



NIGERIA POLICE ACADEMY LAW JOURNAL (NPA LJ)



*A Peer-Reviewed
Law Journal of the Faculty of Law
Nigeria Police Academy, Wudil-Kano, Nigeria*

Volume 1, No.2, December, 2015

State of Emergency: A Comparative Study of the Federal Republic of Nigeria and the Arab Republic of Egypt

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Abstract

Certain situations can so threaten the constitutionality of the state that the binding constitutional provisions cannot, or at least, not with the necessary speed handle state of emergencies sufficiently³⁰⁵. The possibility of such situations, thus, requires the adoption of laws on state of emergency, which permit circumvention of such binding provisions effectively.³⁰⁶ The objective of this paper is to examine various ramification of the subject, state of emergency, on a comparative basis- the Federal Republic of Nigeria and the Arab Republic of Egypt. Thus, issues such as the act of proclamation of state of emergency, presidential powers and state of emergency, state of emergency under the 1999 Constitution, the role of the National Assembly in the act of state of emergency, state of emergency and human rights, consequences of proclamation of state of emergency.

Introduction

A state of emergency is a government declaration which usually suspends only few normal functions of the executive, legislative and judicial powers, alert citizens to change their normal behaviours, or order government agencies to implement emergency preparedness plans. It can also be used as a rationale for suspending rights and freedoms, even if guaranteed under the constitution such declaration usually come during a time of natural or man-made

³⁰⁵ Epiphany Azinge (ed). *State of Emergency in Nigeria: Law and Politics* (NIALS, press Lagos, 2013), p. viii.

³⁰⁶ *Ibidem*.

disaster, during periods of civil unrest, or following a declaration of war or situation of international or national armed conflict. Justitium is its equivalent in Roman law³⁰⁷.

In some countries, the state of emergency and its effects on human rights and freedoms and governmental procedure are regulated by the constitution and/ or a law that limits the powers that may be invoked. Rights and freedoms may be suspended during an emergency, for instance, freedom of movement, but not non-derogable rights³⁰⁸.

It has also been described as a situation requiring immediate attention and remedial action. Involves injury, loss of life, damage to the property, or catastrophic interference with the normal activities. A sudden, unexpected, or impending situation³⁰⁹.

State of Emergency in Retrospect: Nigeria

The history of state of emergency in Nigerian politics began in 1962 when large scale irregularities in the country's first real census led to a crises in the Action Group (A-G)- controlled Western Nigeria. On October 1, Prime Minister Balewa in a nation-wide broadcast told the nation that his government had been aware for some time of violent intentions of certain politicians to forcefully overthrow the legitimate government in Nigeria, and that they had been undergoing military training abroad. October 26, the ban on public meetings and processions was extended to cover the whole of western Nigeria. On November 2, 1962, Chief Obafemi Awolowo was formally charged with 26 others (including Anthony Enahoro, Sam Ikoku, Ayo Adebajo, Lateef Jakande, Alfred Rewane, J.S. Tarka, Josiah Olawoyin, Dr. Oladipo Maja, Bisi Onabanjo, James Aluko, e.t.c.) with conspiring to overthrow the Federal Government by force.

³⁰⁷ Material gotten from the internet, www.nairaland.com. 6/9/2014.

³⁰⁸ *Ibidem*.

³⁰⁹ The lawdictionary.org, 6/9/2014.

The next scene was Ekiti State, Western Nigeria. On the 18th day of October, 2006, Chief Olusegun Obasanjo declared a state of emergency in Ekiti state.

The theatre of emergency rule shifted to another state, and so, President Obasanjo on May 18, 2004 declared a state of emergency in Plateau State. Citing section 305 of the 1999 Constitution, like he did in Ekiti state, the president imposed a state of emergency on Plateau State, suspending the elected governor Joshua Dariye and the state House of Assembly in the process. He accused the governor of failing to act to end a cycle of bloodletting violence between the Plateau State's

Muslims and Christian communities that claimed over 2,000 lives since September 2001.

President Goodluck Jonathan also declared a state of emergency in some local governments in Borno and Plateau states in 2011. Then in 2013, 20th May, President Jonathan vide State of Emergency (Certain States of the Federation) Proclamation, 2013, proclaimed a state of emergency in Borno, Yobe and Adamawa states in North- Eastern Nigeria.

Emergency Law in Egypt

Egyptians lived under an Emergency Law (Law No. 162 of 1958) from 1967 to 2012, except for an 18- month in 1980 and 1981. The emergency was imposed during the 1967 Arab- Israeli War, and reimposed following the assassination of President Anwar Sadat. The law continuously extended every three years in 1981. Under the law, police powers were extended, constitutional rights suspended and censorship was legalized. The law sharply circumscribed any non- governmental political activity: street demonstrations, non- approved political organizations, and unregistered financial donations were formally banned. Some 17,000 people were detained under the law, and estimate of political prisoners runs as high as 30,000. The emergency rule expired on May 31, 2012, and was put back in place in January 2013.

