

EXAMINATION OF “RESTRICTIONS ON AND DEROGATIONS FROM FUNDAMENTAL RIGHTS” UNDER THE NIGERIAN CONSTITUTION

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Abstract

Contrary to lay thinking, there are no absolute rights. Against this legal reality, this paper examined the lawful derogations attaching to the twelve fundamental rights guaranteed under the Nigerian constitutional order. The paper established that derogation to rights is either embedded as provisos to the rights or contained as omnibus “restriction on and derogation from fundamental human rights”. The paper further found that the “right to dignity of human person” and “right to fair hearing” are the only two rights not subject to derogation. It was thus recommended that the Courts, as the bulwark of right, must insist that guaranteed rights are not violated at pleasure. Thus, derogations that go overboard the constitutionally recognised thresholds must be resisted and cut down as unconstitutional.

Keywords: Derogation, interest, morality, order, restriction

1.0 Introduction

The Nigerian Constitution contains “fundamental rights” and “inalienable freedoms” that are declared as “justiciable”, meaning that their actual or threatened violations or infringements can be redressed in the Court of law and the violators sanctioned as appropriate. However, there are, generally speaking, no absolute rights. Against this backdrop, this paper discusses these twelve “fundamental rights” with a view to establishing the extent to which each of them may not be lawfully exercised and the informing reasons therefore. For further discussion, subsequent discussion herein will follow the be ordered as follows: Guaranteed “fundamental rights” in Nigeria and their respective “lawful derogations”; Implications of derogation clauses; Patterns of lawful derogation under the Constitution; Conclusion and recommendations.

2.0 Guaranteed “fundamental rights” in Nigeria and their respective “lawful derogations”

Shorn of the pretence that there is no division between “justiciable and non-justiciable human rights” in Nigeria, the reality is that there are the twelve constitutionally guaranteed fundamental rights in Nigeria. These rights and their respective derogations, where applicable are discussed seriatim below.

(i) “Right to life” is guaranteed under “*section 33* of the CFRN, 1999 as amended”.

However, life may be lawfully taken in the following circumstances recognised under the same *section 33* namely-

(a) in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.

(b) As a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary for the defence of any person from unlawful violence or

(c) for the defence of property; or

(e) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or

(f) for the purpose of suppressing a riot, insurrection or mutiny.

In addition, it is enacted in *section 45(2)* of the CFRN, 1999 as amended that “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 provisions of *sections 33* (right to life) or *35* (right to personal liberty) of the Constitution; but no such measures shall be taken in pursuance of any such Act during any period of emergency save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency: Provided that nothing in this section shall authorise any derogation from the provisions of *section 33* of this Constitution, except in respect of death resulting from acts of war or authorise any derogation from the provisions of *section 36(8)* of this Constitution.” Under *section 45(3)*, a “period of emergency” means “any period during which there is in force a Proclamation of a state of emergency declared by the President in exercise of the powers conferred on him under *section 305* of the Constitution”.

(ii) “Right to dignity of human person”ⁱⁱⁱ guaranteed in “*section 34* of the CFRN, 1999 as amended”. In *section 34(1)*, it is provided that every individual is entitled to respect for the dignity of his person, and accordingly -(a) no person shall be subjected to torture or to inhuman or degrading treatment; (b) no person shall be held in slavery or servitude. These are not subject to derogations of any kind.

However, under *section 34(1)(c)*, it is provided that “no person shall be required to perform forced or compulsory labour”. This is however subject to lawful derogation as under *section 34(2)*, it is provided that

For the purposes of subsection (1) (c) of this section, ‘forced or compulsory labour’ does not include -

(a) any labour required in consequence of the sentence or order of a court;

(b) any labour required of members of the armed forces of the Federation or the Nigeria Police Force in pursuance of their duties as such;

(c) in the case of persons who have conscientious objections to service in the armed forces of the Federation, any labour required instead of such service;

(d) any labour required which is reasonably necessary in the event of any emergency or calamity threatening the life or well-being of the community; or

(e) any labour or service that forms part of - (i) normal communal or other civic obligations of the well-being of the community; (ii) such compulsory national service in the armed forces of the Federation as may be prescribed by an Act of the National Assembly; or (iii) such compulsory national service which forms part of the education and training of citizens of Nigeria as may be prescribed by an Act of the National Assembly. Right to dignity of human person.

