested individuals from arbitral detention by the law enforcement agencies, the constitution further clarifies that, anyone arrested must be taken to court of competent jurisdiction within reasonable time. Reasonable time in this wise means; a period of one day (i.e. 24hours) where there is a court of competent jurisdiction within fortykilometre radius from the place of arrest or detention, or a period of two days (i.e. 48 hours) or such longer time as the circumstances may determine where there is no court within forty kilometre radius from the place of arrest or detention or in any other case.<sup>12</sup> This however does not apply to a person who is alleged or suspected reasonably of having committed a capital offence.<sup>13</sup>

The above represent Legislative timeline laid down for an arrested individual to be brought before the court. Although, this appear to be reasonable and straightforward, complying with these constitutional guidelines sometimes present some difficulties depending on the circumstances of each case as seen from the practice of the law enforcement agencies. In deserving cases, nailing the suspect to the offence at the earliest time of arrest may be difficult. Investigation may sometimes take longer period than expected. It may be difficult in

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<sup>10</sup>1999 Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 35(1)

<sup>11</sup>1999 Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 35(1)(c)

<sup>12</sup>1999 Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 35(4) & (5)

<sup>13</sup>1999 Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 35(7)

some circumstances to release the suspect during investigation for several reasons; there may be likelihood of interfering with investigation, plotting cover-ups by the suspect who is already aware that investigation is ongoing about him, or even committing further or similar offences. Suspect in other cases may also flee from justice knowing the consequence of their action and the likelihood that the law enforcement agency will eventually discover the truth through the investigation. The law enforcement agency especially the police in deserving circumstances also need to obtain legal advice from the Director of Public Prosecution (DPP) before filing a Charge at the appropriate court after complying with the Procedure laid down by law.<sup>14</sup>

All these take time before it materialise. Apart from the enormous work embedded in intelligence, investigation and arrest of suspect, the issue of lack of or minimal man power also plays a diminishing role in achieving the task in good time. Bureaucracy is another factor that contribute to the tardy productivity in the justice sector from the wing of investigators and prosecutors. The investigators cum prosecutors are largely between the devil of nailing the suspect and the deep blue sea of not breaching his fundamental right to personal liberty as enshrined in the constitution.

To wriggle out of the quagmire however, police and other law enforcement agency usually arraign such suspect before a Magistrate Court alleging offences the magistrate does not have requisite jurisdiction to try. The magistrate in such circumstance will only take cognisance of the offence without taking the plea of the accused defendant and remand him in prison custody (now Correctional Centre)<sup>15</sup> pending the time the DPP Legal Advice will be out and the accused defendant is charged before the appropriate court for trial. This procedure is commonly referred to as 'Holding Charge'. Adefope-Okojie, (JCA) describe holding charge

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<sup>14</sup>I. Olubiyi & H. Okoeguale, "The Nigerian Criminal Justice System: Prospects and Challenges of the Administration of Criminal Justice Act, 2015" (2016) *African Journal of Criminal Law and Jurisprudence* available at <<https://www.researchgate.net/publication/317901881>> accessed 24 January, 2023.

<sup>15</sup> This was marked by the repeal of the Prison Act Cap. P 29 LFN 2004 with the Nigerian Correctional Service Act, 2019 accented to by President Muhammadu Buhari on the 14<sup>th</sup> August, 2019. See <https://www.premiumtimesng.com/news/headlines/346738-eleven-years-after-presentation-buhari-signs-bill-to-reform-nigerias-prisons.html>; <https://punchng.com/buhari-changes-nigeria-prisons-to-correctional-service/> accessed last on 24 January 2023

as a situation where a charge for a serious offence is brought by the Police or other law enforcement officer against an accused person before an inferior Court that lacks the jurisdiction to try the offence charged, pending the arraignment before the Court seised with jurisdiction to try the offence.<sup>16</sup>

The procedure of holding charge became so popular that, hardly will any charge be filed in the High Court without first taking the accused defendant to a Magistrate Court and remanded on Holding Charge. It continue to rein up till 1993 when the procedure was challenged in *alocus classicus*<sup>17</sup> where the court later declared the procedure as unknown to the Nigerian legal system and unconstitutional. Since the decision in the above mentioned case, more challenge then came the way of Holding Charge and the attitude of Court did not change in declaring same as unconstitutional. In one of the cases, the court held that holding Charge is unknown to Nigerian Law and the accused detained thereunder is entitled to be released on bail within reasonable time before trial.<sup>18</sup>

