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# A Discourse of the Role and Impacts of Nigerian Judiciary in Enhancing National Security

by

Fagbemi, Sunday Akinlolu\*

## Abstract

This paper discusses the role and impacts of the Nigerian Judiciary in enhancing National Security. The pertinent questions which the paper resolves are: How do the judiciary function enhances national security? Is there any different between the role performs by the judiciary in the period of emergency and at peace time? What impacts has Judiciary made in maintaining the Nigerian Internal Security? The paper adopts the analytical method to examine the position of judiciary as the third arm of government. The paper recommends independence of judiciary to cope with the myriad of security challenges in Nigeria.

**Keywords:** Role, Impacts, Nigerian Judiciary, Enhancing and National Security

## 1. Introduction

Judiciary is the court system of a country.<sup>1</sup> It is the branch of Government vested with judicial powers and regards as the third arm of government. The primary role of judiciary is to interpret laws enacted by the Legislature and applies the existing laws to individual cases to determine any question as to the civil rights and obligations between persons, or between government or authority and to any person in Nigeria. In simple terms, judiciary is 'the court and all those who works in the vine yard of justice.' The best way to determine the excellence of a governance is the efficiency of its judicial system.<sup>2</sup> While describing the role of judiciary, Appadorai,<sup>3</sup> opined that: 'for nothing more nearly touches the citizen than his knowledge that he can relies on the certain, prompt and impartial administration of justice. For effective administration of justice in a democracy, the Judiciary has a definite and decisive role to play. It has constitutional right to settle legal disputes and administer justice impartially. All courts irrespective of type and jurisdiction are presided over by Judges.'<sup>4</sup>

The judiciary occupies a very important, significant and strategic position in Nigerian State.<sup>5</sup> A good independent, upright and incorruptible judiciary precipitates happiness and orderliness of

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<sup>1</sup> Yusuf Ali, 'The Evolution of Ideal Nigerian Judiciary in the New Millennium' [2001] (1) (1) *Bar Journal*, 39-56: 40; Enefiok Essein, and others. 'The Nigerian Judiciary since Amalgamation: Strengths and Weaknesses.' Being paper presented at 47th Annual Conference of the Nigerian Association of Law Teachers (NALT) held on 2<sup>nd</sup> – 6<sup>th</sup> June, 2014 at Ebonyi State University, Abakaliki, Nigeria, 215-233: 215.

<sup>2</sup> Section 6 of the Constitution of Federal Republic of Nigeria 1999 (CFRN) (as amended); Maduekwe Vincent Chucks and Ojukwu Uche Grace and Agbata Ifeanyi. 'Judiciary and the Theory of Separation of Powers in Achieving Sustainable Democracy in Nigeria (The Fourth Republic)' [2016] (4)(8) *British Journal of Education*, 84-104; Obikeze, S.O and Obi, E. A. *Government and Politics of Nigeria: The Struggle for Power in African State Onitsha* (Book Point Ltd. 2003) 23

<sup>3</sup> A. Appadorai, *The Substance of Politics*. (Delhi: Oxford University Press. 1974) 567

<sup>4</sup> A Judge is a public officer appointed or elected to hear and decide legal matters in court'. See Bryant A. Garner. *Black's Law Dictionary*, (8<sup>th</sup>edn, USA: West Publishing Company, 2004) 857.

<sup>5</sup> Maduekwe Vincent Chucks and others(n 1)95

the state. Judiciary is the bastion of the people's hope, as it offers a formidable panacea to the sufferings and predicament of the masses. It is the desire of the general public that justice must be done at all times and be seen to have been done.<sup>6</sup> A bad or corrupt Judiciary on the other hand is the bane of the Nigerian society and democracy.<sup>7</sup> It is of paramount importance to understand that the Judiciary represents an indispensable institution in any democratic state. The Judiciary is the antithesis of oppression, repression and anarchy. Everybody - both the mighty and lowly look up to the Judiciary to obtain justice in any given dispute.<sup>8</sup>

The questions which this paper seeks to answer are: How do the judiciary function enhances the national security? Is the judiciary role the same in the time of war/emergency and at peace period? And what impacts has Judiciary made in the maintenance of Nigeria internal security? This paper is divided into five sections, following this introduction, the paper highlights the history of judiciary in Nigeria. Section three examines the independence of judiciary as the third arm of government. In section four, the paper discusses the role of judiciary and its impacts in enhancing national security. The paper concludes with recommendations.

