

Law for social-ecological resilience

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**ECO-TERRORISTS FACING ARMAGEDDON:
THE IMPACT OF THE DEFENCE OF NECESSITY ON
LAW'S NORMATIVE RIGIDITY IN A CONTEXT OF
ENVIRONMENTAL CRISIS**

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**Workshop on Environmental
Governance: Structures and Theories**

Thursday 18/11, 15.00-16.30

UNDERLYING ARGUMENT

- Law's normative role requires minimal rigidity
- Legal norms inevitably rely on generalisations
- Unique and unforeseeable events constitute an inherent challenge for law
- Specific mechanisms provide flexibility in exceptional cases
- The application domain of these mechanisms may expand critically in times of crisis and emergency
- The resulting increase in legal flexibility may threaten law's role as a framework of normative rules

In a context of environmental crisis and climate change, can mechanisms for legal flexibility diminish law's normative rigidity enough to damage its resilience? A CASE STUDY ON NECESSITY

PLAN

1. Introducing necessity
2. Defining the defence of necessity in Canadian law
3. Increasing legal flexibility: A case law review
4. Dissolving law's normativity? Necessity in environmental crisis

1 - INTRODUCING NECESSITY

DEFINITION: Necessity relates to the situation where an offence is committed to avoid a greater evil which would result from objective dangers in exceptional circumstances

AMBIVALENCE BETWEEN NECESSITY AND LAW:

1 – Law must recognise necessity

«The lawgiver cannot have in view every single case, he shapes the law according to what happens more frequently by directing his attention to the common good. Wherefore, if a case arises wherein the observance of that law would be hurtful to the general welfare, it should not be observed.» St. Thomas Aquinas

2 – Necessity threatens law's normativity

«In terms of policy necessity is a dangerous doctrine. For one thing it allows an individual, as judge in his own cause, to put his own before another's good; for another, it opens the door to all manner of self-serving pleas – (...) it is invoked equally by despots and by rebels.» Law Reform Commission of Canada

2 - DEFINING NECESSITY IN CANADIAN LAW

HISTORY:

- Tributary to English common law
- XVIII century: clearly defined by Blackstone
- XIX century: marginalised by the English drive to codify criminal law – excluded from the English Draft Code of 1879
- Excluded from the 1st Canadian Criminal Code in 1892
- Preserved as a residual and inarticulate common law defence to justify or excuse an act otherwise illegal: subsection 8 (3) CCC
- In 1976, its acceptance is still uncertain - *Morgentaler v. The Queen*

«No system of positive law can recognize any principle which would entitle a person to violate the law because in his view the law conflicted with some higher social value.»

2 - DEFINING NECESSITY IN CANADIAN LAW

DEFENCE RECOGNISED: *PERKA v. THE QUEEN*, 1984

Facts: Ship leaves Columbia for Alaska with a cargo of cannabis. En route in international waters off the coast of British Columbia, the engine breaks down and a storm force the ship on Canadian shore, where the crew are arrested and cargo seized.

Charge: Importing drug in Canada for trafficking.

Defence: Never wanted to import in Canada. Planned to repair ship and leave. Grounding the ship was necessary.

Evidence: Expert witnesses testify that grounding was prudent and essential.

Judgement: The defence of necessity exists in Canadian law. The facts give rise to the defence. However, a new trial is ordered because of errors in instructions to jury.

2 - DEFINING NECESSITY IN CANADIAN LAW

DEFENCE RECOGNISED: *PERKA v. THE QUEEN*, 1984 (Continued)

Necessity renders punishment unjust. The sanction of a necessary offence is not acceptable.

Dissuasion is useless to deal with a necessary act. The offence would have been committed by any other reasonable person in the same situation.

Danger: Necessity can reduce the universality of law and make its application relative.

Solution: Necessity is an excuse. The offence committed under necessity remains wrongful. The universal character of law is preserved.

- Justification: challenges the wrongfulness of an action which technically constitutes a crime.
- Excuse: concedes the wrongfulness of the action but asserts that the circumstances under which it was done are such that it ought not to be attributed to the actor.

