

Legal Gridlock and the Doctrine of Necessity the Nigeria Situation in Perspective

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Abstract: The doctrine of necessity is not alien to Nigeria. Its invocation was not first witnessed in the events of Tuesday 9th February, 2010 which saw the senate passed a resolution making the Vice President Good luck Jonathan Acting President and Commander-in-Chief of the Armed Forces. The action indeed provoked mixed reactions from both legal and political spheres as to its constitutionality. The failure of the then President, Musa Yar'Adua to transmit a letter to the National Assembly informing the National Assembly that he was otherwise unable to discharge the functions of the office in which case and until he transmits to the National Assembly a declaration to the contrary, the functions of the president would be discharged by the vice president as Acting President. This is the express provision of Section 145 of the 1999 constitution. This evoked National legal and political analysis as to whether or not the President is under a legal duty to transmit such a letter to the National Assembly. And whether or not a radio broadcast would amount to such transmission to the National Assembly. And in the face of the legal grid lock, whether the senate was right in invoking the doctrine of necessity. Therefore, this paper will critically consider the concept of legal gridlock and the subsequent invocation of the doctrine of necessity. A cursory overview of the implications of invoking the doctrine and explicate the lesson learnt.

Keywords: Gridlock, the Doctrine of Necessity, Legislative Resolution, Discretion

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Introduction

The doctrine of necessity is a rarely used political concept or utilitarian idea and is used to define and validate extra-constitutional issues that fall outside the purview of the constitution but are necessary to preserve political stability. The fundamental objective of the doctrine is to satisfy the exigencies which have been created by certain situation outside the contemplation of the constitution or the rule of law; and its significant feature is the deliberate circumvention of the constitution or some aspects of the rule of law in order to get out of a political quagmire.

It is also a situation where the rule of law and constitution has to be adulterated by extra-legal civil means in the short term in order to preserve the constitution, the rule of law, the government and democracy in the long term. Simply put: to save the country, the constitution has to be dumped and the rule of law has to be slanted. In addition, the doctrine is not a legal

theory but a concession to human weakness. It is also a political arrangement that has garnered some form of legal validation and global support.

Doctrine of Necessity in Domestic Law

It is obvious that national courts refer to necessity, and, some decisions are taken by relying upon this concept at the present-day. Initially the required criteria and the definition of the doctrine must be clarified. Necessity is a common law doctrine providing a justification for illegal government conduct in cases of public emergency. It bridges the significant gap between the actual powers of government and the government's actual response to an emergency.

Possible illegal acts of government would no doubt destroy rights and obligations of various individuals and organs and, at the same time could secure society in general and the existence of state in particular. So reliance upon the doctrine of necessity brings about a necessity of choice between competing values (individual rights and values versus public rights and values of the state itself) and it includes 'a choice of the lesser evil' as described by Williams. In fact there is no agreement among writers on the existence and meaning of the doctrine. For some writers, because of the distinct character of law, judges have always exercised their vested powers of developing the law, and, the concept 'law' includes the doctrine of necessity. According to them, defense of necessity is an implied exception to various rules of law. However some other writers fear the misuse of the defense of necessity, as in the case of *Gregson v. Gilbert* (1783), where 150 slaves were pushed overboard because water was running short, according to them, 'necessity is the plea for every infringement of human freedom and it is the argument of tyrants.' Again recently in Pakistan the learned council Wasim Sajjad argued that 'the law of necessity was a dead doctrine'.

Some Examples from Experiences of Different States

The likely abuse of the doctrine has not impeded national courts in relying upon it and to establish jurisprudence confirming the doctrine. The doctrine has been referred to, in particular, in the US court decisions and gradually has become an established legal principle subject to the fulfillment of certain criteria.

Nevertheless, since the 1950's, the national courts of several newly independent states have abused the doctrine by ignoring the implementation of the established criteria, by a mere reference to previous court decisions in the West. This misinterpretation departing from the doctrine was seen in Cyprus, Nigeria, Rhodesia, Pakistan and elsewhere.

