

DEROGATION OF HUMAN RIGHTS IN EMERGENCY SITUATIONS: NIGERIA IN PERSPECTIVE*

Abstract

The Human Rights Convention provides some flexibility for States dealing with crises by giving them power to derogate from certain Convention Obligations. It is noteworthy that it is in times of emergency that there is a greater risk for human rights violations due to the possible abuse of powers by States. The African Charter on Human and Peoples Rights unlike other Human Rights Conventions does not contain a derogation clause but employs what has been described as claw back clauses in making provision for derogation. The Nigerian Constitution however provides for derogation. The Article analyses the circumstances under which the derogation provisions shall take place under the Nigerian Constitution and the superiority or otherwise of the African Charter over the Nigerian Constitution. The Article recommends strategies to ensure effective protection of human rights.

Keywords: Derogation, Derogation Clause, State of Emergency

1. Introduction

Most human rights treaties contain a derogation clause to enable a State to derogate from some of its human rights obligations under certain exceptional circumstances. The Nigerian Constitution recognizes certain rights of individuals which can be derogated from in the interest of defence, public safety, public order, public morality or public health and for the purpose of protecting the rights and freedoms of other persons.¹

2. Derogable Rights under the Nigerian Constitution

The Constitution allows the suspension or derogation of certain rights by an Act of the National Assembly during periods of emergency, through measures which are reasonably justifiable for the purpose of dealing with the situation that exist during the period of emergency. Thus, with the exception of the right to human dignity and freedom from torture, the rest of the rights of an individual guaranteed under the Constitution are derogable because they have derogability provisions woven within their provisions.

Right to Life

The right to life is a derogable right under the Nigerian Constitution. By the provisions of Section 33 of the Constitution, every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a Court in respect of a criminal offence of which he has been found guilty in Nigeria. A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary;

- (a) for the defence of any person from unlawful violence or for the defence of property,
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
- (c) for the purpose of suppressing a riot, insurrection or mutiny.²

Right to Personal Liberty

The right to personal liberty of every individual is a derogable right under the Nigerian Constitution.

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¹ Constitution of the Federal Republic of Nigeria 1999, Cap 4 LFN 2004, Section 45(1).

² *Ibid*, Section 33(2).

The Constitution provides that every person shall be entitled to his personal liberty and no person shall be deprived of such liberty.³ The right of an individual to personal liberty can be derogated from in certain circumstances to wit:

1. In execution of the sentence or order of a Court in respect of a criminal offence of which he has been found guilty.
2. By reason of his failure to comply with the order of a Court or in order to secure the fulfillment of any obligation imposed on him by law.
3. For the purpose of bringing him before a Court in execution of the order of a Court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence, in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare.
4. In the case of persons suffering from infectious or contagious disease, persons of unsound mind, persons addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community.
5. For the purpose of preventing the unlawful entry of any person into Nigeria or of effecting the expulsion, extradition or other lawful removal from Nigeria of any person or the taking of proceedings relating thereto.

Right to Privacy

The right to privacy is a derogable right under the Nigerian Constitution. Section 37 of the Constitution⁴ provides that the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is guaranteed and protected.

Freedom of Thought, Conscience and Religion

Section 38 of the Constitution⁵ provides for the right to freedom of thought, conscience and religion. This right is a derogable right under the Nigerian Constitution.

Freedom of Expression and the Press

Another derogable right under the Nigerian Constitution is contained in Section 39 of the Constitution. This section protects the freedom of expression of every person, including freedom to hold opinions and to receive and impart ideas and information without interference. As a derogable right, this right is not without limitation as the constitution provides that nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society: (a) for the purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of courts or regulating telephone, wireless broadcasting, television or the exhibition of cinematograph films; or (b) imposing restrictions upon persons holding office under the Government of the Federation or of a State, members of the armed forces of the Federation or members of the Nigeria Police Force or other Government security services or agencies established by law.

Right to Peaceful Assembly and Association

The right to peaceful assembly and association is another derogable right under the Nigerian Constitution. Section 40 of the Constitution⁶ provides that every person shall be entitled to assemble freely and associate with other persons, and may form or belong to any political party, trade union or any other

³*Ibid*, Section 35(1).

