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POLITICS, RULE OF LAW AND STATE OF EMERGENCY: A TRIPLE EDGED SWORD IN NIGERIA

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ABSTRACT

The paper examinees the 2009-10 constitutional crisis of Nigeria, where President Umaru Musa Yar'adua's deteriorating health and failure to issue a written declaration transferring power over to his next-in-line resulted in a governance deadlock. It makes use of the contending theoretical contributions of Oren Gross and David Dyzenhaus to assess whether the legislature may be considered as having acted extra-legally. The Nigerian case partially exemplifies Gross' contention that the law may be subverted in emergency situations, because the Senate appointed a Vice President to act in the role of the President, without constitutional provisions to do so. However, given that the executive cabinet abstained fro declaring the President incapacitated in the absence of a written declaration from him stating as such, which was a constitutional requirement, the situation also partially subscribed to Dyzenhaus' argument that the law cannot be subverted even in emergencies. Nevertheless, considering that inaction would have resulted in dangerous anarchy, and therefore the subversion of the law by the Senate should be applauded in this context, it may ultimately be said that the law is but the agent of politics, as Cerar would have it.

Keywords: State of emergency, rule of law, politics, democracy

INTRODUCTION

The relationship between law and politics in democratic systems is sometimes an uneasy one. More so in situations of emergencies when the security of the state is under threat. Whether certain rights of the citizens may be suspended in such situations, and to what extent the constitution may be 'stretched' in emergencies are usually big questions democracies continue to grapple with. This is especially relevant for nascent or yet to mature democracies in the developing world. Countries like Nigeria, which is the focus of this paper, with their diverse social fabric and multiple identities usually face special challenges when it comes to democratic regime change in both legal and political terms. In this connection, this paper analyses the uneasy relationship between politics and law

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in Nigeria using one specific case in its recent experiment with democracy: The illness and subsequent demise of a sitting president in its recent history, and the [mis]use of sensitive emergency constitutional provisions in that situation, which had important implications for law and politics especially in a heterogeneous country like Nigeria with its history of military coup d'états. The discussion will be framed by two theoretical arguments put forward by Oren Gross (2006) and secondly by David Dyzenhaus (as cited in Ramraj 2008). Gross argues that emergency situations demand 'extra-legal measures', while Dyzenhaus argues against them, saying emergencies should be put within the context of the Rule of Law. The recent Nigerian experience will be reflected upon within the framework of these two theoretical propositions.

The paper is structured as follows: It starts with a conceptual clarification on the state of emergency, Rule of Law, and politics, and moves on to bring out the arguments of both Oren Gross and David Dyzenhaus; it then engages with the literature on the state of emergency and rule of law, next illustrating the constitutional crisis Nigeria fell into in 2009-10, showing how the uncertainty surrounding an ailing President almost precipitated a constitutional crisis in the country. The paper then makes an illustration of how the doctrine of necessity can be used to curtail crisis situations like the one Nigeria found itself in, and concludes with some observations and remarks of the author.

CONCEPTUAL CLARIFICATION

'State of emergency', as the term indicates, refers to times of abnormality or stress (political, social, or economic) within the state. It is a "…temporary system of rules to deal with an extremely dangerous or difficult situation" (Cambridge English Dictionary 2015), and is "…derived from a governmental declaration made in response to an extraordinary situation posing a fundamental threat to the country" (Hans Born et al 2019, p. 1). Such declaration may suspend normal functions of the government, may alert citizens to alter their normal behavior, and/ or may authorize government agencies to implement emergency preparedness plans as well as to limit or suspend certain civil liberties and human rights (ibid). The need to declare a state of emergency may arise from situations as diverse as an armed uprising against the state by internal or external elements, a natural disaster, civil unrest or an epidemic, a financial or economic crisis, or a general strike (ibid). A state of emergency consists of two components viz:

a. A legal framework consisting of a constitutional and legislative basis for the state of emergency and;

b. An operational framework involving the organizational structure and strategic plans for dealing with the state of emergency (ibid).