One would and should indeed wonder, why the lower courts were persistent in the practice of holding charge despite the declaration of the superior court as being an aberration, unconstitutional procedure, dehumanizing act, abuse of defendants right to personal liberty and unknown to Nigerian Law, for a period of almost three decades. A clear study of case law on holding Charge shows that the procedure had first been declared unconstitutional since 1993, in the *locus classicus* case of Enwere's case. Other decisions condemning the practice did not however seize to unfold up till 2021. Several reasons may account for the above. Apart from the fact that the route to obtaining appellate decision on any challenging issue arising from the decision of inferior court is a little bit far and time consuming; the appeal has to go to the High Court before the Court of Appeal and then Supreme Court in deserving circumstance; bureaucracy from the three angular criminal justice sector which are: the court,

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<sup>16</sup>Charles v. Commissioner of Police Abia State (2021) LPELR-56547 (CA) p. 8 para. B-E

<sup>17</sup>Enwere v. C.O.P. (1993) 6 NWLR (Pt. 229) 333

<sup>18</sup>JIMOH V COMMISSIONER OF POLICE (2004) LPELR-11262(CA) 9-10

the prosecution and the defendant or his counsel are also chief determinant of the time lag on issues of this nature.

As if the superior court's decisions do not reach the inferior courts, magistrates in the northern part of Nigeria ways rely on their power to take cognisance of offences under the Criminal Procedure Code applicable in their courts to effect holding charge. By this, the First Information Report is read and explained to the accused defendant. The defendant will not however be allowed to make plea on the ground that the court does not have jurisdiction to try the offences alleged, but can only take cognisance. The resultant effect is for such court to remand such accused defendant in prison custody. There is always the argument whether the court that does not have jurisdiction to try an offence has jurisdiction to grant bail in respect of that offence. *A fortiori*, should a court that has power to take cognisance of offence it has no jurisdiction to try not have similar jurisdiction in granting bail pending trial

In the southern part of Nigeria however, the Criminal Procedure Act has provision allowing the magistrate to remand an accused defendant for offences it has no jurisdiction to try pending the proper issuance of Director of Public Prosecution's Advice and arraignment at the appropriate court where the defendant is adjudged to have a case to answer. These continue to be in operation and practice until the introduction and enactment of the Administration of Criminal Justice Law/Act. The law practically enacts the holding Charge practice and renamed it "Remand Proceeding". The provision is contained in Section 264 of the ACJL of Lagos State 2015, Section 293 to 299 of the ACJA 2015 and Section 299 to 305 of ACJL of Kwara State 2018 among others. While the Lagos law adopt albeit the previous provision of the Criminal Law of Lagos on the issue, the ACJA introduced a similar provision with different approach which is what was adopted in some of the state's law including Kwara State. For the purpose of this piece, the provision of the ACJA shall be considered as regards holding charge in the following sections.

### **3. Remand Proceeding, Timeline and Effect of Non-Compliance**

Remand simply means ‘the act or an instance of sending something (such as a case, claim or person) back for further action’, an order remanding a case, claim or person. It is ‘to recommit (an accused person) to custody after a preliminary examination.’<sup>19</sup> On yet another wicket, remand *means to send to prison or send back to prison from a court of law to be tried later after further inquiries have been made, often in the phrase ‘remanded in custody’.* It also means to recommit on trial accused to custody after a preliminary examination.<sup>20</sup>

Proceeding on the other hand *has been defined as meaning the regular and orderly progression of a suit, including all acts events between the time of commencement and the entry of judgment. The word is usually used to express the business done in courts. In its general sense, proceeding includes all the steps taken in the prosecution or defence of a case, cause or matter including pleadings and entry or delivery of judgment.*<sup>21</sup>

Going by the definition of the word proceeding above and for the purpose of this piece, proceeding can be defined as that business of the court wherein the procedure to keep the defendant in custody (remand the defendant) outside the constitutionally prescribed time has lapse is being carried out.

