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The Scope and Application of Doctrine of Necessity in Nigeria

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ABSTRACT

Nigeria became an independent sovereign nation on the 1st of October, 1960 and baptized with republican status in 1963. The Constitution has been its supreme law except in few circumstances when it was suspended as a result of military putsches. Nonetheless, the constitution remains the compass that directs the ship of the country. In other words, actions of government are dictated by the supreme law commonly reiterated in the philosophy of Hans Kelsen as the grundnorm. What this presupposes is that actions of government taken outside the purview of the constitution are illegal. The Nigerian courts have declared such actions illegal and so it is because the country threads the path of constitutionalism that resonates with the concept of rule of law. However, in history, the successive leadership of the country has been faced with pressure of circumstance that require the adoption of certain measures or course of action which falls outside the law under the justification of necessity. The aim of this paper therefore, is to analyze the doctrine of necessity and its application. It will further examine the nature, concept, history and its application in Nigeria. It will also juxtapose the concept with rule of law and revolution. In the end, the paper concluded that the application of the doctrine should be guided by law to avoid being used for other purpose. The methodology used in this work is the doctrinal approach. The primary data used are employed through the use of doctrinal methodology. It is mainly the use of manual/ virtual library oriented literatures. Recourse is also heard to the consideration of various types of domestic legislations in the light of constitution as well as judicial authorities. The recommendation of this work is premised on the suggestion that the application of the doctrine should be guided by the position of the law and the courts are also urged to interpret the law with the intention to assuage the purport of applications of the doctrine by the people.

Keywords; Constitution, Doctrine, Application, Necessity, Adoption, Theory. Principle.

1. INTRODUCTION

The doctrine of constitutionalism presupposes that actions of government must conform to fundamental laws of the land. A. V. Dicey's treatise, 'introduction to the study of law of Constitution' eloquently typified this principle when he said men should rule according to the law as stated and not in the way they deem fit.[1] This principle has found its way into so many legal orders or constitutions across the world. It is the reverence of this principle that saw undemocratic dispensations declared archaic or outmoded. Western nations led by the United States of America have been at the forefront of the campaign against absolute rule.[2]Similarly Nigerian laws and judicial decisions have also encapsulated this theory. For example In ***Obeya Memorial Specialist Hospital v.AG Federation***,[3]Hon Justice Kazeem declared that the Nigerian Constitution is founded on the rule of law, the primary meaning of which is that things must be done according to law. Lord Denning (MR) once posited that the stream of justice must be kept pure at all times.[4] Conversely it must be emphasized that the stream of law should not be muddled nor obstruction be allowed to disturb its course. Any obstruction to their course always elicits the chorus of illegality[5]. The proponents of legal positivism and dialectical materialism also hold the view that law must be free from politics, history, sociology and ethics. This is the basis of Hans Kelsen's 'pure theory of law'.

Within the realm of the forgoing theory comes the extralegal actions of the government which are not strictly within the legal order but are taken as of necessity and which, most times, are aimed at restoring order or to prevent worse harm to the state. The Pakistani Chief Justice Muhammad Munir[6] and

[1]*Michael L. Principe*, 'Albert Venn Dicey and the Principles of the Rule of Law: Is Justice Blind? A Comparative Analysis of the United States and Great Britain' (2000) 22 Loy. L.A. Int'l & Comp. L. Rev. 357

[2]George Williams, 'Republic of Fiji v Prasad Melbourne' (2017) vol. 2 Journal of International Law, available at https://law.unimelb.edu.au/__data/assets/pdf_file/0017/1680011/Williams.pdf visited on the 17th February, 2019

[3](1987) SC 7, P52.

[4]Denning L, *Due process of law* (Indian reprint 1980) Oxford University Press.

[5]Read more at: https://www.vanguardngr.com/2018/05/496m-tucano-illegality-buharis-doctrine-necessity.

[6]State v Dosso [1958] 1 PLD 533, 538 (Pak SC) Munir CJ.

Justice Gates of the Republic of Fiji[7]consider such act legal once it fulfills its purpose or becomes effective.[8]This is commonly expressed in the Latin maxim: *saluspopulisupremalex* – the safety of the people or state is the supreme law. Similarly, Henry de Bracton, the famous English jurist, grounded his philosophy of law on legitimizing extra-legal action of government. In this sense, will it be right to accede with the cliché that says: necessity oversteps the law because the law itself springs from the fountain of necessity? If this is the case, Munir, Gates and Bracton are right.

