

# DEROGATION FROM FUNDAMENTAL RIGHTS FOR NATIONAL SECURITY CONSIDERATION IN NIGERIA

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## Abstract

*Derogation from fundamental rights is often justified on grounds of national security concerns, with the net effect of limiting the enjoyment of those rights. The Constitution of the Federal Republic of Nigeria, 1999 (as altered) guarantees fundamental rights and also sets out certain derogations some of which are based on national security considerations. This paper argues that national security and fundamental rights are for the overall benefits of all persons living in the country, without one necessarily overriding the other. It evaluates the procedure provided in the Constitution to justify derogations in relation to national security and poses the question of whether derogation is an unavoidable resort to protect national security. Using doctrinal/analytical contexts, the paper extrapolates the need for government and citizens alike to demonstrate fidelity to the rule of law and its due processes. In particular, the paper advocates compliance with the constitutional requirement for legislative framework which should set out the ground upon which derogations from fundamental rights may be justified. This is an order to avoid arbitrary derogation from fundamental rights on the unsubstantiated premise of combating threats to national security.*

**Keywords:** *Constitution; Derogation; Fundamental Rights; National Security.*

## INTRODUCTION

The promotion of national security is often projected by most governments as the priority of government.<sup>1</sup> This position is reflected in some constitutions as one of the major grounds for the derogation of fundamental rights.<sup>2</sup> It has led

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<sup>1</sup>. William W Burke-White, 'Human Rights and National Security: The Strategic Correlation' [2004] (17) *Harvard Human Rights Journal*, 251; Federico Fabbrini, 'Human Rights in the Digital Age: The European Court of Justice Ruling in the Data Retention Case and Its Lessons for Privacy and Surveillance in the United States' [2015] (28) *Harvard Human Rights Journal*, 28.

<sup>2</sup>. Section 45 CFRN 1999 as amended.

to several laws and legislative proposals enacted and proposed which are aimed at derogating certain human rights on the excuse of promoting national security.<sup>3</sup> In other instances, the government resorts to an apparently illegitimate extension of the power of arrest, detention or outright disobedience of court order on the excuse of protecting and promoting national security.<sup>4</sup> These interpretations of national security gives the impression that protection and promotion of human rights is at odds with national security<sup>5</sup> and have been used as justification of the claim by some government officials that the protection of human rights of alleged terrorists is a threat to national security.<sup>6</sup>

It has, however, been argued and we agree, that the above interpretation of human rights as a threat to national security are in most instances erroneous.<sup>7</sup> This is because the concept of national security should be inclusive, covering the citizens and people living within the country. Neither should be sacrificed for the other.<sup>8</sup> In essence, the failure of one is the failure of the other. National

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<sup>3</sup>. This include laws like the Terrorism (Prevention) (Amendment) Act, 2013; Economic And Financial Crimes Commission (Establishment) Act 2002; Money Laundering (Prohibition) Act 2011 and the proposed Bill for an act to provide for the regulation of telecommunication facilities to support investigations and for other related matters connected therewith 2016, all supposedly enacted or proposed for the purpose of protecting National Security.

<sup>4</sup>. Cases like Else Zakky, Nnamdi Kanu of IPOB, some Boko Haram detainees, US Guantanamo Bay detentions etc.

<sup>5</sup>. William W. Burke-White, *note 1 at 249*.

<sup>6</sup>. Human Rights and U S Foreign Policy: Hearing before the Subcommittee on International Organisations, House Committee on Foreign Affairs, 96th Cong. 254 (1980). According to this report Bruce P. Cameron, Foreign Policy Legislative Representative, stated thus “there will always be a tension between our foreign policy as classically defined in terms of the United States’ economic, political, and strategic interests and our human rights interests.”

<sup>7</sup>. William W Burke-White, note 1.

