

## RECONSTRUCTING THE RELATIONSHIP BETWEEN NATIONAL SECURITY AND HUMAN RIGHTS IN NIGERIA

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### ABSTRACT

Achieving a proper balance between national security and human rights within a national jurisdiction continues to generate controversy among scholars, human rights experts and general commentators across the globe. There are those who tenaciously hold the view that national security/interest must in all circumstances, be placed over and above human rights and personal liberties while others contend that effective national security is better achieved by deepening and expanding the frontiers of human rights. These issues are currently dominating national discourses in Nigeria.

The paper examines, once again the nagging issue of how to properly relate human rights with national security in the country. It observes that national security has become a cloak for human rights abuses in Nigeria and calls for increased judicial scrutiny of its use and greater human rights consciousness by civil societies to prevent its abuse.

**Keywords:** National Security, Human Rights, Nigeria

### 1.0 INTRODUCTION

The issue of institutionalizing a proper relationship between national security concern and the need to protect and advance human rights and personal freedoms or liberties of the citizenry has in recent times occupied the front burner of national discourses in Nigeria. The recurring debate on whether and to what extent national security should override human rights has never enjoyed unanimity of views among scholars, civil rights community and experts in international human rights law. President Muhammadu Buhari, at the opening ceremony of the 2018 Nigerian Bar Association Annual General Conference in Abuja, Nigeria provoked the recent debate when he said:

*Rule of law must be subject to the supremacy of the nation's security and national interest. Our apex court has had cause to adopt a position on this issue in this regard and it is now a matter of judicial recognition that where national security and public interest are threatened, the individual rights of those allegedly responsible must take a second place in favour of the greater good of the society.<sup>1</sup>*

This view generated a lot of controversy among the critical sectors of the administration of justice in the country. The Nigerian Bar Association, disagreeing with the views canvassed by the President countered as follows: "the NBA restates that the Rule of Law is central to a democracy and any

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<sup>1</sup> Reported in the Nigerian Newspaper, The Nation, September 2, 2018, p3; also [thenationonline.ng.net](http://thenationonline.ng.net)

*national security concerns by the government must be managed within the perimeters and parameters of the Rule of Law”<sup>2</sup>*

The emergency of modern statehood as a form of organized socio-economic and political entity has thrown up the challenge of designing a suitable and workable relationship between national security on one hand and human rights and personal liberties on the other hand. However, effective national security system cohabiting with robust national human rights policy has remained elusive in most jurisdictions. It is a paradox, indeed, that national security and by extension, national interests which ought to be an embodiment of the collective interests of the people, most times is made antithetical to the values of human rights and personal liberties. The relationship between the two concepts, in practice, has always been an uneasy one in most legal systems, and in some jurisdiction. tumultuous. The ever-expanding province of human rights has further heightened the tension between the two contending forces.

The treatment of national security vis-à-vis human rights in national jurisdictions varies from place to place; it appears the amount of space allowed for human rights to thrive in a particular legal system depends on a number of variables- the state of the economy, the degree of tension generated by the ethnic or racial composition of the people, the literacy level, the degree of human rights consciousness of the populace and the virility of the civil society groups and human rights organisations among other factors.

This paper focuses on examination and evaluation of the legal and institutional frameworks of national security in relation to human rights in Nigeria, the attitudes and responses of the Nigerian judiciary to cases of human rights violations and infractions of constitutional and statutory law as well as international human rights norms and standards, and how these violations are justified supposedly on ground of national security concerns. The paper also undertakes a comparative analysis of national security/human rights in a few other legal systems.

## **2.0 THE PHILOSOPHY AND THE CONCEPT OF NATIONAL SECURITY**

The dawn of organized human societies in the form of state system made security a *sine qua non* for its existence and progress. In other words, security was, at inception of organized human societies a critical component of its existence. Thomas Hobbes alluded to this in his writings on social contract when he said:

*Without security, there is no place for industry...no arts, no letters, no society, and which is worst of all, continual fear and the danger of violent death, and the life of man solitary, poor, nasty, brutish and short.*<sup>3</sup>

John Locke, another notable philosopher expressed the same view when he said legitimate political government is a product of social contract where people in the state of nature conditionally transferred some of their rights to the government in order to better ensure the single and comfortable enjoyment of their lives, liberty and property. He maintained that since governments exist to protect