The Egyptian presidency announced a one month state of emergency across the country on 14/8/2013 and ordered the armed forces to help the interior ministry enforce security. The announcement made on state television followed deadly countrywide clashes between supporters of deposed Mohammed Morsi and the security forces.

The Act of Proclamation of a State of Emergency

In almost all jurisdictions the world over, the proclamation of state of emergency, the concept of state of emergency is found in the substantive law as it is created by the statute- often times the supreme law, the constitution. And so it is the case in Nigeria. The 1999 Constitution of the Federal Republic of Nigeria (as amended) provides for a declaration of a state of emergency. Section 305 (1) of that constitution provides, *inter alia*:

(1) Subject to the provisions of this Constitution the President may by instrument published in the official Gazette of the Government of the Federation issue a Proclamation of a state of emergency in the Federation or any part thereof.

Subsection (3) of same section provides:

(3) The president shall have power to issue a proclamation of a state of emergency only when-

(a) The Federation is at war;

(b) The Federation is in imminent danger of invasion or involvement in a state of war,

(c) There is actual breakdown of public order and public safety in the Federation or any part thereof to such extent as to require extraordinary measures to restore peace and security;

(d) There is a clear and present danger of an actual breakdown of public order and public safety in the Federation or any part thereof requiring extraordinary measures to avert such danger;

(e) There is an occurrence or imminent danger, or the occurrence of any disaster or natural calamity affecting the community or a section of the community in the Federation.

- (f) There is any other public danger which* clearly constitutes a threat to the existence of the Federation; or
- (g) The President receives a request to do so in accordance with the provisions of subsection (4) of this section.

Against the backdrop of the law, the President of Nigeria is constitutionally empowered to declare a state of emergency in appropriate cases, no doubt about that. The same power inhered in the 1979 constitution; however in the 1960 and 1963 constitutions, the amplitude of the power was of a greater extent.

The above law thus prescribes the procedure by which the said power to declare a state of emergency is to be carried out. The President is to do this by way of a proclamation, referred to in the constitution as an instrument, published in the official gazette of the government of the federation. In tune with this, President Jonathan, declaring a state of emergency in three states of Borno, Yobe and Adamawa, issued a Gazette, titled, "Federal Republic of Nigeria official Gazette, No. 27, volume 100, Government Notice No. 84, 20th May, 2013".

In the above instrument, the president invoked the power conferred on him:

Now therefore, in exercise of the powers conferred upon me by section 305(1), (3) (c), (d) and (f) of the Constitution of the Federal Republic of Nigeria, 1999 and all other powers enabling me in that behalf, I, Dr. GOODLUCK EBELE JONATHAN, President of the Federal Republic of Nigeria hereby issue the following proclamation.

Having invoked the powers, he declares: "As from the commencement of this proclamation, a state of emergency is declared in each of the states listed in the schedule³¹⁰ to this proclamation". In the first republic in Nigeria wherein a state of

³¹⁰ The schedule listed Borno, Yobe and Adamawa States.

emergency was declared by Prime Minister Balewa in the then Western Region of Nigeria, the instrument vide that was done was couched in the above fashion.

"On May 29, 1962, in the Federal House in Lagos, the Prime minister, sir Abubakar began a chain of events with the following statements:

"I rise to move the resolution standing in my name which reads as follows:

That in pursuance of section sixty-five of the Constitution of the Federation it is declared that a state of public emergency exists (IN THE WESTERN REGION OF NIGERIA) and that this resolution shall remain in force until the end of the month of December, nineteen hundred and sixty-two.³¹¹

Consequent upon this, the federal government took over the administration of western Nigeria. Thirteen Emergency powers (General) Regulations 1962 were rapidly passed by parliament on the same day, and senator the Hon. Dr. Moses Adekoyejo Majekodunmi was appointed the Administrator of Western Nigeria. He resumed work in Ibadan on May 31, 1962. Twenty- four commissioners to head ministries and advise (including six Obas as advisers). On May 30, 1962, restriction orders were served on 15 leading political figures in Western Region (including Awolowo, Akintola, Adegbenro, Rosiji, Fanikayode, e.t.c.) and following a subsequent order on 35 additional persons, one of them, Sam Ikoku, the Action Group's Federal secretary, fled to Ghana and took refuge there.

³¹¹Mobolaji E. Aluko, From May 1962 to May 1963: State of Emergency in Western Nigeria and in Nigeria
www.dawodu.com/aluko90.htm.

