

THE EXERCISE OF EMERGENCY POWERS IN NIGERIA: THE POSITION OF ACHPR AND CONFORMITY WITH THE MINIMUM INTERNATIONAL STANDARD*

Abstract

It will be inexhaustive to give account of the Nigerian democracy without the mention of Proclamations of State of Emergency made by the successive administrations in Nigeria. This paper examined the exercise of emergency powers in Nigeria and whether exercise of such powers conforms with the minimum international standard. Due to the conceptual nature of this research, primary and secondary sources of data collection were adopted to wit: statutes, textbooks, journals and internet sources. The study found among others that save for the ACHPR which does not recognize derogation from human rights in the time of emergency, other international Human Rights Treaties contain derogation clauses. Under the African Charter, it is untenable for state facing emergency to temporarily suspend the exercise of certain fundamental rights of its citizens. It is recommended that states should at all times act within the confines of the national constitution and in conformity with the minimum international best practices and standard.

Keywords: State of Emergency, Derogation and Reasonably Justifiable

1.0. Brief History of State of Emergency in Nigeria

The history of State of Emergency in Nigerian politics began in 1962, following the large scale irregularities that characterized the first real census that led to crisis in the Action Group controlled Western Nigeria¹. There was a ban on public meetings and processions in the Western Nigeria. The next State of Emergency was declared in Plateau State by President Olusegun Obasanjo on 18th May, 2004². The then President Obasanjo declared a State of Emergency, suspending the democratically elected Governor of Plateau State and members of the House of Assembly. He accused the Governor of failing to end the conflict between the Christian and Muslim communities in the State. Chief Obasanjo installed an administrator to manage the affairs of the State.

Another State of Emergency was declared in some Local Government Areas of Yobe, Plateau, Borno and Niger States respectively by Dr. Goodluck Jonathan on 31st December, 2011. The declaration was in reaction to the terrorist attack and civil unrest orchestrated by the Boko Haram sect. President Goodluck subsequently extended the State of Emergency on 14th May, 2013 to the whole of Borno, Yobe and Adamawa States.³

It is pertinent to state that while President Obasanjo's government suspended the Governors and all the elected representatives of the people of Plateau State, the government of Dr. Goodluck Jonathan allowed the democratically elected representatives of the affected States to discharge their constitutional responsibilities.⁴ We shall discuss the legality of ousting a democratically elected representatives in this work.

* **BARR. PETER CHIDERA ANEKE (HND, LL.B, BL, LL.M, Ph.D** (in view), Faculty of Law, Ebonyi State University, Abakaliki, Nigeria. Principal Partner: St. Peter's Basilica Legal, NO. 5 Nnaji Street, New Haven, Enugu State, Nigeria Email: peterchideraaneke@gmail.com Phone NO: 08035498873

¹ www.vanguardngr.com accessed 10/4/20

² www.thenewhumanitarian.org>news accessed on 10/4/20

³ Premiumtimesng.com accessed on 9th Apri,2017

⁴ Emphasis mine

1.2. Meaning of State of Emergency

The State of Emergency can be defined in so many ways to suit a particular circumstance. The constitution of the Federal Republic of Nigeria did not give a concise definition of the term. It defines it as follows:

*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.*⁵

A state of emergency is classified into *de jure* and *de facto*. A *de jure* state of emergency exists when the states comply with legal requirements for its declaration. If states exercise their emergency power without complying with preconditions prescribed in their constitutions and international human rights instruments, they are in *de facto* state of emergency.⁶ A *de jure* state of emergency becomes *de facto* when emergency measures are extended beyond the formal termination of a declared state of emergency

It can be defined as a situation when government gives itself special powers in order to try to control an unusually difficult or dangerous situation, especially when it involves limiting peoples freedom.⁷ It is also defined as a temporary system of rules to deal with an extremely dangerous or difficult situation.⁸ Another school of thought defines it as sudden, serious and dangerous event or situation which needs immediate action to deal with it.⁹

