

APPRAISING THE SIGNIFICANCE AND EFFECTS OF EMERGENCY SITUATIONS ON HUMAN RIGHTS*

Abstract

Dating back to ages, human societies all over the world, at one time or the other are faced with one form of danger or the other. These calamities, ranging from man-made to natural occurrences, have always had devastating effects, taking great toll, in term of loss of lives, limbs and properties, on the societies. As often said, necessity is the mother of invention; given this, governments all over the world have always, in most cases, fallen back on a device, in the eventuality or imminence of disasters. That device is called state of emergency or emergency rule or state of siege. When a state of emergency is duly declared, the legal structure prior to the declaration gives way to the use of wider administrative powers than those required in time of peace. The objective of this paper is to evaluate the significance and effects a declared state of emergency would have on human rights of people within the space over which the emergency was declared. This paper adopts a doctrinal methodology, and that is, an examination of the existing legal regimes on state of emergency and how it affects the observance and protection of human rights. This paper found out that the observance and protection of human rights is the first victim of a declared state emergency. Thus, it is recommended that notwithstanding the declaration of state emergency, in appropriate case, states should ensure that human rights of citizens and others within the space of the declaration are observed and protected in line with the law.

Keywords: Declaration of emergency, human rights, abuse of human rights, state of emergency.

1. Meaning of Emergency

In the normal life of a state, people and institutions are governed by laid down rules, laws and policies. However, as we know it, that uncertainty is a feature of human life, so it is for nations, too. Sometimes there are situations wherein the domestic legal system meant to take care of the activities of the government and the governed is unfit to tackle unforeseen or overwhelming situation. When this happens, necessity demands that a nation gets around this sudden condition, referred to as emergency, by making use of wider administrative power than those required in time of peace. State of emergency is one of the most serious challenges to the implementation of international human rights. This is because the use of this power, that is state emergency power, inherently infringes the traditional scope of protection given to individual rights and freedoms in times of peace.

2. Meaning of Human Rights

Given the objective of this paper, the need to describe what constitutes human rights is imperative. One of the most profound happenings in the history of mankind is the concept of human rights:

Just as the French Revolution ended the divine rights of kings, the human rights revolution that began the 1945 San Francisco Conference of the United Nations has deprived the sovereign states of the lordly privilege of being the sole possessors of rights under international law. States have to concede to ordinary human beings the status of subjects of international law, to consider that individuals are no longer mere objects, mere pawns in the hand of state.¹

Generally, a right is that which is proper under the law, morality, or ethics; something that is due to a person by just claim, legal guarantee, or moral principle; a power, privilege, or immunity secured to a person by law; a legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is a wrong; the interest, claim or ownership that one has in tangible or intangible property.² A right is ‘an interest recognized and protected by law, respect for

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¹Sohn, ‘The New International Law: Protection of the Rights of Individuals Rather than States’ 32 *American ULR* (1982) I at p.1., cited in J Rehman, *International Human Rights Law* (2nd edn, Great Britain: Pearson Educational Limited, 2010) p.3.

² *Black’s Law Dictionary*, (9th edition, USA: Thomson West Publishing Co., 2009), p.1436.

which is duty and disregard of which is wrong'.³ In the case of *Afolayan v Ogunrinde and others*,⁴ the court held that a right is an interest recognized and protected by the law. In *Uwaifo v AG Bendel State*,⁵ the Nigerian Supreme Court held that a legal right is any advantage or benefit conferred upon a person by a rule of law. Having looked at 'rights' generally, the next thing is to answer the question, What is human right? According to Black's Law Dictionary,⁶ human rights are the freedoms, immunities and benefits that, according to modern values (especially at international level), all human beings should be able to claim as a matter of right in the society, in which they live. It should be acknowledged that there has been a debate among jurists, publicists, and human rights activities as to the exact definition of human rights. No single universally accepted definition has emerged to date or even foreseen. Human Rights are also a victim of the usual difficulties of any subject or concept as Niki Tobi pointed out in his work.⁷ Not minding this difficulty, legal writers and jurists have ventured a number of definitions. According to Cranston, a human right is something of which no one may be deprived without a great affront to justice. To him, there are certain deeds, which should never be done, certain freedoms, which should never be invaded, some things which are supremely sacred and human rights are eminently qualified as such.⁸ Although Cranston's definition appears somewhat idealist and imprecise, it was nevertheless adopted by the Supreme Court of Nigeria in *Ransome Kuti v Attorney- General of the Federation*,⁹ when it stated that a human right:

