

INVESTIGATION AND PROSECUTION OF TERRORISM: THE HUMAN RIGHTS DIMENSION OF PRE-CHARGE DETENTION UNDER NIGERIAN LAW*

Abstract

The attacks against the United States of America (US) on 11 September 2011 paved the way for the enactment of counter-terrorism legislation across the globe. This tipped the balance towards national security concerns and human rights. Nigeria has shared in this global war by enacting the Terrorism Prevention (Amendment) Act 2013 (TPA). This legislation came into effect in the grip of strong emotions. Nigeria is currently experiencing terrorist attacks and has the potential to experience even more terrorist attacks due to its proximity to countries within the African Sub region that sponsor and harbor terrorist organizations. This study compares the investigation and prosecution of terrorism offences in the context of human rights protection in Nigeria and other democracies. It focuses on the arrest of individuals on suspicion of terrorism and the length of pre-charge detention under the TPA. It is discovered that the 90 days pre-charge detention period which is renewable for a similar period as stipulated under section 27 of the Act far exceeds that obtainable in other democratic jurisdictions. This study recommends further refinement of section 27 of the TPA to be in line with international best practices in upholding human rights.

Keywords: Terrorism, Investigation, Prosecution, Human rights, Arrest and Detention

1. Introduction

Nigeria is currently experiencing terrorist attacks and has the potential to experience even more terrorist attacks due to its proximity to countries within the African Regions that sponsor and harbor terrorist organizations.¹ By way of a response measure, Nigeria has specifically provided for the offence of terrorism by enacting the Terrorism Prevention (Amendment) Act 2013. This is owing to the heinous nature of the offence of terrorism and the devastating effect it has on the society at large. The question of how the Nigerian counter terrorism law contrasts with the law of other comparable democracies have a broad implication. Nigeria has enjoyed a relative stable democracy compared to some African countries, thus, its laws are emulated by other developing, under-developed and non- democratic states in the African sub-region. If Nigerian law is significantly more repressive than the law in other countries, some will use the disparity to question Nigeria's moral authority. Surely, emerging democracies like Nigeria should be setting a positive example, demonstrating to newly emerging democracies and non-democratic states that the best way to counter even the gravest threat from terrorism should be tackled without sacrificing our basic human rights and freedom. Often, in the investigation of terrorism in Nigeria, there have been arbitrary and unlawful deprivation of liberty, these detainees are frequently also deprived of access to both lawyers and their own families and subjected to torture and other forms of ill treatment.² The most common legitimate ground for deprivation of liberty is no doubt that a person is reasonably suspected of having committed an offence. However, such suspicion does not justify an indefinite detention. As such, liberty is the rule, to which detention must be the exception.³ The power of the state constitutes a major threat to human rights and therefore, legal protection of rights should be the focus of government and all concerned in the fight against terrorism.

It is therefore apt to examine some countries which have experienced incidences of terrorism like Nigeria, this is to enable us to understand their position on pre-trial detention as a learning post and to see if the current 90 days pre-trial detention under the Nigerian anti-terrorism law meets international best legal practices. No two legal systems are the same and comparisons are not always simple, but that does not mean we should shut our eyes to the experiences of other countries. The need for laws to comply with states'

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¹ Meservey J. (2019) Africa's Sahel Region Grows as a Breeding Ground for Terror, Posing a Critical Danger to US and Allies. Retrieved from www.heritage.org/Africa/commentary/africa-s-sahel-region-grows-breeding-ground.

² Obi C. and Ezeogu U. (2017) Interrogational Torture As An Abuse Of Human Rights In The Fight Against Terrorism In Nigeria: An Ethical Evaluation. Retrieved from <https://www.ajol.info/index.php/og/article/viewFile/161160/150721>

³ Edwards A. (2011) Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants. Retrieved from <https://www.unhcr.org/4dc94c49.pdf>

obligations under international law is very often invoked⁴; the Nigerian counter terrorism laws do not exist in vacuum. The aim of this paper is to analyze the power of arrest and the length of pre-charge detention on the basis of terrorism cases under the Nigerian law in comparison to some democratic jurisdictions with a view to understanding how a balance can be made between upholding human rights and countering terrorism.