## 2. The History of the Judiciary in Nigeria

A discourse on the Judiciary is a discourse of the arm of government concerned with dispensation of justice. In Nigeria, this includes the Courts system, the judges, magistrates, khadis and members of customary courts.

The history of Nigerian Judiciary can be gleaned from four distinct era: the period before 1842, 1845-1913, 1914 to 1953 and 1954 to date.<sup>9</sup> Prior to the advent of the British Colonial rule in Nigeria, the natives had their own system for the administration of justice in different societies comprising Nigeria. Although, the system was not as sophisticated as the British system, however, they were designed to ensure the stability of society and maintenance of social equilibrium among the citizens. The administration of justice in traditional society was not conducted in the courts in the British context with all its paraphernalia of a formally designed building, punctuated with an aura of legalism and juristic style. On the contrary, there were rudimentary, and to a large extent, transient arrangements in specific places, particularly the family house, if it was family feud, or in the village square or community hall if the litigation involved a wider spectrum of the community.<sup>10</sup>

The above was the position before the arrival of British colonisation. On arrival, the British initially reacted positively to the administration of justice under customary law. They recognised the traditional system outside the framework of English law and jurisprudence. Hence, the traditional Rulers and Chiefs continued to preside over Native Courts. In the northern areas of the country there were Islamic religious courts presided over by persons learned in Islamic law.<sup>11</sup> However, the advent of the British government increased the volume of trade and commerce. The territory no more remained a local area with little or no commercial life. The Royal Niger Company and other commercial enterprises changed the commercial life of the people and this to some extent, influenced the establishment of the British courts in Nigeria. With the advent of the colonialists in the Southern part of Nigeria between 1843 -1913, the British through a combination of Foreign Jurisdiction Act of 1843 and 1893 established law under which various courts were set up. Between 1854 and 1886, there were Courts of Equity

<sup>6</sup>*CAN v Lamido & Ors* [2012] 4 SCM 1 at 24-25

<sup>7</sup>*Eriobuna v. Obiorah* [1999] 8 NWLR (Pt.616) 622 at 630; Hon. Justice Amina A. Augie JCA. 'The Bar and the Bench: Twin Pillars Upholding the Rule of Law in Nigeria' (Thursday, 1<sup>st</sup> June, 2006). After Dinner Speech at the Nigeria Bar Association (NBA) Ibadan Branch held in Ibadan 140, 181.

<sup>8</sup>Eso, H, 'Nigerian Leaders and the Rule of Law' [2003] <<http://www.kwenu.com/publications/hankeso/rulelaw.htm>> accessed 20 March 2017

<sup>9</sup>*Ibid*

<sup>10</sup>Niki Tobi, *Sources of Nigerian Law*. (Lagos: MIJ Professional Publishers Limited, 1996) 3-4.

<sup>11</sup> *Ibid*; Elias Teslim, *The Nigerian Legal System*, (2<sup>nd</sup> Ed, 1963) 42.

established by the British in the Southern part of Nigeria particularly Brass, Benin, Okrika and Opobo.<sup>12</sup>

In 1863, by Ordinance No. 11 of 1863, the Supreme Court of Lagos was established, it had both civil and criminal jurisdictions. By 1900, the Supreme Court Proclamation Order No. 6, established for the first time the Supreme Court in the Southern protectorate of Nigeria to exercise same powers and jurisdiction as were vested in Her Majesty's High Courts of Justice in England. Thus, the common law, the doctrines of equity and statutes of general application in England were to be administered in the courts in so far as local circumstances permitted. Sharia Law in all its ramifications was also in operation in most parts of Northern protectorate. By the Native Courts Proclamation Order of 1900, a new system of Native Courts for the territory presided over by an Alkalis and Emir was established. It is this arrangement that endured until 1914 when the Northern and Southern Protectorates of Nigeria were amalgamated.

