

Partial Declaration of State of Emergency

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Introduction

Globally, there are constitutional and statutory provisions on the declaration of state of emergency at the national and other levels. In some jurisdictions, the declaration is at the national and state levels while in others, it is at the national, state and provincial levels.

In Nigeria, we had the Emergency Powers Act¹ which was omitted in the Laws of the Federation of Nigeria, 1990². In the 1960³, 1963⁴, 1979⁵ and 1999⁶ Constitutions⁷, there are provisions for declaration of state of emergency in Nigeria. Arising from the political crises in the Western House of Assembly, the first state of emergency was declared in Western Nigeria on May 29, 1962. The facts of this case are very interesting. Sometime in 1962, there was a dispute within the Action Group, a ruling political party in the region. The dispute led to two factions emerging, one led by the leader of the party who was the official opposition leader in the Federal Parliament and the other by the deputy leader of the party, who was the Premier of Western Nigeria. In the circumstances, the Governor of Western Nigeria purportedly dismissed the Premier from office on the ground that he had lost the support of the majority in the Western House of Assembly. As the crisis developed, there was a fight on the floor of the House of

1 Act No. 1 of 1961 as amended by the Emergency Powers (Jurisdiction) Act No. 14 of 1962 and Regulations made thereunder.

2 See pp xviii and 1 of the Index to the Laws of the Federation of Nigeria, 1990. It was also omitted in the Laws of the Federation of Nigeria, 2004. See Volume 1, The Laws of the Federation of Nigeria, 2004, p xxxii

3 See section 65 of the 1960 Constitution

4 See section 70 of the 1963 Constitution

5 See section 265 of the 1979 Constitution

6 Section 305 of the 1999 Constitution, as amended

7 1999 Constitution, as amended will hereinafter be referred to as '1999 Constitution'.

Assembly and the Federal Parliament met and passed a resolution declaring that a state of emergency existed in Western Nigeria.

In this chapter, we will examine the powers of the Federal Parliament and/or the President to declare a state of emergency in some parts of Nigeria. We will also examine the practice in other jurisdictions.

Meaning of State of Emergency

A **state of emergency** is a governmental declaration that may suspend some normal functions of the executive, legislative and judicial powers, alert citizens to change their normal behaviour, 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 declarations usually come during a time of natural or man-made disaster, during periods of civil unrest, or following a declaration of war or situation of international or internal armed conflict. *Justitium* is its equivalent in Roman law.⁸

A period of emergency means any period during which there is in force a proclamation of a state of emergency declared by the appropriate authority in exercise of the powers so conferred.

Generally the declaration of state of emergency has effects on the fundamental rights of citizens and there are usually constitutional and statutory provisions dealing with the suspension of some of these rights especially right to life and personal liberty. Thus an act of the government shall not be invalidated by reason only that it provides for the taking, during periods of emergency, of measures that derogate from the provisions of the constitution or law dealing with right to life and personal liberty but no such measures shall be taken in pursuance of such an enactment during any period of emergency save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency. Such derogation does not usually apply to right to life except in respect of death resulting from acts of war.

8 http://en.wikipedia.org/wiki/State_of_emergency accessed on 3 January, 2013.

The Declaration of a state of emergency or martial law is generally associated with dictatorial regimes than with democracies. In the case of the former, they usually last for the duration of the dictatorial regimes. Sometimes constitutions are suspended including the provision of fundamental rights. Article 4 to the International Covenant 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. The European and American Conventions on Human Rights have similar derogatory provisions. However, no derogation is permitted to the International Labour Conventions. Derogations by states having ratified or acceded to binding international agreements such as the ICCPR, the American and European Conventions on Human Rights and the International Labour Conventions are monitored by independent expert committees, regional Courts and other State Parties.⁹

We must state that the powers to declare state of emergency under Section 305 of the 1999 Constitution are not the same as that in section 70 of the 1963 Constitution. This is so because the powers to declare a state of emergency do not include the powers to make consequential laws without an express provision. Section 70(1) of the 1963 authorised Parliament (the National Assembly) to make laws during such period of emergency on matters not in the Exclusive Legislative List but there is no such provision in section 305 of the 1999 Constitution.

Historical Perspectives

Instances abound where state of emergency has been declared in other jurisdictions in the past. For example, either total or partial emergencies have been declared in the following jurisdictions:

Egypt had been under a nearly-continuous state of emergency (**Martial Law**) since 1967 (interrupted for 18 months in 1980-81); the People’s Assembly renews it every two to three years. The state of emergency, expired May 31, 2012 .

9 http://en.wikipedia.org/wiki/State_of_emergency accessed on 3 January, 2013

Tunisia declared state of emergency (**Martial Law**) January 2011, following unrest from economic issues.

