

**COMPARATIVE EXAMINATION OF EXERCISE OF EMERGENCY POWERS
(NIGERIA, INDIA AND EGYPT)**

Abstract

The need for exercising emergency powers arises when a nation is faced with grave danger, which threatens the nation state and its citizens. So the power is exercised to save the nation and its citizens. The danger may be in the form of war, rebellion, national disaster or calamity such as a plague, flood, earthquake or any major catastrophe. The matter is constitutional, so constitutions of various countries make provisions for it. The emergency powers are usually vested in the President of the country. The problem is, some of the provisions are either vague or imprecise. In some cases, there are no time limits for the state of emergency. In such cases, chief executives (presidents) rely on such emergency powers of the constitution to perpetuate atrocities on the citizens indefinitely. So the main problem in exercise of emergency powers is abuse of such powers. Such abuse negates the objective of the declaration of state of emergency which is to protect the nation and its citizens from situations which threaten their safety. The challenge of exercise of emergency powers, therefore, is striking an appropriate balance between managing the threat to the nation state and protecting the people from abuse of such powers. In an attempt to chart a balance, this article examines the provisions of emergency powers in Nigeria, India and Egypt. It is found that exercise of emergency powers by the President has usually been based on political rather than for the exigent needs of the nation and its people. It is also found that whereas there is no public participation in Nigeria and India, the public has a role to play in Egypt especially when there is need to extend the period of state of emergency. The Egyptian approach is commendable because it acts as a check on executive arrogance.

Keywords: *Emergency powers, comparative examination, Nigeria, India, Egypt.*

1. Introduction

A state of emergency is a government declaration which suspends some normal functions of the executive, legislature and the judiciary. A declaration of state of emergency alerts or prompts citizens of a country to change their normal behavior or order government agencies to implement emergency preparedness plans.¹ This definition conforms to the ordinary meaning of the term. ‘Emergency’ in ordinary parlance means a time of crisis, a moment of danger or suspense when the maxim *salus populi suprema lex* has a special force.² However, constitutionally, a period of emergency implies 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 the Constitution of the Federal Republic of Nigeria, 1999 as amended (CFRN).³ The declaration of an emergency is largely the exclusive responsibility of the Federal Government, though its discretion in the matter is not an unrestricted one,⁴ as it is guided both by internal statutes as well as international instruments.⁵ The objective of state of emergency is to control a situation of grave national crisis. Thus, a state of emergency is invoked when

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¹ P. O. Idornigie, “Partial Declaration of State of Emergency”. (Abuja: NIALS Press, 2013); See also E. Azinge, “State of Emergency in Nigeria: Law and Politics.” (Abuja: NIALS Press, 1st ed., 2013).

² See P. A. Oluyede, and D. O. Aihe, *Cases and Materials on Constitutional Law in Nigeria*. (Ibadan: Ibadan University Press, 2nd ed., 2003).

³ CFRN section 45(3).

⁴ See B.O. Nwabueze, *Federation in Nigeria Under the Presidential Constitution* (London: Sweet & Maxwell, 1st ed., 1983) 84

⁵ See CFRN. See also Article 4 of ICCPR

a crisis situation constitutes a challenge to democracy, negates the norms of national human interaction, contradicts the tenets of civil society, devalues opportunities for peace, stability, co-existence and social justice and should secure the 'route back to the normal constitutional state' as the power is sought to be exercised to bring about normalcy in the state.⁶ In Nigeria and the other jurisdictions considered in this article, the reasons for declaration of state of emergency have always been on the need to curb crisis situations. However, in actual fact, the declarations have political colourations. The history and procedure for declaration of state of emergency in Nigeria, India and Egypt on comparative basis are examined below.