2. Responses to Terrorism and the overall impact on Human Rights

Counter-terrorism policies are determined by politics and philosophies of a state.⁵ These countermeasures include and often begin with the passing of antiterrorism legislation. These measures encompass changes in the criminal law, increasing law enforcement powers and administrative functions. Often, these changes violate or water-down various fundamental rights of citizens. It is argued that while counterterrorism may have initially emerged as reaction to terrorism, it has become a continuing practice that anticipates, prevents and pre-empts terrorist activities.⁶

The relationship between human rights and terrorism and in particular the impact of counterterrorism measures on human rights has been given considerable attention at the international level since the 9/11 attacks. This concern over human rights and counterterrorism is however not a recent phenomenon. Even prior to 2011, there was considerable attention paid international jurisprudence to the question of respect for human rights in situations concerning acts of terrorism.⁷

3. Investigation of Terrorism Related Offences in Nigeria

Terrorism demands specialized investigation techniques that must comport with the internal and international legal framework. Police investigation methods that compromise individual rights are only justified based on necessity and proportionality. Most investigations carried out by the Nigerian police have often been criticized for being flawed⁸. These substandard investigations can be attributed to constant transfer among police officers and lack of forensic capability. Police officers often end up transferred without completing investigations to required standard, and in cases where they have completed investigations, they are either unavailable or the evidence is still lacking. The minimum threshold of criminal law is beyond reasonable doubt, and this can only be achieved (sometimes) through forensic investigation and dedication to duty. The police lack this capacity, and this may hamper proper investigation of terrorism cases. There seems to be an insufficient inter-institutional coordination between the police and the prosecutors. In a country such as Nigeria, where the police are legally under the prosecutor's supervision; the police have a duty to file a notice of crime with a prosecutor or judge to begin an investigation and the prosecutors have judicial authority to direct investigations, one would expect harmonization. It is expected that such voluntary cooperation if achieved can be an effective tool in the success of the prosecution of terrorism cases.

Arrest and Detention of Terrorist Suspects

Article 4(2) of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) defines the deprivation of liberty as 'any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority'. Such action may take the form of the arrest of any person, or of his or her pre-trial detention, 'preventive' detention or 'administrative' detention, or of any other form of deprivation of liberty such as secret or incommunicado detention. The Constitution of the Federal Republic of Nigeria guarantees the fundamental right against arbitrary arrest and detention of all persons in Nigeria⁹. The law states further that anyone arrested and detained has a right to be informed, as soon as possible, the grounds for such arrest¹⁰ and right to consult and be defended by a legal practitioner of his choice¹¹. Moreover, such person once detained in custody is required to be produced before the nearest court within a period of twenty -four hours of such arrest and cannot be detained beyond this stipulated time frame without a court order. Under the TPA, the judge is

⁴ Walker C. (2006) Clamping Down on Terrorism in the United Kingdom. 4 Journal of international Criminal Justice. 1137 at 1147

⁵ Barga, T. (2012) *Towards a Theology of peace: A panacea to terrorism and violence*. Jos Studies, Vol. 20,

⁶ Okoli, A.I & Iortyer, P. (2014) *Terrorism and Humanitarian Crisis in Nigeria: Insights from Boko Haram Insurgency*. 14 Global Journal of Human- Social Science F: Political Science. Issue 1.

⁷ Flynn, E. J (2005) *Counterterrorism and Human Rights: The View from the United Nations*. European Human Law Review, 29.

