

DEROGATION FROM FUNDAMENTAL RIGHTS IN NIGERIA: A CONTEMPORARY DISCOURSE

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Abstract: The 1999 Nigerian Constitution guarantees to Nigerian citizens the fundamental rights contained in its chapter IV. This article undertakes a contemporary discourse on derogation from fundamental rights under section 45(1)(a) of the 1999 Constitution. It is the writer's view that the enactment of laws which derogate from the fundamental rights envisaged in the section above other than in the interest of defence, public safety, public order, public morality and public health is unconstitutional. The writer suggests the amendment of the Constitution to define the elastic terms-defence, public order, public safety, public morality and public health.

Key Words: Derogation, Fundamental rights, Reasonably justifiable in a democratic society, Defence, Public order, Public morality, Public safety, Public health, Selfish or Vested interest.

1. Introduction

This article undertakes a contemporary discourse on derogation from fundamental rights under section 45(1)(a) of the Constitution of the Federal Republic of Nigeria (1999 Constitution)¹, analyses the relevant statutory provisions and case law, identifies the short-comings in the various laws, highlights the practice in some other countries and offers suggestions, which if implemented would eradicate the problem of the law-making authorities in Nigeria making laws which derogate from the fundamental rights guaranteed to all citizens of Nigeria in sections 37, 38, 39, 40 and 41 of the 1999 Constitution pursuant to section 45(1) (a) of the 1999 Constitution for the selfish or vested interest of Nigerian leaders rather than in the interest of the public or good of all Nigerians as a whole.

The Nigeria Constitution actually came into force on 29th May 1999 signaling the beginning of Nigeria's fourth Republic. Chapter IV of the 1999 Constitution contains the fundamental rights guaranteed to all citizens of Nigeria. The 1999 Constitution provides for two categories of derogation from fundamental rights guaranteed to all citizens of Nigeria. The first category of derogation consist of derogation set out in different sections of the 1999 Constitution which contain fundamental rights guaranteed to all citizens of Nigeria. While the second category of derogation consist of derogation set out in section 45 of the 1999 Constitution. Section 45(1) of the 1999 Constitution, specifically, allows

the law-making authorities in Nigeria to make a law which derogates from the fundamental rights guaranteed to all citizens of Nigeria in sections 37, 38, 39, 40 and 41 of the 1999 Constitution provided it is reasonably justifiable in a democratic society (a) in the interest of defence, public safety, public order, public morality or public health or (b) for the purpose of protecting the rights and freedom of other persons.²It is disappointing that based on the provisions of section 45(1) (a) above, the law-making authorities in Nigeria have made numerous laws which derogate from the fundamental rights guaranteed to all citizens of Nigeria in the sections above for the selfish or vested interest of Nigerian leaders rather than in the interest of the public or good of all Nigerians as a whole. The 1999 Constitution is blame-worthy for allowing this problem to emerge, as it is silent on the meaning of defence, public safety, public order, public morality and public health.

Concept of fundamental rights

A note worthy point is that rights can be either fundamental or non-fundamental. Fundamental rights are so critical in the lives of citizens of a country. These rights are called fundamental rights because they are provided for or guaranteed in the fundamental law of the land, that is, the constitution of a country. To cut matters short, fundamental rights refer to those rights which are guaranteed to all citizens of a country under the constitution of that

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¹ Cap C 23 Laws of the Federation of Nigeria (LFN) 2004.

² The provisions of section 45(1) above is similar in wording to the provisions of section 41 (1) of the Constitution of the Federal Republic of Nigeria (1979 Constitution). Cap 62 LFN 1990.

country³. It is in that sense that the expression 'fundamental rights' is used in this article.

Brief history of fundamental rights

Fundamental rights have a long history. It suffices to state that fundamental rights emanated from the notion of natural rights. The latter are regarded as being possessed by human beings prior to their recognition by a legal system. It is settled that the formulation of natural rights dates from the second half of the 18th century, the revolutionary period in America and France. Both the United States of America (USA) and France borrowed largely from English experience and thought, particularly as embodied in the writings of early naturalists, namely, Thomas Paine, Thomas Hobbes and John Locke. The latter, for instance, postulates the doctrine: '... that nature had endured human beings with certain inalienable rights that could not be violated by any government authority'.⁴ There were times when the writings of publicists had a great impact on law and society within which the law operates.⁵ In the view of these philosophers, every individual within society possesses certain rights which are inherent and which cannot be wantonly taken and for which man is beholden to no human authority.⁶ The major reasons for individuals coming together to form a

government, according to them, is to enable these rights to be protected and fostered.⁷ Social contract,⁸ which is traceable to the origin of the society itself, is based on a concept of natural law that is rational and unalterable. The right conferred by natural law is considered to be something to which every human being is entitled by virtue of the fact of being human and rational.⁹

In the case of America, the adoption of the principle of natural rights was influenced by Coke's Commentaries on Magna Carta and Blackstone's Commentaries. Blackstone, for one, postulates that the absolute rights of Englishmen are: right to personal security; right to liberty; and right to private property. At the time of independence from Britain in 1776, many Americans had fully embraced the notion of natural rights. It was, therefore, not a surprise that the United States Declaration of Independence in 1776 states that: 'all men are created equal and among their inalienable rights are the rights to life, liberty and pursuit of happiness.'

The USA and other powerful nations of the world worked assiduously to ensure that these inalienable rights of man received recognition and respect at the international level. One major outcome

³These fundamental rights will be elaborated in section IV of this article.

⁴For details on brief history of fundamental rights, see AS Hassan, 'Derogatory Provisions on Fundamental Human Rights: A Perspective from Nigeria's 1999 Constitution' (2003) 6*The University of Maiduguri Law Journal* (UMLJ) 99-100.

⁵ See *Ibid.*

⁶*Ibid.*

⁷*Ibid.*

⁸Note that the major social contract theorists are: Thomas Hobbes; Jean Jacque Rousseau; and John Locke. For details on their views, see WT Jones, *Masters of Political Thought: Machiavelli to Bentham* (London: vol 2, G Harrap and Co. Ltd. 1947); L Strauss and J Cropsey (ed.)

History of Political Philosophy (Chicago: R McNally and Co. 1963); and R Nisbet, *The Social Philosophers: Comment and Conflict in Western Thought* (London: Heinemann Education Books Ltd. 1974), quoted in AE Abuza, 'Environmental Law: Post-Rio Discussions on Environmental Protection – A Reflection,' **BC Nirmal and RK Singh (eds), Contemporary Issues in International Law – Environment, International Trade, Information Technology and Legal Education (New Delhi - 11002: Satish Upadhyay, Satyam Law International, 2014)** 106.

⁹ See Hassan, see above note 7, 100.

of the efforts of these powerful countries in this regard was the Universal Declaration of Human Rights which was proclaimed on 28th December 1948 by the United Nations General Assembly. This was followed by the European Convention for the protection of Human Rights and Fundamental Freedoms of 1950 which was drawn up in Rome. Africans came up with their own version of the declaration of human rights. This can be seen in the African Charter on Human and Peoples' Rights of 1981 (African Charter) which was adopted in Banjul. It is significant to note that the African Charter enjoined state-Parties to the Convention to enact local legislation to give effect to, or domesticate, the provisions of the Charter in their various countries.

With regards to the history of fundamental rights in Nigeria, it should be recalled that about the time of Nigeria's independence some minority ethnic groups had expressed the fear of domination by the majority ethnic groups. This prompted the British Colonial Government of Nigeria to set-up the Willink's Commission to examine the matter. The Commission found that the fear was genuine and consequently recommended that provisions on fundamental rights be entrenched in the 1960 Independence Constitution of Nigeria. This recommendation was warmly embraced and accordingly provisions on fundamental rights were entrenched in the Constitution of the Federation of Nigeria 1960.¹⁰ The provisions, as stated above, were later entrenched in the 1979 and 1999 Constitutions.