Extent and Conditions Precedent for the Exercise of State of Emergence

Without much ado, the invocation of the power to declare a state of emergency is rarely done in vacuum. In Nigeria, as in other climes where the power has been excised, there are conditions consequent upon which the power is exercised.

Under the 1999 Nigerian Constitution

Section 305(3) (a) – (g) stipulates conditions that warrants a statement of emergency. Seven conditions are prescribed here and they are arguably, exhaustive, though paragraph (f)³¹² seems to contain an omnibus or general provision.

The conditions are as follows:

1. When the Federation is at war.
2. The Federation is in imminent danger of invasion or involvement in a state of war.
3. There is actual breakdown of public order and public safety in the Federation or any part thereof to such extent as to require extraordinary measures to restore peace and security.
4. There is a clear and present danger of an actual breakdown of public order and public safety in the Federation or any part thereof requiring extraordinary measures to avert such danger.
5. There is an occurrence or imminent danger, or the occurrence of any disaster or natural calamity, affecting the community or a section of the community in the federation.
6. There is any other public danger which clearly constitutes a threat to the existence of the Federation.
7. The President receives a request to do so in accordance with the provisions to subsection (4) of this section.

³¹² Section 305(3)(g) C.F.R.N, 1999 provides: there is any other public danger which clearly constitutes a threat to the existence of the federation.

Section 305, as it relates to the conditions precedent to the declaration of state of emergency, has witnessed a barrage of criticism. And opinions seem not to be *ad idem* here.

"...many had expected President Goodluck Jonathan to declare a state of emergency in some North-East states, especially Borno, over the Boko Haram insurgency. ... Many are, however, questioning the rationale behind the president's action. They contend that he did not follow the constitution in declaring emergency rule in Adamawa, Borno and Yobe states.

To some lawyers, the president does not have the constitutional backing to declare emergency rule in any state without the governor's request they said he could³¹³ only do so when the country is at war".

Other legal pundits are of the opinion that the president acted in accordance to the law. However, President Jonathon in his Emergency (Certain States of the Federation) Proclamation, 2013, stated the reasons for the declaration:

"Whereas the Federal Republic of Nigeria has been experiencing serious crises, internal tension and civil disturbances which presently constitutes grave threats to peace, order, good governance, security and safety of life and property;

Whereas these crises, internal tension and civil disturbances transcend religious, political and ethnic divide with the perpetrators of the crises utilizing terrorist tactics, thereby occasions serious breakdown of law and order;

Whereas it is evident that the magnitude of the crises in the affected states and Local Government Areas has overwhelmed the response capacities of the concerned state Government which have accordingly not been able to manage, curtail or eradicate the situation leading to the total breakdown of public order, public safety and security in the affected areas;

313

'Emergency rule: Did Jonathan follow the law?'
Thenationonline.ng/new/emergency-rule-did-Jonathan

Whereas extraordinary measures are required to restore peace, order and security in the affected areas;³¹⁴

The excerpt above clearly shows that the president appreciated the law as prescribed in section 305 of the Constitution³¹⁵. Without mincing words, given the insurgency of the dreaded Islamic group, *Boko Haram*, the declaration of a state of emergency was necessary, in fact overdue; though some critics, including preeminent learned academics, have criticized the manner and procedure the president went about it³¹⁶.

According to a prominent legal mind, Nwabueze, acknowledging that the proclamation of a state of emergency is the exclusive prerogative of the federal government, he submitted that if the proclamation is not to be in force throughout the country but in parts of it only, then, it cannot be made unless it is requested by the governor(s) of the state(s) so affected, with the approval of a resolution supported by two-thirds majority of the house(s) of assembly of the states.³¹⁷ Nwabueze tenaciously holds unto this view, right from under the Nigerian 1979 Constitution.³¹⁸ Nwabueze's submission imbued with great legal erudition, but what happens where the governor(s), as it were, in these cases wherein they, the governors, failed, arguably, within a reasonable time to make a request to the president to issue such proclamation? This writer is of the humble view, that relying on the strength of section 305(5), where there is delay, as it were in Bornu, Adamawa and Yobe, the president can and should, subject to other provisions of the constitution, declare a state of emergency.

³¹⁴ State of Emergency (Certain States of the Federation) proclamation, 2013.

³¹⁵ The 1999 Constitution (as amended) of Nigeria.

³¹⁶ Nwabueze Ben, leading academic on constitutional law criticized the president, Jonathan on the manner the

state of emergency was carried out.

³¹⁷ See s. 305 (4), 1999 C.F.R.N. (as amended)

³¹⁸ Both constitutions – 1979 and 1999 (as amended) contain identical provision on the president's power with regards to the declaration of a state of emergency.

