ARTICULATING THE JURISPRUDENCE SURROUNDING DEROGATION FROM FUNDAMENTAL RIGHTS IN THE NIGERIAN CONTEXT

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Abstract

Fundamental rights are aspects of human rights which have been given constitutional recognition. Despite their prominence, in comparison to the general human rights scheme, the extent of their expression is curtailed aimed at enabling their responsible expression vis-a-vis competing rights of others and the collective interest of the society. This paper examines the variants and nature of derogations from fundamental rights evident in Nigerian Constitution and jurisprudence; with the aim of determining the extend of its application and limitations on fundamental rights in Nigeria. The paper adopts the doctrinal research method in examining primary and secondary sources of law such as: Constitution of the Federal Republic of Nigeria 1999 (as amended), African Charter on Human and Peoples' Right (Ratification and Enforcement) Act 1983, case laws, scholarly text in books and journals. The study finds that there are three variants of derogation from fundamental rights. These include: general derogation, specific derogation and derogation arising due to emergency situation. While these variants of derogation are applicable in various instances, depending on the specific fundamental right in question, they all have constitutional flavour. The study concludes that derogation from fundamental rights guards against arbitrariness and is essential for the optimal functionality of the society. It is herein contended that derogation should be retained in the retained in the statute book to the extent that it does not defeat the essence for which the fundamental rights were created in the first instance.

Keywords: Human rights, Fundamental rights, Derogation from fundamental rights, National security; State of emergency; Constitutional law

1.0 Introduction

Human rights are rights appertaining to man by the very nature of his humanity.[1] They are inherent rights which people enjoy by virtue of being human beings and not by the grace of any ruler – natural, elected or self-imposed.[2] As implied by the principle of inherence, inalienability is the fact that human rights are universal in the sense that it is available to beings whenever and wherever they may be.[3] In Nigerian constitutional parlance, the human rights captured Chapter IV of the constitution are referred to as 'fundamental rights'.[4] The choice of words does not make it any less but suggests the critical relevance of these specific human rights that have been given constitutional recognition amongst the large body of human right in International law.[5]

Fundamental rights have been defined as "the rights one holds by virtue, solely of being human person; that is to say, rights naturally inhering in the human being".[6] They are "rights attaching to man as man because of his humanity".[7] They have been described as standing above ordinary laws of the land and a primary condition for a civilized existence.[8] Thus, they occupy a kingly or an Olympian position in the residence of human beings. Fundamental rights fall within the specie of negative rights as against positive rights: economic, social, cultural and environmental rights.[9] Fundamental rights are wrapped and entrenched in Sections 33-45, Chapter IV, of the Constitution, as amended. Section 46 of the Constitution, as amended, donates to every citizen whose fundamental right is trampled upon, even *qua timet,* to approach the Court to ventilate his

[1] United Nations, 'Human Rights' <https://www.un.org/en/global-issues/human-rights> accessed 10 April, 2026.
[2] The British Institute of Human Rights, 'What are Human Rights?' (2024) <https://www.bihr.org.uk/media/bnol0gss/what-are-human-rights.pdf> accessed 10 April, 2026.
[3] Hemen Philip Faga and Daniel Ikechukwu Onyeonagu, 'The Universality of Human Rights: A Review' Nnamdi (2024) 11 (2) Azikiwe University Journal of Commercial and Private Law 168, 169.
[4] See Chapter IV Constitution of the Federal Republic of Nigeria. There are, however, other body of rights contained in Chapter II of the constitution. These body of rights are referred to as "Fundamental Objective and Directive Principles of State Policy".
[5]See for example: Universal Declaration of Human Rights; International Covenant on Economic, Social and Cultural Rights, which was adopted on 16th December, 1966 and became enforceable on 3rd January, 1976, and International Covenant on Civil and Political Rights adopted on 19th December, 1966 and became enforceable on 23rd March, 1976.
[6]Ben O Nwabueze, *Constitutional Democracy in Africa* (Vol. 3 Spectrum Books, 2004) 1.
[7]*Mustapha v. Governor of Lagos State* (1987) 2 NWLR (Pt. 58) 53, 589, per Oputa, JSC.
[8]*Kuti v. A-G, Fed*. (1996) 41 LRCN 200; *Odogwu v. A-G, Fed*. (1995) 2 NWLR (Pt. 6) 211; *Badejor v. Minister of Education* (1996) 9-10 SCNJ 51.
[9]A Borokinu, 'The Impact of Military Rule on Fundamental Human Rights in Nigeria' in Okpara Okpara, ed. *Human Rights, Law and Practice in Nigeria* (Chenglo, 2005) 353.

grievance and obtain redress.[10] The accepted procedure for such a redress is encapsulated in the extant Fundamental Rights (Enforcement Procedure) Rules, 2009.[11]

The central issue for consideration is the legitimate claim of an individual to exercise of his rights, on one hand, and on the other hand, the power of state to curtail those rights in the overall interest of other people, the community or the state as a whole through the instrumentality of the law. Put differently, the fundamental issue for consideration is the concept of individualism against that of collectivism. Fundamental rights though inalienable are not absolute.[12] Hence, they are subject, from time to time, to all manners of derogations and restrictions in the interest of defence, public safety, public order, public morality, public health or for the purpose of protecting the rights and freedom of other persons. The Constitution clearly captures the restrictions and grounds for derogation from fundamental rights.[13]

The notion of absolute fundamental human rights is unknown to Nigerian jurisprudence. None of the rights enshrined in the Constitution provide for freedom to do whatever one pleases, in which case it becomes a license and not right.[14] Rather the Constitution guarantees freedom to do what we ought to do. This right enjoys by the individual is that of freedom within the law and not freedom from the law. No right is limitless. The rationale for imposing restrictions and derogation from fundamental human rights stems from the need to secure rights of others captured in the Latin as *sic utere tuo ut alienum non laedas*.[15] Another rationale is the need to preserve the corporate existence and well-being of the society at large, which is referred to as *salus populi suprema lex*[16] in the Latin maxim. Cicero was, therefore, right when he said that "we are slaves of the law in

[10] See, *Tukur v. Government of Gongola State* (1989) 4 NWLR (Pt. 117) 517; *Jack v. UNAM* (2004) 5 NWLR (Pt. 365) 208, *Gafar Tukur v. Government of Kwara State* (2007) 4 NWLR (Pt. 1024) 375; *Amale v. Sokoto Local Govt*. (2012) 5 NWLR (Pt. 1292) 181; *Jim-Jaja v. COP Rivers* (2013) 6 NWLR (Pt. 1350) 225; *Denton-West v. Jack* (2013) 15 NWLR (Pt. 1377) 205.
[11] *Ayodele v. IGP& Ors* (2016) LPELR-42937 (CA) per Obande Festus Ogbuinya, JCA (Pp. 10-12, paras. D-A).
[12] Igwe Onyebuchi Igwe, Matthew Enya Nwocha, and Amaramiro A. Steve, 'Enforcement of Fundamental Rights in Nigeria and the Unsolved Issue of Poverty among the Citizens: An Appraisal' (2019) 10 (1) Beijing Law Review 1, 1.
[13] Section 45 Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended).
[14] See Chapter IV Constitution of the Federal Republic of Nigeria.
[15] A man must not make use of his property as unreasonably and unnecessarily to cause inconvenience to his neighbour.
[16] The safety of the nation is the Supreme law.

order that we may be free".[17] This paper critically examine the various forms of derogations from fundamental rights and the extent of its application in Nigerian jurisprudence.

