

The Administration and its Instrument of Emergency Powers in Nigeria: Lessons from Adamawa, Borno and Yobe States Experience

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Introduction

In the art of governing a nation, it is the practice, to empower the administrative head to tackle various emergency situations that may arise. In fact, in some countries like United State of America, the president as an epitome of such head, in the past, had unfettered power to do what he deemed necessary to tackle the emergency situation.¹ But today, in an attempt to curtail potential presidential excesses, the exercise of the power is now a subject of legislative and judicial control.² The situation in Nigeria seems not similar as far as the control of presidential powers is concerned.³

The foregoing notwithstanding, it is worthy of note that in Nigeria, the exercise this

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1. Sylves, R. President, Disasters and Policy 1 www.peripresde causa.org/summary data % assessed 10/06/13

2. Ibid

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

emergency powers, more often than not, has been subject of worrisome controversy.⁴ Research has however shown that the controversy is essentially driven by the improper use of the powers by various administrations, past and present, with its attendant monumental, negative consequences.⁵ Interestingly, likely antidotes to this have been severally put forward.⁶

Meanwhile, as a means of halting the intensification of sectarian insurgency in the North Eastern Nigeria, President Goodluck Jonathan's administration on the 15 of May 2013, decided again to exercise his emergency powers as authorized under the constitution.⁷ But certain questions seems compelling here, is it the same old wives' fable? In other words, is there any genuine need for the exercise of the powers as claimed by the President? How justifiable is the content of the powers sought to be exercised? Have any lessons been learnt from the past? What is the prospect of the exercise of such powers in Nigeria? The resolution of these posers constitutes the hub of this piece. But as prelude to this, an examination of important concepts in this piece such as administration, emergency and powers, seems inevitable. This will be preceded by the justification and historical antecedence of emergency powers in Nigeria.

Meaning and Theory of Administration

According to the Webster Comprehensive Dictionary, administration is the existing or the persons collectively who composed it especially its executive department.⁸ The meaning offered by the Black Law Dictionary is not far from the foregoing as it is seen as the management or performance of the executive duties of a government, institution, or business.⁹ One thing deductible from these definitions is that administration is that organ of governance responsible for the execution of government policies be it security, economic, social or otherwise.

The practice of committing the execution of governmental policies to the administration has as its bedrock in the theories of separation of powers propounded by that erudite scholar John Lock, but popularized by the French Jurist Montesquieu. According to the Jurist, the

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4. See for example, Emergency rule: Did Jonathan follow the Law? THE NATION, Tuesday, May 21, 2012. 29-30.
 5. See Aduba N. J., "Presidential Powers and State of Emergency" State of Emergency in Nigeria: Law and Politics (Lagos: NIAL 2013)85.
 6. Azinge, Epiphany (Ed) State of Emergency in Nigeria: Law and Politics (Lagos, NIAL 2013).
 7. THISDAY, Wednesday 15 May, 2013. Front Page.
 8. Walker, A. R. (Ed.) Webster Comprehensive Dictionary, (USA, TMC, 2010) 19
 9. Garner, B. A. (Ed.) Black's Law Dictionary (USA, Thomas Reuters Cor, 2009)600.

ideas of separating powers of governance into three i.e. the legislative, executive (administration) and adjudicatory is anchored in the fact that:

There would be an end to everything where the same person or the same body, whether of the nobles or of the peoples to exercise these powers, that enacting the laws, that executing the public resolution and the trying of causes of individuals.

Agreeing with the foregoing, Madison asserted;¹⁰

*The accumulation of all powers, legislative, executive and judicial in same hand, whether of one, a few or many, or whether hereditary, self appointed or elective may justly pronounced the definition of tyranny.*¹¹

In the same vein, Professor Ben Nwabueze, the erudite constitutional jurist could not agree less with Madison as he noted:

*Concentration of governmental powers in the hands of one individual is the very definition of dictatorship and absolute, power is by its nature, capricious and despotic.*¹²

The concurrence of scholarly opinions witnessed above, no doubt, point, to the facts that the function of implementing government policies rests squarely on the executive otherwise called the administration.

To perform the functions efficiently, it has been the practice by the executive to create various bodies under the aegis of Ministry, Department of Agencies. These bodies enjoy a variety of generic designation from scholars. While Folks and Wade regard them as public authorities;¹³ Schwartz on the other hand prefers “administrative agencies”.¹⁴ A replete of this terminology was also contained in a leading indigenous work authored by Professor S. C.

10. Baron De Montesquieu: *The Spirit of Laws* (New York Hafner Publish Co. Ltd. 1962) translated by Thomas Nugget, 152)

11. Madison, *The Federation Papers*, 1788, 51.

12. Nwabueze, B. *The Presidential Constitution of Nigeria* (London, C. Hurst & Co. 1981)32.

13. Foulkes D. *Administrative Law* 7th Ed. (London: Butterworth, 1979)31

14. Schwatz, B. *Administrative Law: A Case Book*, (Boston: Little Brown, 1982)3

Iluyomade and Justice B.U. Eka.¹⁵ So also is the position of Professor P. A. Oluyede.¹⁶ But Professor Shoyele's perspective appears uncertain as he employs both terminologies interchangeably.¹⁷

