

## **THE DEATH OF PRESIDENT UMARU MUSA YAR'ADUA AND THE DOCTRINE OF NECESSITY IN NIGERIA, 2007-2010.**

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### **Abstract**

Yar'Adua's health condition generated a lot of controversy in Nigeria. It brought to the fore the need for constitutional amendment to close up the vacuum or lacuna in the Nigerian constitution. The socio-political cum economic implications of not ascertaining the true medical status of a presidential hopeful in a heterogonous nation like Nigeria, where ethnicism and religion play a key role in political decisions cannot be over emphasized. President Umaru Musa Yar'Adua's case is a typical example. It threatened the peaceful co-existence of the country and allowed political opportunists manipulate information about the health conditions of the President to their selfish advantages. The Doctrine of Necessity is a basis on which extra-legal actions by the Executive Arm of a state actor which are designed to restore order are found to be constitutional. The research examined the effect of a constitutional lacuna that arose as a result of the failure of President Musa Yar'adua not transmitting a letter to the National Assembly before traveling to Saudi Arabia for medical treatment in 2009 and the subsequent invocation of the Doctrine of Necessity (which is a political concept or utilitarian idea that is used to define and validate extra-constitutional issues which are not fully captured by the constitution of a country but are necessary to preserve the political stability in the country) by the National Assembly. The study tries to elucidate the meaning, evolution, application and the consequences of the Doctrine of Necessity to Nigeria's Political Arena. It also brought to the fore the constitutional crises that nearly rocked the foundation of the country and the need for a constitutional review to avoid such events or the abuse of the Doctrine of Necessity by the Nigerian leadership. The research adopted historical method of research, which makes effective use of various models of discussions and analysis of both primary (oral) and secondary (written) sources. The method of analysis is basically qualitative. Interdisciplinary approach method of examination of issues under discussion was also adopted in interpretation of data collected: The study hopes to solve the problem of how best the Doctrine of Necessity can be applied to Nigerian situation considering her socio-economic cum political situation.

### **Introduction**

How vital is it for Presidential candidates of political parties in a multi-ethnic nation like Nigeria to make public through a sworn affidavit supported by a certified medical report from a General or Teaching Hospital their medical status that qualifies them to vie for the exalted position of the President? Is there any need for constitutional amendment for anybody aspiring for the office of the President regarding their health

conditions? Is there socio-politico cum economic implications of electing a sick president? The Doctrine of Necessity portends a danger signal to human rights of the citizens of the country and the subsequent abuse of power by the Executive Arm of Government, the Judiciary or the National Assembly. This abuse of political invocation of the Doctrine of Necessity can be properly modified, arranged, and /or set out in a more coordinated form to avoid its abuse. In the light of the above, it becomes necessary to undertake a study into its application to Nigerian Political situation, the remote and broad consequences of such applications to the country, and the need for urgent constitutional review to avoid such a constitutional lacuna and loop holes considering the ethnic heterogeneity of the country. The research is set to examine the underlying events that led to the introduction of the Doctrine of Necessity in Nigerian Political situation. The study examined the meaning of the Doctrine of Necessity and the events that culminated into its introduction during the President Umaru Musa Yar'Adua's 'regime in Nigeria. Besides, the research sought in clear terms, to elucidate the implications of the introduction of the Doctrine of Necessity to Nigerian situation and the way forward towards the avoidance of a constitutional lacuna in Nigeria. Sources of data include personal interviews, Newspaper publications, magazines and other secondary sources like books, journals and internet. The study proved that the Nigerian Constitution never made appropriate provisions on how best to apply the Doctrine of Necessity considering the religious, sociological, political and multi-ethnic nature of the country. It also showed that Nigerian Constitution and Electoral Acts never made enough provisions aimed at ascertaining the true health conditions of political office holders before they stand in for an elective position in the country. It concluded by recommending for Constitutional amendment and that section 145 of the Constitution be expunged from the Nigerian Constitution.

### **Background of Study**

This paper discussed President Umaru Musa Yar'adua's health conditions and the upheavals that greeted his travels to Saudi Arabia for medical treatment without following the constitutional requirement of transmitting a letter to the National Assembly which will empower the Vice President to be an Acting President pending his return. His inability to transmit the letter was what necessitated the invocation of the Doctrine of Necessity by the National Assembly coupled with the fact that his true medical state was not made available both to the National Assembly or the public which invariably led to constitutional crises that nearly rocked the foundation and co-operate existence of the country.