### **Application for remand**

In a situation where the Attorney General (AG) or Director of Public Prosecutions (DPP) Legal Advice is required before a suspect is formally arraigned before an appropriate court and there is fear that such suspect could not be released on bail by the police or any other prosecuting authority pending that decision, an application can be made before a Magistrate Court, that has no jurisdiction to try the case, for remand of the defendant pending the receipt of the Legal Advice and the proper arraignment of the defendant before the appropriate

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<sup>19</sup>Blacks Law Dictionary p. 1406; 1407

<sup>20</sup>Lufadeju & Anor. v. Johnson (2007) LPELR-1795(SC) pp. 28-29 paras E-B

<sup>21</sup>Audu v. AGF & Anor (2010) LPELR-4867(CA)



court.<sup>22</sup>An application in this regard must be made ex-parte in the prescribed Form 8 known as ‘Report and Request for Remand Form’<sup>23</sup>in the First Schedule to the law and must be verified on oath, state the reason for the arrest and reasons for the request for the remand.

A Court before whom a Remand Proceeding is filed may grant the remand of the defendant if satisfied that there is probable cause to remand the defendant pending the receipt of the Legal Advice from the Attorney General or proper arraignment of the defendant in a court of competent jurisdiction. Probable cause in this sense includes the consideration of the nature and seriousness of the alleged offences, reasonable grounds for believing that the suspect may abscond or commit further offences where he is not committed to custody, including any other circumstances of the case that justifies the request for remand.<sup>24</sup>

It is instructive to quickly note that, the above suggests that the grant of remand of the defendant under this heading is not a matter of course, the prosecuting authority must prove and satisfied the court of the above element to be entitled to the favourable discretion of the court. The repeated use of the word ‘may’ in the sections had in the first instance indicated that the matter is placed under the courts discretion. This is further fortified with the accompanied requirement to be placed before the court to be entitled to the grant of same.It has been held that the word ‘may’ is said to be a permissive or enabling expression.<sup>25</sup>

This position is adopted in respect of this section because, an examination of the whole section had depicted a scenario of permissibility for the court in granting the application for remand proceeding provided ‘probable course’ is shown. The failure of the court to also grant such application by the provision of the law may not be objectionable in view of the fact that

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<sup>22</sup>ACJA; 299 ACJL Kwara State, Section 293

<sup>23</sup>The ‘Report and Request for Remand Form’ is contained in Appendix D of ACJL Kwara State

<sup>24</sup>ACJA 2015; 300(2) ACJL Kwara State, Section 294(2)

<sup>25</sup>Alonzie V. The State (2021) LPELR-56091 (CA) 31 @ para D-F

the law neither impose obligation nor does it provide any legal damnation for failure to comply with same.<sup>26</sup>

Flowing from all the above, it becomes imperative for the court to be guided by the best practice in the administration of justice of exercising the discretion judicially and judiciously, according to the applicable laws and depending on the facts and circumstances placed before the court. The strict application of the principle of *stare decisis* therefore is strictly of minimal relevance. This the court had given judicial blessing to. See for example the dictum of Per Mustapha JCA in *CLEARANCE V. F.R.N.*<sup>27</sup>

Apart from the discretionary jurisdiction placed on the court in remand proceedings, the ACJL in some jurisdiction has also clearly prohibit the court from granting the remand of a defendant where it is clear to the court from evidence that the original case file has not been transmitted to the Attorney General for Legal Advice.<sup>28</sup> It is of note in this regard that, one of the issues that ought to be placed on oath while requesting remand of a defendant in remand proceeding is the fact that the original case file has been transmitted to the Attorney General to satisfy the court of such element.

