

**State of emergency, state of exception: A critical investigation**

**By**

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## SUMMARY

In fact, the exercise of emergency powers is a phenomenon common to both democratic and undemocratic governments, the only difference between the two being the presence or absence of check and balances to prevent the abuse and arbitrary use of the emergency powers by the government.<sup>1</sup>

In order to interrogate how far a state can go in legitimising arbitrariness, it is important to question whether a juridical system can provide its own suspension, as well as critically assess which scenarios provide for a state of exception or a state of emergency since vagueness can be exploited to the detriment of civil liberties of citizens and the rule of law. The main concern of the study refers to the fact that a state of exception and a state of emergency are the common denominator between the state of law, totalitarian state and authoritarian state. Emergencies situations can be considered as a threat for the enjoyment of human rights and fundamental freedoms, because separation of powers, right to a fair trial and accountability are no longer respected. From a theoretical viewpoint, two conceptions manifest themselves; the first being where a state of exception is located within a juridical order and a second location found within an extra juridical approach. Fundamentally, the nature and the function of the state of emergency and the state of exception have therefore to be contextualised for the purpose of legitimacy, accountability and relevance.

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<sup>1</sup> CM Fombad 'Cameroon's emergency powers: A recipe for (un)constitutional dictatorship? *Journal of African law* (2004) vol.48 62

## CHAPTER 1: INTRODUCTION

### 1.1 Background

According to François Mitterrand, article 16 of the French Constitution is an element in the system put in place by an absolute authority which can legitimise arbitrariness.<sup>2</sup> This statement of former French President relating to the state of exception is significant. With a view of protecting the state, most constitutions worldwide provide some circumstances (war, insurrection, invasion, natural cataclysm...) that may impact negatively on human rights and access to justice. The German jurist Carl Schmitt believes that during these circumstances a state in its aim to survive must infringe its own rules. The assumption is that in a state of law, all must be done according to the law, as noted in the Kelsenian diagram of hierarchy of juridical norms, which posits that the law is the central landmark of all acts in any society. In case where this is not observed, the judge will take sanctions under the principle of legality which is the first feature of a state of law.

However, in a context influenced by good governance, history shows paradoxically many cases where the Kelsenian diagram has been betrayed by the state not following its proper rules through the institution and institutionalisation of exceptional regimes. In this regard, the state of emergency and the state of exception should be subject to critical investigation.

Reasons put forward by states to justify exceptional powers include survival of the society, functioning of institutions, guarantee of public order, national safety, war, natural cataclysms, invasion, and general insurrection. These events are usually termed necessity or exceptional circumstances during which, many juridical systems provide mechanisms to protect government against judges. Indeed, by virtue of the principle of the non-interference of the judiciary, the administration cannot be accountable to the judges.<sup>3</sup>

The problem however is that war, insurrection and invasion are political facts which impose juridical measures on states. Here is the problem with the definition of a state of exception and a state of emergency where the border between law and politics becomes blurred. In this case, critical discussions of the debates within juridical and philosophical spheres are inevitable.

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<sup>2</sup> *Le coup d'état permanent (1964)* 197

<sup>3</sup> Article 13 of the law of 16 and 24 August 1790 and the decree of 16 *Fructidor* year 3

In order to interrogate how far the state can go, it is important to question about a juridical system which provide its own suspension. The matter is to know whether a state of exception and/or a state of emergency must be provided beforehand or if it should be implemented according to whether or not a situation may require it. Fundamentally, this is the issue of the nature and the function of a state of exception and a state of emergency.

Arguably, these two regimes seem to lead to an inversion of the state of law. If a state of exception must be provided beforehand, its functioning allows the state to frame the extent and the duration of powers transferred in order to avoid any drift and to guarantee oneself against a coup d'état.<sup>4</sup> Regarding the second fringe of the question, the assumption is the following: the fact that emergency situations are unpredictable by nature means that a model of functioning established beforehand cannot be adapted.<sup>5</sup>

On assessing the nature and function of exceptional regimes, two keys characteristics are evident. The first one considers that a state of exception or a state of emergency is an exception and a limitation of the principle of legality. A key proponent of this belief Carl Schmitt, considers a state of exception to be a constitutional dictatorship arguing that in a state of exception not only does the president acts as the 'guardian of the constitution'<sup>6</sup>, but also on top of that 'the state continues to exist, while law recedes.'<sup>7</sup> Thus, one can understand the position of 'thinkers of extreme left-wing with anarchist tendencies for whom any organisation under state control based on the law is by nature a part of totalitarianism, so that direct democracy is the only political regime acceptable.'<sup>8</sup> The consequence of this approach is that necessity derives directly from the law in force and therefore is considered as an autonomous source of law. This juridical viewpoint is predominant nowadays and has been constitutionalised by most countries, including Cameroon, France and South Africa<sup>9</sup> and has also been codified in international law through the concept of derogation.

A second tendency manifests itself by arguing that, if a legal system comes to define the conditions where its functioning may not work it would be simply perceived as a monstrosity. According to Agamben, a state of exception has the power to separate the force

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<sup>4</sup> JC Monod 'Le droit et l'état d'exception' <[http://www.droitsfondamentaux.org/article.php?id\\_article=58](http://www.droitsfondamentaux.org/article.php?id_article=58)> (accessed 9 November 2009) [my own translation]

<sup>5</sup> as above

<sup>6</sup> G Agamben *State of exception* (2005) 31

<sup>7</sup> n 6 above, 15.

<sup>8</sup> n 4 above, [my own translation]

<sup>9</sup> Article 16 of the French constitution, article 9(1)(2) of the Cameroonian constitution, section 37 of the South African Constitution

of law from the law. What happens in this case is that on the one hand, the law still exists but is not applied, and on the other hand, acts, which do not have the value of law, acquire force of law.<sup>10</sup> Consequently, although a temporary and controlled use of full powers is theoretically compatible with democratic constitutions, a systematic and regular exercise of the institution necessarily leads to the ‘liquidation’ of democracy.<sup>11</sup> Far from juridical discourses, Agamben asserts that a state of exception and a state of emergency are no longer the action by which the law is suspended in order to save law, but the obliteration of the borders between law and violence.<sup>12</sup>

From a historical viewpoint, the theory of exceptional circumstances dates back from the earliest Roman antiquity. Some authors like Guy Brabant, when talking about a state of emergency refer to ‘a Roman dictatorship.’<sup>13</sup> Likewise, Niccolo Machiavelli wrote about Roman traditions that:

A Republic or a prince has to foresee the events and circumstances that could be unfavourable to them.<sup>14</sup>

Article 92 of the French Constitution of *An VIII* was an exception to the tradition. It stipulated that in case of events threatening national safety, the law could suspend the constitution. Experienced and developed essentially during the two world wars, exceptional regimes are nothing but legal hindrances to human rights protection. It is a mechanism which once activated nibble little by little on the juridical guarantees of individual’s freedom and democratic rules.<sup>15</sup>

## 1.2 Research Problem

This study engages in critical investigation of the state of exception and the state of emergency, and analyse the mechanisms, nature and impact of these regimes on society. Indeed as pointed by Agamben:

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<sup>10</sup> n 6 above, 38.

<sup>11</sup> n 6 above, 7.

<sup>12</sup> n 6 above, 48.

<sup>13</sup> *L’Etat face aux crises* (1979) 7

<sup>14</sup> E Nforbin ‘The declaration of a state of emergency in Cameroon: Myth and reality’ *Annales de la faculté des sciences juridiques et politiques, université de Dschang* tome 2 (1998) 66

<sup>15</sup> n 4 above

The essential task of a theory of the state of exception is not simply to clarify whether it has a juridical nature or not, but to define the meaning, place, and modes of its relation to the law.<sup>16</sup>

The fundamental points are: What is a state of exception and a state of emergency?

What are their impacts?

### 1.3 Significance of Study

This study seeks to contribute to the scholarly debate on the nature and impacts of a state of emergency and a state of exception. Through the concept of derogation, these regimes ignore mechanism of separation of powers, good governance and accountability which are the keystone of a state of law. Therefore it is hardly surprising to consider a state of exception and a state of emergency as the intersection where authoritarianism, totalitarianism and democracy come together. The proliferation of exceptional regimes that espouse principles of the state of exception and the state of emergency significantly affects the quality of human rights and democracy worldwide. Initially, emergency regimes were instituted for a short time in order to find a remedy for a threat. But nowadays it is another story. As rightly observed by Agamben, the state of exception has today reached its maximum worldwide deployment<sup>17</sup> while for Benjamin, the state of exception has become the rule.<sup>18</sup> In Cameroon for instance, between the colonial period and 1992, one can count more than one hundred decrees of declaration of a state of emergency.<sup>19</sup>

Exceptional regimes constitute legal hindrances to human rights and ignorance of democratic principles. One of the purposes of the study is to recall that human rights derive from the mere fact of being human and it is not possible to deprive somebody of a right without depriving him or her of his or her humanity.

Talking about emergency regimes is important in order to assist both the local and international community in removing hindrances to human rights and fundamental freedom. It is worth to analyse such phenomenon and to contribute to its reduction by placing the onus on states to protect human rights in all circumstances. It will also reinforce the notion that the human rights of every individual are sacred and that the interplay between law and politics

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<sup>16</sup> n 6 above, 51.

<sup>17</sup> n 6 above, 8.

<sup>18</sup> n 6 above, 6.