Subsection (5) of section 305 contains a proviso, which the president can exploit:

"The president shall not issue a proclamation of a state of emergency in any case to which the provisions of subsection (4) of this section apply unless the Governor of the state *fails within a reasonable time*³¹⁹ to make a request to the president to issue such proclamation.

What constitute a reasonable time, given the very nature of emergency situation or state of affairs, should be measured subjectively. This writer is of this view, for, given the pronouncement of the Supreme Court in the declaration of state of emergency in Western Nigeria in 1962, the court when called upon, held unanimously, per Ademola, J.S.C, that it is within the bounds of parliament, and not for the court to decide that a state of public emergency exists in Nigeria.

Under the 1999 Constitution, the federal government does not possess under the new constitution the same amplitude of emergency powers as it had under the 1963 constitution. The proclamation of a state of emergency does not necessarily confer upon it power to legislate generally for Nigeria or any part of outside the legislative list for the purpose of maintaining or securing peace, order and good government during the period of the emergency. It can assume such power only in two situations. First is when the federation is at war³²⁰. Even so, it can make only such laws for the peace, order and good government of the federation or any part thereof during such period as it may appear to it to be necessary or expedient for the defence of the federation³²¹. The other situation is when, by reason of the circumstances prevailing in a state, the state house of assembly is unable to perform its function in the sense of being unable to hold a meeting

³¹⁹ Italic is of the writer for emphasis.

³²⁰ See, section 11(3), 1999 CFRN (as amended).

³²¹ Nwabueze, B.O., *The Presidential Constitution of Nig.*, (London, C. Hurst & Co., 1982), p. 69.

and transact business. In such event the National Assembly may make such laws for the peace, order and good government of that state on matters within exclusive state competence as may appear to it to be necessary or expedient until such time as the state assembly is able to resume its functions³²².

The 1962 state of emergency declared by the Balewa-led federal government was the catalyst that threw the nation into an imbroglio it paid dearly for. No under then, given this, that the presidential constitution of Nigeria, 1979 parted ways with the unbridled power to declare a state of emergency bestowed upon the federal government by the 1960 constitution.

“The departure from the wide emergency powers given to the federal government under the 1960-3 Constitutions is aimed at guarding against the kind of abuse that occurred in 1962 when the federal government, on the strength of disturbances in the West regional house of assembly, declared an emergency in the region, suspended the regional governor, premier, ministers, the president, speaker and members of the regional houses of chiefs and assembly and appointed an emergency administrator charged with the function of administering the government of the region and equipped with all necessary powers, including power to make all such orders as appeared to him necessary or expedient for the purpose of maintaining security, peace, order and good government”.³²³

Indeed, this was a very wide emergency power. What then is the extent of the power to declare a state of emergency as bestowed upon the president by the 1999 Constitution? Was it a total erosion of the whole democratic institutions (the executive and legislative arm) of government, as the then President, Olusegun Obasanjo did in Ekiti and Plateau States? Here, again, as with almost all legal

³²² See S. 11 (4), 1999 CFRN as amended; The Presidential Constitution of Nigeria, *op. cit.*, p. 69.

³²³ The Presidential Constitution of Nigeria, *op. cit.* p. 69.

minds, critical of Obasanjo's state of emergency declaration in Ekiti state, addressed these issues³²⁴ vehemently and averred:

"Professor Ben Nwabueze (SAN), the leading authority on constitution law in this country, has argued with considerable force that the power given to the president under section 305 of the constitution is limited to mere declaration of a state of emergency and does not include power to make laws and to execute them with respect to matters within exclusive state competence.

The summary of the point canvassed here is that the president has no power under the constitution or any law to suspend the state House of Assembly and executive in Ekiti state. While the statement made by professor Nwabueze that, "The suspension of the elected Governor and House of Assembly of Plateau State and their replacement by an administration by the democratic government of president Obasanjo without authorization by law must rank as perhaps the greatest tragedy to befall, the rule of law in Nigeria remains agonizing. The repetition of that tragedy in Ekiti is calamitous³²⁵.

The state of emergency declared in Borno, Adamawa and Yobe states by President Goodluck Jonathan left the apparatus of democratic institution – executives and the legislatures intact. Can a state of emergency be in this shape and form? While some critics want a clean sweep, as it was during Obasanjo, some strongly commend Jonathan for being constitutional: It is clear that by virtue of section 305 of the constitution, a state of emergency exists when the president adopts extra- ordinary measures to restore law and order.

I submit, without fear of contradiction, that the president has no power whatsoever to remove an elected governor under the pretext of imposing a state of emergency in any part of the country.

³²⁴ The issue is can the president suspended the executive and the House?