A better but not satisfactory explanation is the definition of state of emergency as a governmental declaration that may suspend some normal functions of executive, legislative and judicial power ... or order government agencies. It can be used as a rationale for suspending rights and freedoms, even if guaranteed under the constitution.¹⁰

Suffice to state that what may give rise to a state of emergency in any clime depends on the constitutional provisions of that country. The constitution of South America of Argentina allows a state of emergency in a situation where the constitution is endangered by internal unrest or foreign attack.¹¹ The constitution of Australia gives the respective states the powers to declare emergency if there is a threat to employment, safety or public order and such emergency expires after 30 days.¹² In Malaysia, the President may declare a State of Emergency if he is satisfied that a grave emergency exists whereby the security or the economic life, or public order in the federation or any part thereof is threatened.¹³ In United States, the power to proclaim a State of Emergency is vested in the Governor of the States and Mayors of the Counties.¹⁴

1.3. State Of Emergency Under The Nigeria Constitution

The Constitution of the Federal Republic of Nigeria 1999 (as amended) stipulates the procedure for the Proclamation of a State of Emergency. The first step is that the President may by instrument published

⁵Section 45(3), 1999 Constitution of the Federal Republic of Nigeria as amended

⁶ Yehenew TSEGAYE Walilegne, State of Emergency and Human Rights under 1995 Ethiopian Constitution, 21. J. ETH I.78, at 87 (2007)

⁷ Longman Dictionary of Contemporary English

⁸ Cambridge Dictionary

⁹ Oxford Advance Learner's Dictionary

¹⁰ Wikipedia accessed on 9th April, 2017

¹¹ Section 23 of Argentines Constitution 1994

¹² See Australian Public Safety Act

¹³ Article 150 of the Malaysia Constitution

¹⁴ US National Emergency Act

in the Official Gazette of the Federation issue a Proclamation of State of Emergency in any part of the Federation.¹⁵ The second step is that the President is expected to transmit the official gazette containing the Proclamation to the Senate President and Speaker House of Representatives. Upon the receipt of the gazette, the Senate and the House of Representatives shall convene a meeting each to consider the situation and decide whether to pass a resolution or not.¹⁶ It is important to state that the Proclamation of a State of Emergency by the President is subject to the approval of the National Assembly.¹⁷ Therefore, a Proclamation issued by the President shall cease to have effect in the following circumstances¹⁸

- a. *If revoked by the President by instrument published in official gazette of the Federation.*
- b. *If there is no resolution supported by 2/3 majority of members of each House of the National Assembly approving the Proclamation within 2 days when the House is in session and within 10 days when the House is not session after the publication .b*
- c. *After a period of six months the approval has been in force.*
- d. *At any time when each House of the National Assembly revokes the Proclamation by simple majority of all the members of each house.*

The issue that crystallizes from section 305(6c) is whether the National Assembly will continue to renew the period of the emergency from time to time .The answer is in the affirmative , since the proviso to that section empowers the National Assembly to extend the period for another six months from time to time.

The conditions under which the President may declare a State of Emergency are as follows:¹⁹

- a. *When the Federation is at war*
- b. *When the Federation is in imminent danger of invasion or involvement in a state of war*
- c. *Actual breakdown of law and order*
- d. *Clear and present danger of an actual breakdown of law and order*
- e. *Occurrence or imminent danger of occurrence of any disaster or natural calamity*
- f. *Other public danger which threatens the existence of the federation*
- g. *The Governor of a State with the sanction of at least 2/3 majority of the members of the House of Assembly requests the President to issue a Proclamation.*

In Nigeria, neither the Governor of a State nor the Local Government Chairman has the powers to declare a State of Emergency. It is trite that the Governor can with the sanction of the 2/3 majority of the House of Assembly requests the President to make such Proclamations.²⁰ The situation in United States is different as the State Governor or even the Mayor of Counties has powers to declare a State of Emergency²¹.

