

ARBITRARY DECLARATION OF STATE OF EMERGENCE UNDER THE 1999 NIGERIAN CONSTITUTION: A CALL FOR AMENDMENT*

Abstract

In Nigeria, one of the most potent weapons in the hands of the President of the Federal Republic of Nigeria to suppress external aggression and internal insurrection, civil unrest or disturbances, natural and man-made disasters, situation of armed conflicts, etcetera is the declaration of a state of emergency in the Federation or any part thereof contained in section 305 of the Constitution of the Federal Republic of Nigeria 1999, as amended. A state of emergency is a governmental declaration, usually exercised by the President, Head of Government or Head of State, that may suspend some normal functions of the executive, legislative and judicial powers, alert citizens to change their normal behaviors, or order government agencies to implement emergency preparedness plans for emergency rule. It can also be used as a rationale for suspending some constitutionally guaranteed rights and freedoms. This article examined the regulation of the use of emergency powers in Nigeria with relevant practice in other jurisdictions such as United States of America, France and Switzerland and assessed to what extent and in what ways existing rules protect the democratic order and the principles of democracy. Also, examined more importantly, the role played by the other arms of government in declaring, supervising, and ending emergency situations? This article concluded with some informed recommendations that will end or reduce minimally the abuse that mostly follow declaration of a state of emergency at the same time, comparative benefits and lessons Nigeria can learn from other jurisdictions.

Keywords: Declaration of State of Emergency, Arbitrary, Nigerian Constitution, Need for Amendment

1. Introduction

It is widely agreed that, at present, states and societies face several complex and partly new threats and challenges, including pandemics, terrorist attacks, transnational organized crimes, sudden and large-scale population flows, as well as natural catastrophes resulting from global warming. Political leaders often do not know how to tackle such multi-faceted and unfamiliar challenges, in particular if they emerge suddenly and take on large proportions. As a consequence, the reflex of resorting to emergency powers, that is, to grant the government extraordinary powers beyond its normal constitutional role can be strong in such situations. In the past, emergency powers have virtually always implied limits on individual human rights and, while intended to secure the survival of the state, such extensive executive powers have not always secured the survival of democracy.¹ In other words, the risk of an undermining of the state's constitutional order, and in particular, the role of the parliament, the judiciary and other oversight bodies, always looms. Emergency declarations are usually made during a time of natural or man-made disasters, during periods of civil unrests, or following a declaration of war or situation of international or internal armed conflict. The need to declare a state of emergency may arise from situations as diverse as an armed action against the state by internal or external elements, a natural disaster, civil unrest, an epidemic, a financial or economic crisis or a general strike. States of emergency are not uncommon occurrences, particularly in dictatorial regimes where the state of emergency may endure as long as the regime lasts. In some situations, martial law is also declared, allowing the military greater authority to act. Other terms for referring to emergency situations are state of exception, state of alarm and state of siege depending on the jurisdiction where such declaration was proclaimed. The implementation of emergency law invariably leads to restrictions on normal economic, civil or political activities and rights in order to address the extraordinary circumstances that have given rise to the emergency situation. Certain restrictions may be fully justified. At the same time, there is a danger that a government will take advantage of a state of emergency to introduce unwarranted restrictions on human rights and civil liberties, to neutralize political opponents, to postpone elections, or for other self-serving purposes that would be more difficult to pursue under normal circumstances.²

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¹ For a good introduction to the problems and issues surrounding emergency rule, see DCAF (2019). 'States of Emergency' Background on Security Sector Governance and Reform, Geneva: DCAF (Geneva Centre for the Democratic Control of the Armed Forces), October.

² Nigeria witnessed the outbreak of pandemic COVID19 in the year 2020, making the Federal Government to declare total lockdown across the entire Nigerian federation from almost about five months before same was relaxed.