- Late August 2011 - Virginia, Maryland, Delaware, Pennsylvania, New Jersey, New York, Connecticut, Massachusetts, Vermont, and Maine declared states of emergency because of Hurricane Irene.
- April 16, 2011 - States of emergency were declared in the cities of Raleigh, North Carolina, Fayetteville, North Carolina, Greensboro, North Carolina, as well as Cumberland County, North Carolina, and the entire state of North Carolina following a severe weather outbreak that caused 62 reported tornadoes within the state.
- April 15, 2011 - States of emergency were declared in the United States for 26 Oklahoma Counties, 14 Mississippi Counties, and all counties in Alabama after a severe weather outbreak caused significant damage on April 14–15 to these areas.
- March 15, 2011 - Bahrain declared a state of emergency on 15 March 2011 and asked the military to reassert its control over the capital, Manama, as clashes between Shia and Sunni groups spread across the country. Bahrain has been gripped by deepening political unrest and widespread protests for over a month, with the Shia majority and some Sunni liberals calling for democracy and an end to discrimination.
- February 24, 2011 - Bolivia declared a national state of emergency on 24 February 2011, because of floods that have been affecting the nine departments in Bolivia, thousands of people have been left homeless.
- February 22, 2011 - New Zealand declared State of Emergency in the city of Christchurch on February 22, 2011 after another powerful 6.3 magnitude earthquake damaged the city and surrounding areas. Civil Defence Minister John Carter declared a national state of emergency at 11.28 am on February 23, 2011.
- January - February, 2011 - Queensland declared a state of disaster in a majority of the

state during the 2011 Queensland Floods.

- October 5, 2010 - Hungary declared state of emergency due to a sludge flood, caused by an accident in Ajka at the local alumina plant, killing at least four people and causing a long-lasting natural disaster.
- September 30, 2010 - A state of emergency was declared in Ecuador due to a coup by armed forces.
- September 4, 2010 - Christchurch City Council declared State of Emergency on September 4, 2010 after a powerful 7.1 magnitude earthquake damaged the city and surrounding areas. The state of emergency invoked provisions of the Civil Defense Emergency Management Act 2002. The State of Emergency was lifted 12 days later on September 16 upon passage of the Canterbury Earthquake Response and Recovery Act 2010.
- February 6, 2010 Pittsburgh declared State of Emergency on February 6, 2010 after the February 5–6, 2010 North American blizzard.
- September 26, 2009 - A “state of calamity” for Metro Manila and 25 other nearby provinces in the Philippines was declared due to heavy flooding caused by Typhoon Ketsana (Local name: *Ondoy*).
- April 11, 2009 - Thailand’s Prime Minister Abhisit Vejjajiva declared a state of emergency in the areas of Pattaya and Chonburi, in response to anti-government protestors breaking into the conference center of a hotel complex in the sea-side resort city of Pattaya, in the then-venue site of the ASEAN was being held, immediately resulting in its cancellation. Another state of emergency on April 12, 2009, was announced in Bangkok and the surrounding areas, due to an heightened escalation of tension between the government and anti-government protesters, but was later lifted.
- January 2009 - Slovakia was in a state of emergency due to natural gas supply shortage.

- January 11, 2007 - Bangladesh was in a state of emergency due to electoral violence. This ended on December 16, 2008, when new parliamentary elections were organised.
- September 2, 2008 - A state of emergency was declared in Bangkok by Prime Minister Samak Sundaravej following civil unrest; it was lifted on September 14, 2008.
- July 1, 2008 - Mongolian president Nambaryn Enkhbayar declared a state of emergency in the capital Ulan Bator for four days after violent protests against the ex-communist Mongolian People's Revolutionary Party (MPRP). The MPRP had claimed a majority of seats in the 2008 parliamentary elections, but was accused of fraud and vote rigging by the less-successful parties.
- March 2008 - Armenia was in a state of emergency from March 2, 2008 to March 20, 2008, declared by President Robert Kocharyan in response to protests over the 2008 Armenian presidential elections.
- November 3, 2007 - Pakistan was in a state of emergency from November 3, 2007 to December 15, 2007. President Pervez Musharraf declared emergency "to stop Pakistan from committing suicide". He lifted the state of emergency after he resigned from the army and took the oath of office as a civilian President of Pakistan.
- August 25, 2007 - Greece was in a state of emergency from August 25, 2007 to August 28, 2007 due to the highly destructive forest fires that occurred throughout the country.
- June 2007 - Oman declared a state of emergency as the country was hit by the strongest named cyclone in the northern Indian Ocean, Cyclone Gonu.
- January 2007 - Santa Clara County, California was under a state of emergency due to extremely cold temperatures.
- May 14, 2006 - The U.S. states of Massachusetts and New Hampshire declared a state of emergency as a result of massive flooding from the strongest rains to hit the regions in almost 70 years.

