

REVIEW ARTICLE

SECURITY AND HUMAN RIGHTS UNDER THE REGIME

A Critique on the Jurisprudence of National Security Challenges and Human Rights Regime Under the Constitution of the Federal Republic of Nigeria, 1999 as amended

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ABSTRACT

This paper reappraises national security challenges, human rights provisions, derogations under the 1999 constitution of the Federal Republic of Nigeria and the place of human rights in conflict situations between national security and human rights under Nigerian law. In achieving its aim, this paper adopts an admixture of the historical, comparative, empirical, the law and development approaches, in relevant areas. The paper ends with a conclusion and set of recommendations.

Keywords: *National Security Challenges, Human Rights, Derogation under the 1999 constitution of the Federal Republic of Nigeria, National Security, Conflict situations*

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STATE OF NATIONAL SECURITY CHALLENGES IN PRESENT-DAY NIGERIA

President Muhammadu Buhari, the Head of State and Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria, on the 22nd day of November, 2018 in Abuja, acknowledged that there were serious National Security challenges in Nigeria saying that the numerous challenges facing Nigeria were rooted in internal and external factors, which his administration was tackling. The President made the said acknowledgement while receiving a security report from course participants at Nigeria’s National Institute for Policy and Strategic Studies (NIPSS) during a visit to the presidential villa, Abuja.

After stating the fact that his government inherited sundry security issues in 2015, which were and still posing serious threat to lives and property of citizens; he expressed the desire to surmount the problems which, according to him, informed the commissioning of NIPSS in 2017 to work out a holistic framework for the purpose of strengthening the nation’s internal security framework through community policing by proposing borders, policy, offence, and strategy. He stated further as follows: “in November 2017, I tasked the management of the National Institute for Policy and Strategic Studies with the decision of government [because government was driven] by a sincere desire to find sustainable solutions to the many security challenges inherited by this administration. These challenges not only threaten the security of lives and property of our people, but also the sovereignty and territorial integrity of our country (Pearce, 2012; Pearce, Albritton, Grant, Steen, & Zelenika, 2012; Zelenika & Pearce, 2014). We are confronted by Boko Haram insurgency in the North East, worrisome conflict with respect to farmers and herdsmen which has resulted in

wanton destruction of lives and property across the country. Furthermore, there is the crisis of separatist agitation in the South East and militancy in the South.

Government is convinced that these security challenges are rooted in both internal and external factors. Most importantly, government is also convinced that finding sustainable solutions to these challenges will require the support and collaboration of security agencies and communities.” Buhari submitted that the report was timely, as it came at a time his administration was reviewing security strategies and promised to study the document and mark recommendations therein. He also assured the institute that the Ministry of Budget and National Planning would work towards providing necessary funding for it (The Guardian, Nov 2018; Allen, 2007; Magee, Scerri, James, Thom, Padgham, Hickmott, Deng, & Cahill, 2013; James, Magee, Scerri, Steger, 2015). As brilliant as the above statement appear, it is sad that it took the presidency of the present government, this long to, after spending more than three years to appreciate the grave security challenges that have be-devilled Nigeria for years now (Abila & Ebobrah, 2017; Abila, 2018; Abila & Abiodun, 2018; Grober, 2007; IUCN-UNEP-WWF, 1980; United Nations, 1982; Scerri & James, 2010).

The more disturbing dimension, however, was the promise of the Federal Government “to study the document and the recommendations therein” and the assurance that “the Ministry of Budget and National Planning would work towards providing necessary funding for it”. The above quoted portions of the President’s remark do not portray any quick readiness on the part of the Federal Government of Nigeria to tackle headlong the security challenges in plaguing Nigeria which has led to the widespread killings of Nigerians by Boko Haram, Herdsmen, several militia groups etc and widespread destruction of properties (Abila & Ebobrah, 2017; Abila, 2018; Abila & Abiodun, 2018). Even-though “the 1999 Constitution of the Federal Republic of Nigeria (1999 CFRN) guarantees the right of Nigerians to enjoy a safe and orderly society just as it assures respect for their liberties and freedoms [since] the Constitution asserts that the *primary purpose* of government (the State) is to ensure ‘the security and welfare of the people’¹.

It is also worthy of note that addressing the Nigerian Bar Association in the 1988 NBA conference in Abuja, President Buhari stated, amongst other things, that the rule of law must be in subjection to constitutional human rights provisions under the constitution of Nigeria. The said position attracted wide criticisms and support from various strata of the Nigeria society. Later in this article the constitutionality and States’ practice in light of decided cases in Nigeria are also examined.