2. Concept of State of Emergency

Emergency powers are being used in several countries, and their use is often contested. In theory, emergency powers³ are those special prerogatives that a government or a President can resort to in extraordinary situations such as war, insurgency, terrorist attacks, or other severe threats to the state, environmental calamities, serious industrial accidents, pandemics or similar situations that threaten a great number of lives. State of emergency is an elusive phrase; and therefore, is not amenable to a precise definition. This is because situations that may give rise to state of emergency are numerous. Again, in determining what situations may give rise to state of emergency, political factors and considerations may have an edge over constitutional or legal factors and considerations. This makes the definition even more complex. The Longman Dictionary defines a state of emergency as a situation when a government gives itself special powers in order to try to control an unusually difficult or dangerous situation, especially when this involves limiting people's freedom. The Cambridge Dictionary sees it as a temporary system of rules to deal with an extremely dangerous or difficult situation. The Oxford Dictionary defines it as a sudden, serious and dangerous event or situation which needs immediate action to deal with it. The problem with these definitions is that they all define state of emergency from the viewpoint of difficult and dangerous situations only. It can also be used as a rationale for suspending rights and freedoms, even if guaranteed under the constitution. Such declarations usually come during a time of natural or man-made disasters, during a period of civil unrest, or following a declaration of war or situation of armed conflict. Therefore, what may or may not give rise to a proclamation of state of emergency varies from country to country depending on their respective constitutions and other domestic laws.

In some countries, like the United States of America, the power to proclaim or declare state of emergency is also vested in the Governors of the States and Mayors of Counties equivalent of our Local Government Council Chairmen. There is an ongoing debate in the United States on how to safeguard civil liberties and the system of checks and balances, given what has been called the 'creeping imposition of emergency rule' after the events of 11 September 2001.⁴ Similarly, in France, there has been a heated discussion about the government's decision to impose a state of emergency in response to the unrest in the suburbs of Paris and other French cities in late 20019. Lately, Germans have been debating whether their constitution gives sufficient guidance and coverage in the case of another event similar to 11 September on the German territory, and in Italy in recent years, states of emergency have been used on occasions when there has been an unusually large influx of migrants, a hot topic in current Italian politics. As these few examples indicate, it is commonly agreed that these powers should only be used in such extraordinary circumstances, and even only to the extent that the situation requires. However, reality is more complex, and two aspects of emergency rule in particular are often problematic: (1) safeguarding the balance of powers, that is, the powers of parliament and the judiciary vis-à-vis the executive, and (2) protecting human rights and the rule of law.

3. Legal Framework for the Declaration of a State of Emergency in Nigeria

The power to declare or issue a proclamation of state of emergency is vested in the President of the Federal Republic of Nigeria. This is covered under section 305 subsection 1 of the Constitution⁵ which states that 'subject to the provisions of the 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. However, the President's power to declare or issue a proclamation of state of emergency is not absolute. The National Assembly has a role to play by considering the situation and decide whether or not to pass resolution approving the proclamation as stated in subsection (2)⁶ of section 305 of the Constitution. Under this heading, the following are to be considered as follows:

Procedure for the Declaration of a State of Emergency

The President does not have the absolute power to declare a state of emergency. There are procedures to be followed as stated in the Constitution under subsection (1) and (2) of section 305, which are as follows:

³ A number of terms are used to cover the various forms of extraordinary powers granted to governments in periods of crisis, such as 'state of emergency', 'state of exception', 'state of alarm', 'state of siege', 'martial law' or even 'times of war'.

⁴WE Scheuermann, 'Emergency Powers and the Rule of Law After 9/11' (2006) *Journal of Political Philosophy*, 14:1, pp 61-84.

⁵ 1999 Constitution of the Federal Republic of Nigeria (as amended)

⁶Subsection (2) states that 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 resolution approving the proclamation.

(1) Subject to the provisions of the 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.

It is pertinent to note that the proclamation, if sanctioned by the National Assembly, shall be for a period of six (6) months in the first instance; and renewable by extension of another six (6) months thereafter.

Grounds for Declaration of State of Emergency

The grounds for the declaration of a state of emergency is covered under subsection (3) and (4) of section 305 of the Constitution. The Constitution does not define what state of emergency is, but only gives us the circumstances that may compel the President to make a proclamation to that effect. The President of the Federal Republic of Nigeria may declare a state of emergency in the federation or any part thereof in the following circumstances, to wit;

- i. When the Federation is at war;
- ii. When the Federation is in imminent danger of invasion or involvement in a state of war;
- iii. When 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.
- iv. When there is a clear and present danger of actual breakdown of public order and public safety in the Federation or any part thereof requiring extraordinary measures to avert such danger;
- v. When 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;
- vi. When there is any other public danger which clearly constitutes a threat to the existence of the Federation; or
- vii. When the President receives a request to do so in accordance with the provisions of subsection (4) of section 305;
- viii. When the Governor of a State may, with the sanction of a resolution supported by two-third 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) paragraphs (c), (d) and (e) of this section and such situation does not extend beyond the boundaries of the State;
- ix. The President shall not issue a Proclamation of a state of emergency in any case to which the provision of subsection (4) of section 305 apply unless the Governor of the State fails within a reasonable time to make a request to the President to issue such Proclamation.

