



State of Exception

What it means today

Agenda

- 1 | What does State of Exception [SoE] mean?
- 2 | Where did it come from?
- 3 | And how is it going?
- 4 | “Conclusion”

1 | What does State of Exception mean?

Some contemporary definitions...

Carl Schmitt (1888–1985)

„Souverän ist, wer über den Ausnahmezustand entscheidet.“

— Politische Theologie - Vier Kapitel zur Lehre von der Souveränität, Berlin 1922, 9.

„Zur Demokratie gehört als notwendig erstens Homogenität und zweitens - nötigenfalls - die Ausscheidung und Vernichtung des Heterogenen.“

— Die geistesgeschichtliche Lage des heutigen Parlamentarismus, 3. Aufl. Berlin 1926, 14.

Bernard Manin

„Les institutions d’exception autorisent à s’écarter temporairement de certaines normes constitutionnelles lorsque les circonstances l’exigent.“

— Le paradigme de l’exception. L’État face au nouveau terrorisme. In: La vie des idées, <https://laviedesidees.fr/Le-paradigme-de-l-exception>, Dec. 15th 2015.

3 Elements

Authorization of SoE according to constitutional rules, derogation from (certain) rules.

SoE only, if “**circumstances**” are met.

Time limit for SoE (i.e. sunset-clause f. ex.).

Matthias Lemke

„In a legal sense, the term SoE [State of Exception] refers to a multitude of different **crisis reaction mechanisms** that exist in the context of differentiated statehood. These mechanisms have in common that they all **enhance the government's power of action and decision-making**, if the relevant conditions to call out a SoE are met. The declared aim of these instruments is **to return as quickly as possible to the pre-crisis situation.**“

— What does State of exception mean? A definitional and analytical approach. In: Lemke, Matthias / Göztepe, Ece / Cahn, Olivier (Ed.), New normality? State of exception as contemporary government technique, Zeitschrift für Politikwissenschaft 28(4), 373.

3 Elements

Authorization of SoE according to constitutional rules, enhancing capacities of the Executive.

SoE only, if situation can be framed as a **severe crisis**.

No time limit for SoE (i.e. potential normalization).

Manin | Lemke

Dimension \ Author	Manin	Lemke
Constitution (legal)	derogation	stronger Executive
Causes (practical / discursive)	objective, real	objective, real and framed, constructed

Causes

man made

non man made



Causes

man made

accidents (i.e. nuclear)

civil unrest / uprising

terrorism

air traffic controller strike

etc.

non man made



Causes

man made

accidents (i.e. nuclear)

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etc.

non man made

inundation, flood, tsunami

earthquake

wild fire, volcano eruption

pandemic

etc.



Causes

man made

accidents (i.e. nuclear)

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etc.

non man made

inundation, flood, tsunami

earthquake

wild fire, volcano eruption

pandemic

etc.

climate-change related issues

hybrid

Manin | Lemke

Dimension \ Author	Author	
	Manin	Lemke
Constitution (legal)	derogation	stronger Executive
Causes (practical / discursive)	objective, real	objective, real and framed, constructed
Time (temporal)	limit	no limit (normalization)

