

## ABUSE OF EXERCISE OF EMERGENCY POWERS UNDER CIVIL RULE IN NIGERIA: AN OVERVIEW

### **Abstract**

*The Constitution of the Federal Republic of Nigeria 1999 (as amended) makes provision for exercise of emergency powers to deal with threats to the security of the Nigerian State. In the midst of rising agitations and outright insurgency in Nigeria, will the government of the day invoke emergency powers to deal with the challenges? And if so, have the factual situations for such action arisen? The paper posits that the 1979 and 1999 Constitutions on this score are a radical departure from the provisions of their 1960 and 1963 counterparts and shows that the suspensions of elected organs of government in Plateau and Ekiti States constitute an abuse and brazen violation of the 1999 Constitution. The paper counsels the present actors to avoid the pitfalls of the past.*

**Keywords:** *Emergency Powers, Abuse, Civil Rule, Nigeria, 1999 Constitution*

### **1. Introduction**

Exercise of emergency powers are usually provided for in civil Constitutions to enable incumbent governments invoke extraordinary powers to deal with challenges that threaten the corporate existence or security and well-being of the State and its citizens<sup>1</sup> These powers are exercised by way of proclamation of state of emergency over the entire country or part thereof and involve derogation from fundamental rights guaranteed under the Constitution.<sup>2</sup> In extreme cases, emergency powers have been exercised in Nigeria to take over legislative and executive functions in matters which otherwise fall within the exclusive competence of a state or region.

The relevance and currency of this topic is buttressed by the increasing breaches of security and palpable threat to lives and property in different parts of the country. The manifestations include the infamous Boko Haram insurgency in North East Nigeria, the seemingly intractable mayhem of the rampaging herdsmen in virtually all parts of North Central, South West, South East and South South Nigeria, the non-violent agitations of the Movement for the Actualization of the Sovereign State of Biafra (MASSOB) and the Indigenous People of Biafra (IPOB) in South East and South South Nigeria; Niger Delta Avengers and the Bakasi Strike Force in South South Nigeria, and recently the Yoruba Liberation Command (YOLICON) declaration of Oduduwa Republic in the wake of the 'Quit Notice' issued to the Igbos by the Arewa Youth to leave Northern Nigeria before October 1<sup>st</sup>, 2017.

In the midst of all these, how would the incumbent federal government react? Would it invoke emergency powers to deal with the challenges? If so, would it resort to sacking or suspending elected legislative and executive institutions? We shall examine closely, whether suspension of elected legislative and executive structures of states or regions as constituent units of the Nigerian federation in purported exercise of emergency powers approximates to an abuse and outright violation of the Constitution. Also of grave concern is the wanton shooting of unarmed worshippers at a morning mass right inside St. Philip's Catholic Church, Ozubulu, Anambra State, cutting short the priceless lives of many; as well as rampant kidnappings, armed robberies and violent crimes. The highly controversial military exercise code-named 'Operation Python Dance II', otherwise called *Egwu Eke II*, embarked upon by the Nigerian Army in South East Nigeria

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\* **Chijioke Uzoma AGBO, LL.M, PhD**, Legal Practitioner and Lecturer, Enugu State University of Science and Technology (ESUT), Enugu, Nigeria. Email: [chijiagbodlaw@gmail.com](mailto:chijiagbodlaw@gmail.com)

<sup>1</sup>See for instance ss. 65 and 70 of the Independence Constitution and Republican Constitution of Nigeria, as well as ss. 265 and 305 of the 1979 and 1999 Constitutions of the Federal Republic of Nigeria respectively.

<sup>2</sup>See Chapter IV of the 1999 Constitution.

ostensibly to deal with such matters as kidnapping, armed robbery, etc which are matters clearly within the competence of the police to handle, has also aroused Constitutional concerns with ample implications.<sup>3</sup>

## **2. Meaning of State of Emergency under the Constitution**

Sections 65 and 70 of the 1960 Independence and 1963 Republican Constitutions of the Federal Republic of Nigeria respectively define an ‘emergency’ as any period during which there was in force a resolution passed by both Houses of Parliament declaring that a state of emergency exists or that democratic institutions are threatened by subversion. Neither the 1999 Constitution nor the 1979 Constitution before it, expressly defines the meaning of the term ‘state of emergency’. They however, provide a glimpse of the meaning attached thereto<sup>4</sup>. Thus, sub-section (3) of section 45 of the 1999 Constitution provides:

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.<sup>5</sup>

It is pertinent to note that neither section 305 of the 1999 Constitution nor section 265 of the 1979 Constitution expressly defines the term ‘state of emergency’. The sections appear to outline extensive processes and procedure for proclamation of a state of emergency, setting out the factual conditions for such proclamation, the duration thereof, as well as the respective roles of the National Assembly, Governors of affected States and their respective Houses of Assembly.