⁴ Constitution of the Federal Republic of Nigeria 1999, Cap 4 LFN 2004.

⁵*Ibid*.

⁶*Supra* p.91.

association for the protection of his interests. This right to peaceful assembly and association protected by this section shall however not derogate from the powers conferred by this Constitution on the Independent National Electoral Commission with respect to political parties to which that commission does not accord recognition.

Right to Freedom of Movement

The right to freedom of movement is another derogable right under the Nigerian Constitution. Section 41 of the Constitution protects the right of every citizen of Nigeria to move freely throughout Nigeria and to reside in any part thereof, and by virtue of that section, no citizen of Nigeria shall be expelled from Nigeria or refused entry thereby or exit therefrom.

However, nothing under this section protecting the right to freedom of movement shall invalidate any law that is reasonably justifiable in a democratic society where:

- (a) imposing restrictions on the residence or movement of any person who has committed or is reasonably suspected to have committed a criminal offence in order to prevent him from leaving Nigeria; or
- (b) providing for the removal of any person from Nigeria to any other country to:
 - (i) be tried outside Nigeria for any criminal offence, or
 - (ii) undergo imprisonment outside Nigeria in execution of the sentence of a Court of law in respect of a criminal offence of which he has been found guilty; provided that there is reciprocal agreement between Nigeria and such other country in relation to such matter.⁷

From the above premise, it can be inferred that the above mentioned rights are derogable under the Nigerian Constitution, by virtue of the provision of Section 45 of the Nigerian Constitution.

3. Non -Derogable Rights under the Nigerian Constitution

Human rights are part and parcel of the Nigerian law. The constitution which is the supreme law of the land has dedicated a whole chapter for the protection of the right of every human being, the State and all its agencies are therefore under an obligation to ensure that they respect these human rights.

Right against Torture

The right against torture is a non-derogable right under the Nigerian Constitution. This right cannot be derogated in all situations, including during state of emergency. Where any person's right against torture is deprived, the Constitution allows him to seek redress in a Court of law.⁸ By Section 34 (1) (a) of the Nigerian Constitution, every individual is entitled to respect for the dignity of his person, and no person shall be subjected to torture or to inhuman or degrading treatment. The Nigeria Constitution despite making provision for the right against torture, did not explicitly state that this right is a non-derogable right, this explains the continued use of torture, cruel, inhuman and degrading treatment by law enforcement officers. The Anti-torture Act 2017 fills this existing legislative gap by explicitly making the right to freedom from torture, cruel, inhuman and degrading treatment a non-derogable right, criminalizing torture and protecting victims and witnesses of torture. By the provisions of section 3 of the Anti-torture Act⁹ no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture. The Act went further in Section 2 to highlight what amounts to torture. By the provisions of that section, torture includes:

- a. Physical torture, which refers to such cruel, inhuman or degrading treatment which causes pain, exhaustion, disability or dysfunction of or more parts of body such as:

⁷*Supra*, Section 41(2).

⁸Constitution of the Federal Republic of Nigeria 1999, Cap 4, Laws of Federation of Nigeria 2004, Section 46.

⁹ Anti-torture Act, 2017 accessed on <http://laws.lawnigeria.com> , 31/5/2019 at 10:27 am.

