

Examination of the Declaration of State of Emergency under the Nigerian Constitution

E.L Effiong* I.U. Ononye*

Abstract

The declaration of state of emergency has been employed at different times in order to curb or terminate both real and perceived dangerous situations. Nigeria, just like every other country has made provisions on the procedure to be adopted when this extraordinary measure is to be employed in a particular situation. This paper examines the origin of State of Emergency in the Nigerian Constitution and also its application from inception till date. The paper also answer the question as to whether the procedure laid down in the constitution has been complied with in declaring the state of emergencies and finally whether the situations in which those declarations were made actually comes under the situations envisaged by the Constitution.

1. Introduction

The word emergency means “a sudden serious and dangerous event or situation which needs immediate action to deal with it.”¹ When a state of emergency is declared in a State it simply means that a sudden and dangerous event or situation has occurred in the State, which requires immediate action, by the government to deal with it. The outbreak of war is not the only reason for the declaration of a state of emergency, it can be declared during a time of natural or man-made disaster, or anything capable of endangering the lives of the citizens.²

In Nigeria, the power to declare state of emergency is provided by the Constitution of Federal Republic of Nigeria. The

* LL.M., Senior Lecturer, Nigerian Law School, Bwari abuje Headquarters.

* LL.M., Lecturer, Nigerian Law School, Bwari abuje Headquarters.

¹ Oxford Advanced Learner's Dictionary, *International Student's Edition*. 8th Edition (Oxford University Press) 2010, page 478.

² See section 305 (3) of the 1999 Constitution

power to declare state of emergency in Nigeria first surfaced in the 1960 Independent Constitution and has survived until the 1999 Constitution. In all the Constitutions³ the power can be invoked when the Country is at war, there exist situations that endanger the lives and properties of citizens.

The essence for the declaration of a state of emergency in a country is national security and as such, once anything threatens the existence of the citizens in a modern society, the government would react to it. Under the International Covenant for Civil and Political Rights⁴, the state of emergency must be publicly declared and the Secretary-General of the United Nations must be contacted immediately, to declare the reason for the emergency, the derogations that may take place and the time frame of the emergency.

This paper shall examine the history of state of emergency in Nigeria, the power to declare state of emergency, state of emergency in some foreign countries and an enquiry into whether state of emergency is a solution to security problems in Nigeria.

2. History of Declaration of State of Emergency in Nigeria

The history of the declaration of state of emergency in Nigeria could be traced to the former Western Region in 1962 when Dr. Moses Majekodunmi was appointed Sole Administrator of the defunct Western Region which resulted from an uproar in the Western House of Assembly caused by the removal of Chief S.L.A. Akintola as the Premier of the Western Region and Dauda Adegbenro was installed as the Premier. Invoking her powers

³ Section 65 of the 1960 Independence Constitution, section 70 of the 1963 Republican Constitution, section 305 of the 1979 Constitution and section 305 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

⁴ ICCPR 1966/1968

under the Constitution⁵, the Federal Parliament declared a state of emergency in the then Western Region.⁶

Although no state of emergency was declared under the 1963 and 1979 constitutions, the two constitutions also made provisions for declaration of state of emergency.⁷

Citing section 305 of the 1999 Constitution, former President Olusegun Obasanjo on Tuesday May 18, 2004 imposed a state of emergency on Plateau State. Prior to the declaration, the state had been engulfed in religious cum tribal crises where hundreds of persons had been killed. Obasanjo stated that Governor Joshua Dariye, the then governor of the state and other elected state officials had “wittingly and unwittingly encouraged acts that have subverted peace and tranquillity.” He therefore suspended the executive and the formal legislative body and appointed a “Sole Administrator” who ran the state for a period of six months.