Is a right which stands above the ordinary laws of the land and which is in fact antecedent to the political society itself. It is a primary condition to a civilized existence, and what has been done by our Constitution since independence is to have these rights enshrined in the Constitution so that the rights could be immutable to the extent of the non-immutability of the Constitution itself.

According to Dowrick,¹⁰ human rights are those claims made by men for themselves or on behalf of other men, supported by some theories, which concentrated on the humanity of man, on man as a human being and a member of human kind.

3. Human Rights: Victims of Emergency

Emergency situations or state of siege has tremendous effects on the observance and protection of human rights. The effects have been horrendous. Whenever emergency is declared, the first victim it comes after is human rights: 'There unfortunately has been a correlation between emergency situations and grave violations of human rights. Even those human rights from which derogation is not permitted are often affected'.¹¹ When exercised in good faith the essence of the exercise of derogation power, as seen in treaty laws, is the protection of national needs in times of emergency. The 1955 report on the drafting of the two covenants by the U.N. Secretary – General is informative, as it reveals:

It was also important that state parties should not be left free to decide for themselves when and how they would exercise emergency powers because it was necessary to guard against states abusing their obligations under the covenant. Reference was made to the history of the past epoch during which emergency powers had been involved to suppress human rights and to set up dictatorial regimes.¹²

³ Osborn's *Concise Law Dictionary*, (8th edn, London: Sweet and Maxwell (1983), p.293.

⁴ (1990) 1 NWLR (part 127) 369 at 391.

⁵ (1982) 7 SC 125 at 127.

⁶ *Op cit*, p.809.

⁷ See N Tobi, sources of Nigerian Law (Lagos: MIJ Professional Publishers Ltd., 1996), p.14.

⁸ M Cranston, Human Rights: Real and Supposed (1967) in Raphael (ed) *Political Theory and the Rights of Man*, (Bloomington: Wadsworth Publishing) p.52,721.

⁹ (1985)2 NWLR (part 6) 211, per Kayode Eso, JSC.

¹⁰ F Dowrick (ed) *Human Rights, Problems, Prospects and Texts* (Westmead, United Kingdom, Saxon House, 1979), p.8.

¹¹ P Sheeran, 'Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics', 34 *MICH.J.INT'L L.* 491 (2013) p.511.

¹² F Hartman, 'Derogation from Human Rights Treaties in Public Emergencies: A Critique of Implementation by the European Commission and Court of Human Rights and Human Rights committee of the United Nations', 22 *HARV INT'L L.J.* 1, 2 (1981). The Italicised lines in the quotation are for emphasis.

History is replete with instances where states of emergency have been accompanied by arbitrary detentions without due process, disappearances, summary execution, torture, and other forms of ill treatment.¹³ Freedom from arbitrary detention and fair trial and human rights are particularly affected by emergencies¹⁴. The UN Working Group on Arbitrary Detention, for example, has described states of emergency as a ‘root cause’ of arbitrary detention¹⁵. States of emergency can impact economic, social and cultural rights as well as civil and political rights.¹⁶ Vulnerable groups may be the most affected by human rights violations, especially minorities and refugees, as well as journalists and human rights workers.¹⁷ There is a disturbing tendency, observed in the ICJ’s¹⁸ study, for states of emergency to become perpetual or to effect far-reaching authoritarian changes in the ordinary legal system. Such semi-permanent states of emergency lead to risk of *institutionalising* the limitations on human rights. This is evidenced by the shift of offending laws from emergency legislation to permanent internal security laws. This idea of ‘institutionalising the emergency’ is well summed up by the U.N. Special Rapporteur for states of Emergency, Mr. Leandro Despony:

The normal legal order subsists although, parallel to it ... allowing the authorities to invoke, according to the needs of the moment, either the normal legal system or the special system, although in practice the former is clearly relinquished in favour of the latter.¹⁹

Israel, for example, has a large volume of legislation that has been developed as a consequence of its state of emergency and has become an inherent part of its legal system.²⁰ States of emergency can become a tool to protect a government or leader by limiting freedom of expression, political assembly, and association and other civil and political rights.²¹ The most serious human rights violations tend to occur in situations of tension when those in power are, or think they are, threatened by forces which challenge their authority or which they perceive to be a threat.²² The ICJ Study importantly noted the one reason for this state of affairs:

It is the acute social conflicts that arise and will inevitably continue to raise in societies founded on deep-seated disparities that are at the root of various states exception ... the civil or military groups that rule in this type of society have a tendency to use state of exception as a means of perpetrating situations that are inherently volatile and explosive.²³

There is a tendency for some governments to regard a challenge to their authority, even if peaceful, as a threat to the life of the nation, and this is particularly so for governments that provide no lawful means for transfer of power. Such governments can be quick to use disproportional force against peaceful protesters, particularly in non-democracies, and then utilize the resulting violence as pretext to justify a state of emergency.²⁴

¹³C Grossman, *op cit*, p. 36.

¹⁴J Fitzpatrick, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY, 66-81(1994).

¹⁵Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Promotion and protection for All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, 64, U.N. Doc.A/HRC/7/4 (Jan. 10, 2008) (by Leila Zerrougui).

¹⁶Special Rapporteur for States of Emergency, The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and State of Emergency: Tenth Annual Report, 20, 33, 172, Commission on Human Rights, U.N. Doc.E/CN.4/sub.2/1997/19 (June 23, 1997) (by Leandro Despony) [hereinafter Special Rapporteur’s Tenth Report].

¹⁷Special Rapporteurs Tenth Report, *op cit*, 172.

¹⁸ ICJ – International Commission of Jurists.

¹⁹INT’L COMMISSION OF JURISTS (ICJ), STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS, 415 (1983) [hereafter ICJ STUDY].

²⁰Special Rapporteur’s Tenth Report, *op cit*, 131, 132.

²¹Human Rights Committee, Second Periodic Report of the Government of Israel, 72, U.N. Doc. CCPR/C/ISR?2001/2 (Dec. 4, 2001), cited in P Sheeran, *op cit*, p. 513.

²²P Sheeran, *op cit*, p. 513.

²³ICJ STUDY, *op cit*, at I, 274-75.

²⁴ICJ STUDY, *op cit*, 274-75, cited in P Sheeran, *op cit*, 513.

4. Effects of Terrorism on Human Rights

Terrorism has also posed a special problem for the law on states of emergency. States, including democratic ones, have used terrorist threats to justify a number of emergencies lasting decades. States of emergency coupled with broad-reaching and vague anti-terrorism laws, can provide extraordinary powers for governance above the law.²⁵ Antiterrorism legislation is also a key vehicle for shifting human rights limitations from emergency to ordinary legal system.²⁶ There are also examples where states of emergency have ended and the emergency law in question have simply shifted or blurred into anti-terrorism legislation. For example, the Terrorism Act 2000 rolled back some long-standing emergency powers in Northern Ireland but consolidated many of the measures as permanent features of British antiterrorism law.²⁷ In a state of emergency, separation of powers is impacted as executive control can become dominant, often leading to human rights violations.²⁸ The judiciary and its work can suffer in the conditions that surround these emergencies. A state of emergencies can also lead to mass dismissal of judges, to special or military courts and to the restriction or suspension of judicial review.²⁹ As former U.N. Special Rapporteur Despony stated, emergencies and their impact on institutions can replace the concept of the separation and independence of powers with that of a hierarchy of powers.³⁰