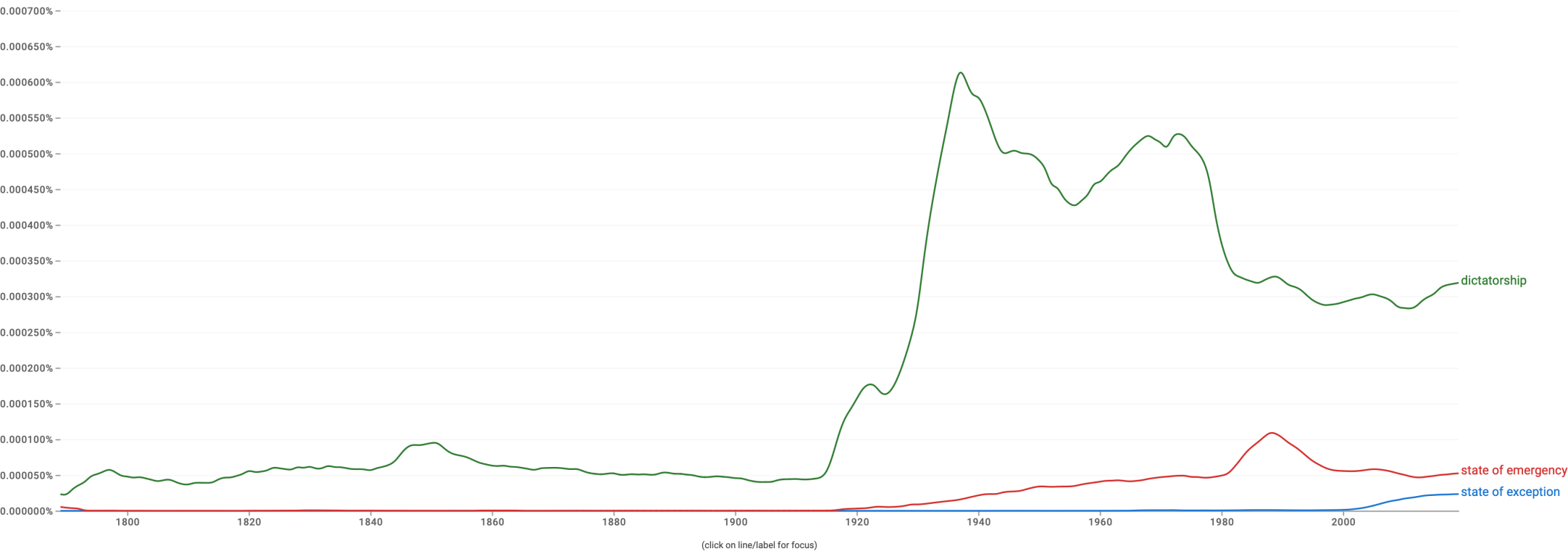
2 | Where did it come from?

Some looking back to the history of ideas...

Google Books Ngram Viewer

state of exception,state of emergency,dictatorship

1789 - 2019 English (2019) Case-Insensitive Smoothing



Search in Google Books

state of exception

>

1789 - 1993

1994 - 2015

2016

2017

2018 - 2019

English (2019)

state of emergency

>

1789 - 1947

1948 - 1986

1987 - 1990

1991 - 2011

2012 - 2019

English (2019)

dictatorship

>

1789 - 1868

1869 - 1967

1968 - 1976

1977 - 2004

2005 - 2019

English (2019)

Roman Republic – Dictator

- extraordinary magistrate, special – but not unlimited – power
- deviation from principle of collegiality
- “ne amplius sex menses” (Cicero)
- specific task (e.g. rei gerundae causa; comitiorum habendorum causa; comitiorum habendorum et ludorum faciendorum causa; seditionis sedandae causa)
- used aprox. 85 times from 5th to 2nd century BC

Lucius Cornelius Sulla Felix (138–78 BC)



Dictator *legibus faciendis et rei publicae constituendae causa* from 82–79 BC, then resigned.

Based on Lex Valeria (82 BC), granting him constituent legislative power.

Gaius Julius Ceasar (100–44 BC)

