

**THE FATE OF HUMAN RIGHTS IN A PERIOD OF A STATE OF EMERGENCY IN  
NIGERIA (published in the Nigerian National Human Rights Commission Journal,  
Vol. 3, 2013, pages 230-259)**

**P.E. Oamen, LL.B, LL.M, BL**

**Lecturer, Faculty of Law, Ambrose Alli University, Ekpoma, Nigeria**

**ABSTRACT**

This paper examined the constitutional and legal derogations or limitations to which the enjoyment of Human Rights could be subjected, during a period of a State of Emergency. The article explored the legal procedure for declaration of a State of Emergency in Nigeria and the author contended that the current President of Nigeria may have followed the laid down procedure in his recent proclamation of Emergency Rule in Adamawa, Borno and Yobe States. However, the writer queried the legality of the continued existence of the Emergency Rule in the face of the failure to approve, or rather, the belated approval of the Rule by the National Assembly outside the constitutionally stipulated timeframe. The article discussed what human rights are all about, the approaches or schools of thoughts of human rights, kinds or classes of human rights as well as the fundamental human rights of Nigerians as guaranteed under Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The author argued that while citizens are entitled to the enjoyment of their constitutionally enshrined rights, such rights are however not without corresponding duties and limitations especially in situations where public peace or the corporate existence of Nigeria is threatened. The author concluded by arguing that the Nigerian Army, nay the Nigerian Government cannot hide under the canopy of Emergency Rule in the said states to deny citizens of their constitutional rights except where such denial is reasonably justifiable or necessary to carry out the effective operation of the Rule while it lasts.

# **THE FATE OF HUMAN RIGHTS IN A PERIOD OF A STATE OF EMERGENCY IN NIGERIA**

## **INTRODUCTION**

It has gone beyond disputation that the Constitution of the Federal Republic of Nigeria, 1999 (as amended) in Section 305 empowers a sitting President of Nigeria to proclaim a State of Emergency in the Federation or any part thereof, in deserving cases. Over time, some past Nigerian Presidents have invoked the provisions of this special clause<sup>1</sup> in Section 305 in cases where the public peace or corporate existence of Nigeria or any part thereof was threatened. For instance, in 1962, the then Prime Minister, Sir Abubakar Tafawa Balewa declared a State of Emergency in the Western Region following a pandemonium in the Western House of Assembly. Also in May 2004, the then President of Nigeria, Chief Olusegun Obasanjo proclaimed a State of Emergency in Plateau State of Nigeria vide a Presidential Broadcast of 18 May 2004<sup>2</sup>. The Proclamation was subsequently gazetted and transmitted to the National Assembly (NASS) for approval, further to Section 305(2) of the Constitution and same was approved by each House of the NASS, though with some minor amendments. Similarly in the year 2006, the same President Obasanjo again wielded the power conferred on him by Section 305 by proclaiming a State of Emergency in Ekiti State<sup>3</sup>. One common feature of Tafawa Balewa and Olusegun Obasanjo's purported exercise of presidential power under Section 305 was the removal of democratically elected State Government officials and replacing them with sole Administrators for the states under Emergency Rule.

Since the year 2009, Nigeria has been combating security challenges in the hands of Boko Haram insurgents who are bent on Islamizing the nation. According to news reports, over 2000 persons have been killed by the religious sect which has the North East Nigeria as its major

---

<sup>1</sup> Akande, J.O., *Akande: Introduction to the Constitution of the Federal Republic of Nigeria 1999*, (Lagos: MIJ Professional Publishers Ltd, 2000) p. 46

<sup>2</sup> See The Guardian, Wednesday 19 May, 2004, p.10

<sup>3</sup> Whether the proclamation was done *bona fide* or with political undertone is another matter which is outside the scope of this work.

stronghold. On several occasions, the insurgents have overrun the Nigerian security apparatus wherein they have killed many Policemen and members of the Armed Forces. They have invaded Prisons and set free their members held for terrorism charges. The situation became so hopeless that many Nigerians and foreigners began to perceive the nation as a failed state.

On Tuesday 14 May, 2013, and perhaps, in a bid to prove his critics wrong, the current President of Nigeria, Goodluck Ebele Jonathan, in a nationwide televised Presidential Broadcast, invoked the provisions of Section 305 of the Constitution by proclaiming a State of Emergency in three states, namely Adamawa, Borno and Yobe which are flashpoints as far as the terrorist activities of the Boko Haram are concerned.

The major contents of the Presidential Broadcast were the acknowledgment of the fact that the Boko Haram insurgents were determined to undermine the sovereignty and territorial integrity of Nigeria through their overt acts, including the destruction of the Nigerian Flag and in their place, hoisting strange flags, killing of innocent citizens and razing down of public and private buildings by the insurgents as well as the retention of the Governors and other political office holders of the affected states, during the Emergency Rule<sup>4</sup>.

It need be stated here that, of particular relevance to this work, vis – a- vis human rights issues, are paragraphs 13 and 14 of the Presidential Speech/broadcast<sup>5</sup> on the State of Emergency wherein the President directed the Chief of Defence Staff to deploy more troops to the states in issue. According to the President, such troops had Presidential orders to take all necessary action which may “include the authority to arrest and detail suspects, the taking of possession and control of any building or structure used for terrorist purposes, the lock –down of any area of terrorist operation, the conduct of searches, and the apprehension of persons in illegal possession of weapons” to put an end to the impunity of insurgents and terrorists. The Military, in their characteristic manner of full obedience, have since taken over the said states and have been carrying out the presidential orders. Dusk to dawn curfew has been imposed on Borno and Adamawa States.

