

EMERGENCY POWERS IN NIGERIA: WHETHER WRONGLY OR RIGHTLY EXERCISED

By

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Abstract

Emergency rule is a common phenomenon in the legal orders and constitutions of nations across the global. The exercise of a state of emergency has to be in line or in strict compliance with the constitution, which spells out how it can be exercised by the President. Apart from the constitutions, international Law, particularly the Bill of Rights of 1966, also makes provisions for the exercise of state of emergency. A state of emergency is usually proclaimed by the President of a country in an event where there is a total breakdown of peace, law and order in that country or any part thereof, with the view to restoring the said peace, law and order, and good governance, however, with strict compliance with the constitutional provisions. Unfortunately, in Nigeria, there are incidents of proclamations of state of emergency by the successive Presidents of the Federal Republic of Nigeria, without compliance with the constitutions, from the first to the fourth republics. The present Nigeria constitution of 1999, as amended, under its section 305 provides for emergency powers of the President and grounds upon which they can be exercised, however, it's on record that the Presidents, particularly of the fourth Republic had at different occasions been involved in gross violations of human rights, during emergency declaration by derogating from the provisions of section 305 and placing his personal interest and whims and caprices over and above his official responsibility and the constitution he has sworn to abide by and protect, a situation that elicited several criticisms, views, reactions and worries by persons and concerned citizens of Nigeria, which we seek to address in this paper. In the course of this research, it was found that the exercise of a state of emergency is the discretionary power of the President, and that such power is only for the restoration of peace, law and order and does not include the removal of the Governor or any of the members of the parliament in the affected state. It was also found that the courts do not have the powers within this context, to review the proclamation made by the President. Upon conclusion, some recommendations were made.

Keywords: *State of Emergency, Constitution and section 305, Rule of Law and Abuse of Rights, Parliaments, President, Governor.*

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Introduction

Several, if not all nations across the entire globe have had incidents of crises and tension having the characteristics of destabilizing the extant administrative mechanisms, institutions and legal orders. This is not unconnected to the fact that human beings are by nature agents of crises, resulting from competing interests in the economy, politics, religion, social and cultural developments. The said competing interests placing man at the center of every realm of life have, in no doubt occasional niches for activities either negatively or positively undertaken by man, in order to attain an enviable height, where he could be revered, adored or worshipped, if the need be, a scenario that has elicited stiff responses from organs or institutions considered to be wielding higher powers and authorities within an existing hierarchy. The response could be for the purpose of restoring a breakdown of order or correcting any anomaly occasioned by the subject of a higher authority or body, institution, agency or administrative mechanism below the higher authority.

The monarchical, military and democratic regimes either hitherto in existence or currently existing are not left out in the picture of conflicts and response to same. In a democracy, where rule of law thrives, political interests and counter political interests are a recurrent decimal. This is as a result of the desire of any group to be made relevant within the purview of a system and a legal order. The attempts to pursue these political interests by the administrators at different levels and, even to consolidate on them for a better result, in some circumstances have led to breach of peace, law and order of un-bearable dimensions or nature, prompting the higher political authority under a system of government within a country, to exercise its powers or authorities derivable from the grundnorm against the head of a government or administrative body lower in hierarchy in the same system. The discretionary power of the President in the system may be a declaration of a state of emergency in any state within the federation, with the view to arresting the existing unsavory situation in that state and restoring law and order. Note that crises in a given state can spill over to a neighbouring state and become a canker worm to the entire country. Apart from political interests, other instances where a President may declare state of emergency include but not limited to a state of anarchy, insurrections, crises, civil or political disturbances, acts of terrorism activities and vices that manifestly have the potentials to cause and sometimes indeed caused death, destruction of property and destabilization of the existing government, which may distort the legal order, political and economic fortune of the very state or region within a country, to the unbearable magnitude wherein the President is left only with the option of invocation of his discretionary powers under the constitution to restore normalcy and enthrone good governance.

In Nigeria, there are avalanche of incidents of invocation of state of emergency by successive Presidents or heads of governments, since the Nigerian independence in 1960. The 1999 constitution³ of the Federal Republic of Nigeria as amend spells out grounds upon which the President of Nigeria can exercise his emergency powers just as other successive constitutions

³ CAL C23 LFN, 2004

that had at one time or the other guaranteed the exercise of the same powers by any President or head of a government that emerged under them. However, it's regrettable that, despite the express or explicit Provisions of the Constitutions of Nigeria, including the extant constitution, which under its section 305 (1) the President is empowered to exercise these emergency powers which are discretionary, records have showed that at most instances the Presidents or heads of government have invalidly exercised these power. They, at various occasion had exercised them in breach and in flagrant violations of the rule of law and the sacred tenets of democracy in Nigeria, which of course, is the basis or pivot upon which they stand.

In this work, we shall reveal holistically, whether the said powers of the Presidents or heads of governments of Nigeria under the constitutions were validly exercised or whether they were actually exercised in breach, as we had earlier asserted herein. Hence, we shall chronicle various instances where governments and authorities had invoked emergency powers in the constitutional history of Nigeria; the reasons and how these powers were exercised, for proper understanding of this subject matter, in consideration of the fact that 'Democracy' and 'Rule of Law' can only thrive in the contemporary political radar where laws are jealously and sacredly obeyed by the rulers and the ruled.

Conceptual Perspectives

In order to situate this paper in its proper context, it is apposite to beam our search light on six key words involved in this discourse. This is informed by the conviction that a proper understanding of the terms will facilitate or enhance a quicker grasp of this work as the senses in which they are employed in legal context will be appreciated.

