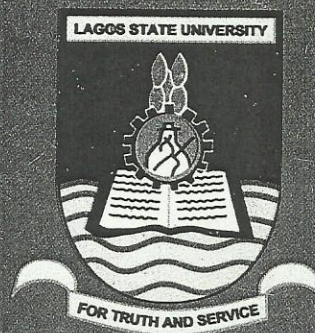


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IX.

Judicial Interpretation of Constitutional Right to Personal Liberty and Imperativeness for the Establishment of Constitutional Courts

Lateef Ogboye¹

Introduction

RIGHT TO PERSONAL LIBERTY IS ONE of the most basic fundamental rights recognized the world over. It is particularly recognized and enforceable in countries practicing constitutional democracy. Various international instruments specifically provide for this right in different languages and enjoin all state parties to recognize and enforce same.² For instance, right to liberty is contained in article 6 of the African Charter on Human and People's Rights, and it declares:

Every individual shall have the right to liberty and the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular no one may be arbitrarily arrested or detained.

According to *Black's Law Dictionary*,³ liberty is freedom from arbitrary or undue external restraint, especially by government. It goes further to state that liberty means a right, privilege or immunity enjoyed by prescription or by grant. Therefore, personal liberty means the freedom of every law-abiding citizen to think what he will, to say what he will on his lawful occasions, without let or hindrance from any person.⁴

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² See Article 1 of the African Charter on Human and People's Rights (Ratification and Enforcement Act) Cap 10 Laws of the Federation of Nigeria 1990, which reads: "Member States of the O.A.U. parties to the present Charter shall recognize the rights and duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them." See further *Ogugu v. State* (1994) 9 NWLR (pt. 366), 1, where the court held the provisions to be not only applicable but enforceable in Nigeria.

³ *Black's Law Dictionary*, 7th Ed. Bryan Garner, Bryan A. Garner Books, 2010.

⁴ Lord Denning, *Freedom Under The Law* (1949), Blackwell Publishing, 2003.

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In Nigeria, the right to personal liberty is contained chapter four of the 1999 Constitution, which exclusively deals with fundamental human rights. It is specifically provided for in section 35 thereof. Jadesola Akande construes the definition of liberty in the Black's as broader in scope than what the Constitution says, which is narrower in scope. According to the learned professor, the right to personal liberty, as contained in our Constitution, could be defined as "the right not to be subjected to imprisonment, arrest and any other physical coercion in any manner that does not admit of legal justification."⁵

The focus of this paper, however, is limited to examining the scope and extent to right to personal liberty as contained in the Constitution. We shall evaluate the premium and importance placed on liberty issues whenever they come up before our judges.

Right to Personal Liberty in 1999 Constitution

Section 35(1) provides that every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases,⁶ and in accordance with a procedure permitted by law.

- a. In execution of a sentence or order of a court in respect of a criminal offence of which he has been found guilty;
 - b. by reason of his failure to comply with the order of a court or in order to secure the fulfillment of any obligation imposed upon him by law;
 - c. for the purpose of bringing him before a court in execution of the order of court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence;
 - d. in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;
 - e. in the care of a person suffering from infection or contagious disease, person of unsound mind, person addicted to drugs, alcohol or vagrants, for the purpose of their care or treatment or the protection of the community; or
 - f. for the purpose of preventing the unlawful entry of any person into Nigeria or of effecting the expulsion, extradition or other lawful removal from Nigeria of any person or the taking of proceedings relating thereto.
1. Provided that a person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence.
 2. Any person who is arrested or detained shall have the right to remain

⁵ This is also the view of the Supreme Court in *Odogar v. A.G. of the Federation* (1996) 6 NWLR (pt. 456) 508 SC. See the comments in *Introduction to 1999 Constitution*, Prof. Jadesola Akande, M.I.J. Publishers, 78.

⁶ Circumstances listed in paragraph a-f of subsection (1) may justify deprivation of citizen's liberty. It should be noted further that in any of such circumstances, the procedure for deprivation may be permitted by law.

silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice.⁷

3. 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.⁸
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 whether unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.⁹

This subsection 4 establishes the legal requirement of bail pending trial, which the suspect is entitled to as he awaits the determination of charges against him. The usual practice is that police do grant bail to suspects as a matter of course, especially where the offence committed is a minor one; but in serious offences, the suspect can only be admitted to bail by a competent court of law. It must however be stressed that non-perfection of bail conditions, which result in prolonged incarceration of a suspect, would not amount to infraction of right.