Also the people of Ekiti state woke up in the early hours of October 19, 2006 to find out that same President Obasanjo has slammed a state of emergency on them. The problem was that three actors, Ayodele Fayose and Abiodun Olujimi who had been removed as governor and deputy governor respectively, and Friday Aderemi, the then Speaker, were laying claim to the office of the governor. He justified the declaration on the need to clear the political impasse ravaging the state at that time. He stated thus:

The Governor and his Deputy and those who purported to be Acting Governors or Deputy by this declaration will cease to be in charge of the affairs of Ekiti State. An

⁵ Section 65 of the 1960 Independence Constitution

⁶ See Professor Jadesola O. Akande, *"Introduction to the Constitution of the Federal Republic of Nigeria 1999"*, (MIJ Professional Publishers Limited, 2000), page 426.

⁷ Sections 70 of the 1963 Republican Constitution and 365 of the 1979 Constitution of the Federal Republic of Nigeria.

Administrator to manage the affairs of Ekiti State in the person of Brigadier-General Tunji Olurin (rtd.) is hereby nominated for six months in the first instance. The Ekiti State House of Assembly also goes on suspension as the formal legislative body of the State with immediate effect for six months. Having a State Assembly in position under a State of Emergency is incongruous and may not allow for the expeditious actions that the Administrator will need, to put the State back into a situation of peace, harmony, security for all, and maintenance of law and order throughout the State. Elected officials below the State level are not suspended. The Federal Gazette containing the Declaration was forwarded to the National Assembly in accordance with the Constitution.

During the administration of President Goodluck Jonathan, he declared a state of emergency twice. On 31st of December, 2011 he declared a limited state of emergency for certain parts of Yobe, Borno, Plateau and Niger States. Again, on May 14, 2013 he declared a state of emergency for the three states in Northern Nigeria, Borno, Yobe and Adamawa. The two declarations were made as a result of the insurgence of a terrorist group, which operates under the name Boko Haram (which literally means western education is sin). The activities of the group have been very alarming and worrisome in recent times.

Under the current Buhari administration, there has been no declaration of state of emergency. Recently however, the President in a bid to stabilize the economy proposes to send an executive Bill to the National assembly tagged “Emergency Economy Stabilisation Bill 2016” the Bill however is set to meet stiff resistance from the Legislature because according to some members of the National Assembly, the Bill if passed into law will turn the president into a complete tyrant. The objectives of the bill will include shoring up the value of the naira, job creation, boosting foreign exchange reserves, reviving the manufacturing

sector, and improving power supply. The bill also seeks to empower Buhari to abridge the procurement process with a view to guaranteeing stimulus spending on critical sectors of the economy; make orders to favour local contractors/suppliers in contract awards; abridge the process of sale or lease of government assets to generate revenue; and allow virement of budgetary allocations to projects that are urgent, without a recourse to the National Assembly.⁸

3. Declaration of State of Emergency under the 1999 Constitution

Unlike the 1960 Constitution, which vested the power to declare a state of emergency on the Parliament,⁹ the 1999 Constitution vests same on the President and the Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria.¹⁰

Under the 1999 Constitution, the part of the Constitution dealing with the declaration of a state of emergency is section 305 and it provides as follows:

- (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.
- (2) The President shall immediately after the publication transmit copies of the Official Gazette of the Government of the Federation containing the proclamation including the details of the emergency to the President of the Senate and the Speaker of the House of Representatives, each of whom shall forthwith convene or arrange for a meeting of the

⁸ Thisday Newspaper, Monday, October 9, 2017.

⁹ Section 65 of the 1960 Constitution of Nigeria

¹⁰ See section 305 (1) of the 1999 Constitution.

House of which he is President or Speaker, as the case may be, to consider the situation and decide whether or not to pass a resolution approving the Proclamation.

- (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 of 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.

It is the responsibility of the President of the Federation to declare a state of emergency under the 1999 Constitution; but the first question for consideration is this, is it the same President who is to make the proclamation that would also determine whether or not there is an emergency? Although, where an emergency situation arises, it would evidently be clear to all that there is an emergency.