<sup>19</sup> J Atemengue 'Le pouvoir de police administrative du président de la République au Cameroun: Réflexions sur les fondements de l'ordre juridique' *Annales de la faculté des Sciences juridiques et politiques, université de Dschang* tome 3 (1999) 146 [my own translation]



should blur such prerogative. In 1999, Koffi Annan, the former Secretary General of the UN, said that time was ripe for the international community to reach a consensus, not only on the principle that massive and systematic violation of human rights must be checked wherever they take place, but also on ways of deciding what action is necessary to be taken, when, and by whom.<sup>20</sup>

A focus on Cameroon, France and South Africa is paramount for many reasons: Cameroon is a Central African country which has witnessed human rights violations. At the same time, being from Cameroon, the author is familiar with the country's legal system and can shed some light on its local reality. A second country South Africa, despite its apartheid's history, has become a reference in matter of democracy and promotion of human rights in Africa and is an important benchmark for comparison purposes. The choice of France is justified by its major role in the history of exceptional circumstances and human rights.

#### **1.4 Definition of concepts**

The state of exception in a specific sense presupposes a constitutional order, while the state of emergency is a general category without specific reference to an existing order because *necessitas non habet legem*.<sup>21</sup> The term 'critical' refers to qualities or defects of a concept while the word 'investigation' espouses the idea of attentive and methodical researches.

#### **1.5 Proposed Structure**

The study will be divided into five chapters:  
Following the present part, Chapter two provides a conceptual and theoretical framework where the concepts and theories used in the study are clarified. The concept state of exception and state of emergency is different and their comprehension and implementation depend also of the contextual framework. At the same time chapter two investigates the nature of these regimes and their controversy within academic circles from Schmitt, Benjamin to Agamben and Derrida.

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<sup>20</sup> Speech of the former Secretary General of the UN at the 54<sup>th</sup> session of the General Assembly, 20 September 1999, SG/SM/7136GA/9596, para 147

<sup>21</sup> G Schwab *The challenge of the exception: An introduction to the political ideas of Carl Schmitt between 1921 and 1936* 2<sup>nd</sup>ed. with a new introd. (1989) 7

Chapter Three will critically analyse the approaches of the juridical regime and impacts of a state of exception and a state of emergency. The main points are the violation of human rights as well as the concentration of powers which espouses the idea of authoritarianism.

Chapter four will look at the dangers and the weaknesses of exceptional regimes. Dangers due to the rise of the state of exception and the state of emergency in modern times and weaknesses due to the fact that they cannot be considered as a constitutional dictatorship because whoever intends to achieve the end of law, must proceed with law.<sup>22</sup>

Chapter Five is the final chapter. It summarises the research, presents the findings and provides recommendations.

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<sup>22</sup> n 6 above, 26.

## CHAPTER 2: MAIN APPROACHES TO THE STATE OF EXCEPTION AND THE STATE OF EMERGENCY

### 2.1 Introduction

The purpose of the present chapter is to point up the scholarly debate on a state of exception and/or a state of emergency. The concepts ‘state of emergency’ and ‘state of exception’ will be used interchangeably to emphasise the same reality. Indeed as pointed by Agamben a ‘state of exception’ is a ‘consistent set of legal phenomena’ appropriate to certain countries.<sup>23</sup> In Germany for instance the concept refers to the state of necessity, the Anglo-Saxon talk about martial law and emergency powers, while Italians and the French refer to emergency decrees and state of siege.<sup>24</sup> However in chapter three the singularity of the two concepts will be examined. There are two approaches to the state of exception and the state of emergency: The juridical approach and the extra juridical conception.

### 2.2 The Juridical approach: Theories seeking to include a state of exception and a state of emergency within the juridical sphere

This approach considers necessity as source of law, a state of exception (a state of emergency) as the state’s subjective right to its own preservation, and as a constitutional dictatorship.

#### 2.2.1 Santi Romano and the theory of necessity as source of law

‘*Necessitas legem non habet.*’ For those who try to include a state of exception within juridical order, this Latin quotation means ‘necessity has no law’, where necessity has the power to render what is illicit to become licit. Proponents of this conception include Santi Romano, Hauriou, Mortati, Jellinek and Duguit<sup>25</sup>.

Romano for instance, considers necessity as ‘the first and ordinary source of law.’<sup>26</sup> According to him, during necessity, there is no obligation to follow rules. Necessity in this case becomes an automatic absolution mechanism for the infringement of the law. Thus, necessity must be conceived as a state of affairs that cannot be framed and regulated by

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<sup>23</sup> ‘On Giorgio Agamben’s state of exception’  
[http://www.google.fr/#hl=fr&&sa=X&ei=8IAjTJv8FtGB\\_QaflejzBA&ved=0CBQOBSgA&q=On+Giorgio+Agamben+State+of+Exception&spell=1&fp=ea54c2dbac400494](http://www.google.fr/#hl=fr&&sa=X&ei=8IAjTJv8FtGB_QaflejzBA&ved=0CBQOBSgA&q=On+Giorgio+Agamben+State+of+Exception&spell=1&fp=ea54c2dbac400494) (accessed 9 November 2009)

<sup>24</sup> as above

<sup>25</sup> n 6 above, 27-29.

<sup>26</sup> n 6 above, 27.

previous juridical order in force. If it has no law, it makes law, that is to say, necessity constitutes a true and proper source of law. It can be said that necessity is the first and originary source of law so that by comparison, the others are to be considered somehow derivative.<sup>27</sup>

Romano's point is that rules do not have the power, the capacity and the maturity to frame every situation of life. Consequently, there are rules that cannot or should not be written; there are others that cannot be determined unless when the circumstances arise for which they must serve. This idea is shared by some authors like Jellinek and Duguit, who consider necessity as the foundation of the validity of decrees, having force of law issued by the executive in a state of emergency.<sup>28</sup>

Undoubtedly, the law has become the highest and most general manifestation of the juridical rules. However, it is unrealistic to extend its dominion beyond its own field. Romano believed necessity is contrary to the law (or illegal). Yet, at the same time, this idea conforms to unwritten positive law where necessity's ability to overrule the law comes from its very nature and its original character.<sup>29</sup> As observed by Romano, although a revolution is certainly a state of fact that cannot be regulated in its course by those state powers that it tends to subvert and destroy and in this sense is by definition 'antijuridical, even when it is just', with respect to the positive law of the state against which it is directed, it is not a movement ordered and regulated by its own law.<sup>30</sup> Thus, if in a state of exception, fact is converted into law (emergency is a state of fact), the opposite is also true, that is, an inverse movement also acts in a state of exception, by which law is suspended and obliterated into fact.

The essential point, in any case, is that a threshold of undecidability is produced at which *factum* and *ius* fade into each other.<sup>31</sup> This allows one to understand the view of Hauriou when talking about the deleterious atmosphere which prevails in a state of emergency where he asserts that what is important is 'to live first and then live normally.'<sup>32</sup> In the same vein, a state of exception is according to some authors, the state's subjective rights to its own preservation.

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<sup>27</sup> as above

<sup>28</sup> n 6 above, 27-29.

<sup>29</sup> n 6 above, 27.

<sup>30</sup> n 6 above, 27-29.

<sup>31</sup> n 6 above, 29.

<sup>32</sup> M Hauriou 'Note sous Conseil d'Etat 28 Juin 1918 Heyries' [my own translation]

### 2.2.2 Rossiter and the theory of the state's subjective right to its own preservation

Proponents of this approach include Hoerni, Ranelletti and Rossiter who consider a state of exception as the state's subjective (natural or constitutional) right to its own preservation.<sup>33</sup>

The main idea of this approach is that, it is a right and even a duty for the state to provide and institutionalise a state of emergency. As a moral entity, sovereign with legal personality, the state must ensure no matter what happens its functioning, given that the state's subjective right to its own preservation derives directly from nature. Hence, when the law in force provides it, for the sake of its preservation, the survival of the state itself and the entire juridical order belong to the state.

Rossiter further asserts that the institution of democracy contains heavy mechanisms which can work only under normal circumstances. It means that the principle of legality, hierarchy of juridical norms, separation of powers, promotion and protection of freedoms and liberties are made for some circumstances. In other situations especially in times of crises, these principles can become a serious barrier for the preservation of the society. On this account Rossiter states that:

In time of crisis a democratic, constitutional government must temporarily be altered to whatever degree is necessary to overcome the peril and restore normal conditions. This alteration invariably involves government of a stronger character; that is, the government will have more power and the people fewer rights.<sup>34</sup>

A state of exception appears like a twin institution of private law called 'self-defence.' Far from being only a right, self-defence is a duty, a mechanism characterised by the instinct of self-preservation. It leads necessarily to exoneration. In addition, 'no sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself.'<sup>35</sup> Julius Hatschek has summarised this position, arguing that emergency powers are grounded in 'a constitutional or preconstitutional (natural) right' of the state, regarding which good faith is enough to guarantee immunity',<sup>36</sup> which in actual fact is not far from the theory of constitutional dictatorship.

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<sup>33</sup> n 6 above, 23.

<sup>34</sup> n 6 above, 8.

<sup>35</sup> n 6 above, 9.

<sup>36</sup> n 6 above, 23.

### 2.2.3 Carl Schmitt and the theory of constitutional dictatorship

The main ideas of Carl Schmitt on the state of exception are articulated in *Dictatorship* and *Political Theology*.<sup>37</sup> According to Schmitt, a state of emergency is an exception to the rule. There are situations where the state in order to survive, must infringe its own rules. To face these situations, it is important to redefine the relations between law and power. Therefore rules should be thought from the exception:

Schmitt's theory of the state of exception proceeds by establishing within the body of the law a series of caesurae and divisions whose ends do not quite meet, but which, by means of their articulation and opposition, allow the machine of law to function.<sup>38</sup>

As observed by Schmitt, every government must provide a dictatorial element within its constitution in order to guarantee its own existence.<sup>39</sup> Accordingly, the dictator's task may include waging war, suspension of an insurrection. His aim is to eradicate an existing critical situation so that the suspended constitution (in exceptional times a part or even the entire constitution may be temporarily suspended) may again be revived.<sup>40</sup> Then according to Schmitt, politics has a fundamental link with the limit. He establishes a link between the concept of sovereignty and the power to decide the instauration of a state of exception.