This article takes an exploratory view of the procedure for declaring a State of Emergency in Nigeria, meaning, approaches and classes of human rights as well as the constitutional provisions

---

<sup>4</sup> See The Guardian, Wednesday, 15 May, 2013.

<sup>5</sup> Ibid

of fundamental human rights as enshrined in Chapter IV of the Constitution. The paper also examines the constitutionality of the invasion of citizens' rights to life, dignity of their persons, personal liberty, freedom of expression, right to peaceful assembly and association, freedom of movement, right to acquire and own immovable property in Nigeria, among other rights in the affected states. We shall contend that though these citizens' rights have been constitutionally flavoured, the same Constitution has however placed limitations on the said rights in situations such as emergency rule situation. We would further argue that the Military can only derogate from the rights of residents of the affected states only to the extent required for restoration of normalcy and in line with the provisions of the Constitution.

### **PROCEDURE FOR DECLARING A STATE OF EMERGENCY**

As noted above, the provisions of Section 305 of the Constitution clearly empower the President of Nigeria to proclaim a State of Emergency throughout the Federation or any part thereof. The President's power in this regard is of wide discretion. In other words, whether the facts of a particular situation fall within the conditions stated in Section 305 – to be examined shortly - to warrant the declaration of a State of Emergency is a matter that falls within the President's discretionary decision which may not be subject to any judicial review. According to Ademola, C.J.F. (as he then was) in **Williams v. Majekodunmi**<sup>6</sup>, **“That a state of public emergency exists in Nigeria is a matter apparently within the bounds of Parliament [in the instant case, the President], and not one for the Courts to decide”**<sup>7</sup> However, as much as the Constitution gives the President the power and discretion to declare a State of Emergency, the Constitution does not leave the gate open. Rather, the Constitution clearly lays down the conditions and procedure for declaring a State of Emergency. It is our submission that failure to follow the constitutional procedure outlined hereunder is fatal and the Courts can thus assume Jurisdiction to set aside any purported declaration that runs contrary to the provisions of the Law. It is trite Law that where a statute (let alone the Constitution) provides for a procedure for doing a particular act, compliance with such statute is mandatory<sup>8</sup>.

---

<sup>6</sup> (1962) All NLR (Pt. 1) 327 at 335

<sup>7</sup> See also *Ningkan v. Government of Malasia* (1970) A.C. 379 at 391 paras C - F

<sup>8</sup> See *Abubakar v. Attorney – General, Federation* (2008) All FWLR (pt. 44) 47 at 908 paras A -C

## THE PROCEDURE FOR DECLARATION OF STATE OF EMERGENCY

State of Emergency has been viewed as “**something that does not permit of any exact definition. It connotes a state of matters calling for drastic actions**”<sup>9</sup> The step by step procedure is as outlined in Section 305 of the Constitution which we have taken the liberty to reproduce *in extenso* below:

### Section 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;
  - 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;

---

<sup>9</sup> Bhagat Singh v. King Emperor (1931) L.R.58 1A. 169

- e) There is 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.
  - 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 of 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.”

From the above constitutional provisions, the step by step procedure for proclaiming or declaring a state of emergency can be summarised below:

- i. The President must study the situation and satisfy himself that any of the incidents stated in Section 305 (3) (a) – (g) as quoted above exists. It bears stating here that the incidents are seven in number and they are alternative or disjunctive and not cumulative<sup>10</sup>. In other words, the existence of any of the incidents would ground a Proclamation of a State of Emergency. Although President Jonathan did not state the incident he founded his proclamation upon, it is obvious from the Presidential Broadcast that he relied on paragraphs (c) and (d) of Section 305 (3). We contend here that a community reading of the provisions of Section 305(3) (g), (4) and (5) of the Constitution would reveal that the President did not have the power to declare a state of emergency in the affected states without a formal request from the Governors of those states to do so. Though it can be argued that subsection (5) gives the President the power to so declare where the Governors fail within a reasonable time to make a request for a Proclamation, it is however contended that what amounts to a “reasonable time” in this context is nowhere defined in the Constitution. Moreso, we submit that the President ought to make reference to the Governors’ failure to make the requisite request in his Presidential Broadcast. By not making known the fact that the Governors failed to so request, thus empowering him to declare an Emergency Rule in their States, it appears the President has failed to comply with the condition precedent inherent in Section 305 (1) (g), (4) and (5). Lastly on this, we submit that the incident in paragraph (f) is too wide and general and same could be subject to abuse by an overzealous President.
- ii. Having satisfied himself with one above, the President shall issue a Proclamation for the declaration of a State of Emergency in the Federation or the affected state(s). Such Proclamation must be published in the official gazette of the Federal Government.

---

<sup>10</sup> Akande, Op. Cit. at 425 - 426

- iii. Consequent upon the said publication, the President shall, with dispatch, transmit copies of the aforesaid official gazette to the President of the Senate and the Speaker of the House of Representatives.
- iv. The Senate President and the Speaker of House of Representatives shall, upon receipt of the copies, convene a meeting<sup>11</sup> of each House of the NASS and each House must in such a meeting either approve or disapprove the President’s Proclamation within 2 days or 10 days, depending on whether the House is in session or not in session<sup>12</sup>. One therefore questions the legality of the Senate Approval which was given by a resolution that was passed only on Tuesday 21 May, 2013. It would be recalled that the President declared the State of Emergency in Adamawa, Borno and Yobe States on Tuesday 14 May, 2013. By simple mathematics, it took the Senate (not even the whole NASS yet) a whole week to pass the requisite resolution of approval. With all humility, we contend that the belated Senate approval is invalid as same runs foul of the constitutional provisions which state that the approval must be given within 2 days<sup>13</sup> unless it can be shown that the Proclamation was not published in the official gazette until about 19 May 2013. We submit that, it is most unlikely that a Proclamation made on 14 May 2013 on such a critical issue, as security, would take till 19 May to be published. Assuming our argument here is correct, what then is the legal implication of this lazy and belated approval from the NASS vis – a –vis the continued existence of a State of Emergency in the affected states? We dare to submit that the continued existence of Emergency Rule in those states has become illegal. We find anchorage on the provisions of Section 305 (6) (b) of the Constitution which provides:

Section 305

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

a) .....