<sup>8</sup>. Megan A Yasenchak, Jennifer Giglio, and Margaret Paxson ‘National Security and Human Rights’ Conference Proceedings June 29, 2006 Moscow, Russian Federation, Kennan Institute Woodrow Wilson International Center for Scholars at 18; Ihugba Bethel Uzoma ‘Constitutionality, Privacy Rights and National Security: Developing a Legitimate Legal Framework for Nigeria’, [2017] (7) (2) *Nigeria Journal of Legislative Affairs*.

security should not be seen as an isolated objective that can be genuinely achieved irrespective of the state of human rights protection in a state or vice versa.<sup>9</sup> Rather, the protection and promotion of human rights should guide the project of national security.<sup>10</sup> Experience and evidence demonstrate that once people's rights are assured, promoted and protected it gives more impetus, promotion and protection to national security.<sup>11</sup>

It is, however, recognized that in certain circumstances the promotion of national security may genuinely and legitimately, but temporarily derogates some human rights.<sup>12</sup> This has often led to the genuine dilemma of which to give priority between national security and human rights.<sup>13</sup> The argument being explored in this paper is that in many cases this dilemma should not arise. Both national security and human rights are for the benefit of the citizens. The objective should rather be in finding ways to ensure that ultimately the citizen does not suffer undue loss and not whether national security or human rights should take priority. In other words, citizens' welfare can take priority and at the same time reduce the magnitude of the dilemma.

To explore this proposition, this paper is structured as follows. The present section outlines the structure of the paper and the research methodology is applied in this study. This is followed by a literature review on the dilemma between national security and human rights. Within this section, we explore the meaning of human rights and national security. The next section then explores instances of human rights provisions of the CFRN 1999 that are threatened by national security fears. This is followed by an analysis of constitutional provisions that stipulate the conditions for the derogation of human rights. Then is an analysis and recommendation of guidelines for developing legislative enactments that may derogate human rights and yet maintain balance. Finally, the last section provides the conclusion.

Following, the above structure, this paper will apply a critical analysis of constitutional provisions. This will entail the statement of the constitutional

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<sup>9</sup>. Megan A. Yasenchak, note 8 at 9; William W. Burke-White, note 1.

<sup>10</sup>. Megan A Yasenchak, *ibid* at 18.

<sup>11</sup>. William W Burke-White, note 1.

<sup>12</sup>. Section 45 CFRN 1999 as amended.

<sup>13</sup>. B E Ewulum, 'Terrorism and Human Rights Protection: Nigerian Perspective' [2015](37) *International Affairs and Global Strategy*.

provisions and analyze them against legal logic, constitutionalism and rule of law principles. It will also use critical analysis to explore the consistency and normative coherence between legislations and practices that purport to derogate human rights guaranteed under the Constitution of the Federal Republic of Nigeria. Based on the analysis, recommendations will be proffered for maintaining citizen welfare as the main priority of government.

### **Theoretical Framework**

There have been quite a number of scholarly research on the relationship between national security and human rights.<sup>14</sup> Most of these researches have dealt with the issue in Western countries especially European countries, the USA and the United Kingdom. However, the perspectives from these countries have been on how to protect the human rights of aliens and alleged criminals outside the country while championing national interests in other countries.<sup>15</sup> Others have also examined the concept of promoting the human rights of aliens within the country while promoting national security within the Country.<sup>16</sup>

There is a considerable body of literature from Nigeria that explores the relationship between national security and human rights.<sup>17</sup> Unlike the papers from the western democracies, Nigerian papers deal solely on the relationship and promotion of human rights of citizens while promoting national security

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<sup>14</sup>. Megan A Yasenchak, note 8; William W Burke-White, note 1; Federico Fabbrini, 'Human Rights in the Digital Age: The European Court of Justice Ruling in the Data Retention Case and Its Lessons for Privacy and Surveillance in the United States' [2015](28) *Harvard Human Rights Journal* 8.

<sup>15</sup>. See William W. Burke-White note 14

<sup>16</sup>. See Megan A Yasenchak, Jennifer Giglio, and Margaret Paxson, Note 14.