⁸ Out N. and Elechi O. (2018) The Nigeria Police Forensic Investigation Failure. Journal of Forensic Science and Criminal Investigation. https://www.researchgate.net/publication/333414221_The_Nigeria_Police_Forensic_Investigation_Failure

⁹ S. 35

¹⁰ S. 35 (3)

¹¹ S36 (c)

empowered to, pursuant to an *ex-parte* application, grant an order for the detention of a suspect under the Act for a period not exceeding 90 days subject to renewal for a similar period until the conclusion of the investigation and prosecution until the matter that led to the arrest and detention is dispensed with¹². The section further provides that a person found on any premises or place or in any conveyance may be detained by the relevant law enforcement officer of any agency until the completion of the search or investigation under the provision of the Act. These provisions are of grave consequences as it relates to the fundamental human rights of the suspects in clear contradiction of the constitutional provisions on the right to personal liberty which specifically provides that 'any person who is arrested or detained shall be informed in writing within twenty-four hours (and in a language that he understands) of the facts and grounds for his arrest or detention'.¹³

The Human Rights Commission has stated that one of the most important reason for the requirement of timely information on a criminal charge is to enable the detained individual to request a timely decision on the lawfulness of his or her detention by a competent judicial authority¹⁴. Most times, whenever terrorist attacks occur, suspects are picked up at random; communities are raided by law enforcement officers who carry away just about anyone on site. The failure or negligence on the part of the security agents to comply with the requirement to submit reasons for arrest and to inform persons arrested of any charges against them is a violation of the right to a fair trial as guaranteed by the constitution which provides that 'every person who is charged with a criminal offence shall be entitled to be informed promptly in the language that he understands and in detail of the nature of the offence'.¹⁵ Thus, it is not enough for the purpose of complying with sec. 36 (6) that the arresting officer simply tells the persons concerned that they are arrested under a particular law on suspicion of being terrorist. They must consequently be interrogated in detail about their suspected involvement in specific criminal acts and their suspected membership of a proscribed organization. As seen from the provisions of sec. (6) (a) the term 'promptly' cannot be overemphasized; this is because any person who is entitled to take proceedings to have the lawfulness of his detention decided speedily cannot make effective use of that right unless he is promptly and adequately informed of the reason why he has been deprived of his liberty.

Pre-Charge Detention of Terrorism Cases

Pre-charge detention is the amount of time the police can detain a person following their arrest and before they must be charged and brought before a court of law.¹⁶ During this time, the arrested person may be questioned, and the police may collect additional evidence. The first question that is often raised with regard to terrorism cases is how long is too long when detaining a suspect pre-charge? Under the TPA, the judge is empowered to, pursuant to an *ex-parte* application, grant an order for the detention of a suspect under the Act for a period not exceeding ninety days subject to renewal for a similar period until the conclusion of the investigation and prosecution for the matter that led to the arrest and detention is dispensed with.¹⁷ Thus, With respect to temporary detention, an accused can be taken into custody during the investigative process under certain conditions for a period not to exceed forty-eight hours; but if the crime is classified as a terrorist act this period can be extended by up to ninety days. There is no time limit whatsoever on the duration of renewal of the ninety days period. This 'limitless extension period' leaves much to be desired. To this end let us examine pre-trial detention of terrorism cases of some jurisdictions as a learning post.

Pre-Charge Detention: United Kingdom

In the United Kingdom the maximum period of pre-charge detention in terrorism cases are 14 days.¹⁸ Schedule 8 of the Terrorism Act 2000 governs the pre-charge detention of those arrested on suspicion of being a terrorist.¹⁹ Legal limitations on the period of time a terrorist suspect can be detained prior to charge run from the time of arrest.²⁰ Once arrest is made concerning any terrorist attacks, the suspect must be taken

¹² S. 27 TPA

¹³ S.35 (3) 1999 Constitution of the Federal Republic of Nigeria.

¹⁴ Communication No 248/1987, *Campbell V. Jamaica* (views adopted on 30 March 1992, 246. Para. 63.