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- i. Systemic beatings, head-banging, punching, kicking, striking with rifle butts and jumping on the stomach;
 - ii. food deprivation or forcible feeding with spoiled food, animal or human excreta or other food not normally eaten;
 - iii. electric shocks;
 - iv. cigarette burning, burning by electrically heated rods, hot oil, acid, by the rubbing of pepper or other chemical substances on mucous membranes, or acids or spices directly on the wounds;
 - v. the submersion of head in water or water polluted with excrement, urine, vomit or blood;
 - vi. being tied or forced to assume fixed and stressful bodily position;
 - vii. rape and sexual abuse, including the insertion of foreign bodies into the sex organs or rectum or electrical torture of the genitals;
 - viii. other forms of sexual abuse;
 - ix. mutilation, such as amputation of the essential parts of the body such as the genitalia, ears, or tongues and any other part of the body;
 - x. dental torture or the forced extraction of the teeth;
 - xi. harmful exposure to the elements such as sunlight and extreme cold;
 - xii. the use of plastic bags and other materials over the head to the point of asphyxiation;
 - xiii. the use of psychoactive drugs to change the perception, memory, alertness or will of the person, such as administration of drugs to induce confession or reduce mental competency, or the use of drugs to induce pain or certain symptoms of disease, or
 - xiv. other forms of aggravated and deliberate cruel, inhuman or degrading physical or pharmacological treatment or punishment and
- b. mental or psychological torture, which is understood as referring to such cruel, inhuman or degrading treatment calculated to affect or confuse the mind or undermine a person's dignity and moral, such as:
- i. blindfolding
 - ii. threatening a person or such persons related or known to him with bodily harm, execution or other wrongful acts;
 - iii. confinement in solitary cells put up in public places;
 - iv. confinement in solitary cells against their will or without prejudice to their security;
 - v. prolonged interrogation to deny normal length of sleep or rest;
 - vi. causing unscheduled transfer of a person from one place to another, creating the belief that he shall be summarily executed;
 - vii. maltreating a member of a person's family;
 - viii. causing the torture sessions to be witnessed by the person's family, relatives or any third party, inducing generalized fear among certain sections of the population;
 - x. denial of sleep or rest;
 - xi. inflicting shame by stripping a person naked, parading him in a public place, shaving his head or putting marks on his body against his will, or
 - xii. confinement in jails and prisons under intolerable and inhuman conditions or degrading treatment or punishment.

It is therefore appropriate to state that the right against torture is a non-derogable right in Nigeria, and an abuse against this right cannot be excused by the fact that there was a declaration of a state of emergency.

4. State of Emergency under the Nigerian Constitution

Nigeria has gone through many crises in its political history. The conflict between Muslims and Christians in Plateau State for instance, saw the declaration of a state of emergency for the first time under a democratic government in Nigeria, as due to the alarming loss of lives and property, the then President, President Obasanjo declared a state of emergency on May 18, 2004, based on the power granted to him by the Nigerian Constitution. The Nigerian Constitution has in Section 305, vested the President of the Federal Republic of Nigeria with the power to declare a state of emergency in the Federation or any part of the Federation. The procedure under section 305 of the Constitution is that the

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President issues a proclamation of state of emergency in the federation or any part of the federation through an instrument published in the official gazette of the Government of the federation.¹⁰ After publication, the President then transmits copies of the official gazette containing the proclamation including the details of the emergency, that is the circumstances which necessitated the President's Proclamation of the state of emergency, to the National Assembly, that is to the Senate President and Speaker of the House of Representatives.¹¹ Each of these officers shall convene or arrange for a meeting of the House of which he is President or Speaker, to consider the situation and decide whether or not to pass a resolution approving the proclamation by an ordinary resolution supported by a simple majority.¹² When the National Assembly decides to approve the proclamation, the approval requires a special resolution supported by two-thirds majority of each House of the National Assembly.

Circumstances under which the President can exercise this power conferred on him by the Constitution to declare a state of emergency are only when:¹³

1. the Federation is at war;
2. the Federation is in imminent danger of invasion or involvement in a state of war;
3. 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;
4. 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;
5. there is an occurrence or imminent danger, or the occurrence of any disaster or natural calamity, affecting the community or a section of the community in the Federation;
6. there is any other public danger which clearly constitutes a threat to the existence of the Federation; or
7. the President receives a request to do so from the Governor of any State in the federation with the sanction of two-third majority of the House of Assembly.

The President can also on the request of the Governor of any State in the Federation issue a Proclamation of a state of emergency in the State, where the Governor with the sanction of a resolution supported by two-thirds majority of the House of Assembly of that State, 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 situations does not extend beyond the boundaries of the State.¹⁴ The President shall not issue a Proclamation of a state of emergency in any case to which the Governor ought to request him to do by the sanction of a resolution of two-thirds majority of the House of Assembly, unless the Governor who ought to make such request to the President, fails within a reasonable time to make a request to the President to issue such Proclamation.¹⁵

A Proclamation of a state of emergency issued by the President shall cease to have effect under the following circumstances:

- 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;

¹⁰ Constitution of the Federal Republic of Nigeria, 1999, Section 305(1).

¹¹ *Ibid*, Section 305(2).

¹² *Ibid*.

¹³ *Ibid*, Section 305(3).

