

Constitutional Theories, International Legal Doctrines and Jurisprudential Foundation for State of Emergency

Emmanuel Saffa Abdulai

Origin and use of State of Emergency

The liberal democratic tradition from Western Europe of the nineteenth century can be credited with the birth of modern legal concepts of state of emergency born out of the artificial legal concept of norm and exception 'which endorses a bifurcated approach to balancing the interests of societal goals and individual rights. The concept is regarded as a tag that legitimises governmental limitation of individual rights'.¹

The concept has been given different names in different contexts including, but not limited to, 'states of emergency,' 'states of exception', 'states of siege', and 'martial law'.² At the same time, major international human rights treaties provide for a derogation from the enshrined rights to allow state parties to 'temporarily adjust their obligation under the treaties in exceptional circumstances'.³

To fully understand the origin and extent of the concept of a state of emergency under international human rights law, three leading questions ought to be answered which are at the centre of the derogation regimes. First, has a situation degenerated to a level of a 'public emergency, threatens the life of the nation'? Second, whether the measures taken by the state are 'strictly required by the exigencies of the situation'. Third, should the state derogating from international law notify the treaty depositary thereby alerting the other state parties to its public emergency derogation?⁴

There is almost a consensus amongst legal scholars that human rights enjoyment should not be curtailed during a state of emergency.⁵ However, in practice, the interpretations as to when a state can derogate from human rights regimes have been co-opted and distorted. The perverseness of the introduction and enforcement of state of emergency was discovered by an in-depth U.N. study, which concluded that about ninety-five states, representing half the world's countries, have been under a state of emergency. Either they have declared it, indirectly, or have openly introduced a state of emergency during the period between 1985-1997.⁶

The French Revolution witnessed an overt introduction of a legal regime of state of emergency, which spiraled over to most national legal systems by the mid-twentieth century.⁷ Contextually, a state of emergency involves government action taken during a great national crisis that usually entails a broad restriction on human rights in order to resolve the crisis.⁸ Despite this conceptualisation, the concept is believed to have stretched as far back as the Roman Empire when a 'dictator' was nominated during exceptional circumstances as external invasion occurred, or civil strife threatened the peace of the

1 Kim Lane Scheppele, Law in a Time of Emergency: States of Exception and the Temptations of 9/11, 6 U. PA. J. CONST. L. 1001 (2004).

2 Ibid 34.

3 Special Rapporteur for States of Emergency, The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and the States of Emergency: Tenth Annual Rep., 11 20, 33, 48, Comm'n on Human Rights, U.N. Doc. E/CN.4/Sub.2/1997/19 (23 June 1997) (by Leandro Despouy) [hereinafter Special Rapporteur's Tenth Report].

4 International Covenant on Civil and Political Rights art. 4, 16 December 1966, S. TREATY Doc. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]; see also Human Rights Committee [H.R. Comm.], General Comment No. 29: the States of Emergency, 1 2, 4, U.N.Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001) [hereinafter General Comment No. 29] ("Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency.").

5 Ibid supra 13.

6 See Special Rapporteur for States of Emergency, The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency: Final Rep., add., U.N. Doc. E/CN.4/Sub.2/1997/19/Add.1 (June 9, 1996) [hereinafter Special Rapporteur's Final Report].

7 Stephen Humphreys, Legalising Lawlessness: On Giorgio Agamben's State of Exception, 17 E.U.R. J. INT'L L. 677, 677-78 (2006) (book review).

8 Claudio Grossman, A Framework for the examination of States of Emergency Under the America Convention on Human Rights. 1 AM U. J Int'l L & Pol'y 35, 36 (1986).

society. Importantly, it was during the eighteenth and nineteenth centuries that 'European constitutions... tentatively began to elaborate on the idea of a constitutional state of emergency'.⁹ Interestingly, the role of separate legislation to regulate the state of emergency was left out.

In practice, however, the French General Constituent Assembly first decreed in 1789 the introduction of what is regarded as the first modern version of a state of emergency. This decree differentiated between a 'state of peace' from a 'state of siege'. The 'state of siege' provides that 'all functions entrusted to the civilian authority for maintaining order and internal policing pass to the military commander, who exercise them under his exclusive responsibility'.¹⁰ The evolution of a state of emergency was taken forward after the 1848 French Revolution when the French Constitution of the Second Republic restricted the powers during 'state of siege.' It provides that the 'occasion, forms and effects' of the 'state of siege' were to be provided for, and elaborated, in law.¹¹

North America also embraced the concept of a state of emergency, with U.S. constitutional law and practice taking heed of the need for extended powers in times of great need. President Lincoln boldly suspended the operationalisation and guarantees of the *habeas corpus* right under Article 1 of the U.S. Constitution. Justifying this harsh decision, the President claimed that it was necessary to suspend the said right and also to institute censorship of the mail. He went further to order the arrest and detention of people suspected to be 'disloyal and [undertaken] treasonable practice'.¹² In an infamous speech to Congress at the beginning of the war, President Lincoln justified his action on the basis that 'whether strictly legal or not' the actions were needed 'under what appeared to be a popular demand and a public necessity'.¹³

Before the United Nations was formed, when the international Bill of Rights was adopted, European nations also experienced the introduction of 'the need to keep society safe' under strict actions of the government. Germany's Weimar constitution, which was drafted and adopted after World War I, 'tried harder than most constitutions to ensure that constitutional failure in a time of emergency [would] not occur'. To ensure this, Article 48 of the Weimar Constitution provided the President with extraordinary powers that would be utilised to address exceptional threats to the system. It meant the President could take 'measures necessary to re-establish law and order, if necessary, using armed force and including the suspension of a particular and limited set of rights'.¹⁴ Alarming, Article 48 was invoked two hundred and fifty times during the life of the Weimar Constitutions.¹⁵ Furthermore, when Adolf Hitler took over power, during Germany's great depression, he 'proclaimed the Decree for the Protection of the people and the State', which suspended the Articles in the Weimar Constitution concerning personal liberties.¹⁶ This Decree remained in force for the entire period of Adolf Hitler's reign, and as Agamben notes 'from a judicial standpoint, the entire Third Reich can be an exception that lasted twelve years'.¹⁷

Throughout wars, the state of emergency has been instituted even by democratic nations to access and use executive powers that they would not otherwise have. Notable is the U.S. government domestic internment of 110,000 people of Japanese descent, during World War II. Seventy thousand of those placed in what would otherwise be referred to as concentration camps were U.S. citizens who had the same rights as all other Americans. Further to this, a severe impact of the state of emergency by a U.S. democratic government could be traced to the Cold War era when President Truman declared a state of emergency in response to the conflict in Korea and 'communist imperialism' in 1950. This particular state of emergency lasted nearly half a century without repeal. This was not the last

9 Kim Lane Scheppelle, Law in a Time of Emergency: States of Exception and the Temptations of 9/11, 6 U. PA. J. CONST. L. 1001 (2004).