On its part, the Rule of Law has multiple definitions. One definition identifies it as "law based rule" (Krieger 2015, p. 236) of the political system, even though it should be stressed that this also has multiple dimensions. Another definition refers to the rule of Law as any "[m]echanism, process, institution, practice or norm that supports the equality of all citizens before the law, secures a non-arbitrary form of government and more generally avoids the abuse of power" (Choi 2018). A more encompassing definition of the term identifies it as:

A principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.

It requires as well, measures to enhance adherence to the principles of the supremacy of

the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency (United Nations 2004 p. 4)

These various definitions converge on the point that rule is to be based on the law. There is no ambiguity to it. Such rule is typically characterized by a) all persons and organizations including the government being subject to and accountable to the law b) the law being clear, known, and enforced c) the court system being independent and resolving disputes in a fair and public manner d) all persons being presumed innocent until proven otherwise by a court e) no person being arbitrarily arrested, imprisoned or deprived of their property and f) punishment being determined by a court in proportion to the law.

Politics, on the other hand, may be defined as "who gets what, when, how" (Lasswell 1963). Politics is also defined as all activities that are directly or indirectly associated with the emergence, consolidation, and use of state power (Nnoli 2011, p. 12). According to yet another definition, politics is about conflict and cooperation:

On the one hand conflict is caused by the diversity among individuals. People differ in the way they perceive things, and disagree in almost every conceivable aspect of life. On the other hand, cooperation is motivated by men's common goal of achieving a happy life. While it is true that men argue and fight, it is undeniable that they desire for peace. The process of overcoming conflict to attain order and thereby maintain that order is politics. In other words, Politics is simply conflict resolution (Tamayao 2014).Politics may also be seen as the creation, maintenance, and amendment of societal norms or rules. While politics as conflict resolution aims at establishing order in the society, the basis of order today is law. Undeniably, religion and other archaic institutions have already lost their central role as sources of order. It is law now that serves as the undisputed order establishing institution. Therefore, modern states and international organizations rely on the adequacy and efficacy of their laws to meet the demands of the people in attaining domestic and international order and social cohesion. Politics therefore in its broad sense means conflict resolution, through the creation, maintenance and amendment of societal norms or rules (ibid).

The author draws from these definitions to contend that these various functions of politics are managed through tactical maneuverings of the government, in an attempt to manipulate a situation to follow a certain direction. It is this manipulation that enables the government – or any other political actor for that matter – to decide who gets what, obtain and consolidate state power, as well as balance a wide array of interests such that society is navigated in a direction that is [hopefully] electorally beneficial for those in power or those who seek power. It is in this sense that the illness of the Nigerian President and the subsequent developments in that regard are treated as 'political' by the author.

GROSS AND DYZENHAUS: TWO WORLDS APART

In an attempt to provide a theoretical explanation of the extent to which the Rule of Law may be subverted within constitutional provisions during emergencies, the author makes use of the arguments of two legal scholars, namely Oren Gross and David Dyenhaus. Of the two, Gross argues for an extra-legal model, holding that "it might occasionally be necessary for public officials to step outside the constitutional order to deal with grave dangers and threats, but that doing so need not undermine, and may in fact strengthen, the legal order" (as cited in Ramraj 2008, p. 7). Here he points to

situations of chaos to which the state might be required to respond strongly. "… the model is premised on three essential components: Official disobedience, disclosure, and ex-post ratification. The model calls upon public officials having to deal with catastrophic cases to consider the possibility of acting outside the legal order while openly acknowledging their actions and the extralegal nature of such actions" (ibid).

Understood this way, Gross implies that in unusual situations such as emergencies when the sovereignty of the state, and thereby the wellbeing of its citizens is under threat, the government of the state can and should adopt extra-legal measures to ensure a return to relative stability, safety, and comfort, even if it means curbing some fundamental rights in the name of greater good. Scholars such as Zwitter (2012), Ferejohn and Pasquino (2004), and Irizarry (1994) propose arguments in a similar vein. This conception of an emergency can be argued to be against the principle of the Rule of Law and thus be labelled an anti-law approach to emergency situations. I should add that presidential and semi-presidential forms of government are more prone to making this choice in emergencies because executive powers are concentrated in the hands of one individual.