In 1922, he published *Politische and Theology* which begins with a thundering declaration:

Sovereign is he who decides on the exception.<sup>41</sup>

The point is that, it is not feasible for the rule of law to distinguish specific exceptional circumstances from normal life. Therefore, it is the duty of the prince to decide on the state of emergency. Moreover, the law being unable to frame the extent of action of the prince, he is empowered to define the modalities of the application of the law. This situation leads to the distinction between two fundamental elements of law: norm and decision.

In suspending the norm, a state of exception reveals in absolute purity a specific juridical formal element: the decision. The two elements; norm and decision show their autonomy.<sup>42</sup> In fact, the sovereign 'decides whether the extreme case exists, as well as what should happen in order to put an end to it. He [the sovereign] stands outside the normally

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<sup>37</sup> n 6 above, 33

<sup>38</sup> n 6 above, 35.

<sup>39</sup> n 6 above, 27.

<sup>40</sup> as above

<sup>41</sup> n 6 above, 1.

<sup>42</sup> n 6 above, 34.

valid legal order and yet belongs to it, because he is competent to make the decision as to whether the constitution can be suspended entirely.’ Furthermore,

A normal situation must be created, and the sovereign is precisely he who definitively decides whether this normal situation actually exists...[Thus] in the same manner as in the normal case, the independent moment of the decision can be pushed back to a minimum, so in the exceptional case the norm is pushed back.<sup>43</sup>

In respect to what happens to the sovereign in normal times, Schmitt argues that the sovereign is, so to speak, slumbering, and he is suddenly awakened at a crucial moment; namely, at the borderline between normalcy and the state of exception.

The main part of Schmitt’s approach of the state of exception derives from the polemic of the Kelsen’s theory of normativism. Hans Kelsen observed that ‘the law is a hierarchy of norms.’<sup>44</sup> But according to Schmitt, all law is ‘law in situation’, one can appreciate the real significance of a rule only in practical context of its application. This recalls the debate between *langue and parole*: there are a lot of words in the life that are not used, and therefore, it is very difficult to frame their contextual significance. According to Schmitt, rules of law look like unused words. Depending on the situation he faces, the sovereign must act. There is no rule to apply to chaos, likewise the prince has the duty to establish the conditions of the materialisation of the state of emergency.

According to Kelsen, a pure theory of law must be devoid of politics, ethics, history or sociology; a legal theory must clarify the link between the highest and lower rules.<sup>45</sup> Contrary to this, Schmitt argues that in itself, the norm is insufficient and becomes real only by decision. The decision is not only a pure emanation and application of the norm, but contains its own specific function. There are false decisions which in spite of their falsity become juridically valid.<sup>46</sup>

Schmitt argues that each norm presupposes its normal situation, and becomes meaningless when this normal situation ceases to exist. A state of emergency reveals what the routine of normalcy veils.<sup>47</sup> To the issue of what happens in a state of exception, Schmitt makes two distinctions. He distinguishes between commissarial dictatorship and sovereign

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<sup>43</sup> n 21 above, 50.

<sup>44</sup> H Kelsen *théorie pure du droit* 2<sup>nd</sup>ed (1988)

<sup>45</sup> n 21 above, 45.

<sup>46</sup> as above

<sup>47</sup> n 21 above, 49.

dictatorship. He makes also a difference between the concept of norm of law and the norm of the realisation of the law, constituent power and constituted power.

Commissarial dictatorship is based upon the *pouvoir constitué* appointing the dictator, while in sovereign dictatorship, the appointment depends upon the *pouvoir constituant* of the people. A sovereign dictatorship, according to Schmitt, 'sees in the total existing order the situation which it seeks to do away with through its actions.'<sup>48</sup> The existing constitution is not merely suspended, but abrogated. On this account:

The final aim of a sovereign dictatorship is to create a condition whereby a constitution which it considers to be a true constitution will become possible.<sup>49</sup>

In terms of a commissarial dictatorship, a dictator may temporarily suspend or make extreme inroads into the constitution and the domain of ordinary legislation, but he may not abrogate existing laws from the statute books. In fact, a commissarial dictator suspends the constitution in order to protect and reinstate it when the threat is over. Hence the dictator's task is to eliminate the danger and to strengthen the foundation which has been threatened.<sup>50</sup> Therefore, the essential elements of a commissarial dictatorship, which emerge, are that it occurs at the moment when an established state of affairs is sufficiently threatened to warrant the appointment of a dictator.

The dictator is appointed by the sovereign a *pouvoir constitué* to accomplish a specific mission, and when it has been accomplished the dictator's task ceases.<sup>51</sup> According to Schmitt:

Both commissarial dictatorship and sovereign dictatorship entail a relation to a juridical context because the state of exception is always something different from anarchy and chaos, in a juridical sense, an order still exists in it, even if it is not a juridical order.<sup>52</sup>

Schmitt does not merge exception and the rule. Rather, he reaffirms the primacy of the exception in the case where it allows the application of the rule. Because it 'suspends the constitution in *concreto* in order to protect its concrete existence' (Schmitt), commissarial dictatorship ultimately has the function of creating a state of affairs 'in which the law can be

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<sup>48</sup> n 21 above, 35.

<sup>49</sup> as above

<sup>50</sup> n 21 above, 32-33.

<sup>51</sup> n 21 above, 50.

<sup>52</sup> n 6 above, 33.



realised.<sup>53</sup> This view is entirely different from the one which considers a state of exception and a state of emergency as a messianic and extra juridical phenomenon.

## **2.3 The extra juridical and messianic theories of the state of exception and the state of emergency**

The extra juridical approach will be raised before the one of messianic conception.

### **2.3.1 The extra juridical approach: the state of exception (the state of emergency) is alien to juridical sphere**

Julius Hatschek argues that every act performed outside of, or in conflict with the law in a state of necessity, is contrary to law and as such, is legally chargeable.<sup>54</sup> Proponents of this thesis include Biscaretti, Balladore-Pallieri and Carre de Malberg. According to them, a state of exception is essentially extra juridical, de facto elements, even though it may have consequences in the sphere of law. Accordingly, the declaration of a state of emergency generally derives from exceptional circumstances, or from a state of necessity.

But for the proponents of this position, it is a mistake trying to see necessity as deriving from a given objective. Rather, necessity entails a subjective assessment, that is to say the only circumstances that are necessary and objective are those that are declared so. On this account Balladore-Pallieri observes that the concept of necessity is an entirely subjective one, relative to the aim that one needs to achieve.<sup>55</sup> Then, a state of emergency may be decreed according to change of mood, whim or even tantrum of the prince. The most important effect is that, despite its extra juridical character, the state of exception has consequences inside the sphere of law. In others words necessity is an extra juridical phenomenon that even so may entail some impacts within the juridical context. Then even facts or norms which are juridically valid may acquire the character of necessity and will lead to the occurrence of a state of exception. Therefore, it would not be an overstatement saying that this conception forced the subjective character of necessity to the wall.

The principle of necessity as argued by Balladore-Pallieri is ‘always’ a revolutionary one. According to him, a revolutionary uprising may proclaim the necessity of a new norm that annuls the existing institutions that are contrary to the new exigencies; but there must be

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<sup>53</sup> as above

<sup>54</sup> n 6 above, 23.

<sup>55</sup> n 6 above, 30.

agreement in the belief that the existing order must be disrupted in observance of new exigencies.<sup>56</sup>

However, some authors like Walter Benjamin think that the real or absolute state of exception is only subject to a ‘pure’ or ‘divine’ violence. That is called the messianic conception.

### **2.3.2 The messianic conception: Walter Benjamin and the absolute state of exception (absolute state of emergency) as ‘pure’ or ‘divine’ violence**

In his essay ‘*Critique of Violence*’<sup>57</sup> Benjamin argues for a connection to a state of exception. He argues for the possibility of a violence that lies absolutely ‘outside’ and ‘beyond’ the law and that, as such, could shatter the dialectic between lawmaking violence and law preserving violence.<sup>58</sup> The text begins as follows:

The task of a critique of violence can be summarised as that of expounding its relation to law and justice.<sup>59</sup>

As summarised by Derrida, first there is a distinction between two kinds of violence in law, in relation to law: the founding violence, the one that institutes and posit law (‘lawmaking violence’) and the violence that conserves, the one that maintains, confirms, insures the permanence and enforceability of law (‘law preserving violence’).<sup>60</sup> Next, there is a distinction between the founding violence of law termed ‘mythic’ and the annihilating violence of destructive law, which is termed ‘divine.’<sup>61</sup> Finally, there is a distinction between justice as the principle of all divine positioning of the end, ‘principle of all divine end making’ and power as principle of mythical positioning of *droit*.<sup>62</sup>

The difference between pure violence and mythic violence is not inside the violence itself, but in its relation with something alien. The basic problem he addresses refers to the relation between law and justice as it hinges on violence. The issue is, to know whether violence, in the social and political realms, can be justified as a pure means in itself,

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<sup>56</sup> n 6 above, 33.

<sup>57</sup> W Benjamin ‘Critique of Violence’ *The continental ethics reader* (2003) 115

<sup>58</sup> n 6 above, 53.

<sup>59</sup> n 57 above, 115.

<sup>60</sup> J Derrida ‘The mystical foundation of the law’ *Deconstruction and the possibility of justice* (1990) 981-982

<sup>61</sup> as above

<sup>62</sup> as above

independent of whether it is applied to just or unjust ends.<sup>63</sup> Likewise, law has an ‘interest in a monopoly of violence.’ This monopoly does not strive to protect any given just and ends but law itself.<sup>64</sup>

Carl Schmitt started ‘political theology’ by stating that sovereign is ‘he who decides on the state of exception.’<sup>65</sup> Benjamin’s answer is that the state of exception has become the rule<sup>66</sup> and there is no point declaring it anymore. This observation is a hard blow to juridical justifications according to which the state of emergency is the ultimate and salutary way to save or create the juridical sphere (Schmittian theory) or the state’s subjective right to its own preservation (Balladore-palleri, Carre de Malberg). The state of emergency decided by the sovereign is the fictitious one while the real state of emergency is the one which can deny the law and affirm the possibility of a human existence outside the law. The fictitious or real character of a state of exception highlights the distinction between mythic violence and ‘divine’ or ‘pure’ violence.