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<sup>2</sup> Ibid

<sup>3</sup> T. Hobbes, 1651 'Leviathan' Tuck R. (ed) Cambridge University Press 1996) 89

the rights of the people and promote public good government that fails to do so can be resisted and replaced with a new government.<sup>4</sup>

If philosophers of old emphasized the significance of security and indeed put it at the very foundation of governance, modern states have made national security a matter of prime concern, an overriding issue, placing it over and above human rights and personal liberties. The issue has often been considered as a consideration of individual interest versus collective interest, (individualism versus collectivism) the state seen as the aggregate or sum total of the interests of the citizenry. Placing collective interests (national security) over individual interests (human rights) presupposes that everybody is a beneficiary; this harmonizes with the utilitarian theory of law which posits that law should espouse and satisfy the greatest happiness of the greatest number.<sup>5</sup>

National security has been looked at from multiple lenses, as being "secured, free from danger and risks"<sup>6</sup>, or a situation where either an individual, social group or geographical entity is protected against any form of danger, espionage or attack of any sort internally or externally,<sup>7</sup> as core values and the absence of threats to these values; and freedom from threats to a nation's capability to defend and develop itself, promote its values and lawful interests<sup>8</sup>, and according to Beland the concept of insecurity connotes absence of safety, danger, hazard, uncertainty and lack of protection.<sup>9</sup> Others have described national security as a state of being secure, free from danger and risk.<sup>10</sup>

In contemporary times, however, the concept of national security has become all-embracing, amplified to consist economic security, environmental security and food security among other components. Kofi Anan, the former United Nation Secretary- General defined national security in this broader sense when he said security could no longer be understood in purely military terms, rather it must encompass economic development, social justice, environmental protection, democratization, disarmament and respect for human rights and rule of law.

National security could be broadly classified into two: internal security and external security. Internal security relates to threats within the territorial space of a sovereign state such as in Nigeria, such as terrorism, political thuggery, armed robbery, cyber- crime, ethno-religious crisis, economic and financial crimes et cetera .External security on the other hand, conceives security in terms of mechanisms against external aggression and/ or interference in the domestic affairs of a sovereign state by another state or entity. For the purpose of this paper, national security is conceived in terms of internal security but May, where appropriate; allude to the other connotation of national security.

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<sup>4</sup> J. Locke, 1651 Second Treatise of Government: of the Beginning of Political Societies, Blackwell Publishing Company Ltd 1976)49

<sup>5</sup> Curzon L. B 1998, Jurisprudence Cavendish Publishing Ltd London 60-78

<sup>6</sup> Okeke A.A. 1999, National Security, Good Governance and Integration in Nigeria : A Discourse 2011 7(iv) Asian Social Science 167

<sup>7</sup> Ibid

<sup>8</sup> Folarin S.F and Oviasogie F. D Insurgency and National security Challenges in Nigeria: Looking Back, Looking Ahead, <http://eprints.covenantuniversity.edu.ng/3243/1/1folarin%20faith%20.6pdf>

<sup>9</sup> Beland D (2005) "The Political construction of Collective Insecurity from Moral Panic to Blame Avoidance and Organised responsibility" Center for European Studies working Paper Series 167

<sup>10</sup> Omode A.J (2011) "Nigeria Analysing the Security Challenges of the Goodluck Jonathan Administration" Canadian Social Science 167

## 3.0 HUMAN RIGHTS AND NATIONAL SECURITY/INTEREST: STATES PRACTICE

The incidence of human rights violations by state operatives presumably to protect national interest or security has almost become a phenomenon in the world including the more developed countries like United Kingdom and United States in recent times. In a report titled "Nine Facts about Human Rights in the United Kingdom"<sup>11</sup> the following facts were documented:

1. The new counter-terrorism policy seems to have trumped human rights and the freedom of the people. Prime Minister Theresa May, during her first party conference speech said that left-wing human lawyers will no longer be allowed to pursue claims of victims of human rights by the British Armed forces. Benjamin Ward from human Rights Watch says "judging from the comments by Prime Minister May, you would think that human rights are dangerous and alien.
2. In 2015, the Royal Air Force of the United Kingdom killed three people, including one British citizen, in a drone strike in al-Ragga, Syria. In May 2016, the Joint Committee for Human Rights Published its enquiry which called on the government to clarify the use of drones for targeted killings.
3. In 2014, the US and Libyan governments- with the knowledge and cooperation of the UK government had subjected two Libyan families to rendition, torture and other ill- treatment. In June 2016, the Crown Prosecution Service, the principal prosecuting agency in England and Wales, decided not to bring any criminal charges relating to the allegation by the families.
4. Abuse and mistreatment by the British Armed forces also loomed large in reports on human rights in the United Kingdom. In September 2016, it emerged that between 2005 and 2013 the royal military police investigated approximately 600 cases of alleged mistreatment of those in detention in Afghanistan. Similarly, the Iraq Historic Allegation Team had Conducted Investigations into 2,356 of 3,389 allegations received. These allegations were related to abuse of Iraqi civilians British Armed Forces personnel.
5. Following Brexit and conservative victory in recent UK elections, there has been a substantial increase in hate crimes. Member of Parliament, Jo Cox who had campaigned vigorously on behalf of asylum seekers, was murdered. There was also a marked rise in xenophobia and arson attacks against E.U citizens, particularly those from Eastern Europe.
6. Despite some progress the UK government has generally not been immigrant-friendly lately. It passed the Immigration Act into law in May, 2016 which extended sanctions against landlords whose tenant immigration status disqualifies them from renting while increasing landlords' eviction powers. The government continued to resist calls for hosting more refugees from the Middle East and North Africa by 2020
7. Violence against women and girls remains a serious concern. There is lack of funding of specialized services for women who have undergone domestic violence and abuse; research by Women Aid shows that shelter were being forced to turn away two out of three survivors due to lack of space and resources. The rate among women who are ethnic minorities was four out of five.
8. In November 2016, the Parliament approved the Investigatory Powers Act (IPA). This has entrenched and broadened the state's surveillance powers both at home and abroad. The IPA increased the powers of public authorities to interfere with private communications and

<sup>11</sup> <https://begenproject.org.human-rights-in-the-united-kingdom> accessed 30/4/2019

information. It also permitted "a broad vaguely defined interception, interference and data retention practice" without adequate safeguards for protecting the rights to privacy.

9. The government continued to refuse to setup an independent inquiry into the 1989 killing of Patrick Fimicane – an Irish politician – although it was previously acknowledged that there had been a "collision" in the case; this is one of the historical and structural issues of injustice, abuse and torture of Northern Ireland that has been systematically neglected for decades.

Although the report is generally a chronicle of marked increase in human rights abuses in the past few decades in the United Kingdom, some of the incidents were perpetrated by state operatives which seems to suggest that they were carried out in furtherance of the interest or security concern of the state.

In the United States of America, Amnesty International Report for 2019<sup>12</sup> states that "the government is violating human rights in the name of national security, often in violation of both US law and International law". In particular, the report noted:

- a. People have been held for years at Guantanamo detention camp in Cuba without even being charged with a crime. Prisoners have been tortured and mistreated, and they are not given fair trials
- b. The US has used lethal force, including through drone strikes, in several countries, leading to civilian deaths. Military operations have exposed civilians and US services members to toxins that have led to the devastating medical conditions.
- c. Surveillance and targeting of Muslims-based on who they are, not what they have done-has fuelled harassment, discrimination and violence.
- d. For years, the US government allowed officials to torture people through horrific techniques that violate US and international law. President Trump has vowed to expand the use of torture even further in the years ahead.

In many other countries in the western world and other places, the pattern clearly is that of the pre-eminent position given to national security, increasingly at the expense of human rights. It is apt now to examine the treatment of national security vis-à-vis human rights in Nigeria.

#### **4.0 HUMAN RIGHTS VERSUS NATIONAL SECURITY: NIGERIAN EXPERIENCE**

The question of whether and to what extent national security should override human rights and personal liberties have been a knotty one in Nigeria. Though successive Nigerian Constitutions from independence till date have made copious provisions for human rights, the limitations by way of derogation provisions couched in the now famous phrase of 'national security, public health, public safety, ethics and freedom of others' have always featured prominently. The rights provided under the Constitution of the Federal Republic of Nigeria 1999 viz: right to private and family life, right to freedom of thought, conscience and religion, right to freedom of expression and press, right to peaceable assembly and association and right to freedom of movement are restricted by section 45(1) of the same Constitution on grounds stated as:

- a. General defense, public safety, public order, public morality or public health;

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<sup>12</sup> <http://www.amnestyusa.org/issues/national-security> accessed 30/4/2019

- b. Protection of the rights and freedom of other persons
- c. Emergency situation wherein an Act of the National Assembly shall not be invalidated by reason only that it provides for the taking during such periods, if measures that derogate from the provisions of section 33(right to life) or section 35(right to personal liberty) provided that such measures are reasonably justified for the purpose of dealing with the situation that exists during emergency (reasonable proportionality)
- d. Death resulting from acts of war in addition to the derogation clauses on human rights provisions stated above the 1999 Constitution of Nigeria provides in section 14(2): ..."the security and welfare of the people shall be the primary purpose of government."

The issue of security is addressed further by numerous other legislations and institutions.<sup>13</sup> Section 214 of the 1999 Constitution of the Federal Republic of Nigeria provides:

"There shall be a Police Force for Nigeria, which shall be known as Nigerian police and subject to the provisions of this section, no other police force shall be established for the federation or any part thereof"

Section 4 of the Police Act<sup>14</sup> gives the Nigerian Police general powers to deal with security challenges of the nation; it defines its general duties as follows:

*...the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of lives and property and the due enforcement of all laws and regulations with which they are directly charged and shall perform military duties within or without Nigeria as may be required of them by or under the authority of this or other Act*

The State Security Service, in Section 2(3) of the National Security Act, is charged with the responsibility for:

- a. The prevention and detection within Nigeria of any crime against the internal security of Nigeria;
- b. The protection and preservation of all non- military classified matters concerning the internal security of Nigeria; and
- c. Such other responsibilities affecting internal security within Nigeria as the National Assembly or the President, as the case may be deemed necessary.

There are other pieces of legislation especially under the military regimes which curtailed or outrightly abrogated civil liberties of individuals. They are:

1. State Security (detention of persons) Decree, No. 2 1984.
2. Federal Military Government (Supremacy and Enforcement of Powers)Decree No. 13 of 1984

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<sup>13</sup> These include Department of State Services (DSS) Nigerian Immigration Service (NIS) Nigerian Custom Service (NCS) National Drug Law Enforcement Agency (NDLEA), Economic and Financial Crime Commission (EFCC) Independent Corrupt Practices and other Related Offences Commission (ICPC) and Federal Road Safety Commission (FRSC)

<sup>14</sup> Cap 19, Laws of the Federation, 2004

3. State Security (Detention of Persons) Decree No.2 1984 as amended by the State Security (Detention of Persons) Amendment Decree No 11 of 1994.

Section 4(2) of the State Security (Detention of Persons) Decree No.2 1984 and Section 1(2)(b)(ii) of the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 13 of 1984 suspended the whole Chapter IV of the 1979 Constitution of the Federal Republic of Nigeria dealing with fundamental human rights. These two Decrees provided that anything done or proposed to be done by the Chief General Staff (army) shall not be inquired into by court of law. The combined effect of these two sections ousted the jurisdiction of the court. Under these enactments, section 1 of Decree No.2 1984 provides that:

*If the chief of General Staff or the Inspector General of Police is satisfied that any person is or recently has been concerned in acts prejudicial to state security or has contributed to the economic adversity of the nation, or in the preparation or instigation of such acts, and that by reason thereof, it necessary to exercise control over him, he may by order in writing direct that the person be detained in a civil prison or police station or such other place specified by him; and it shall be the duty of the person or persons in charge of such place or places, if an order made in respect of any person is delivered to him, to keep that person in custody until the order is revoked.*

Like in other enactments, the Decree made the chief of General Staff the sole determinant of acts prejudicial to state security. Under these enactments, a number of citizens were detained and in most cases the courts were completely helpless in securing the liberties of the citizens. Some of such cases will be examined.