¹⁵ 36(6) 1999 Constitution

¹⁶ Awan I. (2011) *The Erosion of Civil Liberties: Pre-Charge Detention and Counter-Terror Laws*. The Police Journal. Vol. 84. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/policej184&div=28&id=&page=>

¹⁷ S. 27 TPA.

¹⁸ Schedule 8, para. 36 (3) (b) (ii) Terrorism Act 2000, (as amended by) Terrorism Act 2006, S. 23.

¹⁹ For other criminal investigations, pre-charge detention is governed by the Police and Criminal Evidence Act 1984 allowing detention for up to 96 hours.

²⁰ TA, S. 41 (3) and Schedule 8, para. 36 (3B). The Police have the power to arrest anyone they suspect of being a terrorist without judicial warrant TA, S 4.

to a police station as soon as possible. On arrival at the police station, the detention of the suspect must be reviewed by a police officer that is not directly involved in the investigation. Reviews must also take place at 12 hourly intervals thereafter. At the review the officer may only authorize a suspect's continued detention if, *inter alia*, s/he is satisfied that this is necessary: (i) to obtain relevant evidence (i.e. by questioning the suspect), (ii) to preserve relevant evidence or (iii) to make a decision about the deportation or charging of the suspect.²¹ Notes must be kept of the reviews and suspects and their lawyers have the right to make representations.²² After 48 hours, a judicial warrant is required to keep a suspect in detention without charge.²³ A judge can only issue a warrant if satisfied that there are reasonable grounds to believe that (a) it is necessary, *inter alia*, to obtain or preserve relevant evidence and (b) that the investigation is being conducted diligently and expeditiously.²⁴ The first judicial warrant would normally authorize detention for up to a maximum of seven days.²⁵ Further judicial warrants may then be issued, each extending the period by up to seven days. Warrants authorizing detention beyond 14 days can only be made by a senior judge. A judicial warrant may not authorize detention for more than 28 days from the time of arrest, meaning that at this point a suspect must be either charged or released.²⁶ Suspects have the right to be notified of the application for a warrant of extended detention and the right to make representations to the judge.²⁷

The primary purposes of lengthy pre-charge detentions of terrorist suspects in the UK are:²⁸ 'to uncover admissible evidences sufficient to put before the court; to gather background intelligence; to facilitate the carrying out of searches; to deal with special problems posed by international terrorism'. At a point in time, the UK introduced a 28 days pre-charge detention period, this was widely criticized. The coalition government further conceded that 28 days detention was not needed because²⁹ 'it is not routinely required, as demonstrated by the fact that no one has been detained for longer than 14 days since July 2007; it is out of step with other Western democracies; it is incompatible with human rights obligations (primarily the right to liberty); it has a negative impact on Muslim communities in particular and undermines other aspects of the government's counterterrorism strategy'.

The proposal to reduce the length of pre-charge detention is part of the coalition government's promise to 'restore the rights of individuals in the face of encroaching state power, in keeping with Britain's tradition of freedom and fairness'.³⁰ That is why the UK government reverted to 14 days. The UK government did not feel comfortable with a complete abandonment of the 28 day pre-charge detention regime. It wants to preserve the possibility of resorting to that maximum period under exceptional circumstances. Accordingly, the plan is to activate the maximum period, when necessary. There will be a sunset clause³¹ so that the extended maximum period would be in force for a period of three months upon a grant of royal assent.³² This need for contingency powers entails a trade-off involving a shortening of the 28 days pre-charge detention regime, which it concluded was rarely used anyway, while still allowing recourse to that length of detention when the circumstances demand it.³³

Pre -Charge Detention: United States

Under the US Federal Law, the maximum period of pre-charge detention is 48 hours. This limit is derived from the Fourth Amendment to the US Constitution. However, in the US, we do not find a fixed period of detention compared to the UK (14days) or in Nigeria (90 days). However, US authorities use measures that are 'rooted in

²¹ TA, Schedule 8, para.23.