2. Exercise of Emergency Powers in Nigeria

This section evaluates the exercise of emergency powers in Nigeria from historical perspective. It gives the reasons that were put forward to justify the declarations of state of emergency at different times in the country's history. This evaluation is necessary to understand the rationale and the basis for the declarations. History has it that Nigeria has exercised the emergency powers beginning from the early sixties, precisely in 1962 when an internal party crisis between Chief Awolowo, the national leader of the Action Group Party and Chief Adegbenro, Awolowo's deputy, snowballed into a regional political crisis which warranted the then Prime Minister, Sir Abubakar Tafawa Bewlewa to address the National Parliament and subsequently declared a state of emergency in the then Western Region of Nigeria.⁷ What caused the declaration of state of emergency by the then National Assembly is a situation that could pass for a mere fracas on the floor of the Western Region House of Assembly and not necessarily a complete breakdown of law and order.⁸ This is because the relevant provision of the 1960 Constitution was to the effect that a state of emergency was to be declared when the federation was at war or when the National Parliament declared that a state of emergency existed.⁹ Also on the 18th day of May 2004, President Olusegun Obasanjo declared a state of emergency in Plateau State.¹⁰ He sacked the incumbent Governor – Joshua Dariye, accusing him of failing to act to end the cycle of violence between Muslims and Christians in Plateau State, which claimed more than 2000 lives since September 2001. The President also dissolved the Plateau State House of Assembly and appointed retired General Chris Ali as Sole Administrator. President Goodluck Jonathan also declared a state of emergency in some local government areas in Borno and Plateau States in 2011 and on 14th May, 2013, the President declared emergency rule in Borno, Yobe, and Adamawa States as a result of the Boko Haram insurgency in most parts of the Northern parts of the country.¹¹

From a careful study of the above three instances of the exercise of emergency powers by the Presidents, it is obvious that the measures of the exercise of the power in a democratic regime all have varying incidences, though with similar or same constitutional provisions.¹²

3. Nature of Emergency Powers

The emergency powers of the President from an analytical point of view through its antecedents and exercise in Nigeria leaves room for serious deliberations – whether the power is merely a political

⁶ Idornigie, n1 above.

⁷ Oluyede and Aihe, n.2 above, p.122. Under the then 1960 Constitution of Nigeria, the power to declare state of emergency was vested in the Parliament, which differs from the current Presidential Constitution of Nigeria where the National Assembly has only approval powers. It is noted that this power is rubber stamp on the declaration by the President.

⁸ *Ibid*

⁹ See Sections 65 and 70 of the 1960 Constitutions of Nigeria. See also Nwabueze, n.4 above.

¹⁰ The declaration was said to have been made pursuant to the provisions of section 305 CFRN.

¹¹ *The Punch*. May 15, 2013.

¹² cf sections 65, 70 and 305 of the 1960, 1963, and 1999 Constitutions of Nigeria respectively.

question¹³ or a legal question. If it is a political question, it is not justiceable, but if it is a legal question, it can be judicially determined. The 1962 crisis could be said to have been influenced by political factors because what was ordinarily a local problem was taken over by the national government. There was a mere internal fracas on the floor of the House,¹⁴ which had nothing to do with the safety of the lives and property outside the House, nor was the Western Region at war, yet a state of emergency was declared. But in 1965, there was public outcry and resentment of what happened following the parliamentary election of that year. There was wide scale election rigging which triggered looting, arson and violence of all sorts. In fact, there was total breakdown of law and order in the Region. The national government did not see good reason to declare a state of emergency because it was based on the subjective personal discretion of the Prime Minister.

It is agreed that the exercise of the President's power of declaration of state of emergency is a political question, owing to the personal discretion conferred on him by the Constitution.¹⁵ However, with regard to the circumstances or situations upon which such a state of emergency may be declared, we do not share the view that such is also a political question that cannot be subjected to judicial determination. This is in view of the fact that the wordings of the Constitution are very clear, so that failure to comply with such clear provisions will invalidate the action or power exercised. This is justified by the provisions of sections 1 and 5 of the Constitution.¹⁶

Section 5 provides that the executive powers of the Federation shall be vested in President. The proclamation of a state of emergency is an exercise of executive powers. Section 1 provides as follows: 1(1) 'This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria'. And by the provisions of section 305(1), the power to declare a state of emergency is subject to the provisions of the Constitution. What all this means is that in exercising his powers to declare a state of emergency, the President must act in conformity with the Constitution which is the supreme law of the land. This brings us to the situations or circumstances in which the President may declare a state of emergency in Nigeria.

4. Procedure and Circumstances for Declaration of State of Emergency in Nigeria

The procedure and circumstances for declaration of state of emergency in Nigeria is provided for under section 305 of the Constitution of the Federal Republic of Nigeria.¹⁷ The procedure is that the President issues a proclamation of state of emergency in the Federation or any part of the Federation via an instrument published in the official gazette of the Government of the Federation.¹⁸ After publication, the President then transmits copies of the Official Gazette containing the proclamation including the details of the emergency¹⁹ to the National Assembly – to the Senate President and Speaker of the House of Representatives.²⁰ Each of these officers shall 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

¹³ A political question is one which does not lend itself to judicial scrutiny.