1.3.1. Abrogation of Exercise of Citizens Rights During Emergency

The rights of citizens can thrive well in a harmonious, peaceful and safe environment and not in a chaotic situation. As we have seen earlier, a State of Emergency comes into play when there is crisis or conflict in any part of the Federation. Therefore, in a State of Emergency, certain fundamental rights of

¹⁵ Section 305(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

¹⁶ Section 305(2) of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

¹⁷ Section 305(2) of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

¹⁸ Section 305(6) of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

¹⁹ Section 305 (3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

²⁰ Section 305(3)(g) of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

²¹ Section 45 of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

citizens can be derogated and watered down for the purposes of achieving public safety and security. However, the proviso to section 45(2) of the Constitution provides for non derogable rights. For purposes of clarity, may we pause to examine section 45 which states 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 of 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 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:
 3. Provided that nothing in this section shall authorize any derogation from the provisions of section 33 of this Constitution, except in respect of death resulting from acts of war or authorize any derogation from the provisions of section 36(8) of this Constitution.

Derogation refers to temporary suspension of human rights during a state of emergency.²² It refers to “a sudden, urgent, usually unforeseen event situation that requires immediate action, often without time for prior reflection and consideration”.²³ Suspend or derogate from certain human rights under international conventions. In exercising such powers, states have to show that such derogation is necessitated by the exigencies of the situation and that such measures are consistent with other obligations the states have under international law. Accordingly, derogation is not automatic as it has to be subject to judicial review both domestically and internationally. In order to protect the foundation and essence of a state, a state of emergency is often proclaimed under existing laws to enable the government resort to measures of an exceptional and temporary nature.²⁴

Accordingly, derogation as a concept does not exist in *vacuo*. It is designed to be a temporary measure that comes with considerable political and legal costs, both domestically and internationally.²⁵ It is often said that derogation provides a safety valve for the enormous pressures that governments face to repress individual liberties during times of crises. It is argued that derogations are rational response to domestic political uncertainty. More specially, derogations enable governments facing threats at home to buy time and legal breathing space to confront crises while, at the same time, signaling to concerned domestic audiences that rights suspension are lawful.

In Nigeria, section 45 of the 1999 Constitution (as amended) provides for the restriction and derogation from the fundamental rights guaranteed in sections 33, 35, 36, 37, 38, 39, 40 and 41 of the constitution in limited circumstances . That restriction on rights exists only with respect to a law that is reasonably justifiable in a democratic society – in the interest of defence, public safety, public order, public morality or public health, or for the purpose of protecting the rights and freedom of other persons. Considering

²² Civil Code of the Empire of Ethiopia (1960), Proclamation No. 160/1960.FED. NEGARIT GAZZETE, 19th Year No 2, Art. 2044; CRIMINAL CODE, Art 613

²³ Awol Kassim Allo, Derogation or Limitation: Rethinking the African Human Rights System of Derogation in Light of the European System, 2 ETH.J. LEGAL EDU.21,25 (2009)

²⁴ N. Jayawickrama, *The Judicial Approach of Human Rights: National, Regional and International Jurisprudence* , Cambridge University Press ,2002

²⁵ K. Roach, ” Ordinary Laws of Emergencies and Democratic Derogations from Rights

this limited provision of section 45, the immediate question that follows is whether there is any basis for the widespread infractions of fundamental rights in Nigeria.

It is important to note that sections 37, 38, 39, 40 and 41 referenced in Section 45(1) of the constitution relate to the provisions on the right to private and family life, right to freedom of thought, conscience and religion, right to freedom of expression and the press and right to freedom of movement respectively. The import of section 45(1) is that there can be no derogation from the very rights guaranteed under sections 37, 38, 39, 40 and 41 unless there is a law passed to that effect. Furthermore, such derogation has to be reasonably justifiable in a democratic society in the interest of justice, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedom of

However, it is usually difficult to ascertain what is reasonably justifiable in the interest of justice, public safety, public order, public morality or public health. In this regard, Professor Nwabueze expressed the opinion that in view of the opening phrase of the section, there is presumption of validity in favour of the validity of the law made under section 45, thereby placing the burden of proof on whoever asserts the contrary²⁶. Ogbu²⁷ however disagrees with Nwabueze and opines that the onus of proving that a law is reasonably justifiable and that it is made in the public interest lies on the authority that made the law. It is the view that whoever asserts must prove.²⁸

Consequently, the burden of proof lies on whoever asserts that a law is not justifiable in a democratic society. This is because there is the presumption of the validity of laws made by the legislature, as the Constitution vests on the National Assembly the power to make laws for the peace, order and good government of the Federation.²⁹

In determining whether a law is reasonably justifiable, the test required for the restricting law is an objective one and the standards include

- a. whether there is a grave risk of harm to a larger section of the community.
- b. whether the risk of harm is imminent and demanding grave urgency;
- c. and this should not depend on the subjective view or opinion of the Governor of the State.