In a Benjamin’s approach, mythic violence is necessary for the activity of law making, and the law preserving violence needed to maintain a state created by the first kind of violence:

All violence as a means is either lawmaking or law-preserving.<sup>67</sup>

Mythic violence is a manifestation of the power of fate over the human. ‘Mythical violence in its archetypal form is a mere manifestation of the gods.’<sup>68</sup> It can be considered a fundamental dogma of law which is a normal means for a just end. It is a foundation of law which lies with law and establishes law as power.

One characteristic of pure violence is that it does not refer to a primitive violence but to relational purity. Pure violence is not something to follow or to find. It testifies the relation between law and violence. It shows and destroys the link between law and violence and may therefore appear not like a violence which governs, but like the one which purely acts. The state of emergency exists outside of the mythic form of law. Divine violence ends the suspension of the state of emergency under the violence of law.

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<sup>63</sup> n 57 above, 115.

<sup>64</sup> n 60 above, 985.

<sup>65</sup> n 6 above, 1.

<sup>66</sup> n 6 above, 6.

<sup>67</sup> n 57 above, 120.

<sup>68</sup> n 57 above, 123.

As pointed out by Derrida, the violence of God, instead of founding *droit*, it destroys it.<sup>69</sup> The aim of divine violence is to break the mythic forms of law, since it is a pure and immediate violence that does not aim to establish a new order. Further, it is not a means. It ends the violence of law which threatens human destiny. Contrary to mythic violence, which considered humans as guilty by nature, divine violence releases human being from that threat. On this account, divine violence is sovereign:

Divine violence, which is the sign and seal but never the means of sacred execution, may be called sovereign violence.<sup>70</sup>

Benjamin posits a dialectical oscillation in which the decay of one structure of law is superseded by another in a series that has no end except the end of time. While mythic violence brings guilt and retribution, divine violence offers expiation. According to the author if mythical violence immediately brings guilt and retribution, divine violence power only expiates; if the former threatens, the latter strikes; if the former is bloody, the latter is lethal without spilling blood.<sup>71</sup> In one word with regard to two kinds of violence one can understand why the author states that:

Mythical violence is bloody power over mere life for its own sake, divine violence, pure power over all life for the sake of the living. The first demands sacrifice, the second accepts it.<sup>72</sup>

The statement of Benjamin according to who the destiny of the philosophy of history is to reveal the link between the historical and the messianic as a messianic redemption in itself is more understandable.<sup>73</sup> The messianic approach Benjamin refers to is shared by author like Agamben.

### **2.3.3 The messianic conception: Giorgio Agamben and the real state of exception (real state of emergency) as redemption deriving from God**

A state of emergency leads to the relations between law and violence and between law and justice. Having consolidated the conceptual background, Agamben proposes a theory of

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<sup>69</sup> n 60 above, 1027.

<sup>70</sup> n 57 above, 126.

<sup>71</sup> n 57 above, 124.

<sup>72</sup> as above

<sup>73</sup> 'The theological materials of modernity (On Giorgio Agamben)'

<[http://www.thefreelibrary.com/%22The+theological+materials+of+modernity+\(On+Giorgio+Agamben\)%22-a0201210008.>](http://www.thefreelibrary.com/%22The+theological+materials+of+modernity+(On+Giorgio+Agamben)%22-a0201210008.>) (accessed 4 March 2010)

the state of exception as ‘the preliminary condition for any definition of the relation that binds and at the same time abandons the living being to the law.’<sup>74</sup> His inquiry concerns the origins and liminal space of law, how law copes when confronted by the irreducibly non-legal: ‘life itself.’ The state of exception is the recognition of law outside, but it simultaneously prompts sovereign attempts to encompass the outside within the law.<sup>75</sup> Agamben finds this ‘long battle over anomie’ at the heart of Carl Schmitt’s well known definition of the sovereign as ‘he who decides on the exception by means of which Schmitt ties the state of exception to dictatorship.’<sup>76</sup>

According to Agamben, the essential task of a theory of the state of exception, is not simply to clarify whether it has a juridical nature or not, but to define the meaning, place, and modes of its relation to the law.<sup>77</sup> ‘The state of exception is not a special kind of law (like the law of war); rather, insofar as it is a suspension of the juridical order itself, it defines law’s threshold or limit concept.’ A state of emergency is so difficult to define because of its close relationship to civil war, insurrection, and resistance. It is this no-man’s land between public law and political fact, and between juridical order and life which constitutes the core of Agamben’s approach.<sup>78</sup> The state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold or a zone of indifference, where inside and outside do not exclude each other but rather blur each other.<sup>79</sup> The state of emergency is the state power’s immediate response to the most extreme internal conflicts.

Agamben’s argument does not seek to include a state of emergency within the juridical sphere. Rather to consider it as a juridical institution, the state of exception can be considered as a legal civil war. On this account he recalls the example of the Nazi state in which on 28 February 1933 Hitler proclaimed a decree for the protection of the people and the state; a decree which suspended the articles of the Weimar Constitution concerning personal liberties. From a juridical standpoint, the entire Third Reich can be considered a

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<sup>74</sup> S Humphreys ‘Legalising lawlessness: On Giorgio Agamben’s state of exception’ <<http://www.google.co.za/search?hl=en&client=firefox-a&hs=Yji&rls=org.mozilla:en-US:official&channel=s&ei=CAOOS47FDYzBQaw5ZrCQ&sa=X&oi=spell&resnum=0&ct=result&cd=1&ved=0CBMQBSgA&q=legalizing+lawlessness+on+giorgio+agamben+state+of+exception&spell=1>> (accessed 4 November 2009.)

<sup>75</sup> as above

<sup>76</sup> as above

<sup>77</sup> n 6 above, 8.

<sup>78</sup> n 6 above, 2.

<sup>79</sup> n 6 above, 23.

state of exception that lasted 12 years.<sup>80</sup> ‘The state of exception as a paradigm of Government’<sup>81</sup> is therefore a fictitious one, where an exaggeration of lexicon of war, security, and terrorism is maintained to justify a concentration of powers and recourse to an immoderate government powers. Then, the declaration of the state of exception has gradually been replaced by an unprecedented generalisation of the paradigm of security as the normal technique of government.<sup>82</sup> State of exception is characterised by a ceaseless violence outside and against the law. It is a state where the anomie prevails over the whole institution, a space void of law, a situation of ‘an emptiness of law’,<sup>83</sup> a zone of anomie in which all legal determinations are deactivated.<sup>84</sup>

The state of emergency described by Agamben is not far from the state of nature of Hobbes. What is reappropriated in Agamben’s post-sovereign politics is the Hobbesian state of nature as a space of social praxis with no relation to the law or sovereignty.<sup>85</sup> The prince who uses the law as a violent instrument is similar to *Leviathan*. Agamben confronts the Hobbesian figure of the state of nature early in the first part of *Homo Sacer*, devoted to the reconstitution of the logic of sovereignty in terms of the ‘inclusive exclusion’<sup>86</sup> at work in the decision on exception. Sovereignty thus, presents itself as the incorporation of the state of nature in society, as a state of indistinction between nature and culture, between violence and law and this very indistinction constitutes specifically sovereign violence. The state of nature is therefore not truly external to *nomos* but rather contains its virtuality.<sup>87</sup>

The state of emergency has the power to separate the force of law from the law. Because the law has lost its *vis obligandi*, Agamben redefines the state of exception in the Schmittian theory as a ‘state of the law’ in which, on the one hand, the norm is in force but is not applied (it has no ‘force’) and, on the other, acts that do not have the value of law acquire its ‘force.’<sup>88</sup> Therefore, one should write ‘force of ~~law~~’ rather of ‘force of law.’<sup>89</sup>

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<sup>80</sup> n 6 above, 2.

<sup>81</sup> n 6 above, 1.

<sup>82</sup> n 6 above, 14.

<sup>83</sup> n 6 above, 48.

<sup>84</sup> n 6 above, 50.

<sup>85</sup> S Prozorov ‘The appropriation of abandonment: Giorgio Agamben on the state of nature and the political’ (2009) 328

<sup>86</sup> as above

<sup>87</sup> n 85 above, 329.

<sup>88</sup> n 6 above, 38.

<sup>89</sup> n 6 above, 39.

Likewise, according to Agamben, the state of emergency has moved from the exception to the rule under a ceaseless omnipotence of the executive power. On this account Arendt points that, the principle of separation of power actually provides a kind of mechanism built into the very heart of government, through which new power is constantly generated.<sup>90</sup> Thus continuing to sing the democracy's praises is nothing less than an anachronism:

Although a temporary and controlled use of full powers is theoretically compatible with democratic constitutions, 'a systematic and regular exercise of the institution necessarily leads to the 'liquidation' of democracy.'<sup>91</sup>

Furthermore, Agamben draws a parallel between a state of emergency and the ancient Roman institution of *iustitum*. He asserts that, '*iustitum*' means 'suspension of the law' and refers precisely to the suspension not simply of the administration of justice, but of the law as such, that is to say the production of juridical void.<sup>92</sup> Nowadays, as the *iustitum*, the state of exception has become a fearsome tool in the hands of the sovereign or the executive power, to be turned on or off at will.