¹⁴ Which did not affect the everyday living of the generality nor any way adversely affect the economy of the region nor country, yet state of emergency was declared.

¹⁵ See *A.G. Eastern Region v. A.G. Federation* (1964) 1 All WLR 224; *A.G. Federation v. A.G. Abia State*. (2001) 11 NWLR (Pt.725) 689 at 774-775.

¹⁶ Section 1 of the Constitution talks of supremacy of the Constitution while Section 5 defines executive power.

¹⁷ See the marginal note to section 305 CFRN.

¹⁸ CFRN 305(1)

¹⁹ The details of the emergency are the circumstances which necessitated the President's Proclamation of the state of emergency.

²⁰ CFRN 305(2)

not to pass a resolution approving the proclamation.²¹ This involves two stages or steps. The first is to decide whether or not to approve the proclamation. This step requires an ordinary resolution supported by a simple majority. The second step is the approval resolution. When the National Assembly decides to approve the proclamation, the approval requires a special resolution supported by two-thirds majority of each House of the National Assembly.

The circumstances that will warrant or justify the President's Proclamation for a state of emergency are when:²²

- (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 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 a request to do so in accordance with the provisions of subsection (4) of section 305.

There are two types of emergencies, going by the above provisions. One is national emergency which may be declared when the circumstances specified above in paragraphs (a), (b) and (f) occur. In other words, when each of the above mentioned situations occurs, the President may make a Proclamation of a state of emergency, and publish same in the Official Gazette of the Federal Government for onward transmission to the National Assembly for necessary action.

On the other hand, the second type of emergency is the emergency within a state. This state of emergency may be declared when the situations specified above in paragraphs (c), (d) and (e) occur. It must be stressed that even when these circumstances occur, the President cannot issue a Proclamation of state of emergency as regards the particular state unless he is requested to do so by the Governor of the State.²³ This brings us to provisions of subsection (4) of section 305 Constitution of the Federal Republic of Nigeria, which provides as follows:

305(4) The Governor of a state may, with the sanction of a resolution supported by two-thirds 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)(c), (d) and (e) of this section and such situation does not extend beyond the boundaries of the state.

So, with the backing of the House of Assembly, the Governor may request the President to make a Proclamation for state of emergency in instances where any of the specified situations occur. The Governor cannot make the request unless it is approved by the House of Assembly of the State. Although the President has power to issue the Proclamation if the Governor fails to make the request within a reasonable time,²⁴ it is submitted that this power can only be exercised if the House of Assembly

²¹ *Ibid.*

²² *Ibid* (3)

²³ *Ibid* (4)

²⁴ *Ibid* (5)

has given its two-thirds majority support but the Governor, nevertheless, fails or refuses to invite the President to issue the Proclamation. Where there is no resolution from the House of Assembly, the Governor will have no foundation upon which to request the President's Proclamation. Therefore, if the Governor fails to request the President to make the Proclamation within a reasonable time because there is no supporting resolution from the House of Assembly, any purported issue of Proclamation of a state of emergency in a state by the President will be nullity and therefore invalid and void. This is why President Olusegun Obasanjo's declaration of a state of emergency in Plateau State on the 18th day of May 2004, was severely criticized, because it was done in violation of the constitutional provisions discussed above. The power of the President to issue a Proclamation of state of emergency in a state in situations where the Governor of the State fails to request the President to do so within a reasonable time is susceptible to grave abuses.²⁵

5. Timeline of State of Emergency

A state of emergency does not stay in operation indefinitely. A Proclamation issued by the President may cease to have effect if it is revoked by the President by instrument published in the Official Gazette of the Government of the Federation.²⁶ If the Proclamation affects the Federation or any part of the Federation, and it is not approved by two-thirds majority of the National Assembly within two days when the National Assembly is in session, the Proclamation shall cease to have effect.²⁷ But if the Proclamation is not approved by two-thirds majority of the National Assembly within ten days when the National Assembly is not in session, the Proclamation shall cease to have effect.²⁸ It follows that the life span of a Proclamation of state of emergency without supporting resolution is two or ten days depending on whether the National Assembly is in session or not. However, a Proclamation of state of emergency duly approved by the National Assembly shall remain in force for six months.²⁹ Before the expiration of the period of six months, the National Assembly shall extend the period for another period of six months via a resolution supported by two-thirds majority of the National Assembly.³⁰ It is not clear whether the National Assembly can extend the period of a state of emergency beyond one year, that is, after extension period for six months. The Proclamation of a state of emergency may also cease to have effect if it is revoked by the National Assembly through a resolution by a simple majority of all the members in each House.³¹