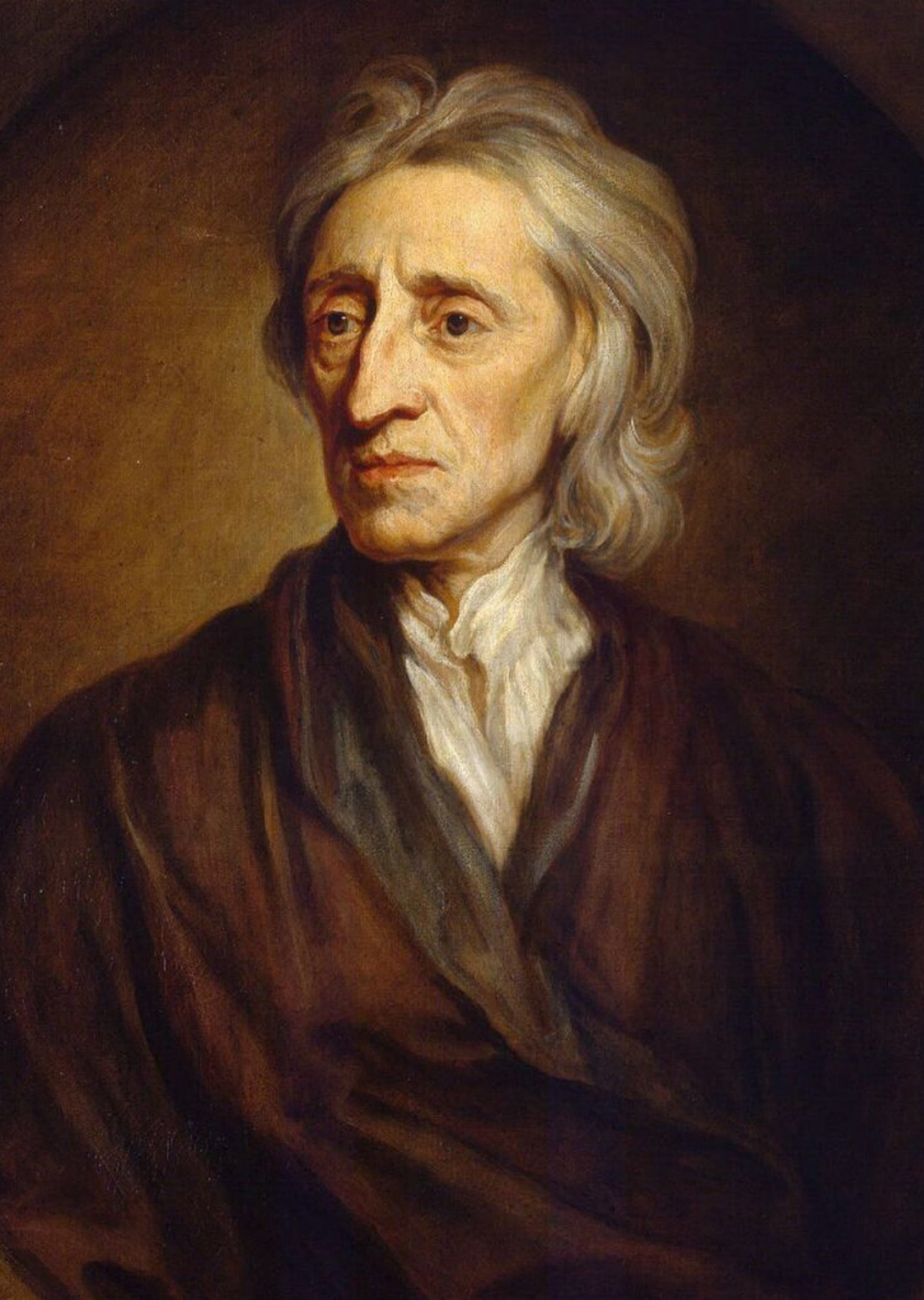
Dictator *perpetuo rei publicae constituendae causa*, from 49–44 BC.

Niccolò Machiavelli (1469–1527)

“And, in truth, among **the institutions of Rome, this of the dictatorship deserves our special admiration**, and to be linked with the chief causes of her greatness; **for without some such safeguard a city can hardly pass unharmed through extraordinary dangers**. Because as the ordinary institutions of a commonwealth work but slowly, no council and no magistrate having authority to act in everything alone, but in most matters one standing in need of the other, and time being required to reconcile their differences, the remedies which they provide are most dangerous when they have to be applied **in cases which do not brook delay**.”

— Discourses on Livy, 1531, Chap. XXXIV [Discorsi sopra la prima deca di Tito Livio].





John Locke (1632–1704)

“**This power** to act according to discretion for the public good, without the prescription of the law and sometimes even against it, is that which **is called prerogative**; for since **in some governments the law-making power is** not always in being and **is usually too numerous, and so too slow for the dispatch requisite to execution**, and because, also, it is **impossible to foresee and so by laws to provide for all accidents and necessities** that may concern the public, or make such laws as will do no harm, if they are executed with an inflexible rigour on all occasions and upon all persons that may come in their way, therefore there is a latitude left to the executive power to do many things of choice which the laws do not prescribe.”

— An Essay concerning the true original, extent and end of civil Government, 1690, Chap. XIV, 160.

The Federalist

“Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. **To be more safe, they at length become willing to run the risk of being less free.**”

“They [i.e. States or confederacies, ML] would, at the same time, be **necessitated to strengthen the executive arm of government**, in doing which their constitutions would acquire **a progressive direction toward monarchy**. It is of the nature of war to increase the executive at the expense of the legislative authority.”

— Federalist VIII: The Consequences of Hostilities Between the States. By Alexander Hamilton: From the New York Packet, Tuesday, November 20, 1787.

Article 48 WRV

„Wenn ein Land die ihm nach der Reichsverfassung oder den Reichsgesetzen obliegenden Pflichten nicht erfüllt, kann der Reichspräsident es dazu mit Hilfe der bewaffneten Macht anhalten.

