APPROACHES TO REDUCING PRE-TRIAL INCARCERATION IN LAGOS*

1.0 Introduction

Lagos State is the most populous of the 36 States in the Nigerian federation. Its population is estimated at 15 million. The National population is estimated at 120 million. It is the commercial and industrial nerve centre of the nation.

Law and order challenges have remained difficult to resolve. Some of that being due to the complex structure of our administration of justice system. While the State controls prosecution, through the Ministry of Justice, the Federal Government controls the police and prison service. This has given rise to policy conflicts, planning difficulties and of course considerable buck passing on questions of who is responsible for problems of delays and inefficiency in the trial system and consequently prison congestion.

1.1 Is Pre-trial incarceration a problem in Lagos?

The straight answer to the question is yes – and it is a significant problem across the Nation. However, Lagos, which has the rather dubious distinction of having the highest number of prison inmates, also has the highest number of awaiting trial persons (ATPs), and the highest percentage relating to its prison population. Shown in Appendix 1 (a State by State breakdown of inmate population in Nigerian prisons), the total inmate population in Nigerian Prisons is 39,011, while the awaiting trial population is 23,543 (60%).

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Total prison population in Lagos is 4,077 while the awaiting trial population is 3,564 (87% of the total prison population).

The problem is compounded by the congestion in the prisons themselves. As shown in Appendix 2, while the 5 facilities available in Lagos are designed to accommodate 2,795 inmates, as at December 2005, they held 4,077 inmates. Lagos again records the highest number of ATPS who have been detained for periods in excess of 5 years – 934 inmates in all (23% of the population of ATPs).

Of course the immediate consequences of lengthy pre-trial incarceration are the major logistical difficulties imposed on the prison system. Facilities, which are poor even for the actual capacity of the prisons, are now required to serve almost double that capacity. Vocational, educational and other facilities designed to meet the reformative objectives of the prison system become hopelessly inadequate and misapplied, since those who will use them may not even be persons in need of reformation.

Worse still is the fact that the constitutional guarantee of presumption of innocence becomes rather empty, when the 'presumed innocent' spend years in custody, with little or no prospects of compensation even if found innocent.

Despite considerable criticism over the years of the fact of and consequences of lengthy pre-trial incarceration, the option still appears to be preferred by operators of the administration of justice system.

The reason generally given is that since there is no reliable national or state identification scheme, the tracking of individuals who may have cause to conceal themselves is difficult if not impossible. There is no

national database of persons who have been processed through the criminal justice system whether leading to conviction or not. Police record keeping, finger printing etc have also been notoriously neglected over the years. Therefore tracking even serial offenders presents difficulties.

A recent report of the National Working Group on Prison Reforms and Decongestion (February 2005) identified the most common reasons for pre-trial incarceration as follows :

(i) Inability to post bail conditions especially for offences with strict bail terms (e.g. homicides, armed robbery).

(iii) Revocation of bail.

(iv) Lack of the court's jurisdiction to try the offence by the court of arraignment (the so called "Holding Charge").

(v) Unavailability of witnesses.

(vi) Delays in advice from the office of the Attorney General.

(vii) Transfer of Investigating Police Officer (IPOS) out of jurisdiction.

(viii) Delays in the trial process – lengthy adjournments etc.

(ix) Transfer of trial judges and magistrates.

(x) No legal representation.

The procedure for remand itself especially for armed robberies and homicides (offences usually referred to as

"not bailable" but more accurately, offences for which bail is rare and difficult to obtain) is one that has remained problematic.

What tends to happen in practice is that such suspects are taken before a magistrate on a charge indicating the alleged offences. This is usually to meet the constitutional requirement that suspects must not be detained for an unreasonable length of time before being taken to court. The Constitution of the Federal Republic of Nigeria 1999 prescribes under Section 35 as follows:

> (5) In subsection (4) of this section, the expression "a reasonable time" means –
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> (a) in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of forty kilometres, a period of one day; and
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> (b) in any other case, a period of two days or such longer period as in the circumstances may be considered by the court to be reasonable.