---

<sup>11</sup> Note the use of the word “meeting” instead of “Sitting”. This suggests that the members of the NASS may informally meet for the approval, hence, the Senate on Thursday 21 May approved the Emergency Rule in a “closed door session”.

<sup>12</sup> See Section 305(2) and (6) (b)

<sup>13</sup> When the NASS is in session. Luckily for this argument, the NASS was and still is in session when the proclamation was made and published.



- b) If it affects the Federation or any part thereof and **within two days when the National Assembly is in session**<sup>14</sup>, 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.

Therefore, in the eye of the Law, the NASS having not passed a two – thirds majority resolution within 2 days of publication of the President’s Proclamation to approve the Emergency Rule in Adamawa, Borno and Yobe States, it is presumed that they did not intend to approve it. Consequently, Section 305 (6) (b) kicks in. That is, the Emergency Rule automatically ceases to exist. The view has been expressed elsewhere that whether or not a State of Emergency Proclamation was subsequently approved by the NASS, it would have lasted for at least 2 days or 10 days as the case may be<sup>15</sup>. We would rather say, with respect, that, under no circumstance should a State of Emergency last beyond 2 days or 10 days, as the case may be, without an affirmatory, confirmatory or approving majority resolution of the NASS in Nigeria.

### **PRESIDENT’S FAILURE TO REMOVE THE GOVERNORS OF THE AFFECTED STATES**

Much concern has been expressed in the media as regards the President’s failure or refusal to remove, albeit, temporarily, the Governors of the affected states. The argument is that , the President ought to have relieved all political office holders in Adamawa, Borno and Yobe States of their positions. To the proponents of this view, no much would be achieved by the military troops with the retention of the politicians in offices. They contend that the political office holders would undermine and frustrate the efforts of the military. Some have even termed the President’s Proclamation a “partial declaration”, thereby suggesting that it is only when the democratic structures are removed or done away with that a complete Emergency Rule can be said to be in place.

As convincing as the above argument may sound, we submit that same is completely flawed as it does not have any legal, nay constitutional legs to stand on. It is obvious that the argument is

---

<sup>14</sup> Emphasis ours

<sup>15</sup> Akande, Loc. Cit.

predicated on Nigeria's past Emergency Rule experience. One would recall that during the 1962 Emergency Rule in the Western Region, the then Prime Minister removed all the democratic structures and replaced them with a Sole Administrator. Also, during President Olusegun Obasanjo administration, he removed the democratically elected state officials in Plateau and Ekiti States when he declared a State of Emergency in the states. He appointed sole administrators to take charge of the states' administration.

The critical question that arises is whether the constitutional power granted to the President to declare a State of Emergency is inclusive of power to remove democratically elected state officers<sup>16</sup>. We submit that the current President of Nigeria, Goodluck Jonathan deserves some commendation by being the first President to toe the line of constitutionality regarding the issue at hand. It is our submission that the President does not possess any modicum of legal or constitutional power to sack, remove or suspend the democratically elected structure in any state, not even during an Emergency Rule. Nowhere in Section 305 or any other section of the Constitution is the President empowered to remove a sitting Governor. Although it may be argued that the President possesses such power under the Emergency Powers Act of 1961 which has become an existing law<sup>17</sup>, we firmly hold the view that the said Act cannot override the clear provisions of the Constitution on the procedure for removal of state elected officers<sup>18</sup>.

Interestingly, the provisions of Section 1(2) of the Constitution put the above contention in a good stead when it provides that:

Section 1(2):

“The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons [including sole administrators during Emergency Rule]<sup>19</sup> take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution [such as Sections 105 – dissolution of State House of Assembly, 110 – recall, 188 – impeachment and 189 – permanent incapacity].”

---

<sup>16</sup> Alabi, M. O., “Emergency Powers in Nigeria: Legal and Constitutional Issues”, Volume 5, No. 4 (2005), *The Constitution (A Journal of Constitutional Development)* p.1 at p.10

<sup>17</sup> Pursuant to Section 315 of the Constitution

<sup>18</sup> See Sections 105, 110, 188 and 189 of the Constitution on procedure for relieving state Governors (or their Deputies) and legislators of their jobs.

<sup>19</sup> The words in bracket are ours.

It follows, therefore, that the President cannot proceed under the provisions of Section 305 or under the Emergency Powers Act to remove the democratic structures in a state under Emergency Rule. After all, the Constitution is supreme and all other Acts, Laws and instruments which are inconsistent with it must, of legal necessity, bow to the Constitution<sup>20</sup>. Even the Section 305 that gives the President the power to proclaim a State of Emergency begins with “Subject to the provisions of this Constitution....” Thus, the President’s Proclamation power is subject to the various sections (including the ones stated above) of the Constitution relating to the procedure for removal of state elected officers. The “subject to” clause is an expression of limitation.<sup>21</sup>

From another perspective, it could not have been the intention of the legislature to empower the President to remove or suspend democratic structure during a State of Emergency. This point is buttressed by the fact that Section 305 (3) of the Constitution envisages a situation where the President could declare a State of Emergency in the whole Federation. Can it be said that if that happens, the President would suspend or remove himself and members of the NASS from office? Could that have been the intention of the lawmakers? We dare answer in the negative. Such a situation would create anarchy or pandemonium which would be greater or graver than the one in respect of which the Emergency Rule was declared in the first place. Further, it has been argued that, further to Section 305 (4), no Governor or State House of Assembly would request or sanction the request for a State of Emergency if they know that they or their offices would be swept away when the President accedes to their request<sup>22</sup>. But the critical question is, what is the fate of human rights in all this? To this question we now turn.

