

# ***L'ÉTAT D'EXCEPTION AND/OR A STATE OF SIEGE: WHAT IS REALLY WRONG WITH SECTION 9(2) OF THE CONSTITUTION OF CAMEROON?***

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## **1 Introduction**

This paper examines the French and English<sup>1</sup> versions of the provisions of section 9(2) of the Constitution of Cameroon, relating to emergency regimes. The French version provides as follows:

Le Président de la République peut, en cas de péril grave menaçant l'intégrité du territoire, la vie, l'indépendance ou les institutions de la République, proclamer, par décret, l'état d'exception et prendre toutes mesures qu'il juge nécessaires. Il en informe la Nation par voie de message.

The English version of the same text 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.

Emergency regimes are brought into being in exceptional situations that allow states to suspend law and violate human rights when dealing with a threat. They generally include a state of emergency, a state of exception or a state of siege. In Cameroon, the English and French versions of section 9(1) and (2) of the Constitution respectively provide for "a state of emergency", "l'état d'urgence" and "a state of siege", "l'état d'exception". These concepts are different in many respects. On the one hand, a state of emergency, *l'état d'urgence* in French, may be declared by the President of the Republic "where

1 French and English are the two official languages in Cameroon.

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circumstances so warrant”,<sup>2</sup> especially if there is an external threat or events which by their nature and gravity are held to be a public disaster, or disturbances undermining public order and the state’s security.<sup>3</sup> On the other hand, while *l’état d’exception* (state of exception) may be implemented if there is a threat to the republic’s safety, a state of siege effects the transfer of control of the country from administrative authorities to the army. If their common denominator is a situation of trouble and urgency, the three institutions differ from each other in the following ways: a state of emergency entails an extension of the legal prerogatives of the authorities in charge of the executive branches of the state, whereas a state of exception calls into question the principle of the separation of powers of the executive, the legislature and the judiciary. The declaration of a state of siege transfers power from civil authorities to the army, which takes control over a city. The problem with emergency legislation in Cameroon is therefore the failure to juxtapose the intended two institutions of emergency as entrenched in section 9 of the Constitution. Instead, the Constitution provides for three kinds of emergency institutions, leading me to believe that a critical analysis of this Constitution demonstrates that Cameroon’s Constituent failed to give expression to its own intention.

Indeed, the wording of section 9(1) is clear in its English and French versions, since it provides for *l’état d’urgence* or a state of emergency, but it is the interpretation of section 9(2) that remains the true challenge. The French version of section 9(2) as previously quoted provides for “l’état d’exception” which literally means “state of exception” whereas the English version of the same text (also previously quoted) refers to “a state of siege” which translated into genuine French would mean “l’état de siège”. A state of exception is emphatically not a state of siege. Clearly, there is confusion over the French and English interpretation of what exactly amounts to “l’état d’exception” or “a state of siege”. This confusion is compounded by the equal authority of French and English as the main official languages in Cameroon. The Constitution clearly entrenches the equal authority of these languages in section 1(3) by providing as follows:

The official languages of the Republic of Cameroon shall be English and French, both languages having the same status.

Therefore any misunderstanding or contradiction within the same body of norms following the use of two different but equal and authoritative texts may lead to a dead end.

In this paper, I argue that “l’état d’exception” and “a state of siege” are fundamentally different, and that it does not make sense for the same section of the Constitution to provide for two different emergency institutions. It is hardly conceivable to consider a state of siege, in the true sense of the word, to be synonymous with or a mere translation of “l’état d’exception”. The French wording “l’état de siège” and the English formulation “a state of exception” do not formally appear in the Constitution of Cameroon but the supreme law clearly provides for the creation of some emergency institution. A critical analysis of the current formulations of these emergency regimes leads one to conclude

2 Section 9(1) Law 96/06 of 18 Jan 1996 to amend the Constitution of 2 Jun 1972.

3 Section 1 Law 90/047 of 19 Dec 1990 on the state of emergency in Cameroon.

that in all likelihood the intention of the authority in charge of drafting the constitution was to establish either a state of siege or a state of exception. Because of the equal status of the French and English texts of the Constitution, it is virtually impossible to establish which one the drafters of the constitution originally had in mind. The only assumption one can make is that the Constitution currently provides for some kind of emergency situation. Whereas a state of siege is characterised by the transfer of the control of the city from the administrative authorities to the army in a period of crisis,<sup>4</sup> *l'état d'exception* embodies the concept of “full powers”.<sup>5</sup> This is characterised by a concentration of power in executive hands and the provisional abolition of the distinction of legislative, executive and judicial powers.<sup>6</sup> Carl Schmitt, a German author, argues that:

What characterises an exception [7] is principally unlimited authority, which means the suspension of the entire existing order. In such a situation it is clear that the state remains, whereas law recedes.<sup>8</sup>

Historically, both emergency regimes originated in France. *L'état d'exception* was inspired by General de Gaulle following the events of July 1940 when France was invaded by Hitler's army. The purpose of this emergency institution was to reinforce the executive office that had been weakened by the powerful system of parliamentary government of the time. *L'état d'exception* is currently covered by section 16 of the French Constitution of 4 October 1958 and was implemented once by de Gaulle during the Algiers putsch in 1961. The concept of “l'état de siège” (a state of siege) was developed essentially during the French revolution, and was usually applied to places besieged by enemies. The practice was later formalised by the Constituent Assembly and was called *l'état de siège réel*, meaning real state of siege. The regular application of this concept demonstrated that it was being enforced beyond places that were involved in war and in 1848, it was constitutionalised as *l'état de siège politique* or *l'état de siège fictif*, which may be translated as political state of siege or constructive state of siege. The state of siege in France is currently covered by section 36 of the Constitution of 1958 and by Laws 1849/08/09 of 9 August 1849 and 1878/04/03 of 3 April 1878. The political state of siege was essentially enforced during the First World War. The fact that the French Constitution clearly distinguishes the two emergency institutions by referring to them in different sections is an argument in favour of the fundamental difference between *l'état d'exception* and a state of siege.