Be that as it may, it can be emphatically asserted that while it may be possible in some sense to view the administrative bodies as a unity, as for example, being wholly organized to achieve some common goals or further public interest, it is not a unity in the sense of being comprised in one legal institution. Rather, it is a large number of institutions or organizations with various forms and function. But this notwithstanding, for effective coordination, these bodies regardless of their variation, nomenclature, functions and forms are, more often than not, placed under a single overall authority. This authority is however determined by the level of governance involved. For instance in Nigeria, it is either the President or the Governor at the Federal and State levels respectively. This is graphically evidenced under the 1999 constitution which provides that:

the executive powers of the Federation;

*(a) Shall be vested in the President and may, subject as aforesaid... be exercised by him either directly or through his vice.*¹⁸

At the State level, similar power is vested on the other hand, in the Governor of the State subject to the provisions of any law made by the House of Assembly which may be exercised by him either directly or through the deputy, Governor and Commissioners of the Government of that State or Officers in the Public service of the state.¹⁹

Powers of the Administration

The word power has been defined as the ability to act or not to act or the legal right or authorization to act or not to act.²⁰ Another author sees it as the ability conferred on the person by law to determine, by his own will directed to that end, the legal relation of himself and others.²¹ The existence of other definitions cannot be foreclosed. From a critical

15. Iluyomade and Eka; Cases and Materials on Administrative Law in Nigeria (Ile-Ife, OAU Press, 1992)3

16. Oluyede, P.A. Nigerian Administrative Law 3rd Edition (University Press, 1988)1-2.

17. Shoyele, O. Principle and Practice of Administrative Law in Nigeria (Jos, Mono Press, 1982)

18. See S. 5(1) Constitution of the Federal Republic of Nigeria 1999 (as Amended).

19. Section 5(2) Ibid

20. Garner, B. Op. cit. 1288.

21. Allen, W. B. (Ed); The New International Webster Comprehensive Dictionary, Encyclopedia ed. (USA: Typhoon Media Corporation 2010) 413.

examination of the two views presented above however, power can be seen as an enabling instrument for action or inaction.

As already observed, the administration at the Federal and State levels in Nigeria are headed by the President and Governors respectively. In order to function effectively, the importance of conferring certain powers becomes paramount. Thus, the President in addition to being the Head of State is also the Commander-in-Chief of the Armed Forces.²² In fact, in his recent work, Professor Aduba identifies other powers of the executive to include the execution of all matters within the legislative competence of the National Assembly and removal of certain office holders; power to grant pardon, to make regulation and to modify the enabling laws, powers of making war and making treaty.²³ Last, but not the least, of these, is the emergency powers, the main thrust of this discourse. And pursuant to the discourse, the following questions appear germane: What is emergency power? Why emergency power? Under what circumstances can it be exercised? And how compliant are the various administration in Nigeria to the rule of exercising the powers?

The Concept of Emergency Power

To examine emergency powers, it seems logical to start from the meaning of the word emergency which as will be seen has actually been variously defined by writers. While one author perceives it as a sudden serious and dangerous event or situation which needs immediate action to deal with it,²⁴ it is seen by another as sudden conclusion or State of affairs calling for immediate action.²⁵ The Black's Law Dictionary's definition however appears more elaborate as it defines it as “unexpected happening an unforeseen occurrence or condition perplexing contingency or complication of circumstances, a sudden or unexpected occasion for action, exigency or a pressing necessity, an unforeseen combination of circumstances that calls for immediate action.”²⁶

The judicial interpretation of the concept is not far from the definitions examined above. For instance, the United States Supreme Court characterized emergency in terms of urgency and relative infrequency of occurrence as well as equivalence to a public calamity resulting

22. See S.130 (2) The Constitution of the Federal Republic of Nigeria Op. Cit

23. Aduba, N. J. Op. cit. 85

24. Hornby, A. Oxford Advanced Learners Dictionary of Current English (New York, Oxford University Press (2005)477

25. Allen W. B. (ed); Allen, W. B. (Ed) Webster's Comprehensive Dictionary of the English Language (USA: Typhoon Media Corporation 2010)413.

26. Garner, B.A. Op. cit. 49.

from fire, flood or like disaster not reasonably subject to anticipation.²⁷

From scholarly angle, emergency conditions are explained as being those “which have not attained enough of stability or recurrence to admit of their being dealt with according to rule”.²⁸ Last, but not the least, is the opinion of a Political Scientist who says an emergency denotes the existence of conditions of varying nature, intensity and duration, which are perceived to threaten life or well-being beyond tolerable limits.²⁹

Despite their variation, the above presented definitions invariably reveal cross-current of certain concepts, significant among which are the likes of sudden, serious, event, or happening, immediate and lastly, action. Thus, a meaning of emergency can be reasonably inferred as a sudden but serious event which requires immediate action. Consequently, given our earlier definition of power, emergency power can therefore be defined in its simplest term as the authority conferred on the administration to act under sudden serious event which requires immediate action.

In England, this powers entails her Majesty's ability to proclaim a state of emergency and make regulations accordingly under the Emergency Powers Act 1920 and 1964 s in the Firearms Strike fire cover.³⁰ Whereas, in the United States, presidential emergency powers translates to the authority and actions that the President may exercise in extraordinary circumstances; terrorists attack, epidemic, labour strike, natural disaster etc. The principal authority for exercising the powers resides in article 2 section 3 of the constitution which states in part that “he shall take care that the laws be faithfully executed”, and section 2, which grants him powers of Commander-in-Chief of the Armed Forces.