Specifically, the provisions on fundamental rights are entrenched in chapter IV of the 1999 Constitution. A vital point to make at this juncture is that the entrenchment of the provisions on fundamental rights in the Constitution is not peculiar to Nigeria. It is in consonance with what obtains in other countries, including South Africa, Zimbabwe, Ghana, Tanzania and India.¹¹ In Nigeria, there is double guarantee for fundamental rights, that is, by the provisions in chapter IV of the 1999 Constitution and provisions of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act¹² enacted in tune with section 12(1) of the 1999 Constitution by the National Assembly of Nigeria a state-Party to the Charter in a bid to domesticate the provisions of the African Charter as enjoined by its provisions. In the Nigerian case of *General Sanni Abacha and Three Others v Gani Fawehinmi*,¹³ the Supreme Court of Nigeria held that the Act, above being a statute with international flavour, was superior to any other Nigerian Act. According to the apex court, where there was a conflict between the Act above and another statute, its provisions would prevail over those of that other statute for the reason that it was presumed that the legislature did not intend to breach an international obligation.¹⁴ In this way, no Act of the National Assembly of Nigeria can take away from Nigerians the rights guaranteed by the African Charter.

¹⁰ See The Constitution of the Federation of Nigeria 1960, sections 17 – 28.

¹¹ See Constitution of the Republic of South Africa 1996, chapter II or sections 7-39; Constitution of Zimbabwe, Amendment (No.17) Act 2005, sections 11- 26; Constitution of Ghana 1992, Articles 12 - 30; Constitution of Tanzania 1977 as amended by Act No. 1 of 2005, Articles 12 -30; and The Constitution of India 1949, Articles 12 - 31.

¹² Cap 10 LFN 1990 (now Cap A9 LFN 2004). It came into force on 17 March 1983.

¹³ [2000] 6 Nigerian Weekly Law Reports (NWLR) (part 660) 228, 251.

¹⁴ For a similar decision, see the Nigerian Court of Appeal decision in *Inspector General of Police v All Nigeria Peoples Party and 11 Others* [2007] 18 NWLR (part 1066) 457,469.

Fundamental rights under the 1999 Constitution

The Fundamental rights guaranteed to all citizens of Nigeria under chapter IV of the 1999 Constitution are as follows:

(a) Right to freedom of expression and the press

This right is guaranteed under section 39 of the 1999 Constitution.

(b) Right to peaceful assembly and association

The right is guaranteed under section 40 of the 1999 Constitution. It states as follows:

Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests: provided that the provisions of this section shall not derogate 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.

(c) Right to freedom of movement

This right is guaranteed under section 41 of the 1999 Constitution.¹⁵

The 1999 Constitution: The issue of derogation from fundamental rights

The relevant provision here is section 45 of the 1999 Constitution which deals with restriction on and derogation from fundamental rights. It states as follows:

(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 of other persons.

The approach of the Nigerian Constitution is in accord with what obtains in other countries, including India,¹⁶ Ghana,¹⁷ Tanzania¹⁸ and South Africa.¹⁹ and international instruments. A note worthy international instrument here is the African Charter which makes the exercise of the right to assemble freely with others subject to necessary restrictions provided for by law, in particular those enacted in the

guaranteed under section 42 of the 1999 Constitution; right to acquire and own immovable property anywhere in Nigeria guaranteed under section 43 of the 1999 Constitution; and right to payment of compensation upon compulsory acquisition of property guaranteed under section 44 of the 1999 Constitution.

¹⁵ See Constitution of India 1949, Article 19(2) - (5).

¹⁷ See Constitution of Ghana 1992, Articles 21(4), 24(4) & 31.

¹⁸ See Constitution of Tanzania 1977 as amended by Act No.1 of 2005, Article 30.

¹⁹ See Constitution of the Republic of South Africa 1996, section 36.

¹⁵ Other fundamental rights under the 1999 Constitution are the: right to private and family life guaranteed under section 37 of the 1999 Constitution; right to freedom of thought, conscience and religion guaranteed under section 38 of the 1999 Constitution ; right to life guaranteed under section 33(1) of the 1999 Constitution; right to dignity of human person guaranteed under section 34(1) of the 1999 Constitution; right to personal liberty guaranteed under section 35(1) of the 1999 Constitution; right to fair hearing guaranteed under section 36(1) of the 1999 Constitution; right to freedom from discrimination

interest of national security, the safety, health, ethics and rights and freedoms of others.²⁰

It should be noted that section 45 (1) of the 1999 Constitution, ensures that laws made by the Legislature in Nigeria which restrict or derogate from any of the fundamental rights guaranteed in sections 37,38,39,40 and 41 are not invalidated on ground of being unconstitutional where they are reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedom of other persons. This implicates that none of the fundamental rights guaranteed in the foregoing sections is absolute but a qualified right which can be derogated from in accordance with section 45(1) of the 1999 Constitution.²¹

The words to emphasise in relation to the fundamental rights that can be derogated from under section 45(1) of the 1999 Constitution are the terms- 'defence', 'public safety', 'public order', 'public morality' and 'public health'. Rather unfortunately, the Nigerian Constitution does not provide in its section 45 or any other provision the meaning of the terms above in relation to the intendment of the framers of the Nigerian Constitution under section 45 above. It is submitted that the terms above are nebulous. A vital question to ask here is: can the provisions of the 1999 Constitution be of assistance

in determining whether a law made pursuant to section 45(1) above is reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health? The answer is in the negative. What can be safely postulated is that the provisions of section 45(1) above are tantamount to the conferment of dictatorial and wide discretionary powers on the law-making authorities in Nigeria as the definition of what is in the 'interest of defence, public safety, public order, public morality or public health' can only be provided by the Legislature and the Executive which are the potential defendants in an action alleging contravention of the rights envisaged in section 45(1) above. Its provisions are susceptible to abuse since there is no clear yardstick in the Nigerian Constitution to determine whether a law made pursuant to the same is reasonably justifiable in a democratic society in the circumstances mentioned in section 45(1) (a) above. Akanle rightly criticises the conferment of wide discretionary powers on public officers.²² It is submitted that the lacuna, as indicated above, has further compounded the work of the regular courts which are constitutionally empowered to protect or safeguard or uphold the provisions of the Constitution on fundamental rights against any infraction by the Legislature or any other body or citizen of Nigeria.²³

²⁰ See Article 11 of the African Charter on Human and Peoples' Rights, 1981.

²¹ See, for example, the Nigerian case of *The Registered Trustees of National Association of Community Health Practitioners of Nigeria v Medical and Health Workers Union of Nigeria* [2008] 2 NWLR (part 1072) 575, 584 where the Supreme Court of Nigeria held that the freedom of association guaranteed under the Nigerian Constitution is not absolute but a qualified right which can be derogated from in accordance with section 45 of the 1999 Constitution. See also the decision of the Supreme Court of Nigeria in *Erasmus Osawe and 2*

Ors v Registrar of Trade Unions [1985] 1 NWLR (part 4) 755, 756 decided under the 1979 Constitution whose section 41 (1) is similar in wording to the provisions of section 45(1) above.

²² O Akanle, 'Pollution Control Regulation in Nigerian Oil Industry' published as *Occasional Paper 16* by Nigerian Institute of Advanced Legal Studies, Lagos 1991 14.

²³ Note the court's power of judicial review and section 46 of the 1999 Constitution. The latter bestows on the High Courts the original jurisdiction to hear and determine applications on violation of any of the constitutionally guaranteed fundamental rights.

A pertinent point to underscore here is that most of the enactments on derogation from fundamental rights are predicated on the fundamental right to peaceful assembly and association guaranteed under section 40 of the 1999 Constitution.

