

**LEGALITY OF THE PRESIDENTIAL DECLARATION OF A STATE OF
EMERGENCY IN SOME STATES IN NIGERIA AND ITS IMPLICATION ON
STATE GOVERNMENT FUNCTIONARIES**

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1.0 Introduction

On the 14th of May, 2013, President GoodluckEbelle Jonathan in a nationwide television broadcast announced the -declarationø of state of emergency in three northern states of Adamawa, Borno and Yobe states following which there was an upsurge of security agents and activities in the affected states seeking to arrest the dire security situation presented in the broadcast. Ever since, there has been a deluge of legal discourse and public commentaries over the legality and constitutionality of the announcement itself, its purport, extent and implications on the continuous existence on state government functionaries i.e. the governors, and their deputies as well as the principal officers and members of the various houses of assembly of the affected states. Not a few opined that this declaration of a state of emergency by President Jonathan is a strange one. This is against the backdrop of similar declarations first in 1962 in the then Western region by the Government of Sir AbubakarTafawaBalewa and subsequent declarations of state of emergency by President OlusegunObasanjo which rather awkwardly tried to follow the precedent of the 1962 declaration in suspending and removing from office the regional and state government functionaries. President Jonathan rather remarkably departed from this precedent and left the state functionaries in the affected states to continue in office. This paper seeks to examine some of the salient legal issues on the legality and constitutionality of the aforesaid May 14th declaration by President Jonathan and its implication on the state functionaries of the affected states. In this endeavor, it shall critically x-ray relevant sections of the Constitution;¹ statutes and judicial decisions with a view to showing that although the procedure adopted by the President is rather clumsy, President Jonathan acted

¹ 1999 Constitution of Nigeria (as amended)

within the ambit of the Constitution in the declaration and in departing from the illegal precedent set by his predecessors in office.

2.0 Meaning of State of Emergency

Generally, it has been defined by the *Chambers 20th Century Dictionary* as;

The suspension of normal law and order procedures and the introduction of strict controls of the population that usually involves the military, so that a crisis, revolution, etc can be contained.²

The 1999 Constitution does not expressly state the meaning of a state of emergency. Its meaning can however, be gleaned from a combined reading of some sections of the Constitution; particularly section 45(3) which provides thus:

In this section, a period of emergency means any period during which there is in force a proclamation of a state of emergency declared by the president in exercise of the powers conferred on him under section 305 of this Constitution.

Section 305 however does not also expressly spell out the meaning of the expression 'state of emergency'. The section only quite extensively provides for the procedure for declaration of a state of emergency, the conditions that will engender such a declaration, when it will cease to have effect, and the role of the National Assembly, the governors of the states and its legislative house in the process.

In the earnest quest to churn out a proper definition within the context of the Constitution, one may call in aid the provisions of s.45 (2) of the 1999 Constitution. A close reading of this section reveals that the term 'state of emergency' means such a period where certain

² *Chambers 21st Century Dictionary (Revised Edition)* Edinburg Chambers, Publishers Ltd 1996, 1375

fundamental rights guaranteed under Chapter IV of the Constitution may be derogated from or limited.

3.0 Conditions Necessary for the Declaration of State of Emergency

Section 305(3) succinctly and in lucid terms provides for conditions that must exist before a proclamation of state of emergency shall be made by the President. These conditions as spelt out are when

- (a) The federation is at war,
- (b) The federation is in imminent danger of invasion or involvement in a state of war,
- (c) There is actual breakdown of public order and public safety in the federation or any part thereof to such extent as to require extraordinary measures to restore peace and security.
- (d) There is a clear and present danger of an actual breakdown of public order and public safety in the federation or any part thereof requiring extraordinary measures to avert such danger;
- (e) 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;
- (f) There is any other public danger which clearly constitutes a threat to the existence of the federation; or
- (g) The president receives a request to do so in accordance with the provisions of subsection (4) of this section.

In the constitutional history of Nigeria, declarations of a state of emergency have always been premised on public order, safety and security concerns. Such that there is the temptation to lose sight of the fact that such a declaration can also arise due to natural disasters and calamity as provided for under section 305(3)(e). Indeed, the first time Nigeria had a declaration of a state of emergency was in 1962 in the then Western region of Nigeria. This was done pursuant to section 65 of the defunct 1960 Constitution. Whilst moving the motion on the floor of federal parliament declaring a state of emergency, the then Prime Minister, Sir AbubakarTafawaBalewa was quick to emphasize that the federal government had been motivated; "Solely by the desire to ensure that peace, order and tranquility are maintained throughout parts of the federation."³

The adoption of the aforesaid resolution is of course sequel to a nationwide broadcast made by the Prime Minister on May 25, 1962 wherein he stated the apparently grave security situation in the Western region. Subsequent declarations of state of emergency in Nigeria have followed this pattern drawing inspiration from dire security considerations or challenges. The latest declaration inclusive.