On the other hand, countering Gross's extra-legal argument, Dyzenhaus argues that even in situations of great stress, we need not give up the application of law and judicial rulings in bringing back normalcy for the benefit of all. He "proposes instead that we do not give up 'on the idea that law provides moral resources sufficient to maintain the rule of law project even when legal and political order is under great stress... Judges he insists have a duty to 'uphold a substantive conception of the rule of law' in an emergency…" (Ramraj 2008, p. 8).

This way, Dyzenhaus points to the principle that nobody is above the law including the government, even during times of emergency and distress. Public officials should act within the ambit of constitutionally provided powers during emergencies, subject to judicial review. The importance of the judiciary is thus stressed in accordance with the principle of Separation of Powers, which aims to check the excesses of the executive as well as legislative arms of government. This approach to emergency situations is conducive to the prevalence of the Rule of Law, and thus should be seen as pro-Rule of Law. I should also add that this form of check on executive powers during emergencies is more likely to be achieved in a Parliamentary system of government, where the three arms of government are very much interdependent.

I will now use the framework set by these two contending approaches to emergency situations in order to assess the 2009-10 constitutional crisis of Nigeria, in which the interplay between politics and legal imperatives was well demonstrated.

CONSTITUTIONAL CRISIS, POLITICS, AND THE RULE OF LAW IN NIGERIA

Between November 2009 and February 2010, Nigeria witnessed a dangerous power vacuum. The then President of the Republic Umaru Musa Yar'adua fell sick and was rushed to Saudi Arabia for immediate treatment (Awoniyi 2010). It was expected the ailment and treatment would not take long and the President would soon resume duties of his post. However, due to unclear reasons, the media was not given access to information about the President, and the Presidential media aide kept repeating the claim that the president would soon be back (Shilgba 2009). This degenerated into a huge political crisis as for four months the administration of daily governance was in limbo. It eventually became apparent that the President was in a precarious situation, possibly incapacitated. The constitution thus became the reference document to which everyone turned. Moves

were made by the legislature as well as the judiciary in order to save the situation from spiraling into a major crisis, as implications of an emergency situation with a power vacuum in Nigeria could be very dangerous. The main reason responsible for this situation was the Federal Executive Council's failure to assert that the President was in fact sick, and was not in a position to perform his duties.

Articles 144-146 of the Nigerian constitution explicitly specify situations when the President of the Republic should cease to hold office (Constitution of the Federal Republic of Nigerian 1999). Article 144 of the Nigerian constitution states that:

(1) The President or Vice-President shall cease to hold office, if -

(a) By a resolution passed by two-thirds majority of all the members of the executive council of the Federation it is declared that the President or Vice-President is incapable of discharging the functions of his office; and the declaration is verified, after such medical examination as may be necessary, by a medical panel established under subsection (4) of this section in its report to the President of the Senate and the Speaker of the House of Representatives.

(2) Where the medical panel certifies in the report that in its opinion the President or Vice-President is suffering from such infirmity of body or mind as renders him permanently incapable of discharging the functions of his office, a notice thereof signed by the President of the Senate and the Speaker of the House of Representatives shall be published in the Official Gazette of the Government of the Federation.

(3)The President or Vice-President shall cease to hold office as from the date of publication of the notice of the medical report pursuant to subsection (2) of this section (Ibid).

Importantly, Article 145 carefully states as follows:

"…Whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives a written declaration that he is proceeding on vacation or that he is otherwise unable to discharge the functions of his office, until he transmits to them a written declaration to the contrary such functions shall be discharged by the Vice-President as Acting President" (ibid).

The excerpts above are clear as to when the President might be removed from office. They state in no ambiguous terms that when s/he has been deemed incapacitated, a resolution with the support of a two-thirds of the members of the Executive Council must be passed, and that a medical examination must be done in order to ascertain the claim. Then the report must get to the President of the Senate and the Speaker of the House of Representatives. After these stages have been passed, the next step is for the members of Parliament to publish in an official gazette that the President or Vice President is no longer capable of discharging the activities of her/ his office.