²² TA, Schedule 8, paras. 26& 28.

²³ TA, S41 (3)

²⁴ TA, Schedule 8, para. 32

²⁵ TA, Schedule 8, para. 29 (3)

²⁶ TA, Schedule 8, para. 36 (3)(b)(ii)

²⁷ TA, Schedule 8, para. 31 &33. However, this is not the equivalent of a true adversarial hearing as the suspect dose not have any charge to answer and may well not know the evidence against them.

²⁸ Walker, C. (2013). *Terrorists on Trial: An Open or Closed Case?* In Cole, D., et al, Cole, D., et al. *Secrecy, National Security and the Vindication of Constitutional Law*. Edward Elgar Publishing Limited UK.

²⁹ Home office (2007). *Options for Pre-Charge Detention In Terrorist Cases*, 25 July.

³⁰ The Coalition: our programme for government (2010) retrieved from

<https://www.gov.uk/government/publications/the-coalition-our-programme-for-government>

³¹ For a detail discussion on the relevance of sunset clauses in anti-terrorism laws, see Ip, J. *Sunset Clauses and Counterterrorism Legislation* (2013). *Public Law* 74-99

³² Joint Committee on Human Rights (2011). *Draft Detention of Terrorist Suspects (Temporary Extension) Bills*. HL Paper 161/ HC Paper 893. London, TSO, para. 3

³³ *Ibid*, par.14

an executive model of counter-terrorism as opposed to a legislative one'³⁴ that enable them to orchestrate pre-charge detention equivalent to, possibly longer than, the 28-day maximum intended as a contingency power for the UK via the Protection of Freedom Act 2012. These measures include Material Witness Protection in the United States. Detaining people as a material witness has a widespread existence in the US. It must be shown that the material witness has information pertaining to criminal proceedings³⁵ and that it is 'impracticable to secure the presence of the person by subpoena'³⁶. By holding its constitutionality, the US Supreme Court has held that 'citizens' have a 'duty to disclose knowledge of crime'.³⁷ However, the Material witness Statute does not set a time limit on a person's detention under the statute. It simply says that a material witness may not be released '...for a reasonable period of time until the deposition of the witness can be taken'. The only superficial time limit available is the requirement to provide '...a biweekly report to the court listing each material witness held in custody for more than ten days and justifying the continued detention of each witness.'³⁸ Whether this requirement provides an effective check on executive zeal is debatable.³⁹

Pre-Charge Detention: Spain

The closest equivalent to pre-charge detention in Spain is preventative arrest. In general, the maximum period for which a person can be detained under these preventative arrest powers, before being released or handed over to the judicial authorities, is three days. In relation to suspected terrorist offences, the maximum is five days. The purpose of preventative arrest is to investigate events that could be considered as a criminal offence. Section 17.2 of the Spanish Constitution⁴⁰ provides that preventative arrest cannot last longer than the time necessary to investigate the events that may result in a criminal offence. In any event, the person arrested must be set free or handed over to the judicial authorities within three days. Section 55 does, however, permit longer preventative arrest if the Government declares a 'state of emergency' or 'siege' or if the activities of armed gangs or terrorist groups are under investigation.⁴¹