5. The provision in subsection (5) defines the expression “reasonable time” to mean—
 - (a) in the event of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of forty kilometers, a period of one day; and
 - (b) in any other case, a period of two days or such longer period as in the circumstance may be considered by the courts to be reasonable.
6. Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person; and in this subsection, “the appropriate authority or person” means an authority or person specified by law.
7. Nothing in this section shall be construed—
 - a. in relation to subsection (4), as applying in the case of a person

⁷ A suspect (arrested or detained) reserves the right to refuse to answer any question put to him by agents or officers of the detaining authority and may even refuse to accompany them to any place save in the course of arrest. See the case of *Candido Johnson v. Edigin* (1990) 1 NWLR (pt. 129), 659 at 672, para E.

⁸ Furthermore, the Constitution provides that the suspect be informed of reasons for his arrest or detention in the language he understands within 24 hours of such arrest. Nigeria being multilingual would definitely require this type of law to afford suspects the opportunity to prepare for his defense in earnest and to appreciate the grounds for deprivation of his right.

⁹ See the case of *Eda v. C.O.P.* (1982) 3 NCLR, 219.

Analysis

The above provisions provide for the right to bail pending trial. The provisions are contained in the Constitution of Nigeria, 1999 (as amended).

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arrested or detained upon reasonable suspicion having committed a capital offence, and

- b. as invalidating any law by reason, only that it authorizes the detention for a period not exceeding three months of a member of the Armed Forces of the federation or member of the Police Force in execution of sentence imposed by an officer of the Armed Forces of the federation or the police force, in respect of an offence punishable by such detention of which he has been found guilty.¹⁰

Analysis of the Section

The above-quoted section is very crucial to human liberty and existence in that it guarantees protection from physical restraint such as detention and imprisonment. Like other fundamental rights, this right to personal liberty is inalienable that cannot be abridged, curtailed nor deprived of without lawful justification. The protection offered herein is twofold—substantive and procedural. In its substantive sense, it requires that a citizen cannot be deprived of his right to liberty without lawful excuse or legal justification (see subsections there under). The procedural protection the section offers is in line with the requirement of law in compliance with our criminal jurisprudence. These are contained in subsections 2–7.

The Constitutional Court in South Africa had opportunity to construe similar provision in section 12(1) of its 1996 constitution, which is right to freedom and security of person.¹¹ Section 12 (1) of South African constitution provides that everyone has the right to freedom and security of the person, which include the right—

- a. not to be deprived of freedom arbitrarily or without just cause;
- b. not to be detained without trial;
- c. to be free from all forms of violence from either public or private sources;
- d. not be tortured in any way; and
- e. Not to be treated or punished in a cruel, inhuman or degrading manner.

Regan, J., describes the two components of the rights contained therein as follows:

There are two different aspects of freedom—the first is concerned particularly with the reasons for which the state may deprive someone of freedom (substantive component); and the second is concerned with the manner whereby a person is deprived of freedom (procedural component).... Our Constitution recognizes that both aspects are important in a democracy: the state may not

¹⁰ A person arrested or detained upon a reasonable suspicion that he committed a capital offence is not ordinarily entitled to be released after 3 months' detention, but in practice the high court may exercise its inherent power to grant bail. Capital offence means a crime which attracts death penalty as maximum punishment (e.g., murder, armed robbery and treason).

¹¹ Section 12(1) of the South African Constitution provides: everyone has the right to freedom and security of the person, which include the right—

- f. not to be deprived of freedom arbitrarily or without just cause;
- g. not to be detained without trial;
- h. to be free from all forms of violence from either public or private sources;
- i. not be tortured in any way and;
- j. Not to be treated or punished in a cruel, inhuman or degrading way.

deprive its citizens of liberty for reasons that are not acceptable reason, and it may not do it in a manner which is procedurally unfair.¹²

Borrowing from the above judicial pronouncement from a South African court, the test of determining whether section 35 of our own Constitution on liberty has been breached at a particular time would depend on three questions, which must be answered in the affirmative.

- (1) Has there actually been a deprivation of a citizens (complainant) liberty?
- (2) Does the deprivation admit of legal justification (validly excusable in law)?
- (3) Is the manner of deprivation of the liberty procedurally fair (in accordance with procedure permitted by law)?

Nigerian courts have tried many times to uphold the protection of fundamental rights of citizens. In actual fact, the right to personal liberty has always been the most litigated in Nigeria. This has been the case since the era of military regimes.¹³ Even in the face of obnoxious decrees, courts have always ensured that there was strict compliance with the law and that any deprivation of citizen's rights must be in strict compliance with the provisions of the law that authorized such deprivation.

