

The Doctrine of Civil Necessity and Its Implications for Constitutionalism

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DEDICATION

To my parents, Blastus and Agnes Waudu and to my elder brother, Dunstan Soida Waudu

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ABSTRACT

While recognizing the need for emergency powers, the study acknowledges the tension that exists between emergency powers on the one hand and the principles of democracy and human rights on the other and examines whether it is possible to constitutionally provide for and control the exercise of emergency powers without constraining the government's ability to adequately respond to unforeseen threats, while avoiding doing permanent damage to the norms and values underpinning constitutional government.

The study examines the arguments presented by those who hold the view that emergency powers cannot be regulated by law and those who maintain that emergency powers can and should be integrated into the state's legal order. The study argues that the exercise of emergency powers can be regulated by law and suggests that it would be prudent to have detailed legal provisions providing for emergencies so that the extent and limits of the state's emergency powers may be known in advance to prevent any abuse of emergency powers for political or any other ulterior purposes.

The study argues that the theory of written constitutionalism is incompatible with emergency exceptions. It argues that the application of the Doctrine of Civil Necessity in Kenya would violate not only the principle of the supremacy of the Constitution but also the principle of legality which requires that state authority be exercised pursuant to the Constitution and laws enacted in conformity therewith. It expresses the view that no legal justification exists for the application of the Doctrine of Civil Necessity as the law cannot possibly support actions which are contrary to it.

The study concludes with the finding that Constitutionalism is possible in times of emergency where the Constitutional Framework preserves the balance of powers between the various arms of Government even during the pendency of a state of emergency. It proposes legal reforms to decentralise the power to declare a state of emergency, clearly define the kind of situations that justify the invocation of emergency powers, provide for differentiated emergency powers and strengthen Parliament's capacity to monitor the exercise of the executive's emergency powers.

TABLE OF CASES

1. Attorney General v. Eastern Railway (1880) 5 App.Cas.473
2. Federation of Pakistan v. Shah (1955)
3. Lakanmi v. The A.G (West) SC.58/69 of April 24, 1970
4. Liyanage v. R (1967) 1 AC 259
5. Mitchell and Others v. Director of Public Prosecutions and Another (1986) LRC (Const) 35, 88-89
6. Myers v. United States 272 U.S.52

TABLE OF STATUTES

1. Constitution of Kenya (Repealed)
2. Constitution of Kenya, 2010
3. Preservation of Public Security Act (CAP 57)
4. Constitution of the Federal Republic of Nigeria
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9. Constitution of the United States of America

INTERNATIONAL LEGAL INSTRUMENTS

1. International Covenant on Civil and Political Rights, 1966
2. Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights

CHAPTER ONE

INTRODUCTION

1.0 Introduction

In all countries, it is recognised that constitutionalism has to be limited by the exigencies of an emergency, since an emergency implies a state of danger to public order and safety, which cannot adequately be met within the framework of governmental restraints imposed by the constitution.¹

It has been argued that the restrictions and procedures characteristic of constitutional government amount to imprudent impediments in times of emergency when quick action is called for to save the state from ruin.²

For that reason, even the most constitutional of governments finds it necessary to arm itself under the constitution with special powers to deal with an emergency.³

However, as Rousseau points out, it is a necessary part of foresight to perceive that everything cannot be foreseen.⁴ The unexpected recently occurred in Nigeria from the month of November 2009 to the month of February 2010, when the prolonged absence from the country (78 days) by the then President Umaru Yar'Adua (now deceased) while receiving treatment in Saudi Arabia occasioned a constitutional crisis after the President refused to formally empower the then Vice President (now President) Goodluck Jonathan to exercise full powers as Acting President for the duration of his incapacitation, as provided for under Section 145 of the Constitution of the Federal Republic of Nigeria, 1999.

Section 145 of the Constitution of the Federal Republic of Nigeria, 1999 provides that whenever the President transmits to the President of the Senate and the Speaker of the House of

¹Nwabueze, B.O., 1973, *Constitutionalism in the Emergent States*, Cranbury: Associated University Presses, Inc, p. 174.

²Kathurima G.I., 1989, 'Emergency powers in Kenya: A Study of the Extraordinary Executive Powers vis-vis the International Covenant on Civil and Political Rights 1966', Unpublished LL.M Thesis, University of Nairobi, p. 12.

³Ibid.

⁴ Ibid, p. 8.

Representatives a written declaration that he is proceeding on vacation or that he is otherwise unable to discharge the functions of his office, until he transmits to them a written declaration to the contrary such functions shall be discharged by the Vice-President as Acting President.

The crisis was ultimately resolved on 9th February 2010, when the Nigerian National Assembly relying on the doctrine of necessity, passed a resolution installing the then Vice President Goodluck Jonathan as Acting President and Commander in Chief of the Armed Forces.⁵

A reading of the Nigerian Constitution reveals that the Nigerian National Assembly was not empowered under the provisions of the said Constitution to pass any such resolution. Section 145 of the Constitution of the Federal Republic of Nigeria, 1999 which has been set out in full herein above sets out the circumstances under which the Vice-President of the Federal Republic of Nigeria can become an Acting President. Section 145 of the Constitution of the Federal Republic of Nigeria, 1999 also sets out the circumstances when the acting Presidency of the Vice-President comes to an end. The said section of the Nigerian Constitution does not provide for any resolution of the Nigerian National Assembly installing the Vice-President as an Acting President. Section 145 of the Constitution of the Federal Republic of Nigeria, 1999 does not provide for circumstances where the President fails or is unable perhaps due to his incapacitation to submit his written declaration to the President of the Senate and the Speaker of the House of Representatives that he is proceeding on vacation or that he is otherwise unable to discharge the functions of his office, which is a condition precedent under the said section, to the Vice-President serving as an Acting President.

The Doctrine of Necessity has been defined as a rarely used political concept or utilitarian idea that is used to define and validate extra constitutional actions which are deemed necessary to preserve political stability. The fundamental objective of the doctrine is to satisfy the exigencies created by certain situations outside the contemplation of the constitution and its significant feature is the deliberate short term circumvention of the constitution by extra legal civil means in

⁵Nat Ofo, 'Spotlighting the inadequacies of Section 145 of the Constitution of the Federal Republic of Nigeria 1999', accessed on 3rd June 2011 at <http://ssrn.com/abstract=1602562>.

order to preserve the Constitution, the rule of law, the government and democracy in the long term.⁶

The disputed Kenyan Presidential elections of 2007 drove the country to the brink of ruin with civil strife breaking out in large parts of the country as citizens violently turned on each other on the basis of political and ethnic rivalry.

With the country rapidly becoming ungovernable and teetering towards civil war, a power sharing agreement was negotiated by the feuding Presidential candidates, Hon. Mwai Kibaki of the Party of National Unity and Hon. Raila Odinga of the Orange Democratic Movement in talks brokered by the former Secretary General of the United Nations, Mr. Kofi Annan.

Peace was ultimately restored with the signing of the National Accord which was later entrenched in the Constitution of Kenya through the National Accord and Reconciliation Act, 2008.

Political realists have often made the argument that when dealing with acute violent crises democracies ought to forego legal and constitutional niceties.

Abraham Lincoln argued that, “just as every man thinks that he has a right to live so does every government think that it has a right to live. Just as every man will override all laws to protect himself from a murderous assailant, so will a government trample down a constitution before it allows itself to be destroyed.”⁷

According to Thomas Jefferson, a strict observance of the written laws is one of the high duties of a good citizen but it is not the highest. The laws of necessity, of self preservation, of saving one’s country when in danger are a higher obligation. He argued that to lose one’s country by a strict adherence to written law would amount to absurdly sacrificing the ends to the means.⁸

⁶Kayode Oladele, *The Doctrine of Necessity in Perspective*, accessed on 8th October 2013 at <http://chatafrik.com/articles/politics/the-doctrine-of-necessity-in-perspective>.

⁷Supra Note 4, p.12.

⁸Letter from Thomas Jefferson to John B. Colvin (Sept 20, 1810) in Thomas Jefferson, *Writings* 1231 (1984) cited in Gross .O, *Chaos and Rules: ‘Should Responses to Violent Crises Always Be Constitutional?’* 112 *Yale L.J* (2003).

Such arguments have been fortified by the argument that a constitution is not a suicide pact and should not be construed as such where an alternative construction is possible.⁹

It is therefore apparent that Constitutionalism is affected by emergencies irrespective of whether a government invokes the emergency powers provided for under the Constitution or invokes the Doctrine of Civil Necessity.

1.1 STATEMENT OF THE PROBLEM

While it is factually correct to assert that a Constitution cannot possibly provide for every kind of situation that may endanger public order and safety, opinion is divided on how a Constitutional Government ought to confront unforeseen emergencies.

A view has been expressed to the effect that the law includes the Doctrine of Civil Necessity. It has been argued that the Doctrine of Civil Necessity does not abrogate the express law, but only qualifies it for the purpose of averting the threatening danger.¹⁰

It has on the other hand been noted that the Doctrine of Civil Necessity is more susceptible to abuse than the emergency powers provided under the express provisions of the constitution as it may justify the assumption of powers beyond those authorised by the constitution.¹¹

The Doctrine of Civil Necessity has consequently been described as the plea for every infringement of human freedom. It has further been described as the argument of tyrants¹²

Emergency powers are provided for under Article 58 of the Constitution of Kenya, 2010. The Constitution of Kenya, 2010 prohibits any extra-legal emergency action on the part of the State. Article 58 (7) of the Constitution of Kenya, 2010 provides that a declaration of a state of emergency, or legislation enacted or other action taken in consequence of any declaration, may not permit or authorise the indemnification of the State or of any person in respect of any unlawful act or omission.

⁹Paulsen. M.S, 'The Constitution of Necessity', 79 *Notre Dame L. Rev.* 1257-1258 cited in Vicki Jackson and Tushnet, *Comparative Constitutional Law*, 2nd Edition (1999).

¹⁰ Williams .G, 'The Defence of Necessity,' *Current Legal Problems*, 1953, p. 216 cited in Supra Note 15.

¹¹ Supra Note 1, p. 184.

¹²Ibid.

The dilemma that faces constitutional lawyers is how to constitutionally provide for and control the exercise of emergency powers without constraining the government's ability to adequately respond to unforeseen threats, while avoiding doing permanent damage to the norms and values underpinning constitutional government through the temporary relaxation of the constitutional restraints that govern the exercise of executive power.

1.2 BROAD OBJECTIVE OF THE STUDY

1. To examine whether constitutionalism is possible during a state of emergency.

1.2.1 SPECIFIC OBJECTIVES

1. To examine whether the Constitution of Kenya adequately provides for a State of emergency.
2. To examine whether the Constitution of Kenya provides any safeguards against violations of fundamental rights and freedoms during a State of emergency.
3. To examine whether there is any legal justification for departing from the constitutional allocation of powers and specification of rights during a State of emergency and the effects of any such departure on the legal system.

1.3 JUSTIFICATION

This study was prompted by a realisation that there is a scarcity of written material on the implications of the exercise of emergency powers on legal systems.

The reference material that I came across on the subject of the study, as might be evident from the literature review, dealt mainly with the Constitution of the United States of America, viewed in the light of the historical experiences of the American people. None of the writings dealt specifically with the Constitution of Kenya and our own local experiences.

In my view, what may hold true for the Americans may not necessarily be universally applicable. Our different political and legal systems, history and culture call for a more focussed study.

Our recent encounter as a nation with civil unrest of unprecedented magnitude soon after the 2007 Presidential election and the innovative yet extra legal solution resorted to by the government in addressing the crises served to remind us that we can no longer ignore this issue.

It is time to consider the merits or demerits of the following warning from Machiavelli:

'Now in a well ordered republic it should never be necessary to resort to extra-constitutional measures; for although they may for the time be beneficial, yet the precedent is pernicious, for if the practice is once established of disregarding the law for good objects, they will in a little while be disregarded under the pretext for evil purposes. Thus no republic will ever be perfect if she has not by law provided for everything, having a remedy for every emergency, and fixed rules for applying it'.¹³

This study is intended to provoke intellectual discourse on the subject and to hold up a mirror to our legal system and address any blemishes that may come to light.

1.4 HYPOTHESES

The following are the hypotheses of the study:-

1. Constitutionalism is possible during a State of emergency.
2. States of emergency are rare occurrences and emergency powers should not permanently weaken the legal system.