4 Section 7 Law 1849/08/09 of 9 Aug 1849 on the state of siege in France.

5 On the concept of full powers, see Herbert Tingsten as quoted by G Agamben *State of Exception* (Chicago, 2005) at 7. According to Tingsten, 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.

6 *Ibid.*

7 It is assumed that Schmitt referred here to emergency regimes in general; in my view the word “exception” in this context matches perfectly the idea of a state of exception compared to a state of siege.

8 Schmitt *Political Theology. Four Chapters on the Concept of Sovereignty* (London, 1985) at 12.

The confusion arising from section 9(2) of the Constitution of Cameroon is paradoxical and has recurred,<sup>9</sup> since most of the country's legislation including the entire Constitution itself remains a legacy of French colonialism. Indeed, of the fifty-two articles of the Constitution,<sup>10</sup> forty-eight were "purely and simply copied from the Constitution of the Fifth French Republic", the liberal and democratic clauses being excluded in favour of authoritarian ones.<sup>11</sup> Moreover, further confusion arose when Cameroon ratified several international instruments that required compliance with democratic aspirations even in emergencies.<sup>12</sup>

Following these developments, the relevant question is: in addition to a state of emergency referred to in section 9(1) of the Constitution of Cameroon, for which other type of emergency regime does the country make provision – a state of exception or a state of siege or both? Is the confusion between *l'état d'exception* and a state of siege a mere problem of translation? Is it an exonerating mechanism for massive human rights violations or a more comprehensive set of powers designed to paralyse the rule of law? What are the consequences for human rights and democracy within the context of Cameroon, and what remedy could solve the issue? Should section 9(2) of the Constitution be amended to provide a clear delineation of emergencies? Through a legal and historical analysis, I shall answer these questions by firstly showing that *l'état d'exception* and a state of siege are two distinct emergency regimes. I shall do this by referring essentially to France as the birthplace of these emergency institutions, which were forcefully exported into many African countries and especially Cameroon through colonisation. It is also necessary to refer to France because in Cameroon, apart from the provisions of section 9(1) of the Constitution on the state of emergency, no bill regulates the implementation of a state of siege and/or *l'état d'exception*. Moreover, this type of regime is yet to be (officially) tested; never having been formally instituted in terms of section 9(2) of the Constitution. The third reason for referring to France is its constant legal influence on Cameroon and Cameroon's mimicry of France. Indeed French legal practice and culture are often adopted by local authorities. For example, in administrative matters the decisions of the French *Conseil d'Etat* are enforceable in

- 9 Section 20 of the Constitution of 4 Mar 1960; s 15 of the Constitution of the Federal Republic of Cameroon of 1 Sep 1961; s 11 of the Constitution of the United Republic of Cameroon of 2 Jun 1972.
- 10 This was the first Constitution of Cameroon, promulgated on 4 Mar 1960 in the aftermath of the independence of the country.
- 11 N Awasom "Politics and constitution-making in Francophone Cameroon, 1959-1960" (2002) 49(4) *Africa Today* 3-30 at 24.
- 12 Eg, UN Charter, International Covenant on Civil and Political Rights of which s 4 sets out state obligations during emergencies; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of which s 2(2) provides: "[N]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." The Paris Minimum Standards of Human Rights Norms in a State of Emergency: during the 61st Conference of the International Law Association, held in Paris 26 Aug-1 Sep 1985, a set of minimum standards including sixteen articles setting out the non-derogable rights and freedoms to which individuals remain entitled even during the declaration and administration of a state of emergency, was approved by consensus. (For additional information on the Paris Minimum Standards, see R Lillich "The Paris Minimum Standards of Human Rights Norms in a State of Emergency" (1985) 79(4) *The American J of International Law* 1072-1081.

Cameroon. Secondly, after analysing the differences between a state of siege and l'état d'exception, I shall discuss the confusion to which section 9(2) may give rise and its impact on human rights and democracy in Cameroon. Thirdly, I shall provide some suggestions and recommendations which may help to strengthen the legal regime of these emergency institutions.

## 2 The fundamental difference between *l'état d'exception* and a state of siege

The difference between *l'état d'exception* and a state of siege may be illustrated through their historical development and the law applicable to them.

### 2 1 The historical differences between *l'état d'exception* and a state of siege

Firstly the state of siege is the foremost emergency regime of modern times, which had its beginnings during the French Revolution. It has a military origin, as its name indicates, in the ancient practice of conferring full powers of government on the general in command of a besieged fortress.<sup>13</sup> A state of siege was perceived as the model for similar instruments of constitutional dictatorship in the German Empire and its member states, in almost all other civil-law countries, and even in Anthony Hope's mythical Ruritania.<sup>14</sup> It was initiated only after an invasion or rebellion.<sup>15</sup> The development of a state of siege in history involved the gradual conversion of this purely military institution to one that was political in character, one in which the state of siege became a fiction. This term indicates that an open civil area threatened by invasion or rebellion was to be regarded in law as "besieged" and that the government would have powers in that area. The government's powers in this regard were analogous to those of a general in command of a beleaguered fortress.<sup>16</sup> The evolution of the institution from a military to a political one, from a real to a constructive state of siege was embodied in the French Law of 10 *Fructidor An V*, (the tenth *Fructidor* of the year 5) that is 27 August 1797.<sup>17</sup> Through this law the previously exclusively military state of siege acquired the wider meaning of *état de siège fictif* or *état de siège politique* (constructive or political state of siege); which was confirmed by Napoleon's decree of 24 December 1811.<sup>18</sup> After being incorporated into the *acte additionnel* of the French Constitution of 22 April 1815, the state of siege was consistently used by authorities.<sup>19</sup> For example, on 24 June 1848, following the fall

13 M Hauriou as quoted by C Rossiter *Constitutional Dictatorship (Crisis Government in the Modern Democracies)* (Princeton, 1948) at 80.

14 *Idem* at 77.

15 F Burdeau & M Quesnet "De l'inefficacité des pouvoirs de crise en France" (1979) 10 *Revue française de droit constitutionnel* 11-20 at 12; see, also, Rossiter (n 13) at 80.

