

# Arrest and Detention Powers Over Civilians: The Police Versus Government Authorities in Period of No Emergency.

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## Abstract

Federal and states legislatures make ordinary laws establishing government authorities, and confer on them the power to arrest and/or detain civilians, even in periods during which there is no proclamation of a state of emergency in force as declared by the President of Nigeria. The objective of this paper is to ascertain whether the federal or states legislatures have the constitutional legislative powers and matters, to establish and confer on their established government authorities, the statutory power of arrest and detention of civilians in periods of no emergency. The methodology is doctrinal. The paper evaluates the constitutional functions of, and foundation for, the establishment and operations of federal and state government authorities that may be conferred with the power of arrest and detention in Nigeria; and finds that government statutory authorities, not being branches of the Nigerian Police Force (NPF), cannot, under the 1999 Constitution of the Federal Republic of Nigeria, be validly conferred with the statutory power of arrest and detention of civilians in time of peace, by the legislatures. The paper recommends that government authorities may only be provided to, *inter alia*, assist the NPF in arrests and detentions within the areas of operations of those authorities in peace time.

**Keywords:** Arrest and detention, Constitutional powers and matters, Fundamental right, Government authorities, Nigeria, Police.

## 1. Introduction

Federal and states legislatures make ordinary laws establishing government authorities, and confer on them the power to arrest and/or detain civilians,<sup>1</sup> even in periods during which there is not in force a Proclamation of a state of emergency declared by the President of Nigeria.<sup>2</sup> Section 10(4) of the Federal Road Safety Commission (Establishment) Act,<sup>3</sup> provides that: 'In the exercise of the functions conferred by this section, members of the Corps shall have power to arrest and prosecute person responsibly suspected of having committed any traffic offence including the following offences and serve such person with court processes or notice of offence sheet'.<sup>4</sup> The federal legislatures have also established numerous other authorities or bodies, and conferred on them the statutory power of arrest and detention. Sections 13 & 14 of the Enugu State Road Traffic Management Authority (ESTMA) Law 2004 confers on ESTMA and its members the power to arrest suspected traffic offenders, impose fines on them, and detain their vehicles until the fine is paid; and in default of paying the fine after six weeks, the vehicles vest in Enugu state government for onward disposal by the state government.<sup>5</sup> Different states in Nigeria have also established

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1 This is commonly seen in federal and state Laws creating government authorities like the Traffic Management Authority Act, Traffic and Environmental Management Authority Laws of the States etc.

2 Section 45(2&3) of the CFRN permits statutory derogation of liberty of persons only in periods of emergency.

3 No 22, 2007.

4 See also section D of the Nigerian Highway Code.

5 See also similar provisions in the Lagos State Road Traffic Management Authority (LASTMA) Law 2004.



numerous authorities, and conferred on them the power of arrest and detention of civilians in periods of no emergency.

A careful perusal of section 2(2) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 as amended<sup>6</sup> shows that the Federal Republic of Nigeria is a federation of states. Section 214 of the CFRN provides that:

*214(1). There shall be a police force for Nigeria, which shall be known as the Nigeria Police Force, and subject to the provisions of this section no other police force shall be established for the Federation or any part thereof. (2) Subject to the provisions of this Constitution (a) the Nigeria Police Force shall be organized and administered in accordance with such provisions as may be prescribed by an Act of the National Assembly; (b) the members of the Nigeria Police Force shall have such powers and duties as maybe conferred upon them by law; (c) the National Assembly may make provisions for branches of the Nigeria Police Force forming part of the armed forces of the Federation or for the protection of harbours, waterways, railways and air fields.*

A critical look at section 214 of the CFRN shows that the CFRN itself establishes the Nigerian Police Force (NPF) and the Armed Forces of Nigeria (AFN), for the federation or any part thereof. The CFRN goes ahead to confer on the federal legislatures the constitutional power to create and regulate ‘other government security services’ than Police<sup>7</sup> for the federation or any part thereof. The law, as ordained by sections 4 & 318(1) of the CFRN and Parts I, II & III of the Second Schedule to the CFRN, is that for a legislature to have the competence to legislate an ordinary law on a constitutional legislative matter that shall have been constitutionally assigned to the legislature, the legislature shall have a competent substantive constitutional power to legislate on a competent substantive constitutional matter. Constitutional legislative powers and matters can be general,<sup>8</sup> specific,<sup>9</sup> substantive<sup>10</sup> or incidental<sup>11</sup>. Except for a member of the AFN or a member

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<sup>6</sup> See section 2(2) of the CFRN.

<sup>7</sup>In Item 45 of Part I of the Second Schedule to the 1999 CFRN.

<sup>8</sup> For general substantive constitutional legislative powers see section 4 & 318(1) of the CFRN, and section 10(2) of the Interpretation Act Cap I23 LFN 2004. For general incidental constitutional legislative power to legislate on constitutional legislative matters, see paragraph 2 of Part III of the Second Schedule to the CFRN. For general substantive constitutional legislative matters, see section 4 of the CFRN. For general incidental constitutional legislative matters, see paragraph 2 of Part III of the Second Schedule to the CFRN.

<sup>9</sup>For specific substantive constitutional legislative power to legislate on constitutional legislative matters, see section 4 & 318(1) of the CFRN, Item 67 of Part I of the Second Schedule to the CFRN, and section 10(2) of the Interpretation Act Cap I23 LFN 2004. For specific incidental constitutional legislative power, see section 318(1) of the CFRN and section 10(2) of the Interpretation Act Cap I23 LFN 2004. For specific substantive constitutional legislative matters, see the Second Schedule to the CFRN. For specific incidental constitutional legislative matters, see paragraph 2 of Part III of the Second Schedule to the CFRN.