There is no doubt that as far as the requirement of section 305 (3) goes, President Jonathan acted well within the ambit of the Constitution in his "declaration" of state of emergency. As he grimly pointed out in his broadcast to the nation, there exists a grave security situation in several states in the country, particularly the states of Borno, Yobe, Adamawa, Gombe, Bauchi, Kano, Plateau and more recently Bayelsa, Taraba, Benue and Nasarawa. With the first three states, worst hit. In view of the spate of wanton killings, destruction of

³ www.waedo.org/nigerdelta/fed.govt/federalism/emergencyrule/westernregionbalewa accessed on 24/6/2013

properties and dreadful terrorist activities which from the text of the presidential broadcast went as far as establishment of control and authority over parts of Nigeria and destruction of the Nigerian flag and other symbols of state authority and replacing them with “strange flags suggesting the exercise of alternative sovereignty”⁴

4.0 Procedure for Declaration of a State of Emergency

The procedure to be followed for the declaration of a state of emergency is provided for by section 305. Considering the imperativeness of this section, permit me to reproduce it in *extensio*. Section 305 provides:

- (1) Subject to the provisions of this Constitution the president may by instrument published in the official Gazette of the Government of the Federation issue a proclamation of a state of emergency in the Federation or any part thereof.
- (2) The president shall immediately after the publication, transmit copies of the official Gazette of the Government of the federation containing the proclamation including the details of the emergency to the president of the Senate and the Speaker of the House of Representative, 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.

Also germane to the issue of procedure is the provision of section 305(4) of the Constitution. This section provides for a situation where the Governor of a state may, with

⁴ Full text of the nationwide presidential broadcast of May 14th, 2013 on Channels television available at www.channelstv.com/home/2013/05/14 Jonathan declares state of emergency in Borno-Yobe-Adamawa, accessed on 24/6/2013 at 12.00noon.

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 where there is in existence any of the situations specified in subsection (3) (c), (d) and (e) of section 305 and such a situation does not extend beyond the boundaries of the state.

Arising from the above constitutional provisions, it is crystal clear that a television ~~declaration~~ of a state of emergency such as that done by President Jonathan on the 14th of May 2013 cannot be a valid declaration of a state of emergency within the purview of section 305(1)(2) and (4) of the Constitution.

From the clear wording of this section, there are basically two hurdles which the president must cross in order for there to be in place a legally valid declaration of a state of emergency. The first being the issuance of a proclamation of a state of emergency by an instrument published in the official gazette of the government of the federation. Thereafter the second hurdle is the immediate transmission of copies of the official gazette containing the proclamation including details of the emergency to the National Assembly for approval which shall then consider the situation and decide whether or not to pass a resolution approving same. Until these two hurdles are effectively crossed, there cannot be a valid declaration of a state of emergency. The Constitution quite clearly does not make provision for a television declaration of a state of emergency before the procedure spelt out in section 305 is followed as the president has done in this case.

In the light of this, it is submitted that the presidential broadcast of 14th May, 2013 can at best be said to be a statement of intent to initiate the process of a declaration of a state of emergency and not a valid declaration. Indeed, even if it is conceded that it amounts to a

declaration of a state of emergency, such a declaration remains **inchoate** until approved by a resolution of the National Assembly. The president cannot single handedly declare a state of emergency under the 1999 Constitution.

Quite happily, on the 20th of May 2013, the *Constitution of the Federal Republic of Nigeria 1999, State of Emergency (Certain States of the Federation) proclamation 2013* was published in the official gazette of the federal republic of Nigeria, No.27, Vol. 100. Legislative approval of both Houses of the National Assembly was subsequently obtained on Tuesday, 22nd May, 2013.⁵ It is at this point that a declaration of a state of emergency in these states became constitutionally valid and operative.