In the criminal jurisprudence violation of penal laws is also excused on the ground of necessity so long as it can be proved that there is no criminal intent or violation is done to prevent greater harm.[9]The English criminal jurisprudence has long recognized this principle. Thus, it is a justification to break the word of the law and not yet break the law itself when necessity beckons.[10]

In tort, the doctrine is invoked as a defence sometimes to justify the invasion of personal chattels or property in situation of wars or to destroy a house on fire to protect other houses from being consume by fire.[11] Thus it is a tortuous necessity for a government to invade private property for public purpose.[12]

Even the religious scriptures relax adherence to or application of legal principles in situations of or in matters of expediencies, for example to save life and properties.[13]

In Nigeria, the government has been faced with the situations that call for the invocation of the principle of necessity in time past, the last being in 2018.[14] Although there is no known case law where such defence of necessity was ever upheld in criminal trial, it is nonetheless regarded as a shield.[15]The reason has always been the inadequacy of the law to cover the prevailing circumstance that call for application of the doctrine. The arguments that necessarily follow the application of the principle are manifold, to wit: whether the circumstance that compel the application of the doctrine is necessary to justify its invocation; that the doctrine itself is illegal and any action founded on it is also illegal because it is not provided for under any law in force; and those who find its application necessary always hinge their defence on the provision of constitution or law and for purposes of political expedience. We shall therefore endeavor to examine or find out these rather tripod contentions or stands with a view to arriving at a better or more enlighten position.

2. THE NATURE AND CONCEPT OF THE DOCTRINE OF NECESSITY

The doctrine of necessity is a concept fashioned by British and American government several centuries ago to determine the legitimacy of absolute rule over democratic government.[16] The concept is also introduced in criminal jurisprudence for a defendant or accused person to escape or justify his criminal liability overtime. The Black's law dictionary not only defines necessity as a force or influence that compels an unwilling mind or person to act but also expounded necessities further by categorizing it into manifest, moral, physical, private and public necessities[17]. However, understanding the doctrine of necessity requires dilation of necessity in its varied concepts in legal, political and religious connotations. Although deeper examination of the nature of necessity as expounded by these principles, tend to sway into a consensus as can be seen anon, generally, it is adoption of certain pressure of circumstance which is outside the law or constitution for the sole purpose of averting a danger or for the good and welfare of the state. To stretch this further, it is a situation where the rules of the constitution are suspended and the rule of law slanted for the purpose of satisfying exigencies which are not contemplated by the law or constitution but necessary to get out of a legal and or political quagmire. In buttressing this point, Alex Frame[18] cited Friedrich Meinecke[19] in the following words:

'If a statesman feels himself obliged by "necessity of State" to violate law and ethics, he can still feel himself morally justified at the bar of his own conscience, if in doing so he has, according to his own personal convictions, thought first of the good of the State entrusted to his care … Thus, all conduct prompted by raison d'etat fluctuates continuously back and forth between light and dark....'

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[7]Prasad v Republic of Fiji [2001] 1 LRC 665 (HC). The learned Justice Gate of Republic of Fiji did recognized that necessity may warrant extra ordinary measures.

[8]Nwabueze B O. *Ideas and fact in constitution making* , Morouhundiya lecture series,(Spetcrum Books Limited, 1993) P12.

[9]Chukkol, K.S. *The Laws of Crimes in Nigeria.* (ABU Press Limited Zaria 1989) at P. 155. See also section 49 of Penal Code

[10]Glaze Brook the plea of necessity in English criminal law (1972) cited from Chukkol KS Op.cit. the law of crimes in Nigeria at P. 265.

[11]Finan J.P And Ritson J, Tortious Necessity; The Privileged Defense, available at https://Documents/Tortious%20Necessity%20-%20Doctrine%20of%20necessity%20in%20tort.pdf assessed on the 14th February, 2019 P.34

[12] For example see section 28 of Land use Act which empower the government to takeover private estate for overriding public interest

[13] See Holy Koran. Surah An'Aam, Part vi Verse no. 119

[14]On the 26th of April 2018, the Nigerian president, Muhammadu Buhari wrote a letter to the national Assembly seeking for an approval for the sum of $496m, which had been spent on 12 tucano fighter jets, payment was made without legislative approval and the reason given was because of 'social emergency. See daily post, 30 April, 2018

[15]See section 49 of Penal Code.

[16]George Williams, 'Republic of Fiji v Prasad Melbourne' (2017) vol. 2 Journal of International Law, available at https://law.unimelb.edu.au/__data/assets/pdf_file/0017/1680011/Williams.pdf visited on the 17th February, 2019

[17] H.C Black 'Black law dictionary ,Lawyers Co-operative Publishing Company, Inc. 8th Edition, 2019 at P. 1058

[18]Is a professor of law, University of Waikatos

[19]Frame A, Salmond, 'Necessity and the law' https://www.victoria.ac.nz/law/research/publications/vuwlr/prv-issues/vol-38-4/sal-nec-state-frame.pdf accessed on the 17th February, 2019 P. 23

In criminal law, the existence of necessity as a shield to violation of criminal law must have the effect of neutralizing the mensrea. Francis Bacon held this view dearly when he said:

The law chargeth no man with default where the act is compulsory and not voluntary and when there is no consent and election; and therefore if either there has been an impossibility for men to otherwise or so great a perturbation of the judgment and reason as in presumption of law of man' s nature necessity carrieth a privilege itself.[20]

In essence, necessity must present unavoidable circumstance, absolutely requisite and indispensable before its application. Islamic connotation of necessity falls in line with this view. Thus, Surah Al-Nehal part XVI Verse No. 115 provides: "He hath only stopped you from eating meat of dead, blood and the flesh of swine…. But if one is compelled under necessity not crossing due limits, then God is forgiving and the Most Merciful."