- October 13, 2006 - Buffalo, New York declared a state of emergency when the “most devastating snow storm in U.S. history” hit the city. Schools and businesses were closed for a week, and Buffalo and surrounding towns and cities were declared major disaster areas by President Bush.
- February 24, 2006 - the Philippines declared a state of emergency via Philippine Proclamation 1017 for one week until Philippine Proclamation 1021, in response to a supposed coup against President Gloria Macapagal Arroyo’s government in the midst of the 20th anniversary of the 1986 People Power Revolution that toppled the rule of Ferdinand Marcos¹⁰.

In Nigeria, the first state of emergency was declared in May 1962. As will become apparent shortly, it is not clear whether the constitutional provisions were met. Section 65 of the 1960 Constitution provides thus:

1. *Parliament may at any time make such laws for Nigeria or any part thereof with respect to matters not included in the Legislative Lists as may appear to parliament to be necessary or expedient for the purpose of maintaining or securing peace, order and good government during any period of emergency.*
2. *Any provision of law enacted in pursuance of this section shall have effect only during a period of emergency:*

Provided that the termination of a period of emergency shall not affect the operation of such a provision of law during that period, the validity of any action taken there under during that period, any penalty or punishment incurred in respect of any contravention thereof or failure to comply therewith during that period or any proceeding or remedy in respect of any such penalty or punishment.

3. *In this section “period of emergency” means any period during which*

- a. *the federation is at war.*
 - b. *there is in force a resolution passed by each House of parliament declaring that state of public emergency exists; or*
 - c. *there is in force a resolution of each House of parliament supported by votes of not less than two-thirds of all the members of the House declaring that democratic institutions in Nigeria are threatened by subversion.*
1. *A resolution passed by a House of parliament for the purposes of this section shall remain in force for twelve months or such shorter period as may be specified therein:*

Provided that any such resolution may be revoked at any time or may be extended from time to time for a further period not exceeding twelve months by resolution passed in like manner

Section 28 of the 1960 Constitution also provides:

1. *An Act of Parliament shall not be invalid by reason only that it provides for the taking, during periods of emergency, of measures that derogate from the provisions of sections 17, 20, 21 or 27 of this Constitution but no such measures shall be taken in pursuance of any such Act during any period of emergency save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency:*

Provided that nothing in this section shall authorise any derogation from the provisions of section 17 of this Constitution except in respect of or resulting from acts of war or any or any derogation from the provisions of subsection (7) of section 21 of this Constitution.

2. *In this section "period of emergency" means a period of emergency for the*

*purposes of section 65 of this Constitution.*¹¹

The events leading to the declaration of the first state of emergency in Nigeria can be summarized thus. The Action Group was the ruling party in the Western House of Assembly. At the party's annual convention held in January 1962 at Jos, the bitter disagreements among the leaders of the party were brought into the open. The dispute was caused largely by differences on tactics between Chief Samuel Ladoke Akintola, the then Premier of the Western Region and the deputy leader of the party who advocated that the Action Group should enter a Federal Coalition Government, and Chief Obafemi Awolowo, Leader of the Opposition in the Federal Parliament, who strongly opposed this view and also supported a more radical policy in internal affairs.

The conflicts involved more than party discipline and a power struggle between the two men. Since 1960, Chief Awolowo, sensing the growing discontent and grumbling among Nigerian Youth, had attempted to woo their votes by transforming the Action Group from a Yoruba-based, Western Regional party into a National Party with a radical socialist outlook. He demonstrated that Action Group had no future without it. The conflict within the Action Group became a battle between the young radicals led by Awolowo and the businessmen and traditional rulers led by Chief Akintola.

Late 1961, Chief Awolowo asked a group of young party leaders to draft a series of working papers defining democratic socialism. These papers were brought before the Action Group Federal Executive in December when they were derided by Chief Akintola as the work of revolutionary babes who haven't the political astuteness to gain the party a single vote. Also Chief Akintola refused to accept the continued push by Chief Awolowo and the young men to campaign both in the North and the East. He argued that the Action Group should face realities and stay in the West. By a vote of 81 to 29, it was decided that Akintola be dismissed from the party and that he resign his premiership. He refused. On May 20, 1962, the Federal Executive Committee of the party decided to remove him as Deputy Leader of the party and Premier. A majority of the legislature also signed a letter sent to the Governor of the Western Region,

11 See also section 29 of the 1963 Constitution.

Sir Adesoji Aderemi, the Ooni of Ife, asking that Chief Akintola be dismissed. Accordingly, on May 21, 1962 the Ooni obliged, stating that “he was convinced that he (Akintola) no longer enjoyed the support of the members of the House of Assembly.” Alhaji Dawodu Soroye Adegbenro was asked to form a cabinet, which was sworn in May 23, 1962. Rather than work from the premier’s office (which remained forcibly “occupied” by Akintola and his supporters), Adegbenro worked from his home residence.