Following the two military coups in Nigeria in 1966, the military government suspended certain provisions of the Constitution and argued that it had the power to issue decrees on any matter whatsoever. On different occasions, the Supreme Court of Nigeria was faced with the question of the character of the military regime. The Court applied the doctrine of necessity to retain its constitutional power of judicial review in *Lakanmi v. Attorney-General* (1970) and intended to legalize the existence of military rule by a reference to this concept. The court held that, necessity in Nigeria dictated such a partial suspension of the Constitution and argued that extra-constitutional acts of a military regime could be validated on the ground of necessity. It validated the new regime while basing its decision on the constitution. This attempt could not be prevented from issuing a decree annulling the court's said decision. According to Stavsky, the *Lakanmi* decision shows the ineffectiveness of attempting to control an illegal regime by legitimizing it.

The General Division of the High Court of Southern Rhodesia used the same approach in 1968 without expressly referring to the phrase 'state necessity'.

A new constitution was granted to the colony of Southern Rhodesia in 1961 by Her Majesty the Queen and in 1965 a coup, led by Ian Smith took place. Prime Minister Smith declared Southern Rhodesia a sovereign independent state and intended to enact a new constitution by disregarding majority rule, which was the constitutional guarantee for black citizens. Following these events, the Governor of Southern Rhodesia announced that Ian Smith no longer held office. All legislative powers were transferred back to the United Kingdom, even though Rhodesia remained under the effective control of Ian Smith.

In 1968, the Rhodesian High Court had the opportunity to analyze the legality of the declaration of independence and 1965 Constitution in the case of *Madzimbamuto v. Lardner-Burke*. The unconstitutional actions of the Smith regime were supported by one judge on the basis of the doctrine of state necessity, and, by another on the basis of the doctrine of public policy. The Court ruled that the revolutionary government was the lawful government; but it also announced that as opposed to the 1965 constitution, the 1961 Constitution was still valid and constituted the grundnorm of Rhodesia. The Court relied upon Kelsen's revolutionary theory, which was very similar to the doctrine of state necessity, in order to legalize the acts of the extra-constitutional regime. According to the court, however, the Smith government had not yet become 'effective' as required in Kelsen's approach. It also determined that if an illegal regime is in de facto control of the government, national courts are under an obligation to confirm some of its actions.

Reference to the defense of necessity departing from the real meaning and criteria was frequently made in Pakistan and an expansive application of the doctrine created a legal basis for regime changes. The Federal High Court of Pakistan relied upon the theories of Kelsen and Grotious instead of a clear necessity in the cases *State v. Dosso* and *Asma Jillani v. Government of the Punjab*.

In the *Governor-General's Case* the Court obviously based its arguments on the doctrine of necessity in order to validate the regime and its actions. But the most important case was the *Bhutto v. Chief of Army Staff*. Following the 1977 elections, widespread civil violence occurred in Pakistan. A proclamation of a state of emergency by Bhutto was ineffective and these events were the main reason for General Zia's coup in July 1977. Bhutto and his cabinet members were arrested and Parliament was dissolved by the military regime. General Zia was appointed as the chief martial law administrator. According to the military regime, the Constitution had not been abrogated, but operation of certain parts of it had been suspended. In addition to other changes, Zia suspended the power of the High Court for judicial review. Notwithstanding the purported suspension, the High Court examined the legitimacy of the new government in the *Case Bhutto v. Chief of Army Staff* in 1977, when the detention of the prime minister under martial law was challenged. The Court decided that the new regime was lawful.

It also concluded that the coup d'état had been dictated by the highest consideration of state necessity and welfare of the people. According to the Court, the constitution was still in force but deviations from it were justified under the doctrine of necessity except the purported suspension of judicial review by the new regime. This constitutional deviation (or partial suspension) period lasted over eight years and martial law was terminated in 1985. Not surprisingly, in 1981 the military regime promulgated a provisional constitutional order,

whereby the authority of judicial review of the Supreme Court and High Court was abolished.

In addition to the above-mentioned deviations, the Greek-Cypriot court also erroneously utilized the doctrine of necessity. In 1964, in the Ibrahim's Case, the doctrine of necessity was completely and arbitrarily reformulated.