### **Remand Timeline and Effect of Non-Compliance**

Section 296 deals with the time and protocols for remand proceeding. The section allows the court before whom remand proceeding is instituted, who is disposed of granting same after being satisfied that probable cause had been shown, to grant an order remanding the defendant for a period of not exceeding 14 days and make the case returnable within the period.<sup>29</sup> This in essence, is to allow the prosecution and the investigating authority to utilise the period to conclude investigation, obtain Legal Advice and arraign the defendant in the appropriate court that has requisite jurisdiction over the alleged offences. Where however these tasks were not

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<sup>26</sup>See the dictum of Katibi-Whyte JSC (as he then was) on the effect of “may” in a statute in *Adesola V Abidoye* (1999) 14 NWLR (Pt. 637) 28 at page 56 Paragraph C-E,

<sup>27</sup>*Clearance V. FRN* (2021) LPELR-54689 (CA) 7-8 para E - A

<sup>28</sup>ACJL Kwara State, See proviso to Section 299

<sup>29</sup>ACJL Kwara State, Section 302(1),(provides 21 days as against 14 days in the Act).

completed within the 14 days granted, an application in writing must be placed before the court to show good cause why an extension should be granted. If the court is satisfied with the written application and the good course presented, an extension of a period not exceeding 14 days may be granted and the case shall again be made returnable within the period.<sup>30</sup>

At the expiration of the second 14 days granted by the court or as the case may be, if the necessary has not been done in respect of the defendant, the court is empowered to take the option of either granting the defendant bail complying with the provisions of section 158-188 of the law on application of the defendant or issue hearing notices to the authorities concerned with the case to inquire as to the situation of the case and show course why the defendant should not be discharged unconditionally.<sup>31</sup> The case is then adjourned for another period not exceeding 14 day and the case is made returnable within the same period. It is instructive to mention that the authorities referred to in the Act are: the Inspectors General of Police, The Attorney General of the Federation, The Commissioner of Police of a State or the Federal Capital Territory and any other relevant authority having the custody of the defendant or in whose instance the defendant is remanded in custody.

The service of hearing notice on these authorities shall clearly imposed on them certain duty to be discharged at the return of the case in the court. Where this duty is discharged by showing good course for the delay and laxity in arraigning the defendant in the appropriate court and the court is satisfied, the case may be adjourned for the final period of not more than 14 days for the law to be complied with within the period.<sup>32</sup>In any event of failure to satisfy the court of the good course why continue detention of the defendant is justifiable, or at the expiration of the final period of 14 days without reasonable action been taken, the court shall with or without an application discharge the defendant unconditionally and be immediately

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<sup>30</sup>ACJL Kwara State, Section 302(2)

<sup>31</sup>ACJL Kwara State, Section 302(3&4) did not make the two action optional. Rather, the court is given discretion to grant bail pursuant to Section 165-195 of the law and also issue hearing notice to the commissioner of police, the Attorney General or any other authority in whose custody or at whose instance the defendant was brought to court.

<sup>32</sup>ACJL Kwara State, Section 302(5).

released from custody. In this instance, no further application as regard the remand of the defendant before arraignment shall be entertained by the court.<sup>33</sup>

Having highlighted the above, it is important to reiterate at this juncture that, the power conferred on the court under this proceeding can be exercised whether or not the defendant is present in court.<sup>34</sup> The court in this circumstance has power to order that the defendant who has been committed to custody be brought before the court during the proceeding.<sup>35</sup> The court may commit such defendant to prison (now Correctional Centre) or other safe custody. The defendant may also be ordered to be taken to hospital, Asylum or any other suitable place if the defendant needs medical attention.<sup>36</sup> Again, the power of the court can be exercised whether of its own motion or on application of another party as provided by the law including the authority in whose custody the defendant is remanded.<sup>37</sup> Where Legal Advice is issued, it must in all circumstances be served on the court who must act on it and make appropriate order.<sup>38</sup> The court shall immediately discharge the defendant in the circumstance that the Legal Advice absorbed the defendant of any case to answer.<sup>39</sup>

#### **4. Constitutionality of Remand Proceeding**

Several issues were raised on the constitutionality *velnon* of the remand proceeding. It was said from one angle that, it trample upon the right of personal liberty guaranteed by the constitution, having regard to the fact that no trial will be conducted before the defendant is put in custody. From another wicket, it was argued that because the proceeding is made *ex-parte*, the right of fair hearing guaranteed by the constitution has been derogated. This is more so when opposing counsel cannot be heard in an *ex-parte* application which will in the circumstances includes not hearing the defendant counsel on bail. Part of the arguments

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<sup>33</sup>ACJL Kwara State, Section 302(6&7). The Kwara state law omit the word ‘unconditionally’ as regard the release of the defendant in the event of failure of the Commissioner of Police and or the Attorney General to show course as required by the section.