### **Meaning of The Doctrine of Necessity**

The doctrine of necessity which is a common phenomenon in many legal systems is a doctrine known to excuse an act which would have otherwise been unlawful. According to Prof. Ben Nwabueze, the rationale of the doctrine is that in an emergency imperilling public order or public security, the safety of the people is the supreme law, based on the Latin maxim "Solus Populiest Supremalex." By this supreme law of necessity, therefore, the organs of the state are entitled, in the face of an emergency, to take all appropriate

actions, even in deviation from the express provisions of the constitution, in order to safeguard law and order and preserve the state and society.<sup>1</sup> The application of the doctrine is subject to the following five conditions;

- a) An imperative necessity arising from an imminent and extreme danger affecting the safety of the state or society;
- b) Action taken to meet the exigency must be inevitable in the sense of being the only remedy;
- c) It must be proportionate to the necessity, that is, it must be reasonably warranted by the danger which it was intended to avert;
- d) It must be of a temporary character limited to the duration of the exceptional circumstances;
- e) The temporary incapacitation of the authority (if any) which normally has the competence to act.<sup>2</sup>

Among the various countries of the world, the Doctrine of Necessity is rarely used. It is a political concept or utilitarian idea that is used to define and validate extra-constitutional issues that is not fully captured by the constitution of a country but are necessary to preserve political stability in that country.<sup>3</sup> The fundamental objective of the doctrine is to satisfy the exigencies, lacuna or gap created by certain situations 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 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 constitutional, the rule of law, the government and democracy in the long term<sup>4</sup>. In short, in order to save the country, the constitution has to be dumped and the rule of law 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.

The term Doctrine of Necessity was first used to describe the basis on which administrative actions by administrative authority, which are designed to restore order, are found to be constitutional. The maxim on which the Doctrine is based originated in the writing of the Medieval Jurist Henry de Bracton, and similar justifications for this kind of administrative action have been advanced by more recent legal authorities, including William Blackstone.<sup>5</sup>

### **Yar'adua's Presidency, His Ill Health And Reactions**

President Umaru Musa Yar'Adua was sworn in and inaugurated on May 29, 2007, as Nigeria's 13th president. The ceremony had particular historical significance, as it was the first time in the country's history that an elected civilian head of state had handed over power to another.<sup>6</sup> He continued the developmental programmes begun by his

predecessor, former President Olusegun Obasanjo, establishing peace and reconciliation in the Niger Delta, and continuing the war against widespread systemic corruption in the country. There was so much rumour regarding his health, as he had traveled abroad for medical treatment several times in the years prior to his presidency and continued to do so after his election.

In 2007 Umaru Musa Yar'Adua, who suffered from a kidney condition, challenged his critics to a game of squash in an endeavor to end speculations about his health. On 6 March 2007 he was flown to Germany for medical reasons, further fomenting rumors about his health. His spokesperson said this was due to stress and quoted Yar'Adua as saying he was fine and would soon be back to campaigning. Another report, which was rejected by Yar'Adua's spokesperson, claims that Yar'Adua collapsed after suffering a possible heart attack. President Yar'Adua left Nigeria on 23 November 2009, and was reported to be receiving treatment for pericarditis at a clinic in Saudi Arabia. He was not seen in public again, and his absence created a dangerous power vacuum in Nigeria.

The President of Nigerian Bar Association (NBA) Oluwarotimi Akeredolu in December 2009, stated that Yar'Adua should have handed over power to Vice-President Goodluck Jonathan in an acting capacity during his illness, a statement that was backed up by the NBA national executive committee. On 22<sup>nd</sup> January 2010, the Supreme Court of Nigeria ruled that the (FEC) had fourteen days to decide a resolution on whether Yar'Adua was "incapable of discharging the functions of his office". The ruling also stated that the Federal Executive Council should hear testimony of five doctors, one of whom should be Yar'Adua's personal physician.

Yar'Adua's ability to serve while dealing with health issues was called into question after he went to Saudi Arabia in late November 2009 for treatment of heart and kidney problems. After he had been absent from Nigeria for several weeks, critics complained of a power vacuum in the country, and there were calls for Yar'Adua to formally transfer power to the Vice President, Goodluck Jonathan. Although a ruling by a Nigerian court on Jan. 29, 2010, indicated that Yar'Adua was not obligated to hand over power to the Vice President while he was out of the country for medical treatment, the controversy surrounding his prolonged absence remained. On Feb. 9, 2010, the National Assembly voted to have Jonathan assume full power and serve as Acting President until Yar'Adua was able to resume his duties. Jonathan agreed and assumed power later that day, but it was unclear whether or not the assumption of power was constitutional. When Yar'Adua returned to Nigeria on Feb. 24, 2010, it was announced that Jonathan would remain as Acting President while Yar'Adua continued to recuperate. Yar'Adua never fully recovered, however, and died several weeks later. He was succeeded by Jonathan.