As another figure of illustration, Agamben follows the Roman relation of *auctoritas* (first of the Senate in ratifying the will of the people, later of the emperor) to the *potestas* of the magistrate. Bringing the parallel forward to contemporary experience, Agamben argues that as long as the two elements (*auctoritas* and *potestas* or life and law) remain correlated yet conceptually, temporally and subjectively distinct, their dialectic can nevertheless function in the same way. However, when they tend to coincide in a single person, when the state of exception, in which they are bound and blurred together, becomes the rule, then the juridicopolitical system transforms itself into a killing machine.<sup>93</sup>

Finally, the state of exception as it appears nowadays is the fictitious one and would not stay forever. Reading '*le temps qui reste*'<sup>94</sup> (*the time that remains*) a comment of the *letter of Paul to the church in Rome*, Agamben reaches to the following conclusion:

Everyone is to obey the governing authorities, because there is no authority except from God and so whatever authorities exist have been appointed by God.<sup>95</sup>

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<sup>90</sup> H Arendt *On revolution* (1990) 151-152

<sup>91</sup> n 6 above, 7.

<sup>92</sup> n 6 above, 41.

<sup>93</sup> n 6 above, 51.

<sup>94</sup> G Agamben '*Le temps qui reste, un commentaire de l'Épître aux Romains*' (2000)

<sup>95</sup> *Romains 13 'soumission aux pouvoirs civiles' la Bible de Jérusalem* (2008) 1896

The fictitious state of emergency will end precisely by a phenomenon namely a real redemption. According to him historical redemption involves forcefully tearing the past out of its context, thus destroying it only to bring it back to its origins, but in a transfigured guise.<sup>96</sup> Some authors state that ‘in Agamben's writings we find the repeated use of the Christian theological tradition to explain contemporary issues, as exemplified in the review of Beercroft's performance.’<sup>97</sup>

In an Agamben's interview by Stany Grelet and Mathieu Potte-Bonneville the author makes points concerning the future: ‘If I may be allowed to predict about the next politic, it will no longer be a battle for the control and the conquest of the state by new or old social subjects, but a combat between the state and the non-state (humanity), irretrievable disjunction of some singularities and state organisation.’<sup>98</sup> In the same vein, Agamben notices that following the Day of the Last Judgement ‘once necessity and contingency have disappeared (from the horizon of the earth) we are left with the Irreparable, which refers to the notion that things find their redemption in the fact that they continue to exist beyond the final event of salvation.’<sup>99</sup> On the question about the messianic, Agamben asserts:

The messianic is not the end of time but the time of end'; it is the time which contract itself and which begin to end.<sup>100</sup>

## 2.4 Concluding remarks

The aim of this chapter was to point up the main theories of the state of exception and the state of emergency where three essential conceptions were presented. Firstly, according to authors such as Romano, Rossiter and Schmitt a state of exception is an entire part of the juridical sphere. Secondly, for others like Carre de Malberg, Balleadore-Pallieri, a state of emergency is alien to juridical order. Finally, there is a messianic approach from Benjamin and Agamben who consider the real state of exception as the fact from God. In the next chapter these different conceptions will be elaborated upon by pointing out a critical perspective on the juridical regime and impacts of the state of exception and the state of emergency.

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<sup>96</sup> n 74 above

<sup>97</sup> as above

<sup>98</sup> ‘A minor biopolitic Agamben's interview’ <<http://www.16beavergroup.org/mtarchive/archives/003036.php>> (accessed 4 March 2010) [my own translation]

<sup>99</sup> n 74 above

<sup>100</sup> n 94 above, 110-111.



## **CHAPTER 3: CRITICAL PERSPECTIVE ON THE JURIDICAL REGIME AND IMPACTS OF THE STATE OF EXCEPTION AND THE STATE OF EMERGENCY**

### **3.1 Introduction**

Until now the concept ‘state of exception’ and ‘state of emergency’ has been used interchangeably to emphasise the same reality. However as mentioned in the previous chapter, the present part will highlight some of the singularities of a ‘state of exception’ in comparison to a ‘state of emergency.’ This section will start by pointing out a critical perspective on the juridical regime of the state of exception and the state of emergency before looking at their impacts on the society.

### **3.2 Critical perspective on the juridical regime of the state of exception and the state of emergency**

The main ideas in this section refer firstly, to the events’ lack of precision that may cause a state of exception and a state of emergency. Second they are sources of the immoderate widening of police’s powers of the administration.

#### **3.2.1 The events’ lack of precision that may cause a state of exception and a state of emergency**

Concerning the state of emergency, and precisely events that may cause it, professor Roby Drago observes that what wrong most with liberal principles in the law on a state of emergency is the vagueness of the situation in which they can be declared.<sup>101</sup> This statement is relevant in light of the juridical regimes of most countries worldwide.

In France, the law of 3 April 1955 provides that a state of emergency is declared in the case of serious peril or events that show, by its nature and gravity, a public character.

Likewise, the 1996 South African Constitution Act N°108 (Section 37) and the State of Emergency Act 1997 provide that a state of emergency may be declared only in terms of an Act of Parliament, and only when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency. This situation happened during apartheid era. In fact on 20 July 1985, following national claims, former

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<sup>101</sup> *‘L’état d’urgence: Les lois des 3 et 7 Août 1955 et les libertés publiques’ revue de droit public (1962) 693*

President Botha announced that violence in the country showed that: ‘ordinary law and order were inadequate.’ He declared a state of emergency in thirty-six districts within the country. 2436 people were detained under the Internal Security Act.<sup>102</sup> It goes against nature of a state to consider national claims with regard to respect of human rights as a threat for national’s life.

Cameroon can testify also of the vagueness of events that may cause a state of emergency. Article 9(1) of the Cameroonian Constitution and the law of 19 December 1990 on the state of emergency provide that, a state of emergency may be declared by decree in case of serious situations deriving from public calamities, interior disturbances that may endanger public order and state safety. Undoubtedly, there is a total lack of precision regarding the occurrences which cause of the state of emergency. As argued by Nfobin:

In Cameroon to know if an occurrence amounts to a national disaster or not is easy at constitutional level. If the President of the Republic calls it a national disaster, then it is one.<sup>103</sup>

The following took place after the failed coup d’état of 6 April 1984: As early as the evening of 7 April, the President told the nation loyal forces had obtained ‘complete victory today, on 7 April in the later part of the morning. Calm now prevails all over the national territory...’ On 10 April he reiterated: ‘The situation marked by calm all over the national territory and resumption of normal activities is normal again...now that victory finally won is irreversible...’ Then on 18 April, the President declared a state of emergency in the Mfoundi Division. This is twelve days after the attempted coup. The declaration in this case cannot be based on ‘a series of disturbances undermining public order or the security of the state.’<sup>104</sup>

In the same vein, Mathias Nguini observes that extraordinary powers conferred to the head of state, gives an account of the codification of a ‘presidentialist solution of institutionalisation of crisis’ powers which takes place in the ‘institutionalisation’s movement of the exceptional legality in aid of the executive power which embrace the whole Cameroonian public law.’<sup>105</sup>

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<sup>102</sup> ‘First state of emergency’

<http://www.sahistory.org.za/pages/classroom/pages/projects/grade12/lesson18/07-first-state-emergency.htm>  
(accessed 9 November 2009)

<sup>103</sup> n 14 above, 66.

<sup>104</sup> n 14 above, 75-76.

<sup>105</sup> E Owona ‘*Juristes-savants, droit de l’état et état de droit au Cameroun : L’énonciation professorale et doctorale du droit de la souveraineté et droits de l’homme au crible d’une sociologie politique du champ juridique*’

At this point one can only deduce that the reasons of the declaration of a state of emergency have more or less the same characteristic. It refers to events which are threatening the life of the nation like war, insurrection, invasion or natural cataclysms.

Nevertheless, considering the characteristics of the occurrences that cause the state of emergency, one can realise that it is a predatory regime of democracy. Concepts like public order, national safety, invasion and others are flexible. Consequently it can be the object of diverse interpretations. Indeed, it is interesting to note that unlike Canada's Emergencies Act, which distinguishes between four types of emergencies (natural disasters, threats to public order, international emergencies and states of war) and subjects each to different regimes, neither the Final Constitution nor legislation distinguishes between the types of occurrences that may constitute a state of emergency. Thus the same acts may be taken in response to an emergency brought about by general disorder as in response to an emergency brought about by invasion.<sup>106</sup> Needless to say, one can find oneself in circumstances where innumerable insignificant facts can become a threat for national safety. There is no criterion or definition of national life or public calamities. Alexander Hamilton rightly observes that the circumstances that may endanger national safety are infinite and unpredictable; and for this reason no constitutional mechanism is able to frame and provide for it.<sup>107</sup>

With regard to the state of exception, the character of the events is not very different. Like the state of emergency, there is still a lack of precise benchmarks regarding threats that may involve exceptional powers. The Cameroonian Constitution reads:

In the event of a serious threat to the nation's territorial integrity or to its existence, its independence or institutions, the President of the Republic may declare a state of siege by decree and take any measures as he may deem necessary. He shall inform the Nation of his decision by message.<sup>108</sup>

The same idea can be read in French Constitution which provides:

Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted, the President of the Republic

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<<http://www.google.fr/search?hl=fr&q=du+contrat+social+pdf&meta=&aq=8&oq=du+contrat+social>>  
(accessed 6 November 2009) [my own translation]

<sup>106</sup> *Constitutional law of South Africa* 2nd ed. part I vol.4 (2002, updated until 04 February 2010) 61-8

<sup>107</sup> J Madison et al *The federalist papers* (1987) 185

<sup>108</sup> Article 9(2) of the Cameroonian Constitution

shall take measures required by these circumstances after formally consulting the Prime Minister, the Presidents of the Houses of Parliament and the Constitutional Council.<sup>109</sup>

Arguably, these provisions are simply a half-open door to arbitrariness. On this account what former French President François Mitterrand said concerning article 16 of the French Constitution is unequivocal. According to him, article 16 of the French Constitution is an element in the system put in place by an absolute authority which can legitimise arbitrariness.<sup>110</sup>