This paper is divided into five sections. The first section is the introduction, which provides background information, sets out the objective and structure of the paper. The second section provides a conceptual analysis of derogation from fundamental rights and the variants thereof. It also points out their practical expression in the constitution. Part three discusses national security as a basis for derogation from fundamental rights. Part five is the conclusion of the paper. It also makes appropriate recommendations.

2.0 Explicating the Nuances of Derogation from Fundamental Rights

Derogation from fundamental right is the temporary suspension, limitation or restrictions on the application of certain fundamental rights provisions by the state, particularly during exceptional instances stipulated by the relevant statutes.[18] It is distinct from restrictions that are applicable in normal instances. Derogation simply suggest that the specific fundamental rights ordinarily apply, however, due to the extreme circumstance, there is need for it to be paused temporarily for that particular instance or occasion. Derogation from fundamental right is an exception, rather than the general rule.

The underlining principle behind the application of derogation is a response to absoluteness. It is also important that the state should be able exercise extreme powers to take care of unanticipated eventualities for collective interest.[19] It has an undertone of utilitarian philosophy of "the greatest good for the greatest number of persons".[20] Thus, one of the major bases for limiting the application of fundamental right is when public interest is at stake.[21]

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[17]Quoted in CA Oputa, 'The Independence of the Judiciary in a Democratic Society – Its Need, its Positive and Negative Aspects' (1990)1 (3) JUS 17.

[18] Emilie M. Hafner-Burton, Laurence R. Helfer and Christopher J Fariss, 'Emergency and Escape: Explaining Derogation from Human Rights Treaties' (2011) 65 (4) International Organization 673, 673.

[19] Alletta Brenner, 'Utilitarianism and Human Rights – Contrary or Complimentary' (2008) 1 (3) Rerum Causae 28, 32.

[20] Probe Ministries, 'Utilitarianism: The Greatest Good for the Greatest Number' (2004) <https://www.probe.org/utilitarianism-the-greatest-good-for-the-greatest-number/?print=pdf> accessed 12 April, 2026.

[21] Leslie Allan 'Can Utilitarianism Ground Human Right?' (Rationalism Realm, 2023) <https://www.RationalismRealm.com/philosophy/ethics/utilitarianism-human-right.html> accessed 12 April, 2026.

According to Ogochukwu,[22] whenever the fundamental right of an applicant is to be determined, the court is usually minded to consider striking a balance between individual rights against government restrictions place upon the expression and enforcement of such rights. Consequently, the court is tasked with the burden of determining how this right is to be balanced. In the case of Nigeria, the Constitution did not entirely leave that task for the court to determine. Inherent in the constitution are specific provisions on the limitations that should be placed on the exercise of fundamental rights. A general review of the constitution would reveal that there are three bases for derogation from fundamental rights. These limitations are classified into three perspectives, namely: general derogation, specific derogation and derogation arising due to emergency situation.

2.1 General Derogation

General derogation is the use of general clause as a ground for derogation from fundamental rights. It is usually captured as an omnibus expression that contained in a specific provision of a statute different from the provisions which created the specific fundamental rights. General derogation is an instance of reasonably justifiable ground to pass a law in a democratic society in the interest of defence, public safety, public order, public morality or public health.[23] The restrictions operate during peace time. The Constitution permits derogation by means of law in the interest of public order and national security, public safety or public health. Section 45 (1)(a) CFRN 1999 provides that: nothing in Section 37, 38, 39, 40 and 41 CFRN 1999 shall render invalidate any law which is reasonably justifiable in a democratic society.

The generic and vague expression used in the derogation clause stated above, has created more problems. The first problem derives from the opening expression "nothing in this Section shall invalidate any law…" Nwabueze argued that this implies a presumption in favour of the validity of a law imposing the restriction. He suggested that it could be rephrased as "any law derogating from a guaranteed right shall be invalid unless it is reasonably justifiable…[24] It is submitted that although anyone who asserts the invalidity of a statute has the burden of proving it. It is in my

[22]B Ogochukwu, 'Balancing, Proportionality, and Human Rights Adjudication in Comparative Context: Lessons for Nigeria' in OC Okafor, ed. *The Transnational Human Rights Review* (Nigerian Institute of Advance Legal Studies, 2014) 1, 5.
[23] CFRN 1999, Section 45(2)(a).
[24]Ben O Nwabueze, *A constitutional history of Nigeria* (C Hurst & Co., 1982) 118.

view, anomalous to presume the constitutionality of an impugned law, especially if it encroaches on the right protected by the Constitution.

The provision of Section 45 CFRN 1999 which contains the general limitation clause to be placed on the fundamental rights contained in the constitution has limitation in itself. In other words, the limitations contained therein are not applicable to all the fundamental right provisions. The limitations are made applicable to the rights contained in Sections 37, 38, 39, 40 and 41 of the Constitution. However, there are self-inherent limitations in the specific sections of other fundamental right provisions. For instance, sections 33 and 35 of the Constitution contain limitations to the right to life and personal liberty respectively. A person may be deprived of the right in circumstances such as when a death sentence is executed pursuant to the determination of a court of competent jurisdiction, defence of self or proprietary right, execution of lawful arrest, prevention of escape from lawful custody, suppression of riot, insurrection or act of mutiny. On the other hand, personal liberty may be restricted in circumstances such as arrest in the instance of reasonable suspicion of criminal offence.

In as much as the Constitution has not left the placement of the limitation on fundamental rights entirely at the discretion of the court, it does not mean that the court is entirely precluded from expressing its discretion.[25] Since the court is tasked with the burden of interpreting the constitution, its interpretation of the constitution would also be reflective of its perception of the intendment of the constitution or the framers of the constitution in instances where the provisions of the constitution are not interpreted by employment of the literal rule of interpretation.[26] Inherent in the limitation are clauses which allows the court to put its discretion and ingenuity to bear in the interpretation of the situation in order to determine in the limitation placed on the fundamental right of a citizen is justified in a specific situation.

In the general and specific limitations to fundamental rights, there is a reoccurrence of the "reasonableness standard". For instance, the force allowed for depriving the fundamental right to life of a person in defence of person, property, prevention of escape from custody or suppression

[25] PFU Nwankwo, 'The Doctrine of Inherent Powers and Jurisdiction of the Honourable Court' (2023) 11 (2) International Journal of Innovative Legal & Political Studies 1, 5.