16 Rossiter (n 13) at 80.

17 *Ibid.*

18 Agamben (n 5) at 11.

19 *Ibid.*

of the July Monarchy in France<sup>20</sup> a decree of the Constituent Assembly placed Paris in a state of siege and assigned to General Cavaignac the task of restoring order in the city. This state of siege lasted until 12 October 1919,<sup>21</sup> and led to a section on a state of siege being incorporated into the new French Constitution of 4 November 1848.

The turning point in the evolution of the strictly military and occasional state of siege into a civil and political institution was Law 1791/07/10 of 10 July 1791 on the conservation and classification of war areas, military positions, police fortification and other related issues.<sup>22</sup> This Law provides that when war areas and military positions are in a state of siege, all the authority that civil officers derive from the Constitution for the maintenance of order and interior police will pass to the military commander who will have sole responsibility for it.<sup>23</sup>

Subsequently, the political state of siege was entrenched in law on 9 August 1849. Before its abrogation by an Ordinance of 20 December 2004,<sup>24</sup> section 1 of this legislation provided that a state of siege could be declared in the case of imminent peril to the internal or external security of the state.

Napoleon III made considerable use of the Law of 1849 both as President and Emperor, but particularly in the former capacity, and indeed turned it against those who had fathered the idea in the Constituent Assembly.<sup>25</sup> Section 12 of his Constitution of January 1852 has the effect of transferring the prerogative of declaring a state of siege from the legislature to the head of state exclusively, with the Senate in the role of advisor.<sup>26</sup> A few years after this provision, a state of siege was to be strictly enforced throughout France. Following the Franco-Prussian War of 1870-1871 in which Germany defeated France, more than forty French departments were declared to be in a state of siege for several years. This emergency government only came to an end on 4 April 1876.<sup>27</sup> Subsequently the Law of 9 August 1849 on the political state of siege was amended twice, by Law 1878/04/03 of 3 April 1878 relating to this political state of siege and the Law of 27 April 1916 (released by the Official *Gazette* of the French Republic on 28 Apr 1916) on the functioning and competence of military tribunals in time of war. In 1914 the First World War broke out and the Law of 9 August 1849 was once again enforced in France on a large scale. On 2 August 1914, President Poincaré issued a decree placing the entire country including the eighty-six French departments, the territory of Belfort and the

20 Constitutional monarchy was established in France after 27, 28 and 29 Jul 1830 with Louis Philippe I as the sovereign who was later overthrown in the revolution of Feb 1848.

21 Agamben (n 5) at 12; further Rossiter (n 13) at 81.

22 Well known under the name "Law of 8-10 Jul 1797", the provisions of this bill are available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070687&dateTexte=20130218> (accessed 8 Oct 2012).

23 Section 10 Law of 10 Jul 1791.

24 Ordinance 2004-1374 of 20 Dec 2004 relating to the legislative section of the code of defence.

25 Rossiter (n 13) at 81; Agamben (n 5) at 12.

26 *Ibid.*

27 *Ibid.*

three departments of Algeria in a state of siege.<sup>28</sup> For more than five years the citizens of France were largely governed by this emergency institution, which was not lifted until 12 October 1919.<sup>29</sup>

To briefly summarise, the concept “state of siege” refers to two different situations: firstly, it is a real military state of siege that may be declared by the commanding officer of a place besieged or threatened by enemies. In France, this state of siege is framed by the Law of 10 July 1791 and the decrees of 24 December 1811 and of 4 October 1891. The second hypothesis is a fiction and is called a constructive state of siege or political state of siege, literally *état de siège fictif* or *état de siège politique*, which had its origins in the Law of 9 August 1849 and section 36 of the French Constitution. It is helpful to know that the concept of a state of siege refers to what is known in Anglo-Saxon systems as martial law. As mentioned by Max Radin, “What is expressed in English as martial law has as its counterpart in France, the *état de siège*, which we may refer to by its literal rendering ‘state of siege’”.<sup>30</sup> In other words, to a certain extent the terms martial law and state of siege refer to the same emergency institution, since both transfer the responsibility for the security of cities to the army. However, as I shall show shortly, there are differences between the two.

Secondly, *l'état d'exception* also originated in France under the presidency of General de Gaulle. As already observed, the historical circumstances of the birth of this emergency regime are different from those of a state of siege. Whereas the latter was developed during the French revolution and implemented primarily during the First World War, the development of the state of exception was strongly influenced by events in France in 1940. It was subsequently implemented by the French authorities in Algeria. After the invasion of France by Hitler's army on June 1940, during the Second World War, Hitler and a French delegation signed an armistice. This experience strengthened de Gaulle's political base because the weakness of France was held to be a consequence of the weak executive of the time. The events of June 1940 were marked by a simultaneous “crisis of institutions and a national crisis.”<sup>31</sup> After an armistice was signed by the two countries, it was no longer denied that Franco-English solidarity had been betrayed.<sup>32</sup> It is generally admitted that from that moment onwards General de Gaulle was convinced of the need to grant exceptional powers to the head of state in times of crisis if the events of June 1940 were not to recur. In a speech in the French city of Bayeux in June 1946, he denounced and criticised the system of government by parliament that characterised the Third French Republic. He argued that that system of governance was weak and lacked stability, and that executive power had to be reinforced through the

28 Official Gazette of the French Republic on 3 Aug 1914; O Gross & F Aol'ain *Law in Times of Crisis Emergency Powers in Theory and Practice* (Cambridge, 2006) at 29; Rossiter (n 13) at 91; Agamben (n 5) at 12.