<sup>10</sup> For general substantive constitutional legislative powers see section 4 & 318(1) of the CFRN, and section 10(2) of the Interpretation Act Cap I23 LFN 2004. For general substantive constitutional legislative matters, see section 4 of the CFRN. For specific substantive constitutional legislative power to legislate on constitutional legislative matters, see section 4 & 318(1) of the CFRN, Item 67 of Part I of the Second Schedule to the CFRN, and section 10(2) of the Interpretation Act Cap I23 LFN 2004. For specific substantive constitutional legislative matters, see the Second Schedule to the CFRN. For specific incidental constitutional legislative matters, see paragraph 2 of Part III of the Second Schedule to the CFRN.

<sup>11</sup> For general incidental constitutional legislative power to legislate on constitutional legislative matters, see paragraph 2 of Part III of the Second Schedule to the CFRN. For general incidental constitutional legislative matters, see

of the NPF,<sup>12</sup> and in period of emergency during which there is in force a Proclamation of a state of emergency declared by the President in exercise of the powers conferred on him under section 305 of the CFRN, the legislatures are not permitted by section 35 of the CFRN, to make ordinary laws that limit fundamental right to liberty of persons.<sup>13</sup> In other words, there is no general or specific substantive constitutional legislative power conferred on the legislatures to make ordinary laws in limitation of liberty, or a general or specific substantive constitutional legislative matter upon which ordinary laws can be made to limit liberty, in section 35(1) of the CFRN.

Section 35(1) of the CFRN is the custodian of the constitutional matter of right to liberty, and arrest and detention. Section 35(1) of the CFRN does not confer on the legislatures the power to limit personal liberty by way of establishing ordinary statutory authorities.<sup>14</sup> Instead, what the section does is to empower the legislatures to prescribe procedures for the limitation of personal liberty by the constitutional authority established in section 214 of the CFRN. To be able to establish an ordinary statutory authority and confer on it the power to limit personal liberty guaranteed in section 35(1) of the CFRN, a legislature must point out a provision in the CFRN empowering it to do so.<sup>15</sup> The constitutional pedestal and unlimited scope to confer powers on the NPF are respectively competent and broad enough to accommodate the matter of limitation of the guaranteed personal liberties in section 35(1) of the CFRN. This is because members of the NPF shall have such powers and duties as the constitutionally empowered federal and states legislatures may conferred upon them through federal and state laws.<sup>16</sup> Because of the constitutional pedestal of liberty right, and in the absence of constitutional sanction of the legislatures to limit the right other than prescribe procedure for the limitation, both the federal and states legislatures appear to have no constitutional competence to establish arresting authorities on their own. This work seeks to find out if the federal or states legislatures can competently confer on bodies, other than the NPF, the power to arrest and detain a civilian<sup>17</sup> in periods of no emergency. The paper is organized in five parts, including Part One, this Introduction. Part Two discusses arrest powers and the guaranteed constitutional right to liberty. Part Three discusses the doctrine of covering the field and implied repeal of state laws on arrest and detention. Part Four discusses the constitutional concept of unlawful arrest and detention, while Part Five concludes the paper.

## **2. Arrest Powers and the Constitutional Right to Liberty.**

The CFRN does not define 'police' in sections 214 & 318(1) of the CFRN or specify what police matter is all about in Item 45 of Part I of the Second Schedule to the CFRN. However, section 214(2) of the CFRN empowers the legislatures to confer on the NPF unlimited powers and duties,

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paragraph 2 of Part III of the Second Schedule to the CFRN. For specific incidental constitutional legislative power, see section 318(1) of the CFRN and section 10(2) of the Interpretation Act Cap I23 LFN 2004. For specific incidental constitutional legislative matters, see paragraph 2 of Part III of the Second Schedule to the CFRN.

<sup>12</sup> See section 35(7)(b) of the CFRN.

<sup>13</sup> See section 35(1) of the 1999 CFRN (As amended).

<sup>14</sup> A body can only be conferred with the statutory power to limit personal liberties, where the CFRN has furnished to a legislature both the legislative power and matter to make a law limiting personal liberty, or conferring power on the body to limit personal liberties.

<sup>15</sup> This can be seen in section 35(7)(b) of the CFRN for members of the NPF and AFN, and in section 45(2&3) for periods of emergency; and no such power is competent of legislation on civilians in periods of no emergency.

<sup>16</sup> See section 214(2)(b) of the 1999 CFRN. (As amended).

<sup>17</sup> i.e. persons other than members of the NPF and AFN.



including, if the legislatures wish, the power to arrest, or even enforce contracts.<sup>18</sup> The matter of limitation of liberty guaranteed in section 35(1) of the CFRN, with respect to civilians in periods of no emergency, is not enumerated in Part I or II of the Second Schedule to the CFRN. Item 68 of Part I of the Second Schedule only covers arrest and detention of persons in periods of emergency under section 45(2&3) of the CFRN, and detention of members of the NPF and AFN under section 35(7)(b) of the CFRN. Sections 4 of the Nigerian Police Act 2020 provides for the functions of the NPF thus:

*The Police Force shall (a) prevent and detect crimes, and protect the rights and freedom of every person in Nigeria as provided in the Constitution, the African Charter on Human and Peoples Rights and any other law; (b) maintain public safety, law and order; (c) protect the lives and property of all persons in Nigeria; (d) enforce all laws and regulations without any prejudice to the enabling Acts of other security agencies; (e) discharge such duties within and outside Nigeria as may be required of it under this Act or any other law; (f) collaborate with other agencies to take any necessary action and provide the required assistance or support to persons in distress, including victims of road accidents, fire disasters, earthquakes and floods; (g) facilitate the free passage and movement on highways, roads and streets open to the public; (h) adopt community partnership in the discharge of its responsibilities under this Act or under any other law; and (i) vet and approve the registration of private detective schools and private investigative outfits.*

The Nigerian Police Act 2020, on investigation and arrest,<sup>19</sup> provides that the federal legislatures have conferred on the NPF, the power of arrest of suspected offenders throughout Nigeria. That is in line with section 214 of the CFRN establishing the NPF for the Federation of Nigeria or any part thereof. Sections 31-32 of the Act provide thus:

*31. Where an alleged offence is reported to the Police, or a person is brought to the police station on the allegation of committing an offence, the Police shall investigate the allegation in accordance with due process and report its finding to the Attorney-General of the Federation or of a State, as the case may be, for legal advice. 32(1) A suspect or defendant alleged or charged with committing an offence established by an Act of the National Assembly or under any other law shall be arrested, investigated and tried or dealt with according to the provisions of this Act, except otherwise provided under this Act (2) A person shall not be arrested merely on a civil wrong or breach of contract. (3) A suspect shall be brought before the court as prescribed by this Act or any other written law or otherwise released conditionally or unconditionally.*

An outstanding and the most conspicuous function of the NPF today, is in the area of enforcement of laws and regulations throughout the whole of Nigeria,<sup>20</sup> such that law enforcement is becoming

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<sup>18</sup> Section 32(2) of the Nigerian Police Act 2020 has now forbidden members of the NPF to arrest on civil matters or breach of contract.

<sup>19</sup> See sections 31-47 of the Nigerian Police Act 2020.

<sup>20</sup> See section 214 of the 1999 CFRN (As amended).

synonymous with arrest and detention.<sup>21</sup> This gross misconception of conferring statutory power of arrest and detention on any government authority that its operations might require arrest or detention, as part of their law enforcement functions,<sup>22</sup> without any general or specific substantive or incidental constitutional legislative matter upon which such functions can be made or conferred,<sup>23</sup> is the subject matter of this paper.

Government authorities other than the NPF, may on their own, effect arrest and detention of civilians in periods of no emergency, by first applying to the court for an order of arrest of the civilian suspect, because such government authorities have no power traceable to the CFRN, to interfere with the fundamental rights of civilians to their liberties in periods of no emergency.<sup>24</sup> The NPF have their power of arrest and detention in the Police Act<sup>25</sup> traceable to sections 35(1) & 214 of the 1999 CFRN (As amended) and Item 68 of Part I of the Second Schedule to the 1999 CFRN. The federal and states legislatures do not have any substantive constitutional power and the requisite liberty-limiting matter, to anchor a competent conferment of civilian arrest powers on government authorities, other than the NPF, in periods of no emergency. The liberty-limitation power in section 35(1)(c) of the 1999 CFRN is not open to any statutory Tom, Dick and Harry authority legislated into any federal or state law.<sup>26</sup>

The definition of police as first proposed by the American sociologist, Egon Bittner,<sup>27</sup> asserts that the common feature among all the different agencies engaged in policing is the legal competence to enforce coercive, non-negotiable measures to resolve dangerous and problematic situations in the society. Such situations are characterized by these two namely features: their potential for harm and the need to solve them urgently before they develop that potential. Hence, the actual use of coercion or the threat of using it allows police to put a quick, non-negotiated, and conclusive end to problematic situations. Egon Bittner's definition of the police, when applied in Item 45 of Part I of the Second Schedule to the 1999 CFRN, crystallizes a liberty-limiting matter that can constitute a further subject-matter substratum for competently conferring on the NPF with the ordinary statutory power of arrest and detention. This substratum is not available to other government authorities that are not Police or parts or branches of the NPF.

Imbued with the general or specific substantive and incidental constitutional legislative powers, the legislatures, in the absence of a general or specific substantive and incidental constitutional legislative matter of fundamental right limiting type, cannot confer on an authority or body established by them, a fundamental right-limiting power unless sanctioned by the 1999 CFRN itself. A general fundamental right limitation clause affecting section 35(1) of the 1999 CFRN,

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<sup>21</sup> Every law enforcement in Nigeria has become an effectuation of arrest and detention. The legislatures follow suit by conferring the power of arrest and detention on virtually every government management authority.

<sup>22</sup> See section 10(4) of the FRSC Act 2007, and sections 13 & 14 of ESTMA Law 2012.

<sup>23</sup> This is grossly ultra vires the legislatures and patently unconstitutional.

<sup>24</sup> See section 35(1) of the 1999 CFRN (As amended).

<sup>25</sup> See the Nigerian Police Act 2020.

<sup>26</sup> Section 35 of the 1999 CFRN (As amended) should therefore be interpreted holistically with other sections of the CFRN, and not subject to interpretation by fragments, in an effort to reach the intention of the framers of the statute. See *NPA Plc v Lotus Plastics Ltd.* (2005) 19 NWLR (PT. 959) 158 @ 182 & 199, *Bakare v NRC* (2007) 17 NWLR (PT. 1064) 606.