[26] PE Oshio, 'Towards a Purposive Approach to the Interpretation of the 1999 Constitution' (Lawguru) <https://nigerianlawguru.com/wp-content/uploads/2024/09/TOWARDS-A-PURPOSIVE-APPROACH-TO-THE-INTERPRETATION-OF-THE-1999-CONSTITUTION.pdf> accessed 10 April, 2026

of riot is a force which is "reasonably necessary".[27] The same "reasonably necessary" standard is the case of emergency is applicable in justifying forced labour in violation of the right to personal dignity.[28] "Reasonable suspicion" and "reasonably necessary" standards are to be applied by the court in order to determine whether it is an individual's right to personal liberty should be derogated from.[29] The reasonableness criteria is applicable to the time limit allowed for detaining a person before bring him to court to be subjected to criminal trial.[30] Similar standard of "reasonable time" also applies to the right to fair hearing.[31] A more controversial expression is contained in Sections 39 (3) where it is provided that the standard for justifying a law which limits right to freedom of expression and the general limitation contained in Section 45 (1) is that it is "reasonably justifiable in a democratic society". The fluidity in the expression is regarded as a serious shortcoming in the quest to uphold human rights.[32]

The use of the "reasonable" standard in the various constitutional provisions reviewed above enables the court to express some level of discretion in determining what amounts to a "reasonable time", "reasonably necessary", "reasonable suspicion" and "reasonably justifiable." This is because the term "reasonable" does not bear any clearly defined meaning. The expression "reasonable" only suggest that it is objective rather than subjective test that is applicable. However, the objectivity of the test is dependent on the special circumstances of each case. It also suggests that the court will arrive at its findings judicially and judiciously. In other words, there must be legal and evidential basis for which the court will reach its conclusion.[33] Not only is the law to be reasonable but is expected to "justifiable in a democratic society".[34]

The courts have always been faced with difficulties in interpreting when a particular law is reasonably justifiable in a democratic society to justify a non-enforcement of the fundamental

[27] CFRN 1999, Section 33 (2).
[28] *ibid*. Section 34 (2) (d).
[29] *ibid*. Section 35 (1) (c).
[30] *ibid*. Section 35 (4) (5) (b).
[31] *ibid*. Section 36 (1), (4).
[32] J.A. Dada, 'Impediments to Human Rights Protection in Nigeria'(2012) 18 (1) Annual Survey of International & Comparative Law 67, 77.
[33] See the following cases: *Okonkwo v. Onu* (2014) All FWLR (Pt. 725) 395; *Ukachukwu v. PDP* (2014) All FWLR (Pt. 728) 887.
[34] Section 45 (1) Constitution of the Federal Republic of Nigeria.

rights indicated in Section 45.[35] In the case of *DPP v. Chike Obi*,[36] the defendant was charged with the offence of sedition. It was strenuously argued in his defence that the alleged offence under the Section 51 was invalid by reason of 1960 Constitution which guaranteed the freedom of expression. He submitted that the provision of the Criminal Code which the state relied upon could not be a law reasonably justifiable in a democracy. The Federal Supreme Court, per Ademola CJF, in interpreting derogation clause in Section 24(2) CFRN 1960, which is *in tandem* with Section 45 of the 1999 Constitution, held that:

> It seems to me that this is taking too narrow a view of the provision, for it must be justifiable in a democratic society to take reasonable precautions to preserve public order, and this may involve the prohibition of acts which if unchecked and unrestrained might lead to disorder even though those acts would not themselves do so directly.

This decision was followed in *Amalgamated Press of Nigeria v. R.*,[37] where the court declared that, "Section 24 of the Constitution of the federation relating to fundamental human rights guaranteed nothing but ordered freedom". Admittedly, the Constitution guaranteed ordered freedom but the court in those two cases refrained from prescribing the guidelines or yardstick as to what constitute reasonably justifiable in a democratic society and for specified reason stated that protest can turn out to be reasonably justifiable in a newly emergent democratic independent country. However, in *Nwankwo v. The State*,[38] the Court of Appeal declared Sections 50 – 52 of the Criminal Code on sedition inconsistent with the provisions of Section 36 and 41 CFRN, 1979. Olatawura JCA (as he then was) aptly declared that, "the law of sedition which has derogated from freedom of speech guaranteed under this 1960 Constitution is inconsistent with the 1979 Constitution. More so, when this cannot lead to a public disorder as envisaged under Section 42(1) (a) of the 1979 Constitution".

In *Director, S.S.S. v. Agbakoba*,[39] where the Supreme Court held that the Applicant had no power under any law to seize the passport of the Respondent, it nevertheless refrained from making a pronouncement on whether the relevant provisions of Passport (Miscellaneous Provision) Act 1985, which enables such seizure violates Section 38 CFRN, 1979 and therefore void. Ogundare

[35]See the following cases: *Williams v. Majekodunmi* [1962] 1 NLR 413; *Olawoyin v. AG Northern Region* [1961] 1 NLR 269; *Adegbenro v. A.G. Federation & Ors*. [1962] 1 NLR 431.
[36](1961) All NLR 186.
[37](1961) 1 All NLR 191. See also: *Cheranchi v. Cheranchi* (1960) NRNLR 24.
[38](1983) 2 FNR 283.
[39](1999) 3 NWLR (Pt. 595) 314.

J.S.C. accordingly restrained himself by saying: "I am not prepared to say that the act is not reasonably justifiable in a democratic society".[40] The court however held that the provisions of Section 38 (1) CFRN, 1979 are not absolute. Otherwise, passports will have to be issued to a known common criminal, a patient of highly infectious disease, a person dealing with foreign enemies etc.

The issue of whether the Public Order Act is a law reasonably justifiable in a democratic society has been a recurring issue. In *Federal Government of Nigeria v. Oshiomhole & Anor.,*[41] the court did not avert its mind to the Act. The court, however, held that the respondent can invoke Section 40 of the 1999 Constitution as a basis for staging mass protest against the imposition of N1.50k per litre tax on petroleum. Gummi, J. held: "the problem here is, we have not been referred to any law that may justify the banning of workers from engaging in strikes or mass protests over issues concerning the interest of such workers".[42] The decision was quickly set aside on appeal[43] on ground of jurisdiction. It was held that it was the Federal High Court that has jurisdiction on federal government revenue related matters. The issue resurfaced again when the Court of Appeal declared the Public Order Act unconstitutional in the case *All Nigerian Peoples Party & Ors, v. Inspector General of Police*.[44]

What emerges from the foregoing is that the courts in Nigeria before year 2007 have not been able to set down general parameters for determining what is "reasonably justifiable in a democratic society". They have rather chosen a case-to-case approach of interpreting specific laws they have been called upon to consider in relation to the Constitution. In certain cases, the courts have completely shielded away from addressing the issue.