Upon amalgamation in 1914, Provincial Courts were abolished and in its place were established High Courts which consisted of the Chief Judge, Judges and Assistant Judges. Below these High Courts were Magistrates Courts, then Native Courts which remain at the bottom of the judicial hierarchy. The Supreme Court exercised appellate jurisdiction over the High Courts. Between 1943 and 1954, appeals from the Supreme Courts went to the West African Court of Appeal (WACA), while appeal from WACA went to the Privy Council. In 1954, the Nigerian Federal Supreme Court was established and was presided over by the Chief Justice of the Federation. From then, appeal from the Federal Supreme went directly to the Privy Council. Each region comprised of the Federation of Nigeria at the period had a High Court with a Chief Justice. Appeal from each of the regions High Courts lay to the Federal Supreme Court.

When in 1967, Nigeria became a Federation of 12 States, each States had its own state judiciary with State Chief Justice. Under the present 1999 Constitution, the Courts constitutionally recognised and vested with judicial powers are: the Supreme Court, the Court of Appeal, the Federal High Courts, the High Court of the Federal Capital Territory Abuja, The National Industrial Court, a High Court of a State, the Customary Court of Appeal, Abuja, the Sharia Courts of Appeal, Abuja, the Customary Court of Appeal of the States and the Sharia Courts of Appeal of the States.<sup>13</sup>

### **3. Independence of the Judiciary as the third arm of Government**

Independence of the Judiciary as a concept has become an international norm with different degrees of adherence.<sup>14</sup> The concept has a long history and it was associated with growing trends of radicalism rather than the development of democratic governance in the ancient period. The new role the Judiciary has acquired under modern constitutional democracy has made the concept of the Independence of the Judiciary to have risen to unprecedented prominence. In the common law tradition, the concept of the Independence of the Judiciary is credited to the British system of justice which is regarded as the cradle of the Independence of the Judiciary.<sup>15</sup> The concept first developed as a fortress against the seemingly unlimited powers of the king who used them capriciously.<sup>16</sup> The English Courts were one time the kings courts, serving at the good pleasure of the Crown and subject to dismissal without cause. Things began to change as the idea of individual rights and the rule of law ensued, culminating into the Magna Charta, 1215. This development showed a manifest need for courts independent of the King, in order to enforce those individual rights.<sup>17</sup>

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<sup>12</sup>EnefiokEssein and others (n 8), 217

<sup>13</sup> Section 6 (5) (6) 1999 CFRN

<sup>14</sup>Maduekwe Vincent Chucks and others (n 1)

<sup>15</sup>*Ibid*

<sup>16</sup>*Ibid*

<sup>17</sup>*Ibid*

According to Igbanugo,<sup>18</sup> the most important element of judicial reform and anti-corruption is the independence of the judiciary. This also includes independence from the executive and legislative branches of government and freedom from political and social influences. Judicial independence is central to maintaining administration of justice, which is a cornerstone of modern democracy. The constitutions of the majority of Sub-Saharan African states mandate judicial independence. For example, Article 78 of the Constitution of Namibia provides that:

The Courts shall be independent and subject only to this Constitution and the law. No member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Courts may require to protect their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law'.<sup>19</sup>

Despite these assertions of judicial independence, many Sub-Saharan African countries face a judicial system constrained by the influence of other institutions of government and society. A major factor inhibiting judicial independence is the control of the executive branch over elements such as the appointment, promotion, discipline and removal from office of judicial officers.<sup>20</sup> In Nigeria, judicial officers are appointed by the Chief Executives of the states – the President or the Governor of a State.<sup>21</sup> The most significant innovation of the 1999 Constitution on appointment and discipline of judicial officers was the establishment of the National Judicial Council (NJC) which plays a pivotal role in the selection, appointment, discipline and removal from office of judicial officers.<sup>22</sup> For the purpose of appointment, the Constitution established Judicial Service Commissions for each State comprising the Federal Republic of Nigeria<sup>23</sup> and the Judicial Service Committee for the Federal Capital Territory.<sup>24</sup>

To guarantee judicial independence and free judicial officers from the influence of the Executives in Nigeria, the 1999 Constitution further provides for the mode of appointment of judicial officers. For instance, by virtue of sections 231 (1) (2) and 238 (2) of the 1999 Constitution, the appointment of Chief Justice of Nigeria (CJN), Justices of the Supreme Court and Court of Appeal is done by the President only upon the recommendation of the NJC. In the case of the CJN and President of the Court of Appeal, their appointment is subject to confirmation by the Senate. Similarly, at the state level, the appointment of a judge of the High Court by State Governor is upon the recommendation of the NJC while the appointment into

<sup>18</sup> Herbert A. Igbanugo, 'The Rule of Law, Judicial Corruption, and the Need for Drastic Judicial Reform in Sub-Saharan Africa's Nation' [2013] (42)(3) *International Law News (ILN)* 67-90: 70; Akinwumi, A.M. *Towards an Independent and Effective Judiciary in Africa*. Speech at African Development Forum, Governance for a Progressing Africa, Addis Ababa (Oct. 11–15, 2004).