<sup>27</sup> According to Egon Bittner, the police are simply 'a mechanism for the distribution of situationally justified force in society'. In Egon Bittner, *The Functions of the Police in Modern Society* 39 (1970). See also Eric J. Miller. (2023) *The Concept of the Police.* *Criminal Law and Philosophy* 17:573–595 <https://doi.org/10.1007/s11572-023-09682-8>.



which is non-existent in the 1999 CFRN, would have provided a substantive and incidental constitutional legislative matter upon which legislatures can legislate and confer liberty right limiting powers on the other government authorities.<sup>28</sup> Even if an ordinary law of the legislatures creates such authority and confers on it the power of arrest and detention,<sup>29</sup> such power is null and void, having been conferred on such authority without a constitutional authority.<sup>30</sup>

The Nigerian Police Act 2020 recognizes that the police, judges, magistrates and private persons can arrest suspects in certain circumstances.<sup>31</sup> The Act also recognizes that persons (private or public) can assist the police (and not to, on their own, engage) in making arrests and detentions.<sup>32</sup> The Act goes ahead to recognize<sup>33</sup> that officials of government security services or agencies authorized by law to make arrests and detentions can arrest and detain suspects.<sup>34</sup> Members of government management authorities are excluded as they are not officials of government security services or agencies. They are only accommodated within the provision of section 42 of the Police Act. Such a body or its member is only entitled to assist the police in making arrests, and thus has no lawful function or conferrable power to go ahead and arrest a suspected offender in the member's official capacity, notwithstanding that the ordinary law creating the authority has conferred on the authority or its members with the power to arrest and detain suspects.<sup>35</sup> Even where these authorities arrest and detain suspected offenders, the authorities shall immediately hand over the suspect to the police for the police officer to proceed to take the necessary action.<sup>36</sup> Curiously, upon the unsolicited arrest and detention of suspects by members of these authorities, they refuse to hand the suspects to the Police, and instead assume the position of the accuser, the apprehending authority, the witness, the prosecutor and the judge imposing fines at the same time; a position already deprecated by the courts.<sup>37</sup>

### **3. Doctrine of Covering the Field, and Implied Repeal of Laws on Arrest and Detention.**

The doctrine of covering the field is a principle in constitutional law that seeks to solve the problem of conflict of laws in constitutional democracies.<sup>38</sup> This doctrine operates between written national Constitutions and ordinary laws of the legislatures, and between federal and state laws;<sup>39</sup> hence the doctrine is pronounced in federal systems of government. Nigeria operates a federal system of government with a written CFRN.<sup>40</sup> Nigeria comprises 36 states and 774 local government areas,

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28 Even if section 45(1) of the 1999 CFRN (As amended) is taken as a limitation clause (and this author has in other works of his, respectfully disagrees with the Nigerian Supreme Court, and has vehemently submitted that subsection 1 of section 45 of the 1999 CFRN (As amended), is not a fundamental right limitation clause), its operations do not extend to section 35 of the CFRN.

29 That would be conferring constitutional-right-limiting power on a body without a constitutional authority.

30 *INEC v Musa 4* (2003] 10 W.R.N.1

31 See sections 39 & 41 of the Nigerian Police Act 2020.

32 See section 42 of the Nigerian Police Act 2020.

33 The Police Act has no competence to confer power of arrest and detention on the other security services in Nigeria.

34 See section 40(4 & 5) of the Nigerian Police Act 2020.

35 Such conferment of arrest and detention function on ordinary statutory creature is ultra vires the constitutional legislative powers of the legislatures.

36 under section 39 of the Police Act.

37 See *NOSDRA v Exxon-Mobil* (2018) LPELR 44210 (CA).

38 See also *Attorney - General of Ogun State v. Attorney - General of the Federation* (1982) 3 NCLR 166.

39 See also the relationship between statutory laws and their subsidiary instruments.

40 See the 1999 CFRN (As amended).

with the federal, states and local governments having full legislative bodies.<sup>41</sup> By the time the 1012 legislative bodies of the 1011 sub-governed federation of Nigeria are in full operations making ordinary laws for their respective governments, there is bound to be enormous and insurmountable amounts of conflicts of laws in the operation of the Nigerian System. The doctrine of covering the field comes to the rescue. In Nigeria, the doctrine of covering the field is not just a set of beliefs, but a crystallization of the provisions of the 1999 CFRN, viz sections 1(3) & 4(5) of the 1999 CFRN. Section 1(3) of the 1999 CFRN provides that '1(3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.' By this provision, the CFRN is Supreme and the provision of any other ordinary law made or deemed to have been made by the other 1012 legislatures cannot conflict with the provisions of the CFRN and still remain operative. The 1999 CFRN thereby becomes the barometer for testing the validity of any other law in Nigeria. Section 4 (5) of the 1999 CFRN goes ahead to provide that '4(5) If any Law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other Law shall, to the extent of the inconsistency, be void.' This section makes any provision of all the ordinary laws made or deemed to have been made by the states legislatures incapable of operating if they come into conflict with any provision of the ordinary laws of the federal legislatures that is validly made on the same matter.<sup>42</sup> An ordinary law of a state will only be suspended or kept in abeyance pending when the Act of the federal legislatures is repealed.<sup>43</sup>