It is therefore, herein submitted that, the existence or otherwise of a "democratic society" can be discerned from the type of government in place, whether it is one that came to power *viet armis*[45] or one that came to power through election the other terms are quite nebulous. Democracy connotes a system of government that is people oriented. In other words, such law must be made of the people, for the people and by the people. This entails people-oriented law which must arise from

[40]*ibid*. 359.
[41](2004) 9 WRN 129.
[42]*ibid*.
[43]*FGN v. Oshiomole* (2004) 25 WRN 50.
[44](2008) WRN 65.
[45]Through the force of arms.

the consciousness of the people in order to serve the interest of the people. Since all the people cannot sit together to make a law, the elected representatives are to make those laws that serve the interest of the people.[46] Upon such legislative enactment, it is the party who asserts that such law is not reasonably justifiable in a democratic society to prove such assertion.[47] To this end, it would be apt for the party to prove that the appropriate body did not enact the law; or the appropriate body was not properly constituted; or the law is not in contradiction to a constitutional provision; or the laid down legal procedure for making such law has not been complied with. The legal procedures essentially seek to create check and balances, which are put in place to checkmate despotic tendencies. This is as opposed to a dictatorial promulgation that emanates from a despotic government.

The legal implication of the general derogation is that fundamental rights is not to be exercised in the absolute sense without restrictions. Thus, in the exercise of individual rights, due caution has to be taken of general interest of the public. However, considering the omnibus expression of general derogation clauses, it leaves room for side discretion in determining facts which constitutes those general terms that would warrant a deviation from upholding the fundamental right of parties. While the state would be more inclined to adopt a wider interpretation of general clauses, which reduces its spans of liability, the court should adopt a more restrictive stance in interpreting general derogation clause. This is due to inherent dangers that a wider application of derogation clause has the tendency to defeat the essence of the provision of fundamental right. The court has a duty to ensure that the need for the deviation from fundamental right is necessary and convincingly established.[48]

2.2 Specific Derogations

Specific derogations are restrictions imposed for the purpose of protecting the right and freedom of other persons.[49] Restrictions could arise for the purpose of protecting the rights and freedom of

[46]In the case of *James v. Government of Edo State* (2021) LPELR-54203(CA), it was held that a verbal or written executive order does not qualify as a law reasonably justifiable in a democratic society.
[47]*Osawe and Ors. v. Registrar of Trade Unions* (1985) 1 NWLR (Pt. 4) 755, 770. See also *Incorporated Trustees of Paradigm Initiative for Performation Technology Development & Ors. v. AG Federation & Ors.* (2018) LPELR-46655(CA).
[48] Andrew Ejovwo Abuza, 'Derogation from Fundamental Rights in Nigeria: A Contemporary Discourse' (2017) 7 (1) East African Journal of Science and Technology 108, 126.
[49] CFRN 1999, Section 45(1) (b).

other persons.[50] Nearly all the rights enshrined in the Constitution contain in-built or self-imposed restrictions. Fundamental rights provisions which have specific derogation include: right to life; right to dignity of human person; right to personal liberty; right to fair hearing; right to freedom of thought, conscience and religion; right to freedom of thought, conscience and religion; right to peaceful assembly and association; right to peaceful assembly and association; right to freedom of movement; and right to freedom from discrimination.

2.2.1 Right to Life

This right may be derogated from as a result of execution of death sentence imposed by a court of law, having found the accused guilty of an offence.[51] The Nigerian Supreme Court in the cases of *Peter Nnemi v. The State,*[52] *Kalu v. The State*,[53] *Okoro v. The State*,[54] *Effiom v. The State*[55] has upheld the constitutionality of death penalty. A lot of arguments have been canvassed for the abolition of death penalty.[56] While it is conceded that the use of death penalty has not completely wiped out the mischief which the law maker sought to cure with its inclusion in our laws. Nonetheless, abolition of death penalty at the stage of our nation's development amounts to giving insidious license to miscreants to kill at will and continue to breach individual right to personal security. Assassination, robbery, murder, kidnapping, terrorism and other heinous crime are on the increase. Having regard to the low literacy level and other socio-economic problems, it is undesirable to scrap the death penalty from the statute book in Nigeria.

Other derogations allowed on right to life include the use of reasonable force as self-defence or defence of property; to prevent the escape of a fleeing suspect or for the purpose of quelling riot, insurrection or mutiny.[57] While killing in self-defence is excusable as a natural protective reaction, no value of property should justify the killing of a human being. Although the court in the case of *Musa v. State*[58] upheld a homicide committed in defence of property, this is not commensurate

[50]*ibid*. Section 45 (1) (b).
[51]*ibid*. Section 33 (1).
[52](1996) 6 NWLR 42.
[53](1998) 11 SCNJ 1.
[54](1998) 12 SCNJ 84.
[55](1995) 1 NWQLR (Pt. 373) 507.
[56]A.A. Adeyemi, 'Death Penalty in Nigeria: Criminological Perspective' (Lecture delivered at a National Conference on Death Penalty, 1990); A Ibidapo-Obe, 'Death Penalty and African Tradition: Lessons for Modernity' (Lecture presented at the Leadership Forum Conference Centre, Ota, Ogun State, Nigeria in Oct, 2003).
[57]CFRN 1999 (as amended), Section 33 (2) (a) (b) & (c).
[58](1992) 2 All NLR 550; *Okonkwo v. The State* (1998) 4 NWLR 142.

with precious human life. This is a country where perennial land dispute is a norm with people asserting confliction rights of ownership over the same parcel of land. An incorrigible land owner may take undue advantage of this provision to desecrate human life.

It would appear that the wanton killing and the use of lethal weapons by police in Nigeria has to do with this derogation. In Kaduna in 1986, police killed some students engaged in peaceful protests at the Kaduna Polytechnic. In 1989, about six students of University of Jos were alleged to have been killed during anti-SAP riot. On May 28, 1991, two students of Yaba Technology were also gunned down during a protest. It is therefore submitted that, apart from death sentence and self-defense all the other derogations on right to life need to be expunged from the Constitution.

2.2.2 Right to Dignity of Human Person

The Constitution permits derogation to this right pursuant to a court order or any labour given to a conscientious objector in lieu of service such as compulsory National Youth Service Corps. There is no subsisting legislation which provides for inhuman and degrading treatment of the people in Nigeria. Equally there is a paucity of judicial decisions in this respect. However, there are certain customary practices which their observance portends infraction on the dignity of human person.

In some communities in Nigeria, when the husband predeceased the wife, the wife will be expected to undergo certain widowhood rites. These include seclusion or isolation, restriction in clothing (black), restriction in feeding, shaving of hair and certain situations, where widow is suspected of having a link with the death of her husband, to subject her to drink the water used in "bathing the corpse". The courts in Nigeria have spared no effort in striking down such customary practices as being repugnant to natural justice, equity and good conscience[59] Other customary practices include the subtle and veil form of slavery known as *Osu* caste system. Although government responded to this odious system through the Slavery Abolition Act, 1961, yet this social problem reared its head in *Nwangwu v. Okonkwo*,[60] where Uwais JSC observed: "the customary law of redeeming a pledge of land with a human being is certainly repugnant to natural justice, equity and good conscience and therefore untenable in present day Nigeria".

[59]*Mojekwu v. Mojekwu* (1997) 7 NWLR (Pt. 512) 283.
[60](1987) 7 SC (Pt. 1) 32, 37.