Emergency Period

The term emergency period has been defined by section 70 of the Nigeria constitution as any period during which the federation was at war or there was in force a resolution by parliament declaring that a state of public emergency existed or that democratic institutions in Nigeria were threatened with subversion⁴. By this definition, apart from war, an emergency was determined, not by the physical situation actually existing in the country, but simply by a resolution by parliament declaring that an emergency existed, no matter that the situation in the country might be perfectly peaceful.

1999 constitution of Nigeria, as amended also defined the term emergency period, also expressly stated the grounds under which the President can declare a state of emergency in Nigeria.

For example, section 45(3) defines a period of emergency as any period during which there is in force a proclamation of a state of emergency declared by the President in exercise of the power conferred on him under section 305 of this constitution.

⁴ Nwabueze, *Federalism in Nigeria under the Presidential Constitution* (sweet & Maxwell, 1983) 85

State of Emergency

The ideal of state of emergency could be traced to ancient Rome when a dictator who was a temporary officer was appointed to provide ad-hoc leadership during a national emergency (tumultus) by repulsing attacks from abroad or quailing internal rebellion⁵. However, it was not until the 18th and 19th centuries that European constitutions cautiously began to elaborate the nation of what is now known as constitutional state of emergency, though; they characteristically left the essential information to separate legislation⁶.

According to Sheeran, the legal regime of states of emergency is a relatively modern development which originated from the French Revolution and that gained a place in most national legal systems by the mid-twentieth century⁷ Sheeran later distinguished a state of peace, from a state of siege, and posited that in a state of siege, all the functions entrusted to the civilian authority for maintaining order and internal policing pass to the military commander who exercises them under his exclusive responsibility⁸. In the words of Igwenyi et al;

State of emergency...or emergency powers... means a situation where the highest state authority takes steps to prevent a breakdown of law and order in the whole or part of the country where there is monumental natural disaster or man-made activity which threatens the existence of the whole country or any part thereof⁹.

Also, Carossman posited that it involves governmental action taken during an extraordinary national crisis that usually entails broad restrictions on human rights in order to resolve the crisis¹⁰.

In the words of David Dyzenhaus:

There are times of tumult or invasion when, for the sake of legality itself, the rulers of law must be broken ... The Ministry must break the law and trust for protection to an Act of indemnity. A statute of this kind is ... the last and supreme exercise of parliamentary sovereignty. It legalizes illegality ... (it) ... combine (s) the maintenance of law and the authority of the Houses of parliament with the free exercise of that kind of discretionary

⁵ J O Fatile, and G L Ejalonibu 'Emergency Rule: A Panacea for peace and conflict resolution in Nigeria' (2014) (9)(1) Journal of Policy and Development Studies 124

⁶ U Simeon, Deconstructing the Doctrine of state of Emergency in Nigeria: A human Security perspective (2018) vol. 6 No. Covenant University Journal of Political and international Affair 44

⁷ S P Sheeran 'Reconceptualizing States of Emergency under international Human Rights Law: Theory, Legal Doctrine and politics (2013) vol. 34, Iss 3 Michigan Journal of International Law 496

⁸ Sheeran (n5) 496

⁹ B O Igwenyi, et al, Nigeria Governor get jittery when state of Emergency is mentioned: a juristic overview of S.305 of the constitution of the federal republic of Nigeria 1999 as Amended (2019) vol. 10, Belling Law Review 1 348

¹⁰ C Carossman, 'A framework for the Examination of State of Emergency under the American Convention on Human Rights (1986) vol.1 Iss. 1 Article 4, American University Journal of International Law and Policy 36

power of critical junctures, be wielded by the executive government of every civilized country¹¹.

This explains, in clear terms, the situation during state of emergency indeed, state of emergency represents a challenge for democratic constitution – makers to provide for the exercise of power, particularly, executive power that facilitates strong and efficient government, whilst simultaneously ensuring safeguards against abuse¹². However, thus problem seems to have been partly solved by modern constitution - makers¹³, since many constitutions seek implicitly to unit or explicitly to prevent judicial review at times of emergency¹⁴, while many others are silent on the matter¹⁵. Therefore, the consequences of declaration of state of emergency on the constitutional order vary, since the fundamental rights, constitutionally protected under normal circumstances, can be limited or derogated from during an emergency and consequently, the institutional framework and balance of constitutional order undergo changes¹⁶.

Rule of Law

The concept of Rule of Law is another fundamental concept that has evolved over the years, as constitutionalism became a part of human idea of co-existence. The concept is founded on the basic principle that inter-human relationship cannot thrive if there is no law governing such relationships, be it bilateral or multilateral as in a community or nation, and that such laws should be accorded a primary and paramount place. Legal and political philosophers from the earliest times, in both secular and theological jurisprudence, have given much thought to this issue. In God's dealing with the Jews as recorded by the great Jewish leader and thinker, Moses who was also 'learned in all the wisdom of the Egyptians and was mighty in words and deeds'¹⁷, emphasis was placed on obedience of the law and conformity with all its tenets by all and sundry.

The essence of rule of law is everyone being subject to the rule of law means, in simple terms, that the law rules or governs and the acceptability of everything, action or institution depends on how much it conforms to the provisions of a pre-existing law. The Greek philosophers also paid a lot of attention to the concept of rule of law. Aristotle, in his work, 'The Politics', strenuously contended for government by law which he argued was better than government by men¹⁸. He was of the view that government will be better organized if law, which implies objective standards, prevails instead of subjective whims and caprices of the leader which will result in oppression and possible chaos.