Since magistrates have no jurisdiction over homicides and armed robberies, the magistrate does not try the matter and would simply remand the suspect until police investigations are concluded, and the file is sent to the office of the Attorney General to decide on whether or not to prosecute. During this period, the suspect of course remains in incarceration. The procedure has been challenged notably in the case of *Evangelist Bayo Johnson v. E.A. Lufadeju (Mrs.), Chief Magistrate Grade 1 and Attorney-General of Lagos State*, CA/L/334m/97

delivered on the 13th of June, 2004 where the Court of Appeal took the view that the procedure adopted in that case was an arraignment proceeding, that once the Magistrate lacked jurisdictional competence to try the substantive offence she could not remand the suspect under Section 236(3) of the Criminal Procedure Law, which provides:

> If any person arrested for any indictable offence is brought before any magistrate for remand, such Magistrate shall remand such person in custody or where applicable grant bail to him pending the arraignment of such person before the appropriate court or Tribunal for trial.

The Court was also of the view that Section 236(3) of the Criminal Procedure Law is in direct conflict with Section 32 of the 1979 Constitution of the Federal Republic of Nigeria (now Section 35 of the 1999 Constitution) which provides thus:

> (1) Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with procedure permitted by law –
>
> (c) for the purpose of bringing him before a court in execution of the order of a 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…"

Unfortunately the decision does not resolve the matter since all it does is to nullify the procedure for remand on the ground that the remanding courts lack jurisdiction to try the substantive matter. The alternative then is for the police to take the suspects to the High Court for remand. The underlying issue of long incarceration of course remains unresolved since the problem is really one caused not by the procedure but by lengthy investigations, possible transfer of Investigating Police Officers etc.

Unavailability of witnesses, and especially Investigating Police Officers, underscores the problem of dichotomy of responsibilities in our criminal justice system. The Nigerian Police is a centrally controlled federal agency headed by an Inspector-General of Police who operationally deploys officers across the nation. Transfer of police officers have for long been done without recourse to State authorities and without regard to the outstanding investigatory or criminal court assignments. An associated issue, which worsened the Lagos ATP situation in particular, was the result of the transition from Military to Civilian rule in 1999.

On account of the new democratic constitution, armed robbery tribunals (which had several draconian features of military decrees) were abolished. Pending trials, some at judgment stage, many of which had already taken years to process had to be begun de novo before the regular courts. Of course, many witnesses could no longer be traced and IPOS had been transferred out of jurisdiction.

Many of the suspects, some rather notorious in their communities had been in detention for a minimum of 5

years, some over 10 years (punishment for armed robbery is death or life imprisonment).

The question was whether to let them go on account of the obvious difficulties of restarting trials. Neither the Ministry of Justice, the Judiciary nor the Police was particularly willing to be seen by the public as having been responsible for the release of a large number of armed robbery suspects, in a city where security concerns have for long been a front burner issue.

1.2 **Reducing Pre-trial incarceration**

Since civilian rule in 1999, considerable attention has been paid to the question of reducing pre-trial incarceration. Federal and State authorities have tried to work together to deal with many of the issues. In Lagos, we have taken a number of options, some novel.

Short-term initiatives

(i) *Ensuring Legal Representation*

One of the major causes of lengthy pre-trial incarceration is the suspect's lack of competent legal representation that is able to work through the criminal justice bureaucracy, get the suspect admitted to bail and have the case heard expeditiously. NGOs and public-spirited lawyers, have tended to take on such cases, but are barely able to scratch the surface of the problem. The expenses one would incur due to delays discourage many. In 2000, the Ministry of Justice established the Directorate for Citizens' Rights (DCR) with the broad objective of vastly improving access to justice (especially criminal justice) to the poor and most vulnerable. A unit of the Directorate is the Office of the Public Defender (OPD) which has 5 offices in the

city of Lagos. The OPD offers free legal representation and counsel to the poor.