Analysis of case law on derogation from fundamental rights

The courts in Nigeria have discussed the issue of derogation from fundamental rights under section 45(1) (a) of the 1999 Constitution in a plethora of cases. It suffices to consider only a few of such cases under the fundamental rights below.

(a) Right to freedom of movement

The case of *FRA Williams v MA Majekodunmi*²⁴ is one important Nigerian case in point. In that case,

Justice Baramian, FJ delivering the leading judgment of the Federal Supreme Court, to which the other three Justices in the case concurred, upheld the fundamental right of the plaintiff to the freedom of residence and movement as guaranteed under section 26(1) of the Constitution of the Federation of Nigeria 1960. His Lordship set aside the Restriction Order of 29th May 1962 which the defendant, who was appointed the Administrator of the Western Region following a declaration of a State of Emergency in the Region by the Federal Parliament of Nigeria in 1962, made ordering the plaintiff to be and remain within a distance of three miles from Number 193 Abeokuta Road in the township of Abeokuta on the ground that it was not reasonably justifiable in a democratic society in the interest of public order. The

Federal Supreme Court's decision in the case above is acceptable.

(b) Right to freedom of expression and the press

The Nigerian case of *Arthur Nwankwo v The State*²⁵ is another case in point. In that case, Justice Salihu Modibbo Alfa Belgore, JCA delivering the leading judgment of the Court of Appeal, to which the other two Justices in the case concurred, allowed the appeal of the appellant/accused who was convicted by an Anambra State High Court in Onitsha for the offences of 'Publishing seditious publication,' and 'Distributing seditious publications' both counts under section 51(1)(c) of the Criminal Code Law Chapter 30 Laws of Eastern Nigeria, 1963 applicable to Anambra State. The appellant/accused had published a book titled 'HOW JIM NWOBODO RULES ANAMBRA STATE' which was alleged to have contained matters which were seditious against the person of the Governor of Anambra State Jim Ifeanyichukwu Nwobodo and the Government of Anambra State of Nigeria. His Lordship upheld the right of the appellant/accused to the freedom of expression as guaranteed under section 36 of the 1979 Constitution and entered a verdict of discharge and acquittal on the two counts in setting aside the conviction and sentence passed by the trial judge. Justice Belgore held, among other things, that section 51 above was inconsistent with sections 36 and 41 of the 1979 Constitution and was repealed from 1st October 1979. The Court of Appeal's decision in the case above is acceptable.

²⁴ (No.3) [1962] All Nigeria Law Reports 410, 426-427.

²⁵ [1985] 6 Nigerian Constitutional Law Reports 228, 237.

(C) Right to peaceful assembly and association

A Nigerian case that is in point is *Erasmus Osawe and Two others v Registrar of Trade Unions*.²⁶ In that case, the appellants/plaintiffs applied to the Registrar of Trade Unions for the registration of a trade union called 'The Nigerian United Teaching Services Workers Union' otherwise called 'The Nigerian Administrative Staff Union of Primary and Post Primary School in 1980. The Registrar of Trade Unions refused to register the trade union on the ground that there was in existence a trade union, namely, Non-Academic Staff Union of Educational and Associated Institutions which sufficiently catered for the interests of members of the proposed union. The Registrar of Trade Unions relied on the provisions of section 5(5) of the Trade Unions Act 1973²⁷ and section 3(2) of the Trade Unions Act as amended by the Trade Unions (Amendment) Decree of 1978.²⁸ Section 3 of the Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Decree 1978, provides that:

(1) An application for the registration of a trade union shall be made to the Registrar in the prescribed form and shall be signed-

(a) in the case of a trade union of workers, by at least fifty members of the union; and

(b) in the case of a trade union of employers, by at least two members of the union.

(2) No combination of workers or employers shall be registered as a trade union save with the approval of the Commissioner²⁹ on his being

satisfied that it is expedient to register the union either by regrouping existing trade unions, registering a new trade union or otherwise however; but no trade union shall be registered to represent workers or employers in a place where there already exists a trade union.

The appellants/plaintiffs appealed to a State High Court in Benin-City against the decision of the Registrar of Trade Unions and sought an order of the Court compelling the Registrar of Trade Unions to register the proposed union. The order was granted. On appeal to the Supreme Court of Nigeria by the appellants/plaintiffs against the decision of the Court of Appeal setting aside the order of the State High Court above, Justice Boonyamin Oladiran Kazeem, JSC delivering the leading judgment of the Supreme Court of Nigeria, to which the other four justices in the case concurred, dismissed the appeal of the appellants/plaintiffs. The learned Justice Kazeem stated that it was not disputed that the fundamental right enshrined under section 37 of the 1979 Constitution (now section 40 of the 1999 Constitution) for freedom of association as trade unions was subject to the derogation set out in section 41(1) (a) of the 1979 Constitution (now section 45(1) (a) of the 1999 Constitution). Hence, according to His Lordship, section 37 of the 1979 Constitution was not absolute as it could not invalidate any law that was reasonably justifiable in a democratic society 'in the interest of defence, public safety, public order, public morality, or public health'. Justice Kazeem,

²⁶ [1985] 1 NWLR (part 4) 755, 762-763.

²⁷ Act No. 31 of 1973 promulgated under the military administration of Lieutenant-Colonel Jack Yakubu Gowon. It sought the legal regulation of trade unions for the first time in Nigeria.

²⁸ No. 22 of 1978 promulgated under the military administration of General Olusegun Obasanjo with effect from 3 August 1977. It was later known as the Trade Unions (Amendment) Act No.22 of 1978.

²⁹ The Commissioner is now the Minister of Employment, Labour and Productivity.

specifically, held that section 3(2) of the Trade Unions Act as amended by the Trade Unions (Amendment) Act 1978 did not contravene section 37 of the 1979 Constitution and that it was a law reasonably justified in a democratic society. According to the learned Justice of the Supreme Court of Nigeria, prior to the re-organisation of trade unions carried out in 1978 by the Federal Military Government under Obasanjo:

... the position of registered trade unions in this country, was rather chaotic; and there was a proliferation of some 800 different registered trade unions with varied objectives and aspirations. It was in order to correct that situation and to bring sanity to the organizations, that the Federal Military Government in order to maintain public order and good government embarked upon the exercise of restructuring all registered trade unions as set out in the Nigeria Official Gazette No. 6 volume 65 of 8th February, 1978. That exercise culminated in the recognition and registration of some 71 Industrial Trade Unions....

The Supreme Court of Nigeria's decision above was followed in another Nigerian case in point, that is, *The Registered Trustees of National Association of Community Health Practitioners of Nigeria and Two*

*Others v Medical and Health Workers Union of Nigeria.*³⁰ In that case, the 1st appellant/applicant an Association registered with the Corporate Affairs Commission as an incorporated trustee under Part C of the Companies and Allied Matters Act 1990³¹ applied to the 2nd appellant /respondent, that is, Minister of Employment, Labour and Productivity for registration as a Senior Staff Professional Association. The 2nd appellant/respondent directed the 1st appellant/applicant to the 3rd appellant/respondent, which directive the 1st appellant/applicant complied with. The 3rd appellant/respondent subsequently refused to register the 1st appellant/applicant as a trade union and as a result the 1st appellant/applicant instituted an action against the 2nd and 3rd appellants/respondents at the Federal High Court, Ilorin by way of application for judicial review seeking, among other things, an order of certiorari, mandamus and declaration against the 2nd and 3rd appellants/respondents.