¹¹ D O Agbara, the Exercise of Emergency Power in Nigeria does not meet Minimum International Standard: A legal Review being a paper presented to the Phd Class, Faculty of law, Ebonyi State University, 2021,4

¹² R Salam, the Relationship between states of Emergency Politics and the Rule of Law (2017) vii.23 Canterbury Law Review, 24

¹³ Cap C23 LFN 2004 (n1) S. 305 (3), South African Constitution 1996

¹⁴ Malaysian Constitution, 1957, Art 150(8)

¹⁵ Cap C23 LFN 2004 (n1)

¹⁶ Agbara (n9) 5

¹⁷ C A J Chinwo, *Principles and Practice of Constitutional Law in Nigeria* (Vol. 1 Life, Law and Grace Bookhouse Chi Amazing Grace Ltd, 2006) 92 – 93

¹⁸ Aristotle, *The Politics* (Translated with Introduction by T A Sinclair), in C A J Chinwo (n15) 94

The Romans whose political rise, dominance and philosophy came after the Greeks' built on the concept enunciated by Aristotle. They developed the concept of natural law, which they propounded as binding on all persons irrespective of their station in life, be they king or subjects¹⁹.

By the later part of the 17th century, John Locke a political philosopher wrote as follows:

Freedom of men under government is to have a standing rule to live by; common to everyone of that society and made by the legislative power created in it and not to be subject to the inconstant, unknown arbitrary will of another man²⁰.

However, it was the English Legal Theorist A. V. Dicey who gave the idea of rule of law, its most concentrated and definitive attention and exposition. He propounded that the Rule of Law has three major facets, namely supremacy of the law, equality before the law and an independent judiciary that enunciates the general principles of rights and obligations of citizens.

On supremacy of the law, he wrote that it means 'absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness of prerogative, or even of wide discretionary authority on the part of government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of the law, but he can be punished for nothing else.

On the second aspect of the Rule of Law, that is equality before the law, he stated that it entails 'equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the 'Rule of Law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.

On the third aspect, Dicey was of the view that Rule of Law may be used as a formula for 'expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of constitutional code, are not the source but the consequence of individual rights, as defined and enforced by the courts²¹.

From the above, Dicey's meaning of the term 'Rule of Law' involves three basic and fundamental elements, to wit: supremacy of the law, equality before the law and fundamental

¹⁹ Chinwo (n15)

²⁰ John Locke, *An Essay Concerning the True Original Extent and End of Civil Government*, Section 22, in Chinwo (n15) 98

²¹ Chinwo (n15) 98 - 100

human rights. As a way of interpretation according to Dicey, there will be no rule of law where there are arbitrary or wide discretionary powers. Also, there will be no rule of law where there is exercise of prerogative. In other words, the regular laws of the land take precedence over the arbitrary exercise of government and discretionary powers. Power whatever its extent, must be exercised in accordance with the constitution and the ordinary laws of the land. This further means that rule of law only exist where regular law is supreme, predominant and obeyed by every citizen in that society. The second meaning, according to Dicey, suggests that no person or class or group of persons is above the law. Every citizen, no matter his rank in the society is equal in the eye of law, however, certain officials are exempted by virtue of their offices, to enable them discharge their official responsibilities without obstacles and for administrative convenience. The exceptions do not mean however, that they are generally above the law of the land. In fact, they are only partially exempted in order to be able to carry out their official functions. On the other hand, the third meaning of the concept according to Dicey, on human rights, connotes that the constitution is the result of the ordinary laws of a country. In other words, the fundamental rights enjoyed by a citizen arose from the ordinary laws of the land or decisions of the courts and not from a constitution. They are fundamental only because they vest in a person as a human being and by virtue of his membership of society. Human rights are what make us human. They are precondition to a civilized existence.

All the constitutions of the Federal Republic of Nigeria, including the 1999 Constitution, as amended are founded on the doctrine of rule of law. In the preamble to 1999 Constitution, it is stated that the people have solemnly resolved among other things to provide for a constitution for the purpose of promoting the good government and welfare of all persons in our country on the principles of freedom, equality and justice...²². The Constitution also provides that it is supreme and binds every authority or person in the nation. In section 1, it provides as follows:

This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria. The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the government of Nigeria or any part thereof, except in accordance with the provisions of this constitution²³.

The Constitution also provides for the ideals of freedom, equality and justice for every citizen before the law²⁴. The foregoing provision deal with the supremacy of the constitution subject to the constitution, every person and authority in Nigeria is also subject to every law made by the competent legislative body. The Nigerian constitution does not leave matters of the rights

²² Cap C24 LFN 2004, (n1) Preamble

²³ Cap C23 LFN 2004 (n1) S. 1(1) (2)

²⁴ Cap C23 LFN 2004 (n1) S. 17(1) & (2)

of citizens to the whims and caprices of lawmakers or the opportunities of disputation. It proactively and in significant detail provides for fundamental human rights²⁵.

It can thus be said that in Nigeria, with a written constitution, rule of law involves supremacy of the law and constitution, equality of all persons before the law subject to expressly stated exceptions and exemptions and absolute respect for the fundamental human rights of the citizens and all persons in the nation.

Democracy

Among the most studied subjects in the social sciences are the causes and consequences of democracy, yet no consensus exists on the definition of the subject. For Schumpeter²⁶, it is the institutional arrangement for arriving at decision which realizes the common good by making the people itself decide issues through the election of individuals who are to assemble to carry out its will. Schumpeter alternatively defined democratic methods as the institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of competitive struggle for the people's vote²⁷. Adam Przeworski et al²⁸, a vocal defender of a 'minimalist' institutionally based democracy definition, construe democracy as a political regime which holds contested elections. Adversaries²⁹ of the 'Schumpeter – Przeworski' view of democracy argued that such insight commit a 'fallacy of elect oralism' in that elections are not sufficient for securing a democratic political regime but require additional 'institutional guarantees'³⁰ which include freedom of expression and alternative sources of information. They³¹ posit further, disagreeing with the underlying premise of defining democracy institutionally, that it cannot be claimed that democracy merely consist of a system of certain rights, liberties and institutions without specifying the underlying principles which these institutions embody or help to realize, and in terms of which they can plausibly be characterized as democratic. It is however, agreed ³² that the core essence of democracy is that of popular rule or popular control over collective decision-making and political equality, while institutions are considered democratic only if they contribute to realizing popular control over politics and political equality.

