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A photograph of two hands clasped together, with metal handcuffs attached to the wrists. The hands are positioned in the center of the frame, with the fingers interlaced. The background is dark, and the lighting highlights the texture of the skin and the metallic sheen of the handcuffs.

**NAVIGATING THE CONUNDRUM OF
HOLDING CHARGES IN NIGERIA:
RECONCILING STATUTORY PROVISIONS
WITH CONSTITUTIONAL PRESUMPTION
OF INNOCENCE**

INTRODUCTION

The concept of a “holding charge”, whereby a defendant¹ is brought before a court to secure a remand order pending investigation or legal advice, presents a profound legal paradox and continues to evoke unease in Nigeria's criminal justice system. The courts have consistently and categorically denounced the practice, branding it unconstitutional, alien to Nigerian jurisprudence, and an affront to the fundamental human rights (particularly the presumption of innocence enshrined in Section 36 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) – “1999 Constitution”) of a defendant.

However, various statutory instruments, including Section 293 of the Administration of Criminal Justice Act 2015 (“ACJA”), and similar provisions in the Administration of Criminal Justice Law of Lagos State, 2015 (“ACJL, Lagos”), appear to codify this condemned practice under the guise of lawful remand procedures.

This article examines this troubling legal paradox. It reconciles the statutory remand framework with the constitutional presumption of innocence,² interrogates whether remand provisions offend constitutional supremacy³ and explores potential legal remedies for defendants trapped in the limbo of prolonged detention without trial.



THE ROLE OF THE POLICE AND THE EMERGENCE OF HOLDING CHARGES

In Nigeria's criminal justice system, the police play a pivotal role as the first point of contact between the state and suspected offenders. Their functions include the arrest,⁴ investigation,⁵ and detention of suspects,⁶ as well as initiating criminal prosecutions⁷ where necessary.

However, over time, a troubling procedural innovation has emerged within police practice in the execution of their mandate and enforcement of laws—the use of “holding charges.” Under this practice, defendants are brought before a court, solely for the purpose of securing a remand order pending the conclusion of police investigations. This approach, often justified by investigative delays or logistical constraints, results in defendants being detained without a formal charge or trial—sometimes for extended periods.

^[1] The term “defendant” can be used interchangeably with “suspect” in this context, particularly in reference to persons arrested and detained by the police pending formal arraignment or prosecution. While “suspect” is more technically appropriate during the investigative stage, “defendant” is adopted to reflect its practical usage within the Nigerian criminal justice system, especially where a person has been made a party to a case or a formal process has been initiated against them.

^[2] See Section 36(5) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) (“CFRN”)

^[3] See Section 1(3) of the CFRN

^[4] See Section 32 of the Police Act, 2020

^[5] See Section 31 of the Police Act, 2020

^[6] See Section 64 of the Police Act, 2020

^[7] See Section 66 of the Police Act, 2020

The evolution of holding charges, though not explicitly codified in Nigerian law, has become a widespread mechanism through which liberty is curtailed before any judicial determination of guilt. It is this extra-legal evolution in criminal procedure that brings the practice into sharp conflict with constitutional safeguards and raises critical questions about legality, fairness, and due process.

STATUTORY FRAMEWORK⁸: CODIFICATION OF A HOLDING CHARGE/AN UNCONSTITUTIONAL PRACTICE?

The provisions of Section 293(1)⁹ of the ACJA and Section 264(1)¹⁰ of the ACJL, Lagos permits a prosecutor to apply for a remand order from a Magistrate, even where the Magistrate lacks jurisdiction to try the substantive offence. Notably, under Section 293(2) of the ACJA, such an application may be made *ex parte*—that is, without prior notice to the defendant. As a result, the defendant is often remanded in a correctional facility for an extended period without being formally arraigned before a court of competent jurisdiction, without the opportunity to take a plea, and without the benefit of an adversarial hearing during the remand process.