Where there is no incumbent President in the country, whose responsibility will it be to declare a state of emergency? It is my submission that, although, the constitution did not deal with

this issue, that the person or persons responsible for the day to day running of the Government will also have the power to declare state of emergency. It was the abuse of this power by the Parliament then, that made the parliament to declare a state of emergency in the then Western Region, despite the fact that what happened only affected the legislative chamber of the Western Region.

The attitude of the court generally was that the declaration of a state of emergency was within the exclusive discretionary powers of the legislature, and it cannot question such exercise. That is, the court cannot question the exercise of power conferred on the legislature except where the parliament fails to exercise the power in accordance with the provisions of the constitution. In *Alhaji D.S. Adegbenro v. A.G. of the Federation & Ors*,¹¹ the court declared, “It is unnecessary for us to rule on the submission that Parliament acted *malafide* in making a declaration of a state of public emergency...since it is impossible to say in the present case that there was no ground to justify a declaration.”¹²

Ideally, the attitude of the Court where a proclamation of state of emergency is made, and none of the situations in section 305(3) of the Constitution is in existence is that, the court should declare such a proclamation void. This is a complete departure from the previous position under the 1963 Constitution.¹³

According to Section 305¹⁴ the procedure for the declaration of a state of emergency can be summarised as follows:

¹¹ [1962] WNLR 150 at page 160.

¹² In *Williams v Majekodunmi* [1962] 1 All NLR 413 Ademola, CJF, said concerning the validity of the Emergency Powers Act 1961, the existence or non-existence of a state of emergency is within the bounds of Parliament, and not for this Court to decide.

¹³ See, Ben Nwabueze, *Federalism in Nigerian under the Presidential Constitution*, Lagos State Ministry of Justice Law Review Series, 2003, page 85.

¹⁴ 1999 Constitution of the Federal Republic of Nigeria (as amended).

1. The President issues a Proclamation of a state of emergency in the Federation or any part thereof by instrument published in the Official *Gazette* of the Government of Federation;
2. The President would immediately transmit copies of the Official *Gazette* containing the Proclamation to the Senate President and Speaker of the House of Representatives;
3. The Senate President and Speaker of the House of Representatives are to convene a meeting of their individual Houses and consider the situation at hand in line with the provision of section 305 (3) of the Constitution; and
4. Decide whether or not to pass a resolution approving the Proclamation.

A critical analysis of the pattern of arrangement of the provisions of section 305 of the Constitution would reveal that the intention of the drafters of the Constitution was that, even if the President may omit to consider section 305 (3), which lists the circumstances under which state of emergency may be proclaimed, they wanted the Legislature to consider it when making its decision, whether or not to approve the Proclamation made by the President. Therefore, it will be correct to assert that, unlike the 1963 Constitution, there is an infusion of some kind of checks and balances in the 1999 Constitution; because, irrespective of the fact that the President has the right to declare a state of emergency, where he does not consider subsection (3) of that section 305 before declaring same, the Legislature would help him perform that function which he has neglected.

President Goodluck Jonathan declared a state of emergency on Adamawa, Borno and Yobe as a result of the persistent insecurity caused by an Islamist extreme group called Boko Haram.¹⁵ Basing his decision to declare the state of emergency on

¹⁵ For more on Boko Haram see Anyadike, Nkechi O, "Boko Haram and National Security Challenges in Nigeria: Causes and Solutions,"

section 305(1) of the 1999 Constitution, military troops were deployed to the affected States and he said that the declaration would not affect the functions of the Governors and other Public Officers as enshrined in the 1999 Constitution.

State of emergency may be declared in the whole of the Federation or any part thereof; however, in respect to declaring it in a State of the Federal Republic of Nigeria, there are additional procedural requirements provided for under the Constitution and these are:

1. The Governor of a State may request the President to issue a proclamation of a state of emergency in the State where there is in existence in the State any of the situations specified in section 305 (3) (c), (d) and (e) and such situation does not extend beyond the boundaries of the State;¹⁶
2. This request by the Governor must be sanctioned by a two-third majority resolution of the House of Assembly;¹⁷ and
3. Where the Governor fails to make the request to the President to make the Proclamation of a state of emergency within a reasonable time, then the President can go ahead to issue it.¹⁸

From the foregoing, the state Governor though not empowered to declare a state of emergency in his domain can make a request to the President to declare a state of emergency. However, the Governor's request must be sanctioned by two-third majority of the House of Assembly.