The case of *State v. Ivory Trumpet*³⁰ is quite instructive on this question. It emphasizes that the test of reasonable justifiability depends vitally on the historical circumstances, as well as the factual mischief which necessitated the promulgation of that law. The Court, in the above case, in appreciating the word “reasonably justifiable” restated the position of the Supreme Court of India in the case of *Superintendent Central Prison Fatehgrah v. Ram Manohar Lohia*³¹ and stated that the limitation imposed in the interests of public order to be reasonable restriction, should be one which has a proximate connection, or nexus with the public order, but not farfetched, hypothetical or problematical or too remote in the chain of its relation with public order. In the same vein, in *Chike Obi v Director of Public Prosecution*³², the Court held that its role was not merely to rubber stamp the acts of the Legislature

²⁶ B.O Nwabueze, “ A Constitutional History of Nigeria”, London : C Hurst and CO Ltd

²⁷ Osita Ogbu , “ Human Rights Law and Practice in Nigeria” ,

²⁸ Section 131 of the Evidence Act, 2011

²⁹ Section 4 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)

³⁰ (1984) 5 NCLR 736 at 750-751

³¹ (1960) 2 SCR 821

³² (1961) 1 ALL NLR .186

and the Executive; that the court must be the arbiter of whether or not any particular law is reasonably justifiable.

In *Olawoyin v Attorney General of Northern Nigeria*,³³ the Court held that a restriction upon a fundamental human right, before it may be considered justifiable must (a) be necessary in the interest of public morality and (b) not be excessive or out of proportion to the object which it is sought to achieve. A typical example of a law that derogates from the freedom of expression and the press entrenched in section 39 of the constitution is section 51 of the Criminal Code Act³⁴ which prohibits the altering, printing, publishing, selling, distributing or reproducing of any “seditious” words or materials.

Furthermore, by virtue of section 45(2) of the 1999 constitution (as amended), no act of the National Assembly shall be invalidated by reason of the fact that it provides for measures that derogate from the right to life and the right to personal liberty guaranteed under section 33 and 35 of the constitution. However, such derogation from the right to life and the right to personal liberty is restricted only to periods of emergency.

Section 45 (3) of the constitution provides that 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 the constitution.

It is pertinent at this juncture to consider whether right to life and right to personal liberty can be trampled upon during the period of emergency. The spirit and intendment of section 45(2) (3) with respect to right to life is that life of persons should not be destroyed in the time of emergency. Again, right to personal liberty should be respected during emergency period. However, right to life can only be derogated in the time of war. For example the war between Armed Forces and the Boko Haram sect in the Northern Nigeria. Under such circumstance, resort to derogation from right to life can only take place, the government has to show justifiable purpose for dealing with the situation that exists during that period of emergency.³⁵

We further submit that apart from those rights specifically mentioned as derogable rights, every other rights as contained Chapter four of the Constitution are non derogable rights. The implication is that those rights cannot be trampled upon or denied of any citizen in the time of emergency. Those fundamental rights include

- a. Right to life³⁶
- b. Right to dignity of human persons³⁷
- c. Right to personal liberty³⁸
- d. Right to fair hearing³⁹
- e. Right to freedom from discrimination⁴⁰
- f. Right to acquire and own immovable property⁴¹

³³ (1961) ALL NLR 269

³⁴ Cap 57 LFN, 2004

³⁵ Ibid p. 9.