The trial Court granted the application and held that the 1st appellant/applicant was entitled to the reliefs sought, including an order of mandamus to compel the 3rd appellant/respondent to register the 1st appellant/applicant as a trade union. On appeal to the Supreme Court of Nigeria by the 1st appellant/applicant against the decision of the Court of Appeal setting aside the decision of the Federal High Court above, Justice Aloma Mariam Mukhtar, JSC delivering the leading judgment of the Supreme Court of Nigeria, to which the other four justices in the case concurred, dismissed the appeal. She considered the provisions of sections 3(1) and (2)

³⁰*The Registered Trustees of National Association of Community Health Practitioners of Nigeria and Two Others v Medical and Health Workers Unions of Nigeria*, see above note 21, 609 – 623.

³¹ Cap 59 LFN 1990 (now Cap C 20 LFN 2004).

and 5(4) of the Trade Unions Act 1990.³²Section 3(1) of the Trade Unions Act 1990 is the same with section 3(1) of the Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Act 1978. While section 3(2) of the Trade Unions Act 1990 is the same with section 3(2) of the Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Act 1978, except that the word 'Minister' instead of the word 'Commissioner' is used in the former enactment. Section 5(4) of the Trade Unions Act 1990 states that:

The Registrar shall not register the trade union if it appears to him that any existing trade union is sufficiently representative of the interests of the class of persons whose interests the union is intended to represent.

Justice Mukhtar held that there were many materials in the documents before the apex court that confirmed that the 1st appellant/applicant had all long been catered for by a wider and encompassing body, the 3rd respondent. Thus, according to His Lordship, after an investigation, there was no way the 1st appellant/applicant could have been registered in the circumstances. She further held that registration of a trade union was not automatic, such

registration being at the discretion of the Registrar of Trade Unions after he would have made his investigations and became satisfied.³³Furthermore, on the issue whether section 40 of the 1999 Constitution is absolute, the learned Justice of the Supreme Court of Nigeria stated that: 'section 40 of the 1999 Constitution which guarantees the right to freedom of association is not absolute'. In addition to this, His Lordship stated, while disagreeing on the issue that the provisions of sections 3 and 5 of the Trade Unions Act 1990, are inconsistent with, or contravene, the provisions of section 40 of the 1999 Constitution as submitted by counsel to the 1st appellant/applicant, as follows:

...the provisions of sections 3 and 5 of the Trade Unions Act Cap. 437 Laws of the Federation of Nigeria 1990 are not inconsistent with the provisions of the said section 40 of the 1999 Constitution. Neither do the provisions of the said sections of the Trade Unions Act contravene section 40 of the 1999 Constitution.

To cut matters short, the Supreme Court of Nigeria had relied heavily on its decision in the Osawe's case above.³⁴ The apex court's decisions in the two cases above are unacceptable. The writer actually has

³² Cap 437 LFN 1990 (now Cap T14 LFN 2004).

³³ This may be considered to be dictatorial and a clear case of wide discretionary power being conferred by law on the Registrar of Trade Unions. This powers is susceptible to abuse. As indicated before, Akanle criticises the idea of vesting wide discretionary powers on public officers.

³⁴ Note also that in *National Union of Electricity Employees and Another v Bureau of Public Enterprises* [2010] 7 NWLR (part 194) 539, 546-575, the Supreme Court of Nigeria per Christopher Mitchell Chukwuma – Eneh, JSC held that the Trade Disputes (Essential Services) Act Cap 433 LFN 1990 (now Cap T9 LFN 2004), which in its section 1(1) authorises the president of Nigeria to proscribe any trade union or association whose members are employed in essential services for acts calculated to disrupt the smooth running of any essential service or for failure to comply with the procedure specified in the Trade Disputes Act Cap 432 LFN 1990 (now Cap T8 LFN 2004) in relation to the reporting and settlement of trade disputes, was a law reasonably justifiable in a democratic society and made to protect the interest of public safety and order in line with section 45(1)(a) of

the 1999 Constitution. This decision is unacceptable. For criticisms of the Act above, see AE Abuza 'A reflection on regulation of strikes in Nigeria', (2016) 42 (1) *Commonwealth Law Bulletin* (CLB) 23. Good enough, in *Inspector General of Police v All Nigeria Peoples Party and 11 Ors*, see above note 14, 457, 479 – 500, the Court of Appeal per Olufunlola Oyelola Adekeye, JCA held that sections 1(2), (3), (4), (5) and (6) and 2, 3 and 4 of the Public Order Act Cap 382 LFN 1990 which require police permit before rallies can be held in Nigeria were inconsistent with section 40 of the 1999 Constitution and therefore they were null and void to the extent of their inconsistency. See also *The Independent National Electoral Commission and Anor v Abdulkadir Balarabe Musa (for and on behalf of Peoples' Redemption Party) and Four Ors* [2003] 3 NWLR (part 806) 72, 161 where the Supreme Court of Nigeria per Emmanuel Olayinka Ayoola, JSC held that section 79(2)(c) of the Electoral Act 2001, which forbids a person in the Civil Service of the Federation or State from being registered as a member of a political association seeking to be registered as a political party in Nigeria, was invalid because it was inconsistent with section 40 of the 1999 Constitution.

reservations about the judgments of the Supreme Court of Nigeria in those cases. Without mincing words, it is the writer's considered view that the Supreme Court of Nigeria is wrong for the ensuing reasons. First, it should be re-iterated that the Trade Unions Act 1973 was an enactment made during a military administration. Also, the Trade Unions Act 1990 was a product of military administration. Section 3 of the Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Act 1978 and sections 3 and 5 of the Trade Unions Act 1990 are aimed at preventing the proliferation of trade unions as it remained during the pre-1978 days or period. During this period there were nearly 1,000 trade unions in Nigeria, many of which were small, weak and divided by struggle for leadership.³⁵ Worse still, there were no fewer than four Central Labour Organisations which were divided along ideological lines, namely, the 'Marxists' and 'Democrats'.³⁶ The military authorities certainly did not like this situation.

The distaste for the proliferation of trade unions by the Nigerian military authorities is attributable to certain factors. For instance, it was difficult for the military to control the nearly 1,000 trade unions and the four Central Labour Organisations. This is the main reason why the Obasanjo military administration carried out compulsory re-organisation of trade unions on industrial lines. It resulted in the dissolution of all

existing trade unions and substitution of a new list of 70 registered and recognised trade unions in Nigeria.³⁷ The Registrar of Trade Unions was enjoined to register the Nigeria Labour Congress (NLC) as the only Central Labour Organisation with the coming into effect of the Trade Unions (Amendment) Decree 22 of 1978 on 3rd August 1977.³⁸

Perhaps, it should be pointed out that Decree 22 of 1978 not only recognised the NLC as the only Central Labour Organisation in Nigeria but also mentioned the 42 industrial unions by name as the only industrial unions in Nigeria and forced to affiliate with the NLC.³⁹ The senior staff associations are statute barred from affiliation with the NLC. Danesi argues that the Obasanjo military administration decreed the NLC into existence so that it could accomplish its selfish desire to put labour under governmental control.⁴⁰

Also, the thinking of the military authorities was that the more the trade unions the more incessant strikes by the trade unions. During the military era, many of the trade unions embarked upon incessant strikes to press demands from their employers. The military authorities could not accept this situation. It should be placed on record that section 13(1) of the Trade Disputes Decree⁴¹ 1976 and section 30 (6) of the Trade Unions Act 1990 as amended by the Trade Unions (Amendment) Act 2005 have the net effect of banning and criminalising strike actions in Nigeria.

³⁵ O Ogunniyi, *Nigerian Labour and Employment Law in Perspective* (Lagos: Folio Publishers Ltd 1991) 226.

³⁶ *Ibid.*

³⁷ Forty-two of these so called industrial unions were unions of junior employees, 18 unions of senior staff, nine of employers and the Nigerian Union of Pensioners. See EE Uvieghara, *Labour Law in Nigeria* (Lagos: Malthouse Press Ltd. 2001) 330.