The law is trite that where the 1999 CFRN has covered the field as to the law governing any conduct, the provision of the 1999 CFRN is the authoritative statement of the law on the subject. The 1999 CFRN would not have covered the field where it has expressly reserved to the legislatures the power to expand on or add to its provisions in regard to the particular subject. Where the 1999 CFRN has provided exhaustively for any situation and on any subject, a legislative authority that claims to legislate in addition to what the 1999 CFRN had enacted must show that, and how, it has derived its legislative authority to do so from the 1999 CFRN itself.<sup>44</sup> Extending this doctrine to the relationship between an ordinary law and its subsidiary instruments is impossible. Ordinary statutes cover the field of their delegated administrative bodies, as those bodies cannot expand on or add to its provisions in regard to the particular subject.<sup>45</sup> Where either the federal or states legislatures make a law on a subject matter of who may arrest and detain civilian suspects, which the CFRN has adequately catered for in its sections 35&214, there is thereby a covering of the field of that subject matter.<sup>46</sup> In this situation, the law made by any legislature creating another arresting authority will be declared null and void.<sup>47</sup> Furthermore, the Police Act has covered the whole field of arrest and detention of any manner of criminal suspects throughout Nigeria. The states legislatures therefore labour in vain to confer arrest and detention

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<sup>41</sup> See also sections 1, 2, 3, 4 & 7 of, and Parts I & II of the First Schedule to the CFRN 1999.

<sup>42</sup> *Attorney - General of Abia State & 35 ors v. Attorney - General of Federation* (2002) 101 FWLR 1419.

<sup>43</sup> *Chikelu v. Ifemeludike* (1997) 11NWLR (Pt.529) 309 403.

<sup>44</sup> *INEC v Musa* 4 (2003] 10 WRN1.

<sup>45</sup> The essence of subsidiary instruments, is not to exercise discretion, but to fill out details within limits already prescribed.

<sup>46</sup> Sections 35&214 of the 1999 CFRN do not cover the field in matters of arrest of members of the NPF and AFN and in periods of emergency.

<sup>47</sup> See *A.G Abia State v. A.G Federation* (2006) 16 NWLR (PT. 1005) 265 @ 371-372; *INEC v. Musa* (2003) LPELR-24927 (SC); *FRSC v Ehikaam* (2023) LPELR 60749(CA).



powers on government management authorities established by states legislatures. Worse still, the Police Act 2020 on the same subject matter of arrest and detention of suspects, is later in time than the states laws. Implied repeal of the state's laws automatically happens.<sup>48</sup>

The CFRN has reserved the power to limit personal liberties of civilians in periods of no emergency to itself, when it refused to delegate the power. Where a statute does not create an entitlement, no 'liberty' or 'property' interest is implicated, and therefore due process does not attach.<sup>49</sup> There is a substantive matter for the limitation of, or conferring of power to limit, personal liberties under section 35(1) of the CFRN, but that matter is reserved only for periods of emergencies, and for members of the NPF or AFN after a conviction by an officer of the NPF or AFN respectively.<sup>50</sup> No legislature, within the civil space of Nigeria in periods of no emergency, is therefore empowered to limit personal liberties of civilian suspects, through a government authority other than the NPF, prior to a court order authorizing such liberty limitation.

#### 4. Unlawful Arrest and Detention.

The acts of stopping, clamping, impoundment, towing or detention of vehicles, or the arrest and detention of suspected offenders, by members of government management authorities, notwithstanding that the acts may have been unconstitutionally sanctioned by ordinary laws of the federal or state legislatures,<sup>51</sup> constitute the ordinary civil law tort of trespass, detainee or false imprisonment; and the constitutional law right violation of arrest, detention, and infringements of fundamental rights of the suspects to liberty. 'Imprisonment' is the restraint of a man's liberty, and once a man is arrested; he is by that act imprisoned though it be in an open field. Therefore the term 'false imprisonment' can for all practical purposes be used interchangeably with 'unlawful arrest and detention.'<sup>52</sup> As long as a detention is adjudged *ultra vires*, unlawful, illegal or unconstitutional, the detention, no matter how short, qualifies as a breach of fundamental right.<sup>53</sup> What constitutes unlawful arrest and detention, as used in section 35(6) of the 1999 CFRN (As amended), appears to have been immersed in gross misconceptions and misinterpretations.<sup>54</sup> Unlawful arrest and detention by authorities or persons specified by law, as used and provided for in section 35(6) of the 1999 CFRN (As amended), has to be differentiated from other forms of arrest and detention effected by persons that are not authorities or persons specified by law, and that fall short of the provision of section 35 of the 1999 CFRN.<sup>55</sup> Although the 1999 CFRN does not define 'authorities or persons specified by law', it is obvious that the NPF are not included in

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<sup>48</sup> 'It is indeed, a settled principle of law that where two Acts are inconsistent or repugnant, the latter will be read as having impliedly repealed the earlier (see: *Paine v. Slater* (1883) 11 QBD 120) and the Courts lean heavily against implying a repeal except where the two Acts are so plainly inconsistent or repugnant to each other that effect cannot be given to both at the same time, in which case it will imply a repeal (see also: Dr. Lushington in *The India* (1865) 12 LT (new series at 316)'. See *Akintokun v LPDC* (2014) LPELR 33941 (SC).

<sup>49</sup> See, e.g., *Hewitt v. Helms*, 459 U.S. 460, 466 (1983); *Olim v. Wakinekona*, 461.

<sup>50</sup> See section 35(7)(b) of the 1999 CFRN. (As amended)

<sup>51</sup> Because such federal or state laws are unconstitutional, void and thereby inoperative.

<sup>52</sup> Per Ekanem, JCA in *Zenith International Bank Ltd v. Nosa Davis Iyamu* (2021) LPELR-54150(CA).