The Doctrine of Necessity and the Nigerian Situation in 2010

A related (although non-judicial) use of the doctrine took place when, on February 9, 2010, the Nigerian National Assembly passed a resolution making Vice President Goodluck Jonathan the Acting President and Commander in Chief of the Armed Forces. Both chambers of the Assembly passed the resolution after President Umaru Yar'Adua, who for 78 days had been in Saudi Arabia receiving medical treatment, refused to formally empower the vice president to exercise full powers as acting president, as provided for in Section 145 of the 1999 constitution. No provision of the Nigerian constitution empowering the National Assembly to pass any such resolution, causing Senate President David Mark to assert that the Senate had been guided by the "doctrine of necessity" in arriving at its decision.

According to Femi Falana in his article "Appraising the Role of the Legal Profession in creating an ideal Democratic society" stated that:

When it became clear that the President and the Executive Council of the Federation were not prepared to comply with the provisions of Sections 144 and 145 of the Constitution both Chambers of the National Assembly accepted the BBC interview granted by President Yar' Adua on January 12, 2010 as the transmission of a written declaration.

Accordingly, the Vice President, Dr. Goodluck Jonathan was directed to assume the post of the Acting President. Since the action of the National Assembly was predicated on the doctrine of necessity it has continued to generate controversy across the broad political spectrum.

Femi Falana continued by adding:

Those who criticized the action of the National Assembly have failed to appreciate that a "written declaration" may not be in writing at all times. In the case of Obafemi Awolowo University v. Dr. Onabanjo the appointment of the respondent as a lecturer was subjected to a written confirmation after a probationary period of 3 years. Even though he was allowed to work for 4 months after the probation the appellant fired him on the ground that his appointment had not been confirmed in writing. In rejecting the position of the Appellant the Court of Appeal presided over by Mustapha Akanbi JCA (as he then was) held that the lecturer was deemed to have been re-appointed and confirmed since after the probation, he was allowed to continue working and duly paid for his service.

While it may be said that the Respondent's employment was confirmed on the basis of estoppel by conduct it was also established that a written confirmation might be deduced from the circumstances of a given case. It is therefore grossly misleading to say that the written declaration of the President to the leadership of the National Assembly has to be in writing even when he is said to be in coma on a life support device.

In line with the provisions of Section 148, 214 and 217 of the Constitution it is the President that is exclusively vested with the powers to hold regular meetings with the Vice President

and Ministers, give directives to the Inspector-General of Police and deploy members of the armed forces to aid the civil authority in the maintenance of law and order in any part of the federation.

The Vice President has presided over the weekly meetings of the Executive Council of the Federation and received letters of credence from foreign envoys posted to Nigeria. When religious riots broke out in Bauchi and Plateau States last December the Vice President directed the Inspector-General of Police and the Chief of Army Staff to restore law and order. The order was promptly complied with and peace was restored. Equally obeyed were the directives given to the Inspector-General of Police to ensure that the Anambra State gubernatorial election of February 6, 2010 was conducted without violence. The aforesaid “illegal” directives which were carried out by the Chief of Army Staff and the Inspector-General of Police prevented a breakdown of law and order in the country. Not only were those directives not challenged they were hailed by Nigerians. Yet they were all justified under the doctrine of necessity.

The actions of Dr. Jonathan are not without precedent. It was common knowledge that there was no love lost between President Obasanjo and Vice President Atiku Abubakar. But the latter never hesitated to exercise presidential powers whenever the former was out of the country. Either by accident or design, President Obasanjo was outside the country in 2004 when armed thugs with the connivance of the police abducted Dr. Chris Ngige and removed him as the governor of Anambra State. The Vice President ordered the Inspector-General of Police to reinstate the embattled governor. When told that the President was privy to the despicable conduct the Vice President made it clear to the police chief that he was in charge of the presidency at the material time. The governor was restored in line with the “illegal” directive of the Vice President. If the reinstatement of the governor had been challenged the Vice President would have rightly pleaded the doctrine of necessity.

The doctrine of necessity has been said to be the act of making legal what is otherwise illegal by circumstances. As far as the common law or bourgeois jurisprudence is concerned all decrees promulgated by revolutionary or military governments are justified by the doctrine of necessity. The Constitution of the Federal Republic of Nigeria (Promulgation) Decree No 24 of 1999 (otherwise called the “1999 Constitution”) is one of such laws. The rationale for the doctrine of necessity was succinctly articulated in the case of *Madzimbamuto v. Ladihardner-Burke* when Lord Pearce said:

“The principle of necessity or implied mandate is for the preservation of the citizen, for keeping law and order, *rebus sic stantibus* regardless of whose fault it is that the crisis had been created or persists”.