On Friday, May 25, 1962 a House of Assembly meeting called to debate a motion of confidence in the new government ended abruptly with a free-for-all fight involving the throwing of chairs. This caused the Prime Minister to call for a special session of the Federal Parliament for 29th May, 1962. At the special session the Prime Minister, Sir Abubakar began a chain of events and moved thus:

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.

He then went on to give historical reasons why he thought his motion should be supported by those present. After his lengthy speech, Chief Obafemi Awolowo, leader of Opposition in the Federal Parliament, and Leader of the Action Group that was the ruling (but then conflict-ridden) party in the Western Region, proposed an amendment thus:

“To delete all the words of the Motion after – That – and substitute – “This honourable House declares that having regard to the provisions of section 65 of the Constitution of the Federation of Nigeria a state of public emergency does not exist.”

Chief Awolowo then went on to argue that the motion was discriminatory, and would amount to a gross misuse of power if approved. After voting, Ayes were 32, Nays were 7 and Abstention – 2, and the motion was passed, giving the Federal Government constitutional powers to take 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. On May 30, 1962, restriction orders were served on 15 leading political figures in Western Region (including Awolowo, Akintola, Adegbenro, Rosiji, Fani-Kayode), 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 there¹².

Various law suits arose from this declaration of a state of emergency and the restrictions placed on some members of the Action Group especially Chief F R A Williams.¹³ However of interest to this chapter is whether party crisis that led to a fight in the Western House of Assembly can qualify as a ground for declaring a state of emergency in Western Nigeria having regard to the provisions of sections 28 and 65(3) of the 1960 Constitution. Did circumstances exist in Western Nigeria to suggest that a state of emergency existed in the state or was there any threat to democratic institutions in Nigeria or was the declaration merely political? Similarly, were the measures taken by the Administrator including the placing of some members of the Action Group on restrictions consistent with the provisions of section 28 of the Constitution? In other words, were the measures reasonably justified for the purpose of dealing with the situation that existed during that period of emergency? In *Williams v Majekodunmi, supra*, the Federal Supreme Court held that it is for the House to decide whether a set of facts justify the declaration of a period of emergency. Similarly in *Adegbenro v Attorney General of the Federation, supra*, the court at page 160 declared thus:

*It is unnecessary for us to rule on the submission that Parliament acted **mala fide** 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.*

With due respect to their Lordships, I hold a contrary view. Party crisis that led to a fight in the

12 See generally J O Ojiako *Nigeria: Yesterday, Today and...?*, (Onitsha: Africana Educational Publishers (Nig.) Ltd, 1981), p 96. See also P A O Oluyede *Peter Oluyede's Constitutional Law in Nigeria* (Ibadan: Evans Brothers (Nigeria Publishers) Limited, 2001) pp 210-211

13 See *Williams v Majekodunmi* (1962) 1 All NLR 413 and *Adegbenro v Attorney General of the Federation* (1962) WNLR 150

House of Assembly cannot qualify as the existence of a state of emergency nor amounting to a threat to democratic institutions. Furthermore, the measures taken by the Administrator were not consistent with the provisions of section 28 of the 1960 Constitution. I also disagree with Akande¹⁴ when she stated thus:

It is, therefore not only when the Federation is at war or is in imminent danger of invasion or involvement in war, but also when there is actual breakdown of public order and safety in the Federation or any part thereof (the italics are mine). This particular provision would justify today the action taken by the Federal Government in declaring a state of emergence in the Western Region on May 29, 1962.

I hold this view because there was no actual breakdown of public order and safety in Western Nigeria or any part thereof. The fact that such a ground did not exist was alluded to by Oluyede¹⁵ when he submitted thus:

*The emergency powers as defined above particularly in (ii) and (iii) had been termed 'the most potent power possessed by the federal legislature' because the emergency powers under the Constitution could be used to advantage of the Federal Government and to the disadvantage of a State Government in substituting federal rule for a State Government if the latter becomes recalcitrant. **The tests here, apart from (i) above, seem to be subjective rather than objective (emphasis added)**¹⁶*

Similarly were the restrictions placed on certain officials of the Action Group consistent with the provisions of Section 28 of the 1960 Constitution? In *Adegbenro v Attorney General of the Federation, supra* the court held, *inter alia* that, measures taken shall be valid only to the extent that they are reasonably justifiable for the purpose of dealing with the situation during a period of emergency¹⁷.

14 J O Akande *The Constitution of the Federal Republic of Nigeria 1999* (Lagos: MIJ Professional Publishers Limited, 2000) p 426

15 Oluyede, fn 10 at 187-188

16 It should be noted that the proper Constitution is that of 1960, section 65 since the state of emergency was declared in 1962 and not 1963 Constitution, section 70.