## **FUNDAMENTAL HUMAN RIGHTS IN NIGERIA**

The Nigerian Constitution in its Chapter IV enshrines or guarantees about 11 rights to which every citizen or person<sup>23</sup> shall be entitled. These are right to life<sup>24</sup>, right to dignity of the human person<sup>25</sup>, right to personal liberty<sup>26</sup>, right to a fair hearing<sup>27</sup>, right to private and family life<sup>28</sup>,

---

<sup>20</sup> See Section 1(1)& (3) of the Constitution and *Hope Democratic Party v. Obi* (2012) All FWLR (pt. 612) 1620 at 1644 paras F - G

<sup>21</sup> *Agundi v. Commissioner of Police* (2013) All FWLR (pt. 660) 1247 at 1304 paras E - H

<sup>22</sup> *Alabi, Op. Cit.* at 12

<sup>23</sup> Note that some of the right sections use “citizen” while others use the word “person”, thus suggesting that some fundamental human rights do not enure in favour of expatriate residents in Nigeria.

<sup>24</sup> Section 33

<sup>25</sup> Section 34

right to freedom of thought, conscience and religion<sup>29</sup> , right to freedom of expression and the Press<sup>30</sup>, right to peaceful assembly and association<sup>31</sup>, right to freedom of movement<sup>32</sup>, right to freedom from discrimination<sup>33</sup> and right to acquire and own immovable property anywhere in Nigeria<sup>34</sup>. We shall examine below these rights and the limitations or derogation placed upon them under the Constitution, especially during a State of Emergency. But before then, we shall first explore the meaning, approaches and classes of human rights, albeit briefly.

## MEANING OF HUMAN RIGHTS

The phrase ‘human rights’, just like Law, defies any precise or commonly acceptable definition. Each author’s definition is informed by his perspective or the school of thought he belongs to. However, we shall attempt a working definition herein after reference to some existing definitions by learned authors and jurists.

According to Eze, human rights are “Demands or claims which individuals or groups make on societies some of which are protected by law and have become part of *lex lata* while others remain aspiration to be attained in the future.”<sup>35</sup> To Ajomo, “human rights are those rights which human being enjoy by virtue of their humanity the deprivation of which would constitute a grave affront to one’s natural sense of justice.”<sup>36</sup> In the words of Lien, human rights are “universal rights or enabling qualities of human beings as human beings or as individuals of human race, attaching to the human being wherever he appears without regard to time, place, colour, sex, parentage or environment.”<sup>37</sup> In Onyekpere’s view, “Human right is the intrinsic worth, equal and inalienable rights of members of the human family to a dignified existence. Its observance is

---

<sup>26</sup> Section 35

<sup>27</sup> Section 36

<sup>28</sup> Section 37

<sup>29</sup> Section 38

<sup>30</sup> Section 39

<sup>31</sup> Section 40

<sup>32</sup> Section 41

<sup>33</sup> Section 42

<sup>34</sup> Section 43

<sup>35</sup> Eze, O., *Human Rights in Africa: Some Selected Problems*, (Ibadan: Macmillan Press and NIIA, 1984) p.5

<sup>36</sup> Ajomo, M.A., “The Development of Individual Rights in Nigeria: Constitutional History”, in M. A. Ajomo & B. Owasanoye(eds), *Individual Rights under the 1989 Constitution* (Lagos: NIALS, 1993), p.1

<sup>37</sup> Lien, A., *Fragment of Thoughts Concerning the Nature and Fulfillment of Human Rights*, (London: Greenwood Press, 1973) p.24

fundamental to the realization of social progress and better standard of life for all humanity.”<sup>38</sup> A learned Senior Advocate of Nigeria (SAN) sees human right as “a specie of legal right that pertain to mankind as a whole or all persons by virtue of their being “moral and rational creatures”.”<sup>39</sup> The definition of human rights has over time, also agitated the minds of Jurists. For example, in **Ransome Kuti v. Attorney – General of the Federation**,<sup>40</sup> Kayode Eso, JSC defined human right as “A right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to a civilised existence.” In our humble opinion, human rights are those rights which are inherent to man and universally recognized as precondition to a worthy living and the violation of which would render man less human. Thus a learned author has stated elsewhere, and rightly in our view, that without human rights, “man is nothing but a slave to his society.”<sup>41</sup>

## **APPROACHES TO HUMAN RIGHTS**

Basically, there are two approaches to the concept of human rights. These are the traditional and socialist approaches.