2.2.3 Right to Personal Liberty

This right may be abridged vide a sentence by a court of law or a law which authorized detention of members of the armed forces and the police for a period not exceeding three months.[61] In the case of *Adamu v. C.O.P. Kaduna State Command & Anor.*,[62] the defendant sought to enforce his right to personal liberty upon being detained for 24 days before he was charged and arraigned in court for the offence of armed robbery. The court declined to hold in favour of the applicant on the ground that by virtue of the status of armed robbery as a capital offence, it is not entitled to the protection offered by Section 35(4)(a) & (b) CFRN, 1999.[63]

2.2.4 Right to Fair Hearing

The right to public hearing of a trial may be constitutionally taken away under Section 36(3) in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of eighteen years (juveniles), the protection of the private lives of parties or to such extent as it may consider necessary by reason of special circumstances in which publicity would be contrary to the interest of justice and privacy of parties.[64] The requirement of openness of trial is an integral part of the adversary system of justice administration. The system allows witness to be examined in the open court and documents to be tendered and read in the open court. It has been held that the true test of fair hearing is the impression of reasonable persons who was present at the trial, whether from his observation; justice has been done in the case.[65] The interpretation of Section 243(1) Evidence Act, 2011 on the finality of executive claim to state privilege is diverse.[66] Section 36(4)(b) CFRN, 1999 as amended now provides a middle way approach where the court can take evidence which cannot be tendered publicly in camera. In observing this provision, care must be taken to ensure that the door which may lead to the truth is not locked through the denial of access to evidence which may do justice to a case.

Another seeming restriction on the right to fair hearing derives from the application of the doctrine of necessity. Section 36(1) of the Constitution clearly provides that the composition of court or

[61] CFRN 1999, Section 35(7) (a) & (b).
[62](2019) LPELR-49456 (CA).
[63]See: CFRN 1999, Section 35(7) (a).
[64]ibid. Section 36(4) (a).
[65]*Alhaji Isiaku Mohammed v. Kano NA* (1968) All NLR 424, 426.
[66]*Maja & Sons Ltd v. UAC* (1977) NMLR 157; *Apampa v. Balogun* (unreported suit No. 1/211/65); *Lere Adebayo v. Concord Press Ltd.* (1982) NCLR 434.

tribunal must be done in such a way as to secure its independence and impartiality**.** This implies that no man should be judge in his own cause – *nemo judex in cause sua*. Simply put, a court may be open to accusation of partiality due to consanguinity, affinity, friendship or enmity with one of the parties or personal interest in the matter which can be pecuniary of proprietary. The doctrine of necessity allows for relaxation of the rule when a statute provides for no other alternative, but unequivocally, quasi-judicial decision be taken by a particular person or body, notwithstanding his personal interest in the matter. This was invoked in *State v. Ogunnoye & Ors Exparte Olajunrin*,[67] where it was held that a person who is prima-facie disqualified for interest or bias may on ground of necessity be held competent and obliged to adjudicate of no other qualified tribunal can statutorily constituted. It is submitted that notwithstanding the doctrine of necessity, the court must still insist that such person acted with scrupulous fairness to otherwise his decision should be set aside.

2.2.5 Right to Private and Family Life

Section 214 Criminal Code forbids sexual intercourse against "the order of nature". Thus, sodomy, bestiality and lesbianism are crimes. A person cannot rely on the right to private family life to indulge in these acts. The new trend in Europe and the United States of America in allowing gay marriages on the guise of right to family and private life will later be examined. It is also arguable whether any regulation or law which requires prospective couple to screen their blood to ascertain their genotype before they can be joined in wedlock or employer requiring the intending worker to undergo Acquired Immune Deficiency Syndrome test constitutes an infraction on their privacy and the right to family life. It is however submitted that this derogation can be subsumed under public interest or public safety.

2.2.6 Right to Freedom of Thought, Conscience and Religion

The obvious limitation on this right provided for in the Constitution is prohibition of membership of secret society.[68] The menace of secret cult in the institution of higher learning and society at large cannot be overemphasized. Besides the destruction of property and fear that pervades

[67](1982) 5 SC 161. See also: O Adediran, 'Relaxation of Nemo Judex… Rule in Nigeria: An Examination of State v. Oba Ogunnoye & Ors.' (1990) 1 (3) JUS 56.
[68]CFRN 1999, Section 38 (4). See CFRN 1999, Section 318, for the definition of secret society.

campuses, a number of clashes among rival cults have resulted in death of innocent persons.[69] Also, it breeds inefficiency, favouritism, indolence and nepotism in public service.[70] Members of cults can easily penetrate government circle, if they are in government, thus undermining government activities and public interest. Interestingly, the Supreme Court although declared in *Registered Trustees of AMORC v. Awoniyi*[71] that AMORC is a secret society within the meaning of the Constitution, yet it refused to prohibit it in a latter case.[72] This stems from the fact that the Constitution merely banned the existence of secret society without making consequential sanction for its breach.[73] A corollary to this is the issue of religious dress code in public service. Can a Muslim woman put all on a veil over her wig and gown? Can a Muslim female nurse refuse to comply with the usual dress code prescribed by professional body in charge of Nursing or female member of the Armed Forces refusing to comply with the dress code of the service.

Bauchi State was alleged to have sacked twelve nurses for non-compliance with Sharia dress code for women nurses employed in nursing service department of Federal Medical Centre, Azare, Bauchi State.[74] It is submitted that a person who subscribes to membership of any professional body or has taking a job with any establishment must comply with such domestic laid down regulations and rules, notwithstanding his or her religious belief. There will be disorderliness if unbridled assertion to religion is carried into public service. This is why the Supreme Court in *Ojeighe v. Marcus Ubani*[75] rejected the contention that elections could not be held on Saturday which is a Sabbath to some people.

2.2.7 Right to Freedom of Expression and the Press

Derogation from this right takes the form of criminal offences of sedition,[76] publication of false information,[77] and Official Secrets Acts.[78] It also involves torts action of defamation. Specific

[69] Solomon Odeniyi, 'Rivers, Lagos lead as cult clashes claimed 1,686 lives in five years – Report' *Punch* 1 July, 2025 <https://punchng.com/rivers-lagos-lead-as-cult-clashes-claimed-1686-lives-in-five-years-report/>
[70] Peter Bisong and Emmanuel Kelechi Iwuagwu, 'Secret Cults Pandemonium in Nigeria: Critical Reflections' (2020) 4 (2) International Journal of Law, Management and Social Science 5, 6.
[71] *Registered Trustees of AMORC v. Awoniyi* (1994) 7 NWLR (Pt. 353) 154.
[72] *Awoniyi v. Registered Trustees of AMORC* (2000) 10 NWLR (Pt. 676) 522.
[73] KO Amusa, 'The Phenomenon of Secret Cults on Campuses in Nigeria' (1998) 6 University of Jos Law Journal 46.
[74] Andrew Ahiante, 'Nigeria: Sharia: Bauchi Hospital Sacks 12 Nurses' *This Day* 16 September, 2003 <https://allafrica.com/stories/200309160231.html> accessed 10 April, 2026.
[75] (1961) 1 All NLR 277.
[76] Criminal Code, Section 50-52 and Penal Code, Section 416.
[77] Criminal Code, Section 59.
[78] Criminal Code, Section 97(1). See: *African Newspapers (Nig) Ltd v. Eze* FCA/L/67/81.