³⁶ Section 34 of the Constitution of the Federal Republic of Nigeria 1999 constitution, 1999 (as amended)

³⁷ Section 35 of the Constitution of the Federal Republic of Nigeria 1999 constitution, 1999 (as amended)

³⁸ Section 36 of the Constitution of the Federal Republic of Nigeria 1999 constitution, 1999 (as amended)

³⁹ Section 42 of the Constitution of the Federal Republic of Nigeria 1999 constitution, 1999 (as amended)

⁴⁰ Section 43 of the Constitution of the Federal Republic of Nigeria 1999 constitution, 1999 (as amended)

⁴¹ Section 44 of the Constitution of the Federal Republic of Nigeria 1999 constitution, 1999 (as amended)

g. Right to compulsory acquisition of property.⁴²

1.3.2. Conformity of State of Emergency with Minimum International Standard

There has been incidences of reckless application of power in Nigeria by the President due to the enormous powers of proclamation of State of Emergency guaranteed by the constitution. There is no law that empowers the President to remove a democratically elected representatives of any State during the State of Emergency. The removal of the Governors of Plateau and Ekiti States by the then President Olusegun Obasanjo was a gross abuse of the Constitution. A State of Emergency is often times employed as an instrument of oppression of any perceived political enemy in Nigeria.

The major pitfall of State of Emergency in Nigeria is the gross abuse of the rights of the citizens. In Nigeria, the military forces who are engaged in the hostilities have grossly violated the human rights of the citizenry in the affected states. The report by the Amnesty International accused the Nigerian army of violating human rights and committing war crime in its fight against the Boko Haram.⁴³ The Nigerian soldiers who are guarding the IDP camps have accused of raping women and engaged in other human right abuses.⁴⁴

1.4. Critique of Non Derogation Clause in the African Charter

In contrast to the Constitution and international Covenant on Civil and Political Rights, the American and European Conventions on Human Rights, the African Charter does not provide for any right of derogation for the State Parties in public emergencies. The absence of derogation provision has been interpreted by the African Commission on Human and Peoples Right to mean that derogations are not permissible under the African Charter.⁴⁵

The teething problem to be considered at this point is the legality or otherwise of section 45 of the constitution viza viz the African Charter which forbids derogation of right during emergency periods. In *Commission Nationale des Droits del'Homme et des Libertes v Chad*⁴⁶, the African Commission considered a communication in which the defendant invoked civil war in its territory as a defence.⁴⁷ The Commission held that member states cannot derogate human rights in the period of emergency. In *Article 19 v Eritrea*⁴⁸, the African Commission dealt with the Eritreans argument that it can suspend Charter rights during war where its existence is threatened.⁴⁹ The holding of the Commission is the same in both communications. The states cannot invoke existence of war, international or civil, or other emergency situation within their territory to defend violation of any right guaranteed in the Charter. Therefore the African Commission elevated all Charter rights to the level of regional *jus cogens*.⁵⁰ In *Jawara v The Gambia*⁵¹, the Commission dealt with a communication alleging violation of the African Charter as a result of suspending the whole bill of rights in the Constitution following a *coup d'etat*. The Commission examined the implication of suspending the constitutional rights under the Charter

⁴²Emphasis mine

⁴³ <https://www.naij.com> accessed on 14th April,2017

⁴⁴ <https://www.hrw.org>>2016/10/31 accessed on 28/4/17

⁴⁵ Available at <http://wwwI.umn.ed/hurnanrts/africa/corncases/74-92.htm/>,visited on 11/6/17

⁴⁶ www.worldcourts.com>decisions accessed 10/4/20

⁴⁷ (2000) AHRLR 66 ACHPR 1995) para 19

⁴⁸ 2007) AHRLR 73

⁴⁹Article 19 v Eritrea, African Commission on Human and Peoples Rights Communication No. 275/2003,AHRLR 73(ACHPR 2007), para 87

⁵⁰ FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA , at 252 (2007)

⁵¹ (2000), AHRLR 107 (ACHPR 200), para48-5

and concluded that the suspending bill of rights in the Constitution amounts to violation of Articles 1 and 2 of the African Charter.