The dilemma that arose in this sensitive period for Nigeria was that the Executive Council, consisting of President Yar'aduas ministers and cabinet, had to affirm that the President was incapable of discharging the duties of his office in line with 'Article 144' of the constitution. This had to be verified by medical personnel to the legislature in order to determine the incapacity of the President. Intriguingly, the executive cabinet refused to affirm such incapacity of the President (supposedly due to loyalty) for a period lasting approximately two months, heating up the political terrain in Nigeria. This created a crisis situation in the Nigerian Federation that could have easily been averted had the Federal Executive Council declared the President as sick or incapacitated. Alternatively, if the President had taken measures to send a letter

or any other written declaration (as article 145 of the constitution requires) stating his inability to continue in his office to the Senate leader or Parliament, this crisis and emergency situation could have been averted. It was said that the President was too sick to issue such written declaration.

POLITICS: ENTER THE COURTS AND THE DOCTRINE OF NECESSITY

The crisis demanded a quick solution without which the government risked overheating the political terrain, given that opposition forces, as well as the possibility of a military takeover loomed large. Thus, the second highest court (the Federal Court of Justice) out of necessity and a lawsuit by the Opposition, on Friday, 22 January 2010, issued the Federal Executive Council a 14 day ultimatum to decide on the incapacity of the President in line with article 144 of the constitution (BBC 2010). However, this still failed to produce a decision by the Federal Executive Council after two weeks had elapsed. Since the President had earlier stated that "he would return to work once his doctors cleared him" (ibid), the upper arm of Parliament, under the Doctrine of Necessity, conferred an emergency acting Presidential role to the Vice President, Mr. Goodluck Ebele Jonathan, until the president returned from medical leave (Zounmenou 2010; Ibagere and Omoera 2010; Agbiboa 2014).

The extent to which the Senate acted out of necessity, without complete alignment with constitutional provisions, may be termed extra-legal. This evokes Gross' contention that "it might occasionally be necessary for public officials to step outside the constitutional order to deal with grave dangers and threats, but that doing so need not undermine, and may in fact strengthen, the legal order" (Gross 2006, p. 5). In essence, even though the act by the Senate did not have constitutional provisions to cover it, and hence was against the principle of the Rule of Law, according to Gross this action shows that the law can be subverted for the greater good.

Here the question arises as to what would have happened had the Court as well as Parliament not acted in this emergency situation of a power vacuum in the executive arm of government? The image that appears is not the most positive, as the state would have collapsed into chaos and suffered a loss of legitimacy, possibly resulting in a military takeover. It should be noted here, however, that this state of affairs could also be resulted by the collapse of other organs of the government such as the legislature, judiciary, and/ or military.

Considering the above constitutional crisis in light of Dyzenhause's counter argument, where the Rule of Law and the importance of the judiciary are stressed, it can be argued that the requirement of judicial intervention has been achieved. However, it may also be observed that by appointing the Vice President as acting President in the absence of a written declaration by the incumbent President, despite explicit constitutional provisions requiring to have such written declaration as provided in article 145, the legislature had compromised the Rule of Law. The problem with subverting the Rule of Law is that it puts the state's legitimacy into question, which in turn renders state authority ineffective, making emergencies unmanageable.

As the preceding discussion shows, it is difficult to define in clear terms the relationship between politics, human rights, and state of emergency. As Salam (2017) opines, one way to go about this would be to deploy the comparative methodology and study multiple cases across space and time to identify possible patterns under varying circumstances. According to Cerar's (2009) classification, the relationship between law and politics in the case of the Nigerian constitutional crisis may be identified as one where politics may be considered the principal and the law, its agent, given the manner in

which the law was maneuvered to play to the satisfaction of political considerations.

CONCLUSION

As the popular Machiavellian sayings go, “unusual situations demand unusual solutions” and thus “the end justifies the means”. Therefore, subverting the law in the name of social order and cohesion may be the solution in certain contexts. Similarly, playing by the book may be the best way forward in other situations. The situation described above in Nigeria has shown that Gross’s argument partially explains the context, while in some aspects Dyzenhause’s argument also partially applies. However, what may best explain the Nigerian constitutional crisis of 2009-10 is Cerar’s classification where the relationship between politics and law sometimes takes the form of principal and agent, where political contingencies shape the deployment of the law. What ended the crisis ultimately, however, was the demise of the President and the subsequent appointment of the Vice President in his stead, who held office until 2015.

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