<sup>19</sup> See also Article 125 of the Constitution of Ghana and Article 128 of the Constitution of Uganda contain similar provisions. Although, there is no such express provision in the Constitution of Nigeria, however, the demarcation of powers of the Federal Republic of Nigeria under sections 4, 5 and 6 of the 1999 Constitution is an indication that each power is independent of each other.

<sup>20</sup> Joshua, A.S. 'The Provision of 1999 Constitution of Nigeria on Appointment, Discipline and Removal of Judicial Officers and Implications for an Effective and Independent Judiciary' [2014] (28) *Journal of Law, Policy and Globalisation*, 170-174: 171; See U.N. Econ. Comm'n for Africa, African Governance Report 2, (2009) <[http://uneca.africa-devnet.org/files/african\\_governance\\_report\\_ii.pdf](http://uneca.africa-devnet.org/files/african_governance_report_ii.pdf)> accessed 20 March 2017, 130–133

<sup>21</sup> Akinola Aguda, *Understanding the Nigerian Constitution of 1999* (Lagos: MIJ Pub Ltd. 2000) 97

<sup>22</sup> Under the erstwhile 1979 Constitution, judicial officers were appointed by the State Governor on the recommendation of the State Judicial Commission which consisted mainly of the nominees of the Governor, thus making it possible for a Governor to influence the appointment of his loyalists as judges. See Taiwo Osipitan, 'Safeguarding Judicial Independence under the 1999 Constitution' in Akinseye-George Yemi and Gbadamosi G (eds) *The Pursuit of Justice & Development: Essays in Honour of Hon. Justice M.O. Onalaja* (Abuja: Diamond Publication Limited, 2004) 17

<sup>23</sup> Section 197 CFRN

<sup>24</sup> Section 304 CFRN

office of State Chief Judge is subject to approval of the State House of Assembly.<sup>25</sup> Thus, the power to appoint a judge is no longer left solely in the hands of Executive.<sup>26</sup>

The NJC is further charged with responsibility to discipline erring judicial officers by making recommendation to either the President or State Governors for removal from office of Judges.<sup>27</sup> The establishment of the NJC has enabled the Judiciary in Nigeria to check the excesses of both the Legislature and the Executive arms of government and thereby expressed their independence. For instance, the executive can no longer unilaterally remove a judge without recommendation from the NJC. Thus, where State Governors in Nigeria invoked section 153 to remove the Chief Judges of their States, the Judiciary intervened in the matter to correct the executive lawlessness.<sup>28</sup> Few examples suffice, in October 2004, the Oyo State Government removed the Chief Judge: Justice Isaiah Olakanmi based on petition by other judges of the State High Court. The Federal High Court nullified the removal as it constituted executive lawlessness by not referring the matter to NJC. In Sokoto State, the attempted removal of the Chief Judge through the State House of Assembly was scuttled by the Federal High Court. In similar vein, when the Governor of Kwara State sent a letter to the House of Assembly to remove the Chief Judge on various allegations. In spite of the intervention of NJC, the Chief Judge was removed but the Court reinstated her after a protracted litigation. Again, in Oyo State, where the State House of Assembly impeached Governor Rashidi Ladoja without following due process, the Supreme Court held *inter alia* that the impeachment of any State Executive or Federal Executive must comply strictly with sections 143 and 188 of the Constitution respectively. For this reason, the Supreme Court declared the impeachment null and void having failed to comply with section 188 of the 1999 Constitution.<sup>29</sup>