### **The Doctrine Of Necessity And Its Application By The National Assembly**

On November 23<sup>rd</sup> 2009, President Umaru Yar'Adua left Nigeria for a medical treatment of acute pericarditis (which is an inflation of the membrane surrounding the heart that can restrict normal breathing) in Saudi Arabia. His absence created a lot of political tensions

in Nigeria. While some believed that the Vice President should take charge of the leadership of the country, others believed that the Nigerian Senate should invoke Sections 143 and 144 of the 1999 Constitution and impeach the

President. The third group believed that there was no need to impeach the President; rather, section 145, of the 1999 constitution should be invoked to make the Vice President an Acting President, by President Umaru Musa Yar'Adua notifying the National Assembly in writing on his medical vacation in Saudi Arabia thereby automatically making the Vice President Goodluck Jonathan the Acting President.

All these agitations arose because of certain development in the country, which include:

1. Acute fuel shortage across the country.
2. The killing of hundreds of Nigerians in sectarian violence in Bauchi and Jos.
3. Thousands of Nigerians displaced as a result of these violence's.
4. The high rate of unemployment which is a fall-out of the bleak economic climate.
5. Classification of Nigeria by the United States of America as a country to be watched in matters of terrorism.
6. The breakdown of the world acclaimed Amnesty programme in the Niger Delta.
7. Unconstitutional administering of official oath to key national appointees 2010 when President Umaru Musa Yar'adua presented the 2010 budget to the National Assembly, there was a controversy whether he actually signed that budget or that somebody signed it for him due to his ill health. Even in the presentation of the said budget:

**Arrangements were made to forestall any medical emergency, including preventing a situation where President Yar'adua did not have to climb any staircase within the vicinity of the National Assembly, the traditional route of the President was altered through the basement of the Assembly complex, and slabs made of plywood mounted to ease him into the chambers of the House of Representatives.**

When he presented the population figures to the Senate, he was in an inclement medical state as he made strenuous efforts to move his legs. The medical personnel in their angelic white *apparel* shadowed him into the chamber.

### **Reactions Of Nigerians On The Health Conditions Of President Umaru Musa Yar'adua**

### **Radical Senators Move for Sanction against the President**

After seventy-one days of the President's absence from the country due to ill health to Saudi Arabia on medical grounds, the Senate gave one-week ultimatum to the President to hand over power to the Vice President as Acting President until he returned from Saudi Arabia and recovered from his ill health. The Senate President, Senator David Mark told his colleagues in pursuant to section 145 of 1999 constitution the need to urge the President and Commander-in Chief of the Armed Forces, President Umaru Musa Yar'adua to formally notify the National Assembly of his medical vacation while the more radical Senators known as National Interest Group of Senators began the collation of signatures from their colleagues and canvassing for a more punitive measure, which they would take which include the impeachment of the ailing President, should he fail to comply with the demands of the Senate. Deputy Senate President, Senator Ike Ekweremadu and twenty-nine others sponsored a motion praying that a delegation be sent to Saudi Arabia to ascertain the true condition of health of the President. In support, Senator Nuhu Aliyu insisted that that was the right thing to do, because every Senator has it as a duty to explain the true position of things to his constituency.<sup>13</sup> The Senate President, David Mark in trying to avoid a situation that could degenerate into political and constitutional crisis in the country expressed dismay that some people were exploiting the President's ill health to score a cheap political goal for their own selfish interests by going as far as insinuating that he (Senator David Mark) was nursing an ambition to succeed the President in the event of his death especially as the President did not officially inform the Senate of his medical trip to Saudi Arabia. Even though he refused to mention names in order not to introduce disaffection among government functionaries, regrettably, he said that he:

**Feel very strongly about what is happening, Sycophants and praise singers have cashed (in) sic on the situation; we must condemn these acts. It is inhuman and unjust. They deliberately sell dummies to Newspapers. The following morning, they collect the Newspapers and fly to Saudi Arabia to tell lies. It is totally mischievous and in bad faith that I do not have such ambition, if others nurse such ambition, certainly I, David Mark is not one of them.**<sup>14</sup>

There was a rash speculation that David Mark was plotting to use President Yar'Adua's ill health to fine-tune his Presidential ambition. To this, Senator David Mark replied;

**This is the handwork of fifth columnists that are bent on causing disaffection among individuals in government as well as the functionaries. It is inhuman and unjust It is wicked, mischievous and unpatriotic and smirks of a grand plan to cause division in the system by those who have a platform on the status of the health of the President Yar'Adua. I am not aware of lawmakers holding nocturnal meetings anywhere to fashion out any solution in the face**

**of eventuality. Neither is there any group canvassing a position for the President of the Senate, David Mark.<sup>15</sup>**

When a group of former leaders of the country, led by former President, Alhaji Shehu Shagari visited him to submit a letter calling for the hand over to Jonathan, the Senate President vehemently defended the position of the Senate in not invoking Section 144 and 145 of the constitution to impeach the President by explaining that:

**Our decision was based on the need for stability, unity, cohesion and the conscious need of power balancing in the country, above all, the security of the Nation is paramount. I want to assure you that whatever we do in the Senate is always guided by national interest, unity, peace and progress of Nigeria<sup>16</sup>.**

All through the period that the President Umaru Musa Yar'Adua was away to Saudi Arabia on medical grounds, every information about him was economical by those that managed that information. It must be noted that if one is not informed, he will be deformed.