## 5.0 RESPONSES AND ATTITUDES OF THE JUDICIARY

The Nigerian courts have generally been helpless in the face of legislation clearly sacrificing human rights particularly personal liberties on the altar of national security, though there are few cases where they have attempted to uphold civil liberties of individuals by construing very strictly and narrowly against the state using the canon of interpretation *contra-proferentem*.<sup>15</sup> On the whole however, the courts have interpreted literally, clearly in line with the legislature intention to override human rights on the ground of national security. In *Ubani v. Director of State Security Services*,<sup>16</sup> The appellant was arrested at about 5:00am in his house by some plain-clothes operatives of the State Security Service (SSS). Before his arrest the appellant alleged that occupants of his residence were harassed and held for some hours. His apartment was thoroughly searched and some valuable properties carted away including his books, documents and international passport. The security operatives bundled him into a car to their office where he was detained for days without trial. The appellant filed an application for the enforcement of his civil rights under the Constitution against the respondent. The State Security operatives contended that the appellant was detained pursuant to the provisions of the State Security (Detention of Persons) Decree No. 2 1984 which ousted the jurisdiction of the court. The pertinent provisions section 4(1) reads thus: "no suit or other legal

<sup>15</sup> Gani Fawehinmi v. Abacha & 3 Ors (2000) 6 NWLR (Pt.660) 228

<sup>16</sup> (1999) 11 NWLR Pt625, P. 129 (CA)

proceedings shall be against any person for anything done or intended to be done in pursuance of this Act” after having the parties, the trial court upheld the Decree, holding that the it had effectively ousted the jurisdiction of the court. The Court in the circumstance was helpless, did not even consider the merit of the case. On appeal however, the Court of Appeal held that though the ouster clause effectively ousted the jurisdiction to question its competence as it was superior to the constitution, the Decree could not override the fundamental rights of the Appellant under the African Charter on Human and Peoples Rights which had been domesticated and now formed part of the *corpus juris* of the Nigeria. The Court followed the majority decision in *Fawehinmi v. Abacha & 3Ors*<sup>17</sup> where Musdapher JCA said:

The member countries – parties to the Protocol recognized that fundamental human rights stem from the attributes of human beings which justify their international protection and accordingly by the promulgation of Cap 10, the Nigerian State attempted to fulfill its international obligation. It is an international obligation to which the nation voluntarily entered and agreed to be bound. The arrest and detention of the Appellant, on the facts advanced, clearly breached the provisions of the Charter and can be enforced under the provisions of the Charter... it is my view that notwithstanding that Cap 10 was promulgated in by the National Assembly in 1983, it is a legislation with international flavour and the ouster clauses contained in Decree No. 107 of 1993 or No.12 of 1994 cannot affect its operation in Nigeria. In *Abacha v. Fawehinmi*, the Plaintiff/Respondent a Legal Practitioner was arrested without warrant at his residence by six men who identified themselves as Operatives of the State Security Service and was taken to their office where he was detained. At the time of the arrest, the Respondent was not informed of, nor charged with any offence. He was later detained at Bauchi Prison. In an action to enforce his fundamental rights under the Nigerian Constitution, the State Security Service contended *inter alia* that the Respondent was being detained under section 4 of the State Security (Detention of Persons) Decree No. 2 of 1984 and that the jurisdiction of the court has been ousted by the Decree. In a split judgment S M A Belgore, J.S.C in a minority judgement said:

*As the Decrees of the military regimes always contain ouster clauses to bar the interference by the judiciary, the judiciary made earlier skirmish in 1970 Lakanmi’s case but military descended heavily on judiciary by Decree No. 28 of 1970 called Supremacy Decree. The only way to stop the military overwhelming curtailment of freedom is to make their coup fail, but once they are in control it was futile effort to adjudicate where jurisdiction is clearly ousted by the Decree.... I therefore agree with my learned brother, Achike JSC that the detention of the Respondent, other than for the first four days was covered by Detention Order in question could not be challenged in any court of law.....*

In his dissenting judgement, U. Mohammed said:

*...it is my respected view that the military administration by enacting Decree No.2 of 1984 and suspending Chapter IV of the Constitution which dealt with fundamental Human Rights had intended to curtail against any breach of the fundamental human rights of Nigerians by*

<sup>17</sup> (2000) 6 NWLR (Pt 660) 228



*Military Government. It is therefore wrong to say that a citizen could still challenge the action of the Military Government by retorting to African Charter on Human and Peoples' Rights which now forms part of our municipal laws... it will therefore be an exercise in futility to send this case back to the Federal High Court to rehear the claim of the respondent/cross appellant for damages for his unlawful arrest and detention. The High Court Jurisdiction has been ousted by the provisions of that Decree.<sup>18</sup>*