Since the 1980's, it has become increasingly clear, with the emergence of new democracies in many regions of the developing world, that the process of democratization consist not only transition to formal democracy, but also the consolidation of such democratic process. Studies also confirm that relying on a minimalist definition of democracy cannot quite underscore or highlight the setbacks experienced by regimes that have transited but are yet to consolidate

²⁵ Cap C23 LFN 2004 (n1) Chapt. IV Ss. 33 – 46

²⁶ J A Schumpeter, *Capitalism, Social and Democracy* (Happer Perennial, 1976) 250 – 267

²⁷ Schumpeter (n24)

²⁸ Przeworski, et al, *Democracy and Development* (Cambridge University Press, 2000)

²⁹ O H Egielemai, Demanding Effective Democracy in Nigeria: A Constitutional Provision or Perversion? [2021] Vol. 15 No. 1 *Journal of Jurisprudence and International Law and Contemporary Issues* 152 – 153

³⁰ Egielemai, (n27) 153

³¹ Egielemai, (n27)

³² Egielemai, (n27)

their fledgling democratic structures. In consequence, a growing number of democratization experts are swayed by a more substantive definition of democracy, one that give greater prominence to accountability. Accountability is vertical where it enables citizens to hold their political leaders accountable through the electoral channel at specific points in time. Horizontal accountability refers to a mechanism within the distinct bodies of government itself whereby state institutions are authorized and willing to control, review and punish, where necessary, unlawful actions by other state institutions³³, while societal accountability refers to the scrutiny of civil associations, non-governmental Associations and Independent Mass Media over state governmental activities³⁴.

On the other hand, the *Black's Law Dictionary* defines democracy as 'government by the people either directly or through representatives'³⁵.

In Nigeria, although it is safe to say that the country is undergoing the longest period of democratic rule since independence, culminating in the fourth Republic, yet the dearth of democratic experience has created enormous challenges to institutionalizing democracy in the Nigerian fourth Republic. Undeniably, the fact is recognizable that the trend over the past decades, particularly since 1999, is modestly positive and work-in progress³⁶, even if insecurity, corruption, ethnic particularism and ethnocentric prejudices have become the major challenges bedeviling the Nigeria democratic dispensations.

Constitution

It is apt to spotlight constitution as a concept, considering its important role in the exercise of emergency powers. This is born out of the fact that the constitution provides for the powers of the President toward the declaration of the state of emergence, and the grounds under which such powers could be invoked. Hence, constitution is inevitable in any event of emergency rule in Nigeria.

Jurists and constitutional experts have defined constitution in different ways. These have spanned from definitions given by courts to definitions proffered by text writers or commentators. Nigerian jurists and writers have also done a lot in this direction.

According to Ben Nwabueze, foremost Nigerian Constitutional Law Theorist, 'A Constitution is a mode of organizing a state and its government'. It is, in other words, a body of fundamental principles according to which a state is organized³⁷. There have been much judicial activities

³³ O G Donnel, Illusions About Consolidations [1996] 7 [2] *Journal of Democracy* 34 – 51

³⁴ Egielemai (n27)

³⁵ B A Caarner, *Black's Law Dictionary* (8th edn., Thomson West 2004) 464

³⁶ A Ozohu – Suleiman, Democracy, Good Governance and Development in Nigeria [2006] vol. 8 (7) *Journal of Public Administration and Policy Research* 80 - 88

³⁷ B O Nawbueze, *Presidential Constitution of Nigeria* (Longman 1982) 7

in this direction in Nigeria. In *Attorney General of Ondo State v Attorney General of the Federation & Ors*³⁸ Uwaifo, JSC defined constitution as follows:

A constitution is an organic instrument which confers powers and also creates rights and limitations. It is the supreme law in which certain first principles of fundamental nature are established.

Ogwuegbu, J.S.C., in the same case said: A constitution is an instrument of government under which laws are made and not mere Acts or Laws³⁹. Twenty-two years earlier in *Nafiu Rabi v The State*⁴⁰, Sir Udo Udoma, JSC had put it thus:

The function of the constitution is to establish a framework and principles of government, broad and general in terms intended to apply to the varying conditions of which the development of our several communities must involve.

It has also been said that the constitution is the organic law or gerund norm of the people not only seeking to provide the machinery of government but also gives rights and imposes legal instrument on the people it is meant for⁴¹. The privy council has also defined a constitution as a legal instrument giving rise, among others to individual rights which are generally capable of enforcement in a Court of Law, except otherwise expressly provided⁴². A constitution is a living dynamic organization which, at any point in time will reflect the moral and political values of the people it governs, and accordingly, the law of the constitution must be appreciated within the socio-political context in which it operates⁴³.

A constitution usually seeks to set a standard of conduct or behaviour which is regarded as correct and which is expected to be adhered to by those for whom the rules are made. These constitutional rule facilities stability and predictability of behaviour. Constitution also serves for evaluation of conduct, programmes and other activities, which are to be assessed by it, in order to decide whether or not members or its government are acting properly, that is constitutionally. Within the context of our discourse, a constitution will thus be defined as a body of laws, rules and objectives which sets out and delimits the structures, powers, rights and duties of an organization or group as well as its organs or its members⁴⁴.