February 8, being Monday 2009, a delegation of five members of the House of Representatives arrived at Saudi Arabia to deliver a good-will message to the President and urged him to hand-over to Jonathan. This was coming after 78 days since the President left the country for medical treatment in

Saudi Arabia. Meanwhile, the Senate was tensed up, awaiting the much expected letter from President Yar'Adua that would comply with section 145 of the constitution and enable Jonathan to act in his stead. But all these were speculations because the Vice President and the Minister of Information, Prof. Dora Akunyili was not aware of the letter. There were conflicting reports as to whether the President had complied with the Senate resolution on January 12 which urged him to write to the legislature on his medical conditions while some people said that the President had sent the letter, another group believed that Yar'Adua will never send such a letter. They were told not to ask how the letter came, just as they were not told how the President signed the 2009 supplementary budget.

### **Rumour As A Vehicle That Drives Official Silence**

Livi Obijiofor observed that rumour thrives when truth is tainted and that the President's trip to his doctors in Saudi Arabia which attracted a lot of uncomplimentary and unprecedented commentary in the Nigerian press as a result of information that was not well managed bred the rumours that invaded the civil society. Politicians and the civil society argued among themselves whether or not President Umaru Musa Yar'Adua was fit to rule Nigeria, whether it is constitutional for the President to govern the country from Saudi Arabia through regular telephone calls and whether the Vice President was good enough to govern Nigeria in event of the permanent incapacitation of the President. To those that insinuated that the President was dead, Obijiofor pointed out that a President

may be unpopular, may be cajoled and may be referred to as a lame duck but it was patently bizarre to openly advocate the death of a President at a time the man was undergoing treatment for a serious ailment. In their eagerness to criticize Yar'Adua's sleepy style of government, some authors seemed to have lost the ability to engage in civilized discourse.

The inability of the President to make clear and unambiguous statement relating to his medical state, the nature of his ailment, how long it would take him to recover from such ailment, and whether he intended to handover to his Vice President until he was fit enough to govern Nigeria or that he would prefer governing the country through telephone calls (or the internet) from Saudi Arabia. But rather than provide the country with clear and unexpurgated account of his medical conditions the President chose silence as an answer to national anxiety. This was the first public relations catastrophe that exploded in the hands of bumbling government officials trying to withhold information from the public. Obijiofor opined that:

**Everybody has the right to discuss the health condition of Mr. President Especially a government that was democratically elected. Nobody can suppress such a discuss and other national issues even if such a discusses and deliberations are founded on rumuours. Official silences feeds rumuour and rumuour natures anxiety<sup>19</sup>.**

Since the President is a public figure, he has a limited privacy. A situation where the Vice President and the Minister for Information were not properly fed with the right information from those that managed information about the President's ill-health, led to mishandling of a bomb of wrong information that could have diffused if properly handled. This is mismanagement of information fuelled a lot of rumours about the health condition of the President, due to public concern and restlessness because the pipeline of public information from the government was not fed. That resulted to lack of credible and accurate information which gave the professional mischief makers room to spread rumours about the health condition of the President. Hiding the truth about the health condition of the President from public knowledge only worsened the political tension in the country. Not disclosing the gravity of the health condition of the President was seen by some northern politicians as a sacred duty to cling on to power while some of the President's aids saw it as an opportunity to speak when the President has not spoken for selfish reasons and personal engradisement. These resulted to a cacophony of voices from the country's seat of power at Abuja. Rumour thrives when official sources of information have been hijacked, compromised and polluted. Francis Nyamnjor wrote that:**"Rumuour flourishes as a legitimate sources of information for the Marginalized majority. This rumuour,..is like the voice of the voiceless seeking to challenge passivity and the oppressive discourse of officialdom"**<sup>20</sup>.

He went on to say that *"rumuours targets those in the limelight. Person must be perceived as having a certain standing to be earmarked for comments, rumuours and*

*calummy*".<sup>21</sup> That is why some even said that the President was dead while he was actually suffering from pericarditis.