<sup>17</sup>. Ihugba Bethel Uzoma, note 8; Bernard Oluwafemi Jemilohun and Timothy Ifedayo Akomolede 'Regulations or Legislation for Data Protection in Nigeria? A Call for a Clear Legislative Framework' [2015] (3) (4), *Global Journal of Politics and Law Research*, 1-16; Laura Ani 'Cyber Crime and National Security: The Role of the Penal and Procedural Law' in *Law and Security in Nigeria*, (Eds) E Azinge and F Bello (Nigerian Institute of Advanced Legal Studies, 2011) 197 -232.

List Nigerian papers.

within the country.<sup>18</sup> Perhaps this is because Nigeria has not had the experience of sustained pursuit of national security, with particular reference to the security of human life from external-terrorism and other organized external aggression perpetrated from within and outside its borders.

Irrespective of the perspectives of these papers, their definitions of the key concepts of *human rights and national security* have remained similar. To properly, situate our discussion, it is necessary to define these concepts, specifically human rights and national security.

### ***Human Rights***

Human rights are defined as regionally or nationally in statutes and constitutions. These definitions, however, do not provide for what is human rights but list activities and actions that may be recognized as a manifestation of human rights. Because of these deficiencies, some scholars have attempted to proffer certain general definitions. One of such definitions that capture most elements describes human rights as “universal values and legal guarantees which aim at protecting individuals and in some cases groups against actions and omissions primarily by governments or governmental agencies which oftentimes interfere with fundamental freedoms, entitlements and human dignity”.<sup>19</sup> In line with this perspective, another definition sees it as a “body of rights which resides in human beings, the enjoyment of which makes life whole and decent”.<sup>20</sup> These definitions have been interpreted as meaning that human rights avails or should avail everybody, irrespective of nationality and political system.<sup>21</sup> The qualification to gain this right is being part of the human race and being present within a country. The right is owed to an individual by the country and can be enforced against all government agencies.

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<sup>18</sup>. See note 17 above for Examples of Nigeria Papers.

<sup>19</sup>. B E Ewulum ‘Terrorism and Human Rights Protection: Nigerian Perspective’ [2015] (37) *International Affairs and Global Strategy*, 64.

<sup>20</sup>. Adetokunbo Mumuni, ‘Security, Human Rights and the State of Nigeria Democracy’, [2013] paper presented at the Civil Society Situation Room Meeting on Tuesday, 9th Day of July, 2013 at Protea Hotel And Apartment, Apo, Abuja at 5

<sup>21</sup>. B E Ewulum, note 19.

Some scholars have described the promotion and protection of human rights as the primary purpose of government.<sup>22</sup> This is an extension of the social contract theory.<sup>23</sup> Members of society surrender their rights to the government in exchange for governance. This is in the understanding that these rights must be protected by the government against breach by individuals and by individuals acting on behalf of the government.<sup>24</sup> In other words, national security is in fact citizen security. However, while human rights can be split into individual rights, national security cannot. Put in another way, National security is an aggregation of all human rights.

It is apparently in this concept of aggregation that recent scholars have tended to individualize human rights to a list or set of rights. This is a reflection of human rights as defined by various national and international laws and conventions. These national and international laws and conventions see human rights to include both civil, political, social, and cultural rights as contained in laws like Nigerian Constitution, European Convention of Human Rights, African Charter on Human and Peoples Rights, Universal Declaration of Rights and Man, International Convention on Civil and Political Rights, and the International Convention on Economic, Social and Cultural Rights.

In Nigeria, these rights fall under either what is commonly regarded as, justiciable or non-justiciable rights. Other scholars have distinguished them as Civil and Political Rights AND Socio-Economic and Cultural Rights.<sup>25</sup> However, for purposes of this paper and the argument being made here, we propose to restrict our definition to Civil and Political Rights (justiciable rights), within the Nigeria context. Within the CFRN 1999, as amended, they

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<sup>22</sup>. See Ihugba Bethel Uzoma, note 17.