This statement has been well illustrated by disasters perpetrated under the presidency of General DE Gaulle during the colonial period in Algeria on 23 April 1961 facing a putsch of soldiers. General De Gaulle decided that it was a serious threat against national safety of France and then applied article 16 of the French Constitution which conceded him full powers. One never understood this draconian measure; all the more that Alger's events did not influence the functioning of French institutions. Agamben argues that:

In April 1961, during the Algerian crisis, DE Gaulle had recourse to article 16 even though the functioning of the public powers had not been interrupted.<sup>111</sup>

The result was human slaughter. Until now, we thought that deportation camp existed only during totalitarianism age while Algerians' nationalists who used to fight for their national independence, their right to self-determination, were held in squalid camps. As stated by Sylvie Thénault:

In that era, the internment's camps were not called such as by public powers. It was called administrative detention centre [*centre de détention administrative (CDA)*] in Algeria, and in France, summons centre under house-arrest [*Centre d'assignation à résidence surveillée (CARS)*].<sup>112</sup>

During the implementation of the state of exception, the Algerian population was victim of all physical and moral abuses including misuse of authority. There was torture, death-warrant and imprisonment without any judgment. Added to this, if the 'suspect' has been sent to law after his arrest, he could still again be interned once liberated by the latter (even if he has served his sentence, even if he got a nonsuit, release or a suspended

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<sup>109</sup> Article 16 the French Constitution

<sup>110</sup> n 2 above

<sup>111</sup> n 6 above, 14.

<sup>112</sup> S Thénault '*L'internement en France pendant la guerre d'indépendance algérienne*'

< <http://www.ldh-toulon.net/spip.php?article3515> > (accessed 7 November 2009) [my own translation]

sentence.)<sup>113</sup> We can realise to which extent, concentration of powers in a society may be merciless to the dignity of human beings.

### **3.2.2 State of exception and state of emergency as sources of immoderate widening of police's powers of the administration and executive power**

Normally, societies work with rules established beforehand. Nowadays, the state of exception and the state of emergency constitute the dark side of this principle established by works of Montesquieu, Rousseau and John Locke. In a state of exception and a state of emergency, the separation of powers and protection of human rights are fanciful. The biggest winner in that case is the administration and executive power with an immoderate widening of police's powers.

In South Africa, on 12 June 1986, in the framework of the commemoration of the 10<sup>th</sup> anniversary of the slaughter of Soweto's children, a state of emergency had been declared once again in the whole country. The measures taken have never been broader and draconian than in the past. Curfews were imposed and even political funerals were forbidden. After 12 June the press was not allowed to print any incidences relating to political unrest.<sup>114</sup> By December 11, newspapers were prohibited from printing non-governmental accounts of the police or the army activities. This went on to cover boycotts and any information relating to civil unrest and detentions.<sup>115</sup> Government censorship of the press monitored publication of any information related to 'unrest activities.' The government continued to claim that the media in South Africa was free, the independent media in South Africa was forbidden by law to report on the state of emergency in the country.<sup>116</sup> The state owned the South African Broadcasting Corporation (SABC) that served to provide daily propaganda in support of the government measures.<sup>117</sup>

The situation in Cameroon was not very different. After the outcomes of the presidential elections which took place on 12 October 1992, people were angry and the authorities were accused of fraud by the opposition. While people decided to show their displeasure, they realised that many leaders were arrested. That was the case of the opposition's leader Ni John Fru Ndi. Everyone realised later that North-West province was

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<sup>113</sup> as above

<sup>114</sup> n 102 above

<sup>115</sup> as above

<sup>116</sup> as above

<sup>117</sup> as above

under a state of emergency. The lawlessness was beyond the unbelievable because an entire province was submerged by a state of emergency which had never been declared previously. As affirmed by Nfobin:

We are thinking here especially for the enactment of the state of emergency in the North-West province in 1992 which was never accompanied by a presidential message to the nation.<sup>118</sup>

In fact, the information had been simply read on television in the evening of 27 October. One would have said a simple trivial fact registered in the rubric ‘news in brief.’ Yet liberty of movement, of press, of communication was banished.

Concerning civil authorities, their powers are excessive. In Cameroon the law of 19 December 1990 on the state of emergency provides for them a large spectrum of prerogatives. A state of emergency may be declared by a presidential decree for a period which cannot exceed three months. Likewise and in pursuance of procedure’s parallelism, another decree is necessary for its prorogation within three months. When this happens, it involves an immoderate increase of civil authorities’ powers. Therefore, the minister of territorial administration and decentralisation, governors and prefects may according to the case, take by order, decree, ordinance instantly applicable measures like requisitions, close surveillance of persons who seem to be a threat to public security during a period of 7 days for prefects, 15 days for governors and 2 months renewable once for the minister of territorial administration and decentralisation. As well, there are searches at homes day and night, prohibition of meetings, publishing, and taking away of individuals and old offenders. There is also the requisition of military authority for assistance and maintaining peace. State of emergency comes to end either automatically on expiry of a deadline appointed by the decree which instituted it or extended it, or by decree during the first as well as the second period of extension if events causes of the extension have stopped. Such is the process of the state of emergency in Cameroon. An exceptional regime provided by a law, declared by a decree and implemented by civil authorities.

As with the state of emergency, the declaration of a state of exception also needs a presidential decree. The implementation here does not have any constraint in consideration of the fact that the President of the Republic should ‘take any measures as he may deem necessary’<sup>119</sup> to ensure the survival of the nation. Therefore he has *feu vert* (green light) and

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<sup>118</sup> n 14 above, 64.

<sup>119</sup> n 108 above

he is empowered to require civil as well as military authorities without loading oneself with parliamentary and juridical considerations.

In France the situation is not very different from the one in Cameroon. Likewise, a state of emergency may be declared by a presidential decree in the council of ministers for a period of 12 days. However, it is possible to extend this regime and this extension must be done by an act of parliament for 3 months. The implementation of the state of emergency involves a hypertrophy of civil authorities' powers. They are invested by the power to prohibit the movement of persons or vehicles inside the places and hours prescribed by order, to prohibit the stay in a part or in entire department to any person who can be a threat to public order. The Home Secretary may put under house arrest any person whose activity is threatening public security; he has the power to close shows, drinking establishments, meeting places or gatherings. Civil citizens may appear in front of military tribunals.<sup>120</sup> This situation took place in France on 5 November 2005, when former President Jacques Chirac declared a state of emergency due to troubles in the suburbs. On 18 November, a law voted by the parliament extended the state of emergency for three months. This situation ended on 3 January 2006 by a presidential decree. In normal times the state of emergency may end when the deadline of its implementation is over. It may also end 15 days after the resignation of the government or after the dissolution of the parliament.

Violations of procedures, law, human rights and instauration of climate of fear, the state of emergency and the state of exception, are fearsome regimes and totally irreconcilable with democratic institutions. Their impact in the society is essentially negative.

### **3.3 The impacts of the state of exception and the state of emergency**

The main impact is that, on the one hand, the state of exception and the state of emergency are mechanisms of legalisation of lawlessness and on the other hand, violation of human rights constitutes their underlying paradigm.

#### **3.3.1 The state of exception and the state of emergency as mechanisms of legalisation of lawlessness**

Hans Kelsen, the Austrian jurist, asserts that the hierarchy of juridical norms requires that, the structure of the juridical order in a society should be pyramidal so that, all juridical

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<sup>120</sup> Articles 5, 6, 8 and 12 of the law of 3 April 1955

norms should consequently derive from a superior norm.<sup>121</sup> But this diagram is unknown by the state of exception and the state of emergency. It is characterised by the upheaval of the normative framework. In fact one is simply pushed in the context of *'force of law: The theory of mystical foundation of the law'*<sup>122</sup> described by Derrida. The syntagm 'force of law' during the Roman era referred to the untouchable and sacred characteristic of the law. In the context of a state of emergency and a state of exception, anything, every act, may acquire force of law. A decree can abolish an institution created by the Constitution, an ordinance does not need to be conformed to a law.

Exceptional legality as mechanisms of legalisation of lawlessness took shape in France early in the history of exceptional circumstances. During these periods all is for the administration and nothing for people. Even in the cases where the judges receive complaints, they behave like a secular arm of the administration. Their role consists of reminding plaintiff that they are nothing less than sacrificed. Van der Walts describes deeply the sacrificial process of the law.<sup>123</sup> This happened many times in numerous cases, but for greater convenience of the study, it is better to examine especially the first and the second case of the history of exceptional circumstances. In others words, the cases of victims used as guinea pigs in the experimentation's laboratory of exceptional circumstances.