In subsection (5) of section 305 of the Constitution, there was the use of the phrase "reasonable time", but the Constitution did not define what amounts to a reasonable time or how it can be

Journal of Economics and Sustainable Development, Vol. 4, No. 5, 2013.

¹⁶ Section 305 (4).

¹⁷ Section 305 (4).

¹⁸ Section 305 (5).

measured. Since the Constitution did not provide for the meaning of "reasonable time", the only avenue left for us is the system of checks and balances, which is given to the Legislature to approve the proclamation made by the President. Where the President is of the opinion that the State Governor has failed to request for a state of emergency within a reasonable time and he (the President), goes ahead to declare a state of emergency, the Parliament has the power, by virtue of section 305 (2) to take a good look and analyze subsection (3) and the situation on ground to see whether or not the President was reasonable in deciding the term 'reasonable time'.

The declaration of a state of emergency does not, and will not, in any way empower the President to remove the Governor of the State or any elected person from office in a manner not contemplated or envisaged by the Constitution.

The Olusegun Obasanjo's administration declared a state of emergency in Plateau State under the Emergency Powers (General) Regulations, 2004 purportedly removing the Governor of the State and appointed Major General Chris Alli the Sole Administrator in place of the Governor. It is submitted that the National Assembly does not have the power to sanction such Regulation because the provision of section 305 merely provides for the issuance of a declaration of a state of emergency, and not the removal of the Governor:¹⁹

"The exercise of the power must be seen as a purely executive exercise of power made subject to the oversight function of the legislature under a check and balance system of separation of powers."²⁰

The action of President Olusegun Obasanjo was widely criticised as unconstitutional; Prof. Ben Nwabueze has this to say:

¹⁹ See K.M. Mowoe, *"Constitutional Law in Nigeria"*, (Malthouse Press Limited, 2008) p. 156; also see the case of *Fawehinmi v Babangida* (2003) 12 WRN 1.

²⁰ K.M. Mowoe, *Ibid*, page 156.

Finally, the removal of a State Governor from office by reason solely of an emergency situation prevailing in the State, whether or not an emergency is formally declared under section 305, is completely and unequivocally precluded by the proviso in section 11(4), which declares that "nothing in this section shall be construed as conferring on the National Assembly power to remove the Governor or the Deputy Governor of the State from office." The Governor remains in office during such period with his executive powers undiminished, since by section 11(4) any "laws enacted by the National Assembly pursuant to this section shall have effect as if they were laws enacted by the House of Assembly of the State." He is the rightful authority to execute such laws by virtue of the provision in section 5(2) that the executive powers vested in him shall extend to "the execution and maintenance of the Constitution (and) all laws made by the House of Assembly." And if the National Assembly cannot, in the exercise of its power to make law under section 11(4), remove a State Governor, it cannot by law authorise the President to do so. The President has no inherent power to remove or suspend a Governor, anyway.²¹

On 19th October 2006, President Olusegun Obasanjo declared a state of emergency in Ekiti State to ensure that peace and orderliness returns to the State and he said that the State House of Assembly had been suspended. Major General Tunji Olurin was appointed Administrator of the State.

Section 11 (4) of the 1999 Constitution provides as follows:

²¹ Prof. Ben Nwabueze, SAN. Obasanjo Rapes Constitution by suspending Plateau Assembly and Governor, available at: USAfricaonline.com, USAfrica The Newspaper, Houston, visited 23/04/2017.