Since Nigerian administration is modeled after American system, the position in Nigeria is not too different. The exercise of the powers is conferred on the President and the governors at the federal and state level respectively under at least seven conditions precedent. These include when:

- a) The Federation is at war,
- b) The Federation is in imminent danger of invasion or involvement in State of war,;
- c) There is actual breakdown of public order and public safety in the Federation or any part thereof to such extent s to peace and security
- d) There is a clear and present danger of an actual breakdown of public order and public

27. See Home Building and Loan Association V. Blaisdell, 290, U.S., 390, U.S. 398, 440, 1934) Cited from Relyea, H. C., CRS Report for Congress Received through the CRS web www.law.edu/marshall/crsrvisited 10/06/13.

28. Ibid

29. Ibid

30. See Rutherford, L. and Bone S. (Ed.) Osborne Concise Law Dictionary (London: Sweet and Maxwell, 1993) 128

- safety in the federation or any part thereof requiring extraordinary measures to avert such danger;
- e) There is an occurrence of 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 public danger which clearly constitutes a threat to the existence of the Federation; or
 - g) The President receives request to do so in accordance with the provisions of subsection (4) of this section³¹

The procedure or declaration process in Nigeria is contained in section 305(2) of the constitution which says:

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 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 the president or speaker, as the case may be, to consider the situation and decide whether or not to pass a resolution approving the proclamation.

As already seen under section 305(4), the State Governors are also empowered to request the president to issue a proclamation of State of Emergency in their State subject to the approval of the House of Assembly in their State, that under customary criteria, the Governors, in the history of proclamation of emergency power in Nigeria, seldom avail themselves of this constitution privilege. Whereas, in places like United States of America, under customary criteria the Governor must ask the President to declare a major disaster or emergency.³² But under the Stafford Act, 1988 and other preceding laws, the President can declare a major disaster or emergency whether governor asks for it or not.³³ In fact, it is recorded that since the first President disaster declaration was issued in May 1953, until December, 2001, about 1 in every 3 Governor requests have been turned down by the President.³⁴

31. See Section 305(1) of the Constitution of the Federal Republic of Nigeria Op. Cit.

32. See Sylves, R. Presidents Disasters and Policy 2, www.peripresde_causa.org. assessed 10/06/13.

33. Ibid

34. Ibid

Justification for Emergency Powers

The existence of various theories as justification for of emergency powers is quite indisputable. In fact, among these are the works of Jean Jacque Rousseau, Machiaveli, Carl Friedrich, Clinton Rossister and John Locke. Since these works have been discussed in other related writings,³⁵ attention here will summarily focus on the writing of John Locke who is said to have a strong influence upon the founding fathers in the United States.³⁶ The eighteen century English Philosopher briefly stated that:

*Occasions may arise when the executive must exert a broad discretion in meeting special exigencies or “emergencies” for which the legislative powers provided no relief or existing law granted no necessary remedy.*³⁷

As argued by the erudite scholar, “the prerogative is not limited to war-time, or even to situations of emergency. It was sufficient if the “public good” might be exercised”, he added.

The influence of the foregoing writing on the utilization of emergency powers in United States cannot be under estimated. For instance before 1976 the federal law provides a variety of powers for the president for crisis, exigency, or emergency circumstances threatening the Nation which are not limited to either military or war situations. As can be seen under the powers,

*the President may seize property, organize and control the means of production, seize commodities, assign military forces abroad, institute martial law, seize and control all transportation communication, regulate the operation of private enterprise, restrict travel and in a variety of ways, control the lives of United States citizens.*³⁹

By the passage of the National Emergency Act 1976, the congress curtailed the practice.

35. For Example See Idowu, Amos A., Emergency Powers Under the Nigerian Constitution: The Plateau State Experience of Year 2004 Revisited, European Journal of Scientific Research <http://www.eurojournals.com/ejsr.htm>. See also Azinge, Epiphany (Ed.); State of Emergency in Nigeria: Law and Politics (Lagos: NIAL, 2013).

36. See Relye, H. C. CRS Report for Congress Op. cit. 1

37. Ibid

38. Ibid

39. Ibid

The Historical Antecedence of the exercise of emergency powers

The history of the exercise of emergency powers has been traced to the ancient Rome where it was the practice to empower Roman dictator to use all available instruments of authority to prosecute a war or quell any rebellion.⁴⁰ Similar reason, is said, to account for same practice by the ancient Greek and Stoic leaders.⁴¹

In modern times however, the practice has its historical origin in the series of Acts and Resolves passed by the Continental Congress between 1775 and 1781 strictly for purpose of dealing with the prosecution of the Revolutionary War.⁴²

Before the independence in Nigeria, the exercise of emergency powers was vested in the Governor, courtesy of the Emergency Power Order-in-Council, 1939. By virtue of this order, the Governor was empowered to declare a state of emergency in any part of Nigeria where there was the need to do so. It has however been noted that the colonial exercise of this powers was characterized by arbitrary cases of arrest and detention.⁴³

Today, the powers are vested in the President of the Federal Republic of Nigeria and the State Governors.⁴⁴

Remarkably, since independence, it is incontrovertible that there were occasions when the emergency powers had been exercised by one administration or the other in Nigeria, save for Alhaji Shehu Shagari's administration. But beginning for an answer at this point is the last poser of this discourse, that is, how compliant have each administration been to the rules of the game. Considering the fact that quite a lot of work has been done in resolving the poser, as already stated, the effort here is to succinctly appraise the works as a prelude to the Adamawa, Borno and Yobe experience which is the main thrust of this piece.