1.5 RESEARCH QUESTIONS

1. What are the conditions for the invocation of emergency powers under the Constitution of Kenya?
2. What are the conditions for the exercise of emergency powers under the Constitution?
3. How does the Kenyan legal system address emergencies which are not specifically provided for under the Constitution?
4. To what extent does the Constitution permit the limitation of fundamental rights and liberties during a state of emergency?

1.6 CONCEPTUAL FRAMEWORK

'Constitutionalism' in its formal sense means the principle that the exercise of political power shall be bounded by rules which determine the validity of legislative and executive action by

¹³ THE DISCOURSES OF NICCOLO MACHIAVELLI bk.1, discourse 34, at 203 (Luigi Ricci and E. R P. Vincent trans., Modern Library, 1950) (1513) cited in Scheppele, Kim Lane, 'Law in a time of Emergency' (2004).Scholarship at Penn Law. Paper 55.http://lsr.nellco.org/upenn_wps/55.

prescribing the procedure according to which it must be performed or by delimiting its permissible content.¹⁴

Constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty.¹⁵

Constitutionalism is a legal limitation on government; it is the antithesis of arbitrary rule, its opposite is despotic government, the government of will instead of law.¹⁶

A Constitutional government may be defined simply as government by which political authority is exercised with due regard to the limitations defined in the constitution.¹⁷

One of the ways by which constitutional governments seek to limit governmental power is through the use of the doctrine of separation of power. As Montesquieu put it, all would be lost if the same man or the same body of principal men exercised these powers; that of making the laws, that of executing public resolutions, and that of judging the crimes or disputes of individuals.¹⁸

The idea of checks and balances is also employed, which presupposes that a specific function is assigned primarily to an organ of government subject to a power of limited interference by another organ to ensure that each organ keeps within the sphere delimited to it.¹⁹

‘The rule of law’ means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.²⁰ The Secretary-General of the United Nations defined the rule of law as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that

¹⁴See Okon Akiba, ‘Constitutional Government and The Future of Constitutionalism in Africa’, in *Constitutionalism and Society in Africa*, Okon Akiba eds (2004), Ashgate Publishing Limited.

¹⁵ Ibid.

¹⁶Mellwain C.H., 1947, *Constitutionalism: Ancient and Modern*, cited in Supra Note 1 above, p. 4.

¹⁷Supra Note 1, p. 5.

¹⁸Dicey A.V., 1938, *Law of the Constitution*, 9th Edition, p. 202.

¹⁹Supra Note 1, p. 20.

²⁰Supra Note 17.

are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."²¹

To lawyers, the rule of law implies no more than that all the powers of the executive are derived either from statute or the common law and must be exercised in accordance with the law.²² Limitation of governmental power is also achieved in a constitutional government by having an enforceable and sometimes entrenched Bill of Rights. Such a Bill of Rights guarantees civil liberties and freedoms to the individual, so that if the liberties are infringed, the individual may seek redress against the transgression.²³

The word ‘emergency’, in its ordinary meaning seems to presuppose some event, usually of a violent nature, endangering or threatening public order or public safety.²⁴ Emergency powers may be defined as those which give the state the legal competence to deal with extraordinary and immediate threats to political, social and economic stability.²⁵

‘Necessity’ is recognised in private law as a legal defence for an action which would otherwise have been unlawful.²⁶ It is also recognised in public law as a justification for an action otherwise unlawful but necessary to preserve the life of the state.²⁷ However, according to Clinton Rossiter, the law of necessity is little better than a rationalisation of extra-constitutional, illegal emergency action.²⁸

²¹ Report of the Secretary General: The rule of law ad transitional justice in conflict and post conflict societies (2004) cited in United Nations Rule of Law at <http://www.unrol.org/article.aspx?article-id=3> accessed on 6th November 2013 at 6.30 p.m.

²²Clarke H. W., *Cases and statutes on Constitutional and Administrative law*, (London: Sweet & Maxwell, 1973), p. 18.

²³Kathurima. G. I.,1989, ‘Emergency Powers in Kenya: A Study of the Extraordinary Executive Powers vis-à-vis the International Covenant on Civil and Political Rights 1966’, unpublished LL.M thesis, p. 10.

²⁴ Supra Note 1, p. 175.

²⁵ Carroll. A., *Constitutional and Administrative Law*, (London: Pearson, 2011), p. 421.

²⁶ Ibid, p. 180.

²⁷ Ibid, p. 181.

²⁸Rossiter. L.C., *Constitutional Dictatorship: Crisis Government in Modern Democracies* (Princeton, Princeton University Press, 1948), p. 11.

The Doctrine of Civil necessity is grounded on the recognition that a constitution cannot provide for every kind of situation that may endanger public order and safety, and that certain situations may justify the government's departure from express provisions of the constitution in order to save the state or society from ruin.²⁹ Its rationale is reflected in the maxim *salus populi est suprema lex*. (The welfare of the people is the supreme law)³⁰

Courts have recognised a principle of necessity that dictates that, in times of extreme crisis, emergency action may validly be taken that would otherwise be illegal. This principle can only be invoked to uphold the rule of law and the existing legal order and the action taken by the government must be a transient and proportionate response to the crisis.³¹

According to Professor Brookfield, 'The courts, then, are under a duty to uphold the legal order of which they are part. But in doing so they may sometimes recognise as valid emergency action taken by the executive government or its armed forces which would be unlawful in normal circumstances but which is justified in times of extreme crisis by the principle of necessity.

The court's duty to uphold the legal order is qualified by other manifestations of the necessity principle, one of which, as recognised by the courts in some modern cases under written constitutions, has allowed temporary and strictly limited deviations from the Constitution for the express purpose of safeguarding it or for preserving the rule of law.'³²

In *Mitchell v Director of Public Prosecution*³³ the Court of Appeal of Grenada provided guidance on how the doctrine of necessity should be used. According to Haynes P. the doctrine should be capable of application to validate unconstitutional legislation by a constitutional representative government in Parliament if the following conditions exist:

²⁹Ibid, p. 212.

³⁰ Williams .G., 'The Defence of Necessity', *Current Legal Problems*, (1953) 6 (1), p. 216 cited in Supra Note 1, p. 184.

³¹ Williams G, 'The case that stopped a Coup? The Rule of Law in Fiji', 2003 Quentin-Baxter Memorial Trust Lecture delivered at the Law School of Victoria University of Wellington on 23th November 2003 accessed on 16th September 2011 at 2pm at www.victoria.ac.nz/nzcpl/Files/Occ%20pares/OP-Williams.pdf.

³² Brookfield M.F., *Waitangi & Indigenous Rights Revolution, Law and Legitimation* (Auckland University Press, 1999) , p. 20 cited in Hatchard J. and Ogowewo I.T., 2003, *Tackling the Unconstitutional Overthrow of Democracies: Emerging Trends in the Commonwealth*, Commonwealth Secretariat, p. 100.

³³ (1986) LRC (Const) 35, 88-89 cited in Ibid.

- a) An imperative necessity must arise because of the existence of exceptional circumstances not provided for in the Constitution, for immediate action to be taken to protect or preserve some vital function of the state;
- b) There must be no other course of action reasonable available;
- c) Any such action must be reasonably necessary in the interest of peace, order and good government, but it must not do more than is necessary or legislate beyond that;
- d) It must not impair the just rights of citizens under the Constitution;
- e) It must not be one the sole effect and intention of which is to consolidate or strengthen the revolution as such.³⁴

According to Haynes, such validation is temporary, being effective only during the existence of the necessity. The right Constitutional steps must be taken forthwith, if and when the necessity ends.³⁵

Perhaps most importantly, the Court of Appeal of Grenada held in the aforesaid case that the doctrine of necessity does not authorise permanent changes to a written constitution, let alone its complete abrogation.³⁶

1.7 LITERATURE REVIEW

The literature review will examine three approaches to the provision and regulation of emergency power. Some scholars argue for the provision and regulation of emergency powers by the law. Other scholars hold the view that that the nature of a state of emergency cannot be predicted in advance hence the state should be allowed to respond to emergencies extra legally. A Third group of Scholars assert that the law of necessity is applicable in a state of emergency as it is provided for under the law.

1.7.1 The Legal Approach

Bruce Ackerman argues that new constitutional concepts are needed to deal with the protection of liberties during emergencies as emergency powers have a tendency of continuing well beyond

³⁴Hatchard J. and Ogowewo I.T., 2003, *Tackling the Unconstitutional Overthrow of Democracies: Emerging Trends in the Commonwealth*, Commonwealth Secretariat, p. 34.

³⁵ Ibid.

³⁶ Ibid, p. 103.

their time of necessity.³⁷ Ackerman proposes that the United States of America should have an emergency constitution which would apply in times of emergency and allow for effective short term responses without allowing states of emergency to become permanent features. His proposed emergency constitution would authorise the government to detain suspects without the criminal law's usual protections of probable cause or even reasonable suspicion.³⁸

Ackerman argues that, restricting emergency powers may deprive the government of the very tools that it may need to counter the threat to its survival, given that a constitution's framers cannot predict every potential threat that may endanger the regime before it happens.³⁹ In his opinion, creating an elaborate structure authorising extraordinary powers brings with it the danger that government officials will exploit the system to create frequent emergencies and employ a wide range of repressive measures despite the adequacy of more standard frameworks involving the criminal law.⁴⁰

Ackerman further argues that the Executive should be permitted to act unilaterally in times of emergency for a brief period, until the legislature convenes to address the emergency. The state of emergency would then automatically expire if the same is not approved by a majority in the legislature. Further extensions of the emergency period would require the support of increasing majorities.⁴¹ After the end of an emergency, his proposed emergency constitution would require a legislative inquest on the administration of the entire emergency which would be chaired by a member of the opposition with an opposition majority. A public report with formal recommendations would be due within a year.⁴² The constitutional framework that he proposes would permit judges to intervene to restrain predictable abuses and allow them to award compensation for human rights abuses.

According to Lawrence Tribe and Patrick Gudridge, Ackerman's proposed emergency constitution is nothing more than an interesting thought experiment. They argue that the proposed emergency constitution is unconstitutional within the terms of ordinary constitutional law,⁴³ and

³⁷Ackerman .B., 2004, 'The Emergency Constitution', No.5 Vol.113 *Yale L.J.*, p. 1030.

³⁸Ibid, p. 1037.

³⁹ Ibid, p. 1038.

⁴⁰ Ibid, p. 1045.

⁴¹ Ibid.

⁴²Ibid, p. 1051.

⁴³Tribe. H. L and Gudridge. P .O., 2004, 'The Anti-Emergency Constitution', No.8,113 *Yale L.J.*, p. 1805.

cite as an example, Ackerman's proposal which emphasises preventive detention of individuals who could not lawfully be held in custody under normal constitutional standards

In the opinion of Tribe and Gudridge, the kind of legal measures that Ackerman contemplates putting in place through a mere Act of Congress to cope with terrorist triggered emergencies would not be likely to survive constitutional challenges even with the flexibility that many parts of the Bill of Rights, such as the Fourth Amendment⁴⁴ already incorporate, or would only survive such challenges at the cost of terrible distortions in Constitutional law.⁴⁵ They point out the ambiguity in Ackerman's proposed emergency constitution noting that the content of the powers granted to executive officials therein by a declaration of emergency seems to have been left to improvisation by unspecified institutions at unspecified times.⁴⁶

Tribe and Gudridge question whether the remedies provided in Ackerman's proposed emergency constitution, such as judicial hearings, compensation schemes and suits for damages, are sufficient from a remedial perspective to meet the demands of ordinary constitutional law.⁴⁷ In their view, the ambiguity in Ackerman's proposal creates uncertainty as to whether or not the injunctive or declaratory reliefs ordinarily available in constitutional law would still be available in his proposed emergency regime even in the absence of the writ of Habeas corpus.⁴⁸

Tribe and Gudridge advance the view that if one was to assume that the injunctive or declaratory reliefs available under constitutional law would still be available in Ackerman's proposed emergency constitution, then it is unclear how the ordinary purposes of the suspension of habeas corpus would be achieved as the government would still be forced to pause mid-battle to justify its actions to the courts. On the other hand, the non-retention of such injunctive or declaratory constitutional reliefs in Ackerman's proposed emergency regime raises a question in their minds as to how substantive constitutional rights would in the circumstances be maintained and protected.