<sup>53</sup> See *Gusau v. Umezurike* (2012) LPELR -8000; *Okonkwo v. Ogbogu* (1996) 5 NWLR Pt. 499 Pg. 420; *Isenalumbe v. Joyce Amadin* (2001) 1 CHR 458. In *IGP & Anor v Agbinone & Ors* (2019) LPELR-46431(CA).

<sup>54</sup> Courts construe unlawful arrests and detentions as arrests and detentions in contravention of laws. See also *Jim-Jaja v. C.O.P., Rivers State* [2013] 6 NWLR (Pt. 1350) 225 at 256, paras. B-C; *Mitin v COP Bayelsa State* (2023) 12 NWLR (Pt. 1898) 259 SC.

<sup>55</sup> In other words, lack of substantive due process

those, as they cannot be constitutionally said to have 'unlawfully arrested and detained' a person, when they are constitutionally empowered, under section 214 of the 1999 CFRN, to be conferred with any manner of power conceivable by the federal and states legislatures, interpretatively inclusive of the power to conduct arrests and detentions of anybody at any period. If anything, the NPF can only be accused of contravening the provisions of section 35(1) of the 1999 CFRN, but not that they have unlawfully arrested or detained a person.<sup>56</sup> To this effect, unlawful arrest and detention under section 35(6) of the 1999 CFRN, speaks to the lack of validly conferred powers to arrest or detain a person, in accordance with the provisions of section 35(1) of the 1999 CFRN. The Supreme Court per Justice Coker (as he then was), nearly arrives at this position in *The Federal Minister of Internal Affairs & Ors v Shugaba Abdulrahman Darman*,<sup>57</sup> when it holds on similar provisions as follows:

*nowhere in Chapter IV of the Constitution which provides for fundamental rights is there any specific provision for a claim in damages as a means of enforcing any of those rights. The only exception is under section 32(6) where infringement of the right to personal liberty can entitle a claimant to compensation and public apology from the appropriate authority or person ... Whilst this provision may authorize the court to make an "order" for damages where a cause of action justifying such an award is established, I do not agree that it can simpliciter be the basis for an action for damages in all cases of infringement of fundamental rights. No such cause of action based purely on Section 42 of the Constitution exists in my view except by way of compensation which can be expressed in monetary terms to obtain redress under Section 32.*

The powers and procedures in sections 35(1) & 214 of the CFRN are antecedent to the Police Act, and therefore cannot be assessed with the provisions of the Police Act. If 'unlawful' as used in section 35(6) of the 1999 CFRN were to mean contrary to the provisions of ordinary laws,<sup>58</sup> then a provision of the Police Act conferring on the NPF or other government security services the power to infringe fundamental rights of persons,<sup>59</sup> would have been lawful, and members of the NPF or the other government security services would have, and have indeed, escaped the liability created under section 35(6) of the 1999 CFRN. 'Unlawful', as used in section 35(6) of the 1999 CFRN has to be construed purposively,<sup>60</sup> holistically<sup>61</sup> and with regard to the constitutional implications of the other provisions of the 1999 CFRN<sup>62</sup> to mean, contrary to the provisions and implications of the 1999 CFRN, and not contrary to the provisions of a future ordinary law that section 214 of the 1999 CFRN does not even define its scope. Where the 1999 CFRN has provided a constitutional authority as the only authority for a matter, the constitutional authority is the only lawful authority and there is no recourse to an ordinary statutory authority to discover the lawful authority. That is bearing in mind that there is a very wide constitutional due process rights

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<sup>56</sup> The Police Act, validly tracing its authority to the 1999 CFRN (As amended), has made Police arrest lawful.

<sup>57</sup> (1982) 2 NCLR 915.

<sup>58</sup> It is humbly submitted by the writers that it is not.

<sup>59</sup> And Section 214 of the 1999 CFRN (As amended) is wide enough to accommodate such an imputation.

<sup>60</sup> *Elabanjo vs Dawodu* (2006) 15 NWLR (Pt 1001) 76 at 138H.

<sup>61</sup> See *NPA Plc v Lotus Plastics Ltd.* (2005) 19 NWLR (pt. 959) 158 @ 182 & 199, *Bakare v NRC* (2007) 17 NWLR (pt. 1064) 606.

<sup>62</sup> See *Abdulraheem v Olufeagba* (2006) 17 NWLR (P 1008) 280 at 355, *Peoples Progressive Alliance vs Saraki* (2007) 17 NWLR (Pt 1064) 453.



in criminal proceedings that reflect the special severity attributed to criminalization.<sup>63</sup> Section 35(1)(c) is so wide that a person can be arrested even when he has not, and/or is not suspected to have, committed an offence. Thus, the constitutional due process rights in criminal processes and proceedings in Nigeria are wide enough to accommodate all the activities of the NPF against a person's guaranteed fundamental right to liberty under section 35(6) of the CFRN.<sup>64</sup> Arrest and detention of suspects under section 35(1) of the CFRN by the NPF do not fall under 'unlawful arrest and detention' in section 35(6) of the CFRN. Anybody 'unlawfully arrested or detained', as used in section 35(6) of the CFRN, does not therefore speak to arrests and detentions conducted in contravention of section 35(1) of the CFRN, but arrests and detentions of civilians in periods of no emergency, conducted by authorities other than the NPF. Arrests and detentions conducted in contravention of the provision of section 35(1) of the CFRN attract court orders, writs and directions as specified in section 46(2) of the CFRN, while 'unlawful arrest and detain' in section 35(6) of the CFRN, which are not arrests and detentions in contravention of section 35 of the 1999 CFRN *stricto sensu*, but are instead arrests and detentions by authorities other than the NPF solely conferred with the power of arrest and detention of civilians in periods of no emergency, attract a compensation and public apology from that government authority specified by law. Section 35(6) of the 1999 CFRN is clearly a warning against all the legislative establishments to leave the functions of arrest and detention of civilians for the constitutional establishment endowed with the functions, as any arrest or detention conducted by a legislative establishment is unlawful and will pay compensation.