Sir Tafawa Balewa's Administration

As said earlier, quite a lot of work has been done in the area of the exercise of emergency powers in Nigeria. Going through the literature, it is quite clear that the first time the powers were exercised as instrument of administration was in 1962 in response to the crisis in the Western region House of Assembly. It will be recalled that the removal of Chief S.L.A. Akintola who was the Region's Premier at that time, an ally of the Federal Government, and Chief Dauda Adegbenro the opposition leader, installed in his place, appears as the genesis of

40. See Idowu, A. Op. cit. 26

41. Ibid

42. See Relyea, H. C. Op. cit 2

43. See Idowu, Amos; Op. Cit.

44. See Section 305, Constitution of Federal Republic of Nigeria, 1999 (as amended).

the crisis. Not satisfied with the removal, Akintola's supporters' activities paralyzed the working of the House of Assembly. This was exacerbated by the confusion created by the two sides making claims to the premiership of the region.

Ostensibly, as a way out of the imbroglio, on a motion moved by the Prime Minister Abubakar Tafawa Balewa, the Federal Parliament declared a state of emergency rule in Western Region of Nigeria. The new Premier Chief Adegbenro was removed and replaced by an administrator, Senator Majekodunmi. As may be expected, the Governor who removed Chief S. L. Akintola from office also fell victim of removal under the same process.

Finally, the House of Assembly also fell casualty of the display of administrative rascality in the guise of exercising emergency powers.⁴⁵

What seems to have constituted the legal platform for the action is the Emergency Act of 1961 and section 65 of the 1960 Constitution of Nigeria which provide for the exercise of emergency powers when;

- a) The Federation is at war
- b) There is in force, resolution passed by each House of Parliament declaring that a State of Public Emergency exists, or
- c) There is in force, a resolution of each House of Parliament supported by the voters of not less than two-third of all the members of the House declaring that democratic institutions in Nigeria are threatened by subversion.

The above provision has however been described as fluid,⁴⁶ hence the elaborate provision of its equivalent under the 1979 constitution reproduced in the 1999 constitution.

Nevertheless, the awful consequences of the exercise of the emergency powers have been well captured by writers. Apart from rightly attributing to it the chain events that facilitated the collapse of the Nigerian First Republic,⁴⁷ the three years bloody civil war which later ensued has also been placed on the threshold of the remote effect of the same.⁴⁸

From the foregoing, it may be well said that the Tafawa Balewa Administration set precedent for demolition of democratic structures under emergency powers and thereby laid the foundation for vindictive exercise of the powers in post independent Nigeria.

45. For more on Emergency Power, Under Balewa's Administration, see Idowu Amos A, Op. Cit p. 27.

46. Nwabueze, B. How President Obasanjo Subverted Nigeria's Federal System. (Ibadan: Gold Press Limited, 2007). 200-201.

47. See Idowu Amos O. Op. Cit. 27.

48. See Ozekhome, M. (SAN) State of Emergency: Good Step, But ... THISDAY, 21/05/2013

President Obasanjo Administration

The Plateau State Experience

Under the administration of President Olusegun Obasanjo, the vindictive exercise of emergency powers became a recurring decimal in Nigeria. As may be recalled, on Tuesday May 18, 2004, Nigeria, under the administration of President Olusegun Obasanjo, witnessed the declaration of another emergency rule in Nigeria, Plateau State, in particular. The decision was said to have been taken in response to a sectarian crisis that claimed hundreds of lives. Many were also rendered homeless. Justifying the declaration, among other things, the president projected the picture of the Plateau State's executive and legislature incompetence to maintain peace and order to the public.⁴⁹

Following the obnoxious practice of 1962, the Governor and the members of the Plateau State House of Assembly were suspended as usual, and an administrator, this time, Major General Chris Alli, was appointed to administer the State for a period of six months with the assignment of the restoration of law and order.

The legality of the declaration has however been put to question especially for non-compliance with formal requirements. As argued by Professor Nwabueze, proclamation should have been used by the President being a subordinate legislative authority, instead of a statutory instrument which failed to expressly limit the duration of the emergency to six months as required by the constitution.⁵⁰

The declaration was also observed legally defective in its failure to comply with the condition for its declaration as laid down in the constitution especially in the aspects of:

- a) An objective factual situation of exigency or a factual state of things actually existing on the ground.
- b) A request by the Governor of the State(s) concerned where the declaration is not applied throughout the federation but in just one or two States only.⁵¹

These observations seem apt, particularly the alleged declaration's failure to meeting condition (a) stated above, when the fact averred in a sworn affidavit by then Speaker of the Plateau State House of Assembly is taken into cognizance. In the averment, Hon. Simeon Lalong stated categorically that:

49. For details of the Plateau State Emergency Powers Declaration, see Aduba, N. Presidential Powers and State of Emergency. Op. cit 88-95.