5. Human Rights Protection and State of Emergency

The problems in the practice of states of emergency are many and varied and combine to create a powerful and severe impact on human rights protection. These problems include the inconsistency of constitutional provisions and international human rights laws on derogations; the broad range of minorities; the fact that governments use self-preservation as a pretext for violent repression of peaceful oppositions; the institutionalising of emergency provisions in the normal legal systems, terrorism as an ongoing emergency; and distorted separation of powers, which leads to the undermining of judicial review.³¹ The problems associated with states of emergencies in countries with serious and continuing violations of human rights have been brought to the fore in the Arab Spring.³² The states most central to the Arab Spring - Tunisia, Egypt, Libya, Syria, Bahrain, and Yemen - have all invoked states of emergency to justify repressive actions. International human rights treaty - monitoring bodies have repeatedly questioned Algeria, Egypt, and Syria for example, about the need to maintain their emergency laws. As these states' respective emergency laws have been inextricably entwined with repressive political regimes, the repeal of the state of emergency has been a central demand of the popular Arab citizen uprisings.³³

6. Emergency and Human Rights Abuse in Syria

Syria has been subject to forty-eight years of emergency governance under the Ba'athist regime. A 1963 emergency decree vested almost total power in the President and the state's military-security apparatus.³⁴ The Constitution of Syria adopted in 1973 states 'laws enacted prior to the declaration of the Constitution remain in force until they undergo amendments which conform to the Constitution'³⁵. The emergency laws accordingly remain valid while being prima facie unconstitutional and therefore in a sense override the constitution. The U.N. Human Rights Committee criticized Syria in 1976 for

²⁵P Sheeran, *op cit*, p.513.

²⁶*Ibid*.

²⁷*Op cit*.

²⁸See Terrorism Act 2000, c. 11 (UK).

²⁹Fitzpatrick, *op cit*, p. 30-31.

³⁰Special Rapporteur's Tenth Report, *op cit*, 149.

³¹*Ibid*, 150.

³²P Sheeran, *op cit*, p.514.

³³The Arab Spring was a revolutionary wave of both violent and non-violent demonstrations, protests, riots, coups and civil wars in the Arab World that began on 17 December, 2010 in Tunisia with the Tunisia Revolution, and spread through the countries of the Arab League and its surroundings. Major insurgencies and civil wars in Iraq, Libya, Syria and Yemen resulted, along with civil uprisings in Bahrain and Egypt, large street demonstration in Algeria, Iran, Lebanon, Jordan, Kuwait, Djiboti, Mauritania, the Palestinian territories, Saudi Arabia, Somalia and the Western Sahara. A major slogan of the demonstrations in the Arab world is *Ash-sha'byuridsqatan - ziam* ('the people want to bring down the regime').

³⁴P Sheeran, *op cit*, p. 515.

³⁵Human Rights Commission, Concluding Observation of the Human Rights Committee: Syrian Arab Republic, 6, U.N. Doc. CCPR/CO/71/SYR (April 24, 2001)[hereinafter H.R. Comm., Syria 2001] (questioning Syria).

failing to provide notification of its state of emergency³⁶, and subsequently the Committee noted that the Syrian government's laws and actions had put Syria under a 'quasi – permanent state of emergency thereby jeopardizing the guarantees of article 4 of the Covenant.³⁷ The Committee also noted that the public emergency continued 'without any convincing explanations being given as to the relevance of these derogations to the conflict with Israel and the necessity for these derogations to meet the exigencies of the situation claimed to have been created by the conflict.³⁸ Syria well illustrates the institutionalization of emergency by the transfer of emergency laws into mainstream security laws. The government listed the state of emergency laws in April 2011 but little seemed to change in practice.³⁹ This partly due to general laws having been passed to "entrench the state of emergency" such as criminalizing expression of opposition to the aims of the revolution"; legally establishing the state security apparatus, granting it sweeping powers of arrest and detention, as well as effective impunity for human rights abuses'; and providing officials immunity from prosecution for offences committed in carrying out their duties.⁴⁰