¹ For more comprehensive explanation, please also see Sec 14(2)(b) of the 1999 CFRN. Emphasis added.

SCOPE OF HUMAN RIGHTS JURISPRUDENCE GLOBALLY

One of the outstanding developments in international human rights law from the time, the 2nd World War, ended till date, is the growing interest over the protection of human rights, worldwide. This signpost a growing awareness of the human rights phenomenon, the worldwide concern over the treatment of persons in many nations of the world below broadly acceptable standards especially where such treatments do not meet up with expected civilized human behavior (Hamilton & Clemens, 1999; Le Kama, 2001; Stavins, et.al., 2003; Castillo, 2016; Goldman, 2005; Pezzey & Toman, 2002; Abubue, 2000).

Speaking globally therefore, emerging rules of law reflect the social standards and the prevailing interest in the protection of human rights in the international plain and the surging interest in the light of the very notable changes in both governmental and personal approaches which are clear signs that the issue of human rights practice and observation are attracting more global attention. This follows a familiar pattern observable in the first half of the 19th century following the growth of the consciousness which heralded the detestation of slavery trade leading which in turn, led to the development of the rules of law outlawing the trading on slaves as an institution (Robertson & Merrills, 1992; Falk, 2013; Meadows, et. al., 1972; Arrow, et.al., 2004; Dasgupta, 2007; Heal, 2009). Human rights in its present-day usage is recognized as the inherent value, equivalent and immutable rights of all participants in the human family to a dignified survival. It should be noted that appreciating the reality of the need to observe, human rights, in the context of promoting social progress and better standards of life for humanity is paramount to ordered human development (Onyekpere, 1993; Fainstein, 2000; Bedsworth & Hanak, 2010). The pursuit for the observance of human rights and dignity of the human person are phenomenal to modern-day life.

Perceptions about human rights, as stated above, have become a notable concept of world order. It can be described as are solve for reforming the globe that every individual's human value is appreciated and that every person's human rights are based on international consensus. The envisaged rights embrace: the right not to be subjected to torture, to cruel, inhuman, and degrading treatments/punishments, arbitrary arrests, unlawful imprisonments, or executions. Others include the right to fair, prompt, and public trial, right to life etc (Halem, 1988; Buehler & Pucher, 2011; Nnaemeka-Agu, 1992; Nwabueze, 1974; Murdoch, 1993).

It is obvious that the notion of human rights falls within the frameworks of constitutional law, international human rights law and some aspect of private and public international law, operating in their different spheres, to defend through institutionalized means, the rights of human beings against abuses carried out mostly by powers authorized by the organs of the State; and at the same time to encourage the institution of human living conditions and the transnational advancement of

human disposition (Szabo *in Vasak*, 1982). The notion of human rights is a norm acceptable and recognized internationally by the community of nations, the world over as a peremptory norm of international law also referred to as *jus cogens*, derogations, of which are not permitted. It limits the rights of nations of the world to enact any law which are in consistent with the peremptory norms. With the modern-day global dispensations, the human rights agenda has received unparalleled focus and has grown tremendously from consular adumbrations (Gye-Wado, 1995; Manning, Boons, Von Hagen, & Reinecke, 2012; Reinecke, Manning, & Von Hagen, 2012).

THE BACKGROUND TO THE DEVELOPMENT OF HUMAN RIGHTS

The concept of human rights has been traced to the old doctrine of natural rights that were always considered as inalienable rights. The dimensions of these rights extended from social, economic, political, and cultural rights (Smith & Rees, 1998; Daly, 1981; 1992; Barbier, 1987; 2007; Faber, 2008; Stivers, 1976). It is stating the obvious that almost all modern nations around the globe have made provisions in their various constitutions protecting the above and other rights. This remains the position, though there appears to be, no generally accepted definition of the term '*human rights*'.

This occasioned the emergence of several definitions leading to several schools of thought and positions showing the various backgrounds of the holders of the various view in line with their own perspectives. In the same vein, there are also different perspectives and conflicts in the mechanisms, priorities and approaches for the enforcement of human rights in the light of the different cultural patterns, ideological inclinations, socialist societies, western and non-western societies etc (Dhokalia, 1993; Martins 1993; An Nalm & Deng 1990; Shepherd & Ankpo, 1990; Eze 1984; Adaba 1993; Aduba, Dakas & Gye-Wado, 1995; Gye Wado, 1995; Zhang & Babovic, 2012).