### **TRADITIONAL APPROACH**

This approach finds its root or support from the works of Thomas Hobbes and John Locke. Essentially, this school of thought or approach sees human rights from the natural law perspective. To the proponents of this approach, human rights are nothing but the rights which are common to every human being notwithstanding his race, sex, creed, social status, political affiliations and other primordial or socio – economic considerations. To them, human rights are fundamental and inalienable and they include right to life, right to personal liberty, right to own property, freedom of thought, conscience and religion as well as freedom of expression and the Press. Thus, according to Nnaemeka – Agu:

---

<sup>38</sup> Onyekpere, O., “Democracy, Human Rights, Dictatorship and the Nigerian Judiciary,” Vol. 3, Nos 1, 2 & 3, (1993), *JHRLP*, pp. 51 – 52

<sup>39</sup> Idigbe, A., “Overview of Human Rights and their Corresponding Duties in Contemporary Nigeria,” Badaiki, A. D. (ed.), *Landmarks in Legal Developments* (Essays in Honour of Justice C.A.R. Momoh, Honourable Chief Judge of Edo State), (Lagos, Nobility Press, 2003), p.239

<sup>40</sup> (1985) 2 NWLR (pt. 6) p.211 at 229

<sup>41</sup> Shikyil, S.S., “Human Rights and National Development,” Badaiki, A.D.,(ed.), *Landmarks in Legal Developments* (Essays in Honour of Justice C.A.R. Momoh, Honourable Chief Judge of Edo State), (Lagos, Nobility Press, 2003), p.180

Human right is conceptualized as the new manifestation of the natural law concepts of the ancient and middle ages. Natural law had always envisaged the external natural law conceived as principles of a right law or as patently correct solution to concrete legal questions. It is reported as the law that emanates from God or accords to reason and therefore does not change. It is the law which the Monarch or Parliament itself is bound not to infringe.<sup>42</sup>

To this school of thought, human rights, though mostly contained in the Constitutions of nations, actually predate and are independent of such Constitutions and the nations. A man is imbued with human rights from conception and the rights are universal and natural. It is because of their naturalness and universality that they are referred to as fundamental human rights.<sup>43</sup>

### **SOCIALIST APPROACH**

On the other hand, this approach which is traceable to the works of Karl Marx states that there is nothing natural or divine about human rights. According to this school of thought, human rights and the extent of their enforceability is majorly, if not solely, dependent upon the socio – economic infrastructure or condition in the society the human beings lives in. In other words, the economic infrastructure determines the superstructure of a society which in turn determines the extent to which human rights are guaranteed by the given society to its members. Hence, in Quashieah’s view:

It is the concrete material condition of the society which gives rise to the sort of rights that can be enjoyed. Therefore, there can never be right with divine context derived from the natural law synthesis. From these points of view, what is considered human right in a bourgeois society is the liberty allowed for either the exploitation or alienation of the working class. The very fact of inequitable social relations constitutes a bottleneck in the enjoyment of human rights.<sup>44</sup>

Sundberg also seems to have pitched his tent with this approach when he said, “Rights and freedom of individuals in any state are materially stipulated and depend on socio – economic,

---

<sup>42</sup> Nnaemeka – Agu, P., “ The Role of Lawyers in the Protection and Advancement of Human Rights,” Vol. 2 Nos 1 & 2, (1992), *JHRLP*, p. 2

<sup>43</sup> Uchegbu, A., “The Concept of Right to Life under the Nigerian Constitution,” Omotola (ed.), *Essays in Honour of Justice T. O. Elias*, (Lagos: University of Lagos Press, 1981) p. 127

<sup>44</sup> Quashieah, K., “The Philosophical Bases of Human Rights and its Relations to Africa: A Critique,” Vol. 2 Nos 1 & 2, (1992), *JHRLP*, p.22

political and other conditions of the development of society, its achievement and progress.”<sup>45</sup> In the words of Klenner, human rights “...are neither eternal truths nor supreme values....They are not valid everywhere nor for an unlimited time. They are rooted neither on the conscience of the individual nor in God’s plan for creation. They are of earthly origin....”<sup>46</sup> It has also been argued elsewhere that, “The attitude of governments to the regimes of rights is determined by a complex set of variables which include economics, ideological polarity, religious and cultural particularism, colonialism, etc”<sup>47</sup>

Despite the divergence of views held by the two different approaches to human rights, one fact is however certain and that is, both schools are agreed that “...human beings are the beneficiaries of human rights. Accordingly, any paradigm which is not cognizant of this axiom wallows in idle fantasy.”<sup>48</sup>

## **CLASSES OF HUMAN RIGHTS**

Human rights have been classified into 3 kinds. These are:

- a) **Civil and political rights:** These are also known as first generation or liberty – oriented rights. They are the earliest recognized rights and they have been enshrined in the Constitutions of most countries as justiciable rights<sup>49</sup>. These rights are couched in such a way that they are asserted against the state and in favour of the protection of the liberty of individual members of the state.
- b) **Economic, social and cultural rights:** These are also termed second generation or security – oriented rights. Most of them are generally not enforceable or justiciable. For example, these are the rights contained in Chapter II of the Constitution. They include right to work, right to fair and just condition of service, right to form and join trade unions<sup>50</sup>, right to social security or welfare, right to protection and assistance to family, right to adequate standard of living, right to education and right to take part in the cultural

---

<sup>45</sup> Sundberg, J., “What is Human Rights: Universal Declaration”, *Acorn Law Review* (1987) p. 587

<sup>46</sup> Klenner, H., “Human Rights: A Battle Cry for Social Change or a Challenge to Philosophy of Law,” being a paper presented at the World Congress on Philosophy of Law and Social Philosophy, Sydney/Camberra, August 1977, p.8

<sup>47</sup> Mamman, T., “Beyond Rhetoric: Challenges for the International and Regional Human Rights Regimes in the New Millennium,” Vol. 2, No 1, (January 2004), *Nigerian Bar Journal*, pp. 1 - 2.