17 In *Williams v Majekodunmi, supra*, such measures had been invalidated by the court on judicial review because they

Constitutional Provisions

Other than the 1960 Constitution, the 1963, 1979 and 1999 Constitutions provide for declaration of emergency. Section 70 of the 1963 Constitution provides as follows:

(1) Parliament may at any time make such laws for Nigeria or any part thereof with respect to matters not included in the Legislative Lists as may appear to parliament to be necessary or expedient for the purpose of maintaining or securing peace, order and good government during any period of emergency.

(2) Any provision of law enacted in pursuance of this section shall have effect only during a period of emergency:

Provided that the termination of a period of emergency shall not affect the operation of such a provision of law during that period, the validity of any action taken there under during that period, any penalty or punishment incurred in respect of any contravention thereof or failure to comply therewith during that period or any proceeding or remedy in respect of any such penalty or punishment.

(3) In this section “period of emergency” means any period during which

(a) the federation is at war.

b) there is in force a resolution passed by each House of parliament declaring that state of public emergency exists; or

c) there is in force a resolution of each House of parliament supported by votes of not less than two-thirds of all the members of the House declaring that democratic institutions in Nigeria are threatened by subversion.

4) A resolution passed by a House of parliament for the purposes of this section

shall remain in force for twelve months or such shorter period as may be specified therein:

Provided that any such resolution may be revoked at any time or may be extended from time to time for a further period not exceeding twelve months by resolution passed in like manner.¹⁸

The provisions in sections 265 and 305 of the 1979 and 1999 Constitutions respectively are in *pari materia*. Section 305 of the 1999 Constitution provides thus:

305. (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 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;

18 This provision is the same thing as in section 65 of the 1960 Constitution

(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.

(4) The Governor of a State may, with the sanction of a resolution supported by two-thirds majority of the House of Assembly, request the President to issue a Proclamation of a state of emergency in the State when there is in existence within the State any of the situations specified in subsection (3) (c), (d) and (e) of this section and such situation does not extend beyond the boundaries of the State.

(5) 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 to make a request to the President to issue such Proclamation.

(6) A Proclamation issued by the President under this section shall cease to have effect -

(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

(d) 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 revokes the Proclamation by a simple majority of all the members of each House.

As in 1960 and 1963 Constitutions¹⁹, restrictions are placed by sections 41 and 45 of the 1979 and 1999 respectively. Section 45 of 1999 Constitution which is in *pari materia* with section 41 of the 1979 Constitution, provides thus:

45. (1) Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society

(a) in the interest of defence, public safety, public order, public morality or public health; or

(b) for the purpose of protecting the rights and freedom or other persons

(2) An act of the National Assembly shall not be invalidated by reason only that it provides for the taking, during periods of emergency, of measures that

19 See sections 28 and 29 of the 1960 and 1963 Constitutions.

derogate from the provisions of section 33 or 35 of this Constitution; but no such measures shall be taken in pursuance of any such act during any period of emergency save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency:

Provided that nothing in this section shall authorise any derogation from the provisions of section 33 of this Constitution, except in respect of death resulting from acts of war or authorise any derogation from the provisions of section 36(8) of this Constitution.

(3) In this section, a “ period of emergency” means any period during which there is in force a Proclamation of a state of emergency declared by the President in exercise of the powers conferred on him under section 305 of this Constitution.

It is clear that all Nigerian Constitutions provide for national or partial declaration of state of emergency. However, when the state of emergency was declared in Plateau State in May 2004 was it constitutional and lawful? Did circumstances exist that warranted the declaration?

On Tuesday, May 18, 2004, President Obasanjo, citing Section 305 of the 1999 Constitution, 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 Muslim and Christian communities that might have claimed as many as 2,000 lives by September 2001. In a nationwide radio broadcast, President Obasanjo stated that Governor Dariye had been an indecisive governor and that his failure to intervene firmly to stamp out sectarian violence had led to the 2nd May, 2001 massacre in the town of Yelwa. President Obasanjo appointed a retired army general, Chris Mohammed Alli as interim administrator for six months²⁰.