The postulation of the forgoing verse of the holy Quran conveys the thought that a servant does not disobey God and is often forgiven if he is forced by necessity.[21]

In Christendom, the rule of necessity also applies but with certain limitations. For example, the book of Proverb 6:30 provides:" People do not despise a thief if he steals to satisfy his hunger while starving. Yet if he is caught, he must pay seven fold, though it costs him all the wealth of his house."

By the import of the foregoing verse, stealing to satisfy hunger will be a lawful disobedience to God's command and there will be no recompense if the person is not caught.[22] In other words, an act which is necessary is not wrongful so long as it is not done deliberately and or with ill- intention. This is best expressed in the Latin maxim, *Necessitas non habetlegem*, which means that necessity knows no law.

In rare political concept, it is a validation of extra-legal or constitutional issues which may or may not fall within the contemplation of the constitution for the purpose of ensuring political stability and good governance.[23]This view came so close to the holding of Justice Gate in *Republic of Fijiv.Prasad*.[24]Sir Casey led Court of Appeal of the Fiji also agreed with Justice Gate on this point and held as follows:

The doctrine of necessity enables those in *de facto* control, such as the military, to respond to and deal with a sudden and stark crisis in circumstances which have not been provided for in the written Constitution or where the emergency powers machinery in that Constitution was inadequate for the occasion. The extraterritorial action authorised by that doctrine is essentially of a temporary character and it ceases to apply once the crisis has passed.[25]

This means that maintenance of law and order and prevention of anarchy can be a solid justification to effect and validate a change of government. In other words, any usurper of legitimate government can ground these epithets or sobriquet as exigencies or necessity to effect a political change. Indeed any government can also be excused to deep her hand in unappropriated public funds to answer or meet the demands of military necessity.[26] In any event and by the foregoing dictum, such necessity must have a short life span. That is to say, it extinguishes once the purpose for which it is invoked lapses.[27]

In all of these, a duty of necessity must be created in each of the situations outlined under the categorization before it becomes effective either as a shield or to avoid liability. In other words the circumstance under which the necessity will be created must be highly or imperatively necessitous, needy, pressing and inevitable. Such instance can be hinged on urgent situation of clear danger or imminent peril.[28]

In all of the forgoing, there is a consensus that the doctrine of necessity operates in a political and legal sphere because it has the character of suspending, usurping, slanting and or bypassing the rule of law to answer for the exigencies or inadequacies which is not contemplated or adequately covered by the rules or law itself for the sole purpose of ensuring stability and equity in the governance and also to avert danger that may harm the individual or destabilize the polity.

Drawing from the conclusion of Alex Frames[29] view, necessity can also be used not only to legitimize the government of a dictator but can also be called in aid to protect the legitimacy of the government from the usurper.

The doctrine itself has the tendency of elevating the power of a law giver beyond limit. Purists and positivists are comfortable with this legal posture of the theory because in their view, such character clearly reflects the definition of true sovereign.[30]

Here remains the question: is necessity driven act illegal? Moralist and natural law purveyors will certainly answer this in the negative. By and large the concept of the doctrine is still weaved around justification and excuses. For whatever it is, the journey of expounding the concept that started centuries ago is still on and so it will be.

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[20]Francis Bacon, (1630) *The Element of common law of* England cited from Chukkol K.S*Law of crime*Op.cit at Pg 155.

[21] Holy Quran, Chapter II Verse No. 173.

[22] Holy Bible, Proverbs 6:31.

[23] Assessed at http://saharareporters.com/2010/02/13/doctrine-necessity-perspective visited on the 18 February 2019

[24]Justice Gate held that necessity may warrant extra ordinary measures

[25] Noel Cox, 'Prasad v Republic of Fiji; Military on trial'(2003) SSRN Electronic Journal https://law.unimelb.edu.au/__data/assets/pdf_file/0017/1680011/Williams.pdf accessed on 18th february 2019, P.8

[26] The withdrawal of unappropriated money by the Government of President Buhari was dubbed necessity in 2018.

[27]This point was vehemently disapproved by appellate court in Prasad Case.

[28]See Canadian Chief Justice Brian Dickson decision in R V Mongetelar. 1 S.C.R. 616

[29]*Ibid*

[30] *ibid*

3. THE HISTORY AND APPLICATION OF THE DOCTRINE OF NECESSITY

As already stated, the doctrine of necessity is a term used to validate extra- legal, administrative and constitutional actions by either government authorities or individuals in defence of criminal liability. The doctrine has its origin from the writings or treatise of Henry de Bracton.[31]In other words, how the doctrine evolved historically can be traced to the writings of these early philosophers. Bracton premised the doctrine on the maxim 'that which is otherwise not lawful is made lawful by necessity'

However, a commentator throws light on the historical development of the doctrine. Michael Head explains what inspired the development of the doctrine thus[32]:

The doctrine of revolution was primarily shaped by the English civil war of the 17th century and the American War of Independence of the 18th century. Both overturned the previous legal order. The civil war of the 1640s initially overthrew the British monarchy. It was followed by the so-called Glorious Revolution of 1688, in which Parliament installed a new royal lineage, the House of Orange, on the condition of power-sharing between the Crown and the Parliament. The War of Independence established a new nation, the United States, through the defeat of the British. In these revolutions, the British and American courts recognised the legitimacy of the victorious side and generally sanctioned acts done in the name of their revolutions, dating back to the dates on which their rebellions commenced. These revolutions were fundamentally progressive eruptions, breaking up the old feudal-monarchical forms of rule and signalling the rise to ascendancy of the emerging capitalist classes

In essence, the development of the theory by the forgoing historical account is anchored on successful revolutions of 17th and 18th Century, which firmly dislodged the existing feudal monarchical order in favour of new aristocratic capitalist order without regard to established rule. In fact the change was given judicial blessings in order to legitimize its authority[33]. As a consequence, the British and American government used this doctrine to further their economic and political interest across the globe by supporting regimes that came to power through undemocratic means especially in Africa and Asia by the 2nd half of 20th Century.[34]. For example, the duo super power have used the doctrine to legalize the military coups which overthrew the existing democratic governments in Pakistan (1958), Congo Democratic Republic(1965)Uganda (1966), Lesotho (1986 and 1990), the Seychelles (1977), Grenada (1979) and recently in Republic of Fiji in year 2000.In fact American support for Mobutu SeseSeko[35]dictatorial regime ensures it lasted for 32 years and by any historical accounts, one of the longest in Africa.[36]

In each of the revolutions or military coups, the reasons advanced for their support was premised on the theory of effectiveness propounded by Hans Kelsen which stipulates that a revolution does not require tacit or express approval of the population as a whole so long as it can prove that it has establish new legal order and in firm control of the country.[37] For example in the State v Dosso, Chief Justice Munir held that revolution needs not to command the acceptance of majority before it becomes effective.[38]Agreeing with this view, Culinal CJ also held in Lesotho case of Mokotso v HM King Moshoeshoe[39] II as follows:

'Throughout the course of history there have been regimes, indeed dynasties, holding sway for many years, indeed centuries, whose rule could not be said by any manner of means to be popular and could even be described as oppressive: but who is there to say that a new legal order was not created with their coming and going'

The above principle became the hanger on which extra-constitutional measures are given legal effect or legitimized. Notwithstanding, the Roman Republic political value around 500 BC which operated on two consuls had made allowances for appointment of a dictator by the senate to deal with issues that arose in emergency or exceptional circumstance usually for a temporary period of six months. During this period he takes over the power of the consuls who are the heads of the executive and would do anything outside the constitution for the purpose of discharging his responsibility.[40]

However, Criminal law recognizes as legitimate the breach of established general rule of conduct under the justification of necessity. Therefore evolution of and reception of doctrine of necessity into criminal Jurisprudence can be traced to this principle. According to the Donald L Horowitz, reception of doctrine of necessity in criminal jurisprudence evolved with philosophy of justificatory and excusatory defenses theory.[41] He explains thus:

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[31] Saad A.S and Rama Subbaiah YP, 'Administrative law: Doctrine of necessity, doctrine of legitimate expectations and doctrine of delegation'(2017) Vol 3, Issue 3, Pages 59-62 International Journal of Law <file:///C:/Users/user/Downloads/3-3-16-196.pdf> visited on the 21st February, 2019.

[32]Michael Head, A Victory For Democracy? An alternative assessment of Republic of Fiji V Prasad assessed at https://law.unimelb.edu.au/__data/assets/pdf_file/0005/1680224/Head.pdf, visited on the 22nd February 2019 P.10.

[33]The US Supreme Court upheld the legality of measures taken by the southern states to maintain order and economic life, even though these governments were engaged in rebellion against the US Government. See the case of Texas v White (1868) 7 Wallace 700, 733.

[34]*Ibid.*

[35]Mobutu SeseSeko; was the military dictator and President of the Democratic Republic of the Congo (which he renamed Zaire in 1971) from 1965 to 1997.

[36] Congo was an integral part of cold war jigsaw and became the base for America to further its interest and cut soviet influence in sub Sahara African.

[37]Hans Kelsen, *General Theory of Law and State* (Reprint 1946) *Pg*118–9. This is because under this theory, law is a coercive order and once it is applied and achieve its purpose, it is effective.

[38]PLD 1958 SC.553.

[39][1989] LRC (Const) 24, 130.

[40] William Vázquez Irizarry, '*Exception and Necessity: The Possibility of A General Theory Of Emergency'* Assessed on https://yale.edu/system/files/documents/pdf/sela/VazquezIrizarry_Eng_CV.pdf visited on the 28th February, 2019 P.25.