Although these provisions are procedurally framed to prevent indefinite police detention and to strike a balance between law enforcement imperatives and pre-trial safeguards, they nonetheless reflect the essential features of a holding charge (without any opportunity to be heard)—a practice that Nigerian superior courts have consistently deprecated as illegal, unconstitutional, and a gross violation of fundamental rights.

CONSTITUTIONAL SUPREMACY AND THE PRESUMPTION OF INNOCENCE

Section 36(5) of the 1999 Constitution affirms that every person charged with a criminal offence is presumed innocent until proven guilty. Further reinforced by Section 35(1), the Constitution guarantees every person the right to personal liberty and specifies the limited circumstances¹¹ under which a person may be lawfully detained. This practice undermines these constitutional protections when juxtaposed with the remand provisions under the ACJA and ACJL, particularly those allowing for *ex parte* applications without a formal charge or an adversarial hearing.

For emphasis, the remand provisions raise significant constitutional concerns and effectively amount to a form of punishment without trial, contrary to the adversarial model of justice, which requires that no person be penalized unless found guilty by a competent court. Though the remand provisions were intended to provide judicial oversight over pre-trial detention, their current application, devoid of procedural safeguards like evidentiary thresholds or participation by the accused, renders them a procedural trap. It permits the curtailment of fundamental rights without substantive justification or due process, in direct conflict with the 1999 Constitution.

Under Section 1(3)¹² of the 1999 Constitution, any law inconsistent with constitutional provisions is void to the extent of that inconsistency. Thus, the constitutionality of the remand provisions or similar statutory mechanisms is called into question, particularly where they permit preemptive detention in a manner that violates guaranteed fundamental rights.

^[8] Administration of Criminal Justice Act (ACJA) 2015 and the Lagos State Administration of Criminal Justice Law, 2015 will be examined.

^[9] It provides that A suspect arrested for an offence which a Magistrate's Court has no jurisdiction to try shall, within a reasonable time of arrest, be brought before a Magistrate's court for remand.

^[10] It provides that any person arrested for any offence triable on Information shall within a reasonable time of arrest be brought before a Magistrate for remand and the Magistrate shall have powers to remand such a person after examining the reasons for the arrests exhibited in the request form filed by the Police, and if satisfied that there is probable cause to remand such person pending legal advice of the Director of Public Prosecutions or the arraignment of such person before the appropriate Court or Tribunal.

^[11] Such conditions must conform to the Constitution itself.

^[12] <https://www.eduweb.com.ng/meaning-of-section-1-3-of-1999-constitution/> (Meaning of section 1 (3) of 1999 constitution - eduweb) - accessed on 21st May 2025.

JUDICIAL CONDEMNATION OF HOLDING CHARGES

The Nigerian judiciary has consistently rejected the legitimacy of holding charges, denouncing them as alien to the nation's criminal jurisprudence and incompatible with constitutional safeguards. The holding of the Court of Appeal in **BOLAKALE V. STATE**¹³ is instructive. The Court held thus:

“It is an aberration and an abuse of judicial process for an accused person to be arraigned before a Magistrate Court for an offence over which it has no jurisdiction, only for the accused person to be remanded in prison custody and not tried or properly charged before a competent Court for trial. It will be an infraction on the right to fair hearing and liberty of the accused person. It will place him in a position of hopelessness as to how to enforce his right.”



Likewise, the orbiter dictum of Niki Tobi J.C.A. in **ONAGORUWA V. THE STATE**¹⁴ is also instructive, when he enunciated that:

“In a good number of cases, the police in this country rush to court on what they generally refer to as a holding charge ever before they conduct an investigation.... Where the investigation does not succeed in assembling the relevant evidence to prosecute the accused to secure a conviction, the best discretion is to abandon the matter and throw in the towel On no account should the prosecution go out of its way in search of evidence to prosecute when it is not there.”