Revocation of State of Emergency

Subsection (6) provides for ways and means by which a declared state of emergency may be revoked as it provides as follows:

(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 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 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.

4. Constitutional Abuse of Section 305 of the Constitution

The power to proclaim state of emergency by the President in the Federation or any part thereof is clear and unambiguous under the Constitution. However, his power stops at the level of proclamation and no more. A careful reading of section 305 of the Constitution shows that the President is only empowered to officially proclaim or declare that the Federation or any part thereof is under a state of emergency. In view of the above, the following questions need to be addressed. Firstly, after the proclamation of the state of emergency by the President, what next? How would the President implement the proclamation? This work submits that since Constitution empowers the President to make a proclamation of a state of emergency, then it should have gone further to empower him on how to implement the proclamation so made in either the Federation or any part thereof. Unfortunately, the Constitution is silent on that aspect. The Constitution does not have such provisions and no reference is made to any enabling law in that respect. What this means is that the President's proclamation is bare. The Constitution should have made explicit and express provisions enabling the President to take certain affirmative actions to ensure enforcement of the proclamation. No such enabling powers exist in our Constitution. It is submitted that since the Constitution makes general provisions and procedure for the proclamation, it should have made additional provisions for its enforcement or implementation. Since it does not, a constitutional lacuna is created.

Secondly, the practice in Nigeria is that as soon as a state of emergency is declared in any State or any other part of the Federation, the President then immediately suspends the Executive Governor and his Executive Council, the House of Assembly or the Local Government Council(s) of the affected area(s) and appoint an Administrator to take charge of the affairs of that State as President Olusegun Obasanjo did during his tenure when he declared a state of emergency in Ekiti and Plateau States, although President Goodluck Jonathan never did so when he declared a state of emergence in some parts of the North West zone as result of insurgency ravaging the zone. The question is: where does the President have the power to do all the aforementioned? The Constitution does not expressly give him such powers, and no other extant law does so. It is submitted that since no such powers exist under the Constitution and other domestic laws, then the President would act *ultra vires* his powers if, after he proclaims a state of emergency in a State, goes on to do the acts mentioned above. Consequently, such actions, being *ultra vires*, are unconstitutional, null, void and of no effect whatsoever. If not checked, this situation may give rise to executive dictatorship, tyranny and abuse of executive powers.

It is very germane to note the proponents and supporters of the President's actions as aforementioned may argue that since the President has the constitutional power to proclaim a state of emergency then he should, equally, have the ancillary power to carry out the implementation or enforcement of the proclamation as he deems fit. They may even find support under sections 10 and 12 of the Interpretation Act⁷. However, this point of view raises more complex questions. In the first place, much as we agree that the President has ancillary powers to discharge his constitutional and other statutory duties; such powers do not extend to suspension of the Governor, the House of Assembly or the Local Government Councils as proclamation of a state of emergency is a very serious constitutional issue, hence its clear provisions in the Constitution. To suspend the whole machinery of the executive and legislative functions of a State Government should not be left at the whims and caprices of the President as this may lead to abuse of power and executive dictatorship and tyranny. The President may proclaim a state of emergency in a State or Local Government using political facts and consideration as against real constitutional or legal facts to suppress Governors who are not loyal to him. The President may also implement the proclamation arbitrarily. The case of Egypt comes handy. Egyptians lived under Emergency Law⁸ from 1967 to 2012, except for 18 months' break in 1980. The emergency was imposed after the assassination of President Anwar Sadat. The Law was continuously extended after 3 years since 1981. Under the law⁹, police powers were extended, constitutional rights suspended, and censorship was legalized. The law sharply circumscribed non-governmental activities; street demonstrations, non-approval of political organizations, banned unregistered financial donations. Some 17,000 people were detained under the law; and an estimate of political prisoners was as high as 30,000. The violent revolution and recent election brought the emergency rule to an end in May 31, 2012.