<sup>23</sup>. For more insight read up on Thomas Hobbes' and John Locke's on Social contract theory. See "Social Contract Theory" in Internet Encyclopedia of Philosophy, A Peer Reviewed Academic resource <<https://www.iep.utm.edu/soc-cont/>> accessed 31 October 2019.

<sup>24</sup>. General human rights can only be enforced against government agencies. Similar breaches by individuals can also be enforced against individuals but not enforcement of human rights per se rather to proceed under civil or criminal charges against the aggressor.

<sup>25</sup>. Adetokunbo Mumuni, note 20.

are those rights referred to in the constitution as fundamental rights as provided under these sections: *Section 33*. Right to life; *Section 34* Right to dignity of human persons, *Section 35* Right to personal liberty, *Section 36* Right to fair hearing, *Section 37* Right to private and family life, *Section 38* Right to freedom of thought, conscience and religion, *Section 39* Right to freedom of expression and the press, *Section 40* Right to peaceful assembly and association, *Section 41* Right to freedom of movement, *Section 42* Right to freedom from discrimination, and *Section 43* Right to acquire and own immovable property.

These are the rights, which due to their justiciability have on many occasions been equated as threats to national security.<sup>26</sup> It is under this premise that our definition of human rights is limited to these fundamental rights guaranteed under the CFRN 1999 as amended.

### ***National Security***

The concept of national security has been adjudged to reflect government policy and interest at various points in time and in a different jurisdiction<sup>27</sup>. It is in fact never permanently one thing. It changes to reflect the nation's priority concern at a given time. However, unlike human rights with identifiable list of rights which are statutorily or constitutionally listed and identified, national security concerns are defined and tackled as they arise. Thus, at different times, national security has been seen as the protection of national survival or capacity for self-defence<sup>28</sup> both in the acquisition of military weapons and the recruitment and deployment of military personnel.<sup>29</sup> National security has thus been expanded to include the pursuit of international trade, economic concerns or health priorities<sup>30</sup> aimed at sustaining the continuity and survival of a nation.<sup>31</sup>

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<sup>26</sup>. See *Director of SSS, & Anor v Agbakoba* (1999) LPELR – 954 (SC); *Abacha & Ors v. Fawehminmi* 2000 LPELR-14 (SC).

<sup>27</sup>. Ebeh, John Igbogo 'National Security and National Development: A Critique' [2015] (4)(2), S/No 14, 1-14, at 3. DOI: <http://dx.doi.org/10.4314/ijah.v4i2.1>.

<sup>28</sup>. Fatima Bello 'Public Policy Implication on National Security' in E. Azinge and F. Bello *Law and Security in Nigeria (Nigerian Institute of Advanced Legal Studies, 2011)*.

<sup>29</sup>. Ebeh, John Igbogo, note 27.

<sup>30</sup>. Ihugba B U and Onyesi I S 'International Intellectual Property Agreements as Agents of Sustainable Development of Developing Countries', [2017] (9) *African Journal of Legal Studies* .

<sup>31</sup>. Ebeh, John Igbogo, note 27.

This ability to change as times and circumstances dictate have led to the expansion of national security to include national issues which when not properly dealt with are likely to jeopardize the security of a nation. These concerns could arise from internal or external sources (not necessarily human aggressors). A country will accordingly channel its national security policy externally or internally depending on where it perceives to be the source of the highest threat to its national security. For western countries, the perception rightly or wrongly is that the preponderant source of threat to its national security is external, particularly terrorism<sup>32</sup> and recently immigration. This is perhaps reflected in western policies attempting to balance national security and human rights not necessarily of its citizens but mostly of aliens and external terrorists. These policies usually emphasize building the human right profile of other countries and less about building internal promotion of human rights.<sup>33</sup>

What the above discussion has demonstrated is that the concept of national security is fluid and contextual both in time and place. The general and core element, however, is the protection of the country from activities, events or actions that would jeopardize the health, well-being and general security of the majority of citizens. Anything less, e.g. political interest of the ruling party or political interests of the person in power, in our humble opinion and drawing from the discussion above does not amount to a national security question.