Section 46(1) of the 1999 CFRN provides for remedies where a person 'alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him', and not where a person alleges that he has been 'unlawfully' arrested and/or detained. The contravention of a person's fundamental constitutional right to liberty, which the person can apply to the High Court for redress under section 46 (1) of the CFRN, is the factual arrest and detention of the person. It is immaterial whether or not the arrest and detention are lawfully or unlawfully conducted by those conferred or not conferred with a valid power to arrest and detain the person. The lawfulness of arrest and detention is not synonymous with absence of contravention of right to liberty. A person arrested by members of the NPF in contravention of section 35 of the 1999 CFRN can recover under section 46(1) of the 1999 CFRN but not under Section 35(6) of the 1999 CFRN; because the arrest and detention are lawful arrest and detention. A person arrested by members of a government authority other than the NPF in contravention of section 35 of the 1999 CFRN can recover under both sections 35(6) & 46(1) of the 1999 CFRN, even if the arrest and detention is 'not in contravention' of section 35 of the 1999 CFRN.

It is material that arrest and detention is conducted by those not constitutionally conferred with the power to arrest and detain persons, ie government management authorities other than the NPF. This is because, even though the constitutional reference to 'unlawful arrest and detention' in section 35(6) of the CFRN is different from the constitutional reference to the contravention of section 35 of the CFRN in section 46(1) of the CFRN,<sup>65</sup> yet the conduct of arrest and detention by

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<sup>63</sup> See Bendor, Ariel & Dancig-Rosenberg, Hadar, "Unconstitutional Criminalization. *New Criminal Law Review*", *An International and Interdisciplinary Journal*. (2016) 19. 171-207. 10.1525/nclr.2016.19.2.171 at p 3.

<sup>64</sup> *Ibid*.

<sup>65</sup> Section 46(1) is a general provision, while section 35(6) is a special provision.

those not constitutionally conferred with the power to arrest and detain persons, is in itself a contravention of section 35(1) of the 1999 CFRN by implication. The unlawfulness of an arrest and detention of a person, is in itself, a contravention of section 35(1)(c) of the 1999 CFRN which presupposes that a body conducting arrest and detention of persons be constitutionally conferred with that power, before it can arrest and detain persons. A person arrested and detained by those without constitutional power to arrest and detain persons can recover, first from section 35(6) of the CFRN, and thereafter under section 46(2) of the 1999 CFRN. An order for damages in unlawful arrest and detention is only compensatory, unlike the order for damages for the contravention of fundamental rights, which may be nominal, compensatory, punitive or exemplary. Of utmost importance is that, even in the absence of section 46 ever having been promulgated in the 1999 CFRN, a person 'unlawfully arrested and detained', would still have had a constitutional remedy for his unlawful arrest and detention, and is entitled to recover the constitutional remedy of compensation and public apology under section 35(6) of the CFRN, although this time around, by way of the general civil procedure. If section 46 of the CFRN had not been promulgated in the CFRN, there would have been no constitutional remedy or an entitlement to recover any constitutional remedy, for the contravention of fundamental rights of persons.

Furthermore, an action for the recovery of compensation and public apology is not an action under section 46 of the 1999 CFRN. The provision in section 35(6) of the 1999 CFRN that 'Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person',<sup>66</sup> is not an allegation 'that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to' an applicant under section 46(1) of the CFRN, but a constitutional remedy that is independently available to a person who has been unlawfully arrested and detained<sup>67</sup> even if the arrest and detention has been conducted in accordance with proper procedure prescribed by the legislatures. The constitutional concept of 'unlawful arrest and detention' in itself, is not a contravention of fundamental right to personal liberty recoverable under section 46 of the 1999 CFRN; rather, the constitutional concept of unlawful arrest and detention, is constituted of the same set of facts constituting the contravention of a person's fundamental right to liberty. A proof that a person has been unlawfully arrested and detained<sup>68</sup> is not a proof that his fundamental right to liberty has been contravened, but a proof of facts constituting proofs that the fundamental right of the person has been contravened; thereby entitling the person to recover for both the unlawful arrest and detention in section 35(6) of the 1999 CFRN under the general civil procedure, and under the special fundamental right procedure in section 46(2) of the 1999 CFRN for the contravention of his fundamental right to liberty. The mischief for this constitutional loathing and deprecation of the use of authorities, other than the NPF, to infringe fundamental rights of persons to their liberties, rather than the employment of the civil authority of the NPF, is not far from the rampant and indiscriminate use of government management authorities to infringe fundamental rights of persons to their liberties.<sup>69</sup>

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<sup>66</sup> As can be gleaned from this work.

<sup>67</sup> It is an independent remedy because, with or without section 46 of the CFRN, a person that is unlawfully arrested and detained is entitled to compensation and public apology from the government authority that conducted the unlawful arrest and detention.

<sup>68</sup> i.e. arrest and detention by persons not conferred with the valid power to arrest and detain persons.

<sup>69</sup> See the arrests and detentions embarked upon by the Economic and Financial Crimes Commission (EFCC), the National Drug Law Enforcement Agency (NDLEA), the Federal Road Safety Commission (FRSC), the Nigerian Security and Civil Defence Corp (NSCDC), and state government management authorities.