²⁰ This appointment was challenged in court. Unfortunately, it was thrown out by the Supreme Court on technical grounds. See *Plateau State of Nigeria & Anor v Attorney General of the Federation* (2006) 3 NWLR (Pt 967) 346

New emergency power regulations were proposed and tabled for consideration by the National Assembly, after the National Assembly had approved President Obasanjo's action on May 19, 2004. In a letter to the National Assembly entitled "State of Emergency (Plateau State) Proclamation: Emergency Powers Regulations," and dated May 21, 2004, the President noted that "sequel to the state of emergency, there is urgent need to make consequential regulations for the administration of the government of the state." The effect of some of the regulations was suspension of all democratic institutions including the Plateau State House of Assembly. The regulations were made under Section 3 of the Emergency Powers Act 1961 (as modified). Under Section 5 of the said Act, every regulation so made requires approval by resolution of each House of the National Assembly within two months of the coming into operation of the regulations. Section 5 of the Emergency Powers Act states,

Every regulation made under Section 3 and every order or rule made in pursuance of such a regulation shall, without prejudice to the validity of anything lawfully done thereunder, cease to have effect at the expiration of a period of two months from the date upon which it came into operation unless, before the expiration of that period, it has been approved by resolutions passed by both Houses of Parliament

In my view, while the President had the powers to declare a state of emergency as provided in section 305 of the 1999 Constitution and circumstances existed that warranted it, the resulting regulations were unconstitutional, particularly when the Emergency Powers Act had been spent²¹. In the Revised Edition (Laws of the Federation of Nigeria) Act²², Section 4 provides for the powers of the Revision Committee as set out in the Schedule to the Act. Paragraph 1 of the Schedule provides that the Revision Committee shall have power to omit all enactments which have been expressly and specifically repealed or expired or have become spent or had their full effect. Section 5(1) of Act No 21 of 1990 also provides that the revised edition when brought into force in accordance with Section 6 of the Act shall be and be taken by all

21 See pp xlviii and 1 of the Index to the Laws of the Federation of Nigeria, 1990. See also page xxxii of Volume 1, The Laws of the Federation of Nigeria, 2004.

22 No. 21 of 1990

courts and for all purposes whatsoever to be the authentic edition of Federal enactments on or before the appointed date. Section 8 of the Act provides that the ‘appointed date’ shall be 31st December, 1990. In other words, since the Emergency Powers Act of 1961 had been spent and was not in force on 31st December, 1990, it ceased to be a Federal enactment from that date. Similarly since the Emergency Powers Act of 1961 was omitted in the Laws of the Federation of Nigeria, 2004, it was not in force on 31 December, 2002 when the Laws of the Federation of Nigeria, 2004 came into force.

Pursuant to the provisions of Section 3 of the Emergency Powers Act, 1961 (modified)²³, the regulations which the President Obasanjo forwarded to the National Assembly for approval were: Emergency Powers (General) Regulations 2004; Emergency Powers (Procession and Meetings, etc); Emergency Powers (Reporting of Persons) Regulations 2004; Emergency Powers (Control of Arms and Explosives) Regulation 2004; Emergency Powers (Curfew) Regulations 2004; Emergency Powers (Detention of Persons) Regulations 2004; Emergency Powers (Restriction Orders) Regulations 2004; and Emergency Powers (Protected Places) Regulations 2004.

It is noteworthy that section 315 of the 1999 Constitution provides for ‘existing law’²⁴ and that the appropriate authority can modify²⁵ an existing law to bring it into conformity with the provisions of the 1999 Constitution. In the case of federal enactments, the President of the Federal Republic of Nigeria is the ‘appropriate authority’²⁶ for the purpose of modifying existing laws. Consequently, if in the exercise of the powers of the President under section 305 of the 1999 Constitution, consequential orders were made or regulations passed by the National Assembly pursuant to section 3 of the Emergency Powers Act of 1961, it is my considered view that such orders and regulations have no constitutional or statutory basis. This is so because after 31st December, 1990, the Emergency Powers Act of 1961 was no longer in force as a federal enactment. Similarly when the 1999 Constitution came in force on

23 Apparently relying on section 315 of the 1999 Constitution.

24 Section 315(4)(b) of the 1999 Constitution provides that “existing law” means any law and includes any rule of law or any enactment or instrument whatsoever which is in force immediately before the date when this section comes into force or which having been passed or made before that date comes into force after that date.

25 Section 315(4)(c) *ibid* provides that ‘modification’ includes addition, alteration, omission or repeal.

26 See section 315(4)(a) *ibid*.

5 May, 1999²⁷, the Emergency Powers Act of 1961 was no longer an existing law. Therefore any purported modification of the Emergency Powers of 1961 as an existing law in May 2004 is, in my considered view, null and void.

On December 31, 2011, partial state of emergency was declared in Plateau, Niger, Yobe and Borno States. Consequently, the Federal Republic of Nigeria Official Gazette No 38 of 12 May, 2012 was published.²⁸ The Official Gazette contained eight (8) Statutory Instruments Nos. 15-22 dealing with several regulations similar to the ones published in 2004.²⁹ The Statutory Instruments had a Schedule showing the Local Government Areas in the affected States.³⁰ Whereas the statement of emergency declared in 2004 applied to Plateau State as a whole albeit partial declaration, that of 2011/2012 applied to some local governments in the four States of Borno, Niger, Plateau and Yobe.