⁷ Cap I23, Laws of the Federation of Nigeria, 2004.

⁸ Emergency Law (Law No. 162 of 1958).

⁹ Emergency Law (Law No. 162 of 1958).

In the second place, as much as the potency of sections 10 and 12 of the Interpretation Act¹⁰ is well appreciated, it is submitted that these provisions are inapplicable in this circumstance. The sections provide as follows:

10(2) An enactment which confers a power to do any act shall be construed as also conferring all such other powers as are reasonably necessary to enable that act to be done or are incidental to doing it.

12(1) Where an Act confers a power, a subsidiary instrument, proclamation or notification, the power shall include: -

- a) make different provisions for different circumstances; and
- b) power, exercisable in the like manner and subject to the like consent and conditions (if any) to vary and revoke the instrument, proclamation or notification.

The problem with these provisions is that the Interpretation Act does not apply when it comes to constitutional interpretations. Its application is only limited to Acts and enactments of the National Assembly or Laws and subsidiary legislations of the State House of Assembly. This is more so that the Interpretation Act¹¹ mentions only Acts, enactments and subsidiary instruments (legislations). Section 318 of the Constitution defines 'Act' to mean any Law made by the National Assembly and includes any Law which takes effects under the provisions of this Constitution as an Act of the National Assembly. The same section defines 'Law' as a Law enacted by the House of Assembly of a state. Sections 18 and 37 of the Interpretation Act contain similar definitions. Therefore, if the Constitution intends that its interpretation should be amenable to the Interpretation Act, it would have clearly stated so. Since it does not, then the Interpretation Act is only applicable to Acts of the National Assembly, Laws or subsidiary legislations of the States House of Assembly. Lastly, the Constitution is the supreme law of the country and all Acts, Laws and subsidiary legislations, including the Interpretation Act, of the land derive their forces and legitimacy from the Constitution. It is therefore an affront to logic and common sense that a law, which is a derivative and subordinate to the Constitution, should be used to interpret the same Constitution.

Thirdly, where the President proclaims a state of emergency in the Federation or any part thereof, which law becomes applicable? The practice in Nigeria is that upon the proclamation of state of emergency, the President suspends the Governor of the State (the executive arm), the State House of Assembly (the legislative arm) and the Local Government Councils affected. The second sets of questions therefore are: who makes laws for the State during the emergency rule? Is it the National Assembly? Will the President apply martial law or executive order? The Constitution does not make such provisions. If the National Assembly makes laws as is the practice in Nigeria, where does it derive its powers to do so? The Constitution does not vest it with such powers. Therefore, any law it makes during emergency rule in respect of the affected State of the Federation is *ultra vires*; and to that extent null and void. The President cannot equally employ martial law or issue executive orders because the Constitution does vest such powers in him. To do otherwise would also be *ultra vires* and of no effect.

Furthermore, where the President proclaims a state of emergency in the whole Federation as a single federating unit with him as the head of government, what becomes of the country? Would the National Assembly be suspended as he would do in the case of a State or Local Government? Would he suspend himself as the head of the executive arm and install full martial law in the Federation with a military head?

Finally, when the President proclaims a state of emergency in a State or Local Government, what happens to the provisions of the Constitution in these areas, especially such provisions that deal with guaranteed rights and freedom of individuals, to wit: Fundamental Rights as enshrined in Chapter IV of the Constitution, and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act¹². These questions are very important because, except where the Constitution itself stipulates otherwise, fundamental rights are sacrosanct and must not be derogated from. It is submitted that if the Constitution intends that fundamental rights of individuals are to be derogated from or infringed upon in times of emergency rule following a proclamation, it should have expressly said so. Under the Canadian Emergency Act, for instance, the Federal, Provincial, Territorial and Municipal Governments can suspend for five (5) years during emergency rule some provisions of their charter of rights and freedom (an equivalent of our fundamental rights) to include right to freedoms, legal rights and equality rights by a simple vote of the legislature. The French Constitution contains similar provisions. Under the Hungarian

¹⁰ Cap I23, Laws of the Federation of Nigeria, 2004.

¹¹ Sections 10 and 12.

¹² African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Laws of the Federation of Nigeria, 2004.