At any time when any House of Assembly of a State is unable to perform its functions by reason of the situation prevailing in that State, the National Assembly may make such laws for the peace, order and good government of that State with respect to matters on which a House of Assembly may make laws as may appear to the National Assembly to be necessary or expedient until such time as the House of Assembly is able to resume its functions; and any such laws enacted by the National Assembly pursuant to this section shall have effect as if they were laws enacted by the House of Assembly of the State: Provided that nothing in this section shall be construed as conferring on the National Assembly power to remove the Governor or the Deputy Governor of the State from office.

From the foregoing, it is clear that the enactment of an Act empowering the president to remove the Governor would be seen as *ultra vires* the power of the National Assembly; hence it is null and void by virtue of the fact that it is contrary to the express provisions of the Constitution.²²

4. Effects of State of Emergency

The President and Commander-in-Chief of the Armed Forces of the Federation may deploy the armed forces to restore order when it is of the opinion that it is necessary for the peace, order and good governance of the country. According to section 217 (2) (c) of the 1999 Constitution, the President may use the armed forces to restore order, but this power is however subject to the overriding control of the National Assembly.²³ However, some unscrupulous

²² Section 11(4) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)

²³ See section 217 of the 1999 Constitution generally which deals with the armed forces of the Federation.

Presidents may misuse the power to declare a state of emergency; and before the two days or ten days expires for the National Assembly to give its consent, the harm that the Constitution envisaged and intended to prevent may have already been done by the armed forces deployed.²⁴

The mere fact that a state of emergency is declared does not in itself empower the National Assembly to assume the responsibility of legislating for the whole country or the part of the country so affected. The only time the National Assembly has the power to legislate generally outside the legislative lists for the purpose of maintaining or securing peace, order and good government during the emergency period are majorly two instances.²⁵

The first instance has to do with when the Federation or any part of the Federation is at war; the National Assembly can make laws for the peace, order and good governance of the Federation, or with respect to any part of the Federation with respect to matters not included in the Exclusive Legislative List as may appear to it to be necessary or expedient for the defence of the Federation.²⁶ The second instance is where the National Assembly may take over the functions of the State House of Assembly, as a result of the present occurrence in the state, the State House of Assembly is unable to perform its legislative functions. The National Assembly may assume such functions, irrespective of the fact that it is within the exclusive legislature competence of the state: Provided that the

²⁴ See section 215 of the Constitution which deals with the Police Force. The same argument that is applicable to the Armed Force is applicable to the police force and other Law Enforcement Agencies that can be used by the president to suppress tension in the country

²⁵ see Ben Nwabueze, "*Federalism in Nigerian under the Presidential Constitution*", Lagos State Ministry of Justice Law Review Series, 2003, pp. 85 - 86

²⁶ See section 11 (3) of the 1999 Constitution.

law(s) made is/are for the peace, order and good government of that state.²⁷

During emergency periods, the rights of citizens might be affected or restricted in one way or another. A State House of Assembly does not have any right whatsoever, to derogate from or limit the fundamental rights of the people residing in the state where such Proclamation is made. This power of limiting citizen's right is exclusively that of the National Assembly: provided that in the case of the right to life, only death which occurs as a result of an act of war²⁸; while in the case of right to personal liberty, the derogation from such rights must be reasonably justifiable in tackling the emergency situation at hand.²⁹ No legislative body, be it the National Assembly or the State House of Assembly has the right to derogate or limit the rights to fair hearing or the dignity of the human person.³⁰

The International Convention on Civil and Political Rights (ICCPR), permits states to derogate from certain rights guaranteed by the ICCPR in "time of public emergency". Any measures derogating from obligations under the Covenant, however, must only be to the extent required by the exigencies of the situation, and must be announced by the State Party to the Secretary General of the United Nations.³¹

The Proclamation of a state of emergency by the President shall cease to have effect:³²

²⁷ See section 11 (4) of the 1999 Constitution.

²⁸ See section 33 of the 1999 constitution.

²⁹ See Nwabueze, note 25 above at 86.

³⁰ However, section 34 (2) (d) permits any required labour that is reasonably necessary in the event of any emergency or calamity threatening the life or well-being of the community.

