HOW DOES A STATE OF PUBLIC EMERGENCY AFFECT YOUR HUMAN RIGHTS? A REPLY TO ALIMAMY SULTAN KOROMA.

By Emmanuel Tondoneh*

“The impression that during a state of public emergency individual rights and freedoms are utterly subverted must not be allowed to hold sway: fundamental rights and freedoms are only interfered with in accordance with the law and only to the extent and in the manner provided by law. It is the judiciary that ultimately makes this call and no other person or authority”

Dr Abdulai Conteh

Abstract

The State, the rule of law and human rights should all go hand in hand. However, the constitution in most jurisdictions, Sierra Leone not an exception, allows the Executive in certain circumstances, in this case, “State of Emergency” to derogate from individual fundamental human rights “enshrined” in their respective constitutions to ensure the continuing protection of their human dignity. Having read the article from a colleague, Alimamy Sultan Koroma, (“Counsel”), in response to the State of Emergency, declared by His Excellency the President of the Republic of Sierra Leone, in which he argues that, as a result of the Proclamation on the 24th March, 2020 approved by Parliament on the 26th March 2020 by the required two-thirds majority, the fundamental human rights of the citizens “enshrined” in Chapter 3 of the Act No. 6 of 1991 will “… no longer apply”, this paper argues that permissible derogation from fundamental human rights does not equate to non-application of the continuum of rights contained in Chapter 3 of the 1991 Constitution of Sierra Leone.

1. **Introduction**

Without examining the details of the Proclamation declaring a state of public emergency, by His Excellency the President of the Republic of Sierra Leone, it is worth noting that the declaration was made to prevent, protect and curtail the spread of the corona virus disease ("COVID – 19"), which has brought the world to a standstill. The declaration was made pursuant to section 29 (1) (a) and (b) and provides that:

> 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.

2. **Analysis of Counsel’s Arguments**

The starting point for any human rights discourse in public emergencies must be the 1948 Universal Declaration on Human Right (the “UDHR”), and the related obligations of member States under the Charter of the United Nations (the “UN Charter”). Intending to protect the rights and dignity of the individuals, Article 2 of the UDHR provides that:

> Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Articles 3 – 30 of the UDHR go on to specify the individual’s rights. Indeed, some international law scholars are of the view that the UDHR has the status of customary international law, however, this argument aside, the rights enumerated in the UDHR are primarily adopted and are enshrined in sections 16 – 27 of Act No. 6 of 1991 (the “Constitution”). To emphasise the importance of these rights, section 28 (1) grants citizens the right to challenge a violation of their rights in the highest court of the land by providing that:

> Subject to the provisions of subsection (4), if any person alleges that any of the provisions of sections 16 to 27 (inclusive) has been, is being or is likely to be contravened in relation to him by any person (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person, (or that other person), may apply by motion to the Supreme Court for redress.
Counsel’s main argument is premised on this categorical statement: “A state of emergency means that the fundamental human rights enshrined in Chapter 3 of the Constitution that protect your basic dignity and freedom no longer apply”. At first reading, this may be the convenient interpretation of section 29 (5) and (6) of the Constitution, but such interpretation must be in the context and limitation of the proviso of section 29 (6) (d). Meaning that the sanctity of the Constitution itself is protected in public emergencies. Thus, on second examination, one would note that Counsel’s assertion is incomplete and thus inaccurate.

The proposition that rights “enshrined” along with one’s “... basic dignity and freedom no longer apply”, is implausible. Counsel goes further by stating in his interpretation of section 29 (5) & (6) that, “The president now has authority to “make regulations and take such measures as APPEAR TO BE NECESSARY AND EXPEDIENT” without having to worry about constitutional safeguards or judicial oversight.” Even though I agree with Counsel that section 29 (5) would appear to give extensive powers to the President during a state of emergency in the use of his discretion, it must be noted that a safeguard is placed in section 29(6) (d) which provides for limitation on the power of the President in that, in the process of amending laws and taking other action, the Constitution in its entirety will not be subject to the amendments.

This argument, post the decision of the Supreme Court in the State vs Adel Osman and Other (1988), on the 1978 Constitution, is first advanced by Dr Abdulai Conteh who argued that “the validity of the exercise of emergency powers, any regulation or measures made or taken thereunder must conform with the prescriptions of the Constitution”2. Considering that some rights cannot be derogated from, it goes without saying that while the President is given broad powers, he cannot derogate from absolute rights but rather can derogate from non-absolute rights for the sole purpose of “maintaining and securing peace, order and good government in the country...”3.