50. Nwabueze, B. How President Obasanjo Subverted Nigeria's Federal System. Op. cit. 196-198

51. Ibid

*the disturbances in the State were confined to just a small part of the State around Shendam which is just one of the 17 local government areas in the State and yet the State of Emergency (Plateau State) Proclamation 2004 painted a completely false picture of the nature and extent of the disturbances.*⁵²

Proceeding from the foregoing, one cannot but totally succumb to the argument that the proclamation declared is unconstitutional, null and void.⁵³ And if so, the suspension of the elected governor and House of Assembly which is founded upon it suffers the same fate. This is moreso, since it is inconceivable that the Governor whose appointment and removal is firmly entrenched in the constitution can be suspended by a proclamation which is just a delegated legislation of the executive organ of government. Certainly, this practice is at variance with the principle of federalism recognized under the Nigerian constitution right from independence.

The Ekiti State Experience

Emergency rule was also declared on Thursday, October 19th, 2006, by President Olusegun Obasanjo in Ekiti State. In the usual pattern of the declaration, the Governor and the Ekiti State members of House of Assembly were suspended for six (6) months in the first instance, the period which the emergency rule was to last. As a result, Major General Tunji Olurin was appointed the Administrator for the State.⁵⁴

The President offered legitimacy for the action on the ground that there existed rival governments in the State with potential of confusion among civil servants, and anxiety and tension in the society generally.⁵⁵ Thus in his opinion, the emergency rule was necessary to ensure that peace and orderliness returns to the state.

The constitutional conditions precedent relevant for the proclamation of State of Emergency in Ekiti State is found in section 305(3)(c) of the Constitution, namely, existence of “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”.

But based on forensic dissection of the fact available, especially the election of new officers and passing of several other resolutions in peaceful atmosphere by the house, a day

52. Ibid

53. Ibid

54. See Aluko M. E. The State of Emergency in Ekiti State and the Nebuchadnezzar non option in Dawodu.com July 23 pp.1-2. Cited from Aduba Nnamdi Op. cit. 95

55. Ibid

before the proclamation,⁵⁶ the argument that the condition on ground in Ekiti State does not justify the proclamation seems sustainable.⁵⁷

Thus, it did not come as surprise when this worrisome action elicited condemnation from erudite jurists including, Professor Nwabueze who asserted that:

*The suspension of the elected governor and House of Assembly of Plateau State and their replacement by an Administrator by the democratic president Obasanjo without authorization must rank as perhaps the greatest tragedy to befall the rule of law in Nigeria remains agonizingly true. The repetition of that tragedy in Ekiti State within two years is calamitous.*⁵⁸

The foregoing argument seems further strengthened by the unchallenged press reports that the president made it clear that only the Governor should be impeached otherwise the legislator should not count on his support.⁵⁹

President Goodluck Jonathan's Administration

Even though on a relatively small scale notwithstanding, the first exercise of emergency powers under President Goodluck Jonathan, cannot be ignored in a writing like this as it has become part of history of the exercise of emergency powers in Nigeria. On the 31st December 2011, President Goodluck Jonathan also declared Emergency rule on seventeen (17) local government areas in Plateau, Yobe, Niger and Borno States. Councils affected in Borno included Maiduguri metropolitan Gboru, Ngala, Banki, Bama, Biu and Jere in Yobe State, Damaturu, Geidam, Potiskum, Buniyadi-Gujba, and Gashua-Bade local government areas affected in Plateau State were Jos-North, Jos South, Barkin Ladi and Riyom local governments. Only one local government area, Suleja, was affected in Niger State.

The President offers some motive for the exercise of the emergency inappropriately used powers by saying the declaration was necessary in the affected areas to enable the security deal with the situation decisively.⁶⁰

56. See Aduba, N. Op. cit 96.

57. Ibid

58. Ibid

59. See Ibid 98

60. Ibid

One cannot but agree with Professor Aduba that “the motive were not vindictive as used to be in the past.”⁶¹ But as argued by the erudite scholar, there were a lot of political coloration in the declaration as most States like Rivers, Bayelsa, Delta, Edo, Anambra, Imo and Abia where kidnapping had become an epidemic, and the home of religious intolerance, Bauchi and Kaduna were left.⁶² Hence, the Scholar did not hesitate to quickly conclude that:

*For any unbiased observer, the local governments selected were mere “scapegoats”. There is in reality hardly any State in Nigeria that is not having security challenges. Declaring State of Emergency in the whole of Nigeria would have been fairer.*⁶³

By contrast, the other positive development under this declaration can hardly go unacknowledged. Part of this is the fact that the action was not only limited to certain local governments, but the elected structure of each of the concerned local governments was left undisturbed.

The Adamawa, Borno, Yobe States Experience

It is but a fact that President Jonathan's address to Nigerians on Tuesday 14th May 2013, heralded the emergence of another emergency powers in Nigeria. This time, the declaration specifically affected Adamawa, Borno and Yobe States.⁶⁴ According to the President, the emergency rule was necessary in order to put an end to the insurgent activities in these States.⁶⁵

But no sooner with the declaration made than a heated argument by various schools of thought ensued on the legality or otherwise of the President's action. A critical examination of the divergent views will be anchored in the following questions.

- a) Is the constitutional condition precedent for the exercise of the power fulfilled?
- b) How justifiable or legal is the content of the powers sought or not sought to be exercised.
- c) With the manner the powers are exercised this time is there any lesson to be learnt?

The condition precedent for the proclamation of State of Emergency in Nigeria under the present administration is contained in section 305 of the constitution already discussed.