Goodluck and the Minister of Information and Communication Prof. Dora Akunyili, who were actually sidelined all through the President Umaru Musa Yar'Adua health saga, was wrong. Prof. Dora Akunyili never saw nor spoke with the President so as to know how to manage information about him. Nigerians then tried to evolve alternative ways to understand the true health condition of their President by embarking on persistent rumour, notwithstanding how incredible it was, because of the official secrecy surrounding the exact condition of the President's health condition. This resulted to agitations in certain quarters that he should be impeached because he was not capable of governing the country due to his health condition. Others said he was in coma on his hospital bed in Jeddah, Saudi Arabia and began to call for the invocation of section 144 of the 1999 constitution for his impeachment. Some others even concluded that he was dead and demanded that, the Vice President Dr. Jonathan Ebele Goodluck should be sworn in as President. Obijiofor noted that the only option left for the masses was:

**Relentless rumours about Yar'Adua's medical situation which suggest also sincere attempts by Nigerians to find answers to questions that Yar'Adua and his government have consistently shielded from public knowledge. The absence of reliable information about Yar'Adua's heart condition, Nigerians have opted to manufacture high flying rumours to satisfy their appetite for official information. The catch phrase is "if Aso Rock cannot answer our questions, we will make up our mind and disseminate the information that fits the picture in our head. That is the danger in allowing rumour to evolve. That says a lot about the importance of being honest"**<sup>22</sup>

Until public restlessness took a destabilizing tone, no one in Yar'Adua's government, not even the Vice President, considered it wise to address public concern over the leadership of the country and Yar'Adua's medical condition in Saudi Arabia. It was clear to any keen observer that neither the Vice President nor the Minister of Information and Communication had any information about the health condition of the President save the wife and some members of his kitchen cabinet.

Speaking further on the issue, the Cross River State Governor, Liyel Imoke stressed the need not to allow any vacuum because both the President Umaru Musa Yar'Adua and the Vice President Goodluck Ebele Jonathan share the same mandate from the electorate. He noted that:

**Section 145 of the 1999 Constitution is subject to interpretation and has recently been interpreted in the court and what we cannot do is to question the judgment until such a time another Judgment is obtained. That remains the position, and until the Judgment is set aside.**<sup>23</sup>

Imoke maintained that the governors intended going along with court pronouncement on the position and abilities of Vice President Goodluck Jonathan in the absence of President Umaru Musa Yar'Adua. The Governor further explained that:

**It is also very now clear that section 145 start with "whenever" it does not start with any other word, other than the word "whenever". In the event that the transmission does not occur, certain actions can be taken to guarantee the stability of the nation<sup>24</sup>.**

He went further to state that:

**As Governors' Forum, we have taken a position, and we intend to stand by that position. We believe that at this point in time, it is necessary that appropriate actions be taken and solution be found to what appears to be a problem of the existence of a vacuum<sup>25</sup>.**

Governor Akpabio said that the Vice President Goodluck Jonathan was happy with the decision of the governors and that while he was praying for the President to recover, there was need to bring all these publications and controversies regarding power vacuum in Nigeria to an end.

The Federal Executive Council (FEC) on 9<sup>th</sup> December 2009, through the Minister of Information and Communication, Prof. Dora Akunyili, said that there was no definite date for the return of the President. She explained that the President was still recuperating in a Jeddah, Saudi Arabian hospital and could only return to the country on the advice of his doctors. She informed the nation that the council has not changed its resolution on the fact that there was no basis for the council to commence the process of easing the President out of office, advising every Nigerian to pray for Mr. President's quick recovery. The FEC meeting was chaired by the Vice President, Dr. Goodluck Jonathan.

Earlier, a Lagos based lawyer and Human Right Activist, Femi Falana, filed a suit on the failure of the President to properly and legally transfer power the Vice President and the constitutional implication of such actions. The suit filed in an Abuja Federal High Court was seeking an orderly transfer of power through the National Assembly and the Federal Executive Council (FEC). In SUIT NO. FHC/ABJ/732/09 filed on December 15<sup>th</sup>, 2009 against the Attorney General of Nigeria, Mr. Falana wanted an orderly transfer of power to the Vice President which inevitably means the interpretations of section 144 - 145 of the 1999 constitution. On 13<sup>th</sup> of January 2010, a Federal High Court gave the Vice President Goodluck Jonathan the power to carry out state affairs while President Umaru Musa Yar'Adua recuperated at a Saudi Arabian hospital. On 22<sup>nd</sup> January, the Supreme Court of Nigeria ruled in a matter brought before it that the Federal Executive Council (FEC) had fourteen (14) days to decide whether or not President Umaru Musa yar'Adua has the capability to discharge his duties as the President of the Federal Republic of Nigeria.

It was in the midst of all these contusions, agitations, accusations and counter-accusations, suspicions, fears and anxieties that Prof. Dora Nkem Akunyili took the bull by the horn, notwithstanding the risk associated with her actions, and because of her overwhelming patriotic zeal, commitment to the Nigerian project and love for her fatherland, she decided to speak up. She knew that her speech might cost her, her job but instead of playing the "loyal" Minister, she spoke up for the interest of the nation. She had to balance her patriotic zeal with her love for President Umaru Musa yar'Adua, who graciously appointed her Minister for Information and Communication of the Federal Republic of Nigeria. As a mother and a wife, she understood the difficult times the Yar'Adua's family was passing through. She had watched the events unfold and noticed that so many people might not be sincere after all concerning their actions and inactions in relation to the President's ill-health. She had to draw a line between her loyalty to the President and her loyalty to the nation. In her speech titled "IF WE FAIL TO ACT NOW, HISTORY WILL NOT FORGIVE US", she tried to present a memo to the Federal Executive Council (FEC) asking President Musa Yar'Adua to transmit a letter of vacation to the Senate as required by section 145 of the 1999 Constitution of the Federal Republic of Nigeria. Some of the reasons she adduced as the need for Dr. Goodluck Jonathan as the Vice President to become the Acting President include:

- (1) As Yar'Adua's Loyalist and ministers, they owe him their duties to help him run the government effectively and efficiently.
- (2) In choosing them, the President considered their individual and collective abilities to guide him rightly to serve the nation, promote and protect the Constitution.
- (3) The unnecessary debates about making the Vice President an Acting President should not have arisen. To those who argued that there was no vacuum, because the Vice President, in the absence of the President, can take decisions for the nation, she pointed out that:
- (4) Permanent Secretaries had been waiting to be sworn in for over two months. These had made many Ministries to be without Permanent Secretaries including ministry of Information and Communication.
- (5) The Vice President cannot take any document to the National Assembly. Even the deployment of troops to the Jos crises situation was openly criticized by some people who think that the Vice President does not have such power to do so, because they cannot be two Commander-in-Chief in a country at a time.
- (6) The decision of the Movement for the Emancipation of Niger Delta (MEND) to opt out of the Amnesty and threat to resume hostilities because they claimed that they have been kept in limbo and abandoned without keeping the promises made to them by President Umaru Musa Yar Adua.

- (7) Our economy was threatened by the absence of the President.
- (8) The past Chief Justice of the Federation swore-in his successor for the first time in the history of this country. Our poor image internationally was compounded by our failure to rise up to international expectations, commitments and engagements due to the power vacuum created by the absence of the President.
- (9) For the past 70 days, there have been uncomplimentary statements and remarks made by United Kingdom, United States, European Union, etc, concerning the state of affairs in Nigeria.
- (10) Agitations by members of the public for the National Executive Council to do something about the situation. Nigerians expect them to rise up to the challenges on behalf of the President as the leaders of the YarAdua's administration. Some eminent citizens spoke which includes the former Head of State and others who have served Nigeria in various capacities.
- (11) The Senate has taken a position as well. The looming crisis in the system was over boiling. Our hard earned democracy is being threatened by the day.
- (12) The President never choose to be ill, and also has the moral and constitutional obligation to officially hand over the mantle of leadership to the Vice President and inform the Senate which he never did before he travelled to Saudi Arabia for Medical treatment. There was the need to right the wrongs done.
- (13) Even though some people have argued that Mr. President travelled out of the country for medical treatment in a hurry, that argument was punctured by the fact that he signed the appropriation bill for National Assembly before he travelled. If he could sign the bill, why did he not sign a letter for the Vice President to act on his behalf until he was well enough?
- (14) The polity was over heated to a frightening level. Posterity will judge members of the Federal Executive Council (FEC) harshly if they do not intervene to resolve the logjam.
- (15) The need to do what is morally right and constitutional; for the President to officially hand over to the Vice President to function as the Acting President has risen. If he does not, she then called on the Federal Executive Council to invoke whatever aspect of the constitution that will make the Vice President and Acting President until the President was well enough to continue his duties. She begged members of the Federal Executive Council (FEC) to act now for the interest of Mr. President and the shame because their stand was becoming very embarrassing to the nation. Even if the President returns, he would need some time to rest and recover before taking over the government from the Vice President. She pleaded with FEC to take advantage of the 14 days' ultimatum by the court which will soon expire, when the President recovers by the grace of God, he takes over his position.

She said that she was not asking President Yar'Adua to resign or condemning him for being sick because he did not choose to be sick, but he should be encouraged to do the right thing so that our hard earned democracy would not be truncated. Anybody who thought otherwise was unfair to our law and utterly unfair to our country. The name of our President and all his achievements were being rubbished by this unfortunate debate. The President and his family were also being put under undue pressure which would not help his recovery. She concluded by saying that history would not forgive the members of FEC if they failed to act now.

The Governors Forum met with the Senators to brief the Senators on the resolutions of the governors on February 4, 2010 regarding their demand on the National Assembly to declare Jonathan Acting President. In the meeting, the Senators were persuaded to admit that the President had already transmitted to the nation, including National Assembly (NASS) his incapability to rule for the time being through the interview he granted British Broadcasting Co-operations (BBC) on 12 January 2010 and would resume when the resolution and he in turn communicated same to the Chief Justice Aloysius Katsina-Alu and the Vice President Goodluck Jonathan. A resolution was also passed that the President Alhaji Musa Yar'Adua could resume his position whenever he returned, and the doctors certified him fit to govern Nigeria. In order for them to succeed, the National Assembly (NASS) and the ruling People's Democratic Party (PDP) were assured of keeping their positions because there was no need of re-zoning of positions before 2011. Even if Jonathan became the Acting President, and President Umaru Musa Yar'Adua never returned to complete his tenure before 2011, Dr. Goodluck Jonathan would merely be completing the tenure of Yar'Adua, although sections 143 and 144 of the Constitution of the Federal Republic of Nigeria provided a stumbling block to the National Assembly. Section 145 provided a break through, because it talked about transmission of a letter. The National Assembly took advantage of that to accept the verbal BBC interview of President Yar'Adua.