⁴⁴ The Fourth Amendment to the U.S Constitution provides that, 'The right of the people to be secure in their persons, houses, papers, and their effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.'

⁴⁵ Ibid, p. 1840.

⁴⁶ Ibid, p. 1803.

⁴⁷ Ibid, p. 1807.

⁴⁸ Ibid.

Tribe and Gudridge further question the origin of the rights whose enforcement by the Courts is contemplated in Ackerman emergency regime noting that in his proposal, he dismissed the Constitution's substantive guarantees of individual rights as 'legalisms'⁴⁹ They criticise the goals of Ackerman's proposed emergency constitution, noting that enhanced public reassurance after a terrorist attack is indefensible as the only or primary goal of an emergency regime.⁵⁰ In their opinion, any responsible Government should primarily be concerned with actually preventing and responding effectively to acts of terrorism and with protecting the basic freedoms on which the country's identity is founded. Convincing the public that the government is providing the needed protection ought to be a secondary concern.

Tribe and Gudridge question Ackerman's assumption that his emergency regime would increase public reassurance, noting that his assumption is not grounded on any particular evidence.⁵¹ They also question the utility of the dramatic measures proposed by Ackerman in so far as their effectiveness in actually preventing the recurrence of a terrorist attack is concerned, noting that the most effective responses are likely to involve unpublicised improvements made by the Government in the gathering and processing of intelligence.⁵²

According to Tribe and Gudridge, the fact that the actions carried out by the executive under the Ackerman's emergency regime would be subject to review only under the terms and procedures of the emergency constitution rather than under the Constitution is problematic in view of the fact that the Constitution already contains provisions dealing with war and war like emergencies.⁵³

It should be noted that Ackerman does not provide any legal justification for preventive detention without any basis for suspicion. The law cannot authorise the blatant violation of fundamental rights through mass detentions carried out by the state without any basis whatsoever. Ackerman does not explain how the baseless detention of innocents would aid the fight against terrorism. He does not offer any explanation as to how his proposed emergency constitution which he proposes to introduce through a statute would override the constitutional

⁴⁹ Ibid, p. 1820-21.

⁵⁰ Ibid, p. 1812.

⁵¹ Ibid, p. 1814.

⁵² Ibid, p. 1813.

⁵³ Ibid, p. 1840-41.

protection of fundamental rights. Ackerman also fails to specify the scope of the powers which would be available to the executive under his proposed emergency constitution and the rights which would be available to citizens during the pendency of the state of emergency.

According to Clinton Rossiter, the principle of constitutional dictatorship finds its rationale in the following three fundamental facts; the complex system of government of the democratic constitutional state is essentially designed to function under normal, peaceful conditions, and is often unequal to the exigencies of a great national crisis. In time of crisis, a democratic, constitutional government must be temporarily altered to whatever degree is necessary to overcome the peril and restore normal conditions. This usually involves an expansion of governmental power resulting in the creation of a stronger government and the imposition of limitations on the people's rights. This strong government can have no other purpose than the preservation of the independence of the state, the maintenance of the existing constitutional order and the defence of the political and social liberties of the people.⁵⁴

1.7.2 The extra-legal Approach

Oren Gross argues that there may be circumstances where the appropriate method of tackling extremely grave national dangers and threats entails going outside the legal order and at times even violating accepted constitutional principles. He therefore proposes an emergency regime that would allow public officials to act extra-legally as long as they openly acknowledge their actions so as to enable the public to decide whether or not to ratify their actions. According to Gross, ex post public ratification of the extra-legal measures taken by the Executive may be done directly by the people through the re-election of leaders who have acted extra-legally and openly acknowledged their actions or it may be done indirectly by the legislature.⁵⁵

It should be noted that Gross does not specify the nature and scope of the emergency powers that would be exercisable by the Executive under his extra-legal model of emergency powers. He does not specify how the excesses of the Executive would be checked during the pendency of a state of emergency. He does not specify the rights which would be available to the citizens

⁵⁴Clinton Rossiter, *Constitutional Dictatorship; Crisis Government in Modern Democracies* (Princeton, Princeton University Press, 1948), p. 5 accessed at <http://archive.org/details/constitutionaldi031287mbp> on 20th July 2012 at 5.30 p.m.

⁵⁵Gross. O., 2003, Chaos and Rules: 'Should Responses to Violent Crises Always Be Constitutional?', 112 *Yale L.J.*

during the pendency of a state of emergency and how those rights would be protected or enforced. He does not offer any convincing reasons as to why he excludes a judicial determination of the validity of the actions of the executive during a state of emergency. Why should the legality of the executive's extra legal actions be determined through public ratification and not by the judiciary which is constitutionally empowered to interpret the law? He seems to be proposing that political solutions be employed to address states of emergency rather than legal solutions.

1.7.3 The law of necessity implied in the law

Michael Stokes Paulsen contends that the Constitution of the United States of America embraces an overriding principle of constitutional and national self-preservation that operates as a meta-rule of construction for the document's specific provisions and that may even, in times of extraordinary necessity, trump specific constitutional requirements.⁵⁶

According to Paulsen, the Constitution is not a suicide pact and its provisions should not be construed to make it one where an alternative construction is possible.⁵⁷ In his opinion, where such an alternative saving construction is not possible, the necessity of preserving the Constitution and the constitutional order as a whole requires that priority be given to the preservation of the nation whose constitution it is, for the sake of preserving constitutional government over the long haul, even at the expense of specific constitutional provisions.⁵⁸

Paulsen considers it inconceivable that the Constitution does not recognise the law of necessity. In his opinion, the absence of a law of necessity would result in a near absurdity, where parts of the Constitution are construed, and given effect, at the expense of the preservation of the Constitution as a whole, with the logical consequence that adherence to the Constitution might require the destruction of the Constitution.⁵⁹ Paulsen's thesis in a nutshell is that a constitutional law of necessity exists and if it does not exist, then the Constitution is a suicide pact.⁶⁰

⁵⁶ Paulsen M.S., 2004, 'The Constitution of Necessity', 79 *Notre Dame L. Rev.* 1257.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, p. 1258.

⁵⁹ *Ibid.*, p. 1258, 1259.

⁶⁰ *Ibid.*, p. 1259.

Paulsen advances the argument that some of the Constitution's provisions apply differently in times of war and crisis than they do in times of peace and stability. For instance, where the Constitution sets a standard, and where that standard's application is arguably circumstance dependent, how the standard is applied must take into account the law of necessity.⁶¹ For instance, determining what would amount to 'reasonable' search and seizure within the meaning of the Fourth Amendment of the Constitution of the United States of America; or what would amount to due process before the detention or incarceration of individuals; or what punishments are 'cruel and unusual' would depend on the circumstances.⁶²

In Paulsen's opinion, the Constitution of the United States of America bestows upon the President the primary duty of determining the existence of the 'indispensable necessity' that is sufficiently compelling to justify the application of the Constitutional law of necessity.⁶³ He hastens to add that this does not mean that the exercise of the President's Constitutional power to invoke and apply the law of necessity is not subject to any control. According to him, such Presidential powers are subject to the usual constitutional checks on executive power by Congress and the Judiciary.⁶⁴

Saikrishna Prakash questions whether the Constitution of the United States of America, as contended by Professor Paulsen, contains a meta rule of construction which requires that the Constitution should be construed where possible, to avoid constitutionally self destructive results.⁶⁵ He doubts whether the Constitution empowers the President to sacrifice constitutional provisions in order to preserve and defend the Constitution and the nation as a whole.⁶⁶

According to Prakash, it is not inconceivable that a Constitution may not contain a rule of necessity. He argues that it is possible that the framers of a Constitution might value the sanctity of the Constitution's substantive provisions, such as religious freedom or an anti-slavery prohibition, more than the durability of the Constitution or the nation and would not therefore

⁶¹ Ibid, p. 1279, 1280.

⁶² Ibid.

⁶³ Ibid, p.1291.

⁶⁴ Ibid, p. 1292.

⁶⁵ Prakash S, 'The Constitution as Suicide Pact', 79 *Notre Dame L.Rev.*1299 (2004).

⁶⁶ Ibid, p. 1300.

frame a constitution that permits the expedient sacrifice of such cherished principles, even temporarily.⁶⁷

Prakash further argues that the framers of the Constitution might believe that Government officials will violate the Constitution anyway on grounds of necessity and might wish to avoid multiplying such infrequent violations by not having them expressly sanctioned by the Constitution itself.⁶⁸

According to Prakash, another troubling aspect of Paulsen's meta-rule of construction is that while conventional rules of construction generate a single meaning, the meta-rule of construction contemplates that a single provision might mean many different things.⁶⁹ Conventionally, the meaning of text does not change in different contexts unless the text itself provides some reason for believing that its meaning might change. However, under the meta-rule of construction, ambiguous constitutional provisions have a contingent meaning that changes with the circumstances.⁷⁰

Prakash argues that the meta-rule of construction lacks a basis in the Constitution itself and seems to be an extraneous device applied in order to achieve a desirable outcome. He questions why the meta-rule of construction should be applied in order to achieve a desired end, when other rules of construction could also be applied to obtain the same results.⁷¹

Prakash argues that, construing the Constitution in such a manner that the meaning of its provisions is contingent on the circumstances would transform its absolute prohibitions into conditional fetters.⁷²

According to Prakash, neither the Oath Clause nor the Executive power Clause in the Constitution of the United States of America provides a Constitutional basis for the law of necessity.⁷³ He opines that, the existence of clause specific, mini rules of necessity in the

⁶⁷ Ibid, p. 1300, 1303.

⁶⁸ Supra Note 47.

⁶⁹ Ibid.

⁷⁰ Ibid, p. 1310, 1311.

⁷¹ Supra Note 47.

⁷² Ibid, p. 1301.

⁷³ Ibid.

Constitution of the United States of America, such as the one set out in the Third Amendment, suggests that the Constitution probably lacks a Constitution wide rule of necessity.⁷⁴

According to Prakash, Paulsen's meta-rule of Construction seems to be based on nothing more than the proposition that the Constitution would be a better constitution if we assumed that it contained a rule of necessity.⁷⁵

In my view, Paulsen fails to support his arguments that the Constitution of the United States of America contains a rule of necessity by pointing to a specific constitutional provision that provides for the application of the rule of necessity in the United States of America. He cannot point at any specific constitutional provision that empowers the President to sacrifice constitutional provisions in order to preserve and defend the Constitution and the nation as a whole. He seems to be reading into the Constitution of the United States of America what he wishes was provided for therein and not what is actually provided in it.

The material that has been examined in this literature review focused on the Constitution of the United States of America. None of the writings dealt specifically with the Constitution of Kenya and Kenya's experiences as a state. This study will examine the legal framework governing a state of emergency in Kenya with particular emphasis on the protection of human rights and the rule of law. The study will also examine whether there is any legal basis and justification for the application of the doctrine of civil necessity under the constitutional order prevailing in Kenya.

1.8 METHODOLOGY

The study will be limited to desk top research due to limited finances and time constraints. The writer will review books and articles touching on the subject matter of the study and will engage in a comparative analysis of the emergency provisions contained in various constitutions and statutes. Relevant material will be obtained from the University of Nairobi's libraries, the High Court library and the Kenya National Library. Internet research will also be undertaken.

⁷⁴ Ibid.

⁷⁵ Ibid, p. 1312.

1.9 CHAPTER OVERVIEW

This chapter contains a general overview of the study. This is intended to enable the reader to quickly appreciate the subject of the study.

It will contain an introduction to the study, the statement of the problem, the objectives of the study, hypothesis, the justification for the study, research questions, the conceptual framework, literature review, methodology and chapter overview.

The second chapter will contain a discussion of the evolution of modern approaches to emergency powers.

The third chapter will examine how the laws of Kenya provide for states of emergency with relevant comparisons being made with the legal approaches of other jurisdictions.

The fourth Chapter will examine the legal basis for the application of the Doctrine of civil necessity with particular reference to the Constitutional order prevailing in Kenya.

The fifth chapter will contain the study's findings, conclusions and recommendations. It will also demonstrate whether the hypotheses of the study have been proved or disproved.