Constitution, the National Assembly of Hungary can declare a state of emergency in case of armed rebellion or natural disaster for a period of 30 days in the first instance but renewable thereafter. During emergency rule, its Constitution clearly stipulates that most civil rights can be suspended, except basic human rights such as right to life, right not to be subjected to torture, and freedom of religion.

If the fundamental rights of individuals under the Constitution can be derogated from or infringed upon during emergency rule following a proclamation,¹³ what then becomes of their rights under the domesticated international treaties, in which Nigeria is a signatory like the African Charter on Human and Peoples' Rights and the Universal Declaration on Human Rights? The judicial position of domesticated international treaties in Nigeria is settled. In the case of *Gani Fawehinmi V. Abacha*¹⁴, the Supreme Court held that the African Charter on Human and Peoples' Rights, by virtue of its domestication under section 12 of our Constitution, is in a class of its own from other local, national or municipal laws and supersedes them in terms of application because it has international flavour; and therefore enforceable in our local courts. The Supreme Court was emphatic, however, that the African Charter on Human and Peoples' Rights could not be superior to the Constitution as it could not supercede the very legal basis in which it was incorporated or domesticated in Nigeria. However, one point stands out: the African Charter on Human and Peoples' Rights and other domesticated international treaties are superior and therefore supercede other municipal laws. The rationale is that a domesticated international treaty, just like the name implies, has international flavor and by virtue of which places it above the pedestal of municipal laws. The Supreme Court clearly stated in *Gani Fawehinmi's* case that the Federal Government is not legally permitted to legislate outside its international obligation.

Based on the foregoing, this paper submits that it is only the Constitution that can make provisions that may derogate from the fundamental rights of individuals during emergency rule; and since there are no such provisions in the Constitution at the moment, the President has no such powers to do so during emergency rule.

5. Proclamation of a State of Emergency: Practice from other Jurisdictions

In the United State of America, there are several methods for government to respond to emergency situations. A State Governor or Local Mayor may declare a state of emergency within his territorial jurisdiction. This is common at the state level in response to natural disasters within that State. The President of the United States, as head of the executive branch of government, has the power to declare a federal state of emergency. The enabling laws are the Insurrection Act and National Emergencies Act. The main thrust of emergency situations in the United States is declarations of states of emergency in respect of natural disasters and terrorism which led to the respective establishment of the Federal Emergency Management Agency, and the signing of the Executive Order 12947 by President Bill Clinton to curb act of terrorism in the United States. The United State of American Constitution contains general provisions, but the implementations can be found in other extant domestic Laws like the Insurrection Act and the National Emergency Act which clearly contain provisions on how to enforce emergency rule. In addition, the French Constitution¹⁵, in article 16, gives the President of the Republic the power to decree a state of emergency in the Council of Ministers, which must be confirmed by the Parliament in order to be held after 12 days. The Article clearly states that the President has the following 'extraordinary powers' during emergency rule: -

- i. Regulate or forbid circulation and gathering in all or some areas (including the use of curfew);
- ii. Close places of gathering;
- iii. Conduct house-to-house searches at any time without judicial oversight
- iv. Regulate freedom of movement and other personal rights;
- v. Censorship;
- vi. Empowers the military authority to act in place of civilian authorities if the Presidential decree states so;
- vii. During the exercise of emergency power, the French National Assembly may not be dissolved; and
- viii. For the President to decree a state of emergency, the state must be confronted with exceptional circumstances, which are clearly contained and defined in the Article, that disrupt regular institutions and machineries; and governance cannot be carried out. This may arise as a result of civil unrest, internal insurrection, and or natural or man-made disasters.

Under Article 36 of the same Constitution, a state of siege can be decreed by the Council of Ministers for a period of 12 days which can only be extended with the sanction of the Parliament. A state of siege may be declared in case of an 'imminent peril' resulting from a foreign war (external aggression) or armed insurrection. Where a state of siege is decreed, the Article goes further to the state that: -

¹³ Constitution of the Federal Republic of Nigeria, 1999 (as amended), s.45 (2) and (3).

¹⁴ (1996) 7NWRL (pt.475) 710.

¹⁵ 1958 constitution of the Republic of France

- i. Military authorities may take over police powers if they judge it necessary;
- ii. Fundamental liberties may be restricted, such as the right of association, legalization of searches in private places day and night;
- iii. Power to expel people who have been condemned for common law matters or people who do not have the right of residence in the territory; etc.