³²⁵ Bamidele Aturu, 'Emergency Rule in Ekiti as the 1999 constitution Holds', The Guardian Newspaper, October 26, 2006.

Jonathan has had cause to impose a state of emergency in some local governments in Borno and Plateau State³²⁶. As gratifying as the disposition in the excerpt above may be, pundits have asked the pertinent question of how a constitutional democratic government will co-exist in a state with the obvious consequences of a state of emergency? It appears that Jonathan anticipated this, for the instrument of declaration said: "Notwithstanding the provisions of this proclamation, the Governor of each state listed in the schedule to this proclamation shall continue to administer the respective state subject to any order, instruction or regulation as may, from time to time, be issued by me"³²⁷.

Pursuant to the above provisions in the state of Emergency Proclamation Act, 2013, the Emergency power (General) Regulations, 2013, provides for the administration of law and order in the states affected by the emergency declaration. In the light of this, some sections of the emergency powers regulations, 2013 are imperative for perusal.

Section 2(1). This section provides that a state Governor in an emergency area shall continue with the general functions of administration of the emergency area under the control of the president or any person designated or authorized to act on his behalf. A local Government Chairman in an emergency area shall continue with the general functions of administering the emergency area under the control of the president or any person designated or authorized to act on his behalf.

The president may give directions to a state Governor or local Government chairman directly or through his designate or a duly authorized person³²⁸ with respect to the administration of the

³²⁶ Vanguard Newspaper, May 16, 2013.

³²⁷ State of Emergency (certain states of the federation) proclamation, 2013, the italicized sentences are by the writer for emphasis.

³²⁸ "Duly authorized person" according to the regulations, means any person designated or authorized to act on behalf of the president of the federal republic of Nigeria with respect to the administration of an emergency area.

emergency area and it shall be the duty of the state Governor in the local Government chairman to comply with the directive.

Importantly, this regulation reserves unto the president an enormous power to make orders. The president may make such order as appear to him to be necessary or expedient for the purpose of maintaining and securing peace, public order public safety and good governance in the emergency area. Under this power, the president may order the detention of persons within the emergency areas or elsewhere, removal and exclusion of any person from the emergency area³²⁹. The president may authorize the taking of possession or control of any property or undertaking in the emergency area. He, the president, can authorize the entry and search of any premises, provide for the application of any law with or without modification, in relation to the emergency area³³⁰. These are indeed enormous power; and still it goes further. The president can utilize the funds of any state or local Government affected by the emergency declaration;³³¹ provide for payment of compensation and remuneration to person affected by the order. Again, importantly, the president, with respect to persons offending against the order, provide for their apprehension, trials and punishment. Also, the president can provide and maintain such supplies and services as he considers essential to the lives of persons in the emergency areas.³³²

The president's designate or any person authorized by him may give instructions or directive to the commissioner of police in the emergency area with regards to maintenance of security, with public safety and order as the person considers expedient and it shall be the duty of the commissioner of police to comply with the directions³³³.

³²⁹ See, Regulation 3 (1) (2) (a) of the Emergency power (General) Regulations, 2013.

³³⁰ *Ibid*, Regulation 3 (2) (d).

³³¹ *Ibid*, Regulation 3 (2) (e).

³³² *Ibid*, Regulation 3 (2) (h).

³³³ *Ibid*, Regulation 4.

Furthermore, it shall be the duty of any person holding office as the Governor in any of the emergency states; as Local Government Chairman in any of the Local Government Areas in the affected states; or in the public service of the state in the emergency area within the meaning of the constitution of the Federal Republic of Nigeria 1999; to exercise their functions in accordance with any directions given to them by the president, his designate or any authorized person.³³⁴ Indeed, these are very sweeping powers.

The Role of National Assembly in the Declaration of State of Emergency

In the Nigerian Constitution, 1999, the National Assembly plays a vital role in the declaration of a state of emergency under the law,³³⁵ the president shall immediately after having published the declared state of emergency, transmit copies of the official gazette, containing the proclamation including the details of the emergency to the President of the Senate and the Speaker of the House of Representatives.³³⁶ Each of whom (that is the Senate President or the Speaker of the House of Representatives) shall forth convene or arrange for a meeting of the House of which he is the president or speaker, as the case may be, to consider the situation and decide whether or not to pass a resolution approving the proclamation.³³⁷

The way the section is worded "*The president shall immediately after*³³⁸ the publication, *transmit*³³⁹ copies of the official gazette of the federation containing the proclamation ... to the president of the senate ...", it can be contended, and reasonably, too, that the consent or endorsement of the National Assembly is sought after the state of emergency must have been declared by the

³³⁴ *Ibid*, Regulation 5.

³³⁵ The Nigerian Constitution, 1999 (as amended).

³³⁶ *Ibid*, section 305(2).