(iii) “Right to personal liberty” is guaranteed in “*section 35 of the CFRN, 1999 as amended*”. A person may however “be deprived of his liberty” in the following cases and in accordance with a procedure permitted by law namely-

(a) in execution of the sentence or order of a court in respect of a criminal offence of which he has been found guilty;

(b) by reason of his failure to comply with the order of a court or in order to secure the fulfilment of any obligation imposed upon him by law;

(c) for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence;

(d) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;

(e) in the case of persons suffering from infectious or contagious disease, persons of unsound mind, persons addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community; or

(f) for the purpose of preventing the unlawful entry of any person into Nigeria or of effecting the expulsion, extradition or other lawful removal from Nigeria of any person or the taking of proceedings relating thereto: Provided that a person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence.

The rights available to a person arrested are however outlined in *subsections (2), (3), (4), (5), (6) and (7) of section 34* the CFRN, 1999 as amended. They are however outside the scope of this presentation.

Regarding lawful derogation, it should be noted in addition that it is enacted in *section 45(2)* of the CFRN, 1999 as amended that “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 provisions of *section 33* (right to life) or *35* (right to personal liberty) of the Constitution; but no such measures shall be taken in pursuance of any such Act during any period of emergency save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency: Provided that nothing in this section shall authorise any derogation from the provisions of *section 33* of this Constitution, except in respect of death resulting from acts of war or authorise any derogation from the provisions of *section 36(8)* of the CFRN, 1999 as amended.”

(iv) “Right to fair hearing”ⁱⁱⁱ guaranteed in “*section 36* of the CFRN, 1999 as amended”. This does not admit of any form of derogation. Not even period of emergency can justify the denial of fair hearing as provided in *section 45(2)* of the CFRN, 1999 as amended. Rather, the constitution lists a host of procedural standards that must be observed to safeguard the right to fair hearing. The position of the law is long settled that “once there is a denial of fair hearing, that in effect is a breach of the audi alteram principle of the rules of natural justice. The denial of fair hearing to a party is fatal to the judgment. It renders the proceedings null and void. When there had been a denial of fair hearing, miscarriage of justice is presumed to have been occasioned to the party denied fair hearing. An appellant who established a denial of his right to a fair hearing under the Constitution is not required to prove that he suffered a miscarriage of justice. A miscarriage of justice is inherent in a denial of a right to a fair hearing.” This was the decision of the Court in *Mpama v FBN Plc.*^{iv}

(v) “Right to private and family life” is guaranteed in “*section 37* of the CFRN, 1999 as amended”. This is subject to the blanket lawful derogation prescribed under *section 45(1)* of the CFRN, 1999 as amended which provides among other things “the right to private and family life may under a law that is reasonably justifiable in a democratic society be derogated- (a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom or other persons.”

(vi) “Right to freedom of thought, conscience and religion” provided in “*section 38* of the CFRN, 1999 as amended”. Expressly, it is enacted in *section 38(4)* that “Nothing in this section shall entitle any person to form, take part in the activity or be a member of a secret society.” This right “excludes membership or promotion of the activities of a secret society”. It is elaborately interpreted under *section 318* of the CFRN, 1999 as amended that “secret society” includes

any society, association, group or body of persons (whether registered or not)- (a) that uses secret signs, oaths, rites or symbols and which is formed to promote a cause, the purpose or part of the purpose of which is to foster the interest of its members and to aid one another under any circumstances without due regard to merit, fair play or justice to the detriment of the legitimate interest of those who are not

members; (b) the membership of which is incompatible with the function or dignity of any public office under this Constitution and whose members are sworn to observe oaths of secrecy; or (c) the activities of which are not known to the public at large, the names of whose members are kept secret and whose meetings and other activities are held in secret;

In addition, this right is subject to the blanket lawful derogation prescribed under *section 45(1)* of the CFRN, 1999 as amended which authorise that this right may be derogated “under a law that is reasonably justifiable in a democratic society- (a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom or other persons”.