29 M Radin “Martial law and state of siege” (1942) 30 *California LR* 634-647 at 638; Rossiter (n 13) at 92.

30 Radin (n 29) at 636.

31 M Voisset *L'article 16 de la Constitution du 4 Octobre 1958* (Paris, 1969) at 18.

32 *Ibid.*



presidential office.<sup>33</sup> Prelot and Goguel, who in 1958 were familiar with the background to the enactment of section 16 of the French Constitution, argue that the enactment of these provisions was also strongly influenced by a scenario of international perils and the political consequences of the birth of nuclear weapons.<sup>34</sup>

The declaration of a state of exception in a French colony in Africa followed on a general escalation of violence in Algeria, especially the “slaughter on all Saints day” (*le massacre de la Toussaint sanglante*) on 1 November 1954 and the Algiers Putsch in April 1961. The “slaughter on all Saints day” that witnessed the killing of many French as well as Algerian Muslims supporting the colonial regime<sup>35</sup> resulted in the return of General de Gaulle as the French head of state on 1 June 1958. A day later, he was given full powers by the National Assembly and on 3 June, he was allowed to revise the Constitution. This led to the collapse of the Fourth Republic and the birth of the Fifth.<sup>36</sup> One of the greatest innovations of de Gaulle’s new Constitution of 4 October 1958 was section 16 concerning a state of exception. This innovation was and is still technically and legally different from other emergency regimes currently in force, such as a state of siege and a state of emergency. Regarded as a real emergency law or an alternative constitution, section 16 of the French Constitution makes provision for a complete concentration of powers in the president when the state’s safety, independence, international obligations or institutions are in danger.

In an atmosphere characterised by the struggle for independence across the African continent, de Gaulle, like his predecessors, knew that he had to address the problems in Algeria, especially the rise of nationalism and incessant violence for which the *Front de Liberation National* (FLN) was primarily responsible.<sup>37</sup> Therefore he eventually became willing to compromise. In September 1958 he proposed “an honourable peace” to the FLN and one year later he acknowledged Algeria’s right to self-determination.<sup>38</sup> In 1960 de Gaulle took important steps when he referred to Algeria as Algerian Algeria (*l’Algérie Algérienne*), the Algerian Republic (*République Algérienne*) and finally the Sovereign Algerian State (*Etat Algérien Souverain*).<sup>39</sup>

However, whereas de Gaulle was acknowledging the demands of those seeking independence, many French settlers in Algeria opposed the struggle for independence, saw it as treason, and strongly disagreed with de Gaulle’s politics. Consequently, on 21 April 1961 four generals of the French army, Jouhaud, Zeller, Salan and Challe,

33 “Composition: L’action politique du général de Gaulle de 1946 à 1969” available at <http://www.cndp.fr/crdp-reims/cinquieme/deGaulle.htm> (accessed 2 Oct 2012).

34 Voisset (n 31) at 15.

35 G Lebreton “Les atteintes aux droits fondamentaux par l’état de siège et l’état d’urgence” available at <http://www.unicaen.fr/puc/ecriture/revues/crdf/crdf6/crdf0607lebreton.pdf> (accessed 25 Sep 2012) at 83; France TV Education “Guerre d’Algérie, de la colonisation à l’indépendance” available at <http://www.curiosphere.tv/guerre-algerie/> (accessed 2 Oct 2012).

36 France TV Education (n 35).

37 The National Liberation Front was the revolutionary movement in Algeria that led the war for independence against French colonialism.

38 France TV Education (n 35).

39 *Ibid.*



acting as the Higher Council of Algeria (*le conseil supérieur de l'Algérie*), organised a military putsch in the capital Algiers. They planned to launch a military operation in France and in Algeria to prevent de Gaulle from relinquishing French sovereignty over French Algeria (*l'Algérie Française*).<sup>40</sup> Two days later, on 23 April, in response to the events in Algiers, de Gaulle formally implemented section 16 of the Constitution and declared a state of exception in Algeria with immediate effect. This measure was aimed at retaliation against the French generals and Algerian settlers who opposed his recent acceptance of the idea of independence for Algeria. The emergency regime lasted until 29 September 1961.

In the light of the developments described above, it is evident that a state of siege and a state of exception are not identical, even though their wording and the laws applicable to them may share some similarities. Indeed, although the French authorities implemented the Law of 9 August 1849 on the state of siege during the First World War in particular, they chose not to apply the same provisions after the Algerian uprisings. Moreover, even though the provisions of Law 55/385 of 3 April 1955 relating to a state of emergency were in force during these uprisings, de Gaulle chose not to implement them. Rather, he decided to implement section 16 of the French Constitution on the state of exception. This confirms that each institution was designed to deal with a particular situation. For example, it is acknowledged that a state of siege can be declared only in the case of an imminent peril resulting from a foreign war or an armed insurrection.<sup>41</sup> In Algeria, the French authorities did not declare a state of siege because this geographical area was at the time part of France. Therefore it would have made no sense to acknowledge that the French Republic was at war with itself. Indeed, one week after the “slaughter on all Saints day”, Francois Mitterrand (subsequently also a president of France), who at the time was interior minister, asserted on 7 November 1954 that “Algeria is France.”<sup>42</sup>

Further proof that a state of emergency is different from a state of siege and a state of exception, is that the French authorities did not apply the Law of 9 August 1849 to the state of siege during the Algerian crisis of 1954. Instead, they passed a new law, that of 3 April 1955, on the state of emergency. The provisions of this Law had the effect of depriving the Algerian events of their international character, and hampered the enforcement of the Law of 9 August 1849. Dominique Rousseau contends that France passed the Law of 3 April 1955 in order to prevent UN interference in Algeria, taking the view that the crisis was an internal affair and should remain so. In this regard, Rousseau stated: “Algeria is a French territory in which [there] are ... some ‘troubles’, some ‘riots’ but not a war.”<sup>43</sup> This supports the view that some emergency regimes, especially the state of emergency are applicable to “some troubles” or “some riots” whereas in a war other regimes such as the state of siege are appropriate.

40 “13 Mai 1958 Alger se révolte” available at <http://www.herodote.net/histoire/evenement.php?jour=19580513> (accessed 2 Oct 2012).

41 Section 1 French Law of 9 Aug 1849.

42 “Guerre d’Algérie, de la colonisation à l’indépendance” available at <http://www.curiosphere.tv/ guerre-algerie/> (accessed 2 Oct 2012).

43 D Rousseau “L’état d’urgence, un état vide de droit(s)” available at <http://www.ceras-projet.org/index.php?id=2284> (accessed 29 Sep 2012).