<sup>34</sup>ACJA; 303(1)(a) ACJL Kwara State, Section 297(1)(a).

<sup>35</sup>ACJA; 304(1) ACJL Kwara State, Section 298 (1).

<sup>36</sup>ACJA; 304(2) & 305 ACJL Kwara State, Section 298(2) & 299.

<sup>37</sup>ACJA 303(1)(b) ACJL Kwara State, Section 297(1)(b).

<sup>38</sup>ACJA; 303(2) ACJL Kwara State, Section 297(2).

<sup>39</sup>ACJA; 303(3) ACJL Kwara State, Section 297(3)

includes that, remand proceeding is a legislation that seek to protect the illegality of the prosecuting and investigating authority to perpetually detain a suspect without trial which is said to be contrary to the constitution and public policy. The above argument is not only found in the media space both print and online, they are also made sometimes in the court even though it has not receive any judicial blessing.

Examining all the above criticism, one would on the face value nearly agree on the unconstitutionality of the remand proceeding as argued. However, a critical look at the constitutional provisions in this regard will definitely urge a second thought. Apart from the fact that the constitution has laid down certain procedures which are more favourable to remand proceeding considering the manner and the length of time involved, the groundnum was also categorical in spelling out certain exceptions while granting each constitutional right. Again, the principle guiding *ex-parte* applications are considered not antithetical to fair hearing. This is because, *ex-parte* applications are only considered in certain exceptional circumstances as determined by the law. These are explicated anon.

### **Remand Proceeding as an Exception to Right to Personal Liberty**

There is no denying the fact that the Constitution by Section 35 guaranteed individual personal right to liberty. This provision however admits certain exceptions thereunder in accordance with a procedure permitted by law. One the of the exception that relates to this discourse is, when a person is suspected to have committed an offence and machinery is put in place to bring him before a court pursuant it's order.<sup>40</sup>

Further provision of the law permit the arrested fellow to be taken to court within a reasonable time.<sup>41</sup> Reasonable time in this circumstance mean one day where there is a court within forty kilometers radius from the place of arrest; two days or such longer period as may be considered reasonable by the court, if there is no court of competent jurisdiction within

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<sup>40</sup>1999 Constitution (as amended), Section 35(1)( c).

<sup>41</sup>1999 Constitution (as amended), Section 35(4); Danfulani V. EFCC & Ors (2015) LPELR-25599 (CA).

forty kilometers radius.<sup>42</sup> Where such defendant is then not tried after a period of two month having being in custody, he shall (without prejudice to further proceedings) be released unconditionally or upon such conditions as reasonable to enable him appear for his trial at a later date.<sup>43</sup> It is therefore clear that the time lag within which a defendant is permitted to remain in custody is logically stated in section 35 of the Constitution.

It is submitted that, considering the above provisions side by side with remand proceedings, a definite conclusion is made that the Administration of Criminal Justice Act/Law has cleverly introduced more stringent procedure to be followed while complying with the above stated constitutional provision. Therefore, remand proceedings rather than trampled upon the right of personal liberty, has complement the exception created thereof. This conclusion is more reasonable due to the fact that, the procedures introduced by the ACJA/ACJL for obtaining remand order creates more duty and burden for the prosecution to comply with, as granting same is not as a matter of course. What is more, the timeline is limited to 14 days, although renewable considering the circumstances as discussed hereinbefore. The above conclusion also find support in the decision of the court that that sanctioned the granting of the order of remand by magistrate court pending investigation.<sup>44</sup>

One may be tempted to be swayed by the contention that the court granting remand does not have jurisdiction over the case, it is instructive to note however that, the jurisdiction of the lower court to take cognisance of cases it has no jurisdiction to try is no more in the realm of contention. The superior court have settled that the fact that a court does not have jurisdiction to try a matter does not derogate its power to take cognisance and order remand of Defendant brought before the court. On a final note, the provision of ACJA/ACJL has also categorically

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<sup>42</sup>1999 Constitution (as amended), Section 35(5).