Der **Reichspräsident** kann, wenn im Deutschen Reich die öffentliche Sicherheit und Ordnung erheblich gestört oder gefährdet wird, die zur Wiederherstellung der öffentlichen Sicherheit und Ordnung nötigen Maßnahmen treffen, erforderlichenfalls **mit Hilfe der bewaffneten Macht einschreiten**. Zu diesem Zwecke darf er vorübergehend die in den Artikeln 114, 115, 117, 118, 123, 124 und 153 festgesetzten **Grundrechte ganz oder zum Teil außer Kraft setzen**.

Von allen gemäß Abs. 1 oder Abs. 2 dieses Artikels getroffenen Maßnahmen hat der Reichspräsident unverzüglich dem Reichstag Kenntnis zu geben. Die Maßnahmen sind auf Verlangen des Reichstages außer Kraft zu setzen.

Bei Gefahr im Verzuge kann die Landesregierung für ihr Gebiet einstweilige Maßnahmen der in Abs. 2 bezeichneten Art treffen. Die Maßnahmen sind auf Verlangen des Reichspräsidenten oder des Reichstages außer Kraft zu setzen.

Das Nähere bestimmt ein Reichsgesetz.“

Variants

extra-legal

Roman dictatorship

legally integrated

bent towards the
executive

bent towards the
legislative

Art. 48 WRV

Notstand

Giorgio Agamben



“In every case, the state of exception marks a threshold at which logic and praxis blur with each other and a pure violence without *logos* claims to realize an enunciation without any real reference.”

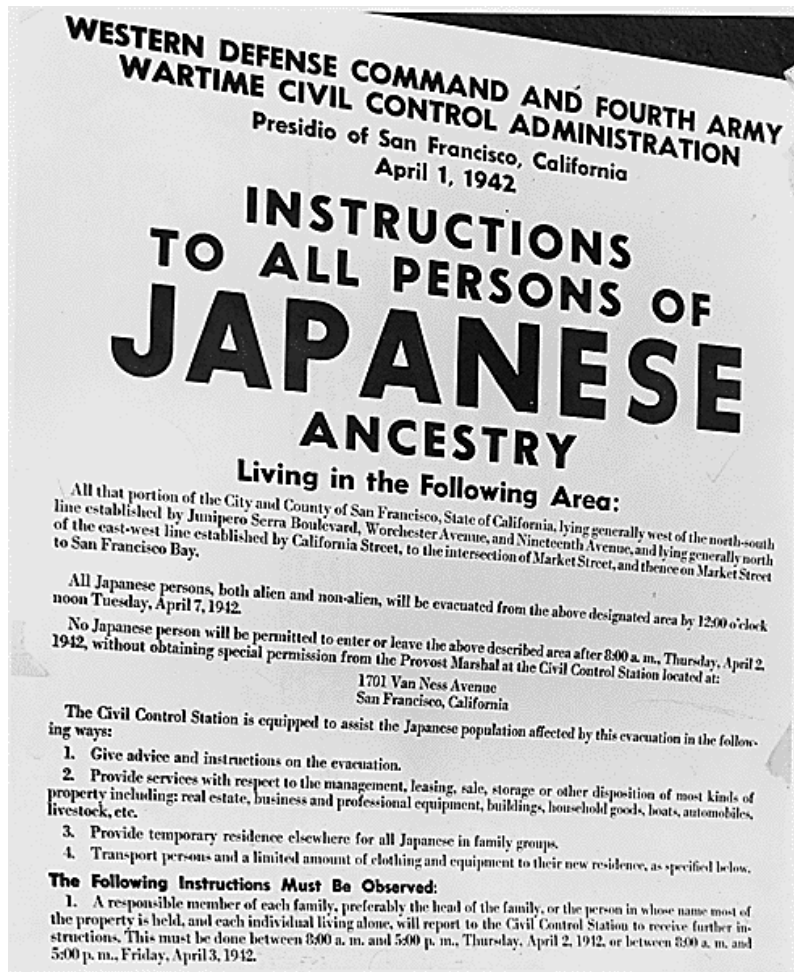
“The entire Third Reich can be considered a state of exception that lasted twelve years. In this sense, modern totalitarianism can be defined as the establishment, by means of the state of exception, of a legal civil war that allows for the physical elimination not only of political adversaries but of entire categories of citizens who for some reason cannot be integrated into the political system.”

— State of Exception, 2005, 40, 2.

3 | And how is it going?

Some examples of current practice of State of Exception policies...

Korematsu vs. United States



Executive Order No. 9066

Executive Order Authorizing the Secretary of War to Prescribe Military Areas

Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities [...].