To summarise: unlike a state of exception, the regime of a state of siege does not confer any law-making powers on the executive and does not introduce any fundamental change in the relationship between the legislature and the executive. Similarly, it does not change the relationship between the civilian government and the military, because the military continues to be subject to the directives and instructions of the ministers.<sup>44</sup>

Although section 16 of the French Constitution was developed by de Gaulle following the events of 1940 in France, its implementation in Algeria is sufficient proof that a state of siege and a state of exception are not identical. That the French version of the Constitution of Cameroon refers to “l'état d'exception” while the English version of the same text refers to “a state of siege” is confusing. Yet this would not have been a problem if the drafters of the constitution had explained themselves more fully whether in the body of the Constitution or in separate legislation. Because of this legal gap in Cameroon's legislation, my further arguments once again rely on the French texts to show that the law relating to *l'état d'exception* and the state of siege are different.

## 2 2 The legal differences between *l'état d'exception* and a state of siege

In respect of a state of siege, the first rule to be noted is the one referring to the circumstances of its declaration. The first sections of the French Laws of both 1878 and 1849 provide for the declaration of a state of siege in the event of foreign invasion, armed insurrection or imminent danger to internal or external security. A state of exception on the other hand can be imposed by the French President only “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”.<sup>45</sup> Carl Schmitt describes the sovereign as the person who decides on the exception,<sup>46</sup> so that in this context a very close resemblance may be observed between this sovereign and the head of state as the only authority competent to declare a state of exception.

A state of siege and a state of exception affect government and society in various ways. The first effect of a state of siege is that the army is given the responsibility for security and the maintenance of peace and public order, usually exercised by the administrative authorities, as provided for by section 7 of the Law of 9 August 1849 on the state of siege:

As soon as a state of siege is declared, the powers which civil authority was clothed for the maintenance of law and order pass entirely to the military authority.

This provision is one of the most essential characteristics of a state of siege compared with other emergency regimes. For instance in September 1914 the city of Paris in a state of siege was handed over completely to the army under the command of General Gallieni.<sup>47</sup> The main consequence of a state of exception is the provisional abolition of

44 Gross & Aol'ain (n 28) at 28.

45 See the entire text of art 16 of the French Constitution.

46 Schmitt (n 8) at xviii.

47 Rossiter (n 13) at 93.

the separation of executive, legislative and judicial powers. The President is vested with full powers and can rule the country through his own decisions. These are no longer subject to any of the checks and balances that characterise a normal democratic society. This was the case on 23 April 1961 when General de Gaulle imposed a state of exception in Algeria following the putsch in Algiers.

Following the abrogation of some sections of Law 1878/04/03 of 3 April 1878 relating to a state of siege, some formal limitations on its declaration may be noted, which were introduced into the legislative section of the French Defence Code<sup>48</sup> by Ordinance 2004-1374 of 20 December 2004. By virtue of section L2121-1 of this Code, a state of siege is declared by a decree issued in a Council of Ministers, only if there is imminent danger or an armed insurrection. The decree establishing a state of siege mentions the specific areas in which it is to be declared as well as its duration.

The declaration of a state of exception is also subject to specific conditions. Section 16 of the French Constitution provides that “the President of the Republic shall take measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the Houses of Parliament and the Constitutional Council”. Moreover, by virtue of section 53 of Ordinance 58/1067 of 7 November 1958 on the Constitutional Council, the opinion of the Constitutional Council should be written, justified and published in the official gazette. Another requirement for a genuine state of exception is the French president’s obligation to address the nation and inform it of the measures taken. The measures must be designed to provide the public authorities with the means to carry out their duties as quickly as possible, and the National Assembly shall not be dissolved during the exercise of such emergency powers.<sup>49</sup> The state of exception differs from the state of siege in that section 16 of the French Constitution provides the following: after thirty days of the enforcement of a state of exception, the question of its termination may be referred to the Constitutional Council by the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators, who have to decide whether the threat to the state and its institutions is over.<sup>50</sup> Based on the wording of these provisions, it may be said that the minimum duration of a state of exception in France is thirty days, whereas section 9(2) of the Constitution of Cameroon on the issue is vague and rather confusing.

### **3 The confusion in section 9(2) of the Constitution of Cameroon and its implications for human rights and democracy**

Cameroon has ratified several international instruments that address questions of human rights, democracy and emergency regimes. These instruments include among others the International Covenant on Civil and Political Rights, the Convention against Torture

48 Law No 2007/289 of 5 Mar 2007 amending the code of military justice and of the code of defence.

49 Art 16 of the French Constitution.

50 *Ibid.*

and other Cruel, Inhuman or Degrading Treatment or Punishment, the Paris Minimum Standards of Human Rights Norms in a State of Emergency, and the United Nations Charter. With particular regard to emergency regimes, standards to be respected by states were established by the United Nations Economic and Social Council (ECOSOC), its Commission on Human Rights, and Sub-commission on the Prevention of Discrimination and the Protection of Minorities. The sub-commission expressed its deep concern at the manner in which certain countries applied the provisions relating to situations known as states of emergency.<sup>51</sup> Cameroon's willingness to protect human rights in accordance with international human rights instruments is evident in section 45 of the Constitution. The section provides that duly approved or ratified treaties and international agreements, following their publication, override national laws. Accordingly, Cameroon is bound by the values and norms entrenched in all the international human rights instruments to which it is party. However, it remains to be seen whether the interpretation of section 9(2) of the Constitution takes cognisance of these human-rights values and norms. It is submitted that the confusion concerning section 9(2) of the Constitution of Cameroon is proof enough that treaty texts are "imperfect documents" whose implementation has been basically weak.<sup>52</sup>

The confusion in section 9(2) of the Constitution of Cameroon is reflected in Cameroon's non-compliance with these international human rights obligations; thus uncertainty about the proper nature of emergency regimes in that country remains a serious challenge. The institution itself undermines the foundations of a democratic society. In the declaration of either *l'état d'exception* or a state of siege in Cameroon, the president of the Republic is the only authority involved. This is a vital issue because in Cameroon a presidential act declaring a state of emergency, a state of siege and/or *l'état d'exception* is an *acte de gouvernement*, a state act. It is an act that has a political motive, which has the peculiarity that it is not subject to judicial review or parliamentary approval. Consequently if the president wrongfully declares an emergency regime, a court cannot review the presidential decision, often because it is not competent to do so. Rossiter observes that this is one of the chief distinctions between the continental state of siege and its common-law counterpart, martial law.<sup>53</sup> Indeed unlike the state of siege in countries with a civil-law tradition such as France and Cameroon, its Anglo-Saxon counterpart, martial law, can never be imposed in England to the exclusion of the legal system. Whereas the former countries consider the institution to be the exclusive prerogative of the state, the latter sees it as a right of the crown and its citizens. Albert Dicey says the following about English martial rule:

51 United Nations, Economic and Social Council, Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities 47th Session, item 10(a), provisional agenda available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/9d7accdf228e4a3802566bf00556e7f?Opendocument> (accessed 16 Oct 2012).