2 - DEFINING NECESSITY IN CANADIAN LAW

LIMITATIONS ON THE DEFENCE : *PERKA + LATIMER v. THE QUEEN*, 2001

3 cumulative requirements for the defence to succeed:

1 – Urgent situation and imminent peril

2 – Impossibility to comply with the law

3 – Proportionality requirement

Proof:

Prosecution bears the burden of repelling doubts raised that the accused was acting out of necessity

Application domain:

Criminal law as well as statutory and regulatory offences

Applicable to strict and absolute liability offences

3 - INCREASING LEGAL FLEXIBILITY: CASE LAW REVIEW

APPREHENSIONS ABOUT NECESSITY IN ENVIRONMENTAL LAW:

- The courts could question the social utility and value of legal frameworks
- Circumvent legislative decisions to impose absolute liability for some offences
- Statutes already provide for necessity exceptions when required
- Easier to invoke necessity with respect to environmental regulatory offences because environmental harms are more difficult to assess than harms to socio-economic interests

«where it is impossible to carry on an undertaking in accordance with the law the undertaking must be abandoned rather than the law be violated [...]. Purely economic difficulties involved in complying with the law have never been accepted as an excuse for non-compliance.»
R. v. Toronto Refiners & Smelters Ltd, 1977

3 - INCREASING LEGAL FLEXIBILITY: CASE LAW REVIEW

SUCCESSFUL DEFENCES OF NECESSITY (Continued):

The Queen v. Municipality of Saint-Cajetan D'Armagh

In the fall of 1986, a municipality does dredging works to avoid flooding in a river without the authorisation required under the *Environment Quality Act*

The defence of necessity is allowed because flooding in the spring of 1986 had damaged properties, there was a chance that similar flooding would reoccur in 1987, the municipality had required an authorisation earlier in 1986, and the ministry was not diligent in granting the authorisation

Issues:

- Flooding was caused by the remnants of a dike that collapsed in 1979
- Since 1979, flooding was an annual occurrence
- Was flooding unforeseeable? Was there no other legal avenue?

3 - INCREASING LEGAL FLEXIBILITY: CASE LAW REVIEW

SUCCESSFUL DEFENCES OF NECESSITY (Continued):

The Queen v. Pootlass

A fishing vessel operates in a prohibited zone after closure of fishing season in contravention to the *Fisheries Act*

The defence of necessity is allowed because the nets could not be retrieved in time due to a storm, and the crew worked as hard as possible in harsh conditions to retrieve them before closure time

Issue:

- The nets could have been cut adrift to respect closure time

4 - NECESSITY IN ENVIRONMENTAL CRISIS

4.1 – THE REGULATION OF CIVIL EMERGENCIES INCREASES NECESSITY'S APPLICATION DOMAIN

Since 2001, a new legal framework regulates civil emergencies in Québec:
Civil Protection Act

It applies to minor and major **disasters** = an event caused by a natural phenomenon, a technological failure or an accident, resulting or not from human intervention, that causes serious harm to persons (or substantial damage to property) and requires unusual action on the part of the affected community, such as a **flood, earthquake, ground movement, explosion, toxic emission or pandemic**

Grants powers to public authorities in a state of emergency to require the assistance of any citizen

Creates offences for the refusal to follow an order requiring assistance

4 - NECESSITY IN ENVIRONMENTAL CRISIS

4.2 – INCREASE IN UNFORESEEABLE DISASTERS AND UNPREDICTABLE CLIMATOLOGIC EVENTS

2°C global warming might push the climate system beyond tipping points after which the warming process is accelerated and reinforced by positive feedback mechanisms

According to some leading scientists, the Earth was already committed to 2.4°C of warming above the pre-industrial level in 2005, irrespective of any actions taken

- Water availability will decrease in areas that are drought-prone
- Precipitations patterns will become unpredictable and more violent, leading to floods
- People and ecosystems in coastal zones will be exposed to risks of higher storm surges, intrusion of salt water and sea levels rise

4 - NECESSITY IN ENVIRONMENTAL CRISIS

4.3 – CAN NECESSITY EXCUSE ILLEGAL ACTIONS TO PROTECT THE ENVIRONMENT?

Québec v. Municipality of Saint-Séverin

The municipality is accused of doing sewers works to stop untreated discharges in a river without a ministerial authorisation in contravention to the *Environment Quality Act*

The defence of necessity is allowed because there was an unpredictable and imminent peril due to the arrival of winter which would have postponed the works for a year, and due to the impending expiry of a governmental funding programme, and to the deliberate delays from the Ministry to grant an authorisation.

The proportionality test between harms is met because the works conformed with state-of-the-art construction practice

4 - NECESSITY IN ENVIRONMENTAL CRISIS

4.3 – CAN NECESSITY EXCUSE ILLEGAL ACTIONS TO PROTECT THE ENVIRONMENT? (Continued)

MacMillan Bloedel v. Simpson

Protesters are accused of criminal contempt for disobeying a court order to avoid interfering with duly authorised logging operations

Protesters argue that their road blockade of the logging areas was necessary to save an exceptional forest ecosystem on Vancouver Island

The Court decides that the defence of necessity “cannot operate to avoid a peril that is lawfully authorized by the law”. Moreover, the protesters had other options than disobey the court orders

THANK YOU