61. Ibid

62. Ibid

63. Ibid

64. Ibid

65. See THISDAY Wednesday 15, May 2013, Front page

Now to resolve the first poser, one may quickly ask, at the time the declaration was made, was the condition on ground in tandem with the constitutional requirement? The President's address to the nation during the declaration of the emergency powers may be handy in response to this. As stated by the President:

Since the return to the country after cutting short my visit to south Africa and aborting a planned State visit to Namibia. I have received detailed briefing from our security agencies. These briefing indicate that what we are facing is not just militancy or criminality, but a rebellion and insurgency by terrorist group which pose a very serious threat to national unity and territorial integrity. Already, some northern parts of Borno State have been taken over by groups whose allegiance is to different flags and ideologies.⁶⁶

The president stated further:

The activities of insurgents and terrorists have been reprehensible, causing fear among our citizens and a near-breakdown of law and order in parts of the country, especially the north. They have attacked government buildings and facilities. They have murdered innocent citizens and state officials. They have set houses ablaze, and taken women and children as hostages. These actions amount to declaration of war and a deliberate attempt to undermine the authority of the Nigerian State and threaten her territorial integrity. As responsible government, we will not tolerate this.⁶⁷

Conclusively, he asserted that:

These terrorists and insurgents seem determined to establish control and authority over parts of our beloved nation and to progressively overwhelm the rest of the country. In many places, they have destroyed the Nigerian flag and other symbols of State authority and in their place twisted strange flags suggesting the exercise of alternative sovereignty.⁶⁸

66. See "President Goodluck Jonathon's Proclamation of State of Emergency Address," Daily Trust May 15, 2013; 3.

67. Ibid

68. Ibid

In fairness, if what we were inundated with by the media, both locally and internationally, (print as well as electronic) is anything to go by, then the picture painted above by the President cannot be far from the reality. In fact, hardened cynics hardly doubt this. The commendation of the President, the various renowned legal luminaries and public affairs commentators on the declaration of the emergency powers is a further vindication. As Femi Falana Observed, “I commend the President for the declaration though almost belated.”⁶⁹

Supporting the view, Sheriff Folarin, a popular columnist also welcomed the State of Emergency as he equally sees it as being long overdue.⁷⁰ This notwithstanding, it has been the opinion of one school of thought that the States affected are already heavily militarized which makes the declaration superfluous.

But in issue like this, dissenting opinion is hardly ruled out. Significant of such is the view of General Muhammadu Buhari, former Military Head of States and the former presidential candidate of Congress for Progressive Change (CPC). In one's observation however, the dissent appear more political than legal. According to the General:

*Special treatment is being given to the Niger-Militants by the Federal Government while Boko Haram members were being killed and their house destroyed by the government... while the Niger-Delta militants were trained in some specific skills and given employment, but the ones in the North are being killed and their houses demolished.*⁷¹

The aforementioned assertion should not come as a surprise when the fact that Nigerian politics is strongly tied to religion and ethnicity is taken into cognizance.⁷²

Concerning the question of justification or legality of the powers sought to be exercised by the President under the emergency powers, this is clearly stated under the Emergency Powers (General) Regulation, 2013 will suffice. As can be seen under:

69. Falana, F. “The Limit of Emergency Powers”, Daily Trust Tuesday May 28, 2013, 47; See also Abubakar, Abdulkadir, Chairman of the Joint Investment Team, “Boko Haram caused colossal loss of live” DAILY TRUST, Wed. Aug 21, 2013, 6.

70. Sheriff, F. “On Emergency Rule 1 Stand!” Sunday Mirror, Sunday May 19, 2013, 18.

71. See the Comment of General Mohammadu Buhari “State of Emergency in Nigeria” In the Nation Wednesday June 5, 2013, 7.

72. The President's warning that religious intolerance will break Nigeria if care is not taken certainly attests to the place of religion in Nigerian politics, See Saturday Mirror, July 13, 2013, 8.

- 3(1) the president may, make such orders as appear to him to necessary or expedient for the purpose of maintaining and securing peace, public order public order, public safety and good governance in the emergency area.
- (2) Army order made under sub-regulation (e) of this regulation may in particular, if it appears to the president to be necessary or expedient for the purpose mentioned to the sub-regulation-
- (a) make provision for the detention of any person either within the emergency area or elsewhere removal of any person from the emergency area.
 - (b) authorize the taking of possession or control of aim property or undertaking in the emergency area.
 - (c) authorize the entry and search of any premises.
 - (d) provide for the application of any law (with or without modification) in relation to that area.
 - (e) provide for the utilization of the funds of any State or local government in the Emergency Area.

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The other request is contained in section of the Act which provides that:

Subject to the provision of subsection (3) of section 215 of the Constitution of the Federal Republic of Nigeria 1999 and of any direction given in pursuance of that subsection, person designated or authorized by the President may give to the Commissioner of Police in the emergency area such directions with respect to the maintenance of security, public safety and order as the person considers expedient and it shall be the duty of the Commissioner of Police to comply with the directions.

It is worth noting that the above powers, sought to be exercised by the President pursuant to the emergency powers has been seen by some commentators as unconstitutional. According to Femi Falana (SAN), the provisions of the proclamation offend the clear provisions of section 1,4,45,81,162 and 305 of the constitution.⁷³ In our opinion, in this regard, since what is sought is emergency powers, the sections of the constitution offende

73. Op. Cit

seems immaterial. Rather, the concern should be whether such powers so requested are necessary for tackling the emergency situation.