³³⁷ *Ibid*.

³³⁸ Italics for emphasis.

³³⁹ Italics for emphasis.

president. The section uses the word, "immediately after", it is the publication containing the proclamation that the president places before the national Assembly for the latter's resolution. The resolution of the National Assembly is mandatory and cannot be dispensed with, for the constitution employs the verb "shall."³⁴⁰ Therefore, the president cannot but come before the National Assembly for approval.

The indispensability of the National Assembly's pivotal role in the declaration of state of emergency is profoundly highlighted when the constitution declares, that the state of emergency as declared by the president, shall cease to have effect if the National Assembly with-holds its consent.

A proclamation issued by the president under this section shall cease to have effect if it affects the federation or any part thereof and within two days when the National Assembly is in session or within ten days when the National assembly is not in session, *after its publication*³⁴¹, there is no resolution supported by two- thirds majority of all the members of each House of the National Assembly approving the proclamation³⁴²

The phrase, "*after its publication*" in section 305 (6) (b) above, demonstrates again, that, the consent of the National Assembly follows the declaration, and not vice-versa. Importantly, given the wording of subsection 6 of section 305- "*A proclamation issued by the president under this section shall cease to have effect*", it can be argued, on good ground, that the declared state of emergency acquires the force of law as soon as the president declares it. However, it ceases to be efficacious as soon as there is no resolution supporting the proclamation³⁴³.

A state of emergency when declared, will be in force, after approval by the National Assembly, after a period of six months³⁴⁴.

³⁴⁰ CFRN, 1999 (as amended) section 305 (2).

³⁴¹ Italics for emphasis

³⁴² Nigerian Constitution, 1999 (as amended) section 305 (6) (b).

³⁴³ C.F.R.N, section 305 (6) (b).

³⁴⁴ *Ibidem*, section 305 (6) (c).

However, the declared state of emergency can have its life span extended. Again, the National Assembly's role is crucial.

The National Assembly may, before the expiration of the period of six months, extend the period of the proclamation of the state of emergency to remain in force from time to time for a further period of six months by resolution supported by two-thirds majority of all the members of each House of the National Assembly³⁴⁵.

The National Assembly, according to law,³⁴⁶ need not wait for the expiration of six months to extend the duration of a state of emergency. It (National Assembly) may extend it (state of emergency) at any time after the approval first granted when it was first declared by the president³⁴⁷.

No doubt, given the role of the National Assembly, an over-zealous president is checked on the use of emergency power provisions in the constitution.

State of Emergency and the Challenges of Human Rights

The proclamation of emergency rule particularly in a democracy poses some problems, chiefly, the challenge of human rights guaranteed under the law- the same constitution that provides the president with emergency power. It should be noted that emergency power is a necessary evil. When a society is faced with a clear and present danger of breakdown of public order and public safety, the emergence of emergency rule becomes inevitable³⁴⁸. This situation is not lost on the international human rights system, when it declares that in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the states parties to the present covenant may take

³⁴⁵ *Ibidem*, proviso to paragraph (c), section 305 (6).

³⁴⁶ The Nigeria constitution.

³⁴⁷ C.F.R. N(as amended), section 305 (6) (d).

³⁴⁸ A good example is the activities of the dreaded Islamic terrorist group, Boko Haram in the Northern part of Nigeria.

measures derogating from their obligations under the present covenant³⁴⁹.

Within domestic jurisdictions provisions abound which give room for the tampering of some rights during emergency rule. In Nigeria, for instance, under the law,³⁵⁰ instances are that justify the derogation of some fundamental rights. Under a state of emergency in Nigeria, the National Assembly may take measures (by way of laws) that derogate from the provisions of the right to life and personal liberty, provided that under this section no derogation shall be taken that will result to loss of life, save death resulting from act of war; derogation from prohibition of retrospective criminal legislation is not allowed.³⁵¹

In the interest of defence, public safety, public order, public morality or public health, laws can be made in a democracy, that derogate from the rights to private and family life; right to freedom of thought, conscience and religion; right to freedom of expression and the right to freedom of peaceful assembly and association, right to freedom of movement³⁵². These rights are also derogable for the purpose of protection of the rights and freedom of other persons³⁵³.

Both domestic and international legal system to some extent do provide the scope within which emergency rule is to operate. At the international firmament, the International Covenant on Civil and Political Rights (ICCPR) above referred to, acknowledging the need of state of emergency in appropriate cases, put a limit to its deployment. The statute proclaims that the phenomenon should exist to the extent strictly³⁵⁴ required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve

³⁴⁹ Article 4(1) (2), ICCPR.

³⁵⁰ Nigerian 1999 constitution, as amended.

³⁵¹ *Ibidem*, section 45 (2).