Other innovation introduced to consolidate judicial independence by the 1999 Constitution is financial autonomy. Section 84 (2) (3) (4) and (7) of the Constitution, provides that the remuneration, salaries and recurrent expenditure of the Judicial Officers shall be made a direct charge on the Consolidated Revenue Fund to exclude them from the annual budgetary and appropriation processes and also from the control which those processes give the Legislative and Executive arms of government. The benefit of financial independence is to guarantee financial autonomy to the judiciary.<sup>30</sup> However, in practice, the enforcement of this provisions of the Constitution granting financial autonomy to the Judiciary poses significant challenges particularly in states judiciaries where it is kept more in breach than in observance. Many state governments considers the provision as an affront to their imperial powers and prefer to see the Chief Judges in those states beg for funds to run their offices.<sup>31</sup> Furthermore, to ensure that officers who dispense justice have no interest of any kind in cases that they handle, the presumed independence in terms of judges' appointment is reinforced by the requirement of maintaining independence from the subject matter upon which they are adjudicating. That is, they should

<sup>25</sup> Section 271 (1) and (2) 1999 CFRN

<sup>26</sup> Enefiok Esseien and others (n.8), 221

<sup>27</sup> Akinola Aguda (n 21)

<sup>28</sup> Uwakwe, F. U. 'The Suspension of Former President of the Court of Appeal Justice Ayo Isa Salami: Threat to Independence of the Judiciary' [2013] (6)(2) *Confluence Journal of Jurisprudence and International Law*, 163

<sup>29</sup> See generally Agbonika, J. A. M, and others. 'The Role of Law in Check-Mating Executive Lawlessness from 1999 – 2014. Being paper presented at 47th Annual Conference of the Nigerian Association of Law Teachers (NALT) held on 2<sup>nd</sup> – 6<sup>th</sup> June, 2014 at Ebonyi State University, Abakaliki, Nigeria, 197-214: 208-209.

<sup>30</sup> EnefiokEsseien, 'Judicial Reforms and Democracy in Nigeria' in Enefiok Essien (ed): *Essays in Honour of Professor Peter Umana Umoh* (Lagos: Top Law Publishments Ltd, 2012) 1-28: 5

<sup>31</sup> *Ibid*, 13

have no interest of any kind in the case before them nor must there be the remotest appearance of bias.<sup>32</sup>

From the foregoing analysis, it is certain that the Independence of the Judiciary is at the very heart of the judicial function, it is a cornerstone of any worthwhile legal structure and an essential element of any democratic system of governance that respects the Rule of Law. Independence of the Judiciary is not to serve the Judges but the society. It is the right of the people to have an Independent Judiciary.<sup>33</sup>

#### **4. The Role of the Judiciary and Its Impacts in Enhancing National Security**

The issue of national security is one that has been top on the Nigerian Government's list in recent years. It has become a matter of concern, not only domestically, but also on the international plane. The spate of violence being experienced in many parts of Nigeria has no doubt led to loss of lives and property, costing the nation both human and natural resources. It is therefore worth the effort to look into how judiciary functions toward enhancing national security in the course of their onerous task of administration of justice? of course, there is no single universally accepted definition of 'National Security'. The variety of definitions provide an overview of the many usages of the concept.<sup>34</sup> Harold Brown,<sup>35</sup> defined 'National Security' as the ability to preserve the nation physical integrity and territory to maintain its economic relations with the rest of the world on reasonable term, to preserves its nature, institution and governance from outside and the control its borders. Mayer,<sup>36</sup> on his part, defined national security in terms of national power. He said: 'National security ---- is best described as a capacity to control those domestic and foreign conditions that the public opinion of a given community believes necessary to enjoys its own self-determination or autonomy, prosperity and wellbeing'. In similar vein, Paleri Prabhakara,<sup>37</sup> defined 'national security' as 'the measurable state of capability of a nation to overcome the multi-dimensional threats to the apparent wellbeing of its people and its survival as a nation state at any given time, by balancing all instruments of state policy through governance that can be indexed by computation, empirically or otherwise and its extendable to global security by variables external to it'.