<sup>43</sup>1999 Constitution (as amended), Section 35(4)( a & b); *Amodu V. C.O.P. Lagos State & Anor* (2014) LPELR-23087 (CA)

<sup>44</sup> *EFCC Chairman V. Osunde* (2022) LPELR-57259 (CA); *Obla V. EFCC* (2017) LPELR-45340 (CA) 16

spell out and gave the court power and jurisdiction to order remand in the circumstances mentioned in the law.<sup>45</sup>

### **Ex-Parte Application vis-à-vis fair hearing in Remand Proceeding.**

Fair hearing is one of the cardinal principle upon which justice of a case stands. Any decision that betrays the doctrine will not and does not stand. Fair hearing is like a blood to the body of a trial just as jurisdiction is a soul to the same body. With the absence of both, the body cannot survive. The failure of fair hearing is also a failure of jurisdiction and the decision derived from such proceeding is a nullity. Fair hearing is mounted upon two pillars, which are: *Audi Alteram Partem*<sup>46</sup> and *Nemo judex in causa sua*.<sup>47</sup> Fair hearing in all senses has been interpreted to mean fair trial<sup>48</sup> and the commencement of trial in criminal cases is held to commence from reading the charge and taking plea of the accused defendant.<sup>49</sup> Superior court cases are bound on issue of fair hearing which coincides with the failure of either of the two pillars of fair hearing in a trial or both.<sup>50</sup>

Ex-parte applications on the other hand are mini or summary interlocutory proceedings. A proceeding where only the party that instituted the proceeding is heard in court, for certain purpose or circumstance indicated in the application. Such circumstance shall be considered by the court before the grant of same. In **Frank Amah & ORS V. EFCC**<sup>51</sup> the description of *ex-parte* was given as "*...a motion made to the Court by one party to a lawsuit without prior*

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<sup>45</sup>*Ibid*

<sup>46</sup>In *Audu V. FRN* (2013) LPELR-1987 (SC), Rhodes-Vivour JSC (as he then was) gives the definition as follows: "Audi alteram partem means hear the other side. It is a maxim denoting basic fairness and a canon of natural justice. A judge must at all times allow both parties to be heard and should listen to the point of view or the case of each. See *ACB PLC v. Losada (Nig) Ltd* 1995 7 NWLR Pt.405 p.26 *Nwaubani v. Golden Guinea Breweries PLC* 1995 6 NWLR pt.400 p.184 *Effiom v. State* 1995 1 NWLR Pt.373 p.507 *Funduk Eng. Ltd v. Mc Arthur* 1995 4 NWLR Pt.392 p.640."

<sup>47</sup>Meaning: a person should not be a judge in his own case. See *Yanowo V. The State* (2021) LPELR-56441 (CA) where a Director of Public Prosecution (DPP) who initiated a Criminal prosecution but later became a judge was held to be occupying a position of a judge and prosecutor at the same time in the case which is in breach of the fair hearing principle.

<sup>48</sup>*Akinlade V. The State* (2022) LPELR-57003 (SC) 20-21; *Ogunssnya V. State* (2011) LPELR-2349 (SC) 44; *Ogboh & Anor V. FRN* (2002) LPELR-2285 (SC) 2-3; *Effiom V State* (1995) LPELR-1026 (SC) 81; *Asikipiti V. The State* (1993) LPELR-572 (SC) 8; *Josiah V. State* (1985) LPELR-1635 (SC) 28; *Mohammed V. Kano N.A.* (1968) LPELR-25487 (SC) 2-3

<sup>49</sup>*Bello & Anor V. State* (2015) LPELR-40411 (CA)

<sup>50</sup>*Akinlade V. The State* (2022) LPELR-57003 (SC) 20-21; *Eye V. FRN* (2018) LPELR-43599 (SC) 28-30; *Okanlawon V. State* (2018) LPELR-24838 (SC) 52-53; *Eze V. FRN* (2017) LPELR-42097 (SC) 17-18; *Audu V. FRN* (2013) LPELR-1989 (SC) 12-13; *Ude V. The State* (2012) LPELR-14193 (CA) 15-16

<sup>51</sup>*Frank Amah & ORS V. EFCC* (2019) LPELR-47312 (CA) 27

*notice to any other party. By its inherent character and disposition therefore, ex-parte is one side only; done by, for, or on the application of one party alone."*