In an earlier case of *Gbenga Komolafe v. Attorney General of the Federation*<sup>19</sup> T.A Odunwo J. had maintained that ouster clauses in Decree could not operate as an absolute bar on the court to consider cases involving violation of citizens' rights. He opined that while the court could be barred from questioning the validity of Decree ousting court's jurisdiction, the court still has the competence to determine whether the acts of the State are in conformity with the legislation, and where there is no such conformity, the court would exercise jurisdiction to declare such acts unlawful, not the legislation null and void. The case also was one where section 4 of the State Security (Detention of Persons) Decree was made basis of arrest and detention without trial of the appellant, Gbenga Komolafe by the State Security Operative. The judge was of the opinion that the condition precedent before the Chief of General Staff could issue detention order pursuant to section 1(1) of the Decree must be adhered strictly to for it to be valid. As he put it... the Chief of Staff must proceed in the following fifteen stages which I must meticulously spell out:

1. He must be satisfied that any person is or
2. recently has been concerned in acts prejudicial to the state security or
3. has contributed to the economic adversity of the nation or
4. in preparation or
5. instigation of such acts and
6. that by reason thereof, it is necessary to exercise control over him
7. he may by order
8. direct that the person be detained
9. in a civil prison or
10. police station or
11. such other place specified by him and
12. it shall be the duty of the person or persons in charge of such place or places
13. if an order made in respect of any person is delivered to him
14. keep that person in custody
15. until the order is revoked

The trial judge noted further:

*It is quite patent from the foregoing analysis that the eight conditions which are within the impeachable discretion of the Chief of Staff, five namely 12,13,14,15 and 16 have not been complied with on the face of both the Detention Order exhibited in the court. Nevertheless,*

<sup>18</sup> Abacha v. Fawehinmi op.cit

<sup>19</sup> Suit No FHC/L/M59/89 Federal High Court Lagos delivered on Friday 1<sup>st</sup> December 1989

*learned Counsel has invited me to presume that two orders are regular. There must be legal basis for the operation of the presumption of regularity, more so as the issues relate to liberty of two citizens of this great country... it is for the above stated reason that I am fully satisfied that the two applications must succeed. This means that the two Detention Order (DO 140 and DO 1411) respectively dated 19<sup>th</sup> September and 9<sup>th</sup> October 1989 are hereby declared illegal, null and void. In the result, the two applicants are entitled to immediate release from detention...*

## **6.0 NATIONAL SECURITY: A NEBULOUS CONCEPT FOR SUPPRESSING AND CURTAILING HUMAN RIGHTS?**

National Security appears to have provided sanctuary for human rights abuses in Nigeria as in most jurisdictions. It is often used as a camouflage under which citizens' rights are brazenly trampled upon particularly those of fundamental nature. While the propensity to deny human rights supposedly in the interest of national security was high under military regimes in Nigeria derogation clauses in human rights provisions in the constitutions of Nigeria under democratic regimes have also been used to suppress human rights. While justification has been advanced for putting national interest over and above individual interest/rights, the parameter for determining what constitute national interest and by extension national security is vague, hazy and constitutes a potent instrument for subjugating citizens' rights when national security is not threatened. On the need for preeminence of national security over human rights, Professor B.O Nwabueze, a notable constitutional law scholar put it as follows: "after all the rights of the individual depend for their very existence upon continuance of an organized political society. The continuance of the society itself depends upon national security for without security any society is in danger of collapse or overthrow".<sup>20</sup> Another scholar looked at the issue from the perspective of two contending forces of individualism and collectivism as follows:

*The jurisprudence of national interest of state security resolves itself into a consideration of the conflicting interests of the individual and the state or community. It is a fundamental controversy that puts the concepts of individualism against that of collectivism. National interest emphasizes the subordination of individual interest to the will of the community...*<sup>21</sup>

Although preponderance of opinions of scholars are in favour of the need to put national security ahead of human rights, in the words of Professor B.O Nwabueze, "... no carte blanche is given to the government to do whatever public security may require..."<sup>22</sup> The question then becomes apt: which arm of government, the executive or the judiciary should determine whether the act in specific cases constitutes the interest of the state or done to protect national security? The ouster clauses either under the Military Decree or derogatory clauses under successive Nigerian Constitutions confer the

<sup>20</sup> Nwabueze B.O (1997) Presidentialism in Commonwealth Africa, C. Hurst and Co (Publishers) 319