In the main, national security refers to a state where the unity, well-being, values and beliefs, democratic process, mechanism of governance, and welfare, of the nation and her peoples are perpetually improved and secured through military, political and economic resources. In other words, the absence of continuous improvement in the socio-political and economic well-being of the people and states are tagged insecurity. A nation is said to be secured when it does not have

<sup>32</sup>Obokhai L. Obadab and Ojjeifo Eikhenomian, 'Judicial Bias as a Violation of Fundamental Human Right in other Jurisdictions: A Lesson for the Nigerian Judiciary' [2015] (2)(1) *BIU Law Journal*, 611-634:612-613

<sup>33</sup>Widner, J. 'Courts and Democracy in Post-conflict Transition: A Social Scientist's Perspective on the African Case. [2001] (95) (1) *The American Journal of International Law*, 64- 75.

<sup>34</sup>Roman Joseph J, 'Defining national security: the non-Military Aspects, pew Project on America LS task in a Changed World (Pew project series) Council of Law on Foreign Relations 22; Yusuf Ali SAN, 'National Security and Development in Contemporary Nigeria' [2014] (5) *The Lord Justice. Essay in Honour of His Excellency, Prince Bola Ajibola, A Journal of the Law Students' Society, University of Ibadan*, 1-15:2

<sup>35</sup>Harold Brown, 'Thinking about National Security Defence and Foreign Policy' in Watson, Cynthia Ann, *A dangerous World*, (2<sup>nd</sup> Revised Edition, Reference Handbook on contemporary world issues A B C – C L O, 2008) 281; David A. Baldwin, 'The Concept of Security'[1997] (23) *Review of International Studies* 5-26

<sup>36</sup>Mayer Charles, S. 'Peace and Security for the (1980). Unpublished paper for the Mac Arthur Fellowship Program Social Science Research Council 12 June 1990 as quoted in Romm, J.J., "Defining National Security: The non-military aspects" Council on Foreign Relations Press (New York), 1993, 5.

<sup>37</sup>Paleri Prabhakaran, *National Security Imperatives and Challenges* (New Delhi: Tata Mcgraw Hill Pages, 2008) 521; Yusuf Ali SAN (2014) (n 34), 3.

to sacrifice its legitimate interest to avoid war and is able if challenged, to maintain them by war.<sup>38</sup>

Nigeria today can boast of territorial security in the sense that it is fully protected against its neighbours who cannot dream of attacking Nigeria on their own. Such a move would be suicidal. But the country cannot place its national security on the same pedestal as its territorial security.<sup>39</sup> The legal framework for the security of Nigerians is provided for in section 11 of the 1999 Constitution. The section empowers the National Assembly and the State House of Assembly to concurrently make laws for the maintenance and securing of public safety and public order for Nigeria. By section 11 (4) the National Assembly is further empowered to step in and make laws for the maintenance of peace and order in a state in the event the state mechanisms have been grounded, much like the situation in Borno, Yobe and Adamawa States.<sup>40</sup> The implication of these provisions is that Nigerian is conscious and committed to maintain the national security of Nigerians. However, the powers conferred on the Nigerian National Assembly and States House of Assembly to make law for the maintenance and securing public safety and order in Nigeria are not self-executory. Such laws, when made, must be interpreted in the interest of preserving peace and order in the country. For instance, the spate of threats to Nigerian internal security now is the Boko Haram insurgency in the Northern part of Nigeria and activities of other Militancy groups in Niger Delta region of Nigeria.<sup>41</sup> These terrorist groups have not only challenged the security of the Nigerian state but also its unity, territoriality and sovereignty.<sup>42</sup> These diverse security threats have correspondently widened the scope of security management mandates to include, non-state actors, individuals, and international social justice and civil rights movements in achieving national and international peace and security.

Traditionally, under a democratic government, the statutory mandate to provide internal security is given by the government to the Nigerian police and other security and law enforcement agencies while, external security and territorial integrity of the Nigerian state is the statutory responsibility of the military and para-military security and intelligence services. However, the judicial arms of the Nigerian government also play key role in the administration of justice and is today part of security management mandate. The law courts are the final medium to confirm the guilt of security breaches or criminal breach suspects and the judiciary has the mandate to sentence such security threat elements to prison with such sentences as penalties against security or law breaches.<sup>43</sup>

<sup>38</sup> See also Smanrada E. Olarinde and Sesan Fabamise and Ifeoluwayimika Bamidele, 'Militancy, Terrorism and National Security 1914-2014: The Role of Law'. Being paper presented at 47th Annual Conference of the Nigerian Association of Law Teachers (NALT) held on 2<sup>nd</sup> – 6<sup>th</sup> June, 2014 at Ebonyi State University, Abakaliki, Nigeria, 290- 314.