A cursory examination of the 1960 and 1965 Constitutions on the one hand and that of 1979 and 1999 Constitutions on the other, will reveal that the President can declare a state of emergency but does not have the powers similar to sections 65(1) and 70(1) of the 1960 and 1963 Constitutions respectively to make laws on the matters that the State House of Assembly has legislative competence. Under Section 7 of the 1999 Constitution, it is only States that have the legislative competence to make laws for local governments as guaranteed by the 1999 Constitution. However, the President under the regulations made pursuant to Section 3 of the Emergency Powers Act 1961 purported to make laws for the affected local government areas. It is conceded that the President can, under section 305(1) of the 1999 Constitution, declare a state of emergency in the Federation or any part thereof.

Consequently, the President after declaring a state of emergency has no powers to make such laws for Nigeria or any part thereof with respect to matters not included in the Legislature Lists

27 See the Constitution of the Federal Republic of Nigeria (Promulgation) Act No. 24 of 1999

28 See Government Notice No. 139 of 12 May, 2012

29 President Dr Goodluck Ebere Jonathan, GCFR purported to exercise the powers conferred on him by section 3 of the Emergency Powers Act No 1 of 1961 (as modified) – similar to what President Obasanjo did in 2004.

30 In Borno State, the affected Local Government Areas are Maiduguri Metropolitan, Gamboru Ngala, Bank Bama, Biu and Jere. In Niger State, it was only Suleja Local Government Area. In Plateau State, the Local Government Areas affected are Jos North, Jos South, Barkin Ladi and Riyom while in Yobe State the Local Government Areas are Damaturu, Geidam, Potiskum, Buniyadi-Gujba and Gashua-Bade.

as may appear to the President to be necessary or expedient for the purpose of maintaining or securing peace, order and good government during any period of emergency. It is noteworthy that democratic institutions in the affected local governments were not suspended.

Similarly in the absence of any enactment on emergency powers similar to section 65(1) of the 1960 Constitution and any emergency powers legislation in force, the President cannot make any consequential regulations for carrying into effect the state of emergency especially legislating on matters of local governments that are within the legislative competence of the states only. Consequently, either section 305 of the 1999 Constitution is amended to have the equivalent of section 70(1) of the 1963 Constitution or a new Emergency Powers Act passed under which the Regulations can be made.

Several positions have been taken on the exact constitutional basis of the Emergency Powers Act of 1961. One school of thought is that the basis of the omission of the Emergency Powers Act of 1961 from the 1990 Laws of the Federation of Nigeria is uncertain. In other words, why was the Emergency Powers Act of 1961 declared as having been spent? Another school of thought is that the omission by the Law Revision Committee was erroneous and therefore, the enactment is an existing law. Yet another school of thought is that since the Emergency Powers Act of 1961 has not been expressly repealed it is an extant law which the President may validly and constitutionally act upon in times of emergency.

An argument in favour of the omission is reliance on section 65(2) of the 1960 Constitution that states that “any provision of law enacted in pursuance of this section shall have effect only during the period of emergency”. I am not persuaded by this argument because an examination of the Emergency Powers Act 1961 shows that it was not passed pursuant to section 65(2) of the 1960 Constitution. Consequently, the enactment had its independent existence. Instead I am persuaded by the argument that since Nigeria was under a military dispensation in 1990 when the laws were revised, it would have been anomalous to have any other emergency legislation during a military regime. This is so because a military regime by its nature is interventionist and martial. Furthermore in a military regime a decree takes

precedence over the constitution. In my view, therefore, it was proper to omit the Emergency Powers Act 1961 during a military intervention. As the Emergency Powers Act 1961 was not in force during the emergence of a civilian dispensation in 1999, the enactment could not have been an existing law as defined in sections 274 and 315 in the 1979 and 1999 Constitutions respectively. Thus, there was no existing law to modify in 2004 and 2012. If the modification is unconstitutional and void, then, being a nullity, incurably bad and amounting to nothing, it confers no powers on the President to make such regulations. To quote Lord Denning in *MacFoy v United Africa Company Limited*³¹ “... every proceeding which is founded on it [i.e. a void act] is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

Germane to the exercise of emergency powers is the issue of removal of Governors. Can the President exercise his powers under section 305 of the 1999 Constitution and remove a Governor and appoint an Administrator? There seem to be no authority for this in the Constitution. The nearest is section 11 of the Constitution dealing with public order and public security. Subsection (3) deals with the powers given to the National Assembly when the Federation is at war. In such a situation, the National Assembly can make laws for the peace, order and good government of the Federation or any part thereof 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.³² More specifically subsection (4) empowers the National Assembly to make such laws 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. In such a situation the National Assembly can 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 provided that nothing in the section shall be construed as conferring