5.0 Implication of a Declaration of a State of Emergency on State Government Functionaries.

In all previous declarations of a state of emergency before the present administration of President Goodluck Jonathan, regional/state government functionaries; the governor, deputy governor and members of the regional or state houses of Assembly were removed from office. In their stead were appointed Administrators who were mandated to govern the affected region or states during the period of emergency. In the case of the 1962 declaration of emergency, Dr. Majekodumi was appointed Administrator, whilst during the President Obasanjoera, General Chris Ali and Tunji Olurin were appointed Administrators of Plateau and Ekiti states respectively.

In the case at hand, President Jonathan opted to depart from this precedent and instead retained all the state functionaries. This approach is a follow up to the earlier declaration of

⁵ Wale Odunsi, Senate, House of Reps. ratifies Jonathan's State of Emergency declaration, available at www.dailypost.com.ng, accessed on 25/06/2013 at 6.30 am.

a state of emergency in some local governments in some northern states in December 2011. Because of the precedents created by previous declarations invariably leading to the removal of state functionaries from office, some legal scholars and commentators have criticized the retention of these functionaries by President Jonathan as a departure from the ideal declaration and therefore not far reaching enough.

The question that we shall now address is whether a proclamation of a state of emergency necessarily displaces state government institutions/ functionaries of the affected states. Clearly, the answer to this question is in the negative. A painstaking appraisal of the 1999 Constitution reveals that there is nowhere that the Constitution expressly or implied provide for this. On the contrary, as Prof. ItseSagay has pointed out:

The whole tenor of section 11 of the Constitution (which is the section containing all the powers exercisable during an emergency shows that an emergency declaration is intended to be a cooperative endeavor between the federal government and state government, whose organs, governors, House of Assembly and judiciary are fully functioning.⁶

Firstly, section 305 of the Constitution begins with the phrase, "subject to the provisions of the Constitution" The implication of this is that everything relating to the declaration of a state of emergency in this section must be done in accordance with the Constitution. The 1999 Constitution clearly spells out the procedure and the grounds for the removal from office of the governor,⁷ deputy governor and Speaker⁸ and members of the House of Assembly,⁹ of a state. Nowhere was it provided under the Constitution for the removal of these officials because there is in place a declaration of a state of emergency. Neither is

⁶ ItseSagay, "Nigeria: The Unfinished Federal Project", being a paper delivered at the 8th Justice Idigbe Memorial Lecture (University of Benin) 2008, 50.

⁷ Supra note 1, S.188

⁸ Ibid S. 92 (a) (b) and (c)

⁹ Ibid S. 105 and 109 and 110

there any provision in the Constitution that makes provision for the appointment of any administrator under any circumstance.

Secondly, by the provisions of the Constitution, the retention of these functionaries is clearly recognized by necessary implications.¹⁰ Under these provisions, as has been pointed out, one of the grounds upon which a declaration of a state of emergency may be predicated is where the president receives a request to do so in accordance with section 4 of the section.¹¹ It is quite obvious from this that the drafters of the Constitution had the continuous existence of these state functionaries in mind, otherwise it would have been difficult if not impossible for a state governor to make such a request to the president knowing full well that he has consciously and unwittingly set in place the machinery for a return to the unemployment market. Same can also be said of the House of Assembly members who must also approve such a request.

Thirdly, proponents of the call for the suspension of government functionaries have obviously failed to realize that reasons stated in the Constitution for a declaration of a state of emergency includes the occurrence of natural calamity or disaster. Were there to be the occurrence of such a situation and prompting a declaration of a state of emergency, will all democratic structures in an affected state be dissolved because of such an act of God completely independent of any blameworthiness on their part? Certainly not.

Fourthly, in the area of public order and security, it is a notorious fact that state governors and their various Houses of Assembly have little or no control over the armed forces within their domain. The various arms of the armed forces are under the control and

¹⁰ Ibid S. 305(3)(9) and 305 (4)

¹¹ Ibid S. 305 (4)

supervision of the federal government. As regards the control of the police, although the state governments are members of the Nigerian police council,¹² and they are given powers to give direction to the commissioner of police in their states with respect to the securing and maintaining of public security and order,¹³ the powers of the governor is, by the proviso to that section made subject to the final dictate of the president or his designated minister. The Supreme Court said this much in the case of *A. G. of Anambra State v. A.G. Federation & 35 Ors.*¹⁴