One other aspect of the powers considered improper in the proclamation is one which touches on the utilization of funds of any State or local government in the emergency area.

According to Falana on this:

Once again, the National Assembly has failed to recognize that the autonomy of each tier of government over its funds in federation cannot be swept away under State of Emergency. Having made provisions for Defence, Police and Security in the 2013 Appropriation Act, The National Assembly cannot turn round to empower the President to utilize funds under the guise of securing life and property in the emergency area.⁷⁴

He added further that:

Since the funds of States and Local Governments are not contained in the Exclusive Legislative list. The National Assembly lacks the power to enact any law or ratify any regulation on them. According, section 3(e) of the emergency regulations should be expunged from the statutory instrument without any further delay.⁷⁵

The above argument seems compelling since in the United States where the idea of presidential system was borrowed, declaration of State of Emergency in any particular area of the country is an opportunity for that area to benefit financially from the federal government. Why then the unnecessary deviation from the norm?

Of the powers not sought to be exercised by the President under the emergency powers is the power to suspend the elected structure in the areas affected by the emergency rule. According to the President, a State Governor or a local government chairman shall continue with the general function of administering the emergency area under the control of the President or any person designated or authorized to act on his behalf.⁷⁶ To critics, this was a blatant error on the part of the President. In the words of Ubani:

74. Ibid

75. Ibid

76. See Emergency Powers Act, Emergency Powers (General) Regulations, 2013 published in Daily Trust , Thursday May 23, 2013.

*The declaration is not holistic since the democratic structures of the executive and legislatures are still intact which is not different from what was obtainable before now. The declaration of emergency rule therefore may not end the crisis in the North; if care is not taken, more troubles await the nation.*⁷⁷

Professor Jubril Aminu, alluding to the foregoing, opined that the emergency measures is not sweeping enough with the Governors, legislators and local government chairmen in place.⁷⁸ Chief Felix Fagboun (SAN) having the same view observed that the proclamation as partial State of emergency and described Obasanjo declaration as complete.⁷⁹

Fred Agbaje also appears to be a student of the same school of thought. According to him, democratic structure ought to give way during emergency rule “to avoid parallel administration as such may be confusing to the citizens as to which order to obey.”⁸⁰

The National Chairman of the Labour Party Chief Dan Nwanyanwu in his own attempt to justify the need for the suspension of democratic structure blamed the State governments for the security breaches in the states. As he posited, the argument that they are not in control of the military and the police hence cannot do anything, is baseless since the Governors collect huge security votes which should have been properly utilized.⁸¹ The argument of Joseph Nwobike (SAN) on the other hand is based purely on point of law, as he contended, that “in constitutional jurisprudence, S. 305 of the constitution which imbued the President with emergency powers is not self executing”, therefore, “the provisions of the Emergency Power Act of 1961, since it has not been repealed, became available for carrying out the powers”.⁸² In other words, if the Emergency Power Act 1961 is still an extant law, and demolition of elected structure is allowed therein, then it may be naïve to argue otherwise.

However, it must be stressed that the position is far from being generally accepted when viewed within the context of the remark that the Act is a lifeless law by virtue of section 4 of the Revised Edition (laws of the Federation of Nigeria) Decree No.21 of 1990 and Paragraph 1(a)(ii) of the schedule made under it. In fact according to Prof. Itse Sagay and Felix Fagbohun (SAN):

77. See Ubani, O. “Emergency Rule: Did Jonathan follow the Law? The Nation, Tuesday, May 21, 2013, 30.

78. Aminu J. “State of Emergency Timely, Vol. Sweeping Enough”, The Nation on Sunday, June 9, 2013, 24.

79. Fagbohun, F. Ibid

80. Agbaje, F. Loc. Cit.

81. See Nwanwanwu, Dan, “Emergency Rule in Nigeria” THISDAY, Wed, May 22, 2013, 16

82. Nwobike, Joseph, op cit.

*The 1961 Act is deformed and no longer a law. It was deleted when the 1990 Laws of Nigeria were being enacted. So, that provision is nullity because it went away with the First Republic.*⁸³

Though the foregoing argument appears a “killer punch”, its Waterloo lies in the Court of Appeal decision in *Ibidapo v. Lufthansa Airlines*⁸⁴ where it was held that the committee that revised the laws of the Federation had no legislative powers so as to validly repeal any otherwise existing law. In fact, the court did not hesitate to stress further that omission to be made cannot be equated with a repealing clause in the Act. Confirming this decision, the Supreme Court was quite unequivocal in asserting that a mere omission does not amount to a repeal of an Act.⁸⁵

Still on the legality or otherwise of the demolition of democratic structure, as already said, the fact remains that the idea of presidential system of governance in Nigeria is a fashion of American practice. If so, is it possible for President Obama to declare a State of Emergency in any part of United States and suspend the Governor and the State Assembly of the area? Certainly not. Jurisprudentially, why then should the practice in Nigeria differ? In our view, dissection of head from the body seldom serves as appropriate curative measure for headache.