The president will be violating the provisions of sections 1 and 305(3) of the Constitution where he declares a state of emergency in any part of Nigeria when the circumstances specified in section 305(3) are not ripe. The court can be invited to determine the correction or otherwise of an executive power (where the President decides to exercise it as to whether it is in line with the laid down procedure provided for by the Constitution, as failure to abide by such provisions is an aberration and amounts to extra constitutional exercise of power. Simply put, where the President decides in the negative – not to exercise his powers to declare a state of emergency, the court cannot be invited to compel him to so declare and his non-exercise cannot be judicially questioned. But where the President chooses to declare a state of emergency in the exercise of his powers pursuant to section 305(3) of the Constitution, then he should and must also stay and act within the ambit provided for in section 305(3).

²⁵ It was abused by President Obasanjo in Nigeria and Indira Gandhi of India where the Indian Constitution has similar provisions.

²⁶ CFRN section 305(6)(a)

²⁷ *Ibid* (b)

²⁸ *Ibid*

²⁹ *Ibid* (c)

³⁰ *Ibid*

³¹ *Ibid* (d)

When a state of emergency is declared, the provisions of section 45 of the Constitution shall come into operation. Accordingly, the fundamental rights provision in the Constitution may suffer derogation.

6. Exercise of Emergency Powers in India³²

The President of India can declare three types of emergencies – national,³³ state³⁴ and financial³⁵ under articles 352, 356 and 360 of the Indian Constitution in addition to promulgating Ordinances.³⁶

National Emergency

A national emergency can be declared in the whole of India or a part of its territory for causes of war or armed rebellion or an external aggression.³⁷ Under article 352 of the Indian Constitution, the President can declare such an emergency only on the basis of a written request by the cabinet of Ministers headed by the Prime Minister.³⁸ Such Proclamation must be approved by Parliament with two-thirds majority within one month.³⁹ Such an emergency can be imposed for six months.⁴⁰ It can be extended by six months by repeated parliamentary approvals. There is no maximum duration. In such an emergency, fundamental rights of Indian citizens can be suspended. The six freedoms under Right to Freedom are automatically suspended. However, the right to life and personal liberty cannot be suspended.⁴¹ National emergency has been proclaimed in India. It was declared first in 1962 by President Sarvepalli Radhakrishnan during the Sino-India war.⁴² There was also a thirteen-day Proclamation of national emergency in 1971 during the military confrontation between India and Pakistan (Indo-Pakistan war) from December 3 1971 to December 16, 1971 lasting 13 days. Another state of emergency in India was from 1975-77, Proclaimed by President Fakhruddin Ali Ahmed, with Indira Gandhi as Prime Minister. The other two types of emergencies are state and financial emergencies. Financial emergency is not critical to this article, so it will be disposed of quickly before discussing state emergency.

Financial Emergency⁴³

Under Article 360 of the Indian Constitution, the President can proclaim a financial emergency when the financial stability or credit of the nation or any part of its territory is threatened. However, there are no guidelines defining the situation of financial emergency in the entire country or state. Such an emergency must be approved by the Parliament within two months by simple majority. This research did not find an instance when financial emergency was declared.

³² See Part XVIII of the Indian Constitution

³³ Article 352 of the Indian Constitution

³⁴ *Ibid* Art 356

³⁵ *Ibid* Art 360

³⁶ *Ibid* Art 123

³⁷ Art 352(1)

³⁸ *Ibid* (3)

³⁹ *Ibid* (4), (6)

⁴⁰ *Ibid* (5)

⁴¹ *Ibid* Art.21.

⁴² This war is also known as Indo-China border conflict between China and India.

⁴³ n.35 above; A state of financial emergency remains in force indefinitely until it is revoked by the President. The President can reduce the salaries of all government officials, including judges of the Supreme Court and High Court, in cases of financial emergency. All money bills passed by the state legislatures are submitted to the President for approval. He can direct the state to observe certain principles (economic measures) relating to financial matters.