The rationale for the ex-parte application is the preservation and protection of certain irreparable injury or damage to the right of the party approaching the court and the urgency required to protect such infraction considering the special circumstance of the case. Karibi-Whyte JSC (as he then was) while explaining the rationale for *ex-parte* held that “...in the absence of a real urgency, the rationale for an ex part application cannot be justified.”<sup>52</sup>

Juxtaposing the above principles, it is clear that, by the nature of ex-parte, an exception is created for the rule of fair hearing in certain circumstances as may be provided by the law. If the antecedent of remand proceedings is critically examined from the perspective of the period the practice started in Nigeria and described as holding Charge, before it was finally declared unconstitutional, it is beyond peradventure that the legislature see the need to incorporate the practice into our laws and clothe it with legality. Hence, the enactment of the ACJA/ACJL introducing Remand Proceeding. The enactment having resides within the corpus of procedural law on criminal adjudication without conflict with the constitution, has remained binding and unassailable.

Can the procedure of remand proceeding be described as unfair or one sided because it is made ex-parte? The answer to this is discernible from the conditions and the hurdle the prosecution must cross prior to presenting such proceeding before the court. What is more, the court is empowered not to grant the proceedings except the laws on it is complied with *stricto sensu*. Since the outcome of the *ex-parte* gives only an interim order of remand, couple with the fact that the period of remand does not exceed the maximum period allowed by the constitution, the grant of same cannot be held to have breached the fair hearing principle in the circumstance.

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<sup>52</sup>Kotoye & Ors V CBN (1989) LPELR-1707 (SC) @ 84



Another fact which must be clearly stated is that, remand proceedings is not part of a trial or hearing that the principle of fair trial or hearing applies. Trial commences with taking of plea in criminal trial. Remand proceedings on the other hand is taking without the plea of the defendant. The nature of order granted by the court in this circumstance is rooted to the special jurisdiction to grant same by the ACJA/ACJL, a substantive law that is more superior to the procedural law.<sup>53</sup>

Part of the contention against the *ex-parte* procedure for remand proceeding is that, since the proceeding is done *ex-parte*, door is seen as being shut at the defendant counsel to present and argue bail on behalf of the accused defendant. As logical as this assertion may appear, it is a great disservice to the legislature for two reasons: the first is the failure to recognise how the *ex-parte* nature of the proceeding has been balanced by several conditions the applicant must comply with in remand proceedings,<sup>54</sup> the other is the deliberate disregard of the provision that allows court to consider bail during remand proceedings.<sup>55</sup> The above suggests that the grant of remand of an accused defendant is not as matter of course, in which, the court will grant at every pinch of opportunity the prosecution present same. Apart from the above, other opportunities are equally available to get the order reversed by the court at the least ineptitude of the prosecution towards the order.<sup>56</sup>

A further clog was insinuated from another random assertion that, since the court is empowered to consider bail during remand proceeding, the proceeding has been technically converted from *ex-parte* to 'on notice', having regard to the fact that remand proceeding and bail are mutually exclusive. This is further complemented by the argument that, since the

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<sup>53</sup>Dangabar V. FRN (2012) LPELR-19732 (CA)

<sup>54</sup>The conditions includes: giving satisfactory reason for the request for remand of the defendant in the "Report and Request for Remand Form" which is to be verified on oath, consequent upon the above, making sure that Legal Advice is issued and the defendant is charged appropriately or released where he has no case to answer; Failure of the above, a written application must be presented before the court to show good course before an extension of the remand order is granted and lastly, showing good cause by the Inspector General of Police or the Commissioner of Police as the case may be and the Attorney General whether of state or the federation upon service of hearing notice why the defendant should not be released.

<sup>55</sup>ACJA, Section 295 and 296(3).

<sup>56</sup>ACJA, section 296(2), (3) and (4). Similar provisions appears in section 302 (2)-(4) of ACJL Kwara State

defendant can argue in his bail as to several reasons and conditions that entitles him to bail, which may include in all circumstance rebutting all what the prosecution has presented to obtain remand of the defendant in the remand proceedings, the request for bail as supported by law in that circumstance is the only a chance given by the law to answer and reply the *ex-parte* request for the defendants' remand. The provisions dealing with the above two issues however depicted what is contrary to this assertion. This is because, the two proceedings are *sue generis*. The discretion granted therein are independent of each other. Although the consideration for the decision in either remand proceeding and bail may be interwoven, the law has clearly set out in different sections the manner and procedures in which each shall be dealt with without affecting the other.