One other thing is that it is an established fact that the success of any government policy counts mostly on the cooperation of the leader and the led. President Goodluck Jonathan did not fail to appreciate this in his address to the Nation on the State of Emergency in Adamawa, Borno and Yobe.⁸⁶ From experience, it is also a fact that the needed cooperation can only be secured in abeyance under political mistrust often engendered by unnecessary suspension of people's elected representative who are more or less their leaders. The earlier case of the alleged impropriety on the part of the President in the declaration of State of Emergency in Plateau State certainly attests to this.⁸⁷

The avoidance of this political tragedy by President Goodluck Jonathan in the Adamawa, Borno and Yobe declaration therefore must have contributed in no small measure to the cooperation received so far in curtailing the insurgency. Otherwise how can the positive

83. Fagbohunbe F. Op. Cit.

84. (1994) 8 NWLR 355

85. (1997) 4 NWLR, 498, 124. See also Ijohor, T.A., *Recognition and enforcement of Foreign Judgment in Nigeria* (Lagos: Innovative Publishers, 2011).

86. See President Goodluck Jonathan “We will dislodge Terrorists” Daily Trust. Tuesday May 15, 2013: 3.

87. *Infra*

result so far recorded in the battle against the insurgency since the declaration of the emergency powers be accounted for? At least one instance of this is the unparalleled participation of civilians (women inclusive) women inclusive⁸⁸ in combating the insurgency. As noted by one of the neighbours of an arrested member of the insurgency,

*We were shocked when we heard that civilian JTF came and arrested sect member in our area. We have never imagined we could have somebody like that in our area because we have been living peacefully. We were being more shocked when the sect member confessed that they killed 23 people in two days.*⁸⁹

Perhaps, the above example is just a tip of iceberg when viewed within the context of the exploit of Joint Task Force so far on their assignment.⁹⁰ Corroborating the foregoing, Kyari Gujbawu, member House of Representative (POP) Borno stated:

*Had it not been for the cooperation and collaboration of these youths, the success recorded so far in fight against terrorism could not have been achieved.*⁹¹

The presidential directive that the security agencies charged to combat the insurgency should play the game according to its tenets⁹² can also be tied to the need to secure necessary cooperation of the people in the areas involved. Indeed, it is a fact that one of such is respect for the rights of the civilian in the insurgency area.⁹³ In fact, it is of interest to see the adherence to this directive already creating optimism of quick end to the insurgency. As recently observed by Sanusi Abubakar, a current affair commentator:

With the President Goodluck Jonathan insisting that all security personnel engaged in the current anti-terrorism adhere strictly to the laid down "rules of engagement" and given the recent change of tactics of the soldiers which have

88. See the Caption "Women Join Hunt for Boko Haram Suspects in Borno, Daily Trust, Tues. July 9, 2013, 55.

89. Ibid

90. For an example of outstanding exploit of the JTF, see The Nation, Thursday August 15, 2013, Front page.

91. See Kijari, Gujbawu (PDP) Borno House of Rep. "Civilian JTF" activities receives support from Rep. Kata" See Daily Trust July 9, 2013, 8.

92. See President Goodluck Jonathan "We will dislodge Terrorists" Op. Cit

93. Ibid

*begun to soften popular perception that - they are targeting whole communities,... we can now begin to hope for peace and an end to terror.*⁹⁴

Conclusion

As may be seen, the main focus of this piece is the examination of the propriety or otherwise of the exercise of emergency powers in Adamawa, Borno and Yobe States under the administration of President Goodluck Jonathan.

The import of this endeavour lies in the fact that the exercise, under past administrations in Nigeria, was borne out of insincerity of purpose. This must have accounted for their consequential negative result which makes nonsensical of the whole exercise.

With the exercise under focus however, after a careful analysis, it must be admitted that the reverse seems to be the case. The fact on ground as at the time of the proclamation indeed appeared clearly to be in tandem with the legal requirement for this exercise.

However, the foregoing does not suggest that the exercise was completely fool-proof. For instance, among the powers sought to be exercised under the proclamation is the power to direct the spending of the States involved in the exercise. To say this is contrary to the international best practices is saying the obvious.

In the same vein, as may be noted, among the powers sought not to be exercised in the proclamation of the emergency powers is the power to demolish the elected structures of the States affected by the exercise. The wisdom in this decision lies in its engendering the most needed trust and cooperation for successful exercise of the powers. As also observed in this work, the legality of the Emergency Powers Act of 1961 which is the enabling law for the exercise of emergency powers is in serious contention. This obviously underscores the need for its review. In its present form, the Act appears an old wine in a new bottle. It is important however that the review should not fail to:

- a) be flexible enough to accommodate any emergency situation
- b) ensure no demolition of elected structures in the emergency area
- c) avoid political vendetta in any guise
- d) prevent the control of fund belonging to the governmental institutions in the areas involved in the exercise.
- e) guarantee that the exercise impact minimally on the rights of the populace affected by the exercise.

94. See Abubakar Sanusi, "What Next After Boko Haram" Daily Trust July 9, 2013. Back Page; See also, Ibrahim Coomassie (Ex-IG) "Boko Haram Menace subsiding, THE NATION, Wed Aug 21, 2013, 6.

In conclusion, one will not hesitate to say that with diligent review of the Emergency Powers Act as suggested above, the concept of emergency powers will not only be turned round in Nigeria from a bye word for political vendetta but will become administrative instrument to advance the cause of good governance which is meant to be and indeed what it is elsewhere.