The above judicial authorities are not applicable in Nigeria, considering that the constitutional provisions on derogation is in conflict with the ACHPR for not recognizing derogation in emergency period. The judicial position of domesticated international treaties has been settled in the case of *Fawehinmi v Abacha* where the Supreme Court held that ACHPR is not superior to the constitution.⁵²

As stated above, the African Charter on Human and Peoples Right (African Charter) does not contain clauses permitting suspension of human rights during public emergency, while major human rights instruments allow state parties to suspend some rights. The African Commission on Human Rights has repeatedly held that a declaration of emergency cannot be invoked as a justification for violating or permitting violations of the charter. It has been argued that the omission of the derogation clause from the Charter is not a mistake. It shows positive development of human rights norms in Africa and should not be seen as a defect⁵³.

However, the silence of the African Charter and the positions held by the African Commission on this issue have not been welcomed by some scholars. Heyns identifies the absence of derogation clause as one of the problems of the African Charter. He said that prohibiting states from suspending human rights during emergencies is hardly conducive to the protection of human rights.⁵⁴ He argues that African Charter has no restraining influence on the State. Heyns recommends for amendment of African Charter to make for explicit provision⁵⁵

Ourguergouz observes that in interpreting the silence if the African Charter on derogation as a prohibition cannot be defended because does not contain a provision prohibiting states from suspending human rights during emergencies. By excluding a derogation clause, states “reserved the right to invoke the derogations which may be possible under general international law.”⁵⁶

Sermet argues that the absence of a derogation clause from the African Charter is a deficiency, as the system of derogation brings with it special guarantees of protection. The absence of derogation clause renders exceptional circumstance common place, leading to their improper perpetuation. Incompatibility of African Charter with the African constitutions and ICCPR is one of the disadvantages of derogation clause from the African Charter⁵⁷. It is not also realistic to expect the same level of human rights protection in a normal situation and in a crisis situation. Jurisprudential inclusion of derogation clause may remedy the deficiency of the African Charter.⁵⁸

Murray argues that the absence of a derogation clause from the African Charter decreases the powers of the state only in theory. In reality, the silence of the African Charter provides “states with more discretion by failing to set any standards at all, allowing states to act as they please”⁵⁹.

⁵² (1996) 7 NWRL (pt 475) 710

⁵³ Abdi Jibril , “*Law Democracy & Development*” vol. 17 (2013) pg 83

⁵⁴ *ibid*

⁵⁵ *ibid*

⁵⁶ *ibid*

⁵⁷ *ibid*

⁵⁸ *ibid*

⁵⁹ *ibid*

Allo sees the absence of a derogation clause from the African Charter as “lack of commitment to and genuine respect for human rights. Given that most democracies of the world do have “a derogation clause, Africa also needs to have one because such a clause is good for human rights “and gives opportunity to Africa institutions to supervise emergencies.⁶⁰ Allo suggests that the African Commission should develop a clear regional jurisprudence on derogation from African Charter.

Conversely, it has been argued that the attack being launched against the African for its exclusion of the derogation clause is not necessary, reason being that the trend of expanding non derogable rights in human rights instruments may be cited as one of the factors. Since the adoption of the Universal Declaration of Human Rights, the promotion and protection of human rights are on an upward trajectory as evidenced by the adoption of several global and regional human rights instruments and the establishment of organs that monitor their implementation⁶¹ . A review of these human rights instruments that contain derogation clauses shows that non derogable rights had been increasing before the adoption of the African Charter. The incorporation of derogation clauses in human rights treaties does not advance the realization of human rights. Derogation clauses are states’ license to violate human rights as they officially condone a derivation from preexisting treaty commitments precisely when those commitments are most at risk of being undermined⁶². Again, human rights are universal, indivisible and interdependent and interrelated. Derogation clauses create unnecessary division between derogable and non derogable rights. There is no justification for dividing them.⁶³ The rights of states to derogate from human rights treaties is usually misused. There is according to Nowak,” an incurable tendency, particularly on the part of military dictatorships to misuse the tool of emergency to maintain their own position in power⁶⁴. In Africa, experience shows that derogation from human rights, even under stringent requirements, is likely to be abused. Many African states that are parties to ICCPR have failed to notify the other state parties although they have made several declaration of state of emergency.⁶⁵