7. Emergency and Human Rights Abuse in Egypt

Egypt demonstrates many of the same problems as Syria. Egypt has been under a state of emergency for most of its modern existence in both its colonial and independence periods.⁴¹ The U.N Human Rights Committee has criticized Egypt's State of Emergency as 'semi-permanent.'⁴² The Egyptian emergency Law of 1958 was invoked after the assassination of President Anwar Sadat in 1981. The law summarily abrogated provisions of the constitution, drastically curbed freedom of expression and association, and institutionalized a parallel justices system comprising specially constituted emergency courts and the trial of civilians by military courts. Decree 1/1981, as amended in 2004, was adopted based on Emergency Law of 1958 and referred a variety of ordinary crime to state security courts, including 'crimes' concerning state security, public incitement (including by newspapers) and public demonstrations and gatherings.⁴³ Like Syria

The Egyptian State of Emergency has been used inter alia to detain people administratively without charge or trial; try people before emergency or military courts (the procedures of which do not satisfy international standards of due process); prosecute journalists and other government critics under criminal defamation legislation; and strictly control freedom of expression, association, and assembly,⁴⁴

Egypt also evidences institutionalisation of the state of emergency. The state of emergency was subject to periodic review and renewal by the Egyptian Peoples Assembly, but this in practice was little more than a pro forma exercise.⁴⁵ The Emergency Law was renewed every two years with the result that Egypt was under a state of emergency for the past thirty years.⁴⁶ In 2007, amendments were made to the constitution that effectively rendered certain aspects of the emergency laws immune from judicial review. Amnesty International described these amendments as the most serious undermining of human

³⁶ALKARAMA, THE PERMANENT STATE OF EMERGENCY – A BREEDING GROUND FOR TORTURE 1, 5(2010) (report submitted to the Committee Against Torture in the context of the review of the Initial Periodic Report of the Syrian Arab Republic).

³⁷Rep. of the H.R. Comm., 7th Sess., July 30-Aug. 17, 1979, 293, U.N. Doc.A/34/40 (Sept. 27, 1979); GAOR, 34th Sess., Supp. No. 40 (1979).

³⁸H.R. Comm., Syria 2001, *op cit*, 6.

³⁹H.R. Comm., Concluding Observation of the Human Rights Committee: Syrian Arab Republic, 6, U.N. Doc. CCPR/CO/84/SYR (Aug. 9, 2005).

⁴⁰See Syria Protest: Assad to Lift State of Emergency, BBC NEWS (Apr. 20, 2011).

⁴¹AMNESTY INT'L, END HUMAN RIGHTS VIOLATIONS IN SYRIA 1, 304 (2011)(Prepared for submission to the U.N. Universal Periodic Review, Oct. 2011).

⁴²P Sheeran, *op cit*, p.556.

⁴³H.R. Comm., Concluding Observation of the Human Rights Committee: Egypt, 6, U.N. Doc. CCPR/CO/76/EGT (Nov. 28, 2002)[hereinafter H.R. Comm., Egypt] (questioning Egypt).

⁴⁴See ICJ, *op cit*, 1-4.

⁴⁵See Human Rights Watch, Elections in Egypt: State of Permanent Emergency Incompatible with Free and Fair Vote (2010) 5.

⁴⁶INT'L FED'N FOR HUMAN RIGHTS, EGYPT: COUNTER-TERRORSIM AGAINST THE BACKGROUND OF AN ENDLESS STATE OF EMERGENCY 5 (2010).

rights safeguards in Egypt since the state of emergency was re-imposed in 1981.⁴⁷ The amendments also provided the government with permanent emergency style powers in national security laws so that ‘when it then bows at last to international criticism and lift the state of emergency the impact will be no more than cosmetic.’⁴⁸ Going by the above, it is no wonder that lifting of the State of emergency and revocation of the 1958 Emergency Law were among the demands of anti-government protesters that ultimately brought about the fall of the Mubarak regime in February 2011.