10 Giorgio A.G.A.M.B.E.N., THE STATE OF EXCEPTION (Kevin Attell trans., Univ. of Chi. Press 2005) (2003).

11 John Ferejohn & Pasquale Pasquino, The Law of the Exception: A Typology of Emergency Powers, 2 INT'L J. CONST. L. 210 (2004).

12 Giorgio Agamben, The State of Exception (Kevin Atteli Trans., Univ. of Chi Press 2005).

13 Ibid at 234.

14 The see The Reich Constitution of 11 August 1919 (Weimar Constitution) with Modifications, PSM DATA, <http://www.zum.de/psm/weimar/weimar-vve.php> (last visited, 2, 10, 2020).

15 Ibid.

16 Agamben, supra, at 3. See Translation: Decree of the Reich President for the Protection of the People and State, U.S. Holocaust Mem'l Museum.

17 Agamben supra at 1008.

emergency that was declared in response to communism by a U.S. Government.¹⁸ Scheppele aptly notes that 'between the 1930s and 1970s, Congress passed about 470 statutes that empowered the executive branch to act under emergency powers'.¹⁹

The above historical outline of the state of emergency manifests that emergency has generally taken place in the context of exceptional threats, including situations of war, and where the nation was or was perceived to be fighting for survival.

Conceptualizing the State of Emergency

Two major fields of studies have dissected the concept of a state of emergency: International Human Rights Law and constitutional law. Rich literature from constitutional law started during the cold war by Clinton Rossiter and Carl Freidrich. Additionally, the conceptual foundation is in political theory and philosophy going back to philosophers like Aristotle, followed by Carl Schmitt of Germany who has looked extensively at the foundational element.

The rational and conceptualisation of state of siege appear to be reasonably straightforward, taking its roots in the character of exceptional. Undeniably, when a given polity faces a challenge to its existence, there will be a need for a government to 'temporarily be altered to whatever degree is necessary to overcome the peril and restore normal condition'.²⁰ The International Commission of Jurist, in 1983, brought together fifteen experts to study the various national implementations of emergencies in a number countries and the study suggested that 'state of emergency is the counterpart in international law of self-defence in penal law'.²¹ The thought of state defending itself in times of external aggression or internal strife is underpinned by the unusual balance between collective interests – in the right to life of the nation. Furthermore, the interest of an individual is predominately protected by international human rights law, commonly referred to as civil liberties. Derogation is a concession to the 'inevitability of exceptional state measures in times of emergency, and also as a means to control these measures'.²² The allowance to derogate is based on the balancing of human rights with collective goals such as public order and national security terms that are not easily defined by law.²³

Striking a balance is not akin to derogation during emergencies, as it takes a long history of the general corpus of international human rights law that embeds limitations and are an inherent feature. According to McGoldrick, the 'idea of limitation is based on the recognition that most human rights are not absolute but rather reflect a balance between individuals and community interests'.²⁴

What is clear, however, is that derogation in terms of exception 'arises in an especially acute way, which raises issues of the scope' of international human rights, and its 'relationship with the concept of a state of sovereignty'.²⁵ What underpins the state of exception concept is the need to restore normalcy in which the full range of human rights can be protected. The derogation concept is a product of a critical distinction between normalcy, which is the general state of affairs, and emergency (for example, the French 'state of siege'), which is the state of exception.²⁶ That said, however, a clear distinction in practice between normalcy and exception is recognised as somewhat artificial.²⁷ As Abi-Saab suggests,

18 For examples of rights abuses justified by emergency declarations to combat communism, see Scheppele, *supra* note 8, at 1018-19.

19 *Ibid supra* note 8, at 1018-19.

20 C.L.I.N.T.O.N. L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* (1948).

21 INT'L COMM'N OF JURISTS [I.C.J.], *STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS*, at iii, 413 (1983) [hereafter ICJ STUDY]; see also MANFRED NOWAK, *U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* 84 (2d rev. ed. 2005) ("[I]t offers a State's democratically legitimate, supreme constitutional organs a basis for avoiding exceptional, irreparable damages to the general public").

22 Tom R. Hickman, *Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism*, 68 M.O.D. L. REV. 655 (2005).

23 *Ibid.*

24 Dominic McGoldrick, *The Interface between Public Emergency Powers and international law*, 2 INT'L J. CONST. L. 380, (2004).

25 *Ibid.*

26 Hickman *supra* 21 at 23.

27 Georges Abi-Saab, *Foreword to SVENSSON-MCCARTHY*, *supra* note 33, at v, vi.

we should refute an apparent dichotomy between ordinary limitations and great derogations, as they 'partake of the same nature and constitute a legal continuum'.²⁸

International Human Rights Law on State of Emergency

Any assessment of international human rights treaties and their coverage of specific issues relating to human rights protection should start with the Universal Declaration of Human Rights (UDHR). Being the parent of subsequent human rights treaties, the UDHR is regarded as the first international Bill of Rights. A cursory review of the UDHR reveals that it omitted to provide a regime for a state of emergency. It attempted to balance individual rights and public interests in a 'general clause on the permissible limitations on the exercise of rights'.²⁹ Specifically, Article 29 places on the individual 'duties to the community in which alone the free and full development of his personality is possible'. It postulates a requirement that when the individual exercises their rights and freedoms, there is corresponding limitation of those rights to secure respect for the rights of others and 'of meeting the just requirements of morality, public order and the general welfare in a democratic society'.³⁰

The second treaty, which provided extension for state of emergency is the International Covenant on Civil and Political Rights (ICCPR). It is believed that the provisions in the ICCPR were provided by the United Kingdom representative in 1947 for several reasons. Article 4 provides that:

- 1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
- 2) No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
- 3) Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.³¹

This derogation provision has critical elements that should be examined: first, it set a threshold of severity cause; second, there is the requirement of national proclamation and international notification to the treaty depositary; third, there must be consistency of the derogation with the state's other international obligations; fourth, a level of proportionality of the measures to the situation; fifth, there should be non-discrimination in applying the measures; and sixth, the protection of non-derogable rights.³² The intent of Article 4 is to create a vehicle which permits states to temporarily limit and modify the rights and obligations set out in the ICCPR, with the exception of the extent to which those rights are non-derogable.