Every government management or regulatory body or security service that is not part or branch of the NPF has no lawful power to arrest and detain civilians in periods of no emergency under the 1999 CFRN. To be part or branch of the NPF, an authority or body has to be a constitutional establishment, organized as constitutionally delegated, conferred with functions as constitutionally assigned to the legislatures, and made a branch of the NPF as constitutionally prescribed. The Armed Forces of Nigeria (AFN) established pursuant to section 217 of the 1999 CFRN is not a part of the NPF, and therefore cannot arrest or detain civilians in periods of no emergency. The AFN are to resort to the NPF for arrests and detentions, under section 214(2)(c) of the 1999 CFRN, in such periods. The Department of Security Services (DSS) are part and parcel of the NPF and therefore can lawfully arrest and detain persons. It is ditto for the Nigerian Prisons Services. However, notwithstanding anything to the contrary contained in their establishment statutes, and being that they are not part and parcel or branches of the NPF, the Economic and Financial Crimes Commission (EFCC), the National Drug Law Enforcement Agency (NDLEA), the Federal Road Safety Commission (FRSC), the Nigerian Security and Civil Defence Corp (NSCDC), all the federal government security services other than the NPF, all the federal government management bodies, and all the numerous state-government management or regulatory authorities, and including all the members of the named bodies above in their official capacities; have no power of their own under the CFRN to arrest or detain civilians in periods of no emergency. That is the import of sections 4, 35 & 214 of the CFRN and the Second Schedule to the CFRN read together.

## 5. Conclusion.

In matters of arrest and detention upon suspicions of commission of an offence, and arrest and detention without a prior court order, the NPF constitutionally towers above all the other federal government authorities established by Acts<sup>70</sup> and state government management authorities established by Laws.<sup>71</sup> The generality<sup>72</sup> and specificity<sup>73</sup> of the incidental constitutional legislative matters in Part III of the Second Schedule to the 1999 CFRN, and incidental constitutional legislative power in section 318(1) of the 1999 CFRN and section 10(2) of the Interpretation Act, are not sufficient to empower the legislatures to create arresting authorities that truncate personal liberties of civilian suspects in periods of no emergency. Without substantive powers and matters for the creation of arresting authorities, incidental powers and matters of arrest and detention cannot be worked into ordinary statutory existence. The legislatures cannot rely solely on incidental matters of arrest and detention to establish authorities and confer them with power of arrest and detention of civilians in periods of no emergency, when there is no substantive constitutional matter for such arrest and detention in section 35(1) of the 1999 CFRN other than the one for the NPF. The law has always been trite that a government body cannot exercise an incidental power or authority on a subject matter when the government body has no substantive

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<sup>70</sup> Although the constitutional legislative matter of the other government security services or agencies is enumerated in Item 45 of Part I of the Second Schedule to the CFRN, yet the specific services or agencies are not constitutional creations.

<sup>71</sup> States governments management bodies, particularly ESTMA and LASTMA that are specifically mentioned in this work, are neither created nor enabled by any substantive provision in the 1999 CFRN, but instead traceable to unenumerated matters included in the Second Schedule to the CFRN or the residual competences of the state.

<sup>72</sup> See section 10(2) of the Interpretation Act Cap I23 LFN 2004.

<sup>73</sup> See Part III of the Second Schedule to the 1999 CFRN.

power on the subject matter.<sup>74</sup> Unlike the Canadian national constitution,<sup>75</sup> the 1999 CFRN has no general Limitation Clause. With a general Limitation Clause affecting section 35 of the 1999 CFRN, Nigerian legislatures would have been able to limit liberty and create arresting authorities other than the NPF by relying on the Limitation Clause as the substantive constitutional subject matter for the limitation of personal liberties. Even section 45(1) of the 1999 CFRN that is said to be a constitutional Limitation Clause,<sup>76</sup> does not cover section 35 of the 1999 CFRN. Nigerian legislatures cannot therefore create other arresting authorities for civilians in peace time.

Government authorities, other than the NPF, are not bodies conferrable with statutory power of arrest and detention under the 1999 CFRN. Both the federal and states legislatures have no constitutional legislative backing or competence to, and indeed cannot, confer on government authorities, other than the NPF, the power of arrest and detention of civilians in periods of no emergency. A federal or state law that provides for arrest and detention of civilian suspects in a period of no emergency must confer the power of their arrest and detention on the NPF established by the CFRN, and not by creating its own arresting statutory authority. The paper recommends that government authorities established under the ordinary laws of the federal or states legislatures, including the EFCC, NSCDC, NDLEA, FRSC, ESTMA, LASTMA etc, instead of engaging in constitutionally actionable unlawful arrest and detention or arrest and detention that are in contravention of section 35(1) of the 1999 CFRN, should rather be limited by their establishment laws to the role of assisting the NPF in arrest and detention of civilians in periods of no emergency.

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<sup>74</sup> In *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (CanLII), [2021] 1 SCR 175.

<sup>75</sup> See Section 1 of the Canadian Charter of Rights and Freedoms, as Part I of the Constitution Act, 1982, which is enacted as Schedule B to the Canada Act 1982, 1982, c. 11 (U.K.), *Constitutional Absolutism*, 56 Wm. & Mary L. Rev. 667 (2015), <https://scholarship.law.wm.edu/wmlr/vol56/iss3/2> at 680.

<sup>76</sup> *Erasmus Osawe & 2 Ors v Registrar of Trade Unions* (1985) 1 NWLR part 4 page 755.