<sup>48</sup> Kartashkin, V., “Economic, Social and Cultural Rights”, Vasak, K & Alston, P.(eds), *The International Dimension of Human Rights*, (UNESCO, 1992), p.111

<sup>49</sup> They are contained in Chapter IV of the Nigerian Constitution and they have been outlined above.

<sup>50</sup> This is however a justiciable right under Section 40 of Chapter IV of the Constitution.

life of society. It is noteworthy to state that these second generation rights only became prominent in the 20<sup>th</sup> century when many nations, including the US, Mexico, Germany and other western countries started to incorporate them into their respective Constitutions<sup>51</sup>.

- c) **Solidarity rights:** These are also known as third generation rights. They are of most recent prominence compared to the other rights explained above. These are right to development, right to self – determination, right to health, right to healthy and balanced environment, right to benefit from the common heritage of mankind and right to humanitarian assistance.<sup>52</sup>

However, it suffices to say here that, notwithstanding the above classification and the much touted superiority usually ascribed to first generation rights over the other rights, there is no set of human rights that is superior to the other. Each class should be equal to and inter – dependent on the other.<sup>53</sup> In other words, all human rights should be treated equally as they are all indivisible, interdependent and interrelated.<sup>54</sup>

## **SOURCES OF HUMAN RIGHTS IN NIGERIA**

Human rights in Nigeria have domestic, regional and international sources. We will mention some of these sources in passing.

- i. The Nigerian Constitution
- ii. Universal Declaration on Human Rights of 1948
- iii. International Covenant on Civil and Political Rights of 1966
- iv. International Covenant on Economic, Social and Cultural Rights of 1966
- v. The African Charter on Human and People’s Right of 1981

We wish to add here that, the Universal Declaration on Human Rights was the first organised international or global statement on human rights following its adoption by the member – states of the United Nations which was established after the Second World War. Before 1948, ideas

---

<sup>51</sup> See Dakas, D., “The Implementation of the African Charter on Human and People’s Rights in Nigeria,” Vol.3, (1986 -1990), *UJLJ*, p. 39.

<sup>52</sup> See Idigbe, Loc. cit

<sup>53</sup> See Vienna Declaration, 1993, World Conference on Human Rights

<sup>54</sup> Udombana, N. J., “Human Rights Protection and Good Governance in Nigeria”, *The Justice Journal* (A Journal of Contemporary Legal Issues), 2<sup>nd</sup> Ed., (2011), p.34 at 39



about human right, its projection and promotion were carried out within the context and confines of municipal laws.<sup>55</sup> The major municipal instruments then were:

- a) Magna Carta – England, 1215
- b) Habeas Corpus – England, 1679
- c) Bill of Rights – England, 1689
- d) Virginia Bill of Rights – America, June 1776
- e) American Declaration of Independence – America, July 1776
- f) French Declaration on the Rights of Man – France, 1789
- g) French Constitution – France, 1791 and
- h) Treaty of Versailles – 1919

The 1948 Universal Declaration did not only recognise human rights, but it also sought to harmonise and universalise human rights. However, as noted under the Socialist Approach above, the extent of the rights enjoyed in any given society is largely dependent on many variables and these rights may expand or reduce as members of the society continue to move their claims from the realm of *lex ferenda* to the realm of *lex lata* (from moral right to legal right) or vice versa.<sup>56</sup>

### **THE FATE OF HUMAN RIGHTS DURING EMERGENCY RULE**

Having identified the various rights available to Nigerian citizens, especially the fundamental human rights enshrined in Chapter IV of the Constitution, we would now examine the fate or status of those rights in a period of a State of Emergency such as is currently in place in Adamawa, Borno and Yobe States of Nigeria.

We submit here that the constitutionally enshrined rights are not without limits. They are not unlimited at all times. In fact, the Constitution itself and other laws in Nigeria have created situations where these rights could be derogated from, restricted or limited. What this means is that the fate of human rights in a State of Emergency period could be that of suspension, restriction or limitation. However, before such rights are denied citizens by agents of the state, the law or due process must be followed. Where the public peace or corporate existence of the Nigerian state is threatened, as exemplified by the events that led to the Emergency Rule in those

---

<sup>55</sup> Mamman, Op. Cit. Note No. 46

<sup>56</sup> Idigbe, Loc. Cit.

affected states, all efforts – which could include the suspension or restriction of human rights – must be taken by the Government to restore normalcy. As Oputa, JSC once said, “Freedom within the Law is good and desirable, but freedom outside the Law is bad and detestable.” The Law only recognises ordered freedom<sup>57</sup>, not crude or limitless freedom.

We completely agree with Akande that in nearly all constitutional expression of fundamental rights and freedom, qualification or limitations are incorporated with respect to the rights of others and of course, the public interest.<sup>58</sup> As desirable as human rights are, in any given society, such rights must however be balanced against the corresponding duty to cooperate with the state in a period of State of Emergency with a view to ensuring the restoration of peace. Section 24 (e) of the Constitution<sup>59</sup> is germane in this instance. It provides that “It shall be the duty of every citizen to render assistance to appropriate and lawful agencies in the maintenance of law and order.” Hence, while the Military in the states under the Emergency Rule are urged to abide by the Rules of Engagement, with the consciousness of not deliberately or unjustifiably invading human rights of the residents of those states, the residents must equally know that some of their rights, such as freedom of movement and peaceful assembly and association would definitely be negatively affected while the Emergency Rule lasts. This would “bring freedom and responsibility into balance to promote a move from the freedom of indifference to the freedom of involvement.”<sup>60</sup> We shall now examine the restrictions or limitations placed on some selected fundamental human rights by the Constitution and other laws of the land.