³⁸ See Trade Unions Act 1990, section 33(1) and section 1(1) of the Trade Unions (Amendment) Decree 1978. Section 3 of this Decree gave the Decree retrospective effect.

³⁹ D Otobo, 'The Generals, Nigeria Labour Congress and Trade Union Bill'. <<http://www.nigerdeltacongress.com/garticle>> accessed 30 January 2012.

⁴⁰ RA Danesi, 'The Trade Union (Amendment) Act 2005 and Labour Reform in Nigeria: Legal Implications and Challenges', (2007) 1 *Nigerian Journal of Labour Law and Industrial Relations* 97-98.

⁴¹ Decree No.7 of 1976. It subsequently became Trade Disputes Act 1976.

The military authorities could have prosecuted an erring trade union or its officials and or members of the same for violation of the provisions of the enactments above. Furthermore, the thinking of the military authorities was that the employer would have difficulties dealing and negotiating with too many trade unions in the work place. Arguably, this problem has been taken care of by section 24(1) of the Trade Unions Act 1990 as amended by the Trade Unions (Amendment) Act 2005 which states that ‘for the purpose of collective bargaining all registered unions in the employment of an employer shall constitute an electoral college to elect members who will represent them in negotiations with the employer’. And lastly, it is a fact that Generals in the military, instinctively and by force of habit and training do not seem to like workers and their trade unions whenever they seize political power.⁴² The latter are seen to be noisy, asking too many awkward questions, asserting their rights and capable of directing local and international attention to potentially embarrassing socio-political development.⁴³ The fewer the trade unions the better for the military authorities.

In the second place, section 3 of the Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Act or Decree 1978 and sections 3 and 5 of the Trade Unions Act 1990 are inconsistent with section 37 of the 1979 Constitution and section 40 of the 1999 Constitution, respectively. The provisions of sections 37 and 40 above are mandatory with the compulsory ‘shall’. On construction of the word ‘shall’ when used in a statute, the Court of Appeal in

the case of *John O Echelunkwo and 90 Others v Igbo-Etiti Local Government Area*⁴⁴ stated as follows:

Whenever the word ‘shall’ is used in an enactment, it denotes imperativeness and mandatoriness. It leaves no room for discretion at all. It is a word of command; one which always or which must be given a compulsory meaning as denoting obligation. It has a peremptory meaning. It has the invaluable significance of excluding the idea of discretion and imposes a duty which must be enforced.

The approach of the Court of Appeal is in tune with that of the Supreme Court of Nigeria.⁴⁵ The only proviso to section 40 of the 1999 Constitution, for instance, restricts the right to freedom of association and the restriction is to the effect that the provision of section 40 would not derogate from the powers of the Independent National Electoral Commission with respect to political parties to which the Commission does not accord recognition. In other words, section 40 above applies only to the political parties which the Independent National Electoral Commission accords recognition. Of course, section 3(1) of the Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Decree 1978 and section 3(1) of the Trade Unions Act 1990 militate against the enjoyment of the fundamental right of workers to form a trade union for the protection of their interests as guaranteed under sections 37 and 40 of the 1979

⁴² Otobo, see above note 39.

⁴³ *Ibid.*

⁴⁴ [2013] 7 NWLR (part 1352) 1, 8.

⁴⁵ See, for example, the decision of the Supreme Court of Nigeria in *Ifezue v Mbadugha* [1984] 1 Supreme Court of Nigeria Law Reports 427.

and 1999 Constitutions, respectively. Their implication is that where an industry or company has less than 50 workers, the workers of such organisation may not be able to form a trade union for the protection of their interests, as they may not be able to get 50 workers to sign such an application for the registration of their trade union.⁴⁶

Sections 37 and 40 above do not stipulate that a person must procure other 49 persons before he can exercise the right to form a trade union for the protection of his interests. They, in fact, vest in every person the right to freely associate with other persons in order to, among other things, form or belong to a trade union for the protection of his interests. It is submitted that the provisions of section 3(1) of the Trade Unions Act 1973 as amended by Trade Unions (Amendment) Decree 1978 and Trade Unions Act 1990 are invalid and void on the ground of inconsistency with sections 37 and 40 above. This submission is grounded on the insightful provisions in section 1(3) of the 1979 and 1999 Constitutions. Nigeria must apply, and show respect for, the Constitution. Section 1(1) of the 1979 and 1999 Constitutions, in fact, declares the Nigerian Constitution to be supreme and the provisions of the same to be binding on all authorities and persons throughout the Federal Republic of Nigeria. While section 1(3) of the 1979 and 1999 Constitutions states

that ‘if any other law is inconsistent with any of the provisions of the Constitution, the Constitution shall prevail and that other law shall to the extent of its inconsistency be void.’

It should be recalled that the Committee of Experts on the Application of the International Labour Organisation Conventions frowns at the excessively high requirement of 50 workers to form a workers’ trade union as contained in section 3 of the Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Decree 1978 and Trade Unions Act 1990 and has actually demanded its amendment in order to ensure full compliance with Article 2 of the International Labour Organisation Convention concerning the Freedom of Association and Protection of the Right to Organise 1948 (Convention 87).⁴⁷ A point to note here is that Nigeria a member of the International Labour Organisation ratified Convention 87, which came into force on 4th July 1950, on 17th October 1960.⁴⁸ The Convention is in force in terms of Nigeria’s membership of the International Labour Organisation. Nigeria is obligated under section 19(d) of the 1999 Constitution to respect international law and its treaty obligations. Today, Convention 87 now has the effect of being a domesticated enactment as required under section 12 of the 1999 Constitution⁴⁹ and therefore, as already indicated, it is superior to an ordinary

⁴⁶ Otopo, see above note 43.

⁴⁷ See *Sunday Vanguard* (Lagos, 9th November 2003) 8.

⁴⁸ *Ibid.*, 17-18.

⁴⁹ This argument also applies to the International Labour Organisation Convention concerning the Right to Organise and Collective Bargaining 1949 (Convention 98). See *Aero Contractors Company of Nigeria Ltd v National Association of Aircrafts Pilots and Engineers and 2 Ors* [2014] 42 Nigerian Labour Law Reports (part 133) 64, 717 per Kanyip, Judge of the National Industrial Court. It should be noted also that the argument above applies to the International Covenant on Civil and Political Rights and International Covenant on Economic,

Social and Cultural Rights. Both are multilateral treaties adopted by the United Nations General Assembly in 1966. Nigeria has ratified these treaties. Article 22 (1) of International Covenant on Civil and Political Rights provides that everyone has the right to form and to join a trade union for the protection of his interests. While Article 1(a)-(c) of the International Covenant on Economic, Social and Cultural Rights provides that everyone has the right to form and to join a trade union for the protection of his interests. The International Covenant on Economic, Social and Cultural Rights is part of the International Bill of Human Rights along with the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights adopted and proclaimed by the United Nations General Assembly on 10 December 1948

legislation of the National Assembly of Nigeria such as the Trade Unions Act 1973 as amended by Trade Unions (Amendment) Decree 1978 and Trade Unions Act 1990.

It should be recalled that in 2010 the 1999 Constitution was amended by the National Assembly of Nigeria through The Constitution (Third Alteration) Act 2010 which came into force on 4th March 2011. Section 254C of the 1999 Constitution, as inserted by The Constitution (Third Alteration) Act 2010, deals with the jurisdiction of the National Industrial Court. Subsections 1(f) and (h), and (2) provide thus:

(1) Notwithstanding the provisions of section 251, 257, 272 and anything contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the National Industrial Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters:-

(f) relating to or connected with unfair labour practice or international best practices in labour, employment and industrial relation matters;

(h) relating to, connected with or pertaining to the application or interpretation of international labour standards;

(2) Notwithstanding anything to the contrary in this Constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified to labour, employment, work place, industrial relations or matters connected therewith.