Pre-Charge Detention under the Ethiopian Anti-terrorism Law

The Ethiopian Anti-Terrorism Law, Proclamation No. 652/2009(EATP) was enacted in 2009. Pre-charge detention is covered by Article 20 of the EATP, which states that once a suspect is arrested on reasonable suspicion of having committed an offence contrary to the EATP, an Ethiopian court 'may give an order to remand the suspect for investigation or trial.'⁴² Article 20(2) of the EATP talks in terms of a request by the police for sufficient time to complete the investigation and reads as follows: 'if the investigation is not completed, the investigating police officer may request the court for sufficient period to complete the investigation.'⁴³ But it does not say anything on whether the police can also request for the suspect to be remanded. The police can request the necessary time to complete the investigation without actually requesting the suspect to be remanded. Despite the vagueness of Article 20(2), the practice of Article 20 of the EATP shows that the police apply for an investigative remand while still holding the suspect in their custody. For instance, a well-known Ethiopian actor, *Debebe Eshetu*, was arrested on suspicion of being involved in the provision of support to terrorist organisations such as *Ginbot 7*. When he first appeared before the court on the 9th of September 2011, the judges failed to question the suspect upon the police's request for a 28 days pre-charge detention. *Debebe* was finally released without being charged after a lengthy detention period.⁴⁴ According to Article 20(3) of the EATP, 'each period given to remand the suspect for investigation shall be a minimum of 28 days; provided that the total time shall not exceed a period of four months.'⁴⁵ According to this sub-article, once the suspect is brought before an Ethiopian court, the minimum remand period that can be requested is 28 days. Why the legislature chose to set a minimum period instead of fixing the maximum period is very difficult to understand. In another case, several defendants were charged for various offences under the EATP. There were 24 defendants mentioned on the charge sheet. However, 16 of the defendants were charged in absentia. For this reason, only eight defendants were actually brought before the court. The defendants were remanded several times, with one of the defendants, *Yohannes Terefe*, telling the court that he was actually detained for 55 days in isolation before he was even brought before a court. Yet, that did not deter the court from remanding him for a further period of time.⁴⁵ By granting a minimum of 28-day, the police and the

³⁴ Roach K. (2012)

³⁵ United States v. Awudallah (2003) 349f 3d.

³⁶ 18 USC S 3144

³⁷ In re Francisco M; (2001) 103 Cal RPT 2d 794, 802 (Cal Ct App).

³⁸ Ibid.

³⁹ Cochran, Q. (2010) *Material Witness Detention in a post 9/11 World: Mission Creep or Fresh Start*. George Mason Law Review 18 (1) .

⁴⁰ Preventative arrest may last no longer than the time strictly necessary to carry out the relevant investigations; in any event the person arrested must be set free or handed over to the judicial authorities within a maximum period of 72 hours.

⁴¹ Subsection 3 of section 17 of the Spanish Constitution.

⁴² Section 20 (1) Ethiopian Anti-Terrorism Proclamation 2009.

⁴³ Section 20(2) EATP

⁴⁴ Nega, E. (2011) *Debebe Eshetu's Arrest and the New Year*. Ethiomedia, 9th September 2011.

⁴⁵ Public Prosecutor v Elias Kifle, et al (Suit No. 112199/2011)

Ethiopian courts are just guessing at the period that would be required to complete a particular terrorism case. Page three of the parliamentary minutes to the EATP states that Article 20(3) of the EATP is intended to rectify the problems associated with Article 59(3) of the Ethiopian Criminal Procedure Code. The latter Article fixes a maximum of 14 days pre-trial detention but there is no limit on the number of Times the maximum days can be requested. As a result, the police can request 14 days as many times as they deem necessary. Thus, the EATP attempts to rectify that flaw by setting a minimum of 28 days and a maximum of four months pre-charge detention. But instead it brought the worst form of violation of liberty in comparison to other democratic states.