As an integral part of the common law the doctrine has also been applied in the cases of *Phillips v. Eire*, *State v. Dosso* and *Uganda v. Commissioner of Prisons*. On the power of the legislature to apply the principle the case of *Attorney-General of the Republic v. Mustapha Ibrahim of Kyrenia* In that case due to the secession of Turkey from Cyprus the members of the judiciary and the legislature were unable to function in accordance with the Constitution. The Greek members of Parliament passed a law which established a new Supreme Court. In upholding the validity of the law *Josephides J.* held *inter alia*:

“I have no hesitation in arriving at the conclusion that in these exceptional circumstances it was the duty of the government through its legislative organ, to take all measures which were

absolutely necessary and indispensable for the normal and unobstructed administration of justice. I agree with the submission of Respondent's counsel that the measures taken should be for the duration of the necessity and no more. This is also conceded by the Attorney-General of the Republic."

Since the doctrine of necessity is not an alien concept in our jurisprudence it is submitted that it was not out of place to have invoked it in resolving the constitutional cauldron in which the nation found itself. However, it is my view that the resolution of the National Assembly ought not to have gone beyond the acceptance of the BBC interview of the President as his "written declaration" to the leadership of the National Assembly. In other words, it is not the resolution of the National Assembly but the acceptance of the BBC interview as the written declaration of the President in the circumstances that enabled the Vice President to assume the post of the Acting President. However, the invocation of the doctrine of necessity by the National Assembly to justify its action cannot be faulted. In *Lakanmi and Anor v. Attorney-General of the West and Ors.* The Supreme Court held that the transfer of power by the Acting President to the military high command on January 16, 1966 was justified under the principle of necessity. In particular, the apex court stated:

"We think it wrong to expect that constitution must make provisions for all emergencies. No constitution can anticipate all the different forms of phenomena which may beset a nation. Further, the executive authority of the Federation is vested in the President by Section 84 of the Constitution and we think in a case of emergency he has power to exercise it in the best interest of the country, acting under the doctrine of necessity."

The Supreme Court has also held that the principle of necessity may permit an exception to the rule of *nemo iudex in causa sua* (a person should not be a judge in his/her own cause). Thus, in *Ex parte Olakanmi and Ors. v. Obas Ogunoye and Ors. Mohammed Bello JSC* (as he then was) held:

"The rule of necessity permits an adjudicator to be a judge in his own cause, if his participation is absolutely necessary to arrive at a decision. Thus, in its decision of 15th December 1980, the Supreme Court of United States of America invoked the rule of necessity and nullified as unconstitutional two Statutes by which the Congress had reduced the salaries of Federal Judges including the Justices of the Supreme Court".

Notwithstanding that the Vice President has begun to function as the Acting President the Executive Council of the Federation should, without any further delay, pass a resolution to the effect that President Yar Adua has become incapacitated to discharge the functions of his office. The resolution will enable the Senate President to set up a medical panel to ascertain the fitness or otherwise of the President to continue in office pursuant to Section 144(2) of the Constitution. If the President is declared medically unfit to govern the country by the medical panel he is required to resign or be removed from office. At that stage the Vice President shall assume the post of the President and then appoint a Vice President in accordance with the provisions of Section 146 of the Constitution.

In support of the above proposition Akpo Mudiaga Odje stated in his article "Law and Human Rights" that:

The Resolution of the National Assembly authorizing Dr. Jonathan to assume the office of the Acting President of Nigeria is a child of necessity. Indeed without that pragmatic

approach, the nation could have drifted towards anarchy. The said Resolution however constitutionally imperfect it may be, is what offered the most pragmatic approach to move the already restless nation forward in the circumstances.

Conclusion

In conclusion it is imperative to state that No doubt, the intervention and the Invocation of the rarely used doctrine of necessity by the National Assembly contributed significantly to the resolution of the self-imposed constitutional crisis.

Finally, in resolving the constitutional crisis in favor of popular democracy the attention of Nigerians ought to be drawn to the words of Shakespeare: “There is a tide in the affairs of men, which taken at the flood, leads to fortune, omitted, all the voyage of their life.

References

1. Gregson v Gilbert, 1783. 3 Doug KB 232, 99 ER 629(KB).