derogation from right to freedom of expression and the press as stated in Section 39(3)(a)(b) CFRN 1999 also entails prevention of information received in confidence, maintain the authority and independence of the courts[79] or regulation telephony,[80] wireless broadcasting or television[81] or the exhibition of cinematography films or restrictions on public office holders in the federation state or in the armed forces or the police. A restriction may also be imposed on establishment of medium of expression such as schools or universities.[82]

There is no doubt that restrictions on freedom of expression is an invitation to anarchy and may be injurious to public morals. Revolutions have always been preceded with incitement to violence.[83] However, all aspects of the laws which exclude truth as justification or defence but which makes inciting statement actionable *per se* should be expunged from the corpus of Nigerian laws. It is also undesirable to permit obscene or pornographic publications in the guise of freedom of expression. This may breed deviant behaviour and may lead to criminality.[84]

There is no doubt that a virile, independent and fearless press is a tool for actualizing democratic norms and sustenance of the rule of law. But it is freedom that must be exercised reasonably, objectively and with circumspection. The Court of Appeal noted in *Senate of the National Assembly v. Tony Momoh*,[85] that our Constitution provides for no greater right for the press to elevate them to the "fourth arm of government". Nnaemeka Agu J.C.A. remarked that "the press or any other medium of information cannot claim any right to confidentiality of the source of their information in a proper investigation by a house of the national assembly or the police".

2.2.8 Right to Peaceful Assembly and Association

The specific derogation provided under Section 40 for this right is in relation to power of the Independent National Electoral Commission to accord recognition to political parties. This power was recently challenged up to the Supreme Court which ruled that any association which complied

[79] *Obiekwe Aniweta v. The State* FCA/E/47/78
[80] National Communication Commission Act
[81] National Broadcasting Commission Act.
[82] *Ukaegbu v. A.G. Imo State* (1983) 1 SCNLR 212.
[83] Bill Kovarik, 'Media incitement to violence in history' (2011) <https://billkovarik.com/2011/01/09/media-incitement-to-violence/>
[84] Vernon Geberth, *Sex-Related Homicide and Death Investigation* (CRC Press, 2003),
[85] [1987] 4 NWLR (Pt. 117) 517; *Onamen v. Onamen* [1993] 8 NWLR (Pt. 311) 358; *Lt. Col. Gombe v. Lt Col Madaki* [1984] 5 NWLR 435.

with Sections 222 to 227 of the Constitution must be registered as a political party. It was on the basis of this that more political parties stood election in 2003 as against three political parties that actually contested in 1999 general elections.

2.2.10 Right to Freedom from Discrimination

By virtue of Section 42(3) CFRN 1999, this right may be abridged by a law which imposes restrictions or appointment into public service of the federation, the armed forces and the police as well as any corporate body established by law in Nigeria, Section 14 (3) and (4) were more poignant in stating that the affairs of the government whether of federal character of Nigeria. The use of principle of federal character has been given further legal teeth vide Federal Character Commission (Establishment etc.) Decree No. 34 of 1996.[86]

The operation of federal character of quota system may be *ex facie* discriminatory, but it has benefits. In a country such as Nigeria where there is ethnic consciousness and mutual suspicion, the use of federal character is capable of fostering national unity, loyalty and gives every citizen a sense of belonging. No particular group, section or area in Nigeria has monopoly of men and women of ability and integrity. It is a question of being able to identify and giving them the opportunity to acquit themselves. The application of federal character quota system can be seen in educational sector, the sharing of political office sitting of developmental projects in states and cities and career opportunities in public service. In *Badejo v. Federal Minister of Education & Ors.*[87] the issue before the court is whether there is justification or otherwise in the applicant Constitutional right in relation to admission into Federal Government College the application of discriminatory cut off marks which placed her at disadvantage and therefore constitutes a breach of her right against discrimination under Section 39 (1) CFRN, 1979. The Court of Appeal by a split decision of 3 to 2 dismissed the appeal.

In spite of its benefits, the principle of federal character has been widely abused and made to become a price we must pay for sacrificing the criterion of ability and competence in making appointments. It is submitted that federal character must go hand in hand with full appreciation of track record and competence to perform. While federal character or quota system cannot be based

[86]This is now a deemed Act of the National Assembly by virtue of CFRN 1999, Section 315.
[87](1996) 8 NWLR (Pt. 464) 15.

solely on academic attainment, it must not be based on accident of birth alone, without proven record of performance or competence. Otherwise, there is a grave risk of enthroning mediocrity which will negatively affect collective aim of making Nigeria progress.

There are also institutionalized gender discriminatory practices in Nigeria. For instance, certain aspects of the Police Regulations[88] contains discriminatory prescriptions for women, restricting their duties to those relating generally to women and children[89] and clerical, telephone and office orderly duties, in order to relieve male police officers from these duties.[90] Worse still, a police woman cannot marry without permission.[91] Why should she be required to seek permission to marry when similar direction is not extended to her male counterpart? Also, an unmarried pregnant female police officer will be discharged from police force.[92] Why should this be when an unmarried police man who impregnates a woman is not so discharged? Curiously, when an unmarried police man who impregnate an unmarried police woman, the police woman is shown the way out of the force while the accomplice police man remains in the force. It is submitted that discriminatory practices outside the purview of the Constitution like these cannot stand.

Another issue of interest today is "indigeneship and settlers" or non-native syndrome. In spite of the long years of residence, there are indigenes who will kick against the election or nomination of non-indigenes who had indwelt in their midst. These ethnic bigots will stop nothing in preventing a non-indigene from the enjoying the benefits which will normally accrued to a person living in that area. It is submitted that save for land and chieftaincy matters where customary law played a prominent role, ethnic and communal identities in Nigeria must be done away with, especially on election or nomination into elective offices. This is not part of the limitation or right against discrimination envisaged by the Constitution. Unfortunately, "indigeneship and settlers" problem accounted for part of the communal crisis in Nigeria. The Ile-Ife indigenes will not want the local government headquarters to be located in Modakeke, an area believed to be occupied by non-indigenes. The indigenes of Zango Kataf in southern Kaduna look at the Hausa/Fulani

[88]Nigerian Police Regulations was made pursuant Police Act 1990, Section 46.
[89]*ibid*. Regulation 121.
[90]*ibid*. Regulation 122.
[91]*ibid*. Regulation 124.
[92]*ibid*. Regulation 127.

"settlers" with suspicion, while the Birom tribe in Jos treat their Hausa/Fulani "settlers" as not being a part of them.