This trend is also reflected in Nigeria's National Security Policy over the years. The Nigeria National Security policy has however tended to be mainly concerned with fighting internal insurrection, engaging in peacekeeping missions in neighbouring countries and projecting the image of a powerful African nation. This is perhaps is attributable to Nigeria's history longer military government than civilian government and because of the hangover of the Biafran Nigeria civil war. Recently, the National Security Policy has tended to expand beyond human security to recognize other issues of good governance. The latest published Nigeria National Security Policy strategy

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<sup>32</sup>. Megan A Yasenchak, note 8; William W Burke-White, note 1.

<sup>33</sup>. Note 31.



lists the following as national security threats: Global Challenges, Terrorism, Transnational Organized Crimes, Nigeria's Borders, Climate Change, Communal and Ethno-religious Conflicts, Politics and Federalism in Nigeria, Bad Governance, Poverty, Kidnapping, Proliferation of Small Arms and Light Weapons, Proliferation of Weapons of Mass Destruction, Illegal Migration, Economic Challenges, Financial Crimes, IT and Cyber Security, Natural, Man-Made and Medical Related Threats, Environmental Security.<sup>34</sup> Although issues of physical human security (including physical security and integrity of the nation) abound, good governance, economic prosperity, and environmental security are being recognized and factored into national security policies.

### **Human Rights and National Security Juxtaposed**

Some arguments have persisted as to which has priority over the other between human rights and national security.<sup>35</sup> We have earlier provided an answer to this question, by highlighting what should be the primary purpose of the state.<sup>36</sup> In our opinion, the primary purpose of the state is the wellbeing of its citizens and this includes both security, socio-political and economic welfare. In Nigeria, this has been constitutionally provided to mean the promotion of the security and welfare of citizens.<sup>37</sup> This is stated thus, in section 14(1) (b) “*the security and welfare of the people shall be the primary purpose of government*”.

This provision is made under Chapter II of the CFRN 1999 as amended which provides for the Fundamental Objectives and Directive Principles of State Policy. Despite this appellation of “Fundamental Objectives”, they have been consistently adjudged as non-justiciable while adjudging chapter 4 justiciable. Chapter IV provides for fundamental rights. But this dichotomy is flawed because the security and welfare of citizens can only be demonstrated by the achievement of the provisions and protections guaranteed by Chapter IV, the so-called justiciable rights. This is perhaps why in certain jurisdictions, for example in India it has been held that fulfillment of civil and political rights

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<sup>34</sup>. Federal Government of Nigeria, ‘National Security Strategy’, Federal Government of Nigeria, November 2014, <<file:///C:/Users/Bethel%20Ihugba/Documents/JOURNAL%20IJLSR/NIGERIAN-NATIONAL-SECURITY-STRATEGY-2014.pdf>> accessed 19<sup>th</sup> May 2018.

<sup>35</sup>. Adetokunbo Mumuni, note 20.

<sup>36</sup>. This is discussed in the introduction to this paper.

<sup>37</sup>. Section 13(2) CFRMN 1999 as amended.

(our Chapter IV), without fulfillment of social and economic rights (our Chapter II), is deficient.<sup>38</sup>

In addition, some Nigeria scholars have suggested, perhaps in a roundabout way that both Chapters II and IV have the same objectives and should, therefore, be justiciable. Authority has in fact been drawn from the provisions of the African Charter on Human rights. This charter, which Nigeria has domesticated, grants justiciability to most of the rights that constitute Charter II of the Nigerian constitution. Some have thus argued that Charter II of the CFRN 1999 as amended, by virtue of the domestication of the African charter, is justiciable. In other words, none have priority over the other but each should be a fulfillment of the other. This position is however yet to be generally accepted or positively pronounced by the Supreme Court of Nigeria.