Now, therefore, **by virtue of the authority vested in me as President** of the United States, and Commander in Chief of the Army and Navy, **I hereby authorize and direct the Secretary of War**, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, **to prescribe military areas** in such places and of such extent as he or the appropriate Military Commander may determine, **from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion.** The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. [...] Franklin D. Roosevelt, The White House, February 19, 1942.

Algerian War (1954–62)

LOI n° 55-385 du 3 avril 1955 instituant un état d'urgence et en déclarant l'application en Algérie de progrès social et de réforme administrative, et l'habilitant à prendre toutes mesures exceptionnelles en vue du rétablissement de l'ordre, de la protection des personnes et des biens et de la sauvegarde du territoire.

LOI n° 56-258 du 18 mars 1956 autorisant le Gouvernement à mettre en œuvre en Algérie un programme d'expansion économique, de progrès social et de réforme administrative, et l'habilitant à prendre toutes mesures exceptionnelles en vue du rétablissement de l'ordre, de la protection des personnes et des biens et de la sauvegarde du territoire.

« Art. 5. — Le Gouvernement disposera, en Algérie, des pouvoirs les plus étendus pour prendre toute mesure exceptionnelle commandée par les circonstances en vue du rétablissement de l'ordre, de la protection des personnes et des biens et de la sauvegarde du territoire.

Lorsque les mesures prises en vertu de l'alinéa précédent auront pour effet de modifier la législation, elles seront arrêtées par décret pris en conseil des ministres. »

1° L'expansion économique au moyen de mesures appropriées concernant notamment les investissements, les travaux publics, l'équipement scolaire et sanitaire, la recherche scientifique, technique et économique, la construction de logements, l'équipement agricole et rural, l'aménagement foncier, la réorganisation de la propriété foncière, le remembrement ou l'extension des exploitations rurales, l'accès à la petite propriété rurale, la réorganisation du crédit

2° L'accélération du progrès social, notamment :
a) L'amélioration de la condition de l'ouvrier agricole par une réglementation des conditions de travail, par la création ou le perfectionnement d'institutions sociales telles que celles relatives aux congés payés, aux allocations familiales, au régime des assurances sociales ;

b) L'amélioration de la condition de l'habitant rural, après les avoir adaptés dans la mesure nécessaire, des textes législatifs ou réglementaires applicables dans la métropole concernant la réglementation du travail et de la main-d'œuvre, les congés payés, le régime des allocations familiales, les prestations dues aux assurés sociaux ;

3° La réorganisation des institutions administratives, notamment par une réforme de l'organisation territoriale, et en particulier du régime des régions sahariennes, par la réorganisation des services administratifs ;

Art. 3. — Les décrets pris en vertu de la présente loi ou abroger les dispositions législatives existantes. Ils entreront en vigueur dès leur publication au Journal officiel de la République française, mais ne deviendront définitifs qu'après leur ratification par le Parlement.

Ils pourront prévoir, soit les peines édictées par les lois antérieures relatives aux mêmes matières sans que puissent être modifiés la qualification des infractions relevées, la nature et le quantum des peines applicables, soit les peines prévues par l'article 471, 15°, du code pénal.

3. — Le Gouvernement est autorisé à ouvrir, par décrets

France 2005



France 2015 sq.



Turkey 2016



Corona 2020 sq.



Some findings

- application of SoE has become more frequent (globally), especially after 9/11 (“war on terror”)
- justification / plausibilization of friend-enemy-distinction / victimization becomes more and more predominant
- some cases show partial (France 2015) or almost complete (Turkey 2016) changes in democratic political culture due to SoE application

4 | “Conclusion”

What a contemporary analysis of SoE should look into...

New normality?

If the exception becomes the new normal – what is then normality?

Are we facing an authoritarian shift in global societies?

Racism?

“The belief that some races are better than others, or the unfair treatment of someone because of his or her race.”

— Cambridge Academic Content Dictionary.

Justice Robert Jackson (1892–1954)

“A military order, however unconstitutional, is not apt to last longer than the military emergency. [...] But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated **the principle of racial discrimination** in criminal procedure and of transplanting American citizens. **The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need.** Every repetition imbeds that principle more deeply in our law and thinking and **expands it to new purposes.**”

— Korematsu v. United States, 323 U.S. 214 (Supreme Court of the United States 1944).

Clinton L. Rossiter (1917–70)



“Constitutional dictatorship is a dangerous thing.”

— Constitutional dictatorship: crisis government in the modern democracies, Princeton 1948, 243.



Thank you!

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