#### **a) RIGHT TO LIFE**

This right is guaranteed under Section 33 of the Constitution. This is, unarguably, the most fundamental of all rights. After all, one needs to be alive before one can assert other rights guaranteed under the Constitution or any other law. As important as this right is, the same

Section that gives it also contains some inbuilt derogations from it. Thus, the right to life can be lawfully denied a person where he has been lawfully sentenced to death by a Court of Law<sup>61</sup>,

---

<sup>57</sup> See *Amalgamated Press of Nigeria v. R.* (1961) 1 All NLR 191

<sup>58</sup> Akande, Op. Cit. at 115.

<sup>59</sup> See also Article 29 (3) of the African Charter which imposes on the citizen the duty not to compromise the security of his state of origin or residence.

<sup>60</sup> Ghai, Y., “Rights, Duties and Responsibilities”, Caugelin, J., Mayer Koenig and Lim, B. (eds), *Asian Values: Encounter with diversity*, (London: Curzon Press)

<sup>61</sup> *Adeniji v. State* (2000) 2 NWLR (pt. 645) p.354. See also *Kalu v. State* (1998)12 SCNJ p.1

where he is killed as a result of self – defence or defence to property against violence from him, where he is killed in the process of trying to escape from lawful arrest or from lawful custody or where he is killed in the process of suppressing riot, insurrection or mutiny. Quite apart from Section 33 – inbuilt derogation in a period of emergency, Section 45(2) of the Constitution also permits agents of the state to, during a period of Emergency Rule, take any reasonably justifiable measure, pursuant to an Act of the NASS, to derogate from this right to life, provided the measure is as a result of acts of war.<sup>62</sup> The recent killing of Boko Haram members by the Military were presumably done pursuant to Sections 33(2) and 45 (2) of the Constitution.

#### **b) RIGHT TO PRIVATE AND FAMILY LIFE**

This right which is guaranteed under Section 37 of the Constitution could also be the subject of derogation or restriction during a period of a State of Emergency. The section guarantees and protects the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications. However, by virtue of Section 45 (1) of the Constitution, this right may be derogated from, pursuant to any law that is reasonably justifiable<sup>63</sup> in a democratic society, in the interest of defence, public safety, public order, public morality or public health or for the purpose of protecting other persons' interest. Little wonder, the Military troops have invaded the homes of residents in the affected states in a bid to arrest suspected Boko Haram members. It is submitted however that such invasion cannot be legally justifiable unless there are concrete reasons to believe that suspects or illegal weapons are being harboured in such homes. Where concrete reasons exist, the private phones of such residents may also be tapped, legally, provided such an action is backed by a reasonably justifiable law in Nigeria.

#### **c) RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION**

This is provided for under Section 38 of the Constitution. Of particular interest to this writer is that portion of aforesaid section which states that every person has freedom to manifest and propagate his religion either alone or in **community with others**, in private or **in public**.<sup>64</sup> We submit that by the incidents or nature of Emergency Rule in place in the 3 affected states, wherein curfew has been imposed, it may be difficult, if not impossible to exercise this right in the broad manner envisaged by the Constitution, during the period of the Emergency Rule.

---

<sup>62</sup> It is arguable that the terrorist activities of the Boko Haram amount to acts of war against the Nigerian State.

<sup>63</sup> The Constitution is silent as to the meaning of “reasonably justifiable.”

<sup>64</sup> Emphasis ours

Ordinarily, Nigerians are known for their zealous religious inclinations which push them to mosques and churches on Fridays and Sundays. With the curfew in place in the affected states, it is doubtful whether the right to worship in community with others and in public (which is mostly in mosques and churches) is still feasible while the Emergency Rule lasts. It is submitted that Section 45(1) of the Constitution permits derogation from this right, by a reasonably justifiable Law. This derogation, it is submitted, is necessary in the instant case of Emergency Rule in Adamawa, Borno and Yobe States, against the backdrop that the Boko Haram war against the Nigerian state is premised on a religion – based demand: islamisation of Nigeria<sup>65</sup>.

#### **d) RIGHT TO FREEDOM OF EXPRESSION AND THE PRESS**

Section 39 of the Constitution protects this right. As laudable as this constitutional flavour may be, it is subject to abuse, hence the Constitution and other laws have placed restrictions on it. During Emergency Rule, this right would most likely be affected, especially in a situation like the one in the affected states, Adamawa, Borno and Yobe. If this right is not curtailed, Boko Haram leaders would continue to hold their terrorist opinions and impart terrorist ideas and information to innocent or gullible Northerners and others. Such exercise of unrestricted right would worsen the situation for which the Emergency Rule was put in place. It is in order to forestall such a worse scenario that the same Section 38 in its subsection (3) provides for inbuilt limitations to the right to freedom of expression, coupled with the general restriction in Section 45(1) of the Constitution. The said subsection recognises the validity of any reasonably justifiable law which places restrictions on this right. It is in pursuance of similar sections in previous Constitutions of Nigeria that such sections as Section 42 of the Criminal Code Act which criminalises advising the promotion of inter -communal wars in Nigeria find their validity<sup>66</sup>. The civil law on defamation is also a limitation to this right. It has been argued elsewhere, and rightly in our view, that to permit an unfettered freedom of expression would

---

<sup>65</sup> Though it is obvious that the war has some political undertone, the open demand of the sect has always been the islamisation of Nigeria, contrary to Section 10 of the Constitution which forbids the adoption of a particular religion as state religion.