Thus, supposing but not conceding, that national security and human rights are two different objectives, we highlight below instances of human rights that are subjected to derogation by the narrow pursuit of national security. Such derogation could be through statutory provisions or prosecutorial practice. The derogation must, however, have been in accordance with the requirements stipulated in the Constitution.

Under the constitution, there could be legislative derogation of fundamental rights on grounds of National security. This is provided for in sections 45(1) and (2) of the CFRN 1999 as amended. Under section 45 the following rights could suffer derogation: Section 33 Right to life, Section 35 Right to personal liberty, *Section 37* Right to private and family life, *Section 38* Right to freedom of thought, conscience and religion, *Section 39* Right to freedom of expression and the press, *Section 40* Right to peaceful assembly and association, and *Section 41* Right to freedom of movement. Sections *Section 33*, Right to life and *Section 35* Right to personal liberty, could however only suffer derogation upon declaration of emergency in fulfillment of *section 305*.

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<sup>38</sup>. *Frannus v Union Territory of Delhi* A I R 1981 SCC 7(Indian Supreme court Judgement); see generally J Nnamdi Aduba, 'The Right to Life under Nigerian Constitution: The Law, The Courts and Reality', [2011] *S M A Belgore Chair Series Nigerian Institute of Advanced Legal studies Abuja* at 8 – 10.

*Derogation of sections 37 to 41 under section 45 (1)*

Section 45 (1) provides thus:

*Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society (a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom of other persons.*

The above provision of the Constitution makes it possible for these five rights to suffer derogation on grounds of national security. However, the Constitution sets strict conditions. The strictness of these conditions goes to demonstrate the importance of these rights. They are rights, as the Constitution puts it, fundamental rights which ordinarily should not be breached on any circumstance. But on the recognition of our humanity and the fact that we may be called upon at any time to sacrifice for the good of the group and not the individual, these exceptions are made. The exceptions are however not made lightly.

As demonstrated in section 45, the derogation can only occur through the power of an Act of National Assembly. However, the fact that it is sanctioned by an Act of the National Assembly is not sufficient. The particular Act must meet some other criteria<sup>39</sup>. These are that: the Act must be justifiable in a democratic society and it must have been made: (a) in the interest of *defence, public safety, public order, public morality or public health, or (b) for the purpose of protecting the rights and freedom of other persons.*

The first condition outlined in section 45 (1) - of the Act being justifiable in a democratic society – is not as easy to meet as it may seem at first glance. The terms “*reasonably justifiable in a democratic society*” means that the law is made following a democratic process and for the reasons justifiable within a democracy. Within Nigeria and any other democracy, reasons justifiable in a democratic society can only mean “*good government and welfare of all persons in our country, on the principles of freedom, equality and justice, and*

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<sup>39</sup>. See Ihugba Bethel Uzoma, note 8.

*for the purpose of consolidating the unity of our people*".<sup>40</sup> Thus if the Act fails to promote or protect the principles of freedom, equality and justice or does not promote the unity of Nigerians, the Act would have failed and cannot be a basis for the derogation of any of the rights outlined in section 45(1). This is irrespective of whether or not there are national security concerns.

Another nuanced requirement of section 45 (1) is that the Act must be made "*in the interest of* defence, public safety, public order, public morality or public health, or (b) *for the purpose of* protecting the rights and freedom of other persons". The keywords here are "*in the interests of*" and "*for the purpose of*". Thus that the Act purports to promote defence, public safety, public order, public morality or public health, or protect the rights and freedom of other persons is not sufficient. Rather the derogations which the Act purports to make must be necessary to achieve these objectives. Thus if it can be demonstrated that the same objectives can be achieved without the derogation of human rights of any particular citizen, irrespective of statutory provision, the Act would have failed. This is because the Act would have failed to demonstrate enacted "*in the interests of*" and "*for the purpose of*" promoting national security.