In the case of *Komolafe & 1 or. v s. A.G. of Federation*,¹⁴ the two applicants were arrested and detained pursuant to a detention order made under Decree 2 of 1984. The order was quashed by the court and the applicants were ordered released forthwith, because their detention order did not specify that they should be kept in custody, and no address of any custody or cell was given therein. This was held contrary to the provision of the said decree. The learned judge held:

Any restriction on the liberty of the subject must be shown to be in conformity with the law which authorizes the exercise of such power. In other words, both the rulers and the ruled are amenable to the rule of law.¹⁵

Nevertheless, it is an established fact that action cannot be brought for infringement of right of liberty where the arrest or detention is justifiable.

In the case of *Nkiruka Okanu v. C.O.P.*,¹⁶ the Court of Appeal Enugu division held that a citizen who was arrested by the police in the legitimate exercise of their duty and on grounds of reasonable suspicion of having committed an offence cannot sue the police in court for breach of his fundamental rights, as this will constitute an example of a situation where individual liberty would be lawfully deprived of him; however, where the arrest is illegal, leading to a subsequent detention, the court will not hesitate to hold

12 *State v. Goezee*, per Reagan, J.

13 In military regimes many Nigerians were arrested and detained without trial, imprisoned without legal justification as a result of promulgations like Decree 2 of 1984, etc. The most regrettable aspect of it is that such decrees could not be challenged in court as they contained ouster clauses.

14 Suit No: FHC/M59/89.

15 Justice T.A. Odunowo, *ibid.*, 425, paras D and E.

16 2001 1 CHR, p. 407

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that the citizen's liberty has been infringed upon. The principle is that there can be no lawful or justifiable detention where the arrest was illegal *ab initio*. In the same vein, the court held in *Abiola v. Abacha* that where the arrest and detention of a person are unlawful and unconstitutional, any subsequent arraignment of that person before a court of law cannot and would not cure the illegality or unconstitutionality thereof.¹⁷

Burden of Proving Legality of Arrest and Detention

The law places a burden on the detaining authority, police or any governmental agency to prove the legality or constitutionality of the arrest and/or detention of a person. It is therefore not for the citizen (person arrested) to prove that his arrest and detention is wrongful. This is the unshifting position of court and has been established in many cases. In *Abiola v. Abacha*, Justice Jinadu of the Federal High Court Lagos remarked—

The burden of proving the legality or constitutionality of the arrest and/or detention of a person is on the arresting authority. Therefore, it is the respondent's duty to justify the arrest of the applicant. The onus of proof rests on them....

The same position has been maintained in legions of cases where the justification of deprivation of liberty has been in issue before the courts.¹⁸

Duration of Deprivation of Liberty

It is immaterial whether the infringement of liberty complained of is short or long. The duration does not count to warrant enforcement in court. Any violation of a citizen's guaranteed fundamental right, however short a period, must attract penalty under the law¹⁹; so whenever there has been an unlawful detention of a citizen, it is immaterial the length of detention, as the court would not hesitate to declare such unjustifiable detention a deprivation of right to personal liberty.

In *Razak Osayiande Isenalumhe v. C.O.P. Edo State & Ors*,²⁰ the Federal High Court Benin held that the detention of a legal practitioner in a police station for three hours without lawful justification amounts to infringement of his right to personal liberty.

¹⁷ *Abiola v. Abacha* (1998) 1 HRLRA, 447 at 453.

¹⁸ See further *C.O.P. Ondo State v. Obodo* (1989) 5 NWLR (pt. 120) 130 at 138, *Iyere v. Duru* (1988) 5 NWLR (pt. 44) 665.

¹⁹ *Enwere v. C.O.P.* (1993) 6 NWLR (pt. 229), 333, it was held that the court is always prepared and will be quick to give relief against any improper use of power, any abuse of power by any member of the executive, the police or any person which results in an unlawful detention of citizen. See also *Alaboh v. Boyees* (1984) 5 NCLR 830.

²⁰ (2001) 1 CHR. The applicant was a legal practitioner who had earlier complained about the activities of commercial drivers and policemen in obstructing access to his office premises. On a particular day he found 1st and 2nd respondents (policemen) collecting money from bus drivers illegally, thereby causing obstruction to his office. The applicant proceeded to write their force numbers down in order to hand it over to authorities as a follow-up to his earlier complaint. 1st and 2nd respondents, upon sighting the applicant, descended on him and assaulted him. He was subsequently detained at the police station for three hours before he was released on bail.