After 78 days of the absence of the President out of the country for medical reasons, the National Assembly passed separate motions empowering the Vice President Dr. Goodluck Jonathan to assume Presidential functions as the Acting President. In fact, on 9<sup>th</sup> February, 2010, the Nigerian Senate decided that the Presidential powers should be conferred on the Vice President to enable him discharge his duties as the President and Commander – In – Chief of the Armed Forces of the Federal Republic of Nigeria. This enabled Jonathan to sign and pass legislations and act as the Commander-in-chief of the Armed Forces, until President Yar'Adua declares that he is fit enough to resume his duties. The Senate President David Mark noted that 78 days of the absence of the President has been very challenging to the nation. The motion tested Nigerian laws, but parliament had to do what is necessary when faced with a situation that was not contemplated by the constitution. The interview given by President Yar'Adua to British Broadcasting Corporation on 12 January 2010 was evidence enough of his absence for medical reasons. He concluded that a rigid and inflexible interpretation would not only stifle the spirit and (intentions) of the constitution but would also affront the Doctrine of Necessity, and so,

the Vice President Dr. Goodluck Jonathan became the Acting President pending the return of President Umaru Musa Yar'Adua.

#### **Calls for Constitutional Amendment:-**

The Senate were divided over the number of days the Vice President and the Deputy Governor could act for the President and the Governor respectively in the event of the latter's absence while some law makers in the Lower House were kicking against section 144 to empower the National Assembly (NASS) to determine if the President or Vice President was incapable of discharging his functions. The Senate Power and Steel Committee Chairman, Senator Uche Chukwumereije said that the Vice President and the Deputy Governor could occupy the office in a permanent capacity should his boss fail to return to work within specific days. According to him

**Let us look at the problem posed by the long absence of the President. Even if the Vice President begins to act, should he begin to act till eternity? I am suggesting that a 90 days of the absence by the he Acting President should automatically transform into the President.<sup>29</sup>**

Continuing, he noted that

**Section 144 ought to be amended to remove that responsibility from members of the EXCOF because it make no political sense to be asked to initiate an action that would culminate in the removal of ones benefactor.<sup>30</sup>**

The Minority Whip, Femi Gbajamila who sponsored the bill for the transfer of the power conferred to EXCOF in section 144 of the Nigerian Constitution to NASS, explained that the legislature would within 21 days of the absence of the President or Vice President, constitute a medical panel that would determine his health condition. Some Senators in their opposition against the bill observed that it would amount to vesting all powers to the legislature when there was supposed to be a separation of powers. But Gbajamila insisted that section 144 of the Nigerian Constitution appeared to be virtually impracticable. He believed that the section should be amended to transfer such powers to NASS whose members are not under obligation to the President and would not be biased in their decision. He noted that members of the EXCOF were appointed by the President and as loyalists of the President, so could not initiate such a process.<sup>31</sup> But Olaka Nwogu believed that the problem is not caused by the constitution but by having a strong political will to act. According to him, even if such power resided with NASS, it would not make any difference unless there is a political will to take action. Those who spoke on the bill included Samson Positive, Suleiman Kawu, Mohammed Ndume, Ubale Kiru, Yakubu Barde, Sada Jibia, Cyril Maduabum, Leo Ogor, Halims Agoda, Aliyu Wadada, Oke Udeh and Independence Ogunewe.<sup>32</sup>

On 5<sup>th</sup> May 2010, almost three months after Dr. Jonathan Goodluck took over as Acting President of the Federal Republic of Nigeria, President Umaru Musa Yar'Adua died, resulting to the swearing in of Dr. Goodluck Ebele Jonathan on 6<sup>th</sup> May 2010 as Nigeria's 14<sup>th</sup> President.

Dr. Goodluck Jonathan was finally confirmed as the Acting President and Commander-in-chief of the Armed Forces of the Federal Republic of Nigeria in line with section 145 of 1999 Constitution by the National Assembly.