Considerable resources are deployed to the issue of ATPs. In 2005 over 200 ATPs were represented by the OPD, whilst 109 of this figure were released. Being themselves government officials, OPD lawyers are better able to sort out bureaucratic problems in the criminal justice system. The Directorate also has a Human Rights Unit, which also has lawyers to whom referrals are made on ATPS.

(ii) Prerogative of Mercy

Existing institutional structures for reducing pre-trial incarceration include the State's Advisory Committee on the Prerogative of Mercy which constitutionally advises the Governor of the State on persons, usually convicted persons who may be deserving of pardon. However, the State has by what appears to be a small opening in the law, been able to use the Prerogative of Mercy Committee to consider ATPs for release. Section 212(1) (a) of the Constitution of the Federal Republic of Nigeria 1999 says:

> The Governor may (a) grant any person concerned with or convicted of any offence created by any law of a State a pardon, either free or subject to lawful conditions.

Our advice to the Committee was to the effect that the words "any person concerned with any offence" could cover persons suspected but not "convicted" of an offence thus giving ample room for the Committee to deal with the problem of long incarceration for ATPs.

(iii) *Nolle Prosequi*

The Attorney General's office also developed a policy of using the Attorney General's powers of Nolle Prosequi (discontinuance of criminal proceedings) to end cases of ATPs who had been in detention for extended periods.

The policy is mainly directed at persons held for relatively minor offences and those that do not involve violence. Once such cases get to court, the Attorney General enters a nolle prosequi. This has helped considerably in reducing numbers of ATPS.

(iv) *Chief Judges' Prison Visits*

The Chief Judge of the State is empowered by law to visit the prisons and conduct on the spot trials for ATPs. This is especially available for minor offences and ATPs who may have been kept in custody for periods in excess of what may have been the likely terms of imprisonment were they convicted for the offences for which they are being held.

(v) *Release to half-way Houses*

In 2004, at the height of the growing crisis over armed robbery suspects whose trials had to be started de novo, the Ministry of Justice, the Police, Judiciary and several civil rights NGOs especially concerned with prison matters, began work on a project with the objective of releasing that category of ATPs to half-way institutions to be jointly run by the NGOs but largely paid for by the State

Government with some support from the DFID Access to Justice Programme.

These half-way-houses were to provide decent accommodation, feeding, and vocational training. Ultimately, where the individual had acquired some skills, modest capital could be made available to start up a business. Alternatively they could be assisted to secure paid employment.

The facilities are planned to be located in rented accommodation within the city. The ATPs will be allowed out of the premises at specified periods under light supervision. Family members are to be allowed virtually unlimited access.

The difficulty with the concept is the fact that these are ATPs not convicts. The very idea of being held, even though under very liberal terms still leaves the issue of persons being detained without the prospect of trial within a reasonable time.

However, on account of the fact that most of such detainees are usually too poor and helpless to do much for themselves upon release, the halfway house option is likely to be voluntarily accepted by many of ATPS. In any event it is a step closer to complete freedom. The concept may also help to allay the fears of a public, who have been told by the media that a horde of armed robbery suspects may suddenly be unleashed on the city. The project is clearly open to criticisms of every kind, but it appears to be one of the few initiatives that have at least caught the joint fancy of the criminal justice sector and the NGOs.

(vii) *The Creation of the Criminal Division of the High Court*

One of the key initiatives taken with a view to reducing trial delays and inefficiency was the creation of the Criminal Division of the High Court of Lagos State. The creation of a specialized division with judges solely dedicated to criminal cases has helped considerably in reducing trial time. In addition electronic recording of proceedings was introduced in October 2005; this has replaced writing in longhand and is expected to considerably cut trial time.

(viii) *Criminal Case Tracking System*

The criminal case tracking system (CCTS) is a computerized case tracking system designed to track and monitor the progress of persons accused of offences and remanded in custody in Lagos State. Each of the key criminal justice institutions – the Judiciary, Ministry of Justice, Prison Service will have its own computerized case tracking unit which will be the focal point of the CCTS in that institution. The central collation unit is located in the Ministry of Justice. Every accused person within the system will be tracked from all units where such has been processed.