[41]*ibid*

'Justification defences evolved earlier largely in connection with privileges accorded to recognized authorities to take forcible action against law-breakers. Excuse defences evolved later, in tandem with the slow growth of the idea of culpability as integral to the criminal law'

Thus it is commonly recognized and asserted that doctrine of necessity has its root in the fabric of English culture from time immemorial. In fact the theory or term honour cliché of right to choose from the two lesser evils was a common law doctrine which has its root in antiquity.[42]It is more or less referring to commission of criminal act in order to preserve a higher value.[43]Fortuitously, evolution of tortuous necessity share same or similar historical account. Tortuous liability is excuse for act that seeks to preserve greater danger. According to the learned professors of law of Akron school of law and the University of Wolverhampton, U.K[44] the notion of necessity in tort originated from the concept or idea of protecting the section of community from peril of the greater harm[45] various English case law authorities have proven this assertion. In other word, English cases as far back as 1608[46] have amplified this historical proposition.

4. THE PHILOSOPHY UNDERPINNING THE APPLICATION OF DOCTRINE OF NECESSITY

The thrust of the doctrine of necessity is rooted in the legitimization of extra- legal order or justification of infraction of legal order on the basis of and for the assumed purpose of greater good of the society and its people. Oliver Cromwell and William Pitts were quoted as saying that the only cozenage men rely on to push for breaking of law or doing things outside the law is to feign necessity.[47]In the word of Oliver Cromwell, he said

'Necessity hath no law. Feigned necessities, imaginary necessities … are the greatest cozenage that men can put upon the Providence of God, and make pretence to break known rules by'.

Again there is a total disconnect between the principle that hold the law supreme and the urge to violate the law for the greater safety of the people. This has generated a great deal of debate that polarized the divide. In any event the world now operate or thread the path of constitutionalism which defined the role the state plays in achieving its social policy objectives.[48] It also place moral burden on the ruler to ensure that the stated objectives are accomplished or realized.

Curiously, the consequences that follow the pursuit for greater good, safety and well -being of the society by the state requires adoption of measures outside the law. Salmond's thought of a state as an embodiment of constitutional structures and social order accord with this assertion and further denotes that the state exists for the promotion of peace and maintenance of law and order.[49]

Interestingly, in Prasad case, the judiciary found itself again in conundrum of trying to bridge the gap between the constitutional fact and constitutional law. A fortiori, it has held that legal order can be disrupted under the excuse of exceptional emergency and unexpected reality. Mr. Justice Gate was quoted as saying that:[50]

In cases of real emergency the maxim "saluspopuliest suprema lex" applies (that is, the welfare of the people is the paramount law). Oliver Cromwell, who had briefly studied law at Lincoln's Inn but who had probably gained his directness and common sense from farming in Cambridgeshire, allegedly said: "If nothing should be done but what is according to law, the throat of the nation might be cut while we send for someone to make a law". I am satisfied that the President acted as lawfully as he could in the circumstances, that he acted under the doctrine of necessity and that he acted in an attempt to buttress the lawful framework of the State

Similarly the defence of justification and excuse is an exculpatory factor and one of the incidences of mitigating criminal liability particularly when the need to choose the lesser evils beckons.[51] This is not to say or be contrasted with Hobbesian theory of absolutism. Justification is available only for necessity driven act. For example a company or growing concern cannot put up a defence of dishonesty or financial misfeasance as basis for her continue existence. Rather the concept engages the imperative theories that elevate the power of sovereign without limitation such that moral element which are not codify into law but are necessary for the good of the society can be apply for that purpose with ease. For example, expropriation of private property can be allowed for greater good of the public. It will not be a tortuous wrong to invade the private property for the purpose of avoiding greater harm to others.[52]

The greater push behind the doctrine of necessity is the urge to fill the vacuum created by circumstance not covered by the legal order for the benefit of the state. It is for this singular reason alone that the doctrine becomes a common place in the body politics and criminal jurisprudence.

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[42]Arnold E B and Garland N F. 'The Defense of Necessity in Criminal Law: The right to choose the lesser evil' Journal of criminal law and criminology (1974) , Vol. 65, No. 3 (2009), Northwestern University school of law. Available at https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=5903&context=jclc, assessed on the 11th March, 2019 P.32.

[44] Professors John P. Finan, J.D., Columbia University, was a member of the faculty of the University of Akron School of Law and John Ritson is a professor of English law.

[45] See Finan J P., *op. cit.*andRitson J, *op. cit.*

[46] From example see Mouses' Case, 77 Eng. Rep. 1341 (LB. 1608).cited in the work of John P and Ritson J, op. cit.

[47] *Ibid* at P.34

[48] For example see chapter 2 of the constitution of Nigeria 1999 (As amended)

[49]*Ibid*

[50]*ibid*

[51]. Arnolds E B, Garland N F ,*Op cit*.

[52]Urban and Regional Planning and Development Law of Lagos S.74

The forgoing view is in tandem with supposition of John Locke when he said the good of the society requires that the executive retains the 'power of doing public good without a Rule'[53]in other words, the state suspend the law on the basis of preserving and uphold the right of citizen only in a dare emergency situation. What this means is that in an emergency situation, the law takes the back seat or recedes temporary until the situation that calls for its suspension abates.