³⁸ (2002) 9 NWLR (Pt. 772) 222 at 418-419; (2002) FWLR (Pt. 111) 1972 at 2167

³⁹ at 2100 of the FWLR

⁴⁰ (1980) 8-11 S. C. 130 at 148

⁴¹ PDP v INEC (2001) FWLR (Pt.31) 2735 at 2776

⁴² *Minister of Home Affairs v. Fisher* (1980) A C 319 at 329

⁴³ Chinwo (n15) 19

⁴⁴ Chinwo (n15)

Constitutionalism

In the study of the constitution, the term ‘constitutionalism’ is inevitable. According to Hillarie Barnett the doctrine of constitutionalism suggests the following:

- a) That the exercise of power be within the limits conferred by parliament in unwritten constitutional systems and by the constitution in written constitutions, on those with power- the concept of *intra vires*- and that those who exercise power are accountable to law;
- b) That the exercise of power – irrespective of the legal authority must confirm to the motion of respect for the individual and individual citizen’s rights;
- c) That the powers conferred on institutions within a state – whether executive, legislative or judicial – be sufficiently dispersed between the various institutions so as to avoid the abuse of power; and
- d) That the government (that is the executive) in formulating policy and the legislature, in legitimating that policy, are accountable to the electorate in whose trust power is held.

In summary, according to Barnett, constitutionalism suggests limitation of power, the separation of powers and the doctrine of responsible accountable government⁴⁵.

Constitutionalism, furthermore, has been described as ‘a process of Political rules and obligations which bind both governors and the governed, both kings and ordinary citizens. There is no constitutionalism under absolute monarchs or absolute Presidents. Constitutionalism is of necessity a version of limited government⁴⁶. Moses Adagbabiri succinctly captured the term in the following words:

The term constitutionalism means that the power of leaders and government bodies is limited, and that these limits can be enforced through established procedures. As a body of political or legal doctrine, it refers to government that is, in the first instance, devoted both to the good of the entire communities and to the preservation of the rights of individual persons. Constitutionalism is a concept in political theory that explains that a government does not derive its power from itself, but gains its power as the result of there being a set of written laws that give the governing body certain powers⁴⁷.

⁴⁵ Chinwo (n15) 20 - 21

⁴⁶ Mazrui Ali, ‘Constitutional Change and Cultural Engineering: Africa’s Search for New Directions in Constitutionalism in Africa’ Femi Falana, ‘Constitutionalism and the Re-Invention of the Nigeria State’, Being a Paper Presented at the Gani, Fawehinmi Annual Lecture Organized by the Ikeja Branch of the NBA, Oranmiyan Hall, Lagos Airport Hotel, Ikeja on 15 January, 2009.

⁴⁷ M Adagbabiri, Constitutionalism and Democracy: A Critical perspective (2015) Vol.5, No. 12 *International Journal of Humanities and Social Science* 109.

To Michel Rosenfield, there are three essential characteristics of modern constitutionalism, which are: limiting the power of government, adherence to the rule of law, and protection of fundamental rights⁴⁸. Thus, the concept of constitution and constitutionalism is transcendental to the concept of rule of law. While the constitution assist the citizens to determine whether any public official has acted '*ultra vires*' or '*intra vires*', so as to agitate for judicial review of such action, constitutionalism provides a pathway of evaluating the form, substance and legitimacy of a constitution.

Brief Analysis of Proclamation of State of Emergency in Nigeria

It should be noted very keenly that a state of emergency is a governmental declaration that suspends certain aspects of normal function of government of the executive, legislative and to some extent, the judicial powers of government⁴⁹, but does not include suspension of the holders of such offices⁵⁰, at all. In this sense, it provides the government with the powers to do, within the bounds of the law, whatever is necessary to ensure the safety of people and the protection of property and the environment except removal of persons especially elected officers, who discharge governmental functions. In Nigeria, there had been several impositions of emergency rule by some Presidents and heads of state in Nigeria, which generated debates and arguments on their constitutionality's or otherwise, and as to whether they were legally or maliciously imposed with the view to solving the lingering conflicts in the affected state.

First, are the events that gave rise to the declaration of a state of Emergency in the Western Region in 1962 by the federal government, which arose as a result of the disagreement between the two prominent leaders of the Action (AG) party, Chief Obafemi Awolowo and Chief S. L. Akintola in May 1962, under Prime Minister Tafawa Belewa⁵¹. Owing to factional squabbles within the ruling party in Western Nigeria, the Action Group as we earlier posited, the regional governor dismissed the premier, Chief Akintola, and appointed another in his place. For his part, Chief Akintola dispatched a letter through the Federal Prime Minister, recommending, as he was entitled to do under the constitution⁵², that the governor's appointment be revoked, but the recommendation was overtaken by events before it could be acted upon. Chief Akintola, refusing to accept his dismissal, promptly commenced a court action to have its validity determined. Subsequently, the house of assembly met to approve the new government. The meeting resulted in a great uproar; during which members hurled chairs at one another (one aimed at the speaker missed him and broke the mace on the wall). The meeting had to be dispersed by the police without any vote being taken. A second attempt to hold the meeting

⁴⁸ M Rosenfield, 'The Rule of Law and the Legitimacy of Constitutional Democracy' (2001) (74) (13) *Southern California Law Review* 1307.