State Emergency

The second type of emergency in India is declared when there is failure of the constitutional machinery in states. Article 356(1) provides for the declaration of this type of emergency. It provides as follows:

356(1) If the President, on receipt of a report from Governor of a state or otherwise, is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by proclamation –

(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the state other than the legislature of the state;

(b) declare that the powers of the legislature of the state shall be exercisable by or under the authority of Parliament;

(c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving to the objects of the Proclamation, including provisions for suspending in whole or in part of the operation of any provisions of this Constitution relating to anybody or authority in the State, provided that nothing in this clause shall authorize the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.

From the above provisions, if the President is fully satisfied on the basis of the report of the Governor of the concerned state or from other sources that the governance in a state cannot be carried out according to the provisions of the Constitution, he can proclaim under Article 356 a state of emergency in the state. Such an emergency must be approved by the Parliament within a period of two months.⁴⁴ Under Article 356 of the Indian Constitution, it can be imposed from six months to a maximum period of three years with repeated parliamentary approval every six months.⁴⁵

During such emergency, the President can take over the entire work of the Executive and the Legislative Assembly can be dissolved or remain in suspended animation.⁴⁶ Although the emergency may last up to a maximum period of three years via extension after each six-month period, after one year it can be extended only if – (i) a state of National Emergency has been declared in the country or in the particular state, and (ii) the Election Commission finds it difficult to organize an election in that state.⁴⁷

Suspension of Certain Rights during State of Emergency

In the case of national emergency, the provisions of article 19 of the Constitution are suspended.⁴⁸ Also, the enforcement of the rights in Part III (except articles 20 and 21) of the Constitution is suspended.⁴⁹

Abuse of Emergency Powers

The exercise of emergency powers in India has been a subject of executive abuse and it has been a source of concern in India. The Indian Government set up a Commission – National Commission – to

⁴⁴ n.34 above

⁴⁵ Article 356(3). But where there is no approval, the Proclamation shall cease to operate within thirty days.

⁴⁶ *Ibid* (4). With respect to the state of Junjab, the Proclamation may be in force for five years.

⁴⁷ Article 357

⁴⁸ Article 356(5). Again, this provision is not applicable to the State of Punjab.

⁴⁹ Article 19 deals with protection of certain rights regarding freedom of speech, etc. Article 20 and 21 deal with protection in respect of conviction for offences and protection of personal liberty.

review the working of the article 356 of the Indian Constitution. The Commission submitted its report on May 11, 2001 with far reaching suggestions.⁵⁰

There had been an earlier report by another commission – the Sarkaria Commission Report, also on ways of curbing abuse of exercise of emergency powers under article 356.

The cases of abuse of emergency powers have been tested in the Indian Courts, and the most notable case is *S. R. Bommai v. Union of India*.⁵¹ This was a landmark judgment of the Supreme Court of India, where the Court discussed at length the provisions of article 356 of Indian Constitution and related issues. This case had huge impact on centre-state relations. The judgment attempted to curb blatant misuse of article 356 of the Indian Constitution, which allowed President's rule to be imposed over state governments.⁵²

Article 356 deals with imposition of President's Rule over a State of India. When a State is under President's Rule, the elected state government is suspended and administration is conducted directly by the Governor of the State. The Governor is the appointee of the President and thus, effectively a functionary of the Union Government. Thus imposition of President's Rule negates the Federal character of the Indian political system, where administration usually is shared between the Union and State governments. It also militates against the democratic doctrine of popular sovereignty, since an elected government is suspended. These reasons have made use of article 356 controversial. Nevertheless, it was used repeatedly by central governments to suspend state governments (of opposite political parties) based on genuine reasons or trumped-up excuses.⁵³

Because of the importance of the *Bommai* case, the facts and the decision of the Supreme Court of India are examined below.

Facts of *Bommai* Case

The *S. R. Bommai v. Union of India* came before the bench of nine (9) judges under the circumstances hereafter outlined. The Janata Party is majority in the Karnataka State Legislature, and formed a