³⁵² *Ibid*, section 45(1) (a).

³⁵³ *Ibid*, section 45 (1) (b).

³⁵⁴ Italics four emphasis

discrimination solely on the ground of race, colour, sex, language, religion or social origin³⁵⁵.

The ICCPR prohibits derogation from right to life; right to freedom from torture or to cruel, inhuman or degrading treatment or punishment; freedom from slavery and servitude; freedom from imprisonment on the ground of inability to fulfill a contractual obligation; freedom from retrospective criminal legislation; right to be recognized as a person before the law; and freedom of thought, conscience and religion⁵². Nigerian constitution, as shown above, also contains non-derogable provisions⁵³.

State of Emergency and Human Rights in International Law

Human rights in state of emergency is an important concept in international law. And this has attracted many critical writings. Almost all the materials encountered during the course of the research on this paper, agree that the doctrine of necessity is the platform upon which state of emergency is based⁵⁴. As much as states of emergency is recognized as a legal institution which justifies derogations from human standards is a well-known institution recognized in almost all system of municipal law, there are recognized principles, upon which it operates, embedded in major international instruments-to the extent that some legal writers are wont to regard these principle as part of the general principle of international law, even customary international law.⁵⁵

Derogation clauses occurs in three great international human rights treaties, that is the European Convention on Human Rights and Fundamental Freedoms (ECHR) which was signed in 1950 and came into force in 1953, the International Covenant on Civil and Political Rights (ICCRR) which was signed in 1966 and came into

³⁵⁵ International convention on civil and political Rights, Article 4 (1).

⁵² *Ibid*, article 4 (2).

⁵³ C.F.R.N, section 45 (2).

⁵⁴ See generally Jaime Oraa, Human Rights in State of Emergency in International Law, oxford, Clarendon Press (1992).

⁵⁵ *Ibid*.

force in 1976⁵⁶ and the American convention on Human Rights⁵⁷ (ACHR) which was signed in 1969 and came into force in 1978. It is noteworthy to point out that the requirement of official proclamation of the emergency appears only in the ICCPR, whereas there is no such formal requirement in the two other treaties.

On the whole, some principles, considered fundamental, are the fulcrum upon which derogation are evaluated in international law. They are:

- i. The principle of exceptional threat. This deals with the very existence of a state of emergency
- ii. The principle of the proclamation of the state of emergency. The ICCPR, for instance, demands that state parties should declare states of emergency in appropriate cases.
- iii. The principle of notification
- iv. The principle of Non-derogability of fundamental rights. There is little doubt as to the fact that this principle is certainly the most important one. Very simply put means that even in the worst period, when there is a real need for a recourse to the state of emergency that is when the state authorities will be entitled to disregard the generally accepted human rights, there are some rights which can never be infringed upon. Those are the non-derogable human rights. There is no clear agreement upon the precise list of those rights. The European Convention has four,⁵⁸ the UN covenant has seven and the American Convention eleven.

⁵⁶ The emergency clause in the covenant is (mainly) Article 4.

⁵⁷ The emergency clause in this convention is article 27.

⁵⁸ The four non-derogable rights in the European Convention are common to the ICCPR and the American convention on Human Rights. These Rights are: the right to life, the right to be free from torture and other in human or degrading treatment or punishment, the right to be free from slavery or servitude and the

- v. The principle of proportionality. This principle has become central both in international and in internal law. This principle states that the derogatory measures must be proportional to the threat.
- vi. The principle of non-discrimination.
- vii. The principle of consistency. This means the right of a state to take measures of derogations in emergencies is limited by the condition that the measures must not be inconsistent with other obligations under international law⁵⁹.

Egypt and Emergency Rule

Among the demands of protesters who brought about the resignation of former Hosni Mubarak of Egypt in February 2011 was the lifting of the state of emergency that was in place in Egypt throughout Mubarak's nearly 30 year presidency and an end to abuses that occurred pursuant to the country's 53-year-old emergency law. The emergency powers in Egypt 1971 Constitution as amended, which governed the country until March 2011, largely followed the neo-Roman model. Article 148 gave the president authority to declare a state of emergency. Article 148 further provided that the state of emergency would last 15 days, after which approval by the legislature was required. The article did not specify a time limit for the state of emergency, other than to say it would be limited, and that any extension required legislative approval. The state of emergency is further regulated by law No. 162 of 1958 which, among others, authorizes the president to restrict freedom of assembly, detain suspects for up to six months without a hearing, and conduct searches without a warrant during a state of emergency.

principle of non-retroactivity of penal laws. Thus it is possible to affirm that those rights are now, *jus cogens*.

⁵⁹ Human Rights in States of Emergency in international Law, Jaime Ovaa, *Supra*.