Specific derogation impacts on the full enjoyment of specific fundamental rights in Nigeria. In the course of enforcing specific fundamental rights the state and security agencies usually come under the cover of the exceptions to fundamental right to breach the rights of individuals. For instance, Nigeria police officers often rely on the specific derogations contained in Sections 35 of the Constitution to detain criminal suspects in their custody for up to 48 hours or more. Their usual excuse is that the matter is pending investigation.[93]

3.0 Derogation Arising from State of Emergency

The third instance when rights could be restricted or is derogated from, is provided for in Section 45(2) by the sub-Section, "an Act of the National Assembly shall not be invalidated by reason only that it provides for the taking during periods of emergency of measures that derogate from the provision of Section 33 or 35 of the Constitution". Derogation arising from emergency are temporary suspension of fundamental human rights at the time of emergency or war.[94] While Section 33 provides for right to life, Section 35 provides for right to personal liberty. It would appear that by combine interpretation of Section 45, the right to private and family life, right to freedom of thought, conscience and religion, right to freedom of expression and the press, right to peaceful assembly and association, as well as right to freedom of movement may be abridge in a period of emergency.

Although what constitutes state of emergency is clearly defined in Section 45 (3) CFRN 1999 as amended. There are always jurisdictional problems as to whether a period of emergency really arises in law. In *Williams v. Majekodunmi*,[95] the plaintiff had contested among other things the general validity of the declaration of emergency in Western Region and the restriction orders served on him. Arguments were canvassed on the validity of the Emergency Powers Act 1961 and the legality of the actions taken thereunder. In other words, the court was invited to consider whether or not the situation in the Western Region at the time justified the imposition of state of

[93] Ayodele Oluwafemi, 'Know you Rights: It's Illegal to be detained for over 48 Hours without a Court Order' The Cable 11, June, 2021 <https://www.thecable.ng/rights-police-detain-48-Hours-illegally/> accessed 12 April, 2026
[94] CFRN 1999, Section 45(2) (3).
[95](1962) 1 All NLR 324.

emergency. The court rejected this move and held that a state of public emergency is a subject within the province of the legislature to determine and not the court. This declaration then confers on government the duty to ensure the peace and security. The court is inclined to interfere thereto except a solid case is established to warrant such judicial intervention. This point was also amplified in the Indian case of *Bhagat Singh v. Emperor*,[96] where it was stated that in a situation of emergency there has to be someone to solely assume the position of Governor-General. The otherwise would negate the entire provision.

It is apt to interrogate whether or not the current situation of security vulnerability which has breached individual right to personal security would justify the declaration of state of emergency. If one may recapture the events that led to a state of emergency in Western Region in 1962, the "instinct" on the matter actually started soon after independence when there was speculation that the federal government may "take over" the Action Group, which was then in control of the western region. On 13th October 1960, Akintola issued a press conference in which he denounced the moved.

Again on 29th of November 1960, Oghalu, honourable member representing Awka North Federal Constituency in the House of Representative, requested for clarification on the floor of the house whether the federal government can legally dissolve a regional House of Assembly if they proved "recalcitrant or proved dangerous". In the debate that followed, the then Minister of Justice and Attorney General, Elias opined that the Federal Government can lawfully legislate and administer any region, in part of the whole, if there is complete breakdown of Constitutional authority in that region.[97] This legal opinion was countered by Awolowo and other opposition members.[98] It could therefore, be seen that the events which led to declaration of state of emergency at that time was pre-planned, well-orchestrated and executed by political opponents not in power in Western Region.

[96](1931) ILR XII 169, 172.
[97]House of Representatives, *Parliamentary Debates*, *29 November, 1960* (Federal Government Press).
[98]Obafemi Awolowo, *The Travails of Democracy and the Rule of Law* (Evans Brothers, 1987) 27-42.

What eventually precipitated it were the factions created in the Action Group, the alleged removal of the Premier by the Governor by votes of parliamentarians outside the legislative house and the pandemonium that ensued on the floor of the house. It is therefore dangerous to remove the issue of propriety of declaration of state of emergency from the purview of judicial powers.

The President is empowered to declare a state of emergency in any of the events specified in Section 305 (3) CFRN,1999. These include: period of war or if the Federation is in imminent danger of invasion or there is actual breakdown of public order and safety in the federation or any part thereof; to such extent as to require extra ordinary measures to restore peace and security. Other events which may give to state of emergency are clear and present danger or actual breakdown of public order and safety, the occurrence of any disaster of imminent danger of any natural calamity or if there is any other public danger which constitutes a threat to the existence of the federation.

Though the executive and legislative arms of government are the ultimate decider of when and where to declare a state of emergency in Nigeria, nonetheless, the court has the power to inquire into whether any of the procedure stipulated in Section 305 for such emergency situation has been complied with.[99] Emergency regulations or legislation passed in haste may contain wider powers than are necessary this may lead to misuse of powers. The National Assembly should be empowered to supervise emergency actions to be taking by the president or his nominee. They must act as watchdog in monitoring measures to be taken by the executive, especially as it affects the liberty of the citizen in the affected areas.

4.0. National Security as a Basis for Derogation from Fundamental Rights

National security is devoid of a clear-cut definition. National security has been defined as "the protection of a nation from attack or other danger by maintaining adequate armed forces and guarding state secrets".[100] It entails putting up protective measures that would shield the state or make it unexposed to aggression from internal or external forces.[101] To this end, states tend to

[99]KO Amusa, 'Emergency Powers Under the Constitution of Nigeria 1999' (2004) 3 (1) Ibadan Bar Journal 101.
[100]Microsoft Encarta Dictionary, *1993-2008* (Microsoft Corporation, 2009).
[101]F Bello, 'Public Policy Implication on National Security' in E Azinge, and F Bello, eds *Law and Security in Nigeria* (NIALS Press, 2011) 55, 61.

classify certain information from public access; maintain a sizeable and well-trained security forces; acquire sophisticated cache of military artillery and hardware. These are measures that are put in place to ensure a forestalment against forces or attacks that put the political sovereignty and territorial integrity of the state in jeopardy.[102] However, Arewa[103] counselled against a narrow and restrictive conceptualization of national security to security operational activities. According to him, a pragmatic and sustainable national security encompasses the ability of the state to deliver on its social mandates to its citizens who include but not limited to protection of lives and property.[104]

National security touches on the core of the existence of the state. Hence, premium is given to it above other consideration in the decision making of the state. In most international human rights instruments, national security has been used as a basis for derogation from certain human rights. One instance where this occurs is the International Covenant on Civil and Political Rights (ICCPR) which mentions specific human rights that shall not be restricted except on the grounds that it is a necessary measure that has to be taken for the purpose of protecting national security.[105] Apart from international instrument, similar provision is contained in the constitution and other bill of rights of most countries.