(vii) “Right to freedom of expression and the press” guaranteed in “*section 39* of the CFRN, 1999 as amended”. However, under *section 39(2)*, “the right of every person to own, establish and operate any medium for the dissemination of information, ideas and opinions is subject to approval and fulfilment of conditions laid down by an Act of the National Assembly”. In addition, under *section 39(3)*, it is provided that “this right may be curtailed under any law that is reasonably justifiable in a democratic society -(a) for the purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of courts or regulating telephony, wireless broadcasting, television or the exhibition of cinematograph films; or (b) imposing restrictions upon persons holding office under the Government of the Federation or of a State, members of the armed forces of the Federation or members of the Nigeria Police Force or other Government security services or agencies established by law”.

The right to freedom of expression and the press in *section 39* of the CFRN, 1999 as amended is also subject to the blanket lawful derogation prescribed under *section 45(1)* of the CFRN, 1999 as amended which authorise that “the right may be derogated, under a law that is reasonably justifiable in a democratic society- (a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom or other persons.”

(viii) “Right to peaceful assembly and association” guaranteed in *section 40*.

This right does not “extend to derogation from the powers conferred by this Constitution on the Independent National Electoral Commission with respect to political parties to which that Commission does not accord recognition”. In addition, this right is subject to the blanket lawful derogation prescribed under *section 45(1)* of the CFRN, 1999 as amended which authorise that “it may be lawfully derogated, under a law that is reasonably justifiable in a democratic society- (a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom or other persons.”

(ix) “Right to freedom of movement” under “*section 41* of the CFRN, 1999 as amended”. Thus, “every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof, and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereto or exit therefrom”. However, this right “shall not invalidate any law that is reasonably justifiable in a democratic society- (a) imposing restrictions on the residence or movement of any person who has committed or is reasonably suspected to have committed a criminal offence in order to prevent him from leaving Nigeria;^v or (b) providing for the removal of any person from Nigeria to any other country to:- (i) be tried outside Nigeria for any criminal offence, or (ii) undergo imprisonment

outside Nigeria in execution of the sentence of a court of law in respect of a criminal offence of which he has been found guilty: Provided that there is reciprocal agreement between Nigeria and such other country in relation to such matter”.^{vi}

(x) “Right to freedom from discrimination” in “*section 42* of the CFRN, 1999 as amended”. Thus,

a citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person- (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or

(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.

(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

The lawful derogation recognised under *section 42(3)* of the CFRN, 1999 as amended is to the effect that nothing in the provisions of *section 42* shall “invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or member of the Nigeria Police Force or to an office in the service of a body corporate established directly by any law in force in Nigeria”.

(xi) “Right to acquire and own immovable property anywhere in Nigeria” guaranteed in *section 43* of the CFRN, 1999 as amended. This right may be lawfully derogated in the circumstances prescribed in *section 44* of the CFRN, 1999 as amended relating to right to right to prompt payment of compensation upon compulsory acquisition of property.

(xii) “Right to prompt payment of compensation upon compulsory acquisition of property” in *section 44* of the CFRN, 1999 as amended.

3.0 Implications of derogation clauses

The constitutionally sanctioned derogation clauses exemplify that there are no absolute rights. In *Nigerian Copyright Commission & Ors v Musical Copyright Society of Nig. Ltd & Ors*,^{vii} one of the issues was whether the right to personal liberty is an absolute right. The Court held that it is trite that no citizen is immune from being investigated for criminal offences alleged against them. The right to personal liberty is not absolute. It is principally for this reason that the Constitution of Nigeria 1999 as amended while guaranteeing the right to personal liberty of the citizen also clearly provided for lawful derogation there from upon reasonable suspicion of the person having committed a criminal offence.

It is unconstitutional and a grave affront to human rights where there is no lawful derogation of constitutional right. For example, it amounts to extra-judicial killing (murder or manslaughter) to take the life of another other than in the lawful circumstances recognised under the constitution. Thus, a lawful derogation clause is like a proviso. In *Abegunde v Ondo State House of Assembly*,^{viii} it was held that “the purport of a proviso whenever same is inserted is to create an exception and derogation from the intendment of the statutory provision.”