CHAPTER TWO

EVOLUTION OF MODERN APPROACHES TO EMERGENCY POWERS

2.0 Historical Background

The first historical reference to the state of emergency can be traced to the Roman Republic. Around 500 BC, the Roman Republic was governed by two consuls, who had to operate as a body and occupied the position for a non-renewable term of one year. However, this executive structure could be disrupted in times of emergency when the Senate could determine that it was necessary to appoint a dictator. The Dictator would be appointed by one of the consuls upon declaration of an emergency by the Senate.⁷⁶

According to Norberto Bobbio, 'he was appointed by one of the consuls in exceptional circumstances, as might be the conduct of war (*'dictator reigerundaepublicce cause'*) or the suppression of a revolt (*'dictator seditionissendae cause'*) and they were attributed to him by the exceptional situation, extraordinary powers, consisting mainly in the disappearance of the distinction between imperium domi, that was sovereign control exercised within the city, as not subject to constitutional limits. The exorbitant power of the dictator was counterbalanced by its temporality: the dictator was nominated only for the duration of the extraordinary task that he was entrusted, and in any way not more than six months or the term of office of the consul who had nominated him. Thus, the dictator was a special magistrate, yes, but legitimate, because his institution was provided by the constitution and his power was justified by the state of necessity'.⁷⁷

In the French Republic, the emergency framework 'the state of siege' received legal recognition during the Revolution with the French Constituent Assembly's decree of 8th July 1791 which distinguished between a 'state of peace' in which the military authority and civil authority acted in their own sphere and a 'state of siege' in which all the functions entrusted to the civilian

⁷⁶ William Vasquez Irizarry, Exception and Necessity: The possibility of a General theory of Emergency, p. 9, accessed at <http://www.law.yale.edu/documents/pdf/sela/vasquez/rizarry-Eng-CV.pdf> on 20th July 2012 at 3p.m.

⁷⁷ NOBERTO BOBBIO, ESTADO, GOBIERNO Y SOCIEDAD, POR UNA TEORIA GENERAL DE LA POLITICA 206 (Trad. Jose F. Fernandez Santillan 1989) (1985) cited in Ibid.

authority for maintaining order and internal policing would pass to the military commander, who would exercise them under his exclusive responsibility.⁷⁸

The application of the state of exception was thereafter gradually enlarged from dealing with the wartime situation for which it was originally conceived to also dealing with political crises.

The law of 10th July 1791 established the conditions and forms of action of a state of siege in regard to fortresses and military posts. It provided that in the event of an attack by enemy troops ‘all the authority with which the civil officers are clothed by the constitution for the maintenance of order.....will pass to the military commanders.’⁷⁹ A law passed on 27th August 1797 provided that rebellion as well foreign invasion could justify the establishment of a state of siege.⁸⁰

Napoleon’s decree of 24th December 1811 provided that the emperor could declare a state of siege, whether or not a city was actually under attack or directly by enemy forces, such as ‘whenever circumstances required giving more forces and more power to the military police, without it being necessary to put the place in a state of siege’.⁸¹

The state of siege was eventually constitutionalised through the provisions of Article 106 of the Constitution of 4th November 1848 which provided for the enactment of a law that would fix the occasions in which the state of siege could be declared and which would regulate its forms and effects.⁸²

The law of 9th August 1849 (which was later partially restricted by the law of 3rd April 1878) established that a political state of siege could be declared by Parliament or additionally by the head of state in the case of imminent danger to external or internal security. The law of 1849 was later modified by Article 1 of the law of 3rd April 1878 to establish that a state of siege could be declared only with a law (or if the Chamber of deputies was not in session, by the head of state, who was then obligated to convene Parliament within two days) in the event of imminent danger resulting from foreign war or armed insurrection.

⁷⁸Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in Modern Democracies* (Princeton, Princeton University Press, 1948), p.80 accessed at <http://archive.org/details/constitutional031287mbp> on 20th July 2012 at 5.30p.m.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Giorgio Agamben, *State of exception* (Chicago, University of Chicago Press, 2005), p. 4.

⁸² Ibid.

On 2nd August 1914, President Poincare of the French Republic issued a decree placing the entire country in a state of siege. That state of siege which was the most complete in the history of France was necessitated by the need to maintain public order while general mobilization was in progress.⁸³

After the First World War, emergency powers were gradually applied to economic matters. For instance, in January 1924, the French Government asked for full powers over financial matters to enable it to deal with a serious crisis that threatened the stability of the franc. A law was consequently passed on 22nd March 1924 which granted the Government such powers, with a four month limit on the Government's special powers.⁸⁴

In Germany, the history of the modern day state of exception is tied to Article 48 of the Weimar Constitution which provided that, 'if security and public order are seriously disturbed or threatened in the German Reich, the president of the Reich may take the measures necessary to reestablish security and public order, with the help of the armed forces if required. To this end he may wholly or partially suspend the fundamental rights established in Articles 114,115,117,118,123,124 and 153.'⁸⁵

Although the said Article 48 provided for the enactment of a law that would specify in detail the conditions and limitations under which the President's emergency powers would be exercised, no such law was ever passed by the German Parliament. As a result, the specific types of crises that could trigger Article 48 were never specified resulting in the abuse of emergency powers by the governments of the Weimar republic which made continuous use of Article 48 by proclaiming a state of exception and issuing emergency decrees on more than two hundred and fifty occasions. Article 48 was invoked to deal with a wide range of issues from civil violence and economic crises to merely sharp political disagreements.⁸⁶

Article 48 of the Constitution of the Weimar Republic was preceded by Article 68 of the Bismarckian Constitution which had empowered the Emperor to declare a part of the Reich to be

⁸³ Supra Note 77, p. 9.

⁸⁴Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in Modern Democracies* (Princeton, Princeton University Press, 1948), p. 121 assessed at <http://archive.org/details/constitutional031287mbp> on 20th July 2012 at 5.30p.m.

⁸⁵ Supra Note 76, p. 3.

⁸⁶Scheppele, Kim Lane., 'Law in a time of Emergency' (2004).Scholarship at Penn Law.Paper 55. http://lsr.nellco.org/upenn_wps/55, pages 13-14 accessed on 20th July 2012 at 3.p.m.

in a state of war, in cases where ‘public security was threatened in the territory of the Reich’. The conditions and limitations of the state of war declared under Article 68 of the Bismarckian Constitution followed those set out in the Prussian law of 4th June 1851 concerning the state of siege.⁸⁷

Although the current Constitution of the Federal Republic of Germany did not originally provide for a state of exception, a law was passed on 24th June 1968 which amended the constitution to reintroduce the state of exception, which was defined therein as the ‘state of internal necessity’. In order to curb any possible abuses of this emergency provision, the amendment specified that the Constitutional Court had to remain open and able to hear challenges throughout any state of emergency and that the executive could not make a declaration of emergency alone.⁸⁸

In Italy, a state of siege was declared after the occurrence of an earthquake in Messina and Reggio Calabria on 28th December 1908 to suppress the robberies and looting provoked by the disaster.⁸⁹

In England, the Defence of the Realm Act of 4th August 1914 granted the government vast powers to regulate the wartime economy and placed serious limitations on the fundamental rights of the citizens, in particular by granting military tribunals jurisdiction over civilians.⁹⁰ Also in England, the Emergency Powers Act was approved on 29th October 1920 at a time of strikes and social tensions.⁹¹

In Germany, on several occasions particularly in October 1921, the government invoked Article 48 of the Weimar Constitution to cope with the fall of the Deutsche Mark.

In 1933, President Franklin D. Roosevelt of the United States of America assumed extraordinary powers to cope with the Great Depression after Congress delegated to him through a series of statutes culminating in the National Recovery Act of 26th June 1933, an unlimited power to regulate and control every aspect of the economic life of the country.⁹²

⁸⁷ Supra Note 76, p. 36.

⁸⁸ Supra Note 81, p. 12-13.

⁸⁹ Supra Note 80, p. 17.

⁹⁰ Ibid, p. 19.

⁹¹ Ibid.

⁹² Ibid, p. 22.

2.1 Legal Theories of the State of Exception

The following are the main legal theories of the state of exception.

2.1.1 The Juridical Approach

Some jurists consider the state of exception to be an integral part of positive law because according to them the necessity that grounds it is an autonomous source of law. Proponents of this school of thought include Santi Romano, Hauriou and Mortati.⁹³

This school of thought appears to find support from legal maxims such as *'Quia enim necessitas non habet legem set ipsa sibifacit legume'* which means that 'necessity knows no law but makes law' and *'necessitas legem non habet'* which means that 'necessity has no law'. The later maxim can also be interpreted to mean either that 'necessity does not recognize any law' or 'necessity creates its own law'.

According to Gratian, if something is done out of necessity, it is done licitly, since what is not licit in law necessity makes licit. In his view, necessity goes beyond rendering the illicit licit and acts to justify a single specific legal infraction by means of an exception.

On his part, Santi Romano considers necessity to be the first and original source of law. According to him, necessity must be conceived of as a state of affairs that cannot be regulated by previously established norms and being unregulated by existing law creates law. He argues that, the origin and legitimacy of the state and its constitutional order must be traced back to necessity where the state is established through a de facto process, for example, by way of revolution. He further argues that what occurs in the initial moment of a particular regime can repeat itself, although in an exceptional way, even after the regime has formed and regulated its fundamental institutions.⁹⁴

Writers such as Jellinek and Duguit see necessity as the foundation of the validity of decrees having force of law issued by the executive in the state of exception.⁹⁵

⁹³ Gerard Emmanuel Kamdem Kanga, State of Emergency, state of exception: A critical investigation, LL.M Thesis, University of Pretoria, p.10.

⁹⁴ Supra Note 76, p.27.

⁹⁵ Ibid, p.26.

Mathiot considers the state of necessity to be a lacuna in public law which the executive is obligated to remedy just as a judge is obligated to pronounce judgment even in the presence of a lacuna in the law. In this case, the lacuna does not concern a deficiency in the text of the applicable legislation; it concerns rather a suspension of the order that is in force in order to guarantee its existence.⁹⁶

The juridical approach is today codified in international law through the notion of derogation where states faced with a public emergency threatening the life of the nation are permitted under international human rights treaties and many constitutions to suspend the protection of certain basic rights. This allows such states to act within the law while in actual fact infringing on certain fundamental rights.

2.1.2 The Extra legal Approach

The proponents of this school of thought such as Biscaretti, Ballardore-Pallieri and Carre de Malberg among others consider the state of exception and the necessity that grounds it to be essentially extrajudicial, de facto elements, even though they may have consequences in the sphere of law.⁹⁷

This school of thought invokes the views of John Locke who insisted that the good of the society requires that the executive retains the ‘power of doing public good without a Rule’.⁹⁸

According to Julius Hatscheck, 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.⁹⁹

Oren Gross argues that it is neither possible nor desirable to control executive action in times of emergency using standard judicial accountability mechanisms. According to him, legal restraints on executive power will not restrain the Government as a matter of necessity from acting

⁹⁶ Ibid, p.31.

⁹⁷ Supra Note 88, p.16.

⁹⁸ John Locke, *Two Treatises on Government* edited by P. Laslett (Cambridge; Cambridge University Press, 1988) p. 375 cited in David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge; Cambridge University Press, 2006) , p. 38.

⁹⁹ Giorgio Agamben, *State of exception* (Chicago, University of Chicago Press, 2005), p. 23 cited in supra Note 77.

contrary to the law in an emergency. In his view, changes to the legal system occasioned by the government's extra-legal actions in times of emergency have the tendency to become permanent features beyond the termination of the crisis.¹⁰⁰

Carl Schmitt argued that, the state suspends the law in an exception on the basis of its right of self-preservation. In a state of exception, the state remains whereas the law recedes. The exception is therefore characterized by unlimited authority as the norm is destroyed.¹⁰¹

Carl Schmitt further opined that, no norm exists which is applicable to chaos. For a legal order to make sense, a normal situation must exist.¹⁰² In a state of exception, the norm is suspended or even annulled to make possible the restoration of a situation which permits once again the application of the norm.¹⁰³ In his view, the state of exception is not a juridically produced void. Rather, it is a space beyond law, a space which is revealed when law recedes leaving the legally unconstrained state, represented by the sovereign to act.¹⁰⁴

According to Schmitt, the exception is more important than the rule since it not only confirms the rule but also its existence, which is derived from the exception.¹⁰⁵ It is the exception which gives meaning to the rule, since one cannot understand a rule except by noting the edges of its applicability. The rule only gains meaning from publicizing what is not covered in its ambit. The extent and core meaning of the rule is therefore defined by the exception.¹⁰⁶

¹⁰⁰Gross O., 2003, Chaos and Rules: 'Should Responses to Violent Crises Always Be Constitutional?' 112 *Yale L.J.*, p. 1096-1097.