⁵⁰. See the Consultation Paper on Article 356 of the Constitution – [www.htt://lawmin.nic.in](http://lawmin.nic.in). – visited 6/4/17. The Commission recommended that Article 356 be amended to provide for the following: (a) It should be provided that until both Houses of Parliament approve the Proclamation issued under clause (1) of article 356, the Legislative Assembly cannot be dissolved. If necessary, it can be kept only under suspended animation (b) Before issuing the Proclamation under clause (1), the President/Central Government should indicate to the State Government the matters wherein the State Government is not acting in accordance with the provisions of the Constitution and give it a reasonable opportunity or redressing the situation – unless the situation is such that following the above course would not be in the interest of security of the state or defence of the country. (c) Once a Proclamation is issued, it shall not be permissible to withdraw it and issue another Proclamation to the same effect with a view to circumvent the requirement in clause (3). Even if a proclamation is substituted by another, the period prescribed in clause (3) should be calculated from the date of the first Proclamation. (d) The Proclamation must contain (by way of annexure) the circumstances and the grounds upon which the President is satisfied that a situation has arisen where the government of the state cannot be carried on in accordance with the provisions of the Constitution. Further, if the Legislative Assembly is sought to be kept under animated suspension or dissolved, reasons for such course of action should also be stated in the appropriate Proclamation. (e) Whether the Ministry in a State has lost the confidence of the Legislative Assembly or not, should be decided only on the floor of the Assembly and nowhere else. If necessary, the Central Government should take necessary steps to enable the Legislative Assembly to meet and freely transact its business. The Governors should not be allowed to dismiss the Ministry so long as it enjoys the confidence of the House. Only where a Chief Minister of the Ministry refuses to resign after his Ministry is defeated on a motion of no-confidence, should the Governor dismiss the State Government. (1994) 2 SCR 644; AIR (1994) SC 1918; (1994) 3 SCCI

⁵¹ (1994) 2 SCR 644; AIR (1994) SC 1918; (1994) 3 SCCI

⁵² Rajendra, P. R. J. "Bomai Verdict has checked misuse of Article 356" Chennai, India: Frontline, 1998.

⁵³ Shubhash Arora. *President's Rule in Indian States*. "A Study of Punjab" (India: Mittal Publications, 1990).

government under the leadership of S. R. Bommai. In September 1998, the Janata Party merged with Lok Dal Party to form a new party called Janata Dal. Within two days thereafter, K. R. Molakery, a legislator of Janata Dal, defected from the party. He presented a letter to the Governor along with 19 letters, allegedly signed by legislators withdrawing their support to the Chief Minister – S. R. Bommai. As a result on 19 April, the Governor sent a report to the President stating therein that there were dissensions and defections in the ruling party. He further stated that the Chief Minister no longer command a majority in the Assembly and, hence, it was inappropriate under the Constitution, to have the state administration by an Executive consisting of council of ministers which did not command the majority in the state assembly. He, therefore, recommended to the President that he should exercise his powers under article 356(1).

Although 7 out of the 19 legislators who allegedly signed letters complained in writing that their signatures were obtained by misrepresentation and declared their total support to the Chief Minister, the Governor sent yet another report to the President that the Chief Minister had lost the confidence of the majority in the House and repeated his earlier request for action under article 356(1). The President then issued the Proclamation in question which was thereafter approved by the Parliament as required by article 356. The President issued similar Proclamations and dismissed the Governments of Meghalaya on 11 October 1998, Nagaland on 7 August 1998, Madhya Pradesh, Rajasthan and Himachal Pradesh on 15 December 1992. All the dismissed governments filed writs of petition which contained similar question of law and were consolidated and heard jointly.

Judgment in the *Bommai* Case

The Supreme Court of India laid down certain basic principles so as to prevent the misuse of article 356. They are:

- (1) The majority enjoyed by the Council of Ministers shall be tested on the floor of the House.
- (2) Centre should give a warning to the State and a time period of one week to reply.
- (3) The court cannot question the advice tendered by the Council of Ministers to the President but it can question the material behind the satisfaction of the President. Hence, judicial review will involve three questions only:
 - (a) Is there any material behind the Proclamation?
 - (b) Is the material relevant?
 - (c) Was there any *mala fide* use of power?
- (4) If there is improper use of article 356, then the court will intervene.
- (5) Under article 356, it is the limitation on the powers of the President. Hence, the President shall not take any irreversible action until the Proclamation is approved by the Parliament, i.e. he shall not dissolve the Assembly.
- (6) Article 356 is justified only when there is a breakdown of Constitutional machinery and not administrative machinery.

Article 356 should be used sparingly by the Centre, otherwise, it is likely to destroy the constitutional structure between the centre and the states. It is now necessary to compare the exercise of emergency powers in Nigeria and India.