Furthermore, although under the then Public Order Act,¹⁵ the Commissioner of Police may in consultation with the Governor of the State take necessary steps to preserve public order in a state, and s. 11(2) of the 1999 Constitution grants states powers to make laws for the maintenance of law and order in the state. No state law has been enacted till date following the prior repeal of all state laws in respect of maintenance of public peace and order by s. 13(2) No. 5 of the 1999 Constitution (then in existence). The implication of this is that only the Public Order Act is still applicable to the whole federation. In the light of the foregoing, it is quite untenable to blame the state government functionaries for any perceived failure to maintain public order and security which was used as a basis for their removal from office by President Obasanjo. Chief F.R.A. Williams (SAN) put it succinctly when he stated as follows:

It follows from this that if there is actual breakdown of public order the responsibility for blame (if any) must fall more on the federal government than on the state government concerned and why should that not be so when the Federal Government controls all the armed forces, the

¹² Ibid the Third Schedule, Part 1, S. 27.

¹³ Ibid Section 215(4), And also s. 10, Police Act, Cap P19

¹⁴ (2005) 9 NWLR (Pt. 93), 572

¹⁵ Cap. 42 LFN 2004, S. 4(3).

police and state security agencies. And why should the members of the State Assembly for whom the people of Plateau State voted to make laws for the peace, order and good government be suspended? What is it suggested they should have done which they failed to do? ¹⁶

This statement is still relevant today as it was then.

Fifthly, it is significant to point out that the Constitution expressly prohibits the National Assembly from removing the State Governor or his deputy from office.¹⁷ It is submitted that by virtue of proviso to the subsection, the National Assembly is clearly incompetent to grant approval to any presidential proclamation of a state of emergency that includes the removal of the governor of a state or his deputy.

This discourse will be incomplete without at least a passing look at the clearly illegal removal of the state functionaries of Plateau and Ekiti States by President Obasanjo following similar declarations. No doubt, this legally clumsy resolve of president Obasanjo to follow the 1962 script in the Western region then culminating in the decision of the Privy Council in the famous case of *Adegbenro v. Akintola*¹⁸, provided the template for those urging president Jonathan to follow suit. So much has been said of the illegality of this action by president Obasanjo;¹⁹ particularly his reliance on the Emergency Power Act 1961. An Act and the regulations made under it which has lapsed by effluxion of time under s. 65(2) of the 1960 Constitution²⁰.

¹⁶ F.R.A William, *Obasanjo Acted Illegally* Sunday Vanguard, May 23, 2004, 5.

¹⁷ Supra note 1, S. 11(4)

¹⁸ (1963) 3 WLR 63

¹⁹ ItseSagay, *Nigeria: The Unfinished Federal Project*, ibid, note 6.

²⁰ 1963) Constitution, section 70(2).

The opportunity that arose for the Supreme Court to review the actions of President Obasanjo arose in the case of *Plateau State of Nigeria & Anor*²¹ was lost as the Supreme Court avoided pronouncement on this live issue on technical grounds. Prof. Sagay sums the situation this way:

It is a great setback for democracy, the rule of law and federalism, that the Supreme Court dodged responsibility when Plateau State brought a suit to challenge the validity of the emergency declaration and regulation made under it. It is a sad episode in Nigeria's Constitutional History that the Obasanjo regime got away with such gross acts of illegality and emasculation of federalism.²²

6.0 Conclusion

There is no doubt that president Jonathan acted within the ambit of the Constitution in declaring a state of emergency in the states of Borno, Yobe and Adamawa, although the declaration only became legal and effective following the subsequent steps taken after the television broadcast which culminated in the approval of the National Assembly on 22nd May, 2013 and not the television declaration of 14th May, 2013. The president was also on the right side of the Constitution in not suspending or removing from office the governmental functionaries of the affected states.

The action of president Jonathan has indeed been commended by a host of legal commentators like Femi Falana (SAN) and Professor ItseSagay in not following the precedent of former president OlusegunObasanjo.

²¹ (2006) 3 NWLR (Pt. 968) 346

²² ItseSagay, Ibid note 20.

According to Mr.FemiFalana, -He has deviated from impunity by following the provisions of the law.²³ Reasoning along the same line, Prof. ItseSagay concurred, stating thus:

I agree entirely with him that the state of emergency does not affect the tenure of the Governors or the right of the House of Assembly to seat what Obasanjo used to do was illegal and a breach of the Constitution.²⁴

²³ Godwin Igharo; *Dissecting the State of Emergency Declaration* available at www.fmi.gov.ng. of May 21st, 2013. Accessed on 25/6/2013

²⁴ Ibid