52 J Fitzpatrick *Human Rights in Crisis The International System for Protecting Rights During States of Emergency* (Philadelphia, 1994) at 66.

53 Rossiter (n 13) at 89.

Officers, magistrates, soldiers, policemen and ordinary citizens, all occupy in the eye of the law the same position and they are each and all of them, liable to be called to account before a jury for the use of excessive, that is, of unnecessary force.<sup>54</sup>

The presidential act declaring emergency regimes remains an act of state not subject to judicial review in the legal system of Cameroon. This principle was developed and adopted by the French council of state in the *Rubin de Servens* case in which the judges declared their incompetence to question the legality and duration of the state of exception that de Gaulle had declared in Algeria.<sup>55</sup>

In Cameroon, *l'état d'exception* and/or a state of siege has never been formally declared in terms of the provisions of section 9(2) of the Constitution, so the question remains: what will happen if the president of the Republic declares either a state of exception or a state of siege? Will the army take over the powers vested in the administrative authorities or will the president rule the country without checks and balances? The scenario is the more confusing because there is no law regulating *l'état d'exception* and/or a state of siege in Cameroon, as there is in France which initiated these emergency institutions. Once the original provisions of the Fifth French Constitution had been incorporated in section 9(2) of the Cameroon's Constitution, the relevant checks and balances were deleted. Indeed, as previously mentioned, in the French Constitution of the Fifth Republic a state of exception is subject to a set of constitutional restrictions listed in section 16. These include the President's obligation to formally consult the Prime Minister, the Presidents of the Houses of Parliament and the Constitutional Council. The Council's opinion should be written, justified and published in the official gazette according to section 53 of the Ordinance of 7 November 1958. Moreover, a state of exception in France should be restricted in time. Section 16 clearly states that after thirty days of a state of exception, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators may refer to the Constitutional Council the question whether it should be extended or not. With regard to a state of siege, section L2121-1 of the French defence code provides that it must only be declared by a decree of the Council of Ministers in the event of imminent danger or armed insurrection. This decree has to mention the specific areas in which the state of siege is to be enforced as well as its duration.

France, the state that inspired these institutions in Cameroon, has laws in place governing the state of siege and there is a detailed description of a state of exception in the Constitution. The provision of Section 9(1) of the Constitution of Cameroon

54 A Dicey *Introduction to the Study of the Law of the Constitution* 10 ed with introduction by ECS Wade (Basingstoke, 1985) at 289.

55 *Conseil d'Etat 2 Mars 1962* NO 55049 ECLI:FR:CEASS:1962:55049.19620302. After the Algiers putsch in Apr 1961, French President Charles de Gaulle had in terms of s 16 of the Constitution declared a state of exception in Algeria that lasted until 29 Sep of the same year. On 3 May, de Gaulle set up a special military tribunal for the trial of people who had threatened the Republic and had infringed the discipline of the army. Ten officers of the army, including Mr Rubin de Servens, were sentenced by the military court. They went to the Council of State to challenge the presidential decision to create a military tribunal on the ground of abuse of power. The judge argued that the presidential decision to implement s 16 of the Constitution was an act of state and was therefore not for the Council of State to judge either its legality or that of the duration of the state of exception.

relating to a state of emergency is backed up by the relatively detailed Law 90/047 of 19 December 1990. One would have expected there to be similar provisions relating to *l'état d'exception* and/or a state of siege.

Another alternative would have been to keep or restore the constitutional guarantee found in the previous Constitutions of Cameroon to the effect that the president of the Republic was not the only authority involved in the enforcement of these regimes. According to section 20 of the Constitution of Cameroon of 4 March 1960:

In case of exceptional circumstances that threaten the safety of the nation, the president of the Republic may by decree issued in the Council of Ministers, after consulting the president of the national assembly proclaim the state of exception that confers upon him the responsibility of government ... An organic law sets the modalities of the proclamation of the state of exception and determines the powers conferred on the president of the Republic.<sup>56</sup>

These provisions of the former Constitution of Cameroon closely resemble the constitutional restrictions of section 16 of the Constitution of the Fifth French Republic. The idea of constitutional guarantee during emergencies also characterised the subsequent constitution of Cameroon on 1 September 1961 in the era of federalism. Indeed, prior to a declaration of a state of exception across the country, the president of the Republic had to consult the Prime Ministers of the Federated States.<sup>57</sup> The operation of this mechanism is best illustrated by the heated debate on the Prime Minister's powers that took place during the parliamentary session of October 1959. Prime Minister Ahmadou Ahidjo, reacting to the ongoing struggle for genuine independence in the country, asked parliament to give him full powers and permission to rule the country by decree for six months. The debate between the government and its opponents continued in the Cameroonian parliament even though the tone was not very friendly. Each party clearly expressed and explained its views. Daniel Kemajou for instance, an opposition speaker from West Cameroon, warned that granting emergency powers to the Prime Minister would mean the suppression of liberty and the establishment of a dictatorship. According to Kemajou, Ahidjo would be so powerful that he would be able to make laws directed against his opponents, redraw electoral districts as he saw fit and by decree suppress anything he wanted to. As recorded, the speech of Kemajou remains a brilliant record of the atmosphere that prevailed in parliament:

Mr. Ahidjo who is essentially unpopular is requesting exceptional powers only to wage war against his Cameroonian brothers and especially to jeopardise the future of a whole people forever ... Once Mr. Ahidjo will be proclaimed almighty, nothing will be able to stop him on the way to despotism. He will make the sun shine or make it rain. You know when the mediocre are in power, they are always tempted to abuse it.<sup>58</sup>

56 My translation.

57 Section 15 of the Constitution of 1 Sep 1961.

58 "Le vote des pleins pouvoirs à M. Ahmadou Ahidjo le 29 Octobre 1959" available at [http://www.pdcpd.org/images/stories/publications/doc/archives/Le\\_vote\\_des\\_pleins\\_pouvoirs\\_a\\_Amado\\_AHIDJO\\_29\\_octobre\\_1959.pdf](http://www.pdcpd.org/images/stories/publications/doc/archives/Le_vote_des_pleins_pouvoirs_a_Amado_AHIDJO_29_octobre_1959.pdf) (accessed 3 Oct 2012) (my translation).