### **Observations**

- i. Three years of President Umaru Musa Yar'Adua's tenure shows that in spite of the good intentions of late President Yar'Adua as shown in his 7-Point-Agenda it remained unimplemented due to his ill health, resulting to severe economic decline, factionalization of the country, escalation of sectarian crises, the Uwais Report was dumped, rule of law hampered and budget unimplemented. All these came as a result of the health challenges of late President Umaru Musa Yar'Adua.
- ii. Even though the late President Yar'Adua was clearly aware of the challenges posed by his ill health in managing the hectic functions of the office of an executive presidency, he will fully have entered into the race to contest the 2007 general elections.
- iii. Notwithstanding the fact that the former President Chief Olusegun Obasanjo, may have been briefed on late President Yar'Adua's ill health (he denied not been aware of late President Yar'Adua's health challenges prior to his nomination as the PDP flag bearer in the election) allowed him to contest the PDP party primary which led to his emergence as the party's Presidential candidate for the 2007 Presidential election in Nigeria.
- iv. In the heat of the 2007 elections campaign late President Yar'Adua's ill health resurfaced and was rushed to Germany for medical treatment.
- v. The heterogynous nature of Nigeria has made it imperative for there to be a Constitutional laid down guideline, rule and or frame-work to guide the application of the Doctrine of Necessity to forestall its abuse.
- vi. For a country like Nigeria that is still striving to attain national integration,(having been weighed down by religious and ethnic influences and considerations in her socio-political growth since independence as well as endemic corruption,) it is absolutely necessary to effectively and constitutionally streamline the application of the Doctrine of Necessity so as to checkmate the domination of one section, and or segment of the country by another or one ethnic and or religious group over others in the country.

- vii. The combined effect of the 1999 Constitution of the Federal Republic of Nigeria (which is the Ground norm of our Law and legal system) and Decided Cases clearly spelt out the qualifications of any person aspiring for the office of the President, conditions under which the President can be removed and the roles of the National Assembly and Federal Executive Council. But because of the absence of complete national integration, which is as a result of Nigerian ethnic and religious cleave and affiliations.

## **Conclusion**

The Doctrine of Necessity though, politically necessary in some situation, should not be seen or regarded as the best solution to all problems; hence politicians will always see it as the most convenient way to abandon the constitution, an action that may escalate into the violation of the rule of law and human rights. For instance, the doctrine has been shoddily used and flagrantly abused in Pakistan as every government has used it as a political weapon to either intimidate their opponents or repress the rule of law using extra constitutional means. Unfortunately, they always have good allies in the judiciary to validate such actions as necessary to save Pakistan from collapsing. Even in Nigeria, during the military era, the rule of law and human rights was repressed and violated with the military using Decrees as a Necessary tool to govern, thereby abandoning the constitution only running to the constitution when it is convenient and served the purpose of the military junta and dictator. The argument is that the Nigerian Constitution has remained so deficient in definitions and articles pertaining thereof to the transfer of power that it had to in essence be suspended in favor of the Doctrine of Necessity. A military coup that would normally be considered illegal is acknowledged and recognized by the courts and the decrees deriving from the occupying force of the presiding junta are equally upheld on the "grounds of necessity". Invariably, Nigeria in 2010, led by its own example, repeating what it started in 1965 with the first coup and follow-up armed events, including the civil war. To this effect, the Pakistani and Nigerian experience should not be considered as a good model and legitimate precedent.

There should be a Constitutional review so that certain grey areas of the Constitution capable of creating a Constitutional lacuna which will invariably lead to the invocation of the Doctrine of Necessity can be covered. The British Broadcasting Co-operation (BBC) interview does not comply with the provisions of Section 145 of the constitution of the Federal Republic of Nigeria, so claiming that it is a transmission to the Senate by the President of the Nigerian Senate and the Speaker of the House of Representatives is totally misleading. The element of voluntariness is lacking. The president must intend to transmit the declaration. He clearly did not intend the BBC transmission to be used to invoke Section 145. The declaration must be written. The BBC transmission is not the type of Transmission envisaged by Section 145. It was electronically broadcasted. The declaration must be to the stated persons and not to "the whole world."

But the Senate knew that it breached Section 145 because the President of Senate, David Mark, tried to justify the step under the Doctrine of Necessity. This effectively opened a

new vista in the debate. It may well be the spirit of Section 145 was appeased by the resolution, as argued by Mark, but the letters were surely desecrated. So, is the haphazard reliance on Section 145 justifiable under Necessity? One plague that often afflicts human documents is their being prone to the lapses of unfeasibility fixed by the limitations of human abilities. This is why the American constitution had seen many amendments introduced to deal with problems that arose ex-imprecision.

. Invariably, Nigeria in 2010, is leading by its own example, repeating what it started in 1965 with the first coup and follow-up armed events, including the civil war. Is it not ironical that the role models for Nigeria in this regard are Pakistan and Grenada? Finally, Festus provided the answer most people have been waiting for, by recalling the controversial judgment given by the Chief Justice of Pakistan. **The Judge had quoted the famous British Jurist, Henry de Bracton who described the Doctrine of Necessity as a process by which "That which is otherwise not lawful is made lawful by necessity"**<sup>33</sup>.

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