Derogation from Right

Section 45, subsections 1 and 2 of the Constitution is normally referred to as restriction and derogatory clause. State agencies often rely on this section to defend wrongful detention orders by maintaining that detention of the suspect or their action in depriving the individuals of their liberty is justifiable in law. The said section 45 provides as follows:

1. Nothing in sections 37, 38, 39, 40 and 41 of this constitution shall invalidate any law that is reasonably justifiable in a democratic society—
 - a) in the interest of defense, public safety, public order, public morality or public health; or
 - b) for the purpose of protecting the rights and freedom of other persons.
- (2) an act of the National Assembly shall not be invalidated by reason only that it provides for the taking, during periods of emergency, of measures that derogate the provisions of section 33 or 35 of this Constitution, but no such measures shall be taken in pursuance of any such act during any period of emergency, save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency;

With respect to this omnibus escape route which is always (albeit without sincerity) resorted to by agencies of government whenever they deprive citizens of their liberty, the judiciary always maintains its stand by construing this derogatory clause strictly vis-à-vis the subject matter of individual complaints, and most often than not the courts would hold the provision not applicable. An example is the case of *Punch Nigeria Ltd. v. A.G. Federation and Ors.*²¹ The first applicant is a publisher of various newspapers including *Daily Punch*, *Sunday Punch* and *Saturday Punch*. On that fateful day, its premises invaded by the State Security Service and armed mobile policemen. All the staff and workers were locked inside the premises between the hours of 3:00 am and 11:00 am. Later, they seized all the newspapers being produced and locked up the office premises. No reason was proffered for this action.

The first applicant and others eventually challenged this invasion in court. Respondents contended that their action was justified relying on section 42 of the 1979 Constitution (now section 45) that the invasion of the applicant's rights was done in the interest of security, public safety, public order or public morality. Rejecting this argument Odunowo, J., had this to say:

I am aware a state of emergency has not been declared in this country to warrant the seizure and occupation of the first applicant's business premises. Nothing has been put forward to justify the detention of the second applicant ... these violations cannot be justified on any of the grounds that the invasion of their rights was done in the interest of security, public order or public morality. Even if a state of emergency was declared, it is still incumbent on the government to pay due regards to the rule of law, which implies that every person,

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21 (1998) *HLLRA I* (Human Rights Law Reports of Africa), 488 at 492-493.

including ministers, judges and other officials, is subject to the ordinary laws of the land....

It should be further pointed out that where the arrest of a citizen is illegal and unconstitutional as a result of a violation of his fundamental rights, anything that derives its existence or emanates from such illegal or unlawful arrest or predicated thereon is in itself illegal and unlawful and therefore null and void and of no effect whatsoever. Thus any detention order issued subsequent to and consequent upon an illegal arrest of the citizen is unlawful.²²

Reasonableness of the Arrest

It is trite law that arrest of a person can be made upon reasonable suspicion that he has committed an offence. However, the Constitution does not envisage mere suspicion or any unsubstantiated allegation; rather the suspicion must be reasonable to warrant detention or arrest. A balance must be maintained between law enforcement on the one hand and giving due regard and recognition to rights of citizens on the other.

In *Abdul Lateef Adegbola v. I.G.P. & 2 Ors.*, the two applicants while traveling to Ilorin to attend a meeting, had their car broke down and had to abandon their vehicle on the road and went by public transport. On getting to Ilorin metropolis they were accosted by policemen on patrol who refused to listen to their explanation, but accused them of wandering and detained them until the second morning when they were released upon intervention of other Muslim brethren who came to attend the same meeting.

The Federal High Court in Ilorin held the arrest and detention to be an infringement of applicants' rights in that it was not based on reasonable suspicion. Justice Tsoho commented on the test of reasonableness that could ground a lawful arrest thus:

Reasonable and probable cause entails the defendant (respondent) having in his possession as a reasonable and sane person a set of facts which to an ordinary man would lead to the conclusion that the plaintiff has committed (or would commit) criminal offences.²³ That the belief in criminal culpability of the plaintiff must be honest, based upon full conviction, founded upon reasonable grounds, in relation to a set of facts and circumstances which if true would lead every reasonable person to believe the plaintiff has committed an offence.

Pre-eminence of Fundamental Right

Fundamental rights are provided for in chapter IV of the Constitution. The rights guaranteed therein are superior to any other law in the land. No law should be inconsistent with their provisions and they rank first in the hierarchy of laws in the entire country.²⁴ It is against the above background that the judiciary is always ready to assist any

²² *Ransome-Kuti v. A.G. Fed.* (unreported) Suit No. M/287/92 delivered on 1/7/92.