It is common to hear government justify their decisions on basis of "national security". In such instances, what they meant to say is that the collective interest and security of state is given a higher consideration than individual interest. "National security" is not one of the constitutionally recognised bases for derogation from fundamental right as contained in Section 45 of the constitution. "National security" only featured in the African Charter on Human and Peoples' Right (ACHPR) as a basis for derogation of certain fundamental rights.[106] However, the aforesaid constitutional provision contains terms such as "interest of defence", "public safety", and "public

[102] Ahmadu Bello, Ab Razak and Mahadi Bahari, 'A Security Violation Adoption Model to Safeguard Classified Information in Nigerian Organizations' (Researchgate, 2020) <https://www.researchgate.net/publication/339746717_A_Security_Violation_Adoption_Model_to_Safeguard_Classified_Information_in_Nigerian_Organizations> accessed 10 April, 2026.
[103] JA Arewa, 'Core National Values as Determinant of National Security and Panacea for the Crime of Kidnapping and Abduction in Nigeria' in E Azinge, and F Bello, eds. *Law and Security in Nigeria* (NIALS Press, 2011) 127, 129.
[104] Ibid.
[105] See: ICCPR, Articles 12 (3), 13, 14, 19 (3) (b), 21 and 22 (1).
[106] ACHPR, Articles 11, 12 (2), 29 (3).

order" which could be cumulatively regarded as constituting national security. There are instances where courts have preferred to uphold national security when it contends with individual right.

It is on this account that the Supreme Court had pronounced in the case of *Medical and Dental Practitioners Disciplinary Tribunal v. Emewulu & Anor*[107] that all freedoms are subject to state policy and overriding public interest. One is left to imagine the basis for Supreme Court's pronouncement that state policy ranks high above fundamental freedom which has constitutional impetus. This is in consideration of the fact that state policies do not even possess legally binding force unless they find expression in legislative enactment.[108]

In certain fundamental right actions where the government is the Respondent, the national security has been relied upon as a defence for derogation of fundamental right. In the case of *Nweke v. FRN*,[109] the appellant has sought to enforce his fundamental right to adequate time and facilities to prepare for defence in a criminal trial guaranteed under Section 36 (6) (b) CFRN 1999. This was in view of the Defendant not being served with the frontloaded proof of evidence as required by Section 220 (1) Administration of Criminal Justice Law of Anambra State. The court held that such request may be declined on the ground that the release to the defendant information which contain state secrets would cause a breach to national security. Similar disposition has been maintained in the case of *Mitin v. C.O.P. Bayelsa State & Ors*,[110] where it was stated that the police duty bound to divulge how it obtained information leading to the arrest of a criminal suspect.

In *Dokubo-Asari v. FRN*,[111] the court extensively dealt with the issue of national security. It has often been misconstrued that the case declared that rule of law would be suspended in order to uphold national security. It would amount to a contradiction for the court to so hold. This is because, the state is a creation of law and law must prevail at all times. Such argument would be a wrong assumption that national security equates lawlessness.

In the *Dokubo-Asari's Case*,[112] the appellant source to assert his right to personal liberty but challenging the refusal of his bail application upon being incarcerated for a charge of treason. The

[107][2001] 3 SCNJ 106.
[108]*Faith Okafor v. Lagos State Government & Anor* (2016) LPELR-41066(CA).
[109](2017) 15 NWLR 120.
[110](2017) LPELR-43064(CA).
[111](2007) 12 NWLR (Pt. 1048).
[112](2007) 12 NWLR (Pt. 1048).

Supreme Court held that the fundamental right to personal liberty of an individual can be put under suspension if the otherwise would put national security in a compromising situation. Such suspect is not to be released until such a time when the government can guarantee national security. The court argued that this is because the corporate existence of the country is greater than the liberty of individual citizens.

In a later opportunity, the Court of Appeal has had cause to clarify the misconception. According to the court, despite the proliferation of armed usage by insurgents and the corresponding need for the National Security Adviser to exercise enormous powers to match the security vulnerabilities, he is constrained to act within the dictates of the rule of law.[113] The Court of Appeal reiterated this position in a later case where it held that the security vulnerability of the state should made the National Security Adviser to be the more constrained to act within the bounds of the rule of law otherwise safety of lives and properties of citizens cannot be guaranteed. It stated that the Court would frown against a brazen breach of fundamental rights of citizens in the pretext of upholding national security.[114]

Although the Court of Appeal refrained from define what amounts to national security. It went on to state that the concept of national security and national interest should always be interpreted and operated in the context of service to the people and the protection of their legitimate interests and aspirations.[115] On the strength of the above reasoning, it is argued that the decision in *Nweke*'s case would have better served the cause of justice if the court decline the right of a defendant to have access to certain classified information in the preparation of his defence for a criminal offence, and the same time hold that such information or document cannot be relied upon by the prosecution in proving its case against the defendant. It would be inequitable to hold otherwise and amount to over-reaching the defendant which is deemed innocent until the otherwise is proved.

[113]*Chief of Defence Staff & Anor. v. Modu Alhaji Tijah (Makama)* (2016) LPELR - 40818 CA.
[114]*Elephant Group Plc. v. National Security Adviser & Anor* (2018) LPELR - 45528 CA.
[115]*SSS & Ors. v. Incorporated Trustees of the Peace Corps of Nigeria & Ors.* (2019) LPELR-47274(CA) Per Mbaba, JCA (Pp 19–23, Paras. F - E).

Honourable Justice Bhagwatti had warned of the dangers that are inherent in subscribing to the national security basis for derogation from fundamental right.[116] It is likely to be abused of power by the government to the detriment of the interest of the citizens. The learned justice stated that the specific circumstances wherein there would be a derogation from fundamental right should be clearly spelt out, while ensuring that core human rights are preserved. In his words:

> We must therefore take care to ensure that in no situation, however grave it may appear, shall we allow basic human rights to be derogated from, because once there is a derogation for an apparently justifiable cause, there is always a tendency in the wielders of powers in order to perpetuate their power, to continue derogation of human rights in the name of security of the state.[117]

So, what is the author(s) view about derogation from fundamental rights, it is desirable in a democratic dispensation of not, what is its impact on constitutional democracy in Nigeria?

5.0. Conclusion

This paper has examined the pros and cons of the application of derogation from fundamental rights in Nigeria. It considered the various forms of derogation from fundamental rights identifiable in the constitution. These are classified as general derogation, specific derogation and derogation in the exercise of emergency powers. The study finds that general derogation is contained in a specific provision of the constitution i.e. section 45 CFRN. This is quite different from specific derogation which is imbedded in the specific provisions of the constitution which contained specific fundamental rights. The application of the third category of derogation, it is preceded upon a step taken by the president in declaring a state of emergency on a specific locality or instance. The study further examines the various aspects of the constitution that implicates any of these various forms of derogation.

A critically review of the CFRN 1999 as amended, suggests that as much as the constitution recognizes the conferment of certain fundamental rights on individuals, these rights are not to be exercised in their absolute terms. The same constitution recognizes instances which permits derogation from the absolute terms of the substantive provisions. This is a constitutional

[116] PN Bhagwati, 'Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms' (Inaugural Address at the Judicial Colloquium in Bangalore, held February 24-26, 1988)
[117] ibid.

recognition of the statement that absolute power corrupts absolutely considering its susceptibility to abuse. Thus, to safeguard against arbitrariness and contemplation of competing rights of other persons it is necessary for each right to be curtailed. It is therefore recommended that derogation should be retained in the retained in the statute book to the extent that it does not defeat the essence for which the fundamental rights were created in the first instance.