Pre-Charge Detention under the Nigerian Law

Pre-charge detention in Nigeria is covered by Section 27 of the Terrorism Prevention (Amendment) Act 2013 which states that once a suspect is arrested on reasonable suspicion of having committed an offence contrary to the TPA, a Nigerian ‘court may pursuant to an ex-parte application, grant an order for the detention of a suspect under this Act for a period not exceeding 90 days subject to the renewal for a similar period until the conclusion of the investigation and prosecution of the matter that led to the arrest and detention is dispensed with’. The inclusion of the vague terms such as ‘subject to renewal for a similar period...’ Under Section 27 of the TPA in effect authorizes the potential for indefinite detention of suspects who have been certified as terrorist. Another issue that can be deduced from section 27 is the practice of remanding the suspects for trial after the protracted investigation is completed. Neither the judge nor the prosecution considers it necessary to disclose the basis of reasonableness at the first appearance. In most cases, the prosecution manages to request for the 90 days maximum detention period without disclosing the basis of the reasonable suspicion for the arrest. This practice is undoubtedly against the spirit of section 36 (4) of the Constitution which relates to fair hearing. Furthermore, the Nigerian courts often do not have access to the information that formed the basis of the reasonable suspicion. As held in the ECtHR case of *Chahal v UK*,⁴⁶ such a problem engages Article 5(4) ECHR, which states that ‘Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful’.

In Nigeria, Section 36(4) of the Constitution has the same spirit as Article 5(4) ECHR, because the former states that ‘Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a hearing in public within a reasonable time by a court or tribunal’: One of the ingredients of a fair trial is ‘trial within a reasonable time’; how can this be the case if a suspect is to be locked for three months and subjected to endless detention at the whim and caprices of the prosecuting agency? In determining the additional time necessary for investigation, the court ought to ensure that the responsible law enforcement authorities carry out the investigation respecting the arrested person's right to a speedy trial. As held in the ECtHR case of *Winterwerp v the Netherlands*,⁴⁷ the review must not be limited to bare legality of detention but ‘deprivation of liberty ... requires a review of lawfulness to be available at reasonable intervals.’ As has been observed, the primary purposes of lengthy pre-charge detentions of terrorist suspects in the UK are:⁴⁸ ‘to uncover admissible evidences sufficient to put before the court; to gather background intelligence; to facilitate the carrying out of searches; to deal with special problems posed by international terrorism’. However, these justifications are difficult to fit in into Article 27 of the TPA where suspects can be locked up for 90 days without a court knowing about the complexity of the case or the kind of evidence the police are attempting to uncover. Some have equally argued that the wordings of section 27 of the TPA are in direct collision with the wordings of section 35 (4) and (7) of the Constitution which provides for right to personal liberty. It is apt to reproduce the provisions of 35 (4) and (7) for a better analysis.

35 (4) Any person who is arrested or detained in accordance with subsection (1) (C) of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of

- (a) Two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or
- (b) Three months from the date of his arrest or detention in the case of a person who has been released on bail

He shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such condition as are reasonably necessary to ensure that he appears for trial at a later.

(7) Nothing in this section shall be construed-

- (a) in relation to subsection (4) of this section, as applying in the case of a person arrested or detained upon reasonable suspicion of having committed a capital offence; and
- (b) as invalidating any law by reason only that it authorizes the detention for a person not exceeding three months of a member of the armed forces of the federation.....

⁴⁶ *Chahal v the United Kingdom*, 15 November 1996, 1996-V

⁴⁷ *Winterwerp v the Netherlands*, 24 October 1979, Series A no. 33, para 51

⁴⁸ Walker, C. (2009), *supra*.