On July 23, 2019, a Constitutional Act was amended which, among other amendments, added a paragraph to Article 16¹⁶ which stated that after 30 days of a decree of state of emergency, the Constitutional Council can be referred to or requested to determine whether the conditions that justify the use of Article 16 in the first place are still current. The ruling must be public. At any time beyond 60 days, the Council may rule on this issue where or not a request or referral is made. The French Constitution in this respect is a masterpiece. Apart from the separation of powers to decree on emergency situations between the President (state of emergency) and the Council of Ministers (state of siege), an amendment was made to put up a check and balance mechanism during emergency rule. A constitutional framework cannot be better. Furthermore, the Swiss Constitution does not provide for any state of emergency per se. In the past, Switzerland has had written rules on the doctrine of necessity. However, in 2015, the Swiss government repealed legal acts that, in one way or the other, regulated this doctrine, on the grounds that they were old and had become purposeless.¹⁷ Three years later, after an examination by the Federal Department of Justice and Police, the government concluded that a new, constitutionally grounded doctrine of necessity would be 'laborious, pointless and not risk free'.¹⁸ What remains in Switzerland, then, is the extra-constitutional doctrine of necessity. This doctrine may be relied on in severe crisis situations such as war or widespread natural disasters that make it impossible for the highest organs and in particular the parliament, to function normally.¹⁹ According to the doctrine, the parliament, if it can be convened, will decide on a state of exception and on the transfer of absolute powers to the executive. If parliament cannot be convened, the government can itself declare a state of exception and take all necessary decisions, even including decisions that are unconstitutional.²⁰ During the two World Wars, the Swiss government relied extensively on the doctrine of necessity. In August 1914, the Swiss parliament decided to give the government absolute powers to undertake those measures that were considered necessary to guarantee the unity, security and neutrality of the country. Based on this decision and until 1921 when the state of exception was lifted, the government and the ministries (federal departments) issued almost 1,400 regulations, many of which were illegal or unconstitutional.²¹ During that emergency period, the supervisory role of the Swiss parliament was reduced.²² In summary, the Swiss system for emergency rule is primarily extra-constitutional, and the non-codified doctrine of necessity allows for practically unrestrained executive rule.

6. Conclusion and Recommendations

Severe crises and emergencies are dangerous periods in the life of a democracy. This article has critically considered emergency powers of various jurisdiction and observed major lacuna in the practice in Nigeria. It is submitted that section 305 of the Constitution should be given a second look by the National Assembly with a view to considering it for amendment. The Constitution should either expressly spell out the powers of the President during emergency rule following a proclamation of a state of emergency in the Federation or any part thereof; alternatively, empower the National Assembly to enact an Act to specifically deal with emergency rule situations. This is the situation in the United State of America where the Insurrection Act and the National Emergency Act were enacted; Malaysia has the Emergency Ordinance and the Internal Security Act; New Zealand, has the Civil Defence Emergency Act 2002; Canada has the Emergency Act which repealed the War Measures Act; and United Kingdom has the Civil Contingency Act of 2004. Secondly, if the Constitution intends that the President should employ executive orders during emergency rule following a proclamation, then amendment should be effected in the Constitution to vest such powers on the President. Thirdly, if emergency rule envisages the suspension of a State Governor and his entire Executive Council, the State House of Assembly and the affected Local Government Council(s), then an amendment should be made to insert such provisions. Fourthly, the Constitution should clearly spell out which fundamental rights can be derogated from during emergency rule. Finally, the Constitution should be amended to determine which laws apply and who makes such laws during emergency rule and until these constitutional lacuna are addressed, section 305 of the 1999 Constitution shall continue to be subject to abuse.

¹⁶ 1958 constitution of the Republic of France.

¹⁷ 'Une nouvelle réglementation du droit de nécessité ne s'impose pas' Communiqués, Federal Department of Justice and Police, 16 March 2019 <http://www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2021/2021>

¹⁸ *Ibid.*

¹⁹ BA François (2001). 'Droit de nécessité et état d'exception' in D Thürer, JF Aubert, JP Müller, et al Diggelmann (Eds.), *Verfassungsrecht der Schweiz*, pp.1268-9; 'Une nouvelle réglementation.'

²⁰ , BA, François 'Concept of Public Emergency' (2009) *Venice Commission*, 1269.

²¹ *Ibid.*

²² *Ibid.*