¹⁰¹ Carl Schmitt, *Political Theology: Four Chapters on the concept of sovereignty*, translated by George Schwab, p. 12.

¹⁰² Ibid, p. 13.

¹⁰³ Giorgio Agamben, *State of exception* (Chicago, University of Chicago Press, 2005), p. 36.

¹⁰⁴ David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*, (Cambridge; Cambridge University Press, 2006), p. 39.

¹⁰⁵ Supra Note 74, p.15.

¹⁰⁶ Supra Note 78, p. 10.

In his view, the functioning of the juridical order ultimately rests on the state of exception whose purpose is to make the norm applicable by temporarily suspending its efficacy.¹⁰⁷ In other words, the state of exception is the means for restoring the order necessary for legality to exist¹⁰⁸

He dismissed constitutional attempts to regulate the exception noting that it is impossible to anticipate the form of an exception and hence impossible to prescribe the President's precise course of action. He also wondered where the law would obtain the force to suspend itself and questioned whether it is logically possible that a norm is valid except for one concrete case that it cannot factually determine in any definitive manner.¹⁰⁹

With his famous quote, 'Sovereign is he who decides on the exception', Schmitt attributed to the sovereign the power to decide whether there is an extreme emergency; the power to decide on the measures to be taken to restore normality including the power to decide whether the constitution needs to be suspended in its entirety and the ability to decide whether or not order and stability have been restored.¹¹⁰ By equating the sovereign with the capacity to define when a situation can be handled within normal rules and when it must be treated as an exception to normal governance, Schmitt takes as a defining feature of a political sovereign the ability to operate outside juridical normality.¹¹¹

2.1.3 Agamben's theory of the state of exception

Agamben rejects the arguments of those jurists who seek to include the state of exception within the sphere of the juridical order and questions how the suspension of the juridical order which is a characteristic of the state of exception can be still be contained within the juridical order.

In Agamben's view, the state of exception is a space devoid of law, a zone of anomie in which all legal determinations are deactivated¹¹² He questions how an anomie can be inscribed within the juridical order? He argues that bringing emergencies into the law contaminates the law itself by making it accommodate practices that will of necessity spoil the law.

¹⁰⁷ Supra Note 76, p. 58.

¹⁰⁸ Supra Note 85, p. 10.

¹⁰⁹ Ibid, p. 14.

¹¹⁰ Ibid, p. xvii and 7.

¹¹¹ Supra Note 85, p. 8.

¹¹² Supra Note 76, p. 50.

According to Agamben, 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 with each other. The suspension of the norm does not mean its abolition, and the zone of anomie that it establishes is not unrelated to the juridical order.¹¹³

Agamben argues 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.¹¹⁴ He compares the state of exception not to the Roman Dictatorship as other jurists have done but to the Roman institution of *iustitium*. The term *iustitium* means ‘standstill’ or ‘suspension of the law’.¹¹⁵

According to Agamben, the Roman Senate would upon learning of a situation that endangered the safety of the Republic, issue a decree ‘*senatusconsultum ultimum*’ (final decree of the Senate) calling upon the Consuls and in some cases, the praetor and the tribunes of the people and even in extreme cases, all citizens, to take whatever measures they considered necessary to save the state.¹¹⁶

This senate consultum would be grounded upon a decree declaring a state of *tumultus* (meaning an emergency situation resulting from a foreign war, insurrection, or civil war) which was usually followed by the proclamation of *iustitium* which means ‘the suspension of the law’.¹¹⁷ During the *iustitium*, no new magistracy was created. The unlimited power enjoyed de facto by the existent magistrates resulted not from being invested with dictatorial powers, but from the suspension of the law that restricted their actions.¹¹⁸

Conclusion

¹¹³ Ibid, p. 23.

¹¹⁴ Ibid, p. 25.

¹¹⁵ Ibid, p. 41.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid, p. 47.

This chapter has examined the various legal theories on the state of exception. It has established that necessity is not a source of law. Necessity is merely a justification for acting contrary to the law under certain circumstances. The chapter has also established that a State of exception is characterized by a total suspension of law where the legally unrestrained government enjoys absolute power.

CHAPTER THREE

THE KENYAN LEGAL FRAMEWORK GOVERNING A STATE OF EMERGENCY

3.0 Introduction

A study of the legal systems of various countries reveals major differences as to how they provide for emergency powers in their legal systems. Those differences can arguably be attributed to each country's own unique history as well as to policy differences between those who argue that emergency powers necessarily fall outside the constitutional order and cannot therefore be regulated by law and those who maintain that emergency powers can and should be integrated into the state's legal order.

In terms of content, some countries have detailed constitutional rules to be applied in emergency situations while the constitutions of other countries contain very limited provisions on emergency powers. Some scholars contend that those states which have had an unhappy experience of emergency rule or authoritarian government in their recent history generally tend to have more detailed constitutional rules to be applied in emergencies.¹¹⁹

In some countries, emergency powers are constitutionally provided for and regulated; other countries prefer to regulate their emergency powers by way of legislation;¹²⁰ while other countries do not provide for states of exceptions per se in their legal systems and rely extensively on the extra constitutional doctrine of necessity.¹²¹

In Kenya, emergency powers are constitutionally provided for and the extent of regulation and content of the relevant constitutional provisions are discussed herein below with necessary comparisons being made to those of other jurisdictions.

¹¹⁹Khakee A., 'Securing *Democracy? A comparative analysis of Emergency powers in Europe*', Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva, Switzerland, p. 8 accessed on 17th August 2012 at [http://www.isn.ethz.ch/Digital-Library/Publications/Detail//ots 591=0c54e3b3-1e9c-bele-2c24-a6a8c7060233&Ing=en&id=99550](http://www.isn.ethz.ch/Digital-Library/Publications/Detail//ots%20591=0c54e3b3-1e9c-bele-2c24-a6a8c7060233&Ing=en&id=99550).

¹²⁰ See Section 37 of the Constitution of South Africa which provides that a state of emergency may be declared in the manner provided for by an Act of Parliament. Also refer to the Republic of South Africa State of Emergency Act enacted in 1997.

¹²¹ Examples include Switzerland and Norway.

3.1 Declaration of a state of emergency

Under the Constitution of Kenya, the President of Kenya has the primary duty of determining the existence of the conditions necessary for the invocation of emergency powers.¹²² The President is not under any duty to consult any other person or institution prior to declaring the existence of a State of emergency. However, the validity of such a declaration of a State of emergency can be questioned before the Supreme Court under the provisions of Article 58 (5) of the Constitution of Kenya, 2010.

A similar situation prevailed under the previous constitution. The language used under Section 3 (1) of the Preservation of Public Security Act is illustrative of this fact and is worth reproducing in full. Section 3 (1) of the Preservation of Public Security Act provides that, if at any time it appears to the President that it is necessary for the preservation of public security to do so, he may by notice published in the Gazette declare that this part shall come into operation in Kenya or in any part thereof.

A distinction may be drawn here between the Kenyan situation and that prevailing in other countries which have avoided leaving the initial decision solely in the hands of an individual. For instance in the Federal Republic of Ethiopia, the constitution confers the power to declare a state of emergency on the Council of Ministers of the Federal Government.¹²³

In France, the President may only take the measures contemplated under Article 16 of the Constitution of October 4th 1958, also known as the Constitution of the Fifth Republic, after official consultation with the Prime Minister, the Presidents of the two Houses of Parliament and the Constitutional Council. A Presidential message to the nation is also required.

The Hungarian Constitution empowers their Parliament to declare a state of war, a state of emergency or a state of national crisis¹²⁴, and in the event that parliament is not in session or

¹²² The President may subject to the provisions of Article 58 declare a State of Emergency under Article 132 (4) (d) of the Constitution of Kenya.

¹²³ Article 1(a) of the Constitution of the Federal Republic of Ethiopia.

¹²⁴ Article 19 (g), (h) and (i) of the Constitution of the Republic of Hungary.

is unable to convene due to the conditions giving rise to the emergency conditions, the Speaker of Parliament, the chairperson of the constitutional court and the prime minister jointly decide whether the president should be entitled to introduce a state of emergency, a state of national crisis or a state of war in the Parliament's place.¹²⁵

Under the Constitution of the Slovak republic, the President declares a state of emergency or a state of war on the proposal of the Government, which should take its decision collectively.¹²⁶

In Portugal, a declaration of state of emergency requires the prior consultation of the Government and authorization by the Assembly of the Republic and where the Assembly is not sitting and it is not possible to arrange for it to sit immediately, by its standing committee.¹²⁷

In the Czech Republic, Parliament can on its own declare a state of war. Such a Parliamentary decision however requires the consent of an absolute majority of all Deputies and an absolute majority of all Senators.¹²⁸

Article 132 (4) (d) of the Constitution of Kenya provides that the President may subject to Article 58 declare a state of emergency. The President may under Article 132 (4) (e) of the Constitution of Kenya with the approval of Parliament declare war.

In an attempt to control the exercise of the executive's power with respect to the declaration of a state of emergency, the Constitution of Kenya has specified the instances in which the state's emergency powers may be invoked. Article 58 (1) (a) of the Constitution of Kenya provides that a state of emergency may only be declared where the State is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency and

¹²⁵ Article 19/A (1) and (2) of the Constitution of the Republic of Hungary.

¹²⁶ Article 102 (m) of the Constitution of the Slovak Republic.

¹²⁷ Article 138 (1) of the Constitution of the Portuguese Republic.

¹²⁸ Article 39 (3) of the Constitution of the Czech Republic.

the declaration is necessary to meet the circumstances for which the emergency is declared.¹²⁹

However, the use of general terms by the Framers of the Constitution in describing some of the applicable situations may allow for the application of emergency powers to unforeseen situations. For instance, in the absence of any definitions in the text of the document, deciding what amounts to ‘disorder’, ‘natural disaster’ or ‘other public emergency’ meriting the declaration of a state of emergency is regrettably left to the subjective appreciation of the President.

The argument for precise definitions for the above mentioned situations is premised on the fact that a state of emergency should not be declared where the measures provided for under the existing legal framework can adequately deal with the crisis confronting the nation.

It should also be noted that it is a requirement of international law that a proclamation of a public emergency be made in good faith based upon an objective assessment of the situation in order to determine to what extent, if any, it poses a threat to the life of the nation.¹³⁰

It is also worth noting that the Constitution of Kenya does not distinguish between a State of emergency occasioned by the threat of war, invasion, general insurrection, disorder, natural disaster or other public emergency by specifying the kind of emergency powers which are available to the State in each instance. This means that the state can invoke the same emergency powers to in a time of war as it would to address a natural disaster occasioned by flooding.

It has been argued that a system that allows for a differentiated approach is less prone to political over-reaction than one that comprises only one single form of emergency powers. The application of the principle of proportionality helps to strike a balance between efficacy (the bigger the danger, the bigger the emergency powers) and fear of abuse (the smaller the

¹²⁹ Article 58 (1) (a) of the Constitution of Kenya.

¹³⁰ Paragraph 62 of Part II E of the United Nations, Economic and Social Council, U. N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

danger, the smaller the emergency powers) by ensuring that the concentration of powers in the executive branch of government is limited during the emergency period to the level and manner that is absolutely necessary.

3.2 Prolongation and termination of a state of emergency

Approving declarations of war and extensions of states of emergency are expressed as being among the roles of the National Assembly under Article 95 (6) of the Constitution of Kenya.

The Constitution further provides that any declaration of a state of emergency and any legislation enacted or action taken in consequence of the declaration shall be effective in the first instance for only fourteen days, with any extension of the emergency period being subject to the approval of the National Assembly with further extensions calling for the support of escalating majorities in the National Assembly.¹³¹

The fact that Article 58 ties any extensions of the emergency period to the support of escalating majorities of the members of the National Assembly also serves as a safeguard against a compliant Parliament acquiescing to every demand of the executive which situation might prevail where the ruling party controls the majority of the members of the National Assembly.