Other writers trace the history of human rights concepts to the period in the light of its national growth and attention to the year, 1948 when the United Nation Declaration of Human Rights and subsequent conventions on human rights drafted as a model to all nations that were signatories came into operation.² Taking a retrospective look at the emergence of the law and practice of human rights in Nigeria, it is a well-known fact that, it has its ancestry in the commission that was setup to protect the minorities in Nigeria and headed by Sir Henry Willink which recommended certain critical provisions of Universal Declaration of Human Rights. The same provisions were adopted in the 1963, 1979, 1989, 1995 Draft Constitution and

² For example, international covenant on civil and political rights 1966, European Convention for the protection of Human Rights and Fundamental Freedoms 1950. American Convention of Human Rights 1989. African charter on Human and People's Rights 1981.

the 1999 Constitution of the Federal Republic of Nigeria, as amended (Nnaemeka-Agu, 1992).

DEROGATIONS OF HUMAN RIGHTS PROVISIONS UNDER THE 1999 CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA

Given the present widespread abuses, it is imperative to question whether the said abuses of human rights in the light of the ongoing killings and massive destruction of properties in Nigeria can be situated as derogations of human rights provisions and permitted under the 1999 Constitution of the Federal Republic of Nigeria from a purely jurisprudential view point it has been asserted the first limitation to human right is the theory of law and freedom which supports the view point that obedience to the law by everyone remains the pivotal for the enjoyment of whatever human beings may have in society. In the words of Cicero “we must all be slaves to the law in order to be free”. The concept of freedom in any society is freedom according to the law or within the law (Opata, 1990).

Furthermore, taking at section 45 of the 1999 Constitution of the Federal Republic of Nigeria, as amended there are provisions dealing with the derogation from certain human rights provisions as found in sections: 37, 38, 39, 40 and 41. There are also similar provisions under the African Charter on Human and Peoples’ Rights, but the permitted derogations and restrictions are applicable only in the interest of public safety, public order etc. Under Article 5 of the European Convention on Human Rights, for example, the following grounds can operate to deprive a citizen of liberty (Murdoch, 1993; Shaker, 2015; Kahle & EdaGurrel-Atay, 2014; Campbell, 1996; Hazeltine & Bull, 1999).

First, Detention after conviction by a competent court. “This provision justifies detention imposed following a finding of breach of a distinct legal obligation by a court. It thus covers loss of liberty after conviction but pending appeal, detention imposed as an alternative to the original sentence and detention classified as a disciplinary rather than criminal matter by domestic law. The sub-paragraph may also justify subsequent loss of liberty after release, but any recall to prison must result directly from the original sentencing by a court of law.”³ Others include the following:

- a) Detention for the non-compliance with the lawful order of a court.
- b) Detention to secure the fulfilment of any obligation prescribed by law.
- c) Detention on reasonable suspicion of having committed an offence.
- d) Detention to prevent commission of crime.

³ See case *Van Droogenbroeck V. Belgium* (1982). A 50. Para 40. *Van Droogenbroeck v Belgium*, Merits, App No 7906/77, A/50, (1982) 4 EHRR 443, IHRL 34 (ECHR 1982), 24th June 1982, European Court of Human Rights [ECHR]

This second ground is to be interpreted restrictively. The sub-paragraph must be read restrictively and not meant to authorize a policy of general prevention directed against an individual or a category of individuals who... Present a danger on account of their continuing propensity to crime; it does no more than afford (States) a means of preventing a concrete and specific offence.

- a) Detention to prevent a suspect from absconding.
- b) Detention of minors for educational supervision.
- c) Detention of minors to allow them to be brought before the competent legal authorities.
- d) Detention to prevent spread of infectious diseases.
- e) Detention of person of unsound mind.

It is submitted that, to come under this heading there must be proof of the existence of 'unsound mind' must be reliably established on objective medical grounds. Secondly, the actual mental state of the victim must be ascertained to justify detentions.⁴ Thirdly, continuing detention can only be supported by the continuing need for such conditions based on the victim's current mental condition.⁵ Generally speaking, "no deprivation of liberty can be considered as justified under this heading if the opinion of a medical expert has not been sought."⁶

- f) Detention of vagrants.

The definition of 'vagrant' is primarily a matter of domestic law as long as this reflects the generally accepted meaning of the term for the purposes of the convention.⁷ A state may not seek to apply the label for an improper purpose.⁸

- g) Detention of alcoholics and drug addicts.