7. Comparison between Exercise of Emergency Powers in Nigeria and India

From the examination of emergency powers in Nigeria and India, the following differences and similarities are noted:

1. In Nigeria, there are two types of emergency – national and state. But in India, there are three types – national, state and financial.
2. In Nigeria, national emergency can be declared when the Federation is at war or is in imminent danger of invasion or involvement in a state of war. Also when there is public danger constituting a threat to the existence of the Federation. In other words the mere threat of danger of invasion or involvement of war or threat to the existence of the Federation can justify the Proclamation of national emergency. In India, national emergency can be declared for the whole of India or part of its territory for causes of war or armed rebellion or external aggression.

Proclamation on the basis of external aggression in India and invasion in Nigeria mean one and the same thing. Also, proclamation on the basis of armed rebellion as obtainable in India is the same as proclamation on the strength of public danger threatening the existence of the Federation as in Nigeria.

Again, where the mere threat of invasion or war is a ground for proclamation in Nigeria, it is not so in India. Thus, there must be outbreak of war or actual external aggression before national emergency could be declared in India.

3. In India, the President can declare national emergency on the strength of a written request by the cabinet of ministers headed by the Prime Minister. This means the President's proclamation must be predicated on an advice or request by the cabinet of ministers.

In Nigeria, there is no equivalent provision. However, the President is the Chairman of the Federal Executive Council consisting of the Vice-President and the duly appointed Ministers. Part of the functions of the Federal Executive Council is advising the President generally in the discharge of his executive functions.⁵⁴ Proclamation of national emergency is a function of the President. Secondly in Nigeria, there is the Council of State⁵⁵ comprising the President as Chairman, the Vice-President, all former Presidents and all former Heads of Government of the Federation, all former Chief Justices of Nigeria, the President of the Senate, the Speaker of the House of Representatives, all Governors of the States of the Federation and the Attorney-General of the Federation.⁵⁶

The Council of State has powers to amongst other things, advise the President on the maintenance of public order within the Federation or any part of it.⁵⁷

It is, therefore, argued that as in India, proclamations of national emergency can be made by the President on the basis of advice from the Federal Executive Council and Council of State.

4. In Nigeria, the Governor and no other person can request the President to make a proclamation of state of emergency. But in India, the Governor or any other person can request the President to make the proclamation.
5. In Nigeria, the basis for the declaration of state of emergency is breakdown of public order and public safety in a state or danger or threat of actual breakdown of public order and public safety in a state or the occurrence of danger or imminent occurrence of natural disaster or calamity in a state. But in India, the President may declare the state of emergency when the State fails to run constitutionally i.e. constitutional machinery has failed.
6. In Nigeria, the life span of a Proclamation of state of emergency without supporting resolution is two or ten days depending on whether the National Assembly is in session or not. But in India, it is one month for national emergency and two months for state emergency.

⁵⁴ This was the view expressed by Dr. Bhimrao Ramji Ambedkar, who was Chairman of the Indian Constitution Drafting Committee.

⁵⁵ Rajendra, P. R. J. n.50 above.

⁵⁶ CFRN s.148(2)(c)

⁵⁷ *Ibid* s.153(1)(b)

7. In Nigeria, a state of emergency can remain in force for one year, but in India, it can remain in force for three years. In the case of national emergency, there is no maximum duration, both in Nigeria and India.

Similarities

1. Both in Nigeria and India, a Proclamation for state of emergency, once approved, will remain in force for six months in the first instance subject to repeated approvals of six months.
2. In both Nigeria and India, President's Proclamation for state of emergency must be approved by two-thirds majority of the National Assembly or National Parliament as the case may be.
3. In both countries, when a state of emergency is declared, the fundamental human rights provisions in the Constitutions suffer derogation.
4. The President, upon a declaration of state of emergency, in both countries, can take over the entire work of the Executive and the House of Assembly or Legislative Assembly can be dissolved.
5. Proclamation of state of emergency in Nigeria and India does not affect the operation of the judiciary.
6. In both Nigeria and India, the exercise of emergency powers have been abused and manipulated.

8. Exercise of Emergency Powers in Egypt

In Egypt, state of emergency was regulated by Law No.162 of 1958. This Law authorized the President to restrict freedom of assembly, detain suspects for up to six months without a hearing, and conduct searches without warrant during a state of emergency. This law was repealed in 2011 following the resignation of Egypt's former President, Hosni Mubarak. Emergency powers in Egypt are further provided for under Article 148 of 1971 Constitution of Egypt. The Article gave emergency powers to the President. It provides that the state of emergency would last fifteen days, after which approval by the legislature was required. There was no time limit for the state of emergency, other than that it would be limited, and that extension required legislative approval. This is very vague and imprecise. When it is to be limited, the question is, for how long before the extension would be required. This lack of a specified time limit is a major deficiency in the Constitutional provision. Another is the lack of an explicit grant of jurisdiction to the Judiciary to review the executive's exercise of emergency actions. Following Hosni Mubarak's resignation in February 2011, the Supreme Council of the Armed Forces (SCAF) assumed control of the country. The SCAF suspended the 1971 Constitution, conducted a popular referendum and issued a Constitutional Declaration that replaced the 1971 Constitution.⁵⁸ The emergency powers provisions were revised.

The Constitutional Declaration gave the President authority to declare a state of emergency after first consulting with the cabinet. It is further provided that the state of emergency must be approved by the legislature within seven days,⁵⁹ and that it is limited to a period of six months,⁶⁰ after which it can only be extended in a national referendum.⁶¹ The involvement of the public is a great innovation which is recommended for other countries. The misuse of emergency powers came to the fore in Egypt. Before Law No.162 of 1958 was repealed, its provisions were used to impose a state of emergency in Egypt which lasted for about fifty-three years.⁶² It means the 1971 Constitution simply reinforced the 1958

⁵⁸ Michelle A. Liguori, "A New Emergency Law Model for Egypt: available at <http://www.wcl.american.edu>. Visited 20/5/17

⁵⁹ Compare two days and ten days as the case may be for Nigeria. See Section 305(6)(b) CFRN, 1999

⁶⁰ Similar to Nigeria

⁶¹ This is a statutory provision that is lacking in both Nigeria and India

⁶² Michelle A. Liguori, n1

Law. The President used provisions of emergency powers both in the Law and the Constitution to restrict freedom of movement, detain suspects without warrant.⁶³

According to Liguori, the protesters who brought about the resignation of Hosni Mubarak demanded the lifting of the state of emergency that was in place in Egypt throughout his nearly 30-year presidency, and an end to the abuses that occurred pursuant to the country's nearly 53-year old emergency law.⁶⁴

9. Conclusion and Recommendations

This article has examined the exercise of emergency powers in Nigeria, India and Egypt. The purpose or objective of declaration of state of emergency is to restore peace, order and stability in any part of the countries considered in this article. It should mean suppression of all acts of rebellion, disorder or insurrection. Nothing should be done under the guise of state of emergency to subvert the constitution. The work has shown that although the countries so far considered have the same objective in declaring a state of emergency, the procedures and approaches are different. The Supreme Court of India had given guidelines to follow while the constitutional declaration in Egypt provided for public participation. None of Nigeria, India and Egypt makes provision for the participation of the highest court of the land. This is why it is urged that before the public should participate in any referendum to extend period of emergency, the highest court of the land should give a judicial opinion on the matter. This will give more confidence to the people before their participation.

Having examined the exercise of emergency powers in Nigeria, India and Egypt, the following recommendations are made:

1. The exercise of emergency powers should not be a political question to be measured only by political factors. It should be a justiceable matter, allowing the courts to exercise their inherent jurisdictions in such cases. Legal questions under this would include what in fact constitutes or should constitute a state of emergency, whether the approving authority has considered the right factors or issues before approving or declining approval; whether a state of emergency entails removal of government functionaries in a democratic setting.
2. Measures should be put in place to objectively define what a state of emergency is, so that it will no longer be a subjective issue to be considered by the authority vested with the power to declare.
3. A declaration of state of emergency should not deny citizens from very important and fundamental rights which the emergent situation ordinarily ought not to affect.
4. The principles laid down by the Indian Supreme Court in *Bomai's Case* are recommended for adoption by Nigeria *mutatis mutandis*.
5. The Sarkaria Commission⁶⁵ report on misuse of the provisions of the Article 356 of India is also recommended for adoption to check arbitrary use of emergency powers.
6. The Egyptian approach of involving the public through popular referendum is recommended if the period of emergency is to be extended. This will help to ensure that the President is accountable to the people in his or her use of emergency powers. It is also suggested that the Supreme Court should give approval to the extension before the referendum. The fact that the Supreme Court gives its approval also ensures that the people will have available to them a judicial determination that the state of emergency was appropriate before they are called on to vote to extend it.

⁶³ *Ibid*

⁶⁴ *Ibid*

⁶⁵ B. K. Sharma, *Introduction to the Constitution of India*. (India: Prentice-Hall of India Pvt Limited, 2007)