The first one is the case of Heyriès.<sup>124</sup> In France, article 65 of the law of 22 April 1905 required that any civil servant must be informed before any sanction against him. A decree of 10 September 1914 came to suspend the application of this law. Heyriès, who was a victim of this situation, went before the judge. But despite the fact that a decree, act of executive power suspended a law, act of parliament, Heyriès was nonsuited. According to the judge, during exceptional circumstances, the administration has all the rights included the one to deny human rights.<sup>125</sup> It is easy to notice at this stage, to what extent a state of emergency may involve ravages and arbitrariness *vis -à- vis* juridical order and peoples' rights. In the Heyriès' case, the state, which is supposed to promote, protect, respect and fulfill socio-economic rights notably the right to work, ignored that obligation. The case of Heyriès was

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<sup>121</sup> n 44 above

<sup>122</sup> n 60 above

<sup>123</sup> J Van der Walts *Law and sacrifice* (2005)

<sup>124</sup> *Conseil d'Etat 28 Juin 1918* Heyries

<sup>125</sup> My own translation



the first one in the matter of exceptional circumstances, the first that inaugurated the beginning of the end of human rights of which Costas Douzinas refers to.<sup>126</sup>

The second case concerns the stories of Dol and Laurent.<sup>127</sup> Isabelle Dol and Jeanne Laurent were two prostitutes who were living freely without incident. By three orders on 9 April, 13 May and 24 June 1916, the prefect of Toulon forbade, on the one hand all owners of cafe, bar and drinking establishments, to serve drinks to isolated girls or in company and to receive them in their establishment; on the other hand, to any isolated girl to solicit outside of the quarters reserved and to any woman or girl to run a drinking establishment or to work there on any grounds. The ladies went before the judge and he reminded them that because of war, and then exceptional circumstances, the orders of the prefect were perfectly valid. He argued that their activity (prostitution) was a serious risk for the national safety.<sup>128</sup> Individual freedoms, freedom of movement, freedom of trade and violation of right to work are highlighted in this case. Then ‘in a judgment the decision that goes against you is not even right for now. It does not address a present moment. It forges a moment where there is one. You are simply the chance victim of society’s sacrificial need to reduce the ambiguous to the unequivocal.’<sup>129</sup> In the same vein, Costa Douzinas asserts that:

The state of exception, the suspension of human rights principle, even the scrapping of the whole British human rights legal arsenal through the repeal of the human rights act is on the agenda.<sup>130</sup>

One of the crucial problems with exceptional circumstances especially in those cases is that, no law provided these hypotheses in that era. The only exceptional law in force at that time in France was the law of 9 August 1849, on the state of siege. One thing leading to another, the judges built a jurisprudential theory of exceptional circumstances with the concept of ‘necessity’ as raw material. Leaning on the fact that ‘necessity has no law’ the judges reduced exceptional circumstances to exceptional legality with the consequence that necessity became an autonomous source of law. Generally if it is admitted that the theory of exceptional circumstances is built on the fact that ‘necessity has no law’, the cases of Heyriès, and Dol and Laurent mentioned above bring out the conclusion that ‘necessity does not recognise any law’ or ‘necessity creates its own law.’

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<sup>126</sup> C Douzinas *Human rights and empire* (2007) 5

<sup>127</sup> *Conseil d’Etat 28 Février 1919 dames Dol et Laurent*

<sup>128</sup> My own translation

<sup>129</sup> n 123 above, 245.

<sup>130</sup> n 126 above, 6.

To date, there are many foundations for exceptional circumstances: A jurisprudential theory, a legislative foundation and a constitutional foundation. In that vein Derrida for instance invoked Pascal, who invoked Montaigne before him by arguing that:

And so laws keep up their good standing, not because they are just, but because they are laws: that is the mystical foundation of their Authority.<sup>131</sup>

In addition, concentration of powers has become a paradigm of exceptional legality, as the state of exception is ‘a paradigm of government.’<sup>132</sup>

### **3.3.2 Concentration of powers as paradigm of the state of exception and the state of emergency**

Exceptional regimes highlight a real concentration of powers. The state of exception is characterised by ‘full powers’ and allows the President of the Republic to ‘take any measures as he may deem necessary’<sup>133</sup>, to ‘take measures required by these circumstances.’<sup>134</sup> The state of exception or the state of emergency according to Agamben, is characterised by the provisional abolition of the distinction among legislative, executive and judicial powers.<sup>135</sup> In these circumstances, the government instead of parliament makes laws. The confusion of powers reaches its greatest point. The Republic becomes governmental instead of parliamentary. The law is empty from its content. On this account, one can recall the example of one Eichmann, Hitler’s henchman during the Nazi period who did not keep on repeating that ‘words of Fuhrer have the force of law.’

Exceptional circumstances are a concept built and experienced during the two world wars with the notion of power of war as raw material. The executive in that circumstance has the power to legislate without any restrictions. Herbert Tingsten asserts that:

By ‘full powers laws’, we mean those laws by which an exceptionally broad regulatory power is granted to the executive, particularly the power to modify or abrogate by decree the laws in force.<sup>136</sup>

With regard to the way how Benjamin coined the image of a state of emergency, it is obvious that South Africa’s apartheid regime was surely another such instance of the

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<sup>131</sup> n 60 above, 937.

<sup>132</sup> n 6 above, 8.

<sup>133</sup> n 108 above

<sup>134</sup> n 109 above

<sup>135</sup> n 6 above, 7.

<sup>136</sup> as above

boundaries of sovereign law's power to exert right to life and right to death over its subjects.<sup>137</sup>

In Cameroon between colonial period and 1992 one can count more than one hundred decrees of declaration of a state of emergency. As observes Atemengue, from May 1959 to November 1990 state of emergency has been declared in some parts of Cameroonian territory at least 97 times. To this number one can add the declaration of the state of emergency in the whole Anglophone province of North-West following the troubles resulting from the proclamation of the outcomes of controversial presidential elections of October 1992. At the same time, one should consider state of emergency in that same province as a consequence of attacks launched against police stations on March 1997 by the militants of a mysterious movement, the Southern Cameroon's National Council.<sup>138</sup> Despite those excessive emergency decrees, this situation has rather helped to a standardisation of concentration of power by the Cameroonian's authorities.

In France, exceptional powers were created to face the wars of 1914 as it is commonly assumed but it is hardly difficult to understand their revitalisation nowadays. The real reason is that, authorities do not like to be bending in front of rules established by them and it is always a pleasure to be on top or outside of the law. In this regard, Costas Douzinas affirms:

The history of civil liberties in Britain and Northern Ireland teaches that while governments have few qualms in using real or imaginary emergencies to assume wide powers, they are reluctant to abandon them once the perceived threat has passed.<sup>139</sup>

One can understand why Agamben rightly consider 'the State of exception as a paradigm of Government.'<sup>140</sup>

### 3.4 Concluding remarks

The purpose of this chapter was to critically investigate the state of exception and the state of emergency and their impacts. The critical approach showed the events' lack of precision that may cause these regimes which are also sources of immoderate widening of police's powers of the administration and executive power. The study of their impacts

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<sup>137</sup> Vilashini C 'Traumatic memory and sovereignty's exception: National narrative in the new South Africa <<http://www.ukzn.ac.za/ccs/default.asp?>> (accessed 11 November 2009)

<sup>138</sup> n 19 above, 146.

<sup>139</sup> n 126 above

<sup>140</sup> n 4 above, 8.

showed them as mechanisms of legalisation of lawlessness on the one hand and concentration of powers as their paradigm on the other hand.

Despite its constitutionalisation worldwide, the state of exception and the state of emergency are subject to many weaknesses and may entail some dangers. This is the core of the next chapter.

## CHAPTER 4: WEAKNESSES AND DANGERS OF THE STATE OF EXCEPTION AND THE STATE OF EMERGENCY

### 4.1 Introduction

The study of weaknesses will be highlighted before the one of dangers of the state of exception and the state of emergency.

### 4.2 Weaknesses of the state of exception and the state of emergency

The principal weakness is that necessity is not a source of law. Consequently, state of exception (state of emergency) is neither a constitutional dictatorship nor the state's subjective right to its own preservation. Moreover, since they are not substantially distinct, the concept 'state of exception' and 'state of emergency' will be used once again interchangeably to materialise the same reality.

#### 4.2.1 Necessity is not a source of law

'*Necessitas legem non habet.*' For those who try to include exceptional regimes within the juridical order, this Latin quotation means 'necessity has no law.' According to the spirit of this adage, necessity has the possibility to render licit what is illicit. This can explain why Santi Romano considers necessity as 'the first and ordinary source of law.'<sup>141</sup> In case of necessity, there is no longer obligation to follow the rules. Necessity appears like an automatic absolution's mechanism of transgression of the law.

Because of the fact that necessity suspends the application of the law in force in order to save the law, it is no longer possible to consider it as deriving directly from the constitution. Thus Agamben asserts that, necessity is not a source of law, nor does it properly suspend the law; it merely releases a particular case from the literal application of the norm.<sup>142</sup> Rules are no longer binding. It means that necessity is a situation where the norms have lost its *vis obligandi*. This may explain why despite the diversity and the difference of the political regime worldwide, exceptional regimes especially in the case of Cameroon France and South Africa leads to the "*inexecution*" of the law.

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<sup>141</sup> n 6 above, 27.

<sup>142</sup> n 6 above, 25.

In sum, attempting to include necessity within the juridical order is one of the principal weaknesses as well as the considerations of exceptional regimes as the state's subjective right to its own preservation.

#### **4.2.2 The state of exception (the state of emergency) is not the state's subjective right to its own preservation**

Proponents of this school of thought are Hoerni, Ranelletti and Rossiter.<sup>143</sup> They consider exceptional regimes as the state's subjective (natural or constitutional) right to its own preservation.<sup>144</sup> According to Rossiter, the democracy contains heavy mechanisms which can only work under normal circumstances. Thus 'in time of crisis a democratic, constitutional government must temporarily be altered to whatever degree is necessary to overcome the peril and restore normal conditions.'<sup>145</sup>

The problem now is that as time proceeds, the concept of necessity, of crisis, change and multiplies itself. This can be compounded by nuclear weapons, terrorism, tsunami and underdevelopment.

Hence, democracy does not need to get swamped with violent scenarios; otherwise it is no longer democracy. In other words it is not possible to seal the interface of the state of law with the state of emergency. These concepts are different by nature and by aim. It is the main reason for which state of exception is not a constitutional dictatorship.

#### **4.2.3 The state of exception (the state of emergency) is not a constitutional dictatorship**

The sovereign is 'he who decides on the state of exception.'<sup>146</sup> This affirmation derives directly from Schmitt's conception that seeks to inscribe the state of exception within a juridical context. But it is evident in the following lines that this approach is limited and even dangerous. The state of emergency according to Schmitt officialises and even legalises a merciless battle between the law and its application. On this account, Agamben argues that the state of emergency in Schmitt's theory is 'the place where the opposition between the norm and its realisation reaches its greatest intensity.'<sup>147</sup> There is still law but it remains inapplicable.