5. THE APPLICATION OF DOCTRINE OF NECESSITY IN NIGERIA

The debate on the legality of extra-legal order is still raging in Nigeria. This is because as a sovereign nation, the country threads the path of constitutionalism which presupposes that any action of government or individual must conform to the law of the constitution. The proponent of this view argued that the application of the principle will do serious violence to the principle of supremacy of constitution and also the principle of legality which denotes that every action of state authority are exercised within the ambit of the law and the constitution enacted in conformity there with.[54]However the school of thought in defence of application of the doctrine premised their reasons on the imperative of well-being of the society[55]

Interestingly, the constitutionalism is not possible when the emergency situation beckons for the purpose of restoring order and to promote good governance. In actual fact, the first time the doctrine was invoked in Nigeria was on the 9[th]February; 2010. When Dr. Goodluck Ebele Jonathan, then Vice President of the Federal Republic of Nigeria was made the acting President by the Joint resolution of both chambers of the parliaments. The situation that calls for it was the apparent and seeming violation of section 145 of the 1999 Constitution as amended. Late President Umaru Musa Yaradua was in Saudi Arabia for medical treatment but did not formally transmit power to the Vice President to act on his behalf as required by the constitution. In other words, Mr. Jonathan cannot act as acting President or exercise the powers of president until the power is duly transmitted to him by the seating president. According to the then Senate President, David Mark, the parliament was guided by the principle of necessity in arriving at its decision to appoint Mr. Jonathan as the acting President.[56]

Similarly, in 2018, President Muhammadu Buhari, while citing social emergency as a justification, spent the sum of USD 496 Million to purchased 12 Tuccano jet fighters to boost the security architecture of the country. This was done without appropriation by the National Assembly as provided under section 80 of the Constitution. Such action has generated a lot of arguments as to whether that singular act of the president was necessary as to justify jettisoning the constitutional provision under section 80 of the 1999 Constitution.

Accordingly, Nigeria is a federation of 36 components state with Federal Capital at the Centre. Each of these states are regarded as autonomous in many respect and are not subject to external control from national governments. In other words each of the 36 states has powers to control its own affairs as are conferred on it by the Constitution, or in the manner prescribed by the Constitution, within the limits prescribed therein.[57] However in situation of emergency or necessity, the center break this bonds and takes over the control of its affairs and sometimes appoints administrators to deal with such issues that may arise during this period.[58]Such period of emergency does not exceed six months.

During this period, extra-legal measures can be taken by the President in other to fulfill the purpose of the declaration of emergency usually to restore law and order. Such instances could be arrest of the individuals beyond the constitutional guarantee period, taking over the finances of the state and control of and exercising authority on those items listed in the constitution which ordinarily would have been beyond its legal limit and in extreme circumstance suspends the governor of the particular state. [59]According to John Locke exercise of prerogative power of emergency is justify if it is exercise for public good.[60]

It is also true that when dealing with violent crises, employment of legal measures or constitutional niceties ought to be jettisoned or forgone.

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[53] John Locke, *Two Treatises on Government* (edited by P. Laslett, Cambridge University Press, 1998) p. 375 cited in David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (; Cambridge University Press, 2006) , p. 38.

[54]Onwanibe, R. C. (1989). The Rule of Law and the Rule of Man in O. C. Eze (Ed.). Society and the Rule of Law. Owerri: Totan Publishers. Pp. 171-189.

[55] B ONwabueze (1964) *Constituional Law of Nigeria Republic* , P.173

[56]See Eagle Online May, 2 2018.

[57] Section 2 (2) of the 1999 Constitution describes Nigeria as a federation consisting of states and a Federal Capital Territory arising from which, Section 5 (2) (a) vests in the Governor of a State the executive powers of that state while Section 176 (2) describes the Governor as the Chief Executive of his state which invariably makes him the Chief Security Officer of that state underscoring the formal division of governmental powers among the component units that make up the federation.

[58] See section 305 of the constitution. In all countries, it is recognized that constitutionalism has to be limited by the exigencies of an emergency, since an emergency implies a state of danger to public order and safety, which cannot adequately be met within the framework of governmental restraints imposed by the constitution. See also Nwabueze, B.O., 1973, Constitutionalism in the Emergent States, Cranbury: Associated University Presses, Inc, p. 174.

[59]President Obasanjo suspend the governor of Plateau State, Joshua Dariye during the proclamation of state of emergency

[60]*Ibid.*

Abraham Lincoln argued that, "just as every man thinks that he has a right to live so does every government think that it has a right to live. Just as every man will override all laws to protect himself from a murderous assailant, so will a government trample down a constitution before it allows itself to be destroyed."[61]

Instances like the forgoing fortified President Obasanjo to proclaim state of emergency in Plateau state in 2001and removed the governor of the state. In 2011, President Goodluck Jonathan was activated by the plight of insurgency in North Eastern state to declare state of emergency in Yobe, Adamawa and Borno State.