⁴⁹ P Mbah 'Politics and the Adoption of the Policy of State of Emergency in Nigeria: Explaining the 1962 and 2013 Experiences (2014) (5) (15) *Mediterranean Journal of Social Sciences* 588

⁵⁰ B O Igwenyi, *et al*, (n7) 1348

⁵¹ O J Adeek, 'The Crises that Truncated the First Republic', 2017 in B O Igwenyi, *et al* (n7) 1348

⁵² 1960 Consitution of NIgeria

later on the same day saw a repeat of the earlier disturbance, with even greater confusion. The chamber of the house was then cleared and locked up by the police⁵³.

From this, the federal government concluded that it had become impossible to carry on the government of the region, and so proceeded to declare a state of emergency. It must be noted; first, that the disturbances in the chamber of the house were caused by only ten supporters of Chief Akintola out of a house of 117, and, second, that apart from the event in the house, the entire region outside it remained peaceful and unaffected by the rather uncivilized behavior of the parliamentarians. When the house was cleared and locked up by the police, the members returned to their homes, and there was no sign of any attempt or intension to carry the affray outside the chamber. The trouble-makers were apparently satisfied that they had achieved their objective, which was to prevent the house from approving the new government⁵⁴.

All that could reasonably be inferred from the inability of the house to transact any business was the legislative arm of the government had been temporarily incapacitated, but surely the government of the region had been lawfully carried on by the new executive until the legality of Chief Akintola's dismissal had been determined by the court⁵⁵. It cannot be seriously doubted that the declaration of a state of emergency on the strength of the situation prevailing in Western Nigeria at the time was ill-motivated, and that it was made for a purpose other than that envisaged by the constitution⁵⁶. This is because an emergency, such as was contemplated by the constitution, presupposes some event, usually of a violent nature, endangering or threatening public order or public safety. The danger or threat must be an imminent one, and the event giving rise to it must involve a considerable section of the public, since only by that can public order or public safety be said to be in Jeopardy.

Section 305 of the Nigerian Constitution of 1999, s Amended 2011

The Constitution of 1999, as amended provides for the procedure for declaration of state of emergency in Nigeria. Section 205 (1) empowers the President to issue 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 the federal. The President thereafter, will transmit copies of the official gazette of the government containing the proclamation and the state of emergency to the President of the senate and speaker of the House of Representatives, and each of whom will convene a meeting of the two Houses (Senate and Reps) and differently preside over same, to decide whether or not to pass resolution approving the proclamation under S.30 5(2).

Section 305 (3) (a-g) (4) (5) & (6) on the other hand, provides the grounds upon which the President shall exercise his power to proclaim a state of emergency. They are as follows:

a) Only when the federation is at war;

⁵³ B O Nwabueze, *A Constitutional History of Nigeria* (Longman 1982) 156

⁵⁴ Nwabueze (n51)

⁵⁵ Nwabueze (n51) 156 -157

⁵⁶ Nwabueze (n51)

- 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 extra ordinary measures to restore peace and security;
- d) There is 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 provision of subsection (4)⁵⁷.

Section 305 (4) provides that the Governor of a state may request the President to issue a proclamation of a state of emergency in the state having first sought and obtained, the support of two-thirds majority of the House of Assembly where any of the grounds in subsection (3) (c) (d) (e) exists in the affected state only and not beyond its boundaries. Note that, it is only when the Governor of a State where any of the grounds aforesaid exists fail within a reasonable time to make a request to the President to issue such proclamation that the President is empowered to issue a proclamation of a state of emergency in that state⁵⁸. Subsection (6) (a-d) of S.305 provides for grounds under which a proclamation of a state of emergency by the President shall cease to have effect.

Declaration of a State of Emergency by President Obasanjo in 2004

On 8th May 2004, President Obsanjo declared a State of Emergency in Plateau State. The details of the declaration were the following:

- a) The emergency rule was to last for six months in the first instance;
- b) The Governor and the Deputy Governor were suspended from their respective offices;
- c) An administrator was appointed to rule the state during the emergency period;
- d) The plateau State House of Assembly was suspend;
- e) Elected official below the state level were not affected by the suspension order; and
- f) The President, after consultation with the Federal Executive Council, was to make Emergency regulations for the administration of the state while the state of emergency lasted⁵⁹. Infact, while the declaration was being made and before the houses of the National Assembly could receive the official Gazette transmitting the proclamation to them, soldiers had already taken over the streets of Jos, the state capital, and the state House of Assembly and Government House sealed up. In spite of this violation of procedure by the President, the National Assembly overwhelmingly approved the Presidential fiat. Like A. V. Dicey said:

⁵⁷ Cap C23 LFN, 2004 (n1) S. 305 (3) (a-g)

⁵⁸ Cap C23 LFN, 2004 (n1) S. 305 (4) & (5)

⁵⁹ Agbara (n9) 22

In an emergency situation, public officials might find themselves compelled to act outside the law and parliament might then indemnify them. But an Act of indemnity does not make what the officials did legal, meaning that parliament has ‘legalized illegality’. Rather, it places them in a zone uncontrolled by law—a legal black hole, to use the current term⁶⁰.

Fatile and Ejalonibu posited that in the case of plateau state, the issue of ethnicity and religion was at the centre of the conflict and the declaration of emergency further polarized the population⁶¹. But Mbah saw it beyond the crises and stated that it was the struggle by President Obasanjo to remove Governor Joshua Dariye⁶². This is why, under international law, states must also refrain from taking measures in emergencies that would simply replace public dominion (public interest) with private dominion (private interest).