Long Term Initiatives

(1) *The Reform of Criminal Procedure Laws*

In 2004, the Ministry of Justice began a comprehensive review of the criminal procedure laws of the State (the States have legislative competence over criminal laws and procedure). The sole objective of the review was to reduce delays and inefficiency in the trial process and by such means

reduce the incidence and length of pre-trial incarceration.

Some of the proposed initiatives under the Criminal procedure reforms include the following: -

(i) **Probable cause**: An amendment to Section 236 of the Criminal Procedure Law enjoins the Magistrate to satisfy himself that there is 'probable cause' to remand the suspect. Probable cause is defined to include the circumstance of the individual case, the nature and seriousness of the alleged offence, reasonable grounds that the person has been involved in the commission of the alleged offence and reasonable grounds that the person may abscond or commit further serious offence.

(ii) **Periodic review of the remand order**: Under the proposed Section 236(5), an order of remand made shall not exceed a period of thirty (30) days in the first instance and the magistrate may order the release of the person remanded thereafter unless good cause is shown why there should be a further remand order for a period not exceeding one month.

(iii) **Remitting records of arrests**: Section 10(3) Criminal Procedure Law (Proposed Law) enjoins the Commissioner of Police to remit to the office of the Attorney-General of the State a record of arrests made with or without a warrant in relation to State offences within one week of arrest.

(iv) **Remitting Other records by Police:** Section 291(7) imposes a duty on the Police to remit

periodically to the Attorney-General of Lagos State the following:-

(a) Records of all cases including appeals being prosecuted by police prosecutors and such records shall be forwarded to the Attorney-General of Lagos State every three (3) months.

(b) Records of all convictions or acquittals in cases prosecuted by police prosecutors shall be forwarded at the expiration of each case.

(v) **No stay of proceedings:** In order to expedite criminal trials, it is proposed under Section 274A that application for stay of proceedings in respect of any criminal matter should not be entertained until judgment is delivered.

(vi) **Registered Bondsmen**: In order to create an enabling environment for relaxing bail conditions and at the same time reducing the chances of the suspects jumping bail, it has been proposed that registered bondsmen should be introduced into the criminal justice system.

(viii) **Plea Bargaining**: Essentially, it is proposed to empower the Attorney General's office to accept the accused person's plea of guilty for a lesser offence, instead of that for which he had been indicted. The obvious advantage is the possibility of avoidance of trial.

(2) **State Police and Prisons**

UNDP estimates that by 2015, Lagos will be one of the 10 largest cities in the world. There is little

doubt that a centralized police force whose superior command resides almost 1,000 kilometres from Lagos is unsuitable for effective policing. The same is true for the Prison Service. All prisons in Lagos were built before 1964 and have not been expanded since. Federal policy has simply not considered it a priority. The need for State Police and control over penitentiaries is apparent. This will also allow for clear policies in the criminal justice sector and more useful planning for processing suspects through the system. A State Police will of course eliminate the transfers of Investigating Police Officers under the current federally controlled police.

(*3) National Identification*

Recently the federal government of Nigeria embarked on a National Identity Card Scheme. This is a long overdue project whose advantages are so obvious. Clearly, it will reduce the necessity for stringent bail conditions especially where the reason is the perceived difficulty of being able to trace the suspect.

(4) Mediating Criminal Cases

Criminal cases are by law regarded as matters in which the State is the other party and complainant. The practical effect of this is that in many cases where the victim or relatives of victims are for some reason, unwilling to seek redress; the State may still and usually insists on continuing the trial. Currently, mediation of small civil claims is an extremely popular unit of the Directorate of Citizen's Rights. It is now being proposed to mediate minor criminal offences, and attempt to assuage the victims' feelings in the process. Mediation will

invariably contribute to reducing pre-trial incarceration.

1.3 Conclusion

Lengthy pre-trial incarceration is a major problem in our criminal justice system. However, it is clearly not insurmountable. There is increasing evidence especially as the different reform initiatives are applied, that the numbers are dropping and that the issue may well be history soon.