4.0 Patterns of lawful derogation under the Constitution

The careful study of the provisions of extant CFRN, 1999 as amended undertaken in the second segment of this paper will reveal that there are two types of derogations formats therein. One is the specific derogation clause that are made as provisos or inherent in the body of the section of the constitution providing the right. The other one is the “omnibus or general restriction on and derogation from fundamental human rights” listed in *section 45* of the CFRN, 1999 as amended. The fundamental rights guaranteed in Chapter IV of the CFRN, 1999 as amended are not absolute. The “modern idea of rights accepts that some limitations on rights are permissible but the limitations are themselves strictly limited.

Derogations are permitted only in constitutionally or legally excused or permitted circumstances”. The concept of “derogable rights” is very well recognised in the “International Bill of Human Rights”^{ix} and in national constitutions. Under most national constitutions, the benchmark for allowing lawful derogation from guaranteed rights seems to be that derogations must be “reasonably justifiable” in “a democratic society”. Hence, under “*section 45* of the CFRN, 1999 as amended”

(1) Nothing in *sections 37, 38, 39, 40 and 41* of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society-

(a) in the interest of defence, public safety, public order, public morality or public health; or

(b) for the purpose of protecting the rights and freedom or other persons.

(2) 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 provisions of *section 33 or 35* of this Constitution; but no such measures shall be taken in pursuance of any such Act during any period of emergency save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency: Provided that nothing in this section shall authorise any derogation from the provisions of *section 33* of this Constitution, except in respect of death resulting from acts of war or authorise any derogation from the provisions of *section 36 (8)* of this Constitution.

(3) In this section, a "period of emergency" means any period during which there is in force a Proclamation of a state of emergency declared by the President in exercise of the powers conferred on him under *section 305* of this Constitution.

5.0 Conclusion and recommendations

From the discussion undertaken in this paper, it has been made manifest that only the “right to human dignity” and the “right to fair hearing” are not subject to any form of lawful derogations meaning that they are considered absolute right. The “right human dignity” and the “right to fair hearing” can in no circumstance be derogated or put in abeyance. However, significantly troubling is the fact that “right to life” remains derogable notwithstanding that it is the foremost fundamental human right. Without life, all other rights are meaningless or cannot be enjoyed. Human dignity and fair hearing are not enjoyed in vacuum. They are ancillary rights to life. It is thus recommended that constitutional provisions authorising derogation of the right to life should be strictly construed while legislative effort is expected to be made to declare “right to life” as an “absolute and inderogable human right”.

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- ⁱ This was the decision in the cases of *Bello v Attorney-General Oyo State* (1986) 5 NWLR 828; *Onuoha Kalu v The State* (1998) 12 SCNJ 1; and *Peter Nemi & Ors v The State* (1994) 10 SCNJ 1.
- ⁱⁱ See *Uzoukwu & Ors v Igwe Ezeonu II*, (1991) 6 NWLR (Pt. 200) 708.
- ⁱⁱⁱ See *Garba & Ors v University of Maiduguri* (1986) 1 NWLR 550 and *Isiyaku Mohammed v Kano Native Authority* (1986) 1 ALL NLR 424
- ^{iv} (2013) LPELR-19896(SC) (Pp. 32 paras. E).
- ^v *Section 41(2)(a)* of the CFRN, 1999 as amended.
- ^{vi} *Section 41(2)(b)* of the CFRN, 1999 as amended.
- ^{vii} (2017) LPELR-50743(CA) (Pp. 61 paras. B).
- ^{viii} (2015) LPELR-24588(SC) (Pp. 73 paras. F) per Ogunbiyi, JSC.
- ^{ix} *Article 29(2)* UDHR, 1948; *article 4* ICESCR, 1966; and *article 4* ICCPR, 1966. Note that *article 4(2)* of ICCPR, 1966 is explicit that “No derogation from *articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18* may be made under this provision.”