8. Emergency and Human Right Abuse in Nigeria

Declaration of state of emergency in Nigeria, just like in the states discussed earlier in this paper, has had untoward effects on human rights and civil liberties of Nigerians. A learned mind buttressed this when he asserted that, ‘it is interesting to note that the Western Nigeria State of emergency went to court, with fundamental human rights issues coming up for determination’.⁴⁹ The issue of human rights violation came up in 1962, in Western region of Nigeria, the first place where the concept of emergency rule was first deployed in independent Nigeria. Upon the declaration of a state of emergency in Western region of Nigeria in 1962; an administrator was appointed for the region, the Federal Parliament approved Regulation whereby the defendant in the case of *F.R.A. Williams v Dr. M.A. Majekodunmi*⁵⁰ (*case No.1*) was restricted to a certain area of town.⁵¹ The issue before the court was whether the defendant’s order restraining the plaintiff from appearing for himself in court is based on the needs for public order. The court restrained the defendant, the administrator from giving effect to the restraining order against the plaintiff. This was decided on June 11, 1962. In case No. 2⁵² decided on June 7, 1962, the issue for determination was whether the restriction of the applicant under the Emergency Regulations is one that is justifiable in a democratic society. Here, the applicant commenced proceedings in the Federal Supreme Court seeking generally a declaration that the Emergency Power Act 1962 or alternative section 3(1) thereof was unconstitutional and void; the Emergency powers (Restriction Orders) Regulation 1962 were unconstitutional and void to the extent that they authorized the defendant to serve Restriction Orders upon the plaintiff; and that the Restriction Orders served upon the plaintiff was unconstitutional.⁵³ He also sought an injunction restraining the defendant from giving effect to the order. For the defendant, the Attorney-General of the Federation contended that parliament acted in exercise of its power under section 64 and 65 of the Constitution and that it could make laws in respect of matters not in the Legislative Lists.

The Court unanimously held that it was within the bounds of Parliament, and not the court, to decide that a state of emergency exists in Nigeria; once a state of emergency is declared, it is the duty of government to look after peace and security for the state and it will require a very strong case against it for the Court to act. In a third case⁵⁴ on whether the restriction order served on the plaintiff was necessary for the maintenance of public peace and order. This time the Court declared the Restriction Order ultra vires. Though the court held that parliament had power under the constitution to make law at any time, whether there was an emergency or not; and that under the Emergency Power Act 1961, parliament could grant authority to make law to the Governor-General-in-Council to make regulations and to empower another person to make rules and orders that the matter was within parliament’s legislative power and its own law had effect in that matter.

9. Recommendation

This paper has examined the significance and effects of the declaration of emergency rule on human rights. It has shown, across jurisdictions that human rights are the first to be assailed in the eventual

⁴⁷*Ibid.*

⁴⁸Press Release, Amnesty Int’l Egypt: Proposed Constitutional Amendments Greatest Erosion of Human Rights in Twenty-Six years (Mar. 2007) [hereinafter 2007 Egypt Press Release].

⁴⁹Samuel Oguche in ‘Challenges of use of State of Emergency in Democratic Governance: Plateau and Ekiti Experiences’ in E Azinge (ed) *State of Emergency in Nigeria: Law and Politics* (Abuja: NIALS Press, 2013), p.317.

⁵⁰ (1962)2 SCNLR, p.26.

⁵¹ Samuel Oguche, *op cit.*

⁵² *F.R.A Williams v Dr. M.A. Majekodunmi, supra.*

⁵³ Samuel Oguche, *op cit.*

⁵⁴ This was listed as F.S.C. 166/1962.

declaration of state of emergency. As unpleasant as the narrative depicts, the situation of human rights in a declared state of emergency will be better if the declaring authority play by the rule. And playing by the rule is by adhering strictly to the conditions strictly provided by the extant laws for the declaration of emergency. For instance, emergency should strictly be for the duration that the facts that produced it subsist, not *ad infinitum*. Again, it should be proportionate to the emergency at hand. Gross abuse of human rights often rears its ugly head when emergency measures outweighs the problems it purportedly set out to deal with – a case of killing a fly with a sledge hammer. This is demonstrated, arguably though, in erstwhile president Obasanjo’s declaration of emergency in Plateau State of Nigeria in 2004. He dismantled the state executive and the legislature. Opinions are that he has no power to do this.⁵⁵ The Jonathan approach of leaving democratic institutions intact is hereby recommended.

⁵⁵ Samuel Oguche, *op cit*, p.345-346.