In each of the forgoing situation, necessity is invoked on the ground of national of security. Needless to say that primary duty of every president or leader in Nigeria is to strengthen national security[62]

6. THE RULE OF LAW AND DOCTRINE OF NECESSITY

The rule of law in any society ensures certainty of law and orderliness. In other words it is only when the law is allowed to rule that the ruler and its subjects become accountable.[63] What this presupposes is that every action of both the government and the individuals are subject of law otherwise they become otiose and hopeless.

In the constitutional theory of state, the state adheres to laid down rules and must not go outside it. However, in a situation of extreme necessity, the backbone of the legal certainty is broken for the good of the state. According to Thomas Jefferson, a strict observance of the written laws is doubtless, one of the high duties of a good citizen but it is not the highest. The laws of necessity, of self-preservation, of saving one's country when in danger are a higher obligation. He argued further that to lose one's country by a strict adherence to written law would amount to absurdly sacrificing the ends to the means.[64]

The forgoing argument led credence to the fact that legal orders can be disrupted once it exceeds the supposition of normalization or certainty in the interest of the state. According to Prof William Vázquez, "the reality then is that legal certainty entails certain conditions of normality under which it is possible to provide predictability to the consequences of individual behavior. Altered or eliminated such conditions, the promise of certainty cannot be fulfilled".[65]

This also fortified the argument of Michael Stoke Paulsen when he said the constitution is not a suicide pact and should not be construed as such when alternative construction is not impossible.[66] Although it is not the concern of this paper to foray into how a constitutional government will confront the unforeseen emergencies, it is not out of place to maintain that the constitution itself creates room for its own disruption. For example the duty of the president in a constitutional government goes beyond the preservation, protection and the defence of the constitution. He has the ultimate duty to preserve the nation from being ruined. [67] This view is in tandem with the supposition that necessity does not abrogate express provision of law but fortified it in other to save the law from being annihilated.[68]

Rule of law protects and preserves the sanctity of the state no doubt but the factual reality is that the constitution cannot possibly provide for every unforeseen circumstance and that is why it is expressed by a scholar that doctrine of necessity is part of the law.[69]

The forgoing view may sound puerile. However Abraham Lincoln advanced these posers, to wit: Was it possible to lose the nation, and yet preserve the constitution? By general law life and limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. He further contends that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.[70]

The arguments of Paulsen[71] and Brookfield[72] are germane in this respect: even the courts cannot do anything in its interpretative exercise of the law to undermine the necessity to preserve the nation or protect the society. Such actions must be pronounced valid. Doing otherwise, the executive arm of government will be justified to defy the order of court. Paulsen was forceful in his argument when he said If a President concludes that the survival of

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[61]Kayode Oladele, The Doctrine of Necessity in Perspective, at http://chatafrik.com/articles/politics/the-doctrine-of-necessity-in-perspective accessed on 23rd April 2019 P.61

[62]ibid

[63] United Nations Report: The rule of law and transitional justice in conflict and post conflict societies (UN Secretary General report 2004) http://www.unrol.org/article.aspx?article-id=3 accessed on 12th April 2019 P.19.

[64]Letter from Thomas Jefferson to John B. Colvin (Sept 20, 1810) in Thomas Jefferson, Writings 1231 (1984) cited in Gross .O, Chaos and Rules: 'Should Responses to Violent Crises Always Be Constitutional?'112 Yale L.J (2003).

[65] William Vazquez op.cit

[66] Michael S. P, The Constitution of Necessity, (2004) 79 Notre Dame L. Rev. 1257. Available at: http://scholarship.law.nd.edu/ndlr/vol79/iss4/3 visited on the 23rd April, 2019 P.28.

[67] By section 305 of the Nigeria Constitution 1999, the President is invested with powers to take over the control of state in situation of emergencies.

[68]Williams .G, 'The Defence of Necessity, Current Legal Problems, (1983) (216) Canadian Journal of philosophy Vol.13 No.1 https://www.jstor.org/stable/40231302?seq=

[69]Ibid

[70] Abraham Lincoln cited in Micheal P. S., The Constitution of Necessity.

[71]Ibid

[72]BrokfieldM,F.'Waitangi& Indigenous Rights Revolution, Law and Legitimation' (1999 Auckland University Press, P.21

the nation or its people depends on a course of action that is indispensably necessary to avert such a disaster, his duty as President-his duty to the Constitution-requires that he not let a judicial decision to the contrary prevent him from performing what his duty requires. In the words of prof. Brookfield, deviation from legal order or constitution is for the express purpose of safeguarding and preserving rule of law.

The forgoing reason was applied in Canadian case of Manitoba to save a whole body or gamut of Canadian legislation enacted in gross violation of the constitution. The Canadian Supreme court granted a grace period in which the government will correct or regularize the anomalies in the laws on the basis of necessity[73]

THE REVOLUTION VERSUS DOCTRINE OF NECESSITY

The desire for freedom and justice is certainly profound and genuine. It is a trait in human nature to aspire for it and truly it accounts for essence of being human and purpose of creation. According to Ira O. Wade, the lust for freedom and justice is the primary goal of democracy and rule of law.[74]In his contention, the pursuit of freedom has shown some way of legitimately acquiring them without distorting sense of justice.