3.3 Constitutional Protection of the Democratic Order during a State of Emergency

The term of Parliament is fixed under the Constitution which provides under Article 102 (1) that the term of Parliament shall expire on the date of the next general election. The legal effect of the aforesaid constitutional provision is to deny the executive branch of government or any other authority or person the power to dissolve Parliament.

In addition thereto, Article 102 (2) of the Constitution of Kenya provides that when Kenya is at war, Parliament may, by resolution supported in each House by at least two-thirds of all the members of the House, from time to time extend the term of Parliament by not more than

¹³¹Article 58 (2) (b), (3) and (4) and Article 95 (6) of the Constitution of Kenya.

six months at a time. However, the term of Parliament cannot be extended for a total of more than twelve months.¹³²

It is clear from the above provision that the Constitution only contemplates the prolongation of the term of Parliament in times of war and not for any of the other reasons under which a state of emergency may be declared under Article 58 (1).

Interesting enough, the Constitution does not envisage the fact that Parliament may be unable to convene to discuss the declaration of a state of emergency and any legislation enacted or other action taken pursuant thereto so as to decide whether or not to approve any extension of the declaration of the state of emergency.

In such cases, the automatic termination of the emergency period in default of Parliamentary approval of an extension of the emergency period as contemplated by the mandatory provisions of Article 58 (2) of the Constitution may not produce the most desirable outcome where emergency conditions still exist. The executive branch of government might be tempted in such cases to unilaterally extend the emergency period.

It appears that the procedures for enacting legislation set out under Part 4 of Chapter 8 of the Constitution may turn out to be too laborious and time consuming in a time of crisis when quick decision making is called for. However, the Constitution does not provide for quicker decision making by the legislature in such cases. In comparison, the constitutions of some countries provide for the postponement of elections and the prolongation of parliamentary terms. Equally common is the compulsory convening of Parliament after a state of exception has been proclaimed and the prohibition to dissolve the Parliament.

Another common safeguard is the prohibition to alter the constitution and in certain cases, other pieces of important legislation such as the election laws and the laws governing the state of emergency during the state of exception.

¹³²Article 102 (3) of the Constitution of Kenya.

3.4 Control of Emergency Powers

3.4.1 Parliamentary Control of Emergency Powers

The provisions of Article 58 (2) (b), (3) and (4) are extremely important as they enable the legislature to act as a check on the executive's exercise of emergency powers in the following ways.

Firstly, they provide Parliament with an opportunity to examine whether the executive's declaration of a state of emergency was justifiable in the first instance.

Secondly, they enable Parliament to periodically review how the executive has exercised its emergency powers since the declaration of the state of emergency.

Thirdly, they provide the National Assembly with the opportunity of interrogating the prevailing conditions to determine whether there is any justification for extending the emergency period.

Fourthly, they provide for the automatic termination of the emergency period upon the executive's failure to secure the National Assembly's support for any further extension of the emergency period.

The National Assembly is also empowered under the provisions of the Preservation of Public Security Act to either confirm or revoke the President's order bringing part III of the said Act into operation, within 28 days of the making of the order.

Further to the foregoing, all subsidiary legislation made under the said Act must be laid before the National Assembly and such legislation shall cease to have effect if the Assembly resolves within the period of twenty days commencing with the day on which the Assembly first sits after the subsidiary legislation is laid before it, that it be annulled.¹³³

¹³³See Section 6 (1) of the Preservation of Public Security Act (CAP 57).

An example may be taken from the Constitution of the Federal Republic of Ethiopia,¹³⁴ which requires the House of Representatives while declaring a state of emergency to simultaneously establish a State of Emergency Inquiry Board which has the following powers and responsibilities:

- a) To make public within one month the names of all individuals arrested on account of the state of emergency together with the reasons for their arrest.
- b) To inspect and follow up that no measure taken during the state of emergency is inhumane.
- c) To recommend to the Prime Minister or to the Council of Ministers corrective measures if it finds any case of inhumane treatment.
- d) To submit its views to the House of Representatives on a request to extend the duration of the State of Emergency.

3.4.2 Statutory Control of Emergency Powers

The Preservation of Public Security Act provides that the regulations made by the President under the provisions of the said Act shall not be inconsistent with the Constitution and cannot make any provision which purports to amend, modify or suspend the operation of any written law other than the regulations made under the Act.¹³⁵

3.4.3 Judicial Control of Emergency Powers

The judiciary's jurisdiction to superintend over the executive's exercise of emergency powers is derived from the provisions of Article 58 of the Constitution of Kenya, 2010.

Article 58 (5) of the Constitution confers exclusive jurisdiction on the Supreme Court to decide on the validity of a declaration of a state of emergency; any extension of a declaration of a state of emergency; and, any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

Pursuant to the aforesaid provisions of Article 58 (5), any person who feels that a declaration of a state of emergency or any extension of any such declaration was not merited by the circumstances or who believes that any law enacted or action taken in consequence of a

¹³⁴ Article 17 (5) of the Constitution of the Federal Republic of Ethiopia.

¹³⁵ See the proviso to Section 3 (3) of the Preservation of Public Security Act.

declaration of a state of emergency is inconsistent with or in contravention of the Constitution may seek redress directly from the Supreme Court. The jurisdiction of the High Court over such matters is excluded by the provisions of Article 165 (5) (a) of the Constitution of Kenya, 2010.

The Constitution ensures that the rule of law is maintained during a state of emergency through the provisions of Article 58 (7) which provides that, a declaration of a state of emergency or legislation enacted or other action taken in consequence of any declaration, may not permit or authorize the indemnification of the State, or of any person, in respect of any unlawful act or omission.

Although the justiciability of a declaration of a state of emergency cannot be questioned due to the clear provisions of Article 58 (5) of the Constitution, it remains to be seen whether the courts will effectively act as a check on the exercise of executive emergency powers in view of the fact that the experience of other jurisdictions has shown that courts tend to defer to the executive in matters of national security and that they have generally been reluctant to upset executive decisions relating to the protection of national security.

For instance, in *R v Home Secretary, ex parte Hosenbal*,¹³⁶ in declining to review an order of deportation, the English Court of Appeal (per Lord Denning M.R) stated as follows:

‘The information supplied to the Home Secretary by the Security Service is and must be highly confidential. The public interest in the security of the realm is so great that the sources of the information must not be disclosed-nor should the nature of the information itself be disclosed-if there is any risk that it would lead to the sources being discovered. So the sources must not be disclosed .Not even to the House of Commons. Nor to any tribunal or court of inquiry or body of advisers statutory or non-statutory. Save to the extent that the Home Secretary thinks safe. Great as is the public interest in the freedom of the individual and the doing of justice to him, nevertheless in the last resort it must take second place to the security of the country itself....’

¹³⁶ (1977) 1 WLR 766.

In another case involving a challenge to a deportation order, *R v Secretary of State, ex parte Cheblak*¹³⁷, the English Court of Appeal held that, ‘The exercise of the court’s jurisdiction to review decisions involving national security was necessarily limited by the subject matter of such decisions, since matters of national security were exclusive matters for the Government.....’

A similar decision was reached by the said English Court of Appeal in *R v Home Secretary, ex parte Chahal*,¹³⁸ where the Court held that in matters of national security it was not competent to review or question the evidence on which the Minister had based his decision.

3.4.4 Controls regarding the existence and Declaration of an Emergency

Controls in this respect are not limited to those provided for under municipal law but also include the ones set out in international Human Rights Treaties which form part of the law of Kenya under Article 2 (5) of the Constitution.

A reading of the International Covenant on Civil and Political Rights reveals that before a state party moves to invoke the provisions of Article 4 of the Covenant, two fundamental conditions must be met: firstly, the situation must amount to a public emergency which threatens the life of the nation and secondly, the state party must have officially proclaimed a state of emergency.

Although, the Covenant does not define what a public emergency threatening the life of a nation is, an interpretation of its scope has been provided by the Human Rights Committee (the treaty’s supervisory body) established under Article 28 of the Covenant. According to the Human Rights Committee, not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation as required by Article 4, paragraph 1 of the Covenant.¹³⁹

¹³⁷ (1991) 2 All ER 319.

¹³⁸ (1995) 1 All ER 658.

¹³⁹ See Human Rights Committee, General Comment 29, States of Emergency (Article 4), U. N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

The expression ‘public emergency’ as used in the Covenant has been defined to mean an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed.¹⁴⁰

The emergency does not have to be one in which the life of the nation is threatened with extinction, but one in which there is such a breakdown of order or communications that organized life cannot, for the time being, be maintained.¹⁴¹

A threat to the life of the nation is one that:

- a) Affects the whole of the population and either the whole or part of the territory of the state, and
- b) Threatens the physical integrity of the population, the political independence or the territorial integrity of the state or the existence or basic functioning of institutions indispensable to ensure and project the rights recognized in the Covenant.¹⁴²

3.4.5 Requirements of Proclamation and Notification

A state party derogating from its obligations under the International Covenant on Civil and Political Rights is required to make an official proclamation of the existence of the public emergency threatening the life of the nation.

Such a state party is also required to notify the other parties to the Covenant through the intermediary of the Secretary General of the United Nations of the provisions from which it has derogated and the reasons by which it was actuated.

¹⁴⁰ See Section A1(b) of the Paris Minimum Standards of Human Rights Norms in a State of Emergency, American Journal of International Law, October 1985 accessed through <http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/ParisMinimumStandards.pdf> on 17th August 2012.

¹⁴¹ Daes, The Individual's Duties to the Community and the Limitation on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights, UN Doc E/CN.4/Sub.2/432/Rev.2 (1983), para 42 (b) at 192. 1980 Report of the UN Special Rapporteur on Chile, UN Doc A/35/522, para 31 cited in Chowdhury, R.S., Rule of Law in a State of Emergency, 1989, p. 26.

¹⁴² See Part II A of the United Nations Economic and Social Council, U.N Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

The notification is required to contain the following;

- a) The provision of the Covenant from which it has derogated
- b) A copy of the proclamation of emergency, together with the constitutional provisions, legislation, or decrees governing the state of emergency, in order to assist the state parties to appreciate the scope of the derogation
- c) The effective date of the imposition of the state of emergency and the period for which it has been proclaimed
- d) An explanation of the reasons which actuated the government's decision to derogate, including a brief description of the factual circumstances leading up to the proclamation of the state of emergency; and
- e) A brief description of the anticipated effect of the derogation measures on the rights recognized by the Covenant 'including copies of decrees derogating from these rights issued prior to the notification.

A state party to the Covenant is also required to communicate to the other state parties on the date on which it terminates any such derogation.¹⁴³

3.4.6 Controls regarding the Nature and extent of Derogations

Any derogation by a state party to the Covenant from its obligations under the Covenant is permitted only to the extent that the same is consistent with the Republic's obligations under international law applicable to a state of emergency. The Covenant requires that the derogatory measures taken by a state party to the Covenant must be limited to the extent strictly required by the exigencies of the situation. This requirement relates to the severity, duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency.

This limitation reflects the principle of proportionality and requires that state parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures taken pursuant to such a proclamation. The competent national authorities are

¹⁴³ See Article 4 (3) of the International Covenant on Civil and Political Rights.,1966.

under a duty to assess individually the necessity of any derogation measure taken or proposed to deal with the specific dangers posed by the emergency.

The legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation establishes both for state parties and for the Human Rights Committee a duty to conduct a careful analysis under each article of the Covenant based on an objective assessment of the actual situation. The principle of strict necessity shall be applied in an objective manner. Each measure shall be applied to an actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of potential danger.

Article 4, paragraph 1 requires that no measure derogating from the provisions of the Covenant may be inconsistent with the state party's other obligations under international law particularly the rules of international humanitarian law. Article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the state's other international obligations, whether based on treaty or general international law.

Article 5, paragraph 2 of the Covenant illustrates this fact by providing that there shall be no restriction upon or derogation from any fundamental rights recognized in other instruments on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Even though Article 26 or the other covenant provisions related to non-discrimination (articles 2, 3, 14, paragraph 1, 23, paragraph 4, 24, paragraph 1, and 25) have not been listed among the non-derogable provisions in Article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular this provision of Article 4, paragraph 1 must be complied with if any distinctions between persons are made when resorting to measures that derogate from the covenant.