<sup>21</sup> Akin Ibidapo-Obe (1995) National Security and Human Rights, Journal of Human Rights Law, Vol.5 No 1 January 1995 p 87

<sup>22</sup> Nwabueze B.O op.cit

powers on the executive arm. Decree No. 2 of the 1984 and the subsequent Decree No.13 of 1984 and section 45 of the 1999 Constitution of Nigeria give the prerogative of determining what constitutes national security to the executive. This power has been abused in many cases.<sup>23</sup>

## 7.0 RECONSTRUCTING THE RELATIONSHIP OF NATIONAL SECURITY AND HUMAN RIGHTS IN NIGERIA

Derogatory clauses under Section 45 of the 1999 Nigerian Constitution should not operate absolutely as a *carte blanche* to deprive the court of judicial scrutiny in cases where it is invoked.<sup>24</sup> The Constitution of the Federal Republic of Nigeria has by Section 45(1) unwittingly encouraged abuse of the term national security, giving legality and legitimacy to abuse of human rights. The section provides: "nothing in Sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate law that is reasonably justiciable in a democratic society."

Judicial review of the application of these provisions will enable the court determine genuine cases where section 45(1) have been invoked and where the use is a hoarse, a cloak for human rights abuses the court should declare the invocation null and void. Thus under section 45(1)(a), the law that is reasonable, justiciable in the interest of defence, public safety, public order, public morality or public health could be scrutinized by the court and determine whether it is indeed made in furtherance of public interest. The same also applies to section 45(1)(b) which provides for reasonable justiciable in a democratic society for the purpose of protecting the rights and freedoms of other persons.

Furthermore, to fortify human rights provisions in the Constitution, the use of *contra- proferentem* as a canon interpretation is absolutely necessary. The Nigerian courts have resorted to this method as the only feasible alternative in the face of statutes encroaching on human rights. This was particularly used admirably in many of such cases<sup>25</sup> during military regimes in the country to confront ouster clauses provisions in the Decrees; the use of the canon of interpretation has proved very effective and must be sustained.

Broad and draconian laws have the potential of compromising human rights, thus non-governmental organisations and groups must be encouraged to act as bulwark of civil liberties by continually being on the watch and condemning anti- human rights law in the country. As clearly stated by the Special Representative of the Secretary General on Human Rights Defenders:

*Any organization has the right to defend human rights: that is the vocation of human rights defenders to examine government action critically and that criticism action, and the freedom to express these criticisms, is an essential component of a democracy and must be*

<sup>23</sup> See *Olisa Agbakoba v. Director State Security Service CA/L/225/92* Court of Appeal (Lagos Division), *Ubani v. Director of State Security* (1999) NWLR Pt 625 P.129. CA

<sup>24</sup> This view was shared by Mary Arden, see Mary Arden, *Balancing Human Rights and National Security* "...in order for courts to know how to balance the interest of national security and the interest of the individual they need to have some idea of what is to be balanced against the infringement of the individual's right..."

[www.oxfordscholarship.com/mobile/10.10](http://www.oxfordscholarship.com/mobile/10.10) accessed 29/4/2019

<sup>25</sup> *Gani Fawehinmi v. Abacha & Ors Op.cit*; *Komolafe v. Attorney General op.cit*; *Ubani v. Attorney General & Ors op.cit*

*legitimized in law and practice. State may not adopt laws or practice that would make activities for the defence of human rights unlawful.<sup>26</sup>*

The above underscores the critical role of civil society in ensuring that national security is not used as a carte blanche to suppress human rights.

## 8.0 CONCLUSION

National security is an issue of prime national concern, being the anchor of organized human societies, the state system and the reason why it is accorded primacy over and above human rights by many nations the world over. Jeremy Bentham's utilitarian principle of law being for the greatest happiness of the greatest number has for decades provided unassailable philosophical foundation for the preeminence of national security. Ensuring that a proper balance of the two concepts of human rights and national security in a way that the latter is not used as a camouflage to compromise the latter is absolutely necessary. Derogation clauses in Nigerian human rights provision must continually come under judicial scrutiny and the watchful eyes of the civil societies particularly human rights organisations. This way a proper balance of human rights and national security could be achieved in Nigeria.

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<sup>26</sup> A/59/401 (10 October 2004) para 49, 51