Section 12 of the 1999 Constitution qualifies as both ‘anything contained in this Constitution’ in subsection (1) and ‘anything to the contrary in this Constitution’ in subsection (2).⁵⁰ As the law presently stands in Nigeria:

When the term ‘notwithstanding’ is used in a section of a statute it is meant to exclude an impinging or impending effect of any other provision of the statute or other subordinate legislation so that the section may fulfill itself.⁵¹

It is submitted that the use of the word ‘notwithstanding’ in section 254C (I) (f) and (h) and (2) of the 1999 Constitution as amended is meant to exclude the impending effect of section 12 or any other provision of the Nigerian Constitution. What follows is that as used in section 254C (I) (f) and (h) and (2) of the 1999 Constitution as amended, no provision of the Constitution shall be capable of

⁵⁰*Aero Contractors Company of Nigeria Ltd v National Association of Aircrafts Pilots and Engineers*, per kanyip, Judge of the National Industrial Court, *Ibid.*, 680.

⁵¹ See decision of the Supreme Court of Nigeria in *Peter Obi v. Independent National Electoral Commission and Ors* [2007] 11 NWLR (part 1046) 565, 634-636, per Aderemi, JSC.

undermining the said section 254C (I) (f) and (h) and (2).⁵²

The foregoing discussion is capable of yielding to the pleasant conclusion that international conventions, such as the International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and International Labour Organisation Conventions 87 and 98 have force of law in Nigeria and can be applied by the National Industrial Court in labour matters having been ratified by Nigeria.

In some other countries, the number of workers required to form a workers' trade union is far less than 50. For instance, under the Labour Act of Ghana 2003, any two or more workers can form a trade union.⁵³ Again, in Tanzania, any 20 or more workers can form a trade union of workers.⁵⁴ Nigeria should stick to the position under the Trade Unions Ordinance of 1938 where any five or more workers can form a trade union of workers.⁵⁵ Third, sections 3(2) of the Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Decree 1978 and 3(2) and 5(4) of the Trade Unions Act 1990 also militate against the enjoyment of the fundamental right of workers to form a trade union for the protection of their interests as guaranteed under sections 37 and 40 of the 1979 and 1999 Constitutions, respectively. The right to, belong or join or form a trade union for the protection of one's interest also include the right not to belong to or join a trade union. Workers should be free to join or belong or form a trade union for the

protection of their interests. Where they belong to a trade union in their work place and for one reason or the other they no longer want to be members of that trade union, the workers should be free to withdraw their membership of that trade union and form another trade union for the protection of their interests. This is consistent with section 12 (4) of the Trade Unions Act 1990 as amended by the Trade Unions (Amendment) Act 2005 which brings back the voluntary principle as it remained in the pre-1978 period to trade union membership in Nigeria. It states thus:

Notwithstanding anything to the contrary in this Act, membership of a trade union by employees shall be voluntary and no employee shall be forced to join any trade union or be victimized for refusing to join or remain a member.

The approach of the Trade Unions Act 1990 as amended by the Trade Unions (Amendment) Act 2005 is in consonance with what obtains in some other countries. For instance, section 71(b) of the Industrial Relations Act⁵⁶ 1972 of Trinidad and Tobago guarantees the right not to be a member of any trade union or other organisation of workers or to refuse to be a member of any particular trade union or other organisation of workers. Additionally, in the case of *Young, James and Webster v The United Kingdom*⁵⁷ the right to freedom of association was construed by the European Court to include the right

⁵² See *Aero Contractors Company of Nigeria Ltd v National Association of Aircrafts Pilots and Engineers*, see above note 50.

⁵³ See Labour Act (Act No. 651) of Ghana, 2003, section 80 (1).

⁵⁴ See Tanzanian Employment and Labour Relations Act (Act No.6) of 2004, section 46 (1)(d).

⁵⁵ Quoted by Y Noah, 'Trade Union Movement and Workers Emancipation within the Context of Contrasting Political Climate in Nigeria'. <<http://www.unilorin.edu.ng/publication/union.htm>> accessed 28th December 2015.

⁵⁶ Cap 88: 01 Laws of Trinidad and Tobago 1972.

⁵⁷[1981] IRLR 408.

to choose not to belong to a trade union. It is submitted that sections 3(2) of the Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Decree 1978 and 3(2) and 5(4) of the Trade Unions Act 1990, to the extent that these sections militate against the enjoyment of the fundamental right to freely associate with others and form or join or belong to a trade union for the protection of a citizen's interests, are invalid on ground of inconsistency with sections 37 and 40 of the 1979 and 1999 Constitutions, respectively and therefore void. If authority is sought for this submission, the insightful provisions in section 1 (3) of the 1979 and 1999 Constitutions would suffice. A wise admonition to make here is that due cognisance must be given to the import of the provisions of chapter IV of the 1979 and 1999 Constitutions in which sections 37 and 40 are a part, respectively. Indeed, they are sacrosanct, hence; the procedure for the amendment of the chapter is tedious and difficult as spelt out in section 9(3) of the 1979 and 1999 Constitutions. Nigeria must apply, and show respect for, the Constitution. The writer recalls here the provisions of section 1 (1) and (3) of the 1979 and 1999 Constitutions.

Fourth, section 3 of the Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Decree 1978 and sections 3 and 5 of the Trade Unions Act 1990 conflict with the provisions of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act⁵⁸ 1983. Article 10 (1) of the

Act, which guarantees the right to free association is mandatory with the compulsory 'shall'. It states thus: 'every individual shall be entitled to free association provided he abides by the Law'. This implicates that citizens of Nigeria are free to associate with others to form a trade union, among other things, for the protection of their interests provided they abide, for example, by the law on strike which prescribes the procedure to be followed in the settlement of trade disputes before any strike can take place.⁵⁹ Article 10(2) of the Act above is to the effect that no person shall be compelled to join or belong to or remain a member of a trade union. To the extent that the sections above militate against the enjoyment of the fundamental right to free association with others and join or belong to or form a trade union for the protection of a citizen's interest, they are in conflict with Article 10(1) and (2) of the Act. As already stated, where there is a conflict between a statute with international flavour and an ordinary statute in Nigeria, the provisions of the former would prevail over those of the latter for the simple reason that it is presumed that the Legislature does not intend to breach an international obligation. The Act is a statute with international flavour and therefore the provisions of Article 10 of the Act prevail over those of the Trade Unions Act 1973 as amended by Trade Unions (Amendment) Decree 1978 and Trade Unions Act 1990 above as the latter statutes are ordinary statutes in Nigeria.

Lastly, there is nothing reasonably justifiable in a democratic society neither in the interest of

⁵⁸ Act No 2 of 1983. It later became Cap10 LFN 1990 and now Cap A 9 LFN 2004. The Act came into force on 17 March 1983.

⁵⁹ See for example, Trade Disputes Act Cap T8 LFN 2004, sections 4 -18.

public order nor in the interest of defence, public safety, public morality and public health in preventing the proliferation of trade unions on the ground that a trade union exists in the work place which represents or caters for the interests of those workers seeking to register their own trade union. It is submitted that the decision of the Supreme Court of Nigeria that section 3(2) of the Trade Unions Act as amended by the Trade Unions (Amendment) Decree 1978 (now section 3(2) of the Trade Unions Act 1990) did not contravene section 37 of the 1979 Constitution (now section 40 of the 1999 Constitution) and that it was a law reasonably justified in a democratic society is erroneous. The Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Decree 1978 was certainly not for the maintenance of public order as the apex court seemed to have held.