3.5 Protection of Fundamental Rights

The Constitution recognizes the fact that some fundamental rights and freedoms may of necessity be limited by the state during a state of emergency. However, any such limitation of a fundamental right or freedom pursuant to any legislation enacted in consequence of a declaration

of a state of emergency must meet certain conditions. Firstly, the limitation must be strictly required by the emergency; and secondly, it must be consistent with the Republic's obligations under international law applicable to a state of emergency.¹⁴⁴

Some of the fundamental rights which may be adversely affected during a State of emergency include the right to freedom and security of the person, as the Constitution authorizes detention without trial during a state of emergency.¹⁴⁵ It is important to note that the Constitution of Kenya, 2010 does not contain the kind of safeguards that were available under Section 83 (2) of the Constitution of Kenya (Repealed) to persons detained pursuant to the emergency legislation that was previously provided for under Subsection (1) of the said section of the Repealed Constitution.

Section 83 (2) of the Constitution of Kenya (Repealed) provided that the following provisions were to apply to any person detained by virtue of the emergency legislation contemplated under subsection 1 of the said section:

- a) He shall as soon as reasonably practicable and in any case not more than five days after the commencement of his detention, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is detained;
- b) Not more than fourteen days after the commencement of his detention, a notification shall be published in the Kenya Gazette stating that he has been detained and giving particulars of the provision of law under which his detention is authorised;
- c) Not more than one month after the commencement of his detention and thereafter during his detention at intervals of not more than six months, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person appointed by the President from among persons qualified to be appointed as a judge of the High Court;
- d) He shall be afforded reasonable facilities to consult a legal representative of his choice who shall be permitted to make representations to the tribunal appointed for the review of the cases of the detained person; and

¹⁴⁴ See Article 58 (6) (a) (i) and (ii) of the Constitution of Kenya.

¹⁴⁵ See Article 29 (b) of the Constitution of Kenya.

e) At the hearing of his case by the tribunal appointed for the review of his case he shall be permitted to appear in person or by a legal representative of his choice.

(3) On a review by a tribunal in pursuance of this section of the case of the detained person, the tribunal may make recommendations concerning the necessity or expediency of continuing his detention to the authority by which it was ordered but, unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations.

It remains to be seen whether the Courts of law in Kenya will be able to extend quick and effective legal protection to such detainees in the absence of such explicit constitutional protection.

It must however be noted that the Constitution of Kenya as well as the general rules of international law provide for a class of fundamental rights and freedoms which cannot be limited under any conditions.¹⁴⁶ The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights provide that, no state party shall, even in time of emergency threatening the life of the nation, derogate from the Covenant's guarantees of the right to life; freedom from torture, cruel, inhuman or degrading treatment or punishment, and from medical or scientific experimentation without free consent; freedom from slavery or involuntary servitude; the right not to be imprisoned for contractual debt; the right not to be convicted nor sentenced to a heavier penalty by virtue of retroactive criminal legislation; the right to recognition as a person before the law; and freedom of thought, conscience and religion.

Articles 2 (1), 3 and 26 of the International Covenant on Civil and Political Rights prohibit emergency legislation that either in form or application involves discrimination on such grounds as race, colour, sex, language, religion and social origin. The prohibition against discrimination, although wide in scope, is not absolute. This is made clear by Article 4 (1) of the International Covenant on Civil and Political Rights which prohibits discrimination

¹⁴⁶ See Articles 2 (5) and (6) and 25 of the Constitution of Kenya read jointly with Article 4 (1) and (2) of the International Covenant on Civil and Political Rights, 1966.

‘solely on the grounds of race...’ suggesting that some forms of discrimination are legitimate.

3.6 Public Oversight

The Constitution of Kenya provides that any law enacted pursuant to a declaration of emergency which provides for any limitation of any fundamental right or freedom can only take effect after its publication in the Kenya Gazette.¹⁴⁷ The international law requirements of proclamation and notification also facilitate public supervision of the manner in which the Executive exercises its emergency powers as they obligate the state to act openly at the onset of the emergency.¹⁴⁸

The Constitution further provides for public oversight over the exercise of the Executive’s emergency powers through the requirement that any extensions to a State of Emergency be made through resolutions passed by the National Assembly following regular and public debates in the National Assembly.

3.7 Conclusion

In Kenya, the President is mandated by the Constitution of Kenya, 2010 to declare a state of emergency without reference to any other person. His decision to declare a state of emergency can only be questioned after the fact by the National Assembly which has to decide within fourteen days from the date of the declaration of a state of emergency on whether or not the declaration ought to be extended. The validity of a declaration of a state of emergency can also be questioned before the Supreme Court. The protection of fundamental rights and freedoms in Kenya during a state of emergency has been weakened by the omission from the Constitution of Kenya, 2010 of a provision similar to what was previously provided for under Section 83 (2) of the Constitution of Kenya (Repealed).

¹⁴⁷ See Article 58 (6) (b) of the Constitution of Kenya.

¹⁴⁸ See Article 4 (3) of the International Covenant on Civil and Political Rights, 1966.

CHAPTER FOUR

APPLICATION OF THE DOCTRINE OF CIVIL NECESSITY

4.0 Introduction

Determining whether the Doctrine of civil necessity is applicable in Kenya necessarily calls for an examination of what constitutes the law of Kenya.

The sources of the laws of Kenya are provided under Section 3(1) and (2) of the Judicature Act (Chapter 8 of the Laws of Kenya) which provide that;

- (1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with-
 - a) The Constitution;
 - b) Subject thereto, all other written laws, including the acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act¹⁴⁹, modified in accordance with Part II of that Schedule;
 - c) Subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August 1897 and the procedure and practice observed in courts of justice in England at that date:

Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

¹⁴⁹ These Acts include the Admiralty Offences (Colonial) Act, 1849, the Evidence Act, 1851 Sections 7 and 11, the Foreign Tribunals Evidence Act, 1856, the Evidence by Commission Act, 1859, the British Law Ascertainment Act, 1859, the Admiralty Offences (Colonial) Act, 1860, The Foreign Law Ascertainment Act, 1861, The Conveyancing (Scotland) Act, 1874, Section 51 and the Evidence by Commission Act, 1885.

(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African Customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

Other sources of the law of Kenya include international law. Article 2 (5) of the Constitution of Kenya provides that the general rules of International law shall form part of the law of Kenya. Article 2 (6) of the Constitution of Kenya provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

4.1 The Doctrine of Civil Necessity vis-a-vis the Constitution of Kenya?

Before we proceed to examine whether the Constitution of Kenya provides for the Doctrine of Civil necessity, it is necessary for us to remind ourselves about what written constitutions represent or rather what they are meant to represent.

According to Patrick Okonmah, ‘Written Constitutions or indeed any constitution for that matter, represent the collective will of the people expressed as the supreme rules to which all citizens are subject and habitually obey’.¹⁵⁰

On its part the Canadian Supreme Court in the Re Manitoba Language Rights Case, put it as follows: ‘ the Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government.’¹⁵¹

The principle institutions of the state are identified and created by the constitution, their specific roles and functions together with the nature and extent of their powers are set out therein, as well as the way in which those institutions relate to one another and to the private citizen. In other words, the state is a creation of the people by means of a constitution and derives its power from

¹⁵⁰Okonmah. D.P., ‘Perspectives on Human Right Violations in Nigeria’ in *Africa Legal Aid Quarterly* (July-Sept 1998), p. 11 at 14 cited in Ibid.

¹⁵¹ (1985) 1 R.C.S. 721, 745 cited in Hatchard. J. and Ogowewo I.T., 2003, *Tackling the Unconstitutional Overthrow of Democracies: Emerging Trends in the Commonwealth*, Commonwealth Secretariat, p. 37.

them. The people through the medium of a constitution express their will as to how they have agreed to be governed. The nation through a constitution specifies which institution, office or organ of the state should have which powers, when and how those powers ought to be exercised. It states how the institution of the state should relate to each other and to the private citizen. It imposes limits on the powers of the Government.

The provisions of the Constitution of Kenya, 2010 must therefore and in accordance with the provisions of Article 259 (1) of the said Constitution be read and interpreted in such a manner as to give value to the aspirations of the Kenyan people.

Article 259 (1) provides that, this Constitution shall be interpreted in a manner that;

- (a) promotes its purposes, values and principles;
- (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- (c) permits the development of the law; and
- (d) Contributes to good governance.

The Constitution of Kenya, 2010 expresses the will of the people of Kenya to be governed in accordance with certain principles and values, which we perceive to be fundamental to us as a people. The popular will referred to herein above found expression in the national referendum held in the year 2010 when the people of Kenya in the exercise of their constituent power overwhelmingly voted to enact the Constitution of Kenya, 2010.

It is clear from the provisions of Article 1(1) and (3) of the Constitution of Kenya, 2010 that all power that is exercised by the state is derived from and exercised on behalf of the people and must be exercised in accordance with the Constitution. Article 1(1) and (3) of the Constitution of Kenya, 2010 provide that;

- (1) all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.

(3) Sovereign power under this constitution is delegated to the following state organs, which shall perform their functions in accordance with this Constitution-

- a) Parliament and the legislative assemblies in the county governments;
- b) The national executive and the executive structures in the county governments; and
- c) The judiciary and independent tribunals

Article 2 of the Constitution of Kenya proclaims the supremacy of the Constitution with the following words:

- (1) This constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government
- (2) No person may claim or exercise state authority except as authorised under this constitution.
- (3) The validity or legality of this constitution is not subject to challenge by or before any court or other state organ
- (4) Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency and any act or omission in contravention of this constitution is invalid.

The Constitution of Kenya, 2010 through Article 3 (1) confers a legal right and imposes a legal duty on all the citizens of Kenya to defend it. Article 3 (1) provides that: ‘Every person has an obligation to respect, uphold and defend this Constitution’.

It is a principle of executive authority as set out under Article 129 (1) of the Constitution of Kenya that, executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution.

Under Article 131 (2) (a) and (e) of the Constitution of Kenya, the President is legally obligated to respect, uphold and safeguard the Constitution; and ensure the protection of human rights and fundamental freedoms and the rule of law.

Article 94 (5) of the Constitution of Kenya provides that, no person or body ,other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.

The principle of the supremacy of the Constitution, envisages that the Government should only exercise such powers as are conferred on it by the Constitution, or in the manner prescribed by the Constitution, within the limits prescribed therein. It precludes the notion of unlimited powers on the part of any organ created by the Constitution. The principle of the supremacy of the constitution demands that the courts should hold void any exercise of power which does not comply with the prescribed manner and form or which is otherwise not in accordance with the constitution from which the power derives.¹⁵² Absent express authorisation by the Constitution, or emergency legislation enacted in accordance with the Constitution, any application of the doctrine of civil necessity would violate not only the principle of the Supremacy of the Constitution but also the principle of legality which requires that the actions of the organs of the State be authorised by law.

It is contended that the Doctrine of civil necessity is not provided for under the Constitution of Kenya or under any other recognised source of Kenyan law. The application of the Doctrine of civil necessity in Kenya would under the circumstances be clearly illegal.

4.2 The application of the Doctrine of civil necessity to justify extra constitutional acts

A different approach would be to consider whether the doctrine of civil necessity can be applied in Kenya to justify extra legal actions taken by the state during a state of emergency. This approach is problematic for the following reasons. Firstly, it is difficult to justify the need to resort to the doctrine of civil necessity in Kenya where emergency powers are provided for and regulated by law. As discussed in detail in Chapter three of this study, Articles 58 and 132 of the Constitution of Kenya, 2010 provide for the declaration of a state of emergency by the President, the extension of the declaration by the National Assembly or the determination of the state of

¹⁵²*Liyanage v. R. (1967)*, 1 A.C. 259 cited in Nwabueze. B. O., *Constitutionalism in the Emergent States*, (Fairleigh Dickinson University Press, Rutherford, 1973), p. 7.

emergency in default thereof, the enactment of emergency legislation limiting fundamental rights and the judicial determination of the validity of a declaration of a state of emergency, the validity of any extension of a declaration of a state of emergency and the validity of any legislation enacted, or other action taken. The Doctrine of civil necessity does not apply where the substantive law provides an alternative.