Also, in the year 2006, President Olusegun Obasanjo, in a very ridiculous manner, declared a state of emergency, sacking the Governor and his Deputy, as well as the State House of Assembly. Aluko gave a chronicle account of the event leading to the proclamation of the state of emergency. According to this report, the Ekiti House of Assembly had passed a motion to serve a notice of impeachment on the Ekiti State Governor Mr. Peter Ayodele Fayose and his deputy Mrs. Abiodun Christine Olujimi, alleging gross misconduct against them⁶³. On that same day, Governor Fayose filed an ex-parte motion in an Ado-Ekiti court to stop the impeachment process. However, the motion was dismissed on the ground that same was ‘alien in law’. Consequently, the House of Assembly then instructed the Chief Judge of the state to form a panel to conduct the formal impeachment investigation of the Governor and his Deputy. The C J subsequently announced his seven-person panel but the House objected that the panel was made up of family members and close allies of the Governor. The C J swept aside the objections of the House, giving the excuse that, as a judge with limited contacts with ordinary folk, he was not expected to know everybody’s backgrounds, and then dismissed them all as ‘Jokers’. The Panel went ahead to be formally inaugurated by the C J, even after the speaker forced his way into the arena to object its composition. This panel eventually exonerated the Governor of all the allegations. The result was that the House promptly suspended the C J⁶⁴, and then appointed an acting Chief Judge, who was not even the most senior judge, an action that was ‘*Ultra Vires*’ the constitutional powers of the House of Assembly⁶⁵.

⁶⁰ A V Dicey, *Lectures on the Relation between Law and Public Opinion England During the Nineteenth Century*, (Macmillan 1914) 12

⁶¹ Fatile and Ejalonibu (n3) 129

⁶² P Mbah, Politics and the Adoption of the Policy of State of Emergency in Nigeria; Explaining the 1962 and 2013 Experiences (2014) Vol. 5, No. 15, *Mediterranean Journal of Social Sciences* 588

⁶³ M E Aluko, The State of Emergency in Ekiti State and the Nebuchadnezzar Non-Option webmaster@dawodu.com accessed 15th July, 2021.

⁶⁴ The embattled C. J. later challenged his removal in the Court and the matter was not heard until the Proclamation of the State of Emergency

⁶⁵ Cap C23 LFN, 2004 (n1) Ss. 271 and 292

Interestingly, the acting Chief Judge constituted a panel on the instruction of the House to investigate the Governor and his Deputy. This panel of course, indicted the duo and reported to the House. Consequently, the House sealed the impeachment of the Governor and his Deputy, amidst all law suits challenging the whole process.

Igwenyi et al, posited that President Obasanjo had appealed to the members of the House of Assembly to spare the Deputy Governor to stay on, but the house members refused and swore in their speaker, Mr. Friday Aderemi, as Acting Governor. The President got annoyed and declared a state of emergency in the state, sacking the Governor, and of course, the house of Assembly as a whole, and appointed Rtd. General Tunji Olurin as the Sole Administrator of Ekiti State⁶⁶

Declaration of State of Emergency by President Goodluck Jonathan in 2013

Again, in the year 2013, President Goodluck Jonathan declared State of emergency in the three North-Eastern State of Adamawa, Borno and Yobe, bedeviled by the activities of the Boko Haram insurgent. Igwenyi *et al*, posited that, by not suspending the Governors nor the Houses of Assembly of these states, the President complied substantially with the provision of section 305 of the constitution, by limiting himself to the extent of powers granted to him under the said section. However, he failed to publish the said proclamation in a gazette before radio and television announcements, a procedural breach which was in violation of the constitution and international standards⁶⁷.

State of Emergency Under International Laws

Recognizing the dangers that accompany states of emergency and the incidental violation of human rights and abuse of power, international law limits the circumstances under which states may legally derogate from the international obligation to respect, protect, and fulfill civil and political rights. The International Covenant on Civil and Political Rights (ICCPR)⁶⁸ like other international and regional laws, employs a two-stage inquire to evaluate the legality of a State's derogation from general human rights standards. First, are circumstances sufficiently dire to justify initiating a state of emergency? Second, if a state of emergency is justified, what measures may a state employ to address the emergency's threats to public policy? In particular, Article 4 (1) of the ICCPR, provides thus:

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 covenants may take measures derogating from their obligations under the present covenant to extent strictly required by

⁶⁶ Igwenyi, *et al*, (n7) 1351

⁶⁷ Agbara (n9) 24

⁶⁸ ICCPR, 1966

the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin⁶⁹.

Article 4(2) provides that ‘No derogation from article 6⁷⁰, 7⁷¹, 8⁷² (paragraph 1 and 2), 11⁷³, 15⁷⁴, 16⁷⁵ and 18⁷⁶ may be made under this provision. By the provision of the paragraph 2 of the article, it becomes pertinent for state parties to be meticulous regarding the circumstances for declaring state of emergency so as not to derogate from the rights so provided for in the articles mentioned in the said paragraph 2 of article 4 to the convention.

The African Charter on Human and Peoples’ Rights, 1981, has no derogation clause- a clause dealing with temporary suspension of rights in times of war or state of emergency, and non-derogation from certain rights on such occasions. However, a corollary to the foregoing discussion could be drawn from the provisions of article 60 of the charter, which provides that:

The commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provision of various African instruments on human and peoples’ rights, the charter of the United Nations, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights as well as from the specialized Agencies of the United Nations of which the parties to the present charter are members⁷⁷.

It follows therefore that the commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the organization of African Unity, African Practices consistent with international norms on human and peoples’ rights, customs generally accepted as law, general principles of law recognized by African state as well as legal precedents and doctrine⁷⁸. Hence, in times of siege, the authorities of the African Union can, under these provisions, hold a state party accountable for derogation from their international human rights obligations.