1.5. Derogation From Human Right Under International Human Right Treaties

A number of human rights treaties envision a regime of derogations enabling state parties to alter their obligations temporarily under the treaty in exceptional circumstances, i.e. in times of public emergency threatening the life of a nation. Examples of such emergency situations include armed conflicts, civil and violent unrest, insurrection, environmental and natural disaster. Although exceptional measures are permissible, their validity is however subject to certain requirements set by the treaty law, such as qualifications of severity, temporariness, proclamation and notification, legality, proportionality, consistency with other obligations under international law, non-discrimination, and lastly, non-derogability of certain rights recognized as such in the relevant treaty. Fundamentally, derogation clauses articulate the concept that states of emergency do not create a vacuum. Derogation aims at striking a balance between the protection of individual human rights and protection of national needs in times of crisis by placing reasonable limits on emergency powers.

Derogation clauses are provided in the International Covenant on Civil and Political Rights (ICCPR)⁶⁶, the European Convention on Human Rights (ECHR)⁶⁷ and of the American Convention of Human

⁶⁰ *ibid*

⁶¹ *ibid*

⁶² *ibid*

⁶³ *ibid*

⁶⁴ *ibid*

⁶⁵ *ibid*

⁶⁶ Article 4 ICCPR

⁶⁷ Article 15 of European Convention on Human Rights

Rights (ACHR).⁶⁸ Consequently, different states may be subject to different emergency derogation regimes, depending on the states' adherence to these treaties as the list of non derogable rights may vary from treaty to treaty. The International Covenant on Civil and Political Rights stipulates that in time of emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties may take measures derogating from their obligations under the Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under the international law.⁶⁹ The non derogable rights under the ICCPR are as follows:

- a. *every human being has the right to life. This right shall be protected by law. No one shall be arbitrary deprived of his life.*⁷⁰
- b. *no one shall be subjected to torture or to cruel , inhuman or degrading treatment or punishment.*⁷¹
- c. *no one shall be held slavery, slavery and the slave trade in all their forms are prohibited. No one shall be held in servitude.*⁷²
- d. *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 it was committed.*⁷³
- e. *Everyone shall have the right to recognition as a person before the law.*

The essential criteria for derogation under the international human rights treaties may be summarized as follows:

- a. *Existence of a Public Emergency that Threatens the Life of the Nation.*

An essential requirement for triggering derogation clauses is the existence of a situation amounting to public emergency. According to the Human Rights Campaign (HRC), not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation. The European Court of Human Rights (ECtHR) in *Lawless v Ireland*⁷⁴ qualified the time of emergency as “an exceptional situation of crisis or emergency which affects the whole population and constitutes a great threat to the organized life of the community of which the community is composed.

This definition was further developed in the *Greek case*,⁷⁵ in which the European Commission on Human Rights pronounced that public emergency must be actual or imminent; the effects of emergency must involve the whole nation; the continuance of the organized life of the community must be threatened and the crisis or danger must be exceptional, in that the normal permitted measures or restrictions for maintaining public safety, health and order are plainly inadequate.

a. ***The Requirements Of Proclamation And Notification.***

The requirement of proclamation and notification are not simply “technical and dispensable formalities” as both procedural guarantees are important for the purposes of national and international supervision.

⁶⁸ Article 27 American Convention of Human Rights (ACHR)

⁶⁹ Article 4(1) International Covenant on Civil and Political Rights

⁷⁰ *Article 6(1)* International Covenant on Civil and Political Rights

⁷¹ Article 7 International Covenant on Civil and Political Rights

⁷² Article 15 International Covenant on Civil and Political Rights

⁷³ Article 16 International Covenant on Civil and Political Rights

⁷⁴ (N0 3) ECHR 1 Jul 1961

⁷⁵ (!969) 12 YB 1

The International Covenant on Civil and Political Rights (ICCPR) for instance, requires an official proclamation of the Existence of a public emergency, which is an important technical prerequisite for the application of derogation⁷⁶.