<sup>39</sup> Eloibagere, 'The Mass Media, the Law and National Security: The Nigerian Perspective' [2010] (24)(2) *Kamla-Raj J Soc. Sci.* 121-128: 122

<sup>40</sup> Iyamu-Ojo, E. A. 'Jungle Justice and the Nigerian Security System' [2016] (1)(1) *Niger Delta University Law Journal* 97-117: 102; The Telegraph. 'Nigeria Declares State of Emergency in three states' <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/nig57720/Nigeria-declares-state-of-emergency-in-three-states.html>> accessed 20 March 2017

<sup>41</sup> For instance, Boko Haram is officially known as the "Congregation of the People of Tradition for Proselytism and Jihad" (Jama'atu Ahlis Sunna Lidda 'awatiWal-Jihad). The group emerged as a local Islamic radical Salafis group which transformed into a Sa'afi-Jihadist organisation after 2009. It is based in the Northeastern Nigeria, Northern Cameroon, Niger and Chad, in the area predominated by the Kanuri people. See Cook, D. 'The Rise of Boko Haram' <<http://www.etc.usma.edu/post/the-rise-of-boko-haram-in-nigeria>> accessed 19 March, 2017; Hagler Okorie, 'Combating Boko Haram Insurgency in Nigeria: The Imperative of Adopting the Mechanism of the Rule of Law, [2014] (1)(2) *Ife Journal of International and Comparative Law*, 367-378:374

<sup>42</sup> Ogonnaya Ehigiamusoe, U and Kizito, U, 'Niger Delta Militancy and Boko Haram Insurgency: National Security on Nigeria' [2013] (4)(3) *Global Security Studies* 35

<sup>43</sup> *Ibid*

In pursuance of the above duty, section 6 of the Constitution establishes Courts and vests them with judicial power to administer justice in all civil and criminal matters in which the rights or liability of Nigerians are involved. The role of the judiciary is a consequence of the institutional position of the judicial power *vis-à-vis* the other branches of government. Linked directly to this is the kind of judicial review that courts exercise.<sup>44</sup> Security depends on the formal existence of operational law and state institutions. The pertinent questions then are: what are those values which should be protected by the judiciary to enhance national security? Is the role of judiciary the same in time of emergency/war and time of peace? Or should the role of the judiciary change in wartime?

View holistically, the role of the judiciary in times of emergency entails assessing the functions that courts design for themselves and for the other institutional actors and the degree of intensity according to which they scrutinise the counter-terrorism measures of other branches of government. Understanding the role of the judiciary in times of emergency has broader implications from the substantive point of view of the protection of fundamental rights. The main function of courts in modern democracies is to enforce constitutional liberties.<sup>45</sup> However, the role of judiciary in times of emergency directly affects the degree of rights protection ensured.<sup>46</sup>

In practice, and putting the issue in proper perspective, Reinhardt,<sup>47</sup> talking from his personal experience as a US Judge stated that the role of judges during times of war is essentially not different from the times of peace: it is to interpret the law to the best of its ability, consistent with constitutionally mandated role and without regard to external pressure. However, among the differences in wartime for the judiciary, as against the time of peace is one that involves a principle that is essential to the proper operation of the federal courts – judicial independence. In wartime, the need for judicial independence is at its highest, yet the very concept is at its most vulnerable, imperiled by threats both within and without the judiciary. Externally, there is pressure from the elected branches, and often the public, to afford far more deference than may be desirable to the President and Congress, as they wage wars to keep the nation safe.