⁶⁹ ICCPR, 1966 Art. 4(1)

⁷⁰ ICCPR, 1966 Right to Life

⁷¹ ICCPR, 1966 Freedom from Torture, Cruelty and Degrading Treatment of Punishment

⁷² ICCPR, 1966 Freedom from Slavery

⁷³ ICCPR, 1966 Freedom from Imprisonment on the Ground of Inability to Fulfill a Contractual Obligation

⁷⁴ ICCPR, 1966 no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.

⁷⁵ ICCPR, 1966 Every one shall have the right to recognition everywhere as a person before the law

⁷⁶ ICCPR, 1966 Right to Freedom of thought, conscience and religion

⁷⁷ ICCPR, 1966 Art. 60

⁷⁸ ICCPR, 1966 Art. 61

Note that Nigeria is a party to the ICCPR 1966 and the ACHPR 1981 and other international instruments.

From the foregoing therefore, there is consensus of opinion that a state of emergency normally provides easy ground for authorities to, sometimes, suspend the law and clampdown on human right. However, municipal and international instruments, envisaging a situation of total breakdown of law and order and the incidental derogation of human rights, have stipulated measures that should be taken in times of emergency or war, including the procedure for taking such measures. In this regard, any action which has the effect of derogating from human rights must be to the extent and time strictly required by the exigencies of the situation and be non-discriminatory in nature⁷⁹.

A very germane point that must not be glossed over in this paper is the power of the National Assembly to ratify a proclamation suspending the governor or his deputy. This action is transcendental in almost all the emergency declarations discussed above. However, section 11(4) of the Constitution of the FRN, 1999, (as amended), provides that:

At any time when any House of Assembly of a state is unable to perform its functions by reason of the situation prevailing in the 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 Governors or the Deputy Governor of the State from office⁸⁰

By this section, it becomes apparent that the National Assembly does not have power to, either remove a democratically elected Governor or Deputy Governor, and derivatively, cannot ratify any instrument purporting to remove the Governor or Deputy Governor. Hence, What happened in Plateau and Ekiti States were mere sham and a show of irresponsibility, a situation where the National Assembly, in difference to the chief Executive, or possibly, in connivance with same, purported to have ratified an illegality, which they had no powers to legalize.

⁷⁹ ICCPR, 1966 Art. 4 (1)

⁸⁰ Cap C23 LFN, 2004, (n1) S. 11 (4)

Do courts have powers to fetter the discretion of the parliament on the declaration of state of emergency?

Question such as this, is very pivotal as it is, with the view to knowing if or whether the President's powers in this regard can be reviewed. From the judicial decisions in Nigeria, in this direction, it could be understood that, the courts seem to have agreed that the territorial extents of such declaration are matters within the purview of executive discretion, which the courts have generally been reluctant to interfere with. For example, in *Governor of Oyo State & others v. Folayan*⁸¹ Justice Oputa rightly held that in relation to matters within a public body's field of judgement the court conducts its review from the body's stand-point and must not intervene solely on the basis that it would itself have acted differently. Infact, with particular reference to emergency declaration in Nigeria, it was held in the case of *Williams V. Majekodunmi*⁸², that the issue of whether a state of emergency existed was outside the province of the courts of law but only within the bounds of parliament.

From the foregoing, therefore, in the event of emergency declaration by the President, the courts are in helpless situation, as they cannot reverse such declaration made by the President. The reason is that issue of declaration of state of emergency by the President is discretionary. It involves the discretionary powers of the President and the relationship between the parliaments i.e. law making bodies and the executive arm of government (President) at the federal level. The courts' powers to review declaration of state of emergency made by the President are indeed fettered.

Conclusion

Considering the above scenario on the declaration of states of emergency in Nigeria, it's obvious that from the first, to the fourth republic, the Nigerian Presidents have been involved in the abuse of human rights and derogation from the postulates of the constitutions. The grounds for the declaration of states of emergency have not been duly followed by the successive Presidents of Nigeria, and the National and States Houses of Assembly are not left out in this act of illegality. The essence of declaration of a state of Emergency by the President, constitutionally speaking, is not for the removal of the Governor of a state or climbing down on the state executive or legislative arm of government, its rather for the purposes of restoring law, peace and order in that state, with temporary infringement on the freedom of the citizens as a sacrifice for peace, law and order in that state. Unfortunately, the Nigerian Presidents, upon proclamation of state of emergency had often quickly removed the governors of the affected states, and flagrantly violated human rights. This is in breach of the constitutional provisions, particularly section 305 of the constitution. In all the incidents here above discussed, it's apparent that grounds upon which the Presidents had at various occasions declared states of emergency in Nigeria, were private rather than constitutional. Also, it's sad enough that the courts in Nigeria lack the powers to review the illegal and '*ultra vires*' actions of the Presidents

⁸¹ (1995) 8 NWLR Part 292, 322 at 233

⁸² (1962) 1 All NLR 328 at 336

on the declaration of a state of emergency, the reason being that such powers are discretionary and absolutely within the executive domain.

Emergency powers in Nigeria are therefore wrongly exercised by the Nigerian Presidents. The exercise of the emergency powers in Nigeria by the Presidents is better construed as not being in tandem with the international best practices. In view of this, we hereby recommend that the constitution be amended, as the President seems to leverage on the unfettered and/or discretionary powers conferred on him by the constitution, to engage in illegal and '*ultra vires*' acts. Second, courts should be given the constitutional mandate to intervene in the executive lawlessness of the President, in any event where a state of emergency was illegally proclaimed. Hence, upon amendment of the constitution, courts could be approached for the purpose of redressing the infractions occasioned by the President, in this regard, and review such act where it is necessary. Nigeria should respect international laws it is a signatory to, and operate within the frame work of international standards and best practices.