However, after the Constitution of September 1961 came into force, Cameroon was about to witness the exclusion of the legislative body, and the president's seizure of the implementation of emergency regimes. In addition, the idea of an organic law to regulate a state of exception and clarify the relevant presidential prerogatives provided for by the Constitution of 4 March 1960 was not entrenched in the Constitution of 1 September 1961. The entire constitutional order, then centred on the presidential office,<sup>59</sup> was retained in the Constitution of 2 June 1972 and that of 18 January 1996, so that no mechanism of consultation with or involvement of any other political or judicial entity remained.

Such a situation reflects a legal void. If these emergency regimes were imposed in accordance with the current provisions it would mean a disaster for human rights and democratic principles. The United Nations Economic and Social Council has observed that derogation from rights recognised under international law in order to respond to a threat to the life of the nation should not happen in a legal vacuum.<sup>60</sup> This requirement is relevant to the recent Cameroonian experience. By a decree of 16 May 1991, President Biya enacted a bill imposing the Operational Command (*le Commandement Opérationnel*) in seven of the ten provinces (currently regions) of Cameroon. Nearly a decade later, in 2000, the President enforced by decree<sup>61</sup> a new Operational Command to fight large-scale banditry (*grand banditisme*) in the city of Douala. At this level, I must stress that in the Operational Commands of both 1991 and 2000, the classic administrative authorities in charge of the police of the cities remained in place even though it was not and is still not possible to account for any of their actions. What is of importance is that a presidential decision transferred responsibility for the security of these cities from these authorities (governor, prefect, sub-prefect, mayor, etc) to the army. Technically and legally speaking, and with regard to the criteria previously analysed, this was no more than the implementation of a state of siege in the true sense of the word.

Yet officially a state of siege has never been imposed in the country, that is to say, to date a presidential decree has never been formally issued in terms of the provisions of section 9(2) of the Constitution. However, as seen above, drastic measures have been taken in an implicit and hypocritical enforcement of a state of siege. The presidential decree further infringes human rights in that responsibility for the security of a city is transferred to a special unit, one that has never been trained to execute such tasks. For instance, the effect of such a transfer on the human rights of the inhabitants of the city of Douala will probably last for decades. When the Operational Command appointed soldiers to deal with theft in Douala it implicitly silenced the law and suspended the provisions of the Cameroonian Penal Code<sup>62</sup> on theft. Consequently, most people who were found guilty of theft were executed after being tortured.

On 23 January 2001, nine people, Chia Efficence, Kuete Jean Charly, Nguouoffo Frédéric, Kouatou Charles Ruben, Kuate Fabrice, Etaha Marc, Kouatou Elysée Herbert,

59 D Olinga *La Constitution de la République du Cameroun* (Yaoundé, 2006) at 64.

60 United Nations Economic and Social Council, Commission on Human Rights, 41 Session, E/CN.4/1985/4, 28 Sep 1984, Status of the International Covenants on Human Rights par 61 9.

61 2000/0027 of 24 Feb 2000.

62 Law 67/LF/1 12 Jun 1967.



Tchiwan Jean Roger and Chia Nain, went missing after being arrested by captain Jean Jacques Aba Nzengue. This launched what is known today in Cameroon as “the case of the nine disappeared of Bepanda” (*l’affaire des 9 disparus de Bepanda*), Bepanda being the name of the area where the people were living. They had officially been accused of stealing a gas cylinder and then executed without trial; and their bodies have never been found.<sup>63</sup> The legal vacuum that characterises such a situation has transformed the army in charge of the operational command in Douala into a clandestine lawmaker and the current democracy into “a degeneracy of *droit* and violence of *droit*”.<sup>64</sup> In his study on martial law and state of siege Max Radin argues that “the vital point is that the state of siege is not a condition in which law is temporarily abrogated, and the arbitrary fiat of a ‘commander’ takes its place”.<sup>65</sup>

The appointment of the Operational Command in the city of Douala, or rather the implementation of a state of siege in this part of the country led to searches, arrests without warrants, tortures and extra-judicial executions by the army, nicknamed by local population the commandos of death (*les commandos de la mort*). Many people have been termed big thieves (*grand bandits*) and arrested after being denounced by a mere phone call. The case of a young man named Ngue Bissog, whose girlfriend was the daughter of the chief of the neighbourhood, is an example in point. The chief, who was opposed to the relationship, took revenge by identifying the teenager to the soldiers in charge of the Operational Command as a very big thief (*un très grand bandit*).<sup>66</sup> It was only through a powerful intervention that Ngue Bissog was freed.<sup>67</sup>

The police machinery is at the heart of the implementation of emergency regimes in Cameroon. The law’s failure to define the emergency institutions inevitably leads to a concept of the police as a “faceless figure, a violence without form”.<sup>68</sup> This is not surprising since after the suspension of law the police became the lawmakers.<sup>69</sup>

When the Operational Command was in control of the city of Douala, Billong Bell Jean-Claude was not as fortunate as Ngue Bissog. Billong, a businessman and father of three children was arrested, shown on television to be a grand bandit and then killed by soldiers.<sup>70</sup> It was difficult to determine whether Cameroon was still a country aspiring to constitutional democracy or a society on its way back to a state of pre-social contract; a state characterised by instinct and where the strong prevail over the weak. Even the

63 “Au Cameroun: Forces de l’ordre hors contrôle?” available at [http //www.wagne.net/csp/csp2003/cahier\\_animation/ec2.htm](http://www.wagne.net/csp/csp2003/cahier_animation/ec2.htm) (accessed 31 Oct 2012).