Perhaps the provisions of sub-section (2) of section 45 of the 1999 Constitution<sup>6</sup> convey the purport of the term ‘state of emergency’. Thus, under the sub-section, ‘state of emergency’ appropriates to such a period where some fundamental rights guaranteed under the Constitution are curtailed. This is *however, subject to the proviso* that nothing in section 45 of the 1999 Constitution shall authorize any derogation from the guaranteed right to life<sup>7</sup> except in respect of death resulting from acts of war or retroactive criminalization of acts and behaviours under sub-section (8) of section 36.<sup>8</sup> It appears also that laws and regulations which derogate from certain fundamental rights guaranteed by the Constitution at periods of emergency cannot be invalidated if they are ‘reasonably justifiable’.<sup>9</sup> It follows therefore, that such laws and regulations can be invalidated by the courts if they constitute ‘unreasonable’ and ‘unjustifiable’ derogations from hallowed fundamental rights.<sup>10</sup>

## **3. Conditions Precedent for Declaration of State of Emergency**

It appears from the foregoing, that all that was required under the 1960 Independence and the 1963 Republican Constitutions in the absence of war, for a proclamation of a state of emergency in the entire country or part thereof, was the passage of a resolution to that effect by both Houses of Parliament.<sup>11</sup> It is

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<sup>3</sup>See ss. 215 and 216 of the 1999 Constitution as well as the Police Act, Cap P.19 Laws of the Federation of Nigeria (LFN) 2004. Contrast with the provisions of s. 217(2) of the 1999 Constitution. This is however, not the focus of the present article.

<sup>4</sup> See s. 45 (3) of the 1999 Constitution which is similar to s. 41(3) of the 1979 Constitution.

<sup>5</sup> S. 41(3) of the 1979 Constitution makes cross reference to s. 265 thereof. S. 265 of the 1979 Constitution is similar to s. 305 of the 1999 Constitution.

<sup>6</sup> This is similar to s. 41(2) of the 1979 Constitution.

<sup>7</sup> S. 33 of the 1999 Constitution.

<sup>8</sup> S. 45(2), *ibidi*.

<sup>9</sup> S. 45, *Ibid*.

<sup>10</sup> *Adegbenro v AG, Federation & Ors* (1962) WNLR 150; *Williams v Majekudunmi* (1962) 1 All NLR 413.

<sup>11</sup>This was the view expressed by the Supreme Court in *Adegbenro v AG, Federation & Ors, Supra*, at p. 160. Both Houses of Parliament refer to the House of Representatives and the House of Senate.

indeed, a great pity that such far reaching provisions could, in the words of Nwabueze ‘merely sacrifice the nation and the liberty of the individual to the whims and caprices of parliaments’<sup>12</sup>.

Apparently acting under the constitutional provision<sup>13</sup> authorizing parliament to take over the government of a region or suspend its legislature during a period of emergency, the Federal Parliament enacted the Emergency Powers Act of 1961 empowering the Governor General to make such regulations as appear to him necessary or expedient for the purpose of maintaining or securing peace, order and good governance in Nigeria or any part thereof during any period of emergency. Thus, in 1962, consequent upon the fighting among members of Parliament within the chambers of the Western Regional House of Assembly, the federal parliament in purported exercise of emergency powers invoked the ‘open-ended’ provisions of the 1960 Independence Constitution and passed a resolution declaring a state of emergency over the Western Region of Nigeria in its entirety. This is however, notwithstanding the fact that apart from the regional assembly building, the entire Western Region was quiet and there was no attempt by, or any observable indication suggesting that members of the regional parliament intended to extend their fight outside the legislative chambers<sup>14</sup> Yet, the federal government acting under the said Emergency Powers Act and pursuant to the resolution of the federal parliament in that behalf, declared a state of emergency in Western Nigeria and suspended the Western regional governor, premier, ministers, and parliament. Dr. Majekudumi was appointed sole administrator with power to administer Western Nigeria on behalf of the federal government. Such was the enormity of the powers of the government at the centre. Such powers were susceptible to abuse and were actually abused.