Despite the above explanation, the secretary-general of the UN in 1955 spelt out the underlying reasons for the derogation that 'It was also crucial that State parties should not be left free to decide for themselves when and how they would exercise emergency powers because it was necessary to guard against States abusing their obligations under the Covenant'. Reference was made to the history of the

28 Ibid.

29 Universal Declaration of Human Rights, *supra* note.

30 Ibid 29.

31 Ibid.

32 A.G.A.M.B.E.N., *supra* note 12, at 1 (quoting Alessandro Fontana, *Du Droit de resistance au devoir d'insurrection*, in *LE DROIT DE RESISTANCE* 16 (Jean-Claude Zancarini ed., 1999)).

past epoch during which emergency powers had been invoked to suppress human rights and to set up dictatorial regimes.³³

The next two regional treaties to provide for derogations from human rights during a period of a state of emergency are the European Convention on Human Rights and the Inter-American Convention on Human Rights. Their derogation provisions are similar, though not identical to, the provisions of Article 4.³⁴ Interestingly, the British initiated the derogation provisions at the European Convention negotiation, and in as much as the European Convention was concluded in 1950, sixteen years earlier than the Covenant, the negotiations for derogation were underway before the ICCPR was passed.

The African Charter on Human and Peoples Rights (ACHPR) of 1981 also omitted to provide for the state of emergency or regulate it. Instead, the ACHPR relied on the general limitation of the UDHR.³⁵ Further, the Arab Charter on Human Rights of 2004 includes a derogation regime.³⁶ It is important to note that non-derogable rights differ from treaty to treaty. Therefore, state parties are subjected to a different regime based on which treaty they accede to and domesticate, where necessary. The Covenant's derogations article, for example, provides for more non-derogable rights than the correlative article of the European Convention.

UN Body Interpretation

Several UN bodies have guided the use of state of emergency and provided extensive literature to inform academic research. The UN Working Group on Arbitrary Detention blames states of emergency as a 'root cause' of arbitrary detention.³⁷ Undeniably, the imposition of states of emergency adversely affects economic, social, and cultural rights as well as civil and political rights of citizens. This is more the case with vulnerable groups who are most affected, especially minorities and refugees, as well as journalists and human rights workers.³⁸ The International Commission of Jurists (ICJ) has frowned at perpetual state of emergencies, or, 'states of emergency to become perpetual or to effect far-reaching authoritarian changes in the ordinary legal system'.³⁹ Since state of emergency regimes are transient, semi-permanent states of emergency will only be institutionalising the limitations on human rights. This idea of 'institutionalising the emergency' is well summed up by the UN Special Rapporteur for States of Emergency, Mr. Leandro Despouy:

[T]he normal legal order subsists although, parallel to it, a unique, para-constitutional legal order begins to take shape . . . allowing the authorities to invoke, according to the needs of the moment, either the typical legal system or the particular system, although in practice the former is relinquished for the latter.⁴⁰

The UN Human Rights Commission appointed a Special Rapporteur (SR) for States of Emergency with a mandate that lasted from 1985 to 1997.⁴¹ Primarily, the SR was mandated to monitor the

33 U.N. Secretary-General, *supra* note 7, ch. V, J 37.

34 See American Convention on Human Rights art. 27, Nov. 22, 1969, 1144 U.N.T.S.123 [hereinafter IACHR]; European Convention on Human Rights art. 15, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. For the drafting history of the IACHR.

35 Compare African Charter on Human and Peoples' Rights art. 27(2), 27 June 1981, O.A.U. Doc. CAB/LEG/67/3 ('The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.'). with Universal Declaration of Human Rights, *supra* note 41, art. 29(2) ('In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely to secure due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.').

36 Arab Charter on Human Rights, League of Arab States, art. 4, 22 May 2004, reprinted in 12 *Irr'L Hum. R.T.s. R.E.P.* 893, (2005).

37 Special Rapporteur's Tenth Report, *supra* note 1, 1 172. The 1983 I.C.J. study focused on fifteen states and analysed in-depth the human rights issues and violations. The I.C.J. study revealed the extensive impact on society of states of emergency that it described as affecting not only freedom from arbitrary detention but also the right to a fair trial.

38 Special Rapporteur's Tenth Report, *supra* note 1, 91 173, 175.

39 See ICJ STUDY, *supra* note 36, at 415; Special Rapporteur's Tenth Report, *supra* note 1, 1 127. FITZPATRICK, *supra* note 11, refers to Brunei, Egypt, Turkey, Paraguay, the Occupied Palestinian Territory (at 4-5), the United Kingdom (at 6-7), Chile (at 10), and Malaysia (at 17).

40 *Ibid.*

41 Special Rapporteur's Tenth Report, *supra* note 1, 1 13.

implementation of Article 4 of the ICCPR and to: draw up an annual list of state parties enforcing a regime of a state of emergency; examine emerging issues of compliance in an annual report; draw up guidelines for the development of legislation on the issue and providing technical assistance. This proves useful until the SR was starved of resources which inhibited the mandate holder's ability to gather and analyse information. In its final report in 1997, recommendations were made for an updated General Comment, and adopted by the Committee in 2001. The work of the Special Rapporteurs' collaborative research and work has aided the conceptual debate going forward and provided significant foundations for the updated UN Human Rights Committee general comment.

In 1982, the Dutch delegation to the Covenant's meetings of state parties suggested among other things empowering the Human Rights Committee to institute special proceedings in the event of a state of emergency.⁴² The Dutch suggestion was met with a procedural objection from the Soviet Union delegate, and the suggestion was not taken any further.⁴³ In 1982 and 1983, Human Rights Committee member Torkel Opsahl of Norway proposed an Article 4(1)(b) special report for states that would be triggered by a state of emergency's declaration.⁴⁴ This proposal was rejected in the Committee based on differing views on the Committee's authority and competence.⁴⁵ The first Special Rapporteur, Mrs. Nicole Questiaux, also proposed that the powers of the UN Secretary-General as the Covenant's depositary be extended to 'seek[ing] additional information and explanations which would be transmitted to the States Parties and the specialist bodies so that the international surveillance authorities have sufficient material on which to reach a decision.'⁴⁶ This would, however, require a substantive monitoring role for the Secretary-General, who would need to make a judgment that the information provided by the derogating state was insufficient and more was required. This proposal is a massive political step forward from current practice that would be strongly resisted by many states.

Derogation from human rights during emergencies

There are different treaties on international human rights; however, as stated above, embedded in these documents are powers of state parties to derogate from the rights protected. The Universal Declaration on Human Rights is the mother of dozens of global and regional treaties protecting fundamental human rights. Further, there is the International Covenant on Civil and Political Rights (ICCPR) which was signed in 1966 and came into effect in 1976. The ICCPR is now part of customary international law. Regionally, the African Charter on Human and Peoples Rights (ACHPR) signed in 1981, the American Convention on Human Rights (ACHR) signed in 1969 but came into force in 1978, and the European Convention on Human Rights (ECHR) signed in 1950 and came into force in 1953 have all formed part of customary international law.

This treaty ecosystem provides and recognised that national emergencies require flexibility; however, they refused to allow national emergency excuse and justification for states to derogate on all rights. Apart from the ACHPR, all the three treaties require the right to life, prohibition of slavery and torture, and freedom from retroactive legislation be respected at all times. The ICCPR and ACHR further maintain the right to legal personality and freedom of thought and religion. These treaties insist that domestic remedies via judicial processes should remain protected at all times. Further, the ICCPR prohibits imprisonment for civil matters for inability to fulfill a contractual obligation. Additionally, the ECHR prohibits the use of the death penalty even in the most extreme situation of crisis⁴⁷ and protection from *ne bis in idem* or double jeopardy.⁴⁸ The ACHR, which is one treaty that has the most extended

⁴² MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 84 (2d rev. ed. 2005).
⁴³ *Ibid.*

⁴⁴ Torkel Opsahl, Emergency Derogation from Human Rights, 5 N.O.R.D. J. Hum. R.T.s. at 4 (1987).

⁴⁵ ICJ STUDY, *supra* note 38, at 454. The UN Working Group on Arbitrary Detention, for example, has recommended that as soon as it is informed of such a declaration, or a state invokes an emergency, an emergency mission by one of the UN special procedures should take place to verify on the ground whether the state of emergency meets the criteria. See Rep. of the Working Group on Arbitrary Detention, *supra* note 179, 98.

⁴⁶ For a significant list of UN Human Rights Committee reports noting the non-reporting of states of emergency, see FITZPATRICK, *supra* note 11, at 91. The Special Rapporteur has also noted this. See Special Rapporteur's Tenth Report.

⁴⁷ Protocol 13, Article 2 of the ECHR.

⁴⁸ Protocol 7, Article 4(3).

set of non-derogable rights, requires continued observance of humane treatment while in custody, freedom from forced labour, rights of the child and the family, rights of name and nationality, and the right to participate in government.⁴⁹

The meaning of emergencies remains vague, and it has been argued that emergencies are in the eye of the beholder. Like its constitutional counterpart, international human rights law fails to provide any detail, explanatory and exhaustive meaning of when an emergency arises and what it actually should be. The ICCPR made it look very simplistic by referring to it as ‘time(s) of public emergency’⁵⁰ the ECHR added a more stringent requirement that emergencies arise during the war.⁵¹ Furthermore, the ACHR goes further to include ‘public danger’. What is however common among these treaties is that they understand emergencies to threaten ‘the life of the nation’.⁵² The ACHR further uniquely describes it as a threat against ‘the independence or security of a State’.⁵³ The margin of appreciation is with the national governments to decide if and when these threats exist. Once proclaimed, they may temporarily limit any derogable rights.

It is now clear that the wide-ranging, self-assessed margin of appreciation for derogations from international human rights law should meet specific criteria. These criteria include: first, that derogation should be proportionate to the crisis at hand; be necessary for protecting the nation and responding to the threat; not to discriminate on the basis of race, colour, sex, language, religion, or social origin; must remain compatible with the state's other international law obligations, and last only as long as necessary.⁵⁴ However, the form and extent of derogation remain open to the national government's interpretation. There remains a gap between the various principles espoused and actual international decisions and determination of whether the state's narrow margin of appreciation meets the test and spirit of international human rights law. The lacuna is inevitable because there are different international convention provisions and as the UN Commission on human rights put it, interpreting the derogation of the various conventions ‘might produce complicated problems of interpretation and give rise to considerable abuse’.⁵⁵

The centrality of the problem of interpretation is the determination of when an emergency situation exists. That is one that threatens the life of the nation, which, for all intents and purposes, should justify derogation from international human rights law obligation by the affected state. A nagging question is why the state has emerged victorious irrespective of how, and for what purpose, the emergency came about. Various international human rights treaty bodies, more often than not, have abdicated the responsibility to make this determination, for example, in Europe the European Court of Human Rights through the ‘margin of appreciation’.⁵⁶ Human Rights bodies have seldom overturned the assertion of a state of emergency by any government.⁵⁷ They rather prefer to focus instead on the issue of proportionality of the emergency measures or rely on other elements of the legal test. In a leading case, the European Court of Human Rights agreed with the UK government that the threat of terrorism before

⁴⁹ The UN Human Rights Committee confirmed this in its General Comment 29. General Comment No. 29, supra note 2, 2, 4; see also Gross & Nf Aoldin, supra note 45, at630; Colin Warbrick, *States of Emergency-Their Impact on Human Rights*.

⁵⁰ Article 4(1) of the ICCPR.

⁵¹ Article 15(1) European Convention on Human Rights.

⁵² Article 27(1) African Charter on Human and Peoples Rights.

⁵³ African Charter on Human and Peoples' Rights art. 27(2), 27 June 1981, O.A.U. Doc. CAB/LEG/67/3 ('The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.').with Universal Declaration of Human Rights, supra note 41, art. 29(2) ('In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely to secure due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.').

⁵⁴ ICCPR Article 4(1), ACHR Article 27(1), ECHR Article 15(1), ESC Article F(1).

⁵⁵ UN Secretary-General, Annotations on the Text of the Draft International Covenants on Human Rights, ch. V, 36, U.N. Doc. A/2929 (1 July 1955).

⁵⁶ The 'margin of appreciation' doctrine associated with the European Convention on Human Rights (ECHR) is based on the notion that each society is entitled to certain latitude in balancing individual rights and national interests, as well as in resolving conflicts that emerge as a result of diverse moral convictions. Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 INT'L L. & P.O.L. 843, 844-45 (1999).

⁵⁷ Kim Lane Scheppelle, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004).

any actual attack was a public emergency threatening the life of the nation.⁵⁸ With such a potentially low threshold, it has become commonplace for regimes that do not respect human rights to claim a state of emergency in many situations that are ill-fitted to the language and intent of the international human rights treaties. The elasticity of what jurisprudentially constitutes a 'state of emergency' has provided a veneer of legality to specious claims by governments. It has undermined the normativity of the law.

There is, therefore, a problem of conceptualising the issue of a state of emergency. However, there has been no shortage of prescriptive solutions provided by academic programs and projects. What is clear is that solution to the issue has been more formalistic by calling for stricter and more rules, presupposing an unrealistic reform proposal of human rights implementation mechanisms. It is further evident that scholars have held extensive debates on the key underlying themes of state of emergency but have failed to grapple with and come up with meaningful regimes of derogation in consonant with human rights treaties and the principles of international law.

This Article demonstrates that the long-existing problem should be treated with the nuanced understanding that fails to account for theory and politics. This conception is based heavily on a rule of law model; as opposed to the sovereignty model the traditional dichotomy of normality and exception although without necessary implementation superstructure of support such as traditional assumptions. The jurisprudence has failed to grapple with other critical challenges including the role of separation of powers, emergencies based on ongoing terrorist threats, democracy as a check on emergency powers, and issues of emergencies caused by government.

Jurisprudential Interpretation of States' Derogation During State of Emergency

State of Emergency has attracted various legal challenges at regional and international courts as it curtails fundamental human rights. International human rights bodies have also provided an extensive interpretation of the permissible derogations under Article 4 of the ICCPR. This section will review and analyse some of the jurisprudence on state of emergency to provide a sort of compendium for reference, and to compare how these international human rights bodies have interpreted derogation and margin of appreciation.

At the United Nations level, the Human Rights Committee has reviewed a small number of complaints brought to it under the Optional Protocol dealing with Article 4 of the Covenant. These communications are from South American countries, in particular, Uruguay during the 1970s and 1980s. The Human Rights Committee has underscored the theoretical basis for the declaration of a state of emergency by affirming the rights of the state to declare an emergency when necessary. It went on to emphasize, however, that 'a measure of international supervision over that national determination' be instituted.⁵⁹ The Human Rights Committee adopted an approach of not assessing the reason or justification of State of Emergency, but to review any measures and violations of the ICCPR irrespective of the derogation. In *Landinelli Silva v. Uruguay* one of the earliest communications which concerns a military dictator in Uruguay declaring a state of emergency led to the complainant banned from running their political party office for a period of fifteen years. They complained that the action violated Article 25 of the Convention. On its part, the government of *Uruguay* failed to provide the necessary information, in the derogation notice, on the nature of the public emergency or measures taken to address the emergency. The Human Rights Committee refused to determine the existence of the state of emergency, but instead found that based on 'the assumption that there exists a situation of emergency in Uruguay,' the measures in

⁵⁸ *A & Others v. United Kingdom*, App. No. 3455/05, 175-181 (Eur. Ct. H.R.2009), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91403>; see also infra text accompanying notes 246-258.

⁵⁹ McGoldrick, supra note 33, at 399-400, 400 n.128. To support this, McGoldrick refers to several communications concerning balancing of rights with national security, but none that focused on Article 4. Id.

question were not 'necessary'.⁶⁰ In essence, the legal assessment of the public emergency's existence was replaced by an assumption in favour of the state's assertion.

The *Consuelo Salgar de Montejo v. Colombia* communication involves the Colombian government submitting a notice of derogation in 1980 to the treaty depository. In the communication, the Colombian government mentioned the existence of a state of emergency that came into place in 1976.⁶¹ The Colombian government claimed that this emergency 'decree was issued because of the social situation created by the activities of subversive organizations which were disturbing public order intending to undermine the democratic system in force in Colombia.'⁶² The UN Human Rights Committee followed the same pattern by refusing to determine whether or not there was a public emergency, instead the UN Human Rights Committee focused primarily on the government having notified derogation of the incorrect ICCPR articles and substantive rights affected by the derogation.⁶³ While the government had referred to 'temporary measures' that limited Articles 19(2) and 21 of the Covenant (freedom of expression, right of peaceful assembly), the Committee ruled that in reality there was a violation of Article 14(5) on the right of appeal 'because Mrs. Consuelo Salgar de Montejo was denied the right to review of her conviction by a higher tribunal'.⁶⁴ These two cases herald a consistent approach of the UN Human Rights Committee refusing to determine the justification of the state of emergency.

There are cases in which the declaration of a state of emergency became tools used for the violation of non-derogable rights such as Article 7's right, which is the right against torture enshrined in the ICCPR, rendering the issues of derogation, or not, manifestly irrelevant in the entire scheme of protecting and promoting human rights.⁶⁵ While reviewing cases, individual committee members had expressed dismay and concern over the justification for a particular public emergency. In contrast, some members have 'suggested that Article 4 allows states considerable latitude in deciding when a public emergency [s] derogation and that the determination concerning the emergency [is] a sovereign act.'⁶⁶ It is clear that the mandate of the UN Human Rights Committee to deal with the state of emergency has been reneged on by the UN Human Rights Committee itself and has instead ruled on issues not germane to the centrality of the reasons for the existence of a state of emergency.

It is essential to review General Comment 29 of 2001 which provides the main statement on the interpretation of Article 4⁶⁷ surpassing early but limited comment that the UN Human Rights Committee released in 1981 on state reports and communications from South African countries such as Chile, Syria, Colombia, and Uruguay.⁶⁸ General Comment 29 addresses a wide range of issues, which for present purposes are not central to this Article. It addresses the central issues of what constitutes a public emergency and struggled with whether to allow its application to go beyond the general principles already articulated in Article 4. While the UN Human Rights Committee did not provide any comprehensive definition for a public emergency, it did, however, touch on instances when a state of emergency can be declared. It went on that some of the attributes of a public emergency that threatens the life of the nation include 'armed conflict', 'a natural catastrophe, a mass demonstration including

⁶⁰ *Silva v. Uruguay*, Commc'n No. 34/1978, H.R. Comm., I 2, 3.1, U.N. Doc. CCPR/C/121D/34/1978 (8 April 1981).

⁶¹ *de Montejo v. Colombia*, Commc'n No. R.15/64, H.R. Comm., 1.2 (18 December 1979), in Rep. of the H.R. Comm., 14th-16th Sess., Oct. 19-30, 1981, Mar. 22-Apr. 9, 1982, July 12-30, 1982, annexe XV, U.N. Doc A/37/40 (22 September 1982); G.A.O.R., 37th Sess., Supp. No. 40 (1982).

⁶² *Id.* 45.

⁶³ *Id.*

⁶⁴ General Comment 29 does not provide that notification of the substantive articles derogated is a requirement of notification. However, the UN Human Rights Committee's guidelines for Article 40 periodic reports provide that for Article 4, 'full explanations should be provided concerning every article of the Covenant affected by the derogation.' H.R. Comm., Guidelines for the Treaty-Specific Document to Be Submitted by States Parties Under Article 40 of the International Covenant on Civil and Political Rights, T 39, U.N. Doc. CCPR/C/2009/1 (4 October 2010).

⁶⁵ *Id.*

⁶⁶ *de Guerrero*, U.N. Doc. CCPR/C/15/D/45/1979, 1 12.2; *Silva v. Uruguay*, Commc'n No. 34/1978, H.R. Comm., 17, U.N. Doc. CCPR/C/12/D/34/1978 (8 April 1981). The Colombian cases of state-of-emergency decrees often involved nondelegable rights, so the Committee saw no need to analyse Article 4.

⁶⁷ *Id.* 45.

⁶⁸ *Id.*

instances of violence [and] a major industrial accident'.⁶⁹ The UN Human Rights Committee went on to restate that the emergency must threaten 'the life of the nation' but failed to provide any exact meaning of what 'the life of the nation' should entail. On the issue of the proportionality test, the UN Human Rights Committee states that 'the extent strictly required by the exigencies of the situation' concerns the 'duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency'.⁷⁰

By contrast, the European jurisprudence of the European system can be regarded as more progressive and developed. For example, the European Court of Human Rights in interpreting the emergency Article 15 allows for state derogation and provides quite an illuminating jurisprudence. The Cyprus case is regarded as the first case in which the European Court decided on the issue of derogation and it came way before the European Commission on Human Rights decided two interstate applications by Greece brought against the United Kingdom in 1956 on allegations of human rights violations and mistreatment of prisoners.⁷¹ In the first case, the Commission ruled on the jurisdiction and declared that it was competent to review the case and decide whether there was derogation. It went on to find in favour of the complainant, the United Kingdom that 'the Government should be able to exercise a certain measure of discretion in assessing the extent [of measures] strictly required by the exigencies of the situation'.⁷²

The next case at the European platform was *Lawless v. Ireland* which concerned extrajudicial detentions by the Government of Ireland of Irish Republican Army members in Ireland. The detention happened outside of Northern Ireland, which could be regarded as part of the United Kingdom. In its ruling, the Commission accepted that a 'certain discretion - a certain margin of appreciation - must be left to the [Irish] Government' in determining what constituted a public emergency that threatens the life of the nation. This determination extended that issue of discretion previously held in the Cyprus case to the public-emergency question. There was a dissenting opinion as a minority of members refused to buy into this new 'margin of appreciation' concept. The dissent argued that the determination should be whether the situation in Ireland reached the threshold of a public emergency, and that there was no need for such a legal determination.⁷³ The case went before the European Court of Human Rights to determine 'if a government complied with Article 15'. It was held that the 'natural and customary meaning' of the words of Article 15(1) were sufficiently clear as 'they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed'.⁷⁴ The Court said terrorist activities were an unprecedented crisis that threatened the life of Ireland as a nation.⁷⁵

Following the *Irish Case* was the *Greek Case* which interrogated the issues of constitutional suspension in Greece and the introduction of martial law after a military coup in 1967.⁷⁶ Quite uniquely, this case involved the overthrow of a constitutional government by the military, and the Commission expressly acknowledged the margin of appreciation concept under Article 15 after Greece pleaded it.⁷⁷ The Commission relies on the *Lawless* case to make a critical statement that a public emergency must have the following characteristics: (1) It must be actual or imminent. (2) Its effects must involve the whole nation. (3) The continuance of the organised life of the community must be threatened. (4) The crisis or

⁶⁹ H.R. Comm., General Comment 5: Article 4 (Derogations) (1981), reprinted in United Nations, International Human Rights Instruments, U.N. Doc. H.R.I./GEN/1/Rev.9 (Vol. I) (27 May 2008); N.O.W.A.K., supra note 38, at 86, 88.

⁷⁰ Id.

⁷¹ Greece vehemently argued that the alleged mistreatment of prisoners in Cyprus related to obligations that could not be derogated from under Article 15. *Greece v. United Kingdom (First Cyprus)*, App. No. 176/56, 1958-1959 Y.B. Eur. Conv. on H.R. 174, 174 (Eur. Comm'n on H.R.).

⁷² For provisions on interstate complaints, see, for example, ICCPR, supra note 2.

⁷³ *Lawless*, Eur. Ct. H.R. (ser. B) at 82.

⁷⁴ The Commission President also raised the margin of appreciation with the Court in the hearing. See *Lawless*, Eur. Ct. H.R. (ser. B) at 408. The French version of this statement, which was the authoritative judgment, included the word that corresponded with 'imminence'. *Lawless*, 1961 Y.B. Eur. Conv. on H.R. 28.

⁷⁵ The Court found the emergency was against human rights.

⁷⁶ *The Greek Case* App. Nos. 3321/67, 3322/67, 3323/67, 3344/67, 1969 Y.B. Eur. Conv. on H.R. 1 (Eur. Comm'n on H.R.).

⁷⁷ Ibid.

danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are inadequate. In response, the Greek military argued that the 'revolution' is a necessity to protect Greece from the communists and their allies and that the threat from these groups had brought about the state of emergency and the need for derogation. In its finding, the Commission said 'it established beyond dispute' that Greece had experienced political instability, tension, and public disorder⁷⁸ however, it rejected the communist argument by the military government.⁷⁹ Therefore, there was no justification for the declaration of the state of emergency applying similar principles as it did in the *Lawless* case, although it reached the opposite result. As Svensson McCarthy points out, though, as 'compared to the *Lawless* case, the Greek situation was marked by much more violence and unrest within the national borders.'⁸⁰ In addressing the 'public emergency' in Greece, the Commission effectively 'lifted the veil' by considering the causation of the public emergency.

In 2009, the European Court had, after a long lull in emergency cases, the case of *A & Others v. United Kingdom*. Here the case provided an opportunity for the Court to settle the jurisprudence scattered in the *Lawless* and *Cyprus* cases. It was also an opportunity to assess the issues of terrorism especially after the 9/11 September terrorist attacks on the twin towers, and ultimately resulted in a unanimous decision of the Grand Chamber (the highest level within the Court). The case involves the passing of legislation that provides for indefinite detention without trial of foreign nationals suspected of terrorism if the Government was unable to deport them. The framework to detain suspected terrorists had been established pursuant to an Article 15 derogation by the United Kingdom. The United Kingdom's House of Lords decided in 2004 that the existence of the public emergency was a 'political question' not for the Court, but that the proposed measures would not be proportionate and therefore were a violation.⁸¹ Lord Hoffman provided a sterling dissent asserting that the terrorist threat was indeed a question for the Court and did not amount to a threat to the life of the nation. He went on that 'terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.' The European Court of Human Rights, however, decided to treat the case differently by endorsing an available position for a wide margin of appreciation, both on the existence of the emergency and the proportionality of measures. The Court held that the margin of appreciation should fall to the contracting state who has the task and responsibility for 'the life of [its] nation', to further determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency.

The European Court appeared deferential to, rather than concerned by, the fact that the United Kingdom was the only European government that felt it necessary to derogate under the Convention post-9/11. The Court dismissed Lord Hoffman's dissenting opinion and based its ruling on the fact that Lord Hoffman had 'interpreted the words as requiring a threat to the organised life of the community which went beyond a threat of serious physical damage and loss of life.'⁸² It went on to hold in the past it concluded that emergencies existed even though 'the institutions of the State did not appear to be imperiled to the extent envisaged by Lord Hoffman.'⁸³ The Court completely omitted to mention the previous interpretation of its threshold, ie that of 'a threat of serious physical damage and loss of life' and merely referred to taking into account a 'broader range of factors' than Hoffman.⁸⁴ This acceptance of a state of emergency in the United Kingdom before any actual terrorist attack by Al Qaeda or its sympathisers provided a broad precedent for the applicable threshold in many other situations.

⁷⁸ Ibid 59.

⁷⁹ Ibid 153.

⁸⁰ Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception: With Special Reference to the Travaux Préparatoires and Case-law of the International Monitoring Organs* (1998).

⁸¹ Oren Gross, 'Once More unto the Breach': The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies, 23 *YALE J. INT'L L.* 437 (1998).

⁸² Special Rapporteur Despoux, in his annual report, suggested that other special rapporteurs and the Working Group on Arbitrary Detention pay attention to the issue. See Special Rapporteur's Tenth Report, *supra* note 1, 192.

⁸³ *Id* 172.

⁸⁴ *Id* 181.

This regrettably suggested that misinterpretation, misapplication, or manifest abuse were the objective standards by which the Grand Chamber would set aside the deferential margin of appreciation, rather than measures that cannot be shown as 'strictly required by the exigencies of the situation' (that is, the wording of Article 15). Finally, the Court also rejected the UN Human Rights Committee's view that measures must be exceptional and temporary. The Court stated that it 'has never, to date, explicitly incorporated the requirement that the emergency is temporary, although the questions of proportionality of the response may be linked to the duration of the emergency.'⁸⁵ The unanimous decision by the Grand Chamber of the European Court in *A & Others* served only to consolidate the problems in the European jurisprudence on Article 15. The case stands for general principles that simply do not work, are not able to protect human rights during an emergency and are internally inconsistent. It provided a weak threshold for both the emergency and proportionality of measures, including by expressly endorsing a wide margin of appreciation on both legal questions; public emergency and proportionality of measures. However, the foundations of the Grand Chamber's reasoning in *A & Others*, including on margin of appreciation, are not rock solid, due to a feeling that perhaps the Court would have reasoned differently if there had been no House of Lords decision to rely on. Even if so, judicial reasoning is hardly satisfying.

In summation, a review of the European jurisprudence evidences a pattern of caution and deference in which the Court has failed to impose strict and objective standards for derogations.⁸⁶ Since the case of *Lawless*, the margin of appreciation has featured in all cases before the Commission and the Court on derogations, and more recently it has usually been a wide margin of appreciation. Aside from the *Greek Case*, the Commission and Court have consistently adopted a deferential approach to governments' assertions of a public emergency.⁸⁷ The European judiciary 'chose to defer to the "better position" of the national authorities both to determine the existence of an emergency and to select measures.'⁸⁸

Constitutional Foundation for the State of Emergency in West Africa

Some West African nations, like many nations around the world, declared a state of public health emergency from the onset of the coronavirus outbreak. Questions have raged whether there are any legal bases for these declarations. The declarations are anchored on provisions within the respective constitutions of several states. This section will review the constitutional provision on the state of emergency of Ghana, Nigeria and Sierra Leone and analyse the check mechanisms curtailing the excessive powers under emergency in the Economic Community of West African States (ECOWAS) in these three Anglophone West African nations.

Nigeria's Federal Constitution

Nigeria's constitution elaborately provides for the declaration of a state of emergency. The Federal Constitution provided a meaning for the state of emergency when it unequivocally declared, particularly section 45(3), thus:

*In this section, a period of emergency means any period during which there is in force a proclamation of a state of emergency declared by the President in the exercise of the powers conferred on him under section 305 of this constitution.*⁸⁹

⁸⁵ The U.N. Human Rights Committee, by contrast, states that the '[m]easures derogating from the provisions of the Covenant must be exceptional and temporary in nature.' See General Comment No. 29, *supra* note 2.

⁸⁶ Special Rapporteur's Tenth Report, *supra* note 1, 3.

⁸⁷ *Id.*

⁸⁸ A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 *COLUM. J. EUR. L.* 113, 115-16 (2005).

⁸⁹ Nigeria (1992). *The Constitution of the Federal Republic of Nigeria*. Lagos: Federal Military Government of Nigeria.

Further, the Federal Constitution provides succinctly and in lucid terms the necessary constitution that should warrant the declaration of a state of emergency by the President.⁹⁰ The conditions are when: (a) the Federation is at war; (b) the Federation is in imminent danger of invasion or involvement in a state of war; (c) there is the actual breakdown of public order and public safety in the Federation or any part thereof to such extent as to require extraordinary measures to restore peace and security; (d) there is a clear and present danger of an actual breakdown of public order and public safety in the Federation or any part thereof requiring extraordinary measures to avert such danger; (e) there is an occurrence or imminent danger, or the occurrence of any disaster or natural calamity, affecting the community or a section of the community in the Federation; (f) there is any other public danger which constitutes a threat to the existence of the Federation; or (g) the President receives a request to do so following the provisions of subsection (4) of this section.

The Federal Constitution went further to guide the procedural steps in declaring a state of emergency when it provides that:

Subject to the provisions of this Constitution the President may by instrument published in the Official Gazette of the Government of the Federation issue a proclamation of a state of emergency in the Federation or any part thereof⁹¹.

The President shall immediately publish, transmit copies of the official Gazette containing the Proclamation including the details of the emergency to the President of the Senate and the Speaker of the House of Representative, each of whom shall forthwith convene or arrange for a meeting of the House of which he is President or Speaker, as the case may be, to consider the situation and decide whether or not to pass a resolution approving the Proclamation.⁹²

Further, a sitting Governor of a state may require the President to proclaim a state of emergency in the requesting state where there is in the existence of the situations specified in section 305 and such a situation does not extend beyond the boundaries of the state.

Despite these explicit provisions, the declaration of a state of emergency is restricted to crossing two hurdles to be legal. First, the declaration has to be published in the Official Gazette of the government of the Federation. Second, the direct transmission of copies of the Official Gazette containing the Proclamation including details of the emergency to the National Assembly for approval which shall then consider the situation and decide whether or not to pass a resolution approving same.

Ghana

Ghana's hybrid constitution⁹³, combining elements of the United States constitutional model with the Westminster model, provides in Article 31 of the 1992 Constitution for emergency powers to the executive in times of necessary needs. Article 31 of the 1992 Constitution is placed immediately after the Bill of Rights provisions which makes it a derogation of the fundamental rights of citizens provided for in the Ghanaian constitution.

The 1992 Constitution expressly provides for instances when a state of emergency could be justified thus:

a natural disaster; a situation in which action has been taken or threatened to be taken by anyone which is calculated or likely to deprive the community of the essentials of life; a situation in which action has been taken or threatened to be taken by anyone which renders necessary the taking of measures necessary to secure the public safety, the defence of Ghana and the

⁹⁰ Ibid 305 (3).

⁹¹ Ibid Section 305 (1).

⁹² Ibid Section 305 (2).

⁹³ Constitution of the Republic of Ghana [Ghana], 7 January 1993, available at <https://www.refworld.org/docid/3ae6b5850.html> [accessed 30 October 2020].

maintenance of public order and supply the needed services essential to the life of the community.

Despite the protection of fundamental human rights, there are permitted derogations from which the rule of law can be abrogated from in the constitution. It states that '[n]othing in, or done under the authority of an Act of Parliament shall be held to be inconsistent with, or in contravention of, Articles 12 to 30 of the Constitution to the extent that the Act in question authorises the taking, during any period *when a state of emergency is in force of measures that are reasonably justifiable to deal with the situation that exists during that period.*'⁹⁴

Under which condition then does the President declare a state of emergency? Article 31(1) of the 1992 Constitution answers this question by guiding that the President of Ghana may, acting on the advice of the Council of State, through Proclamation published in the Gazette declare that a state of emergency exists in Ghana or any part of it for the provisions of the constitution.⁹⁵ It is therefore clear that the President can only declare a state of emergency on the advice of the Council of State. It has been interpreted that without the advice of the Council of State, the President cannot declare a state of emergency. Importantly, the Council of State is, under the 1992 Constitution, an advisory body to the President that is very distinct from Cabinet.

Interestingly, Article 89(1) of the 1992 Constitution provides that: *[t]here shall be a Council of State to counsel the President in the performance of his functions.*

In restricting the state of emergency powers of the President, the constitution mandates for facts and circumstances leading to the declaration of the state of emergency to be made known and put in writing before Parliament.⁹⁶ Within 72 hours, the House of Parliament should debate and decide, through a vote, whether the facts, conditions, and circumstances for emergency powers are sufficient enough for parliament to endorse the emergency invoked by the President. Like every democracy, the President is legally bound by the decision of Parliament. If Parliament approves the Proclamation of the state of emergency, then it shall continue in force for three months. Parliament can subsequently, by a majority vote, extend the approval of the emergency that has been declared by the president for a period not exceeding one month at a time. Parliament may also by a resolution of a majority of its members revoke the state of emergency.

Sierra Leone

The 1991 Constitution⁹⁷, like her counterparts in Ghana and Nigeria, elaborately provides for a state of emergency to be declared by the President. Section 29 of the Constitution states:

*Whenever in the opinion of the President a state of public emergency is imminent or has commenced, the President may, at any time, by Proclamation which shall be published in the Gazette, declare that— a) a state of public emergency exists either in any part or in the whole of Sierra Leone; or b) a situation exists which, if it is allowed to continue, may lead to a state of public emergency in any part of or the whole of Sierra Leone.*⁹⁸

Unlike Ghana and Nigeria, the Sierra Leone constitution places the onus lightly on the 'opinion of the president' to determined that there is a breakdown of law or order, or when these situations are 'imminent'. Meaning it does not have to occur, but whether in the subjective thinking of the President, there is a likelihood of a threat to the life of the state. This provision is unique but vague and unguided.

The constitution went further to provide that.

⁹⁴ Ibid 134.

⁹⁵ Ibid section 33 (1).

⁹⁶ Ghana Constitution Article 31(2).

⁹⁷ Sierra Leone Constitution. Act No 6 of 1991.

⁹⁸ Ibid section 29 subsection (1)(a) & (b).

The President may issue a Proclamation of a state of public emergency only when (a) Sierra Leone is at war; (b) Sierra Leone is in imminent danger of invasion or involvement in a state of war; or (c) there is the actual breakdown of public order and public safety in the whole of Sierra Leone or any part thereof to such an extent as to require extraordinary measures to restore peace and security; or (d) there is a clear and present danger of an actual breakdown of public order and public safety in the whole of Sierra Leone or any part thereof requiring extraordinary measures to avert the same, or (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 Sierra Leone, or (f) there is any other public danger which constitutes a threat to the existence of Sierra Leone.⁹⁹

For an emergency to happen there is a four-part test that has to be met. First, the President, in his opinion, should decide that an actual, or perceived, threat to the life of the state warrants a proclamation of a state of emergency. According to Kanu¹⁰⁰, the Supreme Court in interpreting the wide latitude opined that the provisions '*connote abnormality, and curtailment of our rights and freedoms [...and an emergency,] empowers the President to take measures as he sees fit or necessary to control and contain a crisis*'.¹⁰¹ Secondly, a declaration of emergency can be either in the whole or part of Sierra Leone. Third, there should be in existence a 'situation', whether real or perceived, which if uncontrolled will degenerate into a state of public emergency in part or the whole of Sierra Leone. In guiding the executive on what constitutes such situation, the Supreme Court in *S v Osman and Others* regulated that:

'A situation', could be wide-ranging and encompasses a multiplicity of situations ad infinitum. It lies in the sole power and discretion of the President to determine a situation, which at any given time in his estimation, deserves a declaration by Proclamation of a state of public emergency. The exercise of this power is unquestionable and unchallengeable. The situation could be described as 'Economic' 'Political – 'National Disaster, and like situations, too numerous to mention here. Indeed, they are many and varied'.¹⁰²

Finally, there should be a publication of the Presidential Proclamation in the *Gazette*. '*The Gazette [is one which is] published by order of the Government of Sierra Leone and includes any supplement thereto...*' as provided for in section 4 of the *Interpretation Act 1971*.¹⁰³ It is therefore important to note that publication is a significant step for the Proclamation of the President to take effect. Otherwise, the declaration will have no effect.

An interesting judicial interpretation of the state of emergency provision in the Constitution underscores that the declaration of a state of emergency constitutes a threat to the enjoyment of human rights enshrined in the Constitution. The Supreme Court stated that '*Emergency Regulations are laws to which the fundamental rights constitutionally have to give way. They take a back seat to the extent the Emergency Regulations take the front seat. There is no room for both in the front seat. An emergency is what the word means*'. This meaning was adopted by Rodrigo J. in *Visuvalingam & Ors v Liyanage & Ors*, in the Sri Lanka Supreme Court.¹⁰⁴

Conclusion

Legal theories, principles and jurisprudence remain consistent on the state of emergency at both national constitutional level and international human rights platform. This is because emergency issues have been left to the state to determine the margin of appreciation. That being the case, politics rather than legality has determined the various interpretations of what constitutes a state of emergency. The

⁹⁹ Ibid section 29 (2) (a) to (f).

¹⁰⁰ Ibid section 29 (c).

¹⁰¹ *S v Osman and Others*.

¹⁰² Ibid.

¹⁰³ S.C. Applications No. 85/83 AND No. 6/84.

¹⁰⁴ Supreme Court of Sri Lanka, Law Reports of the Commonwealth, 1985, pp. 919-922.

outbreak of COVID-19 presents an exciting opportunity for judicial interpretation not just in developed democracies, but in countries such as Ghana, Nigeria and Sierra Leone.

This article has presented the existing international law and judicial decisions outside of West Africa, and it has discussed the constitutional provisions with varying powers and margin of appreciation. What remains uncontested, however, is that the declaration of states of emergency has remained a dent on the full enjoyment of the fundamental human rights anywhere in the world.

Emmanuel Saffa Abdulai

Emmanuel Saffa Abdulai is a legal practitioner and a lecturer of Law at the Department of Law, Fourah Bay College, University of Sierra Leone. He is also a PhD Scholar at the Institute of Advanced Legal Studies, School of Advanced Studies, University of London. Emmanuel is Deputy Editor of the Institute of Advanced Legal Studies Student Law Review. He is a civil society practitioner working on human rights and democratic governance in Sierra Leone.