According to John Locke and J. J. Rousseau such freedom which manifested itself in the natural rights to life, freedom to acquire property, liberty etc. cannot be surrendered to anyone save by means of contract because they are inalienable.[75]In Rousseau's contention, the civil state is embodiment of general will of people which by itself symbolizes democracy. He believed that all actions of sovereign must flow from the will of the people.[76]

The philosophical theories and expositions of these scholars, no doubt, have profound effects on the political systems, revolutions and democratic governments that they produced. It also left a bold foot print on how affairs of the state or society can be conducted or run. In fact the doctrine and evolution of democracy and modern day political systems are their brainchild as attested from their various scholarships.[77] In the word of Abraham Lincoln, no one is good enough to govern another man and without that other man's consent.[78] In a terse world democracy has come to stay.

The question then is, what would be the legal consequences or status of revolution that did not conform with the requirement of the law or constitution? The courts in the common law world had always invoked doctrine of necessity to rationalize the constitutional illegality. For example Pakistani experience and recently Republic of Fiji had tested the legal water. The court in Pakistan holds extra constitutional revolution effective and legal.[79] In the case of Republic of Fiji, it was declared illegal.[80]While in the celebrated case of Madzimbamuto v. Lardner-Burke[81] the general division of Rhodesian Court held that the declaration of independence and creation of law by revolutionary process is unlawful but upheld the validity of emergency regulation and detention order of Madzimbamuto on the ground of necessity.

The Pakistani and Rhodesian decisions were based on the doctrine of effectiveness as Justice Lewis puts it, thus:

The Government is the only effective Government of the Country, and therefore on the basis of necessity and in order to avoid chaos and a vacuum in the law, this Court should give effect to such measures of the effective government, both legislative and administrative, as could lawfully have been taken by the lawful government under the 1961 Constitution for the preservation of peace and good government and the maintenance of law and order

The Fiji Court would have also come to same conclusion assuming the revolution is accepted by the majority of Fijians.The court held that:

'The doctrine of necessity would have authorized him to have taken all necessary steps, whether authorized by the text of the Constitution or not, to have restored law and order.'[82]

Having declared the revolution is illegal or unlawful, the natural consequences would have been that the laws or decree enacted during the period of revolution is also illegal. Howeverin the case ofUnited States of America, all the laws enacted by the confederate legislature during the civil war were saved by the doctrine of necessity. [83] In the case of Nigeria, by section 318 of the Constitution military decrees became the Act of National Assembly by virtue of being existing laws before the coming of the constitution. The grounds or reason for validating or saving the law were hinged on preventing

[73]Cited in Hogg, Peter W, "Necessity in a Constitutional Crisis" (1989 *Monash University Law Review*, 253-264) available at :http://digitalcommons.osgoode.yorku.ca/scholarly_works

[74] W O Ira, Rousseau and Democracy , (1976 Journal of America Association of teachers, Vol. 46 no 6) available at www.jstor.org/stable/389301 assessed on the 24th April, 2019 P.21

[75] Ibid.

[76] Ibid.

[77] Ibid.

[78] Abraham Lincoln's quotes available at < //www.brainyquote.com/quotes/abraham_lincoln> _105434 assessed on the 23rd April, 2019 . P.34

[79] State v Dosso [1958] 1 PLD 533, 538 (Pak SC) Munir CJ.

[80]ibid

[81] Judgment GD/CIV/23/66. Cited in Herman R. H, The Privy Council and the Gentle Revolution, see also McGill Law Journal ,Vol. 16 available at http://lawjournal.mcgill.ca/userfiles/other/8409831-hahlo.pdf visited on the 27th April, 2019. P.43

[82]Prasad v Republic of Fiji [2001] 1 LRC 665 (HC).

[83]Hogg, Peter W, "Necessity in a Constitutional Crisis" (1989 Monash University Law Review, 253-264) available at :http://digitalcommons.osgoode.yorku.ca/scholarly_works

a legal vacuum or chaos.[84] It was because of this reason that the Privy Council refused to apply the doctrine of necessity in the Rhodesian case of Madzimbamuto.[85]

CONCLUSION AND RECOMMENDATION

Doctrine of necessity appeared both in legal and political lexicon as hand tool of political leaders and individuals to excuse themselves from violating the laws or constitution. However history has shown that sometimes it has been used to gratify arbitrariness or enthrone perfidy in the art of governance. In Nigeria its application in each occasion had prevented a crisis of monumental proportion. In other words, necessity has always justified its invocation and ultimately became the reason for amendment of the constitution or law to fill in the gap or lacuna created by the necessity. Notwithstanding, the factual reality is that its application is a violation of law whether by individual or government. As shown above, there is a tendency to misuse or create room for misapplication. In order to curb this gravid apprehension, it is suggested that its application should be guided by law in the case of political leader and the courts are also enjoined to interpret the law to assuage the purport of applications of the doctrine by individuals.

[84]Ibid

[85][1969] 1 A.C. 645, 729.