The combination of (a) and (b) of ii of section 45 (1) are what constitutes national security. As already explained above, national security consists of a series of concerns that may face a country at different times<sup>41</sup>. Thus if these concerns, be it food security, health, external aggression, internal upheaval, terrorism, etc., things cannot be prevented by the derogation of rights of citizens or it is unnecessary to derogate rights of citizens to resolve the concerns and thus promote National Security, then any law that derogates human rights in the guise of protecting National Security would be both unnecessary and unjustifiable in a democratic society.

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<sup>40</sup>. Preamble to the Constitution, which is the objective for which the powers in Section 4 of the CFRN 1999 as amended must be exercised.

<sup>41</sup>. Pages 7 and 8 above.

***Derogation of sections 33 and 35 under section 45 (2)***

The derogation provided under this subsection, is in our opinion, more apt and direct. It makes it clear that these rights are important and should not be toyed with. Similar, to section 45 (1), the rights can only be derogated from by an Act of the National Assembly. It, however, makes this provision using a negative statement. This approach buttresses the huge significance of human rights under sections 33 and 35 of the Constitution and the necessity to avoid their derogation.

Section 45 (2) provides thus:

*An act of the National Assembly shall not be invalidated by **reason only**<sup>42</sup> that it provides for the taking, during **periods of emergency**, of measures that derogate from the provisions of section 33 or 35 of this Constitution; **but no such measures shall be taken** in pursuance of any such act during any period of emergency **save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency:***

*Provided that nothing in this section shall authorize any derogation from the provisions of section 33 of this Constitution, except in respect of death resulting from acts of war or authorize any derogation from the provisions of section 36(8) of this Constitution.*

The above provision is quite clear and straight to the point. It makes it very clear that the derogation of section 33 and 35 are highly undesirable and should never be an option except it is absolutely necessary. In other words, derogation should not be incidental but consequential and/or inevitable. It also provides a clear definition of timeline – *period of emergency*. The constitution defines what may lead to a state of emergency. According to section 305 (3): *The President shall have power to issue a Proclamation of a state of emergency only when:*

*(a) the Federation is at war;*

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<sup>42</sup>. Highlights are for emphasis. This suggests that the derogation of sections 33 and 35 are unconstitutional but may only be excused on certain conditions.

- (b) *the Federation is in imminent danger of invasion or involvement in a state of war;*
- (c) *there is actual breakdown of public order and public safety in the Federation or any part thereof to such extent as to require extraordinary measures to restore peace and security;*
- (d) *there is a clear and present danger of an actual breakdown of public order and public safety in the Federation or any part thereof requiring extraordinary measures to avert such danger;*
- (e) *there is an occurrence or imminent danger, or the occurrence of any disaster or natural calamity, affecting the community or a section of the community in the Federation;*
- (f) *there is any other public danger which clearly constitutes a threat to the existence of the Federation; or*
- (g) *the President receives a request to do so in accordance with the provisions of subsection (4) of this section.*

What is peculiar in all these exceptions and constitutional grounds for the derogation of human rights is the consistency of national security as a ground. The national security concern, as we have discussed earlier, must be for the interests of the citizenry. Thus successfully prosecuting an inevitable war is a national security objective. Fighting an epidemic, flood, earthquake and similar disasters that will require the temporary derogation of rights of certain persons through legislation to ultimately achieve security for the entire nation is a national security objective. The ultimate aim must be to ensure that the fundamental rights of the citizenry are protected. If ultimately, these rights cannot be guaranteed by the temporary derogation of some rights then there is no basis for the derogation in the first place.

***Should the National Assembly Make Laws that Derogate Human Rights?***

A hasty answer to this question is no. The National Assembly should never make such laws. However, the Constitution has been very careful in ensuring that the derogation of human rights is not a free for all affair. It is a last resort when no other alternative is possible. The fact that such can only be done through statutory enactment underscores its importance. The legislative power

to make legislations that derogate human rights is a power which the citizenry would ordinarily not want the National Assembly to exercise.