Some scholars take the view that the action of the federal government at the time, in proclaiming a state of emergency in Western Nigeria was largely constitutional but politically distasteful.<sup>15</sup> It seems however, that the political recriminations, intrigues and maneuvers of that era were largely responsible for the declaration of a state of emergency in Western Nigeria than any existence of an objective factual circumstance warranting such a proclamation.

It is instructive to note that the provisions in the Nigerian Constitutions of the Independence and First Republican era which enabled the Federal Government to sack the governments of constituent units of the federation with relative ease were antithetical to the federal system of government which Nigeria supposedly operates. It is the basic thesis of federalism that neither the federal nor the constituent governments should have the capacity to remove the other, even at periods of emergency.<sup>16</sup> Apparently acting with the benefit of hindsight to avoid the mistakes of the past, the drafters of the 1979 and 1999 Constitutions adopted a more comprehensive provision of the prevalence of factual conditions for a declaration or proclamation of a state of emergency.<sup>17</sup> Thus, the President of Nigeria is empowered to issue a proclamation of a state of emergency *only* when the Federation is at war or in imminent danger of invasion or involvement in a state of war,<sup>18</sup> or 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;

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<sup>12</sup>B. O Nwabueze, *The National Question and Corruption as Nigeria's Two Most Challenging and Overriding Problems*, (Ibadan: John Archers Publishers Ltd, 2016), p. 105.

<sup>13</sup>S. 65, 1960 Independence Constitution

<sup>14</sup>B.O. Nwabueze, *op cit* p. 106.

<sup>15</sup>I. Okafor and O. Amucheazi, *The Concept of Federation in Nigeria*, (Enugu: SNAPP Press Ltd, 2008), p. 56. Contrast with the views of B.O. Nwabueze, *op cit*, p. 106.

<sup>16</sup>*Ibid*, p. 56.

<sup>17</sup>SS. 41 and 265, 1979 Constitution; Ss. 11, 45 and 305, 1999 Constitution

<sup>18</sup>S. 305(3) (a) and (b), 1999 Constitution.

- 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;
- An occurrence or imminent danger of the occurrence of any disaster or natural calamity affecting the community or a section of the community in the Federation;
- Any other public danger which clearly constitutes a threat to the existence of the Federation.<sup>19</sup>

The President can also proclaim a state of emergency over a constituent state if he receives a request in that behalf from the governor of such a state supported by a resolution of two-thirds majority of members of the House of Assembly of that state *when there exists within the boundaries of the state any of the situations set out in paragraphs (c) (d) and (e) of sub-section (3) of section 305.*<sup>20</sup> The President shall however, not issue a proclamation of a state of emergency under the foregoing sub-section unless the governor of the state fails to make such a request within a reasonable time to the President in that behalf.<sup>21</sup>

A proclamation issued by the President shall cease to have effect if it is revoked by the President himself through the instrumentality of an official gazette of the government of the Federation; or if within two days when the National Assembly is in session or ten days when it is not in session after the publication of the proclamation there is no resolution supported by two-thirds majority of all members of each House approving it; or after the expiration of a period of six months after the proclamation came into force or a renewal thereof, before its expiration for a period of six months and so for successive periods of six months from time to time by a resolution of the National Assembly passed in like manner; or it is revoked by a simple majority of all members of each House of National Assembly.<sup>22</sup>

#### **4. The Security Question and the Exercise of Emergency Powers**

More often than not, proclamation of a state of emergency in Nigeria is predicated almost exclusively on the breach or breakdown of security in a state or region concerned as if occurrence of disasters and natural calamity are not grounds for declaration of state of emergencies<sup>23</sup>. Yet, paradoxically the control of the instruments of coercion of the Nigerian State including the Armed Forces, the police, the State Security Services (SSS) and all para-military organizations is vested in the Federal Government. Thus, State Governors and State Houses of Assembly have too little or no control over the aforesaid security apparatus. Besides, there is only one centralized police established for the entire country. The state or even local governments cannot establish their own police.<sup>24</sup> Although, state governors are members of the Nigeria Police Council<sup>25</sup> and they may also give directions to the Commissioners of Police in their states with respect to maintaining public security and public order,<sup>26</sup> yet, by virtue of the proviso to sub-section (4) of section 215 of the 1999 Constitution, the power of a state governor in this regard is circumscribed and thus, subject to the overriding direction of the President or his Minister responsible for police affairs.<sup>27</sup> The state governors of course, have no control over members of the Armed Forces stationed within their States. This sad spectacle apparently informed the contribution of Olusola Adeyeye<sup>28</sup> to a debate on the spate of insecurity and the menace of the rampaging herdsmen in Nigeria, on the floor of the senate, aptly likening state governors to