These decisions underscore a judicial philosophy rooted in constitutional supremacy and the rule of law, emphasizing that holding charges circumvent the adversarial process, which requires that evidence be assembled and tested before guilt can be determined. In **JOHNSON V. LUFADJU**,¹⁵ the court held that “Neither the Nigerian Constitution nor any other law in force in Nigeria provides for a holding charge. Thus, a holding charge is unconstitutional. In the instant case, the Chief Magistrate's Court was bound to let the appellant go from the police cell in the absence of facts which the prosecution was duty-bound to supply justifying the appellant's detention in the said cell.” It is opined that the right to a fair hearing¹⁶ cannot be reconciled with a procedure that allows indefinite detention without a formal charge.

DO THE COURTS HAVE A DUTY TO STRIKE DOWN THE STATUTORY PROVISIONS?

While Nigerian courts have vociferously condemned the practice of holding charges, they have stopped short of judicially invalidating the enabling remand provisions under the ACJA and

¹³(2006) 1 NWLR pt 962 pg 507 at 518 para H

¹⁴(1993) 7 NWLR (Pt. 303) 49 at 107

¹⁵(2002) 8 NWLR (Pt. 768) 192 (Pp.217-218, para. H)

¹⁶Enshrined in Section 36(4) of the 1999 Constitution

ACJLs. However, by Section 1(3) of the 1999 Constitution, courts are constitutionally obligated to declare any law inconsistent with the Constitution as null and void to the extent of its inconsistency. In the absence of an express declaration, such inconsistent provisions are deemed impliedly repealed or modified to align with constitutional standards. The decision of the Supreme Court in **AG OF OGUN STATE & ORS V. AG OF THE FEDERATION**¹⁷ is instructive, where it was held that:

“The Supreme Court, it is pointed out, has effectively decided on the proper way to approach the subject of the inconsistencies of any law with the provisions of the constitution. In the very recent case of Edjerode v. Ikine (2001) 18 NWLR (Pt. 745) 446, it is stressed, the Court held that if any existing laws or any of their provisions are inconsistent as from 1st October, 1979 with the 1979 constitution, such laws or any of their provisions whether or not pronounced upon by the Court as being inconsistent with the said constitution, are impliedly repealed or modified to conform with its provisions.”

Further, the Supreme Court in **NPF & ORS V. POLICE SERVICE COMMISSION & ANOR**¹⁸ recently reaffirmed the supremacy of the Constitution and clarified the meaning of "inconsistency" by providing a definitive interpretation, holding that:

“Section 1 of the Constitution is emphatic on the position that if any 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... "Inconsistency", in law to me can be taken to be a situation where two or more

“Section 1 of the Constitution is emphatic on the position that if any 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... "Inconsistency", in law to me can be taken to be a situation where two or more laws, enactments and or rules are mutually repugnant or contradictory, contrary, the one to the other so that both cannot stand and the acceptance or establishment of the one implies the abrogation or abandonment of the other. It is thus, a situation where the two or more enactments cannot function together simultaneously. The Constitution does not tolerate that. In Ishola v. Ajiboye (1994) 7-8-SCN (Pt. 1) 1 (1994) 6 NWLR (Pt. 352) 506, this Court held that the Constitution is not only supreme when another law is inconsistent with it, but also when another law seeks to compete with it in an area already covered by the Constitution.”

Undoubtedly, a more assertive judicial approach is required. Courts should interpret the remand provisions in a manner that aligns with constitutional safeguards—by mandating that such applications be made on notice to the defendant and supported by prima facie evidence. Alternatively, where compliance with constitutional standards is unattainable, the relevant provisions may be declared void pursuant to Section 1(3) of the 1999 Constitution for violating fundamental rights. In parallel, a defendant may institute a constitutional action or raise a preliminary objection to challenge the validity of the remand application on the grounds of inconsistency with constitutional provisions.