In other words, the problem is not in exercising this power but in making sure that it is exercised in fulfillment and in strict accordance with the entirety of the constitution. It should always be recognized that the promotion and protection of national security is fully consummated and demonstrated by the full enjoyment by all citizens of their human rights. Thus as demonstrated above, the National Assembly and all stakeholders in democracy should always, whenever it appears that a law purports to derogate human rights ask certain pertinent questions. Is the law rightfully made by the National Assembly? Is it possible in a democracy? Is it in fulfillment of democratic principles? Is it inevitable for the protection of national security and finally is the derogation proportionate to the harm being averted? If all these questions are answered in the affirmative, then perhaps such legislation may be allowed to stay. But only for the duration of its necessity and not more.

A similar principle that supports this position is regarded as the Siricusa principle on the derogation of the International Covenant on Civil and Political Rights.<sup>43</sup> According to the Siriacusa principle, before a right can be derogated, the government authority must answer five key questions in the affirmative. These are whether:

- The restriction is provided for and carried out in accordance with the law;
- *The restriction is in the interest of a legitimate objective of general interest;*
- *The restriction is strictly necessary in a democratic society to achieve the objective;*
- *There are no less intrusive and restrictive means available to reach the same objective;*

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<sup>43</sup>. UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, available at: <<https://www.refworld.org/docid/4672bc122.html>> accessed 31 October 2019.

- *The restriction is based on scientific evidence and not drafted or imposed arbitrarily i.e. in an unreasonable or otherwise discriminatory manner.*<sup>44</sup>

The objective of fulfilling the requirements of this principle is to ensure that people's rights are fully protected and only derogated when absolutely necessary and inevitable.<sup>45</sup> These principles are thus introduced to protect the provisions of the International Covenant on Civil and Political Rights, an international Charter equivalent in potency to Chapter IV provisions of the Constitution, by preventing and limiting the opportunities for derogations.<sup>46</sup>

## CONCLUSION

Nigeria, like most countries, will forever continue to fight for the protection of its national security against internal or external aggressors. In other circumstances against natural and environmental disasters like floods, earthquakes, health epidemics, poverty, etc. Under the constitution of the Federal Republic of Nigeria 1999 as amended, these are circumstances when the Government could invoke the mantra of national security to derogate human rights. Invoking this mantra is however not enough. It must be statutorily provided for in accordance with the Constitution and strictly for the purpose of combating the identified threat to national security.

A failure to meet these constitutional requirements invalidates whatever legislative enactment made and any action taken pursuant to that legislative enactment. Thus the National Assembly should be at alert and ensure that the

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<sup>44</sup>. WHO "Tuberculosis (TB): WHO Guidance on human rights and involuntary detention for xdr-tb control", World Health Organisation, <[https://www.who.int/tb/features\\_archive/involuntary\\_treatment/en/](https://www.who.int/tb/features_archive/involuntary_treatment/en/)> accessed 31<sup>st</sup> October 2019.

<sup>45</sup>. K W Todrys, E Howe and J J Amon 'Failing Siracusa: governments' obligations to find the least restrictive options for tuberculosis control' [2013] (3)(1) *Public Health Action*. 8. doi: 10.5588/pha.12.0094, OR <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4463097/pdf/7.pdf>> accessed 31 October 2019

<sup>46</sup>. *Ibid.*



executive does not in its guise of combating a national security threat unduly deprive citizens of their fundamental rights or turn a democracy into a dictatorship. The avoidance of this possibility is the ultimate reason the citizens through the Constitution delegates the protection of their rights to the government.

Neither fundamental rights nor national security should be sacrificed for the other. The concept of sacrificing either is in itself a flawed logic. This is because the fullness of national security should reflect in the protection of the human rights of all citizens. This is a responsibility that should be carefully observed not only by the Legislature but also by the Executive and Judiciary. They all constitute the government and in fulfillment of the constitutional mandate must ensure that the security and welfare of the people is always the primary purpose of government. The citizenry, for whom these arms of government-run the affairs of the State, must also be alert to the fulfillment of this mandate.