The 1971 Constitution also contained several provisions that gave the president extraordinary powers to deal with exigent situations, but which did not require the declaration of a state of emergency. Article 74 authorized the president to take "urgent measures" necessary to deal with threats to national unity, the safety of the nation, or the constitutional role of state institutions, after consulting the prime minister and the speakers of both houses of the legislature. Article 74 required the president to hold a public referendum on any such action within 60 days. Similarly, article 108 of the 1971 Constitution provided that the legislature could delegate power to the president to enact decrees having the force of law, "in times of necessity", subject to the approval of the prime minister.

Historically, the emergency clause in Article 148 has been the most important. In fact, Egypt was in a nearly continuous state of emergency from 1967 through May 2011. In 1967, the first president of the Egyptian Republic, Gamel Abd Al-Nasser, declared a state of emergency during the 1967 Arab- Israeli War. It was briefly lifted by Nasser's successor, Anwar Al-Sadat, but was reinstated by Mubarak after Sadat's assassination in October 1981. The state of emergency was renewed by the legislature, even up to May 2010.

Following Mubarak's resignation in February 2011, the Supreme Council of the Armed Forces (SCAF) assumed control of the country. The SCAF suspended the 1971 Constitution, leaving the state of emergency in place, however, it issued a constitutional declaration in March 2011, after input from a popular referendum that replaced the 1971 Constitution and revised its emergency provisions. As under the prior constitution, the Constitutional Declaration gives the president authority to declare a state of emergency though he or she must first consult the cabinet. The declaration also provides that the state of emergency must be approved by the legislature within seven days and that it is limited to a period of six months, after which it can only be extended in a national referendum.

In September 2011, the SCAF issued a decree that expanded the state of emergency, approved by the People's Assembly to cover terrorism and drug trafficking in March 2010, to a number of additional threats, including internal disturbance, public system disruption and its financing, ownership and trading of weapons, bullying, obstructions to transportation, broadcasting false information, and spreading rumours. However, in January 2012, the SCAF lifted the state of emergency for all offences other than "thuggery", a term the SCAF left undefined, in May it let the state of emergency completely expire for the first time in over 30 years.

Analyzing Egypt's Emergency Laws

No doubt, Egypt ranks amongst one of the countries in the world that has had a long history of emergency rule than democratic civilian government. And since emergency rule, though borne out of necessity, is somewhat an aberration, there are implications, particularly on human and fundamental rights. Analyzing the impact of emergency rule, a scholar observed:

Human Rights watch groups recorded systemic human rights abuses by Mubarak's government, under the guise of emergency measures. Not surprisingly, lifting of the state of emergency and revocation of the 1958 Emergency Law were among the demands of anti-government protesters that ultimately brought about the fall of the Mubarak regime⁶⁰

That emergency rule in Egypt brought about gross abuse of human rights is glaring. The legal platform upon which emergency rule operated made this inevitable. For example, the 1971 constitution is bereft of a specified time limit for state of emergency. Another is the lack of an explicit grant of jurisdiction to

⁶⁰ Michelle A. Liguori, 'A New Emergency Law Model for Egypt', gotten from the internet, 28/Aug./2014, p. 12.

the judiciary to review executive emergency actions. Unsurprisingly, the Egyptian Supreme Constitutional Court since its creation, largely declined to review the executive's exercise of emergency powers by upholding the president's authority to prosecute offences related to the state of emergency in Emergency State Security Courts, which were presided over by a mixed panel of judges and military officers and did not provide a right of appeal⁶¹.

Besides the above, as against many countries' constitutions that specify that certain fundamental rights may never be restricted, even during states of emergency. Neither Egypt's 1971 Constitution nor its 2011 Constitutional Declaration specify non-derogable rights, and reports have shown that the Egyptian government systematically violated rights regarded as non-derogable under international law, such as the right to be free from torture and cruel, inhuman or degrading treatment or punishment.⁶² Given these institutional characteristics, in particular legislature's weakness, it became apparent that Egypt's prior emergency powers suffered from the absence of a meaningful check on the decision to declare, extend, and /or terminate the state of emergency, the most used emergency power in the 1971 Constitution.

Observations and Conclusions

This paper has examined the concept of emergency rule in two jurisdictions, Nigeria and Egypt. The doctrine of emergency rule is predicated on necessity. However, emergency rule may be used as cloak for the abuse of constitutionally guaranteed fundamental rights as was the case in Egypt, particularly under Mubarak. Given this research, it is submitted that the used of emergency rule should be used sparingly, if used at all. When used, it should be in accordance with international law, particularly as it relates to non-derogable right which admits of no breach.

⁶¹ *Ibid*, p. 13.

⁶² *Ibid*, p.13.