"The detention of 'alcoholics' could not be restricted merely to persons medically so diagnosed but had to include detention of individuals 'whose conduct and behavior under the influence of alcohol pose a threat to public order or

⁴ That is the assessment must be based on the current state of mental health and not solely on events taking place in the past if a significant period of time has elapsed: *Varbanov v. Bulgaria*, (5 Oct. 2000), para 47. (Application No. 31365/96).

⁵ See case *Cf Luberu v. Italy*, (1985) A 75, paras 27-29, *Ashingdane v. United Kingdom*, (1985) A 93. Paras 40-42, 48-49 (Application No 8225/78)

⁶ See case *Varbano v. Bulgaria* (5 Oct 2000), paras 46-49 [detention ordered by a prosecutor to obtain a medical opinion to assess the need for proceedings with a view to the psychiatric internment of the applicant: the court observed (at para 47) that urgent cases or where a person is arrested because of his violent behavior a medical opinion should be obtained immediately following the start of the detention; in all other instances prior consultation should be necessary and even where there is a refusal to appear for medical examination, a preliminary medical assessment on the basis of the file is required.

⁷ See case *De Wilde, Ooms and Versyp v. Belgium* (the 'Vagrancy cases'), (1971) A 122, para 68.

⁸ See case *Guzzardi v. Italy* (1980) A 39, para 98 [the fact that Article 5[I] (e) justified detention in part to protect the public could not be extension be made to apply to individuals who are considered still more dangerous.

themselves,' and where detention is 'for the protection of the public or their own interests, such as their health or personal safety'.

- h) Detention of a person to prevent his effecting on unauthorized entry into a country.
- i) Detention of person against whom action is being taken with a view to deportation or extradition.

Apparently, the rationale for limiting or allowing for derogation from human rights provisions in constitutions is to recognize the collective interests of the society as superior to the individual right of the members of the society. This collective interest of the society can manifest itself in many ways.

NATIONAL SECURITY AND HUMAN RIGHTS

“The problem of human rights vis-a-vis national security has been a subject of so much discussion, attention and even litigation in Nigeria during its so many years of military rule. The principal preoccupation of military regimes was with national security. Under this, the military in Nigeria have used so many draconian laws and tactics to silence perceived ‘enemies’ of the nation. The military was always willing to subordinate the rights of individuals to national security anytime they felt that individual rights conflict with national security.

The judiciary has done a lot, in spite of the draconian legislations passed by the successive military administrations in Nigeria, to stifle the fundamental rights of citizens, by reaffirming the fundamental human rights of persons whose rights have been encroached upon by military decrees to circumscribe the rights of Nigerians (White, Stallones, & Last, 2013). The 1999 Constitution of the Federal Republic of Nigeria, as stated earlier, providing for fundamental rights has also provided for the way and manner of the realization of these rights. These rights enumerated in Chapter IV of the constitution are not absolute however, and may be derogated from in certain circumstances:

- a. In the interest of defense, public safety, public order, public morality, or public health; or
- b. For the purpose of protecting the rights and freedom of other persons”.

Under section 45(1) of the said constitution, it is provided that the right to privacy and family life; Right to freedom of thoughts. Conscience and religion; Right to freedom of expression and the press; right to peaceful assembly and association; and right to freedom of movement; can be derogated from the circumstances mentioned above i.e. in the interest of defense, public safety, public order, etc. The constitution talks of defense, public safety, public order and not to national security. However, the view is that interest of defense, public safety, public order, etc. Considered also in the constitution, are aspects that touch on national security according to Nwabueze (1974) and Fawcett, Hughes, Krieg, Albertcht, & Vennström (2012).

Though public security may require an act in derogation of a guaranteed right; the courts held that, it still cannot be lawfully done unless authorized by a law. “It is a rule of interpretation that to take away a right given by common law or statute, the legislature should do that in clear terms devoid of any ambiguity. Accordingly, if the legislature had intended to take away the right, it recognized under section 30(1) of the 1979 constitution by section 31(i) (a) of the same constitution it would have done so by clear terms and not by implications.”

The constitution, however, allows for a declaration of a state of emergency. During any period of emergency proclaimed in accordance with section 205 of the 1999 constitution, the National Assembly is empowered by section 45(2) of the constitution to make laws that may allow for measures that derogate from the provisions of Chapter IV. Those measures that may be taken must be reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency. According to Nwabueze “the measures to be taken during the period of emergency or necessity that will warrant the executive to act or interfere with the rights guaranteed under Chapter IV of the constitution must (a) be inevitable in the sense of being the only remedy; (b) be proportionate to the necessity, i.e. it must be reasonably warranted by the danger which it was intended to avert; and (c) be of a temporary character, limited to the duration of the exceptional circumstances” (Nwabueze, 1974).