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<sup>19</sup>S. 305(3) (c) (d) (e) and (f), *Ibid.*

<sup>20</sup>S. 305 (4), *ibid.*

<sup>21</sup>S. 305 (5), *ibid.*

<sup>22</sup>S. 305(6) (a) (b) (c) and (d), *ibid.*

<sup>23</sup>See s. 305(3) (e), *ibid.*

<sup>24</sup>S. 214(1), *ibid.*

<sup>25</sup>S. 153 (1) (L) and Third Schedule, Part 1, Item 27, *ibid.*

<sup>26</sup>S. 215 (4), *ibid.*; s. 10, Police Act, Cap P19, LFN 2004.

<sup>27</sup>The Supreme Court took this view in *AG Anambra State v AG, Federation & Ors (2005) 90 NLWR (Pt. 93) 572.*

<sup>28</sup>Senator representing Osun Control Senatorial Zone of South West Nigeria in the Senate.

‘secondary school prefects who enjoy their positions at the pleasure of their school principal’.<sup>29</sup> This description captures the helplessness of state governors in the face of security challenges in their respective states despite their designation as ‘chief security officers’ of their states. This is another reflection of the defective nature of Nigerian federalism.

In the light of the foregoing, and the obvious helplessness of state governments in the absence of federal intervention, how then could state governors and state functionaries be held liable and in extreme scenario, be suspended from office for failure to maintain public order and public security. A case in point is what happened recently in Nimbo, Uzo-Uwani Local Government Area of Enugu State where the incumbent governor, Ifeanyi Ugwuanyi, not only informed security agencies in Enugu State about an impending invasion of Nimbo Community but also mobilized them with requisite logistics and yet, the security operatives failed to act to prevent the wanton destruction of lives and property in that community. What a pity?<sup>30</sup>

### 5. The Limits of Constitutional Exercise of Emergency Powers

There is no doubt that constitutional order imposes limitations on wild, arbitrary and ‘body language’ employment of naked power by the political executive. However, when a state is confronted with real threat to public order and public safety, such challenge may not be adequately addressed by government within the circumstantial limitations and restraints of the Constitution. Thus, the preservation of the State and society becomes imperative and indeed, overrides the need for constitutional limitations and restraints on government. This is reinforced by the fact that the existence of the liberty of the individual depends on the continuance of the organized political society which in turn, depends on the paramountcy of national security. Without security, society is in danger of collapse and disintegration. Therefore, measures designed to achieve and maintain national security take precedent, and subject however, to the provisions of the Constitution, displace the rights and interests of individuals with which they conflict.<sup>31</sup> And so, Constitutions which impose limitations on governmental powers, also authorize the displacement of such limitations in times of emergency. However, such *constitutions must clearly define the kinds of situations that must constitute an emergency and such situations must exist in an objective factual sense to warrant a proclamation of emergency.*<sup>32</sup>

For the avoidance of doubt, it must be emphasized that the President or the Federal Government is *not* empowered howsoever, by the 1999 Constitution to sack or suspend either the legislature or the executive of a state government. Section 11 of the said Constitution which empowers the National Assembly to make laws for the Federation or any part thereof with respect to public order or public security is only enabled to make laws for a constituent state of the federation when the House of Assembly of the state is unable to perform its functions. The National Assembly in so doing *shall not have powers to remove the governor of the state or his deputy from office.*<sup>33</sup> Besides, a House of Assembly of a state shall be deemed to be unable to perform its functions if the said Assembly cannot hold meetings and transact legislative business.<sup>34</sup>

The foregoing explains the justifiable condemnation of the despicable rape of the Rule of Law and brazen abuse of powers in the declaration of a state of emergency by former President Olusegun Obasanjo in Plateau State in 2004 and Ekiti State in 2005, when the situations stipulated in the Constitution for such declaration had not arisen.<sup>35</sup> Worse still, President Obasanjo suspended the elected governors and Houses of Assembly of Plateau and Ekiti States and replaced same with Generals Chris Ali and Tunji Olurin as unelected sole administrators respectively, in purported exercise of power unknown to law. Commenting on the sad situation, Okafor and Amucheazi stated thus:

Clearly, the action of the President (Obasanjo) was a Constitutional impossibility.  
Since the National Assembly has no power to make laws for the removal of the

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<sup>29</sup>The Senate debate on the State of insecurity and the rampaging herdsmen in Nigeria, 2016.