The duty to proclaim should be distinguished from the duty to notify. This is because the duty to proclaim the state of emergency is designed to prevent arbitrary or de facto derogation and to obligate derogating states “to act openly from the outset of the emergency. At the other end, the notification requirement serves as a guarantee for supervision by international bodies of the legality of the establishment of a state of emergency. State parties are often required to inform other parties immediately.

b. *Measures Strictly Required By The Exigencies Of Situation:*

Derogation from human rights under international human rights treaties must be limited to the extent strictly required by the exigencies of the situation. In other words, they need to be proportionate. The requirement of proportionality constitutes one of the substantive limits to the emergency powers requiring specific scrutiny and specific justification of each measure taken in response to an emergency, rather than an abstract assessment of an overall situation.⁷⁷

c. *The Principle of Consistency*

This simply means that derogation measures should not be inconsistent with other obligations of the derogating state under international law.

1.6. The Need For Balance

Democracy connotes dialogue, discussion, debates and constructive engagement between States and its citizens. State of Emergency is not one of the tenets of democracy. It is true that lives and property are lost when there is serious civil unrest or war in any part of the country but that is not a sufficient reason for resort to State of Emergency. The best approach to ending any civil unrest is dialogue, discussions and debates. The federal government should at all times identify the needs of her citizens by providing the basic social amenities of the people. Once the key developmental needs of the people are met, the spate of crisis will be reduced to the barest minimum.⁷⁸

The practice of balancing is a universal feature of the structure of constitutional rights throughout contemporary societies. Although there is scant jurisprudence on the manner of balancing fundamental rights in Nigeria, a few general principles can be advanced. The first point is that all rights are equal and none is inherently superior to the other. Secondly a number of factors can be used as a basis for balancing the rights. These factors may include⁷⁹:-

- (a) the nature of the right;
- (b) the importance or the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) the less restrictive means to achieve the purpose.

⁷⁶ Paper delivered by Prof. Fabian Ajogwu SAN on the Maiden Edition of the Annual Collaquim of the Law Office of Adegboyega Awomolo & Associates held in honour of Chief Adegboyega S. Awomolo SAN on September 23,2014

⁷⁷ ibid

⁷⁸ ibid

⁷⁹ ibid

It is also important to refer to the Canadian case of *R. v. Chaulk*⁸⁰ where the court laid down the procedure to be followed when the state is attempting to justify a limit on a right or freedom. In *Chaulk's case supra*, the court held as follows:

1. *The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.*
2. *Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:*
 - (a) *be "rationally connected" to the objective and not be arbitrary, unfair or based on irrational considerations;*
 - (b) *impair the right or freedom in question as "little as possible"; and*
 - (c) *be such that their effects on the limitation of rights and freedoms are proportional to the objective.*

Essentially, derogation aims at striking a balance between the protection of individual human rights and protection of national needs and interests in times of crisis or insurrection by placing reasonable limits on emergency powers. It is in this regard that the need for a balance with respect to section 45 of the 1999 constitution arises. Consequently, a balance must be struck between the protection of the rights guaranteed in sections 33, 35, 36, 37, 38, 39, 40 and 41 and the protection of national needs in times of crisis or insurrection by placing reasonable and proportional limits on emergency powers.

1.7. Conclusions

The importance of placing reasonable limits on emergency powers and counter-terrorism measures through balancing fundamental human rights and the protection of national needs cannot be over emphasized. It is in recognition of this that the United Nations Global Counter-Terrorism Strategy provides succinctly that the promotion and protection of human rights for all and the rule of law is essential to all components of the strategy, recognizing that effective counter-terrorism measures and the promotion of human rights are not conflicting goals, but complementary and mutually reinforcing. This idea of 'complementary and mutually reinforcing' should be guiding principle in balancing the fundamental rights of the citizen even in the face of security challenges in a democracy.

1.8. Recommendations

It is recommended that states should at all times act within the confines of the constitution during the period of emergency exercise

⁸⁰ (1990) 3 SCR 1303