The 1999 Constitution did not provide that the fundamental rights in it are absolute and we have seen that it has enumerated instances where the rights can be derogated from. “The courts in Nigeria have held in so many decisions from the decisions of the High Courts of the States to those of the Supreme Court that these rights are not absolute. The courts have said, the right to life prescribed under section 30(1) of the 1979 Constitution (same with section 33 1999 Constitution) is clearly a qualified right. It is not unqualified. The imposition or execution of the death sentence in Nigeria is not subjected to any form of arbitrary, discriminatory or selective exercise of discretion on the part of any court or any other quarters whatsoever.” In *the case of Trucks (Nigeria) Limited v. Ayo Pyne*⁹ the court of Appeal said that by virtue of section 37 of the 1979 Constitution (same as Section 40 of 1999 Constitution), every person shall be entitled to assemble freely and associate with other persons, and in particular he may “form or belong to any political party, trade union or any other association for the protection of his interests. It said further that the phrase ‘for the protection of his interest’ does not give the citizen an unrestrained freedom to join any association. It is not a freedom at large but rather it is one that is certainly restrictive.”

In the case of *Agbakoba v. The Director SSS*,¹⁰ the Court of Appeal said, admittedly, however that “no freedom is absolute as there may be circumstances of derogation. However, where an infringement of a right is alleged, the issue of derogation cannot be wielded as an omnibus shield by the authority against whom the infringement is

⁹ See case (1999)6 NWLR (Part 507)514 C.A. At pp. 532-533

¹⁰ See case (1998) IILRA 253 at p. 278

located within the specific circumstances of derogation permitted by law.” Again, the Supreme Court in the case of *The Director SSS v. Agbakoba*,¹¹ pointed out that “the rights to freedom of movement granted by section 38(i) of the 1979 Constitution are not absolute.” The same supreme court in the case Of *Fawehinmi v. Abacha*¹² held that “where a statute tends to encroach on or curtail the freedom of liberty of an individual, that statute is generally construed very strongly and narrowly against anyone claiming benefit there from”, while the Court of Appeal in the same case,¹³ held that “where the freedom of an individual is curtailed, or abridged, it must be shown that such an act is brought within the confines of the law.”

What these cases seem to recommend is that if the judiciary accepts a generous interpretation of the provisions of the constitution a just equilibrium might be hit which would allow for the satisfaction of individual freedoms and liberty as well as allow the state to uphold peace, order and security for the general interest of the nation. Pats – Acholonu JCA in *Abacha v. Fawehinmi* said, “...since the end of the Second World War when legal positivism or judicial formalism was made nonsense of by the despotic regime of the Third Reich and Fascist Italy, and the United Nations Universal Declaration of Human Rights was enthroned, there is growing tendency in most jurisdictions to protect as much as possible the fundamental rights of the people in times of peace in particular. There is no doubt that in times of war or emergency of some sort like earthquake or internal insurrection, the public might close their eyes to an enactment of laws that appear draconian on their face. Such laws if made are to secure or protect the state in times of emergency... it must be stated that liberty in the context of modern times has now assumed a far broader conception than before and it increasingly demands protections.”

CONCLUSION

This paper has attempted to reappraise national security challenges, human rights provisions, derogations under the 1999 constitution of the Federal Republic of Nigeria and the place of human rights in conflict situations between national security and human rights under Nigerian law. Based on the said reappraisal, the following recommendations are made.

RECOMMENDATIONS

1. It is sad that it took the presidency of the present government, this long to, after spending more than three years to appreciate the grave security challenges that

¹¹ See case (1999)3 NWLR (Pt595)314 S.C.

¹² See case (2000)6 NWLR (Pt. 660)228 SC at pp. 325 – 6

¹³ See case (1998)1 HRLRA at p.610

- have be-devilled Nigeria for years now is worrisome and calls for an emergency of the security delivery system in Nigeria.
2. The statement credited to the President Buhari that he was reviewing security strategies and promising to study the document and make recommendations therein does not paint the picture of a serious government working to protect the lives and properties of its citizens.
 3. Assuring the National Institute for Policy and Strategic Studies (NIPSS) that the Ministry of Budget and National Planning would work towards providing necessary funding for its findings is dilatory as the present Federal Government has sufficient funds, in form of security votes, allocated to the presidency each month to deal with the security challenges in Nigeria today.

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