^[17] (2002) LPELR-621 (SC) (Pp. 19-20 Paras. C-C)

^[18] (2023) LPELR-60782(SC) (Pp. 59-60 paras. A)

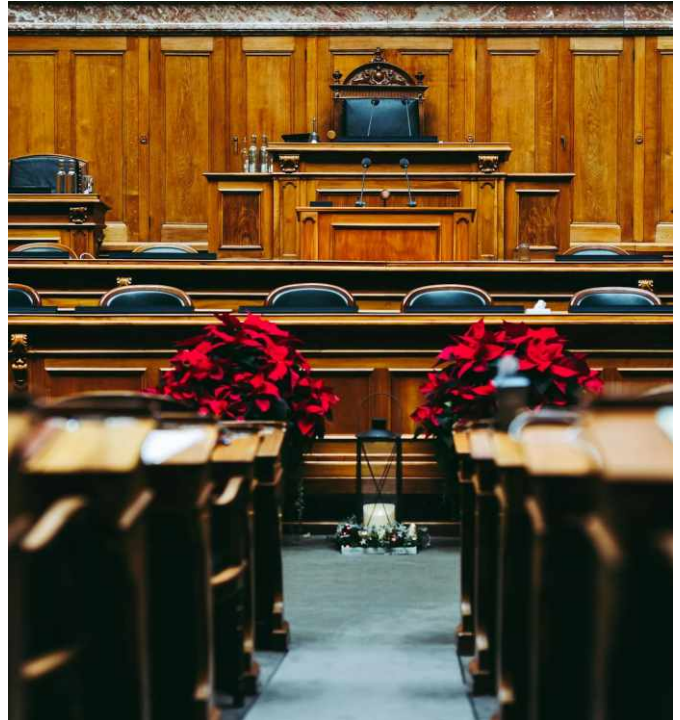
PRAGMATIC LEGAL AND STRATEGIC REMEDIES TO REMAND ORDERS WITHOUT FORMAL CHARGE

In practice, defendants are frequently arrested and brought before magistrate courts that lack jurisdiction over the substantive offence. Despite this, such courts often issue remand orders pending the advice of the Director of Public Prosecutions (DPP). In many cases, no formal charge is filed, and the issuance of the DPP's legal advice is indefinitely delayed. This leads to prolonged and unjustifiable detention, undermining the constitutional guarantees of the defendant and due process. The routine issuance of remand orders by magistrate courts lacking jurisdiction raises grave concerns. It contravenes established jurisprudence, which protects individuals from detention without trial. This situation demands pragmatic and constitutionally sound remedies.

A viable and immediate remedy available to the defendant is to approach a superior court of record—typically the State High Court or the Federal High Court, depending on the nature of the alleged offence—with an application for unconditional release or bail of the defendant.¹⁹ This application should be supported with an affidavit exhibiting:

- ⦿ The remand order of the magistrate court;
- ⦿ The charge sheet or record (if any) showing that no formal charge has been filed before a court of competent jurisdiction;
- ⦿ Evidence of delay in the issuance of the DPP's legal advice;
- ⦿ A strong argument that the continued detention amounts to punishment without trial.

It is imperative to emphasize in the application that the defendant is being held without arraignment or a valid charge before a court of competent jurisdiction, thereby violating the principle of legality and the constitutional safeguard that detention must not precede conviction.



Nigerian courts have consistently held that remand without a formal charge does not justify continued detention. In such circumstances—particularly where the remanding magistrate lacks jurisdiction—the High Court is empowered, and indeed constitutionally mandated, to order the release of the defendant or grant bail. The Supreme Court, in cases such as **LUFADJEU V. JOHNSON**,²⁰ reaffirmed that pre-trial detention must not be arbitrary, indefinite, or unanchored on due process. Similarly, in **LAWAN VS. C.O.P JIGAWA STATE**,²¹ the court held that

“The law is settled, that a parade of a suspect in FIR before an inferior Court, without a formal charge, backed by a proof

^[19] See *Oguji v. DPO Ojo Police Station & Ors* (2021) LPELR-56044(CA) (P. 29, paras. D-F) where it was held that “... the person in remand can approach the High Court for a review of the order or for him to be admitted to bail.”