<sup>66</sup> Ejembi, P.A., "Freedom of Expression in a democratic society: The latitudes and limits under Nigerian Law", *ABU Journal of Public and International Law*, Vol.1, No3,(2009), 108 at 114

amount to an invitation to anarchy which may be injurious to public moral, with attendant incitement to violence.<sup>67</sup>

#### **e) RIGHT TO PEACEFUL ASSEMBLY AND ASSOCIATION**

This right finds expression in Section 40 of the Constitution which states that every person shall be entitled to assemble freely and associate with other persons , including right to form or join any political party, trade union or other association for the protection of his interest. Obviously, this would be one of the rights that would most likely be derogated from under Section 45 (1) of the Constitution, during a State of Emergency. Because of the delicate or volatile nature of security situation in the Boko Haram prone states, the Military men who are carrying out the Emergency Rule in Adamawa, Borno and Yobe States would definitely view any assembly or association of residents of these states with some elements of suspicion. It is our submission that dispersing such assembly, though generally unconstitutional, is constitutionally excusable under Section 45(1) in the interest of public defence, public safety or public order. Residents' right to peacefully assemble should be subject to the overall interest of the public and it would not be in the best public interest to allow uncontrolled gathering during Emergency Rule.

#### **f) RIGHT TO FREEDOM OF MOVEMENT**

Arguably, this is one of the most radically displaced rights during a State of Emergency. This right is provided for under Section 41 of the Constitution which guarantees citizens' entitlement to move freely throughout Nigeria and to reside in any part of Nigeria without fear of being denied a right of ingress or egress<sup>68</sup>. This right includes the right to hold a Nigerian passport with which the right of egress can only be possible.<sup>69</sup> Quite apart from the inbuilt derogations in the same Section 41 as regards restriction on the residence or movement of criminals or criminal suspects or their evacuation from Nigeria, the right to freedom of movement may also be derogated from under Section 45 of the Constitution, during a period of Emergency Rule. Only a few weeks ago, the Military imposed a dawn – to – dusk curfew on Borno and Yobe States as part of their operational strategy under the Emergency Rule in those states<sup>70</sup>. We submit that such curfew, though an infringement on the right to freedom of movement, is necessary for the

---

<sup>67</sup> Amusa, K.O., "Derogations from Fundamental Human Rights enshrined in the Nigerian Constitution", Vol. 7, (2009), *UDUS Law Journal*, p.53 at 88

<sup>68</sup> See *Shugaba v. Minister of Internal Affairs* (1981)1 NCLR p.25

<sup>69</sup> See *Director, State Security Service v. Agbakoba* (1999) 3 NWLR (pt. 595) 314

<sup>70</sup> As was reported in various Nigerian Television and Radio Stations

preservation or maintenance of law and order in those states, considering the havoc the Boko Haram sect has so far wrecked on the nation. We contend that the curtailment of freedom of movement in those states is reasonably justifiable in a democratic society as same is both in the interest of the public and the residents respectively. It therefore calls for sacrifice and endurance on the part of the residents, because, in the words of Lord Finlay L.C., “One of the most obvious means of taking precaution against dangers... is to impose some restriction on the freedom of movement of persons.”<sup>71</sup>

We however hold the view that it is the duty of Government, at least, a moral duty, to provide food, water and other means of survival to the residents during the pendency of the curfew since they may not be able to go out to carry on their daily business, let alone buy foodstuff.

## **CONCLUSION**

In concluding this work, we contend that the derogation from constitutional rights, as done by the Constitution itself is largely commendable as same would help create a balanced society where rights are, in the words of Ghai, “not inherent but earned through good conduct.”<sup>72</sup> However, we have one or two observations to make here, One, we call for an amendment to the Constitution wherein an enforceable duty to respect the rights of others and the state would be created and imposed on the citizens. Hence the extant Section 24 of the Constitution may have to be amended by listing same under the justiciable rights and duties recognized under the Constitution. In this wise, the citizens would be conscious not to infringe on other persons’ rights. After all, “human rights without the effective enforcement of its [sic, their] corresponding duties, is [sic, are] useless.”<sup>73</sup> Two, Section 45 of the Constitution should be amended to set out grounds for determining what is reasonably justifiable in a democratic society vis – a vis laws curtailing human rights. Recourse may have to be had to the provisions of Section 36 (1) of the South African Constitution which embodies the country’s derogation from human rights. The section outlines the factors that should be taken into account in deciding whether a law that limits citizens’ right is reasonable and justifiable in an open and democratic society. These factors include the nature of the right to be limited or derogated from, the importance of the purpose of the derogation, the nature and extent of the derogation or limitation, the relation between the

---

<sup>71</sup> See *Rex v. Halliday* (1917) A.C. 260 at 269

<sup>72</sup> Ghai, Loc. Cit.

<sup>73</sup> Idigbe, Loc. Cit.

limitation and its purpose and the less restrictive or limiting means of achieving that purpose. We recommend these and more specific factors for subsequent Constitution amendment instead of leaving what is meant by a reasonably justifiable law at large or for the Courts to decide.<sup>74</sup> Three, we recommend mass enlightenment campaign on civil rights and civic obligations/duties. In the spirit of “catch them young”, civic rights and civic obligations should be introduced into the curriculum of secondary schools across the country. Lastly, the Military should improve or restructure the special training given to the members of the troops that are deployed to states where a State of Emergency has been declared, so as to sensitise them on the need to respect human rights and their right to restrict such rights in reasonably justifiable situations.

---

<sup>74</sup> See DPP v. Chike Obi (1961) All NLR 186 where the issue was whether Section 51 of the Criminal Code Act which creates the offence of sedition was reasonably justifiable in a democratic society.