In the case of *Ogwuche v. FRN*⁴⁹; the appellant and 2nd to 6th respondents were arraigned in the federal High Court Abuja on an eight counts charge of terrorism. After all the accused had pleaded not guilty to all the counts of terrorism, each of them applied to be remanded in prison custody while awaiting trial since investigation had been completed. The prosecution opposed this application urging that they be remanded in the custody of the Department of State Security Services (SSS) because they were charged with an extraordinary offence and that in recent times, they had been incidents of jail breaks in the country. The trial court refused the application and ordered that the accused be remanded in the custody of SSS pending conclusion of the prosecution case. Hence this appeal was brought. The trial court's discretion to remand the accused pending trial was to strike a balance between the said fair hearing right of the accused and the demand of public and national security. As has been held in *EFCC & Anor v Uba & Ors*, 'the preponderance of judicial decisions across jurisdiction is that fundamental rights under Constitution Guarantees are not above the right of the community to protecting itself from crimes.'⁵⁰ Thus, all issues were resolved in favor of the first respondent (FRN) and the appeal failed for lack of merit. It is easy to understand why the appeal failed; terrorism is a capital offence, where death results from any terrorist act, the penalty shall be life imprisonment.⁵¹ The emphasis of the Court of Appeal was that the appellant and his co-accused killed 75 innocent persons in one day. A question that arises is could the appeal had succeeded if death was not the probable outcome of the terrorist attack? The answer would be a positive one. S. 27 of the TPA makes anyone suspected of any terrorist attacks subjected to 90 days detention period pending investigation and conclusion of the case. Detaining a suspect whose investigation has been completed in the custody of the prosecution may have some implications. For one the uncertainties of what may happen to the suspects and the evidence that may be deduced from the accused in the absence of his counsel. In the case of the *Federal Republic of Nigeria v. Charles Tombra Okah & 3 ors*⁵², the accused persons were charged on 6 counts charge of participating in the commission of terrorist act (1/10/10 Abuja bomb blast) PW 4 gave evidence that he was detained by the SSS for about one month before he was transferred to a 'protective custody'. His phone was given in evidence as 'incriminating text messages' were found in the phone 'out box'. The chairman of the Special Investigation Panel set up by the prosecution testified before the court that the accused was not present at the time the Nokia PC software was used to extract the contents of the Exhibit (the phone)⁵³. Such instances may question the credibility of detaining an accused in the custody of the prosecution.

4. Conclusion

The 90 days pre-charge detention period as currently stipulated under Section 27 of the TPA is not only unnecessary; it is also unjust and potentially counter-productive. Continuing to allow suspects to be held for 90 days (subject to a renewal for a similar period) without charge questions our basic democratic principles of justice, fairness and liberty. When suspects are locked for this lengthy period, and later released without a charge (as is often the practice) such persons may well have lost their families, employment, homes and confidence of their larger communities. Bearing this in mind, it will not be surprising if the suspects become vulnerable to radicalization. The provisions of any good law should be clear and unambiguous enough not to leave room for enormous discretionary powers to law enforcement. Thus, the provisions of Section 27 of the TPA (which gives no limit to the number of times the prosecution can request for extension of detention of a terrorist suspect) should be amended; the specific number of times by which the prosecution could seek to detain a terrorist suspect should be clearly spelt out. By so doing, this would inevitably limit the amount of times the police could request to extend the detention period. Taking into consideration the peculiarities of criminal investigations in Nigeria, the current 90-days pre-charge detention under the TPA should be amended to a lesser period of 30 days; a sunset clause should be inserted to enable the application of 90 days pre-charge detention period in extreme emergency cases. The Nigerian Parliament should request quarterly or annual reports on the effectiveness of prolonged (90 days) detention period, either in terms of the success of bringing more prosecutions or its deterrent effect. This would enable the Nigerian government to glean invaluable information not only on the prolonged detention periods, but on the effectiveness of the TPA. The west is gradually retreating from its 9/11 'hangover'. Partly owing to public outcry and due to the failure of the counter-terrorism measures to bring about the intended effect (the UK reverted pre-charge detention to 14-days from 28 days, the defeat of the US government for attempting to strip foreign terrorist suspects right to habeas corpus). It is agreeable that ordinary investigation techniques may, under exceptional circumstances, be inadequate to deal with terrorism; but the notion that fundamental rights be sacrificed for the sake of national security is gradually losing grounds.

⁴⁹ *Aminu Sadiq Ogwuche v. Federal Republic of Nigeria and 5 ors*, (2017) Appeal No. CA/A/178/C/2015

⁵⁰ (2013) CA/a/ 564.

⁵¹ S. 33 TPA

⁵² (2010) Suit No. FHC/ ABJ/CR/186

⁵³ *Ibid.* page 11.