<sup>30</sup>This is clearly in breach of the constitutional provision in s. 14(2) (b) which states that the security and welfare of the people shall be the primary purpose of government.

<sup>31</sup>B. O. Nwabueze, *op. cit.*, p. 103.

<sup>32</sup>*Ibid.*, p. 104.

<sup>33</sup>S. 11(4), 1999 Constitution.

<sup>34</sup>S. 11 (5), *ibid.*

<sup>35</sup>B. O. Nwabueze, *op cit.*, pp. 106 – 107.

governor, where could the President have sourced his authority to do so? It is an established principle of our jurisprudence that every executive action must be founded on law.<sup>36</sup>

It is however, gratifying to note that the slide from constitutionalism during the era of President Obasanjo between 1999 and 2007 was arrested during the obviously more civil tenure of President Goodluck Jonathan. During the latter's regime, elected democratic institutions in Adamawa, Borno and Yobe states were retained during the periods of emergency in those states. Thus, the governors and the Houses of Assembly of the said states were not sacked as was the practice under the Obasanjo regime and also under the First Republic in 1962.

Let it be said at once that the exercise of the powers conferred on the President under section 305 of the Constitution is made 'subject to the provisions of the Constitution'. The Constitution sets out the procedure and the basis for the removal of a state governor, deputy governor, speaker, deputy speaker, and members of a House of Assembly of a state from office.<sup>37</sup> The Constitution does not provide for, or even contemplate the removal of the aforementioned officers of a state government at times of a state of emergency, nor does it provide for, or contemplate the appointment of unelected sole administrator(s) in their stead. There is no doubt that emergency powers when exercised within the limits provided for in the Constitution can, and should be accommodated in a democratic society, it being seen as 'an ephemeral aberration' that occurs once in a long while<sup>38</sup>. When the exercise of such powers are abused however, as was the case in 1962 and under the Obasanjo presidency, authoritarian rule is unleashed on society to exploit such situations for personal sadistic aggrandizement, of the 'ruler'.

It is regrettable that the Supreme Court which is rightly the guardian of the Constitution, failed to seize the opportunity presented by the case of *Plateau State of Nigeria & Anor v AG, Federation & Anor*<sup>39</sup> to review the reckless abuse of power by President Obasanjo on the altar of technicalities. Lamenting the situation, Itse Sagay pointedly said:

It is a great setback for democracy, the rule of law and federalism, that the Supreme Court dodged responsibility when Plateau state brought a suit to challenge the validity of the emergency declaration and regulations made under it. It is a sad episode in Nigeria's Constitutional history that the Obasanjo regime got away with such gross acts of illegality and emasculation of federalism.<sup>40</sup>

## **6. Conclusion**

One of the misconceptions associated with abuse of emergency powers is to equate its employment by an incumbent federal government to emasculate and suppress its political opponents in its guise to prolong its stay in power against possible removal from office through the lawful activities of the opposition. This is certainly not preservation of state security. It is on the contrary, a subversion of the idea and ideals of democratic government. Section 45 of the 1999 Constitution which provides for derogation from guaranteed fundamental rights in the interest of defence, public safety, public order, public morality or public health does not, and cannot be intended to approximate to derogation in the political interest of an incumbent government. Its purport is certainly not to perpetrate the said government and the ruling party in power by naked suppression of lawful non-violent and non-subversive activities of organized opposition.<sup>41</sup> There is therefore, no justification to unleash agents of coercive instruments of the State against legitimate opponents of an incumbent federal government or peaceful protest against government policies in the guise of exercise of emergency powers. Otherwise, this will result in serious deficits in the gains in democratic values recorded under the Yar'adua and Jonathan administrations. It will be a sad commentary in Nigeria's political history to return to the dark days of totalitarianism under any guise or disguise. The concern and indeed, apprehension of this possibility or probability still stares Nigerians in the face today.

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<sup>36</sup> I. Okafor and O. Amucheazi, *op cit*, pp. 60 – 61. See also Itse Sagay, "Nigeria: The Unfinished Federal Project", being a paper presented at the 8<sup>th</sup> Justice Idigbe Memorial Lecture, University of Benin, 2008, p. 50.

<sup>37</sup> See ss. 188, 92, 105, 109 and 110 of the 1999 Constitution.

<sup>38</sup> B. O. Nwabueze, *op cit*, p. 106

<sup>39</sup> (2006) 25 NSCQR 179.

<sup>40</sup> Itse Sagay, *op cit*, p. 50.

<sup>41</sup> B. O. Nwabueze, *op cit*, p. 110.