¹⁴ Constitution of the Federal Republic of Nigeria 1999, Cap 4, Laws of Federation of Nigeria 2004, Section 305(4)

¹⁵ *Supra* Section 305(5).

- c. after a period of six months has elapsed since it has been in force; provided that the National Assembly may, before the expiration of the period of six months aforesaid, extend the period for the Proclamation of the state of emergency to remain in force from time to time for a further period of six months by resolution passed in like manner; or
- d. Where it is revoked by the National Assembly through a resolution by a simple majority of all the members in each house.¹⁶

Where the circumstances specified under section 305(3) of the Constitution are met and a state of emergency is declared, the provisions of section 45 of the Constitution on derogation of rights shall come into effect and the fundamental rights provision under the Constitution may consequently suffer derogation.

5. The African Charter and the Nigerian Constitution: A Question of Superiority

The African Charter on Human and Peoples' Rights, constitutes the legal basis for the enforcement of peoples' rights in Nigerian Courts having been domesticated by the National Assembly. It is clear from the language of section 12(1) of the 1999 Constitution that undomesticated treaties have no force of law in Nigeria. However, the question of the relationship between domesticated treaties and other domestic statutes has continued to generate controversies as there is nothing under section 12(1) of the Constitution or in any other law in force in Nigeria which suggests that a domesticated treaty supersedes other domestic statutes. On the question of the superiority or otherwise of the African Charter over the Nigerian Constitution, the initial attitude of Nigerian Courts towards the question was that domesticated treaties retain their international flavor and character and therefore do not only stand in the class of their own, but also rank above other domestic laws within our legal system.¹⁷ In the case of *Fawehimi v. Abacha*,¹⁸ the Court held as follows:

The provisions of the Charter (African Charter on Human and Peoples' Rights) are in a class of their own and do not fall within the classification of the hierarchy of laws in Nigeria in order of superiority as enunciated in *Labiya v. Anretiola*.... It seems to me that the learned trial judge acted erroneously when he held that the African Charter contained in Cap 10 of the Laws of the Federation of Nigeria 1990 is inferior to Decrees of the Federal Military Government.... They are protected by the International law and the Federal Military Government is not legally permitted to legislate out of its obligations.

The above precedent set by the Court of Appeal on Superiority was corrected by the Supreme Court when *Fawehimi's* case came on appeal before it in, *Abacha v. Fawehimi*¹⁹. The Supreme Court held that it was erroneous on the part of the Court of Appeal to have held that African Charter on Human and Peoples' Rights was superior to the Constitution. Mohammed J.S.C (as he then was) in the same judgment observed that the elevation of the African Charter on Human and Peoples' Rights above the Constitution by the Court of Appeal amounted to a violation of the provisions of the supremacy of our Constitution. This judgment, finally laid to rest the issue of superiority of the Constitution over domesticated treaties.

6. Comparing Derogation under the Nigerian Constitution and the ECHR

Invoking derogation allows a State to suspend the application and enjoyment of certain human rights upon its declaration of a state of emergency affecting the life of the nation, without fear of violating human rights norms during the derogation period. Over time, terrorism has proven to be the main trigger for States to invoke derogation. For instance, the United Kingdom derogated from the European

¹⁶ *Supra* Section 305 (6)(d).

¹⁷ Okeke and Anushiem, 'Implementation of Treaties in Nigeria: Issues, Challenges and the Way Forward', (2018), NAUJILJ, Volume 9, Issue 2, 216-229.

¹⁸ [1996] 9 NWLR (Pt 475) p. 747.

¹⁹ (2000) 6 NWLR (Pt. 228) p. 856.

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Convention on Human Rights when facing terrorism in Northern Ireland.²⁰ Nigeria has also had its own share of terrorism attacks. On December 31, 2011 after a series of *Boko Haram* bombings across northern Nigeria, President Goodluck Jonathan, the then President of Nigeria, declared a state of emergency which suspended constitutional guarantees in four northern States namely Yobe, Borno, Plateau and Niger. Following an escalation of violence between the Nigerian government forces and *Boko Haram* Islamist insurgents, a state of emergency was declared in the northern States of Borno, Yobe and Adamawa on 14th May 2013. Article 15 of the European Convention on Human Rights and Sections 45 and 305 of the Nigerian Constitution are the two pertinent provisions within the two legislations.