It must however be pointed out that, the fact that remand proceeding is made *ex-parte* does not prevent the court from hearing and considering bail application from the defendant. It is suggested that, when application for remand is made before the court, the court should hear the application without giving audience to the defendant on the issue. It then behoves the court to tarry a while before delivering ruling on the remand until the bail application is argued separately by the defendant and responded to by the prosecution. The two proceedings should be conducted separately with its distinctive features and peculiarities. The court will not allow the defendant to dabble stylishly into arguing against the remand request while dealing with bail application. At the end, a composite ruling is then delivered capturing the reasoning of the court on the remand proceeding and bail application. This will allow the court the latitude to exercise its discretion with fairness and wider thought on the whole issue. Expectedly, where remand order is handed down, bail will be denied and same is done vice versa as the circumstance of the case may demand.

It is equally suggested that, after the remand order is granted for a period of 14 days as provided by the law, getting the order extended is not a matter of course by the court.<sup>57</sup> The prosecution is given the duty to file a written application showing cause why the period of remand should be extended. Written Application in this wise mean ‘motion on notice’. The defendant upon being served is therefore given opportunity to be part of the hearing for an extension of his remand order. This opportunity does not end there. There is further opportunity to re-apply for the bail of the defendant after the extension of the period of remand for the second time where the defendant is still in custody pursuant to the remand order. It is believed that, these opportunities are put in place to counter check the arbitrariness of the prosecution in abandoning the defendant in custody.

### **Conclusion.**

It will be safe to conclude that remand proceeding is a reincarnation of holding charge which enjoys the backing of section 293 and 294 of the Administration of Criminal Justice Act wherein an *ex-parte* application may be brought before a magistrate, who has no jurisdiction to try the alleged offence, for the continuous remand of the suspect pending the time the Attorney general’s advice will be out.

It is beyond peradventure that remand order is not given as a matter of course. This is as a result of the word “may” inserted in section of the law which denotes donation of discretion in the circumstance. Failure of the prosecution in many circumstances to comply with the law and the timeline may sway the courts discretion to refuse the remand order or terminate/reverse same where the circumstance of the case demand. For example, where the prosecution failed to send the original case file to the Attorney General’s office; failure to show probable cause or good cause on written application at the adjournment of the remand period and where the timeline for the remand order has been exhausted, the court is inclined towards quashing the remand proceedings. This, though is brought in different dimension

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<sup>57</sup>*Ibid*

under the ACJA/ACJL, same has been captured by section 35 of the Constitution. The law also prohibits remanding a suspect beyond the period of punishment of the offence alleged against him. It is therefore settled that remand proceedings only seek to complement the constitution in protecting the right of individuals and securing our society in a new dimension with corresponding obligations. The innovation is a welcomed development in the law as it will enhance sanity in the arbitral detention of defendant under the guise of police pending investigation that cannot now go beyond the timeline given for the remand proceeding in the law.

### **Comments and Response.**

**1. Please do a **thorough** grammar check and proofreading**

We have complied with this.

**2. The paragraphing requires review**

Although no specific paragraph was indicated as requiring review, we have done the review as required.

**3. You have examined remand proceedings but your paper has not succinctly addressed the solution to the problem of lower courts failing to abide with the laid down precedent that holding charge is unknown to law.**

This paper have not identify any problem that requires stipulating solution. Identifying a problem such as failing to abide by the lay down precedent of holding charge by lower court will require empirical research which is outside the scope of this paper

**4. You can consider reviewing the topic because the contents of the article reflect a review of the concept, practice and constitutionality of remand proceedings.**

We do not agree with this suggestion. The discussion in the paper was captured properly by the topic.

5. It appears the paper lacks examined literature on criminal law and procedure, please review authors' works in this area to further enrich your work.

We will appreciate if we are directed to any literature apart from those referenced here.