A note worthy point is that the ‘interest of defence’ comes into play especially during war times.⁶⁰ It must also be interpreted to include ‘national security’.⁶¹ In the Nigerian case of *Dokubo Asari v Federal Republic of Nigeria*,⁶² which related to a charge for treasonable felony under Nigerian criminal law, the court stated that where national security was threatened, or there was the likelihood of it being threatened, human or individual rights would take second place, and must be suspended till national security could be protected or well taken care of. It has been argued elsewhere⁶³ that:

The phrase public safety, public order, public morality or health mean the same thing: the rights of other members of the public to conducting living. To that extent, therefore, the phrase should be interpreted together with paragraph (b), which talks of ‘protecting rights and freedoms of other persons’.

It can be argued that the connection between the restriction imposed under section 3(2) of the Trade Unions Act 1973 as amended by Trade Unions (Amendment) Decree 1978 and public order is not proximate or direct. Put differently, the prevention of proliferation of trade unions is not proximate or direct to public order. If the reverse was the case then the Nigerian Companies and Allied Matters Act⁶⁴ 1990 would not have allowed any two or more persons to form a company in Nigeria.⁶⁵ A germane question to ask here is: did the military authorities promulgate a law to prevent the proliferation of companies in Nigeria in the interest of public order? The answer is in the negative. The fact is that companies in Nigeria are unlike the trade unions that are often militant, noisy, always criticising the economic policies of governmental authorities, embarking on incessant strikes at the slightest provocation by the employers of their members and very difficult to be controlled by the military authorities; hence, no such law was promulgated by them.

⁶⁰ S Tar Hon, *Constitutional Law and Jurisprudence in Nigeria* (Port-Harcourt: Pearl Publishers, 2004) 144.

⁶¹ *Ibid.*

⁶² (2007) 30 Weekly Reports of Nigeria 1.

⁶³ Tar Hon, see above note 61.

⁶⁴ Companies and Allied Matters Act Cap 59 LFN 1990 (now Companies and Allied Matters Act Cap C 20 LFN 2004).

⁶⁵ See Companies and Allied Matters Act 2004, section 18.

Chianu, for one, argues that a restriction should be held to be in the interest of the public order only if the connection between the restriction and the public order is proximate and direct.⁶⁶ The learned writer concludes that indirect, far-fetched or unreal connection between the restriction and public order would not fall within the purview of the expression in the interest of public order in section 45(1) of the 1999 Constitution.⁶⁷

The phrase 'reasonably justifiable' means reasonable within a democratic society. In the Indian case of *State of Madras v G Row*,⁶⁸ the Indian Supreme Court held that though no abstract standard or general pattern of reasonableness can be laid down, the nature of the right infringed, the underlying purpose of the restrictions, the extent and urgency of the evil sought to be remedied, disproportion of the imposition and the prevailing conditions at the time must be taken into consideration. Put in another words, the history of the law sought to be impugned, the circumstances surrounding its enactment, its object and the evil it was aimed at preventing must be considered in reaching a conclusion.⁶⁹

Hassan argues that the state must establish that the interference with the freedom of fundamental human rights was prescribed by law.⁷⁰ In addition to this, according to the learned author, the state must show that the interference was 'necessary' in a democratic society.⁷¹ In applying this test, the courts have developed the following principles:⁷²

- i. The adjective 'necessary' is synonymous neither with 'indispensable' nor with the lower test of 'reasonable' or 'desirable'. What the test connotes is a requirement that the state establishes a pressing social need for the interference.
- ii. Therefore, it is for the courts to assess whether an interference with the freedom of fundamental human rights exceeds the limit and the necessity for restricting them must be convincingly established.

It is submitted that the Nigerian state had not established a pressing social need for the interference with the right of every person to associate freely with others in order to form a trade union for the protection of his interests in the two cases above. Of course, the interference in the instant cases exceeds the limit as can be discerned from sections 37 and 40 of the 1979 and 1999 Constitutions, respectively. Nigeria must apply, and show respect for, the Constitution.

The writer recalls here the provisions of section 1 (1) and (3) of the 1979 and 1999 Constitutions. Additionally, the Nigerian state had not convincingly established the necessity for restricting the right above in the two cases above.

⁶⁶ E Chianu, *Employment Law* (Akure: Bemico Publication Nigeria Ltd. 2004) 274.

⁶⁷ *Ibid.*

⁶⁸ *State of Madras v G Row* [1952] All India Reports 196, 199-200 or Supreme Court Reports 597: <<http://indiankanooc.org/doc/554839/>> accessed 28th December 2015.

⁶⁹ See *State v Ivory Trumpet Publishing Ltd* (No.2) [1983] 1 Nigerian Criminal Reports 203, 207 where the court considered the Indian

case of *Virendra v Punjab* [1958] Supreme Court Reports 308. See also *Inspector General of Police v All Nigeria Peoples Party* and 11 Others, see above note 34, 484.

⁷⁰ Hassan, see above note 9, 105.

⁷¹ *Ibid.*

⁷² Quoted in *Ibid.*, 105-106

The writer does not consider anything fundamentally wrong with the proliferation of trade unions as it is healthy for Nigeria's nascent democracy. Going by section 14(1) of the 1979 and 1999 Constitutions, the Federal Republic of Nigeria shall be a state based on the principles of democracy and social justice. Trade unions like political parties are essential organs of the democratic system. Indeed, they are organs of socio-economic discussion and of formulation of ideas, policies and programmes, especially on the social and economic well-being of workers and the citizenry in general.

A noteworthy point here is that a trade union is principally formed for collective bargaining.⁷³ This can be defined as: '...the process under which rules which will govern employment, wages and conditions of employment are negotiated between employers or association of employers and an organisation of workers or an organisation representing workers'.⁷⁴ Negotiation or dialogue is certainly the hallmark of democracy. Without doubt, the plurality of trade unions widens the channel of labour discussion and discourse engenders plurality of labour issues, promotes the formulation of competing ideas, policies and programmes and provides the workers with a choice of forum for participation in governance whether at the level of the corporation or in the nation's governance, thereby ensuring the reality of government by discussion which democracy is all about in the final analysis.

It is submitted that if the members of a trade union have exceeded their bounds or limits in terms of embarking on strike contrary to the statutes on strike the criminal law is there to take care of them.⁷⁵ The provisions of the Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Decree 1978 and Trade Unions Act 1990-relating to registration of a trade union cannot be used as a camouflage to stifle the citizens' fundamental right to freedom of association under the guise of maintaining public order. To do so, would be undemocratic and against social justice. The right to peaceful assembly and association as guaranteed under sections 37 and 40 of the 1979 and 1999 Constitutions, respectively is to enable citizens, for example, demonstrate and protest on matters of public concern as in the January 9-16 2012 mass protest of workers and other Nigerians under the leadership of the NLC and Trade Union Congress over the hike in fuel price from 65.00 naira (₦) to ₦141.00 per litre on January 1, 2012.⁷⁶ It is a right which is in the public interest and that which individuals must possess and which they should exercise without impediments provided no wrongful act is done.⁷⁷ Nigeria must apply, and show respect for, the Constitution. The writer recalls here the provisions of section 1 (1) and (3) of the 1979 and 1999 Constitutions. Perhaps, if the learned justices of the Supreme Court of Nigeria, had adverted their minds to the foregoing points they would have come to a different conclusion in the two cases above.

⁷³ See section I (1) of the Trade Unions Act, 1990 (now section 1(1) of the Trade Unions Act, 2004).

⁷⁴ Ogunniyi, see above note 36, 276.

⁷⁵ Note that both sections 18 (2) of the Trade Disputes Act Cap T8 LFN 2004 and 30 (7) of the Trade Unions Act 1990 as amended by the Trade Unions (Amendment) Act 2005 make it a crime to embark on strike contrary to the provisions of both legislation.

⁷⁶ Note that the mass protest forced the Federal Government of Nigeria to reduce the pump price of fuel to ₦97.00 per litre. See *The Guardian* (Lagos, 17th January 2012) 1.