³¹ Article 4 of the International Convention on Civil and Political Rights

³² Section 305 (6) of the 1999 Constitution

- (a) if it is revoked by the President by instrument published in the *Official Gazette* of the Government of the Federation;
- (b) 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, there is no resolution supported by two-thirds majority of all the members of each House of the National Assembly approving the Proclamation;
- (c) after a period of six months has elapsed since it has been in force:

Provided that the National Assembly may, before the expiration of the period of six months aforesaid, extend the period for the Proclamation of the state of emergency to remain in force from time to time for a further period of six months by resolution passed in like manner; or at any time after the approval referred to in paragraph (b) or the extension referred to in paragraph (c) of this subsection, when each House of the National Assembly revoke the Proclamation by a simple majority of all the members of each House.

4. Conclusion

The essence of declaring a state of emergency is the security, protection and safety of innocent lives and the continued existence of the country at large. A threat to the continued peaceful existence of the country or any part of it should raise national concern; and as such be treated urgently and what other better way of doing this than to declare a state of emergency which would enhance security as well as protect the stability and corporate existence.

Every country or region has its own ups and downs and most of the time such country, county or region devises means of

controlling or at best evolves measures of taking care of such problems. A state of emergency is the last resort usually employed to salvage an irredeemable political or natural condition. It is a governmental declaration which usually suspends a 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. Most of the time, it is used as a rationale for suspending rights and freedoms even if guaranteed under the statute of such country, state or province. It comes most especially during periods of natural or manmade disasters, civil unrest or following a declaration of war or situation of internal armed conflict.

All the state of emergency proclamations made in Nigeria have virtually all been met with criticisms and public outcry. This is due principally to the fact that respective governments have not exploited other mechanisms or such declarations were made with political undertones.

The two declarations made by President Jonathan have also been greeted with criticisms in certain quarters. While that of December 31, 2011 was criticised for being limited and not decisive, the other one was frontally criticised when the Federal Government declared that it was going to deduct allocation meant for these states. This they argued would enable the government to maintain troops deployed. While some saluted Jonathan for not removing the governors, there are still other knotty issues that have not been addressed. Can the Federal Government deduct the allocations of these states? In answering this, the case of Attorney-General of Lagos State v Attorney-General of the Federation & Ors³³ is very instructive; here the Supreme Court held that the Federal Government could not withhold or deduct any statutory allocation meant for states.

³³ (2004) 18 NWLR Pt. 904

Having stated this, where does the Federal Government get the Fund to prosecute the emergency? Again, the retained governors who basically do not have any security role to play, where do they spend the security allowance allocated to them? Do commandants of military operations take directive whatsoever from the governors? If they do not at all, what is the essence of retaining those elected officials? These and other issues are what declaration of state of emergency has not addressed.

The 1999 Constitution (as amended) has not succinctly addressed the declaration of a state of emergency. While it is not in doubt that a critical situation may warrant such declarations, the grundnorm can do more by spelling out the mode in which the President can exercise that power. Can he remove elective officials, if yes, how? What manner? The President's power must be regulated. There must be a clear provision on when and how a state of emergency can be declared on the whole country, would the federal elected persons remain? Can a governor declare a state of emergency? These and other sundry issues are supposed to be addressed to forestall all the pitfalls that have been identified above. Citizens must also be able to approach the courts to determine whether a state of emergency has been declared within the confines of the law. Finally, the National Assembly must not be a rubber stamp in approving a declaration of a state of emergency; there must be a robust debate on the propriety and legality of the declaration of a state of emergency in Nigeria.

Another important factor in this discourse is whether or not the declaration of the state of emergency has been able to solve security problems or not. The fact is that, it has not. When President Goodluck Jonathan, tried to get the National Assembly to extend the period of emergency imposed on Adamawa, Borno and Yobe States, the National Assembly refused to extend the time. The basic reason was that the previous emergency period has failed to address the security challenges.