Secondly, the application of the doctrine of civil necessity in Kenya might invite legal sanction on whoever applies it. Article 58 (7) of the Constitution of Kenya, 2010 provides that a declaration of a state of emergency, or legislation enacted or other action taken in consequence of any declaration, may not permit or authorise the indemnification of the State, or of any person, in respect of any unlawful act or omission. It is clear from the provisions of Article 58 (7) of the Constitution of Kenya that a state officer would be personally liable if he contravened the law under the guise of addressing a state of emergency. Likewise, the state would also be legally liable for any such transgressions of the law.

Thirdly, the application of the doctrine of civil necessity is questionable in view of the fact that the doctrine falls short of the requirements of the Rule of law. The principle of legal certainty is a requirement of the rule of law. It requires that the administrative actions of Public bodies be consistent and predictable enough to allow the citizens to plan their lives with a reasonable degree of certainty. Legal certainty makes it easier for the average citizen to be law abiding as it allows any person to foresee the consequences which a given action might entail. The law should also be publicized. It should be accessible. Anyone who wishes to know what the law provides regarding any particular legal issue should be able with legal advice to identify the applicable law and what it provides on the matter in issue.

The Doctrine of civil necessity clearly violates the principle of legal certainty and by extension the rule of law as the powers which are exercisable by the executive under the Doctrine are not ascertainable in advance. The determination of the nature and scope of the powers which are available to the executive under the doctrine of civil necessity is left to the discretion of the executive. The rule of law requires that laws be enacted and enforced in a fair and transparent manner. The rule of law requires that all government actions must be authorized by law. Additionally, there is no check on the exercise of executive power which under the circumstances is absolute. This violates the principle of equality before the law which provides

that no man is above the law and everyone regardless of rank is subject to the ordinary laws of the land.

To confer unlimited powers on the executive through the doctrine of civil necessity would therefore be a violation of the rule of law which as a principle of constitutionalism excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.....¹⁵³ and, further requires that, ‘the exercise of powers of government should be conditioned by law and that the subject should not be exposed to the arbitrary will of his ruler.’¹⁵⁴

When the doctrine of civil necessity is applied, the citizens are not able to predict in advance what rights are available to them during the state of emergency. It should be noted that a state of emergency ordinarily results in an expansion of governmental power and the imposition of limitations on the rights of individual members of the society. Such limitation on fundamental rights is provided for under the law. Article 24 of the Constitution of Kenya provides that that any restrictions on fundamental rights must be in accordance with or prescribed by law. Article 24 (1) of the Constitution of Kenya provides that, a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- a) The nature of the right or fundamental freedom
- b) The importance of the purpose of the limitation
- c) The nature and extent of the limitation
- d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

¹⁵³ A Dicey, *Introduction to the Study of the law of the Constitution*, 10th edition, (London: Macmillan, 1959) p. 188 and 202.

¹⁵⁴ Wade and Phillips, *Constitutional law: an outline of the law and practice of the Constitution including central and local government, the citizen and the state and administrative law*, ed. E. C. S. Wade and A. W. Bradley, 7th edition (London: Longmans, 1965), p. 60.

Any limitation of fundamental rights under the doctrine of civil necessity would clearly be illegitimate, not being founded on any law as required under the provisions of Article 24 of the Constitution of Kenya.

4.3 The application of the doctrine of civil necessity on grounds of national security

The application of the doctrine of civil necessity in Kenya on grounds of national security would be contrary to the law of Kenya. Under Article 238 of the Constitution of Kenya, ‘National security’ is defined as the protection against internal and external threats to Kenya’s territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests. Article 238 (2) (a) and (b) of the Constitution of Kenya set out the legal limits within which national security concerns ought to be addressed by the state. Article 238 (2) (a) and (b) of the Constitution of Kenya provides that the national security of Kenya shall be promoted and guaranteed in accordance with the following principles-

- a) National security is subject to the authority of this Constitution and Parliament;
- b) National security shall be pursued in compliance with the law and with utmost respect for the rule of law, democracy, human rights and fundamental freedoms;

Article 239 (2) of the Constitution of Kenya provides that the primary object of the national security organs and security system is to promote and guarantee national security in accordance with the principles mentioned in Article 238 (2) of the Constitution of Kenya.

4.4 Conclusion

The rationale behind the doctrine of civil necessity is contestable in view of the fact that there can be no legal basis for the President to claim Powers which the Constitution withholds from him. As stated earlier, all the three branches of government are creations of the Constitution and can only exercise such power as has been conferred on them by the Constitution or by legislation enacted in the manner provided for by the Constitution. It is therefore contended that no legal justification exists for the application of the doctrine of civil necessity because the law cannot possibly support actions which are contrary to it.

I therefore endorse Clinton Rossiter's view that, the Doctrine of Civil Necessity is little more than the rationalisation of extra-constitutional, illegal emergency action.¹⁵⁵

¹⁵⁵Rossiter. L.C., *Constitutional Dictatorship, Crisis Government in the Modern Democracies*, (Princeton, Princeton University Press, 1948) accessed at <http://archive.org/details/constitutionaldi> 031287mbp on 20th July 2012 at 5.30p.m.

CHAPTER FIVE

FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.0 FINDINGS

5.1 There is no legal basis for the application of the Doctrine of civil necessity

It is the conclusion of this study that there is no legal basis for the application of the Doctrine of civil necessity in Kenya. As established in Chapter Four of this study, the Doctrine of civil necessity is not provided for under the law of Kenya. It is in fact not a legal doctrine and is at most a political concept that is employed to validate unconstitutional acts taken by the state to preserve political stability. The Doctrine of civil necessity is merely a justification for breaking the law to ensure the survival of the state and the constitutional order in circumstances where the law does not adequately provide a remedy for the severe crisis that threatens the survival of the state. Any application of the Doctrine of civil necessity in Kenya would contravene the rule of law.

5.2 Weakened Protection of Fundamental Rights

The removal from the Constitution of Kenya of the provisions of Section 83 (2) of the Constitution of Kenya (Repealed) has weakened the legal protection that was previously available to persons who may be detained pursuant to emergency legislation.

The open ended language used in Article 58 of the Constitution is also not helpful and is likely to prevent the effective control of the executive's emergency powers by the courts when their jurisdiction is invoked under Article 58 (5) of the Constitution.

In discharging its constitutional mandate as provided for in the aforesaid provision of law, the Supreme Court may unfortunately be limited to relying on the provisions of international legal instruments such as the International Covenant on Civil and Political Rights which under Article 2 of the Constitution of Kenya, 2010 form part of the laws of Kenya.

5.3 Constitutionalism is possible during a state of emergency

Constitutionalism is possible during a state of emergency where the Constitutional framework preserves the balance of powers between the various arms of government even during the pendency of a state of emergency.

5.4 CONCLUSION

It is in my view, necessary for the protection of our democratic system of governance and of the rule of law which is one of its central pillars that we insist on addressing emergencies through measures which are provided for by law.

While it may not be possible for us to foresee all types of emergencies which might face our nation in the future, it would be prudent to err on the side of caution by having detailed legal provisions providing for emergencies so that the extent and limit of the state's emergency powers may be known in advance to prevent any abuse of emergency powers for political or other purposes.

5.4 RECOMMENDATIONS

5.4.1 Decentralize the power to declare a state of emergency

The power to declare a state of emergency should be shared between the executive and the legislature through an amendment to Article 132 (4) (d) of the Constitution of Kenya to provide that the President may pursuant to a cabinet decision and subject to Article 58 of the Constitution of Kenya and the approval of the National Assembly, declare a state of emergency. Where the National Assembly cannot convene, the declaration of a state of emergency should be immediately placed before it at its next sitting for approval. It should be noted that a declaration of a state of emergency lapses under Article 58 (2) (b) of the Constitution of Kenya if not extended by the National Assembly within fourteen days from the date of the declaration.

This is necessary to prevent personal integrity abuses as an irresponsible leader more concerned with political gain rather than the perpetuation of constitutional principles might otherwise be tempted to abuse the largely unchecked discretionary powers that the constitution confers on the executive with respect to the initial act of invoking emergency powers as well as in determining the unlimited measures that it may employ to address the emergency.

Sharing the initial responsibility between the executive and the legislature will enable the legislature to effectively check the exercise of the executive's emergency powers by first of all confirming the need for invoking the same.

5.4.2 Improve Parliament's capacity to monitor the exercise of the Executive's

Emergency Powers

It is vital for the purpose of maintaining a check on the executive's enlarged powers during the emergency period that the constitution contains explicit provisions prohibiting the dissolution of Parliament during the period within which a state of emergency is still subsisting so as to avoid any concentration of unchecked powers on the executive branch of government following the dissolution of Parliament. The constitution should provide that if the term of Parliament is expiring during a state of emergency the same ought to be extended until the end of the emergency period. It is proposed that Article 102 (3) of the Constitution of Kenya, 2010 be amended to provide that Parliament shall not be dissolved when Kenya is at war or under a state of emergency.

It should also be noted that effective parliamentary scrutiny cannot be guaranteed where Parliament is left to the mercy of the executive in obtaining relevant information about the actions taken by the Government during a state of emergency.

It is therefore proposed that an independent and impartial reporting mechanism similar to the one provided for under the provisions of Article 17 (5) and (6) of the Constitution of the Federal Republic of Ethiopia be provided for through a constitutional amendment.

Article 17 (5) of the Constitution of the Federal Republic of Ethiopia provides that the House of Representatives, while declaring a state of emergency, shall simultaneously establish a state of emergency Inquiry Board, comprising of seven persons to be chosen and assigned by the House from among its members and from legal experts. According to Article 17 (6) of the Constitution of the Federal Republic of Ethiopia, the said Board has the following powers and responsibilities;

- a) To make public within one month the names of all individuals arrested on account of the state of emergency together with the reasons for their arrest.

- b) To inspect and follow up that no measure taken during the state of emergency is inhumane
- c) To recommend to the Prime Minister or to the Council of Ministers corrective measures if it finds any case of inhumane treatment.
- d) To ensure the prosecution of perpetrators of inhumane acts.
- e) To submit its view to the House of Representatives on a request to extend the duration of the state of emergency.

The aforesaid proposals can be achieved through legislation as provided for under Article 51 (3) of the Constitution of Kenya, 2010

5.4.3 Develop an Appropriate Statutory Emergency Framework

It is necessary for the government to develop a statutory emergency framework which will clearly define the kind of situations that justify the declaration of a state of emergency so as to provide objective criteria for assessing the justification of any invocation of emergency powers by the executive. Such legislation should also specify the powers which are available to the government during an emergency as well as provide for when derogation from the fundamental rights of an individual as provided for under Article 24 of the Constitution is permissible. This will simplify the task of the judiciary, international human rights bodies and other concerned parties in monitoring the exercise of such powers as well as facilitate the better enforcement of rights by the citizens. Such legislation should safeguard the legal rights of persons who may be detained pursuant to emergency legislation.

The relevant legislation should apply the principle of proportionality in conferring emergency powers on the executive to address different types of emergencies so as to ensure that the concentration of powers in the executive branch of government is limited during the emergency period to the level and manner that is absolutely necessary.

An example may be taken from the Emergencies Act Canada 1988 which provides for different types of emergencies. Under the Emergencies Act Canada 1988, 'Public welfare emergency' is defined as an emergency that is caused by a real or imminent:-

- a) Fire, flood, drought, storm, earthquake or other natural phenomenon;

- b) Disease in human being, animals or plants,
- c) Accident or pollution, and that results or may result in a danger to life or property, social disruption or a breakdown in the flow of essential goods, services or resources, so serious as to be a national emergency.¹⁵⁶

‘Public order emergency’ is defined under the Emergencies Act Canada 1988 as an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency.¹⁵⁷

‘International emergency’ is defined under the Emergencies Act Canada 1988 as an emergency involving Canada and one or more other countries that arises from acts of intimidation or coercion or the real or imminent use of serious force or violence and that is so serious as to be a national emergency.¹⁵⁸

¹⁵⁶ Refer to Section 5 of the Emergencies Act Canada 1988.

¹⁵⁷ Refer to Section 17 of the Emergencies Act Canada 1988.

¹⁵⁸ Refer to Section 27 of the Emergencies Act Canada 1988.

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