⁷⁷ *Inspector General of Police v All Nigeria Peoples Party and 11 Ors.*, see above note 34, 470-471.

2. Observations

It is clear from the foregoing contemporary discourse on derogation from fundamental rights in Nigeria that the 1999 Constitution in its section 45(1) (a) allows the law-making authorities in Nigeria to make laws which derogate from the fundamental rights guaranteed to all citizens of Nigeria under sections 37, 38, 39, 40 and 41 provided they are reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health. This is in tune with the practice in some other countries such as Zimbabwe, India and South Africa. It is observable that the provisions of section 45(1)(a) above is being misused by the law-making authorities in Nigeria to make laws which provide restrictions on the fundamental rights guaranteed to all citizens of Nigeria under sections 37,38,39,40 and 41 of the 1999 Constitution for the selfish or vested interest of Nigerian leaders instead of the interest of the public or good of all Nigerians as a whole. The resultant effect is that some of the fundamental rights guaranteed to all citizens of Nigeria under the sections above have been unduly eroded or taken away under the guise that the laws enacted by the law-making authorities were reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health. A good example of such laws is the Public Order Act 1990 which in its sections 1(2),(3),(4),(5) and (6),2,3 and 4 require police permit before rallies are held in Nigeria. The Criminal Code Law of Anambra State is also another

note worthy example of such laws. Its section 51(1)(c) makes it an offence for any person to publish any seditious publication against the person of the Governor or Government of Anambra State. This unsatisfactory development is attributable mainly to the fact that the 1999 Constitution is silent on the meaning of the elastic terms-defence, public safety, public order, public morality or public health.

It is regretful that the Nigerian Courts have not been very helpful in dealing decisively with the problem above. The courts in Nigeria, in many of their decisions, have failed to declare void some of the laws made pursuant to section 45 (1) (a) above on ground of inconsistency with the provisions of the 1999 Constitution which guarantee to all citizens of Nigeria the fundamental rights contained in sections 37, 38,39,40 and 41 of the 1999 Constitution. This is attributable, among other things, to the fact that many of the judges in Nigeria are oblivious or unaware of the import and purport of the fundamental rights guaranteed under chapter IV of the 1999 Constitution as well as the fact that many of the judges in Nigeria belong to the ruling capitalist class. These judges administer justice according to the capitalist jurisprudence.⁷⁸ Infact, they exist to ensure that everybody conforms to the requirements of bourgeois law which seeks to preserve and defend the prevailing capitalist relation.⁷⁹The problem of Nigerian law-making authorities enacting laws which derogate or take away the fundamental rights guaranteed to all citizens of Nigeria in sections 37,38,

⁷⁸ O Oni, *Towards a Socialist Political System for Nigeria* (Ibadan: Progress Books Nigeria Ltd. 1986), quoted in A.E Abuza, 'The Problem of Vandalization Oil Pipelines and Installations in Nigeria: A

Sociological Approach' (2006) 2 (2) *Delta State University Law Review- Environmental Law Edition* 276.

⁷⁹*Ibid.*

39, 40 and 41 above for the selfish or vested interest of Nigerian leaders under the guise of making laws reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health must be given the highest consideration it deserves by the government so that it may not be accused of paying lip service to the issue of promoting respect for the fundamental rights entrenched in the Nigerian Constitution for the benefit of all citizens.

A continuation of the problem above poses a grave danger to the survival of Nigeria's nascent democracy. It has already impacted adversely on the country's system of democracy or democratic governance. Of course, the problem if not quickly arrested or check-mated has capacity to impact negatively on political stability. Instability in Nigerian politics would encourage the military to foray into politics and take over political governance of Nigeria like what transpired recently in Burkina Faso,⁸⁰ thus bringing an end to democratic governance and constitutionalism and in its stead enthrone a system of totalitarian or despotic rulership in Nigeria devoid of respect for the rule of law and or the fundamental rights of citizens. This would constitute a serious setback on the country's progress and march toward sustaining the democratic culture and ideals and thus not augur well for Nigeria's system of democratic governance.

3. Recommendations

The bane of statutes is an inadequate enforcement of these statutes. Fundamental right statutes are no exceptions. A critical recommendation that is worthy of note is that failure to enforce statutory provisions on the fundamental rights guaranteed to all citizens of Nigeria should be seriously and urgently tackled by the government. This is imperative so as not to create the impression that the government itself is not concerned with addressing the problem of law-making authorities in Nigeria making laws which erode or take away the fundamental rights guaranteed to all citizens of Nigeria in sections 37, 38, 39, 40 and 41 of the 1999 Constitution for the selfish or vested interest of Nigerian leaders rather than in the interest of the public or good of all Nigerians as a whole. Among other critical recommendations that are worthy of note are:

- (i) The 1999 Constitution should be amended by the National Assembly of Nigeria to define the elastic terms-defence, public safety, public order, public morality and public health in relation to the restrictions envisaged by the framers of the Nigerian Constitution so as to guard against unforeseeable and unreasonable interference with the fundamental rights guaranteed to all citizens of Nigeria in sections 37,38,39,40 and 41 of the 1999 Constitution.⁸¹ In the alternative, the National Assembly of Nigeria should amend the 1999 Constitution to expunge these elastic terms as they are being misused by the

⁸⁰ Note, however, that General Gilbert Diendere, the military head of state, and other soldiers were forced to step down by the international community. <<http://www.theguardian.com/world/2015/sep/25/Burkina-Faso-foiled-military-coup>> accessed 11th October 2015.

⁸¹ AE Abuza, 'Lifting of the Ban on Contracting out of the Check-off System in Nigeria: An Analysis of the Issues Involved' (2013) 42 (1)

Nigerian law-making authorities to make laws for the protection of the selfish or vested interest of Nigerian leaders rather than in the interest of the public or good of all Nigerians as a whole.

- (ii) The government of Nigeria should organise public lectures and other public enlightenment programmes to sensitise members of the legal profession, including judges, members of the Legislature and Executive as well as other Nigerians on the import and or purport of the fundamental rights guaranteed under the 1999 Constitution. The decision of the Nigerian Court of Appeal in *Mallam Abdullah Hassan and Four Others v Economic and Financial Crimes Commission and Three Others*⁸² is very instructive here. The Court of Appeal declared that fundamental rights are rights without which neither liberty nor justice would exist. It went further to declare that these fundamental rights stood above the ordinary law of the land and in fact constituted a primary condition to civilized existence. The appellate court concluded that it was the duty of the court to protect these fundamental rights.
- (iii) Nigeria should emulate the approach in some other countries like Botswana and the USA. To be specific, in the American case of *Shetton v Tucker*⁸³ the United States' Supreme Court observed that:

Even though the Government purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties.

4. Conclusion

This article has undertaken a contemporary discourse on derogation from fundamental rights in Nigeria under the 1999 Constitution of Nigeria. It has identified short-comings in the various laws. It has also discussed the effects of the Nigerian law-making authorities making laws which erode or take away the fundamental rights guaranteed to all citizens of Nigeria in sections 37, 38, 39, 40 and 41 of the 1999 Constitution for the selfish or vested interest of Nigerian leaders instead of the interest of the public or good of all Nigerians as a whole on Nigeria's system of democracy or democratic governance. It has equally highlighted the practice in some other countries and made recommendations, which if implemented would end the problem of Nigerian law-making authorities hiding under section 45(1) (a) of the 1999 Constitution to make laws for the selfish or vested interest of Nigerian leaders instead of the interest of the public or good of all Nigerians as a whole.

⁸² [2014] 1 NWLR (part 1389) 607, 610.

⁸³ 364 US 479, 488 [1960], quoted in *Inspector General of Police v All Nigeria Peoples Party and 11 Ors.*, see above note 77, 498.

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