^[20] (2007) 8 NWLR (PT. 1037) 535

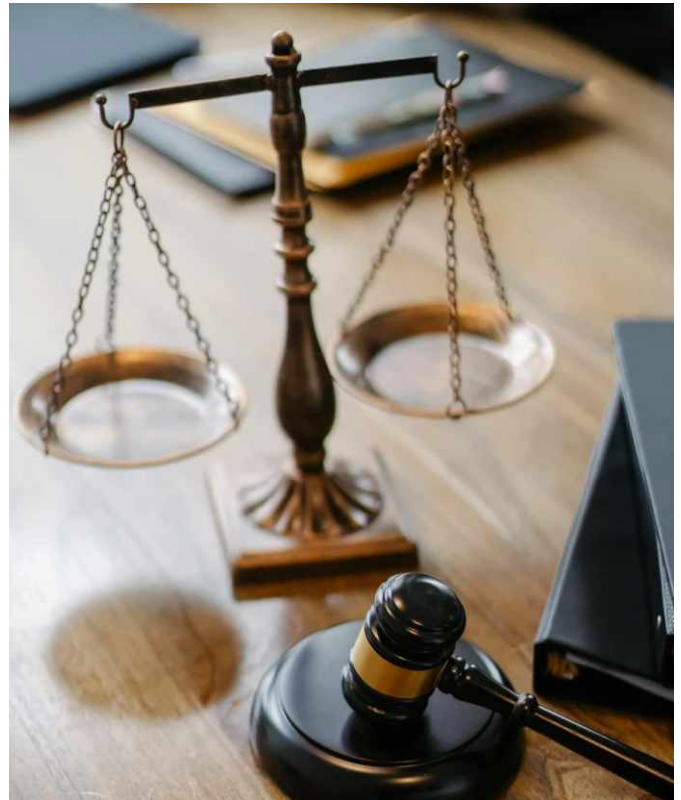
^[21] (2023) LPELR-60508(CA) (PP. 16-19 PARAS. C)

proof of information or proof of evidence, remains a speculation and cannot be used as credible basis to throw a citizen into prison custody without bail or to deny him bail... The State cannot use the holding charge as a pretext to curtail the appellant's personal liberty ad infinitum. That will offend the letters and spirit of Section 35 (1) of the same Constitution... As earlier stated in this judgment, it is quite scandalous that Appellant had been held in prison custody in the circumstances of the case (the gravity of the offence alleged against him notwithstanding), without any formal charge in a competent Court against him, and without trial or hope of trial. He ought to be released from prison and I so order, unconditionally, without prejudice to his being arraigned, when the prosecution, through the office of DPP, is ready and willing to arraign him."

In addition to judicial intervention through higher courts, a complementary remedy lies in a more purposive and constitutionally conscious approach by magistrates and judges. Judicial officers, in the exercise of their gatekeeping role, should refuse remand applications where the prosecution fails to demonstrate good cause or reasonable justification for remanding a defendant without a formal charge and continued detention. Upholding the supremacy of the Constitution requires that courts actively guard against procedural abuses that lead to pre-trial punishment in the absence of due process.

CONCLUSION

Nigeria's criminal justice system stands at a critical doctrinal crossroads. On the one hand, statutory remand provisions cloak themselves in the legitimacy of legislative text, purporting to



balance investigatory necessities with procedural safeguards. On the other, the courts, the Constitution, and the spirit of justice cry foul at the systemic abuse of such provisions to perpetuate unlawful detentions under the mask of legality.

The way forward lies in constitutional fidelity and judicial courage. Until the courts boldly strike down or narrow the application of the remand provisions, defendants will remain vulnerable to the spectre of detention without trial—a reality that mocks the presumption of innocence, undermines the rule of law, and chips away at the foundation of liberty.

The law must not merely speak. It must do justice. This justice demands not only that the innocent be presumed innocent, but that they are treated as such from the moment of arrest to the conclusion of trial. Anything less is a betrayal of the Constitution.

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