31 (1961) 3 WLR 1405. See also *Adejumo v Ayantegbe* (1989) 3 NWLR (Part 110) 417 at 451 and *Sanusi v Daniel* (1956) 1 FSC 93 at 95

32 The provisions in section 11(3) are similar to those in sections 65(1) and 70(1) of the 1960 and 1963 Constitutions respectively in relation to the declaration of the state of emergency.

on the National Assembly power to remove the Governor or the Deputy Governor of the State from office. This is underscored by the fact that section 180 of the 1999 Constitution is very explicit on the tenure of a Governor. Declaration of a state of emergency is not one of the instances in which the Governor can cease to hold office. It is my view, therefore, that the removal of Governor Dariye by President Obasanjo had no constitutional backing and was consequently *ultra vires* and unconstitutional. The constitutionality of this removal was tested in *Plateau State of Nigeria & Anor v Attorney General of the Federation, supra*. Unfortunately, the matter was struck out on technical grounds³³. At the moment, therefore, there is no judicial pronouncement on the constitutionality or otherwise of the removal of the Governor of Plateau State by the President and appointment of an Administrator.

It is submitted that the flood that occurred in Delta, Edo, Kogi, Anambra and Taraba States qualified for declaration of state of emergency as was done in the United States when President Barack Obama on 29 October, 2012 declared state of emergency for the East Coast as a result of Hurricane Sandy³⁴ and the Governors of Virginia, Maryland, New York, New Jersey, Massachusetts and Pennsylvania States and the Mayor of Washington declared state of emergency as a result of the Hurricane Sandy³⁵. However, in Nigeria, in the absence of any legislation on emergency powers or a provision similar to section 70(1) of the 1963 Constitution in the 1999 Constitution, the President would, in my view, have been constrained. This is so because under section 305(3)(e) of the 1999 Constitution the President has the powers to declare such a partial state of emergency but lacks the constitutional or statutory powers to make consequential orders or resolutions.

33 See also Ben Nwabueze *Judicialism and Good Governance in Africa* (Abuja: Nigerian Institute of Advanced Legal Studies, 2009) pp 144-154

34 See Obama Declares State Of Emergency As US East Coast Braces For Hurricane Sandy - <http://www.rttnews.com/1992749/obama-declares-state-of-emergency-as-us-east-coast-braces-for-hurricane-sandy.aspx> accessed on 3 January, 2013

35 See Vickie Frantz - What a State of Emergency Means for You - <http://www.accuweather.com/en/weather-news/what-a-state-of-emergency-mean/791101> accessed on 3 January, 2013

Conclusion

It will be recalled that the 1960 and 1963 Constitutions of the Federal Republic of Nigeria were modeled after the parliamentary system. Consequently, it was the Federal Parliament that had the powers to make laws for Nigeria or any part thereof for the purpose of securing peace, order and good government during the periods of emergency. However, under the 1979 and 1999 Presidential Constitutions of Nigeria, such powers are vested in the President and the National Assembly at the Federal level and the President, the Governor and the State House of Assembly in the case of a State. There are no powers vested in the Local Government Council as in Canada to declare state of emergency.

It would appear that the powers to declare partial state of emergency in Nigeria from 1962 to date were not properly exercised. The powers given to the President in section 305 of the 1999 Constitution to declare a state of emergency do not include the powers to make laws on matters that the National Assembly had no legislative competence nor remove the Governor. Such powers cannot be assumed or inferred but must be express.

The provisions of section 305 of the 1999 Constitution are expansive enough to cover the flood that ravaged parts of Nigeria in 2012. The President ought to have exercised his powers under section 305 of the 1999 Constitution and declare a state of emergency in the affected states. However, even if he did, are there constitutional or statutory backing for making consequential orders or regulations? He does not seem to have such powers.

The Emergency Powers Act of 1961 was spent on 31st December, 1990 by virtue of the provisions of the Revised Edition (Laws of the Federation of Nigeria) No. 21 of 1990. It was not in force on 5 May, 1999 when the 1999 Constitution came into force and did not qualify as an existing law that can be modified by the appropriate authority. In a military dispensation that was in force in 1990, such an enactment could not have co-existed with other federal enactments.

The 1999 Constitution does not provide for Regulations dealing with procedure for declaring

state of emergency. A similar law like that of the Emergency Powers Act, 1961 should be passed under which Emergency Regulations will be made. Similarly, section 305 of the 1999 Constitution should be amended to include provisions similar to section 70(1) of the 1963 Constitution. Emergencies can occur at any time. Instead of waiting for arguments as to whether the Emergency Powers Act of 1961 can be modified or not or for a judicial pronouncement on this matter, it is recommended that a bill be sent to the National Assembly immediately to provide for emergency powers. Such emergency powers should be very clear on the consequential orders or regulations that can be made including the powers to remove a Governor.