Condition for Derogation

Article 15(1) of the European Convention on Human Rights provides: ‘In time of war or other public emergency threatening the life of the nation any High Contracting party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. Section 45(1) of the Nigerian Constitution provides *inter-alia* : Nothing in Sections 37, 38, 39 and 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.

From the foregoing provisions, it can be seen that Article 15 of the ECHR, explicitly provides for the condition of derogation by a State to be in time of war or other emergency threatening the life of the nation. The Court has not been required to interpret the meaning of war under Article 15(1), however in the case of *Lawless v. Ireland*²¹ the Court defined public emergency threatening the life of the nation as an exceptional situation of crises or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed. The Court went further in the case of *Denmark, Norway, Sweden and the Netherlands v. Greece*²² to emphasize on the characteristics which must apply to a public emergency in order for a State to be entitled to derogate from its obligations under Article 15 as follows:

1. The threat must be actual or imminent.
2. The consequences of the threat must involve the whole nation.
3. The nation and the organization of the society have to be under threat.
4. The Crises or threat must be exceptional, considering that normal measures or restrictions afforded by the ECHR, regarding the maintenance of public safety, health and order are clearly inadequate.

Clearly therefore, for a derogation of rights to take place under the ECHR, there must be an actual or imminent public emergency of exceptional nature which threatens the continuance of the organization of the society.

On the other hand, Section 45 of the Nigerian Constitution unlike its European counterpart does not clearly make provision for conditions or circumstances that may necessitate a derogation of the fundamental rights of its citizens. The constitutional provisions limiting the rights guaranteed are somewhat imprecise and as such constitute a real draw back in the effort to promote human rights. For instance, what law is reasonably justifiable in a democratic society does not have any definition and is not capable of any precise articulation. Section 45 of the Constitution,²³ provides that the rights contained in sections 37, 38, 39, 40 and 41 of the Constitution can be derogated from 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 on the condition that such law permitting derogation is reasonably justifiable in

²⁰ Ireland v. United Kingdom (App no. 5310/71) 18 January 1978

²¹ (App no.332/57) ECHR 1 July 1961.

²² (App no. 3321/67,3322/67, 3323/67, 3344/67) Report of the European Commission of Human Rights, 1969.

²³ *Supra*, p.99.

a democratic society. This poses the difficulty of ascertaining what is reasonably justifiable in a democratic society as the Constitution does not provide so.

The only case in which the Supreme Court considered this problem is the case of *Director of Public Prosecution v Chike Obi*²⁴ where the validity of Sections 50 and 51 of the Nigerian Criminal Code which made provision for the offence of Sedition was attacked on the ground that it was in conflict with the Constitutional provision for freedom of expression, the Supreme Court held that the Sedition law, though it gravely circumscribed the Constitutionally guaranteed right of freedom of speech, was reasonably justifiable in a democratic society. The Court however failed to define the phrase 'any law that is reasonably justifiable in a democratic society'.

Again, in contrast to the European Convention on Human Rights, the President shall have power to issue a Proclamation of a state of emergency only when:

1. the Federation is at war;
2. the Federation is in imminent danger of invasion or involvement in a state of war;
3. 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;
4. 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;
5. there is an occurrence or imminent danger, or the occurrence of any disaster or natural calamity, affecting the community or a section of the community in the Federation;
6. there is any other public danger which clearly constitutes a threat to the existence of the Federation or
7. the President receives a request to do so from the Governor of any State in the federation with the sanction of two-third majority of the House of Assembly.²⁵

7. Conclusion

In conclusion, when faced with emergency situations which are likely to threaten the existence of a nation, Government may resort to measures of an exceptional nature that would suspend or derogate from certain rights of its citizens in order to protect the foundation of the society. Unlike other regional instruments of protecting human rights, the African Charter on Human and Peoples Rights failed to specifically include derogation clause to aid member parties in dealing with emergency situations and the observance of fundamental rights, however most Constitutions of African States embody a clause for emergency and derogation of human rights in times of emergency. The Nigerian Constitution clearly shows this trend.

²⁴(1961) ALL N L R 186).

²⁵Constitution of the Federal Republic of Nigeria 1999 (as amended) Section 305(3).