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<sup>143</sup> n 6 above, 23.

<sup>144</sup> as above, 23.

<sup>145</sup> n 6 above, 8.

<sup>146</sup> n 6 above, 1.

<sup>147</sup> n 6 above, 37.

This approach fits very well to the state of nature because it includes in itself the germs of a society where despite of the fact that there is honour among thieves, brother will turn upon brother.

The theory of constitutional dictatorship established by Schmitt has become the common law of exceptional regimes worldwide. Due to misfortune of such a conception it is not overstated arguing that, the state of exception as constitutional dictatorship was instrumental in the implementation of Nazism and thus of totalitarianism. From a juridical view point, it remains difficult to clarify a situation where there are laws in force but are suspended and inapplicable. It represents a state without any law, a situation of ‘an emptiness of law.’<sup>148</sup> Besides, facing this problem of clarification Schmitt who was the law adviser of Hitler confesses himself that:

Because the state of exception is always something different from anarchy and chaos, in a juridical sense, an order still exists in it, even if it is not a juridical order.<sup>149</sup>

The state of emergency seems to ‘subtract itself from any consideration of law.’<sup>150</sup> Agamben observes that it is a paradoxical articulation for what must be inscribed within the law, is something that is essentially exterior to it, that is, nothing less than the suspension of the juridical order itself.<sup>151</sup> It is not possible to go against the law, to obtain the end of the law without using the law. As affirmed by Dante:

Whoever intends to achieve the end of law, must proceed with law.<sup>152</sup>

The state of exception and the state of emergency contain many weaknesses as well as many dangers.

### **4.3 The dangers of the state of exception and the state of emergency**

The main dangers are their rise in modern times and their promising future.

#### **4.3.1 Danger due to the rise of the state of exception and the state of emergency in modern times**

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<sup>148</sup> n 6 above, 48.

<sup>149</sup> n 6 above, 33.

<sup>150</sup> n 6 above, 38.

<sup>151</sup> n 6 above, 39.

<sup>152</sup> n 6 above, 26.

The state of exception is essentially harmful. Yet there are many passions that are aroused by this institution. Born during the Roman antiquity under the name *'iustitum'*, implemented and experienced during the two world wars, the state of emergency is still present in contemporary times. One would have expected its disappearance with the circumstances under which it was born. But as argues Agamben the state of exception has today reached its maximum worldwide deployment.<sup>153</sup> In the same vein Benjamin observes that state of exception has becomes the rule.<sup>154</sup>

In Cameroon for instance, the recurrent usage of the state of emergency brought Professor Joseph Owona to talk about:

Institutionalisation of the exceptional legality in the public Cameroonian law.<sup>155</sup>

Jean-Marie Bipoun Woum following the same idea refers to 'legislation of the fear.' If in Cameroon many authors think of law as 'administrative law of exception'<sup>156</sup> it is not a Cameroonian singularity. Rather to shelve the idea as preposterous, exceptional regimes constitute the front page of modern times. On this account, the following refers to the main topics of a seminar took place in France at *Université de Caen* on 18 and 19 October 2007:

'The political and juridical speech on the obvious necessity'; 'The justification of exceptional powers in international human rights: general approach'; 'The constitutionalisation of exceptional powers as guarantee of rights? The example of the east-Europeans democracies at the end of 20th century'; 'The exception holds by the norm'; 'Exceptional powers in Great-Britain: a model for us?'; 'State of exception in the United States, the Patriot Act and others reactions of American authorities'; 'The infringement of fundamental rights by the state of siege and the state of emergency'; 'The control of constitutional council on the legal regimes of exceptional powers'; 'The American judiciary control of war against terrorism : international aspects'; 'The state of emergency in the sense of article 15 of the European convention of Human Rights'.<sup>157</sup>

One of danger of exceptional regimes, necessity, exceptional legality or other designation consists of raising debates on its nature and its impact particularly on human rights. Despite criticism and condemnations, it has a place of choice in most constitutions worldwide.

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<sup>153</sup> n 6 above, 8.

<sup>154</sup> n 6 above, 6.

<sup>155</sup> Owona J *'l'institutionnalisation de la légalité d'exception dans le droit public camerounais'* revue *Camerounaise de droit* (1974) 116 [my own translation]

<sup>156</sup> as above

<sup>157</sup> *'Pouvoirs exceptionnels et droits fondamentaux'* <<http://calenda.revues.org/nouvelle9082.html>> (accessed 11 November 2009) [my own translation]



### 4.3.2 Danger due to a promising future of the state of exception and the state of emergency

It is senseless to think that states can do away with provisions on the state of exception in their constitutions. It emerges that the institutionalisation movement of the exceptional legality in aid of the executive power<sup>158</sup> in the contemporary societies has not yet got its cruising speed. In fact, nowadays the concept of ‘necessity’ ‘threat’ or ‘national safety’ is much broader and may vary considerably from one region to another. Thus, terrorism has become a cause of exceptional regimes in America whereas in Africa the problem of development remains the priority. As asserts Agamben, the state of emergency necessitates that, military emergency cedes its place to economic emergency with an implicit assimilation between war and economics.’<sup>159</sup>

At a global level there is another challenge with the development of nuclear technologies. The nuclear vocabulary has become an ordinary vocabulary of our daily lives. Then ‘in the atomic age upon which the world is now entering, the use of constitutional emergency powers may well become the rule and not the exception.’<sup>160</sup> In addition, ‘the optimistic age of globalised hope has turned into the dark era of fear.’<sup>161</sup> The recent second war of Iraq, which inaugurated the concept of preventive war is one of the materialisation of the above statements.

The state of exception, whether one is in Cameroon, France, South Africa or somewhere else is on the agenda in time to come. As argued by international experts on human rights:

State of exception is a reality of political and juridical life of nations. Almost all states have a relevant legislation in this respect and international conventions on human rights contain provisions on that issue.<sup>162</sup>

At this level of the study, the extent of the difference between the nature, the foundations, and the process of exceptional legality is more intelligible. But one of the interesting sides is that, in Cameroon the presidentialist regime is favourable to the confiscation of powers by the President. In France, despite its mixed political regime, semi-

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<sup>158</sup> n 19 above

<sup>159</sup> n 6 above, 13.

<sup>160</sup> n 6 above, 9.

<sup>161</sup> n 126 above, 6.

<sup>162</sup> *Droits intangibles et états d'exception / Non-Derogable Rights and States of Emergency* (1996) 644

presidential or semi-parliamentarian, the results are more or less similar to the one of Cameroon; same as in South Africa where the political regime is tinged by a wide parliamentary connotation.

In sum, whatever one uses to term exceptional regimes, exceptional legality, exceptional powers, state of emergency, state of exception, state of siege, martial law, it is only a linguistic game. Despite the profound differences of their political regime exceptional legality in Cameroon, France and South Africa lead to the violation of human rights and the establishment of a juridical void.

#### **4.4 Concluding remarks**

The aim of this chapter was to highlight the weaknesses and dangers of the state of exception. On the weaknesses the fact is that, necessity is not a source of law and consequently the state of emergency is neither the state's subjective right to its own preservation nor a constitutional dictatorship. The state of exception and the state of emergency are also dangerous due to their rise in modern time and their promising future.

## CHAPTER 5: CONCLUSION

This study aimed to critically investigate a state of exception and a state of emergency. The main concern was to analyse the nature and impacts on human rights of a juridical system which provides its own suspension. The theoretical considerations showed two main conceptions: The theory seeking to include a state of exception within juridical order in one hand. Proponents of this approach included Schmitt, Romano, Carre de Malberg, Ballardore-Pallieri and Rosseti. According to them exceptional regimes are parts of juridical order because necessity which is a source of law, allows states to suspend the application of the law in order to save the law. Therefore a state of exception and a state of emergency should be considered as a constitutional dictatorship and as the state's subjective right to its own preservation.

On the other hand, the extra juridical approach with Agamben and Benjamin. They consider a state of exception and a state of emergency as the fictitious one underlying by a mythical violence. Characterised by a concentration of powers, violation of human rights and misuse of authorities, these regimes do not take into account the sacred value of human life. The approach of Agamben and Benjamin is said to be messianic because 'everyone is to obey the governing authorities, because there is no authority except from God and so whatever authorities exist have been appointed by God.'<sup>163</sup> In addition, the real state of exception is the fact from God and will happen by a phenomenon called pure violence or real redemption.

The study of juridical regime of these institutions showed firstly the events' lack of precision that may cause a state of exception and a state of emergency. It showed secondly that, this regime is source of immoderate widening of police's powers of the administration and executive power. The study of their impacts clearly demonstrated the state of exception as a mechanism of legalisation of lawlessness with concentration of powers as its main characteristic. Unfortunately there is an ominous increase.

At the end of this critical study on a state of exception and a state of emergency, these regimes cannot be included within juridical order. In our view, this stand which espouses the messianic conception from Agamben and Benjamin seems to be the right one. Hindrance to human rights, instauration of fear's climate, concentration of powers, legalisation of arbitrariness and 'liquidation of democracy' constitute the underlying paradigm of a state of exception and a state of emergency. These regimes are alien to the state of law characterised

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<sup>163</sup> n 95 above

by accountability, check and balance, ethic and good governance. A state of emergency is the proof of a dysfunction of the juridical order. In other words, and borrowing from the medical vocabulary exceptional regimes are a symptom which testifies of the pathology of the constitution until then in force. It remains a dangerous game for some political systems to play with the law like one plays with fire: ‘A day, the humanity will play with the law like children play with the objects out of use, not to give back to their canonical usage, but to release them once and for all.’<sup>164</sup>

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<sup>164</sup> G Agamben *Homo sacer* (2003) 109 [my own translation]

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