Thus, the manner in which the judiciary perform its role in war time is the balancing of government interests-*à-vis* the individual liberty. In the times of national emergency, greater weight is given to the national security rather than individual. As courts have often recognised, the government's interests in protecting the nation's security are heightened during periods of military conflict. Accordingly, particular searches or detentions that might be unconstitutional during peacetime may well be deemed constitutional during times of war – not because the role of the judge is any different, and not because courts curtail their constitutionally mandated role, but because a governmental interest that may be insufficient to justify such deprivations in peacetime may be sufficiently substantial to justify that action during times of national emergency.<sup>48</sup>

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<sup>44</sup>Fabbrini, F. 'The Role of the Judiciaries in Times of Emergency: Judicial Review of Counter-terrorism Measures in the US Supreme Court and the European Court of Justice' [2010] 28 (1) *Yearbook of European Law*, 664-697; Martin Shapiro, 'The European Court of Justice: of Institutions and Democracy' [1998] (32)(1) *Israel Law Review* 3, 5; Grainne de Burca and Joseph Weiler (eds), *The European Court of Justice* (Oxford University Press, 2001); Charles Fried, *Saying What the Law Is: The Constitution in the Supreme Court* (Harvard University Press, 2004); Wojciech Sadurski, "Reasonableness" and Value Pluralism in Law and Politics' in [2008] 13 EUI Working Paper 3; Francis Jacobs, *The Sovereignty of Law* (Cambridge University Press, 2007).

<sup>45</sup> Learned Hand, *The Bill of Rights* (Harvard University Press, 1958); Peter Haberle, 'Role and Impact of Constitutional Courts in a Comparative Perspective' in Ingolf Pernice et al (eds), *The Future of the European Judicial System in a Comparative Perspective* (Nomos, 2006) 65, 71

<sup>46</sup>*Ibid*

<sup>47</sup>Stephen Reinhardt, 'The Judicial Role in National Security,' at a symposium sponsored by the Boston University School of Law on "The Role of the Judge in the Twenty-First Century." delivered on April 22, 2006, 12

<sup>48</sup>Stephen Reinhardt, (n 47)

According to Reinhardt,<sup>49</sup> the judiciary's practice of according the government's interest enhanced weight during wartime is premised, at least implicitly, on the notion that because a state of war is temporary, the curtailment of individual liberty that ensues will also exist for only a limited period.

For example, the fundamental rights of Nigerians to life and personal liberty are constitutionally guaranteed under sections 32 and 35 of 1999 Constitution. However, these rights may be curtailed by an Act of National Assembly during the period of emergency.<sup>50</sup> A good example is the dusk to dawn curfew imposed by the State of Osun Government early March 2017 in the wake of public disturbance resulting into killing of many people and loss of properties worth several million of naira in Ile-Ife and its environs. Save the above instances, Courts must not at any time allow the balancing to turn into a routine licensing of unbridled and unsupervised governmental power.<sup>51</sup>

## 5. Conclusion

National security cannot be attained without a political will to protect sovereignty of a state and independence of the judiciary. There is no doubt that the Nigerian state is in crisis situation and its survival greatly depends on its ability to manage the current challenges. The fight against terrorism, insurgency and national security must start with the executive. However, this battle cannot be won without judiciary support. Thus, this paper starting with the history of judiciary and the evolution of the concept of judicial independence, has discussed the role and impacts of the judiciary in enhancing National Security. Of course, the liberty and security are part of the natural and inherent rights of man, the preservation of which is the aim of all political association. Nevertheless, balancing these rights in times of emergency has traditionally proved to be an extremely difficult task, both for the political branch and for the judiciary. The role of judges in the twenty-first century with respect to national security is not different from the role jurists regularly do – weighing, balancing, exercising independent judgment, and safeguarding the Constitution. In summary, the role of judiciary is to interpret the law to the best of its ability without regard to personal bias or outside pressure in war time and in peace time.

Stemming from the foregoing and to assist the judiciary to discharge its duty during peace as well as war period within the ambit of independence of judiciary require the following: The judiciary should be allowed to bring into book anyone proven to be guilty of sponsoring terrorism, no matter how highly placed. Government should stop paying lip-services to the Independence of the Judiciary. It must realize that the full Independence of the Judiciary is the bedrock of the administration of justice and thus, *sine qua non* for the role of the Judiciary in enhancing national security in Nigeria. Also to maintain its independence, the judiciary should engage in judicial activism in the interpretation of law to checkmate the executive excesses in handling issue of national security and emergency power. Finally, government should, at all levels, fund, equip, train and re-train judicial officers to make them cope with the myriad of security challenges in the nation since security is the bed-rock of economic development.

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<sup>49</sup>*Ibid*

<sup>50</sup> The term '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. See section 45 (3) and 305 of the 1999 Constitution.

<sup>51</sup> Stephen Reinhardt, (n 47)