²³ *Abdul Lateef Adegbola v I.G.P. & 2 Ors.*, Suit No. F.H.C./M/23/2000. The learned judge referred to, applied and followed the case of *Balogun v. Amubikahun* (1989) 3 NWLR (pt. 107) 18 at 27.

²⁴ Section 1(1) affirms supremacy of the Constitution to the exclusion of any other laws. Specifically, subsection (3) states that if any other law is inconsistent with the provisions of the Constitution, the Constitution shall prevail and that other law shall to the extent of the inconsistency be void.

citizen whose right is being infringed upon. This position was enunciated in *Enwere v. C.O.P.*²⁵ and a host of other cases where courts held the constitutional guaranteed rights as sacrosanct and which cannot be derogated from without lawful justification.

Remedy for Breach of Right

The Constitution provides that anybody who is unlawfully arrested or detained shall be entitled to compensation and public apology from the detaining authority.²⁶ Where there has been a successful litigation on breach of any fundamental right, especially right to personal liberty, the courts always award damages, which may be compensatory or exemplary. Once the court has declared that an applicant's rights have been infringed upon, award of damages follows automatically. This would serve as deterrence against naked, arrogant, arbitrary and oppressive abuse of power.²⁷

Upon filing the necessary processes in the state High Court where the breach has occurred, the judge may order that the detaining authority offers apology or award compensation to the applicant. The court may make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any right to which the applicant may be entitled.²⁸

This position was supported by the apex court in *Okonkwo v. Ogbogu*,²⁹ where the Supreme Court held:

Any trespass to the person, however slight, gives a right of action to recover damages. Nominal damages may be awarded for the injury to the man's dignity or for discomfort or inconvenience. When liberty has been interfered with, damages are given to vindicate the plaintiff's rights, even though he has not suffered any pecuniary damage. It is also not necessary for the plaintiff to give evidence of damage to establish his cause of action or to claim any specific amount of damage.

Conclusion

Despite all the above judicial activism toward preservation of individual rights to liberty, violation of citizens' right to liberty still rages on in the society, even in our democratic setting. Many of our judges are timid when faced with cases involving government and citizens. It takes a lot of courage to make a pronouncement or order against their appointer, particularly the executive arm of government.³⁰

A responsible government would not in any way deprive its citizens their liberty without just cause, and even whenever it is justifiable to do so such a deprivation must be in accordance with laid-down rules and in accordance with procedures permitted by

²⁵ Supra.

²⁶ Subsection 6 of section 35.

²⁷ See the case of *Minister of Internal Affairs v. Shugaba* (1982) 3 NCLR 915. The same position is maintained by court in *Odugu v. A.G. Federation* (1996) 6 NWLR (pt. 456) 505.

²⁸ Section 46(2) of 1999 Constitution. See also Order 1, rules 1 and 2 of Fundamental Rights Enforcement Procedure Rules 1990 as preserved by section 315.

²⁹ (1996) 37 LRCN 580.

³⁰ Note that the Executive on the recommendation of Judicial Service Commission does the appointment of the judicial officers into courts. The situation may arise that who pays the piper dictates the tune.

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law. It is our submission that for courts to make right to liberty more meaningful, they should liberally and broadly interpret it as contained in our Constitution.

Deprivation of one's liberty unjustifiably amounts to torture and dehumanization. The very moment a person's freedom is denied, that person is automatically dehumanized; thus it is not only when a person is bodily harmed that he is said to be tortured. The moment his cherished freedom is taken away, he is under torture.³¹

In conclusion, it is imperative to call on governments at all levels to respect, recognize and protect the citizens' right to personal liberty and take all necessary measures toward its preservation. It needs be pointed out that for government to live up to its expectation in protecting citizen's fundamental rights, it is necessary to put in place special courts whose main businesses would be enforcement of fundamental rights and constitutional cases only. This would assist in timely judicial response to issues affecting citizens' rights and any other constitutional matters. Nigeria could borrow a leaf from the South Africa, where constitutional courts exist with specific jurisdictions. Cases even from the appellate courts are referred to the constitutional courts for determination. This ultimately gives them expertise in particular areas and shows the high premium placed on issues bordering on rights of citizens and allied constitutional matters.

It is this writer's opinion and suggestion that appointment of judges into such courts, if established, should be based on expertise in relevant areas of law. Seasoned legal practitioners may be suited for the position of judges in such courts so that they can bring their erudite and learnedness to bear on the bench. In this way, issues relating to human rights would assume the top priority. ☉

31 See *Ray Ekpri v A.G. Federation* (1988) 1 HRLR 391 at 399 ratio 8.