64 Jacques Derrida “Force de loi: Le ‘fondement mystique de l’autorité’” (1990) 11 *Cardozo LR* 920-1046 at 1013.

65 Radin (n 29) at 637.

66 B Balla “Commandement opérationnel ou machine à exécutions sommaires?” available at [http //www.cameroon-info.net/stories/0,5377,@,commandement-operationnel-ou-machine-a-executions-sommaires.html](http://www.cameroon-info.net/stories/0,5377,@,commandement-operationnel-ou-machine-a-executions-sommaires.html) (accessed 31 Oct 2012).

67 *Ibid.*

68 Derrida (n 64) at 1011.

69 W Benjamin “Critique of violence” in Matthew Calarco & Peter Atterton (eds) *The Continental Ethics Reader* (New York, 2003) 113-126 at 119.

70 See Balla (n 66).

oldest emergency regimes such as the state of siege which had been imposed in war time in France had never entitled the army to arbitrarily kill people whom it was supposed to protect. In this regard section 11 of the French Law of 1849 on the state of siege clearly provides that constitutional guarantees not specifically suspended remain of full force and effect. Michel Foucault, a French author, developed the concept of biopower in regard to the state's power of life and death over its own people and noted with concern:

How could power exercise its highest prerogatives by putting people to death, when its main role was to ensure, sustain and multiply life, to put this life in order?<sup>71</sup>

Following these sinister events, Christian Cardinal Tumi, the first Cardinal of Cameroon and an eminent religious authority in the country, addressed a letter to the governor of the Littoral province denouncing the inhuman treatment and extra-judicial executions of men, women, girls and boys there.<sup>72</sup> He asked the authorities whether it was not possible to fight theft without killing “thieves”.<sup>73</sup> The observation was appropriate, because the events to which he referred constituted a clear violation of the non-derogable clause of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Section 2(2) of this international document, ratified by Cameroon on 19 December 1986, reads:

No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

Following on the summary execution of more than 1000 people, on 23 November 2000 the United Nations committee against torture urged the government of Cameroon to “consider dismantling the special forces set up in the framework of the fight against large-scale banditry, to strongly continue the investigations about gross human rights violation and to launch immediate and impartial investigations”.<sup>74</sup> Nearly two weeks afterwards, on 4 December, Amnesty International asked whether those responsible for massive violations of human rights and extra-judiciary executions in the city of Douala were to remain unpunished.<sup>75</sup> In the same vein, on 17 May 2001, the European Parliament adopted an emergency resolution that strongly condemned the torture, disappearances and extra-judicial executions taking place at the hands of special security forces in Cameroon and recommended the establishment of an independent commission of inquiry and the holding of impartial and fair trials.<sup>76</sup> Some months later, despite the abovementioned criticism and recommendations, Philippe Mpay, the general in charge of the Operational Command was promoted against all expectations. In addition, the infernal cycle of violence in Cameroon still continues. After another decade, the year 2012 witnessed

71 M Foucault *The History of Sexuality Volume 1 Introduction* (tr Robert Hurley, New York, 1978) at 138.

72 “Au Cameroun: Forces de l’ordre hors contrôle?” (n 63).

73 *Ibid.*

74 *Ibid.*

75 *Ibid.*

76 *Ibid.*

another presidential decree that launched another Operational Command. What will be the outcome this time? Only the future will tell us.

## 4 Conclusion

The purpose of this study was to analyse both the French and English versions of the provisions of section 9(2) of the Constitution of Cameroon in which *l'état d'exception* and a state of siege appear to be synonymous.

I have shown that from both a historical and a legal perspective a state of exception and a state of emergency are two different emergency regimes. I have also shown that failure to clarify section 9(2) of the Constitution of Cameroon is a threat to democracy and the protection of human rights. The section as it stands currently reinforces the authoritarian character of the Constitution to the benefit of the head of state exclusively. When one compares the provisions of section 9(2) to previous constitutions' provisions on emergency regimes in Cameroon, it is evident that democratic progress in the country has suffered a severe setback. Indeed, although the Republic was born during a state of emergency following a liberation war and a vote in October 1959 to give full powers to president Ahidjo, who led the majority party in parliament, the emergency provisions of the previous constitutions (section 20 of the Constitution of 4 March 1960 and section 15 of the Constitution of 1 September 1961) were nevertheless closer to democratic ideals. The president was not the only authority to be involved in the declaration of emergency regimes, because parliament and the Council of Ministers also had to examine the issue and give their approval.

In order to remedy this situation I would propose the following: Firstly, it would be appropriate and a significant step towards genuine democracy that section 9(2) be amended. Its wording in English and French needs to be reviewed and given detailed clarification especially since the two official languages have equal authority. Secondly, it would be a great step forward if the emergency provisions in the law of Cameroon could be coupled with some mechanism of checks and balances such as parliamentary approval and judicial review, as is the case in many constitutions of other countries.

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## Abstract

Section 9(2) of the Constitution of Cameroon relating to emergency regimes, in its French version provides for "l'état d'exception" whereas the English version of the same text provides for "a state of siege". In this paper I show that French and English being the official languages in Cameroon, the wording "l'état d'exception", which literally means "state of exception" in English, cannot be understood to be a state of siege which translated into genuine French would mean "l'état de siège". Whereas in *l'état d'exception* there is a concentration of power in the hands of the executive and the provisional abolition of the separation of legislative, executive and judicial powers, in a state of siege responsibility for during a crisis the security of the city is transferred from the administrative authorities to the army. The current provisions of section 9(2)

of the Constitution of Cameroon are confusing and I therefore examine the fundamental differences between the two emergency institutions from legal and historical perspectives. I emphasise the impact of such confusion on human rights and the rule of law in Cameroon. In essence, I demonstrate that “l'état d'exception” and “a state of siege” as currently defined by section 9(2), appear to be mechanisms allowing gross human rights violations and conferring comprehensive powers designed to paralyse the rule of law.