Furthermore, Sierra Leone is a signatory to several international human rights treaties including the International Covenant on Civil and Political Rights (the “ICCPR”), which Sierra Leone ratified on 23rd August 1996 and entered into force on 23rd November 1996, provides in Article 4(1) that:

*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*

---

2 n 1 (Conteh) pp2
3 ibid p5
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.

While the State is entitled to derogate from non absolute rights during a state of
emergency, the Paris Minimum Standards of Human Rights Norms in a State of Emergency
ensure the State does not derogate, not only from the provision of Article 4 of the ICCPR but
also "...from internationally prescribed rights which are by their terms "non-suspendable" and
not subject to derogation"⁴, by providing specific standards which must be satisfied when the
State acts in a state of emergency.

This minimum standard further prescribes safeguards to ensure that standards are met
before derogating from constitutional rights granted to citizens. The fundamental human
rights provided for under sections 15 to 27 of Act No. 6 of the Constitution consist of both
absolute rights (section 16(1)) which the President cannot derogate from as alleged by
Counsel and non-absolute rights. Article 2 provides that, for States to take derogatory
measures, the State is subject to five general conditions:

a. Every State which is a party to a regional or international human rights treaty shall
comply with the principle of notification as may be prescribed by the treaty.

b. Such measures must be strictly proportionate to the exigencies of the situation.

c. Such measures must not be inconsistent with the other obligations of the State
under international law.

d. Such measures must not involve any discrimination solely on the ground of race,
colour, sex, language, religion, nationality or social origin.

e. The fundamental rights and freedoms guaranteed by international law shall remain
non-derogable even during an emergency. As the minimum, the constitution shall
provide that the rights recognised as non-derogable in international law may not be
affected by a state of emergency.

Even though the wording of section 29 (5) may appear to be extensive, it does not in any
way allow the State to trample on the rights "enshrined" in the Constitution without
limitations. The simplistic interpretation of the sections with the use of words like, “your
basic dignity and freedom no longer apply”, gives the ordinary citizenry the impression that
the sacred right to life, for instance, granted under section 16(1) can be taken away because

American Journal of International Law”, (1985), No. 4 (79) pp. 1072-1081
we are under a state of emergency. Although section 29 of Act No. 6 of 1991 gives discretionary powers to the President, section 29(6) contains specific safeguards by ensuring that the Constitution is not interfered with during a state of emergency.

In his final submission, Counsel argues that the only hope for citizens to get back their “basic dignity and freedom...” “...is to call on government to fulfil its obligations under Section 29 (17) of the Constitution that requires the setting up of an independent and impartial tribunal that would review the detention of persons held beyond 30 days during the state of emergency”. I submit that Counsel’s argument goes to support the motion that, even with a state of emergency in place, the rights guaranteed under Chapter 3 continue to be protected pursuant to section 29(17)(a). The power to detain which historically is often wielded during a state of emergency, is subject to review pursuant to section 29(17)(a), after 30 days detention of any citizens by an independent tribunal to assess the proportionality of such derogation.

The safeguards imposed by section 29(17) (a) and (b) goes to show that the dignity and rights “enshrined“ in the Constitution continue to co-exist during public emergencies, albeit limitedly. This view resonates with the position of Dr. Conteh, who argued that even though limitations are imposed on individuals rights under Chapter 3 of the Constitution, during a state of emergency, such limitation on "...fundamental rights and freedoms are only interfered with in accordance with the law and only to the extent and in the manner provided by law. It is the judiciary that ultimately makes this call and no other person or authority“5. The fact that a derogation from individuals’ non-absolute rights under the state of emergency are subject to review by a tribunal goes to support this position and thus discredits the assertion that “enshrined” rights under Chapter 3 of the Constitution, as Counsel puts it,"no longer apply". Instead, it can be said that these rights are somewhat "limited" as provided for in the Constitution; therefore, it can be stated that as derogation does not equate to non-application.

5 n 1 (Conteh) p7
3. **Conclusion**

While I applaud Counsel for his swift response to the subject matter, and for adding to the existing literature on the subject, I disagree with Counsel’s opinion that a declaration of “A state of emergency means that the fundamental human rights enshrined in Chapter 3 of the Constitution that protect your basic dignity and freedom no longer apply”. The ‘simplistic approach’ adopted by Counsel in his interpretation of section 29 does not only cause concern, it also tends to send the wrong message to lay citizenry that, in a state of emergency, that authorities are entitled to infringe on individuals rights without no justification or repercussion under the guise of their non-application.

*About the Author*

Emmanuel Sahr Tondoneh is a legal practitioner in Sierra Leone and a Doctor of Juridical Science (SJD) candidate in International Business Law and Corporate Social Responsibility at the Department of Legal Studies, Central European